

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705106

CASEY LONG, EMPLOYEE	CLAIMANT
POPE LAWN CARE, EMPLOYER	RESPONDENT
CYPRESS INSURANCE CO., CARRIER	RESPONDENT

**OPINION FILED APRIL 16, 2009**

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

Claimant is not represented by counsel, but appears *pro se*.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal from the decision of the Administrative Law Judge finding that the claimant remains temporarily totally disabled for which he is entitled to additional indemnity benefits and reasonable and necessary medical expenses. Based upon our de novo review of the entire record, without giving the benefit of the doubt to either party, we find that the claimant has failed to meet his burden of proof. Therefore, we find that the decision of the Administrative Law Judge must be reversed and this claim for additional benefits denied and dismissed.

The claimant sustained an admittedly compensable injury to his left ankle on May 10, 2007, for which he has received indemnity and medical benefits. Claimant contends that he remains within his healing period and entitled to additional disability and medical benefits. Conversely, respondents contend that the claimant has received all benefits to which he is entitled. We agree with respondents.

The claimant appeared at the hearing with a packet of medical records which he had not shared with respondents. As such, respondents objected to the admission of such evidence as it was not exchanged prior to the hearing in accordance with the Prehearing Order. The Administrative Law Judge sustained this objection, but did allow the claimant to proffer the exhibits. No motion has been made by claimant to consider these records on appeal.

The burden of proof rests upon the claimant to prove the compensability of his claim. Carman v. Hayworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is indeed compensable, that the

claimant's injury is job-related or that the claimant is entitled to benefits. Crouch Funeral Home, et al v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. §11-9-704(c) (2). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704(c) (4); Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The only evidence of record consist of claimant's testimony and that of his mother and father. A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). A witness's close familial relationship to a party has been held to demonstrate a sufficient possibility of

bias so as to treat the witness's testimony as disputed, see Sykes v. Carmack, 211 Ark. 828, 202 S.W.2d 761 (1947), and the testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989).

Claimant testified that he received medical treatment at the emergency room on the day of his injury prior to coming under the treatment of Dr. Claiborne Moseley, an orthopedic specialist. Claimant described his injury as to the ligaments in his ankle. After being released by Dr. Moseley in July of 2007, the claimant testified that he tried to work, but was fired because he was unable to do the work. The claimant obtained a Change of Physician Order on October 17, 2007, which changed his treating physician from Dr. Moseley to Dr. Michael Haughey, a podiatrist. Dr. Haughey released the claimant from his care on October 27, 2007. After being released by Dr. Haughey, the claimant obtained medical treatment from Dr.

Long, his primary care physician, until his Medicaid ran out on his nineteenth birthday.

The claimant's mother testified that she was with the claimant on his visits to both Dr. Moseley and Dr. Haughey. With regard to the claimant's release by Dr. Haughey, Mrs. Long testified that she asked how could the claimant be released when he still had bruises on his ankle to which Dr. Haughey advised, "...he said its always gonna be that way; that ain't gonna get no better, and that's the reason why he recommended the brace on his foot." Likewise, the claimant's mother testified that when the claimant was seen by his primary care physician, Dr. Long, he told the claimant - "...he said, well, you have to live with it, cause it's not gonna get no better...." Finally, on cross-examination by respondent's attorney, the claimant's mother admitted that she or her husband were present when the claimant was treated by Dr. Moseley, Dr. Haughey, and Dr. Lamb and that all three physicians advised that there was nothing further that could be done to improve the claimant's condition.

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). 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 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 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.)

In order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that he remains within her healing period; and (2) that he has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Since the claimant's injury is a scheduled injury, temporary total disability benefits are only

appropriate when he proves by a preponderance of the evidence that he has not returned to work because he remained in his healing period. Fendley v. Pea Ridge School District, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (December 20, 2006). See also, Ark. Code Ann. §11-9-521(a) (Repl. 2002); Wheeler, supra. In Fendley v. Pea Ridge School District, supra, the Court agreed with the Commission's analysis that a claim for temporary total disability for a scheduled injury cannot be considered in a vacuum and stated that "the employee's failure to return to work must be causally related to the injury..."

Although the claimant testified that his ankle remains painful, pain is not sufficient to extend one's healing period if the injury has stabilized. As noted above, the healing period ends when the employee is as far restored as the permanent nature of his 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 claimant did not present any evidence that he remains within his healing period for his compensable injury. On the contrary, all the evidence of record reveals that no additional medical treatment has been offered to the claimant and he has been advised by more than one physician that his condition is not going to improve. The claimant was provided with a brace and told that he would have to learn to live with his condition.

The burden of proof rests upon the claimant. The claimant did not present any medical evidence to prove that he remains within his healing period. When asked by the Administrative Law Judge to describe his present problems of what was keeping him from working, the claimant testified that his ankle does not swell as bad as it used to, but that the he has a whole lot of pain, and that it is still black on one side. However, the record is void of any evidence establishing that these conditions are continuing to require active medical treatment. On the contrary, the claimant and his mother both testified that all of his physicians have released him from their care advising that no further

medical treatment was warranted. The only evidence with regard to the extent of the claimant's healing period, comes directly from the claimant and his mother, and overwhelmingly proves that the claimant's compensable injury is as far restored as the permanent nature of his injury will permit, that his ankle injury has become stable, and that nothing in the way of additional medical treatment will improve his condition.

Accordingly, we find the claimant has failed to prove by a preponderance of the evidence that he remains within his healing period or that any additional medical treatment is recommended for his compensable injury. Therefore, we find that the decision of the Administrative Law Judge awarding additional temporary total disability benefits and medical benefits must be reversed and this claim for additional benefits denied and dismissed.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant has proved by a preponderance of the evidence her entitlement to additional reasonably necessary medical treatment in connection with his May 10, 2007 compensable left ankle injury. I also find, as did the Administrative Law Judge, that the claimant remains in his healing period and is entitled to temporary total disability benefits. As such, I must respectfully dissent from the majority's reversal of the Administrative Law Judge's opinion.

Ark. Code Ann §11-9-508 mandates that an employer provide such medical services as may be reasonably necessary in connection with an employee's injury. Cox v. Klipsch & Associates, 71 Ark. App. 433, 30 S.W.3d 764 (2000). What

constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corporation v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). Medical treatment intended to reduce or enable an injured employee to cope with chronic pain may constitute reasonably necessary medical treatment. Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission Opinion filed June 20, 1991 (D704562). Here, the claimant sustained an admittedly compensable injury on May 10, 2007 when his left lower extremity was run over by equipment while the claimant was unloading trees for the respondent. The claimant was transported to the emergency room of St. Bernards medical center by ambulance following the accident. After his discharge from the hospital, the claimant was treated by Dr. Claiborne Mosley II, a Jonesboro orthopedic surgeon. The claimant treated with Dr. Mosley until July 3, 2007 when Dr. Mosely released the claimant to return back to work. The claimant attempted to return to work for the respondent but the respondent terminated his employment because the claimant could not perform the work due to continued

problems with his left ankle. The claimant requested a Change of Physician and was seen by a podiatrist, Dr. Haughey, who furnished the claimant a left ankle brace.

The healing period is defined as "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). The credible evidence of record shows that the claimant continued to wear the brace furnished to him by Dr. Haughey. The claimant testified that he continues to experience pain, swelling and weakness and that his left ankle is still discolored. The claimant testified that he has been unable to return to work due to the continued symptoms in his left ankle. In fact, the credible testimony of the claimant shows that his employment with the respondent was terminated by the respondent because the claimant was unable to do the work due to continued left ankle symptoms. Because the claimant sustained a compensable injury, remains within his healing period, and has not returned to work due to symptoms of the compensable injury, he remains entitled to the payment of temporary total disability benefits. Ark. Code Ann. §11-9-521, Wheeler

Construction Company v. Armstrong, 73 Ark. App. 146, 41  
S.W.3d 822 (2001).

For the aforementioned reasons I must respectfully  
dissent.

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PHILIP A. HOOD, Commissioner