

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700453

RICKY GRIFFIN,
EMPLOYEE

CLAIMANT

TALBERT LOGGING, INC.,
EMPLOYER

RESPONDENT

CAPITAL CITY INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 28, 2010

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

Claimant represented by the HONORABLE TERENCE C. JENSEN,
Attorney at Law, Benton, Arkansas.

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

Decision of Administrative Law Judge: Affirmed in part,
reversed in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals
an administrative law judge's opinion filed January 11,
2010. The administrative law judge found that the claimant
proved his complaints of back pain were a compensable
consequence of his knee injury. The administrative law
judge found that the claimant was entitled to temporary
total disability benefits from October 27, 2009 to a date

yet to be determined. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion in part. The Full Commission finds that the claimant's complaints of low back pain were a compensable consequence of the claimant's compensable knee injury. We find that the claimant did not prove he was entitled to additional temporary total disability benefits

I. HISTORY

Ricky Griffin, age 52, testified that he worked for Talbert Logging for approximately 29 years. Mr. Griffin testified that his duties as a logger included operating a chain saw and driving heavy equipment. The parties stipulated that the claimant sustained a compensable scheduled injury on December 20, 2006. The claimant testified, "I was walking down the hill looking at the next tree to cut and I stepped in the hole and my toe caught the front of the hole and my heel went down in it and my knees just buckled backwards."

Dr. Kirk Watson saw the claimant on December 28, 2006 and assessed "Right knee strain, mostly (sic) likely a hyperextension mechanism of action." The claimant continued

follow-up visits with Dr. Watson, and the parties stipulated that medical expenses were paid.

Dr. Stephen A. Hudson examined the claimant on January 15, 2007:

The patient is a 49-year-old male who works as a logger. He injured his right knee on 12/20/2006 while at work. He reports he stepped in a hole and injured the knee. He had pain and swelling over the knee. He was treated with a knee immobilizer and rest, ice, etc., and has taken some naproxen. He improved slightly, but tried to go back to work and had significant pain in the knee and then stepped in another hole, injuring the knee again while at work. Since then, he has been having more pain and problems with it. He has been off work....

Dr. Hudson assessed "Osteochondral lesion of the right knee....I think at this point we need to get an MRI to evaluate this osteochondral defect to see if there is still cartilage within this bed or to see if there is a loose fragment floating in the knee."

The claimant followed up with Dr. Hudson on January 24, 2007: "Review of his MRI from 01/19/2007 shows some chondromalacia of the medial compartment of the knee." Dr. Hudson assessed "Right knee injury with medial collateral ligament sprain and osteochondral lesion of the medial femoral condyle." Dr. Hudson performed a surgical procedure on March 1, 2007: "Right knee arthroscopy with partial

medial meniscectomy and debridement and microfracture of medial femoral condyle." Dr. Hudson performed an "Oxford unicondylar knee arthroplasty" on November 5, 2007 and a "Right knee arthroscopy with lateral retinacular release" on February 20, 2008.

The claimant consulted with Dr. Jerry J. Lorio on April 28, 2008: "He is a 50 year old male who is seen for a 2nd opinion, for a right knee problem that started in December of '06. He stepped in a hole, at work. He works for Talbert Logging, and has only worked a few days since that time." Dr. Lorio assessed "Painful knee, following unicondylar knee replacement, with patella femoral symptoms that are not allowing the patient to return to work....I think the options for this are to live with the pain, or try temporizing measures, such as injection and therapy. It sounds like he has done most of that. A definitive treatment would be to convert it to a knee replacement. I think that would give him a smoother range of motion, and less pain, and I believe that was the recommendation he had from Dr. Hudson, as well. We concur. This seems to be a linked series of events that started with his work injury, and he is still not satisfied with his knee."

The claimant testified that Dr. Lorio performed a total knee replacement in about May 2008. Dr. Lorio noted on June 2, 2008, "Seen on follow up of his total knee arthroplasty....The knee looks good, without signs of infection." Dr. Lorio continued to provide follow-up treatment and noted on September 4, 2008, "I'll see him back for a one year visit, and he could be released for light duty, right now. I don't think he will ever do any heavy work, and will probably have to get an FC to really quantify what he can and cannot do, and get a rating after that, if they will send me a form, and the FCE result."

The claimant participated in a Functional Capacity Evaluation on September 24, 2008:

Mr. Ricky Griffin is referred to Functional Testing Centers, Inc. for the purpose of undergoing a comprehensive functional capacity evaluation to determine his current functional status. Mr. Griffin is referred with complaints of pain in his right knee which he attributed [to] a work related injury he sustained while employed by Talbert Logging. Mr. Griffin is referred to FTC by Dr. Jerry Lorio of Benton, AR....

The results of this evaluation indicate that Mr. Griffin gave a reliable effort, with 47 of 47 consistency measures within expected limits....Mr. Griffin's movement patterns were also consistent for all tests given and were characterized by a gait pattern which was slightly stiff on the right side....

Mr. Griffin's evaluation resulted in functional limitations in the area of material handling as he exhibits the ability to lift/carry up to 50 lbs. Mr. Griffin also performed Crouching and Kneeling activities at the Occasional level which is consistent with his diagnosis....

Mr. Griffin completed functional testing on this date with reliable results.

Overall, Mr. Griffin demonstrated the ability to perform work in the Medium classification of work as defined by the U S Dept. of Labor's guidelines over the course of a normal workday with limitations as noted above....

The claimant followed up with Dr. Lorio on January 20, 2009:

It looks good on AP and lateral views. He had a little bit of soreness in there. He has been looking at some different jobs. He has some diffuse pain. Range of motion is 0 to about 105 today. It is stable. No popping. The patella tracks centrally. No warmth, erythema, or signs of infection. He wanted a few pain pills to get by. He has not gone back and done any work thus far. He is going around evaluating jobs offered him....

As far as I'm concerned, he can work without any restrictions or dysfunctional abilities. I did give him a few Darvocet. We're not going to see him back in May. This can count as his one year visit. The X-rays look excellent. I gave him a final rating for a fair result with a total knee arthroplasty, since this was a conversion of a Uni to a total. This will be 20% to the whole body, and 50% to the lower extremity. He will see me back for problems.

The parties stipulated that temporary total disability benefits were paid until January 20, 2009. The parties

stipulated that a 50% anatomical impairment rating had been accepted.

The claimant consulted with Dr. William E. Ackerman, III on March 12, 2009:

The patient is a pleasant 51 year old male. He has sustained a work related injury. He works for a logging company. He sustained a knee injury. He was treated by an initial physician and was referred to Dr. Lorio who is now his orthopedic surgeon. The patient is not working. He has had surgeries on his right knee. He ambulates with a faulty gait. He is complaining of pain in an area about his lower lumbar facet joints on his right side. He wishes he could return back to gainful employment working for the logging company. Apparently the patient has been advised that he will not be able to return back to logging. He relates that vocational rehabilitation had been discussed with him. He would like to be able to return to some gainful employment. He has some difficulty with sleep. His activities of daily living are limited....

MUSCULOSKELETAL: Extension of his lumbar spine causes pain in his right lower lumbar spine approximating his lower facet joints. Lateral flexion to the right side elicits pain as well. He has some atrophy of his right thigh musculature....

NEUROLOGICAL: He ambulates with an abnormal gait. Dr. Lorio has prescribed a cane for him. He is not utilizing his cane today. He has an absent Achilles tendon reflex in the affected extremity. He is unable to place his foot flat on the floor....

Dr. Ackerman assessed "1. Status post-injury to his right knee necessitating surgical procedures. 2. Antalgic

gait. 3. Facet syndrome which I attribute to the way he is ambulating." Dr. Ackerman set forth the following treatment plan:

1. It is my medical opinion that the patient's facet pain is emanating from the way he ambulates. It is my medical opinion that he has enough pathology to warrant utilization of Hydrocodone 5 mg q 6 hours.
2. I would recommend utilization of a back brace to straighten his back while he is ambulating.
3. TENS unit trial.
4. I would recommend utilization of his cane for ambulation unless Dr. Lorio does not wish him to utilize this assistive device.
5. He will be given a prescription for Lidoderm to be placed over his lumbar facet joints.
6. If he has no relief with conservative management, I would recommend a facet joint injection using fluoroscopic needle control.
7. Return for follow up in 3 to 4 weeks.

A pre-hearing order was filed on October 28, 2009. The claimant contended that he "developed back problems as a result of an injury and/or consequence of his abnormal gait after multiple surgeries and a complete knee replacement. He seeks payment of treatment with Dr. Ackerman, temporary total disability benefits from ___ to a date yet to be determined, and attorney's fees."

The respondents contended that all appropriate benefits had been paid. The respondents contended that the claimant

"did not suffer a compensable back injury and there is no objective medical evidence to substantiate a back injury."

The parties agreed to litigate the following issues: "Compensable consequence (back injury), additional medical treatment, additional temporary total disability benefits, and attorney's fees."

On November 6, 2009, Dr. Ackerman completed a questionnaire provided by the claimant's attorney. Dr. Ackerman was asked, "1. Do you feel that the abnormal gait (sic) Mr. Griffin walks with, and refer (sic) to in your report of March 12, 2009, is a result of his right knee injury?" Dr. Ackerman indicated "Yes." Dr. Ackerman also checked a box beside the statement, "I believe that Mr. Griffin should remain completely off work." Dr. Ackerman described the "objective findings" he had observed on March 12, 2009: "pain in lower lumbar facet joints on right side, atrophy of R thigh musculature."

The claimant returned to Dr. Watson on November 12, 2009:

Low back pain noted. His symptoms are worse since last visit....The discomfort is most prominent in the lower, left and lower, right lumbar spine. This radiates to the right buttock. He characterizes it as constant, severe, sharp, and aching.

This is a chronic problem, with essentially constant pain. He states that the current episode of pain started 18 months ago. The event which precipitated this pain was tree accident. Associated symptoms include paravertebral muscle spasm....

LOW BACK examination: Inspection: antalgic gait; Palpation: midline lumbar pain, midline lumbar and right posterior superior iliac spine tenderness; Neurovascular: normal sensory exam of T12 through S5 to light touch and pain ...

Dr. Watson assessed "Low back pain."

A hearing was held on December 11, 2009. At that time, the claimant contended that he was entitled to temporary total disability benefits from January 20, 2009 through a date yet to be determined.

An administrative law judge filed an opinion on January 11, 2010. The administrative law judge found, among other things, that the claimant proved his complaints of back pain were "a compensable consequence of his knee injury." The administrative law judge found that the claimant was entitled to medical expenses, and that the claimant was entitled to temporary total disability benefits from October 27, 2009 to a date yet to be determined.

The respondents appeal to the Full Commission and the claimant cross-appeals.

II. ADJUDICATION

A. Compensable Consequence

If an injury is compensable, then every natural consequence of that injury is also compensable. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000), citing *Hubley v. Best Western Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The basic test is whether there is a causal connection between the two episodes. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). When the second complication is found to be a natural and probable result of the first injury, the employer remains liable; only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). The determination of whether a causal connection exists is a question of fact for the Commission. *Jeter, supra*.

An administrative law judge found in the present matter, "2. The claimant has proven by a preponderance of the credible evidence of record that his complaints of back pain are a compensable consequence of his knee injury, supported by objective evidence as required by Ark. Code Ann. §11-9-102." The Full Commission has the duty to decide

the case *de novo* and is not bound by the characterization adopted by the administrative law judge. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

Moreover, the Commission is charged with strictly construing the provisions of Act 796 of 1993. Ark. Code Ann. §11-9-704(c) (3) (Repl. 2002). We are unaware of any statutory provision in Act 796 of 1993 which requires an employee to prove, by medical evidence supported by objective findings in accordance with Ark. Code Ann. §11-9-102(4) (D), that there was a compensable consequence of a compensable injury. Nor have we located any Arkansas appellate case law before or after enactment of Act 796 which requires an employee to prove a compensable consequence by medical evidence supported by objective findings.

In any event, the Full Commission finds that the claimant proved his back pain was a natural consequence of the claimant's compensable knee injury. The parties stipulated that the claimant sustained a compensable scheduled injury on December 20, 2006. The respondents provided reasonably necessary medical treatment and the claimant underwent four surgeries to his right knee. The respondents paid temporary total disability benefits until

January 20, 2009. The claimant began treating with Dr. Ackerman on March 12, 2009. Dr. Ackerman noted that the claimant had undergone surgery to his right knee, and he noted that the claimant walked with a "faulty" and "abnormal" gait. Dr. Ackerman noted that the claimant was "complaining of pain in an area about his lower lumbar facet joints on his right side." Dr. Ackerman's assessment included "3. Facet syndrome which I attribute to the way he is ambulating....It is my medical opinion that the patient's facet pain is emanating from the way he ambulates."

Dr. Ackerman stated in November 2009 that the claimant's abnormal gait was a result of the compensable right knee injury. There are no medical reports of record which contradict Dr. Ackerman's causation opinion. The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). The Full Commission finds in the present matter that Dr. Ackerman's opinion with regard to causation is entitled to significant evidentiary weight. The Full Commission therefore finds that the claimant's complaints of back pain were a natural consequence of the compensable

injury to the claimant's knee. There is no evidence of record demonstrating that the claimant's back pain resulted from an independent intervening cause. We therefore affirm the administrative law judge's finding that the claimant's complaints of back pain were a compensable consequence of the claimant's knee injury.

B. Temporary Disability

The parties stipulated that the claimant sustained a compensable scheduled injury on December 20, 2006. For scheduled injuries the injured employee is to receive compensation for temporary total or temporary partial disability during the healing period or until the employee returns to work, whichever occurs first. Ark. Code Ann. §11-9-521(a) (Repl. 2002); *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.*

Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

An administrative law judge found in the present matter, "4. The respondents are directed to pay temporary total disability benefits from October 27, 2009, to a date yet to be determined based on Dr. Ackerman's assessment that the claimant is in a healing period, totally unable to work." The Full Commission does not affirm this finding. The claimant sustained a compensable scheduled injury on December 20, 2006. A Functional Capacity Evaluation on September 24, 2008 indicated that the claimant was able to perform medium-level work. Dr. Lorio stated on January 20, 2009, "As far as I'm concerned, he can work without any restrictions or dysfunctional abilities." Dr. Lorio assigned a 20% anatomical impairment rating to the whole body, 50% to the lower extremity. The parties stipulated that the respondents accepted a 50% anatomical impairment rating.

Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has been reached. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878

S.W.2d 411 (1994). Temporary total disability benefits cannot be awarded after the end of an employee's healing period. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). The record demonstrates in the present matter that the claimant reached the end of his healing period no later than January 20, 2009. The claimant did not prove that he was entitled to additional temporary total disability benefits for his scheduled injury. Although the Full Commission has found that the claimant's complaints of back pain were a natural consequence of the scheduled injury, the evidence does not demonstrate that the claimant re-entered a healing period as a result of his back pain. Nor does the record show that the claimant is totally or partially incapacitated from earning wages as a result of his back pain. The claimant therefore did not prove he was entitled to temporary total disability benefits for an unscheduled injury in accordance with *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The Full Commission recognizes Dr. Ackerman's indication on November 6, 2009, on the questionnaire provided by counsel, "I believe Mr. Griffin should remain completely off work." It is within the Commission's

province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, a Functional Capacity Evaluation on September 24, 2008 showed that the claimant could perform medium-level work. Dr. Lorio opined on January 20, 2009, "he can work without any restrictions or dysfunctional abilities." Even with the claimant's complaints of back pain starting on March 12, 2009, the Full Commission does not assign any evidentiary weight to Dr. Ackerman's opinion that the claimant should remain completely off work. The Full Commission finds that the claimant did not prove he was entitled to additional temporary total disability benefits for his right knee or his back after January 20, 2009.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved his complaints of back pain were a natural consequence of the claimant's compensable knee injury. The claimant proved that the current conservative treatment recommendations of record by Dr. Ackerman and Dr. Watson were reasonably necessary in connection with the claimant's back pain, in accordance with Ark. Code Ann. §11-9-508(a). The claimant

did not prove he was entitled to any additional temporary total or temporary partial disability benefits for his right knee or his back. The Full Commission therefore affirms the administrative law judge's opinion in part. For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

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

After my de novo review of the entire record, I must respectfully dissent in part from the majority opinion, because I find that the claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 12, 2009 to a date yet to be determined. I concur in part with the majority opinion that the claimant's back pain was a compensable consequence of his knee injury.

When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Searcy Indus. Laundry, Inc. v. Ferren, 92 Ark. App. 65, 211 S.W.3d 11 (2005). 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. Id. Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. Breakfield v. In & Out, Inc., 79 Ark. App. 402, 88 S.W.3d 861 (2002).

The claimant was released on September 4, 2008 with satisfactory, but not complete, relief of his knee pain after a long period of conservative and aggressive treatment, ending in a total knee replacement. However, the claimant saw Dr. Ackerman on March 12, 2009 with a faulty gait and pain in the area of his lower lumbar facet joints on the right side. Dr. Ackerman attributed the facet pain to his antalgic ambulation. He prescribed Hydrocodone for pain, a back brace to straighten his back while

ambulating, a TENS unit trial, a cane if approved by the knee doctor, and a Lidoderm patch. He felt that facet injections might be necessary if these conservative measures were insufficient. On October 27, 2009, Dr. Ackerman stated that he felt that the abnormal gait was a result of his right knee injury. He felt that the claimant should remain completely off work until his recommended treatment was approved. He observed pain in the lower lumbar facet joints on the right side and atrophy of the right thigh musculature. On November 25, 2009, the claimant saw Dr. Watson, who prescribed pain relievers and Flexeril, a muscle relaxer.

As the majority found, the claimant's back pain was a compensable consequence of his compensable injury. The majority determined that the claimant was not within his healing period or totally incapacitated from earning wages. The majority relied on the facts that he was released from active treatment of his knee on September 4, 2008, that the claimant had a functional capacity evaluation on September 24, 2008, which indicated that the claimant was able to perform medium-level work, and that Dr. Lorio stated that he

could return to work without restriction in January 2009. As far as this analysis goes, it is accurate.

However, the majority's analysis does not take into account the fact that by March 2009, the claimant had developed an antalgic gait due to his compensable injury, which caused his facet joint pain. The claimant entered a new healing period as of March 12, 2009, when Dr. Ackerman began actively treating the claimant's back and gait. I find that the brace and the cane were intended to actively treat the claimant's condition, as was the conditional recommendation of steroid injections. See Amaya v. Mill, 102 Ark. App. 119, 128, 282 S.W.3d 269 (2008) (steroid injections are active treatment).

In Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996), the claimant remained in his healing period where a body "jacket" was prescribed, after it was determined that he was not a candidate for recommended surgery. The Court found that there was substantial evidence to support the Commission's finding that the claimant's back condition would benefit from further treatment (back surgery and/or the body jacket), and therefore he had not reached the end of his healing period.

In the current claim, Dr. Ackerman's stated purpose of the brace was to "straighten his back while he is ambulating." The altered gait caused his back to be out of alignment, which caused the facet syndrome, according to Dr. Ackerman. The brace was intended to correct that alignment, thus treating the results of the altered gait and the facet syndrome. The cane was planned to improve the claimant's gait; again, active treatment. Indeed, these are very conservative treatments of the claimant's facet syndrome, but the brace and the cane are clearly active treatment of the problem, intended to improve and alleviate the claimant's condition. Dr. Ackerman felt that if these conservative measures were insufficient, facet joint injections would be necessary. These injections are clearly active treatment of the claimant's condition. Because the claimant was undergoing active treatment of his back pain, which was directly related to his compensable injury, he was within his healing period from March 12, 2009 to a date yet to be determined.

The second requirement for an award of temporary total disability benefits is that the claimant is totally incapacitated from earning wages. At the time the claimant

was released in September 2008 after his total knee replacement, he had no restrictions and was capable of medium-level work, according to a functional capacity evaluation. However, he developed a facet syndrome related to his altered gait due to his compensable injury, which required treatment beginning in March 2009. Dr. Ackerman stated unequivocally that the claimant could not work until he received the recommended treatment. The conclusion that the claimant was in a new period of total incapacitation from earning wages due to the facet syndrome, which was a natural consequence of the compensable injury, is inescapable. He was capable of earning wages in September 2009, and then, when this compensable consequence developed, he was no longer capable of earning wages.

I find that the claimant is entitled to temporary total disability benefits from March 12, 2009 to a date yet to be determined, during which time he was within his healing period and totally incapacitated to earn wages.

After my de novo review of the entire record, I must respectfully dissent in part from the majority opinion, because I find that the claimant proved by a preponderance of the evidence that he is entitled to temporary total

disability benefits from March 12, 2009 to a date yet to be determined. I concur in part with the majority opinion that the claimant's back pain was a compensable consequence of his knee injury.

For the foregoing reasons, I must respectfully dissent in part and concur in part.

PHILIP A. HOOD, Commissioner