

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207988

KALEN RICHARDSON,
EMPLOYEE

CLAIMANT

PACKAGING SPECIALTIES,
EMPLOYER

RESPONDENT

FAIRFIELD INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 5, 2010

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

Claimant represented by the HONORABLE MARK FREEMAN,
Attorney at Law, Fayetteville, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed July 23, 2010. 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 this claim.
2. On June 11, 2002, the relationship of employee-employer carrier existed between the parties.

3. On June 11, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$383.00 for total disability and \$287.00 for permanent partial disability.
4. On June 11, 2002, the claimant sustained a compensable injury to his lumbar spine, in the form of a herniated disc at L4-5 with nerve root impingement.
5. There appears no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services for his compensable injury.
6. There appears no dispute over the claimant's entitlement to temporary disability benefits prior to April 20, 2009.
7. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to additional temporary total disability benefits for the periods of April 20, 2009 through October 25, 2009; November 2, 2009 through December 15, 2009; and January 1, 2010 through February 2, 2010. Specifically, the claimant has failed to prove by the greater weight of the credible evidence that during these periods he continued within his healing period from the effects of his compensable injury and was rendered totally disabled from regular gainful employment by this compensable injury.
8. The claimant has proven his entitlement to temporary total disability benefits for the period beginning February 3, 2010 and continuing through at least February 24, 2010. Specifically, the claimant has proven by the greater weight of the credible evidence that during this time he continued within his healing period from the effects of his compensable injury and was also rendered totally disabled as a result of this injury. However, the respondents apparently have made an overpayment of temporary total disability

benefits and would be entitled to a credit for such an overpayment against the additional temporary total disability benefits herein awarded.

9. An appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded for the period of February 3, 2010 through February 24, 2010.

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.

Therefore we affirm and adopt the July 23, 2010 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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. After a de novo review of the record, I find that the claimant is entitled to temporary total disability benefits from April 27, 2009 through October 25, 2009; from November 2, 2009 through December 15, 2009; and from January 1, 2010 through February 2, 2010, and I must respectfully dissent on this issue. However, I agree that the claimant is entitled to temporary total disability benefits from February 3, 2010 through at least February 24, 2010, and I specifically concur on this issue.

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). The healing period has not ended so long as

treatment is administered for the healing and alleviation of the condition. Breshears, supra; J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

On August 27, 2009, Dr. James Blankenship wrote:

RE: Kalen Richardson

The above patient started physical therapy on April 27, 2009. Kalen was not able to work the week before he started therapy due to increased pain levels. Kalen has remained off work and will need to continue off work until after his surgical intervention. The date of his surgery is to be determined at a later date.

The claimant was initially scheduled for surgery in August 2009. On September 3, 2009, Dr. Blankenship wrote:

CHIEF COMPLAINT: Distal lower left extremity pain.

HISTORY OF PRESENT ILLNESS: Kalen was in the office today stating his pain is significantly better. He was actually on the surgery schedule a week or so ago and got some significant improvement with some increased manual stretching. He wants to have a further trial of conservative treatment. He feels a little bad since he has been waiting eight years for his workers' compensation carrier to accept responsibility for this where he could have surgery. I told him that it does not really matter, as long as he is getting better, that is what of primarily importance to me.

PHYSICAL EXAMINATION: I have reviewed his prior neurological examination and I do not appreciate any changes today.

IMPRESSION: Disc herniation with mechanical back pain and radiculopathy.

RECOMMENDATIONS: He is going to work diligently with Steve with core strengthening as well as a lumbar stabilization program. He will return to see me in eight weeks. He understands that if he has a worsening of his leg pain, he is going to call me and get back in to see me. We will discuss where we are going from here further.

These two medical reports clearly indicate that the claimant was receiving medical treatment, i.e., physical therapy, and remained in his healing period from April 27, 2009 through October 25, 2009. Although the scheduled surgery was cancelled on the claimant's initiative, apparently Dr. Blankenship agreed with the claimant, and took him off work for physical therapy during this time period. As such, the claimant is entitled to temporary total disability benefits from April 27, 2009 through October 25, 2009.

On October 29, 2009, the claimant saw Dr. Blankenship and advised that he wanted to go ahead and have surgery. Dr. Blankenship agreed, and stated that he would be placed on the surgery schedule for an XLIF/TLIF combination, which is a fusion surgery. On December 9, 2009, at the surgery center, the claimant expressed concern over having a fusion surgery, as his

pain had not been that extreme over the past week. The surgery was cancelled. On January 14, 2010, Dr.

Blankenship wrote:

RECOMMENDATIONS: I told Kalen that if he feels like his pain is bad enough to consider surgery, I have no problem doing a simple diskectomy. I did tell him it will be a little bit more extensive since we will need to do a medical facetectomy and get the extreme lateral disk taken out and also to get the L4 nerve root freed up along with the primary diskectomy. I told him if this results in significant mechanical back pain, then an XLIF stand-alone would be reasonable. I told him the risk he runs is having two surgeries instead of one, but the benefit that would be that he might avoid an arthrodesis. He wants to proceed with this surgical intervention. Since this is a different surgery than we had him authorized for previously, we will need to run it back through his workers' compensation carrier. He agrees with this game plan, and as soon as we have it authorized, we will get him on the surgery schedule. I would be done as an outpatient.

Again, Dr. Blankenship agreed with the patient. The diskectomy surgery was performed on February 3, 2010. Therefore, I find that the claimant is entitled to temporary total disability benefits from November 2, 2009 through December 15, 2009, and from January 1, 2010 through February 2, 2010.

The majority, by affirming and adopting the Administrative Law Judge, has denied the claimant temporary total disability benefits during the time

periods in question on the theory that the claimant extended his healing period by his own volition because he did not have surgery as initially scheduled in August 2009. The problem with the majority's theory is that it directly contradicts the opinion of Dr. Blankenship. Dr. Blankenship agreed with the claimant's cancellation of the initial surgery and set him up with more physical therapy. Dr. Blankenship agreed with the claimant's cancellation of the fusion surgery and scheduled him for a less invasive discectomy. Dr. Blankenship is the only physician in the record during the time periods in question. As I can find no basis in the medical records for the majority's conclusion, I find that it is based on conjecture and speculation, which, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v.

Pro-transportation, 97 Ark. App. 338, 249 S.W. 3d 149, (2007). As there is no evidence in the record contradicting Dr. Blankenship's testimony, the majority has clearly erred by disregarding it.

I would also note that it is very interesting that the respondents would deny benefits to a claimant who actually insists on pursuing conservative treatment, i.e. physical therapy and an outpatient diskectomy procedure versus radical fusion surgery. It is not the position usually taken by respondents in these cases. This claimant was initially injured in 2002, and it has taken almost ten years and a favorable previous ruling from this Commission for the claimant to even be allowed to pursue surgical intervention. The respondent's position in this claim leads me to the conclusion that they are engaging in unnecessary and punitive litigation.

For the aforementioned reasons, I must respectfully concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner