

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106415

ARVEL B. GRAHAM,  
EMPLOYEE

CLAIMANT

OWENS PLANTING COMPANY,  
EMPLOYER

RESPONDENT

AMERICAN HOME ASSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 3, 2010

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

Claimant represented by the HONORABLE KENNETH A. OLSEN,  
Attorney at Law, Bryant, Arkansas and CHARLES P. ALLEN,  
Attorney at Law, West Helena, Arkansas.

Respondent represented by the HONORABLE JOHN P. TALBOT,  
Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed June 11, 2010. The administrative law judge  
found that the claimant was entitled to temporary total  
disability benefits from January 28, 2004 to December 13,  
2006. The administrative law judge found that the  
respondents owed a 20% late-payment penalty. After  
reviewing the entire record *de novo*, the Full Commission

affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved he was entitled to additional temporary total disability benefits from January 28, 2004 through April 9, 2007. We affirm the administrative law judge's finding that the respondents owe a 20% late-payment penalty.

I. HISTORY

The parties stipulated that the claimant, now age 53, sustained a compensable injury on April 26, 2001. The claimant testified that his face "jammed into the steering wheel of a backhoe" when the bucket of the machine dropped. A CT of the claimant's facial bones in September 2001 showed abnormalities including "intraorbital emphysema bilaterally." The claimant began treating at The University Hospital of Arkansas in March 2002 for complaints including facial pain, headaches, vertigo, and ringing/echoing in his ears. Dr. Charles W. Bosch, an otolaryngologist, began treating the claimant in May 2002. The claimant began treating with Dr. Scott Hall in January 2003. An administrative law judge filed an opinion on August 15, 2003. The administrative law judge found, among other things, that "the claimant is entitled to additional

treatment from Dr. Charles Bosch for his cranial injury (dizziness, pain, etc.) Such treatment is reasonably necessary and related to claimant's admittedly compensable facial injury."

The record indicates that the respondents initially paid temporary total disability benefits through January 27, 2004. The claimant began treating with Dr. James H. Fowler, an ear, nose and throat specialist, in December 2004. A CT of the claimant's sinus in January 2005 showed deviation of the nasal septum on the left. Dr. Fowler performed a nasal septal reconstruction on February 16, 2005. Dr. Fowler performed additional nasal surgery on or about July 7, 2005. Dr. Fowler also performed "Bilateral tympanostomies with insertion of tympanostomy tubes" on July 7, 2005. Dr. Fowler referred the claimant to Dr. John Dornhoffer, Assistant Professor of Otolaryngology at UAMS Medical Center.

Dr. Dornhoffer corresponded with Dr. Fowler on December 12, 2005:

I recently saw Mr. Graham in my clinic upon your request for evaluation of his hearing and balance. As you know, Mr. Graham has a history of facial trauma back in April of 2001. He states that approximately one month after that, his hearing became progressively worse. He states that he

also has diplopia with vertigo, and tinnitus. He states that this has not been evaluated until now.

A MRI was done, and I am waiting for the results of that.

At this point in time, I am going to go ahead and evaluate Mr. Graham's vestibular system. I would like to get an ENG on him, but at this point in time, he has ventilation tubes in both of his ears and I cannot obtain an ENG.

I want to go ahead and refer him to ophthalmology to check for the double vision. I want to refer him on to my partner, Emre Vural, who is our trauma surgeon to evaluate his facial fractures. After I get the results of these tests, I will let you know of my findings. At this point in time, I do not know if his balance problem is coming from his ears or from his brain. Today, I did obtain an audiogram, which shows that he has a significant hearing loss in both of his ears, with the left being worse than the right. He states that he has significant difficulty hearing from the left ear. After I get the rest of the tests, I will let you know what I think is going on with Mr. Graham....

An MRI of the claimant's brain was taken on December 15, 2005, with the impression, "1. No acute intracranial process identified." Dr. Dornhoffer referred the claimant to UAMS Audiology Clinic, where an Equitest Summary was completed on December 31, 2005. It was noted at that time, "Results are highly suspect. Pt. responded with extreme lateral sway and jumping towards the end of many conditions.

Amplitude Sealing as well Adaptation Toes Up & Down could not be completed."

The claimant treated with Dr. Joseph G. Chacko, Assistant Professor of Ophthalmology and Neurology at UAMS, beginning in February 2006. Dr. Chacko gave the following impression on February 14, 2006: "1. Functional visual loss, right eye-status post trauma-constricted visual field in the right eye and spiral visual field on Goldmann testing. Patient saw 20/25 unaided in the autorefractor in the right eye today; this is an improvement from 20/40 in the past. 2. Refractive error."

The claimant's attorney questioned Dr. Fowler at a deposition taken April 28, 2006:

Q. Do you feel like something like [a tilt table test] is necessary to determine whether there is a treatable pathology going on?

A. Well, I mean, he needs to have vestibular testing done. And [Dr. Dornhoffer] mentioned he was going to schedule one particular test, which I don't even know what it is, and he wanted to do an ENG, and I think that, you know, it would be nice to have that information obviously....

Q. This may be my last question, and Scott may object to the form of it, but I think what he and I are trying to determine is if Mr. Graham has reached a plateau of healing at which point his underlying conditions are not going to get

substantially better or do you think that's yet to be determined by the additional testing or treatment recommended by the doctors at UAMS.

A. Well, he needs to complete those tests.

Q. Will those tests perhaps determine whether or not he had reached the maximum healing then?

A. I feel like he has most likely with a high probability, medical probability, reached maximum healing, but if they find something new that is treatable, then perhaps -

Q. Revisit the question at that time perhaps?

A. Revisit that question at that time....I think he has reached the plateau as far as my treatment goes. I never felt that when I treated him that it was going to make a substantial difference in all of his symptoms. I thought it might ease some of the pain that he was having....But I didn't feel like it was going to do anything else.

Q. When do you feel like he might have reached the best he was going to get from the treatment, even if it was just for pain relief?

A. Well, when I last operated on him, his revision was in July, I think -

Q. 2005, right.

A. Five. And he has reached that.

Q. Would you say recently or -

A. I think after six months out. I mean, I would say that he has reached his maximum....

Dr. Landon J. Duyka dictated the following on May 12,

2006:

We had the pleasure of seeing this gentleman with a history of facial trauma in 2001 resulting in what sounds like nasal fracture with possible maxillary sinus involvement who has been subsequently followed by a Dr. Fowler in Helena, Arkansas and has had what sounds like endoscopic sinus surgery in February of 2004 and repeat surgery in 2006. He presented to Dr. Dornhoffer in December of 2005 with report of severe headaches, hearing loss, dizziness, and is being worked up for these by Dr. Dornhoffer. He was referred to our clinic to examine him for possible residual effects of his facial fractures. The patient reports that he has a headache that is constant and feels to be originating in his occipital region; extending to his frontal region. He also reports that he has some visual deficit in the right eye and has seen ophthalmology for this. He also reports some numbness in the right side of his face. He reports that his headache is so severe that he is unable to work and he is now on disability. No other complaints at this time....

ASSESSMENT/PLAN:

This is a gentleman with a history of facial fractures, roughly five years ago. Now reporting with headaches, hearing loss and vertigo. It is unlikely that these above symptoms are caused by his history of facial fractures. Given that the headache seems to originate in the occipital region, it does not appear to be localized neuritis. The patient was instructed to follow up with Dr. Dornhoffer as previously scheduled and possibly with neurology to work up his headaches as deemed necessary. Dr. Vural performed the examination and formulated the assessment and plan.

An administrative law judge filed an opinion on December 13, 2006. The administrative law judge found that Dr. Fowler's treatment and authorized referrals were

reasonably necessary. The administrative law judge directed the respondents to pay medical expenses within 30 days of receipt pursuant to Rule 30. The administrative law judge found, "4. The claimant has proven by a preponderance of the evidence of record that he is entitled to temporary total disability benefits from January 28, 2004 to a date yet to be determined as he remains in his healing period and incapacitated from working based on Dr. Fowler's deposition and the claimant's ongoing diagnostic testing at UAMS."

In an opinion filed June 28, 2007, the Full Commission affirmed the administrative law judge's award of additional medical treatment. The Full Commission also affirmed the administrative law judge's finding that the claimant proved he was entitled to temporary total disability benefits "from January 28, 2004 to a date yet to be determined as he remains in his healing period and incapacitated from working based on Dr. Fowler's deposition and the claimant's ongoing diagnostic testing at UAMS." The Full Commission found that the claimant's attorney was entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 1996).

The Arkansas Court of Appeals affirmed the Commission in an opinion delivered May 21, 2008. *Owens Planting Co. v. Graham*, 102 Ark. App. 299, 284 S.W.3d 537 (2008). The Court's Mandate affirming the Commission's order was issued on June 10, 2008. The respondents' exhibits indicate that the respondents issued the claimant a check for indemnity benefits on July 2, 2008, for the period of January 28, 2004 through July 14, 2008. The respondents also issued checks for payment of fees for legal services to the claimant's attorneys on July 2, 2008 and July 3, 2008. The respondents resumed payment of regular indemnity benefits to the claimant on July 24, 2008, for the period beginning July 15, 2008. The record indicates that the respondents' last indemnity check was issued to the claimant on August 31, 2009, for the period of September 8, 2009 through September 21, 2009.

A Summary Of Vestibular Studies was written following examination of the claimant on November 12, 2009:

VIDEONYSTAGMOGRAPHY:

OCULOMOTOR: All oculomotor testing was abnormal. However, reliability is judged to be poor due to lack of patient cooperation.

GAZE: No nystagmus of clinical significance was evoked with any eye deviations.

DIX-HALLPIKES: Not performed due to patient report of previous back and neck injuries.

CALORICS: Binaural, bithermal air calorics revealed robust and symmetrical responses.

COMPUTERIZED DYNAMIC POSTUROGRAPHY: Posturography was not completed due to inconsistent responses on the first three conditions and concern for patient safety.

\*GANS SOP and visual acuity testing were not completed due to lack of patient cooperation.

The parties deposed Dr. Dornhoffer on November 17,

2009. The respondents' attorney questioned Dr. Dornhoffer:

Q. [The claimant] was referred to you in December 2005, roughly, coming up on four years ago. Does that sound right?

A. That's correct....

Q. Why did he, Dr. Fowler, refer Mr. Graham to you?

A. He referred him to me because of a complaint of hearing loss and balance disturbance that he had at that time related to an accident, it was felt....

Basically, the impressions were that he has vertigo, and I questioned whether or not it was peripheral meaning the ears or central, the brain. And SNHL means sensorineural hearing loss left greater than right. Then the third is facial trauma. For the plan I ordered a test called posturography. And appointment with the eye doctors because he was complaining of visual loss and an appointment with our facial plastic surgeon because of his facial fractures and pain. I wanted to have him assessed. As far as imaging, I got a CT scan of his face and called T-bone, which stands for temporal bone, that's the ear bone, and then an MRI scan of the brain.

Q. Okay. And was that plan carried out? Did you get, for example, the posturography?

A. Yes. All those tests were ordered. I'm not sure if he saw an ophthalmologist, but I don't have a report from them. But then, yes, all the other things were performed at that time or shortly thereafter....

Q. What improvement has he seen since you've started seeing him in December 2005?

A. By complaint not a lot. His assessment of how he's doing not a lot of benefit. Feels about - had pretty much the same complaints as he did when I first met him.

Q. Is he at MMI at this point or can improvement be made with him?

A. It's a difficult question because, generally, if you take two scenarios, one, that this is a closed head injury, and we call it post-concussion syndrome, and that's variable how good you get with that. Some people get better. Some people don't. At this point in time I would say what you see is what you get, generally speaking. And again, that is somebody who, you know, really wants to get better and so forth. So it's - I would stay (sic) probably he's at where he's going to be and there's not too much I can do different for that....

Q. You have given him clearance to work light duty, I think. Is that right?

A. Yes. I believe so....Generally speaking, anybody with a complaint of a balance issue, we don't want them to operate something they can hurt themselves or others. High places, machinery, things like that.

Q. On what date, roughly, do you think he was first capable of working light duty?

A. Again, that's difficult for me to say because I'm making the assumption that if he has a closed head injury related to this accident, generally, I tell people usually about a year after or two years after the accident, you maintain - you've gotten to where you're supposed to get....

Q. Do you think that's probably when he reached MMI in this case, maximum medical improvement in this case, about one year out from his injury?

A. Assuming - making the assumption that his balance was caused by the accident, yeah....

A pre-hearing order was filed on December 21, 2009.

The claimant's contentions were, "The claimant seeks payment of mileage expenses dating back to 2006. He also seeks payment of temporary total disability benefits from September 2009 to a date yet to be determined, and medical treatment with Dr. Chacko at UAMS. The claimant contends benefits were untimely paid and he is due a 20% penalty, interest, and attorney's fees on temporary total disability benefits awarded since the Court of Appeals decision on May 21, 2008."

The respondents' contentions were, "The respondents contend the penalty is unconstitutional. The mandatory penalty is not reasonable in relation to the harm sustained by the claimant. They seek an independent medical

examination of the claimant pursuant to Ark. Code Ann. §11-9-511."

The parties agreed to litigate the following issues: "Additional temporary total disability benefits; payment of mileage expenses; additional medical treatment and payment of expenses; penalties pursuant to Ark. Code Ann. §11-9-802; interest pursuant to §11-9-809; and attorney's fees. All other issues are reserved."

The parties deposed Dr. Chacko, a treating neuro-ophthalmologist, on March 5, 2010. Dr. Chacko testified that the claimant's optic nerves were not damaged by the 2001 accident. Dr. Chacko testified that the claimant had been diagnosed with "functional visual loss" with no underlying structural damage. The respondents' attorney questioned Dr. Chacko:

Q. Is Mr. Graham at maximum medical improvement, as far as his functional visual loss is concerned?

A. Right. So it's been almost four years that we've been seeing him and visual acuity, you know, varies and has been around 20/30 in each eye and so that's been very stable. But that visual field constricted on just the one eye has been there and hasn't changed with all the treatment - what treatment we can give him. So I expect, you know, probably - my guess would be that it would remain stable and not change at this point.

Q. Okay. And how long do you think he's been at maximum medical improvement?

A. I would say - looking at my records, I would say from probably 4/07. At that point he was - he was doing pretty well, the 20/30, 20/25 vision, and he wasn't complaining as much as before....

Q. So probably since April 9, 2007, he's been at maximum medical improvement?

A. Right....

Q. Have you ever given him any instructions about whether he shouldn't work or it's okay to work or ...

A. Right. You know, from his visual standpoint, he's got good vision, and that good visual field on that one eye, so, you know, he doesn't meet any requirements of legal blindness, and he could - you know, he could potentially be driving a car and be fine, legally. With these type of patients, you know, I just kind of tell them, you know, if you don't feel safe doing your job, you shouldn't do that job, and, you know, you might have to look for a different type of job, where he feels more safe.

Q. There are jobs that he could be performing?

A. From a visual standpoint, yes.

Q. Yeah. And that's been the case since April of 2007, anyway?

A. Yes.

A hearing was held on March 12, 2010. At that time, the respondents contended that the claimant's healing period ended in January 2006. The respondents' attorney stated

that the claimant was paid temporary total disability benefits through August 31, 2009. The respondents' attorney stated that checks representing indemnity benefits were written on July 3, 2008.

An administrative law judge filed an opinion on June 11, 2010. The administrative law judge directed the respondents to pay medical expenses, including mileage. The administrative law judge found that Dr. Hall was an authorized physician, and that Dr. Hall's treatment for sinusitis and headaches "was related to the compensable injuries." The respondents filed a notice of appeal with regard to the administrative law judge's award of additional medical benefits. The respondents' brief, however, does not discuss whether or not the claimant is entitled to additional medical treatment. The Full Commission therefore concludes that the respondents have abandoned or waived the issue of the claimant's entitlement to additional medical treatment as awarded by the administrative law judge in the opinion filed June 11, 2010. See *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007), citing *Seay v. Wildlife Farms, Inc.*, 342 Ark. 503, 29 S.W.3d 711 (2000). The claimant does not appeal the administrative law judge's

finding that "repeating the vestibular rehabilitation program" would not be reasonably necessary.

The administrative law judge otherwise directed the respondents to pay temporary total disability benefits "from January 28, 2004, to December 13, 2006, based on the last award of benefits." The administrative law judge found that the respondents "owe a 20% late payment penalty on the last award. All statutes are presumed constitutional." The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition, the healing period has ended. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Whether

or not an employee's healing period has ended is a question of fact for the Commission. *Id.*

In the present matter, the parties stipulated that the claimant sustained a compensable injury on April 26, 2001. The claimant testified that his face "jammed into the steering wheel of a backhoe." The claimant was treated for complaints including facial pain, headaches, vertigo, and ringing in his ears. The respondents initially paid temporary total disability benefits through January 27, 2004. Dr. Fowler performed nasal surgery in February 2005 and July 2005. Dr. Fowler subsequently referred the claimant to Dr. Dornhoffer for evaluation of hearing and balance problems. Dr. Dornhoffer began treating the claimant in December 2005. Dr. Chacko treated the claimant beginning February 2006 for "functional visual loss."

The parties deposed Dr. Fowler on April 28, 2006. Dr. Fowler testified that "with a high probability" the claimant had already reached maximum medical improvement. Dr. Fowler recommended additional diagnostic testing with Dr. Dornhoffer, but opined that the claimant had reached maximum medical improvement "six months out" from the nasal surgery performed on the claimant on July 7, 2005. Dr. Fowler

therefore opined that the claimant had reached maximum medical improvement on January 7, 2006. The parties deposed Dr. Dornhoffer on November 17, 2009. With regard to whether or not the claimant had reached maximum medical improvement, Dr. Dornhoffer testified, "what you see is what you get, generally speaking....probably he's at where he's going to be and there's not too much I can do different for that." Dr. Dornhoffer opined that a patient with a closed head injury should reach maximum medical improvement "about a year or two years after the accident." Two years after the accident in the present matter would be April 26, 2003. Finally, Dr. Chacko expressly testified in 2010 that the claimant had been at maximum medical improvement since April 9, 2007.

The Full Commission finds in the present matter that the claimant reached maximum medical improvement and the end of his healing period no later than April 9, 2007. The respondents initially paid temporary total disability benefits from the date of injury until January 27, 2004. In an opinion filed December 13, 2006, an administrative law judge found that the claimant was entitled to temporary total disability benefits from January 28, 2004 until a date

yet to be determined. The Full Commission and the Court of Appeals affirmed this award. The respondents subsequently paid additional temporary total disability benefits for the period of January 28, 2004 through July 14, 2008. The respondents paid fees for legal services to the claimant's attorneys. The respondents then resumed regular payment of temporary total disability benefits through September 21, 2009. The claimant did not prove he was entitled to additional temporary total disability benefits after April 9, 2007. The record does not support the administrative law judge's determination that the respondents "owe double attorney's fees."

B. Penalty

Ark. Code Ann. §11-9-802 provides:

(c) If any installment payable under the terms of an award is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§ 11-9-711 and 11-9-712.

An administrative law judge found in the present matter, "5. The respondents owe a 20% late payment penalty on the last award. All statutes are presumed

constitutional." The Full Commission affirms this finding. In an opinion filed December 13, 2006, an administrative law judge found that the claimant proved he was entitled to temporary total disability benefits from January 28, 2004 to a date yet to be determined. The respondents appealed to the Full Commission and Arkansas Court of Appeals. The Court of Appeals affirmed the Commission in an opinion delivered May 21, 2008. The Court's Mandate affirming the Commission's order was issued on June 10, 2008. The installment under the terms of the award in the present matter was thus due no later than June 25, 2008. The respondents did not issue a check to the claimant for indemnity benefits until July 2, 2008. The respondents admit that they did not pay the indemnity award by June 25, 2008. The respondents argue, however, that imposition of a fine violates the Arkansas and United States Constitutions. The Court of Appeals has long held that failure to begin paying benefits within the statutory period gives rise to the 20% penalty laid out in the statute. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). Moreover, statutes are presumed constitutional, and the burden of proving otherwise is placed on the party challenging the

legislative enactment. *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998). All doubts are resolved in favor of a statute's constitutionality. *Id.*

The respondents in the present matter did not prove that imposition of the statutory fine was unconstitutional. We find that the respondents owe a 20% penalty on the check they issued for indemnity benefits on July 2, 2008, representing the period of January 28, 2004 through July 14, 2008.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved he was entitled to additional temporary total disability benefits from January 28, 2004 through April 9, 2007. The respondents have paid appropriate fees for legal services for the indemnity period through July 14, 2008. The respondents are not liable for "double attorney's fees." In accordance with Ark. Code Ann. §11-9-802(c), the respondents are liable for a 20% penalty on the check for indemnity benefits issued July 2, 2008. The respondents did not prove that the relevant provisions of Ark. Code Ann. §11-9-802(c) were unconstitutional. With

regard to the award of medical expenses in the administrative law judge's June 11, 2010 opinion, the claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing on appeal regarding the issues of medical expenses, mileage, and the statutory penalty, the claimant's attorney is entitled to an additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part. Specifically, I concur in the finding that the record does not support an award of a double attorney's fee; however, I must dissent from the finding modifying the award of additional temporary total disability benefits and extending the award through April 9, 2007. Finally, with

regard to the respondents contention that Ark. Code Ann. § 11-9-802 imposing a 20% penalty for the late payment of an award of benefits is unconstitutional, I must concur with the majority.

With regard to the majority's modification of the award for additional temporary total disability benefits, I find that the claimant's healing period ended in January 2006. The Administrative Law Judge directed the respondents to pay temporary total disability benefits from January 28, 2004 through December 13, 2006, based upon the last award of benefits. However, she did not specifically render a finding with regard to the end of the claimant's healing period. The majority now extends the award through April 9, 2007, finding that the claimant's healing period ended on that date. I am unable to reach such a finding. Dr. James Fowler, testified by deposition that the claimant reached maximum medical improvement from his compensable injury six months after his second sinus surgery. Although this testimony was available at the previous hearing, Dr. Fowler qualified his testimony adding that this healing period may be extended should Dr. Dornhoffer's testing reveal any additional treatable conditions. In his deposition taken

November 17, 2009, Dr. Dornhoffer testified that his test resulted in inconsistent results, suggesting symptom amplification. Thus, Dr. Dornhoffer was unable to provide a medical conclusion regarding any additional treatable conditions. Accordingly, Dr. Fowler's earlier testimony regarding the end of the claimant's healing period must control.

The parties stipulated that the claimant sustained compensable injuries to his shoulder, arm, back, neck, and head on April 26, 2007. Claimant has received extensive treatment for his injuries. Presently, the claimant's primary complaints consist of headaches, impaired hearing, and blurred vision. The claimant has been thoroughly tested for any injury to his eyes, optic nerve, or vision. Due to inconsistent finding on a normal eye exam, the claimant was referred to Dr. Joseph Chacko, a neuro ophthalmologist. Dr. Chacko testified that the claimant suffered no organic damage to his eye or optic nerve as a result of his compensable injury. The claimant did not sustain any optic nerve damage, brain tumor or damage to the eyeball. Although the claimant's symptoms of chronic headache and right sided face pain were consistent with the injury the

claimant sustained, these conditions were not related to the claimant's eyes or vision. Despite the claimant's normal objective examination, the claimant displayed functional visual loss in his peripheral vision in one eye. Dr. Chacko explained that this was a subjective finding, unsupported by objective findings. Based upon Dr. Chacko's testimony I am unable to find that the claimant sustained a compensable injury to his eye or optic nerve as no objective findings of such injury were ever noted by the claimant's treating physicians. Accordingly, I am unable to concur in the majority finding that the claimant's healing period for this subjective finding extends the claimant's period of temporary total disability benefits for his otherwise objective injuries.

With regard to the respondent's contention that the Ark. Code Ann. §11-9-802 is unconstitutional, I agree with the majority's finding that the statute is constitutional. However, I note that given the recent attitudes toward penalties and fees, this argument is persuasive and well reasoned albeit misguided.

I also concur in the finding that the record does not support an award of a double attorney's fee. The

Commission lacks the statutory authority to award a second attorney's fee on a claim by an attorney seeking an order to enforce his prior attorney's fee award. See, Aluminum Company of America v. Neal, 4 Ark. App. 11, 626 S.W.2d 620 (1982); Model Laundry & Dry Cleaning v. Simmons, 268 Ark. 770, 596 S.W.2d 337 (Ark. App. 1980).

Therefore, for all the reasons set forth herein, I must respectfully concur in part and dissent in part from the majority's opinion.

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KAREN H. MCKINNEY, Commissioner