

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F303229 and F309376

BILLY DON TANNER, EMPLOYEE	CLAIMANT
WESTLAKE TRUCKING, INC., EMPLOYER	RESPONDENT NO. 1
FAIRFIELD INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 2
FIRSTCOMP INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 3.

OPINION FILED MAY 18, 2005

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

Claimant represented by the HONORABLE STEVEN R. McNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents 1 and 2 represented by the HONORABLE MICHAEL E.
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed April 5, 2004. The administrative law judge
found that the claimant did not prove he was entitled to
additional medical treatment or additional temporary total

disability compensation. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant did not prove he was entitled to additional medical treatment. We affirm the administrative law judge's finding that the claimant did not prove he was entitled to additional temporary total disability compensation.

I. HISTORY

Billy Don Tanner, Jr., age 39, testified that he sustained a work-related injury in 1992 while working for a bus factory. Mr. Tanner testified that he slipped and fell approximately 13 feet onto a concrete floor. An orthopaedic specialist, Dr. Tod Ghormley, subsequently assessed a 7% anatomical impairment for degenerative disc disease at two levels of the claimant's lumbar spine. Dr. Ghormley wrote in September 1993, "This is a letter regarding Mr. Billy Tanner, who fell approximately 10-12 feet on 10/1/92 landing on his feet. He has had chronic back pain ever since....His diagnosis is a chronic lumbar sprain, facet syndrome and degenerative disc disease documented by an MRI scan at the L4-5 and L5-S1 levels." The claimant testified that he

returned to work in 1995 with "no back pain then to really speak of."

The claimant testified that he began working as a truck driver for Westlake Trucking in December 2002. The parties stipulated that the claimant sustained a compensable injury on March 14, 2003, at which time Respondent No. 2, Fairfield Insurance Company, provided coverage. The claimant testified that his truck rolled over, and "I hurt my shoulder in that wreck and my neck and my back and injured my...I broke my back in that wreck."

The legible notes from emergency treatment rendered on March 14, 2003 indicated that the claimant complained of low back pain following the motor vehicle accident. An x-ray report on March 14, 2003 showed negative views of the claimant's cervical spine, dorsal spine, lumbar spine, and pelvis. A CT of the abdomen and pelvis with contrast showed no evidence of intra-abdominal trauma.

An MR of the lumbar spine was taken on March 18, 2003, and Dr. Steve Harms reported:

A note is made of a slight anterior compression of the L2 vertebral body with low signal intensity marrow on the T1 weighted images and hyper intense marrow on the T2 weighted images this would be consistent with a acute compression fracture and may correlate with a clinical history of a motor

vehicle accident particularly if a seat belt is fastened....

IMPRESSION:

1. Acute compression fracture L2.
2. Small central protrusion L4-5.
3. Right para central disc herniation L5-S1.
4. Disc desiccation L4-5 and L5-S1.
5. Facet hypertrophy at multiple levels.

The claimant was referred to Dr. David Oberlander, who indicated that he was board-certified in neurology, sleep medicine and electrophysiology. Dr. Oberlander examined the claimant on March 27, 2003 and noted, "Walking clearly triggers low back pain and spasm." Dr. Oberlander assessed, "The patient's symptoms and findings are consistent with a history of a significant traumatic injury to the low back region with post traumatic spasm and tenderness in the low back region. He also has a compression fracture and herniated disc: both of which I believe are post traumatic in nature." Dr. Oberlander treated the claimant conservatively.

Dr. Oberlander stated on April 9, 2003, "The patient's symptoms and findings are consistent with a history of a significant traumatic injury to the low back region with post traumatic spasm and tenderness in the low back region. His examination is really unchanged today. He also has a

compression fracture and herniated disc: both of which I believe are post traumatic in nature. He has failed conservative therapy to date." Dr. Oberlander took the claimant off work for six months, "surgery pending."

Dr. Oberlander referred the claimant to Dr. Scott M. Schlesinger for neurosurgical consultation. Dr. Schlesinger examined the claimant and stated on May 9, 2003:

I have carefully reviewed the multiple images of the lumbar spine independent of the radiologist. There is a slight L2 compression fracture, which does appear to be somewhat acute. There is a small left-sided disc protrusion at L4-5 and centrally at L5-S1 without any evidence of significant disc herniation, nerve root compression or spinal stenosis.

Low back pain has many etiologies. The back pain may come from the facet joint arthritis, degeneration of discs, musculoskeletal symptoms, rheumatologic disorders, etc. There are long list of problems that are not surgical in nature that can give rise to low back pain. The differential diagnosis for leg pain could include neurogenic leg pain from neuropathy, radiculopathy, plexopathy, ischemic leg pain from vascular disease, rheumatologic disorders, etc.

In his case, I suspect his neck pain is whiplash type injury. We will get a MRI scan of the cervical spine to sort this out. With regards to his lower back pain, it is multifactorial. I don't know how much contribution is coming from aggravation of his degenerative disc changes versus a new compression fracture.

I am going to go ahead and treat his back pain with lumbar epidural steroid injection. There is

no surgery that will be needed in the lumbar spine, but if his back pain continues despite the epidural shot or a series of these, he may be a candidate for a vertebroplasty if the radiologist feels the pain is coming from the fracture. This is certainly a very complicated situation.

I would give him a permanent partial disability rating in the lumbar spine associated with the compression fracture of 5% in accordance with The American Medical Association publication Guides to the Evaluation of Permanent Impairment. Hopefully he will be able to return to work in the next month. I will have him off work for 3-4 weeks....

Dr. Schlesinger diagnosed "1. Neck pain and low back pain, multifactorial. 2. Lumbar compression fracture at L2, mild." Dr. Schlesinger read a cervical MRI and reported on May 19, 2003, "There is nothing to do for the cervical spine from a surgical standpoint and I will release him from my care." Dr. Schlesinger released the claimant to return to work on May 23, 2003. The parties stipulated that the claimant received a 5% impairment rating for the March 14, 2003 compensable injury.

The claimant followed up with Dr. Oberlander on June 11, 2003. Dr. Oberlander returned the claimant to work, "driving no more than 2 loads a day," and "I will see Billy back in clinic on a PRN basis only." The claimant testified that he returned to work in about July 2003, and that he had "some neck and shoulder pain." On July 22, 2003, Dr.

Oberlander assigned a lifting restriction of "no more than 10 lbs." The record indicates that the claimant continued to occasionally follow up with Dr. Oberlander.

The parties stipulated that the claimant sustained a compensable injury on August 22, 2003, at which time Respondent No. 3, FirstComp Insurance Company, provided coverage. The claimant testified that he was in another roll-over accident. An x-ray of the claimant's thoracic spine was taken on August 22, 2003:

There is a very slight wedge shape of T12 and L2 without an acute fracture line evident. The time sequence of these abnormalities cannot be absolutely defined without any prior studies to compare with. The patient has a history of an L2 fracture with (sic) correlates with the finding and I suspect the T12 wedge shape is old as well. There is normal alignment and no subluxation evident.

The claimant testified that his condition following the August 2003 injury was "worse than it was in March, a lot worse. My neck and shoulders and my lower back were hurting pretty bad then after that rollover." The claimant testified that he did not return to work following the August 2003 compensable injury.

The claimant returned to Dr. Oberlander for additional treatment beginning August 27, 2003.

MR images of the claimant's cervical spine, brachial plexus, thoracic spine, and lumbar spine were taken on October 2, 2003. The MRI of the cervical spine and MRI of the brachial plexus was unremarkable. The impression from the MRI of the thoracic spine was "Schmorl's node at T12 and disc dessication at T11-T12." Dr. Ashley Burnham noted with regard to the MRI of the lumbar spine:

At L4-5, there is an annular tear with bulging annulus but no focal disc protrusion. There are mild facet osteoarthritic changes. There is minimal bilateral neural foraminal narrowing but no significant canal stenosis. At L5-S1, there is also a small annular tear and diffusely bulging annulus. There is no focal herniation. There is no significant canal stenosis or areas of neural foraminal narrowing, although, there is mild facet hypertrophy.

Dr. Burnham's impression was "Annular tears with bulging annulus L4-L5 and L5-S1."

Dr. Schlesinger wrote on October 8, 2003:

I have been asked to do a film review and consultation with Ms. Shy Cox, RN, Medical Consultant for Medical Case Management of Arkansas.

Mr. Tanner was previously seen by me in neurosurgical consultation in May 2003. He had a motor vehicle accident on 3/14/03. At that time he complained of low back pain and neck pain. I saw him at that time and a MRI scan was done of both the cervical and lumbar spine. The cervical

and lumbar MRIs revealed degenerative changes only with mild bulging discs at the C6-7 level in the cervical spine and at the L4-5 and L5-S1 levels in the lumbar spine. Since then I am told by Ms. Cox that he had another motor vehicle in August 2003. I am not familiar with his current neurologic symptoms or findings. However, the MRI scans were repeated and I have been asked to review these and compare them to his prior studies. I have done this as well as compared my prior office notes.

I see no change whatsoever in the lumbar MRI presently done compared to the old MRI, which I have been able to personally review and compare. I have compared the new cervical MRI with my notes and records as well as the MRI report and there is no apparent change.

Dr. Oberlander took the claimant off work "for the time being" on October 31, 2003.

Dr. Schlesinger wrote to Shy Cox on November 3, 2003:

Mr. Tanner is a 37-year-old male who has a very complicated history. He was involved in a motor vehicle accident initially in March 2003. I saw him in neurosurgical consultation in May 2003. He had neck and back pain at that time. He had a MRI scan showing degenerative changes only. He apparently went back to work in July 2003 and on August 22, 2003 was involved in another motor vehicle accident. His complaints remain the same of neck pain, back pain, thoracic area pain, and pain in the right side of his chest. He comes in now for neurosurgical work evaluation. The rest of the comprehensive past medical history questionnaire form has been reviewed and is otherwise noncontributory to the current illness....

I have carefully reviewed the multiple images of the cervical, thoracic and lumbar spine

independent of the radiologist and have compared this to the radiologist's interpretation and prior studies. I have discussed in detail the radiologic findings with the patient. He has mild degenerative changes throughout the cervical, thoracic and lumbar spine only. The so-called annular tear on the MRI of the lumbar spine at the L4-5 and L5-S1 levels are degenerative changes that were present on his prior studies. There is absolutely nothing to suggest a new injury radiologically or by objective criteria.

He has pain that is suggestive of musculoskeletal pain. There is nothing further to do for this. There is no further treatment recommendations at this time. I would suggest he could return to his regular job at this time. This is without restriction. I would state with a reasonable degree of medical certainty that he has reached maximum medical improvement from his August 22, 2003 accident. I see nothing to give him a permanent partial disability rating on.

Respondent No. 3's attorney indicated at hearing that Respondent No. 3 paid benefits through November 3, 2003.

The claimant returned to Dr. Oberlander on November 24, 2003:

As you know, the patient is a 37 year old right handed male with a chief complaint of severe low back pain. He was reportedly involved in another recent 18 wheeler accident (his second in a relatively short period of time) and experienced immediate low back pain as before but more intense thoracic and neck pain with radiation down into the shoulders per report. He is off driving for the time being and complains of really severe pain.

Since his last clinic visit, he continues with severe spasm and pain in the low back and neck

region. Although he remains off work and has avoided driving and lifting at home of any consequence, he continues with severe pain - coupled with burning in the entire spine region. Since his last clinic visit, the level of pain intensity has not subsided. Dr. Schlesinger feels that there is no surgical issue to address at this point in time. In my clinical judgment, Billy simply cannot work at time being....

The patient also has spasm and marked point tenderness in the neck - cervical spine region....

The claimant continued to follow up with Dr. Oberlander, and Dr. Oberlander continued to keep the claimant off work.

A pre-hearing order was filed on January 12, 2004. The claimant contended that he was entitled to additional temporary total disability compensation from November 4, 2003 until a date to be determined. The claimant contended that he was entitled to medical treatment provided by Dr. Oberlander.

Respondent No. 2, Fairfield Insurance Company, contended that the claimant had sustained a new injury on August 22, 2003 and was therefore not entitled to additional benefits as a result of the March 14, 2003 injury. Respondent No. 2 alternately contended that the claimant's current problems were "the result of his pre-existing back

condition primarily arising from a 1992 injury for which he received an impairment rating of 7%."

Respondent No. 3, FirstComp Insurance Company, contended that the claimant's August 22, 2003 injury was "merely a temporary exacerbation of his prior condition and that by November 3, 2003, when he was evaluated by Dr. Schlesinger, the claimant could return to his regular job and had suffered no permanent impairment and had experienced no change in his condition as it existed after the March 14, 2003, injury." Respondent No. 3 contended that, if the claimant had any problems, then those problems were causally related to the claimant's 1992 injury. Respondent No. 3 contended that neither respondent was liable.

A hearing was held on February 25, 2004. The claimant testified on direct examination:

Q. Do you know what the current prognosis, what your condition on your left shoulder is in right now?

A. It's real pain, but, you know, not like it was before. My shoulder is kind of, you know, not that bad now, but I still get some...sometimes, it's pain, just a little (unintelligible) occurring pain in it, in my shoulders, where I hurt my shoulders, a little bit of pain sometimes. I can't keep it raised up very long....

