

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F810557

ANA A. SANDOVAL,  
EMPLOYEE

CLAIMANT

TYSON FOODS,  
EMPLOYER

RESPONDENT

TYNET CORPORATION,  
TPA

RESPONDENT

OPINION FILED SEPTEMBER 15, 2011

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

Claimant represented by the HONORABLE EDDIE H. WALKER,  
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE DIANE GRAHAM,  
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed in part,  
affirmed in part.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed April 27, 2011. The administrative law judge  
found that the claimant failed to prove she was entitled to  
additional medical treatment, and that the claimant failed  
to prove she was entitled to temporary total disability  
benefits. After reviewing the entire record *de novo*, the  
Full Commission finds that the claimant proved she was

entitled to additional medical treatment. We find that the claimant did not prove she was entitled to temporary total disability benefits.

I. HISTORY

The record indicates that Ana Sandoval, now age 35, received medical treatment for "low back pain (muscular)" in June 2006. Ms. Sandoval was assessed with lumbar strain following a motor vehicle accident on October 8, 2006. An x-ray of the claimant's lumbar spine was taken on October 8, 2006, with the impression, "There is bilateral spondylolysis at L5-S1 with associated Grade I anterolisthesis of L5 on S1, age unknown." The claimant sought treatment on October 10, 2007 for conditions including "pain in lower back."

\_\_\_\_\_The record indicates that the claimant became employed with Tyson Poultry, Inc. on or about October 30, 2007. The parties stipulated that the claimant sustained a compensable injury to her back. The claimant testified on direct examination:

Q. Will you briefly explain how you got injured in July of 2008?

A. I was coming out of the plant, my regular time is 10:30 but they asked me to stay till twelve, so I punched my card and there was water and I slipped and I fell with my back.

Stefanie Ellis, APN saw the claimant on July 9, 2008: "She does have an injury to her lower back and having pain with the left leg and the left side of her back." Stefanie Ellis diagnosed "1. Abdominal pain. 2. Diabetes mellitus, type 2. 3. Heartburn. 4. Fatigue. 5. Low back pain."

A Radiology Report on July 9, 2008 showed the following: "Lumbar spine, three views: Bilateral pars defects, L5 with grade I anterolisthesis L5 upon S1. There is otherwise normal alignment. Vertebral body heights and disc spaces are adequately maintained. IMPRESSION: Bilateral pars defects L5 with grade I anterolisthesis L5 upon S1."

\_\_\_\_\_Dr. Keith Holder saw the claimant on July 9, 2008:

This is the initial narrative summary on Ms. Ana Sandoval, an employee of Tyson, who reports she slipped and fell in the cafeteria while it was being waxed. She reports this happened on 07/04/2008 at approximately 12:00 a.m....She is reporting her level of pain today at 8-9/10 in the low-back, left side. She reports she initially had leg pain, but this has not continued....She states most of the pain is around her sacrum....

Musculoskeletal: She has normal gait and station. No swelling about the back is noted....

X-Ray: Lumbar x-ray shows no acute bony injury.

\_\_\_\_\_Dr. Holder's impression was "Lumbar strain." Dr.

Holder planned conservative treatment and stated, "She may

return to work with no lifting over 20 pounds. Limited repetitive back motions. Follow-up here in 7-10 days."

An MRI was performed on August 15, 2008:

Sagittal T1 and double echo images of the lumbar spine performed with axial T1 and proton density images. Examination assumes 5 lumbar vertebral bodies. No marrow edema changes seen. T9-10, T10-11, T11-12, T12-L1, L1-2, L2-3, L3-4 unremarkable. Conus unremarkable. Minimal left paracentral disc bulge L4-5. L5 spondylolysis seen with about 7 mm of anterolisthesis of L4 on S1. There are degenerative disc changes with an uncovered disc bulging but not obviously protruding. There is mild biforaminal narrowing but no obvious nerve root compression.

IMPRESSION:

L5 spondylolysis and mild spondylolisthesis with degenerative disc changes with bulging of the broad uncovered disc and mild biforaminal stenosis.

An Electromyogram Report was entered on September 11, 2008, with the impression, "This electrophysiologic study shows some minimal, borderline changes compatible with a very mild sensorimotor polyneuropathy in the lower extremities. There is no definite evidence, however, for radiculopathy affecting the left lower extremity on EMG study."

Dr. Holder referred the claimant for a Functional Capacity Evaluation, which was performed on September 25, 2008: "Overall test findings, in combination with clinical

observations, suggest the presence of sub-maximal effort on Ms. Sandoval's behalf. In describing sub-maximal effort, this evaluator is by no means implying intent. Rather, it is simply stated that Ms. Sandoval can do more physically at times than was demonstrated during this testing day....Based upon today's test it is difficult to describe the patient's true physical abilities due to lack of effort and poor reliability of subjective reports." A "Physical Abilities" table included in the Functional Capacity Evaluation indicated that the claimant had Demonstrated Abilities such as occasional lifting of 25 pounds, occasional carrying of 35 pounds, and occasional pushing/pulling of 60 pounds.

Dr. Holder examined the claimant on September 30, 2008 and gave the following impression: "1. Small left L4-5 disc protrusion. 2. Spondylolisthesis L5-S1 with degenerative disc changes. 3. Lumbar strain." Dr. Holder returned the claimant to restricted work and stated, "3. She will follow up here as needed. She was referred to her personal physician for future medication use. IMPAIRMENT RATING: The patient has reached maximal improvement. Based on the 4<sup>th</sup> Edition AMA Guide DRE category 2, she is rated at 5% permanent impairment."

The claimant agreed on cross-examination that she at first continued to work after Dr. Holder released her. The claimant agreed on cross-examination that she did not work after April 29, 2009. Stefanie Ellis' impression after seeing the claimant on May 4, 2009 included low back pain with radiculopathy. Ms. Ellis' treatment plan included "back to workman's comp" and "no lifting, pulling, pushing >10# x 2 wks." The claimant's testimony indicated that she had not worked for the respondent since May 4, 2009, and that the claimant was physically unable to work.

An MRI of the claimant's lumbar spine on June 3, 2009 showed "1. L5 spondylolisthesis with broad uncovered disk bulging, maybe slightly protruding with bi-foraminal stenosis." Stefanie Ellis saw the claimant on June 29, 2009 and recommended a physical therapy evaluation and a neurosurgical evaluation. Ms. Ellis recommended that the claimant "remain off work" until the evaluations were completed.

Stefanie Ellis saw the claimant on October 13, 2009 and diagnosed "1. Low back pain/sciatic L pain." The record indicates that Ms. Ellis signed a Claim For Income Protection Benefits on the claimant's behalf on or about

October 13, 2009. Ms. Ellis indicated that she had advised the claimant to cease work on May 4, 2009, and that the diagnosis keeping the claimant from working was "Low back pain with radiculopathy."

Dr. Thomas E. Cheyne evaluated the claimant on April 5, 2010:

The patient is a 34-year-old who complains of chronic low back and left leg pain. She states this has been going on since she had a fall at work in April of 2008. She eventually had an MRI lumbar spine, which was done on June 3, 2009 which indicated an L5 spondylolysis and spondylolisthesis with a broad uncovered disk bulge with biforaminal stenosis at the level. She has not improved. She requested a change of physician and I am seeing her today for that purpose....

X-rays of the lumbar spine indicate spondylolysis at L5 with a grade I spondylolisthesis at that level; otherwise her lumbar spine films are within normal limits.

Dr. Cheyne's impression was "Chronic low back pain with left leg radiculopathy with an underlying L5-S1 spondylolisthesis and spondylolysis as noted....We will repeat an MRI lumbar spine....Depending on the findings, we may consider LESIs at that point. She has tried physical therapy in the past, which she states seems to make her worse instead of better."

Another MRI of the claimant's lumbar spine was done on April 16, 2010, with the following impression:

1. Grade I spondylolisthesis with bilateral spondylolysis at L5-S1 without significant canal stenosis, with mild bilateral foraminal stenosis.
2. Minimal left-sided annular bulge at L4-5.

The claimant followed up with Dr. Cheyne on May 24, 2010: "She had an MRI at Open Aire MRI, which indicated a grade 1 spondylolisthesis with bilateral spondylolysis at L5-S1 without significant canal stenosis and with only mild bilateral foraminal stenosis. She had a minimal left-sided annular bulge at L4-5. She was symptomatically a little better on her Mobic but she has run out of medication. I would like to put her on Celebrex. Have her use hot showers. We will schedule an LESI and I will see her back after her first injection."

Dr. Robert Fisher performed a lumbar epidural steroid injection on June 8, 2010. The claimant testified that the injection helped "a little bit, but it was just one." The claimant testified on cross-examination that the injection helped for "about 24 hours."

A pre-hearing order was filed on December 16, 2010. The claimant contended that she was entitled to additional medical treatment by or at the direction of Dr. Cheyne. The

claimant contended that she was entitled to additional temporary total disability benefits for any period of time established by the medical records.

The respondent contended, among other things, that it had accepted the claimant's injury as compensable and had paid all appropriate benefits. The respondent contended that additional medical treatment was not reasonably necessary in connection with the compensable injury. The respondent contended that the claimant's healing period ended on September 30, 2008, and that the claimant's condition did not prevent her from earning wages.

The parties agreed to litigate the following issues:

1. Additional medical treatment after May 24, 2010.
2. Temporary total disability benefits from May 4, 2009 to a date to be determined.
3. Fees for legal services.
4. Credit to the respondent for long-term disability benefits.

After a hearing, an administrative law judge filed an opinion on April 27, 2011. The administrative law judge found that the claimant failed to prove she was entitled to additional medical treatment, and that the claimant failed to prove she was entitled to temporary total disability benefits.

The claimant appeals 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 claimant must prove by a preponderance of the evidence that she is entitled to requested medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). A claimant may be entitled to on-going medical treatment after the claimant's healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 600, 649 S.W.2d 845 (1983). 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).

An administrative law judge found in the present matter, "2. The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment." The Full Commission reverses

this finding. The parties stipulated that the claimant sustained a compensable injury to her back. The claimant's testimony indicated that she slipped and fell on or about July 4, 2008. The claimant began treating for her back and other complaints with Stefanie Ellis, an APN, on July 9, 2008. Dr. Holder noted on July 9, 2008 that a lumbar x-ray showed no acute bony injury. Dr. Holder's impression was "Lumbar strain." Dr. Holder released the claimant to restricted work duty. An MRI performed on August 15, 2008 showed conditions in the claimant's lumbar spine including spondylolysis, spondylolisthesis with degeneration, bulging, and stenosis. Dr. Holder and Stefanie Ellis treated the claimant conservatively.

Dr. Holder opined on September 30, 2008 that the claimant had reached maximum medical improvement. The claimant began treating with Dr. Cheyne on April 5, 2010. Dr. Cheyne's impression was chronic low back pain with left leg radiculopathy and lumbar spondylolisthesis. Dr. Cheyne's treatment recommendations included additional diagnostic testing and consideration of lumbar epidural steroid injections. Pursuant to scheduling by Dr. Cheyne, the claimant underwent an epidural steroid injection by Dr.

Fisher on June 8, 2010. The claimant testified that the steroid injection provided some benefit, and the claimant testified that she wished to undergo additional injections. The Full Commission finds that the claimant proved treatment in the form of epidural steroid injections was reasonably necessary in connection with the claimant's compensable injury. We find that said treatment was causally related to the claimant's compensable injury rather than 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). The healing period continues until the employee is as far restored as the permanent character of her 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 when the healing period has ended is a question of fact for the Commission. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

An administrative law judge found in the present matter, "3. The claimant has failed to prove by a preponderance of the evidence her entitlement to temporary total disability benefits." The Full Commission affirms the administrative law judge's finding that the claimant did not prove she was entitled to temporary total disability benefits. The record indicates that the claimant sustained a compensable injury to her back on or about July 4, 2008. The claimant thereafter received conservative treatment for a lumbar strain. There were no recommendations for surgery. A Functional Capacity Evaluation on September 25, 2008 indicated that the claimant had physical abilities including occasional lifting of 25 pounds, occasional carrying of 35 pounds, and occasional pushing/pulling of 60 pounds.

Dr. Holder returned the claimant to restricted work duties on September 30, 2008. Dr. Holder assigned a permanent impairment rating and opined that the claimant had reached maximum medical improvement. The Commission is

authorized to accept or reject a medical opinion and to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). In the present matter, the Full Commission finds that Dr. Holder's opinion is entitled to significant probative weight, and that the claimant's healing period for her compensable injury ended no later than September 30, 2008. Temporary total disability benefits cannot be awarded after a claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). The preponderance of evidence before the Commission does not demonstrate that the claimant re-entered a healing period for her compensable injury at any time after September 30, 2008. Nor does the Commission find that the claimant's reasonably necessary treatment with lumbar epidural steroid injections beginning June 8, 2010 cause the claimant to re-enter a healing period or to extend the claimant's healing period.

Based on our *de novo* review of the entire record currently before us, the Full Commission finds that the claimant proved she was entitled to additional medical treatment in the form of lumbar epidural steroid injections

as recommended by Dr. Cheyne and administered by Dr. Fisher. We find that the claimant did not prove she was entitled to temporary total disability benefits at any time after Dr. Holder's declaration of maximum medical improvement on September 30, 2008. The Full Commission therefore reverses in part and affirms in part the administrative law judge's opinion. For prevailing in part on appeal, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

Commissioner McKinney concurs in part and dissents in part.

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CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant has failed to prove by a preponderance of the evidence that she was entitled to temporary total disability benefits. However, I must respectfully dissent from the majority's finding that the claimant was entitled to additional medical treatment. In

my opinion, the claimant has failed to meet her burden of proof.

It is undisputed that the claimant had a compensable injury to her lower back after she fell at work. The respondents have provided the claimant with medical treatment and paid the claimant a 5% permanent anatomical impairment rating. Dr. Holder had opined that the claimant had reached maximum medical improvement as of September 30, 2008. The claimant sought and obtained a change of physician to Dr. Cheyne, who ordered another MRI and a series of injections. The results of the MRI demonstrate that the claimant's findings are degenerative and pre-existing.

The evidence demonstrates that the claimant received medical treatment for her lower back prior to her compensable injury. The medical records indicate that the claimant sought treatment for the lower back complaints at the Good Samaritan Clinic on June 13, 2006, and October 10, 2007. The claimant was also treated for back problems at the Summit Medical Center on October 8, 2006, following a motor vehicle accident. The claimant was involved in a car accident where the car rolled over two or three times and

she was complaining of low back pain. X-rays obtained at the emergency room after that motor vehicle accident demonstrate that there was "bilateral spondylolysis at L5-S1 with associated grade I anterolisthesis of L5 on S1, age unknown."

Further, the claimant had another automobile accident on April 4, 2008 that caused her to miss work. The evidence is clear that the claimant has a history of pre-existing low back complaints prior to her compensable injury. The claimant's subsequent MRI's show a natural progression of the claimant's pre-existing and degenerative back problems.

No physician has stated that the claimant's continued complaints are related to her compensable injury. The claimant contends her back problems have increased and she needs continuing medical treatment, but in my opinion, the claimant's testimony regarding this is not credible. The claimant denied that she had any previous back problems, but the medical records bear out a different story. When confronted with the fact that she had sought medical treatment for her back prior to her compensable injury, the claimant did not remember these prior problems. The records

speak for themselves and indicate that treatment occurred in the two years prior to her compensable injury.

Therefore, after I consider the evidence of record, I find that the medical records establish that the claimant had pre-existing, degenerative changes in her lumbar spine, which were present prior to her compensable injury and required her to receive medical treatment before the compensable injury. The claimant, in my opinion, has not established any evidence that her current problems are related to her compensable injury rather than her pre-existing back problems. Therefore, based upon my de novo review of the record, I find the claimant has failed to meet her burden of proof. Accordingly, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, Commissioner

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

#### **CONCURRING AND DISSENTING OPINION**

I concur in the majority's finding that the claimant is entitled to additional reasonably necessary medical treatment. However, after a de novo review of the

record, I find that the claimant is entitled to temporary total disability benefits, and I must respectfully dissent 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).

Here, the medical evidence indicates that the claimant re-entered a new healing period in May of 2009, and has received considerable treatment since that time. Since the claimant re-entered her healing period in May of 2009, was instructed by her medical provider to remain off work, and has testified that she has been unable to work since

that time, the weight of the evidence indicates that she should be awarded temporary total disability benefits.

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

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PHILIP A. HOOD, Commissioner