

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705427

KENNY SHADDOCK, EMPLOYEE	CLAIMANT
SUPERIOR INDUSTRIES, SELF-INSURED EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 22, 2008

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed November 16, 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. On April 30, 2007, the relationship of employee-self employer-third party administrator (sic) existed between the parties.

3. On April 30, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$369.00 for total disability and \$277.00 for permanent partial disability.
4. On April 30, 2007, the claimant sustained an injury to his neck or cervical spine that was in the form of a herniation of the C6-7 intervertebral disc and resulting stenosis or impingement of the existing nerve roots. Specifically, the claimant has proven by medical evidence, which is supported by objective findings, the actual existence of this physical injury. The claimant has further proven by the greater weight of the credible evidence that this injury arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to his body, required medical services, and resulted in disability.
5. The medical services provided the claimant by and at the direction of Dr. David Sitzes and Dr. Richard Kyle constitute reasonably necessary medical expenses for the claimant's compensable injury. Further, the additional medical services recommended by Dr. Kyle also represent reasonably necessary medical services for the claimant's compensable injury. Specifically, the claimant has proven that these medical services were necessitated by or connected with his compensable injury, and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

6. The claimant has been rendered temporarily totally disabled, as a result of the effects of his compensable injury of April 30, 2007, for the period beginning May 27, 2007, and continuing through a date yet to be determined.
7. The respondents have denied the occurrence of any compensable injury to the claimant's cervical spine on April 30, 2007, and have controverted this claim in its entirety.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted benefits herein and hereinafter awarded directly to the claimant.

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 November 16, 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.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

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. Specifically, I concur in the findings that the claimant proved by a preponderance of the evidence that he sustained a compensable injury and was entitled to reasonable and necessary medical treatment. However, I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to temporary total disability benefits from May 27, 2007, through a date to be determined. In my opinion, the claimant has failed to meet his 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.

In Palazzollo 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).

Further, Ark. Code Ann. §11-9-526 provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

The evidence demonstrates that the claimant was released to return to work light duty. The respondent employer made suitable work available for the claimant that was within his restrictions. The claimant's wife was taking him to work when he was performing his light-duty function. However, he had difficulty getting to work and ended up being terminated for missing too many days. The Administrative Law Judge found that essentially the claimant justifiably refused to come to work because the medication he was taking limited his driving. The respondent's are not responsible for providing transportation to the claimant. A job was made available to the claimant and he did not show up. Under the provisions of Ark. Code Ann. §11-9-526 his refusal was not justifiable. The respondents had light duty work available for the claimant. Therefore, he is not entitled to temporary total disability benefits.

This case is analogous to a recent Court of Appeals decision Coleman v. Pro Transportation, Inc., 97 Ark. App. 338, S.W.3d (2007). In the Coleman case, the claimant was released to light duty and the respondent employer advised the claimant by letter that a position was available. The claimant failed to appear for light duty work. The claimant acknowledged that he was aware that a job was made available for him but that he was not able to report for duty because he had difficulty driving. The Court of Appeals affirmed the Full Commission's denial of temporary total disability benefits during the period that light duty was offered. The Court noted that the claimant offered no persuasive evidence or argument regarding his refusal to return to light duty employment. In this case, the claimant has also offered no persuasive evidence or argument as to why he refused to return to light duty employment. According to Coleman, inability to drive is not a justifiable reason. Accordingly, 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