

DIVISION I

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
LARRY D. VAUGHT, Judge

CA06-166

September 6, 2006

EDWARD GRAYS

APPELLANT

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. F200907]

V.

BECTON TIMBER COMPANY and  
AMERICAN INTERSTATE  
INSURANCE CO.

APPELLEES

AFFIRMED

Appellant Edward Grays appeals from the decision of the Arkansas Workers' Compensation Commission finding that he failed to prove by a preponderance of the evidence that he was entitled to additional medical care and treatment and wage-loss disability. He argues on appeal that the Commission's decision was not supported by substantial evidence. We disagree and affirm.

Grays, a forty-nine-year-old man, had worked for Becton Timber Co. for five years, mainly as a truck driver. On November 21, 2001, he sustained a neck injury as he exited his truck while his load was being weighed. Grays described his injury as "a tear in my neck," "like [I] pulled something." He stated that his neck hurt and that he had muscle spasms in his neck and arms. Appellees accepted his injury as compensable, and paid medical expenses and temporary-total-disability benefits.

Neurosurgeon Dr. Steven Cathey performed surgery on Grays for a disc herniation at “the right C5-C6” on June 21, 2002. Grays testified that his pain worsened after the surgery. However, Dr. Cathey released Grays without work restrictions and assigned him a ten-percent impairment rating in January 2003. Dr. Cathey concluded that Grays did not need additional surgery, based on a postoperative MRI, and referred Grays to Dr. Brian Nichol for pain management. Dr. Cathey also suggested Grays get a second opinion regarding whether additional treatment was necessary. Subsequently, Dr. Barry Baskin evaluated Grays on May 15, 2003. Dr. Barkin found no objective medical evidence to explain Grays’s pain symptoms and agreed that no further treatment was necessary. Grays has not worked since January 2003 when he was released for work by Dr. Cathey.

Dr. Nichol continued to treat Grays’s pain using epidural steroid injections and physical therapy. Dr. Nichol’s medical notes suggested that he was treating Grays for multilevel facets bilaterally from C3-C7. Dr. Nichol’s own notes indicated that Grays’s September 2001 MRI showed the cervical fusion was a “very good, stable fusion at the C5-C6 level with good progression of interbody fusion.” Dr. Nichol went on to note that Grays’s “axial cervical pain [occurs] after a seizure” and that “his cervical fusion is in excellent progression.” Dr. Nichol stated that Grays’s complaints of pain “appear most likely to be that of facet-mediated etiology.” Grays testified that a trial morphine pump furnished by Dr. Nichol alleviated some of his pain and that he intends to return to Dr. Nichol to obtain a permanent pump. Grays took a Functional Capacity Evaluation (FCE) on February 16, 2005, which was considered unreliable based on his inconsistent efforts and refusal to perform all the tests. Additionally, Grays gave inappropriate pain responses on the FCE, describing his pain as a “9” and a “10,” although he was instructed that a “9” meant he was “unable to speak, crying out or moaning uncontrollably, near delirium.” His medical history includes

a knife wound to his right shoulder, hypertension, right knee problems, and a motor-vehicle accident.

When reviewing a decision of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, and we affirm that decision if it is supported by substantial evidence. *Searcy Indus. Laundry Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 72, 110 S.W.3d at 307. We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.*, 110 S.W.3d at 307. In making our review, we recognize that it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Id.*, 110 S.W.3d at 307. Furthermore, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.*, 110 S.W.3d at 307.

Workers' compensation law provides that an employer shall provide the medical services that are reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Repl. 2002); *Stone v. Dollar Gen. Stores*, \_\_ Ark. App. \_\_, \_\_ S.W.3d \_\_ (June 8, 2005). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Id.*

The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 236, 58 S.W.3d 848, 851 (2001). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, because a

lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Id.* at 237–38, 58 S.W.3d at 851–52.

On appeal, Grays argues that the Commission erred in finding that he had failed to prove entitlement to additional medical treatment and that he was not entitled to wage-loss disability. We hold that there is substantial evidence to affirm the Commission's decision on both issues. First, the Commission had to weigh the medical opinions of Dr. Cathey and Dr. Baskin—both stating that there was no explanation for Grays's pain and no reason for additional medical treatment—against the opinion of Dr. Nichol, a pain management doctor who, based on his own notes, agreed with the other two doctors that Grays's surgery was successful. The Commission reviewed Dr. Nichol's records and concluded that he was treating Grays for problems not connected to the November 2001 accident and there was no basis for those treatments to be compensable. Based on the opinions of Dr. Cathey and Dr. Baskin—and the Commission's duty to weigh the medical evidence—we are satisfied that the Commission's decision that Grays was unable to show that he was entitled to additional medical treatment was supported by substantial evidence.

Second, the Commission also declined to award Grays wage-loss benefits based on the fact that Dr. Cathey released him without work restrictions and that Grays did not perform to his best ability on the FCE. Grays never attempted to return to work following his release by Dr. Cathey. Additionally, evidence suggested that he gave poor effort on the FCE and that he described his pain at levels that were incorrect, even after being given instruction describing the differing levels. The Commission is charged with determining if Grays was entitled to wage-loss disability based on his age, work experience, and education, as well as taking into account Grays's motivation to return to work. Based on the facts of this case, we hold that the Commission did not err in denying Grays wage-loss disability because he was

not motivated to return to work, did not perform to the best of his ability on the FCE, was relatively young and in good health, and had received the permission from two different doctors to return to work without restrictions.

\_\_\_\_\_ Affirmed.

HART and NEAL, JJ., agree.