

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CA07-199

OCTOBER 10, 2007

MIKE BONACCI

APPELLANT

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F401228]

V.

HOME DEPOT; AMERICAN HOME
ASSURANCE CO.

APPELLEES

AFFIRMED

Appellant Mike Bonacci appeals the December 15, 2006 decision of the Arkansas Workers' Compensation Commission (Commission) denying his request for benefits. He contends on appeal that the Commission's decision was not supported by substantial evidence. We affirm.

Appellant is thirty-nine years old, has a business administration degree from the University of Arizona, and has attended a two-year physical therapy program at Arkansas State University-Beebe. He has an extensive work history that includes supervisory positions at K-Mart, MCI, and Walgreens. He is fluent in both Portuguese and Spanish.

Appellant sustained a compensable back injury on January 10, 2004, while he was lifting a Rubbermaid shed onto a lift while working for appellee Home Depot. Appellant testified before the Administrative Law Judge (ALJ) that he felt a pop in his back accompanied by pain and tightness. His symptoms progressively worsened. Appellant properly reported the incident to the appellee employer, who accepted the injury as compensable and sent him for appropriate medical treatment.

Dr. Brent Sprinkle, a doctor of osteopathy, was among the physicians who treated appellant for his compensable injury. On March 19, 2004, Dr. Sprinkle reported that a recent MRI of appellant's spine revealed some slight degenerative changes at T6-7 and T7-8, with no significant stenosis revealed. Dr. Sprinkle also noted a "small bulge at 4-5, and a little bit more significant bulge at 5-1 with a more central protrusion." With regard to these findings, Dr. Sprinkle stated, "At this point, I do not think his bulges are causing any significant symptoms." Dr. Sprinkle recommended that appellant participate in a "good lumbar stabilization program." He added that he would consider epidural injections should appellant develop a more radicular pain pattern, since this would indicate nerve-root impingement. Finally, Dr. Sprinkle prescribed medications to appellant and released him to full work duty.

An initial physical therapy evaluation conducted on March 25, 2004, revealed that appellant's symptoms potentially represented degenerative-disc disease, a severe muscle strain, or a disc herniation "that has since resolved and become asymptomatic." The evaluator agreed with Dr. Sprinkle's recommendation for a trunk-stabilization program, and

he estimated that it should take appellant six weeks to return to unlimited functional and recreational activities with no discomfort.

On April 16, 2004, appellant returned to Dr. Sprinkle with complaints of exacerbated pain caused by lifting activities. Dr. Sprinkle restricted appellant's lifting to forty pounds, and no lifting more than ten pounds, ten times per day. Although appellant was scheduled for follow-up in three weeks, the record indicates that he never returned to Dr. Sprinkle. On April 20, 2004, appellant was terminated from his employment with the appellee employer for alleged safety violations.

Appellant was granted a change-of-physician to Dr. Thomas Hart on July 1, 2004. On initial examination, Dr. Hart noted that appellant had diffuse tenderness in the mid-thoracic region with no radicular component. In addition, appellant reported subjective complaints of back pain on the left side from the mid-line to the left back, flank, and upper buttock region, with limited range of motion, but no marked difficulty going from a sitting to a standing position. Dr. Hart reported that appellant's lower back showed no sign of nerve root compression, and he opined that appellant was not a surgical candidate. Therefore, he recommended steroid epidural injections and continued rehabilitation. Notwithstanding that his examination of November 8, 2004, revealed no indication of strong nerve root compression, Dr. Hart recommended that appellant undergo a discogram. In the meantime, appellant received chiropractic treatment from Dr. Bob Carpenter, D.C., which was reportedly helpful in alleviating his symptoms. Appellant testified that Dr. Carpenter released him, from a chiropractic standpoint, to return to work with no lifting.

Dr. Carpenter referred appellant to Dr. Steven F. Bennett, D.C., for an independent medical evaluation. On April 1, 2005, Dr. Bennett reported that appellant had reached maximum medical improvement as of March 31, 2005, and he opined that appellant could work in some capacity. Appellant did not receive temporary-total-disability benefits after this date and has not returned to work.

A discogram of appellant's spine taken on October 19, 2005, revealed degenerative-disc disease at L3-4 and L4-5. More specifically, this study showed a superiorly migrated and central-disc protrusion with extra-annular leakage consistent with degenerative changes at L3-4. In addition, due to the disc bulging, mild to moderate stenosis, ligamentum flavum hypertrophy, and mild bilateral foraminal narrowing were seen at that level. There were similar findings at L4-5, with changes noted in the outer annulus of the disc with an associated central disc protrusion. These findings were said to be consistent with degenerative changes.

Pursuant to an October 31, 2005 referral by Dr. Hart, appellant was seen by Dr. Michael Calhoun on November 9, 2005, for a surgical consultation. Based on his physical examination and review of appellant's recent discogram, Dr. Calhoun opined that appellant suffered from degenerative changes for which surgical intervention was not recommended. Despite Dr. Calhoun's opinion that appellant's condition did not warrant surgery, on December 9, 2005, Dr. Hart recommended a percutaneous discectomy at L4-5 and L5-S1, with an interdiscal electrothermal treatment (IDET) procedure at L3-4.

Dr. Scott Schlesinger conducted an independent medical evaluation of appellant on March 3, 2006. According to Dr. Schlesinger, an abnormal discogram is to be expected in patients with degenerative-disc disease. Moreover, Dr. Schlesinger did not believe that surgery, including percutaneous discectomy, IDET, open discectomy, or fusion, would benefit appellant.

The ALJ issued a decision on June 14, 2006, authorizing appellant to undergo the IDET procedure and awarding him a continuous period of temporary-total-disability benefits from March 31, 2005, to a future date to be determined. Appellee filed an appeal to the Commission. The Commission reversed the ALJ and denied appellant entitlement to specific medical procedures, IDET and percutaneous discectomy, as well as for an additional period of temporary-total-disability benefits from March 31, 2005, to a date to be determined. This appeal follows.

When reviewing a decision of the Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms that decision if it is supported by substantial evidence. *Stutzman v. Baxter Healthcare Corp.*, __ Ark. App. __, __ S.W.3d __ (May 9, 2007). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether this court might have reached a different result from the Commission; the Commission's decision will not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Id.* When a claim is denied because a claimant failed to show

entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial. *Id.* The Commission may accept or reject medical opinions and determine their medical soundness and probative force. *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

Additional medical treatment

Appellant contends that the Commission's decision denying him further temporary-total-disability benefits as well as specific medical treatment was not supported by substantial evidence. He argues that Dr. Hart, his treating physician, reports that an invasive type of treatment, by way of an IDET/percutaneous discectomy, was appropriate. Appellant contends that his previous conservative-type treatment brought no significant relief of his symptoms. He claims that even though Dr. Calhoun did not feel that surgery was warranted, Dr. Hart is the one who continued to follow appellant, and his opinion was that invasive treatment would be the most likely approach to afford appellant relief. Dr. Schlesinger, who described himself as a conservative neurosurgeon, concluded that surgery would not be of any benefit. Appellant argues that by describing himself as conservative, Dr. Schlesinger invalidated his opinion for consideration of an invasive type of treatment.

Appellant also argues that Dr. Schlesinger, being a consulting physician and not a treating physician, should not have been afforded the same level of consideration as the treating source. He contends that, while the "treating physician's rule" as used in social security cases has not been specifically adopted by this court, it at least should be considered

as a guideline, *i.e.*, a physician who treats a patient rather than one that simply has been asked to give an opinion should be afforded more consideration.

Appellant admits that it was his burden to establish the need for the treatment recommended by Dr. Hart and the compensability of his claim. *See Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). Appellant submits that, since the claim had been admitted to be compensable, proof was not required to establish “reasonable and necessary” medical treatment. He claims that the question should be, “What would benefit the appellant under all the circumstances and in light of the evidence?” He states that the question boiled down to a credibility assessment between the doctors in the evaluation. He urges this court to closely scrutinize the doctors’ reports and find that the Commission’s analysis of the evidence was insufficient for meaningful review by this court.

Appellee contends that appellant failed to prove that the procedures recommended by Dr. Hart are reasonably necessary in relation to his compensable injury. We agree. The determination of whether a medical procedure is reasonable and necessary is a question of fact to be decided by the Commission. *See Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). In determining the weight and credibility of a physician’s opinion and medical evidence, the Commission may review the basis for the opinion. *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

The weight of evidence in this case was sufficient to support the Commission’s finding that because the procedures recommended by Dr. Hart are recommended to treat the appellant’s degenerative changes, and have little to no value in treating appellant’s back pain

alone, these procedures are not reasonably necessary in connection with appellant's January 10, 2004 compensable injury. Dr. Schlesinger opined that:

It is my opinion and that of most conservative neurosurgeons that this patient probably has degenerative disc changes and that discograms are going to be abnormal in patients with degenerative discs. It is also unproven in any well controlled randomized study that this discography offers any benefit in terms of predicting surgical intervention.

As the patient's pain is primarily back pain, I am very doubtful that I am going to recommend percutaneous or open discectomy or IDET procedure. No discectomy, either open or percutaneous, has any value in treatment of back pain alone. IDET procedures have not been shown to scientifically benefit patients with degenerative disc disease either. However, I will review the MRI before making a final decision, but I am very likely to conclude that for the treatment of this patient's back pain that no form of surgery, either percutaneous discectomy, IDET or open discectomy and fusion, would have any benefit to the patient.

Pursuant to *Maverick Transp., supra*, and in light of Dr. Schlesinger's opinion, we hold that there was sufficient evidence to support the Commission's finding that additional medical treatment was not reasonably necessary.

Temporary-total-disability 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). 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 ends when the employee is as far restored as the permanent nature of her 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. *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.*

Appellant contends that he is entitled to temporary-total-disability benefits after March 31, 2005, because he is in his healing period. He argues that no one has disputed that he has not been released to return to work. He claims that appellees have not offered him a position within his limitations and in fact have discharged him. Because he has not been returned to work and continues under Dr. Hart's care, he argues that he remains temporarily-totally disabled. He contends that Dr. Carpenter did release him to return to work in some capacity, but that the Commission failed to note that he had not been allowed to return to work in his specific capacity. He maintains that had appellee offered him a position within the limitations given by Dr. Bennett, then a credible argument could be made that temporary-total-disability benefits should then cease. He asserts that at no time did appellee do so.

Appellant testified that he attempted to find work and could not. He argues this evidence that stands unrefuted must be considered credible and persuasive by the Commission. He contends that the Commission was required to discuss this evidence, and because it did not, this court cannot give a meaningful review.

Appellee claims that because appellant was not totally incapacitated from earning wages and did not remain in his healing period beyond March 31, 2005, he is not entitled to additional temporary-total-disability benefits beyond March 31, 2005. When a healing period has ended is a factual determination for the Commission and should be affirmed on appeal if supported by substantial evidence. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84

S.W.3d 878 (2002). Appellee argues that the evidence before the Commission demonstrates that appellant's healing period ended on March 31, 2005, when Dr. Bennett declared him to be at maximum-medical improvement. Appellee also contends that the record reflects that appellant was able to work in some capacity following March 31, 2005. We agree.

Appellant was first released to return to work by Dr. Sprinkle on April 16, 2004, with only two restrictions: no lifting more than forty pounds at all times; and no lifting more than ten pounds more than ten times in a single day. Dr. Carpenter released him to go back to work as long as no lifting was involved. Dr. Bennett, on April 1, 2005, evaluated appellant and stated that "[A]s of 3/31/05 I feel that based upon objective findings MMI has been reached." Further, the testimony before the ALJ demonstrates that appellant is well-educated, experienced in several fields, and is able to earn wages in a position that does not require manual labor and/or fits within the restrictions imposed by Dr. Sprinkle and/or Dr. Carpenter.

Appellee points out that appellant testified that he received unemployment benefits for about four months after he was terminated, until November 8, 2004. He admitted that by receiving those benefits, he represented to the Employment Security Division that he was ready and willing to work and actively sought employment while receiving benefits. There is nothing in the record to establish that appellant is incapacitated from earning wages, as he is required to prove by a preponderance of the evidence in order to be entitled to temporary-total-disability benefits. Rather, the Commission had substantial evidence before it to find

that he was not entitled to further benefits after March 31, 2005. Accordingly, we hold that the Commission's decision is affirmed.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.