

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600340

DAROLD BRUTON, EMPLOYEE	CLAIMANT
VAN BUREN PIPE COMPANY, EMPLOYER	RESPONDENT
CONSTITUTION STATE SERVICE COMPANY, CARRIER	RESPONDENT

**OPINION FILED JULY 31, 2008**

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

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE JAMES A. ARNOLD, III, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed August 1, 2007.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 21, 2007, and contained in a pre-hearing order filed February 23, 2007, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits as a result of his compensable 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 opinion. The majority, by affirming and adopting the opinion of the Administrative Law Judge, finds that the claimant failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits as a result of his compensable injury. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence his entitlement to additional medical treatment and temporary total disability benefits, and therefore, I must respectfully dissent.

The claimant sustained an admittedly compensable injury to his lumbar spine on September 1, 2005. As a result of this injury, the respondent referred the claimant to Dr. Randall Carson, a general practitioner in Fort Smith, for treatment. Dr. Carson treated the claimant conservatively but, when his symptoms did not improve, directed that he undergo an MRI of his lumbar spine. This test, which was performed on December 29, 2005, indicated

the claimant had a central and left paracentral posterior disc protrusion or herniation at L4-L5.

The claimant was then seen by Dr. Jerry Lennington, a Fort Smith physician who specializes in pain management. Dr. Lennington first saw the claimant on January 31, 2006 and, on that date, provided the claimant the first of two epidural steroid injections. The second injection was on February 14, 2006, and in his progress report of that date, Dr. Lennington noted the claimant was complaining of L5 and S1 left radicular pain. The doctor also stated that after the previous epidural, the claimant saw significant improvement for two-to-three days, followed by the same level of pain.

When the second injection administered by Dr. Lennington did not result in any significant improvement in the claimant's condition, he was referred to Dr. James Blankenship, a Fayetteville neurosurgeon. The claimant first saw Dr. Blankenship on February 22, 2006. In a clinic note of that date, Dr. Blankenship reviewed the claimant's medical history. He stated that the claimant, who was 27 at the time of this examination, had pulled a muscle in his

back while in his teens and had also sustained a muscle pull in his back about a month before his job-related injury. According to the doctor's history, the prior injuries were treated with muscle relaxants, and the pain involved following those incidents was different in severity and location compared to his current complaints.

Dr. Blankenship also commented on the deficiencies of the claimant's earlier MRI. Dr. Blankenship stated it did not include the claimant's entire lumbar spine and that the claimant appeared to have some segmental instability in the lower levels. Consequently, Dr. Blankenship recommended the claimant undergo a repeat MRI along with discography of the affected levels of the spine.

Both of those tests were eventually performed. The MRI was performed on March 2, 2006, and a report relating to it indicated the claimant had "slightly eccentric off to the left disc protrusion" at L4-L5 that was also characterized as being a "disc herniation with probable annular tearing... ." The MRI report also stated the L3-L4 and the L5-S1 levels were normal.

Because of various delays, the discography was not performed until March, 20, 2006. Curiously, the report relating to this discography indicates that it was performed at L5-S1. The x-ray interpretation of the test stated the disc space appeared to be "a fairly normal lobulated disc." The report also notes that there was no reproduction of back pain even though pressure in the disc space was raised to 90 psi. The report concludes by finding that the disc was not the etiology of the claimant's pain but that the documented spinal instability at the subject level could be causing the claimant to suffer mechanical back pain.

A follow-up CT scan of the discography was also performed on March 23, 2006. The report interpreting the CT scan stated, "This is CT scan for L5-S1 discography." The report goes on to state that, based on the Modified Dallas Discogram Scale, the claimant would be considered as having a grade III annular disruption with disc herniation.

In reviewing Dr. Blankenship's diagnostic test, I note an obvious discrepancy, in that, the MRI referred to the claimant's disc abnormality as being at L4-L5. But, the discography was performed at L5-S1. In addition, the

discography report indicates the claimant did not report any reproduction of pain. However, a handwritten clinic note, possibly prepared by Dr. Blankenship's staff, stated that on March 21, the day following the discogram, the claimant had been called by Dr. Blankenship's office, and the claimant reported that, "He had hurt pretty bad last night." Lastly, in Dr. Blankenship's clinic note of March 23, 2006, he again discusses the results of the discography and states that there was no pain reproduction even though the disc space had been pressurized at 100 psi. As indicated above, the discography report stated that the pressure was only 90 psi.

Dr. Blankenship addressed some of these discrepancies in a letter to the respondent's counsel dated June 5, 2007. According to Dr. Blankenship, the claimant has an unusual spinal anatomy, in that, he either has an L5-L6 disc space or, more than likely, a rudimentary S1-S2 disc space. In any event, Dr. Blankenship's ultimate explanation was that the discography was performed at the level of disc protrusion which he says is actually at L5-S1, even though earlier MRI's indicated that it was at L4-L5.

After the findings of the MRI and discography, Dr. Blankenship treated the claimant conservatively, with medication and physical therapy. He also recommended the claimant undergo facet injections, but it is not clear if those were performed. Eventually, the claimant underwent a functional capacity exam, at Dr. Blankenship's request. The results of that test were outlined in a report dated, August 2, 2006. The report noted the examination found some "minor inconsistencies to the reliability/accuracy of Mr. Bruton's objective report of pain/limitation." The report specifically stated that it was not intended to imply that the claimant was malingering, merely that he could perform at a somewhat higher level than the test otherwise indicated.

Dr. Blankenship authored another report dated August 16, 2006, wherein he evaluated the claimant's condition in light of the claimant's functional capacity exam. In essence, Dr. Blankenship felt the claimant was at the end of his healing period, and he imposed a permanent 40-pound weight lifting restriction. The doctor also did not believe that any further treatment was likely to improve the

claimant's condition, but found he did not have an impairment rating since the disc protrusion at L4-L5 was not the source of the claimant's pain.

Because the claimant continues to suffer from symptoms associated with his spinal condition, he sought and received a change of physician from the Workers' Compensation Commission. Pursuant to that change, the claimant was directed to Dr. Tony Raben, a Fayetteville orthopedist specializing in the treatment of spinal injuries. Dr. Raben saw the claimant on February 26, 2007, and in his notes regarding that visit, reviewed the results of the past diagnostic tests and discussed the claimant's low back and bilateral hip pain. Dr. Raben stated his recommendation was to perform additional diagnostic testing, including a CT discography at L4-L5 with a possible disc space injection.

Following this report, a deposition was taken of Dr. Raben, which was made part of the record. In that deposition, Dr. Raben explained that he believed the additional diagnostic testing was necessary because of the continuation of the claimant's complaints of pain and

radicular symptoms since his original injury. Dr. Raben noted the consistency of these complaints and indicated he believed there was some objective cause for them. He also explained that, while the testing performed by Dr. Blankenship did not establish this cause, he felt its determination was essential to develop a treatment plan for the claimant. Dr. Raben also discussed in detail the possible confusion over the exact location of the claimant's disc injury in that, at times, it was referred to as being L4-L5, but the past discography detected it at L5-S1. This possible confusion was also a reason that Dr. Raben gave for needing additional diagnostic testing.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. Ark. Code Ann. § 11-9-508(a) (Repl. 2002); American Greeting Corp. v. Garey, 61 Ark. App. 18, 963 S.W.2d 613 (1998). 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 845 (1983).

I find that the claimant has proven by a preponderance of the evidence that the medical services of Dr. Raben represent "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. The majority, by affirming and adopting the Administrative Law Judge, gives more credibility to Dr. Blankenship's opinion than that of Dr. Raben. However, there is not really a material dispute between the two doctor's opinions. Rather, Dr. Raben has correctly noted that Dr. Blankenship simply did not determine a cause for the claimant's symptomology. Dr. Raben is of the opinion that if the cause can be determined, a treatment program for the claimant can be developed. Dr. Raben also candidly admitted that he had a great deal of respect for Dr. Blankenship and does not

believe that his findings were in error. Rather, Dr. Raben was simply of the opinion that something may have been missed or overlooked, especially considering the apparent confusion over the exact level of the claimant's difficulties. Given the extensive period of time the claimant has given credible and consistent complaints of radiating back pain, and given that nearly a year passed between the diagnostic tests performed at the direction of Dr. Blankenship and when the claimant came under the treatment of Dr. Raben, it appears to me that a repeat of these tests would be in order.

Also, I note there were some discrepancies in Dr. Blankenship's report. Not only was there confusion about the exact level that was being examined, but Dr. Blankenship stated there was no pain response from the claimant, despite treatment notes, presumably from Dr. Blankenship's staff, that stated the claimant had been in a lot of pain on the evening following the discography. Likewise, there was some disparity between the pressure placed in the disc space to develop the provocative response in the discography report and Dr. Blankenship's follow-up clinic note.

The most salient point is Dr. Raben's statement that no reason was ever developed for the claimant's ongoing problems. Dr. Blankenship suggests they could be caused by segmental instability in the claimant's lower spine. This is possible, but no testing has ever been done to determine if such is the case. Also, Dr. Blankenship apparently assumed that, unless the cause of the claimant's problem was a herniated disc, the claimant was not entitled to workers' compensation benefits. However, given that the claimant had been performing heavy manual labor jobs for some time prior to his injury, it is quite likely, if his problems are caused by the segmental instability alluded to by Dr. Blankenship, they were caused by the job-related injury. In such case, the respondent would be liable for providing additional medical treatment for the resolution of this problem. However, because Dr. Blankenship apparently ended any further inquiry along those lines, this possibility has never been developed. As Dr. Raben pointed out, until more is clearly known about the etiology of the claimant's problem, a treatment plan cannot be developed. Therefore, I find that the claimant is entitled to receive further

medical treatment, including diagnostic testing, to determine the nature and extent of any possible segmental instability and what is causing it.

I also find that there is a real possibility that Dr. Blankenship's conclusion that the herniated disc in the claimant's spine is not the cause of his problem is in error. As indicated above, there were some inconsistencies in Dr. Blankenship's statements regarding the discography results, including the pressure level the lumbar segment was placed under, as well as whether the claimant experienced any pain. As noted above, even though Dr. Blankenship stated that there was no pain response upon the provocation, the notes, presumably prepared by somebody on Dr. Blankenship's staff, suggest that the claimant had been in a lot of pain in the evening and night following the discography. Given those questions, as well as the confusion as over the exact level where the discography was performed, again, I find that it is certainly reasonable and necessary for the claimant to receive additional medical treatment and diagnostic testing, as outlined by Dr. Raben.

I further find that the claimant has remained within his healing period from August 24, 2006 to a date yet to be determined, and is entitled to temporary total disability benefits. 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). A person remains within their healing period as long as their condition is not medically stable and further medical treatment can be undertaken to alleviate their symptoms. See, Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Since Dr. Blankenship did not ever determine the nature and cause of the claimant's problems, clearly this condition is unresolved and the claimant is in need of additional medical treatment to alleviate his symptoms. Furthermore, the preponderance of the evidence of record shows that in addition to remaining in his healing period, the claimant has been, and remains, totally incapacitated to earn wages.

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For the aforementioned reasons I must respectfully  
dissent.

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PHILIP A. HOOD, Commissioner