

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F808727

STEVEN JUST,
EMPLOYEE

CLAIMANT

MODERN FENCE COMPANY,
EMPLOYER

RESPONDENT

FIRSTCOMP INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 29, 2010

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

Claimant represented by the HONORABLE M. KEITH WREN,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE RANDY P. MURPHY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed March 16, 2010. The administrative law judge found that the claimant proved he was entitled to additional medical treatment and additional temporary total disability benefits. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

The testimony of Steven Lee Just indicated that he became employed with Modern Fence Company in about 2001. Mr. Just testified that he started out as an apprentice and eventually became crew chief. Dr. Eugene H. Alexander examined the claimant on April 7, 2008: "Steven Just presents with a three-week history of low-back pain, which has developed radiation into the right lower extremity over the last week....Pain originally started while he was using a jack hammer at work and then has slowly progressed to the point that he now has the radiation of pain down into his right calf/ankle area." Dr. Alexander assessed "1. Right-sided sciatica....We recommended obtaining an MRI for further evaluation, but he declines at this time because of lack of insurance." Dr. Alexander prescribed medication, and advised the claimant to avoid twisting, bending, or heavy lifting for two weeks. The claimant's testimony indicated that he took a two-week vacation in April 2008 and then returned to full work duty. The claimant described "full duty" as "Jackhammering, digging holes by hand, rockbarring, concreting cutting, sawing, you name it.." The claimant described the work as "heavy."

The parties stipulated that the claimant sustained a compensable injury to his low back on July 8, 2008. The claimant testified, "We was on a tear-out job....we was humping it, we was getting after it....I noticed I was getting really stiff and so, you know, I told the guy that was with me, you know, 'Hey, I need to slow down here.' ... I slowed down, finished my day out, went home, and the next morning when I woke up, I had the pain in my butt and it was a severe pain, and it was nothing like, you know, a sore back."

A Radiology Report regarding the claimant's lumbar spine was entered on July 9, 2008: "There is probably mild degenerative disc space narrowing L5-S1. The other intervertebral disc spaces are adequately maintained. Vertebral body heights are well maintained with normal alignment. IMPRESSION: Questionable mild degenerative disc space narrowing L5-S1."

Dr. Fareed Kannout examined the claimant at Cooper Clinic on July 9, 2008:

Steven Just is a 34-year-old male with no significant past medical history presenting with a chief complaint of back pain in the lower part of his back radiating to the right leg. It happened at work when he was pulling posts on July 8, 2008....

Examination of his back is significant for mild muscle spasm and tenderness and the patient is in a semiflexed position to avoid pressure on his lower back. An x-ray of his lumbar spine was unremarkable for fracture or dislocation.

Dr. Kannout diagnosed "Low back pain, muscular strain/spasm, with subjective numbness in the left 4th and 5th fingers....The patient to be off work for the next couple of days due to the type of job he does and he is to start physical therapy at Cooper Clinic daily for a week upon approval by the employer....He is to avoid any pulling or pushing at home and use the back brace for 2 days, given supply here in the clinic, and he is to follow up with me on July 11, 2008, from 8:00 - 10:00 in the morning." Dr. Kannout prescribed medication for the claimant's pain.

Dr. Kannout's diagnosis on July 11, 2008 was "Low back pain. No muscular strain. Improved....May return to his regular duty on July 14, 2008. He is to continue the medication and follow up with me as needed." The claimant testified that he attempted to return to regular duty for the respondent-employer but was unable to perform his work because of the condition of his back. The record indicates that the claimant underwent physical therapy beginning July

28, 2008. The claimant followed up with Dr. Kannout on July 31, 2008:

Steven Just is here today stating that his back started hurting again and getting to where he started. He denies any recent injury. He has been just doing his regular job, which includes lots of pulling and pushing and heavy lifting and repetitive motion of his lumbar spine. He denies any problems with his neck or upper extremities. His main problem is his back and right leg pain.... Examination of his back is significant for mild tenderness and muscle spasm in the lumbar spine area.

Dr. Kannout diagnosed "Low back pain, muscle spasm, and right leg pain....The patient may return to limited duty if available which includes no pulling, pushing, or heavy lifting over 5 pounds and no standing over 2 hours a day. No repetitive motion of the lumbar spine. In the meantime he is to start back on Mobic 15 mg once a day with food and start on a different muscle relaxer, Amrex 15 mg q h.s. #7, and Medrol pak as directed. He is to follow up with me on August 5, 2008, from 8:00-10:00 in the morning. If he is not doing any better, he needs to have a MRI or at least a CAT scan of this lumbar spine."

The claimant's testimony indicated that he did not work after July 2008. Dr. Kannout's diagnosis on August 7, 2008 was "Low back pain and right leg pain, improved. PLAN: May

return to limited duty for another week and he may go back to full duty on 08-13-08. No need to further follow up with me unless he has any problems, he can come at any time...."

A Radiology Report was entered on August 21, 2008:

PELVIS AND RIGHT HIP, TWO VIEWS:
No fractures or dislocations are demonstrated.
No arthritic changes are present.

IMPRESSION:
No significant abnormality.

RIGHT TIBIA-FIBULA, TWO VIEWS:
No fractures or dislocations are demonstrated.
No arthritic changes are present.

IMPRESSION:
No significant abnormality.

The claimant was seen at Cooper Clinic on August 26, 2008 and was diagnosed with back pain and right hip pain. The claimant was scheduled for a re-evaluation on September 3, 2008 and was taken off work for seven days. The claimant testified on cross-examination that the respondent-carrier arranged for him to see Dr. Sprinkle. Dr. Brent Sprinkle evaluated the claimant on September 3, 2008:

He saw a doctor for this back in April after working with a jackhammer. Just kind of treated it conservatively and says he got better. Had another event in July where he was doing some pulling doing some fence work and got much worse he says. Pain can be severe. Can be sharp, throbbing, or aching. Worse with walking, lifting, bending, squatting, kneeling, sitting.

Improved with rest. Has tried Darvocet and Mobic with limited response. Has had no injections. Had some therapy for a week and a TENS unit....

X-rays show disc space narrowing at 5-1.

Dr. Sprinkle's impression was "1. Lumbar degenerative disc disease. 2. Suspected lumbar disc herniation. 3. Right S1 radiculopathy. 4. Lumbar strain." Dr. Sprinkle planned an MRI of the lumbar spine and a prescription for Lyrica. Dr. Sprinkle stated, "3. He can return to work with no pushing, pulling, lifting over 15 pounds. No frequent stooping."

An MRI of the claimant's lumbar spine was taken on September 3, 2008:

The examination reveals a large central and right paracentral disc herniation at L5-S1 impinging upon the thecal sac and exiting right S1 nerve root. A small to moderate right paracentral disc herniation is seen at L4-5 impressing on the anterior margin of the thecal sac. Degenerative disc disease is seen at L4-5 and L5-S1. The remaining disc levels reveal no bulge or herniation. No foraminal stenosis is seen. The conus medullaris is normal in location and configuration. The visualized marrow signal is normal. A normal alignment is present.

IMPRESSION:

Large central and right paracentral disc herniation at L5-S1 as described above. Small to moderate right paracentral disc herniation at L4-5.

The parties stipulated that there was "no dispute over medical services received through September 3, 2008." The parties stipulated that there was "no dispute over temporary total disability benefits through September 3, 2008." The claimant testified, however, that he had not been able to return to work since September 3, 2008. The claimant testified on cross-examination that the respondent-employer did not have a light-duty position available. On Dr. Sprinkle's referral, Dr. Robert E. Powers performed a right L5 nerve block on September 16, 2008.

A pre-hearing order was filed on March 25, 2009. The claimant contended, among other things, that he was entitled to temporary total disability benefits from September 3, 2008 to a date yet to be determined. The respondents contended that appropriate benefits had been paid, and that the claimant's current problems and any disability were related to the claimant's pre-existing back condition.

The parties agreed to litigate the following issues:

1. The claimant's entitlement to additional medical services after September 3, 2008.
2. The claimant's entitlement to continued temporary total disability from September 4, 2008 through a date yet to be determined.
3. Appropriate attorney's fees.

Dr. Earl Peeples corresponded with the respondents' attorney on May 19, 2009:

Records regarding Steven Just were provided May 18 and at your requested (sic) I conducted a review....

Disc abnormalities are relatively common secondary to both degenerative changes and sometimes can be correlated with specific trauma.

In this case, there are two episodes of normal work activities, that is, the operation of a jackhammer and pulling a fence post, after which pain, including right lower extremity pain, is noted by Mr. Just....

The date and exact causation of the disc abnormality cannot be determined from the records provided. It is possible that operation of the jackhammer and some unreported incident or mechanics caused damage to the disc and protrusion of the degenerative disc already present. On the other hand, it is possible that the protrusion was there and that the jackhammer and later a fence post incident merely exacerbated temporarily symptoms due to a structural abnormality already in place. I am unable to discern from the records the exact cause or specific incident if there was one that created the abnormality in the disc. Abnormalities in discs are noted in asymptomatic individuals without a history of injury; individuals who sustain severe falls and back stresses sometimes present with entirely normal MRIs....

Dr. D. Luke Knox provided a To Whom It May Concern report on September 11, 2009:

Steven Just was seen in the Neurosurgery Clinic on September 11, 2009, for independent medical evaluation related to back and right leg pain. He

presents today as a 35-year-old, right-handed, white male who suffered a workers' compensation injury on July 8, 2008. He was apparently pulling a damaged fence out and he felt pain in his right low back....

I have had the opportunity to review his MRI scan demonstrating the large disc herniation at L5-S1 on the right with a significant disc herniation at L4-5. It is also primarily on the right. As you know, this is over a year old. In the face of that, I would recommend that he redo his MRI scan to see if per chance there may not be some resolution of the previously-diagnosed herniated disc. This most definitely is the culprit of the patient's persistent complaints. I have recommended that Mr. Just redo his MRI scan and complete his evaluation with plain films to further define his difficulties. I will keep you apprised accordingly as I suspect I will see him in follow up to review the new studies.

A lumbar spine MRI was done on November 11, 2009, with the following impression:

1. There is an annular rent at L4-5 and a right paracentral protrusion.
2. There is an annular rent at L5-S1.
3. There are right paracentral bulges and/or protrusions of disc at L4-5 and L5-S1.
4. There also is disc degeneration at these two levels.

Dr. Peeples corresponded with the respondents' attorney on December 8, 2009:

I have been asked to review and comment on the Independent Medical Examination by Dr. Knox and recent MRI study regarding Steven Just....

The IME September 11, 2009 by Dr. Know (sic) does not include any review of records. He uses old

terminology "herniation" to describe the discs' MRI appearance which is less specific than bulge, protrusion, extrusion, and free fragment, the modern terms....

Dr. Knox stated that the abnormal disc did cause the patients symptoms at exam but offers no opinion as to the specific cause of the abnormality nor does he clearly state whether it is work related....

I agree Mr. Just has disc abnormality and symptoms but I was unable to apportion them in May even with knowledge of the multiple physician reports and exams I reviewed. I will be interested to see if Dr. Know (sic) is able to do so six months later without reviewing the prior medical records....

A hearing was held on December 16, 2009. The claimant described his physical condition: "I just have extreme pain in my butt and the best way I can describe it is like having a bad toothache in my butt cheek, and when I stand, a pulse of pain will just shoot to my toe and sometimes clear back to the top of my head, if I stand up too fast, I mean, just 'Whoa!' and it hurts."

An administrative law judge filed an opinion on March 16, 2010. The administrative law judge essentially found, among other things, that treatment provided the claimant by Dr. Sprinkle and Dr. Knox was reasonably necessary in connection with the claimant's compensable injury. The administrative law judge found that the claimant was

entitled to temporary total disability benefits beginning September 4, 2008 until a date yet to be determined. The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The employee must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

In the present matter, an administrative law judge found that treatment provided the claimant by Dr. Sprinkle and Dr. Knox was reasonably necessary. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury to his low back on July 8, 2008. The claimant testified that he felt pain in

his back as the result of his physically demanding work on a fence "tear-out job." Dr. Kannout at Cooper Clinic saw the claimant on July 9, 2008 and corroborated the claimant's history of the compensable injury. Dr. Kannout diagnosed "muscular strain/spasm." Dr. Kannout treated the claimant conservatively and provided follow-up visits. The record indicates that the respondent-carrier arranged for the claimant to see Dr. Sprinkle. After evaluating the claimant on September 3, 2008, Dr. Sprinkle's impression included "4. Lumbar strain." A lumbar MRI performed on September 3, 2008 showed abnormalities including disc herniations at L4-5 and L5-S1. The stipulations indicated that the respondents provided medical services through September 3, 2008. Dr. Knox provided an independent medical evaluation on September 11, 2009. Dr. Knox recommended additional diagnostic testing, and a lumbar spine MRI performed on November 11, 2009 showed "annular rents" at L4-5 and L5-S1.

The Full Commission finds that the treatment of record provided the claimant before and after September 3, 2008 was reasonably necessary in connection with the claimant's compensable injury. We recognize Dr. Peeples' opinions which appear to question the causal relationship between the

claimant's compensable injury and the post-injury diagnostic abnormalities shown in the claimant's lumbar spine. Nevertheless, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 949 S.W.2d 695 (1999). In the present matter, the Full Commission attaches significant evidentiary weight to the opinions of Dr. Kannout, Dr. Sprinkle, and Dr. Knox. We find that the claimant's pain complaints and his need for treatment were causally related to the July 8, 2008 compensable injury to the claimant's low back. The evidence does not support a theory that the claimant's need for treatment after September 3, 2008 was related to the claimant's previous treatment in April 2008 or to a pre-existing degenerative condition.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury

resulting from an accident.” Ark. Code Ann. §11-9-102(12) (Repl. 2002). The healing period continues until the employee is as far restored as the permanent character 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. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of the end of the healing period is a question of fact for the Commission. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

In the present matter, an administrative law judge essentially found that the claimant proved he was entitled to additional temporary total disability benefits beginning September 4, 2008 until a date yet to be determined. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury to his low back on July 8, 2008. Dr. Kannout began treating the claimant on July 9, 2008 and diagnosed low back pain and “muscular strain/spasm.” Although Dr. Kannout released him to return to regular duty on July 14, 2008, the claimant testified that he was physically unable to fulfill the

strenuous work requirements of his job. The claimant began treating with a physical therapist on July 28, 2008. Dr. Kannout subsequently attempted to return the claimant to restricted work, but the claimant testified that he did not return to work after July 2008. Dr. Sprinkle diagnosed "lumbar strain" on September 3, 2008. Dr. Sprinkle stated that the claimant could return to work with restrictions, but the claimant testified that restricted work with the respondent-employer was not available.

The respondents provided temporary total disability benefits through September 3, 2008. The record indicates that the claimant continued within a healing period for his low back sprain as of September 3, 2008. The evidence does not demonstrate that, as of September 3, 2008, the employee was as far restored as the permanent character of his injury would permit. The record also shows that the claimant was totally incapacitated to earn wages beginning September 4, 2008 until a date yet to be determined.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's findings that the claimant proved he was entitled to additional medical treatment and additional temporary total

disability benefits. The Full Commission finds that the claimant was entitled to the current treatment recommendations of record by Dr. Kannout, Dr. Sprinkle, and Dr. Knox. The claimant proved that said treatment recommendations were reasonably necessary in connection with the July 8, 2008 compensable injury. We note from the record currently before us that no treating physician has recommended surgery to the claimant's lumbar spine. The Full Commission finds that the claimant proved he was entitled to temporary total disability benefits beginning September 4, 2008 until a date yet to be determined.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.