

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E901776

JAMES ELLENBERG,
EMPLOYEE

CLAIMANT

HELLE LUMBER COMPANY,
EMPLOYER

RESPONDENT

AMERICAN INTERSTATE INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 26, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The respondents appeal from a decision of the
Administrative Law Judge filed December 18, 2003. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The claimant's continued physical
difficulties with his shoulders are causally
related to the claimant's compensable injury
of February 10, 1999.
2. The claimant is entitled to a reinstatement
of temporary total disability benefits
commencing October 8, 2003 and continuing
through a date yet to be determined. The

claimant has not reached maximum medical improvement.

3. The claimant is entitled to continuing medical treatment with the physicians in the authorized chain of treating physicians, including Dr. Hahn and Dr. Mocek.
4. The respondents have controverted medical benefits subsequent to those medical benefits last paid by them in July of 2003.
5. The respondents have controverted temporary total disability benefits from October 8, 2003 going forward.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's

decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. My de novo review of this claim in its entirety reveals that the claimant's continued shoulder problems are not causally related to his compensable injury of February, 1999, and that he has reached MMI for said compensable injury. Therefore, I find that the claimant is not entitled

to continuing medical and/or temporary total disability benefits as awarded in this claim.

On February 10, 1999, the claimant was working at the respondent employer's saw mill, when he accidentally struck his forehead on the iron rail of a catwalk, rendering him temporarily unconscious. The claimant was seen at a nearby hospital for emergency treatment, which included CT scans of the claimant's head and cervical spine. These studies were negative in that they revealed no acute fractures. An MRI of the claimant's cervical spine conducted on the following day showed central posterior disc bulging at C3-4, and an MRI taken four days afterwards confirmed this finding. The claimant was 61 years old at the time of this incident. The parties stipulated to the compensability of the claimant's cervical injury, for which he has received all appropriate and necessary medical treatment, including a cervical fusion performed by Dr. Ronald N. Williams on March 27, 2000.

The claimant had undergone a previous cervical surgery for a work related injury which occurred in 1992. Specifically, on May 18, 1992, Dr. P.B. Simpson, Jr., performed a partial corpectomy on the claimant at C-6, with removal of a disk at C5-6 and C6-7, strut grafting, and

synthes plating from C5 to C7. Subsequently, in the fall of 1998, the claimant presented to Dr. Simpson with lower back and hip pain, and in October of 1998, Dr. Simpson opined that the claimant suffered from left foraminal disc herniation at L4-5.

Since his injury in February of 1999, the claimant has been treated primarily by Dr. Hahn, Dr. Mocek, and Dr. Rutherford, for pain and problems associated with his cervical spine injury, lumbar spine, hips, legs, shoulders, and gastrointestinal tract. The claimant also suffers from chronic major depression for which he has refused counseling. Aside from his cervical fusion in March of 2000, the claimant has undergone two surgeries on his right shoulder to repair a right rotator cuff tear, the latest being on April 21, 2003. In addition to his surgeries, the claimant has also had numerous other types of treatments to his spine and shoulders in an attempt to alleviate his on-going symptoms of pain. These treatments include steroid injections, narcotic pain medications, pain patches, intradiscal electrothermal therapy, and physical therapy.

Arkansas Code Annotated § 11-9-508(a) (1996), directs that an employer shall provide "such medical ... services ... as may be reasonably necessary in connection

with the injury received by the employee." What constitutes reasonable and necessary treatment under this section is a question of fact for the Commission. Georgia-Pac. Corp. v. Dickens, 58 Ark. App. 266 (1997); (citing Gansky v. Hi-Tech Eng'g, 325 Ark. 163, 924 S.W.2d 790 (1996)). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Moreover, the respondent is only responsible for medical services which are causally related to the compensable injury. The claimant must prove a causal connection between the work related accident and the later disabling injury. Bates v. Frost Logging Co., 38 Ark. App. 36, 827 S.W. 2d 664 (1992).

Arkansas Code Annotated §11-9-102(12) defines a claimant's healing period, in relevant part, as that period for healing of an injury resulting from an accident. Moreover, the healing period continues until the employee is as far restored as the permanent character of her 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. Emerson Elec. v. Gaston, 75 Ark. App. 232, 58 S.W.3d 852 (2001); citing, Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a factual determination for the Commission. Id.; citing, Carroll Gen. Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996). Finally, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). In other words, 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. 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. Etkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

In the present claim, the majority has found that the claimant's continued physical difficulties with his shoulders are causally related to his compensable injury of February 10, 1999. Moreover, the claimant asserts that medical evidence supports a finding that the claimant's

healing period has not ended due to the claimant's ongoing shoulder problems. The totality of the credible evidence presented in this case, however, does not support a finding that the claimant's shoulder problems are causally related to his compensable injury. Consequently, because his shoulder problems are not connected to his compensable injury, the end of his healing period for those specific problems is not an issue. The evidence does show, however, that the claimant's healing period for his compensable cervical spine injury has ended and that he has reached MMI regarding that injury.

First, the nature of claimant's accident on February 10, 1999, indicates that, although a cervical injury was perhaps conceivable from that injury, a resultant shoulder injury was not likely. For example, emergency room documentation shows that the claimant struck his forehead on a metal beam. Initial examinations and testing, therefore, logically focused on the claimant's head and neck. These tests, which included CT scans and MRI's, revealed no acute fractures. When questioned during his hearing of November 21, 2003, as to how his shoulders were involved in his accident, the claimant offered this vague response:

When my head hit the rail, it jammed my neck and shoulders, my rotator cuff in my shoulders.

The above statement is both suspect and speculative in that it places the claimant in the position of rendering a medical opinion regarding his own condition at the time of the accident. Furthermore, providing that the claimant had the medical knowledge to assess the exact extent of his injuries at the time of his accident, his ability to do so would have been greatly impaired by the fact that he was rendered unconscious from the blow to his head.

The claimant has complained of shoulder pain throughout his treatment. However, the claimant has a significant history of cervical problems, which culminated in extensive cervical surgery in 1992, and to which these complaints could at least partially attributed. In addition, the claimant has a history of lumbar spine problems dating back to 1998 which continue to generate pain and numbness in the claimant's upper extremities. In his independent medical evaluation of the claimant on October 8, 2003, Dr. Reginald Rutherford opined that the claimant's shoulder problems and his lumbar spine problems are not related to his compensable

injury of February 1999. Specifically, Dr. Rutherford stated:

Mr. Ellenberg has secondary problems of moderate degenerative arthritis [in] both shoulders with accompanying pathology of the rotator cuffs and multilevel degenerative change of the lumbar spine of moderate degree. From the history provided by Mr. Ellenberg and the medical documentation provided, I am unable to draw a direct causal relationship between either of these problem areas and Mr. Ellenberg's cervical spinal cord injury.

In his rebuttal response to Dr. Rutherford's opinion, pain specialist, Dr. Mocek stated that the claimant has "spine disease" which has resulted in "chronic intractable pain in the neck and low back." Dr. Mocek further stated that sensory nerve conduction tests show an abnormality in the claimant's lower extremities consistent with sensory polyneuropathy, that an MRI of the claimant's lumbar spine taken in May of 2003 showed extensive degenerative disc disease of the lumbar spine, and that the claimant continues to report cervical neck pain which radiates down into his shoulders. Doctor Mocek agreed that no further surgical treatment is required for the claimant's cervical spine problem in that it has stabilized, and that

his treatment for this condition currently consists of pain management issues.

Although the medical evidence presented in this claim perhaps supports Dr. Mocek's evaluation of the claimant's physical condition, Dr. Mocek fails to offer an objective medical opinion as to whether the claimant's current shoulder problems are causally related to his compensable cervical injury. Furthermore, although it is unquestionable that the claimant developed rotator cuff tears in both of his shoulders which required medical treatment, the record is void of any objective medical evidence that connects the claimant's shoulder problems with his accident in February 1999. The record does contain evidence, however, that the claimant has, in the words of Dr. Rutherford, "made an excellent recovery from his prior spinal cord injury," and that he should be considered at maximum medical improvement "referable to his neck injury with central disc herniation at C3/4 and attendant spinal cord compression."

The respondent is only responsible for medical services which are causally related to the compensable injury. Here, the claimant has established that he has multiple degenerative physical problems which will require

future and continuing treatment to address his associated pain. However, the claimant has failed to establish by a preponderance of the credible evidence that his current shoulder problems are causally connected to his compensable cervical injury. Therefore, for all of the reasons set forth herein, the claimant should be denied additional medical treatment for problems associated with his shoulders.

Because the claimant has not proven a causal connection between his shoulder problems and his compensable injury, temporary total disability benefits beginning October 8, 2003, and continuing to a date yet to be determined should also be denied.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner