

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210178

BOBBY V. UPCHURCH, EMPLOYEE	CLAIMANT
CITY OF JACKSONVILLE, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, WCT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 27, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on March 1, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. James W. Stanley, Attorney-at-Law, North Little Rock, Arkansas.

Respondents represented by Mr. J. Chris Bradley, Attorney-at-Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted March 1, 2004, to determine whether the claimant was entitled to additional temporary total disability benefits.

A prehearing conference was conducted in this claim on January 14, 2004, and a Prehearing Order was filed on said date. 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 as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant times, including May 20, 2002; that claimant sustained a compensable back

injury on said date; that he earned sufficient wages to entitle him to compensation benefits at the rate of \$238.00 per week for temporary total disability and \$179.00 per week for permanent partial disability; that respondents paid temporary total disability through March 13, 2003; and that respondents controverted claimant's entitlement to temporary total disability after said date.

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

- 1) Whether or not the claimant's healing period had ended; and,
- 2) claimant's entitlement to additional temporary total disability.

Claimant contended, in summary, that he was entitled to temporary total disability from the date of the injury and continuing through the present, while maintaining that his healing period had not ended; and that a controverted attorney's fee should attach to any additional temporary total disability awarded. Claimant reserved the issue of permanent disability, if applicable.

The respondents contended that it provided the claimant with employment suitable to his physical limitations after his release on March 14, 2003, which the claimant refused to accept; that, thereafter, respondents terminated claimant's employment for cause; and that the claimant cannot prove entitlement to temporary total disability after March 13, 2003.

The claimant was the only witness to testify. The record in this claim is composed solely of the transcript of the March 1, 2004, hearing containing a joint exhibit consisting of thirty-four (34) pages.

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 claimant and to observe his 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 are hereby accepted as fact.
3. The claimant's healing period ended on or before March 17, 2003.
4. The claimant has failed to prove, by a preponderance of the evidence, that he is entitled to additional temporary total disability.
5. Respondents have controverted claimant's entitlement to additional temporary total disability.
6. Issues not addressed herein, including claimant's entitlement to permanent disability benefits, have been specifically reserved.

DISCUSSION

The facts in this case are basically undisputed. On and before May 20,

2002, the claimant worked for the City of Jacksonville, in its Sanitation Department, his primary duties consisting of lifting garbage cans and emptying them into a garbage truck which was an extremely physically demanding job. As reflected by the stipulations, the claimant sustained a compensable injury on May 20, 2002. The claimant's primary treating physician has been Dr. Anthony E. Russell, a neurosurgeon in North Little Rock, Arkansas. Although a complete medical record was not obtained, it is undisputed that the claimant underwent low back surgery, performed by Dr. Russell, in September, 2002. The claimant underwent a follow-up MRI following surgery which reflected no evidence of recurrent disc. The claimant underwent physical therapy and was initially released by Dr. Russell on January 6, 2003, at which time Dr. Russell referred the claimant for a Functional Capacity Evaluation. (Jt. Ex. A, p.34)

The claimant underwent a Functional Capacity Evaluation on February 7, 2003, which indicated that he was capable of medium-heavy work. Apparently, claimant's job description as a sanitation loader falls within his Functional Capacity Evaluation. Based upon the FCE, Dr. Russell released the claimant to return to half-day restricted, light-duty work for two (2) weeks, at which time the claimant could resume full-time work within the Functional Capacity Evaluation guidelines. (Jt. Ex. A, p.5)

It is apparent that the claimant was advised of the results of the Functional Capacity Evaluation while disagreeing with the results. Specifically,

the claimant was advised by respondents that he should return to his regular job duties which he refused, at which point the claimant was terminated. A portion of the claimant's testimony is set out below:

Q Okay. But you testified that after your surgery, six or seven weeks after your surgery, you went back to work for the City of Jacksonville in the recycling department, is that right?

A Yes, sir.

Q And how long did you work in that department?

A Maybe – I'd say probably about a week, maybe a week, and then I had to go see Mr. Charlie Brown.

Q And in the meantime, had you taken a functional capacity test after you had returned to work in the recycling plant, the recycling department? Did you go take a functional capacity evaluation to see how much lifting you could do?

A Yes, sir.

Q And it was after that you saw Mr. Brown?

A Yes, sir.

Q And did Mr. Brown then tell you sometime around March the 13th or 14th that the functional capacity test reflected that you were able to go back to your regular job?

A That's what he told me. I didn't understand it, but I went over there and took – I didn't know what I was doing. I didn't understand that.

Q I understand you didn't know what you were doing, but he, Mr. Charlie Brown, told you that based upon the functional capacity test you should be able to do your regular job? Did he tell you that?

A I think he did. I wasn't sure.

Q And I take it that you disagreed with Mr. Brown and the functional

capacity test, is that right?

A Yes, sir.

Q And so because you disagreed, they fired you, is that right?

A Yes, sir.

Q And then you started drawing unemployment?

A Yes, sir. (Tr.29-30)

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Arkansas State Highway and Transportation Department vs. Breshears, 272 Ark. App. 244, 613 S.W.2d 392 (1981); Johnson vs. Rapid Die & Molding, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"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).

The claimant testified concerning his continued, physical problems. As previously noted, the claimant has undergone back surgery which, in all

likelihood will result in some permanent impairment. The issue of permanent disability was specifically reserved. There is no credible evidence that the claimant's healing period extended beyond March 17, 2004. Respondents paid appropriate benefits through March 13, 2004, at which time the claimant was terminated. Thereafter, he applied for, and received, unemployment compensation which disqualified the claimant from receiving additional temporary total disability. A.C.A. §11-9-506. The claimant has failed to prove entitlement to additional temporary total disability. Accordingly, the within claim for additional temporary total disability is respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge