

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504733

DAVID PYLE,
EMPLOYEE

CLAIMANT

WOODFIELD, INC.,
EMPLOYER

RESPONDENT

RETENTION MANAGEMENT SERVICES,
TPA

RESPONDENT

OPINION FILED JUNE 16, 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.

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
May 17, 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 hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence a total incapacity to

earn wages after August 8, 2006, due to his compensable injuries. Therefore, claimant's requested period of TTD is denied.

4. Claimant has proven by a preponderance of the credible evidence that the additional testing now recommended by Dr. Lipke (myelogram/CT scan) is reasonably necessary and related to the claimant's stipulated compensable injuries of May 4, 2005; and, therefore, the responsibility of the respondents.

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 May 17, 2007 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs & dissents.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Based upon a de novo review of the record in its entirety, I agree that the claimant has proved by a preponderance of the

evidence that the additional testing now recommended by Dr. Jay Lipke (myelogram/CT scan) is reasonably necessary and related to the claimant's compensable injuries of May 4, 2005 and the respondent must pay for the treatment. However, as I also find that the claimant has also proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 8, 2006 until a date yet to be determined, I must respectfully dissent on this issue.

The claimant worked for the respondent as a truck driver, pulling a flatbed trailer. On May 4, 2005, he sustained compensable injuries to his back and left knee. The respondent referred the claimant to an orthopedic surgeon, Dr. Jay Lipke. Dr. Lipke treated the claimant's back and knee injuries for several months, specifically opining that the claimant was temporarily totally disabled from May 10, 2005 until December 6, 2005. On December 6, 2005, Dr. Lipke stated:

David Pyle returns today for followup of his work related back injury. He is now seven months post injury and still complaining of some stiffness in his hip. Since I last saw him he states he has lost 8 pounds, but has developed other medical problems. Apparently he has developed a seizure disorder and is seeing Dr. Fred Murphy in Magnolia

for further evaluation and treatment in this regard.

On exam today he walks without a limp and has a negative straight leg raising test.

I feel he will reach the end of his healing period on January 1, 2006 and I anticipate a 5% permanent partial impairment to the body as a whole based on Fourth Edition, page 3/102, 4th Edition, AMA Guidelines.

I have again counseled him to continue weight reduction, attempt smoking cessation and walk up to 45 minutes per day. I do not feel he will be able to return to work as a truck driver as he is apparently developing a seizure disorder and when this is under control, he may be able to work in some other line of employment or go off long term disability.

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. Here, there is no dispute that Dr. Lipke opined that the claimant initially reached the end of the healing period on January 1, 2006, and was released from Dr. Lipke's care with a 5% anatomical impairment rating to the body as a whole for his lumbar injury. The majority also correctly finds, by affirming and adopting the Administrative Law Judge, that the claimant has entered a second healing period, as evidenced by Dr. Lipke's report dated August 8, 2006, which states:

David Pyle returns today and is still having significant back and left lower extremity pain. He has quit smoking and lost 30 pounds, but is still very symptomatic. He has been using ibuprofen as an analgesic. His wife relates that he has episodes of left lower extremity collapses and he nearly falls to the ground.

Exam today reveals restricted motion of the back and pain with the straight leg raising maneuver, but good reflexes in his lower extremity.

IMPRESSION:

Work related back injury with persistent sciatica.

PLAN:

1. Robaxin and Tylenol #3 for his symptomatic relief.
2. I am going to order a myelogram with CT to follow to see if there is an operative problem that may relieve his persistent symptoms, and allow him to return to gainful employment...

However, the majority incorrectly finds that the claimant did not prove the second prong of the temporary total disability test, total incapacity to work due to his compensable injuries, finding instead that the claimant is totally incapacitated due to his pre-existing, non related medical conditions. I disagree.

The claimant was able to work with his pre-existing, non related conditions up until the date of his compensable injuries. He treated with Dr. Lipke, who took him off work, due to his back and knee injuries, from May 10, 2005 until December 6, 2005, when he was released with a 5% rating. The claimant has not yet returned back to work, and testified at the hearing that he is unable to return to work due to his compensable injuries.

The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant did

not return back to work during the time period immediately after his release from Dr. Lipke's care, not due to his compensable injuries, but due to pre-existing, non related medical conditions. However, the majority's determination regarding the claimant's seizure disorder and other pre-existing conditions is not supported by the medical evidence of record. The only medical evidence that can be construed as an opinion on how the claimant's seizure disorder or other pre-existing conditions impacted his work status at all, are secondary comments made by Dr. Lipke, an orthopedic surgeon, who did not treat the claimant for seizure disorder, and has only treated the claimant's compensable back and knee injuries.

In fact, when asked by the claimant's attorney to clarify his position on the claimant's compensable back and knee injuries, Dr. Lipke signed a letter confirming that it is reasonable and necessary for the claimant to remain off work pending the additional testing Dr. Lipke has recommended for his compensable injuries.

Accordingly, Dr. Fred Murphy, who has treated the claimant for all of his pre-existing, non related

conditions, as well as his back and knee injuries, stated in a letter dated January 26, 2007:

This letter verifies that David Pyle is under my care for multiple medical problems. One of his medical problems involves back and knee pain, which are in need of ongoing care and diagnostic studies. His present condition precludes him from work due to his persistent pain and non-resolution of the underlying etiology.

I find that the evidence of record shows that Dr. Murphy, who is in the best position to determine the source of the claimant's incapacity to work, as he has treated all of the claimant's conditions, has opined that he is totally disabled due to his back and knee injuries, not his pre-existing non related conditions. Furthermore, Dr. Lipke, who is the treating doctor for the claimant's back and knee injuries has also opined that the claimant should remain off work due to his back and knee injuries.

While the majority's conclusion may, at first glance, make sense due to the undeniable fact that the claimant has multiple medical conditions, it is, at second glance, based not on the evidence of record, but on conjecture and speculation, which, even if plausible, cannot take the place of proof. Ark. Dept. of

Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Here, there is simply no basis in the evidence of record for the majority's determination that the claimant is totally disabled due to his pre-existing, non related conditions. There is, however, a preponderance of evidence indicating that the claimant is, in fact, totally disabled due to his compensable back and knee injuries. While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v. Pro-transportation, ___ Ark. App. ___, ___ S.W.2d ___, (2007). Here, there simply is no contradiction in the medical testimony, and it cannot be disregarded. Dr. Murphy has opined that the claimant is totally disabled due to his compensable back and knee injuries. Dr. Lipke has stated that additional testing is reasonable and necessary for his compensable injuries and that it is reasonable and necessary for the claimant to remain off work pending the results of these tests.

In conclusion, I find that the claimant has proved by a preponderance of the evidence that the additional testing now recommended by Dr. Lipke (myelogram/CT scan) is reasonably necessary and related to the claimant's compensable injuries of May 4, 2005 and the respondent must pay for this treatment. I also find that the claimant has proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 8, 2006 until a date yet to be determined.

For the aforementioned reasons, I must respectfully concur & dissent.

PHILIP A. HOOD, Commissioner