

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F401795

DERRICK JOHNSON, EMPLOYEE

CLAIMANT

**AFCO STEEL, INC., EMPLOYER
SELF-INSURED**

RESPONDENT

**CROCKETT ADJUSTMENT (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JUNE 1, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on March 3, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Everett O. Martindale, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Gail Ponder Gaines, Attorney at Law, Little Rock, Arkansas.

A hearing was held on March 3, 2005, to determine claimant's entitlement to additional benefits, including past and future treatment by Dr. Derek Lewis, temporary total disability indemnity benefits, a permanent impairment rating issued by Dr. Lewis, and attorney's fees.

The parties stipulated that claimant sustained a compensable left carpal tunnel injury on October 29, 2003. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$440.00 for temporary total disability and \$330.00 for permanent partial disability benefits.

Claimant contends that he received a one-time change of physician by the Commission to Dr. Derek Lewis and, as such, any treatment or impairment ratings received from Dr. Lewis should be the responsibility of respondents.

Respondents contend that they accepted this claim originally and paid all appropriate medical benefits. Respondents contend that there is no valid permanent impairment rating to be paid at this time, that all reasonable and related medical bills have been paid, and that claimant is not entitled to any temporary total disability benefits at this time.

Respondents further contend that treatment by Dr. Lewis is not reasonable or necessary, that claimant has been treated by Dr. Rhodes, a qualified surgeon, and has been seen by Dr. Weber, a hand specialist and the treating physician who performed surgery and released claimant on March 24, 2004, as having reached maximum medical improvement. Respondents contend that the claimant was then available for modified duty work, which was made available to him.

STATEMENT OF THE CASE

Claimant is employed by respondent-employer as a fitter/welder and indisputably suffered carpal tunnel syndrome on the left over a period of time. Respondents accepted the carpal tunnel syndrome as compensable and referred claimant to Dr. Rhodes, an orthopedic surgeon who treated him. Claimant testified, however, that he went to see Dr. Rhodes on his own.

Claimant testified that he felt Dr. Rhodes was trying to “rush” him to surgery, and claimant did not want surgery if he did not need it. He testified that he then began to “ask around” about other doctors and that he heard Dr. Weber was good. Respondents agreed to allow claimant to see Dr. Weber, a hand specialist, as they knew claimant was dissatisfied with Dr. Rhodes. Claimant admitted in testimony that the claims adjuster for respondents, Rudy Bischof, made the appointment for him with Dr. Weber, at claimant’s request.

Dr. Weber evaluated and treated claimant, including performing a left carpal tunnel release on February 3, 2004. Claimant testified that he returned to work on February 6, 2004, with the following restrictions: he was not to use his left hand; he was supposed to keep that hand elevated; he was supposed to work in an area that was clean and dry; and, he was supposed to be able to take his pain medication. Claimant testified that respondent-employer did not comply with these restrictions in that the work environment was not clean. He testified that he reported this to Mr. Bischof and that he attempted to tell Dr. Weber’s nurse.

Claimant testified that he saw Dr. Weber two more times, on February 11th and 18th, 2004, before he was released to return to full duty on March 24, 2004. Claimant testified that he never had physical therapy; however, medical records reflect that claimant was referred for therapy, beginning on February 11, 2004.

Claimant testified that at his last appointment with Dr. Weber, on March 24, 2004, he told the doctor that he was still experiencing numbness and swelling – tingling in the fingers and swelling in the wrist. Dr. Weber’s letter to respondent-carrier of March 24, 2004, however, states as follows:

Derrick Johnson is seen in return on 3-24-04. He is six weeks status post left carpal tunnel release. His wound is healing well. *He does have some mild pillar pain.* His symptoms have improved. *He is released to full activity.* He is off work because of recent foot surgery. He could go back to full working status from the hand stand point. *He has reached maximum medical improvement and there is no impairment.*

[Emphasis added.]

Claimant testified that he continued to have problems with his hand and was not satisfied with Dr. Weber’s “lack of interest” in his problems. Therefore, he requested a change of physician which was granted on April 21, 2004, by the Commission, to Dr. Derek Lewis, a general practitioner. Claimant testified that Dr. Lewis was not his primary care physician and that he had not been seen by Dr. Lewis prior to the change of physician order of April 21, 2004. Respondents have controverted all benefits in regard to the change of physician to Dr. Lewis.

Medical records reflect that claimant first saw Dr. Lewis on July 26, 2004. Claimant testified that Dr. Lewis “looked [him] over” and gave him pain medication. However, when asked if his hand is any better since he has been seeing Dr. Lewis, claimant responded, “No, but I’m getting relief from the pain.”

Although claimant testified that he is still receiving some treatment from Dr. Lewis from time to time for problems he continues to have with his hand, the only record of any doctor visit with Dr. Lewis is the one and only clinic note of July 26, 2004. Dr. Lewis did issue the following letter on February 4, 2005:

To Whom It May Concern:

This letter is in regards to Mr. Derrick Johnson who has complained of hand pain since 2004. Mr. Johnson has been examined today and was found to have 10% disability rate due to his hand injury.

If you need further information concerning Mr. Johnson, please feel free to contact our office at the number listed above.

Claimant testified that he still experiences tingling today and suffers from a lack of strength, which keeps him from being able to handle certain job situations. Claimant testified that after he went back to work, he hurt his hand again on two separate occasions, due to his lack of strength. On May 3, 2004, claimant testified that he had trouble picking up a heavy plate they hang on bridges; and, again on May 27, 2004, he had trouble holding a large wrench. Claimant testified that he filed accident reports for those injuries; however, no such documents were introduced into evidence. Claimant testified that before the injury and surgery, he did not have these problems. He testified that he believes he has about 65 percent of the strength he had before his carpal tunnel injury.

Notwithstanding, claimant testified that he is now back at work, doing the same job he was doing before the surgery. He testified that he is slower, however, and that he uses his right hand most of the time. He further testified that he sometimes has pain and throbbing in his left hand.

Wayne Elliott, Human Resources Manager for respondent-employer, testified on respondents' behalf. He testified that claimant did work within the restrictions he was given while he *was* under restrictions and that respondents did comply with the restrictions. Mr. Elliott testified that nothing in the reports of the two May incidences described above indicated that there was a relationship between those incidences and claimant's left carpal tunnel injury. Mr. Elliott testified that there have been no complaints made about claimant's job performance since his return to full duty; however, he admitted that he does not watch claimant work and cannot testify as to whether claimant is now slower than he was before or whether he has less strength or uses his right hand more now than before.

Respondents assert that claimant is not entitled to temporary total disability indemnity benefits because, on those occasions where he was released to return to work with restrictions, claimant was provided work within his restrictions. Furthermore, since he has been released to return to full duty, claimant has, in fact, returned to performing his ordinary job duties.

Respondents further assert that the permanent impairment rating given by Dr. Lewis is not justified under the AMA guide, that it is not stated to a reasonable degree of medical certainty, and that it does not state that it is being issued in conformance with the AMA guide. Respondents further assert that there is no evidence that the work injury is the major cause of claimant's condition. Respondents point out that Dr. Weber, who is a hand specialist and who performed the surgery, felt that there was no impairment; and, the very fact that claimant has returned to his same duties speaks to the fact that there is no permanent impairment.

FINDINGS OF FACT

1. The stipulations agreed to by the parties herein are accepted as fact;
2. Claimant is entitled to a one-time change of physician pursuant to Ark. Code Ann. § 11-9-514(a)(3)(A)(ii) to Dr. Derek Lewis;
3. Respondents have controverted all medical treatment by Dr. Lewis;
4. Respondents are liable for the initial office visit with Dr. Lewis;
5. Claimant has failed to prove that additional treatment by Dr. Lewis is reasonable and necessary in relation to his compensable left carpal tunnel injury;
6. Claimant has failed to prove entitlement to the 10 percent impairment rating given by Dr. Lewis;

7. Claimant has failed to prove entitlement to any additional indemnity benefits.

DISCUSSION

The Arkansas Court of Appeals has held that where the claimant has exercised his or her absolute, statutory right to a one-time change of physician pursuant to Ark. Code Ann. § 11-9-514(a)(3)(A)(ii), respondents must pay for the initial visit to the new physician in order to fulfill their obligation to provide adequate medical services under the provisions of Ark. Code Ann. § 11-9-508. *See Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). As such, respondents herein are liable for the first, initial visit by claimant to Dr. Lewis.

With regard to claimant's continued treatment with Dr. Lewis, the Arkansas Court of Appeals has held that medical treatment intended to reduce pain or enable an injured worker to cope with chronic pain attributable to a compensable injury *may* constitute reasonably necessary medical treatment. *See generally, Georgia-Pacific Corp. v. Dickens*, 58 Ark. App. 266, 950 S.W.2d 463 (1997); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tiner v. Total Petroleum*, Full Workers' Compensation Commission, Opinion filed April 3, 2003 (W.C.C. F104990). In addition, an employer may remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

(“Medical treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer.”) *A claimant, however, must still prove that the additional treatment he desires is reasonable and necessary*, in relation to his compensable injury.

Here, claimant admitted in testimony that his hand is no better after seeing Dr. Lewis. Claimant admits that Dr. Lewis is not a specialist and that the only thing Dr. Lewis, a general practitioner, has done for him is prescribe pain medication – not that Dr. Lewis has subjected claimant to any line of “treatment” that would improve his condition. Because *any* medical doctor can prescribe pain medication, claimant has failed to demonstrate that his “treatment” by Dr. Lewis, specifically, is reasonable and necessary in relation to his injury.

Claimant testified that *he* was the one who initially saw Dr. Rhodes *on his own*. After becoming dissatisfied with Dr. Rhodes, claimant testified that *he* “asked around” and that *he chose* to see Dr. Weber, although Rudy Bischof set up the appointment. When he became dissatisfied with Dr. Weber because he claims Dr. Weber expressed a “lack of interest” in his problem, claimant petitioned the Commission for the change of physician, which was granted and for which respondents are liable for the initial visit, as discussed above. However, just because the Commission granted the one-time change of physician to Dr. Lewis, and just because Dr. Lewis gave claimant an impairment rating, does not automatically mean

that Dr. Lewis's treatment is reasonable and necessary nor does it mean that his opinion with regard to an impairment rating is credible.

The law is clear that medical opinions must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B); *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

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).

Here, Dr. Lewis's "To Whom It May Concern" letter of February 4, 2005, regarding the impairment rating, simply states as follows:

This letter is in regards to Mr. Derrick Johnson who has complained of hand pain since 2004. Mr. Johnson has been examined today and was found to have 10% disability rate due to his hand injury.

The permanent impairment rating given by Dr. Lewis is simply not justified under the AMA guide. Further, it is not stated within a reasonable degree of medical certainty, and it does not state that it is being issued in conformance with the AMA guide. Notably, Dr. Weber, who is a hand specialist and who performed the surgery, opined that there was no impairment; and, the very fact that claimant has returned to his same duties speaks to the fact that there is, in fact, no permanent impairment at this time. In this examiner's opinion, claimant has simply failed to prove that he is entitled to further medical care by Dr. Lewis at respondents' expense or that he is entitled to the 10 percent impairment rating issued by Dr. Lewis.

In regard to claimant's assertion that he is entitled to some additional indemnity benefits, claimant has simply failed to prove that he is entitled to same. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as

the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The Court of Appeals has held that the determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.* These are matters of weight and credibility, and thus lie within the exclusive province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Claimant testified that his claim was initially accepted as compensable and that all benefits were paid up until he saw Dr. Lewis. Although he claims that respondents did not comply with the restrictions he was under while he was working on light duty, the fact remains that he did work and was paid during those periods. Further, credible evidence was offered by Wayne Elliott that respondent-employer *did*, in fact, comply with the restrictions.

If claimant is contending that he is entitled to further benefits for the additional injuries he alleges occurred in May of 2004, as a result of his loss of strength, this examiner is without any documentation of those alleged injuries, as none was offered into evidence, in order to examine the credibility of same. Further, claimant admitted during testimony that he has no doctor's excuses for times he alleges he was off as a

result of this injury. In this examiner's opinion, claimant has simply failed to demonstrate that he is entitled to any further indemnity benefits at this time, as a result of his compensable left carpal tunnel injury.

AWARD

Respondents are directed to pay for claimant's initial office visit with Dr. Derek Lewis.

Otherwise, and for all of the above-stated reasons, the remainder of this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge