



OC/H

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 31 2015
MICHAEL S. RICHIE
CLERK

ATWOOD DISTRIBUTING LP, and)
ZURICH AMERICAN INSURANCE)
COMPANY,)

Petitioners,)

v.)

DARLA JEAN CAMP and THE)
WORKERS' COMPENSATION)
COMMISSION,)

Respondents.)

#114575

No.: _____

PETITION FOR REVIEW

A. WORKERS' COMPENSATION COMMISSION HISTORY

Number and style of proceeding in the court: DARLA JEAN CAMP, Claimant, v. ATWOOD DISTRIBUTING LP, Respondent, ZURICH AMERICAN INS. CO., Insurance Carrier, Case Number: CM-2014-05687X.

Decision to be reviewed was rendered by: (Check one)

(x) The Workers' Compensation Commission, or

() Administrative Law Judge of the Commission.

Date of filing of the decision to be reviewed? December 14, 2015.

Date a copy of the decision was sent to the parties? December 14, 2015.

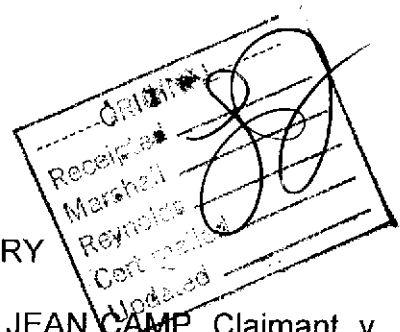
If seeking a review of the decision of the Commission, also give the date of the decision by the Administrative Law Judge: September 4, 2015, and the date an appeal was brought to the Commission: September 14, 2015. (Otherwise mark N/A).

B. DISPOSITION IN THE WORKERS' COMPENSATION COMMISSION

Nature of the decision to be reviewed: An Order affirming the decision of the Administrative Law Judge awarding additional temporary total disability benefits beyond the 32 weeks of benefits allowed before the surgery for the nonsurgical soft tissue injury.

Relief sought: Reversal of the decision for an order denying additional temporary total disability benefits before the date of the claimant's surgery.

Relief granted: Order Affirming Decision of Administrative Law Judge.



(Attach a certified copy of the decisions to be reviewed as exhibit "A" and "B".)

A copy of the clerk's certificate that the employer has an approved statutory bond on the file with the court also is attached hereto yes no
(Required only if review is sought by employer or insurance carrier from a decision awarding benefits to claimant).

C. BRIEF SUMMARY OF PROCEEDING

Exhibit "C" attached (not to exceed one 8 1/2" x 11" double spaced page).

D. ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

Exhibit "D" attached. (Number and state with specificity each point urged as error.)
(General assignments will not suffice.)

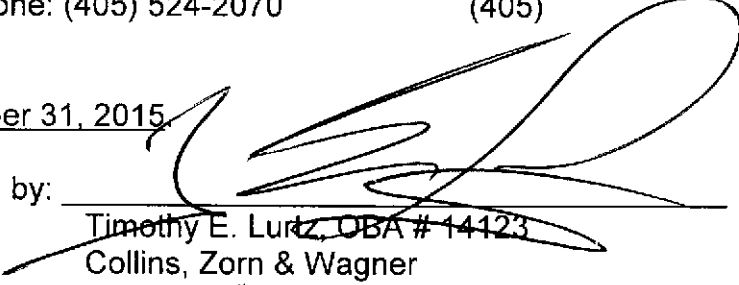
ANY RELATED OR PRIOR APPEALS? yes no
(Identify by style citation, if any, and Supreme Court Number.)

Style	Citation	Supreme Court No.
_____	_____	_____
_____	_____	_____

E.	ATTORNEY FOR PETITIONER	ATTORNEYS FOR RESPONDENTS
Name:	<u>Daniel K. Zorn and Timothy E. Lurtz</u>	Brandon J. Burton
Firm:	<u>Collins, Zorn & Wagner</u>	
Address:	429 NE 50 th , Second Floor Oklahoma City, OK 73105 Telephone: (405) 524-2070	P.O. Box 2666 Oklahoma City, OK 73101 (405)

Date: December 31, 2015

Verified by: _____


Timothy E. Lurtz, OBA # 14123
Collins, Zorn & Wagner
429 NE 50th, Second Floor
Oklahoma City, OK 73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

CERTIFICATE OF FILING AND MAILING

I, Timothy E. Lurtz, do hereby certify that on this 31st day of December, 2015, I did cause to be filed with the Workers' Compensation Commission, and mailed out a correct copy of the Petition for Review with the attachments, to each party to the proceeding or counsel of record as follows:

Brandon J. Burton
P.O. Box 2666
Oklahoma City, OK 73101

Norma McRae, Clerk
Workers' Compensation Commission
1915 N. Stiles, Suite 231
Oklahoma City, OK 73105

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st
Oklahoma City, OK 73105

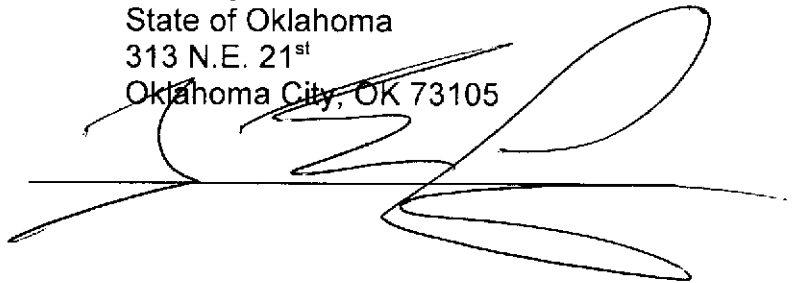
A large, stylized handwritten signature in black ink, appearing to be 'E. Scott Pruitt', is written over the typed name and address of the Attorney General.

EXHIBIT B: BRIEF SUMMARY OF PROCEEDING

The Honorable T. Shane Curtin, Administrative Law Judge, conducted the trial on August 17, 2015, on the claimant's request for an award of additional temporary total disability (TTD) benefits. The claimant sustained a compensable soft tissue injury to her back and right hip as a result of a single event accident occurring on March 19, 2014. She received injections as part of the treatment of her injuries. She received 16 weeks of TTD as a result of the soft tissue injury. Her doctor recommended surgery to the right hip, and Judge Curtin authorized the surgery by order filed on May 6, 2015. Judge Curtin also awarded an additional 16 weeks of TTD due to the surgical recommendation. The claimant underwent the recommended arthroscopic surgery to her right hip on July 10, 2015, resulting in additional weekly TTD payments beginning on the date of the surgery. The claimant received the full 32 weeks of TTD permitted before her surgery. Thereafter, the claimant requested an award of an additional 36 weeks of TTD for the period of time for which she had not already received TTD before the right hip surgery.

The request for additional TTD was denied by Respondents based on the clear language of 85A O.S. § 62 which precludes award of additional TTD for the time period before performance of the surgery. The only surgical procedures which retroactively remove an injury from the soft tissue injury limitations on TTD are spine surgery and joint replacement surgery, 85A O.S. § 62 (B)(1) and (B)(3), neither of which occurred in this case. Therefore, the statutory limitations on TTD for nonsurgical soft tissue injuries apply to the case for the time before the date of the surgery, while the claimant's injury was in fact nonsurgical. Nevertheless, Judge Curtin awarded the additional TTD benefits. The decision was appealed to the Commission, which affirmed the decision of Judge Curtin resulting in this appeal.

EXHIBIT C: ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

Error # 1: The decision of the Workers' Compensation Commission is against the clear weight of the evidence and contrary to law in finding additional temporary total disability benefits were payable for the claimant's injury for the time following the date of the injury and before the surgery, contrary to the express language contained in 85A O.S. § 62 and 85A O.S. § 106.

Error # 2: The decision of the Workers' Compensation Commission issued by Judge Curtin is against the clear weight of the evidence and contrary to law in finding additional temporary total disability benefits for the time following the date of the injury and before the surgery were payable for the claimant's injury, by finding in paragraph III, (1) of the September 4, 2015 Order, that the fact of the surgery retroactively transformed the claimant's injury and removed it from the limitations contained in the "soft tissue injury" provision contained in 85A O.S. § 62, and contrary to the strict construction requirement of 85A O.S. § 106.

Error # 3: The decision of the Workers' Compensation Commission is against the clear weight of the evidence and contrary to law in finding additional temporary total disability benefits were payable for the claimant's injury for the time following the date of the injury and before the surgery, based on unwritten policy, dicta, etc., beyond the statutory language contained in 85A O.S. § 62. Nothing in the Administrative Workers' Compensation Act authorizes the Commission to extend TTD benefits under the facts and circumstances of the case at bar. The order extending the benefits violates the clear language of 85A O.S. § 62, and the strict construction requirement of 85A O.S. § 106.

Error # 4: The decision of the Workers' Compensation Commission is against the clear weight of the evidence and contrary to law in finding additional temporary total disability

benefits were payable for the claimant's injury for the time following the date of the injury and before the surgery, by applying reasoning from Bonat v. Bed Bath and Beyond, Inc., 2008 OK 47, which is a case focused on a recommended corrective spine surgery which when performed would remove the limitations of the soft tissue injury provision under the clear language contained in 85A O.S. § 62 as well as under prior law. The decision further violates the express strict construction requirement of 85A O.S. § 106.

Error # 5: The Court erred in failing to provide the findings of fact and conclusions of law pertaining to the above referenced errors which would allow meaningful appellate review as required by Dunkin v. Instaff Personnel, 2007 OK 51, 164 P.3d 1057.

CERTIFICATION BY WORKERS COMPENSATION COMMISSION CLERK

I, Norma McRae, certify as follows:

I am the Clerk of the Workers' Compensation Commission.

I hereby certify that the Petitioners, ATWOOD DISTRIBUTING LP, and ZURICH AMERICAN INSURANCE COMPANY, have submitted an approved statutory Bond on Appeal which is on file with the Workers' Compensation Commission in relation to the appeal filed arising from the Workers' Compensation Commission case styled and numbered: DARLA JEAN CAMP, Claimant, v. ATWOOD DISTRIBUTING, LP, Respondent, ZURICH AMERICAN INS. CO., Insurance Carrier, Court Number: 2014-05687X.

Dated this 31st day of December, 2015.

s/ Norma McRae



Norma McRae

Clerk of the Workers' Compensation Commission



BEFORE THE OKLAHOMA WORKERS' COMPENSATION COMMISSION

FILED

WORKERS' COMPENSATION COMMISSION

STATE OF OKLAHOMA

September 4, 2015

Norma McRae

COMMISSION CLERK

DARLA JEAN CAMP
Employee-Claimant

ATWOOD DISTRIBUTING LP
Employer-Respondent

ZURICH AMERICAN INSURANCE CO
Insurer

)
)
) Commission File No.
) CM-2014-05687X
)

)
) Claimant's Social Security
) Number: xxx-xx-4245
)

ORDER AWARDING TEMPORARY TOTAL DISABILITY

Hearing before Administrative Law Judge T SHANE CURTIN on AUGUST 17, 2015, in Oklahoma City, Oklahoma.

Claimant appeared by counsel, BRANDON J BURTON.

Respondent and insurance carrier appeared by counsel, TIMOTHY LURTZ for DANIEL K ZORN.

I. STATEMENT OF THE CASE

The claimant seeks an order for a closed in period of temporary total disability from March 23, 2014 to July 9, 2015 (less prior amounts paid by respondent). The respondent denies claimant is entitled to any more than 32 weeks of temporary total disability prior to her surgery pursuant to section 62(A) of the AWCA. The motion for temporary total disability was scheduled for contested hearing which was held in Oklahoma City, OK on August 17, 2015. The parties agreed to submit the case via written stipulations and argument.

II. STIPULATIONS

The following stipulations were submitted by the parties and accepted as fact:

1. That a prior order was entered and filed May 6, 2015 finding jurisdiction and compensable injuries.
2. That claimant's designated treating physician is Dr. Mitchell.
3. That Dr. Mitchell performed surgery on the claimant's right hip on July 10, 2015.
4. That claimant has never been offered alternative work by the respondent, and has not been released to return to work since March 23, 2014.

EXHIBIT

A

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5. That respondent paid 32 weeks of temporary total disability prior to the surgery of July 10, 2015.
6. That claimant has not drawn unemployment compensation, but has filed and been approved for social security.

III. FINDINGS AND CONCLUSIONS

Having considered the record and agreed stipulations of the parties, and being well and fully advised in the premises, I find and hereby order that:

1. Because the claimant has had surgery to the right hip the "non-surgical" soft tissue limitation of temporary total disability found in section 62 do not apply; therefore, section 45 is to be applied. I find based on the stipulated facts the claimant is entitled to the claimed temporary total disability benefits. The respondent shall pay the claimant temporary total disability benefits for the period of March 23, 2014 to July 9, 2015 less the 32 weeks of temporary total disability previously paid by respondent.
2. That claimant's attorney is entitled an attorney fee of 10% of the temporary total disability awarded herein.

IT IS SO ORDERED.

DONE this 3rd day of SEPTEMBER, 2015.

BY ORDER OF:

/s/ *A. Shane Curtin*

T SHANE CURTIN
ADMINISTRATIVE LAW JUDGE

../EButler

A copy of the above and foregoing Commission Order was mailed, by regular or certified United States Mail, on this filed stamped date to:

Claimant's Attorney: BRANDON J BURTON
PO BOX 2666
OKLAHOMA CITY, OK 73101-2666

Respondent's Attorney: DANIEL K ZORN
429 NE 50TH ST 2 FL
OKLAHOMA CITY, OK 73105-1815

I do hereby certify that the above and foregoing is a true and correct copy of the original order signed by the Judge herein. Witness by my hand and the official seal of this Commission on this date.



Norma McRae
Commission Clerk
September 4, 2015

In Re Claim Of:

DEC 14 2015

DARLA JEAN CAMP
Employee-Claimant

ATWOOD DISTRIBUTING LP
Employer-Respondent

ZURICH AMERICAN INSURANCE CO
Insurer

WORKERS'
COMPENSATION COMMISSION

Commission File No.
CM-2014-05687X

Claimant's Social Security
Number: xxx-xx-4245

ORDER AFFIRMING DECISION OF ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

Respondent timely filed an appeal from the Administrative Law Judge's Order entered on September 4, 2015. The appeal hearing was heard before the Commission at its October 16, 2015 meeting. After reviewing the record, hearing oral argument, and deliberating, the Commission voted to take preliminary action to affirm the Order and instructed Commission staff to draft a proposed order with further findings supporting the decision of the Administrative Law Judge, for consideration in continued deliberation at a later meeting.

At the December 10, 2015 meeting, the Commission voted to issue this Order, with the following findings of fact and conclusions of law. After reviewing the record, hearing oral arguments, and deliberating, the Commission en banc hereby affirms and adopts the opinion of the Administrative Law Judge.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The material facts are undisputed. Claimant has not been released to work since March 23, 2014 and the Respondent has not offered alternative work. Claimant was paid the statutory maximum of thirty-two (32) weeks prior to undergoing surgery for a compensable right hip injury. The record reflects that Claimant's treating physician recommended the hip surgery on November 12, 2014, but authorization was refused. The hip surgery was ultimately authorized by order of the Administrative Law Judge and performed on July 10, 2015.
2. A hearing was held before the Administrative Law Judge on August 17, 2015, to consider Claimant's request for temporary total disability benefits from March 23, 2014 to July 9, 2015. Respondent denied any obligation to pay temporary total disability beyond the 32 weeks prior to Claimant's surgery. On September 4, 2015, the Administrative Law Judge entered an Order finding that the claimant's right hip surgery lifted the "non-surgical" soft tissue limits on temporary total disability. The Order applied the general limits found in 85A O.S. §45 and awarded temporary total disability from March 23, 2014 to July 9, 2015, less the 32 weeks previously paid by Respondent.



3. Respondent timely filed an appeal to the Commission en banc. Respondent alleges that the Administrative Law Judge erred by awarding additional temporary total disability for the time period prior to surgery, citing *Scott v. Sprint PCS*, 2012 OK CIV APP 36, 274 P.3d 173, and *Travis v. Mays Housecall Home Health, Inc.*, 2014 OK CIV APP 79, 335 P.3d 279.

4. Respondent urges the Commission to follow *Scott*, which held that soft tissue limitations operate to limit pre-surgical temporary total disability even after surgery has been performed. The *Scott* Court found that:

The legislative structure would be thwarted **if the claimant could wait months or years to decide to have surgery** (which could end the healing period) and then receive compensation up to the regular TTD limits for time preceding the surgery.

Id. at 176 (emphasis added).

5. We do not find the *Scott* Court's reasoning persuasive for two reasons. First, there is no indication that the Claimant caused the delay in the present case. On the contrary, the record shows that the Claimant consistently sought authorization for surgery from the time it was recommended. Further, the applicable soft tissue provision now precludes an employee from collecting excessive benefits by delaying surgery in bad faith. Section 62 directs that when an employee delays surgery for more than thirty days, temporary total disability benefits "shall be terminated and the employee shall reimburse the employer any temporary total disability he or she received beyond eight (8) weeks." 85A O.S. §62.

6. Alternatively, we do find the Oklahoma Supreme Court's analysis in *Bonat v. Bed Bath and Beyond, Inc.*, 2008 OK 47, 186 P.3d 952, *as corrected* (May 19, 2008), instructive as to proper application of the soft tissue provision in Section 62. In *Bonat*, the Court found that when surgery to the soft tissue is performed, the "injury is subject to the limits imposed generally on TTD." *Id.* at 955.

7. While *Bonat* does not answer whether soft tissue limits may be lifted retroactively once surgery is performed, we find such authority from a plain reading of the statute. The temporary total disability limits in Section 62 apply to "non-surgical" soft tissue injuries only. Once surgery has been performed, the soft tissue injury is no longer "non-surgical" and the general limits in Section 45 apply. Section 45 provides:

"If the injured employee is temporarily unable to perform his or her job or any alternative work offered by the employer, he or she shall be entitled to receive compensation...for one hundred four (104) weeks."

We find that a compensable "surgical" soft tissue injury entitles an employee to temporary total disability for any period of time during which an employee is unable to work, subject to the general limits of Section 45.

8. After examining the record, hearing oral argument, and deliberating, the Commission finds that the Administrative Law Judge correctly applied the law to determine the period of time that the Claimant was entitled to temporary total disability. Therefore, the Order was neither against the clear weight of the evidence, nor contrary to law.

III. CONCLUSION

For the reasons stated above, the Order of the Administrative Law Judge, entered in this case on September 4, 2015, is hereby AFFIRMED, its findings and conclusions INCORPORATED herein, and remains in full force and effect as the Order of the Commission en banc.

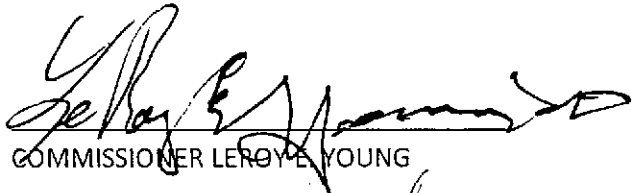
IT IS SO ORDERED.

DONE this 11th day of DECEMBER, 2015.

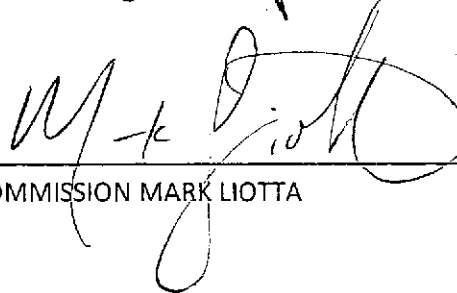
BY ORDER OF:



COMMISSIONER ROBERT H. GILLILAND



COMMISSIONER LEROY E. YOUNG



COMMISSION MARK LIOTTA

mp/EButler

A copy of the above and foregoing Commission Order was mailed, by regular or certified United States Mail, on this filed stamped date to:

Claimant's Attorney: BRANDON J BURTON
PO BOX 2666
OKLAHOMA CITY, OK 73101-2666

Respondent's Attorney: DANIEL K ZORN
429 NE 50TH ST 2 FL
OKLAHOMA CITY, OK 73105-1815

I, Clerk of the Workers' Compensation Commission,
do hereby certify that I have compared
the foregoing copy of Order
with the original now on file in this office, and
the same is a full, true and exact copy thereof.

In witness whereof, I have hereunto set my hand and
affixed the official seal of this Commission this
day of December 2, 2014

Lyndee L. Lusk
Clerk, Oklahoma
Workers' Compensation Commission

