

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F703947

WILLIAM JOHNSON, EMPLOYEE	CLAIMANT
MAX FOOTE CONSTRUCTION, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 3, 2010

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

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

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed January 6, 2010.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 14, 2009, and contained in a pre-hearing order filed July 1, 2009, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that he is

entitled to temporary total disability from July 2, 2008, to May 10, 2009.

3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant is entitled to additional medical treatment and temporary total disability benefits from July 2, 2008 until May 10, 2009.

HISTORY

On January 30, 2007 the claimant was carrying a concrete form with a co-worker when his foot got caught, and he twisted his back. The claimant felt a burning sensation in the right side of his hip and down his right leg. The claimant was initially seen by Dr. Cynthia Almond, who provided medications and restricted the claimant's work activity. An MRI was conducted on March 5, 2007. The MRI showed an L4-5 annular bulge with nerve root abutment. Dr. Almond then referred the claimant to an orthopedic surgeon. On March 19, 2007, Dr. David Wassell, an orthopedic surgeon, provided medications and took the claimant completely off work. On May 1, 2007, Dr. Russell Allison, also an orthopedic surgeon, saw the claimant and ordered EMG/NCV

studies which were conducted on May 10, 2007 and were essentially normal. On May 15, 2007 Dr. Allison opined that the claimant's condition did not appear to be a surgical problem at this time and referred the claimant to Dr. Amir Quereshi to treat the right leg pain. Dr. Quereshi treated the claimant with injections.

The respondents did not want the claimant to treat with Dr. Quereshi so they arranged for the claimant to be seen by Dr. Victor Vargas at the Arkansas Specialty Spine Center. On December 3, 2007, Dr. Vargas stated that the claimant's symptoms were "consistent with a probable radicular component of the right L4 nerve root." A lumbar myelogram indicating a "disc bulge with right far lateral and intraforaminal disc protrusion" was performed on January 23, 2008. The claimant returned to Dr. Vargas on May 6, 2008. On May 6, 2008, Dr. Vargas stated:

**ASSESSMENT AND PLAN:**

I have discussed at great length with this patient that he has done several treatments for his condition in the past with the pain clinics. He has had epidural steroid injections and facet injections without very significant relief of his symptomatology. With this documented CT myelogram with moderate narrowing of the foramen at L4-L5 on the

right side, I have explained to the patient that there is probably nothing else from the nonoperative treatment perspective that I can recommend. I suggested that he make an appointment with Dr. Saer, a spine surgeon, to discuss possible surgical treatment for his condition. The patient agrees with that. I am going to arrange an appointment with Dr. Saer.

At this point claimant's medical bills and temporary total disability benefits were being paid by the respondent. The respondent stopped paying benefits when the claimant enrolled in cooking school in July, 2008.

#### DISCUSSION

##### Temporary Total Disability

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). A claimant who has been released to light duty work but has not returned to work may

be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 675 S.W. 2d 841 (1984). When an injured employee is totally incapacitated from earning wages and remains in the healing period, she is entitled to temporary total disability. Id. Here, there actually has been no light duty release. The only doctor to opine on the subject is Dr. Wassell, and he took the claimant completely off work. The claimant testified that he remained symptomatic during the time period in question:

Q: Okay and tell us what that condition would have been. Describe the symptoms and so forth.

A: The pain in my right hip. The burning down through it and the sciatic nerve through there.

There is no evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury.

Furthermore, the claimant was unable to return to the construction work he had been performing for the respondent. The claimant testified:

Q: That pain that you were having during this time that we're talking about, was that pain that would have made it difficult for you to lift?

A: Oh, yes, sir. Yes, sir.

Q: Would it have been-would it have been-would it have made it difficult to bend and stoop and push and pull and be on your feet all day and that sort of thing?

A: Yes, sir.

Q: And is that the kind of, what I just described to you, is that the kind of thing that you have to do if you're working construction for Max Foote?

A: Oh, yes, sir.

Q: You have to be able to lift and bend and stoop and push and pull and be on your feet all day, is that right?

A: Yes, sir.

The respondents cut off benefits due to the claimant's enrollment in cooking school in July, 2008. However, it is well settled that a claimant's participation

in a plan of rehabilitation, like going to school, does not disqualify one from the receipt of temporary disability benefits. See, International Paper Co. v. McGoogan, 225 Ark. 1025, 504 S.W. 2d 146 (1974).

Furthermore, there is no evidence that the claimant has been found to have reached maximum medical improvement. Pyles v. Triple F. Foods of Texas, Inc., 270 Ark. 729, 606 S.W. 2d 146 (1980) states:

...temporary total disability benefits are payable without interruption from the time of injury to the time at which the degree of permanent disability is ascertainable...if during the period while the body is healing, the employee is unable to perform remunerated labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total.

#### Medical Treatment

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those

services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Here, as the respondent's own doctor recommended that the claimant be seen by an orthopedic surgeon, going so far as to say "I am going to arrange an appointment with Dr. Saer" it cannot be said that the evidence of record supports the majority's conclusion that the claimant is not entitled to additional reasonably necessary medical treatment.

In conclusion, I find that according to the standard set by Breshears the claimant is entitled to temporary total disability benefits from July 2, 2008 to May 10, 2009. As the respondent's own doctor has referred the claimant to an orthopedic surgeon, and this has not been accomplished, I find that the claimant is entitled to additional reasonably necessary medical treatment.

Substantial evidence does not support the majority's  
opinion.

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PHILIP A. HOOD, Commissioner