

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508639

ANNIE MILLER,
EMPLOYEE

CLAIMANT

LENNOX INDUSTRIES,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 27, 2008

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

Claimant represented by the HONORABLE BRUCE D. ANIBLE,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE BETTY J. HARDY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The claimant and the respondents appeal an
administrative law judge's opinion filed March 11, 2008.
The administrative law judge found that the claimant failed
to prove additional medical treatment was reasonably
necessary. The administrative law judge found that the
claimant was entitled to benefits for one year pursuant to
Ark. Code Ann. §11-9-505. After reviewing the entire record

de novo, the Full Commission affirms the administrative law judge's opinion as modified.

I. HISTORY

Annie Lee Miller, age 32, began working for Lennox in June 2005. The record contains a Lennox Industries, Inc. attendance policy updated March 2005. The attendance policy stated, among other things, "Any employee who accumulates a total of four (4) incidents will be subject to disciplinary action up to and including termination. Any employee can erase from their attendance record one (1) incident for each full calendar month worked without an incident during that month." The attendance policy defined an "incident" as "any time absent from work." The policy contained provisions covering employees who were absent for the purpose of treatment with a workers' compensation physician.

The parties stipulated that the claimant sustained compensable injuries to her left shoulder and hip on August 4, 2005. The claimant testified that she injured her left shoulder and lower back: "I slipped on a coil pad and hit my shoulder and fell on the side of the table, and then the cart opened up, and I hit the floor."

A clinical impression on August 4, 2005 was contusion to the claimant's back and left shoulder. X-rays of the claimant's lumbar spine and left shoulder on August 4, 2005 were negative for trauma. A physician stated on August 5, 2005 that the claimant would be able to return to work the following Monday. The claimant was treated conservatively and received physical therapy. A bone scan on August 23, 2005 was negative.

Dr. Bruce Safman evaluated the claimant on August 29, 2005. Dr. Safman's impression was Lumbar sacroiliac strain, left piriformis syndrome, and soft-tissue injury to the left shoulder. Dr. Safman performed trigger point injections. The impression following an MR scan of the claimant's left shoulder on September 28, 2005 was "Evidence for tendonosis involving the supraspinatus tendon. There is also evidence for fluid in the subacromial bursa as described." The claimant continued following up with Dr. Safman.

The claimant testified that, as a result of the accident, she missed time from work in August and September 2005.

Dr. Safman noted on October 17, 2005, "The patient reports she is still working at modified duty; however, she

is doing most of the tasks associated with her job....I will maintain her on modified duty." Dr. Safman noted on November 21, 2005:

Ms. Miller's insurance company denied the MRI of the lumbar spine as, according to her case manager Cheryl Johnson, there was no objective data to support lumbar pathology.

I have done just about all I can for this individual. I think that she is a maximal medical care improvement relative to my care. She has not responded to any of the medications that I have utilized. The MRI of her shoulder showed some tendinosis in the past.

I do not have any additional modalities to offer her. I do not have any basis for any permanent work restrictions. I thus will release her at maximal medical improvement with a 0% disability rating. There are no work restrictions that I will offer her....

The record contains a Change of Physician Order, dated March 6, 2006, allowing the claimant to change from Dr. Safman to Dr. Christopher Mocek.

The claimant returned to Dr. Safman on March 20, 2006: "Ms. Miller reports that on March 8 she lifted about a 40 pound box. She developed pain in the right shoulder. She has had persistent pain in the left shoulder and lower lumbar spine from a prior injury that she had last year." Dr. Safman's impression was 1. Tendonitis of right rotator cuff. 2. Chronic lumbar strain. 3. Chronic tendonitis of

the left shoulder. Dr. Safman reported on April 3, 2006 that he planned to arrange an MRI of the claimant's right shoulder but noted, "I was informed by her case manager that the patient has applied for a change of physician with the Worker's Comp Commission...."

Dr. Christopher K. Mocek began treating the claimant on April 11, 2006: "The patient is having pain consistent with nerve root irritation from a small disc protrusion on the left in the lower lumbar spine at L4/5 or a small angular tear. MRI imaging should pick up if she has a disk protrusion. Annular tears are usually only seen with discography. The patient may be a candidate for percutaneous disk procedure." Dr. Mocek's impression was 1. Lumbar radiculopathy. 2. Muscle spasms lumbar. 3. Lumbar spine pain. 4. Pain in shoulder joints. 5. Insomnia.

Dr. Mocek's treatment plan included an orthopedic consultation with Dr. Scott Bowen for bilateral shoulder joint pain. Dr. Mocek advised the claimant to maintain a 25 pound weight-lifting restriction at work until further notified.

An MRI of the claimant's lumbar spine on April 12, 2006 was normal.

Dr. Mocek noted on April 13, 2006, "Ms. Miller should remain off of work until 4/14/06 pending resolution of symptoms....Also excused for 4/12/06." The claimant testified that she missed two days of work during April 2006.

Dr. W. Scott Bowen's impression after an examination on April 28, 2006 was 1. Impingement syndrome and tendinitis of both shoulders with mild scapular dyskinesis. 2. Synovitis, left shoulder. Dr. Bowen's treatment included a steroid injection to the claimant's left shoulder and he continued the claimant's work restrictions.

A nerve conduction study of the claimant's lower extremities on May 3, 2006 was normal.

Dr. Bowen's impression on May 19, 2006 was 1. Painful shoulder, etiology unclear, possibly a combination of adhesive capsulitis as a result of the trauma and some mild tendinosis.

The claimant followed up with Dr. Mocek on May 25, 2006: "This is a pleasant patient with a history of low back pain with radiation to the left leg in the anterior distribution. She also has intermittent numbness and tingling in the left leg....It sounds like some of her

problem is work-related by walking on the hard concrete every day. She may try some better shoes which may cause the problem to resolve." Dr. Mocek's assessment was Radiculitis Lower Limb, Low Back Pain, Insomnia, and Pin in Shoulder tendonitis. Dr. Mocek's treatment plan included "Recommend taking one day off per week to get 8 hours continuous sleep....Work 4 hours per day for one month due to fatigue, advance to 6 hours per day next month, and 8 hours per day the third month."

The claimant testified that she took a leave of absence from Lennox beginning May 25, 2006. "I was having back trouble and my shoulder was hurting all the time, and I couldn't sleep at night," the claimant testified. The claimant testified that light duty was not available with the employer. The claimant testified:

Q. As of that date, what is your recollection as to how many incidents you had? And by incidents, I'm referring to the attendance policy at Lennox.

A. Two....

Q. And can you explain to Judge Hogan your understanding of how the attendance policy worked at Lennox?

A. Four incidents and they'll put you on a last chance for termination.

Q. What would cause you to receive an incident?

A. Don't show up for work or if you come in late, they'll give you a half incident....

Q. Is there a mechanism by which an employee could work off an incident, in other words have an incident removed?

A. Yes, sir.

Q. What's required to do that?

A. You work a full month without being late or missing a day, and they will take an incident off.

Q. Okay, and I understand from your records that for the month of April 2006, that initially you were given credit for a work-off, do you recall that?

A. Yes. sir.

A representative of MetLife informed the claimant on June 1, 2006, "The information we have received for your claim indicates your disability is work related. The Lennox International Inc. plan does not cover work-related disabilities. Since we have been notified that your condition is work-related, your disability claim has been denied...." However, the MetLife representative told the claimant on June 12, 2006, "We have reviewed your claim for disability benefits and have approved your claim from May 26, 2006 through July 23, 2006....Your benefits are payable effective June 2, 2006."

Dr. Brent Sprinkle, D.O. evaluated the claimant on June 27, 2006 and assessed the following:

1. Lumbar strain.
2. As far as her fatigue and sleep challenges and shoe requirements, those would not be indicated as a direct result of her lumbar strain injury....
3. I do not think a discogram is indicated....Because it is a controversial treatment and diagnostic test to begin with....It would provoke pain....She has a normal-appearing disc, and I would not recommend percutaneous disc decompression, because it would accelerate degenerative disc disease, and there is no evidence that it provides any long-standing benefit for lumbar strain injuries....The trigger point injection improved her low back pain significantly, although not for a long time, verifying that the trigger point is the source of her pain and not an invisible annular tear.
4. I would not agree that she has any indication of a problem with the left L4 nerve root, because she does not have left L4 nerve root pattern pain, nor does she have an abnormal patellar reflex which is transmitted through the left L4 nerve root.
5. I see nothing here to justify permanent work restrictions. She is at maximum medical improvement. She could try a TENS unit since that has not been tried and the stimulator in therapy helped her.
6. She could have 2 additional trigger point injections. Those were offered to her today, but she declined....

Dr. Bowen's impression on June 27, 2006 was left shoulder stiffness. Dr. Bowen recommended arthroscopic surgery. Dr. Bowen performed surgery on July 12, 2006: "1. Left shoulder manipulation. 2. Arthroscopic surgery with

subacromial bursectomy." The post-operative diagnosis was "1. Minimal adhesive capsulitis. 2. Mild subacromial bursitis otherwise intact rotator cuff, intact labrum and articular surfaces."

Dr. Bowen stated during a July 17, 2006 follow-up visit, "She is currently has no use of the left arm at work. She could do some light hand work." Dr. Bowen again returned the claimant to light duty on August 14, 2006. Dr. Bowen's impression on September 19, 2006 was "1. Resolved adhesive encapsulitis and subacromial bursitis....I think she has reached her MMI....I will have her return to work on Tuesday, September 20 with no restrictions....An impairment rating will be forthcoming."

The parties stipulated that temporary total disability benefits were paid from July 12, 2006 to September 19, 2006.

The claimant testified that, despite the full release from Dr. Bowen, "I couldn't hardly raise my arm up and keep it up for a long time." The claimant testified that her employment was terminated "for incidents" on September 20, 2006. Despite termination of the claimant's employment, the claimant's supervisor testified that work within the claimant's restrictions was available. Nevertheless, the

record contains a Lennox Industries Change Of Status form for Annie Miller effective September 21, 2006. The form indicated that the claimant's employment was terminated "for incidents."

Dr. Bowen informed the respondent-carrier on September 28, 2006, "I have released Ms. Miller from my care as of September 19, 2006. She had reached maximum medial (sic) improvement with regard to her left shoulder, which we diagnosed with adhesive capsulitis and subacromial bursitis. Ms. Miller was taken to surgery on 07-12-06 at which time I performed a manipulation of the shoulder under anesthesia as well as arthroscopic subacromial bursectomy. She has had physical therapy. At this point, she has reached maximum medial (sic) improvement and her examination findings are essentially normal. She has full range of motion, no strength deficits about the shoulder or rotator cuff and no instability. As a result there are no permanent ratable impairments for this particular injury. I have authorized her to return to work as of September 20, 2006 with no work restrictions."

Dr. Sprinkle's impression on October 17, 2006 was lumbar degenerative disease, lumbar strain, and lumbar

myofascial pain. Dr. Sprinkle stated that the claimant could return to work at full duty.

The parties stipulated that the claimant received short-term disability benefits and unemployment benefits.

Dr. Mocek saw the claimant on October 16, 2007 and recommended lumbar discography.

A pre-hearing order was filed on October 24, 2007. The claimant contended that she remained symptomatic and needed additional medical treatment with Dr. Mocek. The claimant contended that she was entitled to temporary total disability benefits from May 25, 2006 to July 11, 2006. The claimant contended that the employer unreasonably refused to return her to work, and that she was entitled to "the difference between indemnity benefits paid and the claimant's average weekly wages lost for the period of September 20, 2006 to September 20, 2007 pursuant to Ark. Code Ann. §11-9-505(a)(1)."

The respondents contended that all appropriate benefits had been paid. The respondents contended that they had not violated Ark. Code Ann. §11-9-505(a) and that the claimant was terminated for cause. The respondents alternatively requested an offset against short-term disability benefits.

The respondents contended that additional treatment for the claimant's shoulder was not reasonably necessary.

The parties agreed to litigate the issues of additional medical treatment; additional temporary total disability benefits; refusal to return the claimant to work pursuant to Ark. Code Ann. §11-9-505(a); offset pursuant to Ark. Code Ann. §11-9-411; and fees for legal services.

An administrative law judge found, in pertinent part:

2. The claimant has failed to prove that she is entitled to temporary total disability benefits for fatigue and insomnia.
3. The respondents are directed to pay one year of benefits pursuant to Ark. Code Ann. §11-9-505.
4. All appropriate medical expenses have been paid. The claimant has failed to prove that additional medical treatment is reasonable and necessary.

The claimant and respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The claimant must prove by a preponderance of the evidence that

she is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, an administrative law judge found that additional medical treatment was not reasonably necessary. The claimant contends that she is entitled to additional treatment with Dr. Mocek and follow-up visits with Dr. Bowen. The parties stipulated that the claimant sustained compensable injuries to her left shoulder and hip. The respondents provided medical treatment following an impression of contusion to the claimant's back and left shoulder. An x-ray of the claimant's lumbar spine on August 4, 2005 was negative for trauma. Dr. Safman treated the claimant for a lumbar sacroiliac strain and soft-tissue injury to the left shoulder. Dr. Mocek began treating the claimant on April 11, 2006 following a change of physician. Dr. Mocek recommended further MRI imaging and discography. Dr. Mocek also referred the claimant to Dr. Bowen to treat the claimant's shoulder.

An MRI of the claimant's lumbar spine on April 12, 2006 was normal. A nerve conduction study of the claimant's lower extremities on May 3, 2006 was normal. Dr. Sprinkle evaluated the claimant on June 27, 2006 and assessed lumbar strain. The record shows that Dr. Sprinkle's assessment of the claimant was based on a lengthy interview and discussion with the claimant and a thorough physical examination. Dr. Sprinkle's assessment was based on a general physical examination of the claimant including a hands-on examination of the claimant's lower extremities, cervical spine, lumbar spine, standing, gait, and skin temperature. Dr. Sprinkle opined that a discogram was not reasonably necessary to treat the claimant's lumbar strain. It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Full Commission finds that Dr. Sprinkle's opinion in the present matter is credible and entitled to significant probative weight. The claimant did not prove that discography or percutaneous procedures as recommended by Dr. Mocek were reasonably necessary in connection with the compensable injury. Dr. Mocek expressly reported on October 16, 2007

that the claimant had finished a program of physical therapy. Moreover, the claimant on appeal does not ask for continued physical therapy with Dr. Mocek or any other physician. The claimant requests additional diagnostic testing in the form of diskography and CT scanning. The Full Commission finds that the respondents are not liable for this recommended treatment by Dr. Mocek.

B. Temporary Disability

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).

In the present matter, an administrative law judge found that the claimant was not entitled to temporary total disability benefits "for fatigue and insomnia." The Full Commission does not affirm this finding. The parties stipulated that the claimant sustained compensable injuries

to her left shoulder and hip on August 4, 2005. Dr. Safman diagnosed a soft-tissue injury to the claimant's left shoulder. The claimant was able to return to modified work some days and missed work some days. Dr. Bowen, an orthopedic surgeon, began treating the claimant's left shoulder on April 28, 2006. Dr. Mocek recommended additional work restrictions on May 25, 2006 and the claimant requested a leave of absence beginning May 25, 2006. The claimant testified that her shoulder was hurting.

The Full Commission finds that the claimant remained within a healing period for her compensable left shoulder injury and was totally incapacitated from earning wages beginning May 25, 2006. We note that the respondents began paying temporary total disability on July 12, 2006, the date Dr. Bowen operated on the claimant's shoulder. Dr. Bowen assessed maximum medical improvement on September 19, 2006. The Full Commission finds that the claimant proved she was entitled to temporary total disability compensation from May 25, 2006 until September 19, 2006.

C. Return to work

Ark. Code Ann. §11-9-505(a) (Repl. 2002) provides:

- (1) Any employer who without reasonable cause refuses to return an employee who is injured in

the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

Before Ark. Code Ann. §11-9-505(a) applies several requirements must be met. The employee must prove by a preponderance of the evidence that she sustained a compensable injury; that suitable employment which is within her physical and mental limitations is available with the employer; that the employer has refused to return her to work; and that the employer's refusal to return her to work is without reasonable cause. *See, Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). At a minimum the statute requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary. *Id.* The period of refusal lasts as long as the employer is doing business not to exceed the one-year limit for payment of additional benefits. *Id.*

The administrative law judge in the present matter directed the respondents to "pay one year of benefits pursuant to Ark. Code Ann. §11-9-505." The Full Commission affirms this finding. The parties stipulated that the claimant sustained compensable injuries to her left shoulder and hip (back) on August 4, 2005. As we have stated earlier in the opinion, the claimant was able to return to modified work duties some days but also missed time from work on other days because of treatment and symptoms related to her compensable injuries. Dr. Safman noted on October 17, 2005 that the claimant was working at modified duty. The claimant was off work beginning May 25, 2006, and we have found *supra* that the claimant proved she was entitled to temporary total disability compensation beginning that date. The respondents began paying temporary total disability on July 12, 2006, the day Dr. Bowen performed surgery.

On September 19, 2006, Dr. Bowen assessed maximum medical improvement and stated that the claimant could return to work on September 20, 2006. The claimant testified that she attempted to return to work on September 20, 2006. We note the hearing testimony of Michael W. Strabala, the claimant's supervisor:

Q. What exactly did you tell her?

A. I can't remember exactly what I told her. I would imagine I probably went up front and I told her that, "You're being terminated because you exceeded the four incident rule, and you haven't been here for a year, so you're not eligible for last chance." Something of that nature....

Q. Well, were you the person that terminated her, informed her that she was terminated?

A. I'm the one that informed her that she was being terminated....

Q. During the Spring of 2006, I understand that Ms. Miller worked for Lennox under work restrictions, and that Lennox had accommodated her restrictions, is that true?

A. I don't know the time frame, but I know she had some work restrictions....

Q. Okay, and I also understand from your previous testimony, your deposition, that you had stated that had Ms. Miller not been terminated in September of 2006, that Lennox continued to have work available for her within those restrictions she had in the Spring of 2006, is that true?

A. If she could perform her job with those restrictions.

Q. Okay. Did you still have work available for her?

A. Yeah.

Q. Did you continue to have work available for her?

A. Yeah.

Q. Yes?

A. Yes....To the best of my knowledge, she was always given a job that she could perform under those weight restrictions.

Q. And that Lennox could have and would have accommodated her had she not been terminated?

A. I'm not going to say they could have or would have. There are some times that we can meet some people's weight restrictions, but to do her job, yes.

Q. Okay, and that remains true through the present?

A. As far as her job. I can't speak for everybody.

Q. I'm sorry, but I think you mean yes, but is that yes?

A. Yes.

Q. Okay.

A. As far as her job. I can't speak for every employee at Lennox.

Q. But as concerns Ms. Miller?

A. Exactly.

The parties stipulated that the claimant sustained compensable injuries. The evidence in the present matter shows that suitable employment within the claimant's physical and mental limitations was available with the employer. The evidence also demonstrates that the employer refused to return the claimant to work, and that the

employer's refusal to return the claimant to work was without reasonable cause. The respondent-employer terminated the claimant's employment as a part of enforcing an attendance policy. However, the record does not show that the respondent-employer offered additional training to the employee or reclassified the claimant's position. The respondent's enforcement of its attendance policy cannot outweigh the requirements announced by the Court in *Torrey, supra*.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she was entitled to additional temporary total disability compensation from May 25, 2006 through July 11, 2006. The Full Commission finds that the claimant proved she was entitled to the difference between indemnity benefits paid and the claimant's average weekly wages lost for the period of September 20, 2006 until September 20, 2007, pursuant to Ark. Code Ann. §11-9-505(a)(1). We find that the claimant did not prove she was entitled to discography or percutaneous procedures recommended by Dr. Mocek. We note from the record that Dr. Bowen, an authorized treating surgeon, has not scheduled any follow-up treatment for the

claimant's shoulder. The claimant asserts on appeal that she is entitled to continued follow-up visits with Dr. Bowen. The claimant testified at hearing that she wanted a "new doctor" to examine her shoulder. Nevertheless, we again note from the record that Dr. Bowen has released the claimant and has not scheduled any follow-up treatment. There is no controverted treatment of record from Dr. Bowen for the claimant's shoulder or from any other physician with regard to the claimant's shoulder. The record indicates that the respondents have paid for all of Dr. Bowen's treatment to date, including surgery. The claimant has not attempted to return to Dr. Bowen or any other physician for follow-up care with regard to her shoulder. The Full Commission therefore affirms the administrative law judge's opinion as modified. The respondents are entitled to an appropriate offset pursuant to Ark. Code Ann. §11-9-411(a). The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant failed to prove by a preponderance of the evidence that she was entitled to additional medical treatment. However, I must respectfully dissent from the finding of the majority that the claimant was entitled to temporary total disability benefits for the period May 25, 2006, through July 11, 2006. I also dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she was entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a)(1). In my opinion, the claimant has failed to meet her burden of proof.

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 Hwy. Trans Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Without an initial finding of compensability, a claimant cannot be awarded temporary total disability benefits or additional medical treatment. See, Ark. Code Ann. §11-9-102(4) (D) (Supp. 2005). Although objective medical findings are not directly necessary for the Commission to award temporary total disability benefits, such findings are required for the underlying injury to be compensable. Williams v. Prostaff Temporaries, 64 Ark. App. 128, 979 S.W.2d 911 (1998), aff'd, Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). When an injured employee is totally incapacitated from earning wages and remains in his/her 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/her 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; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The question of when the healing period has ended is a factual determination for the Commission. Arkansas Highway & Trans. Dep't. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, supra.

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. McWilliams, supra; Mad Butcher, supra. 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. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

Recurring symptoms may give rise to a subsequent healing period, after the original one has ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191, 737

S.W.2d 661 (1987). Where a second complication is found to be a natural and probable result of the first injury, the employer remains liable. Id. This liability includes liability for additional temporary benefits when the employee undergoes a second, distinct healing period. Id.

The evidence demonstrates that the claimant, after she was terminated by the respondent employer, applied for unemployment benefits. She indicated on her application for unemployment benefits that she could begin work immediately, that she could work full-time and that she did not have any disabilities that would limit her ability to perform job duties. It is of note that the claimant continued receiving unemployment benefits while she was working because she failed to report her employment to the Department of Workforce Services (DWS). In my opinion, the claimant's credibility is suspect at best based upon her failure to inform DWS she was working. Accordingly, I find that the claimant is not entitled to temporary total disability benefits from May 25, 2006, through July 11, 2006.

I also find that the claimant is not entitled to benefits under Ark. Code Ann. §11-9-505(a)(1) which provides:

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay the employee the difference between benefits received and the average weekly wage lost during the period of such refusal, or for a period not exceeding one (1) year.

In order to establish her claim for additional benefits under this section, the claimant has the burden of proving that the following four requirements are met:

- (1) That she sustained a compensable injury;
- (2) That suitable employment within the claimant's physical and mental limitations was available with her employer;
- (3) That the employer refused to return her to work;
- (4) That the employer's refusal to return the claimant to work was without reasonable cause.

See Torrey v. City of Ft. Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996). In Torrey, supra the Courts stated that:

At a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

My review of the evidence demonstrates that the claimant was terminated from the respondent employer for violating the attendance policy. The testimony of Mr. Tim Brown demonstrates that the policy is clear that if an employee misses work for something that is not indicated in the policy as excused, the employee receives an incident. After an employee receives four incidents, they are subject to termination. Mr. Brown testified that to qualify for a "last chance" the employee must have been employed by the respondent employer for at least a year and their performance is also evaluated. The claimant was not eligible for "last chance" and was therefore terminated.

Mr. Michael Strabala, the claimant's direct supervisor, testified that the claimant was a material

handler and was responsible for removing parts in the stockroom, obtaining the items listed on the past list in the exact quantities listed, taking them to the assembly line or area assigned to the employee and driving a forklift as necessary. He stated that the claimant had a problem doing her assigned duties and he had given her written warnings. He further testified that he had noted in her performance review deficiencies in her job performance and attendance. In addition, Mr. Strabala had conferences with the claimant about her attendance, including a meeting with her regarding a written warning on February 6, 2006, which showed she had three and a half incidents.

It is clear that the claimant's termination in September 2006 was for cause. The respondent employer did not unreasonable refuse to return the claimant to work. In fact, after her compensable injury on August 4, 2005, the respondent employer returned the claimant to work in October of 2005, and she continued working until she took off work in May of 2006 for fatigue. The claimant admitted that the respondent employer

accommodated her restrictions until she was terminated for cause.

Therefore, after considering all of the evidence, I find that the claimant failed to prove that she was entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a)(1). The evidence, in my opinion, demonstrates that the claimant was terminated for cause and was not eligible for "last chance" because of the fact her performance had been deficient. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

I agree with the majority opinion finding that the claimant was entitled to temporary total disability benefits from May 25, 2006 through July 11, 2006 and that she proved entitlement to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1). However, I must respectfully dissent from the majority's failure to award follow-up medical treatment with Dr. Bowen and the majority's

finding that the claimant failed to prove entitlement to additional medical treatment with Dr. Mocek.

The claimant contended entitlement to additional medical treatment from two authorized treating physicians for two separate compensable injuries. She asked for continuing medical treatment from Dr. Bowen for her compensable shoulder injury. She requested additional medical treatment from Dr. Mocek for her compensable back injury. The majority specifically found that the claimant was not entitled to discography or a percutaneous procedure as recommended by Dr. Mocek. While no specific finding is made concerning the medical treatment of Dr. Bowen, the majority opinion affirms the Administrative Law Judge's opinion which contained a finding that the claimant failed to prove that additional medical treatment is reasonable and necessary.

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). What constitutes reasonably

necessary medical treatment is a question of fact. Ark. Dept. of Correction v. Holybee, 46 Ark. App. 232, 878 S.W.2d 420 (1994). It is well settled that a claimant may be entitled to on going medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. Artex Hydroponics, Inc. v. Pipin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

With regard to the treatment by Dr. Bowen, the evidence of record clearly establishes that the claimant should have been awarded these benefits. Dr. Bowen was the claimant's authorized treating physician for her acknowledged compensable shoulder injury. Dr. Bowen performed a left shoulder manipulation under anesthesia as well as an arthroscopic subacromial bursectomy on July 12, 2006. On September 19, 2006, Dr. Bowen released the claimant indicating that her next appointment would be "PRN" (return as needed). The respondents took the position that the claimant could not return to Dr. Bowen. At the time of the hearing, the claimant did not believe that she had functional use of her left arm and shoulder and was experiencing

stiffness in her left shoulder. While Dr. Bowen was not recommending any particular additional treatment at the time of his last examination, it is reasonable to assume that the claimant may require further treatment in the future, especially in light of the fact that she was continuing to experience significant difficulties as of the date of the hearing in this matter. There is simply no need to rush to a conclusion on the claimant's future medical treatment. If Dr. Bowen continues to have nothing further to offer the claimant in the future, the medical treatment will be self-terminating and the respondents would not be obligated for any additional expenses. On the other hand, if it turns out that the claimant wishes to return to Dr. Bowen or there is additional treatment recommended by Dr. Bowen, then the claimant will face unnecessary difficulty in having her condition evaluated and treated.

For the above mentioned reasons, I find that the claimant is entitled to return to her authorized treating physician for additional evaluation and treatment of her shoulder injury.

With regard to the claimant's request to be provided with the additional recommendations of Dr. Mocek, the evidence supports a finding in favor of the claimant on this issue as well. Dr. Mocek was selected by the Workers' Compensation Commission as the claimant's treating physician for her compensable back injury, after a change of physician request. Dr. Mocek began to treat the claimant on April 11, 2006. On that date, Dr. Mocek determined that the claimant's complaints were consistent with either nerve root irritation from a disc protrusion at L4-L5 or a annular tear of that disc. He said that an MRI scan would pick up the disc protrusion but that a discogram would be needed to see the annular tear. An MRI was performed which ruled out a disc protrusion. After the MRI did not uncover the claimant's problem, Dr. Mocek decided to run EMG/ nerve conduction studies to determine whether the claimant had some underlying neuropathy. These tests were normal. After these two studies did not identify the problem, Dr. Mocek recommended three months of physical therapy along with medications and a return evaluation to access the results of physical therapy.

Only after physical therapy proved to be unsuccessful in relieving the claimant's symptoms, Dr. Mocek recommended the discogram.

The evidence reveals that Dr. Mocek attempted extensive conservative treatment before recommending diskography. He suspected that the claimant suffered from an annular tear from the very beginning and performed all of the less invasive tests to rule out the annular tear before recommending the discogram. All of these tests pointed to the conclusion that the claimant did, in fact, suffer from an annular tear. It is reasonable to allow Dr. Mocek to perform this last test in order to determine whether his initial suspicions were correct. If they were, then the claimant can receive treatment in the form of a percutaneous procedure. If the claimant does not suffer from an annular tear, then the percutaneous procedure would not be necessary. The claimant has a right to have her compensable injury properly diagnosed and treated.

In denying the claimant additional medical treatment for her compensable back injury, the majority relies on the opinion of Dr. Sprinkle. He said that the

claimant sustained a lumbar strain and that a discogram was not reasonably necessary to treat a lumbar strain. The majority says that the opinion of Dr. Sprinkle "is credible and entitled to significant weight". There is absolutely nothing credible about the opinion of Dr. Sprinkle. He was hand selected by the respondents to provide them with an opinion which would set up a defense to the payment of expenses related to a discogram and a percutaneous procedure recommended by Dr. Mocek. Respondents' medical case manager set up the appointment with Dr. Sprinkle and directed the claimant to appear. In fact, the case manager escorted the claimant to Dr. Sprinkle's office and remained present during the entire visit. According to the claimant, her entire appearance at Dr. Sprinkle's office lasted approximately ten to fifteen minutes. Under these circumstances, I do not find Dr. Sprinkle's opinions persuasive and take issue with the majority's reliance on them.

And it should be noted that even Dr. Sprinkle recommended additional treatment for the claimant's back

injury, even though it was not the same type treatment recommended by Dr. Mocek.

Therefore, I find that the claimant proved that the additional treatment recommendations of Dr. Mocek were reasonably necessary for the treatment of her injury.

For the reasons stated above, I concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner