

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102602

MARK BENZ, EMPLOYEE	CLAIMANT
DEMPSEY FILM GROUP, INC., EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 9, 2005

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

Claimant represented by HONORABLE SILAS H. BREWER, JR., Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and reversed in part.

OPINION AND ORDER

Respondent appeals and claimant cross-appeals decision of the Administrative Law Judge filed February 25, 2004. In said Opinion the Administrative Law Judge made the following relevant findings of fact and conclusions of law:

1. The claimant's healing period ended on or before January 17, 2002. Even in the event claimant's healing period extended beyond January 17, 2002, the claimant failed to prove, by a preponderance of the evidence, that he is entitled to temporary total disability benefits after January 17, 2002.

2. The claimant has shown, by a preponderance of the evidence, that he is entitled to temporary total disability benefits for the period beginning May 15, 2001, and continuing through January 17, 2002.

5. The claimant has failed to prove that he is entitled to additional benefits pursuant to Ark. Code Ann. § 11-9-505.

It is from the award of temporary total disability benefits that the respondents appeal. Furthermore, the respondents specifically agree that the claimant is not eligible for additional compensation as set forth in Ark. Code Ann. § 11-9-505.

Based upon a de novo review of the entire record, we find that the Administrative Law Judge correctly found that the claimant has failed to prove that he is entitled to additional benefits pursuant to Ark. Code Ann. § 11-9-505, and the denial of benefits pursuant thereto should be affirmed. However, we find that the Administrative Law Judge has erroneously found that the claimant is entitled to temporary total disability benefits as described above, and these benefits should therefore be denied.

The claimant sustained an admittedly compensable injury, namely a muscle strain, to his lower back on February 22, 2001, while employed as a camera-man for the respondent employer. The claim has been accepted as compensable by the respondents, and the claimant has received all appropriate and necessary medical services for the treatment of his condition. In addition, the claimant has received temporary total disability benefits for that time during which he was unable to work due to his injury. Specifically, the claimant was paid temporary total disability benefits through April 9, 2001, at which time he returned to work with physical limitations. On May 14, 2001, the claimant's employment with the respondent employer was terminated due to verifiably non-injury related reasons.

During the course of his medical treatment, Dr. Kenneth Johnston was the claimant's primary treating physician. As such, Dr. Johnston conducted numerous diagnostic studies and made referrals to various specialists, who in turn conducted their own diagnostic studies. All have consistently diagnosed the claimant with lumbar strain, for which the claimant received conservative

treatment including anti-inflammatories, muscle relaxers, and physical therapy.

The claimant has a notable history of pre-existing back injuries including a flexion rotation injury sustained in 1993 while the claimant was serving in the military, for which he was assigned a 40% service-related disability through the veteran's administration. After his service-related injury, the claimant suffered "mild intermittent symptoms in his back" up until he sustained a second back injury in December of 1997. In a clinic report dated March 30, 1998, the claimant's treating physician, Dr. Robert Porter, noted that the claimant had sustained a flexion rotation injury to his back in the third week of December, 1997, while working as a camera-man for another local television station. Dr. Porter diagnosed the claimant with lumbar strain, degenerative disc disease, and intermittent right L5 nerve root inflammation, for which he treated the claimant with anti-inflammatories. Doctor Porter noted that X-rays of the claimant's lumbar spine revealed mild lumbar scoliosis convexed to the left.

In early February of 1999, the claimant presented to Dr. Robert Kennedy with complaints of severe back pain.

In a letter dated February 25, 1999, Dr. Kennedy commented that the claimant had injured his back during the third week of December 1997 in a motor vehicle accident, which is in contradiction to Dr. Porter's account of the claimant's injury during that particular time. A subsequent MRI of the claimant's lumbar spine showed no abnormalities, however the claimant continued to complain of worsening symptoms. On January 7, 2000, the claimant presented to Dr. Kennedy with a work-related back strain from turning approximately 45° with a 35 pound camera on his shoulders. The claimant was given a steroid injection, prescribed anti-inflammatories, and restricted from heavy lifting. At that time, Dr. Kennedy discussed with the claimant the possibility of seeing a chronic pain specialist.

In February of 2001, the claimant again strained his back from reportedly lifting heavy camera equipment while working for the respondent employer. Diagnostic studies conducted after the claimant's compensable injury in February of 2001, continued to show normal results. On March 20, 2001, Dr. William Blankenship provided the claimant with a second opinion concerning his condition. Dr. Blankenship reported the following:

His past history is significant in that he is service connected for similar problems with his back with radiation to his lower extremities. ... In addition, he also injured his back 1 ½ years ago and was treated by Dr. Robert Porter with the same areas of complaints and same symptoms. ... According to this man, he has never completely gotten over any of his symptoms beginning with the military problems up to and including the present complaints.

Dr. Kenneth Johnston released the claimant to return to work on April 5, 2001. On May 21, 2001, Dr. Safman wrote of the claimant:

He has a prior history of a lower lumbar strain. This was a worker's comp injury, but he reports that this resolved.

On May 23, 2001, the claimant referred himself for an MHC diagnostic assessment at Central Arkansas HCS due to persistent depressive and anxiety related symptoms. The results of this study are detailed and informative. The report begins as follows:

[The claimant] is a 32 year old DIVORCED WHITE MALE NOT OF HISPANIC ORIGIN who presented to the clinic today on a self-referral with the chief complaint of depressive symptoms that have persisted for the past year. Furthermore, his symptoms have worsened in the past few weeks. Although he attributes his

current episode of depression to chronic lower back pain, he states that because his employer fired him within the last week for working insufficient hours, he has been feeling worse lately. Consequently, [his] ... marijuana usage has increased from occasional usage to daily usage in the last few weeks. He says that he started smoking marijuana to help with his back pain. The pt. states that he injured his back while in the Air Force during autumn of '93 (24yo at that time) when he was trying to keep a C5 tire assembly from falling. In the process, he severely strained his lower back. Since that time he has exacerbated his back injury by falling twice and lifting loads that were too heavy. He says that he has been told by his private doctor who did an MRI that he may have suffered a lacerated disc. Currently, he is seeing a pain specialist.

In November of 2001, the claimant was treated at the VA Medical Center (VA) for severe back and hip pain. A clinic note from that visit indicates that the claimant again attributed his being fired from his job due to his chronic back pain. X-rays taken in December of 2001 at the VA showed normal findings of the claimant's lumbosacral spine. During his examination on December 4, 2001, the claimant indicated that he was interested in surgery to alleviate his symptoms, should it be clinically warranted.

Surgery has never been a recommended treatment option for this claimant as was confirmed by an MRI taken in March of 2002.

Exacerbating his physical condition has been the claimant's recurrent problems with depression, as is evidenced by documentation from the VA throughout the beginning of 2002. By March of 2002, the claimant had begun to exhibit signs of frustration and anger to medical providers at the VA where he continued to be treated for back pain. Despite continuing physical and drug therapy, the claimant showed no subjective improvement in his condition. In July of 2002, the claimant was referred to a chiropractor in order to help assist him in getting "back in the work force." Subsequently, the claimant reported that the chiropractor "made things worse." In November of 2002, the claimant consulted with a neurosurgeon, Dr. Anderson L. Benson, who recommended that he see a pain specialist. Despite the claimant's continuing complaints of debilitating pain, diagnostic studies continued to reveal no abnormalities in the claimant's lumbar spine. On January 20, 2003, the claimant was examined by Wayne L. Bruffett of the

Arkansas Spine Center, who made the following comments concerning the claimant's condition:

Based on his paperwork and his description of things today, I think there is a significant emotional component to his injury. I have told him that based on objective data I think he sustained a lumbar strain and is certainly at a point of MMI. In other words, I think he is probably about as good as he is going to get.

Doctor Bruffett did not view the claimant as a surgical candidate, he did not consider further testing to be cost effective, and he recommended an aggressive exercise program in order for the claimant to "try to get back to doing his job... ." Finally, Dr. Bruffett stated, "I have told him that he needs to accept this as the way things are going to be. I certainly would have hope[d] that he would improve but I think two years is adequate amount of time to recover from the accident that he describes."

Despite his former back injuries, one which resulted in a 40% disability rating, the respondents accepted the compensability of this claim and paid all reasonable and necessary medical expenses associated therewith. In addition, the respondents paid temporary total

disability benefits to the claimant for that time during which he was totally incapacitated from working following his compensable injury. The claimant now asserts that he is entitled to additional temporary total disability benefits from that date that his employment was terminated by the respondent employer through the time at which the claimant's primary physician released him from his care. We find that 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.

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)

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. Objective testing done soon after the claimant was injured, and subsequent diagnostic testing performed roughly over a two year period of time, produced no objective medical evidence to substantiate that the claimant's injury was anything other than a lumbar strain. Moreover, after comprehensive treatment from several competent physicians, the claimant was released to work with lifting restrictions on April 5, 2001. Furthermore, upon his return to work, the respondent employer appropriately accommodated the claimant's restrictions by switching him to a less physically demanding job. For reasons totally unrelated to the claimant's back injury, the claimant's employment with the respondent employer was terminated on May 14, 2001, approximately one month after he returned to work. In his testimony during the hearing of January 12, 2004, the claimant admitted that he had been hired by the station primarily to work on one major account, and that his position ended when the contract on that account ended. The testimony of chief office manager, Paul Clay Halter Dempsey, confirmed that the claimant's employment ended with her company due to the closing of the account for which he had

been hired to work on. The evidence clearly demonstrates that the claimant was able to work as of April 5, 2001, and did so, and was therefore not totally incapacitated from earning wages after his compensable injury.

It is true that the claimant continued in the care of Dr. Johnston after his employment was terminated with the respondent employer. Furthermore, the claimant testified that he has been offered subsequent employment within the media community, primarily in the form of freelance work, which he says that he has been unable to accept due to his back condition. However, the objective medical evidence presented in this claim does not support the contention that the claimant has been totally incapacitated to work since his injury - only that he should work with certain restrictions. In support of his contention that he was incapacitated from working during that time claimed, or at least unable to return to the same type of work which he performed at the time of his injury, the claimant relies heavily upon statements made by physical medicine and rehabilitation doctor, Dr. John Giusto, who treated him in North Carolina between February and June of 2003. Doctor Giusto's testimony, which was taken by telephonic

deposition on January 8, 2004, is unpersuasive primarily because Dr. Giusto was relying on his memory, as opposed to medical documentation, regarding his treatment of the claimant. Moreover, Dr. Giusto opined that the claimant was unable to work due to a newly discovered "up-slipped" pelvic condition which the doctor assumed was caused from his injury of February 2001. However, in forming this opinion, Dr. Giusto admitted that he relied heavily on history provided to him by the claimant rather than objective medical findings. The claimant proved to be a poor historian in that he neglected to tell Dr. Giusto about the prior back injuries he had sustained, including his military related injury for which he was assigned a significant disability rating. Furthermore, the "objective measurement" used by Dr. Giusto to determine that the claimant was unable to work after his compensable injury is found by its very description to be lacking. Doctor Giusto described it as follows:

The objective - now, if you want to talk about objective findings, the objective finding was did he or did he not work, be able to work. He worked for like three days or was he working for a number of months or a year at a job? If he was doing it, then he was able to do

it, period. ... If he was doing it, that means that he could do it. That's functional objective measurements.

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). Moreover, the Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. CDI Contractors v. McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993). Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). Doctor Giusto's credentials are not challenged in this claim, but for the above stated reasons his medical opinion is of little probative value. Furthermore, although there is ample subjective evidence presented in this claim to support that the claimant continued to experience chronic pain after his compensable

injury, no credible evidence is presented here that proves the claimant's underlying condition had not become stable by the time he was released to return to work in early April of 2001. On the contrary, the results of all diagnostic testing conducted after the claimant's compensable injury have been normal. Even Dr. Johnston could ultimately offer no plausible objective medical reason for the claimant's reportedly worsening symptoms. Furthermore, the claimant worked until such time as his position was terminated for reasons unrelated to his back condition. Although the claimant contends that he was in too much pain to work thereafter, evidence reveals that he was also severely and chronically depressed during that time. The "emotional component" of the claimant's condition most assuredly affected his physical symptoms. Finally, omissions and inconsistencies in the claimant's statements to medical providers over the course of his treatment, combined with other factors such as his psychological component and his admittedly increased use of a mind-altering drug during that time, cast serious doubt upon the claimant's credibility on the witness stand or otherwise.

For all of the above stated reasons, we find that the claimant has failed to establish by a preponderance of the evidence that he is entitled to additional temporary total disability benefits, and an award of such benefits should therefore be denied. Accordingly, we find that the decision of the Administrative Law Judge should be is hereby is affirmed in part and reversed in part.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the Majority opinion that Claimant has failed to prove, by a preponderance of the evidence, that he is entitled to temporary total disability benefits for the period beginning May 15, 2001, continuing through January 17, 2002 and that he is not entitled to additional benefits pursuant to Ark. Code. Ann. § 11-9-505.

Temporary Total Disability Benefits

I find that the Administrative Law Judge was correct in his finding that Claimant is entitled to temporary total disability benefits for the period beginning May 15, 2001 through January 17, 2002.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996); Carroll General Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

Claimant was initially seen by his family physician, Dr. Robert Kennedy. He was then sent to Dr. Kenneth Johnston by Respondent's insurance carrier. Dr. Johnston remained Claimant's physician beginning in February of 2001 and continuing through January 17, 2002.

On several occasions during his tenure as Claimant's primary care physician, Dr. Johnston opined that

Claimant was not able to work during this time period. For example, on August 13, 2001, Dr. Johnston reported that Claimant was having ongoing numbness and low back pressure and he advised Claimant to remain off work. He opined:

It is my opinion that the patient is disabled from his usual occupation as a television cameraman. He is unable to manipulate or lift any items greater than five pounds. He is unable to do any stooping or bending, and is, in fact, impaired in his activities of daily living in this regard.

On October 22, 2001, Dr. Johnston stated:

...Patient is still unable to do any meaningful activity as far as stooping or bending, twisting or lifting.

On December 18, 2001:

...The patient is still unable to work at the previous profession of being a camera man in the video television industry.

Claimant ceased treatment with Dr. Johnston on January 17, 2002. At that time, Dr. Johnston had exhausted all conservative care remedies. However, Claimant's pain did not subside.

Based on my review of the record and Dr. Johnston's opinion, I find that Claimant was unable to work during this time period and is therefore entitled to temporary total disability benefits from May 15, 2001 through January 17, 2002.

Claimant's Entitlement to Benefits For Respondent's

Violation of Ark. Code Ann. § 11-9-505

I respectfully dissent from the Majority's finding that Claimant failed to prove that he is entitled to benefits for his employer's violation of § 11-9-505. The Respondent testified that Claimant was terminated due to a cutback of personnel. However, there is no evidentiary support that Claimant was terminated due to cutbacks. In fact, the facts support the inference that Claimant was terminated for reporting a second back injury.

After returning to work for Respondent and two days prior to his termination, Claimant re-injured his back while working a video shoot. Claimant's injury occurred when he leaned forward to perform a camera shoot and his lower right back "went out," causing him to fall to the floor. Claimant worked the next day, Thursday, but was unable to work on Friday. Claimant made an appointment with his primary care

physician, Dr. Ken Johnston for Monday morning. Claimant reported the incident to Dick Dempsey, the owner, on Monday, May 14th, between 9:00 and 10:00 a.m. Later that same day, Paula Dempsey, the office manager, informed Claimant that his services were no longer required because they had lost the Arkansas Game and Fish Commission account some six months earlier. Respondent admitted on cross-examination that she did not notify Claimant when he returned to work on April 9, 2001, that he was no longer needed because the contract had been renewed, but that she allowed him to return to limited duties for five weeks. Ms. Dempsey stated that she would have terminated the Claimant regardless of his injury because work was not available. However, she did not terminate him during the six months prior when she knew she had lost the Game and Fish account.

Based on the foregoing, I find that the Claimant has proven by a preponderance of the evidence that he is entitled to benefits under Ark. Code Ann. § 11-9-505.

SHELBY W. TURNER, Commissioner