

DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

CA 06-67

September 6, 2006

BRADLEY SCHOOL DISTRICT AND RISK
MANAGEMENT RESOURCES
APPELLANTS

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION, [WCC NO. F201034]

V.

AFFIRMED

MINNIE P. BREWER

APPELLEE

In this workers' compensation case, the Commission determined that appellee was temporarily and totally disabled from November 18, 2003, to a date yet to be determined and that she was entitled to benefits for further medical treatment. Appellants contend on appeal that the Commission's findings are not supported by substantial evidence. We disagree and affirm.

Appellee, Ms. Minnie Brewer, age forty-nine, injured her back on two separate occasions during her employment as a janitor for the appellant Bradley School District. The first accident took place on January 7, 2002, and the second occurred on June 4, 2003. In the last incident, she slipped and fell on her lower back while waxing the floor of a science room. Appellants accepted both claims as compensable, but they stopped payment of temporary-total disability benefits in connection with the June 2003 accident in September 2003, and they later argued that certain medical benefits were not reasonable and necessary.

The record reflects that on the day of the second accident appellee was taken by ambulance to the emergency room with complaints of pain between her shoulder blades, as well as pain to the midback that was radiating to her rectum and left leg. She was sent home with pain and muscle-spasm medication and told to remain off work for two days. Appellee then saw her family physician,

Dr. Sherri Diamond, on June 10, due to continued complaints of pain. Dr. Diamond offered a diagnosis of “back pain/contusion” and directed that she remain off work until July 1. Appellee returned to Dr. Diamond on June 17, again complaining that her back pain had not subsided. Dr. Diamond advised appellee to see Dr. Reza Shahim, who had been treating appellee for the first back injury.

Appellee’s appointment with Dr. Shahim was on June 30. He reported that appellee was complaining of pain radiating to both hips and the posterior aspects of both legs, and of a pressure sensation in her rectum. He noted that the majority of her symptoms were in the posterior lumbar spine. Dr. Shahim reviewed a prior MRI that he believed showed a disc herniation, but because this MRI was of such a poor quality, he ordered another MRI of appellee’s lumbar spine. He took her off work for three weeks.

The MRI was taken on July 28, 2003. It showed “[m]inimal right posteriolateral annular disc bulges at L3-4, L4-5, and L5-S1 levels, of doubtful significance,” and “[m]ild internal dessication of the L3-4 disc”. Dr. Shahim saw appellee on August 4, at which time she was continuing to complain of low-back pain with pain radiating into the left hip and leg. After reviewing the MRI, he stated that there was evidence of lateral recess stenosis, particularly at L4-5, due to disc protrusion. On that date, he wrote:

Since [appellee] has failed the lumbar steroid injection and also physical therapy and has significant radiculopathy in the left leg with left leg numbness and pain, I will obtain a CT lumbar myelogram on her. I suspect that she has lumbar radiculopathy due to a lumbar disc herniation, which is not clearly identified on the MRI.

As of that date, August 4, 2003, Dr. Shahim returned appellant to light-duty work with a weight restriction of thirty pounds and with no bending or stooping until the completion of physical therapy.

The lumbar myelogram was conducted on September 22, 2003. The impression from this study was “[m]ild anterior indentation on the thecal sac at L4-5 probably due to a small annular bulge,” and “[m]ild anterior bulge at L5-S1 probably secondary to the annular bulge.” A post

myelogram CT was also performed that day with the following impression:

1. There is a right posterior disc bulge at L5-S1 which extends into the neural foramen and most likely encroaches on the nerve root. There is posterior displacement of the nerve root in the central canal.
2. There is annular bulging at L3-4 and L4-5 which slightly effaces the thecal sac, but does not cause significant canal or foraminal stenosis.

On September 30, Dr. Shahim reviewed the myelogram with appellee, noting that it revealed a disc herniation at L5-S1 with nerve-root compression; that there was evidence of lateral recess stenosis bilaterally; and that there was disc disease at L3-4 and L4-5 without any clear stenosis. Dr. Shahim discussed treatment options with appellee, who continued to complain of bilateral leg symptoms and pain radiating from the hips to the posterior aspect of both legs. Dr. Shahim stated:

Since she has had symptoms for more than a year I have given her the option of lumbar discectomy at L5-S1. We discussed the risks of surgery which includes infection, bleeding, potential recurrent disc herniation. Most likely she has annular tear at L5-S1 and the disc herniation which has resulted in a lot of her back symptoms. A discectomy may only partially eliminate her symptoms. There is a chance of a recurrent disc herniation requiring further surgery or a redo discectomy.

Her non-surgical options include a percutaneous discectomy at L5-S1 or IDET procedure or intradiscal steroid injection. Since she has had significant back and radiculopathy she would prefer to have surgery done and we will plan on lumbar discectomy bilaterally at L5-S1.

Appellee was seen again by Dr. Diamond on October 21, 2003. According to the progress note of that date, appellee told Dr. Diamond about the option of surgery given by Dr. Shahin, and appellee requested a referral for a second opinion. Appellee was in Dr. Diamond's office again on November 18 because of back pain. Dr. Diamond's progress note of that date reads:

[Appellee] states that she feels like she is overdoing it and trying to go and keep her normal activity level up and feels like it is just catching up with her. She is requesting IM injection of pain medicine, as her regular pain medicine obviously isn't helping much.

Herniated disc, she is in the process of trying to get a second opinion regarding surgery on her back. She is trying to get set up with Dr. Buono in Texarkana. His clinic is awaiting records from the physician that the patient saw in Little Rock in order to schedule her for an appointment. She states that she is really at the point where she

is ready to consider surgery, but is trying to hold out to get the second opinion.

Dr. Diamond also reported that she was going to take appellee off work pending further treatment of her back “because she is beginning to have falls with her legs coming from under her.” In a letter of the same date, Dr. Diamond wrote:

[A]ppellee has a potentially debilitating back problem that requires surgery. This surgery is pending at this time so as to permit worsening of her symptoms, I am recommending that she be off work pending this treatment.

On December 8, 2003, Dr. Shahim released appellee to the care of Dr. Diamond.

By referral from Dr. Diamond, appellee saw Dr. Lee Buono, a neurosurgeon, on January 14, 2004, for a second opinion with regard to surgery. He believed that appellee would benefit more from a TENS unit and conservative treatment than she would from surgery, which he doubted would resolve all of her symptoms. In a letter, Dr. Buono stated his opinion as follows:

Due to the fact that [appellee] failed epidural steroid injections I do not believe that further injections are warranted. However, I believe that her muscle spasm in her back is her primary difficulty. Therefore, we will prescribe her a tens unit for relief of muscle spasm. It is my experience that over 90% of patients with low back pain and muscle spasm have an excellent response to a tens unit.

On March 29, 2004, Dr. Diamond wrote in a medical questionnaire requested by appellee’s counsel that appellee’s injuries were consistent with her on-the-job injury; that appellee remained in her healing period; and that she would not assign an impairment rating at that time. Dr. Diamond further noted that appellee would benefit from a TENS unit and physical therapy, and she recommended that appellee be referred to the spine clinic in Little Rock for further evaluation and treatment, and that she be reevaluated by Dr. Shahim.

Appellee saw Dr. Shahim on April 27, 2004. Dr. Shahim reported from that visit:

I had discussed potential diskectomies with her for treatment of the L5-S1 disease. She had wanted conservative management, particularly because I have explained to her that surgery will not eliminate all of her symptoms. [Appellee] says that her leg and back symptoms are worsening. I will obtain a new MRI of her lumbar spine. I will also recommend Rx medical muscle stimulator for treatment of her back pain. Her symptoms are very chronic. If she

returns to work, she should avoid lifting greater than 50 lbs.

The repeat MRI recommended by Dr. Shahim was taken on May 7, 2004. On May 10, Dr. Shahim reported that it revealed a broad disc protrusion at L5-S1 that involved a focal herniation on the right side with a small annular tear. He opined that these findings were contributing to her symptoms. Dr. Shahim saw appellee again on May 17. Appellee complained of bilateral hip pain radiating into the posterior aspect of her left leg, and to the left ankle and left foot. He again expressed the opinion that appellee was not a candidate for surgery, and he recommended that appellee be evaluated for an IDET procedure.

Appellee then saw a pain specialist, Dr. Sunder Krishnan, on August 23, 2004. His assessment of appellee's condition was that of multilevel lumbar disk bulging and persistent pain. He recommended that appellee undergo a provocative lumbar discography to determine if her pain was diskogenic in origin, and if so, whether her symptoms might be amenable to one of the minimally invasive spine procedures, such as IDET or percutaneous discectomy.

In her testimony, appellee said that she had last worked on November 17, 2003, as Dr. Diamond had taken her off work the next day. She said that she stopped working because she was not able to work because of her back and the weakness in her legs, which had become progressively worse. She said that, prior to June 2003, she had never had the kind of pain that she has experienced since then. She testified that she was not able to bend or stoop and that she could lift only seven to ten pounds. She said that she could, at her own pace, do general housekeeping and cooking, and that she could drive a car and go grocery shopping. She did not feel that she could perform janitorial work. Appellee testified that she declined surgery because of the risks involved and because she had been told that a TENS unit would help. Appellee admitted that she had not taken a functional evaluation test, saying that she was not feeling up to it.

Appellants paid for the studies and doctor visits with the exception of the treatment provided by Dr. Diamond. Appellants refused to pay for the TENS unit that was recommended by Dr. Buono, and also refused to pay for the diagnostic studies and possible IDET procedure or percutaneous

diskectomy recommended by Drs. Krishnan and Shahim. Appellants also ceased payment of temporary-total disability benefits in reliance on Dr. Shahim's release of appellee to return to light duty with restrictions on August 4, 2003. The Commission found, however, that all of the treatment appellee had received to date was reasonable and necessary. The Commission approved the TENS unit prescribed by Dr. Buono and recommended by him and Drs. Shahim and Diamond. The Commission also found that the provocative lumbar discography and possible follow-up procedures such as an IDET or percutaneous diskectomy were reasonable and necessary for the treatment of appellee's compensable back injury. The Commission also found that appellee entered a period of temporary-total disability from November 18, 2003, to a date yet to be determined, in reliance on Dr. Diamond's statement of that date directing appellee to refrain from working until she could receive treatment for her back. The Commission further noted that there was no evidence that any doctor had directed a return to work after being taken off work by Dr. Diamond.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence is that relevant evidence which reasonable minds might accept as adequate to support a conclusion. *K II Construction Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000).

Appellants ask us to hold that there is no substantial evidence to support the Commission's finding that appellee entered a period of temporary-total disability on November 18, 2003. Appellants argue that Dr. Shahim had returned appellee to light-duty work on August 4, 2003, and that the Commission's reliance on the off-work slip issued by Dr. Diamond was misplaced because Dr. Diamond mistakenly believed that appellee was to have surgery. Appellants further contend that

neither Drs. Shahim nor Buono, who are specialists, took appellee off work, and the return-to-work slip issued by Dr. Shahim carried more weight than Dr. Diamond's directive that appellee remain off work.

A claimant is entitled to temporary-total disability benefits for that period within which she remains within his healing period and is totally incapacitated from earning wages. *K II Construction Co. v. Crabtree, supra*. The healing period continues until the employee is as far restored as the permanent character of her injury will permit. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The healing period does not end until the claimant's condition is stable and nothing further in the way of treatment will improve her condition. *Ark. State Hwy. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Whether a claimant's healing period has ended is a factual question that is resolved by the Commission. *Dallas County Hospital v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walters Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

We hold that substantial evidence supports the Commission's decision. Contrary to appellants' assertions, Dr. Shahim did recommend surgery as one treatment option available to appellee; thus Dr. Diamond was not acting under any misapprehension about the recommendation for surgery. In addition, Dr. Diamond was also aware that appellee desired a second opinion before proceeding with surgery. Moreover, the possibility of surgery was not the only reason that she took appellee off work in that Dr. Diamond also noted that appellee was experiencing episodes where her legs came out from under her. We also note that Dr. Shahim's return-to-work slip relied upon by appellants predated the myelogram and post myelogram CT which revealed the presence of a herniated disc with nerve-root compression. The Commission was acting within its authority to accept the opinion of Dr. Diamond. We find no merit in this argument.

From our reading of appellants' opening brief, it is devoted to the argument that appellee was not entitled to further temporary-total disability benefits. As for continued medical treatment, in one

sentence, appellants state, “Further, the additional treatment sought by appellee was not reasonably necessary nor causally related to the June 4, 2003 injury.” Other than that one statement, no further argument is made. It is axiomatic that we will not consider arguments that are unsupported by convincing argument or sufficient citation to legal authority. *Rigsby v. Rigsby*, 356 Ark. 311, 149 S.W.3d 318 (2004). In their reply brief, appellants do make the argument that Dr. Shahim was a specialist and appellee’s treating physician and that the additional medical treatment provided by Dr. Diamond was that of an unauthorized physician and was not reasonably necessary because appellee was receiving appropriate treatment from Dr. Shahim. However, it is also well-established that we do not consider an argument made for the first time in a reply brief. *Maddox v. City of Ft. Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001). Nor does our review indicate that the precise question of whether Dr. Diamond was or was not an authorized treating physician was raised below or ruled upon by the Commission. It is equally well-settled that we do not consider arguments made for the first time on appeal. *Castaneda v. Progressive Classic Ins. Co.*, 357 Ark. 345, 166 S.W.3d 556 (2004).

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.