

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H006623

DAISY STOUT, EMPLOYEE

CLAIMANT

FIRSTSTAFF, INC., EMPLOYER

RESPONDENT

**ZURICH INSURANCE COMPANY/GALLAGHER
BASSETT SERVICES, INC., CARRIER/TPA**

RESPONDENT

OPINION FILED FEBRUARY 8, 2022

A hearing was held before ADMINISTRATIVE LAW JUDGE KATIE ANDERSON in Little Rock, Pulaski County, Arkansas.

Claimant appeared *pro se*.

Respondents were represented by Mr. Rick Behring, Jr., Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on November 10, 2021, in Little Rock, Arkansas. A prehearing telephone conference was conducted on October 6, 2021. Pursuant to the telephone conference, a Prehearing Order was filed on October 8, 2021. The Prehearing Order and the parties' responsive filings have been marked as Commission's Exhibit #1 and made a part of the record without objection from the parties.

Stipulations:

During the prehearing telephone conference and/or during the hearing, the parties agreed to the following stipulations. They read:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed on June 5, 2020, when Claimant sustained a compensable work-related injury to her right great toe and/or foot.
3. Respondents accepted this claim as compensable and paid medical benefits.

4. Claimant's treating physician, Dr. Robert Martin, released Claimant to return to work without restrictions on September 11, 2020.
5. Claimant sought and obtained a Change of Physician to Dr. Michael Weber. Respondents authorized and paid for the initial visit with Dr. Weber.
6. The parties agreed to hold the issue of average weekly wage and compensation rates in abeyance.¹
7. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Issues:

By agreement of the parties, the issues to be litigated at the hearing were as follows:

1. After consideration, Respondents' Motion to Dismiss is held in abeyance pending the outcome of litigation.
2. Whether Claimant is entitled to additional medical benefits for her right great toe, two (2) adjacent toes, the joints of those toes, and/or her right foot.
3. Whether Claimant is entitled to temporary total disability (TTD) benefits.

Contentions:

The following contentions were submitted by Claimant:

Claimant essentially contends that on June 5, 2020, while she was stacking boxes of acetone on a wood pallet, the operator of the electric pallet jack slammed the machine into the wood pallet where Claimant was working, causing the machine to malfunction and spin out of control. The electric pallet jack hit Claimant's right toes/foot. Claimant contends the injury fractured the first three (3) digits of her right foot, caused bruising to her right toes/foot, and caused a sprain to a tendon in her right foot. Claimant contends that she immediately reported the incident

¹ The parties originally stipulated to the fact that they would agree to the average weekly wage and compensation rates on or before the hearing date. However, at the hearing, the parties agreed to modify the stipulation as stated above.

to her supervisor. Claimant sought medical treatment after the June 5, 2020, incident at work and was under the care of Dr. Robert Martin at the University of Arkansas for Medical Sciences (UAMS) orthopedic clinic; Dr. Merritt Finney, PA-C at Concentra; and Dr. Michael Weber, orthopedic surgery specialist at OrthoArkansas. Claimant also alleges she attended physical therapy sessions. Claimant contends that she is entitled to compensation for her right toe/foot injury on June 5, 2020.

The following contentions were submitted by Respondents:

1. Respondents accepted as compensable an injury to the right great toe resulting from a specific incident on June 5, 2020. Respondents contend that all appropriate benefits have been paid.
2. Respondents contend that Claimant was released from care and to return to work without restriction on September 11, 2020. Respondents, therefore, contend that Claimant is not entitled to any additional benefits as a result of the compensable injury sustained on June 5, 2020.
3. Claimant is not entitled to any temporary disability benefits. Claimant continued to work (including a second job) and otherwise refused to return to work for the Respondent-Employer.
4. Claimant has not sustained any permanent anatomical impairment as a result of the compensable injury sustained on June 5, 2020.
5. Respondents contend that Claimant's current physical problems, if any, are unrelated to her employment with Respondent-Employer and instead the result of a pre-existing condition, ordinary disease of life, and/or a subsequent intervening incident.

6. In the alternative, if it is determined that Claimant is entitled to any additional indemnity benefits, Respondents hereby request a set off for all benefits paid by Claimant's group health carrier, all short-term disability benefits received by Claimant, all long-term disability benefits received by Claimant, and all unemployment benefits received by Claimant.
7. Respondents reserve the right to supplement and/or amend their contentions and assert any applicable defense.

Summary of Evidence:

The record consists of the hearing transcript of November 10, 2021, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record. Commission's Exhibit #1 included the Prehearing Order entered on September 16, 2021, and the parties' respective responses to the prehearing questionnaire. Respondents' Motion to Dismiss packet was labeled as Respondents' Exhibit #1 and consisted of sixty-five (65) pages of Commission forms; Respondents' Motion to Dismiss; Respondents' Motion to Compel; Commission's letter; Commission's August 17, 2021, Order; Claimant's production of authorizations; Claimant's answers to interrogatories; an October 8, 2021, Prehearing Order; Respondents' Motion for Reconsideration and Motion to Dismiss; and Commission's October 29, 2021, Order. Respondents' Non-Medical Records exhibit packet was labeled as Respondents' Exhibit #2, which consisted of twenty-five (25) pages of documents from the Commission's file, FirstStaff wage records, and excerpts from unemployment records. The documents proffered by Claimant have not been considered in this matter since they were not made a part of the record pursuant to the parameters set forth in the Prehearing Order.

Witnesses:

During the hearing, Daisy Stout (Claimant, used interchangeably herein), was the only witness to testify.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witness and observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. I hereby accept the aforementioned stipulations as fact.
3. Respondents' Motion to Dismiss, addressed again at the hearing, is held in abeyance based on Claimant's prosecution of the claim.
4. Claimant has failed to establish by a preponderance of the credible evidence that any additional medical treatment is reasonably necessary in connection with her compensable injury to her right great toe/foot on June 5, 2020.
5. Claimant has failed to meet her burden of proving that she is entitled to temporary total disability (TTD) for her compensable right toe/foot injury.

CASE IN CHIEF

Hearing Testimony:

Claimant was thirty-six (36) years old at the time of the hearing. She explained that in March of 2020, she was employed through FirstStaff, Inc. (referred to interchangeably herein as "Respondent-Employer"), who had placed her with Onyx Brands. Claimant testified that Onyx Brands produced cosmetic products, including acetone. At Onyx Brands, Claimant's job duties included stacking acetone products on a wood pallet and working along the production line. Claimant alleges that she sustained a compensable injury while working for Respondent-

Employer/Onyx Brands on June 5, 2020, when the operator of an electric pallet jack slammed into the wood pallet where Claimant was working and injured her right foot. Claimant testified that she could feel the impact of the electric pallet jack and “it [shot] pain all the way up on [her] - - up - - all the way up [her] body, all the way up to [her] head.” Claimant testified that when it was time for her break, she removed her shoe to see if there was bleeding or other damage to her right foot.

Claimant testified that she did not seek medical attention that day, but she did report the incident to her immediate supervisor. She did, however, go to the hospital on June 6, 2020, but admitted that she was not seen for her foot that day. When she was able to get an appointment with her primary care physician (via tele-med only due to Covid-19 restrictions), she was instructed to ice her foot. However, she was not prescribed any medication. Thereafter, she was sent to Concentra for treatment. On the day she was seen at Concentra by Dr. Finney, Claimant described her foot as being purple and bruised, and she stated that Dr. Finney placed her in a “medical boot.” Claimant testified that Dr. Finney referred her to Dr. Martin, who recommended that Claimant continue to wear the walking boot and put her “on limited work.” When asked if Claimant was released to return to work without restrictions on September 11, 2020, by Dr. Martin, Claimant responded that she was “not sure what day” she was released from his care. She also testified that she was still having symptoms on the right foot when she saw Dr. Martin on September 11, 2020. While under Dr. Martin’s care, she was participating in four (4) to six (6) weeks of physical therapy recommended by Dr. Martin for her right foot.

Claimant testified that after she saw Dr. Martin on September 11, 2020, she was seen by Dr. Weber on one (1) occasion. According to Claimant, she was scheduled to have a second

appointment with Dr. Weber but testified that she learned that the second appointment had been cancelled.

When questioned about when she last worked for Respondent-Employer/Onyx Brands, Claimant testified that her last day was the day she “left” Concentra. However, Claimant also testified that she had always “worked two jobs” while working for Respondent-Employer/Onyx Brands. Specifically, at the time of the compensable June 5, 2020, injury, she was also working at Waffle House. Claimant testified that she went to work at Waffle House on June 6, 2020, the day after she injured her right toe/foot. She stated that she had planned to go to the doctor after her shift at Waffle House that day. Further, Claimant testified that she was “let go” from Waffle House, although she did not specify a date. Claimant also did not return to work at Onyx Brands because she was still having issues with her foot and could not return to the warehouse. Claimant stated that she still worked for Respondent-Employer and continued working at the front desk in the corporate office in Little Rock until Dr. Martin released her to return to work at fully duty. At that time, she was told that she could no longer work the front desk at Respondent-Employer’s corporate office. During that time, she was working the front desk for Respondent-Employer, Claimant attempted to work other jobs, including a position at IHOP restaurant, but testified that she was fired for not being able to perform her job duties as a result of her compensable right toe/foot injury on June 5, 2020. Claimant stated that she did not “get a new assignment” from Respondent-Employer because she wanted a second opinion on her right great toe/foot. Claimant testified that she filed for a Change of Physician and waited until December for an appointment with another physician.

On cross-examination, Claimant was asked to confirm an answer in her interrogatories where she stated that she had “tripped” over her right foot since September 11, 2020, and Claimant

ultimately responded that she had in fact tripped over her right foot more than once since the June 5, 2020, incident at work.

When asked about filing previous workers' compensation claims, Claimant testified that she had filed one (1) claim while working for Kroger in 2018, involving an incident with a rodent. She also filed a second workers' compensation claim with Waffle House, for an incident that allegedly occurred on June 6, 2020, the day after the incident at issue in the matter at hand. Claimant confirmed that there was an altercation at Waffle House that led to her filing the second claim.

Also, on cross-examination, when asked if she refused medical treatment when it was offered to her after the injury on June 5, 2020, Claimant denied refusing medical treatment. When shown a document entitled "FirstStaff Refusal of Medical Treatment," Claimant confirmed that she had, in fact, signed the form refusing medical treatment on June 9, 2020. She further explained that she was rushed when signing the forms and that she did not realize what she had signed. She testified that she first received treatment from Concentra on or around June 11, 2020.

On cross-examination, Claimant also confirmed that she continued to work at various places since the June 5, 2020, incident at work. Specifically, she worked for FirstStaff until Dr. Martin released her on September 11, 2020. During that time, she also worked for IHOP restaurant as a server, and she was on furlough for her sales associate position at JCPenney while the company was in bankruptcy. She returned to work at JCPenney as a sales associate after Dr. Martin released her on September 11, 2020. Both the server job at IHOP restaurant and the sales associate job at JCPenney required her to be on her feet to perform her job duties. She also testified that during this time, she did not have a vehicle, so she walked or took the bus to work since the June 5, 2020,

incident at work, and she had walked to work at Respondent-Employer's corporate office, which she admitted was a long walk for her.

Upon further questioning, Claimant admitted that she had applied for unemployment benefits in September of 2020, just after she stopped working for Respondent-Employer and that she had received some benefits. She verified that she answered the questions on the unemployment application truthfully and that she was able to work at full duty at the time she signed the form. However, Claimant went on to explain that her current supervisors knew she had some limits with her right great toe/foot. She further added that due to her military training, she "pushed through" working with an injury. Claimant also verified that she had applied for social security disability benefits on numerous occasions, but her understanding was that since she was medically discharged from the Air Force in 2016, she was unable to get approval for social security disability.

Also on cross-examination, Claimant clarified that after the June 5, 2020, compensable injury, but before Dr. Martin released her at full duty, Claimant was working for Respondent-Employer on a light-duty assignment doing work at the front desk of the corporate office, which complied with Dr. Martin's light-duty restrictions. Claimant confirmed that after she was released by Dr. Martin, Respondent-Employer did not provide light-duty work for her. Claimant agreed that she had not requested any other job assignments from Respondent-Employer. Claimant testified that she was not able to wear the proper shoes for warehouse work.

Claimant testified that once Dr. Martin released her, she attempted to get more treatment for her right great toe/foot; however, Dr. Martin did not recommend any additional treatment for her. When asked about the MRI she received while treating with Dr. Martin, Claimant alleged that the MRI showed a strained tendon. However, when asked to confirm that the MRI did not

show a fracture in her right great toe/foot, Claimant did not answer the question, but she stated that her right great toe/foot was still “not functioning.”

On redirect, Claimant testified that she had requested additional medical care from Dr. Martin. Specifically, she requested that Dr. Martin put her in a special shoe to prevent her from reinjuring her right toes/foot. Claimant also stated that she had consistently complained to Dr. Martin about the bruising on her right foot and additional pain that she had in her right third toe, and in the joints of those toes. She also stated that she had swelling in her right toes/foot until April of 2020. Once the swelling went down, Claimant stated that her foot had a slight curvature to it. Claimant stated that at the time of the hearing she was having pain in her right foot and that she was no longer able to walk on her toes.

Documentary Exhibits:

Respondents’ Exhibit #2 included a Form AR-C filed by Claimant in a separate claim (H006759) on September 16, 2020, regarding an incident on June 6, 2020, when she alleged that she sustained a work-related injury when she became involved in an altercation with police while working for Ozark Waffle, LLC. Respondents’ Exhibit #2 also included the prehearing questionnaire response filed by Claimant in H006759.

Respondents’ Exhibit #2 included Respondent-Employer’s Acknowledgement of Available Modified Duty Work, signed by Claimant on June 9, 2020, wherein Claimant declined the offer of a modified duty assignment.

Respondents’ Exhibit #2 included wage records from Respondent-Employer indicating that Claimant worked the following days in 2020 after the compensable injury on June 5, 2020: June 12th; June 15th through June 19th; June 22nd through June 26th; June 29th through July 3rd; July 6th through July 10th; July 13th through July 17th; July 20th through July 24th; July 27th

through July 31st; August 3rd through August 7th; August 10th through August 14th; August 17th through August 21st; August 24th through August 28th; August 31st through September 4th; and September 7th through September 11th.

Respondents' Exhibit #2 included Claimant's unemployment benefit records reflecting that Claimant filed for unemployment in September of 2020, after she stopped working for Respondent-Employer.

ADJUDICATION

A. Respondents' Motion to Dismiss:

Respondents' Motion to Dismiss was considered prior to the hearing date and was held in abeyance. Respondents' Motion was also addressed at the hearing. However, the previous ruling stands, and the Respondents' Motion to Dismiss was held in abeyance based on Claimant's prosecution of her claim.

B. Additional Medical Treatment:

Claimant's right foot injury was accepted as a medical only claim for the right great toe/foot, and Respondents paid some benefits. Claimant asserts that she was treated by Drs. Martin and Finney. Claimant also received a Change of Physician Order to treat with Dr. Michael Weber, and Respondents paid for the one-time visit with Dr. Weber. Claimant now contends that she is entitled to additional medical treatment for the compensable right toe/foot injury of June 5, 2020. On the other hand, Respondents contend that all benefits were paid, and therefore, Claimant is not entitled to any additional benefits as a result of the specific injury sustained on June 5, 2020.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Repl. 2012). The employee has the burden of proving by a preponderance of

the evidence that medical treatment is reasonably necessary. Stone v. Dollar General Stores, 91 Ark. App. 260, 209 S.W.3d 445 (2005).

Here, Claimant sustained an admittedly compensable injury to her right great toe/foot on June 5, 2020. Claimant explained that while she was working for Respondent-Employer/Onyx Brands loading boxes of acetone onto a wooden pallet, Claimant was injured when an electric pallet jack slammed into the wood pallet where she was working. The prongs of the electric pallet jack hit her right foot. Claimant testified that she was treated at Concentra by Merritt Finney, PA-C, and then by Dr. Robert Martin at the orthopedic clinic at UAMS. Claimant had an MRI on her foot while under Dr. Martin's care. Respondents' counsel questioned Claimant about the MRI results and contend that the results showed no fracture in Claimant's right great toe/foot; Claimant, however, responded that the MRI results showed a strained tendon, but nonetheless, her foot was still "not functioning." Claimant testified that Dr. Martin put her in a walking boot and recommended physical therapy, which she attended. Claimant testified that she was placed on light-duty work. However, on September 11, 2020, Dr. Martin released Claimant at full duty with no restrictions. Other than the conservative treatment initially recommended, the record shows that Dr. Martin did not recommend any more treatment for her right toes/foot. Subsequently, Claimant obtained a change of physician and was seen by Dr. Michael Weber at OrthoArkansas. Based on the testimony and evidence of record, there was no recommendation by Dr. Weber for any additional medical treatment for Claimant's right toe/foot. Although Claimant testified at the time of the hearing that she was entitled to additional medical treatment in the form of "supportive care," specifically special shoes, to prevent further reinjury to her right toes/foot, Claimant's testimony was not corroborated by the evidence. The record does not show that any physician has recommended any further treatment.

In the matter at hand, Claimant was very passionate about her claim and was even argumentative and/or unresponsive at times during the hearing. I recognize that Claimant believes that she is entitled to additional medical treatment, but the only evidence offered of Claimant's alleged entitlement to additional medical treatment is her own testimony and that testimony is not corroborated by the evidence.

Furthermore, the record shows that Claimant has been involved in other accidents since her compensable work injury to her right toes/foot on June 5, 2020. Claimant testified that this was her third workers' compensation case in the last two (2) years. Notably, one (1) of those claims was the result of a physical altercation that ensued when Claimant was working for Waffle House. In that claim against Waffle House, the date of the alleged injury was June 6, 2020, the day after she sustained a compensable injury to her right toes/foot in the matter at hand. In addition, Claimant testified in her deposition and at the hearing that there had been more than one (1) occasion since her compensable injury on June 5, 2020, when she tripped over her own footing. In sum, there have been several subsequent, intervening events after the compensable June 5, 2020, work injury that could have impacted her right toe/foot condition, including one (1) incident that resulted in her filing a workers' compensation claim.

Claimant also admitted that she signed a form on June 9, 2020, with Respondent-Employer where she initially refused medical treatment as a result of the compensable injury on June 5, 2020; although, Claimant testified that she was rushed and did not realize what she had signed. Claimant, however, began receiving treatment on June 11, 2020, a couple of days after signing the form, at Concentra.

The evidence also shows that Claimant returned to work on June 6, 2020, for Respondent-Employer, the day after her compensable right great toe/foot injury. It was clear from Claimant's

testimony that she not only worked for Respondent-Employer/Onyx Brands after her compensable injury on June 5, 2020, but she also worked at other jobs after the June 5, 2020, event, including work as a sales associate at JCPenney and as a server at IHOP restaurant. Claimant admitted that both jobs required extensive time on her feet. Furthermore, Claimant testified that because she did not own a vehicle, she used the city bus system to get to work. On at least one (1) occasion, Claimant admitted that she walked to work while on light duty at Respondent-Employer's office on Rodney Parham Road in Little Rock, which she admitted was "a long walk" from where she lived.

Moreover, the record also shows that in September of 2020, Claimant completed and filed an application for unemployment benefits. Claimant testified at the hearing that she completed the form truthfully. At the time, Claimant stated that she was able to begin work immediately and that she was available for full-time work. Claimant testified that she received one (1) payment in unemployment benefits.

I recognize that it is well-settled in workers' compensation law that a Claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of Claimant's injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark App. 230, 184 S.W.3d 31 (2004). However, in the matter at hand, the record does not demonstrate that any medical professionals have recommended additional medical treatment for Claimant's compensable right toes/foot injury from June 5, 2020.

In sum, considering that Dr. Martin opined that after conservative treatment Claimant was released from his care to return to full-duty work with no restrictions and no recommendations for any further treatment; that no other medical care provider of record (including Dr. Weber) has recommended any additional medical treatment for Claimant's compensable injury to her right

toes/foot injury of June 5, 2020; and that Claimant continued to work more than one (1) job after the compensable injury on June 5, 2020 that required her to be on her feet, I find that Claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with her compensable injury to her right great toe/foot on June 5, 2020.

C. Temporary Total Disability for Claimant's June 5, 2020, compensable injury:

Claimant asserts that she is entitled to temporary total disability compensation as a result of her June 5, 2020, injury to her right toes/foot. Respondents contend that Claimant continued to work after the June 5, 2020, compensable injury, including light-duty work for Respondent-Employer, work as a sales associate at a large retailer, and work as a server at a restaurant. Respondents contend that Claimant refused to return to work after she was released at full duty on September 11, 2020. Thus, all benefits owed to Claimant have been paid.

Claimant's injury to her right great toe/foot is a scheduled injury. An employee who has suffered a scheduled injury is entitled to compensation for temporary total disability during her healing period or until the employee returns to work, whichever occurs first. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. Id. Whether an employee's healing period has ended is a factual determination to be made by the Commission. Ketcher Roofing Co. v. Johnson, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

In the present matter, Claimant was treated conservatively by Dr. Martin, including placement in a walking boot and physical therapy sessions, for her compensable right toe/foot injury as set forth above. On September 11, 2020, Dr. Martin released Claimant from his care to return to work at full duty with no restrictions. The record demonstrates that Dr. Martin did not recommend any additional medical treatment for the compensable injury to Claimant's right toes/foot. The testimony at the hearing revealed that Claimant continued to work after the compensable injury on June 5, 2020, not only for Respondent-Employer in a light-duty capacity, but also as a server for IHOP restaurant and as a sales associate for JCPenney. Once Claimant was released from light duty work by Dr. Martin on September 11, 2020, Claimant did not subsequently request another work assignment from Respondent-Employer.

As such, the preponderance of the evidence demonstrates that Claimant reached the end of her healing period no later than September 11, 2020. Temporary total disability cannot be awarded after the Claimant's healing period has ended. Trader v. Single Source Transportation, Workers' Compensation Commission E507484 (February 12, 1999).

Based on the foregoing evidence presented in this case, I find that Claimant failed to prove her entitlement to temporary total disability compensation following her June 5, 2020, compensable injury to her right toes/foot.

ORDER

In accordance with the findings of fact and conclusions of law set forth above, this claim for additional medical benefits and temporary total disability (TTD) for Claimant's compensable

STOUT – H006623

injury to her right toe/foot on June 5, 2020, is hereby respectfully denied and dismissed in its entirety.

IT IS SO ORDERED.

KATIE ANDERSON
ADMINISTRATIVE LAW JUDGE