

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613016

SAMUEL M. MCINTYRE, EMPLOYEE	CLAIMANT
WOODFIELD, INC., EMPLOYER	RESPONDENT
RETENTION MANAGEMENT SERVICES, INC., TPA	RESPONDENT

OPINION FILED JULY 14, 2008

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

Claimant represented by the HONORABLE CASEY CASTLEBERRY, Attorney at Law, Batesville, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal and claimant cross-appeals an opinion and order of the Administrative Law Judge filed February 11, 2008. 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 over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that he is

entitled to additional temporary total disability benefits.

4. The claimant has proven by a preponderance of the evidence that all medical treatment contained in the record herein is reasonable, necessary, and related to his stipulated compensable injury. As such, respondents are responsible for all medical treatment contained in the record, including, but not limited to, all bills and travel related expenses the claimant incurred with Dr. Nunley after June 13, 2007.

5. I find that the claimant has not reached maximum medical improvement, and therefore find that the respondents are liable for all reasonable, necessary, and related medical expenses now recommended by the claimant's primary care physician, Dr. Nunley.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the February 11, 2008 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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. § 11-9-715 (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).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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

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CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority opinion.

The claimant sustained an admittedly compensable injury on October 24, 2006, when he was involved in an automobile accident. The claimant's course of treatment is difficult to follow in the record. The MRI performed on December 6, 2006, revealed degenerative changes at C3-4, C4-5, C5-6, C6-7, and T1; however no foraminal compromise or cord compression was noted. The only comprehensive review of the medical records appears in Dr. Earl Peeples's Independent Medical Evaluation report. The claimant first obtained treatment for this injury from Dr. Daniels, but Dr. Daniel's medical records were not introduced into evidence. Next the claimant was evaluated by Dr. Eric Akin, a neurosurgeon. In his report dated December 26, 2007, Dr. Akin diagnosed the claimant with a cervical sprain, lumbar sprain, and cervical spondylosis without myelopathy. Dr. Akin ordered medication and physical therapy. No further medical reports from Dr. Akin were introduced into evidence. However, Dr. Peeples's summation of the claimant's medical treatment reveals that Dr. Akin altered his initial diagnosis and concluded that the claimant possibly had "a right sided disc protrusion at C7-T1" and later without any explanation as to why again changed his diagnosis to a

right C4-5 herniation, for which he recommended surgery. This recommendation is consistent with the claimant's testimony that Dr. Akin eventually recommended surgery and that he requested a change of physician to obtain a second opinion. The claimant was changed to Dr. Pierce Nunley with the Spine Institute of Louisiana. Dr. Nunley, along with Mike Brandao, CFNP, and Ginger Loftin, PT, examined the claimant on June 6, 2007. Dr. Nunley opined from reading the MRI reports and examining the claimant that he had a disc herniation at C4-5, with significant osteophyte formation and stenosis at multiple levels of the cervical spine, but that the claimant's pain matched a C6 pattern. After reviewing the MRI films, Dr. Nunley opined in his July 19, 2007, Office visit report that the claimant had "some significant soft disk herniation, right-sided C4-5 and right-sided C5-6." Dr. Nunley recommended a bilateral C6 selective nerve root block, and opined that the claimant would "probably" require reconstructive surgery. Following the claimant's August 22, 2007, office visit, the office visit note prepared by Chris Howard, RN CFNP, indicated that a new MRI was ordered.

Reference was made to both an EMG study and an MRI performed in September of 2007. Neither of these

diagnostic studies were introduced into evidence. However, from reviewing Dr. Peeples's report, it is apparent that Dr. Peeples reviewed both of these studies. Dr. Peeples noted:

EMG study was performed by Dr. David Adams and was indicative of a right C7 radiculopathy. No abnormality in the C5 or C6 level was noted. Mentioned by Dr. Adams is "discussed this patient with Dr. Nunley because of pronounced abnormal changes consistent with right C7 radiculopathy do not correlate well with the anatomical findings on the cervical MRI scan."

In discussing the September 2007, MRI results, Dr. Peeples described the findings as follows: "Again, multilevel degenerative changes, osteophytes, disc abnormality, and foraminal narrowing were noted. The pattern is one of degenerative spondylosis."

After analyzing the medical records for the claimant, and having physically examined the claimant, Dr. Peeples concluded:

The findings in Mr. McIntyre indicate multilevel, including essentially the entire cervical spine, of degenerative disc disease and spondylosis with associated neuroforaminal narrowing. Physicians have provided various opinions as to disc abnormalities, however, the EMG findings do not correlate with these supposed abnormalities. The level of constant pain described is higher

than would be anticipated from his pain behavior and insofar as I am able to discern there has not been psychological evaluation or evaluation for a non-physical basis of pain undertaken.

I do not see a necessity for surgical intervention at present. It would be difficult to determine exactly which abnormality to fix and, in the absence of significant and consistent neurological defect, I think operative intervention would be unlikely to succeed. The indications of surgical necessity in the cervical spine, that is, instability threatening neurological function or progressive neurological deficit, are absent from the evaluation.

With regard to future treatment, Dr. Peeples opined that epidural steroid injections might be considered to address the claimant's degenerative disc disease, as well as, additional observation and re-examination, but that the claimant was not a surgical candidate.

Respondents do not dispute the award of medical treatment that has previously been provided to the claimant. Rather, respondents appeal the finding of the Administrative Law Judge that the claimant is entitled to future medical treatment for his compensable injury, including but not limited to the surgery recommended by Dr. Nunley.

In the present claim, the doctors are at a loss to even reach a consensus as to the claimant's diagnosis. First, he was diagnosed with a cervical sprain, then a herniated disc at C4-5, and later a herniated disc at C5-6, but the EMG findings do not correlate with any of these conclusions. Dr. Nunley proposed reconstructive surgery in his July 19, 2007, report, but that was before he ordered the EMG. No reports from Dr. Nunley were introduced into evidence after having received the EMG report that indicated no abnormality at the levels previous deemed compromised by Dr. Nunley. As noted in Dr. Peeples's review of the medical records, the EMG physician discussed the results personally with Dr. Nunley since the findings did not correlate with the anatomical findings. No defect has been noted to exist at the C7 level, yet this is the level deemed compromised by the EMG study.

I must question why the EMG and the September 2007 MRI results were not introduced evidence. Moreover, no report from Dr. Nunley was introduced discussing either of these diagnostic tests. Without these important documents, we are at a loss to adequately analyze the procedures and the condition for which the claimant seeks a remedy. Deborah Jones v. Seba, Inc.,

F.C. Opinion, Dec. 13, 1989 (D512553). The only comprehensive analysis of all the claimant's medical records is seen in Dr. Peeples's Independent Medical Examination report. Dr. Peeples noted that the claimant did not have any instability threatening neurological compromise and that surgery was, therefore, not warranted. Furthermore, Dr. Peeples noted that surgery based upon the lack of correlation between the anatomical and EMG findings would not be successful. Accordingly, after I weigh all the evidence of record, I cannot find that the claimant has proven by a preponderance of the evidence that the additional medical treatment sought is reasonable and necessary in connection with his compensable injury. Therefore, I must respectfully dissent from the finding in the majority opinion to award additional medical treatment must be reversed.

With regard to the majority's finding that the claimant failed to prove entitlement to additional temporary total disability benefits, I concur.

The claimant underwent an FCE on January 30, 2007, in which he was found to have given full and reliable effort. This test revealed that the claimant was physically capable of performing work in the heavy

physical demand category. There is no off work slip in evidence. At best, Dr. Nunley placed light duty restrictions upon the claimant to only drive one hour at a time. This restriction is not consistent with the FCE of work at the heavy physical demand classification. The record reflects that the claimant is physically capable of working. Therefore, I agree that the claimant has failed to prove by a preponderance of the evidence that his compensable injury rendered him totally incapacitated from earning wages.

Therefore, for all the reasons set forth herein, I respectfully concur, in part and dissent, in part, from the majority opinion.

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KAREN H. MCKINNEY, Commissioner

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

#### **CONCURRING AND DISSENTING OPINION**

I must respectfully concur in part and dissent in part from the majority opinion. Specifically, I agree that the claimant has proved by a preponderance of the evidence his entitlement to additional medical treatment including, but not limited to the treatments provided by

Dr. Nunley after June 13, 2007. I also agree that the claimant has not reached maximum medical improvement. However, I disagree with the majority's finding that the claimant has failed to prove by a preponderance of the evidence his entitlement to additional temporary total disability benefits. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence his entitlement to additional temporary total disability benefits, and therefore, I must respectfully dissent on this issue.

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). The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended. Mad Butcher Inc. v. Parker, 4 Ark. App. 124, 628 S.W. 2d 582 (1982). See Searcy Indus. Laundry, Inc. v. Ferren, 92 Ark. App. 65, 211 S.W. 3d 11 (2005). 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 Breshears, Supra.) I find that the claimant has proved by a preponderance of the evidence his entitlement to additional temporary total disability benefits. First, as noted by the majority, the claimant is actively treating for his compensable injury, and remains in his healing period.

Second, the claimant is totally incapacitated from earning wages. "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. §11-9-102(8). A claimant who has been released to light duty work but has not returned to work may be entitled to 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, 281-82 (1984). Here, the claimant's treating physician limited the claimant to driving for

not more than "an hour at a time" not eight hours, as respondent stated in its brief. The claimant is an over-the-road truck driver, who was required to drive at least 2,750 miles per week. The claimant testified that he has worked exclusively as a driver since he dropped out of high school in the eleventh grade. The claimant testified that after he was released to light duty he contacted the respondent, but that the respondent declined to provide him with light duty work within his restrictions.

The facts of this case are strikingly similar to the facts in Breshears, Supra. In Breshears, the claimant hurt his back while painting a ceiling. The Arkansas Supreme Court upheld the Commission's finding that Mr. Breshears was entitled to temporary total disability benefits through the end of his healing period. As in the instant case, Mr. Breshears' doctor had released him to light work, but he could not do the job he had before the injury through his healing period. Like the claimant here, Mr. Breshears did not have a high school degree and his work experience background was limited. In Breshears, the Court stated:

Although Dr. Cash released claimant for light work, there was no

testimony pertaining to his ability to earn the same or any part of the wages he was receiving at the time of the injury. The Workers' Compensation Commission is in a better position to evaluate the claimant's ability to earn wages in the same or other employment. And, as in this case, once the Commission has before it firm medical evidence of physical impairment and functional limitations, it has the advantage of its own superior knowledge and experience in weighing the medical evidence of functional limitations together with other evidence of the manner in which the functional disability will affect the ability of the injured employee to obtain or hold a job and thereby arrive at a reasonably accurate conclusion as to the extent of disability.

I find that the preponderance of the evidence shows that due to a work restriction of "one hour at a time" and the fact that the respondent declined to provide the claimant with light-duty, the claimant has suffered a total incapacity to work and is entitled to temporary total disability benefits from June 12, 2007 until the end of his healing period.

In conclusion, I find that the claimant has proved by a preponderance of the evidence that he remains in his healing period and is entitled to additional medical treatment including, but not limited to the treatments provided by Dr. Nunley after June 13, 2007. Based on a

preponderance of the evidence of record, I find that the claimant has proved his entitlement to temporary total disability benefits from June 12, 2007 until the end of his healing period.

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

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PHILIP A. HOOD, Commissioner