

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501680

KIMBERLY BRASEL,  
EMPLOYEE

CLAIMANT

HOME DEPOT,  
EMPLOYER

RESPONDENT

SEDGWICK CMS,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 15, 2008

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

Claimant represented by the HONORABLE JASON WATSON,  
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE JEREMY  
SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal and Claimant cross-appeals an  
opinion and order of the Administrative Law Judge filed  
August 29, 2007. In said order, the Administrative Law  
Judge made the following findings of fact and  
conclusions of law:

1. The stipulations agreed to by the parties at  
the pre-hearing conference conducted on May 16,  
2007, and contained in a pre-hearing order filed  
May 17, 2007, are hereby accepted as fact.
2. Claimant has met her burden of proving by a  
preponderance of the evidence that she is entitled  
to additional medical treatment for her compensable

back injury. This includes surgery which has been recommended by Dr. Blankenship.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits subsequent to June 4, 2007 through the date of the hearing.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 29, 2007 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

Commissioner McKinney concurs, in part, and dissents, in part.

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CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority's opinion finding that the claimant proved by a preponderance of the evidence that she was entitled to additional medical treatment including surgery recommended by Dr. Blankenship and a finding that the claimant failed to prove by a preponderance of the evidence that she was entitled to additional temporary total disability benefits

subsequent to June 4, 2007, through the date of the hearing. Specifically, I concur in the finding that the claimant failed to prove by a preponderance of the evidence that she was entitled to additional temporary total disability benefits subsequent to June 4, 2007, through the date of the hearing. However, I respectfully dissent from the finding that the claimant proved by a preponderance of the evidence that she was entitled to additional medical treatment.

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal-Mart, supra; GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark.

App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996).

Further, when the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury. Wackenhut, supra. The basic test is whether there is causal connection between the two episodes. Id. When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Gardner v. Area Agency on Aging, Full Commission Opinion, January 4, 2006 (Claim No. F302438); Jones v. Seba, Inc., Full Commission Opinion, December 13, 1989 (Claim No. D512553).

In my opinion, the overwhelming evidence establishes that the surgery recommended by Dr. Blankenship is not reasonable and necessary to treat the

claimant's low back injury. Both Drs. Carl Kendrick and Richard Kyle have stated that the claimant's symptoms have significantly resolved through therapeutic exercise and that she continues to improve as she progresses with that program. She no longer has objective evidence of any L4 radiculopathy. Her radicular symptoms appear to implicate only degenerative changes at S1, which is a level that was not injured at the time of her injury.

Drs. Kendrick, Kyle and Dr. David Cannon, a pain specialist, all have recommended against surgery for the claimant's compensable injury. The only doctor who has recommended surgery is Dr. Blankenship who saw the claimant approximately two years after the compensable injury.

The surgery recommended by Dr. Blankenship is not reasonably necessary for treatment of the claimant's compensable injury. Despite her admitted improvement through her therapeutic exercise program and over-the-counter medication, the claimant has become focused on the idea that she simply wants to be "fixed", such that all her symptoms are completely resolved immediately, without the hard work of muscle strengthening and physical conditioning.

When the claimant has intermittently pursued conservative treatment measures, they have proven to be beneficial. Shortly after Dr. Kendrick started the claimant on her exercise therapy program, he noted on August 25, 2005, that:

[the claimant] returns today stating that she is doing well with complaints of her back and wanted to be released to return to work. She was released to return to work with no restrictions. It was recommended that she be seen back in a month for a final evaluation and report after she has been on the job for a month.

On October 11, 2005, Dr. Kendrick released the claimant to light duty and noted that Celebrex helped some with the claimant's pain, and that the claimant is neurologically intact. Dr. Kendrick expressed his disappointment and frustration with the claimant when she reported to him on October 25, 2005, that she had failed to return to work, despite having no neurological deficit and the absence of objective findings to support her complaints. Not wanting to abandon the claimant's hope for work-hardening and exercise improvement, Dr. Kendrick released the claimant to work a half-day schedule. Dr. Kyle then noted on October 28, 2005, that the claimant was expected to reach MMI in the next 12 to 15 months.

Significantly, the claimant testified that she has since been able to achieve significant improvement of her ability to do physical exercise. The claimant even acknowledged that she would still continue her home exercises program regularly, despite the fact that her improvement has been slow and incremental. The medical evidence also demonstrates that there is an expectation of continued improvement as the claimant continues with the program.

In my opinion, the surgery proposed by Dr. Blankenship cannot offer any reasonable expectation of resolving the claimant's symptoms. Dr. Blankenship can only conjecture that the claimant's L4-5 radiculopathy is somehow reaching two levels below to cause S1 nerve root impingement, two years after her original injury. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

All of the claimant's other treating physicians -- her general practitioner, a orthopedist and a neurosurgeon -- have all recommended continued

conservative treatment. None of those doctors currently recommend surgery for the claimant, particularly when she has demonstrated considerable improvement through therapeutic exercise and the occasional Tylenol. Accordingly, I give more weight to the opinions of Dr. Kendrick, Dr. Kyle, and Dr. Cannon, than I do to the opinion of Dr. Blankenship. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

Therefore, for all the reasons set forth herein, I respectfully concur, in part, and dissent, in part, from the majority's opinion.

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

**CONCURRING AND DISSENTING OPINION**

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I agree that the claimant proved by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury, including the surgery recommended by Dr. James Blankenship. However, I respectfully dissent from the majority's finding that the claimant failed to prove by a preponderance of the evidence her entitlement to temporary total disability benefits from June 4, 2007 through a date yet to be determined. Based on a de novo review of the record in its entirety, I find that the preponderance of the evidence shows that the claimant is entitled to temporary total disability benefits from June 4, 2007

through a date yet to be determined, and therefore, I must respectfully dissent on this issue.

The claimant worked for the respondent as a head cashier. On December 21, 2004, the claimant sustained a compensable injury to her low back when she bent over to adjust a gallon of paint in a box. The respondent accepted the claim as compensable and the claimant initially treated with a Dr. William Kendrick, for complaints of low back pain radiating into her left leg. The claimant was treated with medications and work restrictions and an MRI was ordered. An MRI taken on January 25, 2005 revealed a disc herniation at the L4-L5 level. Dr. William Kendrick referred the claimant to Dr. Richard Kyle, a neurosurgeon, for evaluation.

Dr. Kyle's February 14, 2005 report shows that Dr. Kyle reported the disc herniation at L4-L5 and stated that these types of disc herniations usually require surgical repair and "that seems to be the case here." However, when the claimant returned to Dr. Kyle on May 5, 2005, she was no longer complaining of pain in her left leg, although she was still experiencing pain in her low back. Based on the absence of leg pain, Dr. Kyle indicated that he would no longer recommend surgery and referred her back to Dr. William Kendrick. Dr.

William Kendrick ordered another MRI scan which again showed the disc herniation. Dr. William Kendrick then referred the claimant to Dr. Carl Kendrick, an orthopaedic surgeon, for a second opinion. Dr. Carl Kendrick reported on August 11, 2005 his belief that the claimant did not have a disc herniation but rather suffered from "facet syndrome." Dr. Carl Kendrick treated the claimant with medication and exercise. On August 11, 2005, Dr. Carl Kendrick noted: "I think she ought to be off work for a little bit longer to help her adjust and get into the exercise program. If she will do the exercises, I expect this to clear. I will follow her for a while."

On August 25, 2005, Dr. Carl Kendrick stated that the claimant would be released to return to work with no restrictions. However, on September 21, 2005, Dr. Carl Kendrick's report indicates that the claimant had been unable to return to work because of the pain. Dr. Carl Kendrick changed her medication and took the claimant off work for two weeks. On October 11, 2005, he released her to return to work at light duty for two weeks with no bending, stooping, lifting or sitting over 30 minutes.

At this point the claimant returned to work for the respondent employer, who initially accommodated the claimant's work restrictions. However, the medical record indicates that the claimant was still having difficulties. A clinic note from Dr. Carl Kendrick dated October 24, 2005 states:

She is still complaining and has all sorts of things that she cannot do as far as work and so forth is concerned. I have reached my wits end with her as far as I am concerned. She has no neurologic deficit. I can find no objective findings that would account for her complaints. I am not going to see her anymore. I think possibly maybe she ought to have one more visit for the surgeon. As far as I am concerned, she needs to get on with her life.

Although obviously frustrated that his recommended treatments were not producing results for the claimant, before releasing her from his care Dr. Carl Kendrick did change the claimant's work restrictions to half-day employment "until further notice." The claimant attempted to return to work for the respondent, but her employment was terminated in January 2006.

On January 23, 2006, the claimant returned to Dr. Kyle who reviewed her MRI, and referred her to Dr.

R. David Cannon for a trigger point injection. Dr. Cannon's report of February 21, 2006 indicates that Dr. Cannon noted the spondylosis with disc bulging/herniation at L4-5, but did not believe trigger point injections would provide the claimant with adequate relief. Dr. Cannon recommended epidural or facet injections. The medical record indicates received a lumbar steroid injection from Dr. Cannon on July 6, 2006, with some transitory relief of symptoms.

The claimant returned to Dr. Kyle on September 14, 2006. This report states:

She has a far lateral HNP @ L4-5 on the left and I recommended surgery for that on 2-14-05 but her care was transferred to Dr. Kendrick. Her leg pain has resolved and the hip pain should resolve in the next 12-15 months. MMI expected in the next 12-15 months.

The record indicates that after the September 14, 2006 visit with Dr. Kyle, the claimant utilized the AWCC's change of physician process to change her authorized treating physician to Dr. James Blankenship. Dr. Blankenship ordered a new MRI and after a lengthy workers' compensation approval process, the claimant actually saw Dr. Blankenship on March 12, 2007. After reviewing the claimant's MRI which again showed the

broad-based disk protrusion at L4-5, and after reviewing the claimant's previous course of treatment, Dr. Blankenship recommended surgery.

The claimant testified that she has been unable to work, due to the pain and physical restrictions associated with her compensable injury since the respondent terminated her employment in January 2006. The respondent continued to pay the claimant temporary total disability benefits until June 3, 2007.

I find that the claimant has proved by a preponderance of the evidence her entitlement to temporary total disability benefits from June 4, 2007 through a date yet to be determined. 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). First, the medical evidence shows that the claimant has remained in the healing period since the date of injury. 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). See Searcy Indus. Laundry, Inc. v. Ferren, 92 Ark. App. 65, 211 S.W. 3d 11 (2005).

The medical record shows that Dr. Kyle stated on September 14, 2006 that it would be 12-15 months until the claimant reached the end of her healing period. The medical record also shows that on March 12, 2007, Dr. Blankenship recommended surgery to alleviate the claimant's complaints of pain and physical restrictions which had not been reduced by conservative treatment. There is absolutely no evidence of record indicating that the claimant had reached the end of her healing period on June 3, 2007, the date that the respondent terminated the claimant's temporary total disability benefits.

Second, the evidence of record shows that the claimant has been totally incapacitated from earning wages since January 2006, when the respondent terminated the claimant's employment, apparently due to the fact that she had been on light duty "too long." 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 has 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, 281-82 (1984). When an injured employee is totally incapacitated from earning wages and remains in the healing period, she is entitled to temporary total disability. Id.

The medical record shows that during this time period the claimant was not only being treated for her compensable injury with pain medications and steroid injections, but also that surgery had been recommended. The claimant credibly testified that she cannot work. In fact, the claimant testified that due to her compensable injury, not only can she not work, she cannot do much of anything:

Q: Why do you want to have a back surgery, Kimberly, that's invasive and carries certain risks?

A: I cannot plant my flowers, I cannot play with my kids. I cannot play in our crafts that we have, watercrafts, because of the jarring. I cannot vacuum. I can(not) carry a gallon of milk. I cannot- there are so many things that I cannot do that I would like to be able to do with my family, with my friends. I want to be productive. I don't like this. I don't like sitting here and having to beg for help, basically. I want to be able to, again, be productive.

Based on the claimant's credible testimony and the corroborating medical record, I find that the claimant has remained in the healing period since the date of injury and has proved by a preponderance of the evidence that she has been totally incapacitated from earning wages since January 2006. Therefore, I find that the respondent should not have terminated the claimant's temporary total disability benefits on June 3, 2007, and that the claimant is entitled to temporary total disability benefits from June 4, 2007, until a date yet to be determined.

In conclusion, I find that the preponderance of the evidence shows that the claimant is entitled to additional reasonably necessary medical treatment for her compensable injury, including the surgery recommended by Dr. Blankenship. I also find that the claimant has proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from June 4, 2007 until a date yet to be determined.

For the aforementioned reasons, I must respectfully concur in part and dissent in part.

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PHILIP A. HOOD, Commissioner