

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305411

KENNETH L. BOONE, JR., EMPLOYEE	CLAIMANT
ARKADELPHIA SHEET METAL, EMPLOYER	RESPONDENT
STATE FARM FIR & CASUALTY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 15, 2006

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

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

Respondent represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment after May 19, 2004, that the claimant had proven he was entitled to a 7% permanent anatomical impairment rating and the finding that the claimant was entitled to 25% loss in wage earning capacity. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof.

Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer hanging duct work for air conditioning and heating units. The claimant had worked for the respondent employer approximately seven weeks when he sustained an admittedly compensable injury on May 15, 2003. The claimant stated that on that date he and three other employees were carrying an old unit from a house and he stepped back and his back popped and began hurting. The claimant testified that he experienced low back pain going down into his right leg and his right testicle. He reported the injury to the company owner, Michael Holloway, and spent the rest of the day resting in the van. After a day or two, Mr. Holloway advised the claimant he should have gone to the emergency room. The claimant sought treatment from a chiropractor, Terry Hudson, who saw the claimant one time. The claimant finally went to the emergency room on May 19, 2003. The claimant was given medication and an x-ray at the emergency room.

The claimant began treating with Dr. James Blackman, who ordered an MRI. The claimant was referred to Dr. John L. Wilson and was treated with medication and physical therapy, as well as home exercise. The claimant received three epidural steroid injections which provided temporary relief from pain. The claimant also underwent a myelogram and a CT scan which did not show any significant findings. Dr. Wilson ultimately released the claimant to return to work to full duty.

The claimant continued to complain of pain and requested a change of physician, which was granted by the Commission on January 7, 2004. The claimant came under the care of Dr. Brent Sprinkle, who ordered an EMG study and prescribed Bextra and Celebrex. He also ordered trigger point injections and a TENS unit. The EMG study yielded normal results. The claimant was released by Dr. Sprinkle to return to work on May 19, 2004. The claimant and Dr. Sprinkle had a conflict and Dr. Sprinkle refused to treat the claimant so the claimant sought treatment from his family doctor, Dr. George Taylor. Dr. Taylor referred the

claimant to Dr. Scott Schlesinger who saw the claimant on October 24, 2004. Dr. Schlesinger ordered another MRI that was completed on November 2, 2004. The claimant requested to see Dr. Sprinkle again but Dr. Sprinkle would not see the claimant. Dr. Schlesinger recommended a home traction unit and a Functional Capacity Evaluation. The claimant also underwent an Independent Medical Evaluation with Dr. Jim Moore, who assigned an impairment rating of 15%. In addition, Dr. Moore also recommended a diskogram.

The respondents contend that the claimant has received all of the medical treatment to which he is entitled, that the claimant is not entitled to any permanent anatomical impairment and that the claimant was not entitled to any wage loss disability benefits. We agree with the respondents.

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.

Our review of the evidence demonstrates that Dr. Sprinkle released the claimant to return to work on May 19, 2004, without a permanent impairment rating. The evidence demonstrates that the claimant suffered an admittedly compensable injury on May 15, 2003. After initially being treated in the Emergency Room at Baptist Medical Center in Arkadelphia, the claimant began treating with Dr. John Wilson. The claimant underwent a lumbar myelogram and post myelogram CT on November 11, 2004, which

both revealed, "no evidence of significant spinal stenosis or nerve root compression." The CT scan only revealed a "mild protrusion at the L4-5 and minimal posterior osteophyte at L5-S1." After reviewing the results of these tests, Dr. Wilson released the claimant on December 1, 2003, to return to work with no restrictions on his activities and no permanent anatomical impairment. Dr. Wilson opined there was no evidence of nerve root impingement in the canal and no evidence of a ruptured disk or nerve root damage. Dr. Wilson instructed the claimant to return to see him if he had an exacerbation of pain.

The claimant did not return to see Dr. Wilson but requested from the Commission a change of physician. The claimant was granted that change of physician to Dr. Brent Sprinkle, who evaluated the claimant, provided treatment for him, and released him to return to work without restrictions and without permanent anatomical impairment on May 19, 2004. Dr. Sprinkle had the claimant undergo an EMG study on April 11, 2004, which indicated a complete absence of any evidence of left or right radiculopathy or sensory or motor

peripheral neuropathy. Dr. Sprinkle's last report dated May 19, 2004, noted that he had no additional recommendations for the claimant and that the claimant had accused him of not acting in his best interest. Dr. Sprinkle concluded his course of treatment with the claimant and released the claimant from his care stating that he had no additional treatment to offer the claimant.

The claimant, on his own accord, then went to see his family physician, Dr. George Taylor and then went to Dr. Scott Schlesinger. The Administrative Law Judge stated that the Change of Physician rules do not apply, therefore the claimant could seek treatment from the physician of his choice. In our opinion, a review of the evidence in this case, as well as the applicable law, demonstrates that the rules do apply. When the claimant desires a change of physician, he must petition the Commission for approval.

Ark. Code Ann. § 11-9-514(a)(3) (1999 Supp.) provides: Following the establishment of an Arkansas Managed Care system as provided in § 11-9-508, subdivisions (a)(1)

and (a)(2) of this section shall become null and void, and thereafter :

(A)(1) The employer shall have the right to select the initial primary care physician from among those associated with managed care entities certified by the Commission as provided in 11-9-508.

(ii) The claimant employee, however, may petition the Commission one (1) time only for a change of physician, who must also either be associated with a managed care entity certified by the Commission or be the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to a certified managed care entity for any specialized treatment, including physical therapy, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by the managed care entity initially chosen by the employer.

In Byars Construction Co. v. Byars, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 20, 2000), the Arkansas Court of Appeals addressed the change of physician law as amended by

Act 796 of 1993. After reviewing the Full Commission opinion, the Court of Appeals found that the Commission correctly found that since a managed care system was established in Arkansas in September of 1995, Ark. Code Ann. § 11-9-514(a) (3) renders null and void the prior change of physician rules set forth in Ark. Code Ann. § 11-9-514(a) (1) and (a) (2). However, the Court went on to hold that the Commission erred as a matter of law in finding that when the employer is not a member of an MCO that the claimant was free to select any physician he wanted without a change of physician. In this regard the Court stated:

The Commission failed to take into account Ark. Code Ann. § 11-9-514(b), which immediately follows the provisions discussed above dealing with the selection and change of physicians:

(b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except in emergency treatment, shall be at the claimant's expense.

Therefore, even if section 11-9-514(a) failed to address the situation, as exists here where (1) and (2) have become null and void yet the employer has not contracted with a managed care

organization, subsection (b) appears to fill this void by precluding any change of physician, except in emergency treatment, or else the new physician will be at the claimant's expense." We are obliged to strictly construe and apply the workers' compensation act. Ark. Code Ann. § 11-9-704(c)(3).

In our opinion, the claimant has had his one-time change of physician when he was granted a change to Dr. Brent Sprinkle. It is important to note that the claimant was not denied any treatment by the carrier until he received an Authorization for Treatment from Dr. Taylor. The claimant stated that he unsuccessfully tried to schedule appointments with Dr. Sprinkle. However, the claimant did not obtain or receive notice from the respondent carrier that they would not pay any further bills and he did not assert that he had submitted bills to the carrier that had been denied. In fact, the respondent carrier continued to pay for the claimant's TENS supplies after Dr. Sprinkle released the claimant from his care.

The claimant maintains that Dr. Sprinkle's decision not to see him anymore constituted controversion of

the claim. However, we cannot find that this amounts to controversion of the claim. The respondent carrier continued to pay for the claimant's supplies for his TENS unit. Moreover, Dr. Sprinkle determined that the claimant should be released from his care on May 19, 2004. The claimant had already utilized his one-time change of physician. Rather than request a referral, the claimant initiated treatment on his own accord from his family physician, Dr. Taylor. The following testimony at the hearing is enlightening:

Q. Then Dr. Sprinkle released you from his care. Is that correct? I think you've told the Judge the circumstances that surrounded that.

A. Yes, I did. Yes.

Q. Now, you testified today - - one of the things I just wanted to clarify - - as far as how you got to Dr. Schlesinger. I kind of went through, as you were testifying, and it looks like how had two workers' comp doctors, one being Dr. Wilson and one being Dr. Sprinkle. Does that sound right?

A. Yes.

Q. And then you went to five different doctors pretty much on your own: Dr. Hudson; Dr. Blackmon; Dr. Taylor; and then I think there was a referral

from Taylor to Schlesinger. Is that right?

A. It might be.

Q. And these all occurred- -

A. From Taylor to Schlesinger, yes, it was.

Q. And that referral occurred after you had the conversation with Sue Maroney about the whole change of physician issue. Is that correct?

A. At what time?

Q. You had a conversation with Sue Maroney about change of physician - - what you had to do to get to other doctors?

A. I did have that conversation with her.

Q. And your going off on your own to seek medical treatment with Dr. Taylor, was that after the conversation with Sue Maroney?

A. Yeah. I spoke with Sue Maroney about when Dr. Wilson released me.

The evidence demonstrates that the claimant knew the procedure that he had to follow to get another authorized physician. In fact, the claimant had already

undergone this procedure to be changed from Dr. Wilson to Dr. Sprinkle. The claimant had signed the Form-ARN acknowledging that he understood the change of physician rules. The claimant cannot bypass the change of physician rules by seeking treatment from a second physician of his choosing once the authorized treating physician of his choice has treated, evaluated and released him. Section 11-9-514(b) specifically states, "treatment or services furnished or prescribed by any physician other than the one selected according to the foregoing, except emergency treatment, shall be at the claimant's expense." The claimant sought treatment from Dr. Taylor outside the authorized chain of physicians and outside the prescribed procedures set forth in §11-9-514, therefore, the respondents are not obligated to pay for any of Dr. Taylor's care.

The claimant also maintained that Dr. Sprinkle referred him to Dr. Schlesinger in his May 31, 2005, report. Dr. Sprinkle, in that report, mentioned referral to Dr. Schlesinger to assess the significance of a non-work

related neurenteric cyst that showed up on the MRI from November 4, 2004. Dr. Sprinkle stated:

Annular tears usually resolve with time, especially with younger patients. Usually a small right paracentral disc extrusion does not necessitate surgery, however, it would certainly be reasonable to have Dr. Schlesinger review his MRI which apparently he ordered for the patient to see if there are any surgical recommendations regarding the neurenteric cyst at the filum terminale. That is a MRI finding that I am not familiar with and certainly think it would be reasonable for Dr. Schlesinger to see Mr. Boone to discuss any clinical significance of that neurenteric cyst.

The Administrative Law Judge's determination that Dr. Sprinkle referred the claimant to Dr. Schlesinger for his compensable injury is completely baseless and should be reversed.

Moreover, Dr. Sprinkle's alleged referral to Dr. Schlesinger only took place after the claimant's attorney wrote Dr. Sprinkle to inform him that he was "Mr. Boone's only hope" and begging that he refer the claimant to Dr. Schlesinger. The Courts, and the Commission,

have found that referrals made at the claimant's request are not valid. Patrick v. Arkansas Oak Flooring Co., 39 Ark. App. 24, 833 S.W.2d 790 (1992). Dr. Sprinkle's correspondence is certainly not evidence of a valid referral. Accordingly, we cannot find that there is a valid referral from Dr. Sprinkle to Dr. Schlesinger. Therefore, because the claimant sought treatment from Dr. Taylor and from Dr. Schlesinger on his own, the respondents are not responsible for this treatment.

We further find that the claimant is not entitled to any additional medical treatment. When the claimant sustained his admittedly compensable injury in May of 2003, he underwent several tests which yielded normal results. Most significantly, the claimant underwent an MRI. After the claimant went to see Dr. Schlesinger on his own, Dr. Schlesinger ordered another MRI. At that time, there was noted that there was an annular tear as well as the cyst. As such, these are new findings and completely different from the finding on the MRI from 2003. The evidence demonstrates that the claimant underwent an MRI November 20, 2003, that

only revealed a "mild disk protrusion at L4-5 and minimal posterolateral osteophyte at L5-S1." It was after the claimant was released by Dr. Sprinkle that the claimant underwent another MRI on November 11, 2004, which revealed a number of new findings. Specifically, they showed advanced degenerative changes at L4-5 and L5-S1, an annular tear at L4-5, small volume right paracentral extrusion at L5-S1 and the neuroenteric cyst at the filum terminale. Dr. Sprinkle, in his March 2005, letter, noted the following:

The previous MRI was done in Hot Springs on June 2, 2003 that showed mild degenerative narrowing and desiccation at L4-5 and L5-S1, small central herniation at L4-5, mild bulging at L5-S1. No significant canal or foraminal impingement was identified at that time. So it seems to be the interval change is this right paracentral disc extrusion at L5-S1 and annular tear at L4-5.

It is clear that these are significantly different findings.

Dr. Schlesinger has suggested home traction therapy and Dr. Moore mentioned a possible diskogram. However, the claimant's two treating physicians, Dr. Wilson and Dr. Sprinkle, never recommended or mentioned either of

these treatments. In fact, Drs. Wilson and Sprinkle were both of the opinion that the claimant's subjective back complaints did not correlate with the minimal objective findings contained in the claimant's diagnostic studies. In our opinion, any of the recommended treatments from Dr. Schlesinger and Dr. Moore are associated with the new findings from November of 2004, which are clearly not associated with the claimant's 2003 compensable injury. The claimant was released to return to work by Dr. Wilson on December 2003, with no restrictions and no permanent impairment. Furthermore, Dr. Sprinkle, who was the claimant's change of physician doctor, released the claimant to return to work on February 11, 2004. Specifically, at the time of Dr. Sprinkle's release he stated:

As far as impairment ratings, I would really concur with Dr. John Wilson. I cannot find any evidence to support that the small disc bulges are causing his pain. I think it is more maybe just a lumbar strain injury. Based on that, it would be a 0% impairment rating. With the lack of any other objective findings, I cannot find any reason to recommend any specific work restrictions. I would recommend that he

return to work at full duty at this point.”

Accordingly, we find that the claimant is not entitled to any additional medical treatment and that respondents are not responsible for the treatment rendered to the claimant by Dr. Taylor and Dr. Schlesinger. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant is also asking 15% permanent anatomical impairment rating that was assessed by Dr. Moore. The Administrative Law Judge reduced that to 7% and the claimant is willing to accept that. However, both Dr. Wilson and Dr. Sprinkle released the claimant to return to work with a 0% permanent anatomical impairment rating. The claimant's two authorized treating physicians who examined the claimant contemporaneously with his injury, released the claimant to return to work with no permanent impairment. The assessment made by Dr. Moore is based upon the findings that were shown on the MRI from 2004 as noted previously which is significantly different from the findings on the original

MRI. Simply put, we cannot find that the claimant sustained any permanent anatomical impairment.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss

disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, *supra*.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A

claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

Because the claimant failed to prove that he is entitled to any permanent anatomical impairment, we find that the claimant is not entitled to any wage loss disability benefits. Accordingly, the decision of the Administrative Law Judge awarding a 25% loss in wage earning capacity is hereby 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 opinion finding that the claimant is not entitled to receive additional medical treatment after May 19, 2004 and that he is not entitled to a 7% impairment rating or other permanent disability benefits. After a de novo review of the record, I find the claimant has shown that he is entitled to additional medical benefits, a 7% impairment rating, and to 25% in wage loss benefits in excess of that rating. Accordingly, I would have affirmed and adopted the decision of the Administrative Law Judge.

_____The claimant was treated at the emergency room on May 19, 2003. He was given medication and submitted to an x-ray. The claimant began treatment with Dr. Blackman, who referred the claimant to Dr. Wilson. As early as June 30, 2003, Dr. Wilson noted that the claimant's x-rays showed bulging discs at L4-5 and L5-S1 on the right side. The claimant continued to receive conservative care with no relief. On July 25, 2003, Dr. Wilson recommended epidural

steroid shots to reduce nerve root swelling in the claimant's lumbar spine. On November 6, 2003, Dr. Wilson noted the claimant had muscle spasms and scheduled a myelogram and CT scan.

The myelogram was performed on November 20, 2003, and revealed that the claimant had, "no evidence of significant spinal stenosis or nerve root compression,". A CT performed on the same day showed, "Mild disc protrusion at L4-5 and minimal posterior osteophyte at L5-S1. There is no evidence of significant spinal stenosis or nerve root compression identified."

_____ On December 1, 2003, Dr. Wilson opined, "The myelogram and post myelogram CT revealed only mild disc bulging. There was no evidence of nerve root cut off in the canal." He further indicated that the claimant suffered from, "a lumbosacral strain that has been slow to improve." Dr. Wilson released the claimant from care and indicated he was able to return to work.

The claimant requested and was granted a change of physician to Dr. Brent Sprinkle. On February 11, 2004,

Dr. Sprinkle reviewed the claimant's previous diagnostic studies. He opined, "After reviewing the films myself, I would concur that there is no significant focal stenosis appreciated. MRI films do show some mild disc desiccation at L4-5 and L5-S1 with very small bulges but not to the degree to produce any significant foraminal, canal, or central canal stenosis." He went on to indicate that the claimant's condition was not surgical but recommended the claimant undergo therapy with the use of a TENS unit.

The claimant continued treatment with Dr. Sprinkle. In April 2004 the claimant submitted to an EMG which returned as normal. On May 19, 2004, Dr. Sprinkle noted that the claimant's Neurontin dosage had been increased but that physical therapy had not improved the claimant's condition. He further indicated that he recommended the claimant continue to increase his Neurontin dosage unless he had no relief from the medication. He opined, "If that is beneficial, I recommend he take that for up to 3 months while he is continuing his home exercise and stretching program." He also recommended the claimant

consider undergoing vocational rehabilitation. Finally, he indicated that there had been a dispute with the claimant and that he was releasing the claimant. He opined,

The patient has made accusations that I have no concern for his well-being and that I am not trying to make him better and that I am not acting in his best interests. I would professionally disagree with this as I communicated to him that I have treated him as I would any other patient and have done everything that I know to try to make him better. With these types of accusations, I am really not comfortable continuing this therapeutic relationship and would not recommend followup care.

In his testimony, the claimant agreed that Dr. Sprinkle refused to see him after the May 19, 2004, visit. The claimant said the reason for the refusal was because he and his wife had researched various tests on the internet and had asked Dr. Sprinkle if a diskogram would be beneficial. He also asked if he could be referred for a diskogram and expressed concern that Sprinkle's only method of treatment seemed to be to change his medication. When Dr. Sprinkle did not seem receptive to the claimant's requests and concerns,

an argument apparently ensued and the claimant was refused further treatment.

The claimant testified that he attempted to return to see Dr. Sprinkle to no avail. Accordingly, he began seeing Dr. Taylor. Dr. Taylor referred the claimant to Dr. Scott Schlesinger. Dr. Schlesinger indicated that he did not believe the claimant's condition was surgical but recommended the claimant have another MRI.

_____An MRI was performed on November 2, 2004, and once again revealed bulging discs at levels L4-5 and L5-S1. It identified an annular tear at level L4-5 and an extrusion at level L5-S1. It also revealed a cyst at the filum terminale.

_____On March 31, 2005, Dr. Sprinkle referred the claimant to Dr. Schlesinger to consider the significance of the cyst. He also noted the interval changes in the claimant's MRI, indicating that the claimant had an MRI on June 2, 2003, which showed,

mild degenerative narrowing at L4-5 and L5-S1, a small central herniation at L4-5, mild bulging at L5-S1. No significant canal or foraminal impingement was identified at that time. So it seems to be the interval change is this right

paracentral disc extrusion at L5-S1 and annular tear at L4-5.

On May 16, 2005, Dr. Schlesinger discussed the findings of the MRI and indicated that the cyst was of no clinical significance. He indicated that surgery was unnecessary and recommended a home lumbar traction unit. He also recommended the claimant have an FCE in one month and opined that, "I think he has just about reached maximum medical improvement."

On December 6, 2004, Dr. Jim Moore treated the claimant and assessed him with a 15% impairment rating. He recommended the claimant comply with Dr. Schlesinger's request for a home traction unit and recommended the claimant undergo a diskogram followed by a contrasted CT to see if there was nerve involvement. He also indicated,

I believe this patient should be appropriately carried with the diagnosis of disk herniation. Dr. Culp, the radiologist, reflected this at L4/5 on 6-02-03 and I think this is appropriate. Whether or not he is a surgical candidate is yet to be conjectured.

The claimant testified that he is not currently receiving medical treatment due to having no money.

After reviewing the record, I find that the claimant's care after May 19, 2004, was reasonable and necessary to treat his admittedly compensable injury. Likewise, I find that the claimant's treatment was not unauthorized as the respondents had already controverted the claim.

Once a claim has been controverted, the change of physician rules become non-applicable. Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59; 696 S.W.2d 779 (1985). See Hawkins v. Jefferson Regional Medical Center, Full Commission Opinion filed August 12, 2003 (E502382, E709020, F003389); Kenney v. Siloam Springs School District, Full Commission Opinion filed August 31, 2001 (E907076); Barnett v. Daniel, Full Commission Opinion filed May 25, 2001 (E600078); Clements v. Shoney's, Full Commission Opinion filed February 12, 1998 (E604632).

_____ In this instance, the evidence is clear that the claimant's request for medical treatment, but for the TENS

unit, was controverted as of May 19, 2004. At that time Dr. Sprinkle refused to see the claimant, thereby effectively cutting off his treatment. Despite the claimant's request for ongoing treatment, his treatment was denied, indicating the claim was controverted. Likewise, the claimant's further medical treatment, but for the TENS unit, was not paid after that time period, indicating that the respondents controverted the claim.

I note the Majority's assertion that the claimant never requested more treatment by going directly to the respondent. However, I find it is implausible that the respondents were not aware of the fact that the claimant was seeking additional medical treatment. I find this to be particularly true since it appears Dr. Sprinkle copied Sue Maroni at State Farm on doctor's notes. Furthermore, even the respondents' attorney indicated that the claimant's request for ongoing treatment was controverted as of May 19, 2004. Accordingly, the only question regarding the claimant's ongoing care should be whether it was reasonably necessary to treat his compensable injury.

The Majority asserts that because both Dr. Wilson and Dr. Sprinkle released the claimant to return to work with no impairment, he should be entitled to no additional medical care. They support this by relying on the opinions of Dr. Wilson and Dr. Sprinkle that the claimant was able to return to work and had a zero percent impairment rating.

In my opinion, the evidence shows that the opinions of Dr. Wilson and Dr. Sprinkle should be accorded little weight. Dr. Wilson repeatedly noted objective findings such as muscle spasms and bulging discs. There is no evidence that the claimant's bulging discs resolved which illustrates that the claimant needed ongoing treatment. Dr. Wilson continued to treat the claimant for his back injuries and as of his last visit with the claimant, he continued to find that the claimant suffered from an injury. Despite the fact that the claimant apparently had no change in symptoms, Dr. Wilson released the claimant to return to work. On December 1, 2003, he indicated that the claimant had a slow healing sprain to his lumbar sprain and specifically indicated that if the claimant were to have an

"exacerbation of pain" he was to return, indicating that even at that time he was aware that the claimant would likely have ongoing complaints.

Likewise, I find that the opinion of Dr. Sprinkle should be given little weight. When reviewing the language in the May 19, 2004, report, I find that it is clear that the argument between the claimant and Dr. Sprinkle was the catalyst for the claimant's release. I note, in particular, that on the last visit, Dr. Sprinkle opined that it would be reasonable to continue and manipulate his medication in order to alleviate his symptoms, indicating the claimant needed ongoing medical care. Additionally, the claimant has continued to receive payment for his TENS unit which further illustrates his need for additional treatment. Finally, I note that while Dr. Sprinkle opined that the claimant's condition was not surgical, that does not preclude a finding that he would be entitled to other medical treatment designed to alleviate his pain or other symptoms.

Finally, I note that neither Dr. Wilson nor Dr. Sprinkle had the advantage of seeing the claimant's

second MRI when they released him to return to work. As Dr. Moore and Dr. Schlesinger had the advantage of seeing all the diagnostic reports, including the second MRI, I find that they were in the best position to determine what treatment was reasonably necessary to treat the claimant.

Next I address the Majority's argument that the findings from the claimant's second MRI did not relate to his compensable injury in 2003. At the time of the hearing, the respondents asserted that was an independent intervening cause, thereby explaining the change in the claimant's condition. The Majority appears to be agreeing with this argument, but identifies no reason or explanation for their conclusion that the claimant's change in objective findings was tantamount to an independent intervening cause. In my opinion, to conclude that there was an independent intervening cause is resorting to impermissible conjecture and speculation. Additionally, I find that the claimant's change in objective findings was merely a continuation of his compensable injury in May 2003.

When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury; the basic test is whether there was a causal connection between the two episodes. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W. 3d 333 (2001). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). When the second complication is found to be a natural and probable result of the first injury, the employer initially liable remains liable; only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. Bearden Lumber Co. v. Bond, 7 Ark. App.

65, 644 S.W.2d 321 (1983). The test of whether a causal relationship exists between the first episode of injury and the second is a question of fact for the Commission. Carter v. Flintrol, Inc., 19 Ark. App. 317, 720 S.W.2d 337 (1986).

In this case, the respondents contend that because the claimant's MRI from November 2, 2004, showed an annular tear at level L4-5, showed an extrusion at L5-S1, and showed a cyst in the filum terminale, he should be precluded from receiving benefits. They further assert that because Dr. Sprinkle noted an "interval change" between the two tests, the change in condition was not related to the original injury.

In my opinion, the evidence shows that the claimant's change in condition was directly related to his compensable injury. The claimant provided no testimony to indicate that he had somehow re-injured his back after the compensable injury. Likewise, the claimant received ongoing care from the time of his compensable injury until the second injury, which indicates that there was no independent

intervening cause explaining the change in objective findings.

More significantly, the medical records show that with the exception of the cyst, the claimant's objective findings from the initial diagnostic tests corresponded with the objective findings on the second MRI. In June 2003, x-rays revealed the claimant had bulging discs at levels L4-5 and L5-S1. Likewise, Dr. Sprinkle indicated that the MRI from June 2003 showed mild degenerative narrowing at L4-5 and L5-S1, a small central herniation at L4-5, and mild bulging at L5-S1. Coincidentally, the claimant's MRI from November 2004, showed findings at the exact levels. Specifically, it revealed that while the claimant still had bulging discs at both levels, he also had an annular tear and had protrusion. Additionally, the second MRI showed the claimant had "advanced degenerative changes," whereas the first MRI indicated the claimant only had mild degenerative changes. Since degeneration would presumably, by definition, take a long period of time to develop, I find that it is curious that his condition would progress from "mild" to

"advanced" in such a short period of time unless it was related to the claimant's compensable injury. As the objective findings from the MRI in November 2004 seems to indicate findings that appear to be a continuation or worsening of the claimant's original findings, and there is no evidence of an independent intervening cause, I find that the claimant's change in condition was the natural and probable consequence of his original injury.

_____The Majority also indicates that because the claimant's condition had changed, he should not be entitled to receive the home traction therapy recommended by Dr. Schlesinger or the diskogram as recommended by Dr. Moore. However, as I previously noted, the claimant's new objective findings appear to be as a direct result of his compensable injury. Likewise, as Dr. Wilson and Dr. Sprinkle released the claimant to work without having the advantage of seeing the claimant's 2004 MRI, I find that the opinions of Dr. Schlesinger and Dr. Moore should be given more weight.

Finally, I find that the claimant should have been assigned a 7% impairment rating and wage loss benefits as previously awarded by the Administrative Law Judge. Dr. Moore assigned the claimant an impairment rating based on his 2003 diagnostic studies, which revealed a bulging disc at L4-L5. While Dr. Wilson and Dr. Sprinkle did not believe that the claimant was entitled to an impairment rating based on the bulging disc, I note that the Guides clearly provide a rating for a bulging disc. As the claimant suffered from a bulging disc which never resolved and credibly testified that he has great difficulty in performing various tasks he was able to perform prior to his injury, I find that he should have been entitled to the 7% impairment rating and 25% in wage loss benefits previously awarded by the Administrative Law Judge.

For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner