

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F304297

JOSE RAYA, EMPLOYEE

CLAIMANT

TURNER INDUSTRIES, EMPLOYER

RESPONDENT

**AMERICAN HOME ASSURANCE CO./
AIG CLAIM SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED OCTOBER 27, 2004

Hearing before Administrative Law Judge Cynthia Estes Rogers on July 29, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

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

A hearing was held on July 29, 2004, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship on October 2, 2002. It was stipulated that the claimant's weekly indemnity rates are \$425.00 for temporary total disability and \$319.00 for permanent partial disability benefits.

Claimant contends that he is entitled to an additional period of temporary total disability benefits commencing on September 5, 2003, and continuing through April 15, 2004. The claimant further contends he is entitled to attendant medical benefits and attorney's fees. The claimant further contends that since respondents will claim a credit for benefits paid from May 14, 2003, through September 5, 2003, that an attorney's fee would attach to those benefits.

Respondents controvert any benefits which have not previously been accepted and paid. Respondents contend that the claimant's healing period ended on or before May 14, 2003, and that temporary total disability benefits were continued through September 5, 2003, thereby entitling respondents to a credit for overpayment of temporary total disability benefits for sixteen and one-half weeks, totaling \$8,294.00.

Respondents further assert a credit for unemployment benefits in the event claimant is found to be entitled to additional temporary total disability indemnity benefits, as claimant received unemployment benefits from June 28, 2003, through November 30, 2003. Respondents contend that claimant's need for medical treatment subsequent to September 2003, which is when it was discontinued by respondents, is associated with a pre-existing condition unrelated to the claimant's workers' compensation claim, and therefore respondents should not be liable for benefits that are associated with that.

STATEMENT OF THE CASE

Claimant sustained an admittedly compensable back injury on October 2, 2002, after working for respondent employer about one year. Respondents paid for claimant's medical care and treatment, and he continued working through December 5, 2002. At that time, respondents began paying claimant temporary total disability indemnity benefits.

Claimant saw a number of doctors. He first saw Dr. Lester Alexander, but was, within a month, granted a change of physician and began treating with Dr. Anthony Russell. Dr. Russell ordered a lumbar CT scan and myelogram, recommended no surgery, and then referred claimant to Dr. Edward Saer, who eventually released him to full duty work on May 24, 2003, never advising surgery.

Claimant testified, however, that he did not return to work; rather he filed for unemployment benefits, telling the Employment Security Department that he was able to return to work. He testified that he was paid unemployment benefits from June 2003 through November 2003, at a rate of \$344.00 per week, minus taxes. He further testified that during that same period of time, he was also drawing temporary disability benefits from the insurance company, which were continued through September 5, 2003. When asked on cross-examination whether he was aware that he was not supposed to draw temporary disability benefits and unemployment benefits at the same time, he responded, "I guess," and then "yes."

Apparently, in the interim, claimant saw his primary care physician, Dr. Tracy Phillips, on his own, who then referred him to Dr. Christopher Mocek. The records introduced contain an off-work slip from Dr. Phillips, stating that claimant had been under her care since May 14, 2003, and should not return to work until a "date to be determined by Dr. Mocek." Claimant saw Dr. Mocek for the first time on July 15, 2003, and told Dr. Mocek that he had had persistent back pain since his surgery in 1991, when he had had a fusion.

Claimant returned to work in mid April 2004 for a different employer, working more than forty hours per week and making as much or more money than he was for respondent employer. He now works as a welder for a construction company, but contends that he still has some pain and wants additional treatment from Dr. Mocek.

Claimant admitted that he had had back surgery in 1991. He testified that the last time he had seen a doctor for his back condition before the October 2, 2002, injury was "about four years ago." Although claimant stated at the hearing that he felt his condition had improved after seeing Dr. Mocek, he admitted that in his deposition

he stated that nothing Dr. Mocek was doing was changing his condition at all. Claimant admitted that all of the previous doctors he had seen agreed that no type of surgical intervention was recommended.

FINDINGS OF FACT

1. Claimant has failed to meet his burden of proving entitlement to additional benefits.

2. Respondents are entitled to a credit for overpayment of temporary total disability benefits for sixteen and one-half weeks, totaling \$8,294.00.

DISCUSSION

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *See Smith-Blair, Inc. v. Jones, supra; Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Smith-Blair, Inc. v. Jones, supra; Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, Inc. v. Jones, supra; Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

In this examiner's opinion, the claimant has failed to prove by a preponderance of the credible evidence that he is entitled to additional benefits. After being granted

a change of physician to Dr. Russell, who then referred claimant to Dr. Saer, claimant *on his own accord*, sought a referral to Dr. Mocek from his primary care physician for yet another opinion. Claimant admitted in his deposition that nothing Dr. Mocek was doing for him was changing his condition at all. Dr. Saer had released claimant on May 24, 2003. Claimant has failed to prove that any additional medical treatment is reasonable and necessary and has failed to prove entitlement to any additional benefits after being released on May 24, 2003, by Dr. Saer. Respondents are, therefore, entitled to a credit for overpayment of temporary total disability benefits.

The above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge