

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F306079, F406144, F509749

LORA D. WILLABY, EMPLOYEE	CLAIMANT
BEVERLY HEALTHCARE, EMPLOYER	RESPONDENT NO. 1
INSURANCE COMPANY OF PA, CARRIER	RESPONDENT NO. 1
NEWTON COUNTY NURSING HOME, EMPLOYER	RESPONDENT NO. 2
CANNON COCHRAN MANAGEMENT, CARRIER	RESPONDENT NO. 2

OPINION FILED JUNE 28, 2007

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

Claimant represented by the HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JAMES A. ARNOLD, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

On October 10, 2006, an Administrative Law Judge issued an opinion finding that the claimant sustained compensable injuries on October 23, 2002, and May 29, 2003. He further found that on April 8, 2004, the claimant sustained a recurrence of the May 29, 2003, injury and that Respondent No. 1 was liable for payment

of medical expenses related that injury. Finally, he found that the claimant was entitled to temporary total disability benefits from May 29, 2003 to a date yet to be determined, with the exception of the time periods where she unsuccessfully attempted to return to work. Respondent No. 1 appealed, but is only appealing the open-ended award of temporary total disability benefits. After a de novo review of the record, we find that the decision of the Administrative Law Judge should be and is affirmed.

The claimant was injured on October 23, 2002, when she lifted a patient due to a failed lift mechanism. The claimant was treated and returned to work without restriction. The claimant was re-injured on May 29, 2003, when she lifted a chair and suffered an acute onset of low back pain.

The claimant was treated by Dr. Maris, who noted the claimant suffered from pain that radiated into her buttocks and hips. The claimant was diagnosed with an acute lumbar strain and given medication in the form of Celebrex, Skelaxin, and pain medication. By June 9, 2003, the claimant was complaining of paresthesias and tingling in both feet. The claimant continued to

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receive treatment in the form of medication and physical therapy.

The claimant was then referred to have an MRI, which revealed she suffered from,

1. Mild degenerative disease at 2-3 and 3-4.
2. Mild broad based annular bulge at 3-4.
3. Small annular fissure at 4-5.
4. No herniated nucleus pulposus or significant spinal stenosis.

The claimant attempted to return to work, but was unsuccessful. On June 18, 2003, she went to Dr. Maris and reported that she had reported for work and despite having performed no lifting, she suffered from intolerable pain after two to three hours. She complained of pain across her back and tingling down her legs to her feet. The claimant returned on June 27, 2003, and was noted to be 65% better and be using less medication. The note also provides, "? start work next week".

However, on July 22, 2003, the claimant returned and reported that she had re-injured her back at work. The claimant denied the re-injury was caused

by a specific incident. The claimant was again taken off work. On July 23, 2003, the physician indicated that there was discussion of a possible change of occupation. On July 30, 2003, the claimant presented with bilateral numbness of both extremities.

The claimant continued to receive conservative treatment and was referred to Dr. Vowell. On August 13, 2003, Dr. Vowell treated the claimant and noted she was complaining of pain and burning in her low back with numbness of both legs. Dr. Vowell assessed the claimant with a sprain and indicated she might suffer from an annular injury of her disc at L4-5. He continued the claimant on Flexeril, changed her prescription for Bextra to Naprosyn and changed her pain medication. He also indicated that she should go to water aqua therapy three times a week for four weeks and that, ". . . she could be at a job with no lifting, no repetitive standing, walking, or sitting. Otherwise she should be off work." On August 19, 2003, he apparently called in a prescription for Darvocet for the claimant.

The claimant returned to Dr. Vowell on September 9, 2003. Dr. Vowell indicated that the claimant continued to have back pain and that "she gives

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me a lot of excuses that she can't take her medicine." He further indicated he believed she was able to return to work and that she could return to work on a "prn basis". Finally, he indicated she had a 0% impairment rating.

On April 9, 2004, the claimant was treated by Dr. Lockyer. Dr. Lockyer indicated that the claimant had re-injured her back the day before while transporting a patient from a toilet. He noted the claimant suffered from intermittent numbness in both legs. The claimant was assessed with a lumbar strain and given Flexeril, Darvocet, Bextra, Vioxx, and Mobic. The claimant continued to present with pain and spasms and was set up for an EMG/NCV.

On May 7, 2004, the claimant underwent the test which revealed, "1. NORMAL NERVE CONDUCTION VALUES, NO EVIDENCE OF NEUROPATHY. 2. ABNORMAL EMG, SUGGEST L-5 RADICULOPATHY BILATERAL." (Emphasis added.) The claimant underwent another MRI on May 14, 2004, which was noted to be the same as her previous MRI. The claimant continued to receive treatment by medication.

The claimant continued seeing Dr. Lockyer and was prescribed medication. Another MRI was performed on

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July 11, 2005, which indicated, "Lower lumbar degenerative disc disease which is moderate at L4-5 where there is mild posterior disc protrusion and a small annular fissure. There is no evidence of disc herniation or significant neural encroachment." The claimant was eventually referred to Dr. Knox.

On August 18, 2005, Dr. Knox treated the claimant for back pain and bilateral leg pain. He noted the claimant had diminished ankle reflexes and that she had, "significant paraspinal muscle spasm". He also noted that her electrical studies were consistent with L5 radiculopathy and that her MRI scan showed a small herniated disc at level L4-5. He opined that he was not sure if surgical options existed, but given her electrical studies, recommended she undergo a myelogram to see if there was evidence of neural foraminal encroachment.

Dr. Maris also apparently completed a questionnaire regarding the claimant's condition. The document, which is dated September 1, 2005, asked if a bulge at L3-4 and small annular fissure at L4-5 could cause pain and bilateral numbness. He answered

affirmatively. Finally, he indicated the nerve studies were consistent with the claimant's complaints.

The claimant testified that since her injury in May 2003, her symptoms have never completely subsided. She testified that she has had to use medication since the incident and that she did not return to work after Dr. Vowell released her because she felt physically unable to work. She said that Dr. Maris also told her she would be unable to perform that work. She eventually accepted a sedentary job with Respondent No. 2 in March 2004 in an attempt to return to work. However, the claimant, even in a sedentary position, could not maintain a regular work schedule and would frequently have to leave early or not report due to pain. Ultimately, the claimant ended up assisting with a patient on April 8, 2004, and suffered another recurrence.

The claimant testified that she currently has difficulty standing, sitting, or lying down for long periods of time. She indicated she has been taking pain medication and muscle relaxers. She also testified that she was given samples of medication during the time

period in which she was not able to seek medical attention.

The respondents essentially contend that the claimant has failed to show that she remained in her healing period or unable to work after her May 29, 2003 injury. Respondent No. 1 did pay benefits for some period after May 29, 2003; however, it is unclear as to how long those benefits were paid. After reviewing the record, we find the evidence simply does not support the respondents' arguments.

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).

We first find that the claimant remains in her healing period. From the time of the May 29, 2003 injury, the claimant has had ongoing complaints directly related to her admittedly compensable injury. The claimant has continued to seek treatment and has been taking medication during that time as well. Her diagnostic testing shows she has objective, legitimate complaints. Specifically, the nerve tests show that she has bilateral numbness in both legs due to abnormalities at L5. Furthermore, Dr. Maris has indicated that these tests are consistent with the claimant's complaints. Additionally, we note that Dr. Knox has indicated that the claimant suffered from significant muscle spasms and noted the claimant had studies consistent with bilateral radiculopathy and that her MRI showed a herniated disc at L4-5. Based on these findings, he recommended she undergo a myelogram to see if surgery was necessary or not. Certainly, this myelogram is treatment designed to

see what treatment is necessary and then to decide what course of treatment should be given to the claimant.

Furthermore, this is evidence that the claimant has not reached MMI or received all treatment that will improve her condition. We note the respondents did not appeal the finding that the claimant is entitled to that treatment. Therefore, it is only logical to conclude that the claimant remains in her healing period.

We further find that the claimant has remained unable to work during the time period for which benefits were awarded. Specifically, we find that the claimant is entitled to benefits for the entire period with the exception of the period of March 5, 2004 through May 2004, which is the time period she attempted to return to work. The claimant has remained under a physician's care and credibly testified that while she attempted to return to work, she was unable to perform her job duties. We find that the claimant's repeated attempts to return to work bolster her credibility and show that she is extremely motivated to return to work, but simply unable to do so.

In the past, the Arkansas Courts have determined that, if, during the healing period, an

employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, her temporary disability is deemed total. See, Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W. 3d 899 (2002). Furthermore, this Commission has previously held that an unsuccessful attempt at work does not affect eligibility for temporary total disability benefits. Morgan v. Quick Lay Pipe, Full Workers' Compensation Commission Opinion filed June 16, 2006, (F409390). Furthermore, an "off work" slip is not required to show a claimant is unable to work. Biles, supra.

In the present instance, the claimant provided credible, consistent testimony that her symptoms rendered her unable to work, despite her repeated attempts to return to work. Despite the assertions of the respondent that the claimant was never taken off work after the May 2003 incident, it is clear that the claimant was consistently taken off work or restricted to perform only light duty work after her 2003 injury. A few examples of the claimant's restrictions and releases are worth mentioning. First, we note that on July 23, 2003, Dr. Maris, after releasing the claimant

from working, apparently told the claimant she might need to consider changing occupations due to her injury. In our opinion, this is strong evidence of the severity of the claimant's condition, and of Dr. Maris' belief that the claimant has been accurately representing her symptoms. Additionally, we note that Dr. Maris issued the claimant a note restricting her from working from July 30 to August 13, 2003. Furthermore, we note that even the respondent's physician, Dr. Vowell, indicated on August 13, 2003, that the claimant should not perform work that required repetitive lifting, standing, walking, or sitting. Clearly, if the claimant could not perform work requiring her to sit or stand, this was, in effect, a restriction from performing any work.

While we note that Dr. Lockyer did not issue a note explicitly releasing the claimant from working, we also note that Dr. Lockyer also did not indicate the claimant could return to work. Rather, his notes were simply silent on whether the claimant could return to work. We also found it extremely pertinent that the claimant had attempted to return to work on three occasions. This is certainly not consistent with malingering. Furthermore, we note that the claimant's

nerve testing and MRI show she has a herniated disc with radiculopathy. Furthermore, as the claimant consistently presented with bilateral numbness of her legs, we find that it is only logical that she would not be able to work, given her symptoms. Also, Dr. Maris has issued an opinion that the claimant needs a myelogram to see if she needs surgery, indicating that the claimant's condition is quite severe.

Though the respondent would assert that the claimant only sustained a back strain, that is simply not consistent with Dr. Lockyer's conclusion that the claimant sustained a herniated disc and annular tear. We also note that even Dr. Vowell believed the claimant might suffer from an annular tear, but simply did not follow through with objective tests to determine the extent of the claimant's injury. Furthermore, once the claimant did receive the necessary testing, her complaints of radiculopathy were confirmed, as was the existence of an annular tear and herniated disc. This is consistent with the claimant's complaints that she suffers from pain that renders her unable to return to work. Furthermore, the Administrative Law Judge specifically found that a myelogram was reasonable and

necessary to determine the extent of the claimant's injury and to see if she needed surgery. The respondents did not appeal this finding. As such, we find that it would be erroneous and inconsistent with the decision of the Administrative Law Judge to conclude the claimant only suffered from a temporary strain.

Finally, we address the respondents' argument that Dr. Vowell's note releasing the claimant to return to work should be given credence. We agree with the Administrative Law Judge's assessment that Dr. Vowell's opinion should be given little weight. First, we note that despite Dr. Vowell's initial assessment that the claimant had a possible annular injury, he did not order additional testing to investigate. Additionally, the claimant complained of bilateral numbness in her legs and feet. Dr. Vowell also failed to order additional testing to see if the claimant had nerve problems. We note, in calling attention to these facts, that later diagnostic testing, in fact, showed the claimant's complaints were shown by objective findings as revealed by abnormal nerve tests and an abnormal MRI. Not surprisingly, these findings were also assessed as being consistent with the claimant's reported symptoms.

Furthermore, it appears that Dr. Vowell only released the claimant because he was angry with her regarding her refusal to take medication due to a pharmacist's concern about drug interactions. On August 13, 2003, Dr. Vowell indicated that the claimant would need aqua therapy for four weeks and that she should be restricted from working unless no repetitive lifting, standing, walking, or sitting was required. He also indicated that he was going to keep her on Flexeril, change her Bextra to Naprosyn and change her Darvocet to Ultram. The claimant testified that when she went to the pharmacy, she was advised she could not take it because when taken with Paxil, it had serious health effects. Indeed, Dr. Vowell, on August 19, 2003, called in a prescription for Darvocet and the pharmacy records show the claimant never received the Ultram. When the claimant returned to Dr. Vowell on September 9, he was hostile. He indicated,

Lora is seen for f/u of her back pain. She gives me a lot of excuses that she can't take her medicine.. . She's wanting to be retrained by the nursing home for another job. I had given her Ultram before, and apparently the pharmacist said she could have some problems with Paxil. I haven't had that experience, but I

really have nothing else to offer this lady. I think she is able to work. I'm going to return her to full job status.

In reviewing the aforementioned language, we find that it is incredibly disturbing that Dr. Vowell is apparently discounting the claimant's symptoms simply because she followed a pharmacist's advice that she should not take medication due to possible drug interactions. Furthermore, we note that the claimant's symptoms had not changed, yet Dr. Vowell released her, despite only treating her on one other occasion, and despite the fact that she had not yet even had time to finish the aqua therapy that he prescribed for her. As he had previously restricted her from any work that required any repetitive actions, we find it is concerning that he would suddenly conclude that she had recovered to the point she could return to all work, particularly since she continued to present with symptoms and he had not ordered diagnostic testing, despite his initial diagnosis that she might suffer from an annular injury. As such, we find that Dr. Vowell's opinion is entitled to little weight.

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In sum, the claimant credibly testified regarding the occurrences of her injuries and her ability to return to work. The Administrative Law Judge issued a decision finding the claimant was entitled to additional medical treatment to assess the severity of her condition. That finding was not appealed and shows the claimant remains in her healing period.

Furthermore, as the purpose of the myelogram is to assess the severity of the claimant's condition, to now find that the claimant only sustained a minor strain would be in error. Additionally, the claimant credibly testified that she was unable to work during the time period in question and this is corroborated by the weight of the evidence. Accordingly, we affirm the decision of the Administrative Law Judge.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-8-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code. Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence she is entitled to temporary total disability benefits from May 29, 2003, to a date yet to be determined. Based upon my de novo

review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to an open-ended period of temporary total disability benefits from May 29, 2003, through March 5, 2004, and from May 31, 2004, to a date yet to be determined.

The claimant was employed by the respondent employer no. 1 as a certified nursing assistant. On October 23, 2002, she was lifting a patient when she injured her lower back. The claimant missed approximately four days from work and returned to work without restrictions. On May 29, 2003, the claimant picked up a chair and reinjured her back. This claim was accepted by respondent no. 1 as compensable and the claimant was off of work for a period of months following that incident. The claimant underwent an MRI on June 13, 2003, which indicated that the claimant had degenerative disc disease, a bulging disk and a small annular fissure. The claimant's MRI specifically revealed that there was no herniated nucleus pulposus and no stenosis.

The claimant was referred to Dr. Vowell at Ozark Orthopedic Associates. Dr. Vowell reviewed the

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claimant's MRI and diagnosed the claimant with a low back strain. He kept her off work until September 9, 2003. He noted:

Lora is seen for f/u of her back pain. she [sic] is still having back pain. she [sic] gives me a lot of excuses that she can't take her medicine. She said she took her Naprosyn and it made her b/p fall to 58/38 with an increased pulse of 104 for 3 days. She thinks that there's aspirin in Naprosyn. I've talked to her about trying a different anti-inflammatory. She's wanted to be retrained by the nursing home for another job. I had given her Ultram before, and apparently the pharmacist said she could have some problems with Paxil. I haven't had that experience, but I really have nothing else to offer this lady. I think she is able to work. I'm going to return her to her full job status. She's to return to see me on a prn basis.

On October 3, 2003, Dr. Vowell noted in his records that he mailed a letter to the insurance carrier stating that the claimant had a 0% permanent impairment rating.

After Dr. Vowell released the claimant to return to work, she did not work from September of 2003, until April of 2004, when she went to work for respondent employer no. 2. The medical records fail to demonstrate that the claimant sought any medical

treatment during this period of time. The claimant stated that she was given medication samples by doctors in order to survive. Unfortunately, there are no medical records to substantiate the claimant's claim that she was given samples from September through April. I find it hard to believe that a doctor's office would continue to give a person samples for six months without some sort of notations in the claimant's records.

The claimant was working for respondent no. 2 helping to transfer a patient when she reinjured her back. The claimant testified that she "did it all over again." She then began treating with Dr. Lockyer, who diagnosed the claimant with chronic low back pain and major depression. There is absolutely no evidence in Dr. Lockyer's medical records that the claimant is unable to work. There are no releases from Dr. Lockyer to the employer stating that the claimant is unable to work. The claimant testified that she did not feel good enough to work so she simply stopped working. The claimant underwent another MRI which yielded exactly the same results as the MRI she previously had in May of 2003. The second MRI showed no herniated nucleus pulposus and no continuing problems.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Highway & Trans Dept v. Breashers, 272 Ark. 244, 613 S.W.2d 392 (1981). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission. Ark. Highway & Trans. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

The persistence of pain may not in and of itself prevent a finding that the healing period is

over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages (citing Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

In my opinion, the evidence fails to demonstrate that the claimant proved by a preponderance of the evidence that she was temporarily totally disabled from September of 2003 through March of 2004, and from May 2004, to a date yet to be determined. The Administrative Law Judge and the Majority awarded the claimant temporary total disability benefits to the

claimant during this time period. However, the only proof in the record that the claimant remains in her healing period and totally incapacitated from earning wages is the claimant's own self-serving testimony. The medical records demonstrate that Dr. Vowell released the claimant to return to work on September 8, 2003, with 0% permanent anatomical impairment rating. The medical reports indicate that the claimant was only suffering from a mild strain. There is no medical opinion in the record that is contrary to this report. The claimant's MRI does not show any surgical condition. Moreover, she was treated and released by a licensed orthopedic physician. The only evidence that we have suggesting disability is the claimant's own self-serving testimony that she is unable to work. The record contains no medical releases whatsoever that any doctor took the claimant off work. Therefore, in my opinion, the claimant cannot prove by a preponderance of the evidence that she is entitled to temporary total disability benefits. Accordingly, the decision of the Administrative Law Judge should be reversed.

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

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opinion.

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KAREN H. MCKINNEY, Commissioner