

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308916

PHILLIP CLAIRDAY,
EMPLOYEE

CLAIMANT

THE LILLY COMPANY, INC.,
EMPLOYER

RESPONDENT

ROYAL SUN ALLIANCE INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 11, 2005

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

Claimant represented by HONORABLE JOHN BARTELT, Attorney at
Law, Jonesboro, Arkansas.

Respondents represented by HONORABLE JOHN D. WEBSTER,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed May 17, 2004. The administrative law judge
found that "In addition to prior periods, the claimant was
temporarily totally disabled for the period beginning April
24, 2003 and continuing through the end of his healing
period, a date yet to be determined." After reviewing the
entire record *de novo*, the Full Commission reverses the
opinion of the administrative law judge. The Full
Commission finds that the claimant did not prove he was

entitled to additional temporary total disability compensation after April 24, 2003.

I. HISTORY

Phillip Lee Clairday testified that he began working for the respondent-employer in September 1999. Mr. Clairday testified that he was a forklift technician, mechanic, and delivery driver. The parties stipulated that the claimant sustained a compensable injury to his low back on April 30, 2002. The claimant testified, "I reached down to release a boom on a chain. I got the boomer half way up, it pulled me straight back down and I came back up with it and felt something give in my lower back." Dr. Randy Carlton noted on May 8, 2002, "L-spine showed mild narrowing at L5-S1 on x-ray." Dr. Carlton assessed "1. Low back pain, lumbar strain. 2. Possible SI joint dysfunction."

A CT scan of the lumbar spine was taken on May 30, 2002:

The L1-L2, L2-L3, and L3-L4 intervertebral discs are normal.

At L4-L5, there is very slight bulge of the disc with some flattening of the anterior margin of the thecal sac. There is no significant stenosis.

At L5-S1, there is a left paracentral herniation of the disc. Disc height is normal. There may be very slight anterior impression upon the thecal sac.

No definite nerve root impingement is seen, although the herniated disc does lie adjacent to the left nerve root.

No abnormalities are seen in the vertebral bodies other than some small anterior hypertrophic osteophytes. The facet joints and remainder of posterior elements are normal.

The resulting opinion was "L5-S1 left paracentral HNP."

Dr. Carlton referred the claimant to a neurosurgeon, Dr. Jeffrey A. Kornblum. Dr. Kornblum's impression on June 21, 2002 was "1 ½ month history of low back, left sided symptoms that are consistent with L5 disc disease. His scan is suggestive of an L5 disc herniation. The significance of this uncertain based on the report." Dr. Kornblum recommended conservative management and referred the claimant to a pain manager, Dr. Calin A. Savu.

Dr. Kornblum arranged an MRI of the lumbar spine, which was taken on August 4, 2002 with the following conclusion:

1. Mild posterior disc bulging at L4-L5 without significant spinal canal or neuroforaminal stenosis.
2. Mild degenerative vertebral endplate Schmorl's node-type defects T11, T12 and L3. Mild degenerative vertebral endplate disease at L3 with small Schmorl's node-type defects.

The claimant continued to treat with Dr. Savu.

Dr. Kornblum wrote on August 20, 2002, "Mr. Clairday shows some mild degenerative disease in his lumbar spine

though no neurological compromise." Dr. Kornblum gave the following impression on January 23, 2003:

Mr. Clairday is noted to have some degenerative changes in his lumbar spine. Neurologically, he is intact without deficit. He does not have a surgical injury. I have reviewed with him that regular exercise may well be of benefit to him. I have discussed with him there is no structural reason to limit his activity. He may function unrestricted from a structural viewpoint. I have suggested that he may wish to be evaluated by a physiatrist to assist him in a structured exercise program.

The claimant began undergoing physical therapy on February 13, 2003.

The claimant was referred to another neurological surgeon, Dr. Jeffrey M. Sorenson, whose impression on February 19, 2003 was "chronic low back pain." Dr. Sorenson planned, "His back pain has been extensively evaluated by Dr. Kornblum in Jonesboro. He had discography done which did not reveal any symptomatic level. I agree with the recommendations of his other neurosurgeons. He is unlikely to benefit from any type of low back surgery at this point and time. He should continue a conservative course of management with physical therapy and followup at the pain clinic."

The record indicates that a representative of Concentra Integrated Services referred the claimant to another pain

clinician, Dr. Moacir Schnapp. Dr. Schnapp evaluated the claimant on March 11, 2003:

This gentleman who works as a fork lift mechanic and driver has had problems with pain starting about a year ago after an on the job injury. Actually, this is the 6th time that his back has gone out, but it is the longest....He was initially seen by Dr. Savu who has performed several blocks. The epidural injections apparently did help at first. He did undergo work hardening, which apparently aggravated his radiculopathy again. This was made even worse by a diskogram. Since then, his back pain as well as the left lower extremity pain has been constant....

I believe that it will be difficult if not impossible to solve all of his pain problems....

Dr. Schnapp performed a series of epidural blocks. The claimant testified that he did not benefit from Dr. Schnapp's treatment.

The claimant returned to Dr. Schnapp on April 24, 2003:

I believe that at the present time, he has reached maximum medical improvement. I would like to have a brief function capacity assessment, and after that, I will come up with a permanent physical impairment for him. I doubt that he will be able to lift 150 pounds lightly like he claims that he has to do at work, and I told him so. I will release him to go back to work with limitations next week.

Dr. Schnapp assigned a 5% permanent physical impairment rating on May 23, 2003. The respondents contended that they "have paid and are paying" permanent partial disability

pursuant to Dr. Schnapp's 5% anatomical impairment rating. The claimant testified that his last payment of temporary total disability compensation was on August 26, 2003.

The claimant began treating with K. Dewayne Eubanks, a neurosurgeon, on September 23, 2003. The record indicates that the Commission approved a change of physician from Dr. Schnapp to Dr. Eubanks on December 4, 2003.

The claimant visited Dr. Sunil Gera, another pain manager, on January 12, 2004. Dr. Gera stated, "I do not think he is a candidate for any other interventional treatment as indicated in the past."

Dr. Eubanks' impression on or about February 3, 2004 was "Probable discogenic pain at L5-S1, clearly related temporally to his injury back in May of 2002 while at work....I think this gentleman deserves repeat discograms. I would do them myself to make a better judgment of concordant or nonconcordant pain. I think it is going to be positive at L5-S1. If it is, then I think unfortunately he has simply had a misdiagnosis and he probably would improve with operative intervention at L5-S1. If his discogram is normal, then I would think that his previous diagnoses of chronic pain not otherwise specified may be correct."

A pre-hearing order was filed on February 24, 2004. The claimant contended that he was entitled to continued temporary total disability compensation and a change of physicians. The respondents contended that the claimant reached maximum medical improvement on April 24, 2003. The respondents contended that the claimant was not entitled to temporary total disability after that date, and that the claimant "has been able to work in at least some capacity since that date." The parties agreed to litigate the issues of "medical benefits and continued temporary total disability benefits subsequent to April 24, 2003."

Dr. Jim J. Moore, a neurological surgeon, independently evaluated the claimant on March 24, 2004 and wrote:

I have reviewed Dr. Eubanks' reports on this patient and noticed that he has had the patient evaluated from the psychologic standpoint and there apparently is no neuropsychologic standpoint to contraindicate workup and possible surgery. The lumbar diskogram CT that was provided me does show some extravasation from one of the levels. I am not sure which one. However, this seems to be quite lateral and rather at a distance from any of the nerve elements. I notice that Dr. Eubanks is thinking in terms of repeating the diskogram....

I think that if Dr. Eubanks is his official physician neurosurgeon that a repeat diskogram as recommended is within his sphere of control. It might very well give some further light on this patient's problems although I tried to point out to the patient that when the classic pattern of

findings is at variance the success rate for corrective surgery falls precipitously....

Dr. Moore diagnosed "lumbar radiculitis post-traumatic."

After a hearing before the Commission, the administrative law judge found, "In addition to prior periods, the claimant was temporarily totally disabled for the period beginning April 24, 2003 and continuing through the end of his healing period, a date yet to be determined." The ALJ found that Dr. Eubanks' treatment was reasonably necessary. The respondents appeal the ALJ's award of temporary total disability. The respondents do not appeal the ALJ's finding that the claimant is entitled to medical treatment from Dr. Eubanks. The respondents argue that the ALJ should have assessed a "forfeiture" against the claimant for the claimant's "missed appointments with Dr. Moore."

II. ADJUDICATION

A. Temporary total disability

An injured employee is entitled to temporary total disability compensation during the time that he remains within his healing period and is totally incapacitated from earning wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392

(1981). Ark. Code Ann. §11-9-102(12) defines "healing period" 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. When the underlying condition causing the disability has become stable, and when nothing further will improve that condition, the healing period has ended. The Commission cannot award temporary total disability after the claimant's healing period has ended. Trader v. Single Source Transportation, Workers' Compensation Commission E507484 (Feb. 12, 1999).

The administrative law judge found in the present matter, "In addition to prior periods, the claimant was temporarily totally disabled for the period beginning April 24, 2003 and continuing through the end of his healing period, a date yet to be determined." The Full Commission reverses this opinion.

The claimant sustained a compensable injury to his low back on April 30, 2002. The initial treating physician assessed "lumbar strain." A CT scan in May 2002 showed a slight bulge at L4-L5 and a left paracentral herniation at L5-S1. A neurosurgeon, Dr. Kornblum, stated in June 2002 that the claimant's symptoms were "consistent with L5 disc

disease." Dr. Kornblum recommended conservative treatment. An August 2002 lumbar MRI showed a degenerative conditions in the claimant's lumbar spine. Dr. Kornblum stated there was "no neurological compromise." Dr. Kornblum opined in January 2003, "He does not have a surgical injury." In addition, "There is no structural reason to limit his activity." Dr. Sorenson, another neurological surgeon, agreed in February 2003 that the claimant was "unlikely to benefit from any type of low back surgery at this point and time." The findings of the treating physicians therefore show that the claimant did not sustain an acute disc herniation as a result of the compensable injury. Nor did any physician recommend surgery for the claimant.

The claimant began treating with another pain manager, Dr. Schnapp, in March 2003. Dr. Schnapp wrote on April 24, 2003 that the claimant had reached "maximum medical improvement." This finding of maximum medical improvement indicates that the claimant had reached the end of his healing period. The claimant is not entitled to additional temporary disability after the end of his healing period. Trader v. Single Source Transportation, supra; Milligan v. West Tree Serv., 57 Ark. App. 14, 941 S.W.2d 434 (1997). In addition, Dr. Schnapp assigned a 5% permanent impairment

rating. Permanent impairment, which is a medical condition, is any permanent functional or anatomical loss remaining *after the healing period has ended*. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

The Full Commission recognizes that the claimant continued to receive some pain management after the end of the claimant's healing period on April 24, 2003. Nevertheless, the persistence of pain does not prevent a finding that the claimant's healing period is over. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The Full Commission also recognizes Dr. Eubanks' statement in February 2004, nearly two years after the compensable injury, that there may have been a "misdiagnosis" and that the claimant might need surgery. This speculative opinion by Dr. Eubanks was never confirmed in the record. The Full Commission attaches greater weight in the present matter to the expert opinions of Dr. Kornblum, Dr. Sorenson, Dr. Schnapp, Dr. Gera, and Dr. Moore. None of these physicians opined that the claimant remained within his healing period or that there had been a misdiagnosis, and Dr. Schnapp expressly opined that the claimant had reached maximum medical improvement as of April 24, 2003. The Full Commission reverses the administrative

law judge's award of temporary total disability compensation after April 24, 2003.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he was entitled to temporary total disability compensation after April 24, 2003. We therefore reverse the decision of the administrative law judge. The Full Commission notes the respondents's argument, "The Administrative Law Judge erred in finding the Claimant is not liable for the \$900.00 Respondents forfeited due to the Claimant's failure to appear for scheduled evaluations with Dr. Moore prior to 3-4-04." We note that the administrative law judge did not enter a finding of fact on this issue. The respondents cite no statutory or appellate authority for their argument that they are entitled to a purported "forfeiture" of \$900, and we decline to enter such a finding in this regard. The claim for additional temporary total disability compensation is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I respectfully dissent from the majority opinion, which reverses the decision of the Administrative Law Judge, entitling the Claimant to additional temporary total disability compensation related to his compensable injury to his lower back on April 30, 2002.

The majority has concluded that the Claimant has reached the end of his healing period based on a report from Dr. Schnapp on April 24, 2003, stating that claimant has reached "maximum medical improvement." However, Dr. Schnapp continued to treat Claimant due to his complaints of disabling pain in his low back and left leg, attributable to his compensable injury. The July 29, 2003 report from Dr. Schnapp reflects a diagnosis of lumbar spondylosis and sacroilitis and recommends further treatment, specifically an increase in Claimant's medication and a medial branch block. Claimant was seen by Dr. Schnapp on September 9, 2003, and underwent a medical branch nerve block at L4 and L5. Respondents suspended Claimant's benefits in August of 2003.

Claimant was then evaluated by Dr. K. Dwayne Eubanks, a Jonesboro neurosurgeon. Dr. Eubanks' September 23, 2003 report detailed a history of Claimant's injury and

medical treatment. Dr. Eubanks diagnosed Claimant with "discogenic pain at L4-S1, clearly related to his injury in May 2002 while at work." His report recommended additional treatment. It stated, in relevant part:

I think this gentlemen deserves repeat discograms. I would do them myself to make a better judgment of concordant or noncordant pain. I think it is going to be positive at L4-S1. If it is, then I think unfortunately he has simply had a misdiagnosis and he probably improve with operative intervention at L5-S1.

Claimant's attorney, on November 5, 2003, inquired of Dr. Eubanks whether Claimant was able to return to work. Dr. Eubanks responded that Claimant had remained unable to return to work since his September 23, 2003 evaluation.

Claimant's September 23, 2003 evaluation by Dr. Eubanks clearly reflects that he was of the opinion that Claimant was in need of further medical treatment relative to his compensable injury. In fact, on December 17, 2003, Claimant was referred to Dr. Sunil Gera, a pain doctor, and a neuropsychologist, Dr. Dan Johnson.

Dr. Gera's evaluation of the Claimant resulted in a diagnosis of "low back pain, herniated disc in the lumbar region, pain in the extremity, and lumbar radiculopathy." Dr. Gera's evaluation also set forth a treatment plan for

Claimant, which included a transforaminal steroid injection and a Duaragesic patch.

Claimant returned to Dr. Eubanks and on February 3, 2004, Dr. Eubanks reported that Claimant had undergone a neuropsychologic evaluation with Dr. Johnson and that his clinical syndrome had not changed. Dr. Eubanks' report also stated:

I spoke with Dr. Johnson on the phone. He tells me that his neuropsychologic evaluation of Mr. Clairday showed absolutely no pathologic behavior or issues. He feels that he is a very straightforward and intelligent man. Dr. Johnson feels there were no issues of secondary gain or malingering.

Dr. Eubanks' report also stated that he wanted to perform another dicogram on the Claimant. The Claimant was then referred to Dr. Jim J. Moore, a neurosurgeon.

Claimant was evaluated by Dr. Moore on March 24, 2004. Dr. Moore's report concluded that Claimant's condition was lumbar radiculitis post-traumatic. Dr. Moore recommended an "EMG/Nerve Conduction Velocity Study, as well as a myelographic survey with contrasted CT." Respondent refused to authorize this procedure, yet they would not allow Claimant to return to work without release from his physician. Dr. Eubanks had not yet released Claimant to return to work, nor

had he declared that Claimant has reached maximum medical improvement.

I find that the majority did not give proper weight to Dr. Eubanks' and Dr. Moore's reports which clearly indicate that Claimant needed further medical treatment and that he had not yet reached maximum medical improvement. The majority relies on Dr. Schnapp's opinion that Claimant had reached maximum medical improvement on April 24, 2003, when clearly the record reveals that Claimant continued to require medical treatment after that date.

Therefore, I find that the Administrative Judge was correct in his finding that Claimant proved by a preponderance of the evidence that he had not yet reached the end of his healing period and was entitled to temporary total disability compensation after April 24, 2003.

SHELBY W. TURNER, Commissioner