

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. F205289**

DAVID SMOKER, EMPLOYEE

CLAIMANT

VS.

PAT SALMON & SONS, INC., EMPLOYER

RESPONDENT

PACIFIC EMPLOYERS INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED AUGUST 8, 2003

Hearing held June 25, 2003, in Little Rock, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant, David A. Smoker Sr., 111 N. Church Rd., Searcy Arkansas 72143, is not represented by counsel, but appears *pro se*.

Respondents are represented by Mr. Frank Newell, Attorney at Law, 101 South Spring Street, Suite 300, Little Rock AR 72201.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in Little Rock, Arkansas, on June 25, 2003. A prehearing telephone conference was held on this claim on May 19, 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-carrier relationship existed between the parties on April 26, 2002;
3. Claimant sustained a compensable injury on April 26, 2002;

4. Claimant earned an average weekly wage sufficient to entitle him to the maximum compensation rates;

5. Claimant was released to return to work on August 22, 2002, without restrictions and with a zero percent impairment rating;

6. Claimant's medical expenses related to this injury have been paid.

During the prehearing telephone conference the parties agreed to limit the issues to:

1. Whether claimant is entitled to change of physician;

2. Whether claimant remains within his healing period and unable to earn wages due to the medication claimant has been prescribed which prevents him from passing his DOT physical.

Pursuant to Wal-Mart Stores, Inc. v. Brown, ___ Ark. App. ___, ___ S.W.3d ___ (CA 03-82 opinion issued June 25, 2003), the claimant's change of physician request was granted by order dated July 1, 2003.

With regard to the issue of temporary total disability benefits, claimant contends that he is entitled to additional temporary total disability benefits as he was unable to return to work as an over the road driver due to the medication he was prescribed for his pain. Claimant initially sought 60 days of benefits as he believed his prescription for Darvocet was for 60 days. However, at the hearing, claimant advised that his prescription for Darvocet was for 70 days and that he has received another prescription for a drug which is prohibited under the DOT physical requirements. Conversely, respondents contend that the claimant reached

maximum medical improvement, and was released to return to work without restrictions on August 22, 2002. Since claimant's healing period has ended, respondents contend that claimant is not entitled to additional temporary total disability benefits. Claimant did not receive any permanent anatomical impairment as a result of his injury and is therefore not entitled to permanent disability benefits. Respondents contend that the claimant has received all reasonable and necessary medical treatment to which he is entitled .

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 May 19, 2003, and contained in the Prehearing Order filed that same date are hereby accepted as fact.
2. Claimant's healing period ended on or before August 22, 2002.
3. Claimant has failed to prove by a preponderance of the evidence that he remained within his healing period and totally incapacitated from earning wages subsequent to August 22, 2002.
4. Claimant has failed to prove entitlement to additional temporary total disability benefits.

CONCLUSION

It is undisputed that the claimant sustained a compensable injury on April 26, 2002, for which he received medical and temporary total disability benefits. A dispute arose between the parties when respondents ceased payment of temporary total disability benefits in August of 2002. Claimant contends that he is entitled to additional temporary total disability benefits as he was unable to pass his DOT physical upon his release to return to work due to the prescription medication he was taking.

Following his injury, claimant sought medical treatment from the emergency room on May 5, 2002. Claimant was prescribed pain medications and was removed from work for several days. When claimant reported his injury and treatment to his employer, he was advised to obtain medical treatment from the company doctor, Dr. Cynthia Almond. Claimant came under the care of Dr. Almond where he received more pain medications and was prescribed physical therapy. Dr. Almond also removed claimant from work. Dr. Almond referred claimant to Dr. John Wilson, a noted orthopedic specialist in Little Rock, Arkansas. Dr. Wilson prescribed additional physical therapy and ordered a bone scan. The bone scan performed on May 22, 2002, revealed "slight isotope activity increase in the right lower anterior rib which could represent previous rib trauma that is nonspecific" as well as similar findings in the right knee and feet. After undergoing additional physical therapy, claimant returned to Dr. Wilson's office on June 10, 2002. In his report to Dr. Almond following the June 10th examination, Dr. Wilson wrote in pertinent part:

This gentleman returned on June 10, 2002, with persistent pain in his dorsal spine. Bone scan is negative.

Mr. Smoker is showing some gradual improvement with physical therapy. I have advised him that he needs to attempt to return to work; he states there is no light duty. I have released him to return to work with a 50 pound restriction. If, indeed, that is not available to him we will continue his physical therapy and plan to release him to his normal activities in two weeks.

Claimant testified that the nurse case manager assigned to his claim by the insurance carrier suggested a change of physician to Dr. Bruce Safman after Dr. Wilson released claimant on June 10, 2002.

Claimant came under the care of Dr. Safman on June 13, 2002. Dr. Safman diagnosed claimant with a thoracic strain and possible lumbar strain, as well as, mild left cubital tunnel syndrome. The cubital tunnel syndrome was not accepted as a compensable injury and is not subject to this claim. Dr. Safman stated in his initial report:

This patient does not demonstrate objective pathology on testing done to date. He has a great deal of subjective pain. The patient did not appear to be in a great deal of distress when I saw him today. If he is not improved when I see him next Wednesday in my Little Rock clinic, I will start him on medications for chronic pain syndrome. In so far as he has not been working, I will keep him off work at this time.

Claimant returned to Dr. Safman on June 19, 2002, and advised that he had not noted any significant improvement in his symptoms. Dr. Safman altered claimant's medications and kept claimant on the same restrictions. On July 2, 2002,

Dr. Safman examined the claimant and noted reports of gradual improvement from the claimant. Dr. Safman noted two trigger points for which he performed trigger point injections. Other than the trigger points, Dr. Safman stated “no other findings are noted on exam. There is no guarding or muscle spasm.”

In his July 24, 2002, office note, Dr. Safman stated:

Mr. Smoker reports that, 4 days after I saw him last, his pain spontaneously increased. This time, the pain is restricted to the mid-thoracic spine and some in the intercostal joints. He has no pain elsewhere....

On examination, he has tenderness in the paravertebral muscles in the mid-thoracic spine and in the mid-sternocostal joints on the right side. He is quite obese and I could not palpate any guarding or muscle spasm. His pulse is 78 and regular.

There is disparity between the findings on examination and the severity of pain which the patient reports: There is a paucity of findings to explain his subjective symptoms.

Dr. Safman again did a trigger point injection and changed claimant's medication. Dr. Safman further noted that the claimant should be at maximum medical improvement in one month.

On August 7, 2002, claimant returned to Dr. Safman with continued complaints of pain. After examining the claimant and again noting no objective findings to support claimant's complaints of pain, Dr. Safman wrote:

I am perplexed by the persistence of his pain and his failure to respond to medications. The patient reports that his brother has a similar situation, where he does

not respond to medications and is currently on methadone.

I would suggest looking into possible emotional factors that may be playing a role in his symptoms. I had suggested a MMPI, but this apparently was not approved by his adjustor. I also suggested a MRI of his thoracic spine as one has not been done.

Dr. Safman increased claimant's medication and noted that he did not have an explanation for the persistence of claimant's pain.

The Thoracic MRI performed on August 16, 2002, yielded normal findings of the thoracic spine.

In his final report dated August 22, 2002, Dr. Safman wrote:

Mr. Smoker reports that nothing to date has resulted in resolution of his pain. He still is having a lot of posterior thoracic pain. The patient reports that his father has posttraumatic stress disorder, other medical problems and is on Methadone.

The MRI was negative. I have not been able to objectively establish any cause for his pain and related this to the patient. There is nothing that I have done that is of any benefits.

PHYSICAL EXAMINATION: There is subjective tenderness only that is unchanged. There is no guarding, no muscle spasm present.

I have suggested to the patient that he see his primary care physician to see there may not be another etiology other than musculoskeletal that is his problem. I have also suggested to him that he get an MMPI test on his own if he and his family physician agreed to this. Sometimes depression masks chronic pain that does not resolve, however, with a family history of mental health issues, I have asked the patient to discuss this

with his primary care physician to see if another etiology for his problems might be uncovered.

I did give the patient a prescription for Darvocet. I think he is at maximum medical improvement. There is no objective pathology, therefore, there are no permanent restrictions nor any disability rating.

At respondent's request, claimant was evaluated by Dr. Earl Peeples on January 30, 2003, for an independent medical examination. Dr. Peeples noted the following findings upon examination:

The patient is a morbidly obese, 385 lb, 6 feet 3 inch male in no acute distress. The patient is able to walk in a normal gait and heel and toe walk without limp. Cervical range of motion is full in flexion, extension, rotation and bending. Thoracolumbar motion is full considering the restrictions that are incumbent upon his girth and increased weight. Reflexes in the upper and lower extremities are intact and are 2+ in the biceps, brachioradialis, triceps, patella and Achilles tendons. The patient does not display sensory or motor deficit in the upper or lower extremities. Straight leg raising test is negative. The patient has diffuse tenderness over the thoracic spine. No obvious external defects are noted. Lumbar spine is non-tender as is the lumbosacral junction.

After noting the examinations and treatments the claimant has received from his various doctors, Dr. Peeples stated in his report:

My examination fails to elicit any objective finding that can directly explain the continued pain in the thoracic spine region. He has been thoroughly evaluated in his exams by several physicians and his studies are negative. I, too, would recommend that an MMPI be performed to see if there is a possible nonphysical basis for some of his complaints of pain. In view of his

negative evaluation I do not think that continued use of narcotics would be advisable. I believe the patient should use Extra-Strength Tylenol. Use of a TENS unit might relieve some of his pain. Without the use of narcotics the patient would possibly qualify for return to his activities as a truck driver.

The period of temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Contrary to claimant's contentions at the hearing, an injured employee is entitled to temporary total disability compensation not simply because he has had a compensable injury, and is currently on medications that prevent certification to return to work, but rather during the period of time that he is within his healing period for the compensable injury **and** while he is totally incapacitated to earn wages as a result of that injury. Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981). Accordingly, to be entitled to temporary total disability benefits, an injured employee must satisfy this two-pronged test.

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, regardless of his 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).

In the present claim, the claimant was released to return to work by Dr. Safman on August 22, 2002, without any restrictions. Dr. Safman opined that the claimant had attained maximum medical improvement and noted that he was at a loss as to how to treat the claimant. The claimant's physical examinations by Dr. Wilson, Dr. Safman, and Dr. Peeples, all failed to disclose any objective findings to support claimant's continued complaints of pain. Despite the efforts of Dr. Safman to find a medication to relieve claimant's pain complaints, claimant's pain complaints continue to linger.

Accordingly, my review of the medical records persuades me to find by a preponderance of the evidence that the claimant reached the end of his healing period on or before August 22, 2002. The medical records reveal that the claimant's compensable injury was as far restored as the permanent character of the injury would permit. Claimant continues to complain of pain. However, the physicians treating the claimant are unable to account for these continued complaints. Consequently, I find that claimant's healing period ended when he was released by Dr. Safman. The only treatment offered subsequent to this has not offered any real improvement in the claimant's condition. Therefore, I find that claimant's compensable injury stabilized as of August 22, 2002, and there has been nothing in the way of additional treatment which has improved his condition.

Arguably, claimant contends that the medications he has been prescribed to address his complaints of pain operate to extend his healing period. However, it has long been acknowledged that the continued complaints of pain are not sufficient in themselves 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). Palliative treatment to address persistent complaints of pain after the healing period has ended may be necessary, but it does not operate to extend the period of healing so long as the compensable injury has plateaued. Scroggins v. TTC Illinois, Full Commission Opinion filed April 18, 2001 (E500032).

Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that he remained within his healing period subsequent to August 22, 2002. Therefore, claimant has failed to meet his burden of proof with regard to additional temporary total disability benefits.

AWARD

Claimant has failed to prove that he remained within his healing period and totally incapacitated from earning wages subsequent to August 22, 2002. Therefore, claimant has failed to prove entitlement to additional temporary total disability benefits. Accordingly, this claim is hereby denied and dismissed.

IT IS SO ORDERED.

HON. KAREN MCKINNEY

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Administrative Law Judge