

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308916

PHILLIP CLAIRDAY, EMPLOYEE	CLAIMANT
THE LILLY COMPANY, INC., EMPLOYER	RESPONDENT
ROYAL SUN ALLIANCE INS. CO., CARRIER	RESPONDENT

OPINION FILED MAY 17, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 16, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE JOHN W. D. WEBSTER, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

_____A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

A prehearing conference was conducted in this claim from which a prehearing order of January 6, 2004, was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Phillip Clairday, the claimant, coupled with medical reports and other documents comprise the record in this claim. A preliminary ruling was made in this claim at the conclusion of the hearing. Prior to completion of the written opinion, respondents submitted a April 27, 2004, report of Dr. K. Dewayne Eubanks relative to a visit of the claimant of the same date for inclusion in the record. The report is herein designated a part of the record as Respondent

Supplemental Exhibit #1.

DISCUSSION

Phillip Clairday, the claimant, with a date of birth of January 13, 1956, is a high school graduate. Claimant commended his employment with respondent on September 13, 1999, as a forklift mechanic and delivery truck driver.

Claimant was in the US Navy from 1974 through 1982. Further, the testimony of the claimant reflects that he attended a four (4) week welding course. There is no evidence in the record to reflect that claimant experience any physical restrictions or limitations on his activity while employed by respondent prior to April 30, 2002.

The compensability of the claimant's April 30, 2002, injury in the employment of respondent is not disputed. Claimant suffered an injury to his low back while discharging employment duties for respondent. Symptoms experienced by the claimant as a results of April 30, 2002, injury included numbness in his groin area and left leg as well as severe pain in his low back. The injury was reported to appropriate supervisory personnel of respondent following the occurrence.

On May 1, 2002, claimant was seen by respondent's designated medical provider at the NEA Clinic for complaints relative to the April 30, 2002, injury. Following a physical examination claimant's complaint was diagnosed as low back pain for which he was prescribed medication in the form of Bexra and Skelaxin. Further, claimant was prescribed sedentary work for one week, and directed to follow-up in one week.

Claimant's testimony reflects that upon presenting the restricted duty released to a supervisory, Beverly Runsick, he was sent out on a job assignment. Upon returning to the office of respondent following completion of the assignment claimant was directed to go home and to return

once he had been released by the doctor.

On May 8, 2002, claimant was seen by Dr. Randy Carlton, relative to the April 30, 2002, compensable injury. Following his examination, Dr. Carlton's assessment of the claimant's complaint was lumbar strain and possibly SI joint dysfunction. Dr. Carlton continued the claimant's medication and also arranged for physical therapy. (CX 1, p3-5)

Claimant was seen in follow-up by Dr. Carlton on May 29, 2002. The May 29, 2002, office note of Dr. Carlton reflected that the claimant had finished a course of steroids and had been going to physical therapy, both of which resulted in minimal improvement. During the May 29, 2002, office claimant noted complaints of numbness and tingling on the lateral side of his left leg. The office note further reflects a history of a bulging disc by CT, fracture 1997. Claimant was continued on light duty by Dr. Carlton following the May 29, 2002, visit and arrangements were made to obtain a CT of the claimant's lumbar spine. (CX 1, p6).

The evidence in the record reflects that on May 30, 2002, claimant underwent a CT scan of his lumbar spine pursuant to the direction of Dr. Carlton. The May 30, 2002, radiology report reflects the presence of a L5-S1 left paracentral HNP. (CX 1, p7).

On June 12, 2002, the claimant was seen in follow-up by Dr. Carlton. The June 12, 2002, office note reflects, in pertinent part:

...Although, the herniated disc does lie adjacent to the left nerve root. The opinion is left L5-S1 paracentral herniated nucleus pulposus. Read this with the patient and discussed this with him. We are going to be making arrangements for him to be seen by a neurosurgeon locally. We are waiting for the neurosurgeon to call us back with an appointment time for Mr. Clairday. He reports that the Vioxx has been helping somewhat. He is able to do some light

housework around his house, however, stooping over at the waist is still a problem for him. He is not having any significant problems with ambulation, although, he does walk with a slight limp favoring his left leg. He is not having to swing his left leg up to move it, nor is he having any foot drop at this time. He does still have some numbness anteriorly in his thigh down into the medial part of his leg and top of his foot. (CX 1, p8)

Claimant was ultimately referred by Dr. Carlton to Dr. Jeffrey A. Kornblum, a Jonesboro neurosurgeon, relative to the April 30, 2002, compensable injury. Following his evaluation of the claimant Dr. Kornblum set forth specific recommendations in his June 21, 2002, report:

RECOMMENDATIONS: I have asked to continue conservative management for several weeks as he appears to be improving. I have also suggested a lumbar epidural block. As well to resume some back exercises at this time. I will see him in 3-4 weeks in follow-up. (CX 1,p10)

On July 8, 2002, claimant was evaluated by Dr. Calin A. Savu, a Jonesboro pain specialist, pursuant to a referral of Dr. Kornblum, relative to claimant's April 30, 2002, compensable injury. Dr. Savu's July 8, 2002, report relative to his evaluation of the claimant reflects, in pertinent part:

MEDICAL DECISION MAKING:

- A. DIAGNOSTIC: Include an magnetic resonance imaging of the lumbar spine which reveals an L4-L5 bulging disc with some flattening of the anterior margin of the thecal sac and an L5-S1 left paracentral herniated disc.
- B. DIAGNOSIS:
 - 1. Left lumbar radiculopathy secondary to herniated disc L5-S1.
 - 2. The differential diagnosis also includes diacogenic pain syndrome which may stem from an internal disc disruption i.e. annular tear. At this time

I cannot definitely rule out that scenario.

C. THERAPY/PLAN:

The patient will need to undergo a series of injections. The epidural steroid injections will address the possibility of a mechanical or chemical irritation of the L5 nerve root which may stem from the herniated disc at L5-S1. Once consistent results are obtained from a series of such targeted steroid injections we may place him on a more targeted physical therapy program that the one he previously graduated from. If on the other hand no significant improvement occurs from the epidural steroid injections an alternative pain generator may need to be investigated. Diagnostic injections in that workup will include provocative diacogram as well as medial branch block to identify possible facet disease. The latter is mentioned in view of the mechanism of injury which involves bending, rotating, and twisting at the same time which are typical in causing host joint injuries. (CX 1, p13)

The evidence in the record reflects that the claimant was seen by Dr. Carlton subsequent to his treatment under the care of Dr. Kornblum and Dr. Savu. (CX 1, p14). Further, the record reflects that following a July 31, 2002, visit wherein claimant relayed additional complaints to Dr. Kornblum arrangements were made for claimant to undergo additional diagnostic studies in the form of an MRI of his lumbar spine. (CX 1, p16). An August 4, 2002, MRI of the claimant's lumbar spine concluded that the claimant had mild posterior disc bulging at L4-L5 without significant spinal cord or neuroforaminal stenosis along with mild degenerative vertebral endplates small Schmorl's node-type

defects T11, T12 and L3.(CX 1, p17).

Claimant's testimony reflects that in addition to treatment under the care of Dr. Carlton, he received concurrent treatment under the care of Dr. Savu and Dr. Kornblum from July until October 2002. Claimant's treatment under the care of Dr. Savu, in addition to injections, also includes prescription for Oxycodone and Percocet. Claimant also attributed his hypertension to residuals of the April 30, 2002, compensable injury and treatment thereof.

A September 5, 2002, office note of Dr. Savu, relative to the claimant, reflects, in pertinent part:

Mr. Clairday returns today for a followup visit. He is reporting excellent pain relief as far as his radicular-type discomfort is concerned. The only problem appears to be the axial low back pain which is worsened by both standing and walking. The physical examination reveals tenderness over the lumbosacral spine in a paraspinal fashion and accompanied by paraspinal muscle spasm. Range of motion is restricted in all directions as well.(CX 1, p24)

The evidence in the record does reflect an October 7, 2002, report of Dr. Kornblum regarding his contact with the claimant on said date. After noting the treatment being received under the care of Dr. Kornblum the October 7, 2002, report reflects:

IMPRESSION: Mr. Clairday has some evidence of degenerative change at L4. He had a recent neuritis, which has resolved. He complains of mechanical back pain at this time, increased with activity. He notes an inability to return to his work because his work exacerbates his backache. I have discussed with him that he had a couple of options. I have suggested he consider a different line of work as he notes that when pain flares up it is generally transient. He may wish to continue and pursue the focus nerve blocks and rhizotomies and if unresponsive, depending upon his

progress and symptomatology, to re-look at a consideration of lumbar surgery.

I reviewed with him this would likely involve a fusion and at this juncture, have not recommended surgery to him. I will see him a month in follow-up. (CX 1, p26)

On November 15, 2002, claimant underwent a discogram pursuant to the directions of Dr. Savu. (CX. 1, p30-33). The November 15, 2002, results of the discogram concludes:

CONCLUSION: Widespread degenerative disc disease at L4-L5, possible tear L4-L5 and L5-S1. Possible internal disc disruption with anterolateral tear at L3-L4. No discogenic source of pain identified. (CX.1, p33)

Dr. Savu diagnosed the claimant's complaint as left S1 joint dysfunction. A January 14, 2003, report of Dr. Savu, set forth a summary of treatment measures undertaken to address the claimant's complaints attributable to the April 30, 2002, compensable injury:

In brief, Mr. Clairday underwent diagnostic/prognostic injections including epidurals, medial branch blocks for possible facet disease as well as SI joint injections for possible SI joint dysfunction. He also underwent a discogram which although it revealed severe degenerative at all the levels investigated it failed to trigger concordant pain, raising serious doubts about the possibility of a discogenic source of discomfort. At this point, I would be inclined to consider his pain mostly functional and I would strongly encourage him to enroll in an aggressive physical exercise program. He would also need to lose weight as well as taper down to off at least Initially the short-acting narcotic medication with a slow-release form to follow thereafter. We will see him back in six weeks to assess his program through the physical rehabilitation program. (CX 1, p37)

The evidence in the record reflects that claimant was last seen by Dr. Kornblum on January

23, 2003. In his final report, relative to the claimant, Dr. Kornblum noted:

IMPRESSION: Mr. Clairday is noted to have some degenerative changes in his lumbar spine. Neurologically, he is intact without deficit. He does not have a surgical injury. I have reviewed with him that regular exercise may well be of benefit to him. I have discussed with him there is no structural reason to limit his activity. He May function unrestricted from a structural viewpoint. I have suggested that he may wish to be evaluated by a physiatrist to assist him in a structured exercise program. (CX 1, p38)

The testimony of the claimant reflects that when last seen by Dr. Kornblum in January 2003, he was returned to the care of his primary physician, Dr. Carlton. Claimant's testimony reflects he was next seen by Dr. Carlton on or about January 29, 2003. Claimant maintains that he continued to experience residuals from the April 30, 2002, injury at the time of his January 2003, return to Dr. Carlton. The January 29, 2003, office note reflects, in pertinent part:

SUBJECTIVE: Mr. Clairday present today with chief complaints of low back pain. Actually, up until now it has been handled through workman's Comp. He has been seen by Dr. Kornblum the neurosurgeon and Dr. Savu the pain specialist. Apparently, he is still having a lot of pain and difficulty with His back. Dr. Kornblum has told him that he is really not a surgical candidate in his opinion and he needs more pain management. The patient just knows that something is wrong with his back and wants to get it fixed and he wants me to send him to somebody who can fix it for him. He has actually scheduled this visit today through his private insurance and we will conduct the reminder of this through his private insurance. As this was not prior approved through Workman's Comp. and so nothing subsequent to it will be handled by Workman's Comp. He reports that he noes limp when he has a lot of pain in his low back. . . .(CX 1, p39)

Claimant was referred by Dr. Carlton to UT Memphis.

Claimant's testimony reflects that he was seen by Dr. Jeffery Sorenson, a Memphis neurosurgeon. The February 19, 2003, report of Dr. Sorenson reflects the history of the claimant's April 30, 2002, compensable injury and medical treatment received, to include diagnostic studies and medication. Report further reflects that a physical examination was had as was an MRI of claimant's lumbar spine. Dr. Sorenson's impression of claimant's complaint was that of chronic low back pain.

The report further reflects:

PLAN: His back pain has been extensively evaluated by Dr. Kornblum in Jonesboro. He had discography done which did not reveal any symptomatic level. I agree with the recommendations of his other neurosurgeons. He is unlikely to benefit from any type of low back surgery at this point and time. He should continue a conservative course of management with physical therapy and follow up at the pain clinic. (RX 1, p57)

Claimant was seen by Dr. Sorenson on only one occasion.

The claimant was evaluated by Dr. Moacir Schnapp, on March 11, 2003, pursuant to her referral by Ms. Lillian Rawlings, a RN and case manager assigned to his claim. Following his evaluation of the claimant, Dr. Schnapp's diagnosis of the claimant's complaints were lumbar radiculopathy, lumbar spondylosis, degenerative disk and joint disease, herniated disc L4-5, and morbid obesity. The treatment plan initiated by Dr. Schnapp relative to the claimant, as reflected in his March 11, 2003, included a change in medication, aquatic exercises, caudal epidural block. (RX 1, p73). Claimant was seen in follow-up by Dr. Schnapp on March 25, 2003, and on April 24, 2003. (RX 1, p94-111)

The April 24, 2003, report reflects, in pertinent part:

INTERIM PAIN HISTORY: Mr. Clairday returns stating that he continues to have pain. He tells me that he had about 25% relief with the last block for the first couple of weeks. Overall, he is doing better. The Duragesic patch seems to be helping, but he is still not well. We had a very long talk with him as well as his case manager and we explained that nothing we do will stop his pain completely.

* * *

IMPRESSION/PLAN: I believe that at the present time, he has reached maximum medical improvement. I would like to have a brief function capacity assessment, and after that, I will come up with a permanent physical impairment for him. I doubt that he will be able to lift 150 pounds lightly like he claims that he has to do at work, and I told him so. I will release him to go back to work with limitations next week. (RX1, p99)

On May 23, 2003, Dr. Schnapp authored a report wherein he assessed the extent of claimant's anatomical impairment at 5% to the body as a whole based upon the AMA Guidelines Permanent Physical Impairment, 5th Edition. Dr. Schnapp's report was directed to the nurse case manager, Ms. Lillian Rawling. (RX 1, p112).

Claimant's testimony reflects that he continued to treat with Dr. Schnapp through September 2003. Claimant maintains that he continued to experience disabling pain in his low back and left leg attributable to the April 30, 2002, compensable injury, and for which he continued to receive active medical treatment. Claimant continued to receive temporary total disability benefits through August 19, 2003.

The medical in the record reflects that claimant was seen by Dr. Schnapp on July 29, 2003, for complaints of bilateral low back and bilateral lower extremity pain. The July 29, 2003, report of

Dr. Schnapp reflects diagnoses of lumbar spondylosis and sacroiliitis. The report concludes:

IMPRESSION/PLAN: I discussed with Mr. Clairday at length about the alternatives. It seems that the Percocet is not helping enough. We decided to add arthrotec, which could help both with the pain, inflammation, as well as constipation. I am increasing his Neurontin to four times a day. I would like to bring him back for a trial of a medial branch block to see if this would be an avenue for pain. (RX 1, p113)

The claimant was seen by Dr. Schnapp on September 9, 2003, and underwent the medial branch nerve block, bilateral at L4 and L5. (RX 1, p115). The medical further reflects an indication that the claimant responded to the results of the September 9, 2003, procedure on September 11, 2003, where it noted that the pain was at a two to three level and that his back and leg felt much better. (RX 1, p116)

Claimant noted that while respondents relayed during his August 2003, conversation with the carrier that based upon the May 23, 2003, report of Dr. Schnapp, they would be reducing his indemnity benefits from \$315.00 per week to \$236.00 per week, he has not received any temporary total or indemnity benefits since August 26, 2003. Respondents take the position that claimant reached maximum medical improvement as of May 23, 2003, when he was assessed with the 5% anatomical impairment by Dr. Schnapp. Accordingly, respondents contend that any indemnity benefits paid to the claimant subsequent to May 23, 2003, should have been paid at the reduced rate of \$236.00 per week for 22.5 weeks, rather than a continuation of indemnity benefits at the temporary total disability rate. As a consequence of the afore, respondents contend that there was an overpayment of indemnity benefits to the claimant at the time benefits were suspended in August 2003.

On September 23, 2003, claimant was evaluated by Dr. K. Dwayne Eubanks, a Jonesboro neurosurgeon, for complaints attributable to the April 30, 2002, compensable injury. Dr. Eubanks' September 23, 2003, report details a history of the claimant's injury and medical treatment relative to same to date. Further, the report reflects that Dr. Eubanks had access to the claimant's prior diagnostic studies. The September 23, 2003, report concludes:

IMPRESSION: Probable discogenic pain at L4-S1, clearly related temporarily to his injury back in May of 2002 while at work.

I think that he had a positive discogram at L5-S1 based on what he tells me, which differs from what the discographer described. It is notable that when I first asked the patient if his pain was the same when he was injected as it usually was, he said "no". He had just finished stating that the pain was so bad that "I had to come off the table". I was puzzled about this and I investigated that further. It seems very clear to me that when this patient was asked that question and he said "no", what he meant was that it was different because it was so much more severe. I talked with him at length about this (without "leading the witness") and once he understood really what the question was, he was very adamant that yet this was indeed the same type of pain that he usually experienced and which was debilitating to him, but that he said no because he meant that it was different because it was so severe in addition, it caused his left lower extremity symptoms to increase to such an extent that he said Dr. Savu had to massage his leg to ease some of the pain.

I think this gentleman deserves repeat discograms. I would do them myself to make a better judgement of concordant or nonconcordant pain. I think it is going to be positive at L5-S1. If it is, then I think unfortunately he has simply had a misdiagnosis and he probably would improve with operative intervention at L5-S1. If his discogram is not normal, then I would think that his previous diagnoses of chronic pain not

otherwise specified may be correct. (RX 1, p118)

In correspondence dated November 5, 2003, claimant's attorney inquired of Dr. Eubanks if the claimant had been able to return to work, based upon his assessment of the claimant's complaint, during the September 23, 2003, evaluation. Responsive to the inquiry, Dr. Eubanks noted, in his opinion the claimant had remained unable to return to work since the September 23, 2003, evaluation. Dr. Eubanks registered the afore observation on November 17, 2003. (CX 1,p50)

A review of the September 23, 2003, report of Dr. Eubanks clearly reflects that he was of the opinion that further medical treatment should be rendered relative to the claimant's April 30, 2002, compensable injury. Further, the report identifies specific treatment modalities recommended by Dr. Eubanks regarding the claimant's compensable injury. On December 4, 2003, a change of physician order was entered by the administrator of the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission relative to the claimant's April 30, 2002, compensable injury. In the change of physician order claimant's authorized treating physician was changed from Dr. Moacir Schnapp to Dr. Kenneth Eubanks. A copy of the order was forwarded to the claimant, Dr. Schnapp, Dr. Eubanks, and respondent-carrier. (Commission Exhibit #2).

The record reflects that on December 8, 2003, Dr. Eubanks' office was contacted by the claimant regarding a refill of medication. The December 8, 2003, clinic note of Dr. Eubanks further reflects that prior to the claimant's January 8, 2004, scheduled visit, he would be evaluated by Dr. Sunil Gera, at the pain clinic, and also by a neuropsychologist, Dr. Dan Johnson.

Pursuant to the above referral of Dr. Eubanks, on December 17, 2003, the claimant was evaluated by Dr. Sunil Gera. Following a physical examination of the claimant during the December 17, 2003 visit, in which Dr. Gera had access to the claimant's prior pertinent medical records, he

assessed the claimant's complaint as low back pain, herniated disc in the lumbar region, pain in the extremity, and lumbar radiculopathy. The December 17, 2003 report of Dr. Gera also sets forth a treatment plan for the claimant. (CX1, p. 52-54)

The claimant was again seen by Dr. Gera on January 12, 2004, in follow-up. The January 12, 2004 report, reflects, in pertinent part:

Mr. Clairday has been followed in my clinic for his back and leg pain. On 12-29, he had left sided L5 S1 transforaminal epidural steroid injection. Today he is in for a return visit. According to him, that injection has not helped him. In fact, for one week his pain increased. Now he is giving a pain score of around 6.5/10. He is having pain same in the left lower extremity. He says it radiates all the way down to the foot and he is still on Duragesic patch. He was seen by Dr. Eubanks who has rescheduled his appointment after one month and is also getting a neuropsych evaluation. (CX1, p. 55)

Dr. Gera concluded his assessment of the claimant by noting that he did not think the claimant was a candidate for any other interventional treatment as indicated in the past. The claimant was discharged from the care of Dr. Gera during the January 12, 2004, visit and returned to the care of Dr. Eubanks.

On February 3, 2004, the claimant was seen by Dr. Eubanks. The February 3, 2004, report of Dr. Eubanks reflects, in pertinent part:

Mr. Clairday returns today for followup after his LESI injection by Dr. Gera and his appointment with Dr. Dan Johnson for a neuropsychologic evaluation. His clinical syndrome has really not changed. He says the epidural steroid injection hurt tremendously and he hurt for a week or so afterward, far worse than he normally does.

Otherwise, he continues to have pain mostly located in his lumbosacral region. With activities, this spreads across his hips and tends to go down into the left lower extremity in a similar way as in his last description.

I spoke with Dr. Johnson on the phone. He tells me that his neuropsychologic evaluation of Mr. Clairday showed absolutely no pathologic behavior or issues. He feels that he is very straightforward and intelligent man. Dr. Johnson felt there were no issues of secondary gain or malingering, etc. The only thing he saw that was a little noticeable was some depressive affects, which he said are perfectly consistent with a patient who has been in more or less chronic pain. In summary, from the neuropsychologic standpoint, Dr. Johnson feels that he has a good understanding of expectations of attempts at surgical treatment should these be indicated by further tests, such as a discogram. He has a good understanding of the fact that his pain may not be completely relieved. Basically, he wants to achieve enough pain relief to give him some semblance of a normal life. He sees no drawback from a neuropsychologic standpoint to continue with his workup and possibility of surgery. (CX1, p. 56)

Dr. Eubanks related in the February 3, 2004, report that he wanted to perform another discogram on the claimant. The record reflects that a copy of the February 3, 2004, report of Dr. Eubanks was forwarded to the attorney for respondent-carrier. (CX1, p. 56).

The evidence in the record reflects that the respondents scheduled an appointment for the claimant to be evaluated by Dr. Jim J. Moore, a Little Rock neurosurgeon, on at least two occasions. The claimant failed to attend the scheduled evaluations with Dr. Moore. Respondents assert that they are entitled to a credit based upon the fact that the claimant's failure to attend the evaluations resulted in the forfeiture of a \$600.00 deposit with Dr. Moore's office. The claimant was ultimately evaluated by Dr. Moore on March 24, 2004.

A review of the March 24, 2004, report of Moore reflects that he had access to the claimant's prior pertinent medical records and diagnostic studies relative to the April 30, 2002, compensable injury. The March 24, 2004, report further reflects that a physical examination was conducted during the evaluation by Dr. Moore. Dr. Moore's diagnosis of the claimant's complaint, as reflected in the March 24, 2004, report was that of lumbar radiculitis post-traumatic. The March 24, 2004, report of Dr. Moore concludes:

I think that if Dr. Eubanks is his official physician neurosurgeon that a repeat diskogram as recommended is within his sphere of control. It might very well give some further light on this patient's problems although I tried to point out to the patient that when the classic pattern of findings is at variance the success rate for corrective surgery falls precipitously. I do think that an EMG/Nerve Conduction Velocity Study might be of some value as well as myelographic survey with contrasted CT if this has not already been done and I am not sure that it has. (RX4)

Respondents assert that they have not controverted further treatment of the claimant under the care of Dr. Eubanks. Nonetheless, the evidence clearly reflects that as of February 3, 2004, Dr. Eubanks, as the claimant's authorized treating physician, had recommended a course of treatment with respect to the claimant's compensable injury, to include a repeat of the discogram. Respondent refused to authorize the procedure. The claimant was seen by Dr. Moore on March 24, 2004, at the request of the respondent. There is no evidence to reflect that the respondents sought authorization from the Commission or an order directing the claimant to be evaluated by Dr. Moore prior to March 4, 2004.

The claimant has presented credible testimony to reflect that since the April 30, 2002 compensable injury he has been in constant pain relative to his low back and lower extremities. There

is no medical in the record to reflect that claimant required medical treatment relative to hypertension prior to the April 30, 2002 compensable injury. The claimant notes that he is unable to walk, sit, or stand for any length of time because of the residual pain attributable to the April 30, 2002 compensable injury. The testimony of the claimant reflects that he is unable to return to his former employment with respondent because of residuals of his compensable injury. The claimant noted that respondents informed him that he could not return to work until he had been released by a doctor. The evidence preponderates that the claimant has not been released by his authorized treating physician to return to work.

Claimant was seen by Dr. Eubanks subsequent to his March 24, 2004, evaluation by Dr. Moore. The April 27, 2004, report of Dr. Eubanks reflects that he had access to Dr. Moore's report. Dr. Eubanks did not declare that the claimant had reached maximum medical improvement. Further, based on the results of the claimant's physical examination and prior diagnostic studied, Dr. Eubanks continued to express the opinion that a repeat discogram is in order. (Respondent Supplemental Exhibit #1).

After a thorough review of all the evidence in this record, to include the testimony of witnesses, a review of the medical reports, and an application of appropriate statutory provisions, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 30, 2002, the relationship of employee-employer-carrier existed among the parties.
3. On April 30, 2002, the claimant earned wages sufficient to entitle him to weekly

compensation benefits of \$315.00/\$236.00 for temporary total/permanent partial disability benefits.

4. On April 30, 2002, the claimant sustained an injury arising out of and in the course of his employment.

5. In addition to prior periods, the claimant was temporarily totally disabled for the period beginning April 24, 2003 and continuing through the end of his healing period, a date yet to be determined.

6. Medical treatment rendered to the claimant under the care of Dr. Kenneth Eubanks to include authorized referrals therefore subsequent to December 4, 2003, is reasonably necessary and authorized relative to his compensable injury of April 30, 2002.

7. The respondents shall pay all reasonable hospital and medical expenses arising out of the injury of April 30, 2002.

8. The respondents have controverted the claimant's entitlement to temporary total disability benefits subsequent to April 23, 2003, and the payment of medical benefits subsequent to February 3, 2004.

CONCLUSIONS

The compensability of the claimant's April 30, 2002, injury in the employment of respondent is not disputed. The evidence discloses that claimant reported his injury to appropriate supervisory personnel shortly after its occurrence and that medical treatment was received relative to same. The stipulations reflect that the respondents paid for certain medical benefits relative to the claimant's April 30, 2002, compensable injury and paid indemnity benefits to the claimant.

The issues before the Commission at this juncture are the claimant's entitlement to additional medical benefits and continued temporary total disability benefits relative to the April 30, 2002,

compensable injury. The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

Respondents take the position that the claimant reached maximum medical improvement relative to his April 30, 2002, compensable injury on May 23, 2004, when his treating physician at the time, Dr. Moacir Schnapp, assessed the extent of his permanent impairment at 5% to the body as a whole.

Arkansas Code Annotated §11-9-102(12), defines the healing period "as the period for healing of an injury resulting from an accident." Whether the claimant's healing period has ended is a factual determination. Ketcher Roofing Company v. Johnson, 50 Ark. App. 63, 901 S.W.2d 25 (1995). The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and nothing further in the way of treatment will improve the condition, then the healing period has ended. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant claim, the evidence preponderates that claimant had not reached the end of his healing period as of May 23, 2003. Indeed, the evidence reflects that the claimant was last evaluated by Dr. Schnapp on April 24, 2003. The May 23, 2003, correspondence assessing the claimant with a 5% anatomical impairment was based on Dr. Schnapp's review of the claimant's record on said date.

Subsequent to the April 24, 2003, visit of the claimant with Dr. Schnapp, the claimant received active medical treatment under the care of Dr. Schnapp when seen by same on July 29, 2003.

During the July 29, 2003 visit, Dr. Schnapp increased the claimant's medication, Neurontin, to four times a day. Further, Dr. Schnapp, in his July 2003 report, noted he would like to bring the claimant back for a trial of medial branch block. The afore was accomplished during the September 9, 2003 visit by the claimant to Dr. Schnapp.

Further, the evidence in the record reflects that after the active treatment provided to the claimant by Dr. Schnapp on September 9, 2003, the claimant was next evaluated by a physician on September 23, 2003, when he was seen by Dr. K. Dewayne Eubanks, a neurosurgeon.

Dr. Eubanks reviewed the prior pertinent medical records of the claimant and concluded that there had been a misdiagnosis of the claimant's complaint. In a November 17, 2003, entry responding to an inquiry to claimant's attorney, Dr. Eubanks opined that the claimant was unable to work as of the September 23, 2003, evaluation by him.

The evidence preponderates that the claimant has remained within his healing period since the April 30, 2002, compensable injury, to include the point in time subsequent to April 23, 2003. Temporary total disability is that period within the healing period in which the claimant suffers a total incapacity to earn wages. Arkansas State Highway & Transportation Department v. Breshears, 272 Ark. 224, 613 S.W.2d 392 (1981); Georgia-Pacific Corporation v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998). The claimant has sustained his burden of proof by a preponderance of the credible evidence that he remained in his healing period subsequent to April 3, 2003, as a result of the April 30, 2002, compensable injury, and correspondingly is entitled to the payment of temporary total disability benefits. Respondents have controverted the claimant's entitlement to temporary total disability benefits subsequent to April 23, 2003.

The evidence in the record reflects that the claimant continued to receive indemnity benefits

at the temporary total disability benefit rate of \$315.00 through August 19, 2003. As of August 20, 2003, respondents reduced the claimant's indemnity benefits to \$236.00 per week, to permanent partial disability benefit rate. (RX2, p. 125)

The evidence in the record clearly reflects that on December 4, 2003, a change of physician order was entered relative to the claimant's April 30, 2002 compensable injury. Specifically, the change of physician order designated the claimant's authorized treating physician as Dr. Kenneth Eubanks, a Jonesboro neurosurgeon. Respondents were aware of the change of physician order, in that a copy of same was provided to the parties and their attorneys. (Commission Exhibit #2)

At the point in time that Dr. Eubanks became the claimant's authorized treating physician, December 4, 2003, relative to the April 30, 2002, compensable injury, he was authorized to provide all reasonable necessary related medical treatment, to include a repeat discogram. Since coming under the care and treatment of Dr. Eubanks claimant has undergone treatment under the care of Dr. Sunil Gera, pursuant to the referral of Dr. Eubanks. Additionally, the claimant has undergone a neuropsychologic evaluation by Dr. Dan Johnson, pursuant to the referral of Dr. Eubanks.

Dr. Eubanks medical reports reflects that the desire to have the claimant undergo a another discogram. Subsequent to the March 24, 2004, evaluation by Dr. Jim J. Moore, claimant was again seen by Dr. Eubanks on April 27, 2004. The April 27, 2004, report of Dr. Eubanks reflects, in pertinent part:

It is notable, again, that his neuropsychologic examination and testing by Dr. Dan Johnson revealed no evidence of neuropsychopathology, secondary gain, or malingering, etc. Basically, Dr. Johnson thinks that he is a fairly straightforward individual, as he discussed with me on the phone.

* * *

I had a long talk with him. In summary, this is a very complex case and I have explained to him that we may not be able to figure out the cause of his pain, much less come up with a treatment strategy. Nonetheless, I am concerned that he reports such a different experience with his discogram than that reported by the discographer (Dr. Savu). I have to wonder if his discogram was truly negative. I think for that reason, as well as the question of left L4-L5 far lateral protrusion, that a repeat discogram is in order.

* * *

This is a complex and challenging case but I do feel like the patient needs to have a benefit of a doubt, at this point, in regards to whether his previous work up was adequate or not. (Respondent Supplemental Exhibit #1).

To date respondents have failed to authorize the procedure. It is undisputed that pursuant to the December 4, 2003, order of the Full Commission Dr. Eubanks is the claimant's authorized treating physician. Further, pursuant to Ark. Code Ann. §11-9-508, respondents are mandated to provide all reasonable related medical treatment relative to a compensable injury suffered by its employee. The compensability of the claimant's April 30, 2002, compensable injury is not disputed.

In the instant claim, respondents have in essence held the claimant medical treatment under the care of Dr. Eubanks hostage to an acquiescence by the claimant to an evaluation by a physician selected by respondent, Dr. Jim J. Moore, a Little Rock neurosurgeon. Claimant was evaluated by Dr. Moore on March 24, 2004, pursuant to an order filed by the Commission on March 4, 2004. In his March 24, 2004, report Dr. Moore echoed the principle of the December 4, 2003, change of physician order entered by the Commission:

I think that if Dr. Eubanks is the official physician/neurosurgeon that a repeat discogram as

recommend is within his sphere of control. (RX 4)

As the claimant's authorized treating physician Dr. Eubanks is not required to get permission from a physician selected by respondent in order to precede with a treatment plan or modality he deems reasonable necessary and appropriate relative to the claimant's compensable injury. Respondents have controverted the claimant's entitlement to medical treatment under the care of Dr. Eubanks subsequent to February 4, 2004.

Respondents assert entitlement to a credit for the forfeiture of the deposit with Dr. Moore's office relative to scheduled evaluations by the claimant with Dr. Moore when claimant failed to appear. At this juncture it should be noted that respondents did not seek the sanction of the Commission in order to compel the claimant to attend that evaluation with Dr. Moore prior to scheduling the evaluation or placing a deposit with the office of Dr. Moore relative to the evaluation. Claimant is not liable for the forfeiture suffered by respondents as a result of his failure to attend the scheduled evaluation with Dr. Moore's office prior to March 4, 2004.

AWARD

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at a weekly compensation benefit rate of \$315.00, for the period covering April 24, 2003, and continuing until such time as the claimant reach the end of his healing period, a date yet to be determined. Respondents may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable injury of April 30, 2002..

Maximum attorney fees are herein awarded to the claimant's attorney the Honorable John Barttelt, on the controverted portion of this Award, pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge