

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F604597

CHARLES ANDREW MANSON, EMPLOYEE	CLAIMANT
AMERICAN HOMEPATIENT, INC., EMPLOYER	RESPONDENT
SENTRY INSURANCE COMPANY, CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 10, 2008

Hearing before Administrative Law Judge O. Milton Fine II on March 12, 2008, in Russellville, Pope County, Arkansas.

Claimant represented by Mr. Gregg Knutson, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Billy Bird, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 12, 2008, the above-captioned claim was heard in Russellville, Arkansas. A pre-hearing conference took place on July 16, 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. Along with two additional stipulations reached at the hearing and the amendment of the second and third, they are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. Claimant sustained a compensable injury in January 2004.

3. Claimant was employed by Respondents in early 2004.
4. At some time in January 2004, while in the employ of Respondent, Claimant sustained an injury to the cervical spine while moving a hospital bed. On or about March 23, 2004, Claimant re-injured his neck while turning his head. Claimant was diagnosed with a cervical strain with right arm paresthesias by Dr. Ben Kriesel of Russellville, Arkansas.
5. An MRI of the cervical spine showed a C5-6 disc protrusion. Claimant was referred to Dr. Scott Schlesinger, a neurosurgeon in Little Rock, Arkansas. After seeing Claimant on April 16, 2004, Dr. Schlesinger did not recommend surgery, but instead referred him for physical therapy and performed three cervical epidural steroid injections. A second cervical MRI in June 2005 showed a posterior disc protrusion at C5-6 without cord effacement or compression. In August 2005, Claimant saw Dr. Darin Wilbourn of the Little Rock Spine and Joint Clinic. Dr. Wilbourn diagnosed him with a C5-6 posterior disc herniation and referred him to Dr. Christopher Mocek for possible percutaneous disk decompression.
6. On October 28, 2005, Dr. Mocek performed a percutaneous disc decompression of the C5-6 and C6-7 discs.
7. On March 28, 2005, Claimant was referred to Dr. Edward Saer of the Arkansas Specialty Spine Center in Little Rock, Arkansas. Dr. Saer did not believe Claimant needed additional surgical treatment and determined that he was at maximum medical improvement.

8. On April 18, 2006, Claimant underwent a functional capacity evaluation at the Functional Testing Center in Mountain Home, Arkansas. His functional capacity evaluation report indicated that he gave an unreliable effort and that true functional limitations could not be determined because he put forth inconsistent effort and demonstrated inappropriate illness responses.
9. On April 19, 2006, Dr. Wilbourn found Claimant to be at maximum medical improvement and determined that he could return to work without restrictions. Dr. Wilbourn assigned a whole body impairment rating of six percent (6%) related to the work injury of March 23, 2004.
10. Respondents have paid the aforementioned six percent (6%) rating.
11. Claimant's average weekly wage was \$494.00, giving him a temporary total disability rate of \$329.35 and a permanent partial disability rate of \$247.01.
12. Respondents controverted all further benefits after Dr. Wilbourn's release of Claimant on April 19, 2006.

Issues

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

The claim discrimination issue was withdrawn, leaving the following to be litigated:

1. Whether Claimant is entitled to additional temporary total disability benefits.
2. Whether Claimant is entitled to additional temporary partial disability benefits.
3. Whether Claimant is entitled to additional permanent partial disability benefits.
4. Whether Claimant is entitled to additional permanent total disability benefits.

5. Whether Claimant is entitled to additional medical expenses and treatment.
6. Whether Claimant is entitled to vocational rehabilitation.
7. Whether Claimant is entitled to attorney's fees.

Contentions

After each side finished questioning Claimant, I questioned the counsels about their contentions. That colloquy is at pages 72-82 in the transcript. The contentions of the parties from the prehearing order are as follows:

Claimant:

1. Claimant contends Claimant's entitlement to requested benefits is being investigated. Claimant notified Respondents that he required additional medical treatment and payment for additional medical expenses in 2006, which expenses Claimant contends were incurred within the applicable statute of limitations. Claimant also contends that he was wrongfully terminated. Claimant also contends that he requires vocational rehabilitation and has been unable to return to work involving physical labor. Claimant also contends that he is entitled to additional disability benefits.

Respondents:

1. Respondents contend that the claim was accepted as compensable and they have paid all monies due and owing, including all medical, hospital, and rehabilitation expenses, temporary total disability benefits, and the additional six percent (6%) rating to the body as a whole, and that Claimant is not entitled to additional benefits over and above the aforementioned paid monies.

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 witnesses and to observe their 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 this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from April 19, 2006 to May 23, 2006.
4. Claimant has not proven by a preponderance of the evidence that he is entitled to temporary partial disability benefits.
5. Claimant has proven by a preponderance of the evidence that he is entitled to an additional two percent (2%) whole body impairment rating over the six percent (6%) awarded by Dr. Wilbourn and accepted by Respondents.
6. Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled.
7. Claimant has proven by a preponderance of the evidence that he is entitled to a 12 percent (12%) wage loss disability benefit.
8. Claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment, reflected in Claimant's Exhibit 1,

Respondents' Exhibit 1 and Joint Exhibit 1, that he received from April 19, 2006 through May 23, 2006. Also, he has proven his entitlement to the epidural steroid injections he received in October and November of 2006 and to future prescriptions.

9. Claimant has not proven by a preponderance of the evidence that he is entitled to vocational rehabilitation.
10. Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).
11. The issues of whether Respondents are entitled to a credit and whether Claimant was authorized to return to Dr. Mocek were not raised at or before the hearing and hence will not be considered.

CASE IN CHIEF

Summary of Evidence

The witnesses at the hearing were Claimant and Michael Scott Cude. In addition to the prehearing order discussed above, also admitted into evidence in this case were Commission Exhibit 2A, Claimant's written summation dated March 19, 2008, consisting of four numbered pages; Commission Exhibit 2B, Respondents' written summation dated March 26, 2008, consisting of seven numbered pages; Claimant's Exhibit 1, a compilation of his medical records, consisting of a two-page index and 50 individually numbered pages thereafter; Respondents' Exhibit 1, a compilation of Claimant's medical records, consisting of a two-page index and 73 individually numbered pages thereafter; and Joint Exhibit 1, the

transcript of the deposition of Dr. Christopher Mocek taken March 11, 2007, consisting of 102 pages.

Testimony-Hearing

Charles Andrew Manson. Claimant testified that he is 35 years old, is a 1992 high school graduate, and made Cs and Ds in school. He has no post-secondary education.

In tracing his vocational history, he stated that he worked in the meat department of a grocery store during high school. This job required only physical labor—no paperwork. Thereafter, he worked for a crop-dusting company, loading fertilizer onto airplanes. This job involved manual labor only. This job ended with high school graduation. He next worked installing satellite receivers. In addition to climbing on ladders and under houses and digging trenches, he had to carry 80-pound bags of concrete. No paperwork was involved. The satellite job ended in 1998. From there, he went to work for Tyson Foods, loading 50-pound boxes of chicken into boxcars. Again, the job was strictly manual labor. Thereafter, he was employed at the Farmer's Co-op, where he loaded farming supplies weighing up to 50 pounds. He handled no money in connection with this position. After the Co-op, Claimant went to work for United Medical in 2001, delivering medical supplies and equipment. The equipment included hospital beds weighing from 60 to 100 pounds, depending on whether they were one or two-piece, and oxygen bottles weighing from 126 to 160 pounds. Claimant stated he handled up to 16 bottles and two beds per day. While the bottles could be moved with dollies, at times they had to be manually hoisted. He stated that the United Medical position required some paperwork—filling orders and signing off on what had been delivered.

According to Claimant, in 2001 or 2002 he went to work for Respondent American Homepatient. He described the job as being similar to the one at United Medical. One day a week was the "liquid route," when oxygen bottles were delivered. Claimant drove a van as part of this job. Sometimes he had help in delivering and setting up equipment, and sometimes he did not.

Claimant stated that he was injured on or around March 23, 2004, while working for Respondent American Homepatient. Under further questioning, Claimant testified that he may be incorrect about the date of the injury—that it may have been prior to March 23. He described the incident in question as follows:

I was delivering a hospital bed in Plainview, walking up stairs. I was on the foot part of it, which is the heaviest part. I turned to open the door, and my back popped. I went back to sit in the van for a little bit, went ahead and set the bed up, got back and told Jesse Whitlock and Mike Cude at the—and I don't—I don't remember if I signed anything.

But after that, I was standing at the back door talking to Jesse, turned around and my back popped again. And, I mean, it pretty much took me to my—almost to the ground, and I went and told Mike, and he set up—he told me to go see Dr. Ben Kriesel. They called my wife. She come over—took off work, come over and took me over there.

Dr. Kriesel took some x-rays and an MRI, and tested Claimant for nerve damage. He referred him to Dr. Scott Schlesinger, and Claimant was started on physical therapy by Dr. Kriesel. He placed Claimant on light duty, with a 10 or 15-pound lifting restriction, the day after the accident, when he returned to work. This duty consisting of filing and cleaning returned equipment. Claimant's restrictions kept him from delivering medical supplies.

Dr. Schlesinger gave Claimant three cervical steroid injections. Claimant testified that they gave him "a little bit" of relief. However, the therapy gave little relief. After the

final shot, Schlesinger returned him to full duty. This occurred in late 2004 or early 2005. However, Claimant did not return to his previous duties until a couple of months later.

One day, Claimant's back popped again while he was on the oxygen delivery route, and he told Cude. He was instructed to talk to Respondent Sentry, and because Claimant did not wish to return to Dr. Schlesinger, he was referred to Dr. Darin Wilbourn. He was placed on light duty. Based on the results of another MRI, Wilbourn referred him to Dr. Mocek, who administered a "perc test." Sentry instructed him to see Dr. Wilbourn again; and he, in turn, referred him to Dr. Saer. Claimant testified that he did not have an intervening injury between the time he saw Dr. Mocek and when he saw Dr. Wilbourn.

Following his visit to Mocek, Claimant underwent a percutaneous disc decompression. He stated that at the time of this procedure, he was experiencing headaches, with sharp pains running into his arm. His hands would go numb while he slept. Claimant did not feel relief from the surgery, and Mocek performed two more injections. However, Respondent Sentry refused to pay for more treatment, and did not cover the injections. The carrier also suspended payment of his prescription medications for four or five months, requiring Claimant to seek coverage through the health insurance his wife had through her employer.

Claimant asked Dr. Mocek to give him an impairment rating, and he instead sent him to Dr. Kevin Collins. He reviewed Claimant's records and examined him, and gave him a 16 percent (16%) rating. Claimant stated that he recently became aware that Dr. Saer has assigned him a rating as well. However, he did not recall seeing Saer.

Claimant testified that the symptoms he described above have not improved. He has trouble with his memory and concentration. In describing his symptoms he was experiencing at the time of the hearing, he stated:

It's just like my head is just pushing down on my—and it goes down into my—like my neck muscles here (indicating) and just goes down into my arm. And like my hands, they are just kind of tingly, you know. I have a headache, and then, you know, I just hurt all the time.

He did not recall having these problems prior to March 23, 2004, and was not aware that he had a disc herniation before that date. Claimant rated his pain at 7/10, and said that his worst pain is where his neck joins his body. He stays home during the day and struggles to help his wife by doing the laundry and cleaning the house. Claimant has to take a break from standing every 20 to 30 minutes, and from sitting every 30 to 40 minutes. He sleeps three to five hours a night. He currently takes Relafen, Lyrica, Ultram ER, Soma, and Hydrocodone. His Soma dosage is four times per day, and his Hydrocodone was increased the day before the hearing from four to six times per day.

When asked about his employment at Respondent American Homepatient, Claimant stated that in October 2005, Cude informed him that he was letting him go because of his back. He refused to sign a paper waiving his right to sue in exchange for severance pay and one month of insurance coverage. At the time of the termination, Claimant was still on light duty—making phone calls, listing things to be ordered, and lightly cleaning equipment. He was working 40 hours per week then, but had to take frequent breaks. His condition since his termination has worsened, in his opinion.

Claimant states that he has not sought work since he was fired. He did not file for unemployment benefits because he could not represent that he was able to work. He did

not know of a job he could do now, based on his condition, education, and work background. Claimant has applied for Social Security disability benefits.

Respondent Sentry sent him for a functional capacity evaluation. He testified that he experienced pain during the testing and that while he feared he would injure himself, he put forth his best effort. However, he had to rest for two days after the test.

When questioned by Respondents, Claimant testified that his memory at the time of the accident was more accurate than it is now. He agreed that the records of Lane Physical Therapy reflect that he went there on March 23, 2004 and was evaluated on that date. He also agreed that the record of this first visit to Lane does not reflect that he stated that he was injured while moving a hospital bed either in January or March 2004. Claimant also agreed that the record of his March 25, 2004 visit to Dr. Kriesel reflects that he had already reported that injury and that he had strained his neck two months before and had gone to Lane. Claimant testified that he may have gone to Lane first because Cude knew someone there. He admitted that the record of the first visit to Kriesel does not reflect that he ascribed his injury to moving a hospital bed. Kriesel sent him for an MRI that showed a C5-6 protrusion. He continued to go to Lane for physical therapy while seeing Dr. Kriesel. He admitted that pages 9 and 10 of Respondents' Exhibit 1 reflect that he reported straining his neck when moving a hospital bed in January 2004 and then being unable to move when he turned his head on March 23, 2004.

Dr. Kriesel referred him to Dr. Schlesinger, who did not perform surgery but instead gave him a series of steroid epidural injections. He agreed that there was a point when he was back at full duty that he was not receiving additional medical treatment. His back popped again in 2005 while he was running the liquid route, and this caused additional

injury. This prompted Claimant to return to Dr. Wilbourn. He stated that he reported this to his employer.

Claimant stated that he injured his shoulder in 2004 when he slipped on gravel and struck it. But the popping of his back does not relate to the shoulder injury. He agreed that Respondent Sentry arranged for him to see Dr. Wilbourn instead of Dr. Schlesinger. Wilbourn placed him on light duty and referred him to Dr. Mocek. Claimant agreed that the record for this visit, on September 2, 2005, reflected complaints of middle and lower back pain. But Claimant could not recall having such complaints at the outset of his injury in 2004.

Claimant stated that Cude told him at the time of his termination in October 2005 that his position was being eliminated, that cutbacks were being made. People with less seniority than Claimant were retained.

While Claimant indicated in his direct examination that Respondent Sentry instructed him to go back to Dr. Wilbourn, he modified his testimony to now state that he was merely told that he needed to go see Wilbourn. He recalled Dr. Saer referring him for an FCE. Claimant stated that he gave maximum effort in the evaluation, but understood that the report reflects that he gave inconsistent effort.

With respect to his impairment rating, Claimant stated that he began to receive checks from Respondent Sentry, but did not know what they were for. But he did not know that Dr. Wilbourn had given him a rating. He did stop seeing Wilbourn, however, and continued to see Dr. Mocek. At a certain point, he became aware that Respondent Sentry was no longer paying for those visits. However, he paid for them through his wife's coverage, and did not seek a change of physician to Mocek.

Claimant agreed that the record of his May 23, 2006 visit with Dr. Mocek reflects that his pain was no longer radiating to both of his arms, but that he was now having pain in his shoulders. Claimant that day requested a second opinion or a referral for a disability rating. He did so because he was seeking disability, and was not aware then that Drs. Wilbourn, Saer and Schlesinger had assigned ratings. Mocek did not provide a rating but instead referred him to Dr. Collins for the evaluation and rating. He only saw Collins once.

When questioned by me, Claimant testified that while he was off work, he received a check in the amount of \$381.00 every two weeks. He was unsure how long this continued, but believed it was until March or April of 2006. Respondent Sentry is currently paying for his prescriptions. But Sentry has not paid for any of his medical treatment since April 19, 2006. In addition to continued epidural steroid injections, Claimant stated that he is asking to be allowed to proceed with whatever treatment Dr. Mocek is recommending for him. He was unsure whether the procedure being recommended was a "nerve block" or a "nerve burning."

Michael Scott Cude. Called by Respondents, Cude testified that he has been general manager at Respondent American Homepatient for nine years. He stated that he was led to believe initially that Claimant's neck injury was not work-related. For that reason, he referred Claimant to a friend at Lane Physical Therapy. Had he known it was work-related, he would have filed an incident report with the company and reported the accident to Respondent Sentry. As for Claimant's testimony about a second injury occurring while he was delivering oxygen tanks in 2005, Cude stated that he had no knowledge of that, and that Claimant's personnel file contained no reference to it. He

thought that any injuries that occurred after the original one were related to the original, or were an exacerbation of it.

With respect to Claimant's light duty restriction, Cude stated that it was accommodated at all times with the duties described by Claimant.

Asked about the reason that Claimant was terminated, Cude testified that Medicare reimbursement cuts required him to trim his delivery driver workforce from three to two. Medicare constitutes 80 to 90 percent of his company's revenue. Had the cuts not occurred, Claimant would have been retained to perform his light duties. Cude stated that the severance package that Claimant was offered was standard any time a position occupied by long-time employee was being eliminated. He was unaware if the package was conditioned on the employee agreeing not to sue the company.

Cude testified that in 2006 or 2007, Claimant coached his own daughter's soccer team. Because the players are five to six years old, the coaches have to instruct the children as well as referee the game.

When questioned by Claimant, Cude admitted that he never saw Claimant running. He only saw him standing. Claimant did not appear to be in any kind of pain or discomfort at the time.

Testimony-Deposition

Christopher K. Mocek, M.D. Dr. Mocek was deposed on March 11, 2007. As noted above, the transcript of her deposition was admitted as Joint Exhibit 1. He testified that Claimant was first seen in his office on September 2, 2005. He presented with complaints of neck pain radiating into both arms, into both thumbs and fingers of each hand, and mid and low back pain. On examination, he presented with tenderness in the paraspinal

muscles in the lumbar region on the left, some tenderness in the thoracic region at T8-9 in the musculature, and some tenderness in the cervical spine and trapezius muscles. The only cause Dr. Mocek knew was Claimant's report that he was carrying a hospital bed. He could not recall if Claimant reported suffering a second injury.

Mocek stated that he reviewed the MRI that was previously taken. There were three disc displacements found by the radiologist at C3-4, C4-5 and C5-6 without spinal cord involvement. Dr. Mocek found an additional small disc bulge at C6-7. The lack of cord involvement indicated that open surgery was not required to address the disc issues. He opined that the protrusions could be causing the neck and arm pain.

Dr. Mocek testified that he recommended percutaneous disc decompression at C5-6 and C6-7. It was performed on October 28, 2005. He stated that while there is a 75 percent chance of relief in arm pain from the procedure, pain in the neck can remain due to arthritis. He saw Claimant again in November 2005, and told him that it was normal for symptoms not to decrease significantly so soon after the procedure. In his follow-up on January 31, 2006, Mocek stated that future treatment would include physical therapy only, that he expected maximum medical improvement would be reached approximately three months post-procedure, and that there would be some limitations in the type of work Claimant could now do, following the surgery.

Dr. Mocek's nurse saw Claimant in a follow-up visit on May 11, 2006. He was aware that Claimant had been placed at MMI by Dr. Saer, but not by Dr. Wilbourn. When Dr. Mocek saw him on May 23, 2006, Claimant's arm pain had resolved. However, Claimant on this visit presented with mild crepitus in the left shoulder joint, and complaints of pain in both joints. Mocek concluded that this did not relate to Claimant's cervical disc

protrusions because it was a complaint of pain itself, not radiated pain. However, Claimant still complained of headaches and neck pain. Dr. Mocek developed a plan that included nerve conduction studies to rule out carpal tunnel syndrome. He testified that he would have no way of knowing whether the carpal tunnel syndrome, if it existed, was caused by Claimant's work-related injury. Claimant also requested an impairment rating, so he referred him to Dr. Kevin Collins. He felt that a rating was appropriate because more than six months had elapse since the decompression, and he was at maximum medical improvement for the cervical disc problems. He was, however, not aware that Dr. Wilbourn had already assigned Claimant an impairment rating.

Mocek was given an opportunity to review Dr. Collins' rating. He disagreed with Collins' statement that the decompression did not help with Claimant's pain, since it alleviated his arm symptoms, but stated that Collins might have been referring strictly to neck pain. Dr. Mocek stated that to his knowledge, Claimant did not suffer two separate injuries—contrary to records indicating two separate disc injuries, with the one to C5-6 occurring first. While Collins' rating is based on the presence of radiculopathy, Mocek stated that there was none present at the time of his last evaluation on May 23, 2006, based on Claimant's subjective report. The radiculopathy was originally an objective finding based on the nerve conduction study by Dr. Kriesel, performed in April 2004. While Dr. Collins gave his rating based on the Fifth Edition of the AMA Guides, Mocek was shown the Fourth Edition. Table 73, category 3, of the Guides requires radiculopathy. But Mocek agreed that there were no objective findings of radiculopathy in Claimant's record after May 23, 2006.

Even after the referral to Dr. Collins, Dr. Mocek continued to treat Claimant. On August 16, 2006, Claimant presented with right arm pain and numbness. Mocek stated that he ordered a cervical myelogram with a three-dimensional CT. The lumbar was tested as well. The tests showed no nerve root impingement. The CT scan showed minimal degenerative disease in the spine with dominant findings that were consistent with his previous MRI.

Dr. Mocek testified that Claimant received a series of cervical epidural steroid injections in October and November of 2006, which were for pain management. He has not had any since. On December 21, 2006, Claimant reported a sharp pain in his cervical spine a little lower than his first pain; he felt the discs in his lower cervical spine were herniating. But Mocek stated that would not happen unless something new occurred, such as a car wreck, to cause a load to the spine.

When asked what Claimant's prognosis is, Dr. Mocek stated:

I mean, it's hard to know the future, but it's not uncommon for a patient with a disc injury to have some chronic pain indefinitely and the pain may wax and wane. And some patients get complete resolution of their pain problem, others do not. So it's really hard to answer that question as far as what will happen in the future.

Mocek testified that in his experience, it is not common for a patient with mild protrusions in his cervical discs and no root impingement to be totally disabled and unable to work. He stated that from the beginning, Claimant's pain pattern was in accordance with the disc problems that Mocek found. Currently, Claimant is on Ultram ER, a mild non-addictive pain reliever; Hydrocodone, a synthetic opiate pain medication; Lyrica, for pain in the nerves; Relafen, an anti-inflammatory for arthritis-type pain; and Soma, a muscle relaxant. Asked for his opinion as to what treatment Claimant would need in the future, Dr. Mocek stated:

“Really just medication management. Oftentimes, these patients will require epidural steroid shots every once in a while for a flare-up of the pain. And that’s pretty much it.”

Dr. Mocek stated that based on his observation of Claimant, he has had no cause to believe that Claimant is exaggerating his pain or his condition.

When questioned by Claimant, Mocek testified that it was possible that Claimant had a recurrence of radiculopathy by the time Dr. Collins evaluated him. Radiculopathy can be detected through EMG nerve conduction studies, or based on a patient’s symptoms. Examination cannot reliably detect radiculopathy in the neck, unless sensory or motor deficits are detected in the arm. Dr. Mocek stated that he used none of these methods in determining that no radiculopathy was present on May 23, 2006; he relied solely on Claimant’s report of his symptoms. Collins similarly did not do a thorough examination of Claimant’s sensory or motor function the day he performed his evaluation. Based on his review of his notes, Claimant told Mocek that his arm pain had resolved. Dr. Mocek stated that it was possible for radiculopathy to return after a percutaneous disc procedure is performed. If it does return, steroid injections and pain medications are used. In addition, a myelogram is performed to insure that a pinched nerve has not been overlooked. But here, the myelogram showed no pinched nerves. Mocek testified that a patient should not have more than three epidural spinal injections per year. Such injections only treat radiating pain to the arm, not arthritic pain in the neck.

Dr. Mocek opined that Claimant should have a permanent 25-pound lifting restriction, and should not return to his previous job of moving hospital beds. He also stated that it was possible that Claimant was injured while moving the bed and was reinjured later.

When asked if any other treatment might possibly improve Claimant's pain, Dr. Mocek stated that cervical facet injections and nerve-burning can help with arthritis pain. But he added that Claimant appeared to be medically stable and managing on his medications. Mocek also stated that repeat nerve conduction studies might be beneficial.

In follow-up questioning by Respondents, Dr. Mocek stated that there is no indication that Claimant has a lumbar spine problem.

Records-Medical

The medical records of Claimant that were introduced at the hearing, and which are part of Claimant's Exhibit 1, Respondents' Exhibit 1 and Joint Exhibit, reflect the following:

Claimant presented to Lane Physical Therapy on March 23, 2004 with sharp pain in the cervical area, right scapular area and right upper extremity into the elbow. He reported that "symptoms began this a.m. for no apparent reason," and that he has had similar episodes in the past but none this severe. He was instructed in home exercises and discharged. On March 25, 2004, he was assessed by Dr. Ben Kriesel as having a cervical strain with right arm paresthesias. He told Kriesel he strained his neck two months before and underwent physical therapy. He also stated that he was having right sided arm pain. A cervical x-ray revealed a C2 area bone fragment. Dr. Kriesel scheduled him for an MRI and placed him on light duty. The March 26, 2004 MRI revealed a small right paracentral and foraminal C5-6 disc herniation. The remaining discs were unremarkable.

On April 1, 2004, Claimant filed a claim with Respondent Sentry. He described his accident as follows: "In January I picked up a one piece semi-Electric hosp. Bed and st[r]ained my neck. Then on 3/23/04 I turned my head and could not move."

Claimant saw Dr. Scott Schlesinger on April 16, 2004. He wrote that the March MRI showed no spinal cord compression; and that right C5-6 neuroforaminal narrowing was not obvious on the study. Dr. Schlesinger opined that Claimant's neck pain was due to the C5-6 disc protrusion. He added: "He certainly does not need any surgery as there is no radiculopathy." Schlesinger recommended epidural steroid injections. On April 29, 2004, Claimant was given his first cervical epidural steroid injection, at C7-T1, by Dr. Schlesinger. These were repeated on June 17 and September 2, 2004. At the time of the first procedure, he complained of neck pain; during the second, neck and shoulder pain; and during the third, left shoulder pain and pain between the shoulder blades.

On June 8, 2004, he returned to Dr. Kriesel, still reporting pain. He was assessed as having cervical strain with right arm paresthesias.

Claimant underwent a second MRI on July 19, 2005. The C1-2, C2-3, C6-7 and C7-T1 levels were normal. C3-4 had a shallow non-compressive central subligamentous disc displacement. C4-5 had a mild decreased intradiscal T2 signal with shallow central subligamentous displacement, reducing the anteroposterior dimension of the central spinal canal to 10.4 mm but without cord effacement or compression. There was also moderate bilateral facet hypertrophy at this level. C5-6 had a shallow posterior disc displacement and moderate bilateral facet hypertrophy, slightly greater on the left. No evidence of cord effacement or compression, or high-grade canal encroachment, was found.

Dr. Darin Wilbourn evaluated Claimant on August 10, 2005. Claimant represented that his injury did not occur until March 23, 2004, and that he immediately experienced neck pain and felt "paralyzed." He stated that he was continuing to have neck pain with occasional pain that radiated to his arms. He represented that he was still working at full

duty. Wilbourn assessed him as having a C5-6 posterior disc herniation and referred him to Dr. Christopher Mocek for a possible percutaneous disc decompression at that level. He put him on light duty.

Claimant first saw Dr. Mocek on September 2, 2005. He complained of neck pain with radiation to both arms, into both thumbs, and all fingers of the hand. He also complained of mid and low back pain. Claimant attributed this to “[c]arrying a hospital bed.” Mocek noted that his July 19, 2005 cervical MRI was significant for disc displacement at C3-4 and C4-5 with disc dessication and a posterior disc displacement at C5-6 with a left paracentral disc protrusion. He also found a slight bulge in C6-7 from his own review of the MRI. Mocek stated that Claimant was having pain consistent with nerve root irritation at the C6, C7 and C8 nerve roots, which line up with the C5-6 disc and the C6-7 bulge. He added that the protrusions could be causing some discogenic neck pain but do not appear to be causing any arm pain. *Inter alia*, he scheduled a percutaneous disc decompression of the C5-6 and C6-7 discs, and an MRI of the lumbar and thoracic spine. The decompression was performed October 28, 2005. The pre and post-operative diagnoses were contained herniated discs at C5-6 and C6-7, cervical radiculopathy, a d cervical spine pain. Claimant still reported pain on November 10, 2005, but Mocek wrote that it was still too early to see results. Among other things, he started Claimant on a muscle stimulator for rehabilitation purposes. Dr. Mocek saw Claimant again on January 31, 2006 and told him that he would experience residual neck pain because C4-5 was not treated; only physical therapy would be recommended for the future; he would reach maximum medical improvement approximately six months after the decompression; he should be able to return to light duty after therapy ends; and he would have a permanent

25-pound lifting restriction and could not return to his old position because it required heavy lifting.

Dr. Wilbourn saw Claimant again on February 6, 2006. Claimant reported that the decompression did not decrease his pain, and that both of his arms and hands feel "asleep." Willbourn kept Claimant off work and referred him to Dr. Edward Saer. After evaluating him on March 28, 2006, Dr. Saer found that Claimant's symptoms were more compatible with a cervical strain; however, he also opined that his arm symptoms were not likely related to his neck but perhaps due to carpal tunnel syndrome. He found Claimant to be at maximum medical improvement and assessed him as having a five percent (5%) whole-body impairment under the Fourth Edition of the AMA Guides.

Saer also recommended that Claimant undergo a functional capacity evaluation, which was conducted on April 18, 2006. The evaluator found that Claimant gave an unreliable effort, with inconsistent effort throughout the evaluation process and inappropriate pain responses. He was found to have the ability to perform work at least at the Sedentary level.

On April 19, 2006, Dr. Wilbourn evaluated Claimant again. He determined that Claimant reached maximum medical improvement on that date and could return to work without restrictions. He also found that Claimant was entitled to a six percent (6%) whole body impairment rating under the Fourth Edition of the AMA Guides, Page 113, Table 75, Disorder IIC.

Claimant returned to Dr. Mocek's office on May 11, 2006, requesting refills of his medications. He stated that the carrier had denied further benefits, and that he was willing to pay out-of-pocket for further visits. Mocek saw Claimant on May 23, 2006. Claimant

reported that he was still having headaches and neck pain. He also reported intermittent numbness in his right hand and pain in both shoulder joints, with the right worse than the left. Dr. Mocek scheduled an EMG nerve conduction study to rule out carpal tunnel syndrome and an MRI of the right shoulder. Because Claimant requested a disability rating, Mocek referred him to Dr. Kevin Collins.

Collins evaluated Claimant on June 27, 2006. He noted Claimant's history was as follows:

Mr. Manson was involved in a work-related injury where he injured his neck resulting in a C5-6 posterior disc herniation. He has been taken to surgery per Dr. Mocek for percutaneous disc decompression of C5-6 and C6-7, November 2005. Apparently they did not help him with pain. He has been treated with different medications. He says he feels that his arms were asleep. Subsequently was seen by Dr. Vin Kressel [sic], who performed nerve conduction studies, showed right greater than left radiculopathy, of course, the right side would be the one that is most important. This study was performed on 04-01-04. In any event, he is still having difficulty, but at this point, they are looking to close his case. He did see Dr. Saer, who did not recommend surgery and recommended an FCE, which was limited secondary to inconsistent effort. The patient is otherwise stable and continues treatment per Dr. Mocek. Looks like the patient is also being seen by Dr. Scott Schlesinger, who felt that he had a right-sided C5-6 herniation, that was the first injury then there was a second injury, which caused the second herniation. Patient apparently exacerbated his injury and came back to Dr. Schlesinger, who sent him on to Dr. Wilburn [sic]. At that time, a repeat MRI was done on 07-19-05, showed C5-6 disc displacement, moderate bilateral facet hypertrophy, left greater than right. In any event, here for further assessment. According to Dr. Mocek's note, he is S/P percutaneous disc compression C5-6, C6-7 and had some resolution of mild pain radiating into both arms, neck pain and headaches, this was on 05-23-06, which is just about a month ago. In any event, he was treated with Lorcet, Lyrica and Soma, and examination showed no numbness in his arms, and he was subsequently stable, that was when recommendation for rating was made. Also recommendation for true nerve conduction study/EMG to rule out carpal tunnel, but apparently that was not approved by worker's [sic] comp. He describes severe constant pain for two years and three months. Walking, sitting, standing, lying down, tension and anxiety aggravate him. Nothing really helps him out.

Collins' assessment was as follows:

S/P work-related injury with exacerbation, two level disc disease per Dr. Mocek, C5-6 and C6-7. He also has had a nerve conduction study without the EMG that showed some evidence of radiculopathy, right greater than left; however, the right side is what is in question for worker's [sic] comp.

Based on the above mentioned findings of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, he qualifies for DRE Cervical Category 3, Table 15-5, Page 392, which shows that he is an individual with clinical significant radiculopathy verified by imaging study, demonstrates a herniated disc at that level and that expected from objective clinical findings, radiculopathy, or with improvement of radiculopathy following surgery, which he had initially after his decompressive percutaneous disc compression [sic] by Dr. Mocek, that would qualify him for a 15% impairment rating based on this.

A myelogram was scheduled on August 17, 2006. A CT scan of the lumbar spine, performed on September 18, 2006, was unremarkable. The cervical CT of the same date reflected minimal degenerative disease in the spine with C5-6 showing minimal spondylotic disc displacement and mild right Luschka joint hypertrophy, along with mild thecal sac effacement.

Dr. Mocek performed additional cervical epidural steroid injections on October 25, 2006, November 27, 2006. Claimant reported on December 21, 2006 that after a few days of relief, his pain returned. He stated that he has pains in his cervical spine a little lower than the first pain he had, and that he feels that the discs in his lower cervical spine are herniating. Mocek scheduled him for a thoracic epidural steroid injection, but the record does not reflect that this took place. On June 28, 2007, Claimant reported to Dr. Mocek that "he has tried working several times but cannot due the pain in the spine." Mocek continued him on pain management.

Claimant returned to see Dr. Mocek's nurse on March 11, 2008. He stated that his pain medication is not always covering his pain, and that he had numbness in both hands.

In addition to the foregoing, a portion of the records in Respondents' Exhibit 1 reflect that Claimant was treated for a shoulder injury in 2004. However, that injury is not at issue here.

ADJUDICATION

A. Temporary Total and Temporary Partial Disability

Claimant asks that he be awarded additional temporary total disability benefits. In the alternative, he asks for additional temporary partial disability benefits. Claimant's compensable injury to his neck is unscheduled. 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). On the other hand, temporary partial disability is the period within the claimant's healing period in which he suffers only a decrease in the capacity to earn the wages he was receiving at the time of the injury. *Id.* 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.*

As the parties stipulated, Respondents terminated benefits to Claimant as of April 19, 2006. This comports with Claimant's testimony that while he was off work, he received a check every two weeks, and that he continued to receive this until March or April of 2006. April 19 was when Dr. Wilbourn declared that Claimant was at maximum medical improvement and gave him an impairment rating of six percent (6%) to the whole body. Dr. Saer found that Claimant reached MMI on March 28, 2006, and Dr. Mocek determined that he reached MMI on May 23, 2006 (per his deposition testimony).

The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). The resolution by the Commission of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000).

After reviewing this evidence, I credit Dr. Mocek's opinion and testimony and find that Claimant reached the end of his healing period on May 23, 2006. The evidence shows that during the period from April 19 to May 23, 2006, Claimant had not returned to work; he was unemployed, having been let go by Respondent American Homepatient in October 2005. At the time of his termination, he was on light duty. The records in evidence do not reflect that he was returned to full duty during that period. A claimant who has been

released to light duty work but has not returned to work may be entitled to temporary total disability benefits where insufficient evidence exists that the claimant has the capacity to earn the same or any part of the wages he was receiving at the time of the injury. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). I find that to be the case here. Claimant is asking for temporary total disability benefits from April 19, 2005 to a date yet to be determined. But I find that Claimant has only proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from April 19, 2006 to May 23, 2006—at his stipulated rate.

I also find that Claimant has not proven by a preponderance of the evidence that he is entitled to any temporary partial disability benefits.

B. Permanent Partial Disability

Claimant has also contended that he is entitled to additional permanent partial disability benefits. In order to be entitled to such benefits, a claimant must prove that the compensable injury, either alone or in combination with the preexisting condition or the natural process of aging, is the major cause of the permanent impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a)-(b) & (14) (Repl. 2002); that the impairment rating is established by objective and measurable physical or mental findings, *Id.* § 11-9-704(c)(1)(B); that any medical opinion is stated within a reasonable degree of medical certainty, *Id.* § 11-9-102(16); and that the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993)(hereinafter “AMA Guides”) were used in

determining the rating, *Id.* § 11-9-522(g); AWCC R. 099.34. See *Le v. Simmons Foods, Inc.*, 2004 AWCC 127, Claim No. E815277 (Full Commission Opinion filed July 19, 2004).

As the parties stipulated, Respondents accepted and paid the six percent (6%) whole-body rating given by Dr. Wilbourn. However, Claimant argues that he is entitled to the fifteen percent (15%) rating that Dr. Collins assigned to him. The record is clear that Dr. Collins used the Fifth Edition of the AMA Guides in making his rating determination. Hence, the fifteen percent (15%) rating is invalid.

The Commission may determine its own impairment rating under the AMA Guides, rather than simply assessing the validity of the ratings that have been assigned. *Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003). Based upon my review of the AMA Guides and the records of Claimant's condition and treatment that are in evidence, I find that he is entitled to a eight percent (8%) whole-body impairment rating under Page 113, Table 75, Category IV(A), for a two-level decompression without spinal fusion and without residual signs and symptoms. As noted above, Claimant underwent a percutaneous decompression of C5-6 and C6-7. No objective findings of residual signs or symptoms remain; Claimant's September 2006 MRI results had only degenerative findings. Hence, Respondents are liable for an additional two percent (2%) impairment, to be paid based upon his stipulated rate.

C. Permanent Total Disability

Claimant has asserted that he is permanently and totally disabled. Respondents dispute that he is entitled to this designation.

Claimant's neck injury is not a scheduled injury. *Cf.* Ark. Code Ann. § 11-9-521 (Repl. 2002). For that reason, his entitlement to permanent disability benefits is controlled by § 11-9-522(b)(1), which states:

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

See Curry v. Franklin Elec., 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such "other matters" include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). Pursuant to § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The term "permanent total disability" is defined in the statute as "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519(e)(1). The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering factors that may impact a claimant's future earning

capacity, the Commission considers his motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of his loss of earning capacity. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

“Major cause” is more than fifty percent (50%) of the cause, and has to be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14). “Disability” is the “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” *Id.* § 11-9-102(8).

I have reviewed all of the evidence relevant to this matter. Claimant is 35 years old, a high school graduate, and made Cs and Ds in school. His work history is populated exclusively by manual labor jobs. He loaded fertilizer, installed satellite receivers, loaded boxes of chicken, and moved farming supplies. His two most recent positions, for United Medical and Respondent American Homepatient, involved moving such items as hospital beds weighing 60 to 100 pounds and oxygen bottles weighing 126 to 160 pounds. While at United Medical he had a small amount of paperwork to fill out, the vast majority of that

job was likewise comprised of heavy lifting. As stipulated by the parties, his average weekly wage at Respondent American Homepatient was \$494.00.

Claimant suffered an admittedly compensable injury to his neck in January 2004, while lifting a hospital bed. It was reinjured in March 2004. He was ultimately diagnosed with cervical disc protrusions, and underwent a percutaneous decompression of C5-6 and C6-7 in October 2005. Dr. Mocek, who performed this procedure, stated Claimant would have a permanent 25-pound lifting restriction and could not return to his old job because it required heavy lifting. As I have found, Claimant reached the end of his healing period on May 23, 2006. He has no objective findings of residual symptoms. Thereafter, in October and November of 2006, he underwent epidural steroid injections, which he also had prior to his surgery. He continues to take numerous medications, including painkillers and muscle relaxers.

Once Claimant was placed on light duty, he worked in this capacity at Respondent American Homepatient until he was terminated in October 2005. Since then, he has not sought work. As discussed *infra*, he has not sought vocational rehabilitation. Respondents introduced no evidence that such had been offered (although I am aware of the statements of Respondents' counsel in his summation), and apparently no vocational evaluation was undertaken (I will not consider the statements of Claimant's counsel in his summation concerning what the testimony of the "vocational expert" was in Claimant's Social Security disability hearing). While a claimant's failure to participate in rehabilitation does not bar his claim, it may hamper a full assessment of his loss of earning capacity. *Nicholas v. Hempstead Co. Memorial Hosp.*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

While his functional capacity evaluation rated him as suitable for Sedentary work, the evaluator stated that Claimant put forth an unreliable effort. Claimant admitted as much at the hearing, stating that he feared injury in the evaluation. I note that the Sedentary classification is limited to occasional lifting of 1 to 10 pounds. But Dr. Mocek, whose testimony I credit, deemed Claimant capable of lifting up to 25 pounds, which would place him in the Light classification.

Based upon my review of all the evidence, including the testimony from Claimant and his medical records, I find that Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled. However, I do find that after considering Claimant's age, education, work experience, the nature and extent of his injury, his permanent restrictions, and all other relevant factors, he has sustained a twelve percent (12%) impairment to his wage earning capacity in excess of his eight percent (8%) anatomical impairment. In so doing, I find that Claimant's compensable January 2004 neck injury is the major cause of his wage-loss disability.

D. Reasonable and Necessary Medical Care

Claimant also argues that he is entitled to additional medical benefits. Under Ark. Code Ann. § 11-9-508(a), 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 parties stipulated that all of Claimant's benefits were fully paid under April 19, 2006. In addition, Claimant testified that Respondents have continued to pay for his prescription medications. That leaves that question of whether Claimant's treatment since that time, and any recommended future treatment, is reasonable and necessary. Based on the evidence adduced at the hearing, I find that Claimant is entitled to reasonable and necessary medical treatment through May 23, 2006, when he reached the end of his healing period. This is comprised of all the treatment during this period that is documented in Claimant's Exhibit 1, Respondents' Exhibit 1, and Joint Exhibit 1.

As for treatments after he reached the end of his healing period, those "treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer." *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Dr. Mocek gave Claimant additional epidural steroid injections on October 25, 2006 and November 27, 2006. Claimant has testified that he would like to undergo a "nerve blockage" or "nerve burning" to help with his pain. But while Dr. Mocek testified that cervical facet injections and nerve-burning can help with arthritis pain, he stated that Claimant appeared to be medically stable and managing on his medications. Hence, I find

that after the end of his healing period, Respondents are liable only for Claimant's medications and the two epidural injections administered in the fall of 2006.

E. Vocational Rehabilitation

Claimant argues that he is entitled to vocational rehabilitation. This is governed by Ark. Code Ann. § 11-9-505(b)(1) (Repl. 2002), which provides:

In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or reemployment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee.

The approval or disapproval of a rehabilitation program is a matter within the Commission's discretion. *Cossenerry v. McCroskey Sheet Metal*, 6 Ark. App. 177, 639 S.W.2d 518 (1982). At the hearing, the following exchange occurred between Claimant and his attorney during direct examination:

Q Is there any type of training or any other kind of educational training you could get now –or that you would like to have now that–or, you know, some type of job that you might be able to do, that's light duty?

A. I don't know anything that I could do. I mean, I filed for disability.

Later in the hearing, when this issue came up, Claimant's counsel stated, "I did question him about [vocational rehabilitation]. My client doesn't know what's available to him at this point." Claimant has not met his burden of proposing or advancing some rehabilitation program for the Commission to consider. Hence, this issue is denied.

D. Attorney's Fee

As the parties stipulated, and I accept, Respondents have controverted this claim, including the issue of his entitlement to additional temporary total disability benefits, since

April 19, 2006. Claimant's attorney is thus entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

E. Issues Not Properly Raised

In their written summation, Respondents assert that Claimant should not have received benefits beyond September 2004, and that they should receive a credit for any benefits paid beyond that date. Respondents admit that this was not raised at or before the hearing. Hence, it will not be considered. See *Singleton v. City of Pine Bluff*, 2006 AWCC 34, Claim No. F302256 (Full Commission Opinion filed February 23, 2006)(improper for administrative law judge to address issues not raised at hearing), *rev'd on other grounds*, No. CA06-398 (Dec. 6, 2006)(unpublished). They also argue for the first time in their summation that Claimant's treatment by Dr. Mocek after being placed at maximum medical improvement by Drs. Saer and Wilbourn was unauthorized. This, too, will not be considered.

CONCLUSION AND AWARD

Respondents are directed to pay benefits in accordance with the findings of fact set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715. See *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge