

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102602

MARK BENZ, EMPLOYEE	CLAIMANT
DEMPSEY FILM GROUP, INC., EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 25, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on January 12, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Silas H. Brewer, Jr., Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted January 12, 2004, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on November 12, 2003, and a Prehearing Order was filed on November 13, 2003. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced without objection as "Commission's Exhibit 1."

It was stipulated that the employee/employer/carrier relationship existed at all relevant times, including February 22, 2001; that the claimant sustained

a compensable injury to his low back on that date; that he earned sufficient wages to entitle him to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability; that respondents paid temporary total disability through on or about April 9, 2001, at which time the claimant returned to work for the employer and continued working through on or about May 14, 2001, at which time his employment was terminated.

By agreement of the parties, the issues presented for determination include:

- 1) Whether the claimant's healing period has ended, as well as claimant's entitlement to additional temporary total disability; and,
- 2) whether the claimant was entitled to benefits under Ark. Code Ann. §11-9-505.

Claimant contended, in summary, that his healing period had not ended; that he was entitled to additional temporary total disability beginning May 14, 2001, and continuing through the present. Alternatively, the claimant maintained that the employer refused to allow him to continue working when suitable employment was available within his physical limitations, entitling him to additional benefits pursuant to A.C.A. §11-9-505.

The respondents contended that the claimant could not prove entitlement to additional temporary total disability. Respondents further contended that the

provisions of A.C.A. § 11-9-505 were not applicable and that the claimant was laid off for reasonable cause.

At the hearing, the claimant attempted to add the issue of entitlement to additional medical treatment. Respondents objected. Accordingly, because this issue was not timely raised, or agreed to by the parties, it is, by necessity, reserved for future determination.

The claimant testified in his own behalf. Paula Dempsey, the chief office manager for the employer, testified in respondents' behalf. The record is composed solely of the transcript of the January 12, 2004, hearing containing numerous exhibits, together with the telephonic deposition of Dr. John Guisto which was introduced as "Claimant's Exhibit B" and retained in the Commission file. Because the parties failed to submit an abstract of the joint medical exhibit, as required by the Prehearing Order, each was asked to submit a letter brief addressing how the medical supported their respective contentions. Subsequent to the hearing, respondents submitted an abstract of the medical evidence, and the claimant submitted a memorandum summary of a portion of the medical, supporting his position.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their

demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties and contained in the Prehearing Order filed November 13, 2003, are hereby accepted as fact.
3. The claimant's healing period ended on or before January 17, 2002. Even in the event claimant's healing period extended beyond January 17, 2002, the claimant has failed to prove, by a preponderance of the evidence, that he is entitled to temporary total disability benefits after January 17, 2002.
4. The claimant has shown, by a preponderance of the credible evidence, that he is entitled to additional temporary total disability for the period beginning May 15, 2001, and continuing through January 17, 2002.
5. The claimant has failed to prove that he is entitled to additional benefits pursuant to Ark. Code Ann. §11-9-505.
6. Additional issues not addressed herein, including, but not limited to entitlement to additional medical treatment, as well as permanent disability benefits are specifically reserved.
7. Respondents have controverted claimant's entitlement to the additional

temporary total disability awarded herein.

DISCUSSION

The claimant, Mark Benz, is thirty-four (34) years old. He has a high school education, having graduated from Catholic High in Little Rock. The claimant received some college credit from UALR, but did not receive a degree. He served in the Air Force for approximately four (4) years. The record reflects that the claimant sustained a prior injury while in the Air Force for which he received a forty percent (40%) VA service-connected disability. After leaving the service, the claimant obtained vocational training at the Columbia Film School in Chicago, Illinois. The claimant worked as an intern for the employer herein between June and September, 1997, at which time he went to work as a camera-man for a television station, KATV, where he worked until January, 2000. The claimant began working full-time for the respondent in January, 2000, earning a salary of \$30,000.00 per year. The claimant sustained an admitted injury to his low back as the result of a slip and fall on February 22, 2001. As reflected by the stipulations, respondents paid temporary total disability through April 9, 2001, at which time the claimant returned to work with physical limitations. The claimant continued working for the respondents through May 14, 2001, at which time his employment was terminated by the respondents. Apparently, the claimant has not returned to any gainful

employment since May 14, 2001. No indemnity benefits have been paid since that time. Although the respondent-insurance carrier terminated all temporary total disability after April 9, 2001, it continued to pay for the claimant's follow-up medical care by the authorized treating physician, as well as any valid referrals from the primary treating physician, as will be set out further below. The record further reflects that the claimant has been examined and treated by various medical providers without prior approval or authorization, specifically, at the VA hospital in Little Rock, as well as from one Dr. John Guisto after moving to Carrboro, North Carolina, in 2003. The claimant has not requested payment to the VA or Dr. Guisto because the treatment was unauthorized. The claimant subsequently returned to Little Rock after August, 2003. As previously pointed out, the claimant attempted to add the issue of entitlement to continued medical treatment as an issue, but, because it was not timely raised, that issue has been specifically reserved.

Again, as reflected by the stipulations, the claimant returned to work for the employer and was either paid his full salary or provided sedentary work by the employer for the period between April 9, 2001, and May 14, 2001, at which time his employment was terminated. Paula Dempsey, one of the primary shareholders and the chief office manager for the respondent testified that she was forced to release the claimant because her company lost a major account

which required a reduction of the workforce. Ms. Dempsey stated that she would have released the claimant regardless of his injury because work was not available following the loss of a major account with the Arkansas Game and Fish Commission. Ms. Dempsey's testimony concerning the claimant's termination is undisputed. There was conflicting evidence concerning whether or not the claimant's initial release by Dr. Johnston on April 5, 2001, was with or without physical limitations; however, Ms. Dempsey acknowledged that the claimant was physically restricted when he returned to work as the result of the admitted, compensable back injury. (Tr.64, 68-69)(Resp. Ex. A, p.22)

Despite conflicting evidence concerning whether the claimant's release on April 5, 2001, was with or without restrictions, the record clearly reflects that the claimant returned to Dr. Johnston, his authorized primary care physician after May 14, 2001, and was, again, taken off work, at which time he underwent an extensive course of conservative treatment, including referrals to a number of other physicians. The claimant also stated that he was involved in a second incident while working for the employer herein prior to his termination which aggravated his pre-existing condition. However, the claimant maintained that he already had a follow-up appointment scheduled with Dr. Johnston which predated his termination. In fact, the claimant returned to Dr. Johnston on May 11, 2001, and was clearly advised to avoid any heavy duty work, and scheduled for

another examination on June 7, 2001. The claimant was terminated in the interim. (Tr.25-26)(Cl. Ex. A, p.5)

MEDICAL HISTORY

As previously noted, the claimant has a history of pre-existing back injury while in the military which apparently resulted in a forty percent (40%) service-connected disability. It is unclear how the Veterans Administration assesses disability because it is apparent to this administrative law judge that the claimant's work history and course of conduct following his discharge from the military is inconsistent with a forty percent (40%) disability in a workers' compensation sense. The claimant's service-connected injury was treated conservatively. In addition, the record reflects that the claimant sustained another low back injury, as well as a cervical injury in March, 1998, while working as a camera-man for Channel 7, KATV, in Little Rock. The claimant maintained that the injury was a medical only claim and did not result in any significant period of disability or affect his ability to work in the film industry. In fact, the claimant continued working for KATV through January, 2000, at which time he began working for the Dempsey Film Group. The claimant worked for the respondents more than one year before sustaining another low back injury as the result of a slip and fall on February 22, 2001. The claimant was apparently, initially examined by his family physician, Dr. Robert Kennedy. The

insurance carrier then sent the claimant to Dr. Kenneth Johnston, a general practitioner in Little Rock, Arkansas, who remained the claimant's primary care physician beginning February 28, 2001. Dr. Johnston examined and treated the claimant through January 17, 2002. Dr. Johnston ran numerous diagnostic studies, made referrals to various specialists, including an orthopedic surgeon, a physical medicine and rehabilitation specialist, a neurosurgeon, and a pain specialist. In addition, Dr. Johnston referred the claimant for physical therapy and other treatment modalities, apparently, all of which were paid by the respondent-insurance carrier. Specifically, Dr. Johnston referred the claimant to Dr. William F. Blankenship, an orthopedic surgeon who recommended additional diagnostic studies which were, in fact, performed; Dr. Bruce L. Safman, a physical medicine and rehabilitation specialist at Arkansas Orthopedic Specialists, who treated the claimant with trigger point injections; Dr. J. Brett Ironside, a neurologist at Neurology Associates in Little Rock, Arkansas, who performed additional diagnostic studies; and Michael Duprist, a physical therapist. In addition, Dr. Johnston ultimately referred the claimant to Dr. Wayne L. Bruffett, a pain specialist at the Arkansas Spine Center in Sherwood, Arkansas, because he was unable to explain the claimant's ongoing complaints of discogenic back pain. This reference was made after evaluations by several specialists and despite numerous diagnostic studies. It is apparent that Dr. Johnston made

numerous attempts to have the insurance carrier pay for an evaluation by Dr. Bruffett which was repeatedly refused. Dr. Johnston's October 22, 2001, report is set out in its entirety below:

S:

Mr. Benz follows up today on his back injury. Original date of accident is listed in his chart at 2/22/01. Patient has continued pain. It sound [sic] to me like it is discogenic in nature. He has been to Dr. Brett Ironside. Dr. Ironside found his nerve conduction and EMG to be normal in the lower extremities. I still believe patient's pain is discogenic in nature. And the normal nerve conductions and EMGs support this. Patient is still unable to do any meaningful activity as far as stooping or bending, twisting or lifting. Medications: Patient is taking **SKELAXIN** 2 po q.d. **PAMELOR** 50 to 75 mg po p.h.s. He is not taking any narcotic pain medications. Medical decision making: This is a frustrating case. I believe the patient's Workman's Comp carrier does not have a broad enough network for me to send the patient to the physician that would be most beneficial. 9/22/01 my assistance [sic], Lisa McClelland documented denial for a visit to Dr. Bruffett. I believe they have previously denied request for patient to see Dr. Thomas Hart on 5/15/01. These are the two specialists that I know of who deal with the type of problem that this patient has.

A:

Lumbosacral injury 2/22/01 with ongoing discogenic pain.

P:

Patient will continue his weight loss and home exercise program. We will try to work with the insurance company and make appropriate referral. (Cl. Ex. A, p.7)

Dr. Johnston next examined the claimant on December 18, 2001, at which time he reported the following:

S:

The patient presents today in follow-up to give me an update on his

chronic back pain. He has been working with a couple of physicians at the VA with good benefit. He is on **FLEXERIL** 30 mg po q day, **NORTRIPTYLINE** 25 mg po p hs. Also **NAPROXEN** apparently 500 mg bid. He has a neurology evaluation scheduled at the VA and they have also recommended doing a functional capacity assessment which I think that the patient should probably go ahead and pursue. He is also scheduled to be set up for a TENS unit for pain relief, and I have encouraged this for the patient as well.

A:

1. Chronic back pain. The patient is not using any narcotic meds.
2. Continue home exercise program.
3. *The patient is still unable to work at the previous profession of being a camera man in the video television industry. (Cl. Ex. A, p.8)(Emphasis supplied)*

Dr. Johnston last examined the claimant on January 17, 2002. His findings are as follows:

S:

Mr. Benz follows up today. He is slowly progressing in his treatment at the Med Center. He has been placed on a TENS unit which is helping his back pain. He is not taking any narcotic pain pills. I am recommending today that we increase the **NORTRIPTYLINE** to [sic] 50 to 75 mg p.h.s., somewhere in that range, to assist with his sleep. In summary of his care to this date, the patient initially reported back injury after falling at work on 2/22/2001. He was seen here on 2/28/2001 as a Workman's Compensation provider. Dr. Robert Kennedy is his regular M.D. Initially, the x-ray of his lumbar spine was unremarkable. The patient continued to have problems and on 3/8/2001 obtained an MRI of the lumbar spine at Premiere MRI. This was read as being normal. Subsequent to that, the patient was placed in physical therapy and also consulted Dr. Rob Porter who assessed the patient with no clear etiology for his back pain. Also in May of 2001, the patient was seen by Dr. Bruce Safman who tried some SI trigger point injections and placed him on **RELA FEN** without any clear

benefit. The patient continued to have problems and had nerve conduction testing by Dr. Ironside of Neurology Associates in approximately September of 2001 with no sign of radiculopathy, neuropathy or plexopathy. I had recommended and requested consultation with a spine physician, either Dr. Bruffett or someone similar who would be an expert in evaluating the patient for discogenic pain. I believe the patient would benefit from a myelogram and if that is negative possibly even a discogram to try to determine the etiology of his pain. (Cl. Ex. A, p.9)

Contemporaneous with his treatment by Dr. Johnston, as well as Dr. Johnston's valid referrals, the claimant, on his own, also received treatment at the VA hospital. Again, the claimant's initial treatment at the VA pre-dated his injury; however, the claimant received considerable evaluations for multiple problems at the VA hospital. In addition, in early 2003, the claimant moved to North Carolina and lived with his brother. While in North Carolina, the claimant received treatment from Dr. John Guisto, apparently a physical medicine and rehabilitation specialist, similar to Dr. Bruce Safman, aforementioned. The claimant apparently received treatment from Dr. Guisto from February, 2003, through August, 2003, at which time he moved back to Arkansas. The claimant maintained that Dr. Guisto's treatment improved his overall condition while, at the same time maintaining that he was still unable to work. The treatment at the VA hospital and by Dr. Guisto were unauthorized and never approved by either the respondent-insurance carrier or this Commission.

Prior to moving to North Carolina, the claimant apparently obtained

approval to undergo the evaluation previously recommended by Dr. Johnston to see Dr. Wayne L. Bruffett. Dr. Bruffett did not find any surgical problem, opined that the claimant had adequate time to fully recover from the accident and recommended an aggressive exercise program to strengthen the claimant's stomach and back muscles, and to find a less physically demanding job. (Resp. Ex. A, pp.68-69)

TEMPORARY TOTAL DISABILITY

Temporary total disability is determined by the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. It is that period in which an employee is within the healing period and totally incapacitated to earn wages. *Arkansas State Highway Dept. vs. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *J.A. Riggs Tractor Co. vs. Etzl Korn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990); *Stafford vs. Arkmo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996). The healing period is that period for healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102(12) (Repl. 2002). The healing period continues until the employee is as far restored as the permanent character of the injury will permit, and if the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods vs. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996); *Carroll*

General Hospital vs. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Mad Butcher vs. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate his ability to engage in any gainful employment. The claimant bears the burden of proving both that he remains within his healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. see, *Palazolo vs. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

Rather than conduct an exhaustive analysis of all the medical evidence, it is herein concluded that claimant's healing period ended at the time of claimant's last examination by his primary care physician, Dr. Kenneth Johnston on January 17, 2002. Although the claimant maintained that he remained within his healing period and was entitled to additional temporary total disability, his statements are mere conclusions and not supported by the record as a whole. Dr. Johnston exhausted all conservative care. There is no competent evidence that the claimant requires aggressive treatment such as surgery. Further, the claimant's

continued complaints of pain are not sufficient to entitle him to ongoing temporary total disability.

In his memorandum brief submitted subsequent to the hearing, claimant relies heavily on the medical opinion of Dr. John Guisto, his treating physician in North Carolina. Dr. Guisto's telephone deposition was taken January 8, 2004, and made a part of the record herein. Suffice it to say that I did not find Dr. Guisto to be a credible witness. First, it must be noted that despite the fact that the deposition had been scheduled for some time, during the deposition, Dr. Guisto acknowledged that he did not have his clinical notes, necessary to answer specific questions. Further, Dr. Guisto opined that he had the knowledge and training to make specific findings of injury that the other physicians that examined the claimant would not be qualified to make. This conclusion is clearly incorrect because the claimant had previously been examined and treated by another physical medicine and rehabilitation specialist of known qualifications, specifically, Dr. Bruce Safman, in Little Rock, Arkansas. Dr. Safman's qualifications and reputation are known by me, whereas Dr. Guisto's are not. In addition, Dr. Guisto acknowledged that most of his conclusions were based upon subjective rather than objective findings. Finally, I feel compelled to point out that Dr. Guisto did not obtain a complete history of the claimant's prior injuries and physical problems involving his low back. He acknowledged that he was

unaware of the claimant's prior injuries, as well as his military disability.

Accordingly, I found Dr. Guisto's deposition to be of little probative value.

The only remaining issue concerns claimant's entitlement to additional benefits pursuant to Ark. Code Ann. §11-9-505 provides, in part:

(a)(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

Before A.C.A. §11-9-505(a) applies, several requirements must be met. The employee must prove, by a preponderance of the evidence, that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer refused to return him to work; and that the employer's refusal to return him to work was without reasonable cause. See, *Edward Tori vs. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

The claimant has failed to prove, by a preponderance of the evidence, that the employer's refusal to return him to work was without reasonable cause.

Clearly, the availability of work must be considered. The undisputed testimony is that the respondent lost a major account, requiring a cut-back of personnel which resulted in the claimant's termination. Accordingly, the provisions of the aforementioned section do not apply in the instant case.

AWARD

Respondent, Risk Management Resources, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$410.00 per week beginning May 15, 2001, and continuing through January 17, 2002. All accrued benefits shall be paid in lump sum and without discount.

Additionally, claimant's attorney, Mr. Silas H. Brewer, Jr., is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715; Coleman vs. Holiday Inn, 31 Ark. App. 224, 792 S.W.2d 345 (1990); and Chamness vs. Superior Industries and Sedgwick James of Arkansas, Inc., Arkansas Workers' Compensation Claim #E019760, (March 5, 1992).

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge

