

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G002335

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| CHARLES GREENLEE, EMPLOYEE | CLAIMANT |
| KITCHEN DISTRIBUTORS, INC., EMPLOYER | RESPONDENT |
| FIRSTCOMP INSURANCE COMPANY, INSURANCE CARRIER | RESPONDENT |

OPINION FILED APRIL 22, 2011

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

Claimant represented by the HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 12, 2011. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 21, 2010, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant also suffered a compensable injury to

his right shoulder is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as recommended by Dr. Blankenship.
4. Claimant is entitled to temporary total disability benefits beginning May 7, 2010 and continuing through a date yet to be determined.
5. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

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 January 12, 2011, 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 respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to

additional medical treatment and additional temporary total disability benefits. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer delivering cabinets to apartment complexes under construction. According to the claimant, the weight of the cabinets ranged from ten to eighty-five pounds. The claimant explained that his job responsibilities required him to unload and carry cabinets up and down flights of stairs, as well as through construction debris at construction worksites.

Prior to the incident on March 12, 2010, the claimant sustained a work-related injury to his low back in September of 1990, when he fell from a truck and landed on his right hip and buttocks. The claimant was working for another employer. X-rays were performed which revealed that the claimant had the following: "(1) Low back pain without clearcut signs of radiculopathy; (2) Grade I and II spondylolisthesis L/5 and S/1 with L/5 pars defect; and (3) ? internal disc derangement L4/5." A CT discography showed that the claimant had degeneration at multiple levels. In addition to taking pain medication and muscle relaxers, the claimant underwent physical therapy, received facet injections,

and used a TENS unit in efforts to reduce his back pain. The claimant complained of persistent leg pain, especially on the right side, after his 1990 work-related injury. Even after completing physical therapy and receiving facet injections, the claimant's back pain and leg pain did not subside.

The claimant ultimately had a fusion surgery by Dr. Raben, which included the placement of hardware or instrumentation in his lumbar spine. After the claimant's fusion was performed, the claimant continued to experience leg and back pain. Dr. Raben recommended that the claimant undergo vocational training; however, the claimant failed to complete any such training. The claimant received a permanent anatomical impairment rating of twenty-five (25%) to the body as a whole. In addition, the claimant received a settlement of approximately \$20,000 and drew Social Security disability benefits for over a year.

Dr. Raben released the claimant to light duty work, and he suggested that the claimant seek "a lighter line of work, especially post-fusion" because he was at risk for having further damage. Also, Dr. Raben predicted that the claimant would continue to experience low back "flare-ups" occasionally and may need further procedures in the future.

After being released to light duty, the claimant worked for a poultry equipment company. Thereafter, the claimant completed manual tasks, such as roofing, which required the claimant to carry rolls of material, buckets of screws, buckets of plates, and other positioning materials used in roof construction. The claimant's job responsibilities involved physically strenuous manual labor, and his work responsibilities did not comply with the terms of his light duty work restrictions. The claimant experienced low back flare-ups, and he would seek medical treatment and medication. After his condition improved, the claimant would discontinue the medication.

In 1991, the claimant was involved in motor vehicle accident, which he explained as follows: "I was on a dirt road and I come up and around a corner and hit a - - there was a road grader coming my direction and he was in the center of the road, and I hit the ditch and hit him." As a result of the motor vehicle accident, the claimant suffered bruised ribs and believed that he "might of hit [his] head or something or another . . ."

The claimant went to work for the respondent employer in 2007. In 2007, the claimant sustained a work-related injury when a cabinet fell from a semi-trailer, striking him in the head and injuring his neck.

The claimant received chiropractic care and treatment from MediServe.

The medical records demonstrate that the claimant experienced back pain prior to the March 12, 2010 work-related injury. On September 15, 2008, the claimant presented to Dr. Wilson with a chief complaint of back pain located bilaterally and in the claimant's lower back. Additionally, that medical record notes that the claimant had experienced similar problems in the past. When questioned about this record, the claimant testified that he did not recall whether he experienced pain bilaterally on both sides of his back or whether the pain radiated into his legs. Furthermore, Dr. Wilson determined that the claimant's weight was likely contributing to or causing his back pain. Dr. Wilson placed the claimant on light duty work with lifting restrictions of ten pounds and no repetitive bending or twisting. Although Dr. Wilson placed the claimant on light duty work restrictions, the claimant testified that he had to take any work that he could obtain in order to make a living. The claimant stated that he was smart about how he lifted materials in order to accommodate his limitations.

Dr. Wilson's record from January 2009, states that the claimant presented with various problems and

noted that the claimant needed to take Flexeril three times daily as needed for muscle spasms or pain. The claimant testified that he quit taking the prescribed medication.

In January 2010, the claimant again presented to Dr. Wilson complaining of chronic low back. On January 20, 2010, Dr. Wilson modified the claimant's medication and wanted the claimant to try Neurontin for his low-back pain and headaches. The claimant testified that he quit taking the Neurontin. Despite the claimant's testimony relating to Flexeril and Neurontin, the claimant testified that he tried to take his medication regularly.

On March 12, 2010, the claimant injured his low back and right shoulder while he was unloading cabinets at an apartment complex under construction in Norman, Oklahoma. He described the incident as follows:

I was carrying one of the heaviest cabinets upstairs. It's a double drawer, weighs about 85 pounds, give or take a few pounds. I got to the top of the stairs, and a nail caught my bootlace. And when I took my next step, it twisted me and I fell on my right shoulder and right hip, and the cabinet landed on top of me.

One of the work crew members observed the incident and assisted the claimant. The claimant suffered injuries to his right shoulder and low back.

After the incident, the claimant notified the office manager.

On the day following the incident, the claimant presented to the emergency room at Northwest Medical Center, complaining of pain in his lower back without radiation. The claimant testified that he experienced radiating pain at that time. A clinical examination was performed which revealed that the claimant was negative for weakness and numbness. X-rays revealed that the claimant had chronic degenerative changes and no acute abnormality. The claimant was diagnosed with acute low back pain, prescribed medication, and instructed to follow-up with his primary care physician.

On March 17, 2010, the claimant presented to Dr. Wilson complaining of back and right shoulder pain. Dr. Wilson's report from March 17, 2010, notes that the claimant did not experience radicular pain. Dr. Wilson also noted that the claimant did not experience sensory or motor loss. He diagnosed the claimant with low back pain, a shoulder contusion, and chronic back pain. Dr. Wilson prescribed medication and physical therapy for the claimant and placed him on work restrictions and determined that the claimant had no permanent anatomical impairment.

The claimant presented to Dr. Moffitt on March 26, 2010, complaining of low back and right shoulder pain. Dr. Moffitt diagnosed the claimant with low back and shoulder pain and ordered that the claimant complete physical therapy. The claimant's physical therapy records indicate that the claimant denied any numbness or tingling and diagnosed him with a lumbar strain without radiculopathy. The claimant testified that he informed the physical therapist that he was experiencing pain radiating from his hip to his legs. Based on his examination of the claimant, Dr. Moffitt found that the claimant could continue to work with restrictions.

On April 16, 2010, Dr. Moffitt ordered an MRI of the claimant's shoulder and low back. The MRI of the claimant's shoulder did not reveal any evidence of a tear in the rotator cuff but only showed pre-existing or degenerative conditions that were not suggestive of acute trauma. The MRI also showed a minimal amount of fluid in the bursa. An MRI of the claimant's back could not be performed due to the claimant's instrumentation so a CT scan was performed. The CT scan of his back showed the claimant had significant degenerative disk disease with disc bulging - but no sign of any acute abnormality. Dr. Moffitt's record from April 23, 2010,

indicates that the claimant is not a surgical candidate or a candidate for epidural steroid injections.

The claimant testified that his condition did not improve during the course of Dr. Moffitt's treatment but, his condition worsened. Despite the claimant's testimony that his condition worsened, Dr. Moffitt found that the claimant had reached maximum medical improvement on or around May 7, 2010, with a five percent (5%) permanent anatomical impairment rating to the whole body. Dr. Moffitt also noted that "the majority cause of [claimant's] condition [was] degenerative." Dr. Moffitt placed the claimant on permanent work restrictions of no lifting, pushing, or pulling more than twenty pounds of force, limited bending and twisting at the waist, and sitting and standing on an as needed basis to prevent him from further injuring his back. Dr. Moffitt testified that he placed permanent work restrictions on the claimant because of his degenerative back condition and the fact that the claimant had back surgery twenty years previously. Dr. Moffitt was of the opinion that the claimant should never have performed heavy work after his fusion surgery.

After receiving treatment from Dr. Moffitt, the claimant applied for a change of physician, which

was approved. On August 24, 2010, the claimant presented to Dr. Blankenship, complaining of low back and shoulder pain. Dr. Blankenship recommended that the claimant be evaluated by Dr. Cannon to determine if injection therapy was necessary. Dr. Blankenship recommended that the claimant undergo aggressive physical therapy and that the claimant's right shoulder be reevaluated by Dr. Cox. Also, Dr. Blankenship found that, if the claimant's condition did not improve in six weeks, he would recommend a lumbar myelography with CT reconstructions. The claimant testified that he wanted to undergo additional treatments as recommended by Dr. Blankenship.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Supp. 2009). 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. Owens Plating Co. v. Graham, 102 Ark. App. 299, 284 S.W.3d 537 (2008). What constitutes reasonable and necessary treatment is a questions of fact for the Commission. Id. Anaya v. Newberry's 3N Mill, 102 Ark. App. 119, 282 S.W.3d 269 (2008). 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. Treatments to reduce or alleviate symptoms resulting from a compensable injury, to maintain the level of healing achieved, or to prevent further deterioration of the damage produced by the compensable injury are considered reasonable medical services. Foster v. Kann Enterprises, 2009 Ark. App. 746 ___, S.W.3d ___ (2009). Liability for additional medical treatment may extend beyond the treatment healing period as long as the treatment is geared toward management of the compensable injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004).

In my opinion, a review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment. The claimant has received all the treatment for which he is entitled. First and foremost, Dr. Moffitt released the claimant from his care on May 7, 2010, with a permanent anatomical

impairment rating and gave him work restrictions that were permanent. Dr. Moffitt, in his treatment, did not feel that the claimant was a surgical candidate or a candidate for epidural steroid injections. Dr. Moffitt specifically testified that he did not recommend injections or surgery because the claimant's condition was degenerative. Further, the diagnostic reports were interpreted as normal with no acute abnormality or injury. The claimant has a history of a back injury from 1990 and had a fusion at that time. The claimant has significant degenerative disc disease and, in my opinion, his current need for treatment is related to his degenerative disc condition and not to any injury that took place on March 12, 2010. Therefore, I must dissent from an award of 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 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.

In Palazzollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages (citing Breshears, supra.)

The claimant is also not entitled to any temporary total disability benefits. The claimant was released to return to work by Dr. Moffitt with restrictions. Both Dr. Wilson and Dr. Moffitt did not indicate that the claimant was totally incapacitated from earning wages, nor did he remain in his healing period. Dr. Moffitt opined on May 7, 2010, the claimant has reached maximum medical improvement. The claimant's healing period, therefore, ended on May 7, 2010, and he is not entitled to any additional temporary total disability benefits. Therefore, I find that the claimant has failed to meet his burden of proof. Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner