

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F709782

EARNEST JOHNSON, EMPLOYEE	CLAIMANT
PAT SALMON & SONS, EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 15, 2010

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE KEITH M. McPHERSON, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence entitlement to additional medical treatment in the form of back surgery recommended by Dr. Harold Chakales and additional temporary total disability benefits. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a truck driver. The claimant testified that he had two work-related incidences that occurred on separate dates. The first incident occurred when the claimant was driving from Arkansas to Oklahoma. The claimant testified that the seat was not functioning correctly and he was bounced around during the trip. The claimant testified that the second incident occurred approximately three weeks after the incident with the seat. The claimant stated that he was attempting to pull a pin from a trailer hitch connected to the truck when he injured his back. The claimant reported the pin incident to his employer and he was sent to treatment at Concentra Healthcare Centers. The claimant was seen by Dr. Cynthia Almond who diagnosed the claimant with lumbar strain and lumbar pain.

The claimant was sent, after treating with Dr. Almond several times, to Dr. Brent Sprinkle at Arkansas Specialty Spine Center. Dr. Sprinkle had the claimant undergo an MRI on October 11, 2007. The MRI showed that the claimant had multi-level degenerative disc disease along with bulging discs at multiple levels. He also had a small central herniated disc superimposed on a bulging disc at

L4-5. On October 23, 2007, Dr. Sprinkle opined that the claimant's MRI showed diffused degenerative changes and some mild to moderate stenosis at L4-5 and diagnosed the claimant with a lumbar strain. He considered the findings to likely be pre-existing. The claimant was released to return to work with a restriction of no lifting over 20 pounds.

The claimant saw Dr. Sprinkle again on November 7, 2007. Dr. Sprinkle indicated that the claimant's condition involved lumbar degenerative disc disease and lumbar stenosis. Dr. Sprinkle administered lumbar epidural steroid injections at the L4-5 level. The claimant's last visit with Dr. Sprinkle was on December 19, 2007. The records from that date indicate that the claimant had three epidural steroid injections; however, the claimant advised that they did not really help his lumbar degenerative disease. Dr. Sprinkle's records indicate that the claimant did not want to consider surgery. The claimant indicated to Dr. Sprinkle that his wife had been through the same situation and he was really not interested in considering the surgery based upon the risk/benefit ratio. Dr. Sprinkle concluded that the claimant had reached maximum medical improvement for his lumbar strain injury and released the claimant to return to

work with no permanent anatomical impairment rating. Dr. Sprinkle noted that "I think most of the findings on his MRI are more consistent with degenerative phenomenon."

The claimant requested a change of physician to Dr. Harold Chakales. Dr. Chakales recommended an FCE and EMG of the claimant's back and both legs to determine if there was any motor involvement. The respondents paid for the EMG, which was completed on October 13, 2008. The results noted, "No electro physiological evidence of motor nerve root irritation, peripheral neuropathy or myopathy." Dr. Chakales opined that the claimant was a candidate for low back surgery.

The claimant underwent an independent medical evaluation by Dr. Edward Saer on April 17, 2009. Dr. Saer assessed that the claimant suffered from multi-level degenerative changes that "clearly pre-existed his injury." Dr. Saer opined that "most likely, he had a lumbar strain or sprain with aggravation of his pre-existing degenerative disc disease." Dr. Saer concluded that that any surgical treatment would not relieve the claimant's symptoms. He recommended non-operative management.

The Administrative Law Judge found that Dr.

Chakales' recommended medical treatment is reasonable and necessary and also ordered additional temporary total disability benefits from September 7, 2007 through December 19, 2007 and August 4, 2008, continuing through a date yet to be determined. The respondents have appealed the decision.

The first issue that must be addressed is the additional medical treatment as recommended by Dr. Chakales. 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.

Our review of the evidence demonstrates that there is not a single medical opinion stating that the claimant's bulging or herniated discs were the reason for the surgical intervention recommended by Dr. Chakales. The medical records are replete with medical findings and opinions of three separate doctors which indicate that the claimant suffered from multi-level lumbar degeneration which pre-existed the claimant's compensable work-related injury. There are two opinions stating that the claimant is not a candidate for surgery. Dr. Sprinkle and Dr. Saer both have opined that surgical intervention was not justified based on the claimant's symptoms and test results. Dr. Saer opined that the claimant needed medical management in the form of a non-operative management. Dr. Chakales is the only one who has recommended surgery for the claimant. We give more weight to the opinion of Dr. Saer because the claimant's findings on the MRI are clearly degenerative in nature and not related the claimant's compensable injury. 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.

It is apparent that the claimant had a temporary aggravation of a pre-existing condition and had reached maximum medical improvement when Dr. Sprinkle released him in December of 2007. Clearly, any need the claimant would have for surgery at this point is not based upon his compensable injury but on his pre-existing degenerative disc disease. Therefore, we find that the claimant has failed to

prove by a preponderance of the evidence that he is entitled to additional medical treatment as recommended by Dr. Chakales.

The next issue that must be addressed is the claimant's contention that he is entitled to additional temporary total disability benefits. 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/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).

A review of the evidence demonstrates that the claimant reached maximum medical improvement on December 17, 2007 and he was capable of returning to employment at that time. The claimant was released by Dr. Sprinkle without any permanent anatomical impairment. Further, the claimant collected unemployment benefits during this time period. Simply put, there's no evidence that the claimant's inability to work is related to his compensable injury. Accordingly, we reverse the decision of the Administrative Law Judge awarding temporary total disability benefits.

For these reasons stated herein, we find that the decision of the Administrative Law Judge must be and is hereby reversed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I would award the claimant additional temporary total disability benefits, additional medical benefits pursuant to the recommendation of Dr. Chakales, and attorney's fees.

The claimant sustained an admittedly compensable injury on August 28, 2007, for which he received medical and indemnity benefits through December 19, 2007. During his treatment, the claimant was diagnosed with degenerative disc disease with herniated and bulging discs, supported by objective findings. The claimant testified that he had no prior back problems and no symptoms similar to the problems he had after his compensable injury. There are no medical records which reflect that the claimant ever sought treatment for back pain.

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See Nashville Livestock Commission v. Cox, 302 Ark. 69, 787

S.W.2d 664 (1990); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Infirmary Med. Ctr. v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The employer takes the employee as he finds him. Murphree, supra. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition. However, although a disabling symptom of a pre-existing condition may be compensable if it is brought on by an accident arising out of and in the course of employment, the employee's entitlement to compensation ends when his condition is restored to the condition that existed before the injury, unless the injury contributes to the condition by accelerating or combining with the pre-existing condition. See Ark. Power and Light Co. v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

Under Arkansas workers' compensation law, the employer takes the employee as she is found, and circumstances which aggravate pre-existing conditions are compensable. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W. 2d 664 (1990). Employers must promptly provide medical services which are reasonably necessary for

treatment of compensable injuries. Ark Code Ann. Sec. 11-9-508(a) (Supp. 2005). Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, injured workers have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 17, 1989 (D612291). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). Further, when the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury. Wackenhut, supra. The basic test is whether there is causal connection between the two episodes. Id.

A causal connection is established when the compensable injury is found to be "a factor" in the resulting need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). Treatment intended to reduce, or enable a claimant to cope with, chronic pain

attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. Sec. 11-9-508. Billy Chronister v. Lavaca Vault, Full Commission Opinion filed June 20, 1991 (D704562).

The majority found that the claimant's symptoms arising out of the herniated and bulging discs had resolved and that the medical treatment and recommendation for surgery at issue were a result of the claimant's pre-existing condition. This conclusion ignores the fact that the claimant had no back symptoms or limitations on his ability to work until his compensable injuries, and that since that time, he has experienced low back pain and radiating symptoms into his leg. Whether pain from his herniated and bulging discs had resolved or not, the pain and limitations from his previously asymptomatic back had not resolved and required treatment. The work-related injury caused the degenerative changes in his spine to change from asymptomatic to symptomatic, and for this reason, the medical treatment of these symptoms is reasonable and necessary treatment of his compensable injury.

Furthermore, it is unreasonable to draw a distinction between the claimant's degenerative disc disease and an acute injury. To repeat, the claimant was asymptomatic before the compensable injury and symptomatic after the compensable injury. Dr. Sprinkle drew such a distinction when he declared the claimant at maximum medical improvement in December 2007, but this is based on a lack of understanding of workers' compensation law in Arkansas. At that time, the claimant continued to be symptomatic.

The claimant was seen in the emergency room for back pain in December 2007, after his visit with Dr. Sprinkle, and in June 2008. In August 2008, the claimant was able to see Dr. Chakales, who noted his complaints of pain in his back and legs, with numbness and weakness in his right leg. He was diagnosed with lumbar disc syndrome with right-sided radiculitis/radiculopathy, consistent with the diagnosis of Dr. Sprinkle in 2007. In December 2007, the claimant was released from treatment, despite his continued symptoms. The claimant's symptoms continued and increased, causing him to need emergency treatment twice before he was able to be seen by Dr. Chakales, for the same symptoms, which were increased in severity.

Similarly to Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), the presence of a pre-existing condition does not prevent a finding of causal connection where the claimant's undisputedly compensable injury either caused or precipitated the need for medication and surgery. The claimant was symptom-free and unaware of any back problems until his compensable injury; thus the compensable injury precipitated the need for additional treatment. As in Estridge, "that is clear." Supra, 343 Ark. at ____.

The claimant's condition changed from asymptomatic to symptomatic after the 2007 accident and worsened without care between the last visit with Dr. Sprinkle and the first visit with Dr. Chakales. A claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). It is undisputed that the claimant had a pre-existing condition. However, the 2007 accident aggravated the pre-existing condition and is a compensable injury. The 2007 compensable injury is a factor in the need for treatment and, under Williams, supra, the claimant is entitled to the treatment

provided by Dr. Chakales.

I find that the claimant has proven by a preponderance of the evidence that he remained in his healing period from the date of injury to a date yet to be determined, as the claimant continued to suffer symptoms for which he required emergency room care and for which Dr. Chakales offered reasonable treatment. I also find that the treatment he received after he was released by Dr. Sprinkle, including emergency treatment and Dr. Chakales' care and proposed care, are causally connected to the compensable injury and reasonable and necessary care of that injury.

The claimant sought temporary total disability benefits from December 20, 2007 to a date yet to be determined. As noted above, the claimant has remained in his healing period from the date of injury to a date yet to be determined. He was released, prematurely in my opinion, from care by Dr. Sprinkle. The claimant was seen on December 22, 2007 and June 12, 2008 with significant lumbar pain and radiculopathy. On August 19, 2008, Dr. Chakales noted that he was "still" unable to work, after his office visits on August 4 and 11, 2008. The claimant received unemployment benefits through September 2008 and beginning in January

2009. Therefore the claimant is entitled to receive temporary total disability benefits from the date in September 2008 when his unemployment benefits ended until the date in January 2009 when his unemployment benefits were reinstated. Presumably, when the unemployment benefits ended in 2009, the claimant would have been eligible for further temporary total disability benefits.

Lastly, the claimant is entitled to an attorney's fee on this controverted claim.

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I would award the claimant additional temporary total disability benefits, additional medical benefits pursuant to the recommendation of Dr. Chakales, and attorney's fees.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner