

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701687

AARON HARVEY, EMPLOYEE	CLAIMANT
WACHTER MANAGEMENT COMPANY, EMPLOYER	RESPONDENT NO. 1
CNA INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MARCH 21, 2011

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

Claimant represented by the HONORABLE KENNETH OSBORNE, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE FRANK NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID SIMMONS, 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 October 12, 2010. 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 July 7, 2010, and contained

in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning April 8, 2009, and continuing through a date yet to be determined.
3. Respondent has controverted claimant's entitlement to all unpaid temporary total disability 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 October 12, 2010, 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.

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A. WATSON BELL, Chairman

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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

temporary total disability benefits beginning April 8, 2009 and continuing through a date yet to be determined. Based upon my de novo review of the record, I find that the decision of the Administrative Law Judge should be modified. My review of the evidence demonstrates that the claimant cannot prove that he is entitled to temporary total disability benefits for the period April 8, 2009 through November 11, 2009. In my opinion, the temporary total disability benefits should begin November 11, 2009.

The claimant sustained an admittedly compensable injury to his right shoulder on January 17, 2007. The claimant underwent surgery on January 8, 2008, and was placed at maximum medical improvement by his treating physician, Dr. Dougherty on May 13, 2008. Dr. Dougherty assigned a 13% permanent anatomical impairment rating which was accepted and paid by the respondents. The claimant returned to work until October 16, 2008, when his employer no longer had work available within the claimant's restrictions. The claimant was restricted to inputting data on a computer for 10 to 15 minutes hourly. The claimant testified that he has been unable to work since January 19, 2009, because he continues to have problems. The Administrative Law Judge found that the claimant was entitled to temporary total disability

benefits beginning April 9, 2009 until a date yet to be determined. The respondents appealed that decision.

The claimant requests benefits from January 19, 2009 through a date yet to be determined. The medical evidence demonstrates that the claimant was evaluated and treated by Dr. Dougherty on January 19, 2009, who diagnosed the claimant with thoracic outlet syndrome. Dr. Dougherty's notes from that date indicate nothing about the claimant being unable to work. The claimant was referred to Dr. Thompson in St. Louis, a specialist in thoracic outlet syndrome. Dr. Thompson referred the claimant to Dr. Rastogi for pain management for Botox injections. Dr. Rastogi saw the claimant on April 21, 2009. Dr. Rastogi did not take the claimant off work or render any opinion regarding the claimant's inability to work.

The evidence demonstrates that Dr. Dougherty made no finding regarding the claimant's arm pain in his April 8, 2009 report. He did not find that the claimant had reached maximum medical improvement nor did he conclude that the claimant was totally incapacitated from working. He simply recorded the claimant's reported symptoms. It was not until Dr. Leesa Glatz took the claimant off work on November 11, 2009 that the record

contains statements by a treating physician that the claimant could not perform his work activities.

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.

The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. McWilliams, supra; Mad Butcher, supra. Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

Recurring symptoms may give rise to a subsequent healing period, after the original one has ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191, 737 S.W.2d 661 (1987). Where a second complication is found to be a natural and probable result of the first injury,

the employer remains liable. Id. This liability includes liability for additional temporary benefits when the employee undergoes a second, distinct healing period. Id. 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.)

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 temporary total disability benefits for the period April 8, 2009 through November 11, 2009. The evidence demonstrates that Dr. Leesa Glatz took the claimant off work on November 11, 2009. There are no other medical records taking the claimant off work until that date. Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits for the period April 8, 2009 through November 11, 2009.

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KAREN H. MCKINNEY, Commissioner