

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301922

DAVID JOHNSON, EMPLOYEE	CLAIMANT
LATEX CONSTRUCTION CO., EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED AUGUST 16, 2005

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

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE LEE MULDROW, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed, in part, and modified, in part.

OPINION AND ORDER

The respondents appeal the decision by the Administrative Law Judge finding that the claimant had proven by a preponderance of the evidence that he was entitled to permanent impairment in the form of wage loss disability benefits in the amount of 45% over and above his permanent anatomical impairment of 5% to the body as a whole. The claimant cross appeals the decision of the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits beginning October 13, 2003. Based upon our de novo review of the

record, we affirm, in part, and modify, in part, the decision of the Administrative Law Judge. Specifically, we affirm the decision of the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he was entitled to additional temporary total disability benefits beginning October 30, 2003. However, we modify the decision of the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to permanent impairment in the form of wage loss disability benefits in the amount of 45% over and above his permanent anatomical impairment of 5% to the body as a whole thereby giving the claimant a 50% permanent impairment. We find that the claimant is only entitled to a 10% loss in wage earning capacity. Thereby giving the claimant 15% in total permanent impairment.

The claimant was employed by the respondent employer as a welder's helper. On February 7, 2003, the claimant sustained an admittedly compensable injury to his back when he picked up a box or a flange. The claimant received treatment in Alabama at the emergency room and had an MRI which revealed "mild dehydration of the discs at L3-4, L4-5 with anterior spondylitic changes and mild disc

bulge at L3-4. No other abnormalities noted." The claimant eventually came under the care of Dr. Jeffrey DeHaan, who referred the claimant to Dr. Edward Saer, who in turn referred the claimant to Dr. Sunder Krishnan. The claimant has received conservative treatment and no surgery has ever been recommended.

Dr. Krishnan ordered a second MRI which was performed on July 31, 2003. The MRI revealed annular tears at L2-3, L3-4 and L4-5, as well as small central protrusions at L3-4 and L4-5. The study revealed "No definite sign of nerve root impingement...". Dr. Krishnan recommended a discogram which was denied by the respondents. Dr. Krishnan discussed the claimant's condition with Dr. Charles Maureriello, who was employed by the respondents' utilization reviewer. The two agreed that the next appropriate step was facet injections which were performed on November 14, 2003. The injections were of no benefit to the claimant and the respondents agreed to a discogram which was performed in January. Dr. Krishnan opined that the discogram and subsequent CT Scan revealed mild degenerative changes at L2-3 a post annular tear at L3-4 and a small central disc herniation at L4-5. Dr. Krishnan concluded that

he had nothing else to offer the claimant and released him from his care on February 11, 2004, pending a functional capacity evaluation.

The functional capacity evaluation was performed on March 1, 2004, by Dr. Donald R. Smith. Dr. Smith concluded that the claimant had reached maximum medical improvement with no permanent impairment and that he was capable of performing medium level work. Dr. Smith summarized the claimant's radiographic studies as showing "some very mild degenerative changes in the L3-L4 and L4-L5 levels, which are commensurate with the patient's age and work history. These studies are essentially normal for a patient of this age group."

On March 5, 2004, the claimant returned to Dr. Saer who released the claimant to return to work with a 5% permanent impairment rating. A second vocational functional capacity evaluation was performed on July 5, 2004. This evaluation concluded that the claimant was capable of performing light physically demanding work for an eight hour day as long as the claimant was able to alternate sitting and standing every twenty to twenty five minutes.

The claimant contends that he is entitled to additional temporary total disability benefits from October 30, 2003, through March 5, 2004, when he was assessed at maximum medical improvement by Dr. Saer. The claimant also contends that he is entitled to the 5% permanent impairment rating as well as additional permanent impairment in the form of wage loss disability benefits. The respondents contend that the claimant has received all the benefits to which he is entitled and that he has not sustained significant wage loss disability benefits in addition to the 5% permanent impairment anatomical rating that was assigned by Dr. Saer. The respondents contend that the claimant has made no significant effort to cooperate in a rehabilitation program.

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 claimant is seeking temporary total disability benefits beginning October 30, 2003, when the respondent carrier ceased to pay benefits. Although the claimant continued to receive medical treatment from Dr. Krishnan in the form of facet injections as well as a discogram, the medical records and the claimant's testimony make it perfectly clear that none of the treatment that claimant received after October 30, 2003, brought any improvement to the claimant's condition. This is significant in that the

claimant is only entitled to temporary total disability benefits during the time he is within his healing period and 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. It is clear, that the claimant's healing period ended on October 30, 2003. None of the medical treatment the claimant received after October 30, 2003, improved the claimant's condition. Therefore, the claimant is not entitled to temporary total disability benefits after October 30, 2003.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett

Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, supra.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a

multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Our review of the evidence fails to demonstrate that the claimant is entitled to any additional permanent impairment in the form of wage loss disability benefits in excess of 10%. The evidence demonstrates that the claimant had an erratic income prior to sustaining his admittedly compensable injury. The claimant stated that he earned between fifteen and twenty thousand dollars a year, but was not able to get any definitive numbers.

Further, the claimant is capable of performing light duty work so long as he is permitted to alternate

sitting and standing. The rehabilitation specialist, Mr. Thomas, identified ninety four occupations that fall within the claimant's physical capabilities. When the testimony of Mr. Thomas, as well as the results of the two functional capacity evaluations are considered, it is evident that the claimant is capable of earning wages in either part or full time employee or self employment. The claimant is self-limiting himself with respect to the jobs that have been identified to him that he is capable of working. The claimant is resistant to the idea of taking a job that would pay an hourly wage less than the hourly wage he reported earning as a welder's assistant. The fact of the matter is the claimant's job did not have reliable income.

The claimant is 49 years old and he has vocational education in welding although the claimant did not pursue this career. The claimant lacks motivation to return to work because he will not take a job that pays less than the \$18.63 he was making before he sustained his compensable injury. The claimant refuses to move from the area where he lives even though the labor market in his area is depressed. The claimant should not be rewarded for refusing to seeking employment at lesser wages and for refusing to move to an

area that offers more opportunities for work. Simply put, when we consider the claimant's age, education, work experience, motivation and physical restrictions, we find that the claimant has proven by a preponderance of the evidence that is entitled wage loss disability benefits in the amount of 10% over and above his permanent anatomical impairment of 5% to the body as a whole thereby giving the claimant a total of 15% in permanent impairment. Accordingly, we modify the Administrative Law Judge's award of 45% to 10%. We note that the attachments to the respondent's brief on appeal were not used in our assessment of the claimant's wage loss disability benefits.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

A hearing was held in this matter on July 29, 2004. By agreement of the parties, the issues submitted for

determination were the claimant's entitlement to certain additional medical treatment in the form of pain management, the claimant's entitlement to additional temporary total disability benefits, and the claimant's entitlement to permanent partial disability benefits in excess of his anatomical impairment, based upon his loss of earning ability.

In an Opinion dated September 3, 2004, an Administrative Law Judge found that the claimant was entitled to additional medical benefits but denied his request for additional temporary total disability benefits. The Judge further found that the claimant had established that he had suffered wage loss disability in an amount equal to 45% impairment to his body as a whole.

From that decision, the respondent appealed the wage loss disability and the claimant cross-appealed the Judge's denial of temporary disability benefits, and the Judge's failure to award a higher amount of wage loss disability benefits. For the reasons set out below, I respectfully dissent from the majorities opinion. In my opinion that the Judge's Opinion should be reversed in part and affirmed in part.

There is no dispute as to the underlying facts of this case. The claimant suffered an admittedly compensable injury on February 7, 2003. At the time of his injury, the claimant was carrying out his assigned duties as a welder's helper. When the claimant lifted an 80 pound flange, he felt a sudden pain in his lower back. The claimant reported this accident to his employer and the respondent eventually provided the claimant a substantial amount of medical and temporary disability benefits.

During the course of his medical treatment, the claimant underwent several diagnostic tests, including MRI's, CT scans, and a discogram. While none of these tests had identical findings, they generally detected a defect at L3-L4 which is described in various tests as being a protrusion, bulge, or annular tear. Some of the tests also detected a defect at L4-L5 which was, on the discogram, noted to be a small herniation or annular tear. The claimant received conservative treatment for these injuries in the form of an epidural steroid injections, facet injections, nerve blocks, and physical therapy. In a progress note dated March 5, 2004, Dr. Edward Saer, a Little Rock neurosurgeon who had provided some treatment to the claimant, opined that

the claimant had reached the end of his healing period and had sustained an anatomical impairment of 5% to the body as a whole as a result of his injury.

At the hearing, the parties stipulated that the claimant sustained a compensable injury and that he sustained a 5% anatomical impairment as a result of that injury. The respondent accepted this impairment and agreed to pay the appropriate benefits based upon it. The dispute arose because of the respondent's refusal to pay temporary disability benefits after October 29, 2003 or to pay for certain additional medical treatment in the form of medical pain management which had been recommended by Dr. Saer in his note of March 5, 2004. The claimant had also requested permanent disability benefits in excess of his anatomical impairment. However, the respondent took the position that the claimant's anatomical impairment would not result in any substantial loss of earning ability and that he was therefore not entitled to any benefits.

I note at the outset that even though the respondent filed a general appeal of the Administrative Law Judge's decision, their briefs did not discuss or raise any issues in regard to the award of additional medical

benefits. As the Appellate Courts of this state have held on many occasions, issues not raised and argued by the parties in their Appellate Briefs will be considered abandoned on appeal. Therefore, I do not believe that this issue is properly before us and I would affirm the Administrative Law Judge's award of additional medical benefits. However, even if this issue were to be considered, I still find that the Administrative Law Judge's decision should be affirmed.

As referred to above, Dr. Saer stated in his progress note that the claimant would need additional medical treatment. Dr. Saer suggested this treatment be provided by a physiatrist, who has an interest in spinal injuries. As noted by the Administrative Law Judge, there are no medical opinions in the record to the contrary which suggest that this treatment is not reasonable and necessary. Further, since the claimant's problem is in the nature of managing his chronic pain, it seems reasonable that he would benefit from additional treatment in this area. Therefore, It is my opinion that the medical treatment is reasonable and necessary medical treatment and such treatment should be provided to the claimant at the respondent's expense.

The next issue is the claimant's entitlement to additional temporary total disability benefits. The respondent terminated payment of these benefits as of October 29, 2003. The respondent apparently chose this date to terminate benefits because of an internal decision made by IntraCorp, a utilization review company retained by the respondent. In a letter to the claimant dated October 29, 2003, IntraCorp advised the claimant that a lumbar discogram which had previously been recommended by Dr. Sundar Krishnan, would not be approved. Apparently, this decision was based upon the opinion of two unnamed IntraCorp physicians who concluded that the discogram was not warranted. Without referring to any medical evidence, or even the IntraCorp letter mentioned above, the Administrative Law Judge concluded that since none of the treatment the claimant received after October 30, 2003, improved his condition, he must have been stable as of that date and his healing period had, therefore, ended.

My review of the applicable medical records leads me to a contrary conclusion. Just prior to the respondents termination of temporary disability benefit, the claimant was primarily being treated by Dr. Krishnan. As the doctor

made clear in his progress notes, he wanted a discogram to more precisely outline the nature of the claimant's spinal problem. Dr. Krishnan also suggested that, depending upon the results of the discogram, the claimant might benefit from an IDET procedure. A denial of this requested treatment was the subject of the IntraCorp letter referred to above. The respondent also filed an AR-4 form, a copy of which was introduced as part of the record. In that form, the respondent notes that they are suspending compensation due the claimant based upon his noncompliance with medical treatment. Even more coincidental is a progress note from Dr. Krishnan dated October 29, 2003, in which Dr. Krishnan states that, after a session with Dr. Charles Maurillo, an IntraCorp orthopedic specialist, he was agreeable to providing the claimant further conservative treatment in the form of facet injections prior to having the discogram performed. The injections were carried out by Dr. Krishnan and were paid for by the respondent. The claimant also underwent a discogram at Dr. Krishnan's direction. However, Dr. Krishnan concluded that the discogram did not indicate that an IDET would be beneficial to the claimant. At the conclusion of Dr. Krishnan's treatment of the claimant, he

returned to Dr. Saer who eventually rendered his opinion of March 5, 2004, that the claimant was at the end of his healing period.

The respondent has never identified any particular treatment that the claimant did not seek or follow up that would justify the termination of permanent disability benefits. Further, there are no doctors opinions that seem to indicate that the claimant was at the end of his healing period on October 29, 2003. In fact, the claimant was actively undergoing treatment from Dr. Krishnan in the form of injections and diagnostic testing to fully evaluate the claimant's condition.

In my opinion, the medical treatment being provided to the claimant was curative in nature and was intended to improve his condition. Unfortunately, Dr. Krishnan's treatment was not successful. However, the treatment was painful and debilitating and would have prevented the claimant from undertaking any type of employment while he was being so treated. In my opinion, the claimant was clearly within his healing period at this time and was undergoing active medical treatment.

What the majority is essentially contending is that if medical treatment is unsuccessful in improving a claimant's condition, then the claimant should be deemed as having left his healing period prior to the start of the treatment procedures. However, this type of reasoning is not persuasive, and a standard based upon it is unworkable. Following this rule would encourage respondents to terminate disability benefits until they observe the outcome of treatment. Then, if the treatment was successful, they could go back and pay appropriate benefits. However, if the treatment was unsuccessful, then they would deem the claimant to have reached the end of his healing period at the start of any unsuccessful treatment procedure. Obviously, that would be an absurd result. For that reason, I believe that the rationale used to deny the claimant's request for temporary disability benefits should be rejected, and it should be found that he was still within his healing period through March 5, 2004, the date Dr. Saer opined that he reached the end of his healing period. On that basis, the respondent should be ordered to pay temporary total disability benefits from October 29, 2003 through March 5, 2004.

The final issue is the claimant's entitlement to wage loss disability benefits. The Administrative Law Judge, after considering the claimant's age, education level, past job experience, functional restrictions, and other vocational considerations, found that the claimant had sustained wage loss disability in an amount equal to 45% to the body as a whole. While I agree that the claimant is entitled to at least that much wage loss disability, I find that his permanent impairment has reduced his functional ability to such that his wage loss benefits should be set in amount equal to 70% to the body as a whole, thereby entitled the claimant to a total of 75% in permanent impairment.

I reached that conclusion based upon the vocational reports prepared by Bob White, a vocational expert retained by the claimant and Dale Thomas, another vocational expert retained by the respondent. I also note that the claimant underwent two functional capacity assessments which both found that his work capacity was substantially less than what it had been prior to his injury.

The first functional capacity assessment the claimant underwent was in March 2004, and the second was in

July of that year. In the first, the claimant's vocational function was in the medium to heavy range and the second found that it was in the light to medium range.

The report by Mr. White outlined the claimant's vocational ability and also discussed the effects of the claimant's injury on his ability to hold down a job. While Mr. White was of the opinion that the claimant might have the residual ability to carry out some of job functions in light employment, the debilitating and chronic pain the claimant was suffering from would severely hinder his employability. Significantly, the claimant stated to Mr. White, and testified at the hearing, that he frequently was in such extreme pain that he had to lay down for extended periods during the day. The claimant also describes his functional ability as very limited in that small exertions might be possible but would cause an exacerbation of his pain level later. Mr. White was of the opinion that the heavy pain medication and the claimant's need to frequently rest and even lay down would make it virtually impossible for him to be a dependable enough employee to obtain gainful employment.

Mr. Thomas felt that the claimant's employability prospects were better than that assessed by Mr. White, but even Mr. Thomas conceded that the claimant's limitations would make it difficult for him to remain gainfully employed. Mr. Thomas, who testified at the hearing, also stated that he was not able to find any particular job that the claimant would be able to perform. Mr. Thomas also acknowledged during his testimony that if it was necessary for the claimant to periodically lay down and rest, he would not be employable as employers would not tolerate that type of conduct. Mr. Thomas likewise stated that the claimant's past employment as a welder or welder's helper was too heavy for his current condition.

Mr. Thomas also provided the claimant a list of jobs in the Magnolia area which he believed the claimant was able to perform. The claimant testified that he had applied at several of those positions prior to the hearing but had not received any response from the potential employers. I also note that, in reviewing the jobs Mr. Thomas outlined, most of them paid in the \$6.00 to \$7.00 per hour range, with some of them being as low as \$5.15 per hour, and none of them higher than approximately \$8.00 per hour. This is in

marked contrast to the claimant's pre-injury wages of \$18.50 per hour.

The Administrative Law Judge did find that the claimant was poorly motivated. The respondent has advanced this perceived lack of motivation as the basis for denying the claimant any wage loss disability benefits. The basis for the claimant's alleged lack of motivation is a statement from Mr. Thomas, who testified that the claimant told him he was willing to try any job that was offered him, he did not believe that he would be able to function as a long term, full time employee. I disagree with the negative assessment made of the claimant's motivation. However, even if I did not disagree, a lack of motivation would not be a basis for denying the requested benefits.

The chronic and debilitating pain the claimant suffers from is a strong disabling factor and in explaining that to Mr. Thomas, the claimant was merely being honest as to why he did not believe he would be successful in finding a job. However, the claimant did make an effort. I do not believe that the claimant's benefits should be denied as asserted by the respondent, simply because he was frankly stating his opinion. More significantly, the jobs found by

Mr. Thomas all pay at roughly one-third of the hourly rate the claimant was making at the time of his injury. That factor alone is sufficient evidence to justify a substantial amount of wage loss disability.

I also note that attached to the respondent's appeal brief and their reply brief, they have attached several pages of estimated salaries for various jobs they allege the claimant could do. However, the documents were not made part of the record at the hearing and any consideration of them at this time is improper.

In summary, it is my finding that the claimant is entitled to the additional medical treatment awarded by the Administrative Law Judge, and that portion of the ALJ's decision should be affirmed. However, I believe the ALJ was in error in finding that the claimant's healing period ended on October 30, 2003. I find that the claimant's healing period did not end until March 5, 2004, and that he is entitled to temporary total disability benefits through that date. Lastly, I find that the claimant suffered wage loss disability benefits in an amount greater than that awarded by the Administrative Law Judge. As stated above, I find that the claimant is entitled to wage loss disability

benefits in an amount equal to 70% to the body as a whole,
thereby giving the claimant a total of 75% in permanent
impairment.

SHELBY W. TURNER, Commissioner