Q. Why don't you tell the Judge, on the average, what your average day is like, has been, from the

time you get up till you go to bed, what do you do?

A. Well, when I first get up, and don't feel much like doing nothing, because my back is hurting, and my neck and shoulders from the night before hurting me, and everything. I get up, and some days, I just lay on the couch all day long, just watching T.V....

The claimant's testimony on cross-examination indicated he had an appointment with Dr. Oberlander scheduled for July 2004.

The administrative law judge found, "The preponderance of the evidence fails to show either that Dr. Oberlander's continuing care was reasonably necessary in connection with the claimant's compensable injuries or that, as a result of the compensable injuries, the claimant remained in a healing period and was totally incapacitated to earn wages so that he should receive additional temporary total disability benefits."

The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. 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, and if the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition, the healing period has ended. Arkansas Highway & Transp. Dep't v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1983). Whether or not an employee's healing period has ended is a question of fact for the Commission. Dallas County Hosp. v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

The Full Commission affirms the administrative law judge's finding in the present matter that the claimant did not prove he was entitled to additional temporary total disability compensation. The Full Commission notes from the record that the claimant first injured his back while working for another employer in 1992. The claimant subsequently received an impairment rating for "degenerative disc disease at two levels." The claimant, who the Full Commission finds was a credible witness, testified that he

returned to work in 1995 with "no back problems then to really speak of." The preponderance of evidence does not indicate that the claimant's physical symptoms at issue in the present matter are related to the 1992 injury and subsequent impairment rating for degenerative disc disease.

The claimant began working for the respondent-employer in December 2002. The parties stipulated that the claimant sustained a compensable injury in March 2003, at which time Respondent No. 2 was providing coverage. The claimant testified that he hurt his shoulder, neck, and back. "I broke my back in that wreck," he testified. An MR of the lumbar spine taken on March 18, 2003 indeed showed an "acute compression fracture L2." The claimant began treating with Dr. Oberlander, a neurological specialist. Dr. Oberlander referred the claimant to Dr. Schlesinger, who recognized "a slight L2 compression fracture, which does appear to be somewhat acute." Dr. Schlesinger wrote on May 9, 2003, "I would give him a permanent partial disability rating in the lumbar spine associated with the compression fracture of 5% in accordance with The American Medical Association publication Guides to the Evaluation of Permanent Impairment."

The parties stipulated that the claimant received a 5% impairment rating for his March 14, 2003 compensable injury. The claimant testified that he returned to work for the respondent-employer in July 2003. The claimant still suffered from pain in his neck and shoulders, and the claimant continued to follow up with Dr. Oberlander.

The parties stipulated that the claimant sustained another compensable injury on August 22, 2003. Respondent No. 3 was providing coverage at the time of the August 22, 2003 compensable injury. The claimant testified that his physical condition worsened following the August 2003 compensable injury, and the claimant resumed treating with Dr. Oberlander. Dr. Schlesinger opined on November 3, 2003, "I would suggest he could return to his regular job at this time. This is without restriction. I would state with a reasonable degree of medical certainty that he has reached maximum medical improvement from his August 22, 2003 accident."

A treating physician's finding of maximum medical improvement may suffice to find that an employee has reached the end of his healing period. See, Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Full

Commission finds that the present claimant reached the end of his healing period for the August 2003 compensable injury by November 3, 2003, the date Dr. Schlesinger assessed maximum medical improvement. Temporary disability compensation cannot be awarded after the healing period has ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191, 737 S.W.2d 661 (1987). In the present matter, therefore, we find that the claimant reached the end of a healing period on November 3, 2003. Based on the record before us at this time, the Full Commission therefore finds that the claimant did not prove he was entitled to temporary total disability compensation after November 3, 2003.

B. Medical Treatment

An employer shall 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 employee must prove by a preponderance of the evidence that he is entitled to additional medical treatment. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). 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 in March 2003, while Respondent No. 2 was providing coverage. Dr. Schlesinger assigned a permanent impairment rating for this compensable injury on May 9, 2003. 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 record therefore indicates that the claimant reached the end of his healing period for the March 2003 injury no later than May 9, 2003.

The parties stipulated that the claimant sustained another compensable injury on August 22, 2003, at which time Respondent No. 3 was providing coverage. We recognize Dr. Schlesinger's subsequent opinion that there was "absolutely nothing to suggest a new injury radiologically or by objective criteria." Nevertheless, Respondent No. 3 stipulated that the claimant sustained a compensable injury on August 22, 2003. The claimant credibly testified that his physical condition following this injury was "worse than

it was in March, a lot worse." We are also aware that Dr. Schlesinger opined in November 2003, "There is nothing further to do for this. There is no further treatment recommendations at this time." However, the Full Commission notes that the claimant continued to treat with Dr. Oberlander after this date. In our opinion, Dr. Oberlander's treatment is palliative in nature and serves to maintain the claimant at his present level of healing, rather than improve his condition as he has already attained maximum medical improvement. It is well settled that after a claimant has reached the end of his healing period reasonable medical treatment necessary to maintain a claimant at his healing level is compensable although it does not bring the claimant back within the healing period. Artex Hydrophonics, Inc. v. Pippen, 8 Ark. App. 200, 649 S.W.2d 845 (1983); Trader v. Single Source Transportation, Claim No. E507484 Full Commission opinion filed February 12, 1999; Wilson v. Amfuel, Claim No. E216994, Full Commission Opinion Filed February 9, 1998; Setser v. Bechtel Const. Corp., Claim. No. E102964, Full Commission Opinion Filed June 18, 1997. The Full Commission expressly finds in the instant matter that Dr. Oberlander's follow-up treatment was

geared toward management of the claimant's August 22, 2003, compensable injury. We find that Respondent No. 3, FirstComp Insurance Company, shall provide this reasonably necessary treatment pursuant to A.C.A. § 11-9-508(a).

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to additional temporary total disability compensation. We find that the claimant did not prove he was entitled to additional temporary total disability after November 3, 2003. The Full Commission reverses the administrative law judge's finding that the claimant did not prove he was entitled to additional medical treatment provided by Dr. Oberlander. We find that the claimant proved Dr. Oberlander's follow-up treatment beginning on November 24, 2003 and following was reasonably necessary in connection with the claimant's August 22, 2003 compensable injury. The Full Commission finds that Respondent No. 3 shall provide this reasonably necessary medical treatment pursuant to Ark. Code Ann. §11-9-508(a). For prevailing in part on appeal to the Full Commission, the claimant is entitled to a fee of

five hundred dollars (\$500). 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

I concur in the Majority's finding that the claimant is entitled to further medical treatment for his compensable injuries. However, I dissent from the holding that the claimant is not entitled to further temporary disability benefits.

The Majority found that the claimant's healing period ended on November 3, 2003, based upon a report of that date authored by Dr. Scott Schlesinger. In that report, Dr. Schlesinger stated that he had no further treatment recommendations and that the claimant should return to his regular job. He also stated that, "with a reasonable degree of medical certainty," the claimant had

reached his point of maximum medical improvement. However, Dr. Schlesinger's opinion is contradicted by that of Dr. David Oberlander, who was the claimant's primary treating physician. Dr. Oberlander authored a number of reports and provided off work statements directing that the claimant remain off work well beyond November 3, 2003. In fact, the final report from Dr. Oberlander, dated January 28, 2004 (approximately one month before the hearing in this case), stated that the claimant should remain off work.

The Majority's Opinion holds that Dr. Oberlander's reports are entitled to more weight than Dr. Schlesinger's in regard to the medical treatment, but relies upon Dr. Schlesinger to find that the claimant was at the end of his healing period.

I believe that Dr. Oberlander is in a superior position to assess the claimant's physical status, including his inability to return to work. Dr. Oberlander provided the claimant with the bulk of his medical treatment for his two compensable injuries and has seen the claimant on numerous occasions following both of his compensable injuries. On the other hand, Dr. Schlesinger,

saw the claimant no more than once or possibly twice over a period of several months. Also, Dr. Schlesinger is a neurosurgeon and his perspective of medical treatment is limited to surgical intervention. On the other hand, Dr. Oberlander, is a neurologist who specializes in the type of conservative treatment that the claimant needs.

Also, it is obvious from Dr. Oberlander's continued treatment of the claimant that he was still within his healing period through the date of the hearing. In his report of January 20, 2004, Dr. Oberlander notes that the claimant is still suffering from severe muscle spasms coupled with pain and related symptoms. The doctor prescribed the claimant further medication and directed him to return.

In my opinion, Dr. Oberlander's ongoing treatment establishes that he was still within his healing period through the date of the hearing. Further, Dr. Oberlander's considered medical opinion was that the claimant was still disabled beyond his last examination of the claimant on January 28, 2004. For those reasons, I find that the claimant was still disabled and within his healing period as of the date of the hearing, and would be

entitled to receive temporary disability benefits through a date not yet determined.

I respectfully dissent from the Majority's denial of temporary disability benefits to the claimant.

SHELBY W. TURNER, Commissioner