

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F310381 & F405087

WILLIAM MILNER, EMPLOYEE	CLAIMANT
PENSKE LOGISTICS, INC., EMPLOYER	RESPONDENT
OLD REPUBLIC INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 7, 2006

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

Claimant represented by the HONORABLE CONRAD ODOM, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 27, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 9, 2003 and April 20, 2004, the relationship of employee-employer-carrier existed between the parties.

3. On September 9, 2003 and April 20, 2004, the claimant earned wages sufficient to entitle him to weekly compensation rates equal to the statutory maximums in effect at that time.
4. On September 9, 2003 and April 20, 2004, the claimant sustained compensable injuries to his left shoulder and on April 20, 2004, to his head.
5. There is no dispute over any benefits for the compensable injuries to the claimant's left shoulder.
6. There is no dispute over medical expenses for the compensable injury to the claimant's head, except for those incurred for the services of Dr. Eugene Chambers and Dr. Anne Stevens.
7. The services provided to the claimant by Dr. Eugene Chambers and Dr. Anne Stevens represent reasonably necessary medical services for the claimant's compensable head injury. Specifically, the greater weight of the credible evidence establishes that these services were necessitated by or connected with the claimant's compensable head injury and had a reasonable expectation of accomplishing the purpose or goal for which they were intended.
8. There is no dispute over the payment of temporary total disability benefits prior to June 22, 2004 and all such benefits have been paid.
9. The claimant continued to be rendered temporarily totally disabled as a result of the effects of his compensable head injury from June 22, 2004 through December 9, 2004. Specifically, the greater weight of the credible evidence proves that during this period the claimant continued within his healing period from the effects of his compensable head injury and continued to

be rendered totally disabled from performing regular gainful employment as a result of this injury.

10. The respondents have controverted the claimant's entitlement to continued temporary total disability benefits after June 22, 2004 and his entitlement to the expenses incurred for the services of Dr. Chambers and Dr. Stevens.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

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

We therefore affirm the January 27, 2006 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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$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 dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that the services provided

to the claimant by Drs. Eugene Chambers and Anne Stevens were reasonable and necessary medical expenses and were connected with the claimant's compensable head injury, and the finding that the claimant was entitled to temporary total disability benefits from June 22, 2004, through December 9, 2004. After conducting a de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as a truck driver. The claimant had a motor vehicle accident on September 9, 2003, and another motor vehicle accident on April 20, 2004. The claimant testified that at the time of the accident on September 9, 2003, that he lost consciousness for a significant period of time. However, there was no evidence to corroborate this testimony. The claimant returned to light duty work for the respondent employer after the September 9, 2003, accident. He returned to driving a truck approximately two months later.

The claimant was involved in another motor vehicle accident on April 20, 2004. The claimant was treated by Drs. Mitchell and Davis for these injuries. Dr. Davis ultimately referred the claimant to Dr. Chambers who performed a battery of tests on the claimant and determined that the claimant needed

cognitive rehabilitation. The claimant returned to work for another employer on December 9, 2004. The claimant only worked for a small period of time because he had trouble finding the farms. The claimant eventually bought his own dump truck which he drives back and forth to the same destinations each day.

The medical evidence demonstrates that a CT scan of the claimant's head was taken on April 24, 2004. This MRI was interpreted as normal. On June 22, 2004, Dr. Ray Mitchell released the claimant to return to work with a permanent anatomical impairment of 20%. Dr. Mitchell opined that the claimant was able to drive a truck. Dr. David Davis, a neurologist, also released the claimant from his care on that same date.

Dr. Chambers evaluated the claimant on June 26, 2004. After conducting extensive neurophysiological testing, Dr. Chambers opined that the claimant experienced a post-concussion disorder with post-concussion headaches and depression. He recommended a cognitive rehabilitation program for the claimant. In his deposition, Dr. Chambers admitted that he did not recommend that the claimant be off work. He admitted that the treatment that he recommended and had his associate perform on the claimant was for his attention and concentration problems. He also admitted that all

the testing that was performed on the claimant was within the claimant's voluntary control. Furthermore, Dr. Chambers stated that he had no base line for the claimant to determine any pre-existing cognitive deficits the claimant may have had prior to September 9, 2003. The evidence demonstrated that the claimant had only a 7th grade education.

Dr. Chambers determined that the claimant had intellectual functioning in the 23rd percentile and stated that there was a parallel between intellectual functioning and memory. He testified that the claimant's cognitive condition would not hinder his ability to drive a truck, but it could hinder his ability to remember where he was going.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured 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 my opinion, the psychological treatment rendered to the claimant by and at the direction of Dr. Chambers was not reasonable and necessary medical treatment. In his report dated June 22, 2004, Dr. Davis reported that the claimant continued to have dizziness, headaches, and difficulty with mentation. However, Dr. Chambers treated the claimant for short-term memory loss. Dr. Chambers candidly admitted that he did not have a baseline for the claimant to determine his neuropsychological condition prior to the claimant's first motor vehicle accident on September 9, 2003. Furthermore, the testing performed by Dr. Chambers is not based upon measurable and objective findings.

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 Mgt. 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.

Dr. Chambers admitted that all the responses to the testing were within the claimant's voluntary control. The claimant's intellectual functioning was in the 23rd percentile and he has a 7th grade education. Dr. Chambers admitted that all these tests were parallel with each other and therefore someone with a lower I.Q. will have a lower memory percentile. Therefore, based on this lower intellectual functioning, the claimant will necessarily have a lower ability to remember. However, there is absolutely no proof in the record that demonstrates that the claimant's memory was hindered by his motor vehicle accident on September 9, 2003. Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that the medical treatment provided by and at the direction of Dr. Chambers is reasonable and necessary medical treatment. Accordingly I would reverse the decision of the Administrative Law Judge.

The claimant is also seeking for additional temporary total disability benefits from June 22, 2004, through December 9, 2004. In my opinion, the claimant has failed to meet his burden of proof.

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. Etkorn, 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 Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

The medical evidence demonstrates that both of the claimant's treating physicians, Dr. Davis and Dr. Mitchell, released the claimant to return to work on June 22, 2004. The claimant contended that his cognitive problems kept him from returning to work until December 9, 2004. However, Dr. Chambers, in his deposition, admitted that he did not recommend that the claimant refrain from working. Dr. Chambers went on to state that there was absolutely no physical reason for the claimant not to be able to drive a truck, but his alleged memory problems could hinder his ability to remember where he was going. However, Dr. Chambers agreed that this problem could be solved by the use of a day-timer, log or notes. He also admitted that these were the techniques that were given to individuals like the claimant to help them remember things in every day life. Furthermore, the claimant admitted during the period of time from his second injury until he returned to work he made money bush hogging and cutting firewood. Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he was incapacitated from earning wages during the time period between the claimant's second accident and when he returned to work on December 9, 2004.

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

KAREN H. MCKINNEY, Commissioner