

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213311

BOB WEAVER, EMPLOYEE	CLAIMANT
SUPERIOR INDUSTRIES, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT

**OPINION FILED DECEMBER 12, 2006**

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, 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 by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment and a finding that the claimant failed to prove by a preponderance of the evidence that he was entitled to additional temporary total disability benefits from March 1, 2005, to a date yet to be determined. Specifically, the respondents appeal the decision of the Administrative Law Judge finding that the

claimant was entitled to additional medical treatment. The claimant filed a cross-appeal on the finding that the claimant failed to prove that he was entitled to additional temporary total disability benefits. Based upon our de novo review of the record, we find the decision of the Administrative Law Judge should be affirmed in part and reversed in part. Specifically, we affirm the finding of the Administrative Law Judge that the claimant failed to prove entitlement to any additional temporary total disability benefits. However, we reverse the decision of the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment. We find that the claimant has failed to meet his burden of proof on these issues.

The claimant was working for the respondent employer on October 17, 2002, when he broke his wrist while using a sledge hammer. The claimant was in a cast for approximately three to four months. Dr. Heinzelmann performed arthroscopic surgery to determine the damage that was done to the claimant's wrist. After doing the

arthroscopic surgery, Dr. Heinzelmann determined that there was nothing further in the way of surgical treatment needed to treat the claimant's wrist. Dr. Michael Moore also examined the claimant on June 24, 2004, and agreed that the arthroscopic surgery was reasonable. The claimant gave Dr. Moore a history of striking the ulnar aspect of his right wrist against a mold. Dr. Heinzelmann's records also note that the claimant complained of pain to the ulnar side of his wrist.

The evidence demonstrates that the claimant attained his job with the respondent employer through the Arkansas Department of Corrections Work Release Program. The claimant had a prior felony conviction in 1997 for distribution of methamphetamine. He was sentenced to twenty years, but served four years and eleven months. He worked for the respondent employer through November 3, 2002. However, there was a period of time of approximately four months when the claimant returned to prison. After he got back out, he returned to work for the respondent employer. The claimant had a second felony conviction for a charge of

possession for which he was incarcerated for approximately six months beginning in March of 2004. The claimant drew temporary total disability benefits while he was incarcerated with the Department of Corrections. After being released from the Department of Correction the second time, the claimant was again arrested and incarcerated in Salem, Fulton County, Arkansas. At the time of the hearing, the claimant had a pending charge of possession of paraphernalia to manufacture and anticipated a trial date of December 12, 2005. The records fail to demonstrate what became of that trial.

The evidence demonstrates that the claimant fished a couple of times a month from the spring until fall for the years 2004 and 2005. The claimant told Dr. Heinzelmann that he had pain due to casting the rod. However, the claimant testified at the hearing that Dr. Heinzelmann was incorrect. Specifically, in Dr. Heinzelmann's March 29, and May 12, 2005 reports, Dr. Heinzelmann noted,

Mr. Weaver is seen in the clinic on 3/29/05, for recheck of his right wrist. He has had coronary bypass surgery and has done well from that procedure. He

states he has not returned to his regular work as a stone and brick mason. He does report that he has had bothersome pain in his right wrist when he has been fishing using that hand to cast the rod.

In the May 12, 2005, Dr. Heinzelmann wrote:

Mr. Weaver was seen in the clinic on 05/12/05, in followup for his right wrist arthritis and pain. He states that he is performing fairly strenuous manual activity with is right hand now in shoveling and lifting heavy rocks in his landscape work. With this type of activity, he is having recurrent and significant pain on the radial aspect of his right wrist but not on the ulnar aspect.

The claimant testified that Dr. Heinzelmann was incorrect in stating that the claimant was working either as brick mason or a landscaper. We find that the claimant lacks credibility. Given the importance of obtaining a correct medical history, we find it difficult to believe that Dr. Heinzelmann erred not once, but twice, on recording the claimant's history of complaints. It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the

exclusive province of the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). Arkansas Code Annotated section 11-9-704(b) (6) (A) vests with the Commission the duty to "review the evidence" and if deemed advisable to "hear the parties, their representatives, and witnesses." The statute further requires the Commission to determine, "on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by preponderance of the evidence." A.C.A. § 11-9-704(c) (2). Thus, in determining that the Commission's authority and duty to conduct a de novo review of the entire record, including issues of credibility as being constitutional, the Court of Appeals stated in Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000):

When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors

must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. White v. Gregg Agriculture Ent., supra. In addition, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995).

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark.

App. 71, 884 S.W.2d 275 (1994). Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). However, the findings of the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d (1987). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b)(6)(A)(Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of

the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id. The claimant has two felony convictions and a third one pending at the time of the hearing. The claimant admitted that he was wanting to go into the landscaping business but could not because his wrist hurt. In our opinion, the claimant lacks credibility and we give more weight to the records of Dr. Heinzelmann than we do to the testimony of the claimant.

Further, the claimant's original injury was to the ulnar aspect of his right wrist. However, Dr. Heinzelmann's records note that the claimant has a degenerative condition of his radial portion of his wrist. Furthermore, Dr. Moore opined as early as October 17, 2002, that "It is my opinion the arthrogram findings, which revealed leaks through the lunotriquetral ligament and triangular fibrocartilage complex, are most likely related to age and not a traumatic

injury." Simply put, we cannot find that the claimant is entitled to any additional medical treatment. Accordingly, we reverse the decision of the Administrative Law Judge.

We agree with the Administrative Law Judge's decision finding that the claimant was not entitled to any additional temporary total 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.

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 order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that he remains within his healing period; and (2) that he has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The claimant last saw Dr. Heinzelmann after he was released from prison on October 24, 2004. There was no indication by Dr. Heinzelmann that the claimant was unable to work due to his wrist. When Dr. Heinzelmann saw the claimant on March 29, 2005, there is no mention whatsoever that the claimant was unable to work. Accordingly, we find

that the claimant has failed to prove he is entitled to additional temporary total disability benefits. Therefore, for those reasons set forth herein, we affirm in part, and reverse in part, the decision of the Administrative Law Judge.

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 finding that the Claimant failed to prove entitlement to additional medical treatment and additional temporary total disability benefits. Based upon my de novo review of the record, it is my opinion that the Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. I respectfully

dissent without opinion from the finding denying additional temporary total disability benefits.

Claimant was 51 years old at the time of the hearing. Claimant began working for the respondent-employer in February of 2002. Claimant sustained a compensable injury to his right wrist on October 17, 2002. Claimant sustained this injury while using a sledgehammer when his hand and wrist slipped and struck a mold. Claimant also described a twisting injury. Claimant was initially treated with a cast for three or four months.

Claimant was first seen by Dr. Peter R. Heinzelmann on January 9, 2003. During that visit Dr. Heinzelmann was interested in ruling out any ligamentous injuries to the right wrist. A right wrist arthrogram was performed on January 13, 2003, which had the following impression:

Findings are consistent with tears of the scapholunate and lunatotriquetral ligaments as well as the triangular fibrocartilage.

On January 20, 2003, Dr. Heinzelmann writes that he has seen the Claimant following his arthrogram, and notes that the Claimant continues to complain of pain in his wrist, mainly in the scapholunate area. Dr. Heinzelmann recommended right wrist arthroscopy with reconstruction of the scapholunate ligament and dorsal capsulodesis and probable debridement of the triangular fibrocartilage tear and possible fusion of the lunotriquetral joint.

Claimant was seen by Dr. Michael Moore on June 24, 2003, for a second opinion evaluation. Dr. Moore writes that Claimant "is a legitimate patient who has mild, residual right wrist pain following an injury that occurred on 10/17/02." Dr. Moore also writes that "[t]he differential diagnosis could include right wrist degenerative arthritis or dynamic instability of the scapholunate joint." Dr. Moore opines that the Claimant does not have systematic tears of the lunotriquetral ligament or triangular fibrocartilage complex. In his opinion the arthrograms findings which revealed the leaks are most likely related to age and not a traumatic injury.

Dr. Moore agreed with Dr. Heinzelmann's opinion that a diagnostic arthroscopy would be helpful in determining the etiology of the Claimant's persistent right wrist pain.

The Claimant underwent a diagnostic right wrist arthroscopy on November 5, 2003, which was performed by Dr. Heinzelmann. During this procedure, the doctor made the following operative findings:

There was a ragged tear of the scapholunate ligament, as well as the and (sic) triangular fibrocartilage in the right wrist. The proximal pole of the scaphoid and the adjacent scaphoid fossa of the radius were devoid of articular cartilage and showed eburnated bone on their opposing surfaces. The radiolunate joint had a normal appearing cartilage. The triangular fibrocartilage had a massive fragmented tear.

Based upon his operative findings, Dr. Heinzelmann determined that "the initially planned procedures would not have been appropriate." Dr. Heinzelmann opined that "at a later date possible scaphoid excision, four corner fusion, or proximal row carpectomy can be made." Dr. Heinzelmann

recommended an MRI of the wrist to completely evaluate all the articular surfaces of the wrist joint.

The Claimant underwent an MRI of his right wrist on November 17, 2003, and Dr. Heinzelmann writes on November 24, 2003, that the Claimant's MRI of his right wrist showed edema of the entire scaphoid bone and loss of normal articular surfaces at the proximal pole of the scaphoid and the scaphoid fossa of the distal radius. Dr. Heinzelmann notes that the test also reveals evidence of a triangular fibrocartilage tear. Dr. Heinzelmann recommended that the Claimant be evaluated by Dr. Ed Weber. I was unable to find any indication in the record of an evaluation of the Claimant by Dr. Weber.

The next medical report in the record is from October 25, 2004, in which Dr. Heinzelmann notes that the Claimant is recovering from coronary bypass surgery which was performed about six weeks earlier. Dr. Heinzelmann writes that Claimant is still complaining of pain and weakness in his right wrist and the doctor told the Claimant

that after he recovers from his heart surgery, he could consider surgery for his right wrist.

The Claimant was next seen by Dr. Heinzelmann on March 29, 2005, for a recheck of his right wrist.

Dr. Heinzelmann's impression was of "radial scaphoid arthritis, probably secondary to scapholunate dissociation."

Claimant was given a canvass wrist splint and it was recommended that he use oral anti-inflammatory medication as needed. Dr. Heinzelmann wanted to see Claimant back in three months for follow-up. Dr. Heinzelmann opined that if the Claimant was still having significant problems, then a scaphoid excision with 4-corner fusion would be considered.

\_\_\_\_\_The last medical report in the record is from May 12, 2005. At that time, Dr. Heinzelmann still wanted to do further diagnostic testing in the form of a triple phase bone scan before proceeding with surgery. Respondents controverted all medical after the May 12, 2005 visit.

\_\_\_\_\_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.

\_\_\_\_\_Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include those that are necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of

the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

There is no indication in the record that Claimant has ever been assessed at maximum medical improvement. The fusion surgery the Claimant is requesting was suggested by Dr. Heinzelmann as early as January of 2003. Claimant has consistently complained of symptoms in his right wrist. Claimant has a compensable injury which has been substantiated by objective medical findings and although there may be some arthritis complex also affecting this Claimant's right wrist it is not uncommon for arthritis to develop in an injured area. Furthermore, there is no indication in the record that the Claimant had any symptoms in his right wrist prior to his compensable injury. In my opinion, Claimant has proven by a preponderance of the evidence that additional medical treatment by

Dr. Heinzelmann is reasonably necessary and casually connected to his compensable right wrist injury.

\_\_\_\_\_For the foregoing reasons, I respectfully dissent from the Majority's opinion denying additional medical treatment and additional temporary total disability benefits.

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SHELBY W. TURNER, Commissioner