

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211940

BOBBY BONDS,  
EMPLOYEE

CLAIMANT

LENNOX INDUSTRIES,  
EMPLOYER

RESPONDENT

LUMBERMENS MUTUAL CASUALTY CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 30, 2006

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

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

Respondents represented by the HONORABLE BETTY J. DEMORY,  
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 January 24, 2006. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on October 10, 2002 at which time the claimant sustained a compensable injury to the body as a whole at a compensation rate of \$425.00. Medical

expenses, temporary total disability benefits, and a 10% rating have been paid.

2. The claimant has returned to work but remains symptomatic with back and right leg pain. These symptoms have been consistent since the injury. Therefore, I find the claimant's complaints of pain are related to the compensable injury.
3. Dr. Hart has recommended a procedure that has not yet been tried by the other physicians. The procedure is designed to identify the source of the claimant's pain. As Dr. Hart specializes in pain management, I find that additional medical treatment with Dr. Hart is reasonable and necessary in relation to the compensable injury.
4. Respondents are directed to pay Dr. Hart's medical expenses within thirty days of receipt pursuant to Rule 30.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

6. The respondents are directed to pay the court reporter's fees and expenses

associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

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 January 24, 2006 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.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment from Dr. Thomas Hart in the form of a discogram for injuries he sustained on October 10, 2002.

A review of the procedural history of this claim reveals that pursuant to a prior Opinion filed on March 26, 2004, the claimant was awarded and received additional temporary total disability benefits. Subsequent to that

hearing, the claimant was granted a change of physicians to Dr. Hart. The respondent carrier paid the claimant's initial visit with Dr. Hart, and controverted the claimant's request for additional medical treatment as recommended by Dr. Hart.

On October 24, 2005, a hearing was held on the issue of whether the claimant is entitled to additional medical benefits under the direction of Dr. Hart. It was stipulated at this hearing that the claimant was employed by Lennox Industries on October 10, 2002, when he sustained a compensable injury, for which he was entitled to, and had received medical benefits, temporary total disability benefits, and permanent partial disability benefits equal to a 10% permanent physical impairment rating to the body as a whole.

Turning to the chronology of the claimant's injury and medical treatment, on October 10, 2002, the claimant slipped and fell at work, injuring his lower back. The claimant was initially treated at Stuttgart Regional Medical Center, then subsequently by Dr. William Blankenship at Ortho Arkansas. The claimant was diagnosed with a herniated disc on the right at level L4-5. Dr. Blankenship referred the claimant for a surgical evaluation to Dr. Scott Schlesinger, who saw him for the first time on December 12,

2002. On January 8, 2003, the claimant underwent a transpedicle microdiscectomy.

In February of 2003, the claimant received epidural steroid injections by Dr. William Ackerman. A follow-up MRI prescribed by Dr. Schlesinger in March of 2003, revealed good compression of the right L4-5 neuroforamen, with no evidence of disc herniation, nerve root compression, or spinal foraminal narrowing. Dr. Schlesinger opined that the claimant should be at maximum medical improvement by May 26, 2003, and he assessed the claimant with a 10% impairment rating as a result of his back surgery.

The claimant continued with conservative treatment under the direction of Dr. Schlesinger. However, the claimant's complaints, which were primarily of right leg and low back pain, showed no improvement in spite of consistently unremarkable neurological and physical examinations. Therefore, Dr. Schlesinger ordered another MRI of the claimant's lumbar spine. The results of this most recent MRI were consistent with the March MRI, with noted degenerative disc disease. In addition, some abnormality was seen along the posterior aspect of the claimant's thecal sac at the L3-4 facet joint level, which Dr. Schlesinger

suspected could represent an atypical synovial cyst. Therefore, Dr. Schlesinger ordered a myelogram with CT scan. This study showed post surgical changes with scarring, but was otherwise normal. In his report of May 2, 2003, Dr. Schlesinger stated that there was "nothing clearly seen" on the myelogram CT scan or the MRI to explain the claimant's persistent right leg pain.

Dr. Schlesinger referred the claimant to Dr. Lon Burba for an EMG nerve conduction study, which indicated L4 radiculopathy. On June 4, 2003, the claimant was seen for follow-up by Dr. Schlesinger. In his report of that follow up evaluation, Dr. Schlesinger stated that post operative diagnostic studies showed no evidence of nerve root compression, but that there appeared to be a small thecal sac abnormality at the surgical level, which he attributed to congenital factors and some epidural lipomatosis. Dr. Schlesinger opined that this abnormality was probably of no clinical significance, and he considered it prudent at that time that the claimant undergo a functional capacity evaluation. In this regard, Dr. Schlesinger stated:

I really don't feel that Mr. Bonds should undergo any further surgery. I think we should do a functional capacity evaluation to determine his long-term

limitations and release him to return to work under the stipulations of the FCE.

Dr. Schlesinger concluded that absent evidence of recurrent fragment at the surgical site, the only treatment left to be considered for the claimant's persistent right leg pain would be a spinal simulator.

The claimant's functional capacity evaluation was performed on July 1, 2003. In summary, this study showed that the claimant was capable of doing more physically than was demonstrated during the test, suggesting a submaximal and inconsistent effort. In addition, overall test findings suggested "considerable question be drawn" as to the reliability and accuracy of the claimant's subjective pain and limitations. In conclusion, this test demonstrated that the claimant was capable of returning to his previous employment.

When the claimant returned to work in September of 2003, he continued to complain of pain. Therefore, the claimant was referred for pain management treatment with Dr. Bruce Safman. Electrodiagnostic studies obtained by Dr. Safman on September 22, 2003, were negative and the findings were said to be normal. Subsequently, Dr. Safman performed three trigger point injections, and ordered

another MRI. This study, which was conducted on September 25, 2003, showed no changes from the claimant's prior MRI studies. However, Dr. Safman noted that an abnormal signal posterior to the thecal sac at L4-5 most likely represented a stable synovial cyst. The claimant continued treating with Dr. Safman, and by April of 2004, this doctor recommended that the claimant undergo a psychological evaluation. This evaluation was performed on May 1, 2004, by neuropsychologist, Dr. Judy White Johnson. Dr. Johnson's summary of her findings are as follows:

In summary, the overall pattern of findings suggest that Mr. Bonds was overtly cooperative, but passive-resistant and defensive in responding to the psychological testing. His pattern of coping is typically through denial, somatization, and repression.

Dr. Johnson further opined that the claimant is apt to develop physical symptoms with no organic basis; that his physical symptoms increase with stress; that he is apt to misinterpret explanations and to misconstrue the actual intent of a work or idea; and, that he is prone to misuse pain medication. Lastly, Dr. Johnson opined that the claimant seeks any evidence that bolsters his beliefs that

he has "undiagnosed disorders, rare pathology, and is unusual or difficult to treat".

Following his psychological assessment, the claimant sought and received a change of physician to Dr. Hart. Following his initial assessment of the claimant on May 17, 2004, Dr. Hart recommended that the claimant undergo additional diagnostic testing in the form of a discography. Although the respondent carrier denied this diagnostic study as being unreasonable and unnecessary to treatment of the claimant's back injury, the claimant was allowed continuing conservative treatment with Dr. Safman.

Dr. Safman was deposed pursuant to this claim on February 8, 2005. Among other things, Dr. Safman testified that he could not relate the claimant's general lower extremity and lumbar symptoms to discogenic pain at the claimant's level of injury. Along these lines, Dr. Safman testified as follows:

Q. It looks like you continued following [the claimant] the rest of 2003 and into 2004. Looking at your April 20, 2004, report, you indicated that you've not been able to identify any objective pathology to support his complaints of pain.

A. Well, probably to support his symptoms.

MR. STANLEY: I didn't hear that.

A. I said to support his symptoms, which included weakness of the entire lower extremity and later on sensory loss of the entire lower extremity on examination. He had the epidural scarring that we mentioned before. But the pattern of apparent weakness, and I'll put that in quotation marks, was not consistent with that. So I didn't see anything to explain, to objectively explain all the findings on examination.

Testifying that it is a "controversial test" with inexact results, Dr. Safman did not recommend a discogram for the claimant. Further, Dr. Safman reiterated that the claimant's subjective complaints did not correlate with any objective pathology. Therefore, Dr. Safman continued the claimant on pain medications to treat his subjective complaints of pain.

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).

In the present claim, the record reveals that the claimant was provided with comprehensive medical treatment from a number of qualified providers. As previously discussed, this treatment included surgery to repair a herniated disc, numerous diagnostic studies, and pain management procedures. In addition, when the claimant's subjective complaints of pain continued to be inconsistent with his physical examinations and the results of his repeated diagnostic studies, the claimant underwent a psychological evaluation. The results of this study were consistent with Dr. Safman's opinion that the claimant has no objective basis for his continuing complaints. Rather, this evaluation revealed that the claimant is "apt to develop physical symptoms with no organic basis". Moreover, after the claimant was granted a change of physician to Dr. Hart, no new treatment was proposed. Rather, Dr. Hart recommended further diagnostic testing using a procedure which is highly disputed within the medical community.

However, prior objective medical testing has consistently failed to support a finding that, aside from pain management techniques, additional medical treatment, including further testing, is appropriate and necessary for the treatment of the claimant's compensable injury. For example, repeated MRI's of the claimant's spine showed no significant changes from their predecessors. Further, other diagnostic studies, such as the claimant's myelogram, CT scan, and electrodiagnostic studies, were negative for findings of significant pathology to support the claimant's complaints of pain and symptomatology. Finally, Dr. Schlesinger opined the claimant was at maximum medical improvement by May 26, 2003, and he assessed the claimant with a 10% impairment rating. Therefore, I find that the respondent was justified in denying additional diagnostic testing and/or medical services that would not likely result in any change in the claimant's treatment plan. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner