

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102830

GRADY MARTIN, JR.,
EMPLOYEE

CLAIMANT

JENSEN CONSTRUCTION COMPANY,
EMPLOYER

RESPONDENT

ST. PAUL MERCURY INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 15, 2005

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE GREG GILES, Attorney at
Law, Texarkana, Arkansas.

Respondents represented by HONORABLE JOSEPH KILPATRICK, JR.,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed in part
and reversed in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals
an administrative law judge's opinion filed October 30,
2003. The administrative law judge found, among other
things, that the claimant sustained wage-loss disability in
an amount equal to 25% to the body as a whole. The
administrative law judge found that "the claimant's care by
Dr. Raker and Dr. Safman, included the MRI scan of the
claimant's low back, was rendered pursuant to valid
referrals and was reasonably necessary in connection with
the claimant's compensable injury, so that it is the

responsibility of the respondents." After reviewing the entire record *de novo*, the Full Commission affirms in part and reverses in part the opinion of the administrative law judge. The Full Commission finds that the claimant sustained wage-loss disability in an amount equal to 25%, in addition to the 15% anatomical impairment rating accepted and paid by the respondents. We find that the claimant's treatment from Dr. Raker and Dr. Safman was reasonably necessary in connection with the claimant's compensable injury. However, the Full Commission finds that the claimant failed to prove that a lumbar MRI was reasonably necessary.

I. HISTORY

Grady Martin, Jr., age 45, testified that he was educated through the ninth grade. The claimant testified that his work history including landscaping and painting, but mostly concrete and construction work. The claimant testified that he began working as a carpenter and concrete finisher for Jensen Construction in June 1997. The claimant testified that his job required manual labor. The parties stipulated that the claimant sustained a compensable injury to his neck on September 10, 1999. The claimant testified

that he was on top of a ladder and fell backwards on his neck. The record indicates that the claimant began a series of treatments with Dr. John Bomar, D.C., on September 13, 1999.

The claimant credibly testified that he continued to work following the accident. The claimant testified, however, that he continued to experience significant neck pain radiating to his extremities. Dr. Khalid Gawad reported on June 12, 2000, "He experienced neck injury about eight months ago during work when he fell off a ladder and hit the back of his neck. His neck has been sore since that time. He was under the care of a chiropractor in Arkansas. In the last few weeks he has noted that the neck pain has been getting worse and has been radiating down his right shoulder."

The claimant began treating with Dr. Anthony E. Russell, who noted on January 5, 2001, "A CT myelogram performed yesterday indicates the presence of a fairly significant disc herniation on the left at C3-C4. This does appear to be causing direct compression on the nerve root....In light of his ongoing pain, we have elected to proceed with anterior cervical discectomy and fusion." The

parties stipulated that Dr. Russell performed surgery at C3-4 on January 19, 2001. Dr. Russell noted on February 8, 2001 that the claimant had improved post-surgically. However, Dr. Russell noted on March 1, 2001 that the claimant had an "onset of pain in his neck with radiation to his shoulders. He did not recall a particular event." Dr. Russell noted on April 5, 2001, "He recently underwent follow-up MRI scan which showed degenerative changes at adjacent levels, but there was no evidence of an operable lesion....I do not believe that further conservative measures offer him a chance for long-term relief. In light of this I would plan to release Mr. Martin effective in the next 2-3 weeks. I would plan to release him with a 10% impairment rating." The claimant testified that he returned to restricted work after Dr. Russell's release.

After the claimant continued to complain of pain, the respondent-carrier arranged a Second Opinion from Dr. Reginald J. Rutherford. Dr. Rutherford examined the claimant, arranged additional diagnostic testing, and referred the claimant back to Dr. Russell. Dr. Russell noted on May 17, 2001:

Mr. Martin presents today with complaints similar to what he had previously. In reviewing the

radiologic studies, there is mild foraminal stenosis present. However, I see nothing that would constitute a surgical lesion at this time....

I let Mr. Martin know that I feel that we have done everything we can from a surgical standpoint. He certainly may require decompression in the future. However, at this time I would be content to continue treating him conservatively. I believe Mr. Martin has already applied for his long-term disability. I let him know that based on his previous surgery, he may not be able to resume heavy physical labor....

On October 4, 2001, Dr. Rutherford noted, "Impairment rating was discussed with Dr. Moore. It is more applicable to use the DRE system via 4th Edition, AMA Guidelines. This would yield a 15% total body impairment for radiculopathy."

The parties stipulated that Dr. Russell performed surgery at C5-6 on December 10, 2001. The claimant testified regarding the second surgery, "Maybe it helped some, you know, but the pain, it's still there. It never did just go away."

Dr. Russell wrote on January 28, 2002:

Grady Martin returned today in follow-up for his anterior cervical diskectomy and fusion. Unfortunately, he continues to have quite a bit of pain, numbness, and tingling extending into his upper extremities. This despite multiple cervical spine operative procedures.

I let Mr. Martin know that in light of this, it is doubtful that he will be able to return to gainful

employment. In light of having undergone multiple operative procedures, it is almost a certainty that he will require further interventions should he continue to engage in heavy physical activity.

Instead, I have encouraged Mr. Martin to look into his options regarding long-term disability versus retirement. It is very doubtful that we will ever be able to return him to his previous level of employment and for that reason we believe that his best hope for the future lies in reducing his activity significantly and attempting to avoid the need for any further intervention.

Dr. Russell noted on July 1, 2002, "I would consider Mr. Martin to be totally disabled based on his previous surgical procedures and his subjective continuing pain."

The parties deposed Dr. Russell on December 20, 2002. Dr. Russell confirmed that he performed a discectomy and fusion at C3-4 in January 2001. Dr. Russell testified that he had released the claimant on April 5, 2001 and had assigned a 10% impairment rating. The respondents' attorney examined Dr. Russell:

Q. Did you think there was a disc herniation at C5-6 or not?

A. I didn't think it was bad enough to warrant surgery at that time. He definitely showed some wear and tear there, some chronic degenerative changes, but not anything that would warrant initial surgery on that first go around.

Q. The degenerative changes that you're talking about, the wear and tear, that didn't occur in any accident, then?

A. No, sir.

Q. Those were already there?

A. That's correct....

Q. Now, you eventually did a surgery. Well, you did it in December of 2001; is that correct?

A. Yes, sir, he continued to complain of pain and I was having to use more and more pain medicine to keep him happy, you know, as far as his pain went. So in December, we took him back and did a redo discectomy at C5-6.

Q. That was not related to the workers' comp accident, was it?

A. No, sir, I didn't think so.

Q. Have you seen him since December the 19th?

A. Yes.

Q. Has he improved since that time?

A. He still continues to complain of pain in the neck, shoulder, and arm. He's requiring medication on a regular basis. In fact, he called this morning requesting a prescription for pain medication....

Anytime you do a fusion at one level, you're going to accelerate the deterioration at other levels, and he already had the process in motion. So basically, he's having more of the same....

Q. Could he return to work?

A. I think there are certain jobs that he would not be clearly suited for, but there - yes, he could return to most work.

Q. Have you placed any kind of restrictions on

his work?

A. I don't believe I specifically set down restrictions in the chart, but I would be reluctant to let him do overhead work or any kind of work that involves repeated flexion/extension of the neck.

Q. Are those the only restrictions that you would place on him?

A. Yes.

Q. Does he have any impairment as a result of the second surgery?

A. Since it's the second level, and a different level, he would be entitled to an additional 3 percent impairment rating, based on that.

The claimant's attorney questioned Dr. Russell:

Q. So if Mr. Martin had not had the problem at C3-4, do you believe the problem at C5 or 6 would have needed surgical intervention at the time that you performed it?

A. Well, that's kind of hard to say. I think that that C5-6 space would eventually have needed surgery, but it may have been months down the line. C5-6 certainly didn't help - I mean, doing C3-4 certainly didn't help C5-6.

The record indicates that the claimant began treating with Dr. James Raker, D.C., on or about February 12, 2003. The claimant wrote that the purpose of his appointment with Dr. Raker was "Neck, Back, Shoulder and leg pain," which had begun in September 1999. The claimant testified that he benefitted from Dr. Raker's treatment.

Dr. Rutherford informed the claimant's attorney on February 13, 2003, "The history provided to me by Mr. Martin would incriminate his industrial accident as the basis for his complaints cervical spine C5/6 level....In my medical opinion which is rendered within a reasonable degree of medical certainty, Mr. Martin's bilateral cervical radiculopathy C5/6 level is causally related to his industrial accident and treatment per se was causally related to his industrial accident."

Dr. Russell wrote on February 14, 2003, "In order to facilitate his ongoing pain management, I would like to release his case to Dr. James Raker, a pain specialist in Texarkana. This gentleman will be able to work with Grady in regard to his pain medications, and hopefully will be able to make some adjustments and ultimately wean the patient from his dependence on the medication. I believe that a nonsurgical pain specialist is better suited to follow the patient for his chronic pain."

Dr. Raker assigned work restrictions on March 14, 2003.
Dr. Bruce L. Safman reported on March 26, 2003:

Mr. Martin was referred by James Raker for evaluation and treatment of cervical and shoulder pain. Approval was obtained from Sheila Hall at St. Paul's Ins. Co. Mr. Martin is a 43-year-old

male who has cervical pain which radiates down to his arms and legs. This problem has been in existence for about four years. He reported he was injured at work in September of 1999....

Dr. Safman treated the claimant conservatively.

Mr. Martin claimed entitlement to additional worker's compensation. The claimant contended that he was entitled to additional temporary total disability compensation "from the date such benefits were terminated, June 14, 2002, until the end of his healing period, July 1, 2002." The claimant contended that the compensable injury had rendered him permanently totally disabled "or has caused him to suffer wage-loss disability substantially in excess of his anatomical impairment." The claimant contended that he was entitled to an attorney's fee for controversion, "including controversion of benefits paid as a result of the claimant's second surgery."

The respondents contended that "although they accepted and paid benefits related to the second surgery, the second surgery, according to Dr. Russell's deposition testimony, was unrelated to the claimant's compensable injury." The respondents therefore contended that the period of temporary total disability requested by the claimant was not related to the compensable injury. The respondents contended that

the claimant did not sustain wage-loss disability and had not been rendered permanently and totally disabled. The respondents "reserved the right to plead further concerning the level of anatomical impairment sustained by the claimant as a result of his compensable injury and the first surgery." The respondents contended that they had not controverted benefits "previously voluntarily paid." The respondents indicated at hearing that they accepted a 15% anatomical impairment rating.

The administrative law judge found that the claimant was entitled to temporary total disability compensation "from the date such benefits were terminated in June, 2002, until the end of his healing period, July 1, 2002, when he was released by Dr. Anthony E. Russell." The administrative law judge found that the claimant "sustained permanent disability in a total amount equal to 35% to the body as a whole and consisting of permanent anatomical impairment of 10% to the body as a whole together with wage loss disability in an additional amount equal to 25% to the body as a whole." The administrative law judge found that the claimant was not entitled to a hospital bed. The administrative law judge found "that the claimant's care by

Dr. Raker and Dr. Safman, including the MRI scan of the claimant's low back, was rendered pursuant to valid referrals and was reasonably necessary in connection with the claimant's compensable injury, so that it is the responsibility of the respondents." Finally, the administrative law judge found, "Except for benefits previously voluntarily paid or accepted as compensable, the respondents have controverted the payment of benefits hereinafter awarded," so that the claimant's attorney was entitled to the maximum statutory fee.

The respondents appeal to the Full Commission. The respondents state that they do not appeal the administrative law judge's award of permanent partial disability. The respondents state that they appeal the "award of additional surgery" in December 2001 and the award of treatment related to the claimant's lower back. The claimant cross-appeals. The claimant states that the administrative law judge improperly reduced the claimant's anatomical impairment rating to 10%. The claimant states that he is entitled to an award of wage-loss disability greater than 25%.

II. ADJUDICATION

A. Anatomical Impairment

The claimant must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). The respondents in the present matter accepted a 15% anatomical impairment rating. The administrative law judge determined that the claimant's anatomical impairment was actually 10% to the body as a whole, but the administrative law judge did not explain his basis for reducing the claimant's anatomical impairment. The Full Commission therefore finds that the administrative law judge improperly reduced the 15% anatomical impairment rating accepted by the respondents.

B. Wage Loss

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). Ark. Code Ann. §11-9-522(b)(1) provides that in considering claims for permanent partial disability benefits in excess of the employee's percentage of physical impairment, the Commission may take into account such factors as the employee's age, education, work experience,

and other matters reasonably expected to affect his future earning capacity. The administrative law judge in the present matter awarded wage-loss disability in the amount of 25%. The administrative law judge determined that the claimant was not precluded from attempting light employment of a sedentary nature. The Full Commission finds the claimant to be a credible witness. The claimant has performed almost exclusively manual labor after leaving school following the ninth grade. The claimant had no prior history of medical problems before falling and injuring his neck in September 1999. It is clear that the claimant can probably never return to his carpentry and concrete duties with the respondents. However, the claimant is only 45 years old. We cannot agree with the claimant's argument that he is permanently and totally disabled. Dr. Russell testified, "I think there are certain jobs that he would not be clearly suited for, but there - yes, he could return to most work." In considering the claimant's young age, limited education, and work experience, the Full Commission finds that the claimant proved he was entitled to 25% wage-loss disability in excess of the 15% permanent physical impairment accepted by the respondents.

C. Medical Treatment

In claims before the Commission, the burden is upon the claimant to prove by a preponderance of the evidence that he is entitled to benefits. Morrow v. Mulberry Lumber Co., 5 Ark. App. 260, 635 S.W.2d 283 (1982). An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

The administrative law judge found in the present matter, "The preponderance of the evidence shows that the claimant's care by Dr. Raker and Dr. Safman, including the MRI scan of the claimant's low back, was rendered pursuant to valid referrals and was reasonably necessary in connection with the claimant's compensable injury, so that it is the responsibility of the respondents." The Full Commission affirms in part this finding by the administrative law judge. We find from a preponderance of evidence that treatment from Dr. Raker and Dr. Safman was

reasonably necessary in connection with the claimant's compensable injury to his neck and/or cervical spine. However, there is no evidence indicating that the claimant was entitled to any diagnostic testing for his low back and/or lumbar spine. The claimant did not sustain a lower back injury. The parties stipulated that the claimant injured his neck in September 1999. In November 2000, a bulging disc was seen at C5-6. Dr. Russell operated at C3-4 in January 2001. An MRI in March 2001 showed "More significant disc bulge at C5-6." Dr. Russell operated at C5-6 in December 2001. The Full Commission recognizes that, at deposition, Dr. Russell agreed that the "degenerative changes" at C5-6 were not the result of the accidental injury. But Dr. Russell also testified, "Anytime you do a fusion at one level, you're going to accelerate the deterioration at other levels, and he already had the process in motion." Causal connection is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. Osmose Wood Preserving v. Jones, 40 Ark. App. 190, 843 S.W.2d 875 (1992). The basic test is whether there is a causal connection between the two episodes. Air Compressor Equip.

v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The evidence in the present matter shows that the surgery at C4-5 led to the deterioration at C5-6. Dr. Russell later testified, "I think that the C5-6 space would eventually have needed surgery, but it may have been months down the line. C5-6 certainly didn't help - I mean, doing C3-4 certainly didn't help C5-6." The Full Commission also notes Dr. Rutherford's opinion, "Mr. Martin's bilateral cervical radiculopathy C5/6 level is causally related to his industrial accident and treatment per se was causally related to his industrial accident." We expressly find that treatment provided for the claimant at the C5-6 cervical level was reasonably necessary in connection with the claimant's compensable injury.

The Full Commission affirms the administrative law judge's finding that the claimant was entitled to treatment from Dr. Raker and Dr. Safman. The evidence before the Commission shows that Dr. Raker and Dr. Safman were treating the claimant for his continued neck complaints which were causally related to the compensable injury. We note that Dr. Russell explicitly referred the claimant to Dr. Raker in February 2003 for pain management related to the compensable

injury. Dr. Raker in turn referred the claimant to Dr. Safman, and the record shows that Dr. Safman's treatment was reasonably necessary. However, the record does not support the administrative law judge's implicit finding that a lumbar MRI was reasonably necessary. The claimant did not sustain a lumbar injury, and the record does not show that the claimant was entitled to treatment for his low back or lumbar spine as a compensable consequence of the cervical injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was entitled to wage-loss disability in the amount of 25%, in addition to the 15% anatomical impairment rating accepted by the respondents. We find that the claimant's treatment by Dr. Raker and Dr. Safman, except for the lumbar MRI, was reasonably necessary in connection with the claimant's compensable injury to his neck. The Full Commission therefore affirms in part and reverses in part the administrative law judge's decision. Because the respondents controverted the claim for additional benefits, the claimant's attorney is entitled to a fee pursuant to Ark. Code Ann. §11-9-715(Repl. 1999). For prevailing in

part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of \$250 pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 1999).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur in the Majority's decision to reverse the Administrative Law Judge's reduction of the Claimant's impairment rating; its finding that Dr. Raker and Dr. Saffman are authorized physicians; and that Dr. Russell's surgery in December 2001 is reasonably necessary medical treatment related to the Claimant's compensable injury. However, I respectfully dissent to the finding regarding the lumbar MRI performed at the direction of Dr. Raker and the denial of the Claimant's entitlement to permanent and total disability benefits.

The Majority found that a lumbar MRI performed on the Claimant by Dr. Raker was not related to his injury. However, I believe that this conclusion is

erroneous in two respects. First, Dr. Raker was, as found by the Majority and the Administrative Law Judge, an authorized doctor. Further, the Claimant had injuries to multiple levels in his cervical spine as a result of a fall. This caused him to have radicular symptoms throughout his body. I also note that there is a question as to whether the Claimant may have sustained an injury to his lumbar spine in his original job related accident. In my opinion, having the Claimant undergo a lumbar MRI is certainly a reasonable course of medical treatment to follow under the circumstances.

Secondly, compensability of the Claimant's back condition was specifically reserved for future determination. In finding that this MRI is not related to the Claimant's compensable accident the Majority is, in effect, adjudicating the Claimant's entitlement to benefits based upon a lower back injury.

I also respectfully dissent from the denial of permanent and total disability benefits. The Claimant is in his middle 40's with a ninth grade education. All of his prior jobs have involved heavy manual labor, primarily in the construction industry. As a concrete finisher, the

Claimant's primary occupation, he was frequently required to lift weight in excess of 100 pounds, as well as engaging in bending, stooping, crawling, and other vigorous activities. His other jobs have also been in the construction industry and likewise involved heavy lifting and other strenuous activities.

As a result of his admittedly compensable injury, the Claimant has sustained injuries at multiple levels of his cervical spine. For treatment of those injuries, he has undergone two cervical fusions and, consequently, his upper torso mobility is significantly limited. Additionally, the fusion caused considerable stress on the other vertebrae in his neck which means that not only will vigorous physical activity rapidly accelerate degenerative changes in those vertebrae, his likelihood of significant injury to the other levels is magnified. The Claimant's treating physician has also placed significant limits on the Claimant's physical activities which would preclude him in engaging in any of his past employments. Given the Claimant's age, limited education, and lack of job experience at any light or sedentary employment, I do not believe that the Claimant

is employable in any meaningful fashion. I would therefore find that he has met his burden of establishing that he is permanently and totally disabled and that he is entitled to permanent and total disability benefits.

I am also writing to clarify one issue which the Majority has not clearly addressed. Both the Administrative Law Judge and the Majority found that the cervical fusion performed by Dr. Russell in December 2001 was related to the Claimant's original compensable injury and was reasonable and necessary medical treatment. However, at the hearing and in its Appellate Brief, the Respondent vigorously contends that this surgical treatment was not related to the Claimant's admittedly compensable injury. While the Respondent concedes that they have already paid for this treatment and that they are not requesting any reimbursement or otherwise controverting their past payment of medical or disability benefits accrued as a result of the surgery, I believe the claimant's attorney is entitled to a fee based upon their contention. In Cleek v. Great Southern Metals, 335 Ark. 342, 981 S. W. 2nd 529 (1998), the Arkansas Supreme Court held that where the actions of the Respondent require the

Claimant's attorney to litigate the Claimant's entitlement to benefits which have been previously paid, he was entitled to a fee upon those benefits. That is exactly the situation in the present case. By contending that Dr. Russell's second cervical fusion was not the result of the Claimant's compensable injury and that therefore the Claimant was not entitled to certain benefits resulting from that surgical treatment, the Claimant's attorney was required to establish that the Respondent was liable for this treatment.

I note this proposition to clarify that it is my understanding that the Majority opinion would result in the Claimant's attorney being entitled to a fee for prevailing on appeal on Dr. Russell's surgery performed in December 2001, and the additional permanent disability benefits based upon that surgery.

For the reasons set out above, I concur in part and dissent in part.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully dissent in part and concur in part with the majority's opinion. Specifically, I find that the claimant has failed to by a preponderance of the evidence that the claimant's second surgery and subsequent medical treatment are causally related to the claimant's compensable injury. I further find that the claimant sustained a 25% decrease in his wage earning capacity. Accordingly, to the extent the majority opinion finds otherwise, I respectfully dissent. However, I concur in the majority's finding that the lumbar MRI was not reasonably necessary in connection with the claimant's compensable cervical injury.

The claimant acknowledged in his brief that Dr. Russell, claimant's treating neurosurgeon, testified that he did not think that the claimant's second surgery was related to the claimant's compensable injury. The Post Myelogram Cervical CT scan performed on January 4, 2001, revealed the following findings at C5-6, in addition to finding a herniated disc at the C3-4 level:

At C5-6, there is posterior spondylitic ridging noted at this level with effacement of the thecal sac and minimal canal encroachment.

There is foraminal narrowing present due to spurring at the uncovertebral joint more prominent on the right than the left. On the left, the nerve root sleeve appears to fill completely; however, on the right it does not fill. No discrete HNP is seen.

The radiologist's impression with regard to these findings was that of spurring at the uncovertebral joints. Upon receiving this report, Dr. Russell, claimant's treating neurosurgeon, did not even address the findings with regard to the C5-6 level. In his deposition, Dr. Russell was asked whether there was a disc herniation at C5-6 to which he responded, "I didn't think it was bad enough to warrant surgery at that time. He definitely showed some wear and tear there, some chronic degenerative changes, but not anything that would warrant initial surgery on the first go around." Dr. Russell unequivocally testified that the wear and tear noted on this myelogram did not occur in any accident. On January 19, 2001, Dr. Russell performed an anterior cervical discectomy and fusion at the C3-4. Again, when asked in his deposition whether the problems associated with the C5-6 level were related to the accident or related to the claimant's underlying

degenerative changes, Dr. Russell responded, " Well, if I'd have felt it was due to the accident, I, most likely, would have taken care of it on the initial operative procedure."

An MRI performed on March 26, 2001, revealed in relevant part, "At C5-6 there is evidence disc degenerative disease with anterior spurring and subchondral marrow edema felt to be degenerative in origin. A moderate bulging annulus is seen at C5-6." In his report dated April 5, 2001, in which he addressed this MRI report, Dr. Russell stated, "He recently underwent follow-up MRI scan which showed degenerative changes at adjacent levels, but there was no evidence of an operable lesion." The claimant returned to Dr. Russell on November 19, 2001, with continued complaints of pain. Although Dr. Russell stated in his report that he ordered a new MRI scan, with a plan to schedule surgery based upon the results, the results of this scan were not introduced into evidence. However, the radiologist's impression was read into Dr. Russell's deposition as follows: "Possible hard disc complex in the right, lateral recess at C5-6. This could be compressing the nerve root. Please

correlate....Diffuse degenerative spondylosis with antecedent, anterior cervical fusion at C3-4." When Dr. Russell was asked to explain these findings, the following testimony transpired:

A. It just means that at C5-6, they felt like there was a bone spur - - or a hard disc complex is generally a spur - - compressing the nerve at C5-6, and could have been compromising the nerve, and then at C3-4, they just saw post-operative changes.

Q. The bone spur was not caused by the workers' compensation accident, was it:

A. No, sir, I wouldn't think so.

Q. No, you eventually did a surgery. Well, you did it in December of 2001; is that correct?

A. Yes, sir, he continued to complain of pain and I was having to use more and more pain medicine to keep him happy, you know, as far as his pain went. So in December, we took him back and did a redo discectomy at C5-6.

Q. That was not related to the workers' comp. accident, was it?

A. No, sir, I didn't think so.

In finding that the second surgery is related to the claimant's compensable injury, the majority relies

upon Dr. Rutherford's causation opinion and the portion of Dr. Russell's deposition in which he testified that the surgery at C3-4 certainly did not help the claimant's condition at C5-6. In this regard, Dr. Russell testified:

Q. Now, you've mentioned that when you've had a second operation or fusion, that that sometimes accelerates naturally occurring or degenerative-type changes in the spine- -

A. Yes, sir.

Q. What actually causes that acceleration?

A. The theory is, that by reducing the number of disc spaces in the neck, the remaining disc have to take up more of the brunt of the normal day-today activity of the neck, supporting the weight of the head, movement, and all that. Where as you had six disc spaces doing it before, now you've only got five, so they're taking up a bigger load, so they're going to wear out faster, just like a hinge on a door or anything like that.

Q. So, if Mr. Martin had not had the problem at C3-4, do you believe the problem at C5 or 6 would have needed surgical intervention at the time that you performed it?

A. Well, that's kind of hard to say. I think that that C5-6 space would eventually have needed surgery, but

it may have been months down the line. C5-6 certainly didn't help - - I mean, doing C3-4 certainly didn't help C5-6.

However, when the remainder of Dr. Russell's testimony in this regard is considered, it is clear that Dr. Russell does not relate the C5-6 surgery to the compensable injury.

Q. As a result of, what I will call a chain of events, can you relate the surgery that you may have to do in the future back to, in any way, the original injury that he had at C3-4?

A. If you take each thing as being a result of the previous step in the chain, yes. Again, I'm not sure that 5-6 was directly in there, you know, that's kind of dropped in the middle and only since it's done would 4-5 be a problem.

Moreover, it is noted that Dr. Rutherford's causation opinion fails to disclose a basis for this opinion. Accordingly, when I weigh all the evidence of record, I cannot conclude that the claimant's second surgery is causally related to the compensable injury. The claimant clearly suffered from chronic degenerative changes at C5-6 prior to the compensable injury and there is no credible evidence upon which I can rely to find that

the claimant's compensable injury accelerated or combined with this pre-existing condition to cause the claimant's need for surgery to address this chronic condition.

With regard to the claimant's wage loss disability, I find that the claimant has failed to prove by a preponderance of the evidence entitlement to any wage loss disability greater than the 25% found by the Administrative Law Judge. Accordingly, I concur with the majority opinion on this issue.

Accordingly, for those reasons set forth herein, I must respectfully dissent from the majority opinion finding that the second surgery and subsequent medical treatment are causally related to the claimant's compensable injury. As I agree with the majority's findings that the lumbar MRI was not reasonably necessary in connection with the claimant's compensable cervical injury, and that the claimant sustained a 25% decrease in his wage earning capacity, I concur without comment as to these findings.

KAREN H. MCKINNEY, Commissioner