

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308940

ROSCOE SHAW, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2005

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

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE ANDREW IVEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant was entitled to additional temporary total disability benefits for the period April 2, 2004, through June 28, 2004. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof.

Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury to his back on August 17, 2003. The claimant testified that he slipped and hit his back and head while he was pulling a pallet jack. The claimant received medical treatment from Dr. Keith Holder and was ultimately referred for physical therapy. On August 29, 2003, Dr. Holder diagnosed the claimant with a lumbar strain. He noted that the claimant had improved with physical therapy and that he no longer suffered from right leg pain. Dr. Holder recommended that the claimant continue with physical therapy but released the claimant to return to work with lifting, pushing, pulling and repetitive back motion restrictions.

The claimant testified that when he returned to work his legs were "numb and tingling". The claimant sought treatment from his family physician, on October 9, 2003. The claimant complained of low back and right leg pain. On October 13, 2003, Dr. Terry Clark noted that the claimant reported that he was "still sore", but denied any radicular symptoms. The claimant indicated that he was a "little bit

better". Dr. Clark released the claimant to return to work without restrictions on October 27, 2003.

On February 9, 2004, the claimant underwent an MRI which revealed a tiny central disc bulge or protrusion at L5-S1, minimally eccentric to the left. The claimant was also diagnosed with a "far left lateral spur and annular tear with disc bulge/protrusion at 4-5." As well as "diffuse mild to moderate disc bulge at L3-4" and "vertebral body hemangioma or lipoma at L1." The claimant sought treatment from Dr. Michael Standefer, a neurosurgeon, on February 16, 2004. Dr. Standefer opined that the claimant was not a surgical candidate because there was no evidence of "intraspinous lesions" or "a ruptured disc" or "overt neurological impairment." Dr. Standefer recommended a thoracic MRI and bilateral lower extremity EMG, as well as physical therapy. Dr. Standefer explained in a letter dated February 26, 2004, that he recommended the additional studies because the claimant complained of numbness and tingling in his hips as well as some numbness and tingling in his feet and the occasional loss of bowel control.

Dr. Standefer wrote at that time that there "are not objective findings that prevent the patient from performing employment with Wal-Mart" and that he had not placed any restrictions on the claimant.

On March 9, 2004, the claimant underwent a thoracic MRI which demonstrated that there were no disc herniations. The EMG was performed on March 24, 2004, and showed that there were no neurological problems that would account for the claimant's complaints. Dr. Standefer released the claimant to return to work full duty, but he also recommended that the claimant consult a medical neurologist to "be absolutely certain that there [was] no neurological problems." In a letter dated June 11, 2004, Dr. Standefer confirmed that the claimant was given the note to remain off work from February 16 to March 24, 2004, to see if the claimant would improve with more limited levels of activity. He stated that the claimant was capable of gainful employment during that period of time.

The claimant failed to consult a neurologist as recommended by Dr. Standefer but instead returned to

Dr. Charles Craft, his family physician, on April 9, 2004. Dr. Craft's impression was that the claimant had persistent lower back pain with multiple levels of degenerative disc disease that was aggravated by the fall. The claimant also had a seizure disorder and hypertension. He recommended that the claimant undergo physical therapy, prescribed medications for muscle spasms, and excused the claimant from work for 90 days. It is of note that the claimant's employer was willing to accommodate him by putting him to work as a door greeter, but the claimant failed to return to work.

On May 26, 2004, the claimant was admitted to the hospital for unrelated seizures. The claimant also complained of back pain which Dr. Keeting, informed the claimant that she would not treat. The claimant was to follow up with his primary care physician or Dr. Swicegood. The claimant returned to Dr. Craft on June 2, 2004, and was diagnosed with seizure-like activity, conversion reaction and low back pain. The claimant has not returned to work since April 9, 2004.

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)).

In our opinion, the evidence fails to demonstrate that the claimant is entitled to any additional temporary total disability benefits. The claimant sustained an admittedly compensable injury on August 17, 2003, and was diagnosed with a lumbar strain. The claimant was released to return to work on August 29, 2003, with lifting, pushing, pulling and repetitive back motion restrictions. On October 27, 2003, the claimant was released to return to work without restrictions. In February of 2004, the claimant sought medical treatment from Dr. Standefer who opined that surgery was unnecessary because there was no evidence of any neurological impairment. Dr. Standefer wrote on February 26, 2004, that there were no objective findings that prevented the claimant from performing his job without restrictions. Dr. Standefer later clarified in a June 11, 2004, letter that the claimant was excused from working from February 16, 2004, to March 24, 2004, but after that period of time he

was capable of gainful employment. In our opinion, the evidence demonstrates that the claimant's healing period ended on March 24, 2004, when the claimant was released to return to work with no restrictions by Dr. Standefer. Because the claimant cannot show he was in his healing period and that he was totally incapacitated from earning wages from April 9, 2004, to June 28, 2004, he is not entitled to any additional temporary total disability benefits. The evidence demonstrates that the respondent employer was ready, willing and able and provided the claimant with light duty work as a door greeter. The claimant did not follow through with that. There is absolutely nothing in the record stating that the claimant was totally incapacitated from earning wages particularly in light of the fact that the respondent employer was willing to accommodate the claimant's restrictions. Simply put, we cannot find that the claimant is entitled to any additional temporary total disability benefits. Accordingly, we reverse the decision of the Administrative Law Judge and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is reversing an Administrative Law Judge's award of temporary total disability benefits for a period of slightly less than three months. Based upon my de novo review of the record, I believe that the claimant is entitled to benefits during that period and, accordingly, I respectfully dissent from the Majority's decision.

As noted in the Majority's Opinion, the claimant sustained an admittedly compensable injury to his back on August 17, 2003. The Administrative Law Judge found that the claimant was entitled to temporary total disability benefits from April 9, 2004 to June 28, 2004. The Majority has found

that the claimant is not entitled to any temporary disability benefits after March 24, 2004, in reliance from opinions from Dr. Michael Standefer, a Fort Smith neurosurgeon, who examined the claimant to determine if he was a surgical candidate.

The record does not contain any report or progress note regarding the claimant's first visit with Dr. Standefer. However, he apparently directed the claimant to undergo an MRI and advised him to remain off work.

In his progress note of February 16, 2004, Dr. Standefer reviewed the claimant's MRI scan and did not believe that he was a candidate for surgical treatment. Accordingly, he referred the claimant to Dr. Swicegood for lumbar epidural steroid injections.

In a letter dated February 27, 2004, directed to the respondent's medical management company, Dr. Standefer reviewed the claimant's symptoms and stated, "there are no objective physical findings that prevents the patient from performing employment work." He also states that he has not placed any restrictions on the claimant or advised him to

remain off work. However, in a subsequent letter to the respondent's counsel dated June 11, 2004, he retracts his previous statement and admitted that he had taken the claimant off work from March 16, 2004 through March 24, 2004.

Another doctor who provided treatment to the claimant was Dr. Charles Craft of Greenwood, Arkansas. Dr. Craft is a primary care physician who began seeing the claimant after he was released by Dr. Standefer. In his treatment note of April 9, 2004, Dr. Craft noted the claimant was suffering from back pain and muscle spasms and related symptoms. As part of his treatment plan, in conjunction with Dr. Swicegood's steroid injections, Dr. Craft directed the claimant to remain off work for 90 days. During that time, Dr. Craft provided to the claimant conservative treatment for his back problems. The treatment program was apparently successful since many of these symptoms had resolved by June 2004. While the claimant remained disabled after that date, the Administrative Law

Judge found that disability beyond June 8, 2004, was the result of physical ailments unrelated to the present claim.

In my opinion, the treatment regimen prescribed by Dr. Craft was reasonable and necessary and appropriated to the claimant's physical injuries. In fact, the respondent is apparently not disputing the claimant's entitlement to treatment from Dr. Craft. In my opinion, the claimant is clearly entitled to receive temporary total disability benefits during the time he was off work pursuant to Dr. Craft's instructions.

I realize that Dr. Standefer is a neurosurgeon and Dr. Craft is a primary care physician. However, Dr. Standefer's examinations of the claimant were all geared towards his need for surgical treatment. When Dr. Standefer determined that the claimant was not a surgical candidate, he released the claimant from further care. While I do not question Dr. Standefer's conclusions in regard to his treatment of the claimant, it appears to me that he was not in the best position to evaluate the claimant's ability to return to work. That conclusion is supported by

Dr. Standefer's apparent confusion over whether he had, or had not, directed the claimant to remain off work.

Dr. Standefer's focus is, quite appropriately, on the neurological aspects of the claimant's condition and his opinions that the claimant can return to work are based almost entirely upon his evaluation of the claimant's MRI scan. However, Dr. Craft was more concerned with the mechanical aspect of the claimant's condition, specifically muscle spasms and limitation in his movement. Dr. Craft provided the necessary treatment to alleviate these symptoms and the result was that the claimant could have, but for his other medical problems, returned to work by June 2004.

I believe that the Majority is in error in finding that Dr. Standefer's work release of March 24, 2004, ends the claimant's entitlement to temporary disability benefits. I believe that Dr. Craft's opinions that the claimant should remain off work for 90 days beginning in April 2004 is compelling and is based upon his reasonable medical treatment. To ignore Dr. Craft's report is a failure of our duty to objectively consider all available medical evidence.

I believe that based upon Dr. Craft's opinion, the claimant was totally disabled from April 9, 2004 through June 8, 2004, and should receive temporary total disability benefits for that period.

SHELBY W. TURNER, Commissioner