

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401228

MIKE BONACCI, EMPLOYEE	CLAIMANT
HOME DEPOT, EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 15, 2006

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

Claimant represented by HONORABLE JAMES STANLEY, Attorney at Law, North Little Rock, Arkansas.

Respondent represented by HONORABLE ANDREW IVEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on June 14, 2006, finding that the claimant is entitled to additional medical treatment, to include an IDET surgical procedure and percutaneous discectomy, as proposed by Dr. Hart. In addition, the respondent appeals the finding that the claimant is entitled to additional temporary total disability benefits from March 31, 2005, to a date yet to be determined.

Our carefully conducted de novo review of the claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that the additional medical treatment proposed by Dr. Hart is reasonably necessary for the treatment of his compensable injury. In addition, we find that the claimant has failed to prove by a preponderance of the evidence that he was still within his healing period and totally incapacitated from earning meaningful wages during the time for which he has been awarded temporary total disability benefits. Therefore, the decision of the Administrative Law Judge is hereby reversed and additional medical treatment and temporary total disability benefits denied.

It is undisputed that the claimant sustained a compensable back injury on January 10, 2004, while he was lifting a Rubbermaid shed onto a lift. The claimant credibly testified that he felt a pop in his back accompanied by pain and tightness. The claimant's symptoms progressively worsened. The claimant properly reported the incident to the

respondent employer, who accepted the injury as compensable and sent him for appropriate medical treatment.

Dr. Brent Sprinkle, a doctor of osteopathy, was among the physicians who treated the claimant for his compensable injury. On March 19, 2004, Dr. Sprinkle reported that a recent MRI of the claimant's spine revealed some slight degenerative changes at T6-7 and T7-8, with no significant stenosis revealed. Dr. Sprinkle also noted a "small bulge at 4-5, and a little bit more significant bulge at 5-1 with a more central protrusion". With regard to these findings, Dr. Sprinkle stated, "At this point, I do not think his bulges are causing any significant symptoms." Dr. Sprinkle recommended that the claimant participate in a "good lumbar stabilization program". He added that he would consider epidural injections should the claimant develop a more radicular pain pattern, since this would indicate nerve root impingement. Finally, Dr. Sprinkle prescribed the claimant medications and released him to full work duty.

An initial physical therapy evaluation conducted on March 25, 2004, revealed that the claimant's symptoms

potentially represented degenerative disc disease, a severe muscle strain, or a disc herniation "that has since resolved and become asymptomatic". The evaluator agreed with Dr. Sprinkle's recommendation for a trunk stabilization program, and he estimated that it should take the claimant six weeks to return to unlimited functional and recreational activities with no discomfort.

On April 16, 2004, the claimant returned to Dr. Sprinkle with complaints of exacerbated pain caused by lifting activities. Dr. Sprinkle restricted the claimant's lifting to 40 pounds, and no lifting more than 10 pounds, 10 times per day. Although the claimant was scheduled for follow-up in three weeks, the record indicates that he never returned to Dr. Sprinkle.

On April 20, 2004, the claimant was terminated from his employment with the respondent employer for alleged safety violations.

The claimant was granted a change-of physician to Dr. Thomas Hart on July 1, 2004. On initial examination, Dr. Hart noted that the claimant had diffuse tenderness in

the mid-thoracic region with no radicular component. In addition, the claimant reported subjective complaints of back pain on the left side from the mid-line to the left back, flank, and upper buttock region, with limited range of motion, but no marked difficulty going from a sitting to a standing position. Dr. Hart reported that the claimant's lower back showed no sign of nerve root compression, and he opined the claimant was not a surgical candidate. Therefore, he recommended steroid epidural injections and continued rehabilitation. Notwithstanding that his examination of November 8, 2004, revealed no indication of strong nerve root compression, Dr. Hart recommended that claimant undergo a discogram. In the meantime, the claimant received chiropractic treatment from Dr. Bob Carpenter, D.C., which was reportedly helpful in alleviating his symptoms. The claimant testified that Dr. Carpenter released him, from a chiropractic standpoint, to return to work with no lifting.

Dr. Carpenter referred the claimant to Dr. Steven F. Bennett, D.C. for an independent medical evaluation. On April 1, 2005, Dr. Bennett reported that the claimant had

reached maximum medical improvement as of March 31, 2005, and he opined that the claimant could work in some capacity.

A discogram of the claimant's spine taken on October 19, 2005, revealed degenerative disc disease at L3-4 and L4-5. More specifically, this study showed a superiorly migrated and central disc protrusion with extra annular leakage consistent with degenerative changes at L3-4. In addition, due to the disc bulging, mild to moderate stenosis, ligamentum flavum hypertrophy, and mild bilateral foraminal narrowing was seen at that level. There were similar findings at L4-5, with changes noted in the outer annulus of the disc with an associated central disc protrusion. These findings were said to be consistent with degenerative changes.

Pursuant to an October 31, 2005, referral by Dr. Hart, the claimant was seen by Dr. Michael Calhoun on November 9, 2005, for a surgical consultation. Based on his physical examination and review of the claimant's recent discogram, Dr. Calhoun opined that the claimant suffered

from degenerative changes for which surgical intervention was not recommended.

Despite Dr. Calhoun's opinion that the claimant's condition did not warrant surgery, on December 9, 2005, Dr. Hart recommended a percutaneous discectomy at L4-5 and L5-S1, with an IDET procedure at L3-4.

Dr. Scott Schlesinger conducted an independent medical evaluation of the claimant on March 3, 2006. According to Dr. Schlesinger, an abnormal discogram is to be expected in patients with degenerative disc disease. Moreover, Dr. Schlesinger did not believe that surgery, including percutaneous discectomy, IDET, open discectomy, or fusion, would benefit the claimant.

Ark. Code Ann. §11-9-508(a) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably 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). However, employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of

the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal Mart Stores, Inc. v. Brown, supra; Specialty Chem. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equip. v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996).

The claimant has failed to prove by a preponderance of the evidence that additional medical treatment as proposed by Dr. Hart is reasonably necessary for the treatment of his compensable injury. Although Dr. Hart has treated the claimant since July of 2004, by his own admission, his area of expertise is pain management. In

his final report of December 9, 2005, Dr. Hart even states, "I don't do impairment ratings, nor am I his [the claimant's] primary care physician." Meanwhile, two neurosurgeons have opined that the claimant will not benefit from surgical intervention. One of those surgeons, Dr. Calhoun, examined the claimant upon referral by Dr. Hart. The other, Dr. Schlesinger, was chosen by the respondent carrier. Regardless of how referred, both surgeons recommended against surgical intervention for the claimant's condition. For example, on November 9, 2005, Dr. Calhoun wrote:

We explained to the patient that with three painful discs, anything surgical would have to involve a three level fusion. Disc replacement can be done for one level changes alone. It was also explained to him that studies have shown that a one level fusion is approximately 60-70% successful, a two level is possibly 40-50% successful, but that a three level fusion only approximately a 20% success rate. With this in mind, I explained to him that even though he has significant pathology in his lower back, a three level fusion is not something I would suggest. Personally, I have never seen a patient improve with a three level fusion. I do think he is a legitimate patient and does have

pathology, but it is not presently surgically correctable.

Although true that Dr. Schlesinger did not have the opportunity to view the claimant's MRI on March 3, 2006, he had access to the report of that study. Dr. Schlesinger also had access to the claimant's CT scan and Myelogram. Based upon his examination of the claimant and review of the claimant's diagnostics studies, or alternatively, the reports from those studies, Dr. Schlesinger stated:

It is my opinion, and that of most conservative neurosurgeons, that this patient probably has degenerative disc changes and that discograms are going to be abnormal in patients with degenerative discs. It is also unproven in any well controlled randomized study that this discography offers any benefit in terms of predicting surgical intervention.

As the patient's pain is primarily back pain, I am very doubtful that I am going to be able to recommend percutaneous or open discectomy or IDET procedure. No discectomy, either open or percutaneous, has any value in the treatment of back pain alone. IDET procedures have not been shown to scientifically benefit patients with degenerative disc disease either. However, I will review the MRI before making a final decision, but I am

very likely to conclude that for the treatment of this patient's back that no form of surgery, either percutaneous discectomy, IDET or open discectomy and fusion, would have any benefits to the patient.

I would recommend, however, that the patient undergo extensive spinal rehabilitation, which has been shown scientifically to be of benefit to patient's with symptomatic degenerative disease. The other thing to consider is a home lumbar traction unit.

Although the claimant contends that Dr. Schlesinger spent very little time with him, thus suggesting that his assessment of the claimant's condition and proposed treatment is invalid, Dr. Schlesinger's medical opinion regarding surgery is consistent with Dr. Calhoun's opinion, of whom the claimant did not openly complain.

The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App.

115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. CDI Contractors v. McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993). Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999). Finally, the Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain v. Texaco, Inc., supra.

The Administrative Law Judge appears to have placed greater reliance on the evaluation and treatment

recommendations of Dr. Hart, over those of Dr. Schlesinger. In doing so, however, the Administrative Law Judge decidedly ignored the surgical evaluation and treatment recommendations presented by Dr. Calhoun, who in agreement with Dr. Schlesinger, did not view the claimant as a viable surgical candidate. Like Dr. Calhoun, Dr. Schlesinger did not deny that the claimant has legitimate pathology. Nor did Schlesinger accuse the claimant of symptom magnification or somatization. Dr. Schlesinger, like Dr. Calhoun, candidly opined that the claimant's condition was not correctable with surgery, and that better results would likely be achieved by rehabilitative therapy, which Dr. Hart had also recommended earlier on. Further, whereas Dr. Schlesinger's opinion contained a scintilla of uncertainty because, at the time given, he did not have the claimant's MRI before him, Dr. Calhoun's opinion was unequivocal. Further, Dr. Calhoun had the benefit of both the MRI and the discogram at his disposal at the time he offered his medical opinion.

In support of his finding that the claimant is entitled to an IDET procedure, the Administrative Law Judge

cites two recent Court of Appeals decisions. See, White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); and, Dallas County Hosp. v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). However, these cases are distinguishable from the current claim. In Galloway, which was decided in May of 2001, the respondent appellant argued that the IDET procedure, which was introduced in 1997 as an alternative to spinal fusion, was experimental and that the medical opinions submitted in favor of the claimant undergoing this procedure amounted to "mere conclusions, without any medical explanation as to why the procedure is necessary in treating Mrs. Galloway's specific condition." Further, the appellants urged the Court that the medical opinions offered regarding this procedure were "faulty in that they failed to discuss the probability of success of the procedure, and further failed to discuss the effect of the procedure on other back problems afflicting Mrs. Galloway, such as degenerative disc disease." In addressing the appellant's arguments, the Court stated:

In its opinion, the Commission specifically stated that it gave greater weight to the opinions of Mrs. Galloway's treating physicians than the documentary evidence offered by appellant. Indeed, it is the function of the Commission to weight medical evidence, Continental Express v. Harris, 61 Ark. App. 198, 965 S.W.2d 811 (1998), and in this case the medical opinions of Drs. Saer and Ghormley supported the Commission's decision, and these were the only opinions addressing the issue of whether or not the IDET procedure was necessary in this case. The appellant cites no authority, and we know of none, that requires a 100 percent success rate before a procedure may be deemed reasonably necessary under workers' compensation law. Nor does it cite authority or convincing argument for the proposition that the opinions of medical experts must be accompanied by specific details underlying and supporting their opinions. In the instant case, Drs. Saer and Ghormley treated Mrs. Galloway for her compensable back condition a number of years, and both recommended the IDET procedure as an alternative to fusion surgery. ... The Commission was free to accept the only medical opinions offered in this case

Ultimately, the Court upheld the Commission's decision to grant the IDET procedure. See, Galloway, supra.

Likewise, in Daniels, supra, the Court upheld the Commissions' decision to award the appellee additional treatment in the form of an IDET procedure. In this case, the Court stated:

In Galloway, the employer argued that IDET was experimental and not reasonably necessary to treat Galloway's back condition. ... On appeal, we agreed with the Commission, noting that whether a procedure is a reasonably necessary medical treatment is an issue for the Commission to resolve.

In Daniels, the Court noted that the claimant had met her burden of proving that the proposed IDET procedure was reasonably necessary treatment for her compensable injury.

In contrast to these two cases, the respondent in this claim does not argue that the claimant should not be granted the IDET procedure because it is an experimental procedure. Rather, the respondent asserts that this procedure is not reasonably necessary to the treatment of the claimant's compensable injury. Unlike Galloway, supra, where the appellee had two surgeons opine that the IDET

treatment was appropriate treatment for her compensable injury, neither Drs. Calhoun nor Schlesinger have offered such an opinion in this claim. On the contrary, Dr. Calhoun opined that the claimant is not a surgical candidate, and Dr. Schlesinger specifically stated that percutaneous discectomy and IDET will not benefit the claimant. Moreover, although not necessarily required, both surgeons offered sound explanations as to why they do not believe surgery is the appropriate treatment modality for the claimant's condition. More specifically, these procedures would have little value in treating the claimant's chronic back pain which results from degenerative disc disease. Dr. Hart, on the other hand, has offered no other sound justification for the proposed procedure, but to say that these procedures "will hopefully" reduce the claimant's pain. Concerning the likelihood of success with regard to these proposed procedures, in his report o December 9, 2005, Dr. Hart stated:

I gave Mr. Bonaci the example that if he came in with three nails in his foot. We could take out one, possibly two and possibly all three nails and *hopefully*

he *should have* some improvement. *The same thing with his back.* (Emphasis added).

Although a proposed procedure does not necessarily require a 100 percent success rate before it may be deemed reasonably necessary under workers' compensation law, certainly the prospects of success from such a procedure should require something more than "hopefully" or "should have". Whereas Dr. Hart appeared to only speculate that the procedures he proposed would achieve the desired results, Dr. Schlesinger recommended without equivocation that the claimant would not benefit from such procedures, but that he would benefit from a program of extensive spinal rehabilitation. Even though recommended at one time by Dr. Hart, as well, this course of treatment has not been pursued, albeit the claimant testified that he would be willing to participate in a spinal rehabilitation program.

Based on the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that additional medical treatment in the form of an IDET procedure and percutaneous discectomy to address his pain,

which has been objectively shown to be related to degenerative disc disease, is reasonably necessary to the treatment of his compensable injury. Therefore, we find that the decision of the Administrative Law Judge should be reversed and this claim for benefit denied.

With regard to temporary total disability benefits, the claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning meaningful wages and remained in his healing period beyond March 31, 2005. Temporary total disability is that period during which a claimant remains in their healing period and is totally incapacitated from earning meaningful wages. Ark. State Hwy. & Transportation Dept. v. Breashers, 272 Ark. 224, 613 S.W.2d 392 (1991). The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. Byars Constr. Co. v. Byars 72 Ark. App. 158, 34 S.W.3d 797 (2002); Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition

causing the disability has become more stable and if nothing further in the way of treatment will improve that condition the healing period has ended. Arkansas Highway & Transp. Dept. v. McWilliams, supra; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982); Arkansas Highway & Transp. Dept. v. McWilliams, supra. The determination of when the healing period ends is a factual determination to be made by the Commission. Dallas County Hospital v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

The Administrative Law Judge erroneously found that the claimant is entitled to additional temporary total disability benefits from March 31, 2005, to a date yet to be determined. The claimant was first released to return to work with lifting restrictions by Dr. Sprinkle on April 16, 2004. Subsequently, the claimant received chiropractic treatment from Dr. Carpenter, who also released him to

restricted work duty. On April 1, 2005, the claimant was evaluated by Dr. Carpenter's associate, Dr. Bennett, who declared him to be at maximum medical improvement, and opined that he could return to work in some capacity. Accordingly, the record demonstrates that the claimant reached the end of his healing period no later than March 31, 2005, as is reflected in Dr. Bennett's April 1, 2005, report. Further, the claimant was able and willing to return to work during the time in question, as is demonstrated by his filing for and receiving unemployment benefits after his employment was terminated with the respondent employer. In addition to his representation to the State of his physical ability to return to work, the claimant has other qualities which make him employable in areas which fit well within his restrictions. To illustrate, the claimant has earned a bachelor's degree in Business Administration, and received training in physical therapy. Moreover, the claimant is fluent in English, Spanish, and Portuguese, and has past experience as a translator for MCI. The claimant has held clerical, accounting, and supervisory positions, including

an assistant manager's position at K-Mart. Further, the claimant admitted in testimony that, had it not been for his termination, he felt there were jobs available with the respondent employer that were within his restrictions and that he could have performed. Finally, the claimant testified that he has not sought employment because he has not been released by Dr. Hart. In his final report of record dated December 9, 2005, Dr. Hart acknowledges that the claimant had not worked for over a year. However, the medical records do not establish that this was per Dr. Hart's instructions. In fact, Dr. Hart's December 9th report reflects that he believed the claimant able to return to work in another capacity.

The claimant sustained an unscheduled injury. Therefore, he must prove by a preponderance of the evidence that he was still in healing period and unable to work after March 31, 2005. See, Breshears, supra. Based on the above and foregoing, we find that the claimant has failed to meet his burden of proof. Therefore, the claimant's claim for

additional temporary total disability benefits is hereby denied.

In conclusion, the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical benefits and additional temporary total disability benefits. Therefore, the decision of the Administrative Law Judge is reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority decision finding that the claimant is not entitled to ongoing medical benefits or temporary total disability benefits from March 31, 2005 to a date to be determined. After a de novo review of the record, I find the evidence

shows that the claimant is entitled to the requested medical treatment. Specifically, I find that the medical reports show that the claimant sustained an admittedly compensable injury in January 2004, from which he has not recovered and requires treatment. Furthermore, I find Dr. Calhoun did not opine that the proposed IDET and percutaneous discectomy were unnecessary. Rather he considered the claimant for fusion surgery that would be performed by a neurosurgeon. Likewise, I find that the opinion of Dr. Hart should be given more weight than Dr. Schlesinger as Dr. Hart was the claimant's treating physician and had access to the claimant's medical records. Finally, I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to the requested temporary total disability benefits. Accordingly, I would have affirmed the decision of the Administrative Law Judge.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). 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). 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). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

In the present instance, the claimant sustained an admittedly compensable injury. Prior to this injury there is no indication that he ever had lumbar back problems for which he had restrictions, limitations, or prevented him from working. Yet after the admittedly compensable injury, the claimant was unable to work and required extensive, ongoing medical treatment. While I note that the claimant's diagnostic studies showed degenerative changes, no doctor

expressed a belief that his symptoms or conditions were not aggravated as a result of his work-related injury. Yet virtually every doctor's report after the time of the injury references the claimant's symptoms in relation to his work-related injury and admittedly compensable injury, indicating that the two are related. Furthermore, the claimant's symptoms from the admittedly compensable injury never changed or resolved, indicating that the claimant's need for treatment is directly related to the admittedly compensable injury.

With respect to whether the claimant's requested treatment is reasonably necessary, the respondents essentially contend that the claimant should not be entitled to an IDET procedure or to a percutaneous discectomy based on the opinions of Dr. Calhoun and Dr. Shlesinger. However, after reviewing the record, I find that the opinion of Dr. Hart should be given the most weight. It is clear that Dr. Hart was familiar with the claimant's condition and used the claimant's former diagnostic studies in deciding what course of treatment he would use for treating the claimant.

Likewise, it is apparent that he recommended conservative treatment prior to even referring the claimant to a neurosurgeon. However, only after surgery was ruled out as an option did he recommend performance of the IDET or percutaneous discectomy. Accordingly, I find that his opinion is entitled to great weight.

The respondents attempt to assert that Dr. Calhoun considered IDET or percutaneous discectomy and ruled them out. However, in my opinion, it is apparent that when Dr. Calhoun treated the claimant, it was not in consideration for a percutaneous discectomy or an IDET procedure. In fact there is no evidence that Dr. Calhoun or other neurosurgeons usually perform such treatment. Rather, it appears that Dr. Calhoun only considered whether a fusion would be appropriate treatment for the claimant. I note that there is no evidence that Dr. Calhoun was ever presented with whether a percutaneous discectomy or an IDET procedure would be reasonably necessary to treat the claimant. Rather, he seemed to provide an opinion as to whether a fusion would be successful. I also note that

Dr. Calhoun specifically indicated that while he did not think surgery was appropriate, he did believe the claimant had a, "significant pathology" and that he was a "legitimate patient."

Dr. Hart's note dated December 9, 2005, also seems to support a finding that Dr. Calhoun did not consider whether IDET or a percutaneous discectomy would be appropriate. Specifically, I note that Dr. Hart indicated that if the claimant developed nerve root compression symptoms then he would need reevaluation by Dr. Calhoun. In my opinion, this shows that Dr. Hart was following the directions of Dr. Calhoun. I also note that Dr. Hart went on to indicate that at that point the claimant's options were to live with the pain or to proceed toward a percutaneous discectomy and IDET. Dr. Hart described the percutaneous discectomy as follows, "This is a minimally invasive, outpatient, nonsurgical procedure in debulking the nucleus pulposus. (This is not the same as a microdiscectomy.)" Pursuant to this language, I find that Dr. Hart was not acting in contradiction to the

recommendations of Dr. Calhoun. Instead, he was simply exploring an alternative treatment when Dr. Calhoun ruled out surgery in the form of a fusion as an option for treatment.

I further find the opinion of Dr. Schlesinger should be given little weight. It is clear from the tenor of Dr. Schlesinger's March 3, 2006, report regarding the claimant that there are limited, if any, circumstances under which he would consider performing or recommending the procedures in the treatment of a patient as outlined by Dr. Hart, which was the precise question placed to him by respondents in securing the evaluation. The claimant had already been evaluated by a neurosurgeon, Dr. Calhoun, at the request of his treating physician. Dr. Schlesinger, who describes himself as a "conservative neurosurgeon", candidly disclosed that he did not "personally" believe that the discogram CT had any predicted value in terms of treatment. The November 9, 2005, report of Dr. Calhoun reflects that the results of the claimant's lumbar discogram were considered in his evaluation. There is no evidence in the

record to reflect that either of the neurosurgeons, Dr. Calhoun or Dr. Schlesinger, perform the procedures that have been recommended by Dr. Hart.

The March 3, 2006, report of Dr. Schlesinger does not reflect that Dr. Schlesinger had benefit of actually reviewing the claimant's lumbar MRI scan films at the time the reported was generated. Nevertheless, Dr. Schlesinger concluded that neither percutaneous discectomy, IDET, open discectomy or fusion would have any benefit in the treatment of the claimant's back pain. In White Consolidated Industries v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001), the employer argued that IDET was experimental and not reasonably necessary to the treatment of Galloway's back condition. The Commission disagreed and found the procedure was reasonable and necessary. The Arkansas Court of Appeals affirmed the Commission after recognizing that an employee is not required to prove a one-hundred percent success rate in order for a procedure to be considered reasonably necessary.

In Dallas County Hospital v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283, (2001), in discussing the claimant's entitlement to the IDET procedure, the court noted the difference of opinion and experience between another neurosurgeon and Dr. Hart which was considered by the Commission in its ruling:

The Commission contrasted Simpson's testimony with that of Dr. Hart, who had performed roughly eighty IDET procedures and testified that the procedure, which was pioneered in 1997, was FDA approved and had a national success rate of seventy percent. It specifically stated that it gave significant weight to Dr. Hart's testimony because of Hart's experience in performing IDETs and because Hart articulated sound reasons for his recommendation that appellee was a likely candidate, including the ineffectiveness of conservative treatment and appellee's inability to tolerate constant pain. *Supra*, 184-185.

Likewise, it is evident that while Dr. Schlesinger anticipated that he would not recommend a percutaneous discectomy or an IDET procedure, I note that he indicated he would reserve that opinion for a time after he reviewed the claimant's diagnostic films. Notably, there is no report in

the record indicating that Dr. Schlesinger actually viewed those films or indicating that he had reached a final conclusion as to what his recommendations were for the claimant's treatment. Therefore, I find that the report in consideration is not a final analysis by Dr. Schlesinger, and even if it were, it should be given little weight.

Again, in the instant claim, Dr. Hart has clearly articulated the basis for the recommendations regarding the treatment of the claimant's January 10, 2004, compensable injury. Further, the evidence preponderates that Dr. Hart had access to all of the pertinent medical records, diagnostic and treatment, regarding the claimant, to include Dr. Calhoun's November 9, 2005, neurosurgery consultation, at the time he made his treatment recommendations. The claimant has sustained his burden of proof by a preponderance of the evidence that the treatment recommendations of Dr. Hart are reasonably necessary in connection with the claimant's January 10, 2004, compensable injury.

I further find the claimant should have been awarded the requested temporary total disability benefits. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). 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).

A claimant who has been released to light duty work but has not returned to work may be entitled temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274 (1984).

The medical records support a finding that the claimant remains in his healing period. Specifically, I

note that Dr. Hart has recommended additional treatment for the claimant, indicating that he has not exited his healing period. Additionally, there is no evidence that Dr. Hart has placed the claimant at maximum medical improvement or that he has released the claimant to return to work. In fact, I note that as late as March 2006, even Dr. Schlesinger believed that the claimant would benefit from additional treatment in the form of extensive spinal rehabilitation or a lumbar traction unit. As such, I find the claimant remains in his healing period.

I further find that the claimant was unable to work for the time period of March 31, 2005 to a date undetermined. While there are no notes from Dr. Hart indicating the claimant was restricted from returning to work, on December 9, 2005, he indicated that the claimant had been unable to even educate himself because of his back complaints, indicating that he believed the claimant was unable to work. He further noted the claimant's inability to work for the past one and a half years and indicated that if the claimant's procedures were successful then hopefully

the claimant would be able to get education and choose another form of employment. In making this recommendation, Dr. Hart noted his belief that the claimant would be unable to return to his prior occupation. Therefore, in my opinion, the evidence shows that the claimant was unable to work during the time period for which he is requesting benefits.

Though the respondents argue that the claimant's application for unemployment benefits shows he can return to work, I find that is not dispositive in determining the claimant's entitlement to benefits. The claimant credibly testified that he separated from the respondent employer because of physical inability to perform his job. Additionally, the claimant credibly testified that he attempted to find work to no avail and that no employer would hire him because of his back. Therefore, when considering that testimony in conjunction with the opinion of Dr. Hart, and the opinion of Dr. Schlesinger that the claimant needed ongoing treatment, I find that the claimant

was unable to work or to earn the same or any part of income as he received at the time of his injury.

I note that on April 1, 2005, Dr. Bennett placed the claimant at maximum medical improvement. However, there is no indication that Dr. Bennett reviewed the claimant's medical records or that he was privy to the recommendations by Dr. Hart. Furthermore, I note that Dr. Bennett was apparently hired solely for evaluation and assessment of a permanent impairment rating on behalf of the respondents. Accordingly, I give more weight to the opinion of Dr. Hart in assessing the claimant's ability to return to work.

For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner