

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F213600**

<b>JOE M. BOWMAN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SOUTHWEST CONTRACTORS, EMPLOYER</b>	<b>RESPONDENT</b>
<b>LIBERTY MUTUAL INSURANCE CORP., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 13, 2004**

Hearing before Administrative Law Judge J. Mark White on January 15, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Gregory Giles, Attorney at Law, Texarkana, Arkansas.

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

**STATEMENT OF THE CASE**

On January 15, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on November 3, 2003, and a Prehearing Conference Order was entered that same day. A copy of the November 3, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including November 8, 2002; that on November 8, 2002, the claimant sustained a compensable injury to his back; that Respondents accepted the November 8, 2002, injury as compensable and paid some indemnity and medical benefits; and that the claimant earned sufficient wages to entitle him to a compensation rate of \$300 per week for temporary disability benefits and \$225 per week for permanent disability benefits.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional medical treatment for his compensable injury; whether the claimant is entitled to additional temporary total disability benefits; whether the claimant has reached the end of his healing period; and controversion and attorney's fees. The parties agreed to reserve the issue of permanent impairment.

The claimant contends that he is entitled to additional temporary total disability benefits from the date those benefits were terminated to a date yet to be determined; and that additional medical treatment, specifically the discTRODE procedure recommended by Dr. Hackbarth, is reasonably necessary in connection with his compensable injury.

Respondents contend that the claimant's injury was a temporary aggravation of a pre-existing condition that is now over; and that the proposed discTRODE procedure is unreasonable and unnecessary because it is unknown and is not a

treatment commonly seen in similar cases.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment, specifically the discTRODE procedure proposed by Dr. Hackbarth, is reasonably necessary in connection with the compensable injury.
4. The claimant has failed to prove by a preponderance of the evidence that he remains in his healing period for his compensable injury.
5. The respondents have proven by a preponderance of the evidence that the

claimant's healing period for his compensable injury ended on November 25, 2003.

6. The claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages from on or about August 20, 2003, the date his benefits were terminated, until November 25, 2003, the date his healing period ended.
7. The claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from on or about August 20, 2003, until November 25, 2003.
8. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant sustained a compensable injury to his back on November 8, 2002, when the company car he was driving was rear-ended by another car. The claimant testified the other car was traveling at 35 miles per hour and that he was wearing his seatbelt. He testified that over the course of the next five days he developed pain in his lower back and right leg. The claimant first sought medical treatment on November 14 when he saw Dr. McKay. X-rays revealed "hypertrophic

spondylitis of the lumbar spine.” An MRI performed November 19 revealed spondylosis at L2-3 through L5-S1 along with multiple disc protrusions. Over the next several months the claimant received conservative treatment from a variety of doctors, culminating with Dr. Mark Hackbarth.

Dr. Hackbarth performed a discogram on July 10, 2003, which resulted in concordant pain at L4-5. A post-discogram CT revealed a central disc protrusion at L4-5 “slightly eccentric to the left” causing “mild canal stenosis.” Based on the discogram findings, Dr. Hackbarth recommended a discTRODE procedure to be performed at L4-5, in the hopes that the procedure would eliminate the need for a fusion surgery at that same level. Dr. Hackbarth described the discTRODE procedure as follows:

Basically this consists of placing a needle into the annulus or outer portion of the disc and then placing a heating catheter through this cannula going across the backside, or posterior aspect, of the disc where it is then heated up gradually over a few minutes and then allowed to heat. This process accomplishes two things: 1) it helps to heat the nerve supply to the annular fibers of the disc which will help with pain, and 2) hopefully seal up any type of disc leak that will also help with controlling the patient’s pain.

The respondents denied the proposed procedure and controverted all further benefits with an AR-2 controversion report filed August 19, 2003. They then sent the claimant to Dr. John Sklar for an independent medical evaluation on November 25,

2003. Dr. Sklar concluded that the claimant's injury consisted of "a lumbar strain superimposed on chronic degenerative changes in the lumbar spine," and that additional treatment would not change the claimant's condition significantly. Dr. Sklar opined the claimant reached his date of maximum medical improvement as of the day of the exam, November 25, and that the claimant was entitled to a permanent impairment rating of 5% to the body as a whole.

At the hearing, the claimant acknowledged having had back problems prior to this injury, but he testified that he had missed only one day of work for back pain "about eight years ago." He testified that he saw no doctor for his back in those intervening eight years.

## **II. Adjudication**

### **A. Additional Medical Treatment**

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). While objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the

causal relationship between the injury and the work-related accident, where a preponderance of other non-medical evidence establishes the causal relationship. *Horticare Landscape Management v. McDonald*, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Even if it is demonstrated that a pre-existing condition is also a causal factor, the claimant has met his burden of proof for additional medical treatment so long as he proves that the work injury combined with or aggravated the pre-existing condition to bring about the need for the treatment. *General Electric Railcar Repair Seros. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

I note as a threshold matter the respondents' objection to the proposed discTRODE procedure as being unknown. It does not appear that the Full Commission or the courts have ever addressed the inherent reasonableness of a discTRODE procedure. However, the description of the procedure contained within the evidence suggests that the discTRODE procedure is similar, if not identical, to Intradiscal Electrothermal Therapy (IDET); the Court of Appeals has previously held that an IDET is an acceptable procedure. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001). Therefore, I conclude that the proposed discTRODE procedure is not inherently unreasonable for its novelty.

The medical evidence plainly establishes that the claimant had pre-existing degenerative disc disease. The claimant's testimony, likewise, plainly establishes

that his symptoms arose shortly after his compensable injury. It therefore follows that the compensable injury combined with or aggravated the claimant's pre-existing condition. The question, then, is whether or not this aggravation brought about the claimant's need for the proposed discTRODE procedure, or if the claimant's need for the procedure pre-existed the compensable injury. Unfortunately, there is simply no evidence in the record to answer that question in the claimant's favor.

Dr. Hackbarth recommended the discTRODE procedure on the basis of the claimant's discogram results. But at no point in the record has Dr. Hackbarth ever opined that the disc pain originating at L4-5, identified by the discogram, is in any way causally connected to the claimant's compensable injury. It is true that Dr. Hackbarth wrote a sarcastic letter to the respondent-carrier protesting its denial of the proposed treatment, but nowhere in that letter does Dr. Hackbarth causally connect the treatment with the compensable injury. The only way to establish a causal connection between the claimant's need for the discTRODE procedure and the claimant's compensable injury is by conjecture and speculation, and such cannot substitute for credible evidence. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1980). I therefore find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment, specifically the

discTRODE procedure proposed by Dr. Hackbarth, is reasonably necessary in connection with the compensable injury.

In making this finding, I am aware that when a claimant's disability arises soon after an accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, there is no substantial evidence to sustain a refusal to award compensation. *Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001). In this case, however, there *is* another explanation for the claimant's condition. Dr. Sklar has opined that the claimant's symptoms are due to a lingering "lumbar strain superimposed on chronic degenerative changes in the lumbar spine." *Dorland's Illustrated Medical Dictionary*, 26<sup>th</sup> Edition, defines a "strain" as, "an overstretching or overexertion of some part of the musculature." Nothing in Dr. Hackbarth's notes directly contradicts Dr. Sklar's opinion in this regard. And if Dr. Sklar is correct in opining that the compensable injury caused a strain and nothing more, then the discTRODE procedure is of no value. It is said by Dr. Hackbarth to be specifically for treatment of an intervertebral disc; nothing in the record suggests that a discTRODE procedure would be of any value in treating the musculature of the back.

In summary, the evidence identifies two possible etiologies for the claimant's injury and subsequent disability. Only one of them, Dr. Sklar's diagnosis of a lumbar

strain, is causally connected by the evidence to the claimant's work accident. A discTRODE procedure is not an appropriate treatment for a strain injury. Therefore, the claimant has failed to prove by a preponderance of the evidence that additional medical treatment, specifically the discTRODE procedure, is reasonably necessary in connection with the compensable injury.

### **B. Healing Period**

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). Dr. Sklar has opined that the claimant's disability was caused specifically by a lumbar strain, and that no further treatment for this strain will change the claimant's condition significantly. Dr. Sklar specifically placed the claimant's date of maximum medical improvement at November 25, 2003. While Dr. Hackbarth has recommended additional treatment for the L4-5 disc, as noted above nothing in the record causally connects any disc problems at L4-5 with the claimant's compensable injury and subsequent disability. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he remains in his healing period for his compensable injury. I further find that the respondents have proven by a

preponderance of the evidence that the claimant's healing period for his compensable injury ended on November 25, 2003.

### **C. Temporary Total Disability**

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

As noted above, a preponderance of the evidence establishes that the claimant's healing period ended on November 25, 2003. Therefore, his entitlement to temporary total disability benefits, if any, ended on that date. At the hearing, the claimant's attorney asserted that the claimant's TTD benefits were terminated on August 19, 2003, and based on that assertion the claimant contended entitlement to TTD benefits beginning August 20. The question, then, is whether the claimant was totally incapacitated from earning wages between August 20, 2003, and November 25, 2003.

The record contains only limited evidence as to the claimant's work capabilities during the course of his treatment. On November 11, 2003, Dr. Hackbarth authored a letter in which he stated, "At the present time, I do not feel

he would be able to return to work until [the discTRODE] procedure is performed.”

Dr. Sklar offered a somewhat equivocal opinion on November 25, 2003: “In my opinion, the claimant can work in an unrestricted capacity with his limitations being based on his pain tolerance.” Given these opinions, and given Dr. Sklar’s MMI opinion, I find that the claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages from on or about August 20, 2003, the date his benefits were terminated, to November 25, 2003. Therefore, I find that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from on or about August 20, 2003, until November 25, 2003.

### **AWARD**

The claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from on or about August 20, 2003, until November 25, 2003. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant’s attorney, Mr. Gregory Giles, is hereby awarded the maximum statutory attorney’s fee on all indemnity benefits controverted, pursuant to Ark.

Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge