

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512871

ROY HUNT, EMPLOYEE	CLAIMANT
HORTICARE CO., INC., EMPLOYER	RESPONDENT
BRIDGEFIELD CASUALTY INSURANCE CO., CARRIER	RESPONDENT

**OPINION FILED OCTOBER 17, 2007**

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

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

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed March 5, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. There was an October 13, 2005, compensable injury.
2. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment and testing by Dr. Harold Chakales is reasonable and necessary in relation to the compensable October 13, 2005, injury.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's finding that the claimant failed to prove by a preponderance of the evidence that additional medical treatment and testing by Dr. Harold Chakales is reasonable and necessary in relation to the compensable October 13, 2005, injury. Based upon a de novo review of the record in its entirety, I find the claimant suffered a compensable injury and that the claimant is therefore entitled to reasonable and necessary medical treatment and testing. As such, I must respectfully dissent.

The claimant contends that he is entitled to additional medical treatment by Dr. Chakales. Dr. Chakales recommended that the EMG test be repeated and that the claimant undergo a lumbar discography. I find that this treatment is reasonable and necessary and related to his compensable injury.

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 claimant proved by a preponderance of the evidence that the tests recommended by Dr. Chakales are reasonably necessary to accurately diagnose the nature and extent of the compensable injury. Dr. Chakales recommended an additional EMG and a discography. I find the discography is reasonable and necessary as a diagnostic tool. 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.

It is therefore evident that Dr. Chakales recommended that the claimant undergo a discography in order

to fully determine the extent of the injury and the nerve root irritation. As the 2005 EMG noted that the claimant did in fact suffer some nerve root irritation, it reasonable for Dr. Chakales to want to know the extent of the nerve root irritation, in order to properly treat his injury. As such, a discography is reasonable and necessary to the accurately diagnose the nature and extent of the admittedly compensable injury, and should therefore be granted.

The Majority, by affirming the Administrative Law Judge's opinion, seem to find that the claimant is not credible, and therefore he should not be entitled to any further medical treatment. This is incorrect as the respondents admit that the claimant sustained a compensable injury, yet they find it convenient to deny him any reasonable and necessary medical treatment as recommended by his physician. The respondents first argue that the claimant admitted that he had sustained a previous injury to his back in 2003. However, he received treatment and he was returned to work without any restrictions. Additionally, the claimant felt that he could perform the work required by the

respondents because he had obtained a full release. Furthermore, the claimant was not symptomatic prior to his compensable injury. Interestingly, the respondents did not introduce any medical from the claimant's previous back injury. The only reasonable explanation for this is that the claimant had fully recovered from what he testified was a "sprain" and was allowed to return to work without restrictions. Therefore, this argument is essentially without merit.

In conclusion, I find that the treatment recommended by Dr. Chakales is not only reasonable, but necessary as well. The claimant sustained an admittedly compensable injury and is entitled to receive treatment necessary to accurately diagnose the nature and extent of the compensable injury.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner