

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F402205 & F502968

RICKY BILLINGSLEY, EMPLOYEE	CLAIMANT
HILLCREST CARE & REHAB, LLC, A SELF INSURE EMPLOYER	RESPONDENT
CANNON COCHRAN MANAGEMENT SERVICES, INC., CARRIER	RESPONDENT

**OPINION FILED JANUARY 2, 2008**

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

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

Respondent represented by HONORABLE 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 January 29, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employee/employer/carrier relationship existed at all relevant times, including February 6, 2004 and July 30, 2004.

3. On February 6, 2004 the claimant sustained a compensable injury to his lumbar spine.

4. The respondents accepted the February 6, 2004 lumbar injury as compensable and paid benefits.

5. The claimant was granted a change of physician by the Commission to Dr. Harold Chakales on February 1, 2005 for the February 6, 2004 injury.

6. The claimant's average weekly wage on February 6, 2004 was \$432.46 entitling him to compensation rates of \$288 for temporary total disability and \$216 for permanent partial disability.

7. The claimant has failed to establish by a preponderance of the evidence that he sustained a compensable cervical injury or a compensable thoracic spine injury on either February 6, 2004 or on July 30, 2004. Specifically, the claimant has failed to establish the occurrence of a cervical spine injury or a thoracic spine injury with medical evidence supported by objective findings.

8. The claimant has failed to establish by a preponderance of the credible evidence that he is entitled to a period

of temporary partial disability between February 6, 2004 and February 11, 2005.

9. The claimant has failed to establish by a preponderance of the credible evidence that he is entitled to any period of temporary total disability after February 1, 2005.

10. The claimant has failed to establish by a preponderance of the credible evidence that the additional diagnostic testing proposed by Dr. Chakales is causally related to the claimant's compensable lumbar strain 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

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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 opinion. The claimant has alleged that he suffered a specific incident injury on February 6, 2004, while moving a steam table at work. He further contends that as a result of a second incident on July 30, 2004, he suffered a recurrence or compensable aggravation to that injury. The claimant requests that he be awarded certain additional medical and disability benefits specifically including treatment for an allegedly compensable neck and upper back injury as well as

additional medical treatment from Dr. Harold Chakles, his designated treating physician. The respondent concedes that the claimant sustained a compensable injury to his lower back on February 6, 2004, but denies that this injury, or the incident of July 30, 2004, caused any injuries to his cervical or thoracic spine or entitle him to entitle him to benefits other than those already provided to him.

The Majority, by Affirming and Adopting the Administrative Law Judge's opinion, found that the claimant did not establish that he sustained a compensable injury to his neck or upper back or that he was entitled to any additional medical or disability benefits. Based on a de novo review, I find that the claimant has established his entitlement to certain additional medical and disability benefits and that he sustained an injury to his cervical and thoracic spine. Accordingly, I respectfully dissent.

The first issue which must be addressed is whether the claimant sustained a compensable injury on February 4, 2004 and whether he later sustained a recurrence or compensable aggravation of that injury on July 30, 2004. In

my opinion, the claimant has met his burden of proof on both of those issues. In fact, the respondent does not appear to contest that accidents on those dates occurred as described by the claimant. That is, on February 6, 2004, while the claimant and some coworkers were attempting to unload a steam table from a delivery truck, the table turned over and fell on the claimant pinning him underneath it. Per the claimant's testimony, the steam table weighed approximately 400 pounds. The claimant also testified that he sustained a lifting injury on July 30, 2004, while picking up an air conditioner unit. The claimant promptly reported these injuries to his employer and sought medical treatment. The respondent accepted responsibility for this injury and paid the claimant certain medical and disability benefits.

The dispute centers upon whether the claimant sustained an injury to his cervical or thoracic spine in either the original injury of February or the second incident in July. The Majority held that the claimant did not establish that he sustained any such injuries. In support of that decision, the Majority relies upon what they

assert to be a lack of objective evidence. However, my review of the medical records demonstrates that the claimant did establish the existence of cervical and thoracic conditions with objective evidence. An MRI performed on the claimant's thoracic spine discovered objective evidence of injury. In a report dated April 21, 2004 by Dr. Mark Robins, the radiologist who performed the MRI scan, it was noted that, in addition to a disc problem at L1-L2, there was a left paracentral disc protrusion at T10-T11. A later MRI of the claimant's cervical spine also detected similar disc injuries. In a report dated September 14, 2004, a radiology report by Dr. Cecil Cupp noted that the MRI scan had central disc bulging at C4-C5. The MRI findings are consistent with the complaints of pain in the claimant's mid back and neck. I also note that complaints from these parts of his body have been consistently related by the claimant during the course of treatment he received following his admittedly compensable lumbar injury of February 4, 2004.

The Majority also relies upon other reports by Dr. Michael Smith, a Hot Springs orthopedist who the

claimant saw at the respondent's direction. Dr. Smith continually characterized the MRIs, and other test results of the claimant, as being "negative." However, I believe these assessments by Dr. Smith cast a doubt upon his reliability in that the scans clearly show an abnormality which supports the claimant's credible complaints of pain and related symptoms.

The claimant also underwent cervical and thoracic MRIs on August 10, 2004. The radiology report relating to those scans merely states that the claimant had a normal MRI of the cervical spine and a normal MRI of the thoracic spine. Curiously, the report does not specifically relate any findings beyond those statements. Once again, the accuracy of this MRI scan is called into question by the results of the later MRI scan which reflects that the claimant had disc bulges and protrusions in both the cervical and lumbar spine.

For the reasons set out above, I find that the Majority erroneously found that there were no objective evidence that the claimant sustained an injury to his

thoracic and cervical spine. I therefore find that the claimant is entitled to medical treatment for these injuries.

The claimant's primary concern was not the pain he has in his upper back and neck. At the hearing, he characterized those as being relatively minor compared to his lumbar problem. The claimant testified that the severe and debilitating pain, muscle spasms, and other symptoms relating to his lumbar condition prevents him from performing any sustained activities. Because Dr. Smith was unwilling to provide the claimant any ongoing treatment for this condition, he requested and obtained a change of physician from Dr. Smith to Dr. Harold Chakles, a Little Rock orthopedic surgeon. Dr. Chakles first saw the claimant on October 14, 2005. Dr. Chakles noted in his progress note of that date that the claimant's chief complaint was low back pain which radiated into his legs. Dr. Chakles noted that the pain was exacerbated with lifting and he also stated that while the claimant complained of a neck injury, he stated that most of the pain was in his back and hip.

At Dr. Chakles' direction, the claimant underwent a motor nerve conduction study to help determine the nature and extent of the claimant's injuries. This study was conducted on February 24, 2005, by Dr. Michael Chesser, a neurologist at the St. Vincent Medical Center. According to Dr. Chesser's report of February 24, 2005, the study indicated a probable chronic left L5 radiculopathy and possibly radiculopathy at S1 as well.

After extensively reviewing the claimant's past diagnostic tests and his clinical history, Dr. Chakles, in a report dated February 28, 2005, recommended that the claimant undergo a lumbar discogram to more accurately assess the extent of his lumbar condition. Dr. Chakles continued treating the claimant and, in a report of March 14, 2005, opined that the claimant was totally disabled and unable to work as of February 11, 2005.

In a letter to the claimant's attorney dated June 23, 2006, Dr. Chakles set out his findings regarding the claimant's condition. According to Dr. Chakles, the claimant was suffering from a lumbar disc syndrome with

chronic radiculopathy and he required further diagnostic studies, including a discogram with a CT scan to determine the disc pathology. Dr. Chakles also was of the opinion that the claimant's condition would not resolve and that he remained disabled and unable to work.

Unfortunately, the respondent has refused to provide the claimant the recommended medical treatment from Dr. Chakles. It is their position that this treatment is not reasonable or necessary. But I note that during the hearing, the respondent's attorney was cross examining the claimant and pointed out to him that the respondent was willing to pay for him to continue to be seen by Dr. Smith. When the claimant responded by stating that Dr. Smith had not been able to provide him any successful treatment, the respondent's counsel asked him the following question:

Q My question was, wouldn't you like to know what Dr. Smith has to say now that you have been seen by Dr. Chakles and what Dr. Chakles recommendations are?

A Yes, I'd like to know.

Q So would you agree to go back  
to Dr. Smith then?

Obviously, the respondent is not really objecting to the claimant obtaining further medical treatment, they seem to be objecting to treatment from Dr. Chakles. It appears to me that the respondent, in attempting to redirect the claimant back to Dr. Smith, is attempting to obstruct the Change of Physician Order previously entered by the Commission in this case. However, Dr. Chakles is now the claimant's authorized treating physician. As such, the course of treatment laid out by him is the liability of the respondent unless such treatment is not reasonable or necessary. In my opinion, the test directed by Dr. Chakles is clearly a reasonable test and well within accepted medical protocol. Specifically, Dr. Chakles wishes the claimant to undergo a lumbar discogram. The claimant has not undergone this specific test in the manner directed by Dr. Chakles and it would, in the opinion of his treating physician, shed more light on the nature and extent of the claimant's injury.

This Commission has specifically approved these types of tests in other cases with similar injuries. Furthermore, 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.

Based on the aforementioned case law, I find that the claimant is entitled to the test to determine the extent of his injury, as it has previously been determined that discograms are reasonable and necessary.

The claimant's testimony also revealed that his inability to work, and the respondent's refusal to pay temporary disability benefits, has resulted in severe financial hardship. The claimant who, prior to the injury, owned a house with some acreage and a number of horses, has lost his property and his animals and is now living in a mobile home on property owned by his father-in-law. Obviously, the claimant would not have endured such a severe decline in his financial standing if he could have returned to work. In my opinion, the claimant's long and successful

work history prior to his injury strongly suggests that he is not malingering and not exaggerating his symptoms. Rather, the claimant has sustained a serious and debilitating injury to his lower back. Unfortunately, the doctors the respondent referred him to have not been particularly interested in providing him any meaningful treatment. Rather, Dr. Smith continued to diagnose the claimant as suffering from a sprain and characterized his MRI scans as being "negative," even though, as indicated above, they indicated disc abnormalities.

In my opinion, the claimant has clearly established that he has sustained injuries to his lumbar, thoracic, and cervical spine in his compensable injury of February 4, 2004. I also believe that his thoracic and cervical spinal conditions were aggravated by the incident on July 30, 2004. However, I believe that his lumbar injury is by far more serious and has resulted in the claimant being unable to work during much of 2004 until the present time. While it is true that Dr. Smith released the claimant to return to work without restrictions on September 29,

2004, Dr. Chakles directed that he remain off work beginning February 11, 2005.

In summary, the majority erroneously found that the claimant did not sustain a compensable injury to his thoracic and cervical spine. I therefore find that the claimant is entitled to all reasonable and necessary medical and disability benefits in connection with injuries that the claimant has had to those parts of his body. Additionally, I also find that the that the claimant is entitled to further medical treatment from Dr. Chakles, based upon his lumbar spine injury, and specifically including the lumbar discogram he has recommended. Lastly, I find that the claimant has established that he was temporarily and totally disabled as of February 11, 2005, and remains in that status to a date yet to be determined.

For the aforementioned reasons, I respectfully dissent.

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PHILIP A. HOOD, Commissioner