

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607399

DAVID THOMAS, EMPLOYEE	CLAIMANT
HOUSING AUTHORITY CITY OF HUGHES, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 23, 2009

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

Claimant represented by the HONORABLE ROBERT J. DONOVAN and the HONORABLE JESSE B. DAGGETT, Attorneys at Law, Marianna, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, 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 July 14, 2008. 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 this claim.
2. On June 28, 2006, the relationship of employee-employer-carrier existed among the parties, when the claimant sustained

an injury to his low back arising out of and in the course of his employment.

3. On June 28, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$278.00/\$209.00, for temporary total/permanent partial disability.
4. The claimant was temporarily totally disabled for the periods June 29, 2006 through January 1, 2007, and continuing (sic) October 2007.
5. The claimant was temporarily partially disabled commencing October 2007, and continuing through the end of his healing period, a date to be determined.
6. The treatment measures recommended by Dr. Jeffrey Kornblum in his August 23, 2007, neurosurgery office note, are reasonable necessary in connection with the claimant's June 28, 2006, compensable injury.
7. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of June 28, 2006.
8. The respondents have controverted the payment of temporary disability benefits to the claimant subsequent to January 1, 2007, and the payment of medical benefits subsequent to August 23, 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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the July 14, 2008, 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 must respectfully dissent from the majority opinion that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment and additional temporary total disability benefits. After conducting a de novo review of the record, I would reverse the decision of the Administrative Law Judge. In my opinion, the claimant is not entitled to any additional benefits.

The claimant was employed by the respondent employer as a maintenance man. On June 28, 2006, the claimant sustained an admittedly compensable injury to his back. The respondent's paid for medical treatment and temporary total disability benefits through January 1, 2007. The claimant was released to return to work effective January 2, 2007. The claimant did not return

to work for the respondent employer but has been working for another employer since 2007.

The medical evidence demonstrates that the claimant initially sought treatment at the Crittenden Memorial Hospital Emergency Room after his accident. He was referred to Dr. Wilfred Onyia. The claimant was treated by Dr. Onyia with pain medication and a referral to physical therapy. The claimant ultimately came under the care of Dr. John Brophy, a neurosurgeon. Dr. Brophy performed a myleogram/CT scan on the claimant and he found "nothing in there" and demonstrated "no evidence of HNP or nerve root compression."

Dr. Brophy indicated in an office note of December 18, 2006, that there was "no indication for surgical intervention" and Dr. Brophy released the claimant to restricted duty on December 18, 2006, for two weeks and to full duty effective January 2, 2007. Dr. Brophy assessed the claimant with a zero percent permanent anatomical impairment rating.

The claimant sought a change of physician with the Commission which was granted. The claimant was seen by Dr. Jeffrey Kornblum who performed an NCV/EMG study on the claimant's left lower extremity, a CT scan of the abdomen, lumbar MRI and a thoracic MRI. In an office note dated August 23, 2007, Dr. Kornblum discussed the

results of the claimant's tests. The NCV/EMG test was normal, the CT scan did not reveal any basis for the claimant's left leg numbness, the lumbar MRI showed degenerative changes but was otherwise negative and the thoracic MRI was normal for the claimant's age. In a note dated December 23, 2007, Dr. Kornblum stated that the claimant had "...degenerative changes in his spine, though he has a significant pain syndrome down his left leg not explained by a structural abnormality."

The claimant contends that he is in need of additional medical treatment in the form of a consultation with a pain clinic and a neurology examination as recommended by Dr. Kornblum for his June 28, 2006, low back injury as well as additional temporary total disability benefits. The claimant maintains that he is having pain in his lower back and into his left leg, with numbness in his left foot. The respondents contend that the claimant reached the end of his healing on January 2, 2007, and have paid all benefits to which the claimant is entitled. I agree with the respondents.

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).

The medical evidence demonstrates that the claimant has had comprehensive, exhaustive testing. All of these tests including a thoracic MRI, lumbar MRI, EMG/NCV, CT scan, and myleogram have all failed to illuminate the physical basis for the claimant's complaints. Simply put, there is absolutely no medical

basis to support the claimant's subjective complaints of pain. The claimant has failed to prove by a preponderance of the evidence that he is entitled to 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 his/her healing period, he 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 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.)

The evidence demonstrates that the claimant was released to return to work without restrictions and without any permanent impairment on January 2, 2007. There is nothing to support the claimant's own self limiting ability to work. All diagnostic testing yielded normal results. No physician has taken the claimant off of work. In fact, the claimant has been working for another employer. The only evidence concerning the claimant inability to work is his own testimony regarding what he felt like he could do which is contradictory to his testimony that he is working. Therefore, I find that the claimant is not entitled to additional temporary total disability benefits.

Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment and the finding that he is entitled to additional temporary total disability benefits. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

