

Cite as 2009 Ark. App. 617

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA09-292

JACK COLE

APPELLANT

V.

COMMERCE & INDUSTRY
INSURANCE CO. and NETWORK OF
COMMUNICATIONS OPTIONS

APPELLEES

Opinion Delivered September 30, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F413280]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Jack Cole appeals the decision of the Workers' Compensation Commission denying his request for additional temporary total and medical benefits. We affirm.

Cole, fifty-nine years old at the time of the hearing, was employed with appellee Network of Communications Options as a shuttle-bus operator for mentally challenged clients. On November 24, 2004, Cole's shuttle was struck on the right rear by a light-weight, Ranger pick-up truck. Cole suffered from neck pain and headaches after the incident, which was accepted as compensable.¹

Cole first received treatment from Dr. David Kauffman on December 2, 2004, who

¹Appellee representative Carol Jean Morris testified that none of the other passengers in the vehicle driven by Cole were injured.

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diagnosed a cervical strain and released Cole from work. Appellees began paying medical and temporary total disability benefits to Cole. After several visits with Dr. Kauffman and physical-therapy visits, Cole's neck pain did not resolve, and Cole was referred to neurologist, Dr. Douglas Green. Cole's complaints to Dr. Green included neck pain and headaches, plus numbness in his hands, nausea, vomiting, sleep disturbance, arm pain, dizziness, staggering, and back, foot, and toe pain. Dr. Green ordered several tests, including a cranial CT scan, MRIs of the cervical and lumbar spine, and x-rays of the cervical and lumbar spine. The cranial CT and x-rays were normal. The cervical MRI demonstrated right-side findings at C5-C6; however, Dr. Green opined that those findings did not correlate with Cole's left-side complaints. Dr. Green recommended additional testing of this area. A right-side small herniated disk was found at L5-S1, but again Dr. Green opined that it did not appear to be adequate to explain Cole's symptoms. A CT of the cervical spine was performed on May 18, 2005, and no herniation was appreciated; however, severe degenerative changes were noted at C5-C6 and C6-C7. Thereafter, Dr. Green recommended a bone scan and a referral to a pain clinic. Cole was seen at the pain clinic in June 2005 and received an epidural steroid injection.

Appellee thereafter referred Cole to Dr. Stephen Eichert, an osteopath. Cole testified that the visit with Dr. Eichert lasted approximately ten minutes. Dr. Eichert, in his August 4, 2005 report, opined that the MRIs of the lumbar and cervical spine showed minimal degenerative change, that there were no objective neurologic abnormalities, and that Cole

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had reached maximum medical improvement and could return to work at full duty with no restrictions. Based on Dr. Eichert's report, appellees controverted benefits.

After being released by Dr. Eichert, Cole sought a change of physician. On July 5, 2006, the Commission ordered that Cole be seen by Dr. Patrick Chan, a neurologist. Dr. Chan's August 9, 2006 report noted the findings on the cervical and lumbar MRIs and diagnosed Cole with chronic neck, left shoulder, low back, and right groin pain. Dr. Chan also recommended additional MRI testing, prescription medication, and physical therapy. He noted that Cole had been declared to be at maximum medical improvement but listed Cole's work status as permanently disabled. Appellees paid for the initial visit with Dr. Chan, but controverted future benefits.

On November 3, 2006, Cole was seen by Dr. James Park, a chiropractic physician. Dr. Park stated that "[b]ased on the length of time since the accident that he is at MMI. However, I have reservations . . . accepting . . . that there is nothing else to be done for him" Dr. Park recommended that Cole be seen by neurosurgeon, Dr. Gregory Ricca.

Cole was seen by Dr. Ricca in February 2007. Dr. Ricca noted in his report that "[Cole's] symptoms are difficult to figure out." Dr. Ricca concluded that Cole needed to be treated by an otolaryngologist for his dizziness and that the neck pain could be from the mild instability at C4-C5 and should be treated conservatively. Dr. Ricca recommended a nerve conduction study and treatment at a pain clinic. Finally, Dr. Ricca stated that he did not think that Cole was capable of working due to his very unsteady gait.

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A functional capacity evaluation was performed on May 24, 2007. The FCE evaluator concluded that Cole could work at sedentary duty. Thereafter, on May 29, 2007, Cole was seen by Dr. Yuanyuan Long, who stated that objective testing thus far had been “negative or unremarkable,” and he noted that “[s]o far, no major or serious objective neurological deficit has been identified.” He also recommended a nerve conduction study, an EEG, a head MRI, and an otolaryngology consult.

At the hearing, Cole acknowledged that in the summer of 2003, he sought medical treatment for complaints of dizziness and tilting accompanied with nausea and vomiting. He testified that the problem resolved in September 2003. Moreover, he said that the symptoms in 2003 were completely different from those he had following the November 2004 accident. Cole further testified that as a result of his compensable injury, he was unable to work because of the restrictions in his neck and his other physical limitations.

The administrative law judge found in favor of Cole and awarded him additional medical and temporary total disability benefits. The Commission reversed the ALJ’s decision, finding that Cole failed to prove that he is entitled to additional medical and temporary total disability benefits. Cole timely appealed, challenging the sufficiency of the Commission’s findings.

On appeal, this court will view the evidence in the light most favorable to the Commission’s decision and affirm when that decision is supported by substantial evidence. *Miner v. Yellow Transp., Inc.*, 2009 Ark. App. 197, at 2–3, ___ S.W.3d _____. Where the

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Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.* A substantial basis exists if fair-minded persons could reach the same conclusion when considering the same facts. *Id.*

Cole's first point on appeal challenges the sufficiency of the evidence supporting the Commission's finding that Cole failed to prove his entitlement to additional medical benefits. Our 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) (Supp. 2007). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Curtis v. Big Lots*, 2009 Ark. App. 292, at 3, ___ S.W.3d ____. What constitutes reasonably necessary medical treatment is a question to be determined by the Commission. *Id.*

The Commission concluded that Cole did not prove an entitlement to additional medical treatment because he had received reasonable and necessary treatment for the compensable injury (the cervical strain), and Cole's other problems (cervicalgia, cervical degenerative disc disease, lumbago, lumbar degenerative disc disease, tinnitus, positive Rhombmerg's sign, burning right-face pain, tingling in hands and feet, and a dislodged otolith) were not causally related to the compensable injury.

We hold that substantial evidence supports this finding. Dr. Eichert's opinion, which

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addressed all of Cole's complaints, was that only degenerative findings were identified on the MRIs, that there were no objective neurologic abnormalities, and that no further medical treatment was necessary. And while Cole may have been diagnosed with many other conditions, the record does not support his contention that these conditions were causally related to the compensable injury or incident. In fact, the record reflects that Cole suffered from many of these other complaints prior to the compensable incident. As such, we affirm the Commission's finding that Cole is not entitled to additional medical treatment for his cervical strain.

Cole also challenges the sufficiency of the evidence supporting the Commission's finding that he failed to prove his entitlement to additional temporary total disability benefits. When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. *Pyle v. Woodfield, Inc.*, 2009 Ark. App. 251, at 3, ___ S.W.3d ____. 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. *Id.* The question of when the healing period has ended is a factual determination for the Commission that will be affirmed if it is supported by substantial evidence. *Id.*

In denying Cole's claim for additional temporary total disability benefits, the Commission assigned "significant weight" to Dr. Eichert's opinion that Cole had reached

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maximum medical improvement on August 4, 2005, and Dr. Eichert's conclusion that Cole's healing period ended on that same date. Cole faults the Commission's decision to rely upon "the wholly unsupported conclusion of Dr. Eichert that [Cole] had reached MMI."

It is the duty of the Commission to weigh medical evidence as it does other evidence. *Fletcher v. Farm Bureau Ins. Co.*, 10 Ark. App. 84, 86, 661 S.W.2d 431, 432 (1983); *Jones v. Scheduled Skyways, Inc.*, 1 Ark. App. 44, 48, 612 S.W.2d 333, 336 (1981). Whenever the medical testimony is conflicting, the resolution of the conflict is a question for the Commission. *Fletcher*, 10 Ark. App. at 86, 661 S.W.2d at 432; *Jones*, 1 Ark. App. at 48, 612 S.W.2d at 336. When the Commission chooses to accept the testimony of one physician over another, we are powerless to reverse that decision. *Fletcher*, 10 Ark. App. at 86, 661 S.W.2d at 432; *Jones*, 1 Ark. App. at 48, 612 S.W.2d at 336.

In the case at bar, there was conflicting medical evidence on the issues of whether Cole had reached maximum medical improvement and was able to work. The Commission weighed the medical evidence, and found that Dr. Eichert's opinion—that Cole had reached the end of his healing period and was able to return to work without restrictions—was entitled to significant weight. We hold that this is substantial evidence supporting the Commission's denial of additional temporary total disability benefits.

Affirmed.

HART and GRUBER, JJ., agree.

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