

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402183

JUNIS BLAKE,
EMPLOYEE

CLAIMANT

URRUTIA, INC.,
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 2, 2007

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

Claimant represented by the HONORABLE BILLY HUBBELL,
Attorney at Law, Crossett, Arkansas.

Respondents represented by the HONORABLE CAROL WORLEY,
Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal
an administrative law judge's opinion filed August 8, 2006.
The administrative law judge found that the claimant did not
prove he was entitled to temporary total disability
compensation from May 14, 2004 through a date yet to be
determined. The administrative law judge found that the
claimant proved treatment from Dr. Hart was reasonably

necessary, "including, but not limited to, the discogram now recommended by Dr. Hart." After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to temporary total disability compensation from May 14, 2004 through a date yet to be determined. We reverse the administrative law judge's finding that the claimant proved he was entitled to a discogram recommended by Dr. Hart.

I. HISTORY

The parties stipulated that Junis Wayne Blake, age 59, sustained a compensable low back injury on January 26, 2004. The claimant testified that he and a co-worker were "Picking up a stereo cabinet - entertainment center....It weighed around 200 pounds, probably, and 5-foot tall. It was big and wooden - maybe a 36-inch TV could fit in it. We was going to put it in a bucket that was probably about four foot tall - somewhere around that. My driver helped me that day, so he had to get out and help me put it in, and when I got to the top, my back went out, and I told him - I said, 'Hurry up and throw it in there. I can't hold it no longer.'" "

The claimant signed an Accident Report on January 26, 2004 indicating that he had hurt his back while loading trash onto a truck. The claimant was diagnosed as having lumbar strain, radiculopathy, and paresthesia.

The claimant testified that he obtained medical treatment but that physical therapy "made me worse."

An MRI of the claimant's lumbar spine was taken on February 4, 2004, with the following impression:

1. Discogenic changes are present at multiple levels.
2. There is a tear in the disc annulus paracentral to the right near the foraminal margin. Mild facet arthropathy.
3. Diffuse disc bulge at L4-5 and L5-S1.
4. No evidence of a significant central canal stenosis. Moderate foraminal narrowing for the L4 and L5 nerve roots, bilaterally.

The claimant was referred to Dr. Wayne L. Bruffett and the record indicates that Dr. Bruffett arranged treatment in the form of a nerve root block. Dr. Bruffett stated on March 15, 2004, "I do not see a specific radicular problem nor do I see anything on his MRI scan that would suggest he needs any spinal surgery at this time." The claimant testified that Dr. Bruffett sent him to Dr. Ackerman, and

that Dr. Ackerman performed a steroid injection with no benefit.

Dr. Bruffett referred the claimant to Dr. Bruce L. Safman. Dr. Safman examined the claimant on March 17, 2004 and gave the following impression: "1. Degenerative disc disease, lumbar spine. 2. Lumbosacral and sacroiliac strain. 3. Enthesopathy of both hips." Dr. Safman treated the claimant conservatively and released the claimant to restricted work on March 31, 2004.

Dr. Safman noted on April 14, 2004, "Mr. Blake is reporting that he is having pain from the waist down. He reports burning paresthesias throughout both lower extremities. He reports a tremor in both lower extremities....I could palpate very little tenderness in the lower lumbar spine. There is no guarding, no muscle spasm present....I suspect there is an emotional component to his problem."

Electrodiagnostic testing was done on May 12, 2004, with the following interpretation: "1. Normal study. 2. No electrodiagnostic evidence of peripheral nerve entrapment, neuropathy, plexopathy or radiculopathy of bilateral lower extremities."

Dr. Scott W.F. Carle performed an Independent Medical Evaluation on May 13, 2004. Dr. Carle gave the following diagnostic impressions:

1. Degenerative disk disease, idiopathic.
2. Chronic back and leg pain and weakness of the upper and lower extremities, etiology unknown, likely non-organic.
3. Altered capacity to function in the work place, most likely attributed to non-physiological factors....

Degenerative disk disease in this client is not attributed to a specific incident that occurred at work. There does not appear to be a specific spinal diagnosis that can be attributed to a specific incident that occurred at work.

His current diagnosis is non-specific back and leg pain with significant psychosocial risk factors to include idiopathic personal social issues, such as disabled spouse, educational level and smoking....

It does not appear that this client's inability to return to work can be related to a specific measurable impairment to the spine....

It does not appear that the client has a biological diagnosis that is likely to be altered significantly over the course of the next twelve months. **He is at his technical MMI date and has 0% permanent impairment.**

The claimant began treating with Dr. Thomas M. Hart, an "interventional spine specialist," on June 10, 2005. Dr.

Hart planned, among other things, "to get a simple updated MRI of the lumbosacral spine and compare that to the original MRI. I would like to see both imaging studies on his next presentation. At this time if it still indicates a disc protrusion or there are indications of high intensity zones, in other words possible annular disc disruption, again I state to a degree of medical certainty and probability and based on the medical literature and North American Spine Society's Commission, he should undergo discography performed properly with a double needle technique. If an abnormal disc is identified both objectively and subjectively with post CT imaging, at that point whether or not he is heading in a surgical versus nonsurgical pathway."

An MRI of the claimant's lumbar spine was taken on June 17, 2005, with the following impression:

1. Mild disc desiccation noted at L3-4 and L4-5, with very mild diffuse disc bulges. These minimally to mildly flatten the ventral aspect of the thecal sac but produce no significant canal or foraminal stenosis.

Dr. Hart reviewed the MRI report and gave the following impression on July 1, 2005: "Multilevel lumbar disc disease and disc protrusions. More than likely he has a discogenic

back pain from his original on the job injury." Dr. Hart planned the following:

To a degree of medical certainty and probability I discussed with Mr. Blake that I think that he is a candidate for discography to once and for all to demonstrate and document does he or does he not have discogenic pain. Perform discography at the 2-3, 3-4, 4-5, S1 level according to the national standards, i.e., double needle technique, measure pressure volumes, identify morphological appearance. That is objective information and compare it to the subjective information. If we find an abnormal disc, we will inject intradiscal steroids, which may be more effective than epidural steroid injections followed by post CT imaging and await those results. If he does appear to have significant disc disruption with annular tear and dye going beyond the nucleus, I think it would be appropriate to get him back to Dr. Wayne Bruffett, his orthopedic spinal specialist. If on the other hand he has contained herniations, then he may be a candidate for other technology, which is less minimally invasive.

The record indicates that the respondent-carrier denied treatment in the form of discography.

A pre-hearing order was filed on December 14, 2005. The claimant contended that he sustained a compensable injury on or about January 26, 2004 and that he had not reached maximum medical improvement. The claimant contended that he was entitled to additional medical treatment,

additional temporary total disability from May 14, 2004 to a date yet to be determined, and attorney's fees. The respondents contended that all appropriate benefits had been paid. The respondents contended that the claimant "was afforded medical care through 5/13/04, when he was released to return to work by Dr. Carle with no impairment rating. That the claimant reached MMI on 5/13/04. Respondents further contend the medical documentation does not support a need for additional medical treatment or indemnity benefits subsequent to 5/13/04."

The parties agreed to litigate the following issues:
"1) Whether the claimant is entitled to additional TTD benefits from 5/14/04 to a date yet to be determined, plus attorney fees. 2) Whether the claimant is entitled to the additional medical treatment recommended by Dr. Thomas Hart. 3) All issues related to permanent impairment are hereby reserved."

Dr. Steven L. Cathey independently evaluated the claimant on February 9, 2006:

Mr. Blake presents with a two year history of chronic lower back pain with radiation to both lower extremities. The patient relates the onset of his symptoms to an occupational injury sustained on January 26, 2004, while he was employed as a sanitation worker at

the Little Rock Air Force Base. According to the patient, he was lifting a discarded home entertainment center when he noted the onset of pain in his low back....He was referred to Dr. Wayne Bruffett, an orthopedic spine surgeon in North Little Rock after an MRI scan of his lower back showed multilevel degenerative lumbar disc disease....

Mr. Blake ultimately requested a change of physician through the Worker's Comp Commission and was referred to Dr. Thomas Hart. Dr. Hart recommended a repeat MRI scan of the patient's lumbar spine that continued to reflect multilevel degenerative lumbar disc disease....Dr. Hart is advising discography despite the fact that Dr. Wayne Bruffett, the attending surgeon on the case, has ruled out operative intervention. It was at this point that an independent medical evaluation was suggested....

PHYSICAL EXAMINATION: The patient's neurological examination is negative. He specifically has no sign of lumbar radiculopathy. Straight leg raising is negative bilaterally as well. While there is point tenderness noted in the lower back, no paraspinous muscle spasm or restriction of movement was noted. The patient identifies pain in his low back with rotation of his shoulders and compression of the head. These maneuvers are typically not painful even in acute situations and are typically categorized as "non physiologic signs".

I reviewed the results of electrodiagnostic testing performed in

May of 2004 by Dr. Darin Wilbourn at the Little Rock Spine and Joint Clinic. The study is negative. There is specifically no sign of lumbar radiculopathy, peripheral nerve entrapment, etc. The negative electrodiagnostic tests are consistent with the patient's negative neurological examination performed today.

Mr. Blake and I reviewed his initial MRI scan obtained on February 4, 2004, as well as a repeat study from June 17, 2005. Although he does have some very mild degenerative disc disease at L3-L4 and L4-L5, neither study shows any acute abnormalities that could be related to the occupational injury in question. In other words, there is no evidence of disc herniation, spinal stenosis, compression fracture, etc. Indeed, the changes noted on both MRI scans are very common in otherwise asymptomatic patients of Mr. Blake's age group. There has been absolutely no change when the June, 2005, MRI scan is compared to the initial February, 2004, study.

IMPRESSION:

Chronic low back pain most likely secondary to degenerative lumbar disc disease. There is no clinical or radiographic evidence to suggest any structural changes in the patient's low back are related to the January 26, 2004, occupational injury.

RECOMMENDATIONS:

1. I do not see an indication for discography in this case. I suspect discography would be abnormal at L3-L4 and L4-L5 based on the preexisting degenerative changes noted on both the patient's MRI scans. This would certainly not, in my

opinion, change his management. In other words, even if discography was "positive", I would not see an indication for lumbar disc surgery, spinal fusion or other neurosurgical intervention.

2. Unfortunately, there seems to be very little else to offer Mr. Blake in terms of treatment. His pain has been refractory to trials of medication, physical therapy, epidural steroids, trigger point injections, etc. There is simply very little else to offer him at this point beyond helping him to develop chronic coping mechanisms for what will undoubtedly be a long-term problem. I do not anticipate this getting any better as he gets older.

3. According to AMA Guidelines, the patient would not be entitled to an impairment rating at least as it relates to the occupational injury in question. Although the AMA Guides to the Evaluation of Permanent Impairment, fourth edition revised, does recognize a 5% impairment rating for multilevel degenerative lumbar disc disease, in my opinion, the changes noted on the February, 2004, MRI scan, as well as the June, 2005, follow-up were preexisting. Or in other words, were present at the time of the January 26, 2004, occupational injury.

4. As far as future employment is concerned, I believe it would be in Mr. Blake's best interest to try to find some type of employment. I believe he will have a very difficult time securing disability benefits through Social Security based on the paucity of findings noted on both his neurological examination, as well as his MRI scans, EMG and nerve conduction studies, etc. Although activities such as bending, lifting, stooping, etc. may lead to an

increased perception of pain in his lower back, there is no absolute medical contraindication for the performance of these tasks.

5. Lastly, I suggest that the patient continue to see Dr. Hart for comprehensive pain management.

Dr. Hart wrote to Pat Capps Hannah with the Commission on March 6, 2006:

This is in response to a recent clinical note I received from Dr. Steve Cathey's office in which apparently, he performed an independent medical evaluation requested by a case manager for Comp Choice....After obtaining imaging studies which showed multilevel disc bulges and disc desiccation, I discussed in great detail with Mr. Blake, and (sic) algorithmic approach based on a scientific based medicine to proceed with discography. According to the North American Spine Society's Protocol Commission, i.e., pain beyond four months and not delineated by other imaging studies, this allows once and for all to determine does he or does he not have discogenic pain. It is a more sensitive study than either an MRI or a CT myelogram that allows us to compare the objective information, i.e., the morphological appearance, as well as pressure volumes vs. subjective, i.e., reproduction or concordant pain. If abnormal, then this will be followed by post CT imaging. I agree with Dr. Steve Cathey's independent medical evaluation, in that he is not a surgical candidate. There are no signs of neurological deficit. Imaging studies do not show significant nerve compression signs. That does not mean the disc does not hurt....

As to Dr. Cathey's last statement "5) Lastly, I suggest the patient continue to see Dr. Hart for comprehensive pain management." In order for me to continue comprehensive pain management, I state again that discography would be the most appropriate diagnostic study. Discography is performed properly according to the nation (sic) standards. If it demonstrates pain concordant abnormal disc, confirmed with post CT imaging independently by the radiologist, then the decision process making would be whether or not he would be a candidate for a minimally invasive and nonsurgical procedure vs. if it does demonstrate significant disc disruption then appropriate referral back to Dr. Wayne Bruffett, his orthopedic spinal specialist. The national guidelines are discography is never to be used as the first test. Since he has failed all conservative treatment, and had multiple imaging studies, again I feel that this is a very appropriate study....

A hearing was held on May 11, 2006. The claimant testified that his physical condition had not improved: "I hurt every day, and I can't do nothing. When I get up, I'm all right - maybe for 15 or 20 minutes I ain't in pain. Then I put my weight on my back and it starts in. And then when it starts getting a little bit worse and worse my legs start hurting - my muscles in my legs and buttocks and down in my groin area starts hurting....I'm miserable every day. I just won't get no better." The claimant testified that he wanted to treat with Dr. Hart.

The administrative law judge found, in pertinent part:

3) The claimant has failed to prove by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from May 14, 2004 to a date yet to be determined.

4) The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 14, 2004, through a date yet to be determined.

5) The claimant has proven by a preponderance of the evidence that the medical treatment from Dr. Thomas Hart after May 14, 2004, has been reasonably necessary in connection with his January 26, 2004, compensable injury; including, but not limited to, the discogram now recommended by Dr. Hart.

The claimant appeals to the Full Commission and the respondents cross-appeal.

II. ADJUDICATION

A. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether or not an employee's healing period has ended is a

question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

The administrative law judge found in the present matter that the claimant "failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 14, 2004, through a date yet to be determined." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable low back injury on January 26, 2004. The claimant, age 59, testified that he hurt his back after lifting a large and heavy stereo cabinet. The claimant was treated on January 26, 2004 and was initially diagnosed as having lumbar strain, radiculopathy, and paresthesia. An MRI in February 2004 showed discogenic changes at multiple levels, a tear in the disc annulus, and diffuse disc bulging at L4-5 and L5-S1. Dr. Bruffett stated in March 2004, "I do not see a specific radicular problem nor do I see anything on his MRI scan that would suggest he needs any spinal surgery at this time."

After the claimant apparently received a steroid injection from Dr. Ackerman, Dr. Bruffett referred the claimant to Dr. Safman. Dr. Safman's assessment included degenerative disc disease of the lumbar spine. Dr. Safman

treated the claimant conservatively and released the claimant to restricted work on March 31, 2004.

Electrodiagnostic testing in May 2004 was a normal study. There was no electrodiagnostic evidence of peripheral nerve entrapment, neuropathy, plexopathy or radiculopathy of the claimant's bilateral lower extremities.

Dr. Carle performed an independent medical evaluation on May 13, 2004. Dr. Carle's impression included degenerative disc disease and chronic back and leg pain, "etiology unknown, likely non-organic." Dr. Carle pronounced maximum medical improvement with zero percent permanent impairment. In June 2005, a lumbar MRI showed mild disc desiccation at L3-4 and L4-5. Dr. Cathey examined the claimant in February 2006. Dr. Cathey noted that the claimant's neurological examination was negative with no sign of lumbar radiculopathy. Dr. Cathey reviewed both MRI's and stated, "Although he does have some very mild degenerative disc disease at L3-L4 and L4-L5, neither study shows any acute abnormalities that could be related to the occupational injury in question. In other words, there is no evidence of disc herniation, spinal stenosis, compression fracture, etc." Dr. Cathey's impression was "Chronic low back pain most likely secondary to degenerative lumbar disc

disease. There is no clinical or radiographic evidence to suggest any structural changes in the patient's low back are related to the January 26, 2004, occupational injury." Dr. Cathey stated there was "very little else to offer Mr. Blake in terms of treatment....There is simply very little else to offer him at this point beyond helping him to develop chronic coping mechanisms for what will undoubtedly be a long-term problem. I do not anticipate this getting any better as he gets older."

The Full Commission finds that the claimant sustained a compensable lumbar strain on January 26, 2004. We find that the claimant reached the end of his healing period for the compensable lumbar strain no later than May 13, 2004, the date Dr. Carle pronounced maximum medical improvement with zero permanent anatomical impairment. The Full Commission assigns significant weight to the expert opinions of Dr. Bruffett, Dr. Safman, Dr. Carle, and Dr. Cathey. None of these treating and/or examining physicians opined that the claimant had sustained an acute herniated disc or otherwise required surgery as a result of the January 26, 2004 lumbar strain. The evidence of record does not demonstrate that the effects of the lumbar strain continued beyond May 13, 2004, the date Dr. Carle pronounced maximum medical

improvement. Temporary total disability compensation cannot be awarded after a claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). In the present matter, the Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to temporary total disability from May 14, 2004 through a date yet to be determined.

B. Medical Treatment

The 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 must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that the medical treatment from Dr. Thomas Hart after May 14, 2004, has been reasonably necessary in connection with his January 26, 2004, compensable injury;

including, but not limited to, the discogram now recommended by Dr. Hart." The Full Commission reverses this finding.

As the Full Commission has noted *supra*, the claimant sustained a compensable low back injury on January 26, 2004. The claimant was diagnosed as having a lumbar strain. As we have also noted *supra*, a lumbar MRI in February 2004 showed discogenic changes at multiple levels, a tear in the disc annulus, and diffuse disc bulging at L4-5 and L5-S1. However, Dr. Bruffett reviewed the MRI and opined that the claimant did not need surgery. Dr. Safman treated the claimant conservatively and did not recommend surgery. Dr. Carle diagnosed degenerative disc disease and implicitly opined that the claimant had not sustained an acute injury to the claimant's disc which would require surgery. The Full Commission has determined that the claimant reached the end of his healing period for the compensable lumbar strain no later than May 13, 2004, the date Dr. Carle assigned maximum medical improvement.

Dr. Hart examined the claimant on June 10, 2005 and recommended additional diagnostic testing. Dr. Hart noted that if additional MRI testing showed " a disc protrusion or there are indications of high intensity zones, in other words possible annular disc disruption," then the claimant

"should undergo discography performed properly with a double needle technique." An MRI on June 17, 2005 revealed mild disc desiccation at L3-4 and L4-5 with very mild diffuse disc bulges with no significant canal or foraminal stenosis. The MRI did not show a disc protrusion or a "high intensity zone" suggesting possible annular disc disruption. Yet, Dr. Hart still recommended treatment in the form of discography. Dr. Cathey provided an expert independent evaluation in February 2006. Dr. Hart's impression was "Chronic low back pain most likely secondary to degenerative lumbar disc disease. There is no clinical or radiographic evidence to suggest any structural changes in the patient's low back are related to the January 26, 2004, occupational injury." Dr. Cathey expressly stated that he saw no indication for discography in the present case.

The Full Commission recognizes that Dr. Cathey suggested "that the patient continue to see Dr. Hart for comprehensive pain management." We also recognize that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). In the present matter, however, the record does not

demonstrate that a discogram would be reasonably necessary in connection with the claimant's lumbar strain. It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Full Commission places significant weight on the credible opinion of Dr. Cathey that discography was not reasonably necessary in connection with the claimant's chronic low back pain and degenerative disc disease. Dr. Hart's recommendation for treatment in the form of a discogram is entitled to minimal weight.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to temporary total disability compensation from May 14, 2004 through a date yet to be determined. We reverse the administrative law judge's finding that the claimant proved that he was entitled to a discogram as recommended by Dr. Hart. The Full Commission finds that the claimant did not prove that discography as recommended by Dr. Hart was reasonably necessary in connection with the January 26, 2004 compensable lumbar strain. We therefore dismiss the claim

for temporary total disability and additional medical treatment in the form of a discogram.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision which denies the claimant medical treatment in the form of a discography, and pain management and denies additional temporary total disability benefits.

I find the evidence shows that the claimant is entitled to the requested medical treatment in the form of a discogram. Specifically, I find that the medical reports show that the claimant sustained an admittedly compensable injury in January 2004, from which he has not recovered and requires treatment. Furthermore, I find that the opinion of Dr. Hart should be given more weight than the opinions of Dr. Safman, Dr. Carle, and

Dr. Cathey, as Dr. Hart recommended reasonably necessary treatment which may be able to find the root of the problem for further treatment options, including pain management. Finally, I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to the requested temporary total disability benefits from May 14, 2004 to a date yet to be determined. As such, I must respectfully dissent.

_____I first address the claimant's entitlement to additional medical treatment. An employer shall promptly provide for an injured employee such treatment as may be reasonably necessary in connection with the injury received by the employee. Ar. Code Ann. § 11-9-508(a). 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 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).

The question in the present case then becomes whether a discography and related pain management is reasonably necessary medical treatment. I find that a

discography is reasonably necessary medical treatment as the claimant suffered an admittedly compensable injury, his symptoms have not yet subsided, and the test is necessary to determine the nature of his injury and aid in the administration of pain management. Additionally, the Court of Appeals has indicated that the results of discographies are valid in showing objective findings, therefore it stands to reason that the Commission should also find that they are reasonable and necessary to diagnose and treat an injury. Furthermore, I find that related pain management is reasonably necessary medical treatment to treat the claimant's admittedly compensable injury.

In the present case, the credible evidence shows that the claimant was lifting an entertainment center into the garbage truck when he injured his back. The Majority found that the claimant's need for ongoing treatment is not casually related to his employment because Dr. Cathey found that the claimant suffered from non-work related degeneration. The evidence simply does not support this finding. The claimant had no history of back problems or treatment prior to the accident, and the claimant sustained an admittedly compensable injury.

Accordingly, immediately after the accident, the claimant was treated by Dr. Merrick, who ordered an MRI, which found that the claimant had a tear in the disc annulus, mild facet arthropathy, disc bulges at L4-5 and L5-S1, and moderate foraminal narrowing for the L4 and L5 nerve roots. Even Dr. Bruffet found that the claimant did indeed have foraminal narrowing, disc bulges, and an annular tear. After the accident, the claimant had no break in symptoms. When considering this in conjunction with his lack of having back problems in the past, I find the only logical conclusion is that his need for ongoing treatment is directly related to the admittedly compensable injury.

Curiously, the Majority concludes that claimant only sustained a temporary strain. However, medical records do not show that the strain ever resolved. While I note that the claimant's diagnostic studies showed some degenerative changes, only Dr. Cathey expressed a belief that his symptoms or conditions were solely degenerative and even he admitted those conditions were aggravated as a result of the claimant's work-related injury. Virtually every doctor's report after the time of the injury references the

claimant's symptoms in relation to his work-related injury and admittedly compensable injury, indicating that the two are related. Furthermore, the claimant's symptoms from the admittedly compensable injury never changed or resolved, indicating that the claimant's need for treatment is directly related to the admittedly compensable injury.

With respect to whether the claimant's requested treatment is reasonably necessary, the Majority finds that the claimant should not be entitled to a discogram based on the opinions of Dr. Safman, Dr. Carle, and Dr. Cathey. However, after reviewing the record, I find that the opinion of Dr. Hart should be given the most weight. It is clear that Dr. Hart was familiar with the claimant's condition and used the claimant's current and former diagnostic studies in deciding what course of treatment he would use for treating the claimant. Likewise, it is apparent that the conservative treatment that the claimant had received was not working, and Dr. Hart felt that more diagnostic testing would pinpoint the claimant's pain. Also, Dr. Hart noted that the claimant may or may not need another surgery, but he should at least be entitled

to receive non-surgical pain relief that only a discogram would be able to assist with. Accordingly, I find that his opinion is entitled to great weight.

I further find the opinions of Dr. Safman, Dr. Carle and Dr. Cathey should be given little weight. It is clear that these physicians are simply providing opinions which are in favor of the respondents, as that is who hired them. Dr. Bruffett found that the claimant did indeed have foraminal narrowing, disc bulges, and an annular tear. As such, he prescribed Vioxx for the claimant's pain. Clearly, Dr. Bruffett's findings are objective medical findings and he would not have prescribed pain medication if he honestly felt that the claimant was not in pain. After conservative treatment, Dr. Bruffett referred the claimant to Dr. Safman, rehab specialist, who also made the objective findings that the claimant had a degenerative disc disease, a lumbosacral and sacroiliac strain, and enthesopathy of both hips. Dr. Safman gave the claimant trigger point injections, and gave him prescriptions for Mobic, Ultracet, and a Lidoderm patch.

After weeks of treatment, Dr. Safman noted that the claimant's complaints of pain exceeded his

objective findings. Dr. Safman also repeated the trigger point injections and prescribed Lexapro, noting that there may be other factors playing a role in the claimant's perception of pain. However, Dr. Safman also noted that if the Lexapro was not helpful, he would prescribe Neurotin. Despite the fact that the claimant reported that it felt like he had a pinched nerve and the Lexapro did not help, Dr. Safman erroneously concluded that the claimant was anxious and that there was an emotional component to his problem. Accordingly, Dr. Safman felt that the claimant had significant pain problems as he prescribed a significant amount of pain medication, yet pushed the idea of emotional problems, even though the anti-depressant drugs did not provide the claimant any relief. Dr. Safman has a long history of proclaiming the claimant to have "emotional problems" when he cannot figure out what causes the patient's pain. See Jobe v. St. Vincent North/Sherwood, Full Commission Opinion Filed May 22, 2005 (F105594); Dallas County Hospital v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001); Tipton v. Saline County Hospital, Full Commission Opinion Filed April 19, 2004 (F113652); Smith v. Great Lakes Chemical Corp., Full Commission Opinion

Filed June 26, 2003 (E704933). Furthermore, Dr. Safman must have concluded that the claimant suffered from chronic pain due to the injury, because he never released the claimant from his care and continued to prescribe pain medication. As such, I find that Dr. Safman's opinion is entitled to little weight.

Dr. Carle's opinion should also be afforded little weight. Dr. Carle first ordered an EMG and Nerve Conduction Velocity Test, in which the interpretation was normal. Dr. Carle then examined the claimant and reviewed all of the claimant's medical history. Accordingly, Dr. Carle fails to note that the claimant had experienced no back pain or problems prior to the January 26, 2004 accident. However, Dr. Carle noted that the patient, although suffering from bulging disks and an annular tear, has complaints of pain not supported by objective medical findings. This is directly at odds with the opinions of the objective medical evidence. As such, I find that Dr. Carle's opinion is entitled to little weight.

Dr. Cathey's opinion should also be afforded little weight, as his opinion was only provided to controvert Dr. Hart's opinion. In response to Dr. Hart's

assessment, Dr. Cathey found that the claimant suffered from non-work related degeneration. Dr. Cathey did not even note that the claimant suffered from a tear in the disc annulus, mild facet arthropathy, disc bulges at L4-5 and L5-S1, and moderate foraminal narrowing for the L4 and L5 nerve roots, as the MRI had revealed and the previous doctors had all noted. Clearly, Dr. Cathey did not make a thorough medical evaluation. Also, Dr. Cathey's recommendation was that the claimant get a job and continue to see Dr. Hart for comprehensive pain management. It is interesting that even though Dr. Cathey does not note that the claimant is suffering from a tear in the disc annulus, mild facet arthropathy, disc bulges at L4-5 and L5-S1, and moderate foraminal narrowing for the L4 and L5 nerve roots, he still believes that the claimant should continue pain management. Therefore, I find that Dr. Cathey's opinion is entitled to little weight.

It is also important to note that the claimant was seen by psychologist, Dr. Johnson. While Dr. Johnson's ultimate evaluation that the claimant was a hypochondriac has absolutely no bearing on the present case, it is interesting that she made note of the

claimant's physical well-being. Dr. Johnson noted that the claimant seemed uncomfortable and tried to find a way to sit that would relieve his discomfort. It is evident that the claimant was in pain even while trying to sit at Dr. Johnson's office. It was so apparent, that she felt it important enough to make a note of it. In fact, Dr. Johnson even noted that the claimant does not magnify his symptoms. Clearly, a person in such pain should be afforded all of the diagnostic tests available to him. As such, it is apparent that the conservative treatment that the claimant had received was not working, and Dr. Hart's recommendation to pursue a discography and Dr. Cathey's recommendation that the claimant continue pain management should be awarded as reasonable and necessary treatment.

Furthermore, I find the discography is reasonable and necessary as a diagnostic tool. Though this Commission has in recent history been disinclined to award discographies, the legitimacy of discographies have been recognized by the Court of Appeals. Furthermore, the Commission has even noted the usefulness of discographies in some instances. Results of discographies are considered to be valid in showing

objective findings. In Smith v. County Market/Southeast Foods, 73 Ark. App. 333, 44 S.W.3d 737 (2001), the claimant fell and was injured while working at County Market on October 2, 1995. Respondents accepted her injury as compensable and stipulated that it was work-related and initially paid for her medical until they decided that the claimant did not have objective findings sufficient to support a claim of compensability. The Respondents argued that several tests including radiographic diagnostic studies, including an MRI, myelogram, and CT scan all showed that the claimant was essentially normal, and therefore there were no objective findings. Still in pain, the claimant received independent additional treatment after her employer controverted the compensability of the claim. A discogram was performed, and revealed that the claimant had a large annular fissure or disc bulge at L4-L5, and her doctor was able to assign an impairment rating to the body as a whole.

_____ In Smith, the Commission attempted to announce a bright-line rule prohibiting discograms to prove "objective findings," but the Court of Appeals found that although reasonable minds may disagree about the

significance of objective findings, it is impossible to disagree that objective findings exist. The Court of Appeals seemed to rely on the opinion of a doctor who proclaimed that the discogram is the "diagnostic gold standard" when MRI and CT scans fail to document disc pathology and the fact that the discogram is an approved test by the Medical Association. As such, results of discographies are considered to be valid in showing objective findings. Id.

_____ Likewise, in Jobe v. St. Vincent North/Sherwood, the claimant, a nurse, sustained an admittedly compensable back injury when she attempted to lift a paralyzed patient. The claimant underwent an MRI, which determined that she suffered a central disc herniation at L5-S1. Subsequently, the claimant failed all conservative treatment, including medication management, physical therapy, and a series of epidural steroid injections. As such, a discography was performed and revealed that the claimant suffered an annular tear at L3-4 and disc herniation at L5-S1. Pursuant to the results of the discography, the claimant underwent an MRI which revealed that the disc herniation at L5-S1 was causing mass-effect on the bilateral S1 nerve root.

Accordingly, the claimant had to undergo surgery in the form of posterior spinal fusion at L5-S1. As such, it is evident that when a claimant undergoes tests that do not reveal much and conservative treatment fails, a discography may be able to find the root of the problem for further treatment options.

_____ Likewise, in Foster v. Wal-Mart Stores, Full Commission Opinion filed January 5, 1999 (E612307), the claimant sustained a back injury while in the course and scope of employment. The claimant was diagnosed as having a herniated disk at L5-S1 and received non-surgical conservative treatment. Still in considerable pain even after conservative treatment, the claimant had an EMG test, which results came back with no abnormalities. As such, the claimant underwent a discography, which revealed significant problems at L3-4 and L5-S1. The Full Commission noted that EMG testing is indicative of abnormality in the function of nerves, and which is in no way indicative of the etiology of back pain. Rather, the Commission relied on the objective findings of the discogram.

I find that the claimant is entitled to the test to determine the extent of his injury. As in Smith

and Jobe, the claimant has undergone several diagnostic tests such as an X-Ray and an MRI, which have revealed a bulging disk and an annular tear, but the conservative treatment that he received had not been effective. Dr. Hart recommended the discography to determine whether the claimant did have a reason to need further treatment. Accordingly, the test could result in the claimant receiving more treatment or not, depending on the outcome. Furthermore, this Commission has previously found that discographies are reasonably necessary to determine the extent of an injury. Nobel v. Whistle Lumber Co., Full Commission Opinion filed August 21, 1997 (E514580). Additionally, a discography could be the "gold standard" to prove once and for all what is causing the claimant's pain. As such, I find it suspicious that the Respondents do not want the claimant to have a discography. Clearly the claimant has sustained an admittedly compensable injury and could benefit from a discography, which would assist Dr. Hart in determining why the claimant (1) has continuous pain and (2) what type of surgical or non-surgical treatment should be administered. In fact, I find that it is likely the motivation for denying the discography is

because in the past it has been so successful in unearthing legitimate, undisputable injuries. Because the results of the discography have in the past been awarded to determine the extent of an injury, and the Court of Appeals has indicated those findings are valid, I find that the test is reasonably necessary to the treatment of the claimant.

The Majority finds that the claimant's EMG tests did not reveal any abnormalities. Yet, as in Foster the Full Commission noted that EMG testing is in no way indicative of the etiology of back pain and relied instead on the objective findings of the discogram. Even more interesting is that even though the Respondents argue that the claimant does not have severe back pain, Doctors Merrick, Bruffett, and Safman, all prescribed pain medication, which indicates that they all felt that the claimant was experiencing pain.

Likewise, in my opinion, the discography is reasonably necessary treatment in a situation where the claimant suffered from an admittedly compensable injury, where he continues to present the same symptoms, and there is treatment available to determine what type of treatment he needs. As in Nobel, a discogram is

reasonably necessary to determine the full extent of the claimant's injury. To deny the claimant this diagnostic testing is to basically deny the claimant the opportunity to discover the true nature of his injury altogether. The claimant has sustained his burden of proof by a preponderance of the evidence that the treatment recommendations of Dr. Hart are reasonably necessary in connection with the claimant's January 26, 2004, compensable injury. As such, I would have affirmed the Administrative Law Judge's decision granting reasonably necessary medical treatment, including a discogram, from Dr. Thomas Hart.

Furthermore, it is well-settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. Patchell v. Wal-Mart Stores, Inc., supra. Reasonably necessary medical services includes that necessary to reduce or alleviate symptoms resulting from the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan, see supra; and See Artex Hydrophonics, Inc., supra. Accordingly, this Commission has found that a referral for pain management as

recommended by a treating physician is reasonably necessary in connection with the claimant's compensable injury. Stewart v. Gaither's Appliance, Full Commission Opinion filed April 24, 2007 (F403161).

The Majority also errs in not awarding pain management independent of the discography. Although the Majority addresses the discography, it fails to adequately address how to manage pain from the admittedly compensable injury. As every physician but one that has treated the claimant has indicated he is in need of pain management, it stands to reason that he would be entitled to ongoing medical treatment for pain management, regardless of whether the discogram was denied.

Prior to this injury, the claimant had never experienced back pain or problems. The claimant testified that he now hurts every day, and that he is unable to do anything and cannot even help around the house because he's too miserable. Even Dr. Cathey admitted the claimant's injury aggravated his degenerative condition and recommended that the claimant continue to see Dr. Hart for pain management. As in

Stewart, the claimant is entitled to pain management, which is reasonably necessary.

The Majority seems to argue that the claimant's pain is from degeneration and therefore not compensable. However, clearly the claimant's pain is not caused by degeneration, as not only did the Respondents initially accept the compensability of the injury, but Dr. Bruffett found that the claimant had foraminal narrowing, disc bulges, and an annular tear, and prescribed Vioxx to treat the pain. Accordingly, Dr. Safman gave the claimant trigger point injections, and gave him prescriptions for Mobic, Ultracet, and a Lidoderm patch for pain caused by the injury. As such, it is evident that all the treating physicians, excluding Dr. Carle, found that the claimant was indeed in pain, which was caused by the work related injury. Of all the physicians, only Dr. Cathey surmised that the claimant's pain was solely caused by degeneration, and he had little contact with the claimant and admitted the claimant's condition could have been aggravated. It is therefore evident that the claimant is not only in pain, but entitled to pain management as well. As such, I respectfully dissent from the Majority's erroneous

decision to deny reasonably necessary medical treatment, which includes pain management.

The claimant also requested temporary total disability benefits for the time period of May 14, 2004 to a date to be determined. However, the Majority found that the claimant failed to prove by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from May 14, 2004 to a date yet to be determined, and therefore not entitled to temporary total disability.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. Breshears, supra; J.A.

Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant had the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, (1984). In Sowell v. Conagra Poultry Company, Full Commission Opinion Filed March 15, 2005 (F304735), the claimant testified that while he had been released to return to light duty work, his employers did not return him to work. As such, the Commission found that there was insufficient evidence that the claimant had the capacity to earn the same or any part of the wages that he was receiving at the time of the injury, and was granted temporary total disability. Id.

Respondents argued that the claimant was released to go back to work on February 26, 2004. However, the claimant did not receive a full release, indicating that he remained in his healing period. On February 26, 2004, Dr. Bruffett found that the claimant

did indeed have foraminal narrowing, disc bulges, and an annular tear and recommended a selective nerve root block to the left L4 nerve root. Dr. Bruffett gave the claimant Vioxx and advised him to begin working March 1, 2004 on sedentary light duty without lifting over 20 pounds and no repeated bending, twisting, or stooping. Respondents admit that there was no sedentary light duty work available to the claimant.

Dr. Bruffett also referred the claimant to Dr. Safman. On March 17, 2004, Dr. Safman noted that the claimant had a degenerative disc disease, a lumbosacral and sacroiliac strain, and enthesopathy of both hips. Dr. Safman gave the claimant trigger point injections, and gave him prescriptions for Mobic, Ultracet, and a Lidoderm patch. More importantly, Dr. Safman noted that the claimant should remain off work. It was not until March 31, 2004 that Dr. Safman released the claimant to go back to work, but was given a 10 pound lifting restriction, with no repetitive lifting, and to sit and stand as needed. Dr. Safman's continued treatment and diagnosis of a strain shows that the claimant remained in his healing period.

The Majority found that the claimant failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits from May 14, 2004 through a date yet to be determined. Dr. Carle concluded that the claimant was at Maximum Medical Improvement (MMI) with a 0% impairment rating on May 13, 2004. At that point, Dr. Carle released the claimant to go back to work with no restrictions. However, as previously discussed, I find the opinion of Dr. Carle should be given little weight.

Clearly, the claimant was still within his healing period. First, Dr. Safman released the claimant to go back to light duty on March 31, 2004, but the employer could not provide any light duty work. The fact that the claimant did not receive a full release is evidence of being in a healing period. As in Sowell, when a claimant is released to return to light duty work, but the employer does not return him to work, the claimant is entitled to temporary total disability benefits. More importantly, the claimant remains symptomatic and multiple doctors have indicated that he is in need of ongoing treatment. I note that Dr. Hart has recommended additional treatment for the claimant,

indicating that he has not exited his healing period. Additionally, there is no evidence that Dr. Hart has placed the claimant at maximum medical improvement or that he has released the claimant to return to work. Furthermore, Dr. Safman never released the claimant from his care or to return to work without restrictions. In fact, Dr. Safman had released him to light duty work only and continued treatment of a strain. As such, Dr. Carle's independent evaluation which released the claimant to return to work is clearly erroneous, as no other treating physician released the claimant to return to his regular duties. As such, I find that the claimant remained in his healing period from May 14, 2004 until a date yet to be determined.

In conclusion, the evidence indicates the claimant injured his back while at work on January 26, 2004. This is undisputed. Dr. Hart has proposed a test that in the past has repeatedly shown legitimate injuries not shown by other diagnostic studies. The claimant also receives pain medication, which almost every doctor recommends. Therefore, I find that the claimant proved by a preponderance of the evidence that medical treatment, including but not limited to a

discogram and pain management, from Dr. Thomas Hart after May 14, 2004 is reasonably necessary. I also find that the claimant is entitled to temporary total disability from May 14, 2004 to a date yet to be determined.

_____For the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner