

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405689

JOHN D. JONES, EMPLOYEE	CLAIMANT
XTREME PIZZA, d/b/a DOMINOS PIZZA, EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 15, 2010

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

Claimant represented by the HONORABLE J. MARK WHITE,
Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE JOHN P. TALBOT,
Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal and the claimant cross-appeals an opinion and order of the Administrative Law Judge filed July 23, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. There was an August 20, 2003, compensable injury.
2. The compensation rates are \$400/325.

3. A hearing was held on June 2, 2005 and an administrative law judge opinion was filed on June 23, 2005, awarding benefits.
4. A Full Commission decision was filed January 19, 2007, awarding benefits as outlined in the administrative law judge's June 23, 2005, decision.
5. The June 23, 2005, opinion awarded the reasonable and necessary medical the claimant had pursued and temporary total disability benefits from September 9, 2003 through November 10, 2003 and attorney's fees.
6. Respondents have paid no medical in the claim.
7. Respondents have paid temporary total disability benefits from September 9, 2003 through November 10, 2003.
8. The claimant has proven by a preponderance of the evidence that he is entitled to the additional medical benefits he requested, to include reimbursement of the physical therapy he paid, reimbursement to the claimant for money he paid to the group health insurance, reimbursement to group health for medical paid and payment of medical bills associated with Rebsamen Medical Center, Radiology Consultants and Dr. Lon Burba.
9. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages from January 16, 2004 through December 31, 2004, and from March 1, 2005 through March 31, 2005.
10. *Res judicata/laches* does not attach to the temporary total disability issue, since the merits were not previously litigated.

11. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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 July 23, 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 is entitled to additional temporary total disability benefits from January 16, 2004 through December 31, 2004 and from

March 1, 2005 though March 31, 2005, as well as reimbursement to the claimant for medical paid for physical therapy, money he paid to the group health insurance and for the medical bills associated with Rebsamen Medical Center, Radiology Consultants and Dr. Lon Burba. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the extensive physical therapy was not reasonable and necessary medical treatment in connection with the claimant's compensable injury and that the claimant has failed to prove by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages when he quit work in January of 2004. Therefore, I find that the decision of that Administrative Law Judge should be reversed with regard to these awards of benefits.

This claim was initially controverted based upon employment services. Following a decision by the Court of Appeals finding that the claimant was performing employment services, the Full Commission entered an opinion on January 19, 2007, ordering respondents to comply with the award of benefits as set forth in the original Administrative Law Judge opinion finding that the claimant was temporarily totally disabled from September 9, 2003 through November 10,

2003, and finding the respondents are liable for all reasonable and necessary medical the claimant has pursued. At the most recent hearing, claimant contended that he has not been paid for his medical treatment and that he is entitled to additional temporary total benefits from January 16, 2004, through July 12, 2005.

The claimant sustained a compensable injury on August 20, 2003, when he was rear-ended on his way to work from a mandatory meeting in another town. The claimant sought medical treatment the following day at Rebsamen Medical Center. The emergency room records from this visit reflect that the claimant presented with complaints of neck and lower back pain after hitting his head on the back of the headrest when he was rear-ended. A physical examination of the claimant's neck and low back revealed the presence of tender muscles. More importantly, however, this medical report also notes the complaint of headaches for the past 2-3 days which causes nausea, blurred vision, and with light bothering the eyes. The claimant reported that these headaches came on gradually and that they were "similar to previous headaches." Under the section for "past history", the physician circled "chronic headaches." In addition under the section for "Similar symptoms previously," the physician wrote "frequently."

The claimant soon came under the care of his family physicians at the France-Tilley clinic. In a report dated September 9, 2003, the claimant provided a history of fainting the previous evening and that he had tingling in his arms and legs when he turns his neck. The claimant again reported a complaint of blurry vision. Finally, the claimant also complained of headaches, but reported that "they are his usual [headaches]." Due to claimant's complaints, his physician ordered an MRI of the head, however he noted that he doubted the claimant's syncope was neurologic in nature but more likely transient vasovagal response, or subclavian steal. The MRI of the brain and head performed on October 22, 2003 was negative. Subsequent carotid duplex dopplers ruled out aneurysm and subclavian steal syndrome. When claimant returned to the France-Tilley clinic on November 10, 2003, he reported that his headaches were so severe that he could not sleep the night before, they were constant and that he could not deal with the pain. The claimant was referred to the McMaster's Physical Therapy Clinic at that time. In addition, the claimant was referred to Dr. Lon Burba, a neurologist, and he continued to treat with his family physicians.

Claimant was examined by Dr. Burba on December 16, 2003, at which time he presented with complaints of headaches and neck pain for the past four to six months associated with nausea. Dr. Burba recorded a family history of a mother deceased at age 52 with migraines. After examining the claimant and reviewing his diagnostic MRI's, Dr. Burba assessed the claimant with "common migraines" and confusional spells for which he prescribed medication and ordered an EEG for the confusional spells. The EEG performed on May 24, 2004, did not explain the claimant's confusional spells.

On July 5, 2004, the claimant was seen by Dr. Keith Schluterman, a neurosurgeon. The claimant provided Dr. Schluterman with a history of headaches bothering him for the past eight months. After examining the claimant and reviewing his normal MRI studies, Dr. Schluterman diagnosed the claimant with "Migraine. Analgesic rebound headache. Occipital neuralgia. Cervical myelopathy. Depression." With regard to the headaches, Dr. Schluterman noted: "...he gives a history most consistent with migraine headaches which have now been transformed in part due to analgesic abuse..." Dr. Schluterman gave the claimant a trial of Topamax, and a prescription for Imitrex tablets and Darvocet to use for severe headaches and he advised the

claimant to wean himself off of Aleve, zanaflex, fioricet, relpax, and midrin. In addition, Dr. Schluterman gave the claimant an Occipital nerve block. The claimant returned to Dr. Schluterman on September 9, 2004. After reviewing the claimant's medical records and interviewing and examining the claimant, Dr. Schluterman doubled the claimant's Topamax dosage and repeated the occipital injection. Claimant was scheduled to return in two months, however, he returned to Dr. Schluterman only 20 days later complaining that the injection did not help and that he has become "dazed" when his pain was real severe. After re-examining the claimant, Dr. Schluterman opined:

Impression: Occipital neuralgia, resolving, Common migraine, intractable. Pain syndrome. Neck pain. His migraines continue and I believe his major problems are his neck pain. This may well be precipitating his frequent headaches. At this point, I do not really see an advantageous additional drug to add to the regimen. He is already on too many medications at this point, and I suspect that this is what is causing his "unsteadiness" and "imbalance." I also fear that he is dependent on medications including darvocet. He seems to be functionally no better at this stage in life; not working, relying on multiple meds and frequent PT, all without meaningful pain benefit, since beginning any treatment. He likely has developed a chronic pain syndrome that feeding

additional meds to will not establish a lasting "cure." At this point, he has no demonstrable brain or spine injury, nor to nerve roots.

After discussing the claimant's medication usage and the need to wean off of several of his prescriptions, Dr. Schluterman did state in pertinent part, "He can continue Ketoflex gel for neck pain and it is OK with me that he continue PT if he finds this beneficial. At some point, however, I would think he would maximize the benefits of this."

Attending Physician Reports from Dr. France of the France-Tilley clinic dated October 6, 2004, October 29, 2004, and March 9, 2005, were introduced into evidence stating that the claimant was and would be totally disabled from January 2004 through December 31, 2004 and from March 1, 2005 through March 31, 2005. However, additional office notes for continued treatment by the France-Tilley clinic during this time period are lacking. The next office visit report introduced into evidence reflects that the claimant returned to the France-Tilley clinic on March 31, 2005. The claimant reported at that time that his headaches had improved and that they were responding to Advil and muscle relaxers, but that he has been having daily neck spasms although they had been less frequent the last two weeks.

Upon examination, the claimant was found to have an ear infection for which he was prescribed medication. The claimant next returned to the France-Tilley clinic on July 12, 2005, with complaints of neck and occipital pain, for which he was diagnosed with Occipital and Temporal neuralgia and prescribed medications.

Throughout the course of his treatment, the claimant has been receiving physical therapy at McMaster Physical Therapy Clinic on a regular and consistent basis from November 10, 2003, through June 16, 2005. The initial physical therapy records indicate that the claimant was diagnosed with cervical and thoracic strain. The initial goal was to improve the claimant's mobility to function and to decrease his pain to a manageable level within 2-4 weeks and with the claimant returning to full activities of daily living within 4-6 weeks. Dr. France ordered the first round of physical therapy in November 2003. The second round requested by the therapy clinic on December 8, 2003, was never signed or apparently approved by Dr. France as noted by the request bearing this date in claimant's exhibit number 2, page 6. Likewise a request for additional physical therapy prepared for Dr. Alonzo Burba dated December 16, 2003, was never signed by Dr. Burba. Dr. France did sign the referral form from McMaster clinic dated

January 22, 2004, as was the April 19, 2004, but this request specifically limited treatment to for only three times a week for two weeks. Despite this limited request, the claimant continued to obtain physical therapy without a referral for treatment through June 2004. On June 23, 2004, Dr. France authorized additional therapy for a limited time of only two weeks. The claimant was referred to Dr. Schluterman July 5, 2004, so the physical therapy referral dated July 30, 2004, was prepared for his signature. No signature was obtained. Dr. Schluterman's medical records reveal that he did not prescribe or authorize physical therapy until the claimant's second return visit on September 29, 2004. This is confirmed by the prescription for physical therapy issued by Dr. Schluterman on September 30, 2004, and marked as Claimant's exhibit 2, page 50. This appears to be an open ended prescription in accordance with his medical records authorizing "continue PT if he finds this beneficial. At some point, however, I would think he would maximize the benefits of this."

It is also important to note that the claimant received a third party settlement as a result of the automobile accident. According to the claimant, after

his attorney and the medical providers were paid, he received over \$30,000 from this settlement.

Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board, 47 Ark. App. 181, 888 S.W.2d 314 (1994). 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 Commission Opinion, Dec. 13, 1989 (D512553).

After analyzing the evidence of record, I find that the claimant has failed to prove by a preponderance of the evidence that the extensive physical therapy he received was reasonable and necessary in connection with his compensable injury. Claimant received a minor

injury that did not result in a cervical spine or nerve root injury. Nevertheless he has continued to complain of neck pain and headaches. As for the headaches, it is important to note that the claimant suffered from headaches prior to his compensable injury. When he first sought medical treatment for his post accident headaches he described them as similar to his previous headaches. Moreover, Dr. Burba noted that the claimant has a strong familiar history of migraines and claimant was eventually diagnosed with "common" migraines. Furthermore, although he authorized additional physical therapy if the claimant felt he was benefitting from it, Dr. Schluterman opined that at some point the claimant would "maximize" his benefit of this modality of treatment. Clearly, two years of continued physical therapy has not provided the claimant with any sustainable relief. Dr. Schluterman also made note of this when he noted as early as September of 2004, when he noted, "He seems to be functionally no better at this stage in life; not working, relying on multiple meds and frequent PT, all without meaningful pain benefit, since beginning any treatment." The claimant received hot packs and massages every time he went to physical therapy. Such treatment obviously felt good leading the claimant to think that it was beneficial. On going

palliative treatment is not always reasonable and necessary even though the claimant testified that he believed it was is beneficial. Gulley v. Mountain View Water & Sewer, Full Commission Opinion July 13, 1996 (D4509366, D410605). Alman v. Good Samaritan Nursing Home, Full Commission Opinion September 3, 1996 (D916588). Claimant testified that he needed continued physical therapy because of his headaches; however, a review of the physical therapy reflects that despite this continued treatment, he continued to have headaches and he never improved under this treatment plan. The physical therapy clearly as not reasonable and necessary treatment as alluded to by Dr. Schluterman. The treatment did not render any type of permanent relief and it did not benefit the claimant in terms of self-education to adequately manage his pain on his own. The continued treatment only served to addict the claimant to the temporary palliative treatment and had long since been maximized even when Dr. Schluterman approved further treatment if the claimant thought it was beneficial. Clearly, the remedy sought for relieving the claimant's pain was never accomplished as evidenced by the claimant's continued use and abuse of this type of treatment.

I further find the evidence lacking with regard to whether the extensive physical therapy visits made by the claimant were actually prescribed and authorized by his treating physicians. The lack of physician signatures on several of the request for treatment forms or actual prescriptions scripts for such treatment, leads me to believe that the claimant was initiating continued treatment without proper physician authorization. My review of the clinic notes and referral requests does not reveal prescriptions for the entire course of treatment obtained by the claimant. Accordingly, I cannot find that the extensive course of physical therapy of constant and continuous treatment from November 2003 through July 2005 is reasonable and necessary medical treatment in connection with the claimant's compensable injury.

I further find that the claimant has failed to prove by a preponderance of the evidence that he was temporarily totally disabled from January 16, 2004, through December 31, 2004, and from March 1, 2005, through March 31, 2005. In reaching this finding I acknowledge the presence of the Attending Physician Reports listing the claimant as totally disabled during these periods of time. Nevertheless, the claimant was fully capable of returning to work for respondent

employer after a short period of disability and continue working until he had a disagreement with the owner. Although the claimant testified that he had pain when he worked, the evidence reveals that the claimant was capable of working through this pain. He worked with this pain until he had a disagreement with the owner and the owner verbally abused him over the telephone. At the first hearing on the issue of compensability, the claimant testified that he quit work because he was not going to be treated like that, and that if this incident had not have occurred, he would have continued working for respondents.

The period of temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation not simply because he has a compensable injury, but rather during the period of time that he is within his healing period for the compensable injury while he is totally incapacitated to earn wages as a result of that injury. Id.

Accordingly, to be entitled to temporary total disability benefits, an injured employee must satisfy this two-pronged test.

The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(13) (Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant voluntarily left his employment on January 16, 2004. He received a DUI on January 17, 2004, and was required to perform community service at the Jacksonville Police Department for eight hours a day. Regardless of the actually type of community service whether it was picking up trash, or sitting in a

room watching a video on drunken driving, this activity clearly evidences the claimant's ability to work in at least a light or sedentary job. Moreover, the claimant applied for unemployment benefits and held himself out as capable of working. The claimant only complained that his pain was keeping him from being able to work. Despite his numerous trips to the physical therapist, and his continued complaints of pain to his treating physicians, no medical reason for the continued complaints of headaches and pain other than common migraines were noted. Claimant did not have a cervical or nerve root injury. He was diagnosed with a cervical and thoracic strain, both soft tissue injuries. Dr. France initially noted that the claimant would take approximately eight weeks to recover. After I consider all the evidence of record, including the fact that the claimant received a third party settlement, I find that the claimant was not motivated to work, and that he was not totally incapacitated from working after he quit in January of 2004.

Therefore, for those reasons set forth above, I find that the decision of the Administrative Law Judge should be reversed.

KAREN H. MCKINNEY, Commissioner