

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511490

BILLY C. SMITH, EMPLOYEE	CLAIMANT
LEER LIMITED PARTNERSHIP, EMPLOYER	RESPONDENT NO. 1
ST. PAUL FIRE & MARINE INS. CO., C/O ST. PAUL TRAVELERS, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 27, 2008

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

Claimant represented by HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondent represented by HONORABLE ROBERT MONTGOMERY
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The respondents appeal, and claimant cross-appeals from a decision of the Administrative Law Judge filed October 17, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on September 1, 2004, when claimant sustained a compensable injury.
3. The claimant was earning an average weekly wage of \$645.00.
4. The respondents have paid some medical benefits.
5. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 22, 2005, to a date yet to be determined.
6. The claimant has proven by a preponderance of the evidence that the additional medical treatment as prescribed by Dr. Bruffett, including the fusion surgery, is reasonable and necessary.
7. The claimant's attorney is not entitled to a statutory attorney's fee since the claimant has only proven entitlement to additional medical treatment.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

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. Specifically, I agree that the claimant proved by a preponderance of the evidence that

the additional medical treatment as prescribed by Dr. Bruffett, including the fusion surgery, is reasonable and necessary medical treatment. However, I disagree with the majority's determination that the claimant has failed, due to the application of Ark. Code Ann. §11-9-526, to prove his entitlement to temporary total disability benefits. After a de novo review of the record, I find that Ark. Code Ann. §11-9-526 does not bar the claimant from the receipt of temporary total disability benefits from June 20, 2005, until a date yet to be determined, 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).

"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.

Here, it appears to be undisputed that the claimant was in his healing period during the time period in question. It also appears to be undisputed that the claimant was working for the respondent under a limited duty, 25-30 pound lifting restriction as per Dr. Adametz in March 2005. Ark. Code Ann §11-9-526 states that 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. Pillow v. Sanyo Manufacturing Co. Workers' Compensation Commission Full Opinion filed October 10, 2007 (F404094). An offer of suitable employment is a condition precedent to applying Ark. Code Ann. § 11-9-526. Webb v. Webb, Workers' Compensation Commission Full Opinion filed June 29, 2000 (E906144). Work must be available within the employee's physical restrictions. McCuller v. Democrat Printing & Lithograph Co., Workers' Compensation Commission Full Opinion filed April 28, 1998 (E608050). Moreover, the claimant must unjustifiably refuse employment which is suitable to his capacity. Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995). Here, the claimant was obviously not totally incapacitated from earning wages before March 22, 2005. The medical records show that the claimant had been released to return to work with a limited duty, no lifting over 25-30 pounds restriction. The respondent provided work within these restrictions. There is

no evidence of record to indicate that the claimant's capacity to work changed on March 22, 2005, regardless of whether the claimant's actions may or may not have entitled the respondent to raise Ark. Code Ann. §11-9-526 as a bar to the claimant's receipt of temporary total disability benefits.

However, Dr. Adametz's report dated June 20, 2005 states:

At this point, I think the best thing to do would be to try to get him back on with his life. I have done all of the simple things I can. I do feel like he could do light to medium duty work at this point, and lifting up to about 25 lbs. He unfortunately says that whenever he bends for any length of time, he starts hurting very severely and so he wouldn't be able to get into positions where he had to stay bent for any length of time. He unfortunately has lost his job, and so this is his biggest problem is he doesn't have anything he can get back to. If he could receive assistance with any kind of vocational rehab and could get to a light or medium type duty job, then I would just encourage him to try to live with his. If he just can't live with it or continues to have a lot of trouble, then the only other thing I would have to offer him would be a fusion....

Based on the claimant's medical condition, as evidenced by the medical record, I find that regardless of Ark. Code Ann. §11-9-526, the claimant has proved by a preponderance of the evidence that, beginning, at least on June 20, 2005, that he is disabled according to Ark. Code Ann. §11-9-102 (8) and entitled to temporary total disability benefits until a date yet determined pursuant to Breshears, supra. While the majority is correct that Ark. Code Ann. §11-9-526 may have barred the claimant's receipt of TTD benefits during the time period that he **was** able to work and was fired for cause and/or quit, due to the claimant's worsening medical condition, which is clearly outlined in the medical record, the respondent's Ark. Code Ann. §11-9-526 defense has been rendered moot. The correct analysis, as outlined in Breshears, Supra, clearly shows that the claimant is entitled to TTD benefits after June 20, 2005.

In conclusion, I find that the claimant proved by a preponderance of the evidence that the additional medical treatment as prescribed by Dr. Bruffett, including the

fusion surgery, is reasonable and necessary. I also find that, while the claimant did not prove entitlement to temporary total disability benefits for the entire time period requested, the medical records show that the claimant has been temporarily totally disabled since June 20, 2005 and is entitled to TTD benefits from that date until a date yet to be determined.

For the aforementioned reasons I must respectfully concur & dissent.

PHILIP A. HOOD, Commissioner