BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F504189

TOM N. PIERZCHALSKI, EMPLOYEE	**CLAIMANT**
MOUNTAIN HOME MFG., INC., EMPLOYER	**RESPONDENT**
CYPRESS INSURANCE CO, CARRIER	**RESPONDENT**

OPINION FILED AUGUST 20, 2007

Hearing before Administrative Law Judge O. Milton Fine II on June 6, 2007, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

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

STATEMENT OF THE CASE

On June 6, 2007, the above-captioned claim was heard in Mountain Home, Arkansas. A pre-hearing conference took place on April 9, 2007. A 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 set forth in Commission Exhibit 1, which I accept. With the third added at the hearing, 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 April 8, 2005.

3. Respondents have controverted any further treatment of Claimant by Dr. Rebecca Barrett-Tuck.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Claimant clarified that he is reserving all issues in connection with the injuries that arose out of the April 8, 2005 incident except for the following:

1. Whether the Claimant is entitled to an additional MRI as recommended by Dr. Rebecca Barrett-Tuck.

Contentions

Claimant

1. The Claimant contends that he sustained a compensable injury to his neck arising out of and in the course of employment and is entitled to the MRI recommended by Dr. Tuck to determine his future medical care and to determine if he is a surgical candidate due to the injury to his neck and to his right shoulder that he sustained on April 8, 2005. Claimant contends that he is entitled to all related workers' compensation benefits.

Respondents:

1. Respondents contend that the Claimant was injured on the job and that all appropriate benefits have been paid.

2. Respondents further contend that another MRI is not reasonable or necessary.

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. Claimant has not proven by a preponderance of the evidence that he is entitled to an additional MRI recommended by Dr. Rebecca Barrett-Tuck.

CASE IN CHIEF

Summary of Evidence

______Three witnesses testified at the hearing: Claimant; Jody Lee Crawford, the girlfriend of Claimant; and Ernest Pierzchalski, the father of Claimant.

In addition to the prehearing order discussed above, also admitted into evidence in this case was Claimant's Exhibit 1, medical records of Claimant, consisting of two index pages and 62 separately numbered pages.

Testimony

Tom Pierzchalski. Claimant testified that full name is Thomas Neal Pierzchalski. He is 35 years old, single, and has a high school diploma. Claimant stated that he worked for Respondent Mountain Home Manufacturing (hereinafter "MHM") as a laborer for three

and a half years. On April 8, 2005, he was leaning over a work table to pick up a steel door frame when he felt a very sharp pain and pulling in the area where his shoulder joins the neck. He stated that it felt like a "pinch" at the time it occurred, and that ever since, he has experienced pain that progresses from mild to severe rather easily, especially if he lifts anything or moves around too much. Claimant has not been able to work since April 2005, and is helped financially by his father and girlfriend, with whom he lives. He testified that he stands six feet, six inches tall and weighs 195 pounds.

He has seen Drs. Osgood and McBride for his injury. Claimant has also seen a pain management specialist, Dr. Kevin Spence, who gave him two epidural steroid injections. However, Dr. Spence did not recommend a third because they were not helping. Dr. McBride sent him for an MRI and referred him to doctors in Little Rock for surgery. Dr. Wilbourn scheduled him for a surgical evaluation with Dr. Mason, a neurosurgeon. However, prior to that time he was sent by Respondent carrier to Dr. Baskin, who released him to return to work. Claimant still saw Dr. Mason, who recommended surgery. Respondent carrier also referred him to Dr. Saer, who obtained an MRI of Claimant's shoulder and determined that the shoulder was not the cause of his problems. The MRI also did not show any significant findings regarding his neck. According to Claimant, Respondent carrier refused to cover the surgery. Instead, Claimant retained counsel and went to see Dr. Rebecca Barrett-Tuck. She recommended that Claimant undergo another MRI, but the Respondent carrier has refused to cover it.

Claimant testified that it has been "[a]bsolutely horrible" to deal with the adjustors since his accident. He described his current condition as follows:

> It's pain every day. If I do anything, any activities, it's worsened. I've lost sleep over it. My girlfriend could definitely testify to that. I've lost many hours of sleep over it, where I can't sleep at all. I have to put an ice pack on. I take Ibuprofen like candy, and I hate taking anything for the pain. It's the only thing that will help me sleep occasionally. I used to be very active, and my activities have dropped to nil. All I do is sit around and ready nowadays. I hardly get out to do anything. And when I do, any activities cause me pain. So I'm limited to do the least I can get away with doing, the least I can do.

Claimant clarified that he is in constant pain, but activity exacerbates it. Prior to the accident, he worked 60 to 70 hours per week in a physically demanding job. In addition, he went canoeing and worked out in his spare time. But his injury has made him adopt a sedentary lifestyle.

On cross-examination, Claimant testified that after he accident, he went on his own to a chiropractor. The chiropractor treated him two or three times, and recommended that he see an orthopedic surgeon. Through Respondent carrier, Claimant was set up to see Dr. McBride. He underwent an MRI on May 3, 2005. He underwent physical therapy and steroid injections, but neither helped. He admitted that he told Dr. Wilbourn that he wished to do everything possible to avoid surgery. But he stated that he "want[s] to be fixed at whatever cost," and has been told that surgery is probably his only solution. Claimant testified that Dr. Barrett-Tuck has not recommended surgery–she has requested an MRI in order to evaluate him. He has seen her only once, and he requested a change of physicians to her because Dr. Baskin released him to full duty with a limited impairment rating. Claimant said that Respondent MHM "had to fire" him because they had no light duty work.

He stated that he has undergone three MRIs of his neck and one of his shoulder. The neck MRIs have been consistent, and the one of his shoulder was negative. In

addition, he has undergone a myelogram and a CT scan per Dr. Saer and an EMG and CV studies per Dr. Rutherford. He has also undergone a functional capacity evaluation. Claimant disagreed with the opinion in the FCE that he gave an unreliable effort and had inconsistent behavior. He has not tried to go back to any of the physicians that Respondent carrier directed him to.

On redirect, Claimant stated that he has not been told that he could go back to these doctors at the carrier's expense. He thought he could not return because he received a full release. Dr. Barrett-Tuck was his first chance of choosing his provider. He testified that he "absolutely" would be willing to have Dr. Mason or another surgeon operate on him.

Jodie Crawford. Ms. Crawford testified that she has known Claimant nearly four years, since before his injury. Before the accident, he was very physically fit and worked a lot of overtime. However, he is not able to be active anymore. He is in constant pain, and is not the same person, physically or mentally, that he was before. She stays with him when she is not at work.

On cross-examination, Ms. Crawford testified that she moved in with Claimant to take care of him after the accident, and that she supports him financially now.

Ernest Pierzchalski. Mr. Pierzchalski testified that he is Claimant's father. He stated that before the accident, Claimant was strong. He would go in early to work and chop wood. He worked 10 to 12 hours per day. Sometimes, he worked 60 to 70 hours per week, most of it for Respondent MHM. Now, Claimant can no longer play golf or go bowling. He cannot cast a fishing line, and can barely move furniture. The pain pills he

was taking caused him to have insomnia. Claimant was muscular before the accident, but no longer is.

Respondents called no witnesses.

Records

The medical records of Claimant that were introduced at the June 6, 2007 hearing and are part of Claimant's Exhibit 1 reflect the following:

On April 15, 2005, Claimant presented for treatment to Dr. Charles Osgood, a chiropractor. He stated that he had been treated in January 1995 for mild whiplash. He stated that his pain began on April 8, 2005 when he was lifting something at work. He presented with sharp pain in his right shoulder that was going upward into his cervical area. Movement aggravated the pain. He underwent a static EMG. C6 was found to be left lateral. T3 was subluxated left lateral. L5 was deviated in a right lateral direction. There was a posterior displacement of the left ilium, and severe pain at C6 and T3 bilaterally. He underwent, inter alia, spinal adjustment. Dr. Osgood assessed Claimant's condition as acute. When he again presented to Dr. Osgood on April 18 and 20, 2005, Claimant's condition had not improved. He again underwent spinal adjustment.

On April 26, 2005, Claimant went to Dr. Anthony McBride, an orthopedic surgeon. He represented that he was working for Respondent MHM lifting a 40-pound door frame on April 8, 2005, when he felt a pulling sensation in the back of his neck and shoulder region with an onset of pain. He described a constant burning sensation in the right posterior periscapular region, radiating towards the posterolateral right arm, along with occasional pain in his right forearm. X-rays from Dr. Osgood revealed no scoliosis, but "significant degenerative disk changes at C6-7 with anterior osteophyte formation noted."

Dr. McBride suspected a herniated nucleus pulposis, gave Claimant a trial of home cervical traction, and scheduled him for an MRI. He was released to light duty, with an eight-pound lifting restriction. On the bottom of the physician's certificate there is a note signed by a "Tony D'Angelo" and dated April 27, 2005, stating "No Light Duty Available[.]"

On May 3, 2005, Claimant underwent the MRI. Dr. Kyle McAlister read the MRI and reported the following:

> REPORT:
>
> Degenerative changes with thickening of the posterior spinous ligament is appreciated at multiple levels. A frankly herniated nucleus pulposus is not noted. On the axial images, there is effacement of some of the CFS anterior to the cord but I do not see a definite herniated nucleus pulposus. Early degenerative changes are noted.
>
> IMPRESSION:
>
> Early degenerative changes but a definite frankly herniated nucleus pulposis is not noted. There is some thickening of the posterior spinous ligament appreciated on these images but it is not definitely calcified. This is not causing marked central canal or neuroforaminal stenosis but it does efface some of the CFS anterior to the cord and there is mild narrowing of the neuroforamina on the right side at the C5-6 and C6-7 levels secondary to this thickening and mild bulging of the disks with bony spurring. No compression fractures are noted. The cord itself is essentially normal. The most pronounced bulging disk is at the C6-7 level and as mentioned above, it does indent the thecal sac slighly eccentric to the right.

Claimant returned to Dr. McBride on May 4, 2005. Based on the MRI, he opined that Claimant has a right-sided C6-7 disk herniation, causing lateral recess stenosis. He added that '"[t]here is no question in my mind that this is causing his right shoulder and arm pain." Claimant reported that the cervical traction was providing some relief, but that he was "miserable" and that the pain was slowly worsening. Dr. McBride added that he was referring Claimant to the Arkansas Spine Center "because I do believe he is going to

require a diskectomy and fusion." Dr. McBride took Claimant off work, pending his consultation appointment.

On May 10, 2005, Dr. McBride wrote the following to the adjustor:

> My office has provided you with my office visit notes as well as the report on the MRI of the cervical spine completed on May 3, 2005. In light of the fact that Mr. Pierzchalski reported a whiplash injury some twelve years ago following a motor vehicle accident, I was asked to give my opinion concerning the cause of his current condition.
>
> Mr. Pierzchalski has a right-sided C6-7 herniated disk, which I believe is an acute injury, a result of his on-the-job injury of April 8, 2005.

Claimant presented to Dr. Darin Wilbourn of Little Rock Spine and Joint Clinic, P.A. on May 11, 2005. He described feeling as if his neck has a "kink" in it. He described sharp pain in his right neck with pain radiating down his right arm to his hand. He also stated that he is experiencing numbness along the dorsal aspect of his right hand. Claimant stated that he is tired of the pain and anxious to return to work, and that he wished to do everything possible to avoid surgery. Dr. Wilbourn noted that the MRI showed bulging disks at C5-6 and C6-7 with narrowing of the neural foramen on the right. The doctor prescribed physical therapy, recommended him for an epidural steroid injection, prescribed Soma, Lorcet and Sterapred, and continued him off work. When he returned to Dr. Wilbourn on June 7, 2005, he was continued on this plan.

Dr. Kevin Spence saw Claimant on June 2, 2005 and recommended not only a steroid injection, but trigger point injection therapy into his right trapezius area.

On a follow-up visit to Dr. Wilbourn on June 21, 2005, he presented with increased pain in his neck along with stiffness and radiating pain into the right arm. The doctor noted that Claimant had missed five of ten therapy appointments. He recommended a second

steroid injection, that he continue physical therapy, and that he remain off work. When he returned again on July 11, 2005, he reported that the June 21, 2005 steroid injection only provided two days of relief. Dr. Wilbourn recommended a third injection and referred him to Dr. Zach Mason, a neurosurgeon, for an evaluation.

On August 9, 2005, Claimant was seen by Dr. Barry Baskin. He was referred to him by the claims adjustor, Bobbye Smith. Claimant informed Dr. Baskin that the door frame he was lifting on April 8, 2005 weighed 50 pounds, not 40 pounds as he told Dr. McBride. Dr. Baskin opined that the May 2005 scan was not of the best overall quality. However, in reviewing the MRI Dr. Baskin found some thickening of the posterior longitudinal ligament in the C5, 6, 7 area. He also found a bulge versus a protrusion of the C6-7 disk on the sagittal views. On the axial views, he found the cut to be slightly below the level of the central disk area and he also found a slight protrusion into the left lateral recess at C6-7, possibly causing some compromise of the neuroforamen. There was no frank canal stenosis. He also found that Claimant was doing home traction "exactly the opposite way he should be doing it." Dr. Baskin instructed him regarding the proper method of home traction. Also, he stated that "I think that it would benefit us to have another MRI scan and a higher field magnet . . . ." Based upon what he had seen thus far, Dr. Baskin opined that he doubted that Dr. Mason would recommend surgery.

Dr. Wilbourn's August 19, 2005 reflects that Claimant did not keep his August 3, 2005 appointment with Dr. Mason due to a transportation problem, which led to the carrier referring him to Dr. Baskin. The repeat MRI Dr. Baskin recommended was performed on August 12, 2005 at Baptist Health Medical Center in Little Rock and "show[ed] a broad-based medium-sized disc bulge at C6-7 extending into the right neural foramen." The

appointment with Dr. Mason was rescheduled. Dr. Wilbourn recommended that Claimant be evaluated and fitted for an RS Medical Sequential Muscle Stimulator, which he felt would be of more benefit than a TENS unit. He also continued Claimant off work.

When Claimant went to Dr. Baskin for a follow-up examination on August 30, 2005, the doctor noted that the MRI, when he stated was "a good quality," showed a broad-based disk bulge at C6-7, but no substantial foraminal stenosis and no canal stenosis. Because his condition had not changed and he had been off work for five months, Dr. Baskin referred Claimant for a functional capacity evaluation. He opined that Claimant "will probably have some minimal impairment but should be at a point of maximum medical improvement very soon given that he does not have a disc herniation." He again opined that Dr. Mason would not recommend surgery.

Claimant saw Dr. Mason on September 6, 2005. He stated that Claimant's MRI "confirms a right C6-7 disc herniation with nerve root compromise." He stated:

> In light that [sic] he has had extensive conservative management which has all failed and has positive findings, both neurologically and radiographic I have recommended that we proceed with surgical intervention of an anterior cervical diskectomy, arthrodesis and plating at C6-7. We will request authorization from CCMSI workmens' compensation/Bobbye Smith, to proceed and in the meantime I have recommended that he remain off work.

Dr. Wilbourn on September 16, 2005, recommended that Claimant follow through with Dr. Mason's recommended course of treatment.

On September 15, 2005, Claimant underwent an FCE. The examiner noted that Dr. Baskin diagnosed him as having a broad based disc bulge at C6-7. Based on the results of the FCE, the examiner opined that Claimant gave an unreliable effort, with 28 of 49

consistency measures within expected limits. He stated that Claimant's efforts during the testing were "very inconsistent." He noted the following:

> Mr. Pierzchalski demonstrates significant cervical AROM deficits with formal testing yet demonstrates only 10-15% gross limitation when performing other functional tasks. He demonstrated a very guarded stiffness of the cervical region with an intake interview and reports that active movement 'kills my neck.' He then proceeds to frequently roll his neck in all planes during functional aspects of testing with minimal ROM deficits. He is noted to have no apparent muscular guarding when he leaves the clinic as well.
>
> Mr. Pierzchalski also demonstrates very limited AROM of the right shoulder region. He demonstrates that he is unable to reach fully overhead with the RUE with shoulder range of motion testing. He then proceeded to not only exhibit full flexion of the right shoulder during overhead lifting, he was able to lift 15 lbs. to overhead level with his arm fully extended. Later, after demonstrating this ability, he was then asked to simply reach overhead and he exhibited only 75 degrees of shoulder flexion. He then stated that he couldn't even straighten his arm fully. He was then noted outside of testing to reach fully with no dysfunction [sic].
>
> Mr. Pierzchalski reports a very broad, non-specific area of pain with over-reaction to light touch throughout an area from his lower thoracic to the upper cervical region with palpable tenderness present even in his right pectoralis musculature. He had no palpable spasms present in the cervical region. He demonstrates indications of inappropriate illness response with pain reports of 9 with no facial expressions of pain. He also reported inappropriate pain (9) with pinch strength testing.
>
> Mr. Pierzchalski demonstrated minimal isometric strength with either UE with high C.V.'s. This alone indicates inconsistent effort. It is also totally inappropriate as he demonstrated good strength in his UE with dynamic lifting as indicated by his ability to lift up to 45 lbs. in the Left hand.
>
> Mr. Pierzchalski also exhibited a normal grip in each UE. This is inconsistent with his complaint of right hand grip strength loss. He also exhibited no biomechanical breakdown with lifting 50 lbs. and as compared to his individual UE lifting, indicates self limiting behavior.

Based on the FCE, the evaluator found that Claimant could work at least in the Medium work category over the course of an eight-hour day.

Claimant went to Dr. Edward Saer for a second opinion independent medical evaluation on December 2, 2005. He noted that x-rays of the cervical region showed slight narrowing and very mild degenerative changes at C6-7. The November 2, 2005 MRI revealed a small right foraminal disc protrusion at C5-6 and a small bulge at C6-7 on the right. Both discs had slight dessication. Based on his examination and the foregoing, Dr. Saer gave the following recommendation:

> I do not think surgery is a good option for this gentlemen. A lot of his discomfort is probably related to a soft tissue injury. His findings on MRI are really not impressive and I think a single level surgery at C5-6 is not likely to help him. He really does not have radicular pain and his disc abnormalities are pretty minimal.

Dr. Saer recommended that Claimant undergo EMG/MCV studies.

Dr. Reginald Rutherford performed an EMG on December 19, 2005. He found the nerve conduction study and needle examination to be normal. He recommended an MRI of Claimant's right shoulder. If that revealed nothing further, Dr. Rutherford recommended that Claimant undergo a cervical myelogram and a post-myelographic CT to rule out nerve root impingement.

The shoulder MRI was performed on January 17, 2006. Dr. Charles Pearce found: "There is rotator cuff tendinosis and, certainly, some fluid and a small paralabral cyst. However, Mr. Pierzchalski's pain does not correlate with this finding and I suspect this is incidental." Dr. Pearce recommended that Claimant undergo the cervical myelogram and a post-myelographic CT. Those were performed on February 9, 2006. Reading those, Dr. Saer found:

> [Claimant] does have a little bit of bulging at C5-6 that is pretty minimal, and also at C6-7. On the myelogram the bulge at C6-7 looks a little bit more prominent on the left side, but on the post myelogram CT it looks a little bit

> more prominent on the right. He has slight narrowing and early degenerative change at the C6-7 level also.

Based on the above, Dr. Saer opined that the C6-7 level was not the cause of Claimant's symptoms. He held to the view that the problem was most likely due to a soft tissue injury, and that surgery would not be particularly helpful. He recommended a more aggressive physical therapy program, and perhaps facet injections.

On February 18, 2006, Dr. Baskin examined Claimant's case in light of all the testing that he had undergone since last seeing him. He wrote:

> Since all of the tests have been negative with the exception of minimal disc bulging at C5-6 and 6-7 both more prominent to the right side, it would appear that no surgery is indicated in this gentleman's case.
>
> I do not see the need to reevaluate Mr. Pierzchalski at this time. There are not any objective findings in my opinion to support continued treatment and off work status at this time. Mr. Pierzchalski, in my opinion, should be at maximum medical improvement at this point with regard to his neck pain and reported neck injury. Mr. Pierzchalski should be able to return to full work duty with no restrictions. Mr. Pierzchalski does have bulging disc [sic] at 2 levels in the cervical spine. Given the fact that he does not have evidence of radiculopathy by EMG and nerve conduction studies and that by myelogram and post myelogram CT scan he is not felt to be in need of surgery, I think he can return to work and be at maximum medical improvement. He did not have pain prior to his work related injury that I am aware of. He would have a minimal impairment rating base on 2 bulging disc [sic] in the cervical spine. Using the AMA Guidelines Fourth Edition, page 113, table 75, category IIB, Mr. Pierzchalski would have a 5% impairment rating to the whole person based on unoperated stable medically documented neck injury and pain with associated rigidity with none to minimal degenerative changes on structural tests such as those involving MRI or CT myelogram. This gives him a 4% impairment rating based on 1 level and a 1% additional rating based on the second level, for a total of 5% impairment. This patient's complaint of left upper extremity pain is not consistent with a disc bulging at C5-6 and 6-7 to the right side of the cervical spine.

Claimant saw Dr. Rebecca Barrett-Tuck on October 30, 2006. He reported to her that he had lost sensation in the index fingers of both hands. She wrote:

> Mr. Pierzchalski underwent the MRI of the cervical spine a year ago. His myelogram and post myelogram CT scan was done in February. I am going to request an updated MRI of the cervical spine. I am hopeful that this new MRI will either show decrease in the disc protrusion or clearly show neural impingement. After that study I would like to meet once again with Mr. Pierzchalski and make a final recommendation for or against surgery. At this time, my feeling is that really neither of the opinions that were given are right or wrong, certainly Mr. Pierzchalski has had extensive conservative treatments and I understand that he does have a small disc protrusion and that it is possible that surgery will benefit him. On the other hand, the protrusion is small and there is a possibility that it will not benefit him. I will be seeing Mr. Pierzchalski back the day of his follow up MRI. I will review it and make definitive recommendation thereafter.

ADJUDICATION

Claimant asserts that he is entitled to additional medical treatment in the form of another MRI. 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). 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*.

As the evidence recounted above shows, Claimant has already undergone two MRIs–one on May 3, 2005 and the other on November 2, 2005. The second was performed at the recommendation of Dr. Baskin because of the dubious quality of the first. Dr. Baskin opined that the second MRI was of good quality, and nothing in the record indicates otherwise. Since the second MRI, physicians who have examined Claimant have generally come down in one of two camps: those who opine that his condition warrants surgical intervention; and those who are of the opinion that it does not. One of those in the latter group, Dr. Baskin, has opined that Claimant has reached maximum medical improvement and has released him with a five percent (5%) impairment rating to the whole body. I note in particular that in addition to the MRIs, Claimant has undergone a battery of other diagnostic tests, including an MRI of his shoulder, an EMG, a nerve conduction study, a myelogram, and a post-myelogram CT.

Since Dr. Baskin's release, Claimant has been granted a change of physician to Dr. Barrett-Tuck. She has not come down in either the pro or con camp regarding surgery. Rather, she states that Claimant has a "small disc protrusion" but feels that an updated

MRI should be done. She stated that he hopes that the MRI results will be more definitive than before, showing either a decrease in protrusion or neural impingement what course of action should be taken in Claimant's treatment. In *Brinkley v. Gateway Industrial Services, Inc.*, 2005 AWCC 128, Claim No. F207551 (Full Commission Opinion filed June 27, 2005), the Commission stated:

> However, we do not agree that the claimant is entitled to the medical treatment that a doctor recommends or additional medical studies when the claimant is granted a change of physician. The claimant must establish by a preponderance of the evidence that repeat tests are necessary and reasonable in connection with the compensable injury.

Claimant underwent a functional capacity evaluation that indicated that he is capable of working at the Medium work category over the course of an eight-hour workday. The FCE also found that he gave an unreliable effort during the evaluation. Claimant in his testimony denied that he gave an unreliable effort, and testified that he is still in constant pain and unable to undertake any activities because of it. However, I am not inclined to credit his testimony regarding either his performance at the FCE or his condition due to the repeated documented findings of unreliable effort in the FCE.

After weighing the evidence in the record, both testimonial and documentary, I find that Claimant has not proven by a preponderance of the evidence that he is entitled to another MRI under § 11-9-508(a).

CONCLUSION

As recounted above, I find that Claimant has not met his burden of proving that he is entitled to additional medical treatment in the form of another MRI as recommended by Dr. Barrett-Tuck.

IT IS SO ORDERED.

____

Hon. O. Milton Fine II
Administrative Law Judge