

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409229

GREG CRAFTON, EMPLOYEE	CLAIMANT
ARCO TOWERS & CONTRACTING, INC., EMPLOYER	RESPONDENT
AIG CLAIMS SERVICE, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 8, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on October 8, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Frank B. Newell, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted October 8, 2007, to determine whether the claimant was entitled to additional temporary total disability benefits.

A prehearing conference was conducted in this claim on August 15, 2007, 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."

It was stipulated that the employee/employer/carrier relationship existed at all relevant times, including August 25, 2004; that the claimant sustained compensable injuries on said date; that he earned sufficient wages to entitle him to compensation rates of \$342.00 per week for temporary total disability and \$257.00

per week for permanent partial disability; that respondents have paid all appropriate medical benefits, to date; that respondents paid temporary total disability benefits from August 26, 2004, through July 7, 2005, as well as additional temporary total disability following the claimant's lumbar surgery on January 4, 2007, and continuing through at least the date of the hearing; as well as permanent impairment benefits from July 28, 2005, through January 5, 2006, pursuant to a prior impairment rating; and that respondents had controverted an interim period of temporary total disability claimed, specifically, for the period from November 9, 2005, through January 5, 2007.

By agreement of the parties, the sole issue presented for determination concerned claimant's entitlement to additional temporary total disability for the disputed period of time from November 9, 2005, through January 5, 2007.

Claimant contended, in summary, that he entered into a new healing period as the result of his compensable injury and was entitled to additional temporary total disability for the period beginning November 9, 2005, through January 4, 2007; together with a controverted attorney's fee if awarded. Claimant specifically reserved the issue of entitlement to permanent disability benefits.

The respondents contended that it had paid all appropriate benefits to which the claimant was entitled; that it reinstated temporary total disability following a lumbar surgery on January 4, 2007, and that it did not owe any temporary total disability for the period claimed.

In addition to the claimant, his fiancée, Jenny Beck, was called as a corroborating witness. The record is composed solely of the transcript of the October 8, 2007, hearing containing a joint medical exhibit consisting of one hundred seven (107) pages, together with non-medical documentary evidence consisting of twelve (12) pages which was introduced as "Claimant's Exhibit A."

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 witnesses and to observe their 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 had not ended as of the date of the within hearing on October 8, 2007.
4. The claimant has proven, by a preponderance of the credible evidence, that he has been temporarily totally disabled at all times since August 24, 2004. Accordingly, respondents are responsible for temporary total disability benefits during the disputed period of time beginning November 9, 2005, through January 4, 2007.

5. Respondents are entitled to a credit or offset for all indemnity benefits previously paid, both temporary total as well as permanent impairment benefits.
6. Respondents have controverted the interim period of temporary total disability claimed and are responsible for the maximum statutory attorney's fee on said benefits.
7. Respondents have not controverted any additional workers' compensation benefits, to date.

DISCUSSION

The relevant facts in this case are basically undisputed. As reflected by the stipulations, as well as the record as a whole, respondents have exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt reasonably necessary medical treatment, as well as appropriate indemnity benefits at all times, save the interim period between November 9, 2005, through January 4, 2007, at which time respondents reinstated temporary total disability after the claimant underwent low back surgery. However, there does not appear to be any factual dispute that the claimant's healing period did not end on July 5, 2005, when respondents initially terminated temporary total disability and subsequently paid some limited permanent impairment benefits based upon a rating by Dr. Terry Smith. Rather, a preponderance of the credible evidence reflects that the claimant, at all times after July, 2005, continued to experience

significant physical problems which required follow-up medical care. The claim was compromised, in part, because the claimant, a former resident of Mississippi, was displaced as the result of Hurricane Katrina. In addition, the claimant's authorized treating physician was displaced as the result of the hurricane. Thereafter, the claimant, by and through his attorney, requested and obtained a change of treating physicians which lead to additional follow-up treatment, as well as additional diagnostic studies ultimately resulting in surgery on January 5, 2007. Again, respondents recognized the causal relationship between the surgery and the compensable injury and promptly reinstated temporary total disability following the surgery. The claimant continued to receive temporary total disability at the time of the within hearing.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. *Id.* The healing period is statutorily defined as that period for healing of an injury resulting from an accident. *Dallas County Hospital v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable, and if nothing in the way of treatment will improve that condition, the healing period has

ended. *Crabtree, supra*. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway & Transportation Department v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Id.*; *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *McWilliams, supra*; *J.A. Riggs Tractor v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a factual determination to be made by the Commission. *McWilliams; Parker; supra*. In *Pallazollo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

On and before August 25, 2004, the claimant was employed by Arco Towers to build and repair TV and radio cell phone towers. He had been employed for approximately three (3) years. The claimant's job duties required him to walk or stand from daylight to dark. He was also required to perform extremely heavy lifting, as well as frequent bending, squatting, and climbing at high, unprotected heights. The claimant sustained an admitted injury as the result of a specific incident identifiable in time and place of occurrence on August 25, 2004, which was described as follows:

Q Can you tell the Judge in your own words how you got hurt?

A We were removing a set of the big microwave dishes from a tower in Memphis, and the rope that was wrapped around the Cat head come loose and the dish began to fall to the ground. And my left hand became tangled in the rope, and I couldn't get loose from it. It drug me across the parking lot and the driveway, and then began to pull me up in the air as the dish continued to come down. I guess I twisted loose from the rope after I was up in the air, and I fell back to the ground.

Q All right. What parts of your body got hurt?

A My right knee, my lower back, the T-12 vertebra in my upper back, and the back of my head. (Tr.9-10)

The claimant was initially examined and treated at the trauma unit of the Regional Medical Center at Memphis, Tennessee. The claimant was treated for a multitude of physical problems, including head and neck, right arm, left hand, right knee, right shoulder, and low back, as well as chest/abdomen and pelvis injuries. (Jt. Ex. A, pp.1-12)

The claimant was next examined on August 27, 2004, by Dr. Kenneth Stone

in Sikeston, Missouri. Dr. Stone's initial diagnosis included cervical strain, lumbar contusions, and soft tissue injury, possible fracture of the thoracic spine, left hand multiple abrasions, and right knee and shoulder strains resolving. The claimant was continued on medications. The claimant returned to Dr. Stone on August 30, 2004, at which time the claimant was diagnosed with probable fracture of the lower thoracic spine and a CT scan was ordered. The CT scan confirmed a compression fracture at T-12 without any bony protrusion into the spinal canal and also indicated a bulging disc at L4-5. The claimant was continued on various medications including Bextra, Demerol for pain, and Soma, and permitted to return to his home in Mississippi to obtain follow-up treatment by a local physician.

The claimant was next examined by Dr. Joseph Hull, D.O., in Gulfport, Mississippi, on September 23, 2004. Dr. Hull ordered various diagnostic studies and eventually referred the claimant to Dr. Terry Smith, a spinal and neurological specialist in Biloxi, Mississippi. The claimant was first seen by Dr. Terry Smith on January 11, 2005. Dr. Smith continued to treat the claimant conservatively. Following a functional capacity evaluation, performed on April 26, 2005, which reflected that the claimant demonstrated work capacities in the light to medium work category, Dr. Smith felt that based upon the functional capacity evaluation, the claimant could return to work with various restrictions, specifically, limitations of lifting, as well as avoiding walking and standing for prolonged periods of time which clearly prevented the claimant from returning to his job with Arco Towers &

Contracting. However, Dr. Smith further noted that since the FCE, the claimant's condition had worsened and that the claimant was experiencing pain in his mid-lower back going into his right side. The claimant stated that following the FCE, he was unable to get out of bed for almost one week as the result of the activities he performed during the evaluation. It must further be noted that Dr. Smith also pointed out that he had attempted to set the claimant up with an epidural steroid injection which was never approved. Dr. Smith continued to recommend the additional treatment. (Jt. Ex. A, p.55)(Tr.27)

On July 24, 2005, Dr. Smith released the claimant with a five percent (5%) whole person impairment. (Jt. Ex. A, p.59)

Shortly after claimant's release by Dr. Smith, Hurricane Katrina forced the claimant to move from Bay St. Louis, Mississippi, to Marston, Missouri, and live with his mother. In addition, Dr. Smith was displaced from his office as the result of Hurricane Katrina. Thereafter, the claimant, by and through his attorney, the Honorable Keith Wren, corresponded with the claims adjustor, Irene Voyles, in an effort to obtain a change of treating physicians. These efforts began on November 9, 2005. Eventually, a change of physicians Order was entered by the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission approving a change of physician from Dr. Terry Smith to Dr. Patrick Knight in Cape Girardeau, Missouri. Although efforts began on November 9, 2005, the claimant did not see Dr. Knight until March 16, 2006. Dr. Knight immediately increased the

claimant's physical restrictions and prescribed additional medications and requested that the claimant undergo a MRI. Dr. Knight opined, within a reasonable degree of medical certainty, that the claimant's low back problems were all the result of his work-related injury. The MRI of the lumbar spine revealed a small to medium size disc protrusion/extrusion at L5-S1 on the left with encroachment on the left S1 root. Dr. Knight noted that the claimant's pain had not improved despite various medications and recommended that the claimant be evaluated by Dr. Mike-Mayer for possible surgical intervention. (Jt. Ex. A, pp.63-66)

The claimant was next examined by Dr. Henrik Mike-Mayer on May 31, 2006. Dr. Mike-Mayer did not feel that surgery would provide significant benefit. Dr. Mike-Mayer noted that the claimant demonstrated magnification with functional overlay and anger regarding his condition and that psychosocial issues were also prominent in the claimant's chronic pain syndrome. Dr. Mike-Mayer referred the claimant to Dr. Bernard C. Burns for pain management. The claimant was treated by Dr. Burns through on or about October 6, 2006. In the interim, the claimant returned to Mississippi where he came under the care and treatment of Dr. Eric H. Wolfson, a spinal and neurosurgical surgeon in Gulfport, Mississippi. The claimant was initially evaluated by Dr. Wolfson on November 20, 2006. Based upon the MRI reflecting the moderate size disc herniation, causing nerve root displacement, as well as a significant amount of spinal stenosis at multiple levels, together with claimant's failed conservative treatment, Dr. Wolfson recommended that the

claimant undergo a lumbar decompression laminectomy lower L3, L4-5, and S1, as well as a left L5-S1 discectomy. Respondents approved the recommended surgery which was performed on January 4, 2007. The claimant has continued under the care of Dr. Wolfson since November 20, 2006. Dr. Wolfson's last clinic note reflected that the claimant could return to work at a light-duty level. However, he recommended lumbar facet blocks for residual low back pain after which he stated the claimant would reach maximum medical improvement.

As reflected by the stipulations, respondents reinstated temporary total disability on January 5, 2007, following the claimant's lumbar surgery.

The only issue is whether the claimant is entitled to temporary total disability for the interim period beginning November 9, 2005, when the claimant requested additional medical treatment and the date surgery was performed. I find that the claimant is entitled to temporary total disability during this period. Clearly, the claimant's healing period had not ended at the time Dr. Smith assessed permanent impairment. The claimant's underlying condition causing disability was never stable because it was ultimately determined that the claimant required surgical intervention. The claimant testified that the surgery improved his overall condition. Based upon the claimant's credible testimony, together with the medical evidence set out above, the claimant has shown, by a preponderance of the credible evidence, that his healing period had not ended and that he is entitled to additional temporary total disability.

AWARD

Respondent, AIG Claims Service, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$342.00 per week beginning November 9, 2005, and continuing through January 4, 2007.

All benefits having accrued, respondents are to pay same in lump sum and without discount.

Respondents may claim credit for all indemnity benefits previously paid.

Additionally, claimant's attorney, Mr. M. Keith Wren, is hereby awarded the maximum statutory attorney's fee on this entire Award, one-half (½) to be deducted from the claimant's benefits and one-half (½) to be paid by respondents pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest and the legal rate until paid.

All additional issues are, by necessity, specifically reserved.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge