

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F109011

ROBERT BOONE, EMPLOYEE

CLAIMANT

ARKANSAS OREGON PNEUMATICS, INC., EMPLOYER

RESPONDENT

**CONTINENTAL CASUALTY COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED NOVEMBER 13, 2006

Hearing before Administrative Law Judge Barbara Webb on August 11, 2006, in Pine Bluff, Arkansas.

Claimant represented by Mr. Kenneth Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. Michael Dennis, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on August 11, 2006, before Administrative Law Judge Barbara Webb. A Prehearing Order was entered in this case on March 13, 2006. The Prehearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Prehearing Order and as amended on the record are hereby accepted:

1. A compensable injury having occurred on June 21, 2001.

2. The claimant was earning an average weekly wage of \$570.00; entitling him to a TTD rate of \$410.00 per week.

3. Some medical benefits and temporary total disability benefits through September 12, 2005 have been paid.

By agreement of the parties, the issues to be litigated are:

1. Whether the claimant has reached the end of his healing period for his cervical spine and shoulder injuries, and if he has reached the end of his healing period, whether the appropriate impairment ratings have been paid.

2. Claimant's entitlement to additional medical treatment, that being physical therapy.

The record consists of a one volume transcript of the August 11, 2006 hearing, consisting of the testimony of Robert Boone, and all documentary evidence consisting of Commission's Exhibit No. 1 (Prehearing Order); Claimant's Exhibit No. 1 (medical records); Claimant's Exhibit No. 2 (supplemental packet of medical records); Claimant's Exhibit No. 3 (supplemental packet of medical records); Respondents' Exhibit No. 1 (deposition of Nat Grubbs); and Respondents' Exhibit No. 2 (payment schedule). In addition, by agreement of the parties, this record incorporates by reference the transcript, exhibits, and Opinions from the earlier hearing held on April 24, 2003, in this case.

CONTENTIONS

The claimant contends that he is still in his healing period for his cervical spine injury, as well as his shoulder injury, and contends that even if it is found that he has reached the end of his healing period, that appropriate impairment ratings have not been paid for his cervical injury, his shoulder injury, or his lumbar injury. Claimant contends that temporary total disability benefits were ceased some time in late September or early October 2005, and that he is entitled to reinstatement of temporary total disability benefits from the time they were ceased and continuing to a date yet to be determined. The claimant reserves all wage loss and rehabilitation claims at this time.

The respondents contend that claimant has reached the end of his healing period on March 22, 2002, and is therefore not entitled to any further temporary total disability benefits. Respondents contend that any overpayment of characterized TTD would apply towards the impairment. Respondents further contend that an 8 percent (8%) impairment rating for the lumbar injury has been paid.

FACTUAL BACKGROUND

An earlier hearing was conducted in this case before Administrative Law Judge Don N. Curdie on April 24, 2003 in Monticello, Arkansas. The question presented was one of the compensability of the neck and back injury on June 21, 2001, and whether the claimant was entitled to temporary total disability

benefits subsequent to May 2002 for his compensable right shoulder and neck. Further, there was a question of whether Dr. Carl Covey's treatment subsequent to November 27, 2002 was reasonably necessary. In an Amended Opinion filed July 21, 2003, the Administrative Law Judge held that claimant sustained a compensable neck injury but did not sustain a compensable back injury on June 21, 2001. He further held that the claimant was not entitled to temporary total disability benefits or medical benefits for the compensable right shoulder injury subsequent to May of 2002. The Administrative Law Judge found that claimant was entitled to continued medical treatment and temporary total disability benefits beyond May 2002 until a date yet to be determined in connection with his neck injury and recognized that Dr. Carl Covey was the authorized treating physician.

Dr. Gregg Massanelli (an El Dorado orthopedic surgeon) initially treated the claimant's shoulder injury but with no success. Subsequently, Dr. Charles Pearce became the treating physician for the shoulder problem. The claimant's primary care treating physician, Dr. Randolph McKiever, referred the claimant to Dr. Richard Peek because of his spinal problems. Thereafter, Dr. Peek referred the claimant to Dr. Carl Covey.

On May 23, 2002, Dr. Pearce indicated in his report that he thought the claimant could return to his regular duties regarding

the shoulder but he stated "however, he needs an assessment by a spine or pain specialist as it pertains to his neck prior to the full release without restrictions."

In 2003, Dr. Covey recommended a spinal cord stimulator. The claimant was referred to Lewis Bracy, Ph.D. Claimant underwent psychological counseling and with Dr. Jody Hagen during the summer months of 2004. The trial of the spinal cord stimulator was carried out on January 11, 2005 but it was unsuccessful. The claimant returned to Dr. Covey the next day to have it removed. At the request of Respondents, the claimant underwent an evaluation by Dr. Barry Baskin on August 23, 2005. Dr Baskin indicated that he felt the claimant to have reached maximum medical improvement for the shoulder on or about March 22, 2002, which represents "eight to twelve weeks post surgery."

On January 10, 2006, the claimant received an epidural steroid injection for the cervical problem and on February 14, 2006, the second in a series of three injections was carried out by Dr. Covey. On February 14, 2006, Dr. Covey referred the claimant to begin physical therapy for the cervical spine. From March 23, 2006, until April 17, 2006, claimant underwent physical therapy at South Arkansas Rehabilitation. In a report dated April 17, 2006, Nat Grubbs, the physical therapist, noted that Boon had demonstrated little significant functional benefit as a

result of the 4 weeks of therapy. He noted a reported decrease in the severity of symptoms associated with the therapy visits without any significant "carry-over" or decline in symptom severity over time. He noted Boone responded favorably to clinical interferential current stimulation and recommended a trial with a home IFC stimulator. His skilled physical therapy was discontinued with the directions to continue the self-directed exercise regimen.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. A compensable injury having occurred on June 21, 2001.
3. The claimant was earning an average weekly wage of \$570.00, which would entitle him to TTD benefits of \$410.00 and PPD benefits of \$308.00.
4. The preponderance of the evidence demonstrates that the claimant is not entitled to temporary total disability benefits or medical benefits in connection with his compensable right shoulder injury subsequent to May 23, 2003.
5. The preponderance of the evidence demonstrates that the claimant reached the end of his healing period in

connection with the compensable neck injury on January 12, 2005.

6. The preponderance of the evidence demonstrates that the claimant is entitled to the payment of temporary total disability benefits through April 9, 2004, in connection with the compensable neck injury.
7. The preponderance of the evidence demonstrates that the claimant is entitled to payment of permanent partial disability benefits at a 4% impairment to the cervical spine and an 11% impairment as a result of the injury to the shoulder and subsequent surgery resulting in a 7% whole person permanent partial impairment in accordance with the AMA Guides, 4th Edition.
8. That Respondents are entitled to a credit for payment of all TTD benefits paid between April 9, 2004, and September 12, 2004, against any unpaid permanent partial impairment benefits.
9. The preponderance of the evidence demonstrates that the claimant is entitled to reasonable and necessary medical treatment for his cervical spine injury as recommended by his authorized physician, Dr. Covey, i.e. the rental and trial use of a home IFC stimulator.
10. Respondents have controverted claimant's entitlement to

additional medical benefits, temporary total disability benefits from March 23, 2002 until April 9, 2004, and unpaid permanent partial disability benefits.

11. Claimant is entitled to the maximum attorney's fee on the unpaid benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

DISCUSSION

The primary issue in this case is a determination of when Boone's healing period ended. Stated differently, the determination of when Boone reached maximum medical improvement.

The Arkansas Workers' Compensation Act does not define maximum medical improvement. However, Ark. Code Ann. § 11-9-102(12) states that "'healing period' means that period for healing of an injury resulting from an accident. The healing period ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition." *Clairday vs. The Lilly Company, Inc.*, No. CA05-696, (April 19, 2006). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of

pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982); *Arkansas Highway & Transportation Department v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993); *Harvest Foods vs. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

In the instant case, there is overwhelming evidence that Mr. Boone's healing period as to his compensable shoulder injury ended long ago. In addition, the Administrative Law Judge found in his earlier Opinion in this case that the claimant was not entitled to temporary total disability benefits or medical benefits for the compensable right shoulder injury subsequent to May of 2002. For the above-stated reasons, I find that the preponderance of the evidence supports and that the law of the case requires a finding that the claimant reached maximum medical improvement in connection with his compensable shoulder on May 23, 2002.

Both Doctors Pearce and Baskin have issued opinions that Mr. Boone has reached maximum medical improvement as to his injury. Ratings have been issued. Likewise, the testimony of Nat Grubbs, physical therapist, indicated that the physical therapy regimen which occurred from December 20, 2004 through June 4, 2005 produced no appreciable result. It was discontinued because the only benefit it was conferring to Mr. Boone was transient during the

period of the heavy therapy sessions themselves. A second therapy session which occurred from March 23, 2006 through April 17, 2006 was also discontinued because the claimant was not benefitting from the process.

Claimant testified he has no current active treatment for his shoulder or his low back and the only treatment he receives currently is to his neck. Claimant has had epidural steroid injections, physical therapy, a trial stimulator and numerous prescription medications. He testified that he believed his condition had improved since treating with Dr. Covey in that he used to get "knock out shots" approximately every two months and now he only has to get those shots for breakthrough pain once every three months. Claimant stated that his treatment with Dr. Covey has consisted of once every three month maintenance visits for several years now.

The fact that claimant reached maximum medical improvement some time ago should not be confused with whether claimant should receive reasonable and necessary medical treatment. Respondents agree that this is a compensable injury and the claimant is entitled to reasonable and necessary medical treatment until there is complete resolution of claimant's compensable injury symptoms. This is true even though the credible medical evidence in this case demonstrates that claimant has progressed physically as far as he

is likely to progress. Unlike a situation where a proposed medical treatment is in controversy, claimant has had all the treatments. No specific treatment is proposed (other than continued medications). The evidence has demonstrated that epidural steroid injections gave the claimant only transient relief and cannot be continued in light of claimant's adverse reaction to them. Physical therapy has not proven effective. The stimulator is not an option. The proposed IFC unit may provide temporary relief from pain but is not a cure for claimant's condition.

On April 9, 2004, Dr. Schlesinger performed an independent medical examination on the claimant. He did not recommend any further intervention, rated the cervical spine as 4%, and recommended a functional capacity examination ("FCE"). On July 22, 2004, Dr. Bryant evaluated the claimant's condition according to the 4th Edition of the Guides to the Evaluation of Permanent Impairment. He determined that according to the Guides the claimant had 4% impairment to the cervical spine, 8% impairment to the lumbar spine, and an 11% impairment as a result of the injury to the shoulder and subsequent surgery resulting in a 7% whole person permanent partial impairment. On August 23, 2005, Dr. Baskin conducted an independent medical evaluation of the claimant. He noted that the claimant could have had an exacerbation of preexisting degenerative problems in his neck resulting in the 4%

impairment rating to the cervical spine. Dr. Baskin opined that although the claimant had demonstrated inconsistencies with his FCE, the claimant would probably be able to return to light to medium duty work and recommended vocational rehabilitation. He also opined within a reasonable degree of medical probability that the claimant should have been at maximum medical improvement within 8 to 12 weeks following the surgery on his right shoulder. In a report dated February 14, 2006, Dr. Covey observed that while the claimant was out of his healing period for his right shoulder, he continued to have flare ups from the injury to the nerves of the right upper extremity as well as pre-existing degenerative changes of the cervical spine. He noted that after his recent treatment for the flare up of RUE radiculitis, the claimant had returned to baseline pain management and was back in the post healing state.

Based on the preponderance of the evidence in the case, I find that the claimant reached the end of his healing period for his shoulder in May of 2002, but did not reach the end of his healing period for his neck injury on April 9, 2004. At that time, Dr. Schlesinger opined that there was no further medical intervention needed. Moreover, the medical evidence in the case demonstrates that all subsequent treatment, i.e. the TENS unit and physical therapy, have been directed at relieving pain symptoms and not intended to be a cure for the claimant's condition. *Mad Butcher,*

Inc. v. Parker, 4 Ark. App. 124 , 628 S.W.2d 582 (1982).

Additional Medical Treatment

The claimant argues that the medical treatment received at the recommendation of Dr. Covey, including the placement of and subsequent removal of a spinal cord stimulator, was reasonable and necessary medical treatment. Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonable and necessary. Winslow v. D & B Mech. Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000). In the instant case, the medical evidence supports the reasonable and necessary treatment of the claimant, including the placement of the spinal cord stimulator and physical therapy. Even though the stimulator had to be removed, the claimant passed a psychological examination to receive the treatment and Dr. Covey thought it was reasonable and necessary. Dr. Covey has recommended the purchase

or rental of a home IFC, an interferential current stimulator, for the purpose of decreasing inflammation, based on the progress report from Nat Grubbs, the physical therapist, and continued physical therapy for the purpose of pain management with decreased need for medications. Although Grubbs testified in his deposition that the use of the IFC would not eliminate Boone's symptoms, he indicated that he expected the symptoms to be diminished resulting in a diminished need for pain medication. Based on the recommendations of Dr. Covey and the physical therapist, I find that the medical treatment for pain management proposed is reasonable and necessary.

Controversion

Based on my review of the evidence in this case, I find that Respondents have fully controverted payment of temporary total disability benefits from March 23, 2002 until April 9, 2004, and the claimant's attorney is therefore entitled to controverted attorney's fees on this period of temporary disability benefits for which an overpayment credit was sought but denied. *Stamper v. A. Tenenbaum Company*, Full Workers' Compensation Commission, Opinion filed February 19, 2002 (F011937 and F001609). However, I do find that Respondents made overpayments of temporary total disability benefits from April 9, 2004 until September 12, 2005, and are therefore entitled to an appropriate overpayment credit against

liability for these overpayments. *Mixon v. Valley Implement, Full Workers' Compensation Commission*, Opinion filed June 20, 1996 (E315872). I further find that Respondents controverted payment of permanent partial disability benefits in excess of the permanent impairment of 8 percent (8%) to the lumbar spine paid by the Respondents. I find that the claimant's attorney is entitled to a maximum statutory attorney's fee on the benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

ORDER

The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge