

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F304774**

**LARRY W. McCURRY, EMPLOYEE** **CLAIMANT**

**FIRST PRESBYTERIAN CHURCH,  
EMPLOYER** **RESPONDENT NO. 1**

**CHURCH MUTUAL INSURANCE CO.,  
INSURANCE CARRIER/TPA** **RESPONDENT NO. 1**

**SECOND INJURY FUND** **RESPONDENT NO. 2**

**DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND** **RESPONDENT NO. 3**

**OPINION FILED JANUARY 11, 2008**

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Robert L. Depper, Jr., Attorney at Law, El Dorado, Arkansas.

Respondent No. 1 was represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David Pake, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 was represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On October 16, 2007, the above captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing conference was conducted on July 11, 2007, and a Prehearing Order was filed on July 12, 2007. A copy of the July 12, 2007, Prehearing

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Order was marked as Commission Exhibit "1" and made a part of the record herein without objection, subject to any modifications made at the full hearing.

The parties stipulated to the following at the October 16, 2007, hearing:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times including April 28, 2003.
- 3) The administrative law judge Opinion filed April 28, 2005, is *res judicata* and the law of the case.
- 4) Claimant's applicable weekly TTD and PPD compensation rates are \$401.00 and \$301.00, respectively.
- 5) The claimant sustained a compensable back injury on April 28, 2003, for which he reached maximum medical improvement no later than March 5, 2004.
- 6) The parties agree the hearing record transcript and all exhibits from the February 1, 2005, full hearing will be incorporated by reference.

The parties agreed at the full hearing to litigate the following issues:

- 1) The determination of past due medical expenses and past due travel expenses.
- 2) Whether claimant is entitled to additional medical treatment from Dr. Hart.
- 3) Whether claimant is entitled to permanent partial disability benefits.
- 4) Whether claimant is now permanently and totally disabled or in

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the alternative entitled to wage loss disability benefits in excess of his anatomical impairment.

- 5) Second Injury Fund liability.

At the full hearing, claimant contended that despite demands for payment of pharmaceutical expenses, medical mileage expenses, and medical expenses the respondents have failed to pay all said expenses. The claimant further contended that he has reached maximum medical improvement and that he is permanently and totally disabled. It is also the contention of the claimant that this case has been controverted as to all the issues and therefore attorney's fees are owed by the respondents.

At the full hearing, Respondent No. 1 contended the following:

- 1) Respondent-Carrier No. 1 has paid all medical benefits owed.
- 2) Claimant is not permanently and totally disabled.
- 3) Claimant is not entitled to medical care from Dr. Thomas Hart, such care not being reasonable and necessary medical care for the claimant's compensable injuries.
- 4) All medical benefits owed have been paid.
- 5) Claimant is not entitled to award of additional TTD benefits.
- 6) Claimant has no entitlement to additional care by Dr. Hart.
- 7) Claimant has no permanent physical impairment from the April 28, 2003, injury.
- 8) Claimant has no permanent physical impairment from the April 28, 2003, injury that is major cause of any degree of wage

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loss disability.

- 9) The Second Injury Fund is liable for payment of any wage loss disability benefits.
- 10) Respondents have paid medical benefits for care from 4-28-05 through 9-7-06, when they stopped paying for additional medical care on grounds that the care was not reasonable necessary treatment for claimant's 4-28-03 injury.
- 11) Respondents have not paid medical bills for treatment of claimant's heart condition or for care antedating 4-28-03 injury.
- 12) Respondents are not liable for medical care of Dr. Richard Davis or for his prescriptions per the 4-28-05 ALJ order.
- 13) Respondents are not liable for medical care provided by Dr. Hart from 9-14-04 to 4-28-05, period of time medical benefits were controverted before the ALJ's initial decision on 4-28-05. Medical benefits have apparently not been paid for services provided during this period of time.
- 14) Claimant is not entitled to continued care in the form of rhizotomies from Dr. Hart because rhizotomies are for joint pain and claimant's compensable injury involves disc pain. (6-26-06 report.)
- 15) Dr. Hart is treating claimant for problems at L2-3, L3-4, L4-5, L5-S1 and eight facet joints at these levels. (8-24-06 and 10-13-06 reports.)
- 16) The 4-28-05 ALJ decision did not impose on respondents responsibility for treatment of every level of claimant's lumbar spine and all facet joints in claimant's lumbar spine and claimant's rheumatoid arthritis and failed surgical syndrome.
- 17) Claimant is suffering from a failed back surgical syndrome and multilevel lumbar disc disease unrelated to a 4-28-03 injury. (3-

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13-07 and 4-3-07 reports of Dr. Hart.)

- 18) Respondents have no liability for claimant's degenerative problems.

At the prehearing conference, Respondent No. 2 contended the following:

- 1) Claimant cannot prove entitlement to any permanent benefits.
- 2) The Second Injury Fund does not have liability in this case.

At the prehearing conference, Respondent No. 3 contended the following:

- 1) Pursuant to A.C.A. § 11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of Death & Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. § 11-9-502. Therefore the Trust Fund has not controverted the claimant's entitlement to benefits.
- 2) The Death & Permanent Total Disability Trust Fund will state its contentions upon completion of discovery.

**DISCUSSION**

The parties stipulated that the claimant sustained a compensable injury to his back on April 28, 2003. At that time, the claimant worked for the respondent-employer as a building superintendent. The claimant had experienced other problems with his back prior to April 28, 2003. In 1997, Dr. Schlesinger performed surgery on the claimant at the left L4-5 level. The claimant also had two injuries to his back in 2001. He was diagnosed with a compression fracture at L1 in December of 2001 but

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was treated non-operatively and returned to work.

After the compensable event on April 28, 2003, the claimant presented himself to Dr. Richard Davis, and reported his low back problems. Two days later, Dr. Davis conducted an MRI of the claimant's lumbar spine. Dr. Davis concluded the following in his April 30, 2003, MRI report:

**CONCLUSION:**

L2-3, L3-4, L4-5 and L5-S1 degenerative disc disease described in detail above with evidence of previous L4-5 partial discectomy and some scarring about the left neural foramina. All of this appears relatively unchanged from November 21, 2001 examination except for the progressive healing of the L1 compression fracture.

(Cl. Ex. 1, pp. 28-29).

On May 5, 2003, the claimant was examined by the same neurosurgeon who performed his 1997 back surgery, Dr. Scott Schlesinger. Dr. Schlesinger's May 5, 2003, report concluded the following:

There are multilevel degenerative changes, but no evidence of new disc herniation, nerve root compression, spinal stenosis or foraminal stenosis.

In his case, I think he will do well with the passage of time. He has gotten a lot better. We will go ahead and have him off work for another week. Then he can go back to light duty. There is nothing to base a permanent partial disability rating on.

(Cl. Ex. 1, pg. 77).

The claimant sought pain management from Dr. Thomas Hart and received an independent medical evaluation from Dr. Edward Saer on March 5, 2004. Dr. Saer

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opined in his March 5, 2004, report that “. . . I would recommend repeat MRI to evaluate his worsening symptoms. If there is no structural change noted from his prior studies, or structural reason for the increasing symptoms, then I think he will be at MMI from the April 2003 injury.” (Cl. Ex. 1, pg. 74).

Dr. Saer went on to say “I cannot assign any additional impairment for the April 2003 injury at this time.” (Cl. Ex. 1, pg. 75).

Evidently, based on the March 5, 2004, recommendation from Dr. Saer, the claimant underwent another MRI on April 1, 2004. Upon review of the April 1, 2004, MRI, Dr. Saer did not change his opinion regarding his previous finding of MMI. (Cl. Ex. 1, pg. 70).

The claimant has asked that the Commission decide whether he is entitled to permanent partial disability benefits. Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award of permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively

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use part of the body or the body as a whole.

Consequently, an injured worker must prove that the work related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. With regard to the determination of the claimant's anatomical impairment rating, the statutory constraints adopted by the General Assembly must be considered. A.C.A. § 11-9-704(c)(1)(B) states that "Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." The Commission adopted the *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) "exclusive of any sections which refer to pain and exclusive of straight-leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine." (Rule 34). With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is the result of a diagnostic procedure which does not come under the voluntary control of the patient. Dept. of Parks & Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2nd 749 (1988).

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The medical records in this case clearly show that the claimant did not sustain any permanent physical impairment as a result of his April 28, 2003, stipulated injury. As stated above, Drs. Schlesinger and Davis both concluded that the claimant's back condition after his April 28, 2003, injury showed nothing to base a permanent partial disability rating on. Dr. Davis reviewed the claimant's April 30, 2003, MRI and found that the claimant's back was relatively unchanged from his previous November 21, 2001, examination. The claimant himself testified that no doctor had found that the claimant was entitled to a permanent disability rating regarding the 2003 compensable injury:

Q I have not received a rating on the 2003 injury.

A Right.

Q So is that still a true statement today?

A Yes. No doctor has give me a rating as to what the injuries are.

Q For 2003, correct?

A Yes.

(T. pg. 113-114, lines 19-25 & 1).

It is clear to this examiner that the claimant has not met his burden of proving by a preponderance of the evidence that he is entitled to an award for permanent physical impairment due to his compensable April 2003 back injury. Therefore, I find

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the claimant has failed to prove entitlement to permanent partial disability benefits.

The claimant has also alleged that he is now permanently and totally disabled or in the alternative entitled to wage loss disability benefits in excess of his anatomical impairment. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000) and Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998). As stated above, the claimant has failed to prove any permanent physical impairment he sustained as a result of his April 28, 2003, injury; therefore, the claimant cannot prove entitlement to wage loss disability benefits or permanent and total disability benefits. Therefore, I find the claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits or permanent and total disability benefits. Since I have found that claimant is not entitled to permanent partial disability benefits, wage loss disability benefits, or permanent and total disability benefits, the issue of Second Injury Fund liability is rendered moot.

The issue of additional medical treatment from Dr. Hart is also at issue as well as some of Dr. Hart's medical bills for services performed in the past. An employer must promptly provide for an injured employee such medical treatment as may be

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reasonably necessary in connection with the injury received by the employee. A.C.A. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. Ark. Dept. of Correction v. Holybee, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

As recited in my previous Opinion filed April 28, 2005, which has been incorporated herein, I noted that Drs. Saer and Schlesinger recommended pain management for the claimant. It is also clear that for a considerable period of time after this administrative law judge's April 28, 2005, Opinion, the respondents paid for some of Dr. Hart's pain management. For some arbitrary reason respondents decided that they no longer had to pay for Dr. Hart's continued pain management for the claimant's back. In my April 28, 2005, Opinion under the Findings of Fact and Conclusions of Law section, this administrative law judge found "The claimant has proven by a preponderance of the evidence that additional medical treatment in the form of pain management from Dr. Thomas Hart is reasonably necessary in connection with the compensable injury." There was no appeal taken from the April 28, 2005, administrative law judge order and I find it is now *res judicata* to this case.

There is also at issue some of Dr. Hart's medical bills incurred prior to the October 16, 2007, hearing as well as future treatment from Dr. Hart. The respondents

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indicate that they were somewhat confused as to my previous instructions regarding Dr. Hart's pain management. The Commission has long interpreted that medical treatment is intended to reduce or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonable and necessary medical treatment. Georgia Pacific Corp. v. Deacons, 558 Ark. App. 266, 950 S.W.2d 463 (1997). Based on the medical evidence in the claimant's testimony regarding the pain management, I find the claimant's treatment for pain management with Dr. Hart is reasonable, necessary, and related to his April 2003 compensable injury. To be clear, I find that all of Dr. Hart's treatment to the claimant's back after April 28, 2003, through the date of this Opinion to be reasonable, necessary, and related to the claimant's compensable injury of April 28, 2003. As such, I find that respondents are responsible for all treatment contained in the record herein by Dr. Hart to the claimant's back from the date of the claimant's compensable injury to date. I also find that the claimant is entitled to future pain management from Dr. Hart to the claimant's back to be reasonable, necessary, and related to the claimant's April 28, 2003, injury and thus the respondents' responsibility. Respondents are also liable for all travel expenses the claimant incurred going to Dr. Hart's office for back treatment after April 28, 2003, through the date of this Opinion and for any future visits to Dr. Hart for pain management. In addition, respondents are liable for all prescriptions from Dr.

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Hart with regard to the claimant's pain management for his back.

The claimant has also requested a determination for unpaid medical bills. The claimant has listed those unpaid medical bills in a comprehensive list found at Claimant's Exhibit 2 in the record herein. On pages 1 and 2 of Claimant's Exhibit 2, the claimant lists the disputed medical bills individually as Items A through GG. In my ALJ Opinion dated April 28, 2005, I specifically found and recited on page 5 "the claimant reached MMI no later than 3/5/04." Based on the finding that the claimant reached maximum medical improvement no later than March 5, 2004, I find that Items A, B, C, D, E, F, G, H, R, Z, AA, EE, and FF were all incurred after the claimant reached maximum medical improvement and therefore I find that those items were not reasonable, necessary, and related to the claimant's compensable injury of April 28, 2003. With regard to Items I, J, K, L, M, N, O, and P, I find those items in Claimant's Exhibit 2 to have been reasonable, necessary, and related to the claimant's April 28, 2003, compensable injury as they were all for Dr. Hart's pain management which I have found to be the respondents' responsibility. With regard to Items U and V, which were bills incurred at the Smackover Family Practice prior to March 5, 2004, I find Items U and V to have been reasonable, necessary, and related to the claimant's compensable back injury of April 28, 2003, and therefore the responsibility of the respondents. With regard to Items W, X, and Y, I find that those visits to Dr. Davis

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were prior to March 5, 2004, and were reasonable, necessary, and related to the claimant's April 28, 2003, compensable injury and therefore the responsibility of the respondents. The remaining items in controversy contained in Claimant's Exhibit 2, deal with mileage reimbursement and pharmaceutical costs. After reviewing these documents regarding the mileage and pharmaceutical costs, I find that all prescription medication that was actually prescribed by Dr. Thomas Hart to have been reasonable, necessary, and related to the claimant's compensable injury of April 28, 2003, and therefore the respondents' responsibility as such medication was for the claimant's pain management which I have previously approved from Dr. Hart. Any medication prescribed by physicians other than Dr. Hart contained in Claimant's Exhibit 2, I find were not reasonable, necessary, and related to the claimant's April 28, 2003, compensable injury and therefore not the responsibility of the respondents. With regard to the travel expenses outlined in Claimant's Exhibit 2, I find that all travel to and from Dr. Hart's office to be the responsibility of the respondents and should be paid forthwith. The request for mileage reimbursement by the claimant for any travel related expenses to or from any health provider other than Dr. Hart is not the respondents' responsibility.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents,

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and all other matters properly before the Commission and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that he is entitled to an award for permanent physical impairment due to his April 28, 2003, compensable injury.
- 4) The claimant has failed to prove by a preponderance of the evidence that he sustained any permanent physical impairment as a result of his April 28, 2003, compensable injury. The claimant has also failed to prove by a preponderance of the evidence that he is permanently and totally disabled.
- 5) Since the claimant has failed to prove by a preponderance of the evidence that he sustained any permanent physical impairment as a result of his April 28, 2003, compensable injury, the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits.
- 6) The Second Injury Fund has no liability in this claim.
- 7) The claimant has proven by a preponderance of the evidence that all medical treatment, mileage costs, and prescription medication from Dr. Thomas Hart that is contained in the record herein was reasonable, necessary, and related to the claimant's compensable injury of April 28, 2003, and therefore the respondents' responsibility.

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- 8) The claimant has proven by a preponderance of the evidence that the additional and future pain management from Dr. Hart with regard to the claimant's back is reasonable, necessary, and related to the claimant's April 28, 2003, compensable injury and therefore the respondents' responsibility.
- 9) The claimant has failed to prove by a preponderance of the evidence that the requested medical treatment contained in Claimant's Exhibit 2 from doctors other than Dr. Hart after March 5, 2004, were reasonable, necessary, and related to the claimant's April 28, 2003, compensable back injury, as I find that the claimant had reached maximum medical improvement by March 5, 2004, and therefore any pharmaceutical costs or any medical bills for treatment from anyone other than Dr. Hart that occurred after March 5, 2004, and contained in Claimant's Exhibit 2 herein is not the respondents' responsibility.
- 10) All medical treatment and doctors' visits contained in Claimant's Exhibit 2 prior to March 5, 2004, and after April 28, 2003, were within the claimant's healing period from his April 28, 2003, injury, and I find that they were reasonable, necessary, and related to the claimant's compensable injury and therefore the respondents' responsibility.
- 11) With regard to the pharmaceutical expenses outlined in Claimant's Exhibit 2, I find that those drugs prescribed by Dr. Hart contained therein were reasonable, necessary, and related to the claimant's compensable injury and therefore the respondents' responsibility; however, any pharmaceutical expenses from anyone other than Dr. Hart after March 5, 2004, were not reasonable, necessary, and related to the claimant's compensable injury and therefore not the respondents' responsibility. With regard to pharmaceutical expenses contained in the record in Claimant's Exhibit 2 that were prescribed prior to March 5, 2004, and after April 28, 2003, I find those pharmaceutical expenses to be reasonable, necessary, and related to the claimant's April 28, 2003, compensable injury and therefore the respondents'

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responsibility. Specifically with regard to Item DD contained in Claimant's Exhibit 2, there are several bills for pharmaceutical expenses that were incurred prior to the compensable injury of April 28, 2003. To be clear with regard as to Items in DD, respondents are only liable for those pharmaceutical expenses contained in Claimant's Exhibit 2, Item DD between April 28, 2003, and March 5, 2004. Any pharmaceutical expenses prior to the compensable incident of April 28, 2003, were not reasonable, necessary, and related to the claimant's compensable injury of April 28, 2003, and therefore not the respondents' responsibility. The only mileage reimbursement the claimant is entitled to requested in Claimant's Exhibit 2 is for travel expenses related to Dr. Thomas Hart.

**AWARD**

Respondents No. 1 are directed and ordered to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

**IT IS SO ORDERED.**

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**S. DALE DOUTHIT**  
**Administrative Law Judge**

SDD/pjb