

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508814

WILLIE B. JONES, EMPLOYEE	CLAIMANT
R C LANDSCAPING, EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MAY 14, 2007

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

Claimant represented by HONORABLE MARC I. BARETZ, Attorney at Law, Memphis, Arkansas.

Respondent represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on June 6, 2005, and awarding the claimant temporary total disability benefits for the period June 7, 2005, and continuing to a date yet to be determined. Based upon our de novo review of the record, we affirm, in part, and modify, in part, the decision of the Administrative Law Judge. Specifically, we affirm the decision of the Administrative Law Judge finding that the

claimant proved by a preponderance of the evidence that he sustained a compensable injury. However, we modify that portion of the Administrative Law Judge's decision awarding the claimant temporary total disability benefits for the period June 7, 2005, through a date yet to be determined. In our opinion, the claimant reached the end of his healing period on October 25, 2005, when Dr. Kornblum released the claimant to return to work with no lifting over 30 pounds for two months and no shoveling.

The claimant was employed by the respondent employer's landscaping business. The claimant had been employed by the respondent employer at least since the late 1990's. However, there was some dispute as to when the claimant started working for the respondent employer. The evidence demonstrates that the respondent employer did not begin his business full time until 1998. The respondent employer testified that in the year 2000 is when the claimant began working for him as a paid employee.

On June 6, 2005, the claimant was loading a lawnmower onto a trailer when he flipped the lawnmower and became pinned underneath it. The lawnmower was removed from the claimant and an ambulance was called which took the claimant to the emergency

room. The claimant's chief complaint was lower back pain. The claimant was provided medication, underwent X-rays, and was provided a prescription for Darvocet. The claimant was directed to remain off work for two days and to follow up with his personal physician.

On June 13, 2005, the claimant sought treatment at the White River Rural Health Clinic in Parkin. The claimant complained of complaints of neck, back and chest pain and advised the Darvocet was not helping him with his pain. The claimant was prescribed Lortab and Flexeril and directed to return to the clinic.

The claimant returned to the White River Rural Health Clinic on June 15, 2005. The progress notes from that date reflect that the results of the radiology report from the emergency room disclosed old fractures in the claimant's ribs. Additional C-Spine films were ordered, which the claimant underwent on June 16, 2005. These x-rays and CT scans noted the following findings:

CT OF THE LUMBOSACRAL SPINE.
CT images of the lumbosacral spine were
obtained as the patient also now complains of

low back pain and x-rays of the lumbosacral spine reveal compression of L1.

CT imaging of the lumbar spine was obtained from L1 up to the L5-S1 level.

There is evidence for mild compression of L1 vertebra associated with slight vacuum disc phenomena at the L1-2 level and also small fracture of the spinous process of L1 vertebra noted as well.

These findings are thought to be acute in nature.

IMPRESSION: Burst compression fracture of L1 of a mild degree with anterior wedging. This is also associated with mild vacuum disc phenomena at the L1-2 space and possibly a tiny avulsion chip fracture of the superior anterior osteophyte at L2 and also the spinous process of L1 vertebra. Dr. Sarkar was notified of these results on completion of the exam.

LEFT RIBS. Views of the left ribs were obtained. There appears to be possibly old fracture of the left 7th rib. No other obvious fractures are detected. There is no evidence for pneumothoraces.

IMPRESSION: Possible old left 7th rib fracture.

CT OF THE CERVICAL SPINE.

CT evaluation of the cervical spine was obtained from the skull base to the thoracic inlet.

There is evidence for fractures of the spinous process of C4, C5, and C6. Fractures do not involve the anterior elements and are noted at the base of the spinous processes at these three levels.

The C7 vertebra appears to be intact.

IMPRESSION: Fractures of the spinous processes of C4, C5, and C6 vertebrae. A report was called in to this affect to Dr. Sarkar by the on-call radiologist following completion of the CT scan.

The claimant was ultimately referred to a neurologist, Dr. Jeffrey A. Kornblum, who examined the claimant on June 24, 2005. Dr. Kornblum recommended that the claimant start wearing a TLSO for approximately two months while the claimant's spine healed. He gave the claimant a slip to be off work for eight weeks.

On July 13, 2005, the claimant was again seen at the White River Rural Health Clinic. The claimant was complaining of being incapacitated and in need of physical assistance.

On July 21, 2005, the claimant was seen by Dr. Kornblum. Dr. Kornblum noted that the claimant seemed to be doing well and he asked him to maintain the use of the brace and avoid bending and lifting. He further restricted the claimant

from lifting over ten to fifteen pounds. He noted that the claimant should return in six weeks for a follow up x-ray.

On October 25, 2005, the claimant saw Dr. Kornblum and his report of that date reflects in pertinent part:

Mr. Jones is seen in follow up on October 25, 2005. It has been several months since he was last seen, several appointments have been rescheduled. He notes that when he is lifting he has some back pain, he is not in a brace at this time. On exam he is ambulating well. Straight leg raising is negative. Strength is 5/5. He has had follow up x-ray, the degree of collapse appears to be essentially the same, there has been no progression in his compression deformities. Spinous process fracture in the cervical spine again noted.

Impression: Mr. Jones is status post injuries as previously outlined with regard to compression fractures at L1 and L2 and clay shoveler fractures in the cervical spine. I have advised that he avoid any lifting over 30 pounds until the end of the year, as well as not to be shoveling through the end of the year. I have advised him in general of considering less laborus [sic] activities with regard to seeking out employment. If the need arises he may be referred for re evaluation.

Dr. Kornblum gave the claimant a certificate to return to work which stated that the claimant not lift over thirty pounds for two months and no shoveling.

Ark. Code Ann. §11-9-102(4) (A) (i) (Supp. 2005) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "in the course of employment" when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987).

In addition to establishing the general requirements for compensability set forth in §11-9-102(4) (A) (i), the claimant must establish a compensable injury by medical evidence,

supported by objective findings as defined in §11-9-102(16). That a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary to establish a causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996). Finally, medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical

certainty. Ark. Code Ann. §11-9-102(16)(i)(B); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). Crouch Funeral Home, et al v. Crouch, 262 Ark. 417, 557 S.W.2d 392 (1977). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act, and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). In other words, in a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, ie., that his injury was the result of an accident that arose in the course of his employment and that it grew out of, or resulted from the employment. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Further, the claimant must show a causal relationship exists between his condition and his

employment. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

It is well established that the party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 2002). A preponderance of the credible evidence of record means "evidence of greater convincing force." Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See also, Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 42 (1947). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

In our opinion, a review of the evidence demonstrates that the claimant sustained a compensable injury on June 6, 2005. The respondents' argument that the claimant refused a drug test, simply, in our opinion, is not credible. The claimant had undergone several drug tests prior to this and had never refused

nor had he ever failed one. The only evidence of the claimant's refusal is the testimony of the respondent employer-owner, Mr. Carroll. Mr. Carroll testified that the claimant told him he did not want to take a drug test because he was afraid it would "hurt his check". However, no drug test was ever even administered. Furthermore, Mr. Carroll denied that he instructed the hospital personnel to have the charges for the claimant's medical treatment billed to Medicaid and that he told them at the emergency room that it was a workers' compensation injury. However, there is no evidence in the record that this was billed to the respondent employer's workers' compensation policy. It was billed to Medicaid. Simply put, we find that the claimant has established the elements for a compensable injury which occurred within the time and space boundaries of his employment and which is supported by objective medical findings. However, with respect to the issue of temporary total disability benefits, we find that the claimant has only established entitlement to benefits through October 25, 2005, when Dr. Kornblum released the claimant from his care. Furthermore, the respondents are entitled to a credit for the wages it paid the claimant while he was off.

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. Etzkorn, 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)).

It is clear that Dr. Kornblum released the claimant from his care on October 25, 2005. Not only did Dr. Kornblum give the claimant a release to return to work, he also stated in his note of that day he was releasing the claimant from his care and that he had advised the claimant to get a job that required less laborious activities.

Therefore, after considering the evidence, we find that claimant reached the end of healing period on October 25, 2005,

when Dr. Kornblum released him. The respondents should also receive credit for the benefits paid to the claimant in the form of wages during the time the claimant was off work during that time period for his compensable injury.

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). 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) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

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 finding that the claimant sustained a compensable injury and awarding the claimant temporary total disability benefits from June 7, 2005, to October 25, 2005. Specifically, I agree with the Majority's decision that the claimant sustained a compensable injury and that he is entitled to temporary total disability benefits. However, I must respectfully dissent from the Majority's decision that the claimant is not entitled to temporary total disability benefits after October 25, 2005.

The claimant's injury occurred when, during the process of loading a lawnmower onto a trailer, he flipped the mower and became pinned underneath it. The lawnmower was lifted off the claimant and he was taken to the emergency room. The claimant complained of lower back pain. The reading of the X-rays concluded the claimant had chronic changes, but noted, "Anterior wedging of the L1 vertebral bodies indicative of prior anterior superior end plate compression injury. Age is indeterminate on

this study. There may be minimal anterior wedging of the L2 vertebral body as well." The claimant was restricted from working and given Darvocet.

On June 16, 2005, a CT scan was performed and revealed, Burst compression fracture of L1 of a mild degree with anterior wedging. This is also associated with mild vacuum disc phenomena at the L1-2 space and possibly a tiny avulsion chip fracture of the superior anterior osteophyte at L2 and the spinous process of L1 vertebra.

The report further indicated, "IMPRESSION: Fractures of the spinus processes of C4, C5, and C6 vertebrae."

On June 24, 2005, Dr. Purnima Sarkan indicated that the claimant that while the claimant's report indicated he had burst fractures, it appeared they were, in fact, compression fractures. He also restricted the claimant from working for eight weeks. The claimant continued to receive medical care and to be restricted from working.

On July 21, 2005, the claimant returned for x-rays. The claimant was identified to have partial wedge compression fractures at L1 and L2. X-rays also revealed spinous fractures at

C4 and C6. The claimant was again instructed he would be out of work and to return for further care.

On October 25, 2005, the claimant returned for additional x-rays. The report indicated, "He has had follow up x-ray, the degree of collapse appears to be essentially the same, there has been no progression in his compression deformities. Spinous process fractures in the cervical spine again noted." The report goes on to indicate, "I have advised that he avoid lifting over 30 pounds until the end of the year, as well as not to be shoveling through the end of the year. I have advised him in general of considering less laborus (sic) activities with regard to seeking out employment. If the need arises he may be referred for reevaluation." Finally, and perhaps most importantly, the record contains a copy of a card for a radiology appointment on June 16, 2007 for a CT scan of the claimant's cervical and lumbar spine.

The claimant testified that since his treatment in October, he has been unable to work due to the residual effects of his injury. He said that he has made numerous attempts to see

Dr. Kornblum again, but that he had been refused treatment because he had no way to pay for care.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). 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).

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).

I find that the overwhelming weight of the evidence supports a finding the claimant remains in his healing period and unable to return to work. The claimant credibly testified that he

has not been released to return to work and that he remains under a doctor's care. Likewise, the medical records indicate the claimant has not exited his healing period and that he is unable to substantially replace his wages.

The last available doctor's report is dated October 25, 2005. In that report, the physician opined that there had not been any change in the claimant's x-rays. Notably the report also indicates that the claimant still had fractures in his cervical spine. Dr. Kornblum also continued the claimant on temporary restrictions, which is further evidence the claimant remained in his healing period. Likewise, I note the claimant was apparently scheduled to return for a CT scan, which also indicates that he was to continue receiving ongoing care for his condition to make sure he healed properly.

I note the Majority's argument that the claimant was released from care. However, Dr. Kornblum indicated the claimant could return for treatment if needed. When considering the claimant's testimony that he attempted to seek care again and that he was refused service due to lack of money, it is apparent

that the only reason for the discontinuation of treatment was the respondents' refusal to provide medical care.

Finally, I find that the claimant has been and remains unable to work or substantially replace his wages. The claimant's job was manual in nature and the claimant credibly testified that he has been unable to work due to his work-related injury. Likewise, it is undisputed that as of the claimant's last doctor's visit, he remained on restriction, also supporting a finding he cannot return to work. Lastly, as previously discussed, the respondents have refused to provide the claimant access to medical care thus prolonging his inability to return to work.

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

PHILIP A. HOOD, Commissioner