

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509984

WILLIAM SPURGEON,  
EMPLOYEE

CLAIMANT

LOWE'S,  
EMPLOYER

RESPONDENT

SPECIALTY RISK SERVICES, INC.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 14, 2008

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

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

Respondent represented by the HONORABLE RANDY MURPHY,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed in part,  
affirmed in part.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed November 1, 2007. The administrative law  
judge found that the claimant proved he was entitled to  
temporary total disability benefits and additional medical  
treatment. After reviewing the entire record *de novo*, the  
Full Commission reverses the administrative law judge's  
award of temporary total disability, but we affirm the

administrative law judge's award of additional medical treatment.

I. HISTORY

William Scott Spurgeon, age 35, testified that he was hired as a delivery driver for Lowe's in about December 2000. Mr. Spurgeon described his duties as "Move appliances, furniture, lumber, load the truck, and put it in their house, and deliver it, and set it up." The parties stipulated that the claimant sustained a compensable injury to his low back on August 25, 2005. The claimant testified:

Q. And what happened to you on August 25<sup>th</sup>, 2005?

A. Me and my partner, we delivered to a mobile home in Springdale, and we were taking a dryer out of a house, and we were walking out backwards through the step, because there wasn't a lot of room to move. And his porch broke on the first top rung as I was stepping out backwards. My leg got hung up, and then I was falling backwards, and I went to step on the next step to catch myself from falling, and I - I broke through its step, and then my feet were hung up. And then when I fell backwards, my back hit the last rung, and I was upside down. The dryer fell back on me.

Q. So did you hurt something?

A. Yes....My lower back.

The claimant was treated on August 25, 2005: "Patient reports that he was at a home taking a dryer out of a home stepping backwards when the step gave way and he fell

through the step. Patient reports that he started falling backwards and fell through the next step. Patient reports that when he landed on his back on the rest of the steps the dryer fell on top of him. Patient reports that he is having some back pain and has some bruising." The record indicates that Dr. Ronald Bertram diagnosed lumbar and thoracic back strain, muscle spasms, and bruised ribs. Dr. Bertram planned conservative treatment and returned the claimant to restricted work on August 26, 2005.

The claimant testified that he returned to work at light duty: "I was sitting down between - alternating between just being a customer service associate and answering the phone, but the longer that I was at work, the more pain that I was getting."

It was noted on September 14, 2005 that an MRI of the claimant's thoracic spine was normal. The impression from an MRI of the lumbar spine on September 14, 2005 was "Bulging disc at L4-L5 but no evidence of significant compromise of the canal or foramina." Dr. Bob Wilson, III diagnosed right lumbar radiculopathy and bulging L4-5 disc on September 14, 2005. Dr. Wilson noted on September 19, 2005, "The claimant cannot return to work due to his/her

work-related injury until he has been evaluated by neurosurgeon."

Dr. Kelly R. Danks, a neurosurgeon, examined the claimant and reported on September 27, 2005, "MRI reveals very minimal disc bulge at 4-5. He has a normal thoracic spine." Dr. Danks assessed "Musculoskeletal injury to the lumbar spine. I am going to have him seen by physical therapy. I will see him back after he has completed with Joseph."

Dr. Danks noted on November 11, 2005, "He has only had two weeks of physical therapy. He has only had very mild relief. He certainly wants to avoid any surgical treatment." Dr. Danks recommended epidural steroid injections. Dr. Danks noted on December 9, 2005, "William returns. His therapy has not helped him at all. He is set up to see Dr. Cannon for epidural steroid injections. I will see him back after Dr. Cannon has completed these." Dr. R. David Cannon performed an injection on January 20, 2006.

Dr. Danks noted on January 20, 2006 that the claimant should remain off work until treatment with Dr. Cannon was completed. Dr. Danks noted on February 24, 2006, "William

returns. His epidural steroid injections have not helped him. He has some chronic back pain. I think he has reached maximum medical improvement. He has a 5% disability rating. He is not to do any lifting heavier than 40 pounds." The claimant testified that he was paid for a permanent impairment rating but that he was still in pain. The claimant testified that he returned to work at light duty on the sales floor.

The record indicates that Dr. Danks provided the claimant a prescription for orthopedic shoes on March 27, 2006. The claimant's testimony indicated that the respondents would not approve the prescription for orthopedic shoes. The claimant testified that he fell and broke his right leg while driving a four-wheeler on or about July 4, 2006. The claimant testified that the four-wheel accident did not hurt his back.

Dr. Danks corresponded with the claimant's attorney on July 11, 2006 and stated, "In response to your letter, I understand that a prescription had been written for orthopaedic shoes. I do not have a record of my office prescribing for this, but if that is the case, I do not have any problems with him wearing orthopaedic shoes. Hopefully,

it will improve some of his back pain. He has failed to respond to any measures of treatment, and I doubt that any further treatment is going to help him at this time."

The claimant testified that he underwent surgery on or about July 12, 2006 to repair the broken bone in his right leg and that he returned to work in about October 2006.

Dr. D. Luke Knox, a neurosurgeon, saw the claimant on November 30, 2006:

Mr. Spurgeon is a 34-year-old, right-handed white male who has had difficulty with back and right leg pain. He is a former patient of Dr. Danks. His pain extends into his hip and right groin and mediolateral leg, down to the knee....He works all day, and he is quite miserable with leg pain at night. He has had no recent Cortisone or physical therapy. Apparently, he busted his right lower extremity and that has caused some difficulty with his gait and some pelvic obliquity. Otherwise, his reflexes were symmetric....

I asked Mr. Spurgeon to go ahead and redo his MRI scan, as I suspect that there are some significant changes from his MRI scan one (sic) over a year ago. We are also going to check him out on an RS stimulator. He was given a shot of Depo-Medrol. I will plan to follow him up in a month to see how things are going....

Dr. Knox wrote an x-ray report on November 30, 2006:

AP, lateral, flexion and extension, oblique, lumbar spine, demonstrating five non-rib-bearing lumbar vertebrae with spina bifida occulta of S1. There is no evidence of bony abnormality. Normal anterior, middle, and posterior columns. There is mild disc space settling at L4-5 and L5-S1, with

no evidence of instability on flexion and extension views. The oblique views are otherwise unremarkable. I question the possibility of a spondylo defect at L4 on the left, demonstrated best on the oblique views. Otherwise unremarkable lumbar spine films.

The claimant followed up with Dr. Knox on March 6, 2007: "We reviewed his new MRI scan. As previously described, he has a significant bulging disc at 4-5 with neural foraminal encroachment. I suspect that this is the culprit of his persistent complaints. I recommended that Scott undergo a Marcaine disc space injection at 4-5 to assess the possibility of resolution of his pain. I informed him that it will only last four to eight hours. I will plan to follow him up after he has had a chance to complete the above. This will be arranged through Dr. Cannon at his clinic."

Dr. Knox noted on May 10, 2007 that the claimant reported no improvement with a Marcaine injection. Dr. Knox informed Dr. Wilson, "I have asked that he go through an RS stimulator trial to see if that may not afford some benefit to his persistent complaints....If he does have to return, I would probably consider the possibility of a facet injection."

A pre-hearing order was filed on August 8, 2007. The claimant contended that he was entitled to temporary total disability benefits and that he was entitled to additional medical treatment. The respondents contended that all appropriate benefits had been paid.

Dr. Knox began providing the claimant with off-work slips on August 22, 2007. Dr. Knox corresponded with Dr. Wilson on August 28, 2007:

William S. Spurgeon was seen in the Neurosurgery Clinic on 8/28/07. As you know, he has been followed in the past for continuing difficulty with back and leg pain dating back to 2005. It does increase with Valsalva and requires frequent position changes for comfort. He had no benefit from his RS stimulator trial. He is still requiring narcotic medications. He is on no physical therapy. He has been off work for the past week due to his persistent difficulties. Historically, in the past I had always believed that his problems were probably related to the L4-5 level; however, he underwent an MRI scan back in January that was, for the most part, unrevealing with the exception of the disc space changes noted at L4-5.

I informed Mr. Spurgeon that the next step is to go ahead and proceed with myelography, which will be arranged in the near future. I will keep you apprised of his progress, as he was counseled in detail concerning the risks and complications.

The last off-work slip of record from Dr. Knox indicated that the claimant should remain off work until a follow-up appointment on November 1, 2007.

A lumbar myelogram and post-myelogram CT were done on September 11, 2007, with the following impression:

There are bilateral pars defects at L4 without spondylolisthesis or evidence of instability. There is a diffusely bulging disc at L4-5 but definite neural encroachment to account for his right radiculopathy is not appreciated. Mild bulging of the disc at L5-S1 without obvious neural encroachment.

Dr. Knox reported on September 21, 2007:

I had him undergo myelogram and post-myelogram CAT scan, and rather impressively, it demonstrated a bilateral pars defect that is at the L4 level, this being associated with the underlying bulging disc. I am about ready to convince myself that that is the culprit of his persistent complaints. As you know, he has been miserable for quite some time. I am going to send him over to Drs. Ennis and Swicegood to undergo Marcaine injections of the pars defect, bilaterally, to see if perchance that may not alleviate his symptoms for four to six hours. The next step is to consider an L4-5 disc space injection with Marcaine. I will have him return to see me after he has had a chance to complete the above....

A hearing was held on September 26, 2007. The claimant testified that he was being scheduled for another injection treatment with Dr. Cannon. The claimant testified that he did not feel he was able to return to work, because "I just have a lot of pain....My legs and my back, the - the pain that I have, walking around the store. They've cut so many hours back on the store that it's there's hardly anybody to

help in the store....There's the chances that I did get the chance to sit down are virtually gone, where I can't alternate."

The administrative law judge found, in pertinent part:

3. Claimant has met his burden of proving ... that he is entitled to additional medical treatment for his compensable injury. This includes, but is not limited to, medical treatment provided by and at the direction of Dr. Knox.
4. Claimant is entitled to temporary total disability benefits beginning August 22, 2007 and continuing through November 1, 2007.

The 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 he 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).

An administrative law judge found in the present matter that the claimant proved he was entitled to additional medical treatment, including treatment by and at the direction of Dr. Knox. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury on August 25, 2005, when he fell backwards with a dryer falling back on him. Diagnostic testing showed a bulging disc at L4-5 but no physician has recommended surgery. Dr. Danks diagnosed a musculoskeletal injury to the claimant's lumbar spine. Dr. Danks pronounced maximum medical improvement on February 24, 2006 and the respondents paid a rating. The claimant subsequently began treating with Dr. Knox.

The Full Commission finds that the claimant sustained a compensable musculoskeletal injury on August 25, 2005. We find that the claimant reached the end of his healing period no later than February 24, 2006, the date Dr. Danks found maximum medical improvement. However, it is well-settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury.

*Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d

845 (1983). The Full Commission agrees in the present matter that the claimant was a credible witness, and that the claimant proved he was entitled to additional conservative treatment as managed by Dr. Knox. We therefore affirm the administrative law judge's finding that the claimant proved he was entitled to additional medical treatment as directed by Dr. Knox.

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). The healing period is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway and Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of the end of the healing period is a question of fact for the

Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

In the present matter, the claimant sustained a compensable injury to his low back on August 25, 2005. The claimant was treated conservatively with no recommendations for operative intervention. Dr. Danks, a treating physician, assessed a musculoskeletal injury to the claimant's lumbar spine. Dr. Danks pronounced maximum medical improvement on February 24, 2006. The Full Commission finds that Dr. Danks' assessment of maximum medical improvement signaled the end of the claimant's healing period for his compensable injury. An employee is not entitled to temporary total disability after the end of his healing period. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). Nor does continued pain extend the employee's healing period. *Parker, supra*. The evidence in the present matter indicates that the claimant's compensable musculoskeletal injury had stabilized no later than February 24, 2006.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's findings in part and we affirm in part. The Full Commission

reverses the administrative law judge's finding that the claimant proved he was entitled to temporary total disability benefits beginning August 22, 2007 through November 1, 2007. The claimant reached the end of his healing period no later than February 24, 2006 and was not entitled to temporary total disability after that time. We affirm the administrative law judge's finding that the claimant proved he was entitled to additional medical treatment, including such treatment provided and directed by Dr. Knox. For prevailing in part on appeal, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to 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. Specifically, I concur in the majority opinion that the claimant has failed to prove entitlement to additional temporary total disability

benefits; however, I dissent from the finding that additional medical treatment is reasonable and necessary.

Throughout the course of claimant's treatment his symptoms have remained the same. Regardless of the treatment administered, the claimant has continued to complain of pain. Oral pain medication, physical therapy, steroid injections, epidural steroid injections, and Marcaine injections into the disc space have provided no relief. Thus, it is evident that the claimant's condition has stabilized and nothing else in the form of treatment, that has not already been tried, will likely improve his condition. This was noted by Dr. Danks in February 2006 when he found that the claimant had reached maximum medical improvement and released the claimant to return to work with permanent lifting restrictions of 40 pounds. Dr. Danks assessed the claimant with a permanent impairment rating of 5% to the body as a whole which in and of itself indicates that the claimant would continue to suffer from the permanent effects of his injury, i.e. chronic pain. Following this release by Dr. Danks, the claimant returned to work for respondents and continued to work, despite his pain, until he was involved in the four-wheeler accident in

July of 2006. After being released from that injury in October of 2006, the claimant continued to work until August 2007. Pursuant to the claimant's testimony, he was able to work for respondents until they made staffing changes.

Based upon the evidence, I find that the claimant has failed to prove by a preponderance of the evidence that he remained within his healing period and totally incapacitated from earning wages after he was released to return to work by Dr. Danks in February of 2006. Dr. Danks assessed the claimant with a permanent impairment rating of 5% to the body as a whole. A permanent impairment cannot be assessed until the permanent nature of the claimant's condition is known. The permanent nature of one's condition is not known until one has reached a point of stability in the healing process from which additional medical treatment will unlikely improve the condition to a greater extent. In my opinion, the evidence fails to support a finding that the claimant's healing period did not end in February of 2006 or that he entered a new healing period in August of 2007. The claimant's condition has remain constant, without any evidence of improvement from any of the different forms of treatment administered to him throughout the course of his

treatment. The claimant's condition in August of 2007, is virtually identical to his condition in February of 2006, when Dr. Danks assessed the claimant at maximum medical improvement and assigned him a 5% permanent impairment rating. Admittedly, the claimant continues to experience pain; however such pain is not unexpected in light of the claimant's permanent impairment rating. However, pain, in and of itself, is not sufficient to extend one's healing period once a period of stability has been reached.

Moreover, the fact that Dr. Knox may now have convinced himself that the claimant's pain is the result of bilateral pars defect, does not operate to extend the claimant's period of healing. The treatment proposed by Dr. Knox for this condition has already been tried and has failed. Thus, there is no known treatment which is likely to improve the claimant's degenerative pain.

With regard to the claimant's request for additional medical treatment as provided and recommended by Dr. Luke Knox, I find that the claimant has failed to prove by a preponderance of the evidence that such treatment is reasonable and necessary medical treatment in connection with his compensable injury.

The claimant was deemed to be at maximum medical improvement by Dr. Danks in February of 2006. The claimant continued to complain of pain and eventually returned to Dr. Knox for treatment. Initially Dr. Knox suspected the bulging disc at L4-5 to be the cause of the claimant's pain. This was also Dr. Danks's impression. Dr. Knox recommended Marcaine injections at that time. The claimant received no relief. Now that the myelogram has confirmed Dr. Knox's suspicion of spondylo or pars defect, he again wants to try this failed injection treatment. In my opinion, Dr. Knox has not recommended any additional medical treatment that has proven beneficial to the claimant. It is unfortunate for the claimant that he has this degenerative condition, however, there is no evidence that additional treatment will offer the claimant any relief. All treatment rendered after the claimant was released by Dr. Danks has simply been to confirm prior diagnoses and repeat failed treatment. Accordingly, I must respectfully dissent from the majority opinion finding that additional medical treatment is reasonable and necessary.

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 & dissents.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. I agree that the claimant has proved by a preponderance of the evidence that he is entitled to additional medical treatment as directed by Dr. Knox. However, I disagree with the majority's finding that the claimant is not entitled to additional temporary total disability benefits. Based on a de novo review of the record, I find that the claimant has proved that he is entitled to temporary total disability benefits as awarded by the Administrative Law Judge, from August 22, 2007 continuing through November 1, 2007, and therefore, I must respectfully dissent.

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). 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).

The majority's determination that the claimant's healing period ended on February 24, 2006, although purportedly based on Dr. Dank's assessment of maximum medical improvement on that date, is not supported by the evidence of record. Dr. Dank's February 24, 2006 report states:

William returns. His epidural steroid injections have not helped him. He has some chronic back pain. I think he has reached maximum medical improvement. He has a 5% disability rating.

The claimant credibly testified that even though he was released by Dr. Danks he continued to have pain in his low back and right leg which eventually resulted in him seeking additional medical treatment from Dr. Knox.

I find, as did the Administrative Law Judge, that Dr. Danks' February 24, 2006 report supports the claimant's credible testimony that he continued to have low back complaints as a result of his compensable injury. Dr. Danks indicates that the epidural injections had not helped the claimant's condition. Dr. Danks also noted that the claimant "has some chronic back pain." Despite the fact that Dr. Danks declared the claimant to be at maximum medical improvement, he did not indicate that the claimant no longer had symptoms, but to the contrary, indicated that the claimant continued to have chronic back pain. Therefore, the majority's statement: "The evidence in the present matter indicates that the claimant's compensable musculoskeletal injury had stabilized no later than February 24, 2006,"

inasmuch as the majority's statement is based on Dr. Danks' report, is clearly in error.

Furthermore, Dr. Knox's medical reports clearly indicate that Dr. Knox attributes the claimant's continued low back problems to the original compensable injury. In his report of August 28, 2007, Dr. Knox notes that the claimant has had continued difficulty with his back and leg dating back to 2005. Dr. Knox took the claimant off work and the claimant remained in an off-work status through at least November 1, 2007. 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, I find, based on the claimant's credible testimony and Dr. Knox's reports, which are not contradicted by Dr. Danks' February 24, 2006 report, and which were credited by the majority on the issue of additional medical treatment, that the claimant has proved by a preponderance of the evidence his entitlement to

temporary total disability benefits from August 22, 2007  
until November 1, 2007.

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

PHILIP A. HOOD, Commissioner