

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212343

MARVIN L. TREAT,  
EMPLOYEE CLAIMANT

MICRO PLASTICS, INC.,  
EMPLOYER RESPONDENT

TRAVELERS INSURANCE COMPANY,  
INSURANCE CARRIER RESPONDENT

OPINION FILED SEPTEMBER 26, 2005

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

Claimant represented by the HONORABLE M. KEITH WREN,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE ROBERT  
MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of  
the Administrative Law Judge filed October 28, 2004. In  
said order, the Administrative Law Judge made the  
following findings of fact and conclusions of law:

1. The stipulations agreed upon  
by the parties are reasonable and  
are approved.
2. The relationship of employee-  
employer-carrier existed on  
February 25, 2002, and at all  
relevant times.

3. Claimant sustained a compensable injury on February 25, 2002.

4. Claimant's compensation rate for temporary total disability benefits is \$277.00; his compensation rate for permanent partial disability benefits is \$208.00.

5. Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. The medical records produced by Dr. Schlesinger and Dr. Bruffett, as well as Claimant's credible testimony, established that Claimant's compensable injury is a factor in his need for surgery, and that the recommended procedures are reasonably necessary to treat Claimant.

6. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 29, 2003 through May 15, 2003. The proof does not establish Claimant's total incapacity to earn wages during this period.

7. Claimant is not entitled to an award of an attorney's fee, because the applicable statute does not permit such awards on medical benefits or services.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly

applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the October 28, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is entitled to additional medical treatment in connection with his compensable injury in the form of spinal surgery.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that the spinal surgery recommended by Dr. Scott Schlesinger and Dr. Wayne Bruffet is reasonable and necessary to the treatment of his compensable injury. Therefore, I find that the decision of the Administrative Law Judge should be reversed.

The claimant sustained a compensable injury on February 25, 2002, while loading a thirty-five pound box onto a wooden pallet. On the day of this incident, the claimant presented to Dr. Bruffett with complaints of

right pelvic pain radiating into his back. An MRI taken of the claimant's lumbar spine on March 3, 2002, revealed that the claimant had severe degenerative changes throughout his lumbar spine, with associated stenosis, osteophyte formation and disc bulging. In addition, this study showed a disc protrusion at T12-L1, a probable protrusion at L2-L3, and a severe bulge at L1-L2. On March 18, 2002, the claimant was seen by Dr. Schlesinger for a neurosurgical evaluation. In his report of that examination, Dr. Schlesinger wrote:

I have read the MRI scan of the lumbar spine. There are very complex changes. There are multilevel degenerative and arthritic changes and bulging discs.

Dr. Schlesinger added:

It is difficult to tell exactly where his problems are coming from and I certainly want to manage him conservatively if at all possible.

Dr. Schlesinger referred the claimant to physical therapy and a lumbar stabilization program. In addition, he referred the claimant to Dr. William Ackerman for pain management, and he placed him on light duty at work. Without surgery, Dr. Schlesinger anticipated that the claimant would have a permanent partial impairment rating of 7%.

The claimant continued under the conservative care of Dr. Ackerman, who treated him with steroid injections and medications. The claimant responded favorably to the steroid injections and continued to work light duty. On October 15, 2002, however, the claimant reported to Dr. Ackerman that his lumbar pain had become worse. Myelogram and post myelogram studies conducted on October 23, 2002, revealed that the claimant's canal stenosis and broad based disc bulges are secondary to "developmentally short pedicles", or in other words, scoliosis. In his report dated November 7, 2002, Dr. Ackerman noted:

The patient's pain remains severe. He has a myelogram and a post myelogram CT. He has facet joint hypertrophy. He has stenosis at L3-4 and L4-5. He has moderate central canal stenosis at L1-2. He has had a sprain/strain injury to his lumbar spine. His current conditions and pain are of medical origin. He should have reached maximum medical improvement with respect to his sprain/strain injury. He should remain on light duty as a result of his medical condition as opposed to his work related condition. It is my medical opinion that he has reached maximum medical improvement with respect to this injury.

Dr. Ackerman's assessment of the claimant's condition was "Sprain/strain injury in the course of his employment, which aggravated his underlying medical

problems, which is degeneration of the lumbar spine.” Dr. Ackerman gave the claimant a 5% permanent partial impairment rating to the body as a whole. Dr. Ackerman planned to continue the claimant on his current medications and refer him back to Dr. Schlesinger for reevaluation in order to determine whether the claimant “would be a surgical candidate for his stenosis.”

From his examination of the claimant on November 18, 2002, which included a review of his recent diagnostic studies, Dr. Schlesinger concurred that the claimant suffered from congenital scoliosis throughout his lumbar spine. Concerning the source of the claimant’s continuing back pain, Dr. Schlesinger wrote:

This is a very complicated situation. I am not sure where his back pain is coming from, but he has multi factorial causes. Low back pain has many etiologies. The back pain may come from the facet degeneration of the discs, musculoskeletal symptoms, rheumatological disorders, etc. There are a long list of problems that are not surgical in nature that can rise to low back pain.

In spite of Dr. Schlesinger’s stated uncertainty as to the etiology of the claimant’s back pain, and his further admission that the claimant was “born with significant abnormality”, Dr. Schlesinger opined:

I do think with a high degree of medical certainty that this is indeed related to his work injury by greater than 50%.

On January 9, 2003, the claimant was assessed by Dr. Bruffett, who stated that he did not feel that surgery was the most viable treatment option for alleviating the claimant's back pain.

I would agree with Dr. Schlesinger that a decompression of the spinal stenosis would not really help his back pain. Certainly, because he has a significant amount of low back pain, which is typically not treated successfully with surgery, I would recommend that he try to manage his pain and get by without having a major operation.

Dr. Bruffett explained that decompression of spinal stenosis, in light of scoliosis with lateral listhesis, creates a risk of post-operative instability. Therefore, Dr. Bruffett stated that a concomitant fusion at the time of the claimant's multilevel lumbar decompression procedure would be necessary to prevent further destabilization. Dr. Bruffett concluded by stating that he had discussed with the claimant that the proposed surgery was not for the purpose of eradicating his back pain, and that his pain would be best managed by weight loss, stomach strengthening, and back strengthening.

On May 30, 2003, Dr. Schlesinger once again opined that the claimant's work injury caused the onset of his symptoms. Dr. Schlesinger stated that he was basing his opinion primarily on the accuracy of the claimant's history. "If this history is correct," stated Dr. Schlesinger, "and he was having only minor back problems intermittently prior to the accident, then I think the work injury caused the onset of his symptomatic condition."

On direct examination, the claimant testified that the only treatment he received prior to his compensable injury for low back pain were occasional chiropractic full body adjustments. Furthermore, the claimant denied ever having radiating pain down his legs prior to his work related injury. On cross examination, however, the claimant admitted that he had pulled muscles in his back in a prior work related incident, and that he had been received medical treatment for that injury. According to the medical records, this incident, which occurred in June of 1999, was similar to the incident that occurred in February of 2002, in that the claimant was moving boxes off of some shelves when he experienced a sudden onset of pain in his lower left back. As with his contemporary claim, the claimant was

diagnosed with a muscle strain, given medications, and put on work restrictions.

Pursuant to Ark. Code Ann. § 11-9-508(a), employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). Moreover, when assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Finally, the respondent is only responsible for medical services which are causally related to the compensable injury.

In the present claim, the claimant asserts that he is entitled to complex decompression surgery with stabilization as part of his medical treatment for his compensable injury. However, as the respondent correctly asserted during the hearing, the record

confirms that the claimant's work related injury of February 2002, was a strain/sprain type injury, thus a soft tissue injury only. The medical records also confirm that the claimant's current problems are the result of progressively worsening degenerative disc disease caused by a congenital disorder. Furthermore, although Dr. Schlesinger has stated that the claimant's work related injury caused him to become symptomatic, Dr. Schlesinger has also stated that the complicated and risky surgery that he proposes for the claimant will not alleviate the claimant's symptoms of back pain. As previously mentioned, Dr. Bruffett concurs with Dr. Schlesinger in this regard. Furthermore, Dr. Schlesinger has stated that he is not sure where the claimant's back pain is coming from, but that it has "multi factorial" causes. And although the claimant was said by Dr. Bruffett to have a clear understanding that the proposed surgery would not eradicate his pain, the claimant testified, "I need the relief from the pain."

In his report of January 9, 2003, Dr. Bruffett clearly indicated that surgery was left up to the claimant, and was not necessarily the most preferable treatment option. More specifically, Dr. Bruffett stated, "Whether or not he has surgery for his condition, in my opinion, is really up to him." Dr.

Bruffett added, "... I would recommend that he try to manage his pain and get by without having a major operation." The claimant's testimony contradicted the statements made by Dr. Bruffett regarding the proposed surgery as follows:

Q. You want to have that surgery?

A. I need the relief from the pain. I don't want surgery; I need the surgery. The surgery scares me.

Finally, in his report dated May 7, 2003, Dr. Bruffett wrote the following:

I again reviewed things with Mr. Treat, and he understands the risks of surgery, ... . He understands that the main goal of the surgery is to help with his neurogenic claudication [limping or lameness] and the pain in his hip and legs. He understands that the best treatment for his back pain would be weight loss and a vigorous exercise program. Therefore, this surgery should not be expected to cure his back pain, and I think he understands this.

In summary, I find that the claimant has failed to prove by a preponderance of the evidence that the surgery proposed by Dr. Schlesinger and Dr. Bruffett is reasonable and necessary for the treatment of his compensable back injury. And even though causality was not specifically identified as an issue at the hearing,

I find that the claimant has failed to prove that the proposed surgery to which he claims entitlement is causally related to his compensable injury. Rather, the stated "main goal" for the claimant's proposed decompression surgery is "to help with his neurogenic claudication [limping or lameness] and the pain in his hip and legs." Otherwise, Dr. Bruffett sees no benefit from the proposed surgery in terms of the claimant's back pain, and he does not advocate that the claimant undergo surgery specifically for those symptoms. In fact, Dr. Bruffett has recommended that the claimant's best treatment for his continuing back pain is a combination of weight loss and strengthening exercises. Finally, as of November 7, 2002, Dr. Ackerman stated that the claimant had reached maximum medical improvement with respect to his sprain/strain injury, to which he added that the claimant should remain on light duty as a result of his medical condition as opposed to his work related condition. In addition, Dr. Ackerman assigned the claimant with a 5% permanent partial impairment rating.

Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that the proposed surgery is reasonable and necessary to the treatment of his compensable

Treat - F212343

14

injury. Therefore, must I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner