

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E712283

DIANA VAUGHAN,
EMPLOYEE

CLAIMANT

APS SERVICES, LLC,
EMPLOYER

RESPONDENT

HARTFORD UNDERWRITERS INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 27, 2007

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

Claimant represented by the HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondent represented by the HONORABLE A. GENE WILLIAMS,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed the Full Commission in the above-styled matter and has remanded "for the Commission to fully examine the relevant evidence in this case." *Diana Vaughn v. APS Services, LLC*, CA07-35 (June 20, 2007). After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove

she was entitled to temporary total disability benefits after January 26, 2005.

I. HISTORY

Diana Vaughn Arledge, now age 46, began working for A-Plus Staffing at Flowers Discount Bakery in August 1996. Ms. Vaughn described her job duties as "stocking, help the customers, run the cash register, do ordering, daily reports, count down the drawers, there was also the cleaning and general rotating of stock." The parties stipulated that the claimant sustained a compensable injury on September 17, 1997. The claimant testified, "I noticed that my shoulder and arm, especially my shoulder area, my shoulder blade and into my neck, was hurting."

The record indicates that Dr. Thomas S. Duckworth examined the claimant on September 19, 1997: "Ms. Vaughn has been having a lot of pain in her rt shoulder since doing some lifting 2 days ago at work. Her pain is now radiating down from her rt neck and into her rt arm and her rt ulnar nerve." Dr. Duckworth assessed "Acute cervical neuritis."

An MRI of the claimant's cervical spine was taken on September 22, 1997: "There is no evidence of disc

herniation. Bone and soft tissue structures appear to be normal....Study is within normal limits."

Dr. Steven L. Cathey consulted with the claimant in October 1997: "[S]he was injured at work last month and has identified pain in the right paracervical area, as well as the right shoulder with paresthesias radiating along the ulnar distribution of the right arm ever since....I have reassured Ms. Vaughn that her symptoms are well explained on the basis of a musculoskeletal injury that will eventually resolve without any long term sequelae. The paresthesias in her right arm are well explained on the basis of anterior scalene muscle spasm with resulting impingement of the inferior brachial plexus."

Dr. Cathey opined in February 1998 that the claimant was at maximal medical improvement.

On a form dated March 10, 1998 and signed on March 16, 1998, Dr. Duckworth circled the following sentence in regard to the claimant: "Has not reached the end of her healing period and should not return to work at this point."

Dr. John H. Yocum evaluated the claimant in April 1998:

I reviewed copies of the nerve conduction study done in 3/98 that showed normal motor nerve studies with electrodiagnostic studies suggestive

of a mild demyelinating sensory peripheral neuropathy of the right upper extremity.

She has had an MRI of the cervical spine in the fall of 1997 that did not show any abnormality.

I took x-rays of the cervical spine that did show some flattening of the cervical lordosis; otherwise, no fracture or dislocation.

I was unable to explain her sensory and arm symptoms on the basis of the MRI. The electromyogram nerve conduction study did apparently show a definite abnormality. I feel that continuing evaluation and treatment at the direction of a neurologist is in order at this point....

Dr. Dalwyn M. Sealy subsequently evaluated the claimant and gave the following clinical impression in April 1998:

"1. Right brachial plexus. 2. Possible neurovascular syndrome with right thoracic outlet syndrome."

A pre-hearing order was filed on April 14, 1998. The claimant contended that she was entitled to continuing medical care, and that she was entitled to temporary total disability compensation from February 10, 1998 through a date yet to be determined. The respondents contended that the claimant reached the end of her healing period on February 10, 1998 and that the claimant had been paid all benefits to which she was entitled.

Dr. Lon G. Bitzer examined the claimant in April 1998 and assessed the following: "Probable thoracic outlet syndrome, right upper extremity."

Dr. Sealy signed a note in May 1998 indicating that the claimant was "unable to work as a result of the work related problems for which I am treating her."

Dr. Charles A. Clark examined the claimant in June 1998: "Her electro-diagnostic studies are consistent with the possibility of a thoracic outlet syndrome, as well as confirmed increased latency at the cubital tunnel." Dr. Clark diagnosed "Cubital tunnel syndrome, R arm" and recommended a cubital tunnel release.

A hearing was held on July 17, 1998. The claimant testified that she wished to undergo the procedure recommended by Dr. Clark.

An administrative law judge filed an opinion on September 30, 1998. The ALJ found that the claimant had remained in a healing period and was totally incapacitated to earn wages from February 10, 1998 until a date to be determined. The ALJ found that medical care provided the claimant after February 10, 1998 was reasonably necessary,

but that the surgery recommended by Dr. Clark was not reasonably necessary.

The respondents appealed the award of additional temporary disability to the Full Commission (the Full Commission affirmed and adopted the administrative law judge's decision in an opinion filed May 27, 1999).

Dr. Clark informed the claimant's attorney in October 1998, "she has cubital tunnel syndrome of the right arm that at this time is nonoperable. The findings of the nerve conduction studies were not severe enough to consider that and at present, we can only offer her Cortisone injections and therapy as an alternative."

The claimant returned to Dr. Duckworth in November 1998: "Ms. Vaughn was involved in an MVA 11/5/98....She has since been having exacerbation of her previous cervical problems and exacerbation of rt shoulder pain." Dr. Duckworth assessed the following: "1) Whiplash injury w/cervical, dorsal and lumbar strain. 2) Rt shoulder pain." Dr. Duckworth's plan included a physical therapy regimen.

The claimant continued to follow up with Dr. Sealy.

An MRI of the cervical spine was taken on February 16, 1999, with the impression, "Negative MRI examination of the

cervical spine." An MRI of the thoracic spine was taken on February 16, 1999, with the impression, "Negative MRI examination of the thoracic spine."

Dr. Sealy's impression on February 23, 1999 was "Reflex sympathetic dystrophy." Dr. Sealy's treatment of the claimant eventually included recommendation of a morphine pump for pain.

Dr. Jim J. Moore independently evaluated the claimant on May 26, 1999:

At this point I do not believe that I could consider the diagnosis of RSD. I don't think that all diagnostic studies have been obtained. She should be submitted to a bone scan with the specific idea to rule out such an entity. I think she should also have a repeat EMG/NCV by an independent electromyographer. A trial of a TENS unit would also be appropriate. This patient is a smoker, one pack a day, and it would be important for her to cease to use (abuse) nicotine. At this time she is not in proper condition to return to work. A reconditioning program would be something that would be required but I would not think that it would be appropriate until the above recommendations have been outlined. Possibly biofeedback could be of some value to this patient as well. Additionally, I think a radiograph of the hand would also be appropriate.

Dr. David A. Miles performed an electro-diagnostic examination on July 6, 1999 and concluded the following:

The electrodiagnostic studies are normal. There is no electrodiagnostic evidence for nerve root irritation in the cervical area on the right side.

There is no evidence for disturbance in the proximal nerves around the shoulder girdle. There is no evidence of a true neurogenic thoracic outlet syndrome when the median and ulnar nerve values are combined. There is no evidence of compression or entrapment syndromes of the median or ulnar nerves on the right side. There is no evidence of disturbance in the muscles supplied by these peripheral nerves, especially around the shoulder girdle. This is a normal examination.

The following impression was taken from a triple-phase bone scan of the claimant's hands and wrists taken July 6, 1999: "1. No evidence of reflex sympathetic dystrophy. 2. Increased uptake in the PIP joint of the long finger of the reportedly asymptomatic left hand. This may be due to a remote injury. No areas of abnormal uptake in the right hand or wrist on delayed scans."

On August 20, 1999, Dr. Sealy opined that the bone scan result showing no evidence of reflex sympathetic dystrophy was "medically incorrect." Dr. Sealy stated, "Today, the patient requests trial of the TENS unit as another step in the multiple medical management with several failures. This will do no harm, and the benefits from it are expected to be short-lived, but at least, she deserves some comfort as her activity of daily living is reduced to a person with one hand and a painful right upper limb syndrome. She will be followed with three modalities of therapy: The TENS unit,

Baclofen and Stadol nasal spray prn and other management decisions made as appropriate."

Dr. Sealy's impression on November 19, 1999 was "Painful right upper extremity, chronic....The management of this condition has been in large part refractory to multiple modalities of therapy. No further interventions at this time but the next session will be scheduled for cold pressor test of the right upper extremity to see if that gives any further light to the autonomic function of the right upper extremity."

The record indicates that the respondent-carrier ceased paying temporary total disability as of November 19, 1999.

Dr. Sealy performed a "Cold Pressor Test" of the claimant's hands in January 2000, which he interpreted as being abnormal.

A pre-hearing order was filed on March 6, 2000. The claimant contended that she was entitled to temporary total disability "from the date of November 19, 1999, to a date to be determined. She alleges that she is within a healing period from that date and remains totally incapacitated from earning wages. The claimant also alleges that she is entitled to additional medical treatment from Dr. Dalwyn

Sealy and Dr. Charles Watson, who was referred by Dr. Sealy. The claimant alleges that further medical treatment is reasonable and necessary and related to her compensable injury. The claimant also alleges that she is entitled to an attorney's fee for controversy."

The respondents contended that they had paid all benefits to which the claimant was entitled. The respondents contended that the claimant was "not within a healing period nor is she totally incapacitated from earning wages from November 19, 1999. The respondents also argue that any further medical treatment from Dr. Sealy or Dr. Watson is not reasonable and necessary."

The parties agreed to litigate the following issues: "1. Is claimant entitled to a period of temporary total disability from 11/19/99 to a date yet to be determined? 2. Is claimant entitled to medical treatment from Dr. Dalwyn Sealy and Dr. Charles Watson? Is that medical treatment reasonable and necessary and related to claimant's compensable injury? 3. Is claimant entitled to an attorney's fee for controversy?"

Meanwhile, the claimant began pain management with Dr. Charles R. Watson in March 2000.

Dr. William E. Ackerman, III consulted with the claimant on March 22, 2000:

MUSCULOSKELETAL: She has painful range of motion about the right shoulder. She has multiple trigger points to deep palpation of the musculature of the cervical and thoracic spine to the right of midline. No muscle wasting noted. PERIPHERAL VASCULAR: Her right hand is 2.5 degrees colder than the left as measured with a skin surface temperature monitor. She has increased sweating in the right hand. Edema is noted. She does have discoloration of the right hand. Her hair pattern is decreased in the right forearm when compared to the left....

Based on these criteria, it is my medical opinion that the patient has a diagnosis of reflex sympathetic dystrophy. It is furthermore my medical opinion that this individual has not reached maximum medical improvement. There are three phases to reflex sympathetic dystrophy. This individual is in the second stage and is progressing toward the third stage.

Dr. Ackerman's treatment plan included "a series of 6 to 12 stellate ganglion blocks followed by vigorous occupational therapy with stress loading. Reflex sympathetic dystrophy can be a lifelong problem. Goals at this time should be to attempt to stabilize her condition with treatment over several months. However, some individuals continue to deteriorate. This individual is devastated with respect to activities of daily living."

A hearing was held on June 2, 2000, and an administrative law judge filed an opinion on July 26, 2000. The ALJ found, among other things:

4. The preponderance of the evidence reflects that claimant is entitled to a period of temporary total disability from November 19, 1999 to a date to be determined; specifically, the preponderance of the evidence reflects that claimant is within her healing period and is totally incapacitated from earning wages and has been since November 19, 1999.

6. The preponderance of the evidence reflects that the claimant's authorized treating physician should be changed from Dr. Watson to Dr. Ackerman.

The preponderance of the evidence reflects that further medical treatment of the claimant is reasonable and necessary and is related to claimant's admittedly compensable injury.

There was no appeal of the administrative law judge's July 26, 2000 opinion.

The record indicates that the claimant began treating with Dr. Ackerman on September 18, 2000. Dr. Ackerman noted, "The patient had a 3-phase bone scan, which was negative for reflex sympathetic dystrophy....It is my opinion that her pain is neuropathic in origin with an intermittent sympathetic component to her chronic pain syndrome. A stellate ganglion block will be repeated."

Dr. Ackerman noted in October 2000 that a ganglion block by Dr. Watson had provided the claimant "significant pain relief."

An MRI scan of the claimant's right shoulder was taken on November 29, 2000, with the following impression:

ABNORMAL APPEARANCE OF THE SUPRASPINATUS TENDON. THE FINDINGS ARE THOUGHT TO BE MOST CONSISTENT WITH TENDONOSIS WITH OR WITHOUT INTRASUBSTANCE TEAR. I DO NOT SEE EVIDENCE OF FULL THICKNESS TEAR. THERE IS EVIDENCE FOR A SMALL GANGLION CYST AS DESCRIBED. THIS CAN BE SEEN ASSOCIATED WITH LABRUM TEARS.

Dr. Ackerman arranged a Laser Doppler Study and stated in December 2000, "The laser Doppler findings were asymmetric and correlate with her lesion."

Dr. Ackerman assessed "Reflex sympathetic dystrophy" in January 2001.

Dr. Ackerman noted in March 2001, "I have nothing further to offer her other than medications and consideration for a dorsal column stimulator trial."

The claimant continued to treat with Dr. Ackerman.

Dr. Ackerman's notes indicated that the claimant underwent a right carpal tunnel release in about June 2001 and a left carpal tunnel release in about October 2001.

Dr. Ackerman stated in January 2002 that the claimant was "approaching maximum medical improvement."

Dr. Ackerman noted in April 2002, however, that the claimant was still "unable to work."

Dr. Ackerman assessed "Reflex sympathetic dystrophy" in July 2002 and noted, "I have nothing further to offer her, other than consideration for a dorsal column stimulator. At this time, I am requesting consultation with Dr. Richard Jordan, a neurosurgeon who implants these devices for the treatment of reflex sympathetic dystrophy."

Dr. Ackerman informed the claimant's attorney in September 2002, "If Dr. Jordan does not feel that this would help her, she is definitely at maximum medical improvement."

Dr. Ackerman noted in October 2002, "The patient has not seen Dr. Richard Jordan for consideration of a dorsal column stimulator....I am awaiting Dr. Jordan's report. It is my medical opinion that she is not at maximum medical improvement." Dr. Ackerman subsequently opined in 2002, "It is my medical opinion that her reflex sympathetic dystrophy has spread to her opposite extremity. It is my medical opinion that she is a candidate for a dorsal column

stimulator. She will be referred to Dr. Richard Jordan for evaluation of same."

Dr. F. Richard Jordan saw the claimant on October 16, 2002 and reported, "We do feel that she is a good candidate for an epidural stimulator trial and have scheduled this for October 21, 2002 at BHMC-NLR."

Dr. Jordan reported on October 31, 2002, "Diana returned to the office today one week post-op implantation of her epidural stimulator. She reports an amazing improvement with almost complete resolution of the right shoulder and arm pain. She is now able to touch the arm and shoulder with complete resolution of the hypersensitivity. She also reports that the arm and hand feel much warmer now."

Dr. Ackerman opined in November 2002 that the claimant was not yet at maximum medical improvement.

Dr. J.K. Smelz evaluated the claimant on January 10, 2003. Dr. Smelz opined that the claimant had reached maximum medical improvement with zero percent anatomical impairment.

Dr. Ackerman informed the claimant's attorney on April 14, 2003, "Since this patient has met the ISAP

classification for complex regional pain syndrome, and there is no doubt that she has reflex sympathetic dystrophy, the Hartford Insurance Company can continue to refer her to physicians."

Dr. Ackerman noted on August 18, 2003, "I would estimate that she should reach maximum medical improvement in 6 to 8 weeks, with the goal of attempting to return her back to gainful employment. She will have trigger point injection therapy today."

A pre-hearing order was filed on August 18, 2003. The claimant contended, among other things, that she was entitled to "a reinstatement of temporary total disability benefits commencing January 6, 2003 and continuing through a date yet to be determined." The respondents controverted any additional temporary total disability, contending that the claimant's healing period ended "no later than January 6, 2003." The respondents contended that the claimant was not entitled to additional temporary total disability after the last payment on January 14, 2003. The parties agreed to litigate the issue, "additional benefits."

Dr. Ackerman was deposed on September 9, 2003. The respondents' attorney questioned Dr. Ackerman:

Q. What diagnostic label would you use to describe her condition at this point?

A. Well, the myofascial pain and reflex sympathetic dystrophy, that is essentially the symptoms, have resolved with the dorsal column stimulator.

Q. Do you see - or can you predict whether she's reaching a point where she may be stabilized or reaching her maximum improvement?

A. I think the last report that I got from her therapist - and it will take a while to find that - but she was making progress with respect to strength - with respect to range of motion. And I noticed in her last visit that she was increasing the actual circumference of the - her muscular extremities. I would expect in four to six weeks she should be at maximum medical improvement. The sweating of the hand has resolved. The skin temperature is becoming symmetric in both upper extremities. The swelling, what we call edema, has pretty much decreased - the cyanosis. So it looks like the stimulator has pretty much knocked out the signs and symptoms of reflex sympathetic dystrophy. And what she has now is just a periodic - what's called myofascial pain or muscle spasms. And I attribute that to really the inactivity that she's had over time from disuse of the extremity, which that should resolve, too, with heat or even alternating heat and ice....

A hearing was held on October 3, 2003. The claimant testified on direct examination:

Q. Describe for His Honor your condition before the stimulator was installed in October of last year and after.

A. Before the stimulator was implanted, I was on some very major medications that included opiates,

other pain medicines, medicines for muscle spasms. And the medication helped with the pain, but it also put me in almost a fog, where I could move around the house but I wasn't really functioning. Since the stimulator has been put in, all medications except for Celebrex and Zanaflex I'm off of. And now I am able to move on with my life, get my strength back. Before I couldn't hardly move my arm, now I can.

Q. Diana, the doctor indicates in his deposition - and I sent that home with you for you to read, is that correct?

A. Yes, sir.

Q. - that he feels like you are now reaching the end of your healing period and that you have gotten significantly better. Would you agree with that?

A. Yes, sir, I will....

Q. Now you told Mr. Williams when you gave your deposition that you planned to try to obtain a commercial driver's license, is that correct?

A. Yes, sir.

Q. And if you're able to do that, you will go to work hopefully in that field in some shape, form or fashion once you're released to return to work from Dr. Ackerman, is that right?

A. Yes, sir....

An administrative law judge filed an opinion on October 29, 2003. The ALJ found that the claimant was "entitled to a reinstatement of temporary total disability benefits

commencing January 15, 2003 and continuing through a date yet to be determined."

There was no appeal of the administrative law judge's October 29, 2003 opinion.

Dr. Reginald J. Rutherford provided an EMG Report on January 11, 2005: "Ms. Vaughn is seen for electrodiagnostic testing to evaluate whether or not there is evidence for recurrent carpal tunnel syndrome or evolving cubital tunnel syndrome right upper extremity....The nerve conduction study and needle examination are normal. There is no evidence via electrodiagnostic parameters to suggest cervical radiculopathy, brachial plexopathy, ulnar neuropathy or median neuropathy right upper extremity."

Dr. Marcia L. Hixson informed the respondent-carrier on January 11, 2005, "She had a nerve conduction study performed today and this was normal. Ms. Vaughn clinically has right cubital tunnel syndrome....She remains with her permanent restrictions."

On January 18, 2005, Dr. Jordan performed a "Revision of epidural stimulator."

Dr. John O. Lytle provided an Independent Medical Evaluation on January 26, 2005:

Diana Vaughn is a 43 y/o lady I am seeing today for an Independent Medical Evaluation at the request of MES Solutions, a WC benefits management company.

She attends this exam today by herself in my office. She drives herself to this appt. She is stating that she was seen earlier this morning by the neurosurgeon who removed the sutures from her back where she had a neurosurgical procedure 1 wk ago on 1/19/05 to revise her spinal cord stimulator and wire and replace the battery.

HISTORY: Ms. Vaughn was first injured on 9/17/97 while working at a bread store. She was standing on a church table un-stacking stacks of bread and began having pain. This was R shoulder and arm pain; it progressed. She went to her family doctor under the instruction of her employer the next day to see Dr. Duckworth. Subsequently, she was seen by Dr. Sealey, Dr. Clark, Dr. Hixon, and various other physicians in the interim. She has not been normal since that time. She has been off of work an extended period of time and has not been back to work now since before 2003 when she had her spinal cord stimulator placed.

SURGERIES: Surgeries at this point include bilateral carpal tunnel syndrome by Dr. Hixon and ulnar nerve transposition on the L elbow. She is considering revision carpal tunnel on the R and ulnar nerve on the L. She recently saw Dr. Hixon 2 wks ago and received a shot of cortisone in the elbow and wrist, and this has given her some relief.

Her current complaints of pain in the R arm and shoulder; burning, stinging, nerve generated pain that is constant and is not relieved by any activity. The spinal cord stimulator is the only thing that provides her enough relief that she can function on a daily basis and her function is not normal.

She has been diagnosed with reflex sympathetic dystrophy by Dr. Ackerman, a pain management doctor, with a Doppler laser scan. This was before the spinal cord stimulator was placed.

In the interim, she does her housework on a limited basis. She cannot sweep, mop, or wash dishes because of the activity involved. She will do a little bit at a time and can ultimately manage for herself. She sleeps with carpal tunnel braces in place....

She has not had an FCE exam or any type of functional evaluation. She has had grip strength test and ROM test in March and April 2004 by her physical therapist, all of which were decreased from normal but showed a relative stability at the current levels....

She complains of pain in the R shoulder of the arm and she has little function and use of the arm and will not offer it to shake hands or volunteer to use it in the exam. She has only fair ROM of the shoulder and is able to flex 140° and abduct the same. She has active and passive ROM of the shoulder and the hand that are normal, but extremely weak....

I review multiple medical records from multiple physicians. I think that this is a reasonable collection/assembly of physicians for this type of problem....

In response to specific questions:

What damage or harm did this person strain the physical structure of the body?

This is very difficult to answer. She had no particular trauma that could be linked directly to an injury. It appears from the date of her original complaint of her overworking or overusing her arms with reaching above her head, stacking

crates of bread on 9/17/97, the UE pain syndrome began.

What is the diagnosis?

Neuropathic pain to the RUE; weakness of the RUE NOS; pain in the LUE; weakness of the LUE; s/p carpal tunnel release bilaterally; cubital tunnel syndrome bilaterally with surgery on the L. She is postop spinal cord stimulator for pain control.

All of these problems that seem to have evolved over time with Ms. Vaughn are related by her to her original problem as this developed while working in the bread store on 9/17/97. Without the rather constant and continuous medical involvement, it would be difficult to relate her current condition to her seemingly benign, injury at that time....

What would be a medically reasonable and necessary plan for future treatment? Indicate use of medication use in your answer.

Seeing how that she has just recently undergone surgery for revision of her implanted spinal cord stimulator, I think that it is reasonable to continue to support that implant as necessary, including future battery changes.

Medication seems to be stable. I would anticipate the continuous use of anti-inflammatory medicine and obviously the occasional and as needed use of narcotic pain medicine for which she seems to have become accustomed.

Does the injured worker need any additional diagnostic testing?

I see no reasonable diagnostic testing that would assist this woman in becoming pain-free and returning to her normal functional position in life.

Please state whether the effects of the injury will ever resolve?

No. I do not see any chance that this problem will resolve in her lifetime.

Is the injured employee able to work, and if so, in what capacity?

This is a most difficult question. I see no reason she could not do cognitive work and at this point some work with her L hand. I think the functional use of her R hand is extremely limited, even from the seemingly benign activities such as answering the phone.

This is a most confounding and frankly bizarre progression of subjective symptoms without objective physical findings. This has escalated to the point now where she is truly a functional invalid. There are in my opinion significant psychological and physical dependencies on her treatment and medication at this point.

Dr. Hixson reported on April 26, 2005, "Ms. Vaughn symptomatically has right cubital tunnel syndrome. Options were discussed with her. Today we injected the cubital tunnel with a cortisone preparation. My recommendation is that she has release of the right cubital tunnel as an outpatient. She is not working at this time and is on permanent restrictions."

A pre-hearing order was filed on August 29, 2005. The claimant contended that her "weekly indemnity benefits were terminated some time around the first of May, 2005; that

certain medical bills remained unpaid in spite of the Commission's orders; and that no attorney's fees have been paid since May of 2005. Specifically, claimant contends that she is entitled to the replacement of her stimulator, which was denied in January of 2005, and that in regard to future medical, she contends she is entitled to a cubital tunnel released proposed by Dr. Hixson, as well as elbow injections proposed by Dr. Hixson, and that she is entitled to follow-up by Dr. Ackerman or whomever Dr. Ackerman refers her to, as Dr. Ackerman has moved to Ohio, in regard to the treatment of her reflex sympathetic dystrophy."

The respondents contended that the claimant had been provided "all benefits to which she is entitled; that her healing period should be at an end; and that she is simply not entitled to any further TTD benefits or any medical benefits as she cannot prove that any medical is reasonably necessary or related to her compensable injury of September 17, 1997."

The parties agreed to litigate the following issues: "Claimant's entitlement to additional TTD benefits from on or about May 1, 2005 to a date yet to be determined. That date will be more specifically determined and specified at

the hearing. Other issues include claimant's entitlement to additional medical expenses, both past and future, as well as attorney's fees."

A hearing was held on December 8, 2005. At that time, counsel for the claimant contended that the respondents ceased paying benefits of any sort, including medical, shortly after May 1, 2005. The claimant contended that Dr. Ackerman had left the State and that the claimant needed additional medical treatment. The claimant mentioned possibly treating with Dr. Ahmad. The respondents contended that additional medical treatment was not reasonably necessary.

At the December 8, 2005 hearing, the claimant testified that "when Dr. Ackerman and Dr. Jordan agreed that I should try the spinal column stimulator, once it was implanted I made great leaps ahead. I was able to get off the narcotics. The pain has not completely gone away, but it is very very tolerable. I still have problems in using my right arm. My left arm, I have no problems with it anymore, the stimulator has basically taken control and I can handle that. With my right I still have swelling of my arm, my hand, I still have pain, but it is a lot more tolerable."

The claimant testified on direct examination:

Q. Does your left arm work fairly well?

A. Yes.

Q. What kind of education do you have?

A. High school equivalency, I have my GED.

Q. At one time you thought about getting a commercial driver's license, is that correct?

A. Yes.

Q. Did you ever get that commercial driver's license?

A. No.

Q. You studied the book?

A. Yes.

Q. Did you pass the written part of it?

A. No.

Q. Did you take it and flunk it?

A. Yes.

Q. What made you think you could drive commercially with your right arm being in the condition that it is?

A. The vast improvements that I had made from basically not being able to use it to getting back to what I would almost call my normal self.

Q. Okay. Now, as far as you know, has any doctor released you to return to work or indicated that you had reached the end of your healing period?

A. No....

The claimant admitted on cross-examination that she had not looked for employment.

An administrative law judge filed an opinion on March 8, 2006. The ALJ found, in pertinent part:

2. Claimant has proven entitlement to additional medical treatment, both past and future, including revision of her internal stimulator, which was denied in January of 2005, medication and equipment rental for an external stimulator, as well as a cubital tunnel release and elbow injections proposed by Dr. Hixson;
3. Claimant has proven entitlement to follow-up treatment with Dr. Amad in regard to the treatment of her reflex sympathetic dystrophy (RSD), as her treating physician, Dr. Ackerman, is no longer practicing in this State and did not release claimant from care prior to moving;
4. Claimant has proven entitlement to reinstatement of TTD indemnity benefits commencing on or about May 5, 2005, and continuing to a date yet to be determined;
5. Respondents have controverted benefits since on or about May 5, 2005.

The respondents appealed to the Full Commission.

The Full Commission filed a unanimous opinion on October 11, 2006:

After reviewing the entire record *de novo*, the Full Commission affirms in part, reverses in part, and modifies in part the opinion of the administrative law judge.

We find that the claimant proved her entitlement to past and future treatment for her RSD and that she is entitled to follow-up treatment for this condition with Dr. Amad. However, we find that

the claimant failed to prove that the cubital tunnel release and elbow injections proposed by Dr. Hixson were reasonably necessary in connection with her compensable injury. The Full Commission further finds that claimant only proved her entitlement to temporary total disability compensation from on or about May 5, 2005 through June 15, 2005.

The claimant appealed to the Court of Appeals. The claimant appealed "that portion of the opinion of the Arkansas Workers' Compensation Commission rendered and entered on October 11, 2006 only to the extent that it applies to the end of her healing period which the Commission found ended on June 15, 2005." The claimant argued to the Court that there was "no substantial evidence to support the Commission's decision regarding the end of her healing period."

The Court of Appeals has reversed and has remanded the case to the Full Commission.

II. ADJUDICATION

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12).

Whether or not an employee's healing period has ended is a question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

As we understand the remand from the Court of Appeals, the only issue before the Commission at this time is the issue of the claimant's entitlement to additional temporary total disability. An administrative law judge found that the claimant had proven entitlement to "reinstatement of TTD indemnity benefits commencing on or about May 5, 2005, and continuing to a date yet to be determined." The Full Commission subsequently found that the claimant had proven entitlement to temporary total disability "from on or about May 5, 2005 through June 15, 2005." The Court reversed this finding and has remanded for the Commission to examine the relevant evidence.

The Full Commission finds that the claimant did not prove she was entitled to temporary total disability benefits after January 26, 2005. The parties stipulated that the claimant sustained a compensable injury on September 17, 1997. The claimant initially complained of pain in her shoulder, arm, and neck. The claimant thereafter was examined and/or treated with Dr. Duckworth,

Dr. Cathey, Dr. Yocum, Dr. Sealy, Dr. Bitzer, Dr. Clark, Dr. Moore, Dr. Miles, Dr. Ackerman, Dr. Jordan, Dr. Smelz, Dr. Rutherford, Dr. Hixson, and Dr. Lytle. Dr. Lytle independently evaluated the claimant on January 26, 2005 and observed that the claimant "had no particular trauma that could be linked directly to an injury." Dr. Lytle credibly opined that there was "no reasonable diagnostic testing that would assist this woman in becoming pain-free and returning to her normal function in life....I do not see any chance that this problem will resolve in her lifetime."

The healing period is defined as 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. *Arkansas Highway and Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *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. *J.A. Riggs Tractor Co. v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

In the present matter, the evidence demonstrates that the claimant reached the end of her healing period no later than January 26, 2005. By that date, which was the time of Dr. Lytle's independent medical evaluation, the claimant was as far restored as the permanent character of her injury would permit. The record does not show that additional treatment would improve the claimant's underlying condition resulting from the September 17, 1997 compensable injury. The Full Commission also attaches significant weight to Dr. Lytle's expert opinion on January 26, 2005 that the claimant could perform cognitive work, even though functional use of the claimant's right hand was extremely limited. The evidence in the present matter demonstrates that the claimant was not totally incapacitated from earning wages after January 26, 2005.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove she was entitled to additional temporary total disability compensation after January 26, 2005. The record demonstrates that the claimant's healing period ended no

later than January 26, 2005, and that the claimant was not totally incapacitated to earn wages after January 26, 2005. The Full Commission reverses the administrative law judge's award of temporary total disability benefits commencing May 5, 2005 and continuing to a date yet to be determined. The Full Commission dismisses the claimant's claim for additional temporary total disability compensation.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The Majority errs in finding that the claimant's healing period ended on January 26, 2005. There is simply no evidence that the claimant had reached the end of her healing period, and there is certainly not a doctor's opinion that the claimant had reached maximum medical improvement. The Majority erroneously chose January 26, 2005 as the date of maximum medical improvement due to the fact that Dr.

Lytle performed an Independent Medical Evaluation on that date. However, the Majority utterly failed to acknowledge that Dr. Lytle did not place the claimant at maximum medical improvement or that on April 4, 2005, Dr. Ackerman, her treating physician, documented myofascial muscle spasms. Therefore, the claimant has not exited her healing period. As such, I must respectfully dissent.

HISTORY

The claimant's admittedly compensable injury occurred on September 17, 1997. At the time the claimant worked as a temporary employee that was assigned to work at a discount bakery. Her job required her to stock, help customers, count the draws, and do cleaning and rotating of stock. During the performance of these duties, the claimant developed an injury that initially caused pain in her neck, right shoulder, and right arm.

The claimant underwent treatment in the form of physical therapy, trigger point injections, and various medications. As early as September 19, 1997, the claimant began complaining of pain in her right

ulnar nerve. In February 1998, Dr. Cathey opined that the claimant could return to work and that she was at maximum medical improvement. At that time, the respondents stopped paying benefits.

The claimant submitted to a nerve conduction study in March 1998, which returned with abnormal results. A doctor's note from Dr. Duckworth, dated June 26, 1998, indicates, "Dr. Sealy called me, is concerned about her, thought she had some ulnar entrapment on the rt as well as her brachial plexus compression and that she will need a surgical translocation of the ulnar nerve." Dr. Clark also recommended that the claimant undergo surgery.

On July 17, 1998, a hearing was conducted to determine the claimant's entitlement to additional medical including, but not limited to, surgery in the form of a cubital tunnel release and temporary total disability benefits. On September 30, 1998, an Administrative Law Judge issued an opinion reinstating temporary total disability benefits and awarding ongoing medical treatment, with the exception of the proposed surgery. In denying the surgery, the Administrative Law Judge opined as follows,

Thereafter, by agreement of the parties the claimant was examined by Dr. John Yocum on April 6, 1998. His report, like Dr. Cathey's notes, noted the claimant's negative MRI scan of the cervical spine which was done in the fall of 1997, but recommended continuing evaluation and treatment at the direction of a neurologist, based on the copies of the nerve conduction study done by Dr. Sealy in March, 1998, which was suggestive of a mild demyelinating sensory peripheral neuropathy of the right extremity, and which were not available for review by Dr. Cathey. In that regard, Dr. Sealy felt that the claimant might suffer from cubital tunnel syndrome, possibly thoracic outlet syndrome, or brachial plexopathy and referred her to Dr. Clark. Dr. Clark agreed with the observations of Dr. Sealy and recommended surgery, a cubital tunnel release, which has been opposed by the respondents.

Dr. Clark's note and deposition testimony indicate that he suggested the surgery for three reasons: to try to correct the problem; to try to delineate exactly where (sic) the problem is coming from; and to prevent further damage. However, his deposition testimony revealed his not unreasonable assumption that the claimant had been treated for this condition without satisfactory result for about a year. The record, however, indicates that cubital tunnel syndrome was only recently put forward as a possible diagnosis and that the claimant has not undergone significant conservative treatment, such as

night splinting, for that diagnosis. On the final page of the deposition, Dr. Clark stated that based on just the claimant's NCV's and physical findings he would not have normally recommended surgery at this time, but because it had been a year without resolution, he had recommended surgery. Thus, because the claimant had only recently been diagnosed as possibly suffering from cubital tunnel syndrome and had not received conservative treatment directed to that condition, the recommendation for surgery was premature.

The Administrative Law Judge went on to indicate that while the recommendation for surgery was premature, the claimant showed objective signs of an injury and that she was therefore entitled to receive other, ongoing medical care at the expense of the respondents.

The respondents appealed the decision of the Administrative Law Judge. On May 27, 1999, the Full Commission issued a decision that affirmed and adopted the September 30, 1998, decision.

The claimant continued to receive medical treatment and temporary total disability benefits until November 1999, at which time the respondents cut off the claimant's medical treatment and temporary total disability benefits. On June 2, 2000, a hearing was

held to determine if the claimant was entitled to medical treatment as provided by Dr. Sealy and Dr. Watson, to determine if the claimant was entitled to future medical treatment by Dr. Watson or Dr. Ackerman, whether the claimant was entitled to a change of physician to Dr. Ackerman, and whether the claimant was entitled to have her temporary total disability benefits reinstated.

At the hearing, the claimant testified that Dr. Watson and Dr. Sealy had both diagnosed her with RSD and that they recommended treatment in the form of a series of stellate ganglion blocks. The claimant also indicated that she was suffering from muscle spasms, pain, weakness, and numbness, and tremors in her arm. She also described that there was a, "noticeable temperature change between the right and left arms. Sometimes the right arm is extremely warmer than the left; sometimes it's extremely colder than the left. There's skin discoloration and at times it feels prickly."

On July 26, 2000, the Administrative Law Judge issued an opinion finding that the claimant was entitled to have her temporary total disability benefits

reinstated and that she was entitled to ongoing medical treatment (except for one unauthorized visit to Dr. Ackerman). He also awarded the claimant a change of physician to Dr. Ackerman.

In awarding the claimant the requested benefits, the Administrative Law Judge found that the claimant suffered from RSD due to her admittedly compensable injury in 1997. The Administrative Law Judge noted that at least three of the claimant's treating physicians, Dr. Sealy, Dr. Duckworth, and Dr. Ackerman had noted that the claimant suffered muscle spasms. He opined that, "The record is replete with objective and on-going clinical findings indicative and corroborative of the claimant's on-going clinical symptoms related to her admittedly compensable injury." He further noted that Dr. Moore found that there was insufficient evidence to support a finding that the claimant suffered from RSD. However, he also noted that Dr. Watson, Dr. Sealy, and Dr. Ackerman all diagnosed the claimant with RSD and in his decision, ultimately concluded the claimant suffered from RSD. The respondents did not appeal the July 26, 2000, opinion to the Full Commission.

It appears that the claimant continued to receive treatment in the form of treatment to her neck and shoulder and to her extremities for carpal and cubital tunnel syndrome. Specifically, the claimant underwent surgery for right carpal tunnel syndrome. On May 22, 2001, Dr. Ackerman indicated that the condition was caused by the claimant's occupation. The same year the claimant submitted to an EMG which showed she suffered from left carpal tunnel syndrome and mild cubital tunnel syndrome. Surgery in the form of a left carpal tunnel release and a ulnar nerve transposition was performed.

On January 10, 2003, an independent medical examination was performed by Dr. Smelz. Dr. Smelz, in effect, indicated that the claimant should not receive further treatment and that she had no objective findings to support a diagnosis of RSD. Based on the results of the examination, the respondents again ceased payment of benefits to the claimant. On October 3, 2003, a hearing was held to determine if the claimant was entitled to have her temporary total disability benefits reinstated, whether she was entitled to additional medical treatment, and whether the respondents should be

assessed a penalty for failing to pay the claimant benefits pursuant to the Commission's previous orders.

On October 29, 2003, a decision was rendered. The decision found the claimant was entitled to the requested temporary total disability and medical benefits. However, she was not awarded a penalty. In that decision, the Administrative Law Judge noted the report by Dr. Smelz, dated January 10, 2003, indicating that she believed the claimant was at MMI and that "Further medical intervention would simply further "medicalize" what appear presently to be social issues for Ms. Vaughan." However, the Administrative Law Judge also noted that the claimant had testified she had received trigger point injection points the day before she was seen by Dr. Smelz, that she had not received instructions to turn off her stimulator prior to seeing Smelz, and that she was having a "good day" in the way of symptomology on the day that test was performed. He also noted and relied on Dr. Ackerman's deposition testimony, in which he indicated that the claimant had shown progress as a result of treatment and that he believed she was near the end of her healing period. He opined, "This Administrative Law Judge chooses to give

the greater weight to the evidence produced by Dr. Ackerman in his deposition of September 9, 2003, as opposed to the opinions expressed by Dr. Smelz as a result of her one-time examination of the claimant on January 10, 2003."

The respondents did not appeal the October 29, 2003, decision. The claimant continued to receive treatment between October 2003 and May 2005; at which time the respondents again stopped paying benefits.

The medical records reveal that the claimant's condition and symptoms did not resolve entirely after the 2003 decision. On May 13, 2004, a report from Dr. Ackerman indicates that the claimant continued to complain of pain in the right upper extremity and shoulder and that she had been undergoing trigger point injection therapy. It indicated that the claimant had returned for medications in the form of Celebrex and Zanaflex. The report also provides, "She has her hand in a splint. She does have slight allodynia and discoloration. She has 4 myofascial trigger points in her trapezius musculature."

A note from August 5, 2004, indicates that the claimant was taking Valium at night to decrease spasms

and that she was suffering from, "numbness in her ring and small finger as well as pain in her elbow." Dr. Ackerman referred the claimant to Dr. Hixson. The report further indicates that Dr. Ackerman did not feel that further trigger point injections were warranted at that time.

A note dated October 12, 2004, from Dr. Hixson, indicates that the claimant had previously undergone treatment in the form of carpal and cubital tunnel syndrome on the upper left extremity in 2002. The note provides that the claimant had a right carpal tunnel release in 2001. Dr. Hixson indicated that the claimant was complaining of pain in the right elbow, shoulder, and neck. The report indicates,

She states that the elbow pain radiates distally in to the hand, mainly the middle, ring and little fingers and proximally to the shoulder. She was complaining of these symptoms when I first examined her back in 2001. The spinal cord stimulator has been a big help with her pain but this pain is exceeding the benefit provided by the stimulator. She also complains of increasing weakness in the right wrist and hand. She is occasionally awakened from sleep with pain in the right wrist and hand, which is a burning type pain. Occasionally she

has some muscle cramping in the right forearm.

Dr. Hixson recommended that the claimant have a nerve conduction study and opined that the claimant might suffer from cubital tunnel syndrome. On January 11, 2005, Dr. Hixson indicated that while the claimant's nerve test had returned as normal, the claimant suffered from right cubital tunnel syndrome.

On January 26, 2005, Dr. Lytle performed an independent medical examination. Dr. Lytle noted that the claimant had undergone a procedure on January 19, 2005, to, "revise her spinal cord stimulator and wire and replace the battery." He noted that the claimant had a history of having bilateral carpal tunnel surgery and left ulnar nerve surgery. He further noted that the claimant had been diagnosed with RSD, pursuant to the opinion of Dr. Ackerman and a Doppler laser scan.

Dr. Lytle opined that the claimant's diagnosis was

Neuropathic pain to the RUE;
weakness of the RUE NOS; pain in the
LUE; weakness of the LUE; s/p carpal
tunnel release bilaterally, cubital
tunnel syndrome bilaterally with
surgery on the L. She is postop

spinal cord stimulator for pain control.

All of these problems that seem to have evolved over time with Ms. Vaughan are related by her to her original problem as this developed while working in the bread store on 9/17/97. Without the rather constant and continuous medical involvement, it would be difficult to relate her current condition to her seemingly benign injury at that time.

He further opined that he believed that it would be reasonable to maintain the spinal cord stimulator and that the claimant would likely require continued use of anti-inflammatory and pain medication. He also indicated that he did not believe that the claimant's condition would ever resolve and that in his opinion there were, "significant psychological and physical dependencies on her treatment and medication at this point." Dr. Lytle's records do not reflect or indicate that he placed the claimant at maximum medical improvement or even at the end of her healing period.

On April 4, 2005, Dr. Ackerman treated the claimant noting, "She has significant muscle spasms to palpation noted about her right trapezius musculature." He also noted that the claimant was not working and

recommended that the claimant have a RS muscle stimulator. He indicated,

Rather than constant injections of her trapezius muscle, it is my medical opinion that RS muscle stimulator could cause less trauma to the muscle. She was advised that repetitive injections with a needle can cause muscle trauma. With her history of reflex sympathetic dystrophy and the fact that she may need further surgery, I would like to minimize any invasive procedures and proceed with a less invasive modality, such as the RS stimulator.

On April 26, 2005, Dr. Hixson treated the claimant for her right cubital tunnel complaints. She injected the cubital tunnel with cortisone and recommended that the claimant undergo right cubital tunnel surgery. On June 29, 2005, Dr. Hixson again injected the claimant with cortisone and recommended she undergo surgery.

At the time of the hearing the claimant testified that prior to having her spinal column stimulator she was in great pain and that she was on many narcotics. She said that she was no longer on narcotics and that while her pain had not completely resolved it was, "very very tolerable." The claimant said that she no longer has difficulty with her left arm

but that she still suffers swelling in her right hand and arm. She also indicated that she had run out of muscle relaxers used to control spasms in October. She indicated that while difficult, she was able to manage and that she had been using an external stimulator to control her spasms.

She said that she also suffered from problems in the base of her neck and shoulder area and across her shoulder blades in her back. She indicated that she had severe muscle spasms in her biceps and triceps and that the internal stimulator allows her relief from pain.

The claimant said that the last time she was treated by Dr. Ackerman was on April 5, 2005. She testified that she was to return after three months for, "him to reevaluate me after three months' use of the external stimulator for the muscle spasms." The claimant testified that when she called to set up the appointment, she learned he was no longer practicing medicine in Arkansas. She said she attempted to see another doctor but was denied treatment due to "payment arrangements."

On March 8, 2006, the Administrative Law Judge issues a decision finding that the claimant was entitled

to additional medical treatment in the form of replacement of a stimulator and follow up care for reflex sympathetic dystrophy (RSD). The claimant was also awarded treatment in the form of a right cubital tunnel release and elbow injections as proposed by Dr. Hixson. Finally, she was awarded temporary total benefits for the time period of May 5, 2005, to a date yet to be determined.

The respondents appealed that decision to the Full Commission and argued that the claimant has received all benefits to which she is entitled. Furthermore, the respondents argued that the claimant should have been placed at the end of her healing period in 2003, even though that issue had already been litigated and not appealed by the respondent. As such, it is precluded by res judicata. Additionally, the respondents only controverted indemnity benefits since on or about May 5, 2005.

On October 11, 2006, the Full Commission found that the claimant was entitled to additional medical treatment in the form of replacement of a stimulator and follow up care for reflex sympathetic dystrophy (RSD). Additionally, the claimant was entitled to temporary

total disability benefits from May 5, 2005 until June 15, 2005.

The Full Commission's findings were appealed to the Court of Appeals, who reversed the Commission's findings on temporary total disability, finding that the Commission "expressly relied on erroneous factual findings in reaching its decision."

DISCUSSION

I find that the Majority's finding that the claimant reached the end of her healing period is a clear error. Specifically, I find that the claimant has remained in her healing period and is entitled to temporary total disability benefits from May 5, 2005 until a date yet to be determined.

I find that the claimant is entitled to have her temporary total disability benefits reinstated. Though Dr. Ackerman previously opined that the claimant was near the end of her healing period, he also testified that RSD was not a static condition and has admittedly had to revise his opinions regarding when the claimant was near the end of her healing period in the past. Likewise, as late as April 4, 2005, the last date

that the claimant was seen by Dr. Ackerman, the claimant was noted to have muscle spasms. Specifically, Dr. Ackerman opined, "She has significant muscle spasms to palpation noted about her right trapezius musculature."

Additionally, I note that Dr. Lytle, who was hired at the request of the respondents indicated that the claimant suffered from, "Neuropathic pain to the RUE; weakness of the RUE NOS; pain in the LUE; weakness of the LUE; s/p carpal tunnel release bilaterally; cubital tunnel syndrome bilaterally with surgery on the L." He further indicated that each of these problems had occurred as a result of her injury in September 1997, which indicates that her need for ongoing treatment is directly related to her compensable injury from 1997. Specifically, Dr. Lytle did not place the claimant at maximum medical improvement, nor did he indicate that the claimant had reached the end of her healing period on January 26, 2005.

Furthermore, since there is no doctor's note or other evidence to indicate that the claimant was placed at maximum medical improvement or that she needs no additional care, I find that there is simply not

enough evidence to show that she has exited her healing period or that she is able to return to work.

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).

In this instance, the claimant is still under medical care and there is no medical record indicating that she is at maximum medical improvement. Rather, the

records reveal that as late as April 2005, she continued to suffer from significant muscle spasms and that she required ongoing treatment. Additionally, I note that Dr. Ackerman through his deposition, testified that without appropriate treatment the claimant's condition could worsen and progress to a more debilitating level. The claimant also testified that to her knowledge she had not been placed at maximum medical improvement or been released to return to work. Likewise, the notes from Dr. Ackerman fail to indicate that the claimant had exited her healing period or released to return to work.

The Majority erroneously relied on Dr. Lytle's medical report. However, the argument that the claimant could possibly be at maximum medical improvement on January 26, 2005, is so preposterous that even the respondents failed to make such an erroneous argument in their appeals brief to the Commission. Essentially, the Majority expressly relied on erroneous factual findings in reaching its decision.

_____ For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner