

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F111416

JAMES JOHNSON,  
EMPLOYEE

CLAIMANT

ROBBINS HARDWOOD FLOORING,  
EMPLOYER

RESPONDENT

ZURICH AMERICAN INSURANCE,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 22, 2007

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

Claimant represented by the HONORABLE PHILIP M. WILSON,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE RANDY P. MURPHY,  
Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

Both parties appeal an administrative law judge's  
opinion filed July 6, 2006. The administrative law judge  
found that the claimant proved he was entitled to additional  
medical treatment and additional temporary total disability  
compensation. The administrative law judge found that the  
claimant did not prove he was entitled to a permanent  
impairment rating. After reviewing the entire record *de*

*novo*, the Full Commission affirms as modified the administrative law judge's award of additional medical treatment and temporary total disability. We affirm the administrative law judge's finding that the claimant did not prove he was entitled to an anatomical impairment rating.

I. HISTORY

The parties stipulated that James Johnson, age 44, sustained a compensable injury to his right foot on August 31, 2001. Mr. Johnson testified that a skid loaded with lumber rolled over his right foot. Dr. Gary Sherwood saw the claimant on August 31, 2001 and diagnosed "R foot contusion." Dr. Sherwood filled out a form indicating that the claimant could return to light duties on September 4, 2001.

Dr. Terrence R. Yates noted on September 4, 2001, "He has marked swelling of the toes, foot and ankle....X-ray of the ankle today reveals no bony abnormality." Dr. Yates' impression was "Severe contusion to right foot and ankle." Dr. Yates kept the claimant off work until re-checked in one week.

Dr. Kyle R. Blickenstaff examined the claimant on September 20, 2001. Dr. Blickenstaff noted that the

claimant had been on light duty, and he reported the following x-ray findings: "Three views right foot, 3 views right ankle - no evidence of fracture, subluxation or acute bony abnormality. He has changes of the first MTP joint consistent with hallux rigidus." Dr. Blickenstaff's impression was "Residual pain and swelling right foot contusion....James has not progressed very well over time. I will allow him to remain on significant light duty with a sit down job only."

The claimant continued to follow up with Dr. Blickenstaff.

The parties stipulated that the respondents "accepted the claim as compensable and paid related medical bills along with 15 weeks and 1 day of temporary total disability benefits."

An MRI of the claimant's lower extremity was taken on January 15, 2002:

Minimal subcutaneous edema of the dorsum of the foot. Do not see any evidence of fracture or dislocation and there is no evidence of bone bruise. Do not see any edema of the plantar surface of the foot. No other abnormality noted.

Dr. Blickenstaff reported on February 7, 2002:

James is here for recheck of his right foot injury. He reports no subjective improvement. He

is still utilizing crutches and his boot walker. His MRI scan demonstrated no bony or soft tissue abnormality.

PE: No significant swelling or deformity. Two plus dorsalis pedis pulse. He has subjective tenderness when palpated at the metatarsal head region volarly. He also complains of pain with passive range of motion of the ankle.

IMP: Persistent subjective pain right foot, now greater than 5 months out from right foot injury....I have encouraged him to progress full weight bearing in the boot walker and then subsequently into a regular shoe working on range of motion and calf strengthening exercises. I think that he should discontinue his crutches as soon as possible to try to progress back to regular activity.

I have also recommended neurologic evaluation due to his neurologic type complaints in the right foot. Possibly medical management could improve this. I see no need for further orthopedic intervention and I will discharge him to return as needed.

Although James continues to have pain in the right foot, according to the Guides to the Evaluation of Permanent Impairment, Fourth Edition, there is no permanent impairment that I can calculate at this time.

The respondents' attorney cross-examined the claimant:

Q. Blickenstaff released you to light-duty work. Did you try to go back to work then?

A. I tried to go back on the 12<sup>th</sup>, I believe, or 13<sup>th</sup>.

Q. How long were you able to work?

A. I stayed out there probably like three hours.

Q. Did they give you some light-duty work and you just couldn't do it?

A. Yes, sir.

Q. What type of light-duty work was provided?

A. It was put in on a board.

Q. Were you able to do that?

A. No, sir.

Q. So you went home?

A. Yes, sir.

Dr. Peggy J. Brown, a neurologist, examined the claimant and corresponded with Dr. Blickenstaff on April 2, 2002:

Mr. Johnson presents with paresthesias after an alleged injury on August 31, 2001, and he has remained off work since then, has an attorney and I believe is applying for disability. On physical examination he has a paucity of findings. I have recommended that he have a three-phase bone scan looking for any evidence of reflex sympathetic dystrophy. Also he will have a nerve conduction study and I will complete that in my office in about 2 weeks. I have encouraged him to use his foot as much as possible and if he does not need the crutches, not to use them. He will continue his other medicines as directed by you. No prescriptions were given and none were requested....

Dr. Brown diagnosed "1. Foot pain, unknown etiology."

A three-phase bone scan of the claimant's right foot was taken on April 3, 2002: "Findings consistent with

arthritis of the ankle and tarsal articulations and metatarsal phalangeal joints with no discrete abnormal areas noted to indicate osteomyelitis or fracture."

Dr. Brown informed Dr. Blickenstaff on April 24, 2002:

Mr. James Johnson returned for a nerve conduction study of the lower extremities, which was completed and entirely within normal limits. James is a 39-year-old black male who had a right foot crush injury at work last year. A 3-phase bone scan of the left foot was normal. The 3-phase bone scan of the right foot showed persistent concentration in the ankle and the talonavicular articulation and in the metatarsal phalangeal articulations of the toes. The impression was findings consistent with arthritis of the ankle with no discrete abnormal areas to indicate osteomyelitis or fracture. The nerve conduction study was completed today and is totally within normal limits and I see no evidence of nerve damage....He is ambulatory with his crutches and he is still wearing the ankle boot. There is no edema in the foot.

I suggested to James that he might consider wearing regular shoes because he does not appear to need the ankle boot anymore. I see no evidence of nerve damage. I am returning him to your care at this time and I encouraged him to settle on his case and I do not believe any further treatment will be necessary.

The claimant began treating with Dr. Bruce K. Berkheimer, a podiatrist, on June 18, 2002. Dr. Berkheimer assessed, "Past strain resulting diffuse, atrophy and now residual synovitis lateral sinus tarsi and plantar fasciitis." Dr. Berkheimer noted in July 2002 that the

etiology of the claimant's pain was unknown. Dr. Berkheimer reported on July 30, 2002, "Patient is still having pain. Only improvement has been with injection therapy only administered to the plantar fascia and sinus tarsi. He does have pain out of proportion. Not able to find any areas of difficulty. He states he has extensive symptoms which I cannot support objectively. However, in light of possible RSD, we will treat with injection therapy." Dr. Berkheimer noted in August 2002 that the claimant had improved and was now able to wear shoes.

Dr. Blickenstaff reported on January 9, 2003:

James is here for recheck of his right foot crush injury suffered 8-31-01. He was last seen in this clinic 2-17-02 at which time I referred him to the neurologist for evaluation and discharged him from my care. He continues to complain of "shaking" and pain in various aspects of the foot and ankle, most severe medially near the mid-foot and even lateral ankle.

PE: No significant swelling or deformity. Diffuse tenderness to palpation. Neurologically intact.

Dr. Blickenstaff gave the following impression: "Right foot pain/status post crush injury....We will refer him to Dr. Bruce Berkheimer for evaluation and possible shoe modification."

The parties stipulated that the respondents controverted additional benefits after January 9, 2003.

Dr. Berkheimer noted on January 14, 2003, "We will need an MRI which he did not get previously due to cost. However, it is now workers comp related and we will order an MRI to obstruction or mass in the tarsal tunnel canal."

The following impression resulted from an MRI of the claimant's foot and ankle taken January 31, 2003:

Signal changes in the tarsal navicular at its articulation with the head of the talus suggesting recent microfracture of the subarticular bone of the tarsal navicular.

2. Slight increased amount of fluid around the posterior tibialis tendon as it passes through the tarsal canal consistent with tenosynovitis perhaps due to recent trauma. Otherwise MRI of the ankle and foot are negative.

Dr. Berkheimer reported on February 5, 2003:

I have evaluated Mr. James Johnson extensively. As you remember, he is a 39 year old black male who sustained a crush injury on August 31 with a steel roller striking the top of the foot rolling up to the ankle. He had continued bruising and pain. He sought medical attention with Dr. Peggy Brown who did a nerve conduction study and found him to be within normal limits. He also has had physical therapy.

He sought medical attention from me as early as June 2002. We have been seeing him intermittently for therapeutic (sic) injections for possible tarsal tunnel syndrome. Multiple injections offered him some relief. He still has continued radiation pain to the outside of the foot

radiating approximately to the hip which led us to order another MRI. This was found within normal limits. No mass within the tarsal tunnel canal.

He does have a little pes planus. I recommended orthotics if his worker's compensation would cover that. Other than that, I don't think I am able to help him anymore. I did discuss this with him and encouraged him to seek attention at a diagnostic clinic....

Dr. Ruth L. Thomas examined the claimant on August 21, 2003. Dr. Thomas injected Marcaine into the claimant's right ankle but the claimant reported that he experienced no relief. Dr. Thomas noted, "This is a crush injury and crush injuries usually damage nerves. The superficial peroneal nerve could easily have been damaged by the description of his injury. It often takes many years for the symptoms to resolve." Dr. Thomas assessed, "Chronic right foot and ankle pain, etiology unclear." Dr. Thomas recommended "Serial injections."

The claimant continued to occasionally follow up with Dr. Thomas.

Dr. Thomas' assessment on January 7, 2004 was, "Painful neuroma versus other nerve injury to the right foot status post trauma....I just believe the patient has a superficial peroneal nerve neuroma that may be causing him pain in his sinus tarsi region....He agreed to procedure. He will call

Debbie in the future for exploration of the superficial peroneal nerve on the right foot as well as baring of the nerve into the EDB muscle."

Dr. Thomas noted the following on June 30, 2004: "The patient is here for preoperative workup. The plan is to explore the superficial peroneal nerve at the point of maximum tenderness just medial to the spinous process. I think he has a neuroma of the superficial peroneal nerve related to previous crush injury. I will explore this area and bury the remnant of the nerve in the muscle."

The record indicates that Dr. Thomas performed the following surgical procedure on July 2, 2004: "1. Excision of neuroma. 2. Exploration of superficial peroneal nerve."

Dr. Thomas noted:

The superficial peroneal nerve was encountered easily. There were no gross abnormalities that were evident in the nerve and it looked intact. However, this was the site where the patient was exquisitely tender, and it was located directly over this nerve which was encountered. For this reason, a portion of the nerve was then removed and sent as a specimen to pathology. The remaining proximal end of the nerve was tied and buried deep under the extensor retinaculum....

Dr. Thomas' pre- and post-operative diagnoses were, "Superficial peroneal nerve neuroma."

Dr. Thomas noted the following on July 14, 2004:

Mr. Johnson suffered a crush injury to the right lower extremity. His point of maximum tenderness corresponded with the underlying superficial peroneal nerve. I resected a segment of this nerve directly at the point of maximum tenderness and anticipated that pathology would recognize neuroma changes. Instead, the pathology report came back no identifiable pathology. I placed the resected stump of the nerve deep under muscle at the most proximal end of my incision. I held him very still, in neutral position, trying to allow this nerve to scar into position. It is unclear if he is going to get substantial relief from my surgical intervention. He did improve temporarily with superficial peroneal nerve block....I am putting him in a straight leg walking cast today after removal of the sutures. The incision is essentially healed, but I do not want movement of the ankle. He is agreeable....

The claimant returned to Dr. Thomas on August 11, 2004:  
"The patient reports 70% relief from surgery....the fact that he has got 70% relief with surgery is an indication that in spite of the fact that the nerve was not reported by pathology as abnormal, it was delivering neuritic type symptoms."

Dr. Thomas corresponded with the claimant's attorney on October 28, 2004:

My examination of this patient revealed dysthesia on the dorsum of his foot and I suggested a superficial peroneal nerve resection to help relieve his pain. When I last saw him on August 11, 2004 he reported 70% pain relieve (sic) from this surgery. I believe he suffered a contusion to the superficial peroneal nerve. I was not treating him for arthritic changes in the

foot. Certainly I cannot say with certainty that he will not develop changes over time, but at this point his x-rays did not show arthritic changes....

Dr. Thomas noted the following on November 10, 2004:

This patient is five months status post resection of superficial peroneal nerve at the site of pain and discomfort and implantation of the nerve into the EDB right foot. He reports that this did improve his complaints of pain. On his previous visit, I injected the neural nerve. He got relief of pain again. I explained that this could be a temporary thing and I was concerned about marching across the foot taking out superficial sensory nerves. Today, he presents stating he really does not want to have his neural nerve reset. I \_\_\_ at this time for an MMI impairment rating. I believe he has reached the maximum improvement. I have nothing further to offer. It should be noted that he has 0.5 cm of atrophy on the right compared to the left. He has excellent range of motion of the hind foot and ankle....I will establish his impairment rating and send a copy to Jessie Dan Moore, MD. I have invited Mr. Johnson to return on a p.r.n. basis.

Dr. Thomas wrote to the claimant's attorney on December 10, 2004:

I have reviewed the "Guides to the Evaluation of Permanent Impairment" fifth edition, published by the American Medical Association. Mr. Johnson has suffered an injury to his right foot. He has loss of the sensory component of the superficial peroneal nerve and dyesthesia in the sural nerve. Based on table 17-37, page 552, the impairment rating would be 2% the whole person and 5% to the lower extremity for both of these nerves. If they are combined, they are shown in the combined values chart, page 564 the overall result is 4% to the whole person and 10% to the right lower

extremity. The work related injury as reported to me by Mr. Johnson was a crush injury to this foot and does correspond with his residual problems.... It is my opinion that the patient has reached maximum medical improvement. I cannot make a statement on his return to work, because I am unaware of his work duties.

A pre-hearing order was filed on November 16, 2005. The parties agreed to litigate the following issues: 1. Whether the claimant was entitled to additional medical treatment. 2. Whether the claimant was entitled to additional temporary total disability compensation from February 26, 2002 until December 4, 2004. 3. Whether the claimant was entitled to an anatomical impairment rating of 10%.

A hearing was held on January 11, 2006. The respondents' attorney cross-examined the claimant:

Q. Even though Dr. Thomas released you December 4, 2004, following the surgery, you've not returned to work?

A. No, sir.

Q. You've not looked for work?

A. No, sir.

Q. Are you still having problems with your right foot?

A. Yes, sir....I'm having problems standing on it or resting on it. You know, just basically

standing on it and resting on it and laying down at night.

Q. Has your foot improved to the point where you feel you can go to work?

A. No, sir.

The administrative law judge found, in pertinent part:

7. Claimant sustained his burden of proving that he is entitled to additional medical benefits. Dr. Thomas' care was reasonably necessary because it led to an accurate diagnosis of Claimant's problem and then reduced or alleviated the symptoms resulting from his compensable injury. There is no other cause for Dr. Thomas' treatment reflected in the record other than Claimant's compensable injury; therefore, his injury is a factor in his need for medical treatment.

8. Claimant sustained his burden of proving that he is entitled to temporary total disability benefits from February 26, 2002 until November 10, 2004. Because his compensable right foot injury is classified as a scheduled injury, Ark. Code Ann. §11-9-521(a) applies to this claim. The record reflects that Claimant's right foot continued to heal from the date of his injury through November 10, 2004, at which time Dr. Thomas opined that Claimant reached maximum medical improvement. Claimant did not return to work prior to that date. Claimant's testimony and the medical records demonstrate that Claimant attained no significant relief until Dr. Thomas treated his injury, so that he remained in his healing period during this time.

9. Claimant did not sustain his burden of proving that he is entitled to benefits for a permanent impairment rating. Claimant's atrophy is not significant enough to sustain a rating under the Guides. Otherwise, Claimant did not present evidence of objective and measurable physical findings to support an impairment rating.

Both parties appeal to the Full Commission.

## II. ADJUDICATION

### A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, the administrative law judge found that the claimant proved he was entitled to additional medical treatment. The Full Commission reverses this finding. The parties stipulated that the claimant sustained a compensable injury to his right foot in August 2001. Dr. Yates noted that the claimant had marked swelling of the toes, foot, and ankle, and he diagnosed "severe contusion to right foot and ankle." An x-ray in September 2001 showed no evidence of fracture, subluxation, or acute bony

abnormality. An MRI in January 2002 showed minimal subcutaneous edema in the dorsum of the claimant's foot. No other abnormality was noted.

Dr. Blickenstaff reported in February 2002 that the MRI had shown no bony or soft tissue abnormality. Dr. Blickenstaff did not recommend an orthopedic intervention but he did recommend a neurological evaluation. Dr. Brown, a neurologist, examined the claimant in April 2002 and reported "a paucity of findings." Dr. Brown diagnosed "foot pain, unknown etiology." A bone scan of the claimant's right foot in April 2002 revealed findings consistent with arthritis but not abnormal areas indicating osteomyelitis or fracture. Dr. Brown also reported in April 2002 that a nerve conduction study was normal and showed no evidence of nerve damage. Dr. Berkheimer stated in July 2002 that the etiology of the claimant's foot pain was unknown. Dr. Blickenstaff examined the claimant and reported on January 9, 2003, "No significant swelling or deformity. Diffuse tenderness to palpation. Neurologically intact." The respondents controverted further benefits after January 9, 2003.

The Full Commission finds that the claimant reached the end of his healing period for the compensable injury no later than January 9, 2003. There is no evidence of record that the claimant continued to suffer from a contusion or swelling after January 9, 2003. The claimant underwent several diagnostic tests in the weeks and months after the compensable contusion of August 31, 2001; none of this testing demonstrating any injuries to the claimant's bones or nerves. The respondents controverted additional benefits after January 9, 2003. None of the examinations or diagnostic testing performed after this time show any objective medical findings demonstrating an injury.

The Full Commission recognizes that the claimant does not have to provide objective medical evidence of his continued need for treatment. *Castleberry v. Elite Lamp Co.*, 69 Ark. App. 359, 13 S.W.3d 211 (2000), citing *Chamber Door Indus., Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Nevertheless, the claimant does have the burden of proving that he is entitled to additional medical treatment. *Brown, supra*. The claimant in the present matter did not prove that he was entitled to additional medical treatment, pursuant to Ark. Code Ann. §11-9-508(a),

after January 9, 2003. None of the diagnostic testing or physical examinations after January 9, 2003 revealed that the claimant still suffered from the effects of the August 2001 compensable injury, diagnosed as a contusion. Dr. Thomas performed a surgical exploration of the superficial peroneal nerve in July 2004. Dr. Thomas reported, "There were no gross abnormalities that were evident in the nerve and it looked intact." Dr. Thomas' July 2004 report of no gross abnormalities confirmed the April 2002 findings of Dr. Brown.

We also recognize Dr. Thomas' October 2004 letter where she stated, "I believe he suffered a contusion to the superficial peroneal nerve." The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). In the present matter, we are unable to attach significant evidentiary weight to Dr. Thomas' report of a peroneal nerve contusion. Not only does the April 24, 2002, nerve conduction study fail to confirm an injury to the superficial peroneal nerve, but Dr. Thomas' own surgical report belies such a finding as well. Further, none of the

reports from treating physicians Dr. Sherwood, Dr. Yates, Dr. Blickenstaff, Dr. Brown, or Dr. Berkheimer could be construed to find that the claimant remained within his healing period after January 9, 2003, or that additional medical treatment was reasonably necessary after that date.

Finally, the Full Commission is aware that Dr. Thomas reported the claimant had experienced "70% relief from surgery." We recognize that evidence of post-surgical improvement is one relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D&B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Yet, the claimant testified at hearing that he had problems standing on his foot, resting on his foot, or even lying down at night. The claimant testified that he was still unable to return to work. The claimant's testimony contradicted Dr. Thomas' notion that the claimant had experienced substantial relief from surgery.

The Full Commission finds, pursuant to Ark. Code Ann. §11-9-508(a), that the claimant did not prove he was entitled to additional medical treatment after January 9, 2003. The claimant did not prove that the surgery performed by Dr. Thomas was reasonably necessary in connection with

the compensable injury. Nor does the record show that any treatment provided after January 9, 2003 was geared toward management of the compensable injury. See, *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, \_\_\_ S.W.3d \_\_\_ (2004). The decision of the administrative law judge is reversed.

B. Temporary Disability

An employee who has suffered a scheduled injury is to receive temporary total disability compensation during his healing period or until he returns to work. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.3d 457 (1994). 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. *Id.* Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

The administrative law judge found in the present matter, "Claimant sustained his burden of proving that he is entitled to temporary total disability benefits from February 26, 2002 until November 10, 2004." The Full Commission has discussed at length *supra* our finding that the claimant reached the end of his healing period no later than January 9, 2003. The claimant sustained a compensable injury on August 31, 2001. He was subsequently diagnosed as having a contusion and swelling. The evidence does not indicate that the claimant suffered from a contusion or swelling after January 9, 2003. Temporary total disability compensation cannot be awarded after the claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). Accordingly, the Full Commission finds that the claimant was within his healing period and had not returned to work from February 26, 2002, through January 9, 2003. The decision of the administrative law judge is affirmed as modified.

C. Permanent Impairment

"Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. *Johnson v. General Dynamics*, 46

Ark. App. 188, 878 S.W.2d 411 (1994). The claimant must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. *Weber v. Best Western of Arkadelphia, Workers' Compensation Commission* F100472 (Nov. 20, 2003). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the impairment. Ark. Code Ann. §11-9-102(F)(ii)(a). "Major cause" means "more than fifty percent (50%) of the cause." Ark. Code Ann. §11-9-102(14).

In the present matter, the administrative law judge found that the claimant did not prove he was entitled to benefits for a permanent impairment rating. The Full Commission affirms this finding. The claimant sustained a compensable injury to his right foot on August 31, 2001. He was subsequently diagnosed as having a contusion and swelling. An x-ray in September 2001 was normal. An MRI in January 2002 showed minimal edema but was otherwise normal. Dr. Blickenstaff stated in February 2002 that he could not calculate a permanent impairment rating. A bone scan of the claimant's right foot in April 2002 showed arthritis but no fracture. A nerve conduction study in April 2002 was

normal. The Full Commission has determined that the claimant reached the end of his healing period no later than January 9, 2003.

Dr. Thomas noted on November 10, 2004, "He has 0.5 cm of atrophy on the right compared to the left." Pursuant to Ark. Code Ann. §11-9-522(g) and Commission Rule 34, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993) as an impairment rating guide to be used in assessing anatomical impairment. The administrative law judge in the present matter cited the Guides, Table 37, p. 77, and correctly noted that the Guides assign zero percentage of permanent physical impairment for 0.5 cm atrophy. We recognize that Dr. Thomas assigned a purported 4% whole person rating based on the 5<sup>th</sup> edition of the Guides rather than the appropriate 4<sup>th</sup> edition. 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*, 83 Ark. App. 273, 105 S.W.3d 811 (2003). The impairment rating assessed by Dr. Thomas was based on wholly subjective criteria. Any determination of the existence or extent of physical impairment shall be supported by objective and measurable

physical findings. Ark. Code Ann. §11-9-704(c)(B). Nor does the instant record show that the claimant sustained any nerve damage ratable pursuant to the Guides.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to an anatomical impairment rating. We affirm as modified the administrative law judge's finding that the claimant proved he was entitled to additional temporary total disability compensation. We reverse the administrative law judge's finding that the claimant proved he was entitled to additional medical treatment.

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. 1996).

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 in part 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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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

\_\_\_\_\_I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the finding that the claimant is entitled to temporary total disability benefits for the time period of February 26, 2002 to January 9, 2003. However, I must respectfully dissent from the balance of the decision which finds that the claimant has not shown he is entitled to an anatomical rating, medical benefits, or temporary total disability benefits after January 9, 2003. After a de novo review of

the record, I find that the medical records show the claimant's need for additional medical treatment was directly related to his admittedly compensable injury. I also find that the treatment provided by Dr. Thomas was both reasonable and necessary in treating the claimant's compensable injury. I further find that the preponderance of the evidence shows the claimant is entitled to temporary total disability benefits as awarded by the Administrative Law Judge. Finally, I find that the claimant is entitled to a 4% impairment rating to the body as a whole.

The Majority denies the claimant medical benefits on the basis that he allegedly had no objective findings of an injury after January 9, 2003. They further reject Dr. Thomas' opinion that the claimant suffered from a peroneal nerve injury and conclude the claimant's treatment after January 9, 2003, was not geared towards treating his compensable injury. Finally, they reject Dr. Thomas' conclusion and the claimant's testimony that he obtained relief as a result of surgery. However, after reviewing the record, I find that the claimant should have been awarded additional medical benefits.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). Reasonably necessary medical services may include that 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. Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); Artex Hydrophonics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W. 2d 845 (1983). The employee need not establish that the compensable injury is a factor in the resulting need for medical treatment. See, Williams v. L & W Janitorial Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Ballance v. K.C. Contracting, Full Workers' Compensation Commission Opinion filed August 30, 2004 (F204392).

As noted by the Administrative Law Judge, the claimant had never suffered from foot problems prior to the admittedly compensable injury. Additionally, the claimant had objective findings in the form of arthritis as shown by

a bone scan, increased fluid in his foot, signal changes with a "recent microfracture", and atrophy as noted by Dr. Thomas. When considering the fact the claimant had no history of foot pain in conjunction with the nature of his injury and his continued complaints, I find that the claimant's need for treatment by Dr. Thomas was directly related to his admittedly compensable injury.

Contrary to the Majority's assertions that the claimant swelling and contusion had subsided, it is clear from the results of the MRI recommended by Dr. Berkheimer, that the claimant showed objective signs of injury that were related to his work-related accident. Specifically, the Radiology Report, dated January 31, 2003, indicates as follows,

**IMPRESSION:** Signal changes in the tarsal navicular at its articulation with the head of the talus suggesting recent microfracture of the subarticular bone of the tarsal navicular.

2. Slight increased amount of fluid around the posterior tibial tendon as it passes through the tarsal canal consistent with tenosynovitis perhaps due to recent trauma.

\_\_\_\_\_Despite this reading, Dr. Berkheimer read the MRI to conclude the claimant's MRI was, "within normal limits. No mass within the tarsal tunnel canal." Dr. Beckheimer also indicated that the claimant suffered from pes planus, recommended the claimant have orthotics, but otherwise released him from receiving care. \_\_\_\_\_

Additionally, as noted by the Majority, the claimant is not required to have ongoing objective proof of injury in order to receive ongoing medical treatment. See, Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W. 3d 211 (2000), citing Chamber Door Indus., Inc. v. Graham, 59 Ark. App. 224, 956 S.W. 2d 196 (1997). When considering the nature of the claimant's injury and the fact that the claimant received no relief of symptoms until after his surgery, I find that the preponderance of the evidence shows that the treatment provided by Dr. Thomas was both reasonable and necessary to treat the claimant's compensable injury.

Additionally, there is absolutely no evidence to indicate that the claimant's complaints resolved as of January 9, 2003. Instead, on January 9, 2003, the date which the claimant last received care which was accepted and

paid for by the respondents, Dr. Blickenstaff referred the claimant for additional treatment, indicating the claimant was still in need of treatment.

\_\_\_\_\_I must also disagree with the Majority's assertion that the claimant did not improve from the surgery performed by Dr. Thomas. Dr. Thomas' medical reports specifically indicate that the claimant received some 70% relief from his symptoms. Likewise, at the time of the hearing, the claimant testified that while he had residual effects from the surgery, he had received improvement from the surgery. Specifically, he testified that he was able to rest his foot more after the surgery, and indicated that he had reduced pain levels after the surgery. As such, I find that the claimant has shown by a preponderance of the evidence that the treatment provided by Dr. Thomas was both reasonable and necessary to treat the claimant's work-related injury.

I also find that the claimant should have been awarded temporary total disability benefits for the entire time period requested. A claimant "who has suffered a scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work." Ark. Code Ann. § 11-9-521(a) (Repl. 2002); Wheeler

Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). 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).

I find that the medical evidence clearly indicates that the claimant remained in his healing period and was unable to work after the time of February 26, 2002. I note the respondents' argument that the claimant continually sought treatment and was allegedly placed at MMI on February 7, 2002. However, the doctor's note from that date does not indicate that the claimant was at the end of his healing period. Instead, Dr. Blickenstaff merely appears to be releasing the claimant from orthopedic care and indicates that he was unable to assign an impairment rating. In fact, Dr. Blickenstaff imposes a plan on the claimant in order for him to return to normal activities and recommends the claimant receive neurological treatment. Dr Blickenstaff opines,

I have also recommended neurologic evaluation due to his neurologic type complaints in the right foot. Possibly medical management could improve this.

I see no need for further orthopedic intervention and I will discharge him to return as needed.

Accordingly, based on this language, I find that the medical records do not support a finding that the claimant's healing period had ended or that he had failed to return to work on his own volition as of February 7, 2002.

Furthermore, despite the assertions of the respondents, the claimant's care in between the time period of February 7, 2002 and the time of his surgery was not merely maintenance. During that time period the claimant underwent a myriad of diagnostic tests and injections, only to eventually be referred for surgery.

I further find that the claimant remained in his healing period and unable to return to work even after the time period of January 9, 2003, until the time of his surgery. In my opinion, the January 9, 2003, note from Dr. Blickenstaff does not indicate that the claimant's symptoms had resolved. In fact the use of the words, "No significant swelling or deformity," seems to indicate that the claimant had swelling, but that it was simply not significant in nature.

I also note that while the Majority concludes the claimant reached the end of his healing period at that time, the physician did not indicate that the claimant was being released or that he had reached maximum medical improvement. Instead, he refers the claimant to another doctor. In my opinion, this illustrates that the claimant had not reached the end of his healing period and was not simply receiving maintenance treatment. Additionally, the claimant went on to receive ongoing treatment and continued to present with objective problems such as atrophy and noted arthritis, which indicates that he had not reached the end of his healing period and that he continued to display objective signs of injury directly related to his work-related accident. Most importantly, the claimant had to undergo surgery, and only after that point did he resolve part of his pain. Therefore, I find that the claimant remained in his healing period and unable to return to work after January 9, 2003. Accordingly, I would have awarded the claimant benefits for the entire time period in question.

I further find that the claimant should have been awarded an impairment rating in the amount of 4% to the body as a whole. On December 10, 2004, Dr. Thomas specifically

indicated, "He has loss of the sensory component of the superficial peroneal nerve and dysthesia in the sural nerve." She then indicated she was assigning a rating by using the AMA Guides to the Evaluation of Permanent Impairment (5th ed. 2000). While this is admittedly the wrong edition of the Guides, I find that the claimant is entitled to a 4% impairment rating to the body as a whole pursuant to Table 68 of the 4<sup>th</sup> edition of the Guides.

Ark. Code Ann. §11-9-704(c) (B) (Repl. 2002) provides:

[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.

Further, permanent disability "benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." Ark. Code Ann. §11-9-102(4) (F) (ii) (a) (Supp. 2002).

In Avaya v. Bryant, 82 Ark. App. 273; 105 S.W.3d 811 (2003), the Court of Appeals stated,

Any determination of the existence or extent of physical impairment must be supported by objective and measurable physical findings. Pursuant to Ark. Code Ann. § 11-9-522(g) (1) (Repl. 2002), the Commission must adopt an impairment rating guide to be used in the assessment of anatomical impairment, and

the Commission has adopted the AMA Guides to be used in this assessment. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. Thus, the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. (Internal citations omitted).

As recently noted by the Arkansas Court of Appeals, an impairment rating need not be based solely on objective findings. Donald Groom v. Nekoosa Papers, Inc., Et Al., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W. 3d. \_\_\_ (2006). Rather, so long as objective findings are used as part of the basis for an impairment rating, subjective criteria may also be used in assigning an impairment rating. Id. I also note that in the past, the Courts have ruled that the major cause requirement is satisfied where a compensable injury necessitates a surgery and the surgery is the basis for the impairment rating. Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998).

In the present instance the claimant's impairment rating was not wholly based on subjective criteria. The claimant sustained an admittedly compensable injury in the

form of a crush injury, for which the respondents have accepted and paid benefits. As late as the MRI performed on January 20, 2003, the claimant was noted to have signal changes consistent with a "recent microfracture."

Additionally, the claimant was noted to have an increased amount of fluid around the posterior tibial tendon that was, "consistent with tenosynovitis perhaps due to recent trauma." Additionally, on November 10, 2004, Dr. Thomas noted the claimant had, ".5 cm of atrophy on the right compared to the left." Additionally, the claimant underwent a surgery in which his peroneal was severed.

For the aforementioned reasons I respectfully concur in part and dissent in part.

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PHILIP A. HOOD, Commissioner

