

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704625

CURTIS JONES, EMPLOYEE	CLAIMANT
CRAWFORD COUNTY, EMPLOYER	RESPONDENT NO. 1
AAC RISK MANAGEMENT SERVICES, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

**ORDER FILED JUNE 11, 2008**

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

Claimant represented by HONORABLE STEPHEN SHARUM, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

NUNC PRO TUNC ORDER

The Full Commission, on its own motion, finds that a clerical error exists in the Opinion and Order filed June 3, 2008. The Opinion and Order reflects a draft version and incorrect "Concurring and Dissenting Opinion" in the above-referenced case. The Full Commission finds that the Opinion and Order should reflect the correct Concurring and Dissenting Opinion of Commission Hood as follows:  
Commissioner Hood concurs, in part, and dissents, in part.

**CONCURRING AND DISSENTING OPINION**

\_\_\_\_\_I must respectfully concur, in part, and dissent, in part, from the majority's opinion. Specifically, I agree that the claimant

established by a preponderance of the evidence that he sustained a compensable injury on April 25, 2007. However, I dissent from the majority's failure to make findings with regard to the claimant's request for additional medical treatment and from the majority's decision to deny the claimant temporary total disability benefits. Based on a de novo review of the record, I find that the opinion of the Administrative Law Judge should be affirmed in its entirety and that the claimant is entitled to temporary total disability benefits from April 26, 2007 until a date yet to be determined in addition to medical benefits and attorney's fees.

The Administrative Law Judge made two specific findings with reference to medical treatment, as follows:

5. The medical services rendered to the claimant by and at the direction of the medical personnel at the emergency room of Summit Medical Center, by and at the direction of Dr. George Tompkins, by and at the direction of Dr. Terry Hoyt, by and at the direction of Dr. Larry Armstrong, by and at the direction of Dr. Brett Whatcott, and by and at the direction of Dr. Bradley Short, represent reasonably necessary medical services for the claimant's compensable injury, under Ark. Code Ann. §11-9-508. Specifically, these medical services were necessitated by or connected with the claimant's compensable injury and had a reasonable expectation of accomplishing their intended purpose or

goal, at the time the services were rendered.

6. The medical services recommended to the claimant, in the form of an evaluation by a neurosurgeon or spinal specialist and an evaluation and possible treatment by a chronic pain management specialist, also represents reasonably necessary medical services, under Ark. Code Ann. §11-9-508. Specifically, such medical services are necessitated by or connected with the claimant's compensable injury and have a reasonable expectation of accomplishing their intended purpose or goal.

The majority correctly finds that the claimant sustained a compensable injury and acknowledges his initial need for medical treatment for that injury. Further, the medical evidence of record clearly establishes the claimant's need for additional treatment, all of which has been recommended by physicians chosen by Respondent No. 1. Dr. Hoyt and Dr. Tompkins have recommended another surgical evaluation. Dr. Tompkins has recommended chronic pain treatment, additional epidural steroid injections, physical therapy, medication, and a trial of a TENS unit. And even the physician hired by Respondent No. 1 for an opinion, Dr. Short, has recommended continued treatment with Dr. Whatcott. Under these circumstances, it is obvious that the Administrative Law Judge's award of additional

medical treatment should be affirmed, even though no specific finding on this issue can be found in the majority opinion. The claimant has a right to findings on all issues raised at the hearing and decided by the Administrative Law Judge.

ITT/Higbie v. Gilliam, 43 Ark. App. 154, 807 S.W.2d 44 (1991).

With regard to the claim for temporary total disability benefits denied by the majority, I must issue a dissent. The majority opinion correctly states that there is a two prong test for entitlement to temporary total disability benefits and that this test is set out in the landmark case of Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The majority also correctly identifies the first prong of the test as requiring proof that the claimant remains in the "healing period" and the second prong as proof of "total incapacity to earn". The healing period continues until the employee is as far restored as the permanent character of the injury will permit, the underlying condition has become stable, and nothing further in the way of treatment will improve the condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The issue of the duration of the healing period is a medical question and must be resolved on the basis of the greater weight of the medical

evidence presented. In this case, there is no dispute among the physicians that the claimant needs additional medical treatment. The reports and records of Dr. Tompkins show that he continued to provide the claimant with active medical treatment for his compensable injury through July 6, 2007. These records further show that, on that date, Dr. Tompkins was of the opinion that further active medical care continued to be necessary and medically appropriate. Even the October 2, 2007 report from Dr. Short reflects that it was also his expert opinion that the claimant continued in need of active medical treatment, at that time, and had not yet reached "maximum medical recovery". Based on this uncontradicted medical evidence, it can not be said that nothing further in the way of treatment is available which would improve the claimant's condition. His healing period continues.

On the second prong of the temporary total disability test, the medical evidence strongly suggests that the claimant continues to be disabled. During his course of treatment by Dr. Tompkins, the claimant has not been released to return to any type of gainful employment. In fact, Dr. Tompkins has expressly indicated that, in his expert medical opinion, the claimant has been totally disabled from employment due to his compensable injury from the date of his injury

through some undetermined date after July 8, 2007. Dr. Hoyt has also opined that the claimant should be medically restricted from engaging in any type of regular gainful employment until he has seen and been released to return to employment by a back or spinal specialist. On June 28, 2007, Dr. Whatcott indicated that the claimant was restricted from bending or lifting or anything that would "strain the injured area". Dr. Whatcott expressly stated the claimant should perform "a desk job only". Dr. Short indicated that the claimant should not be required to respond to emergency situations, such as subduing prisoners. In addition, the claimant has not been offered a position that would meet the restrictions imposed by Dr. Whatcott and Dr. Short, and the evidence of record indicates that there are no such positions available. Under these circumstances, it is obvious that the claimant remains totally disabled.

There is no real dispute in this case that the claimant is disabled and in need of additional medical treatment. The issue is whether his disability and need for treatment is causally related to his compensable injury or related to preexisting conditions. The requisite causal connection is established when the compensable injury is found to be "a factor" in the resulting inability to work and need for medical treatment,

even though the compensable injury is not the major cause of the disability or need for treatment. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). Findings on causation must be supported by substantial evidence which a reasonable mind might accept as adequate to support a conclusion. The medical evidence of record must support the conclusions on causation reached by the Commission or the decision on this issue is reversible. Barnes v. Greenhead Farming, Ark. App.\_\_\_\_,\_\_\_\_ S.W.\_\_\_\_ (2008).

In the determination that the claimant did not prove entitlement to temporary total disability benefits, the majority says that the claimant is restricted from working because of the preexisting conditions and not because of the compensable injury. The decision declares that "the claimant possessed all of the physical conditions which his physicians are currently relying upon to remove him from work prior to his compensable injury". This conclusion is based almost exclusively on one alleged medical fact which was stated in the opinion as follows:

After comparing the claimant's 2002 CT scan with the 2007 MRI and CT scan, Dr. Short specifically stated that there are no additional findings on the latter diagnostic studies that would be directly related to the claimant's industrial injury of April 25, 2007.

A careful review of Dr. Short's medical report reveals that he did not even review a report of the 2002 CT scan. And he never said that he did. What actually transpired was as follows: the respondent hired Dr. Short to examine the claimant, review medical records, and answer five questions. The first question posed by the respondent was:

QUESTIONS FOR REVIEW:

Question #1: In reviewing the CT of the lumber spine of 10/10/2002, and the CT of the lumbar spine 4/25/2007, and the MRI of the lumber spine 4/26/07, are there any changes of the objective findings noted as a result of the reported 4/25/07 work related injury?

Dr. Short's response was:

Response: There does not appear to be any findings which would be directly related to his industrial injury of 4/25/07.

It should be noted that, in his response, Dr. Short did not say that he reviewed the 2002 CT scan. In fact, he did not review it. Dr. Short listed the medical records he reviewed in his report of October 2, 2007. The 2002 CT scan was not listed. Because Dr. Short never saw the pre-injury findings, he was not in a position to conclude that there were no new findings from the compensable injury.

It is also worth noting that no report of a 2002 CT scan was introduced at the hearing. If the respondent was in possession of a report showing that the claimant had pre-injury findings identical to those of his post injury studies, showing a herniated disc at L5-S1, one would think that the respondent would introduce that report; before all others. The fact that no such radiology report appears in the record, calls into question the assertion that the 2002 CT scan contains the same finding as the post injury studies.

All of the other evidence supports the claimant's contentions on appeal. Following his injury, the claimant began to experience back pain with radiation into his right lower extremity which the Administrative Law judge referred to as "a sudden and immediate onset of new and significant difficulties with his low back and right lower extremity". These new difficulties were diagnosed as a herniated disc at L5-S1, following the results of the claimant's MRI which produced findings of "a right paracentral disc protrusion with a right lateral disc protruding component at L5-S1 indenting the nerve root sleeve in the right lateral recess...". The claimant's initial symptoms included right leg pain. The MRI later showed the disc herniation to be on the right. These are certainly objective findings which correlate with the new difficulties and the

diagnosis of a herniated disc resulting from the compensable injury.

In conclusion, it can not be said that reasonable minds could reach the conclusion, from a review of the credible evidence of record, that "all of the physical conditions" from which the claimant now suffers preexisted his compensable injury. The majority's conclusions regarding preexisting conditions are based on a phantom CT scan and an erroneous assumption that Dr. Short reviewed that scan and compared it to the post-injury studies. Dr. Short's opinion on preexisting conditions is baseless and, as such, it is legally inadequate to support the conclusions reached by the majority. In addition, the record finds no other support for the majority opinion, as all of the other medical evidence of record supports the conclusion that the claimant's disability and need for treatment is causally related to his compensable injury. The credible medical evidence in this case reveals that the claimant's compensable injury of April 25, 2007 was the primary factor in his disability and need for treatment. Therefore, the Commission is bound, under the law, to find a causal connection between the claimant's disability and need for additional medical treatment and the compensable injury.

For the reasons stated above, I concur in the finding that the claimant sustained a compensable

injury but must respectfully dissent from the majority's failure to make findings with regard to the claimant's entitlement to additional medical treatment and from the majority's denial of the claimant's entitlement to temporary total disability benefits.

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PHILIP A. HOOD, Commissioner

The Full Commission is authorized to correct clerical errors and this is a proper case for exercise of that authority.

Ark. Code Ann. § 11-9-713(d) (Repl. 1996).

The Opinion and Order filed on June 3, 2008, is hereby modified only to include the correct Concurring and Dissenting Opinion of Commission Philip A. Hood. In all other respects, the Opinion and Order shall remain the same and shall not be otherwise affected.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

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PHILIP A. HOOD, Commissioner