

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F709684

MICHAEL BELIN, EMPLOYEE	CLAIMANT
UNITED PARCEL SERVICES, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 5, 2010

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

Claimant represented by HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and Reversed in Part.

OPINION AND ORDER

The respondent appeals and the claimant cross-appeals a decision by the Administrative Law Judge filed January 25, 2010. Respondent appeals the finding that the claimant proved by a preponderance of the evidence that he was entitled to temporary total disability benefits for the period February 27, 2008 through June 26, 2008, and June 1, 2009 continuing through a date yet to be determined and a finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment.

The claimant cross-appeals the finding that the claimant failed to prove by a preponderance of the evidence that he sustained bilateral shoulder injuries. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we affirm in part and reverse in part the decision of the Administrative Law Judge. We affirm the finding that the claimant failed to prove he sustained bilateral shoulder injuries. However, we reverse the award of temporary total disability benefits.

The claimant was employed by the respondent employer as a pre-loader and he also did HAZMAT spills. On August 3, 2007, the claimant was sorting and loading boxes when he fell against some boxes and injured his back. The claimant did not immediately report the incident but did so the following Monday on August 6, 2007. The claimant reported only a problem with his back. The respondents accepted the claim as compensable and paid benefits accordingly.

The claimant sought and received treatment for his low back from both Dr. Brenda Covington and Dr. Victor Vargas. While receiving treatment from Dr. Covington, the

claimant took part in a functional capacity evaluation ("FCE") on October 25, 2007. The FCE revealed that the claimant actually had "the ability to perform work within the Heavy classification as defined by the U.S. Dept of Labor's guidelines over the course of a normal workday..."

Dr. Covington referred the claimant to Dr. Vargas, who began treating the claimant on December 11, 2007; however, prior to the claimant's initial visit to Dr. Vargas, an MRI was conducted on the claimant's lumbar spine. In his December 11, 2007 report, Dr. Vargas explained that the claimant's MRI showed no specific nerve entrapment in the thoracic spine. There was also no bulging disc or significant narrowing of the foramina. As a result, Dr. Vargas opined that the claimant needed physical therapy. The claimant continued treating with Dr. Vargas for the next several weeks. Then, on February 26, 2008, Dr. Vargas issued a report wherein he stated:

Physical examination shows tenderness to palpation around the supraspinous ligament around T6-T7 and mildly from down to L1 and including T5. There is no paraspinal muscle spasm in the thoracic or thoracolumbar spine.

The patient has been treated for thoracic pain since November 2008, with different nonsurgical treatments without complete relief of the symptomatology. We had tried oral steroids. We tried steroid injections and physical therapy with phonophoresis, electrotherapy and different modalities without complete resolution of the symptomatology. We also tried nonsteroidal analgesic anti-inflammatories orally during those months, and the patient has had these symptoms since August 2007. At this point, after several trials of different modalities of treatment, I do not think that I have anything else to offer this patient. I think that he has reached maximum medical improvement. There is no objectively demonstrated structural lesion in this patient. We have an MRI that shows a small broad-based disk bulge in the upper thoracic spine at at T1-T2 and T2-T3 that does not foramina stenosis(sic) and is very distant from the place that the patient claims is the location of the pain. I explained those findings to the patient and explained that there is no reason to explain why he is not getting better. There is nothing else that I can offer him at this time. I do not think he has a

structural injury, so [he] can go back to working full duty.

Upon the respondents' receipt of Dr. Vargas's February 26, 2008 report, the respondents ceased paying temporary total disability benefits to the claimant. The claimant then conferred with his manager, Mr. Matt Williams, about returning to work for UPS.

The claimant testified that when he reported for work, he was unable to clock-in. As a result the claimant confronted Mr. Mark Fijo, the respondent employer's pre-load supervisor, who asked to see the claimant's return-to-work note from Dr. Vargas.

Following his exchange with Mr. Fijo in late February 2008, the claimant did not return to work for the respondent employer until later on July 2, 2008. While off work, the claimant received a Change of Physician Order from Dr. Vargas to Dr. R. Earl Peeples. The claimant also worked as a real estate agent while off work.

The claimant initially saw Dr. Peeples on June 26, 2008, registering "pain only in the midline of the lower thoracic spine." Dr. Peeples examined the claimant, as well as his records and films, and then determined that the

claimant has sustained merely a "spinal contusion and strain." In support of his assessment, Dr. Peeples explained:

[The claimant] is a somewhat obese black male in no acute distress. Examination was carried out. He displays ability to heel and toe walk. He has a normal symmetric gait. He has mild tenderness over the midline of the thoracic spine in the lower area. He has no tenderness up at T2-T3. Straight leg raising test is negative. Reflexes are intact. There is no evidence of neurological deficit in the upper or lower extremities.

Radiographs of the thoracic spine were repeated. These show excellent position and alignment without evidence of abnormality.

This gentleman has no evidence by MRI of structural deformity in the area of injury. I agree with Dr. Vargas in this regard. He continues to have pain. There is no contraindication to his return to his usual duties. I have suggested that he use a TNS unit. I have explained to him that the presence of discomfort in the area of contusion is not a

contraindication of working.

I believe he should be allowed to resume his normal occupation at UPS on a trial basis. I do not see any anatomic reason he should not be able to successful[ly] return to his regular duty.

In light of the claimant's June 26, 2008, release from Dr. Peeples to return to full duty work, the claimant returned to work on or about July 2, 2008, performing either the same type of work or lighter duty work than he did prior to the August 3, 2007 incident. Despite the claimant's continued complaints of pain following his return to work, an August 7, 2008 whole body scan revealed no abnormalities whatsoever. The claimant continued seeking treatment for his alleged low back ailments from Dr. Peeples.

Following his July 2, 2008 return to work, the claimant received and consumed prescription medication that according to the claimant, impaired his ability to properly perform his work duties. The claimant contended that he had problems sorting packages at work in the Spring of 2009 and, therefore, created a "logistical nightmare" for the respondent employer after "mis-sorting" a number of packages. Eventually, the claimant visited with Dr. W.

Warren at Concentra Health Centers for a "fit-for-duty" examination, which the claimant attended on June 1, 2009.

At the conclusion of the June 1, 2009 examination, Dr. Warren took the claimant off work until the claimant could provide Dr. Warren with a copy of his medical records, which Dr. Warren requested to determine not only what precise medications the claimant was consuming but also whether it was safe for the claimant to return to work while on the prescribed medications. Apparently, Dr. Warren never received the claimant's medical records because the claimant admitted during the hearing that in July 2009, he received yet another request to provide Dr. Warren with his medical records. He indicated that the ball was in his court to provide Dr. Warren with his medical records.

Since June 1, 2009, despite never being taken off work by Dr. Peeples, the claimant has remained off work. An August 12, 2009 neuropsychology pain evaluation revealed the claimant suffered only from "[c]hronic pain syndrome, with no unusual psychogenic contributions to symptoms." The claimant admitted that since June 1, 2009, he has been able to work as a real estate agent.

The first issue that must be addressed is the

claimant's entitlement to additional temporary total disability benefits. In our opinion, the decision of the Administrative Law Judge must be reversed. 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/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).

Recurring symptoms may give rise to a subsequent healing period, after the original one has ended. Elk

Roofing Co. v. Pinson, 22 Ark. App. 191, 737 S.W.2d 661 (1987). Where a second complication is found to be a natural and probable result of the first injury, the employer remains liable. Id. This liability includes liability for additional temporary benefits when the employee undergoes a second, distinct healing period. Id.

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 by Dr. Vargas on February 26, 2008, to full duty. The claimant had undergone a functional capacity evaluation, which showed that he was able to work in the heavy category. The claimant, while contending that he was ready, willing, and able to return to work, complained that he actually hurt too much for him to actually return to work. The claimant told Mr. Matt Williams, the manager, that he doubted that he could return to work. The claimant also informed Mr. Mark

Fijo, the respondent employer's pre-load supervisor, that he was still hurting pretty bad. Mr. Williams asked the claimant to come on in and return to work, but the claimant opted not to do so. The evidence demonstrates that the claimant was self-limiting, as the functional capacity evaluation indicated that he could work in the heavy category. Further, Dr. Vargas released the claimant to return to work for full duty.

Further, the evidence demonstrates that for the period July 2, 2008 through June 1, 2009, the claimant was able to return to work for the respondent employer. The claimant was also able to work as a real estate agent during that time period as well. Accordingly, we cannot find that the claimant has proven by a preponderance of the evidence that he remained in his healing period and totally incapacitated from earning wages.

The claimant's complaints in February 2008 that his back hurt too much for him to return to work were suspect at best. The claimant was not actually trying to perform any work for the respondent employer. It appears that the claimant's own self-limiting behaviors were keeping him from going to work, which was in direct contradiction to

the claimant's FCE.

It further appears that the claimant has not returned to work because he has not provided Dr. Warren with the requested medical records. Dr. Warren was assessing the claimant for his fitness for duty when the claimant was having problems with medication. It is of note, that the claimant suffers from other problems that are not related to his compensable injury. Therefore, after considering all the evidence of record, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.

The claimant also contends he sustained compensable bilateral shoulder injuries. The Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that he sustained bilateral shoulder injuries. The Full Commission affirms this finding. The record lacks objective medical evidence that the claimant had any sort of injury. From the period August 3, 2007 until April 29, 2009, all the claimant's medical records fail to even mention or provide problems with the claimant's shoulders. The first time the claimant registered complaints of pain concerning his shoulders was in April

2009, almost two years after his compensable back injury.

After considering the fact that there are no objective findings of injury and the fact that the claimant did not even complain of problems with his shoulders until April of 2009, we find that the claimant failed to prove by a preponderance of the evidence that he sustained bilateral shoulder injuries.

Finally, we affirm as modified the award of additional medical treatment. The respondents do not dispute their responsibility to pay for treatment recommended and rendered by Drs. Covington, Vargas and Peebles. However, the claimant has received treatment from other physicians as well as for his non-work-related bilateral shoulder ailments or neck problems. Accordingly, we find that the claimant is entitled to all reasonable and necessary medical treatment from his authorized treating physicians in connection with his compensable injury. Respondents are not liable for claimants non-compensable shoulder or neck problems.

Accordingly, for those reasons set forth herein, we hereby affirm the decision of the Administrative Law Judge in part and reverse in part.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. I agree with the majority that the claimant has not provided objective findings of bilateral shoulder injuries; therefore, the bilateral shoulder claim must be denied. However, after a de novo review of the record, I would award the claimant temporary total disability benefits for the time periods of February 27, 2008 through June 26, 2008, and June 1, 2009 continuing through a date yet to be determined. Therefore, I must respectfully dissent on the issue of temporary total disability.

Temporary total disability for unscheduled

injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). A claimant who has been released to light-duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 281-82 (1984). When an injured employee is totally incapacitated from earning wages and remains in the healing period, he is entitled to temporary total disability. Id.

Here, Dr. Vargas returned the claimant to full duty on February 27, 2008. The claimant reported to work, but, after informing his supervisor of his continued pain, the respondent refused to allow him to return to work. The claimant did not again return to work until Dr. Peeples

released him on a trial basis on June 26, 2008. As the Administrative Law Judge correctly noted, the claimant has not reached maximum medical improvement in connection with his compensable back injury, and remains in his healing period. Therefore, the claimant was in his healing period and totally incapacitated from engaging in gainful employment between February 27, 2008 and June 26, 2008. As such, he is entitled to temporary total disability benefits during this time period.

Furthermore, the respondents' own designated medical provider, Dr. Warren, took the claimant off work on June 1, 2009, due to the possible side effects of the medications the claimant was taking for his compensable injury. As such, the claimant has been rendered totally incapacitated to earn gainful employment by the respondents' refusal to return him to work. Therefore, I find that the claimant is entitled to temporary total disability benefits from June 1, 2009 until a date yet to be determined.

The majority states that the claimant was self-limiting, as the functional capacity evaluation indicated that he could work in the heavy category and Dr. Vargas released the claimant to work full duty. It is my opinion

that the claimant is not self-limiting; rather, the majority is overly optimistic. The evidence of record shows that the claimant has been compliant with all of his medical care, and has simply been physically incapable of performing any work. Each and every time that the claimant was released, he returned to work, despite continued complaints of pain. Furthermore, the claimant's supervisors who testified at the hearing testified that the claimant was a good worker and they had no reason to question his veracity. The claimant never sought to be taken off of work. The respondents refused to allow the claimant to return to work due to concerns over the possible side effects of the medications that the claimant was taking in connection with his compensable injury. The claimant went to work, but he was not allowed to clock in. Despite all of the claimant's actions, and his continued compliance with all of the requests made of him, the majority somehow finds the claimant's behavior to be self-limiting. I find that the evidence shows the opposite. The claimant is a hard-working employee, who has worked for the respondent for approximately 20 years. He has made every attempt to return back to work, but has either been physically unable to do

so, or has not been allowed to return back to work by his employer.

For the aforementioned reasons I must respectfully concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner