

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410457

TIMOTHY F. WILLIAMS, EMPLOYEE	CLAIMANT
HUTCHISON TRUCKING, INC., EMPLOYER	RESPONDENT NO. 1
AMERICAN HOME ASSURANCE, CARRIER AIG CLAIM SERVICES, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

**OPINION FILED NOVEMBER 27, 2007**

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

Claimant represented by HONORABLE STEVEN R. McNEELY,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE JARROD PARRISH,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE,  
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 December 20, 2006.

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

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on September 1, 2004 and at all other relevant times.
3. Claimant sustained a compensable injury to his low back and cervical spine on September 1, 2004.
4. Claimant's healing period ended on January 31, 2005.
5. Claimant's temporary total disability rate is \$322.00; his permanent partial disability rate is \$242.00.
6. Respondent #1 accepted a 2% permanent partial impairment rating assigned on March 15, 2005.
7. Claimant was not a credible witness. Claimant's hearing testimony is vague, evasive, and not entirely supported by the medical records. Other records in evidence demonstrate Claimant's evasiveness and lack of cooperation.
8. Claimant did not sustain his burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary in connection with his compensable injury. Because his condition resulting from his September 1, 2004 compensable injury resolved by April of 2005, well in advance of his July 10, 2005 emergency room visit, his compensable injury is

not a factor in his current need for medical treatment. He had responded well to physical therapy; he reported on April 4, 2005 that he was "very comfortable much of the time"; and a surveillance of Claimant's residence in April of 2005 depicts Claimant engaging in extensive and varied physical activity without any apparent distress. Claimant only required medical treatment after some incident not related to his work occurred on July 10, 2005.

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.

---

OLAN W. REEVES, Chairman

---

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the Majority's opinion that the claimant is not entitled to additional medical benefits in the form of pain management. The claimant's condition was stipulated to be compensable and the respondents have accepted liability for payment of a permanent anatomical impairment rating due to the injury. The claimant's two treating physicians have opined that because of the compensable injury, the claimant is in need of treatment in the form of pain management. Based on this evidence, I find that the claimant has shown that he is

entitled to the requested additional medical treatment. As such, I must respectfully dissent.

The claimant sustained an admittedly compensable injury on September 1, 2004, after he was involved in a motor vehicle accident wherein his 18-wheeler rolled over. The claimant suffered from symptoms in his neck, low back, and left shoulder and arm. He was initially diagnosed as suffering from a low back sprain. The claimant was treated with medication in the form of Robaxin and Vicodin. On September 2, 2004, MRI scans of the claimant's cervical and lumbar spine were performed.

The MRI scan of the claimant's cervical spine revealed,

1. Diffuse osteoarthritis and multiple level degenerative disc disease. This is most pronounced in association with lower cervical spine. More specifically, in association with C6-C7, then C5-C6, and then C4-C5.
2. Posterior protrusions are noted which are felt to most likely represent a combination of bulging discs and osteophytes. This is again most pronounced at C6-C7, then C6-7, and then C4-C5.

3. No large, bulky or focal HNP is identified.

The MRI scan of the claimant's lumbar spine revealed,

1. Osteoarthritis and degenerative disc disease, most pronounced at L2-L3.

2. No HNP identified.

3. Spinal stenosis is suggested, which may be a combination of congenital and acquired spinal stenosis. This appears most pronounced at L4-L5.

The claimant continued to receive care for middle and lower back pain, including left arm numbness. The claimant initially treated with Dr. Raben on November 11, 12, 2004. At that time the claimant relayed he had been injured in a motor vehicle accident in September 2004. The claimant reported that he was having pain in the form of stabbing, burning, numbness, and tingling. He also reported especially severe tenderness, pain, and spasms in his lower back. Dr. Raben noted the findings of the claimant's MRIs and indicated that the claimant had restricted range of

motion, particularly in his lower lumbar spine. Dr. Raben diagnosed the claimant with,

1. Lumbar disc herniation and degeneration with possible stenosis.
2. Cervical disc degeneration and stenosis.

Dr. Raben recommended the claimant continue with his medication, and that he also receive an RS stimulator and physical therapy. He also noted that he did not have the claimant's MRI scans available and asked for at least a CD of the MRIs.

The claimant returned to Dr. Raben on December 3, 2004. Dr. Raben opined,

I have MRI scan that shows he has disc space bulging and/or herniation of C4/5, C5/6 and C6/7. C4/5 appears to be to the left of midline and central. C5/6 appears to be central and right sided.

In his lumbar spine, he has an MRI scan showing at L2/3 disc space desiccation and degeneration. His lower thoracic spine shows more changes. He has at L4/5 a trefoil-shaped canal with lateral recessed stenosis and central stenosis.

The claimant was given an RS stimulator and scheduled for another round of physical therapy. The nurse practitioner noted that if the claimant did not improve after that course of treatment, then steroid injections would be set up for the claimant's lumbar and cervical spine.

On January 7, 2005, the claimant reported to Dr. Raben that he still had back and neck pain ranging from a 5-6 out of 10. The claimant reported that he could only sit for 30 minutes, stand for 40 minutes, and walk 2 blocks. He reported that he would wake up in pain. The claimant returned on January 31, 2005. Dr. Raben indicated, "To date I see nothing changed with him." Dr. Raben recommended the claimant try another profession with light duty or sedentary restrictions. He further indicated that if the claimant's symptoms did not decrease, then he would consider injections and aggressive physical therapy. Likewise, he indicated that if that failed, then surgery and additional diagnostic testing would be warranted. He also indicated that the claimant might also require pain management and scheduled him for a follow up appointment.

On February 14, 2005, Dr. Raben indicated,

Mr. Williams was seen and evaluated in our office today following his FCE. I have released him back to a light, sedentary type job which is within the recommendations of the FCE. He is not interested in surgical intervention at this time; therefore, I have referred him back to your care for continued conservative treatment of his spinal conditions, including pain management.

The claimant underwent physical therapy in order to increase his range of motion and to help with his pain. The claimant reported that he had a decrease in his pain.

On March 1, 2005, Dr. Raben reiterated that the claimant would need pain management from Dr. VanOre. On March 15, 2005, Dr. Raben drafted a letter indicating that the claimant had reached maximum medical improvement but recommending that the claimant continue with pain management. The letter indicates,

I feel that Mr. Williams has reached maximum medical intervention as of his January 31, 2005, clinic visit with regard to conservative care. I would suggest that he continue with pain management.

I can also see in the future for him a two-level fusion for his cervical spine. After further work up including discography for the lumbar spine, future intervention may include a one or two-level 360° fusion here, as well.

A partial permanent impairment rating for a non-operated spine at this point with the findings of disc herniation and disc degeneration of his cervical and lumbar spine would be (2%) of his body to the whole according to the *Arkansas Modifications of the AMA Guidelines*.

On March 28, 2005, in physical therapy notes, the claimant reported that he had some decrease in his pain and that his pain was, " a 4 on VAS at most". The physical therapist indicated that the claimant should be seen for an orthotic lumbar support device for when his back was under stress. Likewise, on April 4, 2005, the claimant's physical therapist noted, "Pt called today to report that he's very comfortable much of the time, reporting a pain on the pain scale at a 0 on VAS. He says at times it may be up to a 1 or 2, a "Noticeable" discomfort." The physical therapist again discussed the use of an orthotic support device with the claimant.

Unfortunately, the relief of the claimant's symptoms did not last. The claimant testified that he ran out of pain pills and that he began suffering from back pain again. The claimant presented to the emergency room on July 10, 2005, and reported that he had pain radiating down the left side of his back. The medical records are unclear however as to the cause of the claimant's injury. The claimant indicated that he had an acute onset of back pain but also indicated that he had a job related injury. The report indicates, "Other history includes PT was involved in a MVA roll over in September 2004. Sustained a back injury. Pt states that he has not had much pain until today when he was getting out of a car and onset of pain in mid to lower back and down left leg." Later the report indicates, "Patient complains of pain affecting lower back Pain described as sharp. Pain is constant. Pain radiates to left buttock. Patient states unknown cause." Later, the report provides, "This is not a job related problem. Injury can be coded as occurring in home environs. Problem occurred at Pt had a rollover MVA 1 year ago with a back injury that he has

recovered from (Pt is unsure exactly what type of back injury), today he was going up a short flight of stairs when he noticed pain in the mid and low back radiating into the left buttock." The claimant was noted to have degenerative findings in his spine, but there was no evidence of acute injury.

The claimant was treated on August 8, 2005, and reported that after he discontinued therapy for his compensable injuries, his pain had increased. The claimant reported that he had decrease of muscle strength in his bilateral lower extremities, difficulty sleeping due to stiffness and discomfort, and pain that radiated to his lower leg, especially during prolonged standing or walking. The claimant underwent another round of physical therapy with little evidence of improvement.

On February 7, 2006, the claimant was treated and reported that he suffered from "darting" pain on the left side of his lower back and pain down his left arm. The claimant's medication was refilled and the physician opined that the claimant needed a discogram and an EMG. The

physician also noted that the claim was a workers' compensation claim.

On June 13, 2006, Dr. VanOre completed a questionnaire regarding the claimant's condition. In response to the question "Within a reasonable degree of medical certainty, the Major Cause (51% or more) of Timothy Williams Treatment, including Physical Therapy is his work related injuries sustained on 9/1/2004." Dr. VanOre checked, "Yes". In response to the question, "Within a reasonable degree of medical certainty, the "objective and measurable findings" related to the above referenced are," Dr. VanOre indicated, "Persistent neck ↓ROM and persistent back issues manage pain only as of Jan 05". Dr. VanOre also indicated that the claimant had exited his healing period as of January 2005.

On May 4, 2006, the claimant was seen by Dr. Moffitt, at the request of the respondents. The report indicates,

He relates today that he is still having pain. The pain is not all the time. It is mostly in his lower back at this time

going down his left leg to the ankle. However, he has not had this pain for the past 4-5 days. When he does have the pain he will also have a burning sensation in his left buttock area and pain into the tail bone. He has noted that whenever he exercises at home that it helps. He states that the pain is a grabbing type of a pain, and he knows that it is there all the time even though he doesn't have pain all of the time. He is not really having much in the way of complaints in his neck or upper back at this time. He is on Hydrocodone on an occasional basis.

The report further indicates,

To summarize, diagnoses for Mr. Williams include osteoarthritis and degenerative disc disease of the cervical and lumbar spine. He also has cervical stenosis of the lumbar spine that is possibly both congenital and acquired. There is no evidence of any herniated discs or pinched nerves.

In your letter dated March 7, 2006, you asked four specific questions. I would like to address those in their order at this time.

- You wanted to know whether the problems found on the diagnostic studies are due to an acute injury suffered on 09-01-04 or unrelated degenerative and osteoarthritic changes. My answer is that they

appear to be unrelated degenerative and osteoarthritic changes.

- Whether the incident reflected in the narratives from 07-01-05 when he injured himself getting out of a car walking up stairs would be causally related to the accident occurring on 09-01-04 or unrelated and due to degenerative and osteoarthritic changes. In my opinion, they are most likely unrelated and due to degenerative and osteoarthritic changes.
- 

At the hearing the claimant admitted that he had previously suffered a back injury in 2001. The claimant testified that he recovered from the accident and that Dr. VanOre had been involved in treating him. Medical records indicate that a MRI of the claimant's cervical spine was performed on November 9, 2001. The claimant's MRI indicated,

NORMAL ALIGNMENT OF THE CERVICAL  
VERTEBRAL COLUMN.

DESICCATION OF ALL INTERVERTEBRAL DISCS  
MODERATE DEGENERATIVE DISC DISEASE AT  
C4-5, C5-6 AND C6-7 WITH ANTERIOR  
OSTEOPHYTES AT C6-7 COMPATIBLE WITH A  
COMBINATION OF DISC BULGING, VENTRAL  
BONY RIDGING AND UNCONVERTEBRAL JOINT

SPURS BUT NO DEMONSTRATION OF A  
TRANSLIGAMENOUS HERNIATED NUCLEUS  
PULPOSUS (HNP) OR EXTRUDED DISC  
FRAGMENT.

An EMG performed shortly thereafter also revealed evidence of radiculopathy at C6-7. Dr. Danks noted if the claimant failed to improve then surgery would be a potential option. There is also an undated report to Dr. VanOre and there is correspondence from Dr. Danks to Dr. VanOre regarding the claimant. Significantly, there are no dated medical records indicating that the claimant had treatment for his neck or back until the admittedly compensable injury in 2004. Likewise, the claimant testified that he did not have medical treatment for his neck or back after recovering from the 2001 incident.

Prior to the hearing before the Administrative Law Judge the parties made the following stipulations,

1. The employee-employer-carrier relationship existed on September 1, 2004, and at all other relevant times.
2. Claimant sustained a compensable injury to his low back and cervical spine on September 1, 2004.

3. Claimant's healing period ended on January 31, 2005.

4. Claimant's temporary total disability rate is \$322.00; his permanent partial disability rate is \$242.00.

5. Respondent #1 accepted a 2% permanent partial impairment rating assigned on March 15, 2005.

The parties further indicated that the only issue to be decided was whether the claimant was entitled to additional medical benefits. Specifically, the claimant is requesting additional treatment for pain management.

After a de novo review of the record, I find that the claimant has shown that he is entitled to the additional requested medical treatment. Both Dr. VanOre and Dr. Raben have opined that the claimant is in need of pain management and have related the claimant's need for treatment to his compensable injury. Likewise, the parties have stipulated that the claimant's injury is compensable and that he has sustained a permanent impairment rating as a result of the compensable injury. While there is no doubt that the claimant's surveillance video does show him engaging in

activity, those activities were simply not that strenuous. Furthermore, just because the claimant was able to be active on one particular date, that does not mean that he would never be in need of pain management. In fact, the medical records are consistent in showing that the claimant only requires pain medication sporadically.

Likewise, while the claimant had pre-existing degeneration, there is no evidence that he was treated for back or neck pain during the two years preceding the compensable injury. Additionally, the claimant's objective injuries, in particular to his lumbar spine, had changed and worsened as a result of the admittedly compensable work injuries. There is simply no convincing or probative evidence to show that the claimant's need for treatment is related to his pre-existing degeneration or related to an independent intervening cause. Finally, the fact remains that the claimant's two treating physicians have opined that pain management is reasonable and necessary and due to his admittedly compensable injury. Therefore, I respectfully dissent from the Majority's opinion.

\_\_\_\_\_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 173 (1995). 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). 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).

Respondents are responsible for benefits that result from an injury that is causally related to a compensable injury. However, the respondent is not responsible for benefits when the injury is sustained due to a non-work related, independent intervening cause which causes or prolongs disability or need for treatment. Richardson v. ACF Industries, 2003 AWCC 120, Claim No. F100097 (June 18, 2003); A.C.A. §11-9-102(4)(F)(b). An intervening cause does not exist unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969

S.W.2d 677 (1998), citing Guidry v. J & R Eads Construction Co., 11 Ark. App. 219, 669 S.W. 2d 483 (1984). The claimant's knowledge of her condition must be considered in determining whether her conduct was unreasonable under the circumstances. Lunsford v. Rich Mountain Electric Corp., 33 Ark. App. 66, 800 S.W.2d 732 (1990); Lunsford v. Rich Mountain Electric Corp., 38 Ark. App. 188, 832 S.W.2d 291 (1992). However, when a primary injury is shown to have arisen out of the course of employment the employer is responsible for any natural consequence of that injury. Wackenhunt Corp. v. Jones, 73 Ark. 158, 40 S.W.3d 333 (2001).

I find that the claimant has proven that he is entitled to the requested additional medical treatment. The claimant's condition was accepted as being compensable and when the injury occurred, he was not being treated for his neck or for his back. Yet, after the accident he was noted to have objective findings, including herniated discs in his lumbar and cervical spine. It is particularly important to note that during the claimant's prior treatment, there were

no objective tests to show that he had a herniated disc in his lumbar spine. Furthermore, there is no evidence to refute the claimant's testimony that he was not being treated for his neck or back at the time the compensable injuries occurred. Likewise, since the respondents have accepted impairment ratings for both the claimant's lumbar and cervical spines, there is simply no way to credibly dispute that his condition or need for treatment is related to a pre-existing condition. The claimant's two treating physicians, Dr. Raben and Dr. VanOre have both indicated that the claimant needs additional treatment in the form of pain management and that the need for that treatment is directly related to his admittedly compensable injury. These two physicians have the most experience in treating the claimant and given Dr. VanOre's prior knowledge of the claimant's condition, it is evident that both he and Dr. Raben are the most well equipped to decide what course of treatment is appropriate and to provide opinions regarding the reason that treatment is needed. Though the claimant no doubt does not require medication for his pain

at all times, that does not preclude a finding that he is entitled to pain management as needed.

The Majority contends that the claimant's need for treatment is not related to the compensable injury because his physical therapy had been successful and because the emergency room report from July 2005, allegedly showed the claimant's need for treatment was due to an independent intervening cause. However, when looking at the evidence it is clear that the claimant did not sustain a new injury in July 2005. Furthermore, even if one were to find he did sustain a new injury, the fact remains that there is no proof that the claimant was acting in an unreasonable manner so as to cut off the respondent's liability.

The Majority relied on the language in the July 2005 emergency report indicating that the claimant had not sustained a work injury and that he injured himself either while going up stairs or when getting out of his car as proof that the claimant sustained a new injury. However, this is an oversimplified approach in reviewing the medical report from that date. The nurse specifically noted that the

claimant had suffered from an on-the-job injury. Likewise, the report specifically indicates that the claimant was unsure as to what caused his onset of pain. Each of these factors indicate that the claimant was simply suffering from a recurrence of his admittedly compensable injury.

Additionally, given the fact that even the Administrative Law Judge noted that the claimant provided contradictory accounts of how he injured his back, it is evident that the claimant did not sustain a new injury as a result of any particular activity. Rather, what is apparent is that the claimant was simply getting out of a car or walking up steps and later noticed pain in his back. Given the fact that the claimant was unable to pinpoint the onset of his pain and reported that he had not sustained a new injury, it is apparent that the claimant simply suffered a recurrence of symptoms and was simply recounting his recent activities in an attempt to provide an accurate and thorough medical history.

It is also significant to note that Dr. VanOre and Dr. Raben opined the claimant would need pain management.

The claimant also testified that he would occasionally take pain medication, but that he was out when he presented at the emergency room. When considering that recommendation for pain management had already been given, in conjunction with the claimant's testimony that he had to take pain medication on occasion, and the medical evidence indicating the claimant was unable to pinpoint exactly how he injured himself when he went to the emergency room, it is evident that the claimant's need for treatment is related to the compensable injury. It is equally important to note that in 2006, Dr. VanOre related the claimant's need for treatment to the compensable injury, thus illustrating that there was no new injury in July 2005.

Furthermore, even if one finds that the claimant sustained a new injury (a finding which I do not make) it is evident that the claimant's actions were not sufficient to rise to an independent intervening cause so as to cut off liability for the respondents. The Majority opined that the claimant sustained a new injury either due to climbing stairs or due to getting out of a vehicle. There is

absolutely no evidence that either of these activities were prohibited or would in any way be unreasonable given the claimant's condition. Accordingly, it is simply error to find that the claimant's actions would have been sufficient to show the claimant's activities were enough to constitute an independent intervening cause.

In an alternative approach, the Majority argues that the claimant's condition is pre-existing and that his need for treatment is not causally related to the compensable injury. In supporting this opinion, they rely on the opinion of Dr. Moffitt, who essentially opined that the claimant's condition was pre-existing. They further argue that because the claimant's physical therapy was successful and he was released from treatment in April 2005, he cannot show a causal connection.

However, the claimant's two treating physicians have explicitly rejected such an argument. Both Dr. Raben and Dr. VanOre have explicitly opined that the claimant's need for treatment is due to the compensable injury. Given the fact that they are the only physicians that have an

ongoing doctor-patient relationship with the claimant, they are in the best position to give an opinion regarding causation.

It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony. DeQueen Sand & Gravel v. Cox, 95 Ark. App. 234, S.W.3d (2006). The Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. Allen Canning Co. v. Woodruff, 92 Ark. App. 237, S.W.3d (2005) When the Commission weighs medical evidence and the evidence is conflicting, its resolution is a question of fact for the Commission. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). Moreover, the Commission can reject or accept medical evidence and determine the probative value to assign to medical testimony. Hamilton v. Gregory Trucking, 90 Ark. App. 248, 205 S.W.3d 181 (2005). However, it is also well settled that the Commission may not arbitrarily disregard medical evidence or the testimony of

any witness. Coleman v. Pro. Transportation Inc., CA 06-525 (Ark. App. 2-7-2007).

After reviewing the pertinent evidence, it becomes apparent that the Majority's argument is flawed. First and foremost, it is important to note that the parties have stipulated that the claimant's injury is compensable. Likewise, the parties have stipulated that the claimant sustained permanent impairment as a result of the admittedly compensable injury. Yet, they continue to rely on the opinion of Dr. Moffitt, which was essentially that the claimant was not injured and instead was simply suffering from pre-existing degeneration. The opinion of Dr. Moffitt is clearly not correct. Both Dr. VanOre and Dr. Rabens opined that the claimant's need for treatment is related to the admittedly compensable injury. As previously indicated, the parties stipulated not only that the claimant had a compensable injury, but also that he sustained permanent injury as a result. For the respondents to now circumvent the stipulations in order to say that the claimant's condition is pre-existing, is to essentially allow the

parties to ignore their stipulations. To allow such would be reversible error.

In contrast to the credible opinions of Dr. VanOre and Dr. Raben, Dr. Moffitt was simply hired by the respondents in an effort to avoid liability. I also find that it is incredibly ironic that Dr. Moffitt seems to be finding that the claimant's condition and all of his treatment was related to a pre-existing condition when the respondents have stipulated the claimant sustained permanent impairment due to the work-related injury. Additionally, the opinion of Dr. Moffitt is even further diminished when he indicates that the claimant's condition was either related to a pre-existing condition or due to a new injury from July 2005. Such an obvious contradictions simply underscores that Dr. Moffitt's opinion was entirely speculative and designed to help the respondents in litigation. As such, it should be given no weight.

Additionally, when reviewing the medical records themselves, it is apparent that the claimant simply did not have a symptomatic back until he was involved in the

compensable injury. Specifically, while the claimant had received treatment for his back in 2001, he was released, able to return to work, and had not received treatment for some two years as of the time of the compensable accident. This is significant in that it shows that while the claimant had pre-existing back degeneration, he simply did not require treatment until the time of the compensable injury. It is also important to note that Dr. VanOre treated the claimant during 2001, and therefore was well equipped to determine whether the claimant's condition was new or whether it was related to his pre-existing condition.

It is equally important to note that while the claimant was reporting to his physical therapist that his pain was improving, his treating physicians, during the same period of time, still believed the claimant would require ongoing care in the form of pain management. Likewise, the claimant also reported to the therapist that while he was not suffering from pain on a daily basis, he still had pain sporadically. Accordingly, it is simply an error of fact to now conclude that because the claimant was placed at MMI and

reported on occasion that he had little pain, he did not need further medical care.

The Majority further argues that the surveillance tape of the claimant demonstrates that the claimant is not in need of treatment in the form of pain management. However, I must disagree. I find that it is simply not in the Commission's best interest to support a policy that if someone is able to perform daily activities but requires occasional medication, they should be denied benefits. In fact, to deny necessary treatment in the form of pain management simply results in injured workers being unable to get necessary care in order for them to be able to successfully return to work. Such a policy is not consistent with the intent or purpose of workers' compensation statutes and should not be promoted.

In this particular instance, there is no dispute that the claimant actively engaged in various activities while being taped. Though the respondent argues that his activities are consistent with a "faker", I find that it is simply more credible that the claimant has some days where

he experiences more pain than others. If anything, the claimant's disclosure that he does not stay in constant pain, in my opinion, makes him more credible because it illustrates that he is not simply lying in order to make himself appear more debilitated than he actually is.

The claimant has clearly and consistently maintained that his pain ebbs and flows. He has also been up front that on days his pain does not exist or is minimal. In fact, even when being treated by Dr. Moffitt the claimant was forthright in admitting that his pain was not present all the time. Likewise, at the time of the hearing, the claimant testified that he does not take pain medication all the time, but that on occasion he would "flare up" and use the medication because it helped. This testimony is consistent with the accounting of symptoms the claimant gave to physicians when receiving treatment. Likewise, it shows that simply because he was able to be active on one occasion, that does not reflect his abilities on a continual basis. As I have previously indicated, the respondents seem to argue that if one engages in any activity then they

should be precluded from receiving maintenance medication. Yet, that is simply not logical as most conditions do not result in one being unable to engage in any activity or to require constant medication. In fact, to find that respondents are only liable for maintenance medication in such instances only serves to encourage workers to engage in symptom magnification so they can receive legitimate and necessary medication. This is something that clearly cannot be encouraged.

In short, I find that the claimant has met his burden of proof in showing entitlement to treatment in the form of pain management. The claimant's injury and permanent impairment rating were stipulated to by both parties and the claimant is now simply requesting treatment for the admittedly compensable injury. Two physicians have opined that the claimant's need for treatment is related to the compensable injury and is reasonably necessary. That is consistent with the evidence showing that while the claimant is not in constant pain, he does require treatment for such occasionally. In contrast, Dr. Moffitt, who only saw the

claimant on one occasion, at the request of the respondents, and in contradiction to the claimant's treating physicians has indicated an inherently contradictory opinion that the claimant's need for treatment is due to a pre-existing condition. Ironically, he then indicates the claimant's condition could be due to an aggravation in July 2005. Certainly the opinion of Dr. Moffitt should be accorded no weight, given the fact that even the respondents acknowledge that the claimant has lasting impairment.

For the aforementioned reasons, I must respectfully dissent.

---

PHILIP A. HOOD, Commissioner