

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F413066

ROBIN RAY, EMPLOYEE	CLAIMANT
CITY OF EUREKA SPRINGS, EMPLOYER	RESPONDENT
MUNICIPAL LEAGUE WCT, CARRIER	RESPONDENT

OPINION FILED JULY 8, 2009

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

Claimant represented by HONORABLE MARK FREEMAN, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 6, 2008.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 13, 2008, and contained in a pre-hearing order filed August 14, 2008, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits for 2005. Even though claimant may have remained within

her healing period during 2005, she has failed to prove by a preponderance of the credible evidence that she suffered a total incapacity to earn wages during that period of time.

3. Claimant has failed to prove by a preponderance of the evidence that she was totally incapacitated since her release by Dr. Knox on April 12, 2006. Therefore, claimant is not entitled to additional temporary total disability benefits subsequent to that date including benefits beginning on July 18, 2007.

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.

A. WATSON BELL, Chairman

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 that the claimant has remained in her healing period and has also been totally incapacitated from earning wages since January 20, 2005 and is entitled to temporary total disability benefits from that date until a date yet to be determined, therefore, I must respectfully dissent.

This claim was the subject of a prior hearing, held on May 24, 2005. In addition to finding that the claimant had proven a compensable injury to her lower back, in an opinion dated August 18, 2005, an Administrative Law Judge found that the claimant was entitled to temporary total disability benefits from September 30, 2004 through October 19, 2004. That opinion found that as of October 19, 2004 there was no indication that claimant was to continue off work; therefore, she was not entitled to additional

temporary total disability benefits at that time. That opinion was not appealed and is res judicata.

The medical records show that the claimant returned to her treating physician, Dr. Viane France, on January 20, 2005, complaining of pain in her hips and her left lower back. The record indicates that she was prescribed Flexeril for spasm and Vicodin for pain. The claimant was not prescribed physical therapy due to the fact that workers' compensation was refusing to pay for treatment. The record indicates that the doctor wanted the claimant to follow up with physical therapy when workers' compensation was "straightened out." The medical record then indicates that the claimant returned to Dr. France on August 29, 2005 to continue care for her back injury. The claimant was prescribed Percocet for pain and referred to physical therapy. On this date, Dr. France notes that the claimant is not working. On September 27, 2005, Dr. France again prescribes Percocet and Flexeril. The claimant returned to Dr. France on November 8, 2005. During this time period the claimant continued with physical therapy.

In a report dated December 5, 2005, Dr. Knox noted that x-rays revealed a bulging disc at the L4-5 level. A subsequent MRI confirmed the presence of the bulging disc.

In a report dated January 19, 2006, Dr. Knox indicated that he suspected that claimant had a significant disc herniation at the time of her injury. He also indicated that a significant component of that herniation had resolved on its own, but that claimant was left with an unstable L4-5 level. Although surgery was considered as an option, Dr. Knox indicated that he would prefer that claimant not have surgery. Instead, Dr. Knox ordered aggressive physical therapy as well as a lumbosacral stabilization evaluation and a RS stimulator. In a report dated February 24, 2006, Dr. Knox again recommended that claimant pursue non-operative treatment. He indicated that he did not believe surgical options would benefit claimant's condition and he continued to treat claimant with medication and physical therapy. In a report dated April 12, 2006, Dr. Knox indicated that claimant had not tolerated her physical therapy. He indicated that she had eight appointments and missed four. He also noted that claimant indicated that she had felt too sore to follow up with physical therapy. Dr. Knox went on to state: "she demonstrated such a lack of willingness to try to get herself better, that I was inclined to discharge Robin from my clinic." Dr. Knox went on to recommend that claimant close her workers'

compensation claim and he assigned her a permanent physical impairment rating in an amount equal to 7%. Dr. Knox also recommended that claimant undergo a functional capacities evaluation.

The claimant returned to Dr. France on June 21, 2006 and was treated with pain medications and Flexeril. On September 26, 2006 the claimant underwent an FCE, which showed inconsistent effort, but produced the conclusion that the claimant was able to perform only light, sedentary work. The claimant returned to Dr. France on January 3, 2007 for more treatment for her back injury. On January 17, 2007, the claimant saw Dr. James Blankenship who recommended a home RS Medical stimulator. Dr. Blankenship stated that his goal would be to avoid any type of surgical intervention. The claimant continued to treat with Dr. Blankenship, Dr. France, and Dr. David Cannon for epidural injections up through May 16, 2008.

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).

After reviewing the medical record it is clear that the claimant was in her healing period from January 20, 2005, continuing through to the date of the present hearing. I do not place any weight on Dr. Knox's assessment of maximum medical improvement on April 12, 2006, as this appears to be based more on frustration over the claimant missing physical therapy appointments than on the claimant's actual physical condition. The claimant continued to treat, with the goal of improving her condition immediately after April 12, 2006, and in fact continued to receive medications, physical therapy, and ultimately epidural

steroid injections. These treatment measures were not simply for pain management, they were to better the claimant's condition, with the specific goal of avoiding surgery. Therefore, I find the claimant remained in her healing period from January 20, 2005 until a date yet to be determined.

As for her capacity to return to work, I find that the claimant was undergoing consistent medical treatments, including physical therapy appointments and epidural steroid injections. She was prescribed heavy duty pain medications. The claimant credibly testified that she has been unable to work since the date of injury. I find nothing in the record to contradict the claimant's credible testimony. Even the functional capacity evaluation relied on by the Administrative Law Judge to deny this claim actually bolsters the claimant's testimony that she cannot work. It is evident that before this injury the claimant performed manual labor, and is now incapable of performing even light sedentary work. As such, I find that the claimant has been totally incapacitated from work since January 20, 2005 and continuing to a date yet to be determined.

As I find that the claimant remained in her healing period and has remained totally incapacitated from

work during the time periods in question, I find that the claimant is entitled to temporary total disability benefits from January 20, 2005, until a date yet to be determined.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner