

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214212

DELOIS LEE,
EMPLOYEE CLAIMANT

ADVANCE AUTO PARTS,
EMPLOYER RESPONDENT

ROYAL INDEMNITY COMPANY,
INSURANCE CARRIER RESPONDENT

OPINION FILED MAY 17, 2005

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

Claimant represented by the HONORABLE GARY DAVIS,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE RANDY P.
MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed July 13, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The claimant is entitled to
reinstatement of temporary total
disability benefits commencing May 23,
2003, and continuing until December 5,
2003.
2. The claimant is entitled to ongoing
medical benefits, including a cane
prescribed by Dr. Harold Chakales.

3. Respondents have controverted this additional period of temporary total disability benefits, as well as the prescription of the cane.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the July 13, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as

amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs.

CONCURRING OPINION

I concur in the principal decision affirming and adopting the Administrative Law Judge's award of additional medical treatment and temporary total disability benefits. I write separately to address medical evidence not addressed in the principal opinion.

The claimant was injured on December 5, 2002, when she was a victim of an armed robbery at her place of employment. During the course of this robbery, the claimant was roughly handled, including being lifted off the floor by her neck, was threatened with a gun, and witnessed her co-worker receive fatal injuries after

being shot multiple times. As a result of this incident, the claimant suffered physical injuries to her neck, shoulders, and upper back, as well as suffering psychological trauma in the form of post traumatic stress disorder.

The respondents accepted the claim as compensable and have paid a substantial amount of medical benefits on behalf of the claimant and temporary disability benefits from the date of the injury through May 22, 2003. The present claim concerns the claimant's request for additional temporary total disability benefits from May 23, 2003 through December 5, 2003. In addition, the claimant has requested that the respondent provide her with a cane to assist her ambulation pursuant to a prescription from her treating physician.

In regard to the request for benefits, the claimant contends that the combined effects of her psychological trauma and her physical injuries caused her to remain disabled and within her healing period beyond the date the respondent stopped paying her temporary total disability benefits. The claimant's assertion is based upon the statements of Dr. Harold Chakales, her treating physician who opined that she was not able to return to work until one year following her

injury. Dr. Chakales also advised her to obtain a cane to assist in her ambulation.

The respondent has taken the position that the claimant reached the end of her healing period and, consequently, was not entitled to further disability benefits after May 22, 2003. Their argument that the claimant is not within her healing period appears to be based primarily upon the opinions of two consulting medical providers to whom they had referred the claimant. The first of these medical providers was Dr. Bruce Safman, a Little Rock physician specializing in rehabilitative medicine. Dr. Safman first saw the claimant in late February 2003. In a progress note dated February 24, 2003, he notes that she was markedly tight in her upper trapezius muscles bilaterally with tenderness in those muscles and in her scapula as well as the biceps tendon of her left shoulder. He also noted that she appeared to be extremely depressed and very anxious. His impression was that the claimant was suffering from a cervical strain, an upper trapezius strain, levator scapular tendinitis and biceps tendinitis.

Another progress note dated March 24, 2003, Dr. Safman again saw the claimant and noted that her affect was better and that she was smiling and

communicating. He released her to limited duty work with the restriction of 10 pound lifting.

However, in spite of Dr. Safman's limited work release, the respondent employer advised the claimant in a memorandum dated March 31, 2003, that since her leave of absence had exceeded 12 weeks, her "job protection" had ended on March 24, 2002. The claimant did not see Dr. Safman again. However, she did see, at the direction of the respondent, Judy White Johnson, a clinical psychologist in Little Rock, Arkansas. During the course of Dr. Johnson's examination, the claimant underwent an MMPI-2 test which Dr. Johnson noted had produced a valid and interpretable clinical profile. After summarizing the claimant's psychological profile, Dr. Johnson stated that "a behaviorally oriented goal directed plan needs to be in place with a set time to return to work." Dr. Johnson further recommended that this plan be put in place as soon as possible so that the claimant could resume a normal life.

Even though the claimant stopped seeing Dr. Safman after March 24, 2003, and did not follow up with Dr. Johnson for further psychological evaluation and treatment, she continued to receive treatment from Dr. Chakales for her physical injuries, and Dr. Brenda Smith, a social worker, and Dr. Kay Cogbill, a clinical

psychologist, for treatment of her psychological problems. Dr. Chakales stated in progress notes and his deposition of October 2003, that the claimant continued to be disabled because of her physical condition. Dr. Chakales acknowledged that the claimant's psychological condition was also a factor in her inability to return to work, and was of the opinion that the severe depression that she was suffering from was undoubtedly impairing her recuperative abilities. This opinion was also shared by Dr. Safman. In his deposition, he, like Dr. Chakales, acknowledged that a patient who is suffering from significant clinical depression will not recover as quickly from physical injuries.

While respondents repeatedly argue that Dr. Safman released the claimant to return to work, I note that his release was of a restricted nature and limited the claimant's lifting ability. Further, almost contemporaneously with the limited work release from Dr. Safman, the respondent employer advised the claimant that she was no longer employed by them. Since the respondents did not offer the claimant a job within her restrictions, I find that there is no basis for considering Dr. Safman's limited work release to, in any way, limit or end the claimant's entitlement to temporary total disability benefits. This is

particularly true in light of Dr. Chakales continued directions that the claimant was totally disabled and should remain off work, which is evidenced by the numerous off-work slips he generated after May 22, 2003 and continuing through his December, 2003 release. It is also significant that Dr. Johnson did not consider the claimant to be able to return to work based upon her visit with the claimant on March 29, 2003. As noted above, Dr. Johnson felt at that time, that the claimant needed to undergo a plan of psychological treatment in order to get the claimant to where she could return to work.

The respondents also imply in their brief that the claimant was not complying with the directions of Drs. Smith and Cogbill. However, an examination of the progress notes developed in regard to their treatment of the claimant indicates that such is not the case. Both of those doctors had directed the claimant to attempt to return to as normal a life as possible by leaving the house to interact with crowds and people in other public places. The claimant was attempting to do this, but because of the psychological trauma she suffered, this was very difficult for her. Also, Dr. Smith, frequently talks about reviewing the claimant's journal which she was keeping at Dr. Smith's request as part of her

psychological therapy. A review of Dr. Cogbill's progress notes make it is apparent that the claimant was improving. While she occasionally would have an increase of her symptoms, she was, by and large, leaving her house more frequently, and becoming more comfortable in situations involving with contact with the general public.

In sum, I find that the claimant remained within her healing period, that she was undergoing treatments from Dr. Chakales including medication and trigger point injections, that she was undergoing continued treatment and therapy from Drs. Smith and Cogbill and that her psychological condition and clinical depression was improving based upon their treatment plan. For these reasons, I concur that the respondent improperly terminated the claimant's temporary disability benefits in May 2003, and that the claimant is entitled to receive those benefits through her release by Dr. Chakales on December 5, 2003.

The respondent has also refused to provide the claimant a cane as recommended by Dr. Chakales. The respondent does not offer any basis for this refusal but merely states that providing the claimant a cane is not reasonable and necessary. I find, however, the claimant's treating physician has opined that she would

benefit from a cane. The respondent has not offered any concrete medical opinion or any other basis for denying this directive. Consequently, I find that the respondent should be ordered to provide the claimant a cane as directed by Dr. Chakales.

For these reasons, I concur that the Administrative Law Judge's decision was correct in all respects and should be affirmed and adopted.

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant was entitled to temporary total disability benefits for the period May 23, 2003, through December 5, 2003, as well as continuing medical treatment, including a cane to help the claimant walk. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment and additional temporary total disability benefits.

The claimant was employed by the respondent employer when she was injured during a robbery on December 5, 2002. The claimant was grabbed from behind around her neck and dragged by one of the assailants while the assailant held a gun to the claimant's head. The other assailant shot the claimant's supervisor while the claimant witnessed the incident. The claimant has subsequently testified at the trials of both assailants.

The claimant first sought medical treatment from Dr. Harold Chakales on December 23, 2002, complaining of pain in her neck and left shoulder. Dr. Chakales prescribed physical therapy for the claimant and found that the claimant was temporarily totally disabled. The physical therapy prescribed by Dr. Chakales was discontinued on January 10, 2003, because it appeared to be aggravating the claimant's condition.

The claimant sought medical treatment from Dr. Bruce Safman on February 24, 2003. Dr. Safman reviewed the claimant's MRI, which showed multiple degenerative changes but no evidence of any disk protrusion. Dr. Safman recommended that the claimant stay off work at that time. On March 10, 2003, the claimant again saw Dr. Safman who reported that "psychiatric problems primarily and to a lesser degree physical problems preclude her returning to work.

Therefore, just based on her physical problems I would return her to light duty." On March 24, 2003, Dr. Safman released the claimant to return to work with a 10 pound lifting restriction.

Dr. Chakales testified by deposition that the claimant could have returned to work in July on a limited basis.

The claimant has also sought on-going psychological treatment following this incident. She first presented to Brenda Smith for psychotherapy on December 10, 2002, and she has had on-going psychotherapy with Dr. Smith. She has also undergone a psychological evaluation with Dr. Judy White-Johnson on March 28, 2003. The claimant began psychiatric management with Dr. Kay Cogbill on April 22, 2003. On December 15, 2003, Dr. Gary Souheaver performed a neuropsychological examination of the claimant. Neither Dr. Smith nor Dr. Cogbill have advised the claimant to remain off work due to the psychological impact she suffered from the incident. The claimant has been prescribed antidepressants, sleeping pills, and anti-anxiety medication.

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 evidence demonstrates that on March 24, 2003, Dr. Safman released the claimant to return to work with a 10 pound lifting restriction. The claimant failed to follow up with Dr. Safman and did not reschedule or call his office. The claimant did not present any evidence from any of her mental health providers which stated that the claimant was mentally

unable to work following her release to return to work with restrictions from Dr. Safman. Dr. Chakales acknowledged at the time of his deposition, which was October 28, 2003, that the claimant was orthopedically ready to go back to work. He stated that it was her emotional overlay which prevented the claimant from returning to work. Dr. Chakales described the claimant's physical condition as follows:

Q. And when did you next see her?

A. I saw her again on March the 3rd. I saw her in April, June, July, September, October; most recent, October 27th. And at this time, during this entire evaluation, I tried to see whether or not she wanted to go back to work. She said she could not go to work.

Q. From a pure orthopedic standpoint, was she capable of returning to work?

A. On a limited basis, yes.

Q. Did she show any improvement from an orthopedic standpoint?

A. Yes.

Q. If you can, just describe what improvement she showed.

A. Well, she's not as symptomatic. She does have some pain in her neck and her shoulder. Her range of motion is improved; she's ambulating; she can use the upper extremities. She has the preexisting cervical lumbar degenerative disc disease, as well as an impingement

syndrome of her shoulder. She's 51 years old. She looks older than that physiologically, She acts older. The biggest problem that I know of was that she showed a reticence in wanting to return to work.

Dr. Chakales admitted that psychologically speaking, a psychiatrist, not an orthopedist, was the appropriate person to make a determination as to her psychological fitness to return to work.

Though Dr. Chakales had not yet rated the claimant for permanent partial impairment, he testified as follows:

Q. And you believe she's entitled to a 5 to 8 percent permanent partial -

A. No greater than that, yes.

The claimant has also failed to demonstrate that her lingering low back symptoms are related to her on-the-job injury. The claimant was initially treated by Dr. Chakales for neck complaints. She did not report low back complaints until June 2003. Dr. Chakales further testified that the claimant's low back problems predated the accident.

The claimant was strongly encouraged during her psychotherapy to get out of her home every day. Dr. Smith, her psychotherapist, stated:

I gave her a notebook that I want her to write down every time she goes out and how she feels when she is out; but, I want it to be every day this week. She stated her sister-in-law and cousin would both go with her. I stressed to her that this was the only way for her to get back to normal and functioning where she can return to work at some point and carry on with some semblance of a normal life.

According to her deposition testimony, the claimant is not following her providers' recommendations. She indicated that most days she stays home.

The claimant was seen by Dr. White-Johnson for psychological evaluation. Dr. White-Johnson's March 28, 2003, report stated:

On intellectual screening and problem solving tasks [the claimant's] lack of cooperation resulted in an invalid outcome. She failed to answer even extremely simple questions accurately. However, later on in the test, she answered significantly more difficult questions accurately. Thus, this test is not valid or interpretable.

Furthermore, the claimant was found on the Wahler Physical Symptoms Inventory to have a pattern of findings typically seen with symptom magnification. In her report, Dr. White-Johnson went on to state:

The validity scales of the MMPI-2 indicate that she [the claimant] produced a valid and interpretable clinical profile. The clinical

profile produced by the items Ms. Lee endorsed reflect an individual who is viewing herself as physically ill and extremely concerned with her health and bodily functions. There may be no clinical evidence of an organic basis for these symptoms, which typically include headache, digestive problems, eating problems, nausea, dizziness, insomnia, weakness, fatigue, and tiredness. She can be expected to over-react to minor physical discomfort. She does not handle stress including responsibility well and often develops physical symptoms in response to what she perceives are demands.

The claimant was also evaluated neuropsychologically by Dr. Souheaver on December 15, 2003. Dr. Souheaver found, through the administration of the MMPI-2, "a strong potential to overly endorse psychiatric symptoms. Reasons for such a validity pattern on the MMPI-2 include overt symptom exaggeration, disinterested/careless responses, or a plea for help by excessive symptom endorsement." These responses resulted in the MMPI-2 being unable to be interpreted.

The claimant's deposition testimony indicated that she was not performing the activities that were recommended by her mental health providers. Her psychological evaluations indicated there were symptom magnification. There is nothing in the medical records or the testimony which indicate that any medical health

professional has recommended that the claimant remain off work beyond the period of time proposed by Dr. Safman. The claimant has failed to present any medical evidence which supports her contention that she is physically unable to work following her release from Dr. Safman. Her psychological treatment records do not support her contention that her mental health providers have advised her to remain off work. It appears that the claimant has made no attempt to look for work or return to her previous employment. Since Dr. Safman gave her the limited release to return to work, the claimant has failed to return to Dr. Safman for treatment. Further, the claimant's psychological testing showed symptom magnification. Therefore, in my opinion, the claimant has failed to show that there is any causal connection between her continuing unemployment after May 22, 2003, and her admittedly compensable injury. In short, I simply cannot find that the claimant is entitled to additional temporary total disability benefits as a result of her compensable injury.

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.

The claimant contended that she was entitled to receive a cane which was prescribed to her by Dr. Chakales. It is evident from the deposition testimony of Dr. Chakales that the claimant was not in need of the cane anymore. When questioned about the cane, Dr. Chakales stated that "she didn't look like she needed it today. She did for a period of time because she was unstable in her gait." He was questioned about whether or not the claimant appeared to be little better today and he stated, "oh, much better." In my opinion, the claimant could not prove by a preponderance of the evidence that the cane is reasonable and necessary medical treatment.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner