

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214295

DON R. WILSON, EMPLOYEE

CLAIMANT

CONAGRA INC.,
A SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 24, 2004

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

Claimant represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent represented by HONORABLE BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by the respondents from an opinion filed herein by an Administrative Law Judge on January 21, 2004. The Administrative Law Judge found, in relevant part, that the claimant proved by a preponderance of the credible evidence that he is entitled to an award of temporary total disability compensation beginning December 8, 2002, and continuing through a date yet to be determined. In a pre-hearing order entered on October 7, 2003, the parties stipulated that the claimant sustained a compensable low back injury on November 13, 2002.

After a carefully conducted de novo review of this claim in its entirety we find that the claimant has failed to prove by a preponderance of the credible evidence that he is entitled to temporary total disability benefits beginning December 8, 2002, and continuing through a date yet to be determined. Therefore, we find that the decision of the Administrative Law Judge must be, and hereby is, reversed.

At the time of his admittedly compensable injury, the claimant worked as a shipping clerk for the respondent employer. As such, it was the claimant's job to inventory pallets of frozen chicken as they were taken from a freezer to be loaded into a truck. On November 13, 2002, the claimant was pulling a pallet of frozen chickens into a truck when the pallet became stuck. While the claimant was attempting to dislodge the pallet, he slipped and fell, injuring his head and back. The claimant was taken by ambulance to a nearby emergency room where he was treated and released.

Emergency room x-rays revealed "no fracture[s] or malalignment[s]," but did show signs of disc degeneration at L5, S1. MRI's of the claimant's cervical and lumbar spine taken on November 22, 2002, confirmed these earlier

findings. On November 14, 2002, the day after his initial emergency treatment, the claimant was seen by a company authorized physician, Dr. Redding, for his injuries resulting from his accident of the previous day. Dr. Redding examined the claimant and released him to light duty for one week. On November 21, 2002, Dr. Redding examined the claimant and again released him to restricted work duty for two additional weeks. On November 25, 2002, the claimant sought treatment with his family doctor, Dr. Starnes, who recommended that the claimant attempt to continue to work. Aside from the claimant's obvious injuries, Dr. Starnes assessed the claimant with depression/anxiety, insomnia, hypertension (high blood pressure), esophageal reflux, coronary artery disease, and chronic obstructive pulmonary disease. (Emphasis added) The claimant continued to seek treatment with Dr. Starnes for complaints of increasing pain, and finally, on December 4, 2002, Dr. Starnes took the claimant off work for one week. In his clinic report of that visit, Dr. Starnes noted, "States he [claimant] went to work and it didn't work." By agreement of the parties, neurosurgeon, Jim J. Moore, made an initial assessment of the claimant's condition in early February of 2003, and then

follow-up assessments in July, September, and October of 2003. Doctor Moore diagnosed the claimant with back strain/sprain, for which he treated the claimant conservatively. At the time of his hearing in November of 2003, the claimant stated that the treatment he has received has provided him with limited relief from his persistent pain.

At issue here is not whether the claimant sustained a compensable injury while working for the respondent employer. But rather, the question is whether the claimant has reached the end of his healing period, and whether he has been totally incapacitated from earning wages within the time for which he claims temporary total disability benefits. The respondent employer accepted the compensability of this claim and paid all reasonable and necessary medical expenses associated therewith. The evidence in this claim does not support a finding that the claimant is entitled to temporary total disability benefits for the time awarded, for the following reasons.

First, temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. 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. 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." 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 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 question of when the healing period has ended is a factual determination for the Commission.

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). 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 (citing Arkansas State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981); See also, Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

Although a lack of objective medical evidence makes it questionable when the claimant's healing period ended, the evidence in this claim clearly demonstrates that the claimant has not suffered a total incapacity to earn wages since the date of his compensable injury. Upon returning to work the day after his compensable injury, the claimant's duties were restricted to that of filling out paperwork, i.e, invoices and Bills of Lading, which was a regular part of his job. According to the claimant's dock supervisor, Janice Stubbs, the claimant's job description did not include activities such as lifting, pulling, or pushing, so these activities were not an issue. However, Ms. Stubbs testified that she was instructed by her supervisor that the claimant was not to engage in certain other activities that were regular to his duties, such as

"running a pallet jack, loading trucks," or "moving trailers.") As seen in the following testimony, the claimant stated that his having to stand for prolonged periods of time was the *only* problematic part of his restricted duties, and he denied being furnished sitting accommodations, i.e., stool, by the respondent employer. The claimant admitted, however, that he has always been able to perform certain aspects of his job.

Q. Okay. So you're saying - it's your testimony that you had to stand up and write out these Bills of Lading and these invoices?

A. Yes, sir.

Q. So, the only problem was the problem of standing?

A. Yes, sir.

Q. Could you fill out those Bills of Lading now?

A. I could fill them out, yes, sir.

Q. And the invoices?

A. Yes, sir.

Q. And have you been able to do that for the past several months?

A. I was able to do it the day I went back on light-duty work.

Q. Okay. last November?

A. Yes.

Q. And that was the job assigned to you?

A. Yes, sir.

Q. I noticed in Dr. Redding's second report that was dated I believe around November 21 that the only restriction he placed on you was no sitting for more than ten to eleven hours?

A. Yes, that's what I understood.

Q. Okay. So, he didn't put any restrictions on you about standing, did he?

A. No, sir.

...

Q. If I'm following your testimony here today, if you were back writing invoices and Bills of Lading like you were in November after you hurt yourself - - ... - - you could do that today?

A. Yes, sir, if I had a place to sit down.

Q. All you'd have to have is a place to sit, be able to alternate between sitting and standing?

A. Yes, sir.

The claimant contradicted his own testimony, and the testimony of Ms. Stubbs, when he later testified that he was unable to return to light duty because of certain physical requirements of his job other than standing, such

as walking, pushing, and loading. The claimant also testified that there was no one available to help him with the more physical requirements of his job. Ms. Stubbs testimony, however, contradicted that of the claimant's, as follows:

Q. Tell us what light duty he [claimant] was given when he came back to work.

A. He was to fill out all the paperwork only on the shipping dock, which was part of his job. But he -- he just filled out invoices and Bill of Lading and such as that.

Q Was he to move any pallets of chicken?

A. No, sir.

Q. Was he to go up and down any stairs?

A. No, sir.

...

Q. And would he have had to do any lifting in that job?

A. No, sir.

Q. Any pulling, pushing?

A. No, sir.

Ms. Stubbs further testified that the pallets of frozen chicken were brought by someone other than the claimant from the coolers to the shipping docks. Therefore,

she claimed that the claimant's duties involved minimal walking. Ms. Stubbs also stated that the claimant was allowed to alternate between sitting and standing, and that the company had provided the claimant with a stool. Ms. Stubbs stated that the claimant left work, without explanation, mid-shift on the evening of December 4, 2002, after having been written up for labeling mistakes, after which time he did not return to his job. Ms. Stubbs also stated that she instructed the claimant to see the nurse, LaDonna Gilmer, before leaving, which he did not do.

A "night nurse" for the respondent employer, LaDonna Gilmer, confirmed in her testimony that the claimant had not seen her on the evening of December 4, 2002, prior to leaving work early. Ms. Gilmer further testified that the claimant presented the respondent employer with a release from Dr. Starnes to return to work in July of 2003, but that the respondent employer required a doctor's release concerning the claimant's *heart* problems before he could be allowed to return to work. Ms. Gilmer was unaware whether the claimant ever provided the respondent employer with such a release. Ms. Gilmer's testimony contradicted statements by the claimant indicating that Dr. Starnes' release concerned

only his heart condition. Ms Gilmer testified that she was unaware at the time that the claimant was being treated by Dr. Starnes, and that the claimant did not present slips or notes to her from Dr. Starnes or Dr. Moore regarding his inability to perform restricted duty.

The record is void of evidence which indicates that Dr. Reddy ever opined that the claimant was totally disabled from his back injury. Moreover, the record reveals that upon his initial examination of the claimant, Dr. Starnes recommended that the claimant "try to continue his job." It was not until December 4, 2002, that Dr. Starnes took the claimant off of work completely pending his visit with Dr. Moore. December 4th was also the day that the claimant walked off of his job early without explanation.

On February 5, 2003, the claimant was examined and assessed by Dr. Moore. In his summary of that examination, Dr. Moore made the following observations:

I feel the injury is primarily soft tissue superimposed on pre-existent changes. I do not see evidence that would support a disk herniation nor is there any evidence that would suggest an upper motor neuron or pyramidal tract involvement although the reflexes are brisk.

Doctor Moore diagnosed the claimant with sacroiliac sprain/strain, and recommended a TENS unit, Amitriptyline (to increase his pain threshold), nonsteroidal anti-inflammatories, and possible trigger point injections. Doctor Moore felt that the claimant should have a bone scan to "exclude any other pathology," but he felt that further investigative studies were inappropriate at that time. In his final statements concerning the claimant's condition at that time, Dr. Moore wrote:

Although it has been almost three months since the patient's injury I still feel that the likelihood of him resolving this without other more aggressive steps is likely to be good.

Doctor Moore did not indicate in his clinic note of February 5th, whether he thought the claimant could/should return to work at that time. Included in Dr. Moore's clinic notes from his evaluation of the claimant on July 16, 2003, are the following comments:

The findings today are essentially as were developed on initial evaluation and do confirm my recommendations which have been made. ... I do not believe there is an association to the primary injury and the headaches he is experiencing. I do not believe the patient has reached MMI.

Furthermore I believe that he would be in a situation that he should not have worked since his last evaluation given the findings as outlined on initial evaluation as well as today.

Doctor Moore's diagnosis from the July 16th evaluation was that of "post-traumatic scaroiliac sprain/strain." Doctor Moore administered trigger point injections during this visit, which reportedly gave the claimant "excellent relief" for a period of about nine days. In his clinic note of September 3, 2003, Dr. Moore commented that the RS4 device was also helping alleviate the claimant's symptoms, and should be continued. On October 28, 2003, Dr. Moore stated that the claimant's leg pain was "much improved." Doctor Moore noted that the claimant had "exhausted his medication" by the time of that visit, so he reissued the claimant Elavil in an increased amount. Doctor Moore recommended that the claimant increase his activities to tolerance, and he stated that he may repeat the trigger point injection "one final time."

Although Dr. Moore had not assessed the claimant at MMI as of his July 16, 2003, examination, Dr. Starnes had released the claimant to return to work without restrictions

approximately one week earlier (July 7, 2003). Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages at any time following his compensable injury.

Moreover, the evidence in this claim does not support a finding that the claimant is entitled to temporary total disability benefits for the time awarded due to credibility issues. It is the exclusive function of the Commission to determine the credibility of the witness and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W. 2d 626 (1994).

Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W. 2d 603 (1995). The findings of the ALJ on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W. 2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W. 2d 275 (1987). Finally, the Commission is not bound by a doctor's opinion which is based

largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

The claimant's testimony concerning his ability to work after his compensable injury of November 13, 2002, is equivocal, and it often contradicts that of other, apparently credible, witnesses. For instance, the claimant stated that the pain associated with his back sprain prevented him from standing for long periods of time, thus making it impossible for him to stand and fill out paperwork. A restriction placed on the claimant by Dr. Redding, however, was "no *sitting* for more than ten to eleven hours." (Emphasis added) Moreover, the claimant admitted that the only thing which has prevented him, at any time, from performing his work duties is his not being allowed to alternate between sitting and standing. Furthermore, the claimant denied that the company had provided him with a stool. The claimant's supervisor, Ms. Stubbs, testified that the claimant was allowed to alternate between sitting and standing, and that the company had provided the claimant with a stool. It is apparent from

the evidence presented that respondent employer fulfilled its obligation to the claimant by providing restricted activities and accommodations which allowed him to safely continue to fulfill his work duties after his compensable injury.

Finally, although the Administrative Law Judge assigned greater weight to the opinion of Dr. Moore over the opinions of Dr. Redding and Dr. Starnes, the record reveals that both of these physicians believed that the claimant could return to light duty work immediately following his compensable injury. Furthermore, Dr. Starnes released the claimant to return to full duty on July 7, 2003. Although Dr. Moore opined that the claimant had not reached MMI as of July 16, 2003, Dr. Moore offered no objective indication as to when the claimant might be expected to reach MMI, or what restrictions should be placed upon the claimant in the interim. Finally, rather than finding that the claimant had sustained a more serious type of injury, Dr. Moore's examinations and evaluations merely confirmed that the claimant had sustained a soft-tissue injury. In his clinic note from his initial evaluation of the claimant, Dr. Moore stated that it was likely that the claimant's back sprain

would resolve "without other more aggressive steps." This statement by Dr. Moore, combined with the credible medical evidence in this claim would lead reasonable minds to believe that the claimant's underlying condition had stabilized by that time, and that his follow-up treatment was only necessary in order to address his persistent pain.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the credible evidence that he has been totally incapacitated from earning wages during his healing period, regardless of when his healing period may have actually ended.

Furthermore, based upon the credible medical evidence presented in this claim, including statements by Dr. Moore, it would seem more likely than not that the claimant's underlying condition, namely a sacroiliac sprain/strain, had become stable and nothing else in the form of treatment would improve that condition, no later than February 5, 2003. Accordingly, we find that the claimant has failed to meet the statutory requirements necessary in order for temporary total disability benefits to be awarded, and all such benefits, therefore, should be denied.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I respectfully dissent from the Majority opinion. I find that the Administrative Law Judge correctly applied the law, reviewed the evidence of record and did not err when he gave more weight to Dr. Moore's opinion than the opinion of Dr. Reddy.

Claimant credibly testified that he cannot perform the light duty position offered by Respondent and that he hasn't been released to work at all by Dr. Jim Moore since he has not reach maximum medical improvement Specifically, on July 16, 2003, Dr. Moore stated:

I do not believe the patient has reached MMI. He has had no active therapy per se. Furthermore, I believe that he would be in a situation that he should not have worked since his last

evaluation given the findings as outlined on initial evaluation as well as today.

Likewise, Claimant's last office note by Dr. Moore, dated October 28, 2003, stated that he would continue the Claimant's medication and the use of an RS device. Claimant continued to be treated by Dr. Moore until the date of his hearing before the Administrative Law Judge and testified that he had future appointments with Dr. Moore. I find that the Claimant's testimony and Dr. Moore's medical opinions are credible and that Claimant has established by a preponderance of the evidence that he has remained incapacitated from working and is still within his healing period from December 8, 2002 through the hearing date of November 12, 2003 and continuing to a date to be determined.

SHELBY W. TURNER, Commissioner