

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.F311775

DAVID BLACKBURN,
EMPLOYEE

CLAIMANT

RANDSTAD NORTH AMERICA, INC.,
EMPLOYER

RESPONDENT

PACIFIC EMPLOYERS INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 13, 2005

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

Claimant represented by the HONORABLE MATTHEW KETCHAM,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE JAY KUTCHKA,
Attorney at Law, Fort Smith, Arkansas.

Decision of administrative law judge: Affirmed as modified
in part and reversed in part.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed July 21, 2004. The administrative law judge
found, among other things, that medical treatment provided
for the claimant at "Accidents, Injuries, and
Rehabilitation" was reasonably necessary pursuant to Ark.
Code Ann. §11-9-508(a). The administrative law judge found
that the claimant was temporarily disabled "for the period

beginning July 25, 2003 and continuing at least through October 17, 2003." After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that medical treatment provided at "Accidents, Injuries and Rehabilitation" was reasonably necessary. The Full Commission affirms as modified the administrative law judge's finding with regard to temporary total disability. We find that the claimant proved he was entitled to additional temporary total disability compensation from July 25, 2003 through August 1, 2003.

I. HISTORY

The testimony of David Alan Blackburn, Sr., age 45, indicated that he began working for the respondent-employer, a temporary agency, in about 2000. Mr. Blackburn testified that he began working at Hiram Walker through the agency in about 2001. The claimant testified that he "Unloaded pallets of liquor from a pallet, cases of liquor from a pallet to a conveyor line." The parties stipulated that the claimant sustained a compensable injury to his lower back on July 3, 2003. The claimant testified, "I was doing what I usually do, just lifting pallets or cases of liquor

from the pallet to the line....I felt my back, felt like a pop in it."

The claimant presented to Dr. Terry L. Clark, Cooper Clinic, on July 10, 2003:

The patient is a 42-year-old gentleman who complains of low back pain. It started as soreness last week and has gotten worse over the last few days. His job requires lifting and twisting with cases of liquor. He complains of radiation of the pain down the posterior thigh to both knees. He states this radiation of the pain is worse on the left than the right. He has no previous history of back problems....

Dr. Clark's impression was "lumbar strain." Dr. Clark prescribed medication and assigned restricted work duties. The claimant testified that he did not return to work after the first visit with Dr. Clark.

The claimant told Dr. Clark on July 17, 2003 that he felt worse. Dr. Clark's impression was "lumbar strain, rule out HNP." An MRI of the lumbar spine was taken on July 22, 2003, with the impression, "Multilevel facet hypertrophy. This is superimposed on congenital canal stenosis with resultant stenosis at L3-4 and severe stenosis at L4-5 and mild at L5-S1. There is associated disc bulge L4-5 without definite protrusion although subtle protrusion not excluded."

The claimant followed up at Cooper Clinic with Dr. Keith F. Holder on July 24, 2003. The claimant reported to Dr. Holder that he was "doing no better." Dr. Holder noted, "He has clubbing of the bilateral finger tips. He reports it has been present all of his life." Dr. Holder's impression was "1. Lumbar strain. 2. Spinal canal stenosis." Dr. Holder provided medication and wrote that the claimant "May return to work, no lifting over 20 pounds, no repetitive back motions. Follow up here in 10 days."

The parties stipulated that there was "no dispute over temporary total disability benefits accruing through July 24, 2003." The claimant testified, "I went back to them and explained to them what the doctor said and they said they had no such jobs for me and they let me go."

Dr. Clark provided a Final Narrative Summary on August 1, 2003:

Follow-up lumbar strain and congenital canal stenosis. He complains of continued pain at times, no radicular symptoms. I reviewed his MRI scan which does show the congenital canal stenosis, severe at some levels. There are no herniations of the discs....His exam today is unchanged.

Dr. Clark's impression was "Congenital canal stenosis and lumbar strain." Dr. Clark planned the following:

1. I have advised the patient that the congenital canal stenosis is not a Worker's Comp injury but is rather more of a hereditary type problem. He seems to understand, and I have advised him that he needs to see his family physician for further care of that. Most likely, he will need to be evaluated by a neurosurgeon, but again that would be arranged by his family physician.
2. From the Worker's Comp standpoint, he is released from the Occupational Medicine clinic.

The parties stipulated that there was "no dispute over the payment of medical expenses incurred through August 1, 2003."

The claimant testified that he believed Dr. Clark "had done nothing for me." The claimant testified that he was having "the same pain, as far as my lower back and shooting down into my legs." The claimant testified that he did not have a family physician.

The record indicates that Dr. Scott Fedosky with Accidents, Injuries & Rehabilitation checked off "spasm" on a medical form dated August 1, 2003. A chiropractic physician at Accidents, Injuries & Rehabilitation wrote on August 1, 2003, "Mr. Blackburn came to be evaluated and treated for low back pain (LBP) as ordered by Dr. Clark. I'm recommending that Mr. Blackburn be placed on light duty until otherwise instructed by this office or myself."

A physical therapist wrote on August 5, 2003, "swelling/myospasm noted L lumbar paraspinal....multiple myospasms noted mid & low back."

The record indicates that the claimant presented to Accidents, Injuries & Rehabilitation on August 7, 2003, at which time the claimant complained of "Back & hip/leg pain; occasionally has shooting 'electrical shock' type pain along R trapezius/shoulder into R tricep to elbow level. None currently." Dr. Scott Fedosky wrote on August 7, 2003, "In my opinion, pt's congenital canal stenosis probably contributed to but is not the cause of pt's back pain....He would have had back pain earlier in life & earlier in job career if it resulted from a congenital abnormality." Dr. Fedosky planned restricted light duty for the claimant at work, physical therapy, and "continue chiropractic care."

A physical therapist with Accidents, Injuries, and Rehabilitation wrote on October 17, 2003, "The individual's suggested whole person impairment level is 7% based on the AMA's "Guide to the Evaluation of Permanent Impairment," 4th edition. This "rating" appears to have been based at least in part on "ROM - Lumbar Lateral" and "ROM - Lumbar Rotation."

The claimant continued with regular physical therapy.

On December 29, 2003, an examiner reported "palpable mm spasms....paraspinals." A diagram indicated that this "palpation" actually occurred in the claimant's middle back (or thoracic spine).

A pre-hearing order was filed on March 3, 2004. The parties agreed to litigate the issue, "The claimant's entitlement to additional medical services and temporary total disability benefits from July 24, 2003 through a date to be determined, and attorney's fees." After a hearing before the Commission, the administrative law judge found, among other things, that treatment provided the claimant at Accidents, Injuries, and Rehabilitation was reasonably necessary pursuant to Ark. Code Ann. §11-9-508(a). The administrative law judge found that the claimant had been rendered temporarily disabled "for the period beginning July 25, 2003 and continuing at least through October 17, 2003."

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The employer must promptly provide for an injured employee such medical treatment as may be reasonably

necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. Morgan v. Desha County Tax Assessor's Office, 45 Ark. App. 95, 871 S.W.2d 429 (1994). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In the present matter, the parties stipulated that the claimant sustained a compensable injury to his lower back on July 3, 2003. The claimant testified that he felt "like a pop" in his back while lifting pallets. The claimant began treating with Dr. Clark, whose impression was "lumbar strain." An MRI taken on July 22, 2003 basically showed degeneration in the claimant's lumbar spine. Although the interpreter of the MRI wrote, "subtle protrusion not excluded," there is no evidence before the Commission that the claimant herniated a disc as a result of the compensable injury.

Dr. Clark's impression on August 1, 2003 was "congenital stenosis and lumbar strain." Dr. Clark advised the claimant that "the congenital canal stenosis is not a

Worker's Comp injury but is rather more of a hereditary type problem. He seems to understand, and I have advised him that he needs to see his family physician for further care of that. Most likely, he will need to be evaluated by a neurosurgeon, but again that would be arranged by his family physician. From the Worker's Comp standpoint, he is released from the Occupational Medicine clinic."

The Full Commission finds that the claimant did not prove he was entitled to additional medical treatment following Dr. Clark's release on August 1, 2003. Dr. Clark, the primary treating physician, clearly believed that additional medical treatment was not reasonably necessary in connection with the claimant's compensable injury, and that the claimant's lumbar strain had resolved no later than August 1, 2003. Dr. Clark attributed the claimant's continuing symptoms to the claimant's pre-existing degenerative condition, not the compensable injury. Nor is there any medical opinion of record diagnosing the claimant's symptoms as an "aggravation" of the claimant's pre-existing condition. The Full Commission recognizes that Dr. Clark advised the claimant to see his family physician; however, Dr. Clark's advise in this regard was related to

"congenital canal stenosis," not the claimant's lumbar strain. Nor is there any evidence to suggest that the July 3, 2003 injury was the cause of the claimant's pre-existing stenosis.

The record indicates that the claimant presented on his own to Accidents, Injuries & Rehabilitation (A.I.R.) on or about August 1, 2003. There was not a referral from Dr. Clark to this clinic. The Full Commission recognizes that Dr. Fedosky with A.I.R. opined on August 7, 2003, "pt's congenital canal stenosis probably contributed to but is not the cause of pt's back pain." The Commission has the authority to accept or reject medical opinion and to determine its medical soundness and probative force. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999). In the present matter, Dr. Fedosky did not opine that the claimant had aggravated a pre-existing condition. However, even if Dr. Fedosky did so opine, the Full Commission places greater weight on the opinion of treating physician Dr. Clark, who implicitly stated on August 1, 2003 that the claimant's compensable condition had resolved.

The Full Commission also recognizes the various reports of "spasm" at A.I.R. beginning August 1, 2003. We note that

the initial treating physicians, Dr. Clark and Dr. Holder, did not detect any muscle spasms. (The Full Commission is aware that the claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997)). To the extent that the claimant did suffer from muscle spasms beginning August 1, 2003, the evidence does not indicate that these spasms were the result of the claimant's lumbar strain occurring July 3, 2003.

Pursuant to Ark. Code Ann. §11-9-508(a), the Full Commission finds that the claimant did not prove he was entitled to medical treatment provided at Accidents, Injuries & Rehabilitation beginning August 1, 2003 and following.

B. Temporary disability

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood based on medical evidence, age, education, experience, and other matters reasonably expected to affect the claimant's earning power. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981), citing Rooney & Travelers Insurance Co. v. Charles, 262 Ark.

695, 560 S.W.2d 797 (1978). Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Breshears, supra. Ark. Code Ann. §11-9-102(12) defines "healing period" as "that period for healing of an injury resulting from an accident[.]" The determination of when the healing period has ended is a question of fact for the Commission. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present matter, the claimant sustained a compensable injury on July 3, 2003, diagnosed as a "lumbar strain" by the initial treating physicians. A subsequent MRI showed a degenerative condition with no indication of an acute disc injury or other surgical condition. The parties stipulated there was "no dispute over temporary total disability benefits accruing through July 24, 2003." The claimant was returned to light duty on July 24, 2003, but the claimant testified that the respondents had no light duty available and terminated him at about that time.

Dr. Clark did not release the claimant until August 1, 2003. Based on Dr. Clark's expert opinion from that date, the Full Commission finds that the claimant reached the end

of his healing period for the lumbar strain no later than August 1, 2003. We again note, however, that the respondents did not provide temporary total disability compensation after July 24, 2003. The respondents state in their brief, "Claimant simply failed to prove that he was temporarily and totally disabled beyond August 1, 2003." The Full Commission therefore finds that the claimant proved he was entitled to additional temporary total disability compensation from July 25, 2003 through August 1, 2003.

Based on our *de novo* review of the entire record, the Full Commission reverses in part and affirms as modified in part the opinion of the administrative law judge. The Full Commission reverses the administrative law judge's finding that treatment provided the claimant by Accidents, Injuries & Rehabilitation was reasonably necessary pursuant to Ark. Code Ann. §11-9-508(a). The Full Commission affirms as modified the administrative law judge's finding with regard to temporary disability. Based on the evidence before the Commission at this time, we find that the claimant proved he was entitled to additional temporary total disability compensation from July 25, 2003 through August 1, 2003. The claimant's attorney is entitled to a fee for legal services

pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

_____ IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

For the reasons set out below, I respectfully dissent from the Majority's finding that the respondent is not liable for certain medical treatment the claimant received after August 1, 2004. Also, while I concur in the Majority's decision to award the claimant an additional week of disability benefits, I dissent from the finding that he is not entitled to any temporary disability benefits after August 1, 2004.

In my opinion, the Majority's decision is based upon a medical opinion in which a doctor makes an erroneous conclusion as to the Workers' Compensation law. The claimant's original treating doctor was Dr. Terry Clark, a general practitioner in Fort Smith. Based upon the claimant's complaints, Dr. Clark directed the claimant to undergo an MRI scan. The scan was performed on July 22, 2003. In addition to finding congenital canal stenosis at several levels in the claimant's lumbar spine, the scan also found a disc bulge at L4-L5.

Dr. Clark, in an office note of August 1, 2003, outlined the findings of the MRI and his final meeting with the claimant. In that note, Dr. Clark discusses the claimant's canal stenosis but seems to overlook the existence of the disc bulge. Dr. Clark states in his note that he has "advised the patient that congenital canal stenosis is not a workers' comp. injury but is rather more of a hereditary type problem. . . I have advised him that he needs to see his family physician for further care of that. Most likely, he will need to be evaluated by a neurosurgeon but, again that would be arranged by his family physician."

What Dr. Clark failed to appreciate is that even though the claimant may have had preexisting canal stenosis,

if the disc bulge was the result of his admittedly compensable job related accident, then the claimant would still be entitled to receive workers' compensation benefits. It appears to me that Dr. Clark is far more concerned with limiting the respondent's potential workers' compensation liability rather than treating his patient.

In any event, it is apparent from Dr. Clark's last treatment note that the claimant did need additional medical treatment for his condition, but that Dr. Clark was not going to provide it to him. As the Administrative Law Judge correctly noted, Dr. Clark's statement that the claimant should seek treatment from his "family physician" is in effect a referral to a physician of the claimant's choice.

Since the claimant did not have a family physician as such, he sought treatment on his own from a medical provider specializing in accidental injuries. Consequently, the claimant sought treatment from Dr. Scott Fedosky, a physician with Accidents, Injuries and Rehabilitation Clinic (AIR). In the initial intake reports dated August 7, 2003, Dr. Fedosky took a history in accordance with the claimant's back injury and prescribed the claimant certain medication and limited him to light duty work under restrictions very similar to those propounded by Dr. Clark. The claimant

continued to see and be treated by the physicians at this clinic and underwent physical therapy. The Administrative Law Judge held that the claimant received treatment for his compensable injury through October 17, 2003. I find that the Judge is correct in holding that the claimant's treatment through that date was reasonable and necessary medical treatment of his compensable back injury and that it was not until that time that the claimant reached the end of his healing period. Therefore, I find that the claimant should have received temporary total disability benefits through not only August 1, 2003 but extending on to the end of the claimant's healing period on October 17, 2003.

For the above stated reasons, I find that the Commission erred in denying the claimant the requested medical treatment and concluding that his healing period ended on August 1, 2003. Therefore, I concur in part and dissent in part from the Majority's decision.

SHELBY W. TURNER, COMMISSIONER
