

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214185

PATHY SELLARS, EMPLOYEE	CLAIMANT
ST. VINCENT HEALTH SERVICE, EMPLOYER	RESPONDENT
PREFERRED PROFESSIONAL INSURANCE CO., CARRIER	RESPONDENT

**OPINION FILED JULY 13, 2006**

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

Claimant represented by HONORABLE EMILY PAUL, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The respondents appeal, and the claimant cross-appeals a decision of the Administrative Law Judge filed on July 22, 2005, finding, in relevant part, that the claimant has proven by a preponderance of the evidence that she is entitled to additional medical benefits associated with her compensable hip injury of October 1, 2002. In addition, the Administrative Law Judge accepted the 10% permanent physical impairment rating assigned by Dr. Rosenzweig. The

Administrative Law Judge denied temporary total disability benefits as sought by the claimant from July 2004 through October 5, 2004. Specifically, the respondents appeal that portion of the Administrative Law Judge's opinion wherein the Administrative Law Judge found for additional medical benefits and a 10% impairment rating. The claimant cross-appeals that portion of the opinion wherein she was denied temporary total disability benefits as described above.

Our 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 she is entitled to additional medical benefits past October 5, 2004, at which time Dr. Rosenzweig assigned the claimant with a 10% permanent impairment rating. Therefore, we find that the decision of the Administrative Law Judge awarding additional medical benefits subsequent to the treatment that the claimant received from Dr. Rosenzweig through October 5, 2004, should be reversed. In addition, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to a 10% permanent physical

impairment rating as assessed by Dr. Rosenzweig, as this rating is not supported by the A.M.A Guides. Accordingly, we hereby reverse these portions of the Administrative Law Judge's opinion. Finally, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as awarded by the Administrative Law Judge from July, 2004 through October 5, 2004. Therefore, the decision of the Administrative Law Judge to deny these temporary total disability benefits should be affirmed.

The record shows that on October 1, 2002, the claimant slipped and fell in the course of her employment as a nurse with the respondent employer, injuring her right hip. This injury was accepted as compensable by the respondents. After her fall, the claimant began a conservative course of treatment which failed to alleviate the claimant's symptoms. Eventually, diagnostic studies were conducted to determine the source of the claimant's continuing symptoms. For example, a pelvic lumbar MRI ordered by Dr. Rosenzweig and conducted on December 10,

2002, revealed no acute findings. In the meantime, physical therapy reportedly improved the claimant's back and leg pain, but not her left hip. Finally, a left hip MR arthrogram, which was conducted on December 26, 2002, by Dr. Jimmy Tucker, confirmed Dr. Rosenzweig's suspicion that the claimant suffered from a left labral cartilage tear. Accordingly, on February 20, 2003, the claimant underwent a left hip arthroscopy with resection of her left torn labrum.

Initially, the claimant appeared to be making a slow but positive recovery from her surgical procedure. As of the claimant's April 25, 2003, follow up appointment Dr. Rosenzweig reported that he was pleased with "somewhat of a turnaround" in the rate at which the claimant was recovering. The claimant continued to experience neuropathy in her injured area, which Dr. Rosenzweig attributed to either resolving sciatica or piriformis syndrome. On June 13, 2003, Dr. Rosenzweig recommended aquatic therapy for conditioning due to the claimant's obesity, and he released the claimant to 3 hours per day of sedentary type work duty. Finally, Dr. Rosenzweig noted that Dr. Tucker,

who had been on military leave, would be returning to his practice soon, and that the claimant should follow up under his care.

The claimant refused to follow up with Dr. Tucker, but continued under the care of Dr. Rosenzweig. In a letter dated June 16, 2003, Dr. Rosenzweig wrote that the claimant had "come a very long way" from her injury, but that due to de-conditioning and what appeared to be a "variant of complex regional pain syndrome", she was still somewhat debilitated. At that time, the claimant was reportedly off all of her medications, was on her feet up to 3 hours per day, and was able to drive on her own. In his letter, Dr. Rosenzweig reiterated that the claimant could return to work in a sedentary position up to 3 hours per day. Dr. Rosenzweig saw no further need for diagnostic testing at that time, as he felt the claimant's concurrent sciatica was most likely aggravated by traction from her surgery, and that there were no signs of residual permanent nerve damage on recent nerve testing. In his closing comments of his report, Dr. Rosenzweig wrote:

Her prognosis to continue to improve with current treatment modalities remains good. Her rate of improvement is slow, but it is positive and therefore we will continue to support her recovery with the current modalities.

Dr. Rosenzweig concluded that a self-directed aquatic therapy program at a facility such as a local YMCA would help the claimant make the recovery hoped for. Supposedly due to her financial circumstances at the time, the claimant informed Dr. Rosenzweig during her visit with him on July 18, 2003, that she had not begun the aquatic exercises that he had recommended. The claimant was back at work, however, stating that she had worked 6 of the last 14 days. She reported increased pain from her increased activity, but stated that it was a "good pain". Dr. Rosenzweig instructed the claimant to continue with her home strengthening exercise program, he prescribed her a cane in order to neutralize her gait, and he restricted her to a light duty, modified work schedule of every other day.

On August 8, 2003, Dr. Rosenzweig stated that the claimant appeared to be improving physically, but that she

reported being under a fair amount of work related stress during that time. In addition, Dr. Rosenzweig noted that the claimant had allegedly suffered a recent fall over some electrical cords, and he observed bruising on her thigh. Therefore, Dr. Rosenzweig opined that a hiatus from work and/or further restrictions might better facilitate her recovery.

In his report of August 29, 2003, Dr. Rosenzweig included the context of a detailed letter that the claimant had written to him concerning her symptoms. In essence, the claimant described to Dr. Rosenzweig unremitting back, neck, and hip pain, weakness and instability in her left hip, problems with gait and mobility, difficulty sleeping, neuropathy, sexual dysfunction, and developing problems with her right hip. Upon Dr. Rosenzweig's physical examination of the claimant on that date, however, the only change in her condition that he observed was "a severe waddle, trunk shift type gait, not neutralized by her cane". Dr. Rosenzweig added that the claimant had "pain on internal rotation and limited flexibility", and that her current weight was 220

pounds. Dr. Rosenzweig noted that the claimant's recovery had been slow and lengthy, but he fully anticipated that the claimant would "get to a satisfactory level of function" with the proper therapy. Dr. Rosenzweig opined that it was safe for the claimant to continue to work 3-4 hours every other day. Between her August 29<sup>th</sup> visit and the claimant's next follow up with Dr. Rosenzweig on September 19, 2003, the respondent carrier made arrangements for her to receive supervised aquatic therapy at HealthSouth. The claimant had also made private arrangements during that time to use a deeper pool than that available at the HealthSouth facility; however, Dr. Rosenzweig preferred that she utilize the HealthSouth facility in order that her therapy be supervised. Otherwise, the claimant's overall physical condition remained unchanged, as did her work restrictions.

As of October 10, 2003, Dr. Rosenzweig reported that repeat x-rays of the claimant's left hip showed no significant joint deterioration. In addition, Dr. Rosenzweig commented that an MRI of the claimant's neck rendered by a private physician showed multilevel degenerative disease.

Dr. Rosenzweig stated that the claimant's chief complaints at that time were of back and neck pain. Dr. Rosenzweig reported that the claimant was showing progress in her left hip recovery, in that she was able to forward flex her left foot in order to remove her shoe. For the most part, however, the claimant continued with a significant trunk shift gait. Dr. Rosenzweig recommended no real changes at that time in the claimant's treatment.

On November 7, 2003, Dr. Rosenzweig stated that the claimant had made significant improvement in her condition. Improved were her pain control, motion and strength around her left hip girdle. In addition, she had regained control to flex, rotate, and abduct her hip with only very slight hip trunk shift, and she was said not to have the "profound weakness" that she had been allegedly experiencing. From a work standpoint, Dr. Rosenzweig stated that the goal was to get the claimant back to an 8 hour per day, 3 day per week work schedule. Dr. Rosenzweig noted, however, that due to her unrelated congenital and developmental heart and renal disease, the claimant had not

worked a full week "for some time" prior to her 2002 hip injury. Due to her marked improvement on that visit, Dr. Rosenzweig opined that the claimant's aquatic therapy was "paying off".

On November 17, 2003, the claimant sought treatment for her neck and back pain by Dr. William F. Hefley. Included in the medical history that she presented to Dr. Hefley was heart attack, cancer, kidney defect, stomach ulcer, hernia surgery, and bilateral knee replacement surgeries. Regarding the claimant's hip complaints, upon examination Dr. Hefley found that the claimant's gait was antalgic on the left, her left hip flexion was 90 degrees, and she reported pain with rotation. Otherwise, her leg length was normal and her neurocirculatory exam was intact. In addition, x-rays of the claimant's pelvis and lateral left hip were negative. Dr. Hefley did not consider the claimant as a candidate for hip replacement. However, Dr. Hefley referred the claimant to his radiologist for a steroid injection in her left hip.

On December 5, 2003, Dr. Rosenzweig reported that the claimant's left hip had improved as a result of her recent steroid injection. In addition, Dr. Rosenzweig reported that the claimant had returned to a 4 hours per day, 3 days per week work schedule, which he commented was "almost to her full schedule at the time of her injury. As of her next appointment with Dr. Rosenzweig, on January 9, 2004, the claimant was working 5 hours per day, she had completed her supervised therapy, and she was reportedly responding well to the steroid injections. Being under the impression that the claimant had persistent synovitis from labral pathology without evidence of progressive osteoarthritis or trauma induced arthritis, Dr. Rosenzweig opined that the claimant had reached a plateau in her recovery, and he expected that with continued aquatic exercises, she should be able to gradually increase her work schedule to 6-8 hours per day.

On February 26, 2004, the claimant reported severe and intractable pain presumably due to her steroid injection having worn off. Furthermore, the claimant had not followed

through with her aquatic exercises, and she had apparently regained some previously lost weight. Dr. Rosenzweig suspected that the claimant's recurrent problems were due to internal derangement of her left hip in the form of persistent labral tearing, loose body, or progressive delaminating changes. Based upon this assumption, Dr. Rosenzweig recommended that an arthrography with a combined steroid injection might be helpful in alleviating the claimant's symptoms, but he expressed reluctance in repeating the claimant's steroid injection due to the associated risks. On March 16, 2004, Dr. Jack Fendley agreed with Dr. Rosenzweig's recommendation that the claimant undergo a repeat arthrogram. Dr. Fendley also recommended that the claimant follow up with a pain specialist. In the meantime, the claimant received another steroid injection, which reportedly brought her some relief.

In his March 25, 2004 report, Dr. Rosenzweig reasserted that a second surgical procedure was necessary on the claimant's left hip. In a letter to Dr. Lowry Barnes dated March 25, 2004, Dr. Rosenzweig briefly explained the

nature and treatment of the claimant's left hip injury, and he asked Dr. Barnes to render an opinion concerning the claimant's diagnosis and treatment options. Having exhausted the claimant's conservative treatment options, and not having received a response from Dr. Barnes, at the claimant's request, Dr. Rosenzweig recommended that she be evaluated by a regional expert on arthroscopy, namely Dr. Thomas Byrd. Subsequently, a left hip MR arthrogram conducted on June 10, 2004, revealed findings consistent with a recurrent labral tear.

Dr. Byrd reviewed portions of the claimants medical records and a copy of her personal medical summary as provided to him by Dr. Rosenzweig. On July 22, 2004, Dr. Byrd wrote that there was nothing his facility could offer the claimant in terms of arthroscopic intervention that would "reliably be of much benefit to her". In addition, Dr. Byrd wrote that due to her "numerous difficulties", the claimant was at a "much higher than normal risk of having some type of surgical complication". Therefore, concluded Dr. Byrd, he was uncomfortable

recommending surgery for the claimant, and he stated that he would not perform such a surgery himself.

On October 5, 2004, Dr. Rosenzweig rated the claimant with a 10% whole person permanent impairment based on Table 62 of the Guides, 4<sup>th</sup> edition.

It is well established that 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). Furthermore, the healing period is

defined as the period necessary for the healing of an employee's injury resulting from an accident. Ark. Code Ann. §11-9-102(6). The healing period continues until the employee is as far restored as the permanent character of her 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. Emerson Elec. v. Gaston, 75 Ark. App. 232, 58 S.W.3d 852 (2001); citing, Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a factual determination for the Commission. Id.; citing, Carroll Gen. Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

As described above, following the claimant's slip and fall accident of October 1, 2002, the respondents provided her with comprehensive medical treatment, including hip surgery performed by Dr. Tucker. Due to Dr. Tucker's military absence, the claimant was followed by Dr. Rosenzweig, who remained a strong advocate on the

claimant's behalf concerning her medical care and treatment in spite of his preference, and the claimant's refusal, to return to Dr. Tucker upon his return from active military duty. The claimant reportedly made slow but steady progress in her recovery after her surgical procedure of December 26, 2002, then apparently suffered a setback in her recovery, likely due to a subsequent slip and fall accident in August of 2003. Eventually in March of 2004, a re-tear of the claimant's left hip labrum was diagnostically confirmed, for which Dr. Rosenzweig sought the surgical opinion of Dr. Thomas Byrd. Dr. Byrd opined that surgery was not a viable option for the claimant due primarily to the risks involved and the likelihood of failure. Having exhausted all conservative treatment options, and because surgery was obviously not an option for the claimant, on October 5, 2004, Dr. Rosenzweig assigned the claimant with a 10% permanent physical impairment rating, thus signaling the end of her healing period.

Based upon the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that

additional medical treatment after October 5, 2004, is reasonable and necessary to the treatment of her compensable injury. Therefore, the decision of the Administrative Law Judge to award additional medical benefits subsequent to October 5, 2004, is hereby reversed.

In addition, the respondents argue that because Dr. Rosenzweig's basis for assigning a permanent physical impairment rating was speculative, it is, therefore, erroneous. While Table 62 of the AMA Guides is not perfectly clear on rating a hip injury with a documented labral tear with secondary reactive synovitis should receive, objective medical testing has confirmed that the claimant's current hip condition is, more likely than not, the result of her compensable injury. Dr. Rosenzweig treated the claimant extensively throughout the course of her recovery and, therefore, his opinion regarding the claimant's degree of physical impairment should be given proper weight. However, because Dr. Rosenzweig's rating was admittedly speculative, it does not comply with the Act. The claimant sustained a cartilage tear. Dr. Rosenzweig stated in his October 5,

2004, correspondence to the claimant's attorney that the American Medical Association Guides to the Evaluation of Permanent Impairment is silent with regard to the claimant's injury. Accordingly, we find that the claimant has failed to prove entitlement to any permanent partial disability benefits for the compensable injury.

In the present claim, although the claimant has provided sufficient objective medical evidence to show that her work-related injury resulted in a physical abnormality, she has failed to prove by a preponderance of the evidence that she sustained a physical impairment rating in accordance with the A.M.A Guides.

Finally, the preponderance of the credible evidence shows that the claimant has failed to prove that she is entitled to temporary total disability benefits from July, 2004 through October, 2004. It should be noted for purposes of clarity, that the respondents do not appeal the Administrative Law Judge's award of temporary *partial* disability benefits. 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. On July 16, 2003, Dr. Rosenzweig returned the claimant to work 3 hours per day, every other day, gradually thereafter increasing the claimant's hours until such time as she was working at her pre-injury capacity, which incidentally, was not full-time hours. On July 7, 2004, the claimant's position was

terminated. Although the claimant claims temporary total disability benefits from July 2004 through October 5, 2004, which was the end of her healing period, she has failed to prove by a preponderance of the evidence that she was totally incapacitated from working during that time. Therefore, the Administrative Law Judge's finding that the claimant is not entitled to temporary total disability benefits from July, 2004 through October 5, 2004, is correct and is hereby affirmed.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment after October 5, 2004, or that she is entitled to temporary total disability benefits from July, 2004 through October 5, 2004. We further find that the claimant has failed to prove that she is entitled to a 10% permanent physical impairment rating. Therefore, the Administrative Law Judge's opinion is hereby affirmed, in part and reversed in part.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

**DISSENTING OPINION**

\_\_\_\_\_I respectfully dissent from the Majority's opinion affirming, in part, and reversing, in part, the Administrative Law Judge's July 22, 2005 opinion.

Based upon my de novo review of the record, the claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment associated with her compensable hip injury of October 1, 2002. The claimant has also proven entitlement to the 10% physical impairment rating assigned by Dr. Rosenzweig. Also, in my opinion, claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from July 2004 through October 5, 2004.

\_\_\_\_\_The claimant had surgery on her compensable hip injury by Dr. James Tucker on February 20, 2003. She underwent physical therapy for about two weeks after the surgery. Dr. Tucker went off to war and the carrier sent claimant to back to Dr. Rosenzweig for follow-up treatment. Claimant returned to work in July 2003 and worked for the respondents in a light-duty capacity until July 7, 2004, when respondents terminated the claimant's light duty position. All workers' compensation benefits were terminated on July 31, 2004.

\_\_\_\_\_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 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 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.

\_\_\_\_\_Treatment intended to reduce or enable a claimant to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. §11-9-508(a). See Chronister v. Lavaca Vault, Full Commission Opinion, Filed June 20, 1991 (Claim No. D704562). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. Artex Hydrophonics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

\_\_\_\_\_The claimant credibly testified to continued pain and problems associated with her hip. All of the medical reports in evidence indicate that she did not reach maximum medical improvement until October 2004. Dr. Rosenzweig recommended a second opinion from Dr. J. W. Thomas Byrd on

the issue of surgical intervention. The claimant, after workers' compensation refused to pay for the second opinion, sought the opinion on her own. Dr. Byrd did not recommend surgical intervention. Dr. Rosenzweig's medical records all indicate that a pain management program would be beneficial, and he continued to prescribe hydrocodone to the claimant for this purpose.

\_\_\_\_\_ In my opinion, the Administrative Law Judge's finding that claimant had sustained her burden of proving that her additional medical treatment was reasonable and necessary and the responsibility of respondents is correct and should be affirmed.

\_\_\_\_\_ Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark.

App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Crow, supra.

\_\_\_\_\_Ark. Code Ann. §11-9-704(c) (1) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are defined as: "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. §11-9-102(16) (Repl. 2002). The Commission

cannot consider complaints of pain when determining physical or anatomical impairment. Id. Furthermore, "for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests shall not be considered objective findings." With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is not the product of a diagnostic procedure which does not come under the voluntary control of the patient. Dept. of Parks and Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998). The Commission has the authority and the duty to weight medical evidence to determine its medical soundness, and we have the authority to accept or reject medical evidence. Mack v. Tyson Foods, Inc., 28 Ark. App. 299, 771 S.W.2d 794 (1989); Wasson v. Losey, 11 Ark. App. 302, 669 S.W.2d 516 (1984); Farmers Insurance Co. v. Buchheit, 21 Ark. App. 7, 727 S.W.2d 391 (1987). Likewise, the Commission is entitled to examine the basis for a physician's opinion, like that of any other expert, in deciding the weight to which that

opinion is entitled. However, as with any evidence, we can not arbitrarily disregard the testimony of any witness. In making determinations regarding the existence and extent of anatomical loss of use, we are not limited solely to medical evidence.

\_\_\_\_\_Ark. Code Ann. §11-9-522(g) (Supp. 1997) provides that the Commission shall adopt an impairment rating guide to be used in the assessment of anatomical impairment and specifically provides the guide shall not include pain as a basis for the impairment. In compliance with this statutory mandate, the Commission adopted the AMA Guides to the Evaluation of Permanent Impairment, (4<sup>th</sup> ed. 1993) with the enactment of Commission Rule 34. To the extent that the Guides allow the use of subjective criteria for the establishment of an impairment rating, the statutory definition of objective findings takes precedence.

\_\_\_\_\_Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411

(1994), citing Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969).

\_\_\_\_\_The Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003). The Court has held in cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, the Commission has the duty to determine whether the claimant has met his burden of proof by using the Guides when determining the existence and extent of permanent impairment. Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

\_\_\_\_\_Section 1.3 of the Guides sets forth the impossibility of addressing every medical condition for a physical impairment rating.

It should be understood that the Guides does not and cannot provide answers about every type and degree of impairment, because of the considerations noted above and the infinite variety of human disease, and because the field of medicine and

medical practice is characterized by constant change in understanding disease and its manifestations, diagnosis, and treatment.

\_\_\_\_\_The physician's judgement and his or her experience, training, skill, and thoroughness in examining the patient and applying the findings to Guides criteria will be factors in estimating the degree of the patient's impairment.

\_\_\_\_\_In my opinion, the Administrative Law Judge's finding that claimant is entitled to the permanent impairment rating assigned by Dr. Rosenzweig is correct and should be affirmed. Dr. Rosenzweig is/was claimant's authorized treating physician. On October 5, 2004, he assigned claimant a physical impairment rating of 10% to the body as a whole for her compensable hip injury. A review of the medical evidence introduced in this claim clearly shows that Dr. Rosenzweig based his impairment rating on "objective medical findings". The rating was based on a "documented labral tear". Dr. Rosenzweig did not state that the injury was not perfectly clear, rather, he noted that he had to utilize a secondary table, Table 62, to arrive at the

10% impairment rating. In my opinion, the 10% impairment rating assigned by Dr. Rosenzweig and approved by the Administrative Law Judge is appropriate for the claimant's hip 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 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 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)).

\_\_\_\_\_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).

\_\_\_\_\_Claimant was working for the respondent employer in a light duty capacity, three hours a days for three days a week prior to her position being terminated in June 2004. Claimant did not reach maximum medical improvement until October 5, 2004. Claimant credibly testified as to her pain and the symptoms related to her compensable injury which totally incapacitated her from working after June 2004.

\_\_\_\_\_In my opinion, claimant has met her burden of proving by a preponderance of the evidence that she was within her healing period and totally incapacitated from earning wages entitling her to temporary total disability for the period of June 2004 through October 5, 2004.

\_\_\_\_\_In my opinion, the portions of the Administrative Law Judge's decision awarding claimant additional medical treatment associated with her compensable hip injury of October 1, 2002, and the 10% physical impairment rating assigned by Dr. Rosenzweig should be affirmed. The Administrative Law Judge's decision denying temporary total disability benefits should be reversed. In my opinion, claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from July 2004 through October 5, 2004.

\_\_\_\_\_For the foregoing reasons, I respectfully dissent from the Majority's opinion.

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SHELBY W. TURNER, Commissioner