

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712301

GILBERT WISEMAN, EMPLOYEE	CLAIMANT
QUEBECOR JONESBORO, INC., EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 16, 2011

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

Claimant represented by the HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MARK MAYFIELD, Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed December 16, 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 September 30, 2007, the relationship of employee-employer-carrier existed among the parties when the claimant earned wages sufficient to entitle him to weekly compensation benefits of

\$504.00/\$378.00, for temporary total/permanent partial disability.

3. On September 30, 2007, the claimant sustained an injury arising out of and in the course of his employment.
4. In addition to prior periods of temporary total disability, the claimant was temporarily totally disabled for the period commencing March 16, 2009, and continuing through the end of his healing period.
5. The respondents shall pay all reasonable hospital and medical expenses arising out of the injury of September 30, 2007.
6. The respondents have controverted the claimant's entitlement to medical benefits subsequent to August 28, 2008, and entitlement to temporary total disability benefits subsequent to March 16, 2009.

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 December 16, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must 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 temporary total disability benefits subsequent to March 16, 2009. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury on September 3, 2007. The claimant was wiping down rollers to clean off ink when he felt a sharp popping pain in his shoulder. The respondents accepted this injury as compensable and paid medical and temporary total disability benefits.

An MRI revealed that the claimant had a herniated disc at C6-C7. The claimant underwent a cervical fusion on January 10, 2008, under the treatment of Dr. Parsioon. In a follow-up dated March 3, 2008, Dr. Parsioon indicated that the claimant was doing well, but complained of interscapular pain and bilateral shoulder pain. Dr. Parsioon explained to the claimant that the pain was muscular and he needed to start moving his arms, otherwise he would get a frozen shoulder. The claimant saw Dr. Parsioon on April 17, 2008. The claimant indicated that he was much better and he was

prescribed medication and four weeks of physical therapy. On June 5, 2008, the medical records indicate that the claimant's radicular pain that he had from his neck into the upper extremity had resolved. He reported mild neck pain and right shoulder and joint pain as well as pain with range of motion of the shoulder. Dr. Parsioon released the claimant as having reached a maximum medical improvement and gave the claimant a 15% permanent anatomical impairment rating. He also recommended that the claimant see an orthopedic surgeon, Dr. Day.

The claimant saw Dr. Day on June 30, 2008, for right shoulder and arm pain. An MRI was ordered. On July 9, 2008, Dr. Day released the claimant to return to work driving a forklift and referred the claimant to Dr. Chuck Pearce, a shoulder specialist. On July 23, 2008, the claimant was seen by Dr. Pearce, who indicated that the claimant could continue working on the forklift and wanted him to be seen by a neurologist for evaluation and nerve conduction velocity (NCV) test. The claimant was tested by Dr. Reginald Rutherford and the NCV tests revealed right carpal tunnel syndrome and right cubital tunnel syndrome. The claimant was referred to Dr. Michael Moore who, after examining the claimant, indicated that the claimant had severe right carpal

tunnel syndrome. The claimant refused to undergo carpal tunnel relief surgery.

The claimant returned to Dr. Parsioon on August 28, 2008. The claimant stated that he started having problems with his neck and shoulders with arm pain. Dr. Parsioon indicated at that time:

This was not present when I saw him last on June 5, 2008. On June 5, 2008, he had complained of right shoulder pain; however, his radicular pain down the right upper extremity was gone. He had no left shoulder pain and only mild neck pain. Now, he is complaining pain, bilateral shoulder pain, interscapular pain, bilateral arm pain and bilateral limitation of range of motion of the shoulders.

Dr. Parsioon reviewed the claimant's MRI from August 19, 2008, and compared it to the MRI from November 14, 2007, and indicated they were basically the same. He noted that X-rays of the claimant's cervical spine confirmed that the alignment and hardware from the claimant's cervical fusion were intact. Dr. Parsioon explained to the claimant that his cervical spine problems were chronic and degenerative and if he felt like he needed treatment, he needed to use his private insurance. He also indicated that the claimant needed to get advice from a neurosurgeon regarding his arthritis and spondylosis at C3-C4 and C4-C5 levels. Dr. Parsioon

explained that the claimant's carpal tunnel syndrome and ulnar neuropathy were not related to the work injury and that he needed to consult an orthopedic surgeon for his shoulder pain because that was out of his specialty.

The claimant saw Dr. Mark Harriman, an orthopedic surgeon on September 11, 2008. Dr. Harriman, after reviewing the claimant's medical records stated:

When questioned carefully, he states that the symptoms definitely developed after about three and a half to four months ago and were not present in the few months after the January 2008 surgery. He states that the right arm feels weak.

Dr. Harriman opined that the claimant's pain seemed to be out of proportion to his physical examination findings. He noted that the claimant was "a bit histrionic, to say the least, but I believe that he does have something significant going on, likely from his lower cervical area, but not C6-C7."

The claimant saw a Dr. Laverne Lovell, a neurosurgeon who found that the claimant's symptoms were unrelated to his compensable injury. Dr. Lovell reviewed the claimant's prior medical records and did an extensive exam. Dr. Lovell noted that the claimant had significant degenerative changes at C3-C4 and C4-C5, with several foraminal disease at those levels. Dr. Lovell's impression with the right upper extremity

weakness was probably a C5 root weakness. Dr. Lovell stated:

I suspect a C-4 root on the right side might be affected as well, Although this is less clear to me. I believe that the weakness is secondary to the foraminal stenosis on the right at C3-C4 and more likely C4-C5.

Dr. Lovell diagnosed the claimant with right C5 and possible C4 radiculopathy with weakness and believed those problems were secondary to the degenerative changes at C3-C4 and C4-C5. Dr. Lovell noted that surgical intervention might not help the claimant's recovery if there had been permanent damage done. Dr. Lovell stated with regard to the right shoulder pain and the claimant's compensable injury:

I can only go by the medical record provided to me. They showed good recovery from the C6-C7 surgical procedure, and there is no weakness identified in this patient's claim until to six to seven months after the surgical procedure. I would therefore have to go on record as saying that the current complaints are not secondary to the 2007 work injury, but they occurred at a later point in time.

He went on to state that:

... since the medical records do not show the weakness in his right arm during his post operative visits for the first five months, I would attribute his current complaints to the chronic degenerative changes in

the neck. For that reason, I would be unable to provide him with any further partial impairment rating secondary to the arm weakness. I have recommended using his regular insurance to have surgical intervention if he so desires in the future.

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 his current shoulder problems are related to his compensable injury. The claimant has been treated by Dr. Parsioon, Dr. Thomas Day, Dr. Charles Pearce, Dr. Reginald Rutherford, Dr. Michael Moore, Dr. Mark Harriman and Dr. Laverne Lovell. None of these physicians have related the claimant's shoulder complaints to his compensable injury. The only physician who has related the claimant's right shoulder pain to his work injury is Dr. Stephanie Aeinhaus, who is chief of neurological at the VA in Memphis. Dr. Aeinhaus only reviewed the claimant's medical records that were from the Veteran's Administration. She did not review the medical records of Dr. Parsioon, Dr. Day, Dr.

Pearce, Dr. Rutherford, Dr. Moore, Dr. Harriman or Dr. Lovell. In fact, the claimant admitted that he did not even know who Dr. Aeinhaus was.

The overwhelming medical evidence in the record indicate that the claimant's right shoulder problems are not related to his compensable injury. The claimant has been diagnosed with carpal tunnel syndrome and has severe degenerative problems with his cervical spine. In fact, the claimant's treating physician for his neck surgery, Dr. Parsioon, has stated that he thinks that the claimant's problems are specifically not related to that injury and that the claimant should put this on his private insurance. Therefore, after I consider the fact that Dr. Parsioon, Dr. Day, Mr. Moore, Dr. Pearce, Dr. Lovell, Dr. Rutherford and Dr. Harriman have not related the claimant's shoulder problems to his compensable neck injury, I cannot find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his right shoulder as it is not related to the claimant's compensable injury.

The claimant has also requested temporary total disability benefits and the Administrative Law Judge awarded those from March 16, 2009, to a date yet

to be continued. In my opinion, the claimant has failed to meet his burden of proof.

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).

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 evidence demonstrates that the claimant returned to work on June 5, 2008, operating a forklift. He had been released at maximum medical improvement from a neurological standpoint and was given a 15% permanent anatomical impairment rating. The claimant worked at this job until March 15, 2009, when he was laid off by the respondent employer.

Further, the evidence demonstrates that the current problems the claimant has with his right shoulder are not related to his compensable injury. They are degenerative problems and, therefore, the respondents should not be responsible for paying the claimant temporary total disability benefits during this time. But for the claimant being laid off, he would still be able to work for the respondent employer driving a forklift.

Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner