

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA08-796

BENJI DAVIS

APPELLANT

V.

WAL-MART ASSOCIATES, INC.
CLAIMS MANAGEMENT, INC.

APPELLEES

Opinion Delivered FEBRUARY 11, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NOS. F502737; F604782]

AFFIRMED ON DIRECT AND
CROSS-APPEAL

WAYMOND M. BROWN, Judge

Appellant Benji Davis suffered an admittedly compensable injury on August 19, 2004, for which appellees, Wal-Mart Associates, Inc., and its carrier Claims Management, Inc., initially paid benefits. Appellees later stopped paying for appellant's treatment and refused to give him temporary-total-disability benefits. After considering appellant's claim, the Workers' Compensation Commission found that appellees were responsible for additional medical treatment already provided and recommended by appellant's treating physicians. However, it denied appellant's claim for temporary-total disability. Appellant challenges the finding that he was not entitled to temporary-total disability, contending that the Commission's findings were inconsistent with the denial of temporary-total-disability benefits. Appellees cross-appeal, contending that substantial evidence does not support the finding that appellant is entitled to additional medical treatment. We affirm both the direct and cross-appeal.

Factual and Procedural History

On August 19, 2004, appellant suffered a compensable back injury while trying to get a box of juice from a high shelf. One week later, he presented to Dr. Mike Buffington and complained of pain and muscle spasms in his lumbar region. He was prescribed Mobic, Darvocet, and Flexeril, and was instructed to return if symptoms worsened. Appellant followed up with Dr. Buffington on several occasions from September 7 to November 4, 2004. On the November 4 visit, appellant reported that he was “somewhat” better, and Dr. Buffington returned him to full duty. Appellant did not believe he was ready for full time work, as he was still experiencing burning and pain. Dr. Buffington also recommended that appellant receive additional testing or referral to a specialist, but the record does not reveal that those recommendations were followed.

Appellant claimed that he was involved in another workplace incident on March 8, 2005, when he irritated his back lifting a box of queen size memory foam. He testified that he did not experience any new symptoms. He was directed to present to Dr. Thomas Jones, who on March 10, 2005, detected no evidence of a muscle spasm. Dr. Jones prescribed Naproxen, Hydrocodone, and Flexeril, and directed him to return in a week if his symptoms had not resolved. Appellant testified that he did not return to Dr. Jones because appellees would not pay for treatment. Instead, he returned to Dr. Buffington a week later and received prescriptions for Darvocet, Skelaxin, and Keflex. Appellant next returned to Dr. Buffington on February 20, 2006, complaining of back pain. He left the doctor’s office that day with a prescription for Lortab and Neurontin. Follow-up visits during March and April

2006 show adjustments and increases to appellant's medication. On April 7, 2006, appellant submitted to an MRI of his lumbar spine, which yielded an impression of disc dessication, loss of height at L3-4, a broad base disc protrusion, and ligamentum hypertrophy. One week later, he presented to the Christus St. Michael emergency room, complaining that he was out of medication. He reported that Dr. Buffington had "cut him off" and wanted him to go to pain management. The ER doctor prescribed Vicodan, Lortab, and Amitriptilline. He returned to St. Michael on April 17, 2006, and received Oxycontin and Oxycodone. Dr. Roderick Echols wanted to refer appellant to a physical therapist and a surgeon, but this was not done. A note dated April 18, 2006, showed that appellant and his family were unhappy with the surgical options presented and that they wanted a second opinion. Dr. Roshan Sharma, a pain manager, offered appellant trigger point injections, but appellant claimed that he could not afford the treatment. Upon being discharged from St. Michael, appellant indicated that he did not want any more Oxycontin, Oxycodone, or Flexeril; he only accepted another prescription for Lortab. Appellant returned to the emergency room for more medication on April 29, 2006, but the doctor there instructed him to return to his regular physician.

Appellant presented to Dr. James Arthur on May 24, 2006. Dr. Arthur prescribed Elavil and a work-hardening program. He wanted appellant to follow up in a month, but appellant sought and received a change of physician to Dr. Chris Mocek instead. On October 12, 2006, Dr. Mocek opined that appellant's symptoms lined up with his disc protrusion at L4-5. He recommended steroid injections and physical therapy. He also

thought that appellant “may eventually require a minimally invasive disc procedure but hopefully not. These disc abnormalities are not big enough to warrant any type of open surgical procedure. However, they are big enough to cause irritation of the nerve roots and pain.” Dr. Mocek prescribed Percocet, Trazadone, and Baclofen. On the November 7, 2006 visit, Dr. Mocek increased appellant’s dosages and added Oxycontin. He returned on December 4, 2006, to request a change in his medication, claiming that he could not afford the medicines. He was prescribed methadone.

On January 2, 2007, appellant presented to the DeQueen Medical Center, stating that he was out of methadone. He was given morphine. During subsequent visits to various providers on January 3, February 2, February 5, he was given more medication. By March 2, 2007, appellant was working for a taxi service. He was given more methadone that day, but was instructed that he should not drive with that medication. Appellant was also referred to a functional capacity exam, but he did not take the test.

Dr. Mocek referred appellant to Dr. Collins for a one-time examination, which took place on April 2, 2007. Dr. Collins assessed him with a herniated disc with radicular symptoms. He opined that further testing would be necessary to get a clearer picture. Dr. Collins thought that appellant had not reached maximum medical improvement.

Appellant’s employment history was a major issue at the hearing before the ALJ. According to the hearing testimony, appellant continued to work for Wal-Mart until July 2005, when he was terminated for excessive absenteeism. Appellant attributed the absences to the pain. He then worked as the manager for a Baskin-Robbins located at a Tiger Mart

convenience store in August 2005. He quit in January 2006 because he was going to be demoted. The demotion was because appellant had problems completing the required paperwork. From December 2005 to April 2006, appellant worked at a Burger King, but he was terminated because he was not consistently reliable. He also attributed this to pain and to muscle spasms. His last job was at Professional Transportation, Incorporated, where he worked as a taxi driver for a railroad service. He quit that job on February 26, 2007, due to pain and the inability to drive while on medication. In response to questions from appellant's counsel, Dr. Mocek stated that it was reasonable and necessary for appellant to have remained off work since February 22, 2007.

The ALJ found that all of the treatment associated with appellant's back, as well as the additional treatment recommended by Drs. Mocek and Collins, were reasonable, necessary, and related to his August 19, 2004 injury. However, he denied appellant's claim for temporary-total disability. He found that appellant was within his healing period and recognized Dr. Mocek's opinion that it was reasonable for appellant to remain off work. Nonetheless, he opined that appellant had been able to work in some capacity since February 22, 2007, based upon the medical evidence and the number of jobs appellant has had since the date of his injury. The Commission affirmed and adopted the ALJ's opinion.

Standard of Review

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 decision and affirm if that decision is supported by substantial evidence. *Smith*

v. City of Ft. Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The issue is not whether we might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we must affirm the decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Direct Appeal (Temporary-Total Disability)

On direct appeal, appellant asserts that the Commission erred in denying him temporary-total-disability benefits. He claims that it makes little sense for the Commission to find that he was entitled to additional treatment and that he was still within his healing period, but that he was not entitled to benefits.

When an injured employee is totally incapacitated from earning wages and remains within his healing period, he is entitled to temporary-total disability. *Searcy Indus. Laundry, Inc. v. Ferren*, 92 Ark. App. 65, 211 S.W.3d 11 (2005). Even if a claimant is still within his healing period, the Commission should deny benefits if the claimant has not suffered a total incapacity to earn wages. *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1994). If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total. *Farmers Co-op v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Appellant relies upon our decision in *Biles*. There, the claimant injured himself after

falling from a loading dock. The claimant sought medical attention, but he continued to work, with difficulty, until he was terminated five months later. We affirmed the Commission's determination that appellant was entitled to temporary-total disability and rejected an interpretation barring claimants from temporary-total disability once they have made an attempt to return to work.

Appellant correctly asserts that workers' compensation law does not punish someone who makes an unsuccessful attempt to return to work, but we disagree that he was so punished in this case. Rather, the Commission found that appellant is not incapacitated from earning wages. Substantial evidence supports the Commission's conclusion. Though appellant remained in his healing period, he attempted many jobs. In one case, he quit because he disagreed with being demoted. In others, he was terminated for poor performance, and the Commission did not have to believe appellant when he testified that he could not work because of the pain. See *White v. Gregg Agric. Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001) (stating that questions concerning the credibility of witnesses lie within the province of the Commission).

Appellant also relies heavily on Dr. Mocek's opinion that appellant was justified in not working for the taxi service. It is the Commission's duty to weigh medical evidence, accepting or rejecting it as the finder of fact. *Jones v. Wal-Mart Stores, Inc.*, 100 Ark. App. 17, 262 S.W.3d 630 (2007). In this case, the Commission fully considered Dr. Mocek's opinion and rejected it in light of other evidence in the case.

While the record in this case would support a finding that appellant was incapacitated

from earning wages due to his compensable injury, our standard of review requires us to affirm if the Commission's decision is supported by substantial evidence. Accordingly, we affirm on direct appeal.

Cross-Appeal (Additional Medical Treatment)

In their cross-appeal, appellees assert that appellant was not entitled to additional medical treatment. In so arguing, they rely on the long periods of time between treatment, the fact that appellant's condition had not changed, and their theory that appellant has a drug dependency.

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); *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). What constitutes reasonable and necessary treatment under this statute is a question of fact for the Commission. *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). A claimant may be entitled to ongoing medical treatment after the healing period has ended if the treatment is geared toward management of the injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004).

With these standards in mind, we affirm on this point as well. Appellees accepted appellant's injuries suffered on August 19, 2004, as compensable. The Commission was within its authority to accept appellant's testimony that his condition never resolved, despite being released to full duty and despite appellant's attempts to hold a job. Appellant's

testimony is supported by Dr. Collins's opinion that appellant never reached maximum medical improvement. Dr. Mocek opined that appellant's symptoms required treatment but not open surgery. His opinion is again bolstered by Dr. Collins's one-time examination. Appellees heavily rely on the fact that appellant often sought medications, but it is reasonable to believe that appellant sought medicinal treatment because he could not afford more aggressive treatment. Finally, there were a number of tests recommended but never performed. The Commission could have reasonably believed that such treatment may have helped appellant's condition. While reasonable men could agree to appellees' view of the record, substantial evidence supports the Commission's findings.

Affirmed on direct and cross-appeal.

PITTMAN and HART, JJ., agree.