

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F509335

SCOTT BOWDEN, EMPLOYEE	CLAIMANT
NOBLE HOSPITALITY, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, C/O AIG CLAIM SERVICES, INC., CARRIER	RESPONDENT

OPINION FILED OCTOBER 9, 2007

Hearing before Administrative Law Judge O. Milton Fine II on July 11, 2007, in Russellville, Pope County, Arkansas.

Claimant represented by Mr. Philip Wilson, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 11, 2007, the above-captioned claim was heard in Russellville, Arkansas. A pre-hearing conference took place on April 30, 2007. The Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations, which I accept, that are set forth in Commission Exhibit 1. They are the following:

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

2. The employee/employer/carrier relationship existed at all relevant times, including February 21, 2005.
3. Claimant has already received some benefits under this claim.
4. The Claimant's average weekly wage was \$310.00, entitling him to TTD and PPD rates of \$207.00 and \$155.00, respectively.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1.

Following amendments, the issues thus read:

Claimant:

1. Whether Claimant is entitled to temporary total disability benefits from August 21, 2005 to January 1, 2007.
2. Whether Claimant is entitled to continued medical care and treatment by Dr. Schlesinger.
3. Whether Claimant is entitled to attorney's fees.
4. Claimant expressly reserves all other issues.

Respondent:

1. Whether Respondents are entitled to obtain a second opinion or independent medical evaluation.

Administrative Law Judge:

1. Whether Claimant has been provided a TENS unit.

Contentions

Respondents amended their contentions to add three additional ones regarding temporary total disability benefits, an independent medical evaluation, and controversion.

The contentions now read:

Claimant:

1. Claimant is under the care and treatment of Dr. Schlesinger, who has suggested a TNS, physical therapy, and additional medical testing. As of September 7, 2006, Respondents had not approved of this request.
2. Claimant is entitled to the follow-up care and treatment as suggested by Dr. Schlesinger, along with the appropriate temporary total disability benefits.
3. Claimant is entitled to appropriate attorney's fees.

Respondents:

1. Respondents contend that all appropriate medical has been and is continuing to be provided to the Claimant. Recommendations for further diagnostic testing have been made by Dr. Scott Schlesinger; however, Claimant has not been examined by Dr. Schlesinger for approximately 10 months. An IME was scheduled for Claimant on February 6, 2007, but he failed to attend. Respondents request a second opinion or IME in order for a physician to address Claimant's current need for treatment and his healing period. There is also an issue as to whether any further treatment would be needed for the work-related injury or for Claimant's preexisting degenerative disc disease.

2. Respondents contend that the medical records do not support Claimant's entitlement to temporary total disability benefits.
3. Respondents requested an independent medical evaluation or a second opinion evaluation to determine whether the medical treatment that Dr. Schlesinger is recommending is associated with an acute injury as opposed to a degenerative or pre-existing process, and whether the proposed treatment is reasonable and necessary for Claimant's acute injury. However, Claimant has refused to participate in such an evaluation.
4. Respondents have not controverted Claimant's entitlement to additional treatment; rather, they have only sought clarification.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant/witness and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Admission of pages 23 to 31 of Claimant's Exhibit 4, objected to by Respondents, will not be allowed because such admission would not help to "best ascertain the rights of the parties" under Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2002).

4. Admission of the surveillance report, pages 20 to 24 of Respondents' Exhibit 2, objected to by Claimant, will be admitted because not only did Claimant, despite being asked to do so, fail to serve notice that he would be objecting to its admission, which would have given Respondents notice to produce the investigator at the hearing to authenticate the document, but such admission would, regardless, help to "best ascertain the rights of the parties" under Ark. Code Ann. § 11-9-705(a)(1).
5. Claimant has not proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from August 21, 2005 to January 1, 2007, or during any portion thereof.
6. Because of Respondents' request that an independent medical examination be ordered to address whether Claimant currently needs medical treatment and/or has reached the end of his healing period, the issue regarding Claimant's request for additional medical treatment is not yet ripe and will be considered reserved.
7. Claimant has not received a TENS unit, despite its approval by Respondents.
8. Claimant should submit to an independent medical evaluation by Dr. Reza Shahim, with such evaluation to be conducted in accordance with Ark. Code Ann. § 11-9-511.

PRELIMINARY RULINGS

Admission of pages 23 to 31 of Claimant's Exhibit 4

At the beginning of the hearing, Respondents objected to the admission of pages 23 to 31 of Claimant's Exhibit 4. The following colloquy occurred:

[RESPONDENTS' COUNSEL]: Your Honor, Claimant's Counsel has introduced some screen printouts, it looks like from a computer . . . Your Honor, they're hearsay. They're not medical records. There's no one here as a foundation person to testify as to where these came from.

[JUDGE FINE]: [Claimant's counsel], your response?

[CLAIMANT'S COUNSEL]: Judge, I got these and furnished those to her, and this is the first time I've heard of an objection. We could have had someone here if she would of [sic] notified us or said she had an objection. But that's fine. We'll call Ms. Young and see what she says about them, 'cause most of these are to her. I'm sure she has her entire files since she knows this a Hearing [sic] here.

[RESPONDENTS' COUNSEL]: And Your Honor, with all due respect, I did tender an objection when I first got those. And in fact tendered an objection of [sic] the PreHearing Telephone Conference with regard to those. And I think Claimant's counsel had indicated at that point in time, at the first PreHearing Conference that he was going to have someone from Dr. Bowden's office here to testify. I meant from Dr. Schlesinger's officer here to testify and then said he was going to take a deposition of them, neither of which occurred.

I took the matter under advisement at the hearing and permitted Claimant to proffer the exhibit pages.

Arkansas Code Annotated § 11-9-705(a)(1) (Repl. 2002) provides:

In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or statutory rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner that will best ascertain the rights of the parties.

The Commission has a “great deal of latitude in evidentiary matters.” *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001). The pages at issue appear to be computer screen captures of chart notes from the chart of Claimant at the Arkansas Neurosurgery Brain & Spine Center. These pages record alleged contacts. No one testified regarding these printouts, to authenticate or explain their contents. During the direct examination of Judy Young, the adjustor for Respondent AIG, the witness testified that she is apparently the “Judy” referred to in six of the pages. And she was able to corroborate that some of the contacts with her referenced in the printouts did take place. But she was unable to verify other contacts, and was not even asked about others.

After due consideration of this matter, I find that admission of the printouts will not help to “best ascertain the rights of the parties,” since there are too many unknowns about the printouts. Certainly, Ms. Young’s testimony regarding some of them are in evidence and will be considered. However, the printouts themselves will not be admitted into evidence.

Admission of pages 20 to 24 of Respondents’ Exhibit 2

Claimant objected to the admission of the above pages, which constitute a surveillance report concerning Claimant. The following colloquy occurred:

[CLAIMANT’S COUNSEL]: Well, Respondents’ Exhibit Two (2), the private investigator’s report, blatant hearsay and I object to it, the same reason she objects to mine.

. . .

[RESPONDENTS’ COUNSEL]: Your Honor, just for the record, I have written to you on June the 18th of 2007, when I tendered the surveillance report specifically, and sent a carbon copy to Claimant’s Counsel indicating that I was introducing the surveillance, and if I needed someone there to testify regarding the same, to notify me immediately so that I could have the

investigator available to testify. And I have never received anything from [Claimant's counsel] indicating an objection till this very moment.

JUDGE FINE: Okay, I'll look at my record on that. There's some [-] if there's a need for me to blueback something from my file into it, to [-] so we have a full understanding of that issue, I will do so.

I have reviewed the Commission's file, and confirm that the June 18 letter referred to above was sent. It has been blue-backed to the record. However, the report was actually sent on January 3, 2007. The transmittal letter has been blue-backed to the record as well. Claimant's counsel was copied on these letters. Also, I note that Claimant did not object to the admission of the report on the grounds that it was not produced in conformity with the Prehearing Order.

As noted above, pursuant to § 11-9-705(a)(1) the Commission is not bound by the Arkansas Rules of Evidence—including the rules governing hearsay and the exceptions thereto. See *Tracor/MBA v. Artissue Flowers*, 41 Ark. App. 186, 850 S.W.2d 30 (1993). It is true that without the testimony of the investigator who prepared the report concerning the circumstances surrounding its preparation, Claimant is placed at somewhat of a disadvantage. However, Claimant was provided notice via the June 18, 2007 letter that Respondents intended to introduce the investigative report without the investigator testifying, and was given the opportunity to lodge an objection in advance of the hearing to afford Respondents time to produce the investigator as a witness. Nothing indicates that Claimant gave notice that he intended to object. I find that admission of the report would help to “best ascertain the rights of the parties.” For these reasons, the report, pages 20 to 24 of Respondents' Exhibit 2, will be admitted into evidence.

CASE IN CHIEF**Summary of Evidence**

_____ Four witnesses testified at the hearing: Claimant called himself, along with Charlotte Davis and Judy Young; while Respondents called Christy Millsaps.

In addition to the Prehearing Order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit 1, Nurse Case Manager Carolyn Waggoner's record, consisting of one title page and 28 individually numbered pages; Claimant's Exhibit 2, the records of Nora House, consisting of one title page and 32 individually numbered pages (the title page incorrectly states that it is 31 pages); Claimant's Exhibit 3, records related to Claimant's employment by Respondent Noble Hospitality, Inc. (hereinafter "Noble"), consisting of one title page and seven individually numbered pages; Claimant's Exhibit 4, medical records of Claimant, consisting of one index page and 22 numbered pages thereafter (as noted above, the nine unnumbered pages thereafter were excluded from the evidence); Respondents Exhibit 1, medical records of Claimant, consisting of one index page and 28 individually numbered pages; Respondents Exhibit 2, non-medical records, consisting of one index page and 24 individually numbered pages (pages 25 to and 27 were removed by agreement of the parties); and letters from Respondents' counsel to the Commission (and copied to Claimant's counsel) dated January 3 and June 18, 2007, and a letter dated July 23, 2007 from Respondents' counsel to Claimant's counsel, which have been blue-backed to the record.

Testimony

Charlotte Davis. Called by Claimant, Davis testified that she has known Claimant for approximately ten years. She has worked at the Seven Forty Supper Club for nearly ten years, four and one-half of which as the manager. Davis stated that Claimant worked in the kitchen of the business for a very short period of time in 2000. Since that time, he has not worked there, and has not been issued a W-2 or Form 1099 for any work there. However, he has come by the business and visited with Davis on occasion. Davis testified that during his visits, Claimant has never waited on a customer or helped the business in any way. He merely sits at a table when there. The hours of the establishment are 4:00 p.m. to midnight or shortly thereafter.

When questioned by Respondents, Davis testified that Claimant's aunt and uncle are two of the four club owners.

Judy Young. Called by Claimant, Young testified that she is the adjustor for Respondent AIG. The notation "CM" in the records when referring to Young denotes the title of "Case Manager." Young took over Claimant's file in November 2005. The injury occurred in February 2005. The claim was accepted as compensable. Whether or not the records speak of a second injury in this case, Young is only aware of one injury. Carolyn Waggoner is the nurse case manager. She works directly under and communicates with Young.

Young testified that Respondent Noble sent Claimant to Dr. Bruce Brown. He, in turn, suggested a neurosurgery consultation with either Dr. Scott Schlesinger or Dr. Edward Saer. However, Young was not the case manager at the time this took place—she took over the file around November 15, 2005. Waggoner notified the previous case

manager, Irene Voiles, that Dr. Brown wanted Claimant referred because he may have a herniated nucleus pulposus. Young is aware that the case manager contacted Dr. Saer's office to schedule an appointment. However, he was scheduled with Dr. Wayne Bruffett because he could see Claimant sooner. She did not know why an appointment with Dr. Schlesinger was not attempted instead, but surmised that Dr. Saer's office referred the case to Dr. Bruffett. The records were ultimately sent to Dr. Saer for review. But his office called back and stated that while Dr. Saer's appointments were further in the future, Dr. Bruffett could see Claimant. (However, the October 6, 2005 note from Cathy Bass to Waggoner, part of Claimant's Exhibit 1, reflects that Dr. Bruffett was scheduling new patients for November 14, 2005, while Dr. Saer was scheduling for November 1, 2005.) But while Dr. Bruffett was in Dr. Saer's office, he was not one of the physicians recommended by Dr. Brown. Young was aware that Claimant had an MRI on March 21, 2005 that reflected a disc herniation at L5-S1. She testified that she would have notified Respondents' counsel about the file as soon as Claimant requested a hearing. Respondents' counsel never told her that Claimant's counsel would object to the use of Dr. Bruffett. On November 16, 2006, Waggoner wrote that Dr. Bruffett would not see Claimant until he has seen Claimant's records. Shortly after that, Young became aware that Claimant's counsel had requested a hearing regarding the treatment of Claimant by Dr. Schlesinger, and that as of November 21, 2005, counsel would not approve of Claimant seeing Dr. Bruffett.

Young stated that with respect to lost time cases, she has the nurse case manager direct the medical treatment, "[u]nless I question. I get the call and I question something." When asked to explain her communication with the nurse case manager on December 16,

2005 regarding the case, when Claimant's attorney had instructed Claimant not to see Dr. Bruffett and Young had instructed her to "try to get him to release him and make him MMI. Young stated that "[i]f we couldn't get [Claimant] seen, and couldn't get a doctor to address it, then let's try and just see if he's at MMI."

According to Young, a physician requested that Claimant have physical therapy. Dr. Schlesinger wanted some injections, and also suggested a TENS unit. Young stated that she would not object to providing a TENS unit or a traction unit, provided that the doctor clarified what body part the apparatus was for, and whether its need was due to a degenerative or an acute problem. The last medical Young received on Claimant, in April 2007, reflected a number of degenerative problems. So, she needed a clarification. The TENS unit was not approved until clarification was received regarding its purpose. Ultimately, the unit was approved, in April 2006, despite the fact that clarification was never received. When such an item is approved, Respondent AIG calls its provider and has the provider ship the item. Unless so notified by the Claimant, Young would not know whether he actually received the unit.

Young testified that she records in a log everything that transpires in a claim. However, she did not bring her log to the hearing because Respondent AIG does not allow her to do so. She had noted instances where Dr. Schlesinger's office contacted her about this claim. She was contacted on April 5, 2006 seeking authorization for a lumbar epidural steroid injection, along with physical therapy, traction, a TENS unit and a cervical MRI. A message was left with her. Young returned the call and authorized the injections, but had questions regarding the other requests because there was a reference to cervical treatment and the claim was for a lumbar injury. On July 13, 2006, Dr. Schlesinger's office

called for approval of a myelogram. However, Young stated that when she returned the call, the phone number she had been given was incorrect. She was unaware of any attempts to contact her on July 3, 2006. On July 28, 2006, a message was left with Young regarding the status of the myelogram request. Young requested that the records be sent directly to her.

Young testified that One Call Medical would have been used to ship the TENS unit, if that occurred in this case. She believed one was sent, but did not know for sure. Young offered to check after the hearing to make sure. She did know that at least one doctor has diagnosed Claimant as having a herniated nucleus pulposus, and was not aware of him having back problems prior to the injury at issue.

Young stated that she did not know until the day of the hearing that Claimant's counsel would not approve of Dr. Bruffett as Claimant's physician. She stated that Dr. Saer must have selected Dr. Bruffett. Then, she testified that Dr. Brown selected Dr. Saer. Young stated that he had a compensable injury and was seen by a doctor that Respondent Noble sent him to, and that he had a disc herniation. That doctor suggested Dr. Schlesinger, whom Claimant ultimately saw. Young testified that she is an LPN. She changes physicians for a claimant if the patient is not pleased or if the treatment is not proceeding. However, if the claimant is represented, she goes through his attorney. She also advises them of their right to go through the Commission to select a doctor of their choice. In this case, an independent medical evaluation was set up. At first, Young testified that the IME was not set up through the Commission. Later, she stated the opposite. At first, she stated that the IME physician is a neurosurgeon. Later, she was unsure but "hope[d]" he was a neurosurgeon. She stated that he is in the managed care

organization used by Respondent Noble. On direct examination, she was unable to recall his name. Young estimated that the IME would cost \$800.00 to \$1,200.00. A myelogram costs \$700.00 to \$800.00, and a TENS unit runs around \$800.00 plus monthly fees of \$24.00.

Young admitted that a myelogram usually occurs after a CT scan and an MRI when pain is present, but a question arose in the case regarding whether Claimant's condition was due to a degenerative or pre-existing condition, especially in light of the gap in treatment. Written justification for the myelogram from Dr. Schlesinger was needed. She testified that Dr. Schlesinger only sent a written statement in January 2007, but that he still did not address how the test is related to the compensable injury. She denied that the gap was due to the failure of Respondent AIG to approve treatment, and stated that the reason to inquire into whether the test was necessary was not due to cost, but rather to be able to justify it if her file was audited.

When questioned by Respondents, Young testified that the "CM" referred to in Respondents' records denotes Carolyn Waggoner, the case manager or nurse case manager. "CC" in the records refers to Comp Choice. Young stated that she did not contact the offices of Drs. Schlesinger, Saer or Bruffett when trying to set up an evaluation for Claimant. However, she later contacted Dr. Schlesinger's office. To the extent that the records detail Waggoner's reports regarding efforts to schedule with Drs. Bruffett and Saer, those are her efforts and not Young's. Nurse case managers are hired to coordinate medical care for claimants. Young testified that she did not actually schedule any of Claimant's evaluations.

Young stated that the claim was initially accepted as compensable, and medical benefits were paid. At no point did she have any medical documentation indicating an off-work status. Temporary disability benefits were never paid. On October 5, 2005, Dr. Brown referred Claimant for a neurological evaluation. At that point, Young assigned Waggoner to set up the evaluation. Dr. Brown had specified Drs. Saer or Schlesinger, but he did not indicate a preference for either. Waggoner got the file on October 5, 2005 and talked to someone at Dr. Saer's office the next day. According to the records, she talked to the office several times, attempting to coordinate an evaluation.

Respondent AIG approved the evaluation. The records were faxed to Dr. Saer. Nothing in the file indicates that the records were to be directed to Dr. Bruffett as opposed to Dr. Saer. At the time Young took over this claim, she had just arrived in Arkansas. So at the time, she had no opinion of any of the doctors. In her experience, in cases where a claimant is referred to a specific doctor for a neurological consultation but that physician cannot see the claimant for whatever reason, the use of another doctor is approved. Generally, this does not create a problem. The records indicate that Waggoner received a call from Dr. Bruffett's office stating that Claimant was scheduled to see him on November 4, 2005. It was the next day when Young received notice that Claimant had retained an attorney. Claimant did not keep that appointment; instead of cancelling it, however, he simply failed to show up. Thereafter, Waggoner attempted to reschedule the evaluation. Both Claimant and his counsel were notified of the appointment. However, Claimant again failed to keep the appointment. To Young's knowledge, he simply failed to show up.

After Young had determined to either close the file or put it on hold until more information was received, Respondent AIG ultimately approved an evaluation of Claimant by Dr. Schlesinger. This was done to get the matter moving again. Claimant saw Dr. Schlesinger on April 5, 2006. The epidural steroid injections were approved. However, the TENS unit was not approved because Dr. Schlesinger's note "listed a lot of degenerative, rheumatoid, and non work related diagnos[e]s, and [Young] just needed him to clarify," specifically with regard to why a cervical MRI was needed when the injury concerned Claimant's lumbar region. While she received a diagnosis from Dr. Schlesinger, Young never received justification for the myelogram or the TENS unit. However, Young stated that if she were to receive justification from Dr. Schlesinger or an IME doctor indicating that the TENS unit was needed for an acute injury, she would approve it. However, if the records indicated that it was for a degenerative condition, it would not be approved. Young stated that she wrote Dr. Schlesinger in August 2006, asking for records supporting his telephonic request for a myelogram. No response was received until January 2007, but the response still did not contain a justification.

At that point, according to Young, either she or Waggoner attempted to schedule Claimant for an independent medical examination. An evaluation was scheduled in February 2007 with Dr. Shahim, but Claimant failed to show at the appointment. Young stated that she did nothing differently in this claim than she has done in others. She always uses a nurse case manager to assist in coordinating doctor referrals. It is the policy of Respondent AIG to have documentation in hand to support the need for specific diagnostic tests or treatment. When such documentation is not forthcoming, Young normally requests a second opinion evaluation or an independent medical evaluation.

Young stated that prior to the problem with receiving justification, Claimant was not compliant with his prescribed care. He missed appointments with both Dr. Brown and with the physical therapist. There was a gap in his care due to his refusal to see Dr. Bruffett. Moreover, Claimant has never returned to see Dr. Schlesinger.

With regard to referrals, Young testified that it is not the practice of Respondent AIG to notify a claimant's attorney each time a referral is made, nor are attorneys contacted to authorize each appointment. Young stated that she did not have any reason to believe that there was going to be a problem with scheduling an evaluation with one of Dr. Saer's partners if the partner could be seen more quickly. Claimant on September 5, 2005 complained of pain radiating into both legs, and rated his pain as 8/10 when seen by Dr. Schlesinger on April 5, 2006. She stated that it is a common practice to do this when the claimant is having pain. While she knew that Claimant's counsel had instructed him not to keep the appointment with Dr. Bruffett, she did not know why. As for the independent medical evaluation, Young stated that Respondents requested a hearing regarding their right to get an independent medical evaluation after Claimant's counsel informed them that Claimant would not go to the IME scheduled with Dr. Shahim on February 27, 2007.

Scott Bowden. Claimant testified that he is 36 years old. He stated that his only previous back injury was a pulled muscle in 1995 or 1996. In February 2005 he injured his back while working for working for Holiday Inn. He reported the injury. The morning after this, he went to the emergency room, with his employer's knowledge. From there, he was referred to Dr. Brown. He was referred to Dr. Schlesinger, whom he ultimately saw in February 2006.

Claimant stated that he did not keep certain appointments with Dr. Brown because the doctor wanted cash up front to treat him. Respondents had not been paying Dr. Brown. The bills from Dr. Brown came to his house and he took them to Christy Millsaps. Eventually, the bills were paid, and Claimant continued to treat with Dr. Brown.

Claimant testified that he has tried to do what his doctors have told him. After he saw Dr. Schlesinger, he had some shots and some physical therapy. He also received a traction unit, but was not given instructions regarding how to use it. However, Claimant stated that he has never received a TENS unit.

According to Claimant, his last day working for Respondent Noble was August 20, 2006. At the time, he was working regular duty. He testified that he was terminated “[f]or being late on the day that I wasn’t even scheduled for.” He volunteered to work as a cook on a day when one was not scheduled. Before the shift was to begin, he went to Little Rock to visit his hospitalized brother. While returning to Russellville, where he was employed, he experienced car trouble. Claimant stated that he contacted his employer at 4:00 a.m. that day and told them that he would be there as soon as possible. While he needed to be there at 5:00 a.m., he did not arrive until shortly before 7:00 a.m. When he arrived, the kitchen supervisor, Wade Turnipseed, had everything ready. The Monday after this incident, the kitchen supervisor contacted him by phone and terminated him. He told Claimant that the general manager had instructed him to do so.

At the time this occurred, Claimant’s job was to cook for the lunch buffet. He testified that he did not have a set time to arrive at work. Until this incident, according to Claimant, he had never been disciplined while working for Holiday Inn, despite the fact that he had worked there off and on for ten years.

Claimant testified that he returned for work for another employer on January 15, 2007. He stated that he is still having back problems. He is still experiencing numbness and pain radiating down his legs, with the condition being worse in his left leg. Claimant stated that he is satisfied with the treatment he received from Dr. Schlesinger and wishes to continue with whatever he suggests.

When questioned by Respondents, Claimant did not dispute Young's testimony regarding efforts to set Claimant up for a neurosurgical evaluation or his failure to show up for the appointment. Claimant admitted that he knew of the appointment with Dr. Shahim for February 27, 2007, but that he declined to attend on the advice of his counsel. He stated that he has not agreed to undergo a second opinion evaluation or independent medical evaluation. He agreed that everything that had transpired with Dr. Schlesinger had been discussed at the hearing.

Regarding his termination, Claimant denied that he was chronically late for work. He disputed Holiday Inn's representation to the Arkansas Department of Workforce Services that he had been late 128 times. He admitted that he may have actually called in around 4:40 a.m. the morning that he was scheduled to be there at 5:00 a.m., and that it was not in compliance with the policy to call in two hours early. Claimant stated that he was in Conway at the time of the call. After his termination, he applied for unemployment benefits.

On January 15, 2007, Claimant went to work soliciting donations for Special Olympics. He works 35 hours a week at \$7.75 per hour. He denied working at the North Forty Supper Club any time after 2000.

As for the reference in his medical records to a second fall that occurred in August 2005, Claimant did not file a separate claim. He stated that he did not file an incident report

because he did not know where the forms were and no one was there. Also, the person in the office was new.

Christy Millsaps. Called by Respondents, Millsaps testified that she is the Guest Service Manager at the Holiday Inn. She held this position on February 21, 2005, and is familiar with Claimant. While she was not the direct supervisor of Claimant, she was aware from the records that he was late 128 times from November 24, 2004 to August 21, 2005. Millsaps stated that employees are required to call three hours prior to the beginning of a shift to inform the employer that one is going to be late. On August 21, 2005, Claimant did not call in until 4:40 a.m., which violated the policy because his shift was to begin at 5:00 a.m. She testified that Claimant was not terminated because of his workers' compensation claim.

Millsaps also testified that she witnessed Claimant work since February 21, 2005 at the Seven Forty Supper Club. She saw him filling an ice bin and carrying a large bucket of ice, and did not observe him having any physical problems while doing so. She spoke with him. When he was not working, Claimant was sitting in a chair at the end of the bar.

When questioned by Claimant, Millsaps confirmed that no cook was scheduled to work on August 21, 2005. She also stated that she could not locate in his personnel file where Claimant was disciplined for any of the 128 instances where he was late for work. His morning arrival time was a matter of common practice.

Records

Claimant's Exhibit 1. This exhibit (a substantial portion of which is also in Respondents' Exhibit 1) contains notes and related documents from the nurse case manager, Carolyn Waggoner, and reflects the following:

On October 5, 2005, Waggoner noted that Dr. Brown wanted Claimant referred to either Dr. Saer or Dr. Schlesinger. She stated that the case manager would set up the referral, but that some records and the MRI report were missing. Her records indicate that Claimant reported that he slipped and fell in the kitchen at the Holiday Inn on February 21, 2005. He experienced a little pain, but got up and continued to work. He was unable to work the next day. He began to experience excruciating pain above the buttocks and radiating into both legs, which rendered him unable to move. On October 6, 2005, the scheduler for Drs. Saer and Bruffett were contacted to determine how far out they are scheduling. Bruffett was scheduling November 14, 2005, and Saer was scheduling November 1, 2005. A letter was sent to Dr. Bruffett regarding the claim on October 10, 2005, requesting that he evaluate Claimant. On October 13, 2005, Dr. Saer's office was contacted to determine if he had yet reviewed Claimant's records. Contacts with Dr. Saer's office regarding scheduling an appointment for Claimant were attempted on October 17 and 18. On October 20, 2005, Waggoner contacted the adjustor to see if an appointment with Saer could be scheduled for the first week of November, 2005. Waggoner noted that the adjustor had questioned the injury. That day, the person with Dr. Saer's office stated that she had given the appointment request to Dr. Bruffett's office for approval to schedule an appointment. On October 24, 2005, Dr. Bruffett's office scheduled patient to see him for an evaluation on November 4, 2005. On November 7, 2005, it was discovered that Claimant did not keep the appointment. After numerous attempts to reach him, Claimant was contacted on November 15, 2007 and stated that his attorney instructed him not to keep the appointment. The appointment with Dr. Bruffett was rescheduled for December 16, 2005. Claimant's counsel was informed by letter on November 18 about the

appointment. The day before, Claimant canceled the appointment. When Young was asked for advice because "Dr. Bruffett cannot put patient at MMI without first seeing the patient," Young told her: "I would just try and get him to release him and make him MMI."

Claimant's Exhibit 2. This exhibit includes notes and related documents from Comp Choice and reflect the following:

Dr. Schlesinger's office was contacted regarding Claimant on October 31, 2006. The office stated that Claimant had not been seen there since June 14, 2006, when he received an epidural injection. Dr. Schlesinger was contacted by letter on November 28, 2006 to see if Claimant was at maximum medical improvement. His office did not report receiving the letter, so another letter was sent on December 22, 2006. A TENS unit and a traction unit were ordered around January 5, 2007. It appears that they were approved on that date. Dr. Schlesinger's office contacted Waggoner on February 26, 2007 and informed that Claimant had stated that they have been trying to schedule a follow-up appointment with Dr. Schlesinger but had been unable to do so because of no return call from the office. Waggoner stated that she knew nothing about this, but Claimant was scheduled to have an IME on the next day, February 27. Dr. Schlesinger's office then informed Waggoner on March 2, 2007, that Claimant's attorney wanted Claimant to return to Dr. Schlesinger.

The exhibit also includes an undated handwritten MRI report for Claimant from ProScan Imaging and reads:

Lumbar MRI

L4-5--BBB + mixed right foraminal protrusion which abuts exiting right L4 nerve[.]

L5-S1--BBB + 7mm left paracentral disc extrusion which effaces descending left S1 nerve[.] Exiting left L5 nerve is also effaced.

On November 28, 2006, Waggoner wrote Dr. Schlesinger to ask that, since Claimant apparently had not been seen by him since June 14, 2006, he address maximum medical improvement relating to Claimant's low back treatment. This letter was faxed on more than one occasion. On December 4, 2006, Dr. Schlesinger replied:

I am writing in response to your letter of November 20 [sic], 2006 . I have not seen the patient since May 2006 after a couple of epidural steroid injections. However, my office staff called him today and he says he lost his job due to his back condition. He says his back still hurts and radiates into his legs. Therefore, I cannot really declare him at maximum medical improvement because of his continued suffering. We would need some finality here first.

On December 22, 2006, Waggoner followed up with a letter back to Dr. Schlesinger, which noted that he was unable to place him at MMI and that he had recommended a TENS and traction unit, along with an MRI of cervical spine, as of April 5, 2006. She asked a number of questions related to Claimant's condition. As before, this correspondence had to be faxed more than once. On January 23, 2007, Dr. Schlesinger responded (the response is located in Claimant's Exhibit 4, but is included here for continuity purposes):

I am writing in response to your correspondence of January 4, 2007. According to the patient's history, his symptoms are related to the injuries at work suffered approximately one year before I saw him in April 2006. Therefore, if the patient's history is accurate, then the symptoms would be related to the work injury. I cannot answer whether or not the pain is related to any non-organic or co-morbid conditions. This is impossible to tell. If the patient's history is accurate, I would state that a high percentage of the patient's symptoms are related to a work injury. I am only able to answer the above questions based on the history the patient provided me. Anything else would be conjecture and I am unable to make a guess in this nature. The patient called in June 2006 stating that he was continuing to have problems and I did suggest a myelogram be done at that time. To my knowledge, this has not been approved.

Claimant's Exhibit 3. This exhibit comprises documents related to Claimant's employment for Respondent Noble (these may also be found in Respondents' Exhibit 2).

In addition to schedules, there are documents related to his termination. A note from Wade Turnipseed dated September 7, 2005 states:

On Saturday, August 20, 2005, I received a phone call from the general manager letting me know that our breakfast cook, Scott Bowden, had not come in to work. This was at 6:40 a.m. The restaurant opens at 6:00 a.m. I was informed later that he had called at 4:40 a.m. to say that he was in Little Rock and on his way. Our call in procedure states that an employee must call in at least three hours before his shift. Scott arrived around 7:30 a.m., worked that day and the next, then was terminated on Monday.

Matt Coombs, the general manager, signed a note the same day as Turnipseed that reads:

I was notified on August 20th @ 6:30 am that Scott Bowden had not showed up for his shift at [5:00 a.m.] I was told that Scott had called at 4:40 am to say he was in Little Rock and was trying to come to work and was on his way. Little Rock is a 1 hour drive from Russellville. At 7:30 am I got a phone call that he was at home and wanted to know if he should continue and come in to work. I then turned the phone call over to his supervisor Wade Turnipseed to handle. In order to not upset a hotel full of guest[s] who were coming into the restaurant for breakfast his supervisor made a dash to the hotel to prepare breakfast for our guest[s].

An "Employee Reprimand Notice" dated August 22, 2005 and signed only by Turnipseed reflects that in addition to failing to follow proper call-in procedure and to notify a supervisor when unable to work, Claimant was accused of being "always late to work as scheduled."

Claimant's Exhibit 4 and Respondents' Exhibit 1. These exhibits, which contain the majority of Claimant's medical records, reflect the following:

On October 4, 2002, Claimant presented to the Millard-Henry Clinic in Russellville with complaints of severe back pain at L4-5 that he attributed in part to a slip at work. He was assessed as having lumbar strain.

An x-ray of his lumbar spine taken on February 22, 2005, one day after the injury at issue, showed lumbar curvature but was otherwise unremarkable. When he presented to Dr. Bruce Brown on March 8, 2005, he reported that he injured his back in a fall two weeks

before at the Holiday Inn. He described having pain, spasms, and decreased range of motion. He denied having any previous back injury. He was diagnosed as having a probable herniated disc with muscle spasm and mild scoliosis secondary to spasm. An MRI performed on March 21, 2005 showed disc dessication at L4-5 and L5-S1, with the latter being more severe. Disc herniation was found at L5-S1 on the left and paracentral, which mildly effaced the thecal sac but did not significantly displace the S1 nerve root. On June 20, 2005, Dr. Brown noted that he had not seen him since March. Dr. Brown wrote that “[h]is MRI did demonstrate an L5-S1 disk,” but did not specify the problem. He recommended physical therapy. On July 15, 2005, Claimant reported that the therapy was helping, although he was still having some left leg pain. On August 4, 2005, he stated that he was still having occasional back pain, but that it was radiating more into his right leg than into his left. He also reported that the physical therapy was helping him. On August 31, 2005, he reported that he had another fall at work and was experiencing increased pain. Dr. Brown stated that he was improving until this episode and that he did not improve in four weeks, surgery would be considered. When he returned to Dr. Brown on September 29, 2005, he was still having pain that was radiating to both legs. Because he did not seem to be making much progress with conservative treatment, Dr. Brown stated that he was referring him to be evaluated for possible back surgery.

Claimant saw Dr. Scott Schlesinger. His April 5, 2006 report reflects that he conducted a neurological examination and reviewed Claimant’s MRI, which he noted showed degenerative changes at L4-5 and L5-S1 along with a right L4-5 disc herniation and a left L5-S1 disc herniation, with both abutting adjacent nerve roots. Dr. Schlesinger stated that his findings comported with the radiologist’s interpretation of the MRI. The doctor

recommended that conservative treatment should be used at first, to include a lumbar epidural steroid injection along with a traction unit and a TENS unit. Because Claimant also complained about intermittent numbness and tingling in the upper extremities, Dr. Schlesinger also recommended a cervical MRI.

Claimant underwent lumbar epidural steroid injections on April 19, 2006 and May 15, 2006. He reported that he was feeling much better, and that the first injection helped to significantly decrease his pain. He underwent a third injection on June 14, 2006.

Respondents' Exhibit 2. This exhibit contains a number of non-medical documents. A judgment and commitment order reflects that on September 7, 1999, Claimant pled nolo contendere to, *inter alia*, one count of theft of property and was given a 36-month suspended sentence.

The exhibit also includes a statement to the Arkansas Employment Security Department regarding the circumstances of Claimant's termination, and the Department's finding that he was discharged for being late to work.

An investigative report dated January 30, 2006 reflects that surveillance was conducted on January 20 and 28, 2006 of Claimant's residence and the North Forty Club in Russellville. On both days, the investigator, according to the report, discovered from "an area canvass" that Claimant worked at the club. On the 28th, according to the investigator, "an activity check was conducted and it was learned that the claimant was scheduled to work this evening [at the club], but had called in sick."

On January 9, 2007, Respondents' counsel sent a letter confirming that Respondents have approved the TENS and traction units. On that same date, Claimant's counsel wrote Dr. Schlesinger, informing him that the medical procedure he wanted to perform has not

been allowed because he has not produced a medical report detailing exactly what medical procedure is needed and how it relates to Claimant's work-related injury.

ADJUDICATION

A. Temporary Total Disability

At the hearing, the following colloquy occurred regarding this issue:

[CLAIMANT'S COUNSEL]: I can state that we are requesting temporary total disability benefits from the date last paid, January 1, 2007. I mean up to January 1st, 2007. And I thought I had written down here the date last paid, but [Respondents' counsel], I'm sure you have that.

[RESPONDENTS' COUNSEL]: They've never been paid.

[CLAIMANT'S COUNSEL]: Well, then it would be the date that he last worked, which would be August 21st of '06 through January 1st of '07.

Claimant's counsel misspoke. The evidence unquestionably showed that Claimant last worked for Respondent Noble on August 21, 2005; he was terminated the next day. Hence, Claimant is apparently seeking temporary total disability benefits from August 21, 2005 to January 1, 2007.

Claimant's back injury is an unscheduled one. See Ark. Code Ann. § 11-9-521 (Repl. 2002). 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 has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. 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 determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Claimant must prove by a preponderance of the evidence that he was still in his healing period and unable to work after August 21, 2005. *See Breshears, supra.* He has failed to do so. The evidence adduced at the hearing shows that as of August 21, 2005, Claimant was working at full duty at his job. In fact, he volunteered to come in and work the previous day, when he failed to show up for work on time. The change in circumstances that he underwent on August 22, 2005, was to his employment status—he was terminated—and not to his medical condition. Despite the extensive documentary evidence and testimony that was offered at the hearing regarding the circumstances surrounding his termination, the fact remains that he is not alleging that he was wrongfully terminated. Moreover, the evidence does not show that the termination was related in any way to the instant claim. The testimony of Christy Millsaps and the surveillance report introduced by Respondents are of limited value with regard to this issue. They do not show that Claimant was working at the North Forty Club during the period for which he is seeking temporary total disability benefits. However, this does not impact my ruling. Finally, there is nothing in Claimant's medical records to indicate that he was incapable to any degree of earning a wage. Hence, Claimant has not proven by a preponderance of the evidence his entitlement to temporary total disability benefits during the period at issue, or any portion

thereof. See *Hardin v. Holiday Inn-Airport*, 2007 AWCC 90, Claim No. F510183 (Full Commission Opinion filed July 25, 2007).

Reasonable and Necessary Medical Care

Claimant asserts that he is entitled to additional medical treatment related to his compensable low back injury. He states that he wishes to follow through with the care recommended by Dr. Schlesinger, and contends that he has not been provided a TENS unit, physical therapy, and additional medical testing. Arkansas Code Annotated Section 11-9-508(a) provides that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

The Commission is authorized to accept or reject medical opinions. *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000).

Respondents contend that Claimant has not been examined by Dr. Schlesinger for a number of months, calling his recommendations into question. They assert that they have repeatedly attempted to schedule Claimant for an independent medical evaluation, but that

he has refused to attend. Respondents are requesting the Commission to order “a second opinion or IME in order for a physician to address Claimant’s current need for treatment and his healing period.”

As discussed *infra*, I believe that Respondents’ contention that a IME should take place is well-founded. However, were I to rule at this point on the issue of Claimant’s need for further treatment, the IME issue would be moot. The Arkansas Court of Appeals has previously held that it is an abuse of discretion by the Commission to reserve an issue that would serve no other purpose than to allow the claimant a “second bit at the apple” by giving the claimant an another opportunity to present evidence substantial enough to prove a claim. See *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991). That is distinguishable from the situation at bar. Here, Respondents agree that this issue needs to be further developed. Consequently, this issue will be reserved.

B. TENS Unit

Notwithstanding the above decision, it is appropriate at this point to address the matter of the TENS unit. Respondents have not controverted Claimant’s entitlement to a TENS unit. Rather, they merely contended at the hearing that they have already provided it to Claimant. Witness Judy Young testified that the request for a TENS unit was not initially approved because documentation was needed from Dr. Schlesinger to show that it was for the treatment of Claimant’s compensable low back injury. However, she testified, and the documentary evidence supports, that the unit was ultimately approved. While Young stated that it was her belief that a TENS unit had been sent to Claimant, she admitted that the unit would have been shipped directly from the supplier to Claimant and she would thus not know if it had not been delivered unless the Claimant informed her.

Claimant was adamant in his testimony that while he had gotten a traction unit, he had not received a TENS unit. Respondents pledged at the hearing to check further into the matter.

On July 23, 2007, Respondents' counsel wrote a letter, stating in pertinent part:

As promised, the adjustor went back to Direct DME after the hearing in this matter to find out about the TENS unit. According to their billing records, they had been charged upwards of \$1,000 from that company but it was not clear what they were charged for. According to Terry, an employee at Direct DME, that charge that AIG paid was for a traction unit. They have never been given a prescription for a TENS unit from the claimant's treating physician. She indicated that the prescription they received from Dr. Schlesinger was simply for the traction unit, which was provided to the claimant.

This letter has been blue-backed to the record. After consideration of this matter, I find that Claimant has not received the TENS unit, despite its approval by Respondents.

C. Independent Medical Evaluation

Respondents contend that Claimant should undergo a second opinion or an IME in order to allow a physician to address whether Dr. Schlesinger's recommended treatment relates to Claimant's low back injury of February 21, 2005, and whether he has reached the end of his healing period. In addressing this issue, Ark. Code Ann. § 11-9-511 (Repl. 2002) provides:

(a) An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the Commission may require from time to time if reasonable and necessary.

(b) The places of examination and treatment shall be reasonably convenient for the employee.

(c) Such physician as the employee, employer, or insurance carrier may select and pay for may participate in the examination if the employee, employer, or insurance carrier so requests.

(d) In cases where the commission directs examination and treatment, proceedings shall be suspended, and no compensation shall be payable for

any period during which the employee refuses to submit to examination and treatment or otherwise obstructs the examination or treatment.

(e) Failure of the employee to obey the order of the commission in respect to examination or treatment for a period of one (1) year from the date of suspension of compensation shall bar the right of the claimant to further compensation in respect to the injury.

See generally Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997)(Arey, J., concurring).

In determining whether to order an IME under this provision, the threshold question is whether the proposed examination is reasonable and necessary. *See King v. Willow Oaks Acres*, 2001 AWCC 16, Claim No. E903202 (Full Commission Opinion filed January 25, 2001)(citing *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1980)(construing earlier provision of § 11-9-511 found in Ark. Stat. Ann. § 81-1311)). In the claim at bar, Claimant's physician, Dr. Schlesinger, has recommended a myelogram, physical therapy, and a cervical MRI (Claimant's diagnosis is of a low back injury). However, some time has passed since he made those recommendations. In addition, Claimant was found by Dr. Schlesinger to have degenerative changes in L4-5 and L5-S1. Respondents repeatedly contacted him in writing to see if Claimant was at MMI and whether his proposed treatments were related to his February 2005 injury or instead to his degenerative condition. On December 4, 2006, Dr. Schlesinger wrote that he could not place Claimant at MMI, but only because of his subjective complaints of pain. As for the bases for his treatment recommendations, on January 23, 2007 he wrote that his opinion that Claimant's symptoms were related to the work injury was based solely on the patient's history, and that "[a]nything else would be conjecture and I am unable to make a guess in this nature." However, he did opine that if Claimant's history were accurate, the symptoms

were related to his work injury. He further stated that it would be “impossible to tell” if Claimant’s pain was “related to any non-organic or co-morbid conditions.” Finally, Dr. Schlesinger stated that his recommendation of a myelogram was based on a call he received from Claimant where he complained of continued problems. On the bases of the foregoing, I concur with Respondents that an IME is needed to resolve the issue of whether Dr. Schlesinger’s treatment recommendations are reasonable and necessary.

If the proposed examination is determined to be reasonable and necessary, under § 11-9-511 it is for the Commission to *designate or approve* a physician. See *King, supra*. Respondents attempted on two occasions to send Claimant to Dr. Wayne Bruffett for an evaluation in late 2005. However, Claimant refused to attend on the advice of counsel, and it was made clear at the hearing that his counsel does not wish for his client to see Dr. Bruffett. He was scheduled for an evaluation by Dr. Reza Shahim on February 27, 2007. Again, Claimant refused to attend on the advice of counsel. After consideration of this matter, Claimant is directed to submit to an IME by Dr. Shahim. This evaluation shall be conducted in accordance with § 11-9-511.

CONCLUSION

As recounted above, I find that Claimant has failed to meet his burden of proving that he is entitled to temporary total disability benefits. As to whether he is entitled to the treatment recommended by Dr. Scott Schlesinger, I find that this issue should be reserved, and that Claimant should submit to an independent medical evaluation by Dr. Reza Shahim, with such evaluation to be conducted pursuant to Ark. Code Ann. § 11-9-511. Finally, I find that Claimant has not received a TENS unit, despite its approval by Respondents.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge