

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F206430**

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| <b>KENNETH DEASON, EMPLOYEE</b>                              | <b>CLAIMANT</b>         |
| <b>DONNIE PEARSON, EMPLOYER</b>                              | <b>RESPONDENT NO. 1</b> |
| <b>AMERICAN INTERSTATE INS. CO., CARRIER</b>                 | <b>RESPONDENT NO. 1</b> |
| <b>LOCKESBURG TIMBER, INC., EMPLOYER</b>                     | <b>RESPONDENT NO. 2</b> |
| <b>AMERICAN INTERSTATE INS. CO., CARRIER</b>                 | <b>RESPONDENT NO. 2</b> |
| <b>DEATH &amp; PERMANENT TOTAL DISABILITY<br/>TRUST FUND</b> | <b>RESPONDENT NO. 3</b> |

**OPINION FILED APRIL 28, 2004**

This matter comes before Administrative Law Judge J. Mark White on the record.

Claimant represented by Mr. William K. Moritz, Attorney at Law, Hot Springs, Arkansas.

Respondents Nos. 1 & 2 represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by Mr. David Pake, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

This claim was the subject of a full hearing held on February 10, 2004, and a subsequent Opinion filed March 9, 2004. The parties did not appeal the Opinion of March 9, 2004. The claimant has now asked for a ruling on his entitlement to temporary total disability benefits and associated attorney's fees. Pursuant to the

Prehearing Order filed April 20, 2004, the parties agreed to submit consideration of these issues on a stipulated record. The record herein is comprised of the Prehearing Order filed April 20, 2004; the record of the prior hearing held February 10, 2004; and the Opinion filed March 9, 2004.

The parties stipulated in the prior hearing that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that on June 6, 2002, the claimant sustained a compensable injury; and that the respondents accepted the injury as compensable and paid some medical and indemnity benefits. These stipulations were accepted as reasonable and entered as findings of fact in the Opinion filed March 9, 2004. That Opinion also made the following findings of fact and conclusions of law:

1. The phrase "mental injury or illness" as used in Ark. Code Ann. § 11-9-113 does not encompass cognitive dysfunctions and impairments caused by actual physical trauma to the brain.
2. The claimant has proven by a preponderance of the evidence that his cognitive dysfunctions and impairments were caused by actual physical trauma to the brain as a result of his compensable closed-head injury.
3. Ark. Code Ann. § 11-9-113 therefore does not govern this claim.
4. The claimant has proven by a preponderance of the evidence that additional treatment, including

neuropsychological treatment, is reasonably necessary in connection with his compensable closed-head injury.

5. The claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits of 5% to the body as a whole for a cervical strain.
6. Because additional treatment is reasonably necessary, the claimant remains in his healing period for his closed-head injury.
7. Because the claimant remains in his healing period, the issue of permanent impairment as it relates to the claimant's closed-head injury is not ripe for consideration.
8. Because the claimant remains in his healing period, the issue of permanent and total disability is not ripe for consideration.
9. The claimant has proven by a preponderance of the evidence that at the time of his injury he earned an average weekly wage of \$372.26, entitling him to a compensation rate of \$248 for total disability benefits and \$186 for permanent partial disability benefits.
10. Respondents Nos. 1 & 2 have controverted this claim in its entirety.

The parties agree that the issues to be presented herein are whether the claimant remains entitled to temporary total disability benefits; and controversion and attorney's fees.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The findings of fact and conclusions of law set forth in the Opinion filed March 9, 2004, in particular the finding that the claimant remains in his healing period for his closed-head injury, are *res judicata* to the present claim.
3. The claimant has proven by a preponderance of the evidence that he remains totally incapacitated from earning wages.
4. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from the date those benefits were terminated until a date yet to be determined.
5. Respondents Nos. 1 & 2 have controverted this claim in its entirety.

## DISCUSSION

The history of this case is recited in the Opinion of March 9, 2004, and will not be repeated herein. The claimant contends that he remains entitled to temporary total disability benefits. An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

As noted above, the Opinion of March 9, 2004, includes a finding that the claimant remains in his healing period. As that Opinion was not appealed, it has become a final adjudication, and the finding regarding the healing period is *res judicata* to the present claim. *Res judicata* applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001) (citations omitted). Even though the Workers' Compensation Commission is not a court, its awards are in the nature of judgments, and the doctrine of *res judicata*

applies to its decisions. *Id.*

Therefore, the only question herein is whether the claimant remains totally incapacitated from earning wages. If the claimant, during his healing period, is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total. *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). The performance of isolated farm and household tasks alone, where the claimant can perform the tasks only with difficulty, will not bar an award of temporary total disability benefits. *Id.*

The most recent medical evaluation of the claimant was by Dr. John Sklar, who evaluated the claimant for purposes of assigning an impairment rating on July 2, 2003. Dr. Sklar described the claimant's condition at that time as follows:

The claimant does continue to have significant difficulties with daily activities. He is in today with his wife, who is a good source of data regarding his ability to function. The claimant continues to have headaches and dizzy spells and is quite weak after these spells. He reports that his neck is sore. His wife reports that he is difficult to arouse in the mornings and moves quite slowly and deliberately after getting up. He does have ongoing memory problems with short-term recall being poor to fair for activities of daily living and related tasks. The claimant and his wife report that he is easily frustrated and doesn't do well around more than a couple of people. He is definitely more irritable. Also, he avoids social situations. His wife describes his condition overall as like living with someone who has a hangover much of the time despite the fact that her

husband does not drink.

Dr. Sklar recommended that the claimant should “be as active as possible,” and he discussed with the claimant and his wife “the beneficial effects of physical activity on not only his physical condition but on his anxiety and depression as well.” Nonetheless, Dr. Sklar concluded:

There is a slight chance that this gentleman would be able to return to work as a truck driver, but I have told him and his wife today that that is a long shot. Possibly some other type of gainful employment will be a possibility in the future but that remains to be seen. Most likely, this gentleman will not reach his previous earning capacity.

Though Dr. Sklar does not specifically state that the claimant is presently incapable of working, the context of his report impliedly supports that conclusion. His statement that the claimant may “possibly” be capable of working “in the future” necessarily implies an underlying opinion that the claimant is not capable of working *at present*.

Dr. Dietze’s opinion is expressed more directly, albeit without the explanation and rationale provided in Dr. Sklar’s report. A statement completed by Dr. Dietze on June 6, 2003, notes that the claimant’s condition has resulted in “total disability” from June 6, 2002, to “continuing.”

I find instructive a comparison to the decision of the Court of Appeals in *Hope*

*Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999). Unlike the present claimant, Knighton was found to have a mental injury compensable under Ark. Code Ann. § 11-9-113. However, Knighton was found by the Commission and the Court of Appeals to be disabled from work due to his psychological problems. The Court noted testimony from Knighton's wife and doctors that he had "problems being around people and functioning in society." The present claimant exhibits similar problems. Dr. Sklar has noted that the claimant continues "to have significant difficulties with daily activities." Dr. Dietze has likewise noted that the claimant "still has a considerable amount of difficulty in terms of behavioral problems and sleep disturbances with chronic headaches, all of which are related to his injury." In her testimony at the February 10, 2004, hearing, the claimant's wife described her current life with the claimant as "like living with a twelve-year-old boy." She testified that he is unable to complete tasks; that he has exhibited inappropriate behavior around others; and that he sometimes has difficulty speaking. She testified that he has twice attempted to return to work, and that both attempts ended in failure.

Though Dr. Sklar thought the claimant was at maximum medical improvement, at no point did he opine that the claimant was capable of working, and his report implies that the claimant is in fact not capable of working. Likewise,

Dr. Dietze is on record as saying that the claimant remains disabled. There is no evidence in the record to suggest or establish that the claimant's condition has markedly changed since the opinions of Dr. Sklar and Dr. Dietze were offered, nor is there any medical evidence in the record contradicting the opinions of Dr. Sklar or Dr. Dietze. Therefore, I find that the claimant has proven by a preponderance of the evidence that he remains totally incapacitated from earning wages. Because the claimant is totally incapacitated from earning wages, and because he remains in his healing period, I find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from the date those benefits were terminated until a date yet to be determined.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from the date those benefits were terminated until a date yet to be determined. Respondent No. 1 is hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. William K. Moritz, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant

to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge