

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409551

MARCOS AMAYA, EMPLOYEE	CLAIMANT
NEWBERRY'S 3N MILL, EMPLOYER	RESPONDENT
AIG CLAIMS SERVICE, CARRIER	RESPONDENT

OPINION FILED JUNE 12, 2007

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to temporary partial disability benefits for the period January 5, 2006, through March 21, 2006. The Administrative Law Judge also found that the claimant failed to prove by a preponderance of the evidence that he was entitled to medical treatment in the form of surgery and an additional period of

temporary partial disability benefits after March 21, 2006. Based upon our de novo review of the record, we affirm, in part, and reverse, in part, the decision of the Administrative Law Judge. Specifically, we affirm the decision of the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he was entitled to additional medical treatment in the form of surgery, and we affirm the finding that the claimant was not entitled to any additional temporary partial disability benefits after March 21, 2006. However, we reverse the decision of the Administrative Law Judge finding that the claimant was entitled temporary partial disability benefits for the period January 5, 2006, through the date of March 21, 2006. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof.

This claim has been the subject of two prior hearings. The initial hearing was held on April 7, 2005, and an opinion was issued finding that the claimant had sustained a compensable injury to his back while working for the respondent employer on June 2, 2004. The claimant was awarded reasonable and necessary

medical treatment for his compensable back injury. Another hearing was held on January 5, 2006, on the issue of claimant's entitlement to temporary total disability benefits. In an opinion filed January 30, 2006, the Administrative Law Judge found that the claimant was entitled to temporary partial disability benefits at the rate of \$109 per week beginning June 3, 2004, and continuing through a date yet to be determined. Presently before the Commission is the issue of whether or not the claimant is entitled to any additional temporary partial disability benefits and a surgery by Dr. Danks.

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.

The medical records demonstrate that the claimant has been treated conservatively by his treating physicians. The claimant was initially treated by Dr. Shannon Card who ultimately referred the claimant to Dr. Kelly Danks, a neurosurgeon. Dr. Danks recommended that the claimant undergo epidural steroid injections for his back injury after the physical therapy did not alleviate some of the claimant's symptoms. Ultimately, the claimant was recommended to undergo surgery by Dr. Danks but opted not to undergo the surgery because he did not have anybody to take care of him. In a note dated March 14, 2006, Dr. Danks noted:

Marcos returns. He had epidural steroid injection by Dr. Cannon. This only afforded him temporary relief of no more than two weeks. At this time, I have discussed his options with him, which include surgical treatment. He would most probably need a posterior lumbar interbody fusion at L4-5 and L4-S1. I do not believe surgery is going to

return him to the status of being able to go back to roofing. At this time, he does not feel like he would like to proceed with surgical treatment. I have given him some Arthrotec to take. I have ordered a functional capacity to be performed on him. I will see him back after this is done.

The claimant underwent an independent medical evaluation by Dr. Steven Cathey on December 8, 2005. Dr. Cathey stated in his evaluation:

IMPRESSION: Chronic low back pain most likely secondary to degenerative lumbar disc disease. Although Mr. Amaya most likely did suffer some type of musculoskeletal injury a year and a half ago, I believe his continued symptoms are more likely related to the degenerative changes documented on the MRI scan than to the occupational injury itself.

RECOMMENDATIONS:

1. Although I would like to have an opportunity to review the MRI scan firsthand, I do not believe Mr. Amaya is a candidate for lumbar disc surgery, spinal fusion, or other neurosurgical intervention. Based on my review of Dr. Danks' clinic notes, I do not believe he was particularly enthusiastic about the prospects of surgery helping in this case either.
2. I believe epidural steroid injections are a reasonable treatment option at this point. I believe this should also be covered under his workers [sic] compensation carrier. I base this on the

fact that he was never offered epidural steroid injections during the initial phase of his injury and might have actually responded favorably had this been carried out.

3. Since the patient's lower back pain has been refractory to trials of physical therapy, medication, etc., I really do not see much point in continuing these options any further.
4. As far as his job is concerned, I believe Mr. Amaya will either need to return to work at a regular duty or find something else to do where he can handle himself. Again, he does seem motivated to go back to work, and I believe he should be encouraged to along these lines. Perhaps a functional capacity evaluation is in order to help return him to the workforce. He certainly does not seem to be making any progress just sitting around the house every day.
5. I believe he has essentially reached maximal [sic] medical improvement with regard to his occupational injury. Since the degenerative changes noted on the MRI scan are almost certainly preexisting, I do not believe he has sustained any long-term impairment referable to the June 2, 2004, occupational injury.
6. I have encouraged the patient to follow-up with Dr. Danks to discuss these issues with him if he remains symptomatic following the epidural steroid injection later this month. As always, I stand ready to reevaluate the patient should new problems arise.

On December 20, 2005, Dr. Cathey noted that he had reviewed the claimant's MRI scan that he did not have available at the time of the claimant's IME. Dr. Cathey stated:

The study shows congenital spinal stenosis. There is a right paracentral disc protrusion at L4-L5 and [sic] a smaller left paracentral disc herniation at L5-S1. I was not, however, impressed with any resulting nerve root compression or spinal stenosis at either L4-L5 or L5-S1.

ASSESSMENT/PLAN: Based on my review of Mr. Maaya's [sic] MRI scan of his lumbar spine, I do not see an indication for lumbar disc surgery or other neurosurgical intervention. None of the other opinions rendered following his independent medical evaluation have been affected by my review of the MRI scan.

On March 21, 2006, the claimant underwent a functional capacity evaluation. The evaluation report noted that the claimant gave an unreliable effort during the evaluation. Specifically, the report states:

RELIABILITY AND CONSISTENCY OF EFFORT
The results of this evaluation suggest that Mr. Amaya gave an unreliable effort, with 40 of 55 consistency measures within expected limits.

Mr. Amaya demonstrated higher than expected coefficient of variations with repetitive trial isometric strength testing, which is an indication of inconsistent effort between repeated trials. Mr. Amaya also had inappropriate results with horizontal strength change testing, which is also an indication of inconsistent effort with isometric strength testing.

Mr. Amaya also demonstrated significantly higher force with both the right and left handed rapid grip exchange, which is an indication of sub-maximal effort with the hand grip testing.

Mr. Amaya's AROM with lumbar flexion was significantly limited during formal evaluation but with functional aspects of the testing, Mr. Amaya was noted to have minimal deficits with lumbar flexion. Mr. Amaya demonstrates normal movement patterns throughout testing yet demonstrated moaning with slow movement patterns with formal measurement.

Mr. Amaya's pain reports did not correlate with his movement patterns and overall abilities. He moved freely throughout testing and without significant body mechanic changes that indicated pain. He demonstrates no outward expression of pain and no facial expressions indicating pain as well. These do not correlate with his subjective complaints of pain at a level 7. His movement patterns did not change when his pain when between a 4 and 7.

It is further noted that Mr. Amaya was positive on Waddell's signs for non-organic

back pain including passive hip rotation, over reaction to light touch, regional pain over a broad area and axial loading of the spine. These are inappropriate illness responses.

FUNCTIONAL ABILITIES

Mr. Amaya demonstrated inconsistent effort but did demonstrate the ability to perform material handling activities at the Medium level with an occasional lift/carry of 50 lbs.

Mr. Amaya is able to perform the following activities on a Constant basis: Push Cart-40Lb, Pull Cart-40 Lb, Reach with 5 lb. Weight, Fingering (L), Fingering (R), Sitting and Standing, Mr. Amaya demonstrates no difficulty with sitting or standing.

Mr. Amaya is able to perform the following activities on a Frequent basis: Walk, Balance, Stoop, Overhead (R), Handling (L), Handling (R).

Mr. Amaya is able to perform the following activities on an Occasional basis: Carry up to 50 Lb.

FUNCTIONAL LIMITATIONS

Mr. Amaya's true functional limitations remain unknown due to the inconsistencies that he demonstrated but he did not demonstrate the ability to material handle over 50 lbs. He performed at a level that placed him in the Frequent and Constant categories with functional activities.

CONCLUSIONS

Mr. Amaya underwent functional evaluation this date with unreliable results for effort.

Overall Mr. Amaya demonstrates the ability to perform work at least at the MEDIUM Physical Demand Classification as determined through the Department of Labor.

After the claimant's functional capacity evaluation, Dr. Danks authored a letter dated May 3, 2006. He stated that he had not evaluated the claimant since his last visit on March 14, 2006, and had not seen the results of the functional capacity evaluation. Dr. Danks reiterated his prior discussion of surgery and the claimant's statement that the claimant did not wish to proceed with surgery. Dr. Danks indicated that the claimant's work limitations would be dictated by the functional capacity evaluation and noted, that in his opinion, the claimant had reached maximum medical improvement.

After considering all of the evidence, the fact that Dr. Danks discussed surgery with the claimant and that the claimant did not wish to proceed with the procedure and the fact that Dr. Danks opined, in a letter dated May 3, 2006, that the claimant had reached MMI and the claimant's work limitations were

dictated by his functional capacity evaluation, the fact that Dr. Cathey specifically opined that the claimant was not a surgical candidate and that the claimant's problems were degenerative in nature, we cannot find that the claimant proved by a preponderance of the evidence that he is entitled to additional medical treatment in the form of surgery. There is no indication whatsoever that Dr. Danks is still of the opinion that surgery is necessary, particularly when the functional capacity evaluation is considered and the claimant was giving unreliable effort and demonstrated inappropriate illness responses. Accordingly, we cannot find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment in the form of back surgery. Therefore, we affirm the decision of the Administrative Law Judge.

The next issue that must be addressed is the claimant's request for additional temporary total disability benefits. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Highway & Trans Dept v. Breashers, 272

Ark. 244, 613 S.W.2d 392 (1981). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission. Ark. Highway & Trans. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition.

McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages (citing Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

In the January 30, 2006, Administrative Law Judge opinion, the Judge found that the claimant remains within his healing period for his compensable back injury. Although no appeal was taken from this opinion, it is axiomatic that this finding only applied to the facts and evidence as presented at the January 5, 2006, hearing. Since that hearing, the claimant has undergone a Functional Capacity Evaluation in which he was found to have given inappropriate pain responses and an unreliable effort. In his letter dated May 3, 2006, Dr. Danks agreed that the claimant's work restrictions would be as reflected in the Functional Capacity Evaluation. Moreover, despite having not examined the claimant since March 14, 2006,

Dr. Danks opined that the claimant had reached maximum medical improvement. Dr. Cathey had previously opined that the claimant had reached maximum medical improvement on December 8, 2005. The only treatment the claimant underwent after the January 5, 2006, hearing was epidural steroid injections and an evaluation by Dr. Danks. The injections only afforded the claimant temporary relief. Clearly, as of January 5, 2006, the claimant had reached a plateau in his healing that no form of additional treatment would or could alleviate. At best, the claimant only required palliative treatment to maintain him at this present level of healing. Other than the claimant's own self-serving testimony that he is unable to work, there is absolutely no evidence that the claimant should be awarded additional temporary total or temporary partial disability benefits. The claimant is clearly not motivated to work or he would work more than a day or two here and there. He gave unreliable effort during his functional capacity evaluation. There was nothing whatsoever in the record showing what the claimant had been paid. The claimant was allegedly paid in cash. All we have is the claimant's testimony denoting that he was paid in cash and he only worked a day or two

here or there. Therefore, the finding of the Administrative Law Judge awarding temporary partial disability benefits from January 5, 2006, through March 21, 2006, should be and is hereby reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion, which finds that the claimant is not entitled to additional medical treatment in the form of surgery by Dr. Danks and is not entitled to additional temporary partial disability benefits.

Specifically, I find that the claimant is entitled to temporary partial disability benefits from January 5 to May 3, 2006. Accordingly, I would have modified the Administrative Law Judge's findings regarding the claimant's entitlement to

temporary partial disability benefits. However, I would have reversed the portion of the decision denying the claimant additional medical benefits and awarded the claimant the requested surgery.

The claimant's job required him to grind up trees and then place the ground up wood in large bags. On June 2, 2004, the claimant injured his back when he stepped into a hole and twisted while in the process of putting wood in the mill to grind. The claimant reported the incident and the pain gradually worsened. He sought treatment on July 15, 2004.

On July 15, 2004, the claimant was treated by Dr. Card. The report provides, "There is tenderness about the central lower LS region extending to bilateral S1 areas with overlying spasm." The claimant was assessed with a back strain with spasm. Dr. Card further indicated that he claimant might have a disc injury. The claimant continued to seek treatment and was referred to Dr. Danks.

On May 18, 2005, the claimant underwent an MRI. The report from the MRI indicates,

1. Overall AP diameter of the canal is diminished, most likely represents a congenital process.
2. A broad-based disc bulge at L3-4 with minimal effects on the anterior aspect of the thecal sac.
3. A broad-based disc bulge with a right paracentral component at L4-5 contributes to moderate narrowing of the central canal.
4. Broad-based disc bulge with a left paracentral component at L5-S1 contributes to moderate central canal stenosis.
5. Reactive appearing endplate changes at L3, L4, and L5.

On July 19, 2005, Dr. Danks indicated that the claimant's MRI revealed a disc protrusion, "on the right at L4-5 and left paracentral at L5-S1." He diagnosed the claimant with, "Herniated nucleus pulposus with lumbago" and ordered physical therapy. On September 19, 2005, Dr. Danks noted the claimant was unable to work. Dr. Danks continued treating the claimant and on October 25, 2005, recommended the claimant undergo epidural steroid injections.

On December 8, 2005, Dr. Cathey saw the claimant for an IME. Dr. Cathey noted that the claimant reported Dr. Danks had

discussed surgery with him. Dr. Cathey, without the benefit of the claimant's MRI, related the claimant's condition to degeneration and noted the claimant's high level of motivation to return to work and opined the claimant had reached MMI. However, he also recommended the claimant receive steroid injections at the expense of the employer carrier. Finally, he encouraged the claimant to seek follow-up treatment with Dr. Danks in the event his steroid injections were not successful.

_____ On December 20, 2005, Dr. Cathey authored another note indicating he had reviewed the claimant's MRI. He noted the claimant had congenital spinal stenosis and indicated the claimant suffered from, "a right paracentral disc protrusion at L4-L5 an (sic) a smaller left paracentral disc herniation at L5-S1." He further indicated the claimant did not appear to have nerve root compression or spinal stenosis at L4-L5 or L5-S1. Notably, he did not indicate if the claimant had degenerative changes in the spine. Finally, he opined the claimant was not in need of surgery.

On March 14, 2006, the claimant again sought treatment with Dr. Danks. Dr. Danks indicated the claimant had only been

provided temporary relief with the epidural injections. Dr. Danks further indicated, "At this time, I have discussed his options with him, including surgical treatment. He would most probably need a posterior lumbar interbody fusion at L4-5 and L5-S1." Dr. Danks noted the claimant did not wish to undergo surgery and referred the claimant for an FCE.

On March 21, 2006, an FCE was performed. The examiner noted the claimant reported having undergone injections and physical therapy without relief. The claimant also disclosed he had attempted to return to work to no avail and that he had decided not to have surgery because he had no one to care for him during his recovery. Despite the severity of the claimant's objective injuries, the examiner found the claimant had given unreliable results and deemed him able to return to medium level work. On April 10, 2006, Dr. Cathey indicated the claimant could return to full duty work with no restrictions and indicated the claimant was at MMI.

_____ On May 3, 2006, Dr. Danks indicated the claimant had been sent for an FCE for which he did not have the results. Dr. Danks reiterated that during his last visit with the claimant

he had discussed surgery for relief of pain, but that the claimant had declined surgery. Dr. Danks also indicated that the claimant's work limitations would be dictated by the results of the FCE and that the claimant was considered to be at MMI since he had decided not to undergo surgery.

At the time of the hearing, the claimant testified that the injections only provided temporary pain relief. He said that Dr. Danks had recommended surgery multiple times and that he had opted to undergo injections first only because he had no family here in order to take care of him after surgery. He further testified that throughout the course of treatment he has attempted to return to work, only to find he was only capable of performing limited and sporadic light duty work.

The present case has previously been litigated on two prior occasions. The first opinion was issued April 29, 2005, and the Administrative Law Judge found the claimant had sustained a compensable back injury and awarded temporary total disability benefits from June 2, 2004 to a date to be determined. No appeal was taken of that decision. Another hearing was held on January 5, 2006. The subject of that hearing was the claimant's

entitlement to temporary total disability benefits for the time period of June 2, 2004 to a date to be determined. The respondents essentially argued the claimant's condition was degenerative in nature and that he had only sustained a strain. They relied on the opinion of Dr. Cathey to assert that the claimant was at MMI and that his condition was not related to the work-related incident. Finally, they asserted the claimant was not unable to work. The Administrative Law Judge noted the inconsistencies in Dr. Cathey's opinion. He also noted the diagnosis of Dr. Danks that the claimant suffered from herniated discs. Ultimately, he found that the opinion of Dr. Danks was entitled to more weight than that of Dr. Cathey. Based on this finding, the Administrative Law Judge found the claimant remained in his healing period, but limited his benefits to temporary partial benefits as the claimant had been performing sporadic work.

The claim is now back before the Commission to determine if he is entitled to additional medical and disability benefits. After reviewing the record, I find that the claimant is entitled to both medical benefits in the form of surgery and to

additional temporary partial disability benefits. In making this finding, I note that the claimant, since the time of his injury, has been diagnosed as having herniated discs for which Dr. Danks recommends surgery. This claim has previously been litigated and the claimant was found to have a compensable injury for which he was entitled to ongoing treatment and ongoing temporary disability benefits. There is no evidence his condition has changed or that his symptoms have subsided, indicating that Dr. Danks' recommendation is still valid. Furthermore, it is apparent that he now wishes to have surgery, and since his symptoms persist, he is entitled to the surgery.

Furthermore, I find that the claimant was under active treatment in the form of receiving epidural steroid injections and other treatment until he was placed at MMI on May 3, 2006 indicating that he should be awarded temporary partial disability benefits until that time.

Arkansas Workers' Compensation law provides that an employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann.

§ 11-9-508(a). The claimant bears the burden of proving that she is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 114 (1985). The Court of Appeals has noted that even if the healing period has ended, a claimant may be entitled to ongoing medical treatment if the treatment is geared toward management of the claimant's compensable injury. See, Patchell v. Wal-Mart

Stores, Inc., 86 Ark App. 230; 184 S.W. 3d 31, (2004), citing Pippin, supra. Furthermore, this Commission has found that, treatment intended to help a claimant cope with chronic pain attributable to a compensable injury may be reasonable and necessary. See, Maynard v. Belden Wire & Cable Company, Full Workers' Compensation Commission Opinion filed April 28, 1998 (E502002); See also, Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission opinion filed June 20, 1991 (Claim No. 704562). 845 (1983). Additionally, a claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

In the present instance, the Majority denies the claimant treatment in the form of surgery because the claimant allegedly gave inconsistent results on his FCE. The Majority further asserts that Dr. Danks has not seen the results of the FCE and that there is no evidence that he currently wishes the claimant to undergo surgery. I must reject both of these reasons for denying the claimant additional care.

It is apparent that Dr. Dank's recommendation for the claimant to have surgery is based on his objective findings and the lack of response to conservative treatment. Shortly after being injured the claimant was diagnosed with having a strain with spasms and possible disc herniations. Not surprisingly, his MRI, in fact, revealed two such herniations. Since that time the claimant has undergone conservative treatment in the form of physical therapy and injections without relief. These were treatments that were not simply recommended by Dr. Danks. Rather, the respondents' physician has also indicated the claimant is entitled to such treatment. Furthermore, I note that as of the December 8 visit with Dr. Cathey, Dr. Cathey recommended the claimant pursue further treatment with Dr. Danks in the event that his injections did not work.

Furthermore, Dr. Danks has repeatedly indicated that he and the claimant have discussed having surgery, but that the claimant did not wish to undergo surgery. The claimant testified, and various references in the medical reports, all illustrate that this decision was solely based on the fact that the claimant did not have someone to care for him. Since these

recommendations, there is no evidence that the claimant's condition has improved. The claimant testified his symptoms persist but that he has decided his only recourse is to have surgery. Likewise, there is absolutely no evidence that Dr. Danks has retracted his opinion that surgery is a reasonable option for the claimant. In fact, had the claimant decided to immediately undergo surgery rather than try conservative treatment, it is almost certain that the respondents would be liable for it pursuant to the decision issued by the Administrative Law Judge on January 30, 2006.

Furthermore, I note the FCE was designed to determine the claimant's appropriate work level; not to assess if he needed additional medical treatment. As such, I find the Majority errs in finding that the results of the FCE should somehow change the claimant's course of treatment; particularly when the FCE report contains inconsistencies and the claimant has significant objective findings related to his admittedly compensable injury.

Likewise, I must reject the Majority's contention that the claimant only sustained a strain or sprain which has resolved and that the claimant's current problems are due to degeneration.

In fact, I believe that finding is completely at odds with the evidence in the record. I also find that as the claimant had no history of back problems, his injury was adjudicated to be compensable, and his symptoms have not subsided, it is evident that regardless of whether he sustained a strain or herniations, his need for treatment is directly related to the admittedly compensable injury.

However, I find that it is apparent that the claimant's symptoms are not simply due to degeneration. While the claimant had pre-existing degeneration, he had never required treatment for such and he had not been diagnosed with spasms or herniations. Likewise, the claimant was initially diagnosed with a strain; however, he was also noted to have spasming, which is consistent with a herniated disc. Furthermore, even as early as July 15, 2004, Dr. Card suspected the claimant might have herniated a disc. As the claimant was shown to have herniated discs and his symptoms never subsided, it is only logical that he did in fact, sustain herniations due to his work related injury.

I also note that Dr. Cathey's opinion from December 8, 2005, in which he opined the claimant had degeneration, was given

without the benefit of having the claimant's MRI and was not given within a reasonable degree of medical certainty.

Additionally, while he later opined the claimant had congenital stenosis he did not indicate if the claimant's herniations were due to degeneration nor did he retract his opinion that the claimant should return to Dr. Danks if he had ongoing problems.

Additionally, I note that even if the claimant did not sustain herniations from the compensable injury, his symptoms continued to persist and as his condition was found to be compensable, even treatment for degeneration would be as a direct result of his aggravation. As the claimant is only required to show that his aggravation was a factor in his need for treatment, he would still be entitled to receive additional medical treatment to alleviate symptoms that aggravated a degenerative condition. Since the claimant sustained an admittedly compensable injury for which his symptoms have not subsided, his need for treatment is directly related to the admittedly compensable injury.

As to the Majority's reliance on the opinion of Dr. Cathey, I note that in the January 30, 2006, opinion, the

Administrative Law Judge indicated he preferred the opinion of Dr. Danks over that of Dr. Cathey. I agree with the Administrative Law Judge's original conclusion that Dr. Danks' opinion is entitled to more weight than that of Dr. Cathey. I am also greatly disturbed that the Majority refuses to give any weight to the opinion of the claimant's treating physician and instead chooses to rely on the opinion of Dr. Cathey, who was hired by the respondents and had only one visit with the claimant. This is especially surprising since Dr. Cathey advised the claimant to return to Dr. Danks if he had ongoing problems, thereby acknowledging that Dr. Danks was best suited to treat the claimant. Even more disturbing is the fact that the Majority ignores the inconsistencies in Dr. Cathey's reports and in the FCE report.

First, I find that the opinion of Dr. Danks is entitled to more weight than that of Dr. Cathey because Dr. Danks has been the treating physician of the claimant; whereas Dr. Cathey only saw the claimant on one occasion. Additionally, I found Dr. Cathey's reports to be contradictory and slanted towards the respondents viewpoint. While Dr. Cathey on December 8, 2005,

opines the claimant is at MMI and his condition is due to degeneration, he did not even have the claimant's diagnostic tests. Clearly, this shows that he was not entirely objective. Additionally, I note that even despite this lack of objectivity, even Dr. Cathey realized the respondents' were not treating the claimant appropriately. This is illustrated by his recommendation the claimant receive epidural steroid injections at the respondents' expense. Furthermore, he goes so far as to indicate that if the injections were not successful, the claimant should discuss other options with Dr. Danks, indicating that he is deferring to the opinion of Dr. Danks. I find that Dr. Cathey's recommendation of further treatment at the expense of the employer is contradictory with his statement that the claimant is at MMI and that his condition is only related to degeneration. Furthermore, as previously discussed, I find that since the claimant had no pre-existing back problems before the admittedly compensable injury, he was originally diagnosed as having a possible disc problem which was later varified by MRI, his symptoms did not resolve, and given the finding from the previous decision that the claimant remained in his healing period,

presumably, at least as of the date of the last hearing on January 5, 2006, the claimant has shown that his need for treatment is directly related to the admittedly compensable injury. In fact to make any other finding, in my opinion, defies logic and common sense.

As to the assertion that the claimant is somehow unmotivated to return to work or gave unreliable results on his FCE, I find that there is simply not enough evidence to support such a finding. The claimant testified that he has attempted to return to work and that he, in fact, has been working to the best of his ability given his condition. Likewise, on December 8, 2005, Dr. Cathey noted the claimant's eagerness to return to work, opining, "Again, he does seem motivated to go back to work, and I believe he should be encouraged along these lines." Certainly to now assert the claimant is unmotivated to work is in contrast with the facts in the record.

Yet, inexplicably, the examiner for the FCE somehow concluded the claimant was not motivated. As previously mentioned, this is in direct contradiction to the other medical reports indicating the claimant is motivated. Furthermore, it is

simply not logical to conclude the claimant would be working, despite his need for ongoing treatment and surgery, if he was not motivated.

Additionally, when looking at the various medical reports and the inherent inconsistencies in the FCE report itself, I find that the results of the test are entitled to little, if any weight. Specifically, I note the inconsistencies with regard to the claimant's pain responses. The report provides,

Mr. Amaya's AROM with lumbar flexion was significantly limited during formal evaluation but with functional aspects of the testing, Mr. Amaya was noted to have minimal deficits with lumbar flexion. Mr. Amaya demonstrates normal movement patterns throughout testing yet demonstrated moaning with slow movement patterns with formal measurement.

Mr. Amaya's pain reports did not correlate with his movement patterns and overall abilities. He moved freely throughout testing and without significant body mechanic changes that indicated pain. He demonstrates no outward expression of pain and no facial expressions indicating pain as well. These do not correlate with his subjective complaints of pain at a level 7. His movement patterns did not change when his pain went between a 4 and a 7.

Yet, later in the report, the following comment is entered, "Mr. Amaya was very slow and guarded while doing movements into lumbar flexion." Likewise, the claimant was noted to have a slight limp on his right side when the weight of the box he was carrying was increased from 40 to 50 pounds.

Simply put, when reviewing the FCE report, it is inconsistent at best. The claimant is noted not to have any pain behaviors, but then is noted to be moaning. In another instance he is noted to lack body mechanics indicating pain, then he is noted to be limping and to have slow and guarded movements. These findings are simply not consistent and I simply do not believe the claimant would decide to have major surgery if he were not in pain. Furthermore, since until this test the claimant was believed by both Dr. Cathey and Dr. Danks to be behaving normally considering his objective findings, I find that the FCE should be given little weight.

Finally, I address the claimant's entitlement to temporary partial disability benefits. In order to be entitled to temporary partial disability benefits, the claimant has the burden of proving by a preponderance of the evidence that he

remains in his healing period and that he suffered a partial incapacity to earn wages. Arkansas State Highway Transportation Department v. Breshears, 272 Ark. 244, 613 S. W. 2d 392 (1981).

While the Majority argues that the claimant's condition plateaued by January 6, 2006, and that no other treatment would or could alleviate his condition, the record suggests otherwise. The claimant had no change in his symptoms from the time of injury and was receiving consistent, active care during the time he is requesting benefits. Even the respondents' own physician recommended the claimant receive ongoing treatment in the form of injections. In fact, the respondents' physician went so far as to say that the treatment should be covered by the claimant's workers' compensation claim and indicated if the injections were not successful he should return to Dr. Danks indicating the claimant remained in his healing period. The claimant had no one to care for him after he had surgery and so he decided to try conservative treatment. Clearly, this constituted conservative treatment which was designed to improve the claimant's condition and demonstrates the claimant remained in his healing period. Furthermore, and as previously discussed, Dr. Danks continued

recommending the claimant have surgery, indicating that there was treatment available that was specifically designed to improve the claimant's condition. In fact, it is apparent that the only reason Dr. Danks found the claimant was at MMI is because the claimant decided not to pursue surgery. Likewise, the claimant credibly testified that he has had a limited ability to work, and that he has had reduced wages, indicating that he has a partial incapacity to earn wages.

In sum, I find that the Majority errs in relying on the FCE report and the opinion of Dr. Cathey. While I recognize the Majority has the right to weigh medical evidence, I find that in this instance they have failed to properly weigh that evidence. The respondents have accepted this claim as compensable and there is simply no evidence to show that the claimant had symptoms prior to the compensable injury or that his condition has changed. The claimant has tried conservative treatment and Dr. Danks has indicated surgery would help in treating the claimant. I also find it is simply not plausible he would decide to undergo surgery unless necessary. The Majority errs in refusing to acknowledge or consider the lack of an ongoing

doctor-patient relationship between the claimant and Dr. Cathey and the multitude of inconsistencies in the reports of Dr. Cathey and the FCE examiner. They also fail to recognize that even Dr. Cathey essentially deferred to the recommendations of Dr. Danks. From the onset of this claim the respondents have essentially tried to repeatedly cut the claimant off from receiving benefits despite his apparent need for treatment due to the admittedly compensable injury. Dr. Cathey even alluded to the respondents' failure to provide appropriate care when he suggested the claimant receive epidural injections at the expense of the respondents because the claimant had not received epidural injections at the initial phase of his injury as necessary. The Majority allows the respondents to continue to rely on the opinion of Dr. Cathey to assert the claimant was not in his healing period and that his condition is due to degeneration. They fail to acknowledge that the claimant had no lapse in symptoms and is entitled to treatment to treat an aggravation of an underlying condition. Furthermore, they erroneously assert that the claimant's FCE, which was designed to determine the claimant's work abilities, somehow would influence whether he

needed additional treatment. In my opinion, the FCE has absolutely no bearing on the claimant's need for treatment as it was not designed to assess his need for additional treatment.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner