

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA08-1278

KAREN ROEBUCK

APPELLANT

V.

UNITED METHODIST CHILDREN'S
HOME AND AIG INSURANCE

APPELLEE

Opinion Delivered JUNE 17, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F501677]

AFFIRMED

RITA W. GRUBER, Judge

This workers' compensation case arises from a 2005 injury that Karen Roebuck sustained while employed by United Methodist Children's Home (Methodist) and working as an LPN at a behavioral hospital. Her left-shoulder injury was accepted as compensable, and she received some medical care for it. At a hearing before the administrative law judge on May 15, 2007, Roebuck claimed that she had sustained a compensable low back injury as well as the shoulder injury in the 2005 incident. She claimed entitlement to additional medical treatment for her shoulder, including surgery that Dr. Ken Martin had performed; to medical treatment for her back; and to temporary total disability benefits from September 18, 2006, through a date to be determined.

The law judge found that Roebuck had proven the compensability of additional

medical treatment she had pursued for her left shoulder, including the surgery by Dr. Martin, and she had proven that she remained in her healing period and remained totally unable to earn wages from July 12, 2007, through a date to be determined. The law judge found that Roebuck had not proven that she sustained a compensable lumbar injury supported by objective findings, or that she remained in her healing period and was totally unable to earn wages from September 18, 2006, through July 11, 2007. In a decision rendered on July 30, 2008, the Workers' Compensation Commission affirmed and adopted the law judge's opinion.

Roebuck appeals the Commission's decision, and Methodist cross appeals. Roebuck contends that the Commission erred as a matter of law in denying temporary total benefits from September 18, 2006, through July 11, 2007, and that the Commission erred in finding that her back injury was not supported by objective findings. Methodist contends that substantial evidence does not support the Commission's findings that Roebuck was entitled to additional medical care for her left shoulder and temporary total disability benefits from July 12, 2007, to a date yet to be determined. We affirm on direct appeal and cross-appeal.

The parties do not dispute the fact that Roebuck suffered a compensable injury to her left shoulder on January 26, 2005, when a teenager grabbed her and slammed her into locked doors. On the same date, Roebuck described her injury on a work form as "L shoulder, neck

side & back pain.”¹ On an AR-N completed two days later, she wrote “L side of neck, L shoulder & upper arm L side and back, bruise in L shoulder” as the injured parts of her body.

Roebuck was treated by three doctors, beginning with Dr. Neema Suphan, her family doctor, the week after her injury. Dr. Suphan treated Roebuck until workers’ compensation referred her to Dr. David Barnett, who first saw her on August 31, 2005, and performed left-shoulder arthroscopic surgery on December 27, 2005. She reported little improvement a month later and he administered cortisone shots, ultimately releasing her from his care on May 17, 2006.

Roebuck requested a change of physician and began seeing Dr. Ken Martin on July 19, 2006. He returned her to light-duty work on September 18, 2006. On July 12, 2007, Dr. Martin performed her surgery and took her off work. She was to return to him the week after her May 15, 2007 hearing before the administrative law judge. Roebuck asserted at the hearing that she still had “weakness and spasms in her back, neck and shoulder and range of motion problems.”

Temporary Total Benefits

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Highway and Transp. Dep’t v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Roebuck claimed at her hearing that she

¹These are Roebuck’s words and punctuation, but the symbols are not precisely reproduced.

was entitled to temporary total disability benefits beginning on September 18, 2006, to a date yet undetermined. The Commission found that Roebuck had proven entitlement to temporary total disability only for the period July 12, 2007, to a date to be determined.

Commission noted that Roebuck had been released to work with restrictions and found her testimony credible that her employer did not offer her work. The Commission's denial of her claim for total temporary benefits from September 18, 2006, through July 11, 2007, was based upon its finding that she was not totally unable to earn wages for that time period but "chose instead to further her education in order to make herself more marketable for future opportunities." Roebuck had enrolled as a full-time nursing student in January 2007 to become an RN, having begun prerequisite courses for nursing school in January 2006. At the time of the hearing, she anticipated completing nursing school in December 2007.

Roebuck contends that the Commission erred as a matter of law in denying total-temporary disability benefits for the period September 18, 2006, through July 11, 2007, and Methodist contends that substantial evidence does not support the finding that Roebuck was entitled to benefits for September 18, 2006, to a date yet undetermined. The Commission explained in its opinion:

On September 18, 2006, Dr. Martin released the claimant to return to work with limitations to include no overhead lifting, no repetitive reaching, no reaching overhead and no lifting over 10 pounds. The claimant testified that she contacted the respondent employer on several occasions and no employment opportunities were provided. The claimant made the decision to pursue RN school and began school for her prerequisites in January 2006 and

started RN school full time in January 2007. She will complete the RN program in December 2007, with Arkansas Rehabilitation and Pell grants paying for her program. While the claimant testified that she could work while pursuing this course of study, she would have had to have weekend work or elect to pursue school on a part time basis. *I found the claimant's testimony to be credible that she contacted the respondent employer and no jobs were offered her; however, her release from Dr. Martin did provide that restricted duty work was permitted. I am unable to find that the claimant was totally unable to earn wages beginning on September 18, 2006 through July 11, 2007. I find instead that she chose to further her education and make herself more marketable for future opportunities.*

(Emphasis added.)

In *International Paper Co. v. McGoogan*, 255 Ark. 1025, 504 S.W.2d 739 (1974), our supreme court held that a claimant should not be precluded from receiving compensation during a period of disability simply because he becomes a full-time student. The *McGoogan* court stated that such a rule would not only be unsupported by any provision of workers' compensation law but would also "violate the spirit and intent" of the law "by penalizing a claimant for attempting through the furtherance of his education to limit the effect of his disability." *Id.* at 1027, 504 S.W.2d at 741 (citing *Underwood v. Terminal-Frouge Builders*, 128 So. 2d 605 (Fla. 1961)).

The appellee in *McGoogan, supra*, was a summer employee who neither sought nor performed employment during the school year, and he suffered a compensable injury to his left thumb. The appellant controverted temporary total disability payments to him during the time he was a student. As planned, he attended the university the following academic year, during which time the appellant suspended payments of temporary total disability benefits

for loss of wages. The appellee made numerous trips for medical treatments, for which he was compensated by the appellant. At the beginning of the summer of 1971, the healing period had not ended and the appellant renewed payment of disability benefits for wage losses. Although finding that the employer “persuasively” argued that requiring payment during the school year based upon temporary total disability was unjust, the *McGoogan* court affirmed the award upon construing the Workmen’s Compensation Act in accordance with its beneficent purpose and resolving all doubts in favor of the claimant. 255 Ark. at 1027, 504 S.W.2d at 741.

The issue and the facts in the present case are distinguishable from *McGoogan*. Roebuck was not a summer employee “injured while in fulltime employment, . . . who subsequently returns to school as he intended at the time of his employment, and who is still in his healing period.” 255 Ark. at 1025, 504 S.W.2d at 740. Roebuck testified that she would have accepted light-duty employment, had Methodist offered it after Dr. Martin gave her the light-duty release in September 2006, and that an offer of full-time employment “would have probably changed her decision about going to school full time. It depends on the hours that they offered me to work.” She said that she had not actively looked for work while involved in the nursing program.

The Commission noted that medical records supported Roebuck’s testimony that she underwent surgery on July 12, 2007; that Dr. Martin’s records indicated she had been taken off work on that date and was to remain off work until he released her following her shoulder

surgery; that she had a return appointment with Dr. Martin the Thursday following the May 15, 2007 hearing; and that his August 8, 2007 notes indicated she was unable to return to work until her next appointment. Thus, substantial evidence supports the Commission's opinion that she had proven entitlement to temporary total disability benefits from July 12, 2007, to a date to be determined. The denial of Roebuck's claim for total temporary disability was based upon the Commission's finding that she chose to further her education during a time that she had been released to work with restrictions. This finding is supported by Roebuck's testimony, and it constitutes a substantial basis for the Commission's denial of her claim for temporary total disability benefits for the period September 18, 2006, through July 11, 2007.

Lower Back Injury

The Commission found that Roebuck reported at work her back, left-shoulder, and neck injuries; that initial medical records indicated she reported left-shoulder, neck, and back pain; and that physical therapy was ordered for her neck, left shoulder, and back. The Commission noted that Dr. Barnett initially treated Roebuck's left shoulder, neck, and back; that he ordered exercises and physical therapy involving her neck and back; and that his August 31, 2005 diagnosis included a lumbar strain. The Commission denied Roebuck's claim for a compensable lumbar injury, however, because there were no specific findings to substantiate it. A compensable injury must be established by medical evidence supported by objective findings, which are findings that cannot come under the patient's voluntary control.

Ark. Code Ann. § 11-9-102(4)(D) and (16) (Supp. 2007).

Roebuck asserts that the required finding is evidenced by Dr. Suphan's February 18, 2005 notation that she had a history of neck, shoulder, and back swelling. Methodist responds that Dr. Suphan's notation does not indicate that the doctor observed the swelling, and that a claimant's unverified complaints of swelling would undermine the intention of our legislature that our workers' compensation statutes be strictly construed. *See* Ark. Code Ann. § 11-9-704 (Supp. 2007). Roebuck counters in her reply brief that Dr. Suphan's statement "was obviously not simply based upon Ms. Roebuck's complaints, but was based upon her own observations." Noting that strict construction "means narrow construction and requires that nothing be taken as intended that is not clearly expressed," *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 42 S.W.3d 443 (2001), Roebuck also asserts that the statute does not require an objective finding to "actually be observed by a physician" and that, here, "a report of objective findings in the form of swelling" meets the statutory requirement.

The Commission did not indicate in its decision that it interpreted the statute to require physicians themselves to observe objective findings that support the medical evidence of a patient's injury, and we need not address such arguments in this appeal. The Commission simply assessed whether Roebuck proved a back injury based upon medical evidence supported by objective findings. The Commission found that the evidence "certainly" supported Roebuck's testimony that she reported her back injury to both her workplace and her medical providers. Although acknowledging that she reported her back injury and back

pain and was treated for it, the Commission denied her claim on the following basis:

The claimant has failed to prove by a preponderance of the evidence that she has sustained a compensable lumbar injury along with her left shoulder and neck injury. The initial treatment seemed to be conservative care with physical therapy to address shoulder, neck and back; however, there was not specific diagnostic testing regarding the lumbar spine. Dr. David Barnett, on August 31, 2005, included in his diagnosis a lumbar strain; however, no specific “objective findings” were noted to substantiate a compensable lumbar injury.

The weight and interpretation of the medical evidence, on which this decision turned, are matters for the Commission. *Pyle v. Woodfield, Inc.*, ___ Ark. App. ___, ___ S.W.3d ____ (Apr. 8, 2009). We affirm the denial of Roebuck’s claim for a compensable back injury.

Additional Medical Care for the Left Shoulder

On cross-appeal, Methodist contends that substantial evidence does not support the Commission’s findings that Roebuck was entitled to additional medical care for her left shoulder. Addressing Roebuck’s claim for awarding benefits for medical treatment related to her left-shoulder injury, to include Dr. Martin’s surgery of July 12, 2007, the Commission wrote:

As Dr. Martin suspected, the surgery revealed a rotator cuff tear. Dr. Martin utilized the arthroscopic repair technique to correct the problem. The claimant testified that her shoulder is now improved following the surgery and that she is able to move her arm better and has less pain. She is working on building her strength back but now takes less pain medication. The claimant’s testimony clearly shows post surgery improvement. The probative evidence of post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary.

The Commission gave great weight to the testimony and opinions of Dr. Martin, and it was

within the province of the Commission to do so. We hold that substantial evidence upholds the Commission's award of these additional medical benefits as reasonable and necessary, related to Roebuck's compensable injury.

Affirmed on direct appeal and cross-appeal.

GLADWIN and GLOVER, JJ., agree.