

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502737 & F604782

BENJI DAVIS,
EMPLOYEE

CLAIMANT

WAL MART ASSOCIATES, INC.,
EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 15, 2008

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

Claimant represented by the HONORABLE GREGORY R. GILES,
Attorney at Law, Texarkana, Arkansas.

Respondent represented by the HONORABLE CURTIS L.
NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals and Respondents cross-appeal an
opinion and order of the Administrative Law Judge filed
October 4, 2007. In said order, the Administrative Law
Judge made the following findings of fact and
conclusions of law:

1. The Arkansas Workers' Compensation Commission
has jurisdiction of this claim.

2. The stipulations agreed to by the parties are reasonable and hereby accepted as fact.

3. The claimant has not reached maximum medical improvement as a result of his August 19, 2004, compensable injury.

4. The claimant's need for medical treatment for his back is due to a recurrence of his symptoms caused by his stipulated August 19, 2004, compensable injury. As such the claimant is entitled to and respondents are hereby directed to pay all additional medical treatment related to the claimant's back that is contained in the record herein, as such treatment was reasonable and necessary and related to the claimant's August 19, 2004, compensable injury. In addition, claimant has proven by a preponderance of the evidence that the additional medical treatment now recommended by Drs. Mocek and Collins is reasonable and necessary and related to his compensable injury of August 19, 2004, and as such is the responsibility of the respondents.

5. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

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

Therefore we affirm and adopt the October 4, 2007 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner McKinney concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully dissent, in part, and concur, in part, from the majority opinion. Specifically, I must dissent from the finding that the claimant has not reached maximum medical improvement and

that the need for medical treatment is due to a recurrence of his symptoms related to his August 19, 2004, compensable injury. However, I must concur in the finding that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

The claimant sustained an admittedly compensable injury on August 19, 2004, when he was stocking the cooler and the ladder he was on shifted causing the claimant to hyper-extend his back. The claimant received medical treatment from Dr. Buffington and was diagnosed with lumbar pain. While under Dr. Buffington's treatment the claimant complained of muscle spasms, but the medical records do not record the presence of any muscle spasms upon physical examination. At most, Dr. Buffington noted tenderness and swelling along the claimant's low back. A review of the medical records reveals that Dr. Buffington treated the claimant conservatively throughout August, September and November of 2004. The claimant did not seek any medical treatment for his compensable injury during December, January, and February. In fact, when the claimant sought treatment from Dr. Buffington on February 9, 2005, the claimant's chief complaint was upper respiratory problems; the

claimant did not seek any treatment for his back at that time. The claimant sought medical treatment from Dr. Thomas Jones on March 10, 2005, complaining of "severe entire back pain" after struggling to lift a box of foam at work several days ago. Dr. Jones noted complaints of neck and back pain, but did not find any sign of muscle spasms. Dr. Jones assessed the claimant with "pain" at that time. The claimant then returned to Dr. Buffington on March 18, 2005, for a second opinion. The claimant advised Dr. Buffington of his recent lifting incident and described his pain as worse in his lower back. Dr. Buffington noted the presence of swelling and tenderness, but did not find any muscle spasms at that time. Dr. Buffington released the claimant to light duty. Following this release, the claimant did not seek any additional treatment for almost a year. The claimant was examined by Dr. Buffington on December 5, 2005, but only for complaints of coughing, aching, hot and cold sweats, a fever, and a boil on his buttocks. Dr. Buffington drained the boil and continued to treat the claimant for this condition for the next month. While receiving treatment for his boil, the claimant was prescribed main medication.

It was not until February 3, 2006, after going eleven months without treatment that the claimant returned to Dr. Buffington with complaints of lower back pain. An MRI performed on April 7, 2006, revealed disc dessication and loss of disc height at L3-4, with a broad base disc protrusion and ligamentum hypertrophy at this level as well. All other levels were deemed normal. Dr. Buffington sought a referral to a Texarkana Pain Clinic at that time. Rather than return to Dr. Buffington, the claimant began to seek treatment from Christus St. Michael Hospital advising that his pain medication had run out. An MRI of the claimant's thoracic spine was conducted on April 19, 2006, which revealed normal findings. An MRI of the claimant's lumbar spine conducted on that same date revealed degenerative changes at L3-4 with a minimal posterior disk bulge at that level. Again, all other levels were deemed normal. A Progress note dated April 18, 2006, notes that the claimant had a motor vehicle accident because he was so sleepy and could not sleep well at night. After noting the motor vehicle accident, the progress note states, "recently pain worsened and he has had to take hydrocodone for pain."

On April 26, 2006, the claimant was examined by Dr. Roshan Sharma, a physical medicine and rehabilitation specialist. Dr. Sharma diagnosed the claimant with back pain, degenerative changes at L3-4 with a minimal posterior disc protrusion. Dr. Sharma recommended trigger point injection, medication, and physical therapy. Just three days later, on April 29, 2006, the claimant returned to Christus St Michael's hospital with back pain stating that he was out of pain medication. The claimant was advised at that time to seek all further refills from his regular treating physician.

On May 24, 2006, the claimant was examined by Dr. James Arthur, a Hot Springs Neurosurgeon. In a letter of that same date addressed to Dr. Buffington, Dr. Arthur advised that the claimant had decreased range of motion of the lumbar spine with tenderness of the thoracic paraspinous muscles. Dr. Arthur prescribed pain medication and a work hardening program. On September 28, 2006, the claimant received a Change of Physician order from the Commission changing his physician from Dr. Buffington to Dr. Chris Mocek, a pain doctor. Dr. Mocek examined the claimant on October 12, 2006, and reviewed the claimant's MRI films. Contrary to the

radiologists' reports, Dr. Mocek opined that these films revealed a tiny left disc protrusion at L4-5, as well as, the minimal disc protrusion at L3-4. After examining the claimant, Dr. Mocek stated that the claimant's pain was consistent with irritation of the right L5-S1 nerve roots, and that this pain "does lineup" with the disc protrusion at L4-5. However, the claimant's pain on the right is opposite the "tiny" left disc protrusion first noted by Dr. Mocek. Dr. Mocek ordered lumbar epidural steroid injections at L5-S1 along with Percocet, Trazadone, and Baclofen. The claimant did not undergo the injection therapy but was seen by Dr. Mocek's nurse for follow up visits and medication changes once a month thereafter. At least twice while under Dr. Mocek's care, the claimant presented to local emergency rooms seeking additional pain medication.

Although the claimant has continued to work for both the respondent and subsequent employers every since his compensable injury, Dr. Mocek advised the claimant on March 2, 2007, that he should not continue in his present occupation as a "taxi driver" while taking his pain medication. Dr. Mocek did not remove the

claimant from working altogether, only from driving as an occupation.

My de novo review of the entire record reveals that the claimant sustained a compensable injury in August of 2004, with a recurrence in March of 2005 for which he received appropriate medical treatment. The claimant did not present with any objective medical findings while treating for these injuries. Conservative medical treatment was provided and the claimant was physically capable of returning to his normal life and routines. In March of 2005, the claimant was advised to return for further treatment if his symptoms persisted. The claimant did not seek any additional medical treatment from March 2005 through February 2006. It is interesting to note that when the claimant finally did seek additional medical treatment, the claimant advised his medical care provider that he had recently been involved in a motor vehicle accident. The claimant continuously worked for the respondent and subsequent employers throughout this period of time. Although the claimant testified that he suffered pain which affected his work, the claimant never sought any medical treatment for this alleged pain. Given the claimant's failure to require any medical treatment from March 2005

through February 2006, together with his continuous work history, I find that the claimant has failed to prove by a preponderance of the evidence that he remained within his healing period, or that his present need for medical treatment is causally related to his compensable injury. The MRIs performed in 2006 and 2007 only revealed a minimal disc bulge and did not correlate with any of the claimant's symptoms other than pain from degenerative disc disease. The claimant's condition had obviously plateaued. If anything, the claimant's behavior as of February of 2006, reveal a pattern of drug seeking. This condition did not require strong medication in 2004 and early 2005, and the claimant was more than capable of living with his condition for almost a year without even requiring any medication at all. Accordingly, I cannot find that the claimant has established by a preponderance of the evidence that his present need for medical treatment, including medication therapy, is in any way related to his minor compensable injury. Therefore, I must respectfully dissent from the majority opinion finding that the claimant is entitled to additional medical treatment.

With regard to the claimant's request for temporary total disability benefits, I concur in the

finding that the claimant failed to prove that he was totally incapacitated from earning wages. The claimant was returned to work by his treating physician on November 4, 2004 and has never been totally removed from employment since. The claimant has demonstrated an ability to perform numerous jobs ever since his compensable injury and there is no credible evidence that the claimant's compensable injury ever prevented him from performing his job duties. Although I find that the treatment the claimant is currently receiving is not related to his compensable injury, even if such treatment were compensable, a finding I do not make, I still find that the recommendation that the claimant refrain from working as a taxi driver, does not totally incapacitate the claimant from earning wages. The claimant has clearly demonstrated that he is capable of working, even though he is prohibited from driving while taking his pain medication. Therefore, I must concur in the majority opinion finding that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

Accordingly, for those reasons set forth herein, I must respectfully concur, in part, and dissent, in part, from the majority opinion.

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I agree that the claimant has proved by a preponderance of the evidence that his need for medical treatment is due to a recurrence of his symptoms caused by his compensable back injury of August 19, 2004. I agree that the claimant is entitled to all reasonably necessary medical treatment related to this injury, including the additional treatment now recommended by Drs. Mocek and Collins. However, I must respectfully dissent from the majority's finding that the claimant failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits. Based upon a de novo review of the record in its entirety, I find that the claimant has shown by a preponderance of the evidence his entitlement to additional temporary

total disability benefits, and therefore, I must respectfully dissent on this issue.

The claimant sustained compensable back injuries on August 19, 2004 while working for the respondent. The claimant continued working for the respondent until July of 2005 when he was terminated for absenteeism. The claimant then began working for Tiger Mart/ Baskin Robbins in August of 2005, leaving Tiger Mart/ Baskin Robbins to work for Burger King from December 13, 2005 through April 16, 2006. After Burger King the claimant worked for PTI as a taxi driver from approximately June of 2006 until February of 2007. The claimant testified that he had to leave PTI due to his back pain and Dr. Mocek's recommendation that he not drive while taking his current medication. The claimant testified that he never hurt his back after leaving his employment with the respondent and continued to have the same problems with his back since the August 19, 2004 injury.

Based on the evidence of record, I find that the claimant has shown by a preponderance of the evidence his entitlement to additional temporary total disability benefits from the end of his employment with PTI in February of 2007 until a date yet to be

determined. 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). First, the claimant has presented proof by a preponderance of the evidence that he has remained in the healing period since the date of injury. A claimant's healing period has not ended when treatment is being administered for the healing and alleviation of the condition. Breshears, supra; J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W. 2d 51 (1990). Here, the medical records show that on April 2, 2007, Dr. Collins stated: "he is certainly not at MMI and certainly needs further treatment." Based on Dr. Collins' report and the fact that no doctor has opined that the claimant has reached the end of his healing period, I find that the claimant remains in his healing period.

Second, I disagree with the majority's determination that as the claimant had actually worked a number of jobs since he was injured in 2004, the claimant could not meet his burden of proving his entitlement to temporary total disability benefits starting February 22, 2007. The fact that an employee

remains able to do some type of work for some period of time, as the claimant was here, does not necessarily demonstrate that he is not temporarily and totally disabled. Mountain Valley Suprette v. Bottorff, 4 Ark. App. 251, 629 S.W. 2d 320 (1982). If during the healing period, an employee is unable to consistently perform remunerative labor, without pain and discomfort, he is temporarily totally disabled. Farmers Cooperative v. Biles 77 Ark. App. 1, 69 S.W. 3d 899 (2002); Plyes v. Triple F. Feeds of Texas, 270 Ark. 729, 606 S.W. 2d 146 (1980). Furthermore, I find that evidence of past work performed is simply not relevant to the issue at bar, which is whether or not the claimant is totally incapacitated, due to his compensable back injury, after February 22, 2007. Here, the medical record shows that on May 24, 2006, Dr. James Arthur wrote a letter describing the claimant's condition. Dr. Arthur stated: "Benji Davis as you know, initially hurt his back in August, 2004. He has had a lot of thoracic pain since with some low back pain that disrupts his sleep. He has also been having a lot of muscle spasms." After this visit with Dr. Arthur, the claimant requested and was granted a change of physician to Dr. Mocek. On October 12, 2006, the claimant had his initial visit with Dr.

Mocek, who stated: "Muscle spasms keep him awake at night. He is having trouble sleeping because of the pain and back spasms...He is currently working at another job driving but not doing any heavy lifting." Dr. Mocek recommended a series of three injections, followed by physical therapy. Dr. Mocek also stated that if the pain persisted that he would consider performing a discogram, but that an open surgical procedure was not warranted. Dr. Mocek prescribed Baclofen, Percocet and Trazadone. At this point, the respondent controverted the claimant's entitlement to additional reasonable and necessary medical treatment. On November 11, 2006, Dr. Mocek continued the Baclofen, increased the Percocet, increased the Trazadone and prescribed Oxycontin 10 mg. A nurse follow up visit on December 4, 2006 indicates that the claimant told the nurse that he could not afford to re-fill the Oxycontin prescription and requested something he could afford. The decision was made to stop the Percocet and Oxycontin prescription and to start the claimant on 10 mg of methadone. The medical records show that the claimant went to the DeQueen Medical Center ER on January 2, 2007 due to his back pain. The claimant immediately followed up with Dr. Mocek on January 3, 2007, again reporting a lot burning

and pain down his spine and legs. The claimant went to the St. Michael Health System ER in Texarkana on January 30, 2007 again complaining of back pain. The claimant followed up with Dr. Mocek on February 5, 2007 requesting a change in medication. Dr. Mocek increased the claimant's methadone prescription to 20mgs. On March 2, 2007, Dr. Mocek's report states:

Patient with complaints of pain in the mid to low back, legs and knees. This is a pleasant patient with a history of above complaints. His greatest pain comes after he has been driving for 8-12 hours a day. He sometimes needs to take an extra tablet after working a long day. He is satisfied with the pain relief he is getting from the methadone.
DISCUSSION: Discussed patient having occupation as a Driver for a Taxi Service. Dr. Mocek advised that he should not take methadone and drive.

I find that the preponderance of the evidence shows that although the claimant endured the pain from his compensable injury and continued to work for a very long time, his doctors have recommended that the claimant not work, and he is in fact totally incapacitated from work. The respondent has repeatedly denied appropriate medical treatment for the claimant's admittedly compensable injury, which has apparently lengthened his healing period and forced his doctors to prescribe medications to alleviate pain, rather than

utilize more expensive treatments that could actually improve the claimant's condition. Rather than give in to his injury, the claimant valiantly attempted to return to the work force, and should not be punished for his efforts, which is the effect of the majority's opinion. I find that the preponderance of the evidence shows that despite his previous ability to return to work, the claimant is now totally incapacitated and entitled to temporary total disability benefits.

Finally, I must address the other concurring and dissenting opinion's assertion that the claimant has engaged in "drug-seeking" behavior. While there is an abundance of evidence of record indicating that the claimant was in pain from his compensable injury, and abundance of evidence indicating that the respondent refused to provide reasonably and necessary medical treatment for the claimant's injury, there is absolutely no evidence of record indicating that the claimant has ever taken prescription medications contrary to the recommendations of his treating physicians.

In conclusion, I find that the claimant has proved by a preponderance of the evidence that his need for medical treatment for his back is due to a recurrence of his symptoms caused by his compensable injury of August 19,

2004. I find that the claimant is entitled to all reasonably necessary medical treatment related to this injury, including the additional treatment now recommended by Drs. Mocek and Collins. Furthermore, I find that the claimant has proved by a preponderance of the evidence his entitlement to additional temporary total disability benefits from February 22, 2007 until a date yet to be determined.

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

PHILIP A. HOOD, Commissioner