

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G006579

TONYA A. WINKLEY,
EMPLOYEE

CLAIMANT

ST. EDWARD MERCY MEDICAL CENTER,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED SEPTEMBER 21, 2011

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE EDDIE H. WALKER,
JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE RANDY P.
MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals and Respondent cross-appeal an
opinion and order of the Administrative Law Judge filed
May 6, 2011. In said order, the Administrative Law
Judge made the following findings of fact and
conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 24, 2010, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On June 24, 2010, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$562.00 for total

disability and \$422.00 for permanent partial disability.

4. On June 24, 2010, the claimant sustained a compensable injury to her right hand/thumb. Specifically, the claimant has established by medical evidence, which is supported by objective findings, the actual existence of a physical injury or damage to her right hand/thumb. She has further proven by the greater weight of the credible evidence that this physical injury or damage arose out of and occurred in the course of her employment with the respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to her body, required medical services, and resulted in disability (at least temporarily).
5. The medical services rendered the claimant for her right hand/thumb difficulties, by and at the direction of Dr. Roger Bise, represents reasonably necessary medical services for the claimant's compensable injury, within the meaning of under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondent is liable for the expense of these services, subject o the medical fee schedule.
6. At the present time, the claimant is prevented from being awarded temporary total disability benefits, during the period of July 13, 2010 through August 20, 2010, by the provisions of Ark. Code Ann. §11-9-807(b). Specifically, the greater weight of evidence shows that during this time, the claimant received her regular wages from the respondent.
7. The respondent has denied the occurrence of any compensable injury to the claimant's right hand/thumb and have controverted this claim in its entirety.
8. As no controverted benefits have been awarded to the claimant in this Opinion, the claimant's attorney would not be entitled to a

controverted attorneys fee, at the present time.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the May 6, 2011 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

After a de novo review of the record, I must respectfully concur, in part, and dissent, in part,

regarding the majority opinion. Specifically, I agree that the claimant is entitled to additional reasonably necessary medical treatment, and I concur on that finding. However, as I find that the claimant is entitled to temporary total disability benefits, I must dissent from that portion of the majority opinion.

The claimant's injury was to her thumb; therefore, it is a scheduled injury governed by Ark. Code Ann. § 11-9-521. Accordingly, an injured employee shall receive temporary disability benefits so long as that employee is within his or her healing period and has not returned to work. The claimant testified that, after Dr. Bise had performed a procedure on her thumb on July 21, 2010, she was off work for about four weeks.

The medical records confirm that Dr. Bise performed surgery on July 21, 2010. The records also indicate that the claimant was still under active medical treatment through at least September 13, 2010; therefore, the claimant's testimony that she returned to work about four weeks after her July surgery establishes her period of temporary total disability as four weeks.

Instead of awarding temporary total disability benefits, the majority, by affirming and adopting the Administrative Law Judge's opinion, has applied Ark.

Code Ann. § 11-9-807(b) and determined that the claimant could not receive temporary total disability benefits because she received regular wages during the period in question. The problem with this analysis is that the evidence shows that the money that the claimant received during the period in question was not regular wages. Instead, it was vacation pay. The payments the claimant received were PTO (paid time off) benefits.

Although the claimant referred to the payments as wages, she clearly explained that the payments were actually PTO benefits. Ark. Code Ann. § 11-9-102(19) defines wages as meaning the money rate at which the services rendered is recompensed under the contract of hire in force at the time of the accident. Therefore, the question becomes whether the PTO that the claimant received during the period in question represented the money rate at which the service rendered was recompensed or whether it represents a "fringe benefit".

Many employments include fringe benefits such as health insurance, life insurance, sick leave, etc. Therefore, it is necessary to determine whether earned PTO, vacation leave that accrued because of the claimant's length of service to the respondent, constitutes a fringe benefit. If it is a fringe

benefit, Ark. Code Ann. § 11-9-807(b) does not apply to this case.

In Tabor v. Levi Strauss & Co., 33 Ark. App. 71, 801 S.W.2d 311 (1990), the Court determined that fringe benefits are not included in the calculation of the average weekly wage. It further determined that vacation pay is a fringe benefit. If vacation pay is a fringe benefit in regard to the calculation of average weekly wage, it, of course, is no less a fringe benefit in determining whether Ark. Code Ann. § 11-9-807(b) is applicable.

In conclusion, I find that the claimant was not paid her actual wages, but PTO time, which is a fringe benefit. Therefore, Ark. Code Ann. § 11-9-807(b) does not apply. The claimant should receive temporary total disability benefits. She should not have had to use her earned vacation days for a time period when she should have been receiving workers' compensation benefits.

For the aforementioned reasons, I respectfully concur, in part, and dissent, in part, regarding the majority opinion.

PHILIP A. HOOD, Commissioner