

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214260

HEATHER BABB, EMPLOYEE	CLAIMANT
DELTA PLASTICS, INC., EMPLOYER	RESPONDENT
FIREMAN'S FUND INSURANCE COMPANY, CARRIER	RESPONDENT

**OPINION FILED MAY 6, 2005**

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

Claimant represented by HONORABLE RICHARD S. MUSE, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE WENDY S. WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal the decision by the Administrative Law Judge finding that the claimant has proven by the preponderance of the evidence that she was entitled to additional medical treatment and awarding temporary total disability benefits for the period of February 27, 2002, through a date yet to be determined. Based upon our de novo review of the record, we reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable back injury on October 5, 2001. The claimant was working as

a machine operator when she bent over to make some cardboard boxes and stood up and felt a pop in her low back. The respondents accepted the injury as compensable. Following the injury, the claimant continued to work in a light duty capacity. The claimant was able to sit down and stand up as she was comfortable. The claimant worked light duty from October 2001 through February 27, 2002.

On the day of the incident, the claimant sought medical treatment from Dr. Puen, who diagnosed the claimant with sciatica/lower back pain. He recommended rest, a back brace and prescription medication. On October 8, 2001, the claimant was seen by Dr. Richard Finch who recommended an MRI of the claimant's lumbar spine and also prescribed medication. Dr. Finch ultimately referred the claimant to Dr. Pace, but he would not treat the claimant because it was a workers' compensation injury. The claimant was then referred to Dr. Bruce Smith who first treated the claimant on October 8, 2001. Dr. Smith opined that the claimant suffered from an L4-L5 disc defect and performed surgery on April 2, 2002.

Dr. Smith failed to find the herniated disc at the L4-5 level but did find some post operative scarring. The

claimant had undergone a laminectomy at the same level in 1994 as a result of an injury that was not work related. Dr. Smith continued to treat the claimant for continued complaints of pain after the surgery he performed and recommended a second surgery.

The claimant then went to see Dr. Jim Moore for a second opinion. Dr. Moore referred the claimant for EMG/NCV testing of both lower extremities and on June 25, 2002, the claimant underwent these tests which yielded normal results. Dr. Moore recommended an L4 nerve block which was performed on June 27, 2002. Dr. Moore stated that the claimant did not get any relief as a result of this injection and he recommended a TENS unit. Dr. Moore opined that the claimant was not a candidate for surgery at the L3-4 level. In August of 2002, Dr. Moore recommended a functional capacity evaluation which yielded the results that the claimant was able to perform light work. On September 5, 2002, Dr. Moore recommended a second EMG/NCV test. This test yielded normal results once again.

On November 19, 2002, Dr. Moore opined that the claimant had reached maximum medical improvement, that she could return to light duty activity, and assessed her with a

10% permanent impairment rating. The respondents paid the 10% permanent impairment rating and ceased paying temporary total disability benefits as of November 19, 2002.

The claimant requested a change of physician and the Commission appointed Dr. Andrew Prychodko. Dr. Prychodko first saw the claimant on March 13, 2003. On May 22, 2003, Dr. Prychodko recommended a follow up MRI, physical therapy and pool therapy. On January 14, 2004, Dr. Prychodko opined that the claimant was unable to work until March 26, 2004, and he referred the claimant to Dr. Thomas Hart for pain management. The respondents have controverted any treatment for Dr. Hart and have also controverted any permanent temporary total disability benefits after November 19, 2002.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). 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). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

Dr. Prychodko has diagnosed the claimant with arachnoiditis. Dr. Moore has also diagnosed the claimant with this condition. Arachnoiditis is a pain disorder which is caused by the inflammation of the arachnoid, which is one of the membranes that surround and protect the nerves of the spinal cord. The arachnoid becomes inflamed as a result of irritation from chemicals, infection from bacteria or viruses, as the result of direct injury to the spine, chronic compression of spinal nerves or complications from spinal surgery or other invasive spinal procedures. The inflammation can sometimes lead to the formation of scar tissue and adhesions which cause the spinal nerves to stick together. According to the National Institute of Neurological Disorders and Strokes, "if arachnoiditis begins to interfere with the function of one or more of these

nerves, it can cause a number of symptoms, including numbness, tingling, and a characteristic stinging and burning pain in the lower back or legs. Arachnoiditis has no consistent pattern of symptoms, but it more frequently affects the nerves that supply the lower back and legs."

The medical records are void of any evidence that attributed the claimant's arachnoiditis to be causally related to the claimant's compensable injury. Although Dr. Prychodko initially testified that he thought that the surgery performed by Dr. Smith in April of 2002 was the cause of the claimant's arachnoiditis, Dr. Prychodko retracted this statement in his final opinion. During his deposition, he testified that the dura was not cut during the April 2002 surgery, therefore this was not the cause of the claimant's arachnoiditis. He does not know what the cause was and testified as follows:

Q. And this [April 2, 2002] report does not state anywhere that the dura was nicked or cut?

A. Correct, so I would have to, you know, retract that. When I read it before, I just sort of saw that as dural defect, but I have to back off on that.

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Q. And is it fair to say that you can't say with any reasonable degree of medical certainty that the cause of that arachnoiditis was that surgery in April of 2002?

A. I can't say with a reasonable degree of medical certainty, no. Based on the operative report and based on the information I have, I can't say that, no.

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Q. And is it fair to say that in this particular case with Ms. Babb, you really don't know with any medical probability the cause of her arachnoiditis?

A. The specific cause right now, I don't know the cause. I know kind of the time, but - - the time when it arose, but I don't know specifically what the cause is.

In reviewing Dr. Prychodko's deposition in whole, it is clear that he does not believe that the arachnoiditis was caused by the April of 2002 surgery. It is clear that he has absolutely no idea what the cause is of the claimant's condition. Therefore, the referral to Dr. Hart for pain management for the arachnoiditis is not reasonable and necessary medical treatment in connection with the claimant's compensable injury.

Dr. Prychodko testified that there is no cure for the arachnoiditis and that surgery was not an option. He stated, "there's not a whole lot of good solutions to arachnoiditis." Although Dr. Prychodko is the physician who referred the claimant to Dr. Hart for treatment for the arachnoiditis, even Dr. Prychodko questioned whether the treatment will be of any benefit:

There may be some kind of, you know, an injection, you know, one of those interventional pain management injections. There may be one or another of those that might help, but for the most part, they don't help.

For the arachnoiditis, I don't know that there would be anything else that Dr. Hart would recommend. You know, I would like to believe that in 10 years or 15 years, you know, laser surgical techniques or procedures will reach a certain new threshold where something else might be considered, might be done for somebody with her condition. But that's - - you know, that's just a whole pie in the sky thing. But for the arachnoiditis, I don't believe that there's anything further that can be done.

Since the referral by Dr. Prychodko to Dr. Hart is only for the treatment of the claimant's arachnoiditis and Dr. Prychodko testified that there is no cure/treatment for

arachnoiditis, clearly, this referral is not for reasonable and necessary medical treatment for the claimant's compensable injury. After reviewing the evidence in the record, we cannot find that the claimant's condition of arachnoiditis is causally related to her compensable injury. Accordingly, the referral to Dr. Thomas Hart is not reasonable and necessary medical treatment and is not related to the claimant's compensable injury.

The claimant is also requesting temporary total disability benefits. 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. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. 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 & Transp. Dept. 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 (citing Arkansas State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

The Administrative Law Judge awarded the claimant temporary total disability benefits beginning on February 27, 2002, to a date yet to be determined. The respondents paid the claimant temporary total disability benefits from February 27, 2002, through November 19, 2002, the date she was released to return to light duty work by Dr. Moore. That period is not in controversy. The claimant was merely requesting additional temporary total disability benefits from November 19, 2002, through a date yet to be determined.

After reviewing the evidence, we cannot find that the claimant has established that she remained in her healing period beyond November 19, 2002, and therefore she is not entitled to any additional temporary total disability

benefits. It is on this date that the claimant was assessed as having reached maximum medical improvement and received a 10% permanent impairment rating by Dr. Moore. The respondents accepted this rating and paid it accordingly.

Dr. Prychodko testified that he agreed with the 10% rating that was assessed by Dr. Moore. He also testified that the claimant had reached maximum medical improvement if no surgery was recommended and if interventional procedures considered are speculative. No doctor has recommended surgery for the claimant. Dr. Moore, on July 18, 2002, specifically stated that any aggressive approach at the L3-4 level would not be of any benefit to the claimant. Dr. Prychodko testified in his deposition several times that he did not recommend surgery for the claimant. Dr. Prychodko further testified: "I honestly do not feel - - I mean, I think she would be better off not getting any further surgery."

The record reflects that other interventional procedures for the claimant's conditions are speculative at best. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction

Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858

S.W.2d 125 (1993). The claimant's current condition is diagnosed as arachnoiditis. Interventional procedures, according to Dr. Prychodko, are speculative because there is no cure for her condition. Dr. Prychodko testified, "there really is no surgical cure" for arachnoiditis. Dr.

Prychodko stated:

Q. ...So you're saying that surgery is really not an option for that?

A. No.

Any recommendations Dr. Prychodko made about treating arachnoiditis were purely speculative:

There may be some kind of, you know, an injection, you know, one of those interventional pain management injections. There may be one or another of those that might help, but for the most part, they don't help.

And the point is to keep the patient off of narcotics, you know, maybe give them some kind of, you know, an antidepressant or whatever to help them with the, you know, adjustment that they have to the chronic pain. And there's not a whole lot of good solutions to arachnoiditis.

So, I mean, to answer your question, if we could get the medications that, you know, the basic medications, if we could at least get an opinion from an interventional pain management doc as far as what else there might be in terms of studies. But, I mean, this woman may be just stuck with arachnoiditis. I mean, she may just have to live with it and find a level of activity, whether it's sedentary or light or light-medium, or whatever, that she can do.

Clearly, the above medical evidence establishes that the claimant's healing period ended November 19, 2002, when the impairment rating of 10% was assessed by Dr. Moore. Dr. Prychodko agreed with that rating. Both Dr. Prychodko and Dr. Moore have opined that the claimant has reached maximum medical improvement. No surgery has been recommended by Dr. Moore or Dr. Prychodko and there is no cure or treatment for arachnoiditis. Although the claimant continues to suffer from pain due to the arachnoiditis, Arkansas law is clear that 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). The above cited medical evidence makes it clear that the

claimant's underlying condition had stabilized as of November 19, 2002. Therefore, the claimant's healing period ended at that time.

The claimant also cannot satisfy the second element required to prove that she is entitled to temporary total disability benefits. The claimant cannot establish that she is incapacitated from earning wages. On August 28, 2002, the claimant participated in a functional capacity evaluation (FCE) performed by Barbara Morris. The results of the FCE demonstrated that the claimant could work in the "light work" category. "Light work" is defined as "exerting up to 20 pounds force occasionally, and/or up to 10 pounds force frequently, and/or a negligible amount of force constantly to move objects." Dr. Moore, after reviewing the FCE results, concurred and released the claimant to return to light duty work on November 19, 2002. It should be noted that Dr. Moore, at the time he released the claimant to return to light duty work in November of 2002, was well aware of the arachnoiditis diagnosis as he was the first to make it. Despite diagnosing the claimant with arachnoiditis, Dr. Moore felt she was able to return to work at light duty.

Further, Dr. Prychodko first saw the claimant on March 3, 2003, and did not feel the need to take the claimant off work. Dr. Prychodko next saw the claimant on May 22, 2003, and again he failed to take the claimant off work. It was not until January 14, 2004, that Dr. Prychodko took the claimant off work. The off work slip from Dr. Prychodko is limited to the period of January 14, 2004 through March 25, 2004.

During his deposition, Dr. Prychodko was specifically asked about the claimant's ability to return to work. He acknowledged the results of the FCE and testified that he believed Ms. Morris was a very credible and very outstanding person in terms of conducting FCE's. He testified, "and I think she's, you know, highly regarded as far as, you know, performing these tests." He testified that he thought it was a valid test. Despite his confidence in the ability of Ms. Morris, Dr. Prychodko testified that he did not believe the claimant was able to work at the "light work" level. Instead, he testified she thought she could return to work at the lesser "sedentary work" category. When questioned about his opinion on this Dr. Prychodko

acknowledged that there is a discrepancy between his opinion and that of Ms. Morris. He stated in his deposition:

Q. Do you think it's odd that this person who did the examination chose light work instead of sedentary work, which is an even easier load, I would think? I mean it's not like - -

A. I think that's a good point.

Nevertheless, it is clear that all three experts opined that the claimant can return to some level of work. Dr. Moore and Ms. Morris both agreed that the claimant can return to "light work". Dr. Prychodko agreed that the claimant could return to "sedentary work."

Moreover, it was Dr. Prychodko whom testified about the importance of the claimant returning to work and that he would not object to her request to return to work if in fact she made one:

Q. If she came to you today and said, I really want to go back to work, I feel like I would be distracted and it would help my condition, would you prevent her from going back to work?

A. I don't think I would. I mean, I would want to know what she's getting herself into work wise. ...I would at least want to know what it is that she's talking about as far as going to work. But I agree with everything that you

said, you know, take her mind off of the pain and give her a livelihood and all that. To answer your question, absolutely, I think that that would be the most desirable thing, you know, objective or outcome to strive for.

Q. And if she came in wanting to do that, you wouldn't prevent her or object to her doing that as long as everything met with your criteria?

A. I think so, that's correct.

The medical evidence clearly establishes that the claimant had the capacity to return to work and earn wages. The respondent employer had light duty available and actually provided the claimant light duty work for four months following her injury. The claimant testified she was able to perform this light duty work. The facts are also undisputed that when the claimant was returned to work by Dr. Moore in November of 2002, she did not make any effort to return to work for the respondent employer. During the hearing, the claimant testified that even if the respondent employer had contacted her after she was returned to work at light duty and offered a light duty job, she would not have tried that job:

A. [Claimant] ...I haven't been in contact with Delta since I left work on February 27<sup>th</sup>.

Q. [Judge] You've not?

A. No.

Q. But you've not gotten any information from them saying, "hey, we've got a job; come back to light duty?"

A. No.

Q. Would you try that?

A. No.

Q. Even if they called you, you just don't think you're able to do that?

A. No.

The claimant's failure to attempt to try any type of work is indicative of the claimant's lack of motivation to return to work, despite having been released to do so. Dr. Moore, Ms. Morris, and Dr. Prychodko, have all opined that the claimant can perform either "light work" or "sedentary work." The claimant, on her own, has simply decided she can't and has not made any effort to try.

In our opinion, this does not satisfy the claimant's burden of proof. Moreover, the claimant's testimony is contrary to the physical activities the

claimant is able to perform. For example, the claimant is able to do the dishes, mop, sweep, drive 15 to 20 minutes at a time, take clothes out of the dryer, cook and shop for her family, and run if she must. The claimant has a 12<sup>th</sup> grade education, can read, write, and balance her checkbook. Even the claimant testified that in her current condition, she thought she could operate a daycare out of her home with older kids.

Therefore, after conducting a de novo review of the record, we find that the claimant was not incapacitated from earning wages after November 19, 2002. There are three expert opinions opining that the claimant can in fact return to work at some level of activity. The claimant has made no effort whatsoever to return to work for the respondent employer or anywhere else, and stated that even if they had offered her a job at light duty she would not have accepted it. The claimant is able to do quite a few physical activities and has even testified she could operate a daycare in her home if she had older kids. Accordingly, we find that the claimant is not incapacitated from earning wages and is not entitled to additional temporary total disability benefits.

Accordingly, for all the reasons set for herein,  
we reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.