

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F709461

LINDA K. FRANKS,
EMPLOYEE

CLAIMANT

HEBER SPRINGS SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 8, 2009

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

Claimant represented by the HONORABLE LAURA BETH YORK,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD
WORLEY, 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 April 22, 2009. 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 the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including August 30, 2007.
3. The claimant's average weekly wage at the time of her injury was \$347.00 this entitled her to a

weekly temporary total disability rate of \$232.00, and a permanent partial disability rate of \$174.00.

4. The claimant sustained a compensable injury to her neck on August 30, 2007. Some benefits have been paid for the claimant's lumbar spine, right shoulder, and hip conditions.

5. This claim for additional benefits has been controverted.

6. The claimant proved by a preponderance of the evidence that she is entitled to additional medical treatment, in form of work hardening, for her compensable neck injury of August 30, 2007.

7. The claimant proved by a preponderance of the evidence that she is entitled to temporary total disability compensation from February 19, 2008 until October 22, 2008.

8. The claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715.

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 April 22, 2009 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she was entitled to additional benefits. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The evidence demonstrates that the claimant sustained a minor cervical strain when she slipped and fell on August 30, 2007. The claimant was treated conservatively and released to return to work on February 19, 2008. Since that date, she has made absolutely no effort to return to work, even in a light duty capacity. The respondent employer was willing to accommodate her and left her job open for as long as they could. However, the claimant made no effort to return to work. The claimant exaggerated her symptoms and gave poor effort on the Functional Capacity Evaluation (FCE). In my opinion, her claims for additional medical treatment and additional temporary total disability benefits are not supported by the evidence.

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal-Mart, supra; GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996).

In the present case, the evidence demonstrates that the claimant complained of back pain in the year prior to her admittedly compensable injury. She was treated on October 10, 2006, after slipping and falling. She was given prescriptions for Lorcet and Zanaflex. A few months later, the claimant was seen on January 22, 2007. She was given prescriptions for Lorcet, Flexeril and Naprosyn.

After the claimant fell in August of 2007, she was treated with anti-inflammatory drugs and analgesic medication by Dr. Ashabranner. The claimant complained of pain in the cervical, right upper trapezius, lower lumbar and right hip areas. She was referred to Dr. Bruce Safman who diagnosed the claimant with myofascial pain after reviewing her MRI which revealed a small herniation at C5-6 and a "very small syrinx." The claimant continued to seek treatment from Dr. Safman who noted in January of 2008 that he felt the claimant's workers' compensation injury did not cause her diffuse myofascial pain problem.

Dr. Safman requested the claimant undergo an FCE which she completed on February 12, 2008. The claimant gave unreliable effort. The claimant was asked to describe her pain level. She stated that it was a 9.

Dr. Safman's report of February 19, 2008, stated that the claimant's FCE results were "meaningless" due to her inconsistent effort. Dr. Safman noted that the claimant was at maximum medical improvement and released her with no permanent anatomical impairment rating. He also noted that the claimant's MRI findings were degenerative and appeared to be long standing.

The claimant requested a change of physician to Dr. Christopher Mocek who examined the claimant on March 18, 2008. The claimant did not disclose her prior treatment for back complaints. Due to the claimant's complaints of are pain, Dr. Mocek performed an EMG on the claimant. Dr. Mocek treated the claimant with physical therapy and epidural steroid injections.

On October 22, 2008, the claimant was examined by Dr. Sprinkle for an Independent Medical Evaluation. Dr. Sprinkle noted that the claimant had a cervical strain injury and he did not have any further recommendations associated with the claimant's work related injury. He felt that the claimant's complaints were "more likely related to the natural sequelae of degenerative disc disease." He also pointed out that Dr. Mocek was not qualified to perform the EMG that he

performed. He noted that the claimant's arm complaints would not be related to the work injury.

After conducting a de novo review of the evidence, I cannot find that the claimant is entitled to additional medical treatment. When I consider the fact that the claimant had back problems which required her to seek medical treatment in the year before her injury, the fact that Dr. Safman released the claimant to return to work with no permanent anatomical impairment, the fact that the claimant gave an unreliable effort on her FCE, the fact that she failed to disclose her prior history of back pain to Dr. Mocek and the fact that Dr. Sprinkle has opined that the claimant's complaints were related to degenerative disc disease and not her compensable injury, I find that the claimant has failed to meet her burden of proof. Accordingly, I must dissent from an award of additional medical treatment.

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 her healing period, she 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 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).

In my opinion, a review of the evidence demonstrates that the claimant is not entitled to temporary total disability benefits for the period February 19, 2008, through October 22, 2008. The claimant was released by Dr. Safman as having reached maximum medical improvement on February 19, 2008. The claimant's subjective complaints of pain, which are not related to her work related injury, are the reason Dr. Mocek took the claimant off work. Further, the claimant has made no effort to work since she was injured other than one week in 2007. Simply put, there is no evidence that the claimant was totally incapacitated from working

during that period of time. Therefore, I must dissent from an award of temporary total disability benefits.

KAREN H. MCKINNEY, COMMISSIONER