

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F900624

DAVID GUNN, EMPLOYEE	CLAIMANT
COMFORT SYSTEMS USA/ S M LAWRENCE COMPANY, EMPLOYER	RESPONDENT
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA/GALLAGHER BASSETT INSURANCE COMPANY/TPA	RESPONDENT

OPINION FILED MARCH 26, 2010

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

Claimant represented by the HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed November 16, 2009.

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 February 16, 2008, the relationship of employee-employer-carrier-third party

administrator existed between the parties.

3. On February 16, 2008, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$296.00 for total disability and \$222.00 for permanent partial disability.
4. On February 16, 2008, the claimant sustained a compensable injury to his right elbow or arm.
5. There is no dispute over medical services received through August 26, 2008.
6. The medical services recommended for the claimant's right elbow/arm difficulties by Dr. C. Noel Henley, on and after August 26, 2008, represent reasonably necessary medical services for the claimant's compensable injury, as that term is used in Ark. Code Ann. §11-9-508. Specifically, the claimant has proven by the greater weight of the credible evidence that these medical services were necessitated by or connected with his compensable right elbow/arm injury and have a reasonable expectation of accomplishing their intended beneficial purpose of reducing the actual physical damage and resulting symptoms caused by the compensable injury. Pursuant to the provisions of Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services.
7. There is no dispute over temporary total disability benefits prior to June 16, 2008.
8. The claimant has proven by the greater weight of the credible evidence that he is entitled to temporary total disability benefits during the period beginning June 17, 2008 and continuing through a date yet to be determined.

Specifically, the claimant has proven by the greater weight of the credible evidence that during this time he continued within his healing period from the effects of his compensable injury and has not "returned to work" within the meaning of Ark. Code Ann. §11-9-521(a).

9. The respondents have controverted the claimant's entitlement to any additional medical services, after August 26, 2008, and his entitlement to any temporary total disability benefits, on and after June 17, 2008.
10. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits awarded herein.

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 November 16, 2009, 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 respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he was entitled to temporary total disability benefits beginning June 17, 2008 and continuing through a date yet to be determined. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury to his right arm on February 16, 2008. There was no dispute over the temporary total disability benefits prior to June 16, 2008. In a hearing before the Administrative Law Judge, there was also the issue of additional medical services after August 26, 2008. The Administrative Law Judge awarded those benefits and that does not appear to be an issue on appeal. The only issue is the entitlement of temporary total disability benefits from June 17, 2008 through a date yet to be determined.

The claimant was employed by the respondent employer as a forklift driver. On February 16, 2008, the claimant suffered an admittedly compensable injury to his right elbow. The claimant's main responsibility was driving a forklift to pick up large metal spools and move them to the intended location. The claimant was

picking up the spool on February 16, 2008 when the overhead wench arm got caught, hoisting the spool and hoist back at the claimant. The claimant kept both arms on the hoist and his arm was forced back into his body injuring his right elbow. The claimant reported the injury to a supervisor and he was taken to the emergency room where he received medical treatment. The claimant followed up with Dr. Berestnev at the Arkansas Occupational Health Clinic. He was restricted from lifting more than five pounds with his right arm. The claimant was also restricted to left-handed duty only and no repetitive gripping, twisting or pulling with his right hand.

The claimant continued to work for the respondent employer working left-handed duty only. His responsibilities including burning the spools and sweeping. Burning the spools required the use of a blow torch to burn the wires off of the spools. The claimant was doing it left-handed. The respondents provided the claimant with light duty through May 29, 2008. This is where there is a dispute regarding the claimant working. The claimant contended that after May 29, 2008, there was nothing for him to do. The claimant testified that for three weeks straight, he called Tom Allison, the respondent's office manager to see if there was any work

for him. When he called Mr. Allison, he was told there was no work available for him and that he told Mr. Allison to call him if they had work. The claimant testified that Mr. Allison never called him back and he eventually just quit calling Mr. Allison.

The respondents offered the testimony of Mr. Allison to refute the claimant's claim. He testified that the respondent employer did not run out of work for the claimant. He stated that the claimant never complained to him about being able to do restricted duty and that there was always work to do burning the spools, that it was "pretty much 24 hours a day, 7 days a week." Mr. Allison testified that the claimant just quit showing up for light duty. He also testified that while the claimant was working light duty, he hardly ever worked a full shift. After the claimant quit showing up for work, Mr. Allison testified that he had called the claimant on the phone but there was no answer. After two and a half months passed, Mr. Allison terminated the claimant under the company's no call/no show policy. Although the policy stated that an employee would be terminated after three days of not calling or showing up for work, Mr. Allison testified that he cut the claimant some slack because he knew that he had a work-related injury and was on light duty. Mr. Allison additionally

testified that he never told the claimant there was no work for him. He testified that there was always work around the plant that the claimant could do, which included picking up wires or sweeping.

The claimant has not worked for anyone since May 29, 2008, nor has he looked for work. After quitting working for the respondent employer, the claimant stayed home and took care of his child.

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 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.

In order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that he remains within her healing period; and (2) that he has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Since the claimant's injury is a scheduled injury, temporary total disability benefits are only appropriate when he proves by a

preponderance of the evidence that he has not returned to work because he remained in his healing period.

Fendley v. Pea Ridge School District, 97 Ark. App. 214, 245 S.W.3d 676 (2006). See also, Ark. Code Ann. §11-9-521(a) (Repl. 2002); Wheeler, supra. In Fendley v. Pea Ridge School District, supra, the Court agreed with the Commission's analysis that a claim for temporary total disability for a scheduled injury cannot be considered in a vacuum and stated that "the employee's failure to return to work must be causally related to the injury..."

While conducting a de novo review of the record, in contrast to the majority, I give more weight to the testimony of Mr. Allison than I do the claimant. The evidence clearly shows that the respondent was willing to make accommodations for the claimant. In fact, the respondents were so willing to accommodate the claimant that they, in spite of a three-day no show/no call policy, they did not terminate the claimant until two and a half months after he quit showing up for work and failed to call.

The evidence demonstrates that Mr. Allison was at the plant from 6:00 a.m. to 5:30 p.m. and was on call for 24 hours a day, 7 days a week. There was no reason that the claimant could not get a hold of him if he

tried hard enough. The evidence indicates that the claimant just simply quit showing up for work and his excuse that there was not enough work to do is not supported by the evidence. Quite to the contrary, the respondent employer always had work available for the claimant and, in fact, created a job for the claimant within his medical restrictions. The respondent allowed the claimant to leave work earlier on days he would experience pain in his arm. Simply put, it is clear that the respondent employer had a job available for the claimant and he refused to work. Therefore, he is disqualified from receiving TTD benefits. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner