BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401228

MIKE BONACCI, EMPLOYEE	**CLAIMANT**
HOME DEPOT, EMPLOYER	**RESPONDENT**
AMERICAN HOME ASSURANCE CO., CARRIER	**RESPONDENT**

OPINION FILED JUNE 14, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 27, 2006, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE JAMES W. STANLEY, JR., Attorney At Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE ANDREW M. IVEY, Attorney At Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefit.

On March 28, 2006, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. The parties withdrew the issues of anatomical impairment and wage loss benefits from consideration at this time. Additionally, the parties stipulated that temporary total disability benefits were paid to the claimant through March 31, 2005. The testimony of

Mike Bonacci, the claimant, coupled with medical reports and other documents comprise the record in this claim. The record of the prior December 20, 2004, hearing before the Commission was also incorporated in the present record.

DISCUSSION

Mike Bonacci, the claimant, with a date of birth of December 3, 1966, is a collage graduate with a degree in business administration from the University of Arizona. Additionally, the claimant has attended a two-year physical therapy program at Arkansas State University-Beebe. Claimant's employment history includes supervisory positions at K Mart, MCI, and Walgreens.

There is no evidence in the record to reflect that the claimant experienced difficulties, restrictions or limitations in the discharge of his employment duties prior to January 10, 2004. Claimant commenced his employment with respondents on February 11, 2003, as a member of the night crew/receiving and stocking. On January 10, 2004, claimant suffered a compensable injury to his low back while lifting a Rubbermaid shed onto a lift.

Claimant received initial treatment regarding the January 10, 2004, compensable injury under the care of a chiropractic physician, Dr. Bob Carpenter. Claimant received medical treatment under the care of his family physician before being directed by respondents to Dr. Brent Sprinkle, D.O. On June 21, 2004, a Change of Physician Order, which designated Dr. Thomas Hart as the claimant's authorized treating physician relative to the January 10, 2004, compensable injury, was entered by the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission.

On December 20, 2004, a hearing was conducted before the Arkansas Workers'

Compensation Commission on the claimant's claim for additional workers' compensation benefits, which included temporary total disability and medical treatment as recommended by Dr. Hart. Respondents were ordered to pay temporary total disability benefits to the claimant from July 1, 2004, through the end of his healing period or until he returned to appropriate employment within his medical restrictions. Respondents were also directed to pay all reasonable hospital and medical expenses arising out of January 10, 2004, compensable injury, to include the procedure recommended by the claimant's authorized treating physician.

Claimant maintains that his medical treatment relative to his spinal injury has been furnished by Dr. Hart for the last couple of years, who he sees every couple of months. In describing the doctor/patient relationship claimant testified:

> I feel that the doctor listens to me and he's just trying to heal me as best he can and try to bring my back to a hundred percent as much as possible. And gives me options of treatment as to what I can do to bring - - (T. 10).

Claimant noted that Dr. Hart answers all of his questions and presented treatment options as well as prescribed medications. Claimant testified that his current prescription medicines are Tramadol and Indomethacin for pain and Flexeril for muscle spasms. Claimant asserts that he has been unable to take the physical therapy prescribed by Dr. Hart because respondents have refused to pay for it. Claimant's testimony reflects:

> I'm willing to do anything to get the pain stopped and to get some treatment. (T. 12).

Claimant testified that he had followed the sheet of instructions furnished by Dr. Hart regard home exercises, which he observed sometimes help with his symptom levels and other times don't. Claimant has also used ice packs and a heating pad in an effort to address his pain levels.

The testimony of the claimant reflects that the pain in his back has gotten worse over the twelve months since he has been seeing Dr. Hart:

> Well, it's worse than I'm - - I'm still having trouble when I sleep. I wake up in the middle of the night with pain. When I go to the bathroom or when I'm , you know, trying to do any kind of yard work or house work, it's pain. When I drive. Sometimes I get real severe muscle spasms. I constantly have to have my pills nearby. And sometimes that helps but sometimes it doesn't. (T. 13).

Claimant describes the pain, which is constant throbbing shearing-type, as being in his lower back - waist level. The testimony of the claimant reflects that he has never been prescribed a back brace or given a TENS unit.

Claimant testified that Dr. Hart has discussed the IDET procedure with him and that he is willing to undergo same. Claimant noted that the procedure was scheduled in December 2005, however respondents refused to pay for it.

Claimant acknowledged that he visited with Dr. Schlesinger pursuant to the directions of the respondents. Regarding his visit with Dr. Schlesinger claimant testified:

> I met with Dr. Schlesinger for about five minutes and he had me wiggle my fingers and wiggle my toes and then basically told me that he felt like I needed physical therapy but was not - - did not agree with Dr. Hart's recommendation - - as far a surgery.(T. 15).

Claimant asserts that Dr. Schlesinger did not perform a CAT scan, MRI, x-rays or nerve conduction studies as a part of or in the course of his evaluation/examination. Claimant acknowledged that he was informed by Chenal MRI Center that his MRI had been furnished to the office of Dr. Schlesinger. Claimant's testimony does reflect that during the course of his examination by Dr. Schlesinger a small hammer was used to test his reflexes and that he was instructed to bend over as far as he could and try to touch his toes. Claimant testified that the

duration of his examination with Dr. Hart is "about 30 minutes".

Claimant maintains that due to the failure of respondents to authorize the recommended medical treatment and his inability to obtain the necessary treatment he has not been physically able to work since he last discharged employment duties for respondent-employer. Claimant asserts that he last received a temporary total disability benefit check in August 2005, and that the same covered the time period April 2004 through March 2005.

Claimant testified that he had tried to look for employment but had been unsuccessful in obtaining same once he disclosed the injury to his back. Claimant noted that in disclosing his back injury to prospective employer he was trying to find something where he did not have to use his back in the same manner as he did in his employment with respondent-employer. Claimant testified that he sent resumes out to various companies through the internet. Regarding his last effort to secure employment in a position suitable to his educational background claimant's testimony reflects:

> Well, I haven't sought any employment since Arkansas Rehab Services told me that they will not assist me in finding employment until Dr. Hart releases me to go back to work. And so far he refuses to release me because I've been denied treatment.(T. 26).

Claimant noted that his back injury has impaired his ability to perform chores and activities around his residence. Claimant now resides with his mother who provides him with a place to live and a source of income and food. Regarding his reason for pursuing his claim, the testimony of the claimant reflects:

> Well, what I would like to happen is what we were here back in December of 2004, is to get some treatment so that I can move on with my life.
>
> * * *

> Yes, sir, but in the meantime I mean with treatment, there comes physical therapy, there comes dates that I have to go to the hospital for medical procedures. All this takes time out of my life and unfortunately it's been difficult trying to find work with my back the way it is and what I don't understand is, I have yet to receive any kind of treatment since we were here in December of 2004. Nothing has changed. (T. 20-21).

Claimant concedes that he has gone to see Dr. Hart on multiple occasions, however notes that the treatment recommended by Dr. Hart has been denied by respondents. Claimant acknowledged that the prescription medication had been paid for by respondents. Claimant maintains that in addition to denying the IDET procedure and the percutaneous diskectomy respondents have also denied physical therapy. Claimant testified that the recent recommendations of Dr. Schlesinger, extensive spinal rehabilitation and possibly a home lumbar traction unit, were previously recommended by Dr. Hart in July 2004. Claimant's testimony reflects that he is willing to pursue the recommendations to improve the condition of his back.

Claimant acknowledged receiving a copy of the March 3, 2006, report of Dr. Schlesinger, and the presence of the nurse case manger during the examination. Nevertheless claimant disputes the accuracy of the report in terms of the number of test recited as having been performed by Dr. Schlesinger during the examination.

Claimant acknowledged that he treated with Dr. Bennnett, D.C., a partner of Dr. Carpenter, D.C. Claimant testified that he was aware that Dr. Bennett released him as having reached maximum medical improvement on March 31, 2005. Claimant asserts that the only doctors that have told him he could return to work were Dr. Sprinkle and Dr. Carpenter, who placed restrictions on lifting.

The most recent medical report contained in the record of the December 20, 2004,

hearing in this claim was a November 8, 2004, report of Dr. Thomas M. Hart. The December 20, 2004, hearing record served as the basis for the prior award of the prior temporary total disability benefits and medical benefits in this claim, which was finalized in July 13, 2005, Full Commission opinion.

An October 19, 2005, report of Dr. Hart reflects that claimant was seen/reevaluated on September 29, 2005. The October 19, 2005, Procedure Report of Dr. Hart regarding the claimant reflects, in pertinent part:

> . . . . He had his original on-the-job injury. After failure at conservative care, I had recommended back in November 2004 a discography according to the North American Spine Society's protocol commission, i.e. pain beyond four months, not explained by the imaging studies. Discography is a more sensitive study than either the MRI or CT and it once and for all allows us to determine who does and does not have discogenic pain since an MRI did show disc protrusions. Yes, 30% of the population do have disc protrusions, which have no pain. On the other hand, people can have a disc protrusion, which can be very painful and that is why discography helps once and for all delineate. Apparently this was held up with his Workers' Comp company. . . . . Fortunately Mr. Bonacci was able to head on and win his Worker's Comp dispute so our plan today is, again according to the medical literature, North American Spine Society's protocol commission is to perform discography, double needle technique, if we find an abnormal disc. In other words, do we find abnormal pressure volumes, abnormal morphological appearance, and does that correlate with the subjective response. We will inject intradiscal steroids, which may be more effective that epidural steroid injections to hopefully reduce inflammation and this will be followed by post CT imagining and have these results.
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> Mr. Bonacci, unfortunately, has been seen by some physicians who are very either <u>ignorant</u> or not familiar with discogenic back pain. This also I find extremely unfortunate if they are to be dealing with the Worker's Compilation population and they do not understand discography and discogenic back pain but try to tell the patient it is all in their head and these physicians obviously need to be out of the "network" or get some better training.(CX #1, p. 1).

Thereafter the report details the mechanics of the procedure performed by Dr. Hart during the

October 19, 2005, visit.(CX. #1, p.2-4). Claimant was seen in follow-up by Dr. Hart on October 31, 2005. The clinic note regarding the October 31, 2005, visit reflects, in pertinent part:

> Mr. Bonacci presents today for a routine followup to discuss his recent discography which was performed on 10/19/05 according to the North American Spine Society's protocol. This clearly demonstrated three levels of intervertebral disruption. All three levels appeared to be very painful. The worst was the 3-4 level. The 5-S1 showed a significant posterior intervertebral disruption to the outer 1/3 of the annulus and 4-5 also showed a posterior intervertebral disruption. 3-4, on the other hand showed an immediate large posterior tear in which the dye was seen in the epidural spaces captured on Sony permanent prints. 2-3 was a perfectly normal disc. This was confirmed independently with post CT imaging, which I reviewed with Mr. Bonacci today.
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> * * *
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> **PLAN:** I basically discussed with Mr. Bonacci this is a very complex situation, in that he has three levels of intervertebral disruption. The 3-4 area had a very large posterior tear with dye leaking immediately. The most painful level. I would like to obtain a surgical consultation, which he had Not had. I would like to recommend Dr. Michael Calhoun in neurosurgical consult which I think in appropriate and medically necessary. (CX. #1, p.6).

On November 9, 2005, claimant was evaluated by Dr. J. Michael Calhoun at Central Arkansas Neurosurgery Clinic, pursuant to the referral of Dr. Hart. After reciting a history of the claimant's injury and medical treatment relative to same, the November 9, 2005, report of Dr. Calhoun reflects, in pertinent part:

> . . . . Because of the abnormalities of this and the patient's persistent pain, he is referred here. Mr. Bonacci now characterizes his pain as in his lumbar spine with radiations occasionally into both buttocks and upward into the lower thoracic area. There is no pain or numbness in the lower extremities. He never had significant back pain prior to his injury in 2004.
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> * * *
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> Neurologic examination of the lower extremities reveals that there is

adequate iliopsoas, obturator and gluteus medius function bilaterally. There is intact quadriceps function bilaterally. There is adequate extensor digitorum brevis, extensor hallucis longus and gastrocnemius function bilaterally. Sensation is intact to pinprick in the L3, L4, L5 and S1 dermatomes bilaterally. There are trace knee reflexes and trace ankle reflexes bilaterally. Straight leg raising is negative bilaterally. There is flexion to approximately 60 degrees but essentially no extension of the lumbar spine.

* * *

We explained to the patient that with three painful discs, anything surgical would have to involve a three level fusion. Disc replacement can be done for one level changes alone. . . . With this in mind, I explained to him that even though he has significant pathology in his lower back, a three level fusion is not something I would suggest. Personally I have never seen a patient improve with a three level fusion. I do think he is a legitimate patient and does have pathology, but it is not presently surgically correctable. (CX. #1, p.10-11).

The claimant was seen in followup by Dr. Hart on December 9, 2005. The December 9, 2005, clinic note of Dr. Hart regarding his visit with the claimant reflects that the results of the November 9, 2005, neurosurgical consultation with Dr. Calhoun were discussed. The December 9, 2005, clinic note further reflects, in pertinent part:

. . . . At this time I suggested to proceed in a surgical direction.

PHYSICAL EXAMINATION: He is alert and oriented. He carries on an intelligent conversation. He appears to be mild to moderately depressed. He is 6 feet 4 inches, 270 pounds. BP: 131/86. Pulse: 84. Saturation: 98%. Respiration: 18. VAS score 5. His back is diffusely tender with some limited range of motion. Straight leg raising is negative. There are no strong nerve root compression signs.

PLAN: I discussed with him again that obviously he has a discogenic pain. This is well documented and very legitimate and there is no doubt he has back pain. The question is now what do we do about it? He has been seen by Dr. Calhoun and not considered a surgical candid <u>unless</u> he develops a nerve root compression signs. In other words if the disc protrusion develops into a herniation then obviously he will need surgical reevaluation by Dr.

> Calhoun. Options are 1) do nothing and live with it, which is unacceptable to Mr. Bonacci. He is unable to even to further education himself because of his significant back pain complaints. 2) Proceed toward a percutaneous discectomy. This is a minimally invasive, outpatient, nonsurgical procedure in debulking the nucleus pulposus. (This is not the same as a microdiscecomty.) That may help reduce his discogenic pain at the 4-5 and 5-S1 since the discography and the CT scan has demonstrated that these were contained herniations at 4-5 and 5-S1. There is no extravasation. No frank herniations. With the percutaneous discectomy 2 levels can be done at one time. That would hopefully reduce the discogenic component to his pain. This technology though would not be appropriate for the 3-4, since he has a large posterior tear one cannot decompress what has already been decompressed. My recommendations would be an IDET. This is coiling a catheter and allowing heat to shrink the collagen and hopefully repair the posterior tear. They are two different technologies, all depends on proper patient selection. . . . . The same thing with his back. If we can address all three levels, the percutaneous discectomy at the 4-5 and 5-S1 and the IDET at 3-4 and if that is successful then hopefully he should have enough reduction in his back pain complaints he may be able to carry on his activities and get reeducated and chose another form of employment since he has not been able to work for the last year and a half. . . . . I also informed Mr. Bonacci today since he presented with several sheets of paper that I don't do impairment ratings, nor am I his primary care physician. Since I do think he has legitimate back pain and he has had a tremendous struggle with is worker's comp, they have not been able to approve my recommendations questionable. I do state these to a degree of medical certainty and probability. I will put on some Tramadol 50 mg 1 po q 6 to 8 hours as needed for back pain. Again, my recommendation is the percutaneous discectomy at 4-5 and 5-S1 and allow several weeks for that to continue to heal and do an IDET at the 3-4. That may take several months for that to heal and hopefully see a reduction in his back pain complaints. If there is any worsening of his condition or he develops any nerve root compression, bowel or bladder paralysis we will need to reimage and get him back to Dr. Calhoun. (CX. #1, p. 7-8).

The record reflects a April 1, 2005, report of Dr. Steven F. Bennett, D.C., regarding the results of his evaluation of the claimant pursuant to a referral of Dr. Bob Carpenter, D.C., for evaluation and assessment of permanent impairment. The April 1, 2005, report of Dr. Bennett recites the history of the claimant's January 2004, compensable injury as well as diagnostic studies and treatment received relative to same under the care of Dr. Carpenter and Dr. Sprinkle.

The report does not reflect that Dr. Bennett had access to the medical records generated while the claimant was under the care of Dr. Hart, or that he was aware of claimant's treatment under the care of Dr. Hart. The April 1, 2005, report of Dr. Bennett reflects, in pertinent part:

> Based upon the fact that it has been over a year since the date of injury and the patient's history of treatment, I feel he has reached maximum medical improvement and is left with permanent impairment and disability.
>
> *   *   *
>
> Functional capacity test were performed on Mr. Bonacci in order to objectively evaluate his range of motion and neuromuscular function of the lumbar spine and lower extremities. By performing computerized functional capacity tests the patient has to give a valid effort during the course of evaluation or the computer will invalidate the test. In Mr. Bonnaci's case the computer validated that he was giving a valid effort. . . . . (RX. #1, p. 2-3).

Finally, the record reflects a March 3, 2006, report of Dr. Scott M. Schlesinger, regarding his evaluation of the claimant at the request of respondents. The report reflects that the question posed to Dr. Schlesinger regarding his evaluation was whether or not he could recommend percutaneous discectomy and IDET procedures that had been "proposed" by Dr. Hart for the claimant. The March 3, 2006, report of Dr. Schlesinger reflects, in pertinent part:

> **Interpretation of Data**
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> He had a MRI of the lumbar spine, but he did not bring the films with him. According to the report from Chenal MRI, it sounds like he had degenerative changes without herniated disc. We will obtain the actual films and review these prior to making a final recommendation. The report, however, suggests a broad based central disc protrusion at L4-5 with no nerve root compression and a small central disc protrusion at L3-4 without nerve rood compression. The report suggests a small central disc protrusion at L5-S1 without nerve root compression. I would like to personally review this and decide if I agree.
>
> He had a discogram CT. I don't personally believe that this has any predicted value in terms of treatment. While this may be controversial, most conservative

> neurosurgeons would argue that this offers little predictive value in terms of the response to surgical minimally invasive interventions. However, according to the report the had pain upon injection at L3-4, L4-5 and L5-S1. There were abnormalities described on the post-myelo CT report. According to the report, he had no pain at L203.
>
> **Impression/Plan/Discussion**
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> It is my opinion and that of most conservative neurosurgeons that this patient probably had 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 be able to recommend percutaneous or open discetomy or IDET procedure. No discectomy, either open or percutaneous, has any value in the 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 suggestion, 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.
>
> I would recommend, however, that the patient undergo extensive spinal rehabilitation, which has been shown scientifically to be of benefit to patient's with symptomatic degenerative disease. The other thing to consider is home lumbar traction unit. (JX. #1, p. 3-4).

The record does not reflect documentation that Dr. Schlesinger obtained and reviewed the actual films of the claimant's MRI of the lumbar spine.

After a thorough consideration of all of the evidence in this record, to include the testimony of the claimant, review of medical records and other documentation, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On January 10, 2004, the relationship of employee-employer-carrier existed among the parties.

3. On January 10, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of $277.00/$207.00, for temporary total/permanent partial disability.

4. On January 10, 2004, the claimant sustained an injury to his back arising out of and in the course of his employment with respondents.

5. On June 21, 2004, a Change of Physician Order was entered by the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission designating Dr. Thomas M. Hart as the claimant's authorized treating physician relative to the January 10, 2004, compensable injury.

6. The treatment plan and recommendations as outlined in the December 9, 2005, clinic note of Dr. Hart regarding the claimant is reasonable, necessary and casually related to the January 10, 2004, compensable injury.

7. The claimant was temporarily totally disabled for the period beginning July 1, 2004, and continuing through the end of his healing period, or until such time as he is released by his authorized treating physician to return to appropriated employment within the medical restrictions growing out of the January 10, 2004, compensable injury, a date to be determined, to include the period subsequent to March 31, 2005, the date said benefits were terminated by respondents.

8. The respondents shall pay all reasonable hospital and medical expenses arising out of the January 10, 2004, compensable injury, to include the recommended percutaneous

discectomy at the L4-5 and L5-Sl levels and an IDET at the L3-4 level.

9. The respondents have controverted the claimant's entitlement to the medical treatment as recommended by his authorized treating physician with respect to the percutaneous discectomy at the L4-5 and L5-S1 levels and IDET at the L3-4 level, and the payment of temporary total disability subsequent to March 31, 2005.

CONCLUSION

The compensability of the claimant's January 10, 2004, low back injury is not disputed. At issue before the Commission at this juncture is the claimant's entitlement to the medical procedures as recommended by his authorized treating physician and continued temporary total disability benefits subsequent to March 31, 2005, as a result of the January 10, 2004, compensable injury. The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to additional workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

Ark. Code Ann. §11-9-508 (a) requires that employers provide such medical services as are reasonably necessary in connection with the injuries received by employees. *Cox v. Klipsch & Assoc.,* 71 Ark. App. 433, 30 S.W.3d 764 (2000). What constitutes reasonable and necessary under Ark. Code Ann. §11-9-508 (a) is a fact question. *General Electric Railcar Repair Services v. Hardin,* 62 Ark. App. 120, 969 S.W.667 (1998). Medical treatment intended to reduce or enable an injured worker to cope with chronic pain may constitute reasonably necessary medical treatment. *Billy Chronister v. Lavaca Valt,* Full Compensation Commission, June 20, 1991 (D704562).

The authorized treating physician relative to the claimant's January 10, 2004,

compensable low back injury has been Dr. Thomas M. Hart, a pain management specialist, since the entry of a June 21, 2004, Change of Physician Order by the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission.

The evidence clearly reflects that the treatment recommendations of Dr. Hart regarding the claimant's diagnosed compensable injury are based on careful considerations of objective findings and diagnostic studies. Further, prior to making the recommendations regarding the percutaneous discectomy and IDET, Dr. Hart explored conservative treatment measures. After obtaining the results of the diagnostic studies Dr. Hart referred the claimant to Dr. Michael Calhoun, a North Little Rock neurosurgeon, for a neurosurgical consultation. Dr. Calhoun found the claimant to be a "legitimate patient" with "pathology" however found that the same was not surgically correctable at the time.

The evidence preponderates that the claimant has a legitimate compensable injury which was sustained in the employment of respondents. Respondents are mandated by statute to provide reasonable necessary medical treatment in connection with the compensable injury. Following the neurosurgical consultation of Dr. Calhoun claimant returned to his authorized treating physician, Dr. Hart. Having benefit of the results of the diagnostic studies and neurosurgical consultation, Dr. Hart has set forth a definitive course of treatment relative to the claimant's compensable injury. In denying the treatment recommendations of Dr. Hart respondents have placed greater reliance on the evaluation and recommendations of Dr. Scott Schlesinger, a Little Rock neurosurgeon.

It is clear from the tenor of Dr. Schlesinger's March 3, 2006, report regarding the claimant that there are limited, if any, circumstances under which he would consider performing

or recommending the procedures in the treatment of a patient as outlined by Dr. Hart, which was the precise question placed to him by respondents in securing the evaluation. The claimant had already been evaluated by a neurosurgeon, Dr. Calhoun, at the request of his treating physician. Dr. Schlesinger, who describes himself as a "conservative neurosurgeon", candidly disclosed that he did not "personally" believe that the discogram CT had any predicted value in terms of treatment. The November 9, 2005, report of Dr. Calhoun reflects that the results of the claimant's lumbar discogram were considered in his evaluation. There is no evidence in the record to reflect that either of the neurosurgeons, Dr. Calhoun or Dr. Schlesinger, perform the procedures that have been recommended by Dr. Hart.

The March 3, 2006, report of Dr. Schlesinger does not reflect that Dr. Schlesinger had benefit of actually reviewing the claimant's lumbar MRI scan films at the time the reported was generated. Nevertheless, Dr. Schlesinger concluded that neither percutaneous discectomy, IDET, open discectomy or fusion would have any benefit in the treatment of the claimant's back pain. In *White Consolidated Industries v. Galloway,* 74 Ark. App. 13, 45 S.W.3d 396 (2001), the employer argued that IDET was experimental and not reasonably necessary to the treatment of Galloway's back condition. The Commission disagreed and found the procedure was reasonable and necessary. The Arkansas Court of Appeals affirmed the Commission after recognizing that an employee is not required to prove a one-hundred percent success rate in order for a procedure to be considered reasonably necessary.

In *Dallas County Hospital v. Daniels,* 74 Ark. App. 177, 47 S.W.3d 283, (2001), in discussing the claimant's entitlement to the IDET procedure, the court noted the difference of opinion and experience between another neurosurgeon and Dr. Hart which was considered by the

Commission in its ruling:

> The Commission contrasted Simpson's testimony with that of Dr. Hart, who had performed roughly eighty IDET procedures and testified that the procedure, which was pioneered in 1997, was FDA approved and had a national success rate of seventy percent. It specifically stated that it gave significant weight to Dr. Hart's testimony because of Hart's experience in performing IDETs and because Hart articulated sound reasons for his recommendation that appellee was a likely candidate, including the ineffectiveness of conservative treatment and appellee's inability to tolerate constant pain.

Supra, 184-185.

Again, in the instant claim, Dr. Hart has clearly articulate the basis for the recommendations regarding the treatment of the claimant's January 10, 2004, compensable injury. Further, the evidence preponderates that Dr. Hart had access to all of the pertinent medical records, diagnostic and treatment, regarding the claimant, to include Dr. Calhoun's November 9, 2005, neurosurgery consultation, at the time he made his treatment recommendations. The claimant has sustained his burden of proof by a preponderance of the evidence that the treatment recommendations of Dr. Hart are reasonably necessary in connection with the claimant's January 10, 2004, compensable injury. Respondents have controverted the claimant's entitlement to the treatment measures/recommendations of his authorized treating physician.

Respondents last paid temporary total disability benefits to the claimant relative to his January 10, 2004, compensable injury on March 31, 2005. Respondents assert reliance on a April 1, 2005, report of Dr. Steven F. Bennett, D.C., as the basis for discontinuing the payment of temporary total disability benefits to the claimant. The July 13, 2005, Opinion of the Full Commission, which affirmed the administrative law judge's December 21, 2004, ruling,

provided that the respondents pay temporary total disability benefits to the claimant until he reached the end of his healing period or returned to gainful employment within his medical restrictions.

At the time of the April 1, 2005, report of Dr. Bennett the claimant's authorized treating physician relative to the January 10, 2004, compensable injury remained Dr. Thomas Hart, pursuant to the June 21, 2004, Change of Physician Order. Further, Dr. Hart had not released the claimant to return to work nor had he indicated that the claimant had reached maximum medical improvement. Rather, specific treatment measures had been recommended by Dr. Hart, which respondents had contested and the same was in litigation at the time of the claimant's March 31, 2005, visit to Dr. Bennett. Additionally, a review of Dr. Bennett's report clearly reflects that he did not have access to "all" of the claimant's prior pertinent medical records at the time of his assessment.

The healing period is statutorily defined as "that period for healing of an injury resulting from an accident." Ark. Cope Ann. §11-9-102 (13). The healing period includes the time following the accident until the employee is as far restored as the permanent character of the injury will permit. *Roberson v. Waste Management,* 58 Ark. App. 11, 944 S.W.2d 858 (1997). Once the underlying condition is stable and nothing further in the way of treatment will improve it the healing period is over. It is clear based on the treatment recommendations of Dr. Hart, the claimant's authorized treating physician, and even those of Dr. Schlesinger, the respondents' evaluating physician, that the underlying conditions causing the claimant's disability has not stabilized, and that further medical treatment is being offered/recommended to improve the condition. According, the claimant's healing period has not ended. Temporary total disability

represents that interval of time within the healing period in which the claimant suffers a complete inability to earn wages.

The claimant has sustained his burden of proof by a preponderance of the evidence that he remains within his healing period and total incapacitated from engaging gainful employment, and correspondingly entitled to the payment of temporary total disability benefits from the date the same was terminated until such time as he reaches the end of his healing period. Respondents have again controverted the afore benefits subsequent to March 31, 2005.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of $277.00, for the period commencing March 31, 2005, the date of termination, and continuing until such time as the claimant reaches the end of his healing period, a date yet to be determined. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to all reasonable necessary and related medical, nursing, hospital and other apparatus expenses, to included the cost of the procedures recommended by the claimant's authorized treating physician, Dr. Hart in his December 9, 2005 report. Specifically, respondents are directed to pay the cost of the percutaneous discectomy at L4-5 and L5-S1 and the IDET at the L3-4 level.

The claimant's attorney, the Honorable James W. Stanley, is herein awarded attorney fees at the maximum rate on the controverted awarded indemnity benefits, pursuant to Ark. Code Ann. §11-9-715, §ll-9-801, and WCC Rule 10. The claimant's portion of the controverted attorney's fee shall withheld from and paid out of indemnity benefits, and remitted by

respondents directly to claimant’s attorney.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein, to include permanency, are expressly reserved.

IT IS SO ORDERED.

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Andrew L. Blood, Administrative Law Judge