

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G708197

JOSE MANUEL PEREZ, EMPLOYEE

CLAIMANT

v.

SOUTHERN TIRE MART, LLC EMPLOYER

RESPONDENT

LIBERTY INSURANCE CORPORATION, CARRIER/TPA

RESPONDENT

OPINION FILED FEBRUARY 7, 2023

Hearing before Administrative Law Judge, James D. Kennedy, on the 13th day of December, 2022, in Little Rock, Pulaski County, Arkansas.

Claimant is represented by Mr. Gary Davis, Attorney-at-Law, Little Rock, Arkansas.

Respondents are represented by Mr. Michael E. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 13th day of December, 2022, to determine the sole issue of temporary total disability from December 8, 2020, or, in the alternative, from September 23, 2021, to a date to be determined. A copy of the Prehearing Order was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided that the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the within claim and that an employer/employee relationship existed on October 13, 2017, when the claimant sustained compensable injuries. At the time of the hearing, the parties agreed to stipulate that the claimant earned sufficient wages to earn a temporary total disability rate of \$476.00 and a permanent partial disability rate of \$357.00.

At the time of the hearing, the claimant provided there was a previous hearing on December 8, 2020, which ultimately resulted in the claimant's requested surgery on September 23, 2021, and the Court of Appeals affirmed the Commission's findings in an Opinion issued in April of 2022. Consequently, the claimant contends he is entitled to

temporary total disability from the original hearing date of December 8, 2020, or, in the alternative, from September 23, 2021, the actual date of the surgery, to a date to be determined. The claimant had saved money for the surgery and paid for the procedure himself, and then after the decision of the Court of Appeals affirming the superior surgery, the respondents reimbursed the claimant.

The respondents contended at the time of the hearing that they were asserting the *Doctrine of Laches*, and that if the claimant was disabled, he should have raised the issue at the initial hearing or the second hearing, which he failed to do. The respondents further contended that these actions were detrimental to the respondent due to the fact they were unable to return the claimant back to work or to a doctor for a rating, since he had failed to make a timely claim. The respondents also contended that the claimant had testified at the second hearing that he had been fully released and had been working, that there were jobs that he could perform, and that the superior surgery recommended by Doctor Olaya would provide immediate relief, and there shouldn't be any temporary total disability.

Consequently, the parties agreed at the time of this hearing that the sole issue before the Commission was the issue of temporary total disability. The parties further agreed that the claimant was continuing to receive additional medical. The parties also agreed that they were unable to obtain any medical from the pain clinic, and Dr. Olaya, who performed the superior procedure, had left the clinic and they were unable to locate him. The claimant's medical records apparently left with him.

The claimant responded to the respondent's position by contending that they had filed the AR-C and they reserved the right to pursue disability benefits, including temporary or permanent, and consequently the claim for temporary total disability had been reserved throughout the entirety of the claim.

The claimant's and respondents' contentions are set out in their respective responses to the prehearing questionnaire and made a part of the record without objection. The sole witness to testify was the claimant, Jose Perez. The claimant submitted an exhibit of medical records along with the Court of Appeals transcript without objection. The respondents submitted an exhibit which provided for the payments that were made in regard to the claimant's treatment. From a review of the record as a whole, to include medical reports and other matters properly before the Commission and having had an opportunity to observe the testimony and demeanor of the witness, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on October 13, 2017, the date that the claimant suffered a compensable injury.
3. That the claimant has failed to prove, by a preponderance of the credible evidence, that he is entitled to temporary total disability.
4. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The claimant, Jose Perez, testified that he was born on June 25, 1982, and had gone through the fifth grade in Mexico with no education in the United States. (Tr.p.11) The claimant testified he had worked for the respondent for about ten (10) years. At the time of the injury, he was driving a service truck for the respondent and was injured while lifting a large tire. (Tr.p.12) The claimant admitted he had received medical treatment and his medical treatment was continuing. He also admitted he had already been involved in a couple of hearings in regard to this matter and the surgical procedure recommended by Dr. Olaya

had been provided. He also admitted he had received multiple injections which could be sometimes referred to as a surgical procedure. (Tr.pp.13-14)

The claimant testified that after the actual surgery in September of 2021, he returned to the clinic for a follow-up and found Dr. Olaya was no longer at the clinic. Consequently, he went to Little Rock, where he saw Dr. Nissan, who removed the stitches from his back that were the result of the surgery. He told Dr. Nissan the surgery was no good because he was still suffering pain. The pain continued, so he returned to see Dr. Nissan and stated that in regard to the surgery, "It don't help at all now." Dr. Nissan refused to see him and sent him to Conway to Dr. Mohammed Tolba, who ordered injections where the L3-L4 surgery was performed. (Tr.pp.15-16)

During this time period, the claimant stated that Dr. Olaya personally called him and stated, "Hey I moved to a different doctor. He's got a beautiful place. I'm gonna help you with your surgery. We'll do the surgery in the right place, which you really need it, and can see me." Dr. Olaya also told him, "but you have to cancel the contract you have with them so you'll be able to see me." (Tr.p.17)

The claimant returned to the pain clinic after the surgery to obtain his records and was told they did not have any records of the surgery and he never had surgery there. He stated his wife then pulled up his shirt and showed the clinic the scars on his back. (Tr.pp.18-20) The claimant also testified he was able to find and see Dr. Olaya one more time and Dr. Olaya told him, "Next fall you come and see me and we'll talk where the surgery is gonna be, cause he was supposed to do another surgery he thinks where the pain was." The claimant went on to testify he had also received a letter which stated that the place was closed and Dr. Olaya was not there. The claimant did not know where to go, so he went to Dr. Garlapati in North Little Rock to receive injections for his pain. The injections were placed right beside where he had the surgery. (Tr.pp. 21-23) The claimant contended he had made complaints

to the police and to the medical board in regard to his problems. (Tr.p.25) He also was unable to locate Dr. Olaya after he had treated with Dr. Garlapati. (Tr.p.26) The claimant was currently treating with Dr. Fletcher at the Pain Treatment Center of America in Searcy. It was his understanding that Dr. Fletcher was considering surgery. He also admitted traveling to Mexico, after the superior surgery, to obtain another opinion. (Tr.p.27) He paid for an MRI out-of-pocket to show that he did in fact have the superior device in his back. (Tr.p. 28)

The claimant testified he has pain in the center of his low back and when he stands or walks for a while, it spreads to the side. He denied having pain in his legs. He went on to state, "But it's like, it's so strong like it burns, and when I'm standing for a while, it starts to feel like somebody may be pinch where the nerves. It feels like it's real hotter." (Tr.p.30) He went on to state that he would not be able to work under the circumstances. (Tr.p.31) Additionally, he had not been released to return to work after the surgery and had not worked from December 8, 2020, the date of the surgery, until now due to the horrible pain. He admitted he had performed some work with his wife at a hotel and had also admitted the work at the previous hearing. (Tr.p.35) He also admitted that he had worked for a week and a half and would work for a little bit and would then have to go home. He also worked two (2) hours a day, two (2) or three (3) days a week at a restaurant, and had probably worked there two to two and one-half (2-1/2) months, but the pain was horrible. He quit due to the pain. (Tr.pp.36-37)

Dr. Fletcher had seen him three (3) times. He received injections and Dr. Fletcher had reviewed the MRIs from Jonesboro, Searcy, and Little Rock, and referred him to Dr. Calhoun, a surgical doctor in Little Rock. (Tr.p.39) The claimant had a return appointment with Dr. Fletcher, who is going to tell him if his insurance approved the next surgery. (Tr.p.40)

Under cross-examination, the claimant admitted the pain management treatment by Dr. Qureshi was approved at the time of the first hearing. Dr. Qureshi, or his clinic, referred the claimant to Dr. Olaya. The claimant stated after Dr. Olaya left, he then went to North Little Rock and then to Little Rock and was told Dr. Rush would not see him, but Dr. Nissan would, and they were in the same clinic as Dr. Qureshi. Dr. Nissan removed the stitches from the surgery, but she refused to see him when he returned with the horrible pain. She sent him to Dr. Tolba in Conway, at Arkansas Spine and Pain, which is the same company that provided the trigger point injections. The claimant denied actually seeing Dr. Garlapati at the time, but saw Dr. Nissan who was in the same building with Dr. Garlapati. Dr. Nissan removed the stitches on a Friday, but when he returned on the following Monday, she refused to see him, and that's when he was sent to Dr. Tolba who provided the injections. (T.pp.41-43) The claimant also admitted he was currently being treated by Dr. Fletcher at Pain Center of America, who had treated him three (3) times, and that he had elected to go there and was not referred by Dr. Qureshi. On the second visit to Dr. Fletcher, he was sent to Dr. Calhoun. (Tr.p.44) He also testified the trigger point injections were not helping and that he had thirteen (13) injections with Dr. Olaya, but is currently taking medications prescribed by Dr. Fletcher. (Tr.p.45) The claimant also admitted the superior device that had been implanted into his spine did not work at all. (Tr.pp.46-47)

The claimant also admitted that at the second hearing, he had testified he was working at a hotel and at a restaurant. He also admitted no doctor had taken him off-work completely and that at one time Dr. Olaya had stated that he should be released to work. Prior to the superior procedure, he was released to return to full-duty. The claimant also admitted that at one time he was seen by Dr. Roman who stated that he did not need any treatment. (Tr.p. 48) He also admitted that the MRI showed that the superior device was still in his

back and he did not currently have a record from any doctor that provided that he could not work. (Tr.p.50)

The claimant was then asked if he had any evidence of a doctor taking him off-work since the superior was inserted, yes or no. The claimant responded, “Sir, the doctor has not released me to work. After I had this surgery, the doctor never gave me permission to work.” (Tr.p.55)

On re-direct, the claimant testified that the fourteen (14) injections he had received from Dr. Olaya was prior to the September surgery. (Tr.p.56) The claimant admitted talking to Dr. Garlapati and Dr. Calhoun about the superior being placed one level above where it should have been.

The attorneys were asked to make a closing argument. The claimant’s representative contended that an injured workers’ compensation party was entitled to rely on the expertise of their physician. The attorney stated Dr. Olaya had personally showed up at his office at one point and stated that he had performed fifty (50) of the procedures, and they all went great. It appears Dr. Olaya believed the surgery needed to be performed, but the device was apparently placed one level too high. Even Dr. Olaya himself knows this because he’s offered to fix it to avoid a medical malpractice case. If medical malpractice was committed, the respondents are still responsible for it. The claimant is still in pain. The medical records from the Arkansas Spine and Pain Clinic and Dr. Olaya are gone. (Tr.pp.61-64)

The respondents’ representative argued that since medical treatment was not an issue at this time, the only issue was indemnity benefits. Workers’ compensation cases rely on medical evidence and there’s nothing you can say except, “Yeah, we need some medical evidence.” We need some medical evidence that this man cannot work and was taken off-work. There is no evidence to that effect. The claimant was released to fully return to work and there is no basis for an award of temporary disability. (Tr.pp. 65-66)

The claimant's medical records provided that the claimant received injections for sacroiliitis, with the first injection of record by Dr. Olaya on October 25, 2018. The claimant also received a lumbar facet medial branch block at the L3-L4, L4-L5, and the L5-S1 by Dr. Olaya, on his left side on May 13, 2021. (Cl. Ex. 1, pp.1-8) On September 23, 2021, Dr. Olaya inserted a Stabilink MIS Interlaminar Spinal Fixation System at the Central Arkansas Surgery Center.

After the surgery, the claimant received trigger point injections from Dr. Tolba at Arkansas Spine and Pain on October 12, 2021. (Cl. Ex. 1, p.9) Later, Dr. Tolba provided a lumbar transforaminal injection to the claimant on January 4, 2022. (Cl. Ex. 1, p.10) On September 19, 2022, Dr. Garlapati performed a bilateral lumbar medial nerve block at L4-5 and at L5-S1. The report provided the pain score was a 6 out of a 10 prior to the block and a 4 out of 10 after the block. (Cl. Ex. 1, p.11)

The claimant made multiple visits to Dr. Olaya, starting November 27, 2018, through the date of September 28, 2021, for his back pain. (Cl. Ex. 1, pp.12-16) The claimant also provided pharmacy records at Stanley Pharmacy for the period January 10, 2022, through November 7, 2022, which showed multiple prescriptions for oxycodone, duloxetine, pregabalin, and methadone. (Cl. Ex. 1, pp.17-18) The claimant also provided a letter from the carrier approving the superior procedure. (Cl. Ex.1, p.19) The claimant also submitted the Court of Appeals transcript (Cl. Ex. 2, pp.1-218) and photos of the claimant's back which were admitted without objection. (Cl. Ex. 3)

The respondents submitted a payment record which consisted of three pages of records that was admitted without objection. (Resp. Ex. 1, p.1-3)

DISCUSSION AND ADJUDICATION OF ISSUES

The parties agreed at the beginning of the hearing that the sole issue before the Commission was the issue of the claimant being entitled to temporary total disability from

December 8, 2020, or, in the alternative, from the date of the surgery on September 23, 2021, to a date to be determined. The facts in this matter are unusual due to the fact the doctor who performed the procedure on the claimant's back has disappeared along with the medical records that should have been preserved at the facility where the out-patient procedure was performed. Here instead of having a normal issue such as dueling medical opinions, we are basically faced with the fact that both parties agree many important medical records have simply disappeared.

The claimant bears the burden of proof in establishing entitlement to benefits under the Arkansas Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. *Dalton v. Allen Engineering Co.*, 66 Ark. App 260, 635 S.W.2d 543.

The claimant injured his back in a work-related injury on October 13, 2017, and the claim was accepted as compensable. He received treatment from Doctor Olaya, receiving lumbar epidural steroid injections, facet medial branch blocks, and oral pain medications. He contended he received little relief from his pain and after a contested hearing, was successful in obtaining the superior procedure, which was recommended and performed by Dr. Olaya on September 23, 2022. The claimant admitted that no doctor had taken him off-work completely and that Dr. Olaya had provided he should be released to work.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W. 2d 392 (1984). The claimant bears the burden of proving both that he remains within his healing period and in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *Palazzo v. Nelms*, 46 Ark. App. 130, 877S.W.2d 938 (1994). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment

will improve the condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The injured employee bears the burden of proving his inability to earn any meaningful wage. Ark. Code Ann. §11-9-519(e)(1)&(2). In the present matter, the claimant admitted to some work after the injury. There are no medical reports of record providing that the claimant should remain off-work due to his lower back injury, and no physician has opined that the claimant was unable to resume any gainful employment. The disappearance of the medical records possibly constitutes an injustice to the claimant, but the law is clear that the claimant has the burden of proof. The claimant testified he had persistent pain which resulted from the original work-related injury and the following superior surgery. However, persistent pain is not sufficient in itself to extend the healing period or to find the claimant totally incapacitated from earning wages. *See Mad Butcher, Inc. v. Parker, supra*. Temporary total disability cannot be based on speculation or conjecture. Consequently, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof that he is entitled to temporary total disability.

After reviewing all the evidence, without giving the benefit of the doubt to either party, there is no alternative but to find that the claimant has failed to prove, by a preponderance of the credible evidence, that he is entitled to temporary total disability. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

IT IS SO ORDERED.

JAMES D. KENNEDY
Administrative Law Judge