

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F907467

RONALD WEBB, EMPLOYEE	CLAIMANT
BILLY WEBB, EMPLOYER	RESPONDENT
EMPLOYERS MUTUAL CASUALTY CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 16, 2011

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

Claimant represented by the HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, 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 April 22, 2011. 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 the within claim.
2. The employee-employer relationship existed on April 2, 2007, when the claimant sustained a compensable back injury.

3. The claimant's average weekly wage of \$763.73 entitles him to temporary total disability and permanent partial benefits in the amounts of \$504.00/\$378.00, respectively.
4. The claimant was placed at maximum medical improvement and a 7% rating has been assigned by Dr. Cathey. This rating has been accepted and is being paid by the respondent carrier.
(However, respondents have not accepted the rating as being causally connected to the claimant's compensable injury. This clarification was made by respondents at the time of the hearing).
5. This claim for additional benefits has been controverted in its entirety.
6. The claimant proved his entitlement to additional medicals, in (sic) form of surgery and pain management.
7. The claimant prove (sic) his entitlement to temporary total disability compensation from September 11, 2010, and continuing to a date yet to be determined.
8. That the claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. §11-9-715.
9. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

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 April 22, 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 has proven by a preponderance of the evidence that he was entitled to medical treatment in the form of surgery recommended by Dr. Zachary Mason as well as temporary total disability benefits from September 11, 2010 through a date yet to be determined. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The evidence demonstrates that the claimant sustained a compensable back injury on April 2, 2007. The claimant was loading a trowel machine into the back of a pickup truck when he felt and heard his lower back pop. The claimant denied having immediate pain but said he had pain approximately 45 minutes later. The

claimant sought treatment from Dr. Monfee. The claimant reported the injury to his dad, the owner of the respondent employer, the next day and his dad directed him to go see Dr. Monfee. The claimant treated with Dr. Monfee for approximately one year before he told Dr. Monfee that it was a Workers' Compensation related injury.

The claimant was referred to Dr. Thomas Cheyne in March of 2009. Dr. Cheyne recommended an MRI and performed some epidural steroid injections. The claimant testified that the first two injections helped, but after that, they did not help any more. Dr. Cheyne recommended physical therapy. The claimant stated that the massages and the heat felt good, but when they put him in traction, he could hardly walk after he got out of it. The claimant treated with Dr. Cheyne until February of 2010 when he was sent to see Dr. Zachary Mason. Dr. Mason has recommended a lumbar fusion surgery. The claimant requests that the respondents pay for this surgery.

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 cannot prove by a preponderance of the evidence that he is entitled to additional medical treatment in the form of lumbar surgery recommended by Dr. Mason. The evidence demonstrates that the claimant did not have an MRI until April 6, 2009, two years after the injury. The MRI revealed minimal multi-level disc bulging, most notable at L5-S1. Dr. Cheyne reviewed the claimant's MRI and indicated that he did not believe there was anything surgical they could do for the claimant. The claimant had another MRI performed on May 7, 2010, which revealed mild disc degeneration at L2-L3 and L5-S1 without canal stenosis or definite root impingement and possible spondylosis at L5. The claimant also had a CT scan that showed bilateral spondylosis at L5. Dr. Mason then recommended a fusion.

The surgical procedure was sent to peer review for pre-certification and it did not pass pre-certification. The claimant was sent for an independent medical evaluation with Dr. Stephen Cathey on August 5, 2010. Dr. Cathey noted that the claimant denied any previous history of low back pain or injury. Dr. Cathy opined that the claimant had a congenital abnormality at L5-S1, which was pre-existing and he felt that there was

no need for surgery. He stated the claimant's problems would not likely be resolved by surgery. He also stated that the need for surgery is "No way, related to this occupation injury on April 2, 2007."

The evidence demonstrates that prior to the injury on April 2, 2007, the claimant had been taking prescription pain pills for a few days before this injury. The claimant had previous back problems and had not related these prior problems to any of his treating physicians.

Therefore, when I consider the fact that the claimant was receiving treatment with pain pills prior to the incident in 2007, the fact that the claimant did not seek medical treatment for over a year, and the fact that there were two MRIs taken years after the claimant's injury, I cannot find that there is a causal connection between the findings in 2010 and the 2007 injury. Further, the findings on the MRI's are congenital and degenerative in nature, and Dr. Cathey has opined that the proposed surgery would not likely help the claimant's symptoms. Therefore, I must dissent from the majority's award of benefits.

The majority has also awarded additional temporary total disability benefits. In my opinion, the

evidence fails to prove that the claimant is entitled to any such 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. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, supra.

The evidence demonstrates that there is no physician that has taken the claimant off work after September 10, 2010. The claimant underwent a functional capacity evaluation on December 10, 2009, which resulted in a finding that the claimant could do work in the medium level category as defined by the U.S. Department of Labor. Dr. Cheyne confirmed on January 15, 2010 that the claimant could do work within this category. Dr. Cathey opined that the claimant was at maximum medical improvement on August 5, 2010 and awarded the claimant a permanent anatomical impairment rating, which the respondents accepted and paid. The evidence demonstrates that the claimant has not applied for any jobs, but has applied for Social Security benefits and

has been denied twice. Further, the claimant has been able to hunt and fish and, in fact, went to Wyoming in 2009 to hunt.

Therefore, after I consider all the evidence of record, I cannot find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits. As such, I must respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner