

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404386

DAVID ZOLLICOFFER, EMPLOYEE	CLAIMANT
ARKANSAS VALLEY ELECTRIC, EMPLOYER	RESPONDENT
ARKANSAS RURAL ELECTRIC SELF-INSURED TRUST, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 7, 2006

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

Claimant represented by the HONORABLE GUNNER DELAY, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE BETTY DEMORY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed May 31, 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 April 21, 2004, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On April 21, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$453.00 for total disability and \$340.00 for permanent partial disability.
4. On April 21, 2004, the claimant sustained a compensable injury to his neck or cervical spine.
5. At the present time (sic), there appears to be no dispute over the claimant's entitlement to reasonable necessary medical services for his compensable injury.
6. There is no dispute over the claimant's entitlement to temporary total disability benefits accruing prior to January 18, 2005.
7. The claimant has proven by the greater weight of the credible evidence that he continued to be temporarily totally disabled, as a result of the effects of his compensable injury from January 18, 2005 though (sic) a date yet to be determined. Specifically, he has proven by the greater weight of the credible evidence that he continued within his healing period from the effects of his injury and continued to be rendered totally disabled as a result of the effects of this injury during this period.
8. The respondents have controverted the claimant's entitlement to any temporary total disability benefits accruing after January 17, 2005.
9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded.

We note that the claimant and Steve Holt, the claimant's supervisor, essentially testified that the claimant worked two and a half days after his release by Dr. Cathey in January 2005. Therefore, the Commission finds that the claimant proved that he remained within his healing period and totally incapacitated to earn wages beginning on January 18, 2005 (with the exception of the two and a half days he returned to work in January 2005), and continuing, so as to entitle him to TTD from January 18, 2005, until a date yet to be determined.

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 as modified. 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 as modified by the Full Commission.

We therefore affirm the May 31, 2006 decision of the Administrative Law Judge as modified, 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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional temporary total disability benefits from January 18, 2005, with the exception of the two and a half days he returned to work in January of 2005, through a date yet to be determined. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury to his cervical spine on April 21, 2004. The respondents accepted liability for the claimant's injury and he ultimately underwent a anterior cervical decompression of a herniated disc at C5-6 and a fusion of the C5-6 vertebrae utilizing a threaded allograft bone implant in conjunction with anterior spinal instrumentation on December 8, 2004. Dr. Cathey released the claimant to return to work and assessed the claimant with a 10% permanent anatomical impairment rating. The respondents accepted the rating and began paying the permanent impairment rating. Dr. Cathey released the claimant to return to work on January 18, 2005, without any restrictions. The claimant returned to work making the same wages he was making at the time of

his accident but he only worked a couple of days and then stopped coming to work. The claimant was ultimately fired for being off for more than three days of work. At this time, the claimant is requesting additional temporary total disability benefits from the date of January 18, 2005, through a date yet to be determined. The respondents argue that the claimant has reached the end of his healing period as of January 18, 2005, and is not entitled to any additional temporary total disability benefits. I agree with the respondents.

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); Ark. State Highway & Trans Dept v. Breashers, 272 Ark. 244, 613 S.W.2d 392 (1981). 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. Ark. Highway & Trans. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

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). 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)).

In my opinion, a review of the evidence demonstrates that the claimant failed to prove that he

is entitled to additional temporary total disability benefits after January 24, 2005, when Dr. Cathey returned the claimant to work and released him with a permanent anatomical impairment rating. In his report of January 18, 2005, Dr. Cathey stated:

His neurological examination remains entirely negative. There is no sign of cervical myeloradiculopathy. His skin incision has healed nicely. The patient demonstrates full range of motion of the cervical spine without paraspinous muscle spasm.

Due to his continued complaints of pain, I went ahead today and checked a postoperative lateral cervical radiograph. The bond graft at C5-6, as well as the spinal instrumentation looks perfect. There has been no change since a prior film obtained a month ago.

Lane, I am certainly disappointed with Mr. Zollicoffer's [sic] negative response to surgery. Unfortunately, I expect he will always complain of chronic neck and upper back pain. He says he has been plagued with chronic lower back pain for several years related to a disc abnormality in the lumbar spine. At this point, I believe he has reached maximal [sic] medical improvement with regard to his occupational injury and his subsequent cervical disc surgery. According to AMA Guidelines, he is entitled to a 10% permanent partial impairment rating to the whole person.

At this point, I am releasing him to return to work at regular duty on January 24, 2005. The patient says he most likely will be unable to

perform the job responsibilities of a lineman. If that turns out to be the case, he will need to find another line of work since I do not believe he will qualify for long-term disability based on the fact that he is only 32 years old and has an entirely normal neurological exam. Although I have not scheduled a follow-up visit for the patient, I stand ready to reevaluate Mr. Zollicoffer [sic] should new problems arise.

The claimant did not return to Dr. Cathey when he continued to have the alleged "pain" in his neck and shoulders. Instead, he sought a change of physician to Dr. Blankenship. The claimant saw Dr. Blankenship on July 20, 2005. In his report of January 18, 2006, Dr. Blankenship stated:

...As you know, I only have seen Mr. Zollicoffer once in the office on July 20, 2005. At that time, I indicated that the patient still has some C6 numbness, but did not have any gross defects. The MRI that I read at that time indicated the patient had undergone anterior cervical arthrodesis with a MTF spacer implant and an anterior plate. I did not indicate that there were any abnormalities at that level or adjacent levels. It appeared to be a successful treatment for a C5/6 disc herniation and his plain films also appeared solid. There was no fusion as of yet, but that would not be unreasonable at six months out from surgery, but it certainly appeared to be stable.

At that time, the major complaints that the gentleman had was neck pain. I felt like the majority of the patient's clinical complaints are related to more of a muscular type of problem. I did recommend a transforaminal epidural steroid injection. I also recommended an aggressive course of physical therapy. As you indicated, I have declined to continue in the patient's care. This has nothing to do with Mr. Zollicoffer or the case, it has more to do with the difficulties we had with his attorney and I won't go in to details of that.

At the time of his original visit, we were unaware that the patient was represented, although we do see patients frequently who have counsel in Worker's Compensation claims. I was not aware, however, at the time, that I had been recommended for the patient to see from more of a legal standpoint.

The bottom line is that I have declined to participate in the gentleman's care. My recommendations stand on themselves. Concerning your question, whether I have an opinion if the gentlemen had been able to continue to work following his release by Dr. Cathy on January 18th, I would state that at the time I saw him, the majority of the patient's pain, I felt like was myofascial in nature. That would not preclude him from working. I note that Dr. Cathy released him to work on January 19, 2005. I can state, unequivocally that I know Dr. Cathy very well and he is an exceptional spine surgeon and if Dr. Cathy felt that he was able to return to work at that time at full duty, I see nothing in the records that indicate

that he could not. I am unaware as to exactly what the gentleman was doing from the standpoint of work at the time I saw him. I do know that he had not worked since January 26th, but I am unsure what job he would have gotten back to. Your question is a rather open ended question concerning whether the patient would be able to work and the answer to that is unequivocally yes. As to whether he could return to his preinjury job at the time of my office visit would probably have required a Functional Capacity Evaluation, but the gentleman was certainly capable of working at that time in some capacity.

Dr. Blankenship's evaluation of the claimant and order of physical therapy and work conditioning is not indicative that the claimant continued and remained within his healing period. These findings and recommendations by Dr. Blankenship were a response to the claimant's continued complaints of pain. The persistence of pain does not extend the healing period.

The claimant is also very active and this demonstrates that he has the ability to work. The claimant does household chores and cares for his 4-year-old daughter. He also does yard work. The claimant admitted that he is the primary care giver for his 4-year-old daughter while his wife works long hours. He is able to go shopping at Wal-Mart and the grocery store. He is able to cook, do dishes, do laundry and sweep. The

claimant is 33 years old and has a high school education. He has not sought any employment since January of 2005. Instead, the claimant has elected to stay at home and take care of his daughter. In my opinion, when you consider the evidence that the claimant is able to take care of his daughter, take care of the house, do the yard work, shop, as well as the medical records of Drs. Blankenship and Cathey, I cannot agree with the majority's findings decision that the claimant is still temporarily totally disabled from the period January 18, 2005, with the exception of the two and a half days he returned to work in January of 2005, through a date yet to be determined. In my opinion, this conclusion is based on conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

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

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KAREN H. MCKINNEY, Commissioner