

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
AWCC NO. F206984**

**CLARENCE CULBREATH, EMPLOYEE**

**CLAIMANT**

**VS.**

**CONAGRA POULTRY CO., A SELF-INSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED JULY 31, 2003**

Hearing held May 22, 2003, in El Dorado, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Mr. Billy Hubbell, Attorney at Law, P.O. Box 574, Crossett AR 71635.

Respondents are represented by Mr. Brian Ratcliff, Attorney at Law, P.O. Box 1718, El Dorado AR 71731.

**STATEMENT OF THE CASE**

The above-styled claim came on for a hearing in El Dorado, Arkansas, on May 22, 2003. A prehearing telephone conference was held on this claim on March 17, 2003, with a Prehearing Conference Order filed that same date. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, the parties agreed upon the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
2. The employee/employer/self-insured relationship existed between the parties on April 13, 2002;
3. Claimant sustained a compensable injury on April 13, 2002, when he fell and hit the Argo Stand;

4. Respondents have paid for medical treatment provided by Dr. Matthew Callaway and Dr. Robert Forward.

During the prehearing telephone conference the parties agreed to limit the issues to whether claimant is entitled to additional benefits, specifically temporary total disability, temporary partial disability, permanent partial disability, wage loss disability, medical expenses, rehabilitation and an attorney's fee.

With regard to these issues, claimant contends that he suffered a compensable injury on April 13, 2002, for which he is entitled to temporary total disability benefits from the date he last worked through July 28, 2002, when he returned to work. Claimant returned to work at a lower income, therefore, claimant contends entitlement to temporary partial disability benefits. Finally, claimant contends entitlement to additional medical treatment and an attorney's fee. Claimant withdrew for consideration at this time the issues of permanency, wage loss and rehabilitation. These issues are specifically reserved.

Respondents contend with regard to temporary total disability benefits, claimant had been released to return to work and that claimant's work was still available to him at the time he was terminated. With regard to the claimant's request for additional medical benefits, respondents contend that the treatment at the VA was reasonable and necessary nor was it authorized medical treatment as the claimant's treating physician was Dr. Callaway, claimant received the Form N, and the claimant did not petition the Commission for a change of physician.

Representatives of the VA were present at the hearing. The VA submitted documentation for its lien. Subsequent to the hearing additional documents and briefs with regard to the VA's lien were submitted to the Commission and made a part of the record by the undersigned.

From a review of the record as a whole, to include the medical reports, documents, and all other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. § 11-9-704:

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on March 17, 2003, and contained in the Prehearing Order filed that same date, are hereby accepted as fact.
2. Subsequent to claimant's injury, respondents provided light duty work within the claimant's restrictions.
3. Claimant was terminated from his employment for insubordination.
4. Claimant was released to return to work without restrictions on July 2, 2002.
5. Claimant's healing period ended on July 2, 2002.
6. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

7. Claimant obtained employment on July 28, 2002, earning less wages than he was earning at the time of his injury.

8. Claimant is capable of working at least forty hours a week, and he does not have any physical restrictions.

9. Claimant has failed to prove by a preponderance of the evidence entitlement to temporary partial disability benefits.

10. Respondents controverted claimant's entitlement to additional benefits on or about June 25, 2003, therefore the change of physician rules are not applicable.

11. Claimant sought additional medical treatment from the VA after additional medical treatment was controverted by respondents.

12. Claimant has failed to prove that the medical treatment he obtained from the VA is reasonable and necessary medical treatment related to his compensable injury.

### **CONCLUSION**

Claimant began working for respondents on March 12, 2002. On April 13, 2002, claimant sustained a compensable injury when he slipped and fell. Claimant struck his neck on a conveyor belt prior to falling to the floor. Claimant reported the incident and tried to continue working but was in too much pain. Claimant spent the remainder of his shift in the break room. When claimant next reported to work he reported to the nurse's station and was provided ice packs, Ibuprofen, and was

placed on light duty with no lifting over ten pounds. Claimant continued to work in a light duty capacity for two weeks until he was terminated for insubordination.

Claimant was first seen by a physician on May 8, 2002, when he came under the care of Dr. Matthew Calaway. Claimant provided Dr. Callaway with a history of neck pain for the past three weeks. Claimant further complained of back pain, numbness and tingling. Dr. Callaway's cervical examination yielded objective findings of trapezius muscle spasms, while the spine examination produced objective findings of paraspinous muscle spasms. Dr. Callaway diagnosed claimant with a strain, prescribed pain medication, and physical therapy. Follow-up reports from Dr. Callaway reveal that the paraspinous muscle spasms resolved after the initial visit while the trapezius muscles spasms slowly improved. On June 21, 2002, Dr. Callaway noted that the claimant only had trapezius spasms on the left, without any objective findings on the right. Dr. Callaway further found; "Less stiffness, less spasm, some significant improvement, still with some symptom amplification. May begin to resume normal activity." On July 2, 2002, Dr. Callaway provided claimant with a full release to return to work.

On June 25, 2002, claimant called the VA seeking medical care after the respondents controverted claimant's entitlement to any additional treatment. Claimant advised the telephone nurse that he wanted a second opinion regarding his workers' compensation injury. A notation of "denies any significant past medical history" appears throughout claimant's VA records. Claimant was examined at the

VA on July 19, 2002, with primary complaints of neck pain. CT scans of claimant's cervical and lumbar areas were taken on August 16, 2002. The lumbar CT revealed bilateral facet hypertrophy at L2-L3 without any evidence of a disc herniation or fracture. The cervical CT revealed straightening of the cervical spine and bilateral moderate foraminal stenosis at C3-C4. In December of 2002, claimant underwent an EMG/nerve conduction study which yielded normal results.      C l a i m a n t admitted during cross-examination that he had sustained several previous injuries to his shoulder, back, and neck. Claimant was discharged from the military in 1979 after sustaining an injury to his right shoulder. Claimant received a 10% permanent disability as a result of his shoulder injury for which he receives monthly compensation. While working for Service Paint, claimant sustained another injury to his right shoulder. Claimant testified that his right shoulder has never really stopped hurting. In 2000, claimant sustained an injury to his back when he was struck by a forklift in his back. Claimant settled this forklift injury for \$7,500.00. Claimant testified that his back would occasionally hurt before he went to work for respondents. In the summer of 2001, claimant was involved in a motor vehicle accident and sustained an injury to his neck. Claimant settled this claim for \$10,000.00. After the motor vehicle accident, claimant had a slip and fall incident in store in which he injured his lower back. Claimant again settled this claim for \$3,200.00. Claimant did not report any of these previous injuries to his treating physicians.

The medical records from these previous injuries are not in the record. On cross-examination claimant acknowledged that he was examined by Dr. Edward Sayer with the Arkansas Spine Center on April 29, 2002, for his previous shoulder injury. Pursuant to claimant's testimony, Dr. Sayer released claimant to return to full duty on April 29, 2002.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981). An injured employee is entitled to temporary partial disability compensation during the period that he is within his healing period and suffers only a decrease in his capacity to earn the wages that he was receiving at the time of the injury. Id. The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(13) (Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally

incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits. Claimant sustained his injury on April 13, 2002. Claimant continued to work for respondents in a light duty capacity until he was terminated for insubordination. Claimant admitted on cross-examination that if he had not been fired he would have remained at work for respondents, working under restrictions. Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages after his compensable injury. Light duty work was available within claimant's working capacity at all relevant times.

I further find that the claimant has failed to prove by preponderance of the evidence that his compensable injury caused claimant to suffers a decrease in his capacity to earn the wages that he was receiving at the time of the injury. Claimant was able to earn the same wages under light duty restrictions. Claimant's conduct of insubordination resulted in claimant's loss of earnings, not his compensable injury. Moreover, the record reveals that the claimant was released to full duty on July 2, 2002. Claimant secured full time employment at the Huddle House. Although this job as a cook pays less money than his job with respondents, I find that the claimant is physically capable of earning the same wages. Merely because a claimant takes employment which pays less than he was earning at the time of the injury does not mean that the claimant is entitled to temporary partial disability. The claimant must prove that he is still within his healing period and the injury, itself, prevents the claimant from earning the same wages.

With regard to his healing period, I find that the claimant's healing period for his compensable injury ended on July 2, 2002, when he was released to return to work by Dr. Callaway. During his previous examination, Dr. Callaway noted that the claimant had sustained "some significant improvement." Claimant's objective findings of spasms were altogether gone in the lumbar region and significantly reduced in the trapezius muscles. Claimant has continued to seek medical treatment at the VA, however, his condition has remained constant. Additional treatment is not improving the status quo with regard to claimant's subjective complaints of pain. Moreover, claimant's objective findings of spasm have disappeared, and all diagnostic tests have been unable to locate any objective basis for claimant's continued complaints. The CT scans revealed degenerative findings, which are to be expected given claimant's previous medical history. Accordingly, I find that claimant's healing period ended on July 2, 2002. Claimant's continued complaints of pain are not sufficient to extend his healing period. Mad Butcher, Inc. v. Parker, supra.

Furthermore, I find that the claimant has failed to prove that his compensable injury has resulted in a decrease in his wage earning capacity. At his present job, claimant works five or six days a week, eight hours a day. Claimant tried to work two jobs for a period of time, but he was unable to keep up the pace of continually working without any time off. I cannot find that claimant's choice of jobs is driven by his compensable injury and ability to earn wages. Claimant is physically capable of earning the same wages he was earning at the time of his injury, as he works full time and accepts overtime when ever it is offer. Claimant has failed to prove that he remains within his healing period or that his strain injury

prevents him from earning greater wages. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary partial disability benefits.

Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). In workers' compensation cases, the burden rests upon the claimant to establish his claim for compensation by a preponderance of the evidence. Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board, 47 Ark. App. 181, 888 S.W.2d 314 (1994). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, the Commission must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Commission Opinion, Dec. 13, 1989 (D512553).

Claimant has continued to seek medical treatment from the VA. The VA records reveal treatment for claimant's cervical and lumbar pain complaints. Testing at the VA has failed to reveal a basis for claimant's continued complaints of pain. Dr. Johnny Smelz diagnosed claimant with Myofascial pain. The CT scan of claimant's lumbar spine revealed bilateral facet hypertrophy at L2-L3. As claimant's compensable injury was to his left side, this bilateral finding of facet hypertrophy is more likely degenerative in nature. Likewise, the CT scan of claimant's cervical

spine revealed straightening of the cervical spine and bilateral moderate foraminal stenosis at C3-C4. Claimant's previous injury to his neck which accounted for a \$10,000.00 settlement, and the degenerative process are more likely the cause of this bilateral finding and not claimant's strain to the left trapezius area.

In reaching this finding, I specifically find that claimant's testimony regarding not experiencing any pain from his previous injuries while working for respondent not to be credible. Claimant began working for respondents on March 12, 2002. Claimant continued to be under the care of specialists with the Arkansas Spine Center until April 27, 2002. According to claimant's testimony, the only reason he was seen at the Arkansas Spine Center on April 27, 2002, was to obtain a release to continue working for respondents. This testimony is suspect in that the claimant's injury occurred two weeks prior to this doctor's visit. The medical report which would support the claimant's testimony is not in evidence. As a claimant's testimony is never considered uncontroverted, the real purpose of this office visit is left to speculation. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

Moreover, the diagnostic tests run at the VA revealed degenerative findings. The denial of any past significant medical history is less than true in light of claimant's previous injuries which resulted in monetary settlements. Accordingly, I find that the claimant's continued need for medical treatment after he was released by Dr. Callaway stems from claimant's pre-existing, underlying degenerative condition and not his compensable injury.

Since I find that the claimant's medical treatment at the VA is not causally related to claimant's compensable injury, I further find that the respondents are not liable for payment on the lien filed by the VA.

**AWARD**

Claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional benefits. Therefore, this claim for temporary total disability benefits, temporary partial benefits, and additional medical benefits is hereby denied and dismissed.

**IT IS SO ORDERED.**

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**HON. KAREN MCKINNEY**  
Administrative Law Judge