

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F711102

TONYA HACKNEY, EMPLOYEE	CLAIMANT
ATLIS IN-HOME CARE, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE, INSURANCE CARRIER/AIG DOMESTIC CLAIMS, INC., TPA	RESPONDENT

OPINION FILED FEBRUARY 17, 2010

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

Claimant represented by the HONORABLE ADRIENNE K. MURPHY, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed November 3, 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 the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including August 30, 2007.

3. The claimant's average weekly wage at the time of her injury was \$218.00. This entitles her to a weekly temporary total disability rate and permanent partial disability rate of \$145.00.
4. The claimant sustained a compensable injury to her back while working for the employer/respondent.
5. Some medical and indemnity benefits have been paid on this claim.
6. The Commission's opinion of September 24, 2008 is the law of the case.
7. The claimant proved by a preponderance of the evidence that the additional CT discogram as recommended by Dr. Raben and all of the treatment of record from him are reasonably necessary for her compensable back injury.
8. The claimant proved by a preponderance of the evidence that she is entitled to temporary total disability compensation from June 29, 2009 until a date yet to be determined.
9. The claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715.

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 3, 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 must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that the additional CT discogram, as recommended by Dr. Raben was reasonable and necessary medical treatment for the claimant's compensable back injury and awarding the claimant additional temporary total disability benefits. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

This claim has previously been before the Commission and a decision dated September 28, 2008, awarded benefits. Since that decision, the claimant essentially has been undergoing pain management. According to the claimant, she sees Dr. Brooks, a pain management doctor, every month. The respondents are

paying for this treatment. However, the claimant testified that she has gotten worse or stayed the same, as she has not gotten better. Specifically, she testified:

- Q. And when you say you haven't gotten any better, describe the pain.
- A. It's in my low back. It radiates down in my left hip. Some days it will radiate down into my left leg depending on like today is a bad for me so, as far as the radiating pain down into the hips.
- Q. How does it feel compared to after you 8-30-07 injury?
- A. The same.
- Q. And did you ever have pain like this before that injury?
- A. No.

The claimant has not returned to work and is currently a full-time student, in class twelve to fourteen hours per week. According to the claimant, she takes breaks during her classes and has to shift positions. The claimant also testified that between classes she walks up and down the halls to stretch.

The claimant testified that she is currently not working, but that she has worked at Salon Seven as a receptionist on and off since September 2008, maybe one day a week. According to the claimant, she stopped working there in December of 2008 until March of 2009, and then she started back again until August of 2009.

A review of the medical evidence of record demonstrates that On December 7, 2007, the claimant underwent an MRI of the lumbar spine with the following results:

... There is mild disc space narrowing at the L4-L5 and L5-S1 levels. There is some mild disc desiccation at these levels. The L2-L3 level is essentially normal. The L3-L4 level reveals no marked abnormalities. The L4-L5 level reveals some mild flattening of the thecal sac secondary to the disc bulge, but this minimal. The L5-S1 level revealed some very minimal disc bulging. I see no frankly herniated nucleus pulposus, and no severe central canal or neuroforaminal stenosis is noted. No compression fractures are noted.

On May 13, 2008, Dr. Raben wrote to the claimant's attorney:

.... As per our conversation time, she was injured the first time while lifting a patient last August. She was tough enough to continue to work and try to simply avoid the medical treatment and to simply ignore the pain. Her initial work-up was for an MRI scan that showed some questionable desiccation of one of the discs. Further work-up showed, indeed, that she had a new onset injury directly related to her on-the-job injury. This included the CT diskography. Within a reasonable degree of medical certainty, the acute and proximate cause, need for medical treatment, and probable need for further treatment, at some point distant from now, is a direct result of the on-the-job injury. As I'm

sure you're well aware of your client's progress since she has had an arthroscopically assisted microdisectomy with interdiskal electrothermal thermal therapy and is doing well postoperatively from that. The longevity of this procedure is suspect however and I'm reticent to believe that she will not require an arthroplasty or arthrodesis at some point in the future. This, again is within a reasonable degree of medical certainty. You questioned whether or not this single episode of lifting the large patient, sustaining a lifting twisting injury, and then being able to work for some time later is concordant with the patient's history. The progression of disc derangement and some annular herniation is just as this patient listed, that is, there will be an injury at some point in time and it will progressively decrease the patient's of function to the point where they seek medical attention. This may be weeks to months later and, in her case, was from August until November for my case. This is very representative of this particular type of injury and indeed the fact that she had minimal changes on MRI scan that then showed an annular herniation with disc derangement by diskography validate her and, in fact, the onset of that injury being the single lifting episode described. This of course is predicated by history and as stated this is the only historical event that I have that could have caused these radiographic findings. She had no other supervisory reported episode of injury besides that listed.

The claimant saw Dr. Raben for follow-up care of her low back pain on January 5, 2009. At that time, Dr. Raben wrote, in pertinent part:

Tonya persists in her problem with low back pain, if anything, its seems to be getting worse. She's on a tremendous amount of medication and I think at this point we need to go ahead for further evaluation as I believe she will need a fusion. We will see her back after further workup.

At that time, Dr. Raben's assessment was "L-spine disc deg; L-spine disc herniation, and L-spine radiculitis." He also continued the claimant's off work status and noted that she was not at maximum medical improvement.

Dr. Raben next saw the claimant on January 22, 2009 for follow-up of her back pain and MRI results. At that time, the claimant stated that she hurts everyday and cannot sleep. The claimant also stated that she was unable to sit for very long at all and that the pain was still going into both hips. Dr. Raben noted:

Tonya presents back today with MRI scan results of which now show desiccation of the L4-5 disc space with what appears to be neuroforaminal and folding of the ligamentum flavum secondary to probable disc space height collapse.

He continued the claimant's off work status and recommended arthrodesis versus arthroplasty.

The claimant underwent initial evaluation with Dr. Wayne Brooks on February 24, 2009 for pain management. She reported that she was in constant pain greater than 75% of the time, which was dull, burning, stablign and radiating. Her pain was about a seven on a scale of 0-10, it gets up to about an eight, but the average intensity of pain was about a six. Dr. Brooks wrote: "... She cannot work as a care aid or EMT because I do not think she can lift patients at this time. She may need to be trained for other activities, which apparently she is doing at this time."

On February 24, 2009, Dr. Brooks reported to the respondent the following concerning the claimant's current diagnosis and prognosis, "This is a patient with degenerative disc disease and a herniated nucleus pulposus at L4-L5, with persistent back pain. The overall prognosis is fair." With respect to her anticipated return to work for both modified and regular duty he wrote, in pertinent part:

At this time the patient is going to college. I think she can continue with those type of activities, meaning she will need to sit for 1-2 during the lecture times, and do activities which require sitting and studying, etc. With any activities

she must be allowed to change positions frequently, she will require rest breaks on at least a 1-2 hour basis....

On April 3, 2009, Dr. Calhoun saw the claimant for an independent medical evaluation. He gave an extensive explanation of the claimant's history of treatment and symptoms for her admittedly compensable back injury of August 30, 2007. With respect to her most recent treatment, he specifically noted that the claimant had continued to have pain in her back with radiations into both hips, which was followed-up by Dr. Raben. Dr. Calhoun noted that Dr. Raben had ordered an MRI of the lumbar spine, which was performed on January 16, 2009. He wrote, "According to the radiologist there had been further collapse of the disc and more degenerative signals at L4-L5 compared to the study prior."

With respect to specific questions, Dr. Calhoun felt that the claimant had only suffered a lumbar strain. According to him, from what he could ascertain from the MRI report of December 17, 2007, there was no true herniation at that time, only degenerative changes. Therefore, he felt that the claimant was now suffering from a chronic pain syndrome.

In comparing the 2009 MRI with the 2007 study, there had been further collapse of the disc space, most likely from the claimant undergoing an intradiscal decompression. He wrote, " Most assuredly these are degenerative and not an acute work related injury."

Dr. Calhoun was asked specifically if the claimant was a reasonable surgical candidate and he opined, "In reviewing the medical records and from what I have seen from this patient, I would not suggest either an arthrodesis or an arthroplasty." He noted that there were no indications for a fusion that could be related to the claimant's acute work injury other than the claimant's pain. Dr. Calhoun disagreed with Dr. Raben that the claimant required an arthrodesis or arthroplasty for her acute work-related injury. He felt that by his evaluation the findings all appeared to be degenerative in nature and not an acute work-related injury. According to Dr. Calhoun, he felt that the claimant could never return to her regular duty. However, he felt that she could return to modified duty at any time with the restrictions of lifting, pushing or pulling more than ten pounds and must be allowed to sit, stand or walk freely and as needed with occasional bending or twisting at the waist. Dr. Calhoun felt that the claimant was at maximum medical improvement.

Specifically, he wrote, "Because I would not suggest anything further surgical in this patient, and because she will be on chronic pain medications from a neurosurgical standpoint, she has essentially reached maximal medical improvement."

On April 14, 2009, Dr. Calhoun wrote:

Rating permanent partial disability for Mrs. Hackney will be difficult. She had surgery for disc herniation but actually had no true disc rupture on MRI. This I would say she has suffered no permanent partial disability.

In correspondence dated June 22, 2009, Dr. Calhoun was asked follow-up questions. He reported that the he was unable to clarify the percentages of the MRI findings that were related to the post-op changes from the decompressive microdiscectomy performed April 18, 2008 and what percentage is related to the pre-existing condition. He also reported that he felt that arthrodesis or arthroplasty would not correct or resolve the claimant's current complaint or post operative changes.

On July 29, 2009, Dr. Raben gave the following responses to the claimant's attorney's questions:

1. Please describe the procedure you have recommended and how it would benefit Ms. Hackney's condition:

CT discography would allow us to identify her pain generator and allow us to offer a solution to her pain.

2. Whether you can state within a reasonable degree of medical certainty that this procedure is reasonable and necessary and likely to lead to a an improvement of her condition:

Yes, it is.

3. Whether or not the need for surgery is 51% or more related to Ms. Hackney' work injury of 8/30/2007:

It is within a reasonable degree of medical certainty.

4. Whether or not Ms. Hackney is able to work in any capacity at this time, and if not, what the duration is of those restrictions:

She is not able to work and the duration is guarded.

5. Whether or not Ms. Hackney has reached maximum medical improvement:

No.

On August 6, 2009, Dr. Calhoun wrote:

I reviewed the previous evaluation of Ms. Brandy(Tonya) Hackney done in April of 2009. According to my report and the records, the patient has already undergone a previous provocative discogram. This was performed on March 18, 2008. It showed a grade V annular tear in the right extraforaminal location at L4-L5. This is the reason Dr. Raben subsequently performed surgery. The

patient already has had a discogram. A repeat discogram would only verify what was documented back in March of 2008. I really do not understand why he would recommend a second CT discography.

The Administrative Law Judge awarded the claimant the additional CT discograph as well as additional temporary total disability. The respondents have appealed.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

My review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that she is entitled to the CT discogram recommended by Dr. Raben. The evidence demonstrates that Dr. Calhoun saw the claimant for an independent medical evaluation and opined that the claimant not undergo either an arthrodesis or an arthroplasty. Specifically, he stated that either procedure would not be reasonable and necessary for any post-operative changes that the claimant has and neither procedure would correct or resolve the claimant's problems. Dr. Calhoun pointed out that the claimant had already had a discogram in March of 2008, and a repeat discogram would only show what was documented at that time. Now Dr. Raben is making a recommendation for another CT discogram, but he has also made a recommendation for another surgery before recommending additional diagnostic testing. There is nothing in the medical records indicating why a repeat discogram would be needed at this time other than Dr. Raben's comment that it would identify the claimant's "pain generator". Dr. Calhoun succinctly pointed out that this has already been done and the cause of the claimant's pain has been established. Dr. Calhoun has clearly opined that another surgery would not help the claimant's current

condition. He also made it clear that the first surgery performed by Dr. Raben was what most likely caused further collapse of the claimant's L4-5 disc space. I give more weight to the opinion of Dr. Calhoun to the opinion of Dr. Raben. Clearly, Dr. Raben's prior medical treatment has caused the further deterioration of the claimant's condition. The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). However, it is well

established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. McClain, supra.

The Commission is never limited to medical evidence in arriving at its decision. Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain, supra.

Therefore, after considering evidence, I cannot find that the claimant has proven by a

preponderance of the evidence that another CT discography as recommended by Dr. Raben is reasonable and necessary medical treatment. Accordingly, I must dissent from the majority's finding.

The majority also ordered additional temporary total disability benefits. In my opinion, the claimant cannot prove that she is entitled to any additional temporary total disability benefits from June 28, 2009 to a date yet to be determined.

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 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 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 worked at Salon Seven as the receptionist until August of 2009. After quitting working for Salon Seven, the claimant went back to school as a full-time student. She is enrolled in classes that require attendance 12 to 14 hours a week. When questioned by the Administrative Law Judge, the claimant testified that she had not

returned to work, nor was she even looking for a job because she was enrolled in school. Further, the claimant's pain management physician, Dr. Wayne Brooks, has opined that the claimant can continue with activities associated with being a college student. The claimant has chosen to further her education instead of working. Accordingly, I cannot find that the claimant is entitled to additional temporary total disability benefits.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's award of additional benefits.

KAREN H. MCKINNEY, Commissioner