

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-753

EARNEST JOHNSON

APPELLANT

V.

PAT SALMON & SONS, INC., and
ACE AMERICAN INSURANCE

APPELLEES

Opinion Delivered January 26, 2011

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[No. F709782]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Earnest Johnson appeals a decision of the Arkansas Workers' Compensation Commission denying him additional medical and related temporary total disability benefits. He argues that the Commission's decision should be reversed because it was predicated solely on a theory that does not exist in fact and, as such, was not supported by the requisite level of substantial evidence required to survive appellate review. We disagree and affirm.

Johnson was employed by appellee Pat Salmon & Sons, Inc., as a truck driver, when he suffered two separate work-related back injuries. The first incident involved a malfunctioning driver's seat in the vehicle that Johnson was driving from Arkansas to Oklahoma. The second incident occurred approximately three weeks later. Johnson stated that he also injured his back while attempting to pull a pin from a trailer hitch that was

connected to his truck. He reported this incident (and the prior incident) to his employer and was sent for treatment at Concentra Healthcare Centers.

At Concentra, Johnson was treated by Dr. Cynthia Almond, who diagnosed him with lumbar strain and lumbar pain and treated him on several occasions. Johnson was then referred to Dr. Brent Sprinkle at Arkansas Specialty Spine Center. Dr. Sprinkle administered an MRI on October 11, 2007. The MRI showed that Johnson had multi-level, degenerative disc disease along with multi-level bulging discs. The MRI also revealed that Johnson had a small, central herniated disc superimposed on a bulging disc at L4-5. Later that month, Dr. Sprinkle opined that Johnson's MRI showed diffused degenerative changes and some mild to moderate stenosis at L4-5 and, on October 23, 2007, diagnosed Johnson with a "lumbar strain."

On November 7, 2007, Dr. Sprinkle indicated that Johnson's condition involved lumbar, degenerative disc disease and lumbar stenosis. Dr. Sprinkle administered lumbar epidural steroid injections at the L4-5 level. Johnson's last visit with Dr. Sprinkle was on December 19, 2007. According to the records from that date, Johnson had received a total of three epidural steroid injections, but was not satisfied with the relief—or lack thereof—that the treatments provided. Dr. Sprinkle's records indicate that Johnson did not want to consider surgery because his wife had been through the same situation and that he was really not interested based upon the risk-benefit ratio. Dr. Sprinkle concluded that Johnson had reached maximum-medical improvement for his lumbar-strain injury and released him to return to work with a lifting restriction of twenty pounds and no permanent anatomical impairment rating.

Johnson then requested a change of physician to Dr. Harold Chakales, which Johnson received. Dr. Chakales recommended an FCE and EMG testing of Johnson's back and both legs to determine if there was "any motor involvement." Appellee paid for the EMG tests, which were completed on October 13, 2008. The results noted, "No electro physiological evidence of motor nerve root irritation, peripheral neuropathy or myopathy." Thereafter, Dr. Chakales opined that Johnson was "a candidate" for low-back surgery.

Johnson then underwent an independent medical evaluation by Dr. Edward Saer on April 17, 2009. Dr. Saer assessed that Johnson suffered from multi-level degenerative changes that "clearly pre-existed his injury." Dr. Saer opined that "most likely, he had a lumbar strain or sprain with aggravation of his pre-existing degenerative disc disease." Dr. Saer concluded that surgical treatment, in any form, would neither benefit Johnson nor relieve his symptoms. Dr. Saer recommended non-operative management.

The Administrative Law Judge found Dr. Chakales's recommended surgical treatment to be reasonable and necessary and also ordered accompanying temporary total disability benefits from September 7, 2007 through December 19, 2007, and August 4, 2008, continuing through a date yet to be determined. Appellee appealed the decision, and the Commission reversed the ALJ, denying additional medical and temporary total disability benefits. The denial is the subject of our review.

We review his claim considering 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. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Furthermore, 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. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Ark. Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

On appeal Johnson argues that because the Commission's denial of his claim for additional medical and related benefits flowed from an inaccurate characterization of the law, the decision must be reversed. Specifically, he claims that the Commission relies on a new, unfounded theory for denial—a "temporary aggravation of a pre-existing injury." Just as Johnson contends, the Commission does set out a basis for denial that is rather novel. The following language is contained in its opinion:

It is apparent that [Johnson] has a temporary aggravation of a pre-existing condition and had reached maximum medical improvement when Dr. Sprinkle released him in December 2007. Clearly, any need [Johnson] would have for surgery at this point is not based on his compensable injury but on his pre-existing degenerative disc disease.

However, to view this alternative and additional reasoning as the sole basis for the Commission's denial of benefits would require both a myopic view and fractured reading of the entire opinion.

The opinion also contains a thorough discussion of Dr. Chakales's (rather tepid) recommendation for surgical treatment and other related medical evidence. The Commission's opinion specifically accounted how it weighed all of the evidence and plainly stated that it ultimately found Dr. Saer to be most credible and that it therefore placed the greatest quantum of weight on his opinion that surgical intervention was not necessary. Furthermore, Dr. Saer's opinion relating to Johnson's lack of need for surgery comported with the opinion of another of Johnson's treating physicians, Dr. Sprinkle. As such, without considering the validity (or lack thereof) of the purported "temporary-aggravation theory," there is more than enough substantial evidence to affirm the Commission's decision to deny additional medical benefits on its primary basis for denial—the fact that two doctors indicated that surgery was neither a recommended nor a necessary treatment for Johnson's purported work-related injury.

Following suit, temporary total disability is that period within the healing period in which a claimant suffers a total incapacity to earn wages. *Ark. State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The question of when the healing period has ended is a factual determination for the Commission, and it will be affirmed if substantial evidence supports it. *Owens Planting Co. v. Graham*, 102 Ark. App. 299, 284 S.W.3d 537 (2008). Here, there is evidence to support the Commission's decision that Johnson's healing period ended on

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December 17, 2007, when Johnson was released to return to work and, according to Dr. Sprinkle, had reached maximum-medical improvement. As such, we affirm on this point as well.

Affirmed.

HART and GLOVER, JJ., agree.