

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E814677

GRATTON HARRIS, EMPLOYEE	CLAIMANT
SOUTHERN TELEPHONE CONSTRUCTION CO., EMPLOYER	RESPONDENT NO. 1
LEGION INSURANCE CO. c/o ARKANSAS PROPERTY & CASUALTY GUARANTY FUND, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MAY 12, 2006

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

Claimant represented by the HONORABLE MICHAEL J. HAMBY,
Attorney at Law, Greenwood, Arkansas.

Respondents No. 1 represented by the HONORABLE JASON
BROWNING, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas, although not present
at hearing.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed June 17, 2005. In said

Harris - E814677

order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The parties' stipulation that the prior opinions are final and res judicata is hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 10, 2000 and continuing through a date yet to be determined.
3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable back injury subsequent to March 1, 2004. This includes the functional capacities evaluation recommended by Dr. Capocelli.
4. Claimant is entitled to be paid mileage for 8 visits to receive medical treatment at a distance of 118 miles each.
5. Respondent No. 1 has controverted claimant's entitlement to all unpaid compensation.

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

Harris - E814677

the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the June 17, 2005 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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 1996).

Harris - E814677

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical benefits and/or to additional temporary total disability benefits as awarded by the Administrative Law Judge. Likewise, the claimant has failed to prove by a preponderance of the evidence that he is entitled to mileage reimbursement for more than 3 round trips to visit Dr. Capocelli.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). However, injured

Harris - E814677

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.

In support of his finding that the claimant is entitled to additional medical treatment, the Administrative Law Judge, and now the majority rely upon Gansky v. High-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). In Gansky, the high court reversed the decision of the Commission, which found that additional medical treatment for the claimant was not reasonable and necessary for the treatment of his compensable back strain. Although very similar in facts to the present claim, Gansky is

Harris - E814677

distinguishable from the present claim as follows. When Mr. Gansky's treating physician recommended a functional capacity evaluation, the claimant had not yet been released from his care. Moreover, in anticipation of this evaluation, Mr. Gansky's treating physician withheld his final opinion as to the claimant's permanent physical condition and any permanent impairment he may have suffered as a result of his compensable injury. In other words, the physician's opinion "hinged on the results of the functional capacity evaluation, which was not performed". Gansky, supra.

In the current claim, the claimant's treating physician, Dr. Capocelli, recommended the *additional* functional capacity evaluation, stating that it would allow him to assign "final work restrictions in an objective way". However, Dr. Capocelli was unaware of the claimant's first functional capacity evaluation when he made this recommendation. Moreover, the medical records reveal that when Dr. Capocelli recommended this study, he had assessed the claimant to be at maximum medical improvement, assigned him a permanent physical impairment rating, and released him from his care. And, unlike the physician in Gansky, Dr. Capocelli was unequivocal in his statements that this

Harris - E814677

impairment rating was an actual assessment of the claimant's permanent impairment based upon his recent diagnostic studies and physical examination, as opposed to an approximation based on certain assumptions which were not objectively supported. As the respondent correctly asserts, Dr. Capocelli's treatment of the claimant, his determination of the claimant's physical impairment, and his opinion that the claimant had reached maximum medical improvement and was in no further need of surgical treatment, did not depend on the proposed functional capacity evaluation. Therefore, because this study was in no way recommended for the treatment of the claimant's condition, it stands to reason that it is not reasonable and necessary to the claimant's treatment of his compensable injury.

Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment, specifically in the form of a functional capacity evaluation, is reasonable and necessary to the treatment of his compensable injury.

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

Harris - E814677

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 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). 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. McWilliams, supra.

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

Harris - E814677

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. 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 the present claim, Dr. Capocelli found that the claimant had reached maximum medical improvement by April 22, 2004. Moreover, the functional capacity evaluation recommended by Dr. Capocelli was not recommended for the treatment of the claimant's condition; rather, to help determine final work restrictions. However, the results of his first functional capacity evaluation established the claimant's capacity to work in a light to medium category. There is no evidence that the claimant is still in his healing period. On the contrary, in an August 2004 letter to claimant's counsel, Dr. Capocelli wrote that there were no

Harris - E814677

anatomical changes in the claimant's condition, and that the claimant's condition had actually improved to the point that surgery was no longer indicated. At that time, the claimant had reached maximum medical improvement and Dr. Capocelli released him from his care. Clearly, therefore, and as supported by the results of his last diagnostic studies, the claimant had reached the end of his healing period by April 22, 2004. Furthermore, with the exception of three weeks, the claimant has not worked since November 20, 1998.

However, the claimant has offered no proof that he has been totally incapacitated from working. In fact, the results of the claimant's first functional capacity evaluation, which was conducted approximately a year after his compensable injury, demonstrated that he is capable of working in at least a light or sedentary position. Even if the claimant has not been physically able to return to his previous line of employment, as some of the medical records appear to indicate, he has offered no explanation as to why he has been physically prevented from returning to some type of employment. Further, the claimant testified that he spends all of his time caring for his young son, and that he

Harris - E814677

applied for and now receives social security disability benefits on behalf of he and his son.

In view of the fact that the claimant's first functional capacity evaluation demonstrated that he is capable of working in some capacity; that subsequent diagnostic testing has actually shown an improvement in the claimant's condition with regard to inflammation and swelling, with no anatomical changes other than degeneration; the claimant leads an active lifestyle caring for his young son, cutting firewood, etc...; and, he reached maximum medical improvement no later than April 22, 2004, he has failed to establish that he is entitled to temporary total disability benefits from March 10, 2000, to a date yet to be determined. As the respondent correctly asserts, even with the noted degenerative changes, Dr. Capocelli's 2004 assessment of the claimant's condition was consistent with Dr. Queeney's 2000 opinion, in that no surgery or further treatment is indicated. In addition, Dr. Capocelli did not take into account the claimant's full history when assessing the cause of the claimant's degenerative changes. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to

Harris - E814677

temporary total disability benefits after March 10, 2000, on which date the Full Commission rendered a decision concerning additional medical treatment, because, even though the claimant may have still been in his healing period, the evidence preponderates against his having been totally incapacitated from working during that time.

Finally, pursuant to our Workers' Compensation Advisory 89-2, the Commission approves mileage reimbursement rates as medical expenses related to an injury or illness arising out of and in the course of employment. However, travel must be as a result of job-related injuries and meet all reasonableness requirements established by the law, the Commission, and the courts. *Id.* That the claimant made 3 trips to visit Dr. Capocelli, at a round-trip distance of 118 miles per visit is documented in the record, and, therefore, not disputed. However, the claimant contends that he made 15 trips to visit Dr. Capocelli between May 17, 2003, and May 10, 2004. Further, the claimant asserts that on 4 or 5 of these trips to visit Dr. Capocelli, he arrived to find that the doctor was unavailable. The Administrative Law Judge apparently gave the claimant the benefit of the doubt when he awarded the claimant mileage reimbursement for

Harris - E814677

8 out of the alleged 15 trips. However, as the respondent correctly asserts, aside from the claimant's own self-serving testimony, there is no evidence contained within the record that the 5 additional purported and unsubstantiated visits to Dr. Capocelli ever occurred. Moreover, there is no documented evidence that any of the claimant's alleged trips, other than those documented by Dr. Capocelli's office, were medically necessary or related to his work related injury. Therefore, I find that reimbursement for more than 3 round trips would be in contravention of the evidence presented in this claim.

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

KAREN H. MCKINNEY, Commissioner