

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G308279

KEAHA HENDLEY, EMPLOYEE	CLAIMANT
MERCY HOSPITAL OF FORT SMITH, EMPLOYER	RESPONDENT
MERCY HEALTH, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 20, 2015

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

Claimant represented by the HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 14, 2014. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 19, 2014, and contained in a pre-hearing order filed March 19, 2014, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her admittedly compensable left shoulder injury in the form of physical therapy.
3. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from October 16, 2013, to December 16, 2013.
4. The claimant has proven by a preponderance of the evidence that she is entitled to an attorney's fee in this matter commensurate with the benefits awarded herein and the Arkansas Workers' Compensation Act.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm and adopt the October 14, 2014, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant proved by a

preponderance of the evidence that she is entitled to medical treatment for her left shoulder injury in the form of physical therapy and to temporary total disability benefits from October 16, 2013 through December 16, 2013. My carefully conducted *de novo* review of this claim in its entirety shows that the claimant has failed to prove that she is entitled to additional medical and temporary total disability benefits.

The claimant's authorized treating physician, Dr. Clark, initially recommended that the claimant undergo physical therapy treatment for her compensable left shoulder strain. The claimant initially refused this treatment, insisting rather that she be allowed an MRI study of her shoulder before commencing physical therapy. The record demonstrates that Dr. Clark never recommended or referred the claimant for an MRI study of her left shoulder. Thus, according to the claimant, she ultimately agreed to undergo physical therapy, only to learn that this treatment had been denied.

Outside of the claimant's own self-serving testimony, the record is devoid of evidence, credible or otherwise, to corroborate the claimant's testimony that the respondent-employer denied the claimant medical treatment for her left shoulder strain in the form of

physical therapy at any time. Rather, the preponderance of the evidence demonstrates that the claimant chose unilaterally to "delay" this treatment. In the meantime, the claimant left her employment with the respondent-employer and began working for another employer. In addition, the claimant sought treatment with her primary care physician, namely Dr. Nolan-Smith, outside of her workers' compensation claim over three (3) months following her compensable left shoulder strain. The record shows that Dr. Nolan-Smith recommended that the claimant undergo physical therapy for left shoulder bursitis. The claimant's treatment with her primary care physician was clearly unauthorized. Regardless, however, of whether the claimant's treatment with Dr. Nolan-Smith was authorized or not, the claimant has failed to show that she is currently being prescribed physical therapy for her left shoulder strain of 2013. Rather, the medical record shows that Dr. Nolan-Smith diagnosed the claimant with bursitis of the left shoulder, which she failed to specifically relate in any way to the claimant's compensable left shoulder strain. Therefore, the claimant has failed to prove by a preponderance of the evidence that physical therapy is currently recommended for the treatment of her left shoulder strain of 2013 by

any authorized treating physician, and thus, that this treatment is currently reasonably necessary for the treatment of her compensable injury. Therefore, this additional medical treatment must be denied.

With regard to temporary total disability benefits, the record fails to establish that the claimant was ever taken off of work or that she has ever been unable to work due to her compensable left shoulder strain of 2013. It is well-settled that temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002); *Ark. State Hwy. Trans Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). When an injured employee is totally incapacitated from earning wages and remains in her healing period, she is entitled to temporary total disability. *Id.*

The claimant's injury was initially accepted as a medical-only injury, for which the respondents provided reasonably necessary medical treatment in a timely and appropriate manner. In addition, the claimant did not miss any work due to this injury. Therefore, temporary total disability did not become an issue in this claim until the claimant left her employment with the respondent-employer on October 16,

2013. And, even though the claimant was relieved of her position with the respondent-employer for reasons which are still too speculative for us to fully understand, the claimant has presented no evidence, medical or otherwise, that she was unable to work between the time she left her employment with the respondent-employer and began her employment with her current employer.

Clearly, however, the claimant returned to work following her left shoulder injury and prior to her discharge from employment with the respondent-employer. Moreover, the claimant testified that she has worked on a steady and consistent basis for her new employer since her December 16, 2013, hire date. Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that she was totally incapacitated from earning wages due to her compensable injury at any time relevant to this claim. Accordingly, I respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner