

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407042

BOBBY HEARD, EMPLOYEE	CLAIMANT
CENTRAL ARKANSAS BUILDING MATERIALS D/B/A MARTIN BORCHERT CO., EMPLOYER	RESPONDENT
STATE FARM FIRE & CASUALTY CO., CARRIER	RESPONDENT

OPINION FILED JUNE 15, 2006

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

Claimant represented by HONORABLE SIMMONS S. SMITH, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The respondent appeals a decision of the Administrative Law Judge filed on February 1, 2006, finding that the claimant had established compensable injuries to his neck, low back, left shoulder, and to his left ankle. The Administrative Law Judge also awarded medical benefits and temporary total disability benefits for the time period of November 18, 2003 to June 8, 2005. Last, she found that

the respondents were entitled to a credit for payments made against indemnity benefits owed to the claimant.

After a de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part. More specifically, we find that the claimant did not sustain a compensable injury to his ankle. However, we affirm the remainder of the Administrative Law Judge's decision.

The claimant worked as a delivery driver for the respondents. He worked for the employer without interruption from 1994 to the time of his injury. On November 18, 2003, the claimant was making a delivery of concrete to a customer. The claimant was standing in the bed of a truck unloading concrete when a garbage truck hit the truck on which he was standing. The claimant testified as follows,

A. I was standing on the back of this bed right here (indicating).

Q. And tell us how the impact felt and what all took place in detail.

A. My neck popped, and it knocked me down on the bed of the truck. Then, when I got up, I was still staggering, and I grabbed a hold of the forklift to hold on to keep from falling on the ground.

The claimant further testified that after the accident he went to the office where Shane Wilkins was talking on the phone. The claimant said that he contacted his supervisor, Curtis Lyman, of the accident and was instructed to return to work.

The police arrived at the accident scene and took statements from David Eads (the driver of the garbage truck), the claimant, Henry Parker, and from Jason B. Allison (passenger in garbage truck). Eads' report indicated that he was attempting to maneuver between two parked trucks and hit one on the right side. Allison's report provided that he was standing in the back of the garbage truck and attempted to tell Eads to stop to no avail. The claimant's report provided that he was on top of the truck when his vehicle was struck. A statement by the police officer indicated, "Heards vehicle was parked on the North side of the Road with Heard standing on the back unloading blocks when struck by V-1. Heard complained of neck + back pain; however refused needing any medical attention at this time." The report further indicated that Allison was "ejected off upon collision".

The claimant was seen at Baptist Health Medical Center on the date of the incident. The report indicated that the claimant was standing on the back of a flat bed trailer when another vehicle hit it. The report further provided that the claimant complained of pain in his neck and reported hearing his neck pop at the time of his accident. X-rays were performed and revealed that the claimant suffered from some degenerative changes and that he had a reversal of his lordotic curve. The claimant was given a cervical collar. He was also given Toradol and prescribed Flexeril and Lortab. He was also instructed to use moist heat and to follow up with his primary care physician if his condition had not improved within five days. He was also restricted from working for the day and then from lifting greater than 10 pounds for the next three days.

The claimant was treated by Christopher L. Cathey, D. C. A note reflecting x-rays were performed on November 21, 2003, indicated that Cathey diagnosed the claimant with "Right Spinous rotation of C5-7/T1." Cathey restricted the claimant from working from November 24, 2003 to December 8,

2003. Progress notes indicated that the claimant also complained of pain in his left ankle. The date of the progress note is not legible but appears to be from some time prior to December 5, 2003. It indicates, "Left ankle-old fx".

The claimant was subsequently treated by Christopher Dodson, D.C. Dr. Dodson restricted the claimant from working beginning December 15, 2003. Other notes indicate that he provided excuses approximately every two weeks extending the claimant's restriction. On January 12, 2004, he opined that, "Upon palpation, tenderness and muscle spasms were palpated in the posterior cervical spine radiating out into the right upper trapezius."

The claimant was prescribed physical therapy, in which he complained of right hip pain. A note from February 2, 2004, indicated that the claimant suffered from ankle pain. The note provided that the claimant had no swelling in his ankle, that x-rays showed a properly healed fracture, and that the claimant's hardware was not out of position. Dr. Shock also opined that he did not believe that the claimant's symptoms were related to his motor vehicle

accident as the symptoms had only been going on around a week.

An EMG was performed on the claimant on March 3, 2004. The report provided that the claimant had suffered from, "atrophy of left calf and thigh over the past few years." It further indicated that the claimant's test returned as normal.

A note from April 14, 2004, also revealed that the claimant had an ankle fracture in approximately 2000 and that the claimant, "presents wanting us to change a letter that was sent to neurology stating that he has had increased atrophy over the last several years." The same report provided there was no joint swelling and that x-rays showed, "a beautifully aligned bimalleolar fracture after open reduction internal fixation. The hardware is properly placed and nothing appears to be loosened." Finally, the report indicated that the claimant's neurological studies were normal. The claimant was assessed with foot pain of "unknown etiology".

During physical therapy, the claimant complained of ankle pain and pain in his SI Joint and in his lower

back. On May 5, 2004, Dr. Johannes Gruenwald diagnosed the claimant with, "Left lower extremity atrophy secondary to ankle pain and lack of use." On May 6, 2004, Dr. Gruenwald released the claimant from working.

On June 9, 2004, Dr. Gruenwald indicated that the claimant's ankle pain had resolved. However, he indicated that the claimant was suffering from radiating pain in his left shoulder and arm and neck. He also complained of low back pain. The claimant was referred to see Dr. Fox and was given a work release. An MRI dated June 18, 2004, indicated that the claimant had multilevel degenerative disc disease with mild canal stenosis at levels C4-5 to C6-7. It further revealed the claimant had, "UNCINATE SPURRING WITH BILATERAL SEVERE FORAMINAL NARROWING AT C6-7 AND MODERATE FORAMINAL NARROWING AT C4-C5 LEVEL."

A doctor's report dated September 2, 2004, from Dr. Fox, provided that the claimant had been evaluated for, "neck pain with left-upper-extremity radiation symptoms." The claimant was referred for an EMG. The MRI showed no electrophysiologic evidence of cervical radiculopathy. A report dated September 16, 2004, indicated that Dr. Fox did

not believe the claimant was a surgical candidate. However, he recommended the claimant continue with physical therapy. He also instructed the claimant he could, "return to work as tolerated". He was also advised to get another MRI in 3 months.

Another MRI was performed on the claimant on December 16, 2004. The report indicated that it was compared with the MRI performed in June 2004. The report provided, "This study is of considerably higher quality than the prior study as there is no motion artifact on the current examination." It also provided as follows,

The C2-3 disc spaces and neural foramen are unremarkable. The C3-4 level shows prominent diffuse bulging. Degenerative changes are seen causing moderate bilateral foraminal narrowing. The anteroposterior dimension of the spinal canal is narrowed to 9 mm consistent with early acquired stenosis.

The C4-5 level shows prominent bulging with degenerative changes. Mild narrowing of the spinal canal to 9 mm. There is some flattening of the cord without abnormal signal. There is moderate foraminal narrowing.

A doctor's note from Dr. Jamie Howard, dated June 29, 2004, revealed that the claimant suffered from radiating

pain and spasms in his left rhomboids. She further indicated, "Pain and muscle spasm may be secondary to the findings of degenerative disk changes with stenosis on his cervical spine MRI." In a note dated August 19, 2004, Howard indicated that the claimant suffered from, "neck and shoulder pain resulting from an on-the-job accident in November of 2003." There is also a notation that the claimant would be seeing a neurosurgeon in September 2004. Another note from Dr. Howard, dated October 18, 2004, indicated that the claimant would be able to work so long as it did not require heavy lifting or straining of his neck.

A doctor's note dated May 18, 2005, indicated that the claimant had his hardware from his ankle removed on April 26, 2005. A note dated June 8, 2005, indicated that the claimant was released to return to work.

The Administrative Law Judge's decision finds that the claimant established injuries to his ankle, left shoulder, low back, and to his neck. After a de novo review of the record, we find that her decision should be affirmed except for the portion of the decision pertaining to the compensability of the claimant's ankle. In our opinion, the

record indicates that the claimant credibly testified as to the events of the accident. We also find that each of his injuries were shown by objective medical findings and that he has proven by a preponderance of the evidence his injuries were directly related to his work-related activities.

In order to prove a compensable injury, a claimant must prove, among other things, a causal relationship between his employment and the injury. McMillan v. U.S. Motors 59 Ark. App. 85, 953 S.W.2d 907 (1997). Objective medical evidence is necessary to establish the existence and extent of an injury, but not essential to establish the causal relationship between the injury and a work-related accident. Horticare Landscape Mgmt. v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Objective findings are defined at Ark. Code Ann. § 11-9-102(16) as those findings which cannot come under the voluntary control of the patient. When the Commission determines physical or anatomical impairment, complaints of pain, straight-leg raising tests, or active range of motion tests shall not be considered objective findings. Further, medical opinions

addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Objective medical evidence is not essential to establish the causal relationship between the injury and a work-related accident where objective medical evidence establishes the extent and existence of the injury, and a preponderance of other non-medical evidence establishes a causal relation to a work-related incident. McDonald.

In the present case, the credible evidence shows that the claimant was standing on a truck when a dump truck hit his vehicle. Immediately after the accident, the claimant reported that he was on top of the truck when the other vehicle struck. This statement was corroborated by the police statements given by Jason Allison and Henry Parker. Likewise, the police report indicated that the claimant was standing on the back of the truck at the time of injury.

The police report also indicated that the claimant complained of neck and back pain immediately after the injury. The claimant testified to the same effect. The emergency room report from the day of the accident,

corroborates the police report and the claimant's testimony. Specifically, it indicated that the claimant heard a pop in his neck at the time of the collision and presented with neck pain. Likewise the report provided, "He does have pain with all range of motion of his neck. There is some mild midline in the lower c-spine." An x-ray revealed that he had degenerative changes in his cervical spine but also revealed some curvature of the spine. Furthermore, the claimant was given Flexeril and Lortab. He was also diagnosed with a cervical sprain and given a cervical collar. In our opinion, each of these factors show that the claimant's cervical and low back injuries were directly related to his work-related accident, and were shown by objective findings.

Objective findings to the claimant's cervical spine and shoulder are further shown in the examinations by Christopher Dodson, D. C. A note dated January 12, 2004, revealed, "Upon palpation, tenderness and muscle spasms were palpated in the posterior cervical spine radiating out into the right upper trapezius. Additionally, on June 29, 2004, Dr. Jamie Howard indicated the claimant suffered from spasms

in his left rhomboids. Likewise, on July 13, 2005, Dr. Christopher Cathey, opined, "Mr. Heard presented to this clinic on 11-23-03 with complaints of neck and shoulder pain starting at the time of the accident. After physical and radiological examination my diagnosis for Mr. Heard was cervical sprain/strain, cervical radiculitis and muscle spasms. Furthermore, an MRI dated, December 16, 2004 revealed, "C4-5 level shows prominent bulging with degenerative changes". Last, in a note dated August 19, 2004, Dr. Howard indicated the claimant suffered from, "neck and shoulder pain resulting from an on-the-job accident in November of 2003."

The respondents argue that the claimant at most suffered a temporary aggravation of a pre-existing condition in his neck and that he suffered no injury to his low back. In supporting this argument, they opine that the claimant had been suffering from back spasms yearly since 1998 and that Dr. Howard had linked the claimant's spasms to degenerative problems.

We note, first, that the only medical report indicating any history of previous neck problems is dated

January 23, 1998. This indicates there was a lapse of almost five years between his last complaint and the time of the accident. Additionally, the note indicated he had a "stiff neck" once a year; whereas after the accident, he had ongoing, continued problems that did not resolve. Last, and most importantly, the report from 1998 indicated that the claimant suffered from, "NO RADICULAR SYMPTOMS". In contrast, the medical records after the accident repeatedly indicated the claimant had spasming in his neck and that he suffered from radicular symptoms. Accordingly, his condition after the accident was different from that prior to the accident.

With respect to the claimant's prior back complaints, the last report prior to December 2003 indicating a back problem, was dated August 18, 2003, and simply indicated that the claimant felt he had slept wrong and as a result suffered from low back pain. Just as with the claimant's neck, there is no indication that the claimant had ongoing low back pain or spasms prior to the accident. However, after the accident the claimant presented with ongoing low back pain and spasms. As such,

even if the claimant suffered from a pre-existing condition (a finding which we do not make), then his condition was aggravated by his work-related accident.

As to the opinion of Dr. Howard, we note her opinion that the claimant's, "pain and muscle spasm may be secondary to the findings of degenerative disk disease with stenosis on his cervical spine MRI." However, in our opinion, the use of the word "may" indicates that Dr. Howard's opinion was not given within a reasonable degree of medical certainty. Just as a claimant cannot rely on such an opinion in showing causation, such an opinion should not be used by the respondents to conclude that causation does not exist. Furthermore, we note that another note from Dr. Howard explicitly provides that the claimant suffered from, "neck and shoulder pain resulting from an on-the-job accident in November of 2003."

The respondent also relies on the MRI conducted on June 9, 2004, which indicated that the claimant suffered largely from degenerative disc disease. We note that a later MRI performed in December 2004, appears to be more reliable. The report from the December 2004 MRI

specifically indicated that there were problems with the June 2004 MRI and provided, "This study is of considerably higher quality than the prior study as there is no motion artifact on the current examination." Accordingly, we find that the results from the December 2004 MRI should be relied upon more heavily than those of the June 2004 MRI. While the December 2004 MRI revealed degenerative changes in the claimant's spine, it also revealed that the claimant suffered from bulging discs at levels C3-4 and C4-5. When considered with the change in the claimant's symptomology, the existence of objective findings that were not present prior to the injury, and his ability to work before the accident, we are convinced that the claimant's conditions are directly related to his injury rather than due to pre-existing degenerative disc disease.

We also affirm the decision of the Administrative Law Judge in awarding medical treatment for the claimant's neck, back, and shoulder injuries. The evidence shows that the treatment requested by the claimant is both reasonable and necessary to treat conditions that are directly related to his work-related injuries. This is evidenced by the

medical records indicating that the claimant has suffered from ongoing low back, neck, and shoulder pain and spasming after the accident. Likewise, the need for medical treatment is shown by the fact that multiple doctors continued treating him and did not release him to return to work until June 2005.

With respect to the claimant's request for treatment for his ankle, we find that there are no objective findings of any ankle injury due to his work-related accident. It is undisputed that the claimant had previously suffered a fracture in his ankle and that he had hardware as a result of that injury. The EMG report from March 3, 2004, indicates the claimant suffered from atrophy for years prior to the incident in question. Additionally, the diagnostic tests performed on the claimant fail to reveal any signs of any aggravation to his pre-existing condition. Further, Dr. Shock indicated he did not believe the claimant's ankle pain was attributable to the claimant's work-related accident. Last, on May 5, 2004, Dr. Johannes Gruenwald diagnosed the claimant with, "left lower extremity atrophy secondary to ankle pain and lack of use,". Accordingly, we reverse the

portion of the Administrative Law Judge's decision awarding benefits related to the claimant's ankle.

The Administrative Law Judge awarded the claimant temporary total disability benefits for the time period of November 18, 2003 to June 8, 2005. We affirm this decision, but note that pursuant to Ark. Code Ann. §11-9-501(a)(3) provides, "If a disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury." Accordingly, we find the claimant's entitlement to compensation is actually for the period of November 19, 2003 to June 8, 2005.

The respondent contends that the claimant should not be entitled to any temporary total disability benefits after April 21, 2004. In making this argument, they allege that the claimant did not provide doctor's releases after April 21, 2004, and that any subsequent releases were related to the claimant's ankle, low back, or shoulder injuries.

Temporary total disability for unscheduled injuries is that period within the healing period in which

claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). 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. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

A claimant who has been released to light duty work but has not returned to work may be entitled temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274 (1984).

In our opinion, the medical records indicate that the claimant remained in his healing period and was unable to return to work even after April 21, 2004. The medical records reflect that even after April 21, 2004, the claimant was still undergoing physical therapy for his low back, an injury which we find to be compensable. Likewise, the medical records reflect that the claimant was restricted

from working by multiple doctors due to that injury. We also note that the claimant continued to present with left arm pain and pain radiating from his neck to his shoulder, indicating that he was unable to work, in part due to his neck injury. The medical records also reveal the claimant was receiving treatment for his low back and shoulder, and that those conditions only materialized after the claimant's work-related injury. Finally, at the time of the hearing, the claimant was still receiving treatment, indicating he had not exited his healing period.

We recognize that as of September 16, 2004, Dr. Fox indicated the claimant could return to work as tolerated. Likewise, we recognize that as of October 18, 2004, Dr. Howard indicated that the claimant could return to work so long as it did not require heavy lifting or neck straining. Despite these doctor's notes, we find the claimant should be entitled to receive temporary total disability benefits until his full release to work as of June 8, 2005. We make this finding because it is undisputed that the claimant's job required heavy lifting, and prior to June 8, 2005, the claimant was still unable to perform that

duty. As such, we find that there is insufficient evidence to support a finding that the claimant was able to replace his wages for the time period in question. Accordingly, we find the claimant is entitled to temporary total disability benefits as awarded by the Administrative Law Judge.

The respondent argues that the claimant should be precluded from receiving temporary total benefits because he did not provide the respondent with doctor's releases after April 14, 2004, and because he refused to undergo an Independent Medical Examination at the request of the respondent. We find these arguments to be unpersuasive.

The respondent admits they paid the claimant his full salary until the time of his discharge in the beginning of May. Likewise, they admit that the claimant's medical expenses were paid for until that time. The claimant also testified that he took doctor's statements as he received them. The claimant described his discharge as follows,

Well, in May he done got mad at me when I gave him my doctor's statement that the doctor gave me for four more weeks of therapy. On 5-5 I went in there, and he fired me. And the doctor had sent him a statement saying that I was under a doctor's care - - Dr. Gruenwald.

The claimant testified that around the first of May, Lyman also requested that he go see another doctor. Lyman corroborated that testimony and indicated he was dissatisfied with the reports he had been receiving from the claimant. Accordingly, it is apparent that until the time of his discharge, the claimant was providing doctor's releases and keeping Lyman apprized of his medical condition. It is also equally apparent that the claimant was discharged, in part, due to his inability to return to work due to his compensable injuries. As the claimant had been discharged, in our opinion, any subsequent attempt to provide additional notes would have been pointless because he had already been terminated.

As to the respondent's assertion that the claimant should be denied benefits because he refused to undergo an Independent Medical Examination, we find that the respondent was obligated to petition the Commission for such a change. It is unrefuted that the respondent was aware that the claimant was receiving medical care and they initially agreed with the claimant's choice of physician. However, after the employer became dissatisfied because the claimant

had not recovered, they decided on their own accord to make him see another physician. As noted by this Commission, in the event the respondent wants an independent medical examination, they must still petition the Commission and show that it is reasonable and necessary. See, King v. Willow Oaks Acres, 2001 AWCC 16, Claim No. E903202, (Full Commission Opinion filed January 25, 2001), See, also, Johnson v. Arkansas Highway Department, 2001 AWCC 140, Claim No. E912379, (Full Commission Opinion filed June 21, 2001). In the present case, the respondent did not attempt to petition the Commission in order to have the IME performed, and accordingly, we find that the claimant should not be penalized because he did not comply with the respondent's unauthorized request to go to the IME.

In summary, we find that the claimant has shown that he sustained compensable injuries to his left shoulder, low back, and neck. Likewise, we find that he is entitled to receive medical benefits for treatment of those conditions and is entitled to temporary total disability benefits for the time period of November 19, 2003 through June 8, 2005. We also find that the respondents should be

entitled to a credit for the time period in which the claimant was paid his full salary. Last, we find that the claimant did not sustain a compensable ankle injury shown by objective medical findings.

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 (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

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part with and dissent, in part from the majority opinion. I concur in the finding that the claimant failed to prove he sustained an injury to his left ankle. However, I dissent from the finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on November 18, 2003, and the finding that the claimant was entitled to temporary total disability benefits from November 18, 2003, through June 8, 2005. I find that the claimant had a temporary aggravation of a preexisting condition which resolved by April 2004.

After conducting a de novo review of the medical records in this case, I find that the claimant had a temporary aggravation of a preexisting condition with respect to his neck injury. The medical evidence demonstrates that the claimant had received treatment for his low back, cervical spine, and ankles prior to the incident on November 18, 2003. The medical evidence demonstrates that the claimant had been suffering from back

spasms on a yearly basis since at least 1998. In fact, Dr. Jamie Howard, in a report dated July 6, 2004, linked the spasm to the claimant's extensive degenerative problems. Dr. Howard opined that the claimant's "pain and muscle spasm may be secondary to the findings of degenerative disk disease with stenosis on his cervical spine MRI."

Likewise, on June 9, 2004, Dr. Gruenwald ordered a comprehensive set of x-rays aimed at detecting physical abnormalities in the claimant's elbow, pelvis, and right hip and shoulder. Each x-ray returned normal results. The claimant underwent another MRI which did not produce evidence of any problems other than degenerative disk disease with mild spinal canal stenosis at C4-5 through C6-7, as well as, unciniate spurring with bilateral severe foraminal narrowing at C6-7 and moderate foraminal narrowing at C4-5 level. Dr. Shihibi ordered an EMG/NCS test to see if there were any physiologic evidence of cervical radiculopathy, but these also came back normal. All the medical evidence demonstrates is that the claimant had degenerative problems. At the very most, the claimant sustained an aggravation of his preexisting condition which resolved by April of 2004.

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Therefore, after considering the evidence, I find that the claimant sustained a compensable temporary aggravation of a

preexisting condition of his cervical spine on November 18, 2003. Since the respondent paid the claimant his salary, they are entitled to a credit.

I also must dissent from the finding that the claimant was entitled to additional temporary total disability benefits. In my opinion, the claimant is not entitled to any temporary total disability benefits after April 21, 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 my opinion, the claimant has failed to prove by a preponderance of the evidence that he is entitled to any temporary total disability benefits after April 21, 2004. First, it is of note that Mr. Lyman continued to pay the claimant his full salary through May 5, 2004. Medical records indicate that Dr. Lori Bacon first opined that the claimant could return to work when he was discharged from the emergency room on November 18, 2003. Dr. Bacon's orders were that the claimant should work modified duty for 3 days and then return to regular duty. Mr. Lyman paid the claimant for 3 days of light duty without asking him to come to work. He expected the claimant to return after the third day but the claimant never did. The claimant presented work releases through April 21, 2004. After that date, all the subsequent treatment and therapy deal with the claimant's ankle, lower back, and left arm and shoulder which are not related to the

incident of November 18, 2003.

Moreover, the claimant failed to cooperate with the respondent employer in undergoing an independent medical evaluation. After receiving essentially the same note every two weeks, and after hearing from the claimant that he needed just two weeks of therapy, Mr. Lyman decided that he was dissatisfied with the answers that he had been getting from the claimant's treating physicians. Mr. Lyman wished to get another doctor's opinion as to what, if anything, was wrong with the claimant and what types of treatment would be necessary. In fact, Mr. Lyman continued to work with the claimant to try to return him to work until he refused to see a doctor that he had set up an appointment with in May of 2004. The claimant failed to attend his first appointment and informed Mr. Lyman that he refused to attend the second. It was at that time that Mr. Lyman terminated the claimant's employment.

Further, the evidence demonstrates that Mr. Lyman was never provided any documentation indicating that the claimant should be off work subsequent to April of 2004. Mr. Lyman testified, "Bobby repeatedly told me that he was ready to come back to work; that he was ready to be released; and

that he didn't understand why the chiropractor kept extended it to two weeks, that he was tired of being at home and was ready to come back to work." Therefore, after considering all the evidence in the record, I cannot find that the claimant proved by a preponderance of the evidence that he was entitled to any temporary total disability benefits subsequent to April 21, 2004. Therefore, for all the reasons set forth herein, I must respectfully concur, in part with, and dissent, in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner