

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103026

GARY GREEN, EMPLOYEE	CLAIMANT
TRUCK TRANSPORT, EMPLOYER	RESPONDENT NO. 1
PACIFIC EMPLOYERS INSURANCE, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MAY 13, 2008

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

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

Respondents No. 1 represented by the HONORABLE BETTY J.
HARDY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals and Respondent No. 1 cross-appeals
an administrative law judge's opinion filed February 28,

2007. The administrative law judge found, among other things, that Dr. Hart's treatment prior to April 20, 2006 was reasonably necessary in connection with the claimant's compensable injury. The administrative law judge found that the claimant had sustained wage-loss disability in the amount of 25%, for which Respondent No. 1 was liable. After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove he was entitled to additional treatment from Dr. Bryant, Dr. Hart, or Dr. Shahim. We affirm the administrative law judge's finding that the claimant proved he sustained wage-loss disability in the amount of 25%.

I. HISTORY

Gary Don Green, age 49, testified at first hearing before the Commission that he had a high school education. Mr. Green testified regarding his work history, "I worked five years as a machine tender at a roofing plant, and most of the rest of my work was done in the beverage industry, Coca-Cola, Pepsi, Coors beer, and then I went to work in '95 driving a truck."

The claimant reported in January 1991 that he had injured his right wrist at work, apparently while working at

Coca-Cola Bottling Company. Dr. Jay M. Lipke performed a right carpal tunnel release in April 1991. Dr. Lipke stated in June 1991, "I feel he sustained a five percent permanent partial impairment to his right hand as a result of his work-related injury and subsequent surgery."

The claimant testified that he began working for Truck Transport in 1995.

The parties stipulated that the employment relationship existed on March 2, 2001 and the parties stipulated that the claimant sustained a compensable injury. The claimant testified that he injured his back, ribs, and lungs. Dr. Kenneth J. Ransom gave the following hospital discharge summary on March 21, 2001:

DIAGNOSES:

- 1) Multiple rib fractures.
- 2) Hemopneumothorax.
- 3) Pulmonary contusion.
- 4) Respiratory insufficiency posttrauma.
- 5) T5-6 compression fractures.
- 6) Transverse process fractures at the L2 and L3.
- 7) Spinous process fractures of T6 through T10....

This 43 year old, male driver in a big rig that had a collision with another car with a fatality. He was transferred directly from the scene to Wadley where workup revealed the above diagnoses. He is placed in the hospital intensive care unit for observation. He did well, complained of much pain in the back of his chest. Further evaluation revealed compression fractures. He was placed in

a brace and he developed a pleural effusion, hemothorax requiring placement of a chest tube. This resolved. Chest tube was able to be removed. Patient was discharged to be followed in the office.

The claimant was seen at Neurosurgical Associates Of Texarkana on July 17, 2001:

Mr. Green is a 43 year old white male involved in a motor vehicle accident in which he was driving an 18 wheeler on the job back in March of this year. He sustained a spinous process fracture of T10 and transverse process fractures of L1 and L2 on the right side. Since that time he has had severe pain in his lower back, more so on the right than the left. He does not have any radicular type pains at all. He comes today with a CT scan and MRI scan of his lumbar spine. The CT scan shows these fractures. His MRI scan shows some diffuse degenerative changes with a small central disc bulge at L4-5. There is no obvious neural impingement.

PAST MEDICAL HISTORY: Significant for hypertension treated with medication....

The claimant was treated conservatively.

Dr. Barry M. Green reported on October 17, 2001:

Mr. Green was evaluated at HealthSouth Evaluation Center on 10/17/2001 for a functional capacity evaluation, which was carried out on the examinee in our performance laboratory where he underwent ergometric analysis....

Based on his own residual functional capacity evaluation, he should be able to perform "light" work based on the Dictionary of Occupational Titles. His maximum lift should be up to 20 pounds (0-33% of a workday), and his frequent lift should be up to 10 pounds (34-66% of a workday). He can sit and stand for 30 minutes

with appropriate rest. He can walk 1-2 blocks and occasionally climb 1 flight of stairs. He can bend and twist occasionally, but he should not squat or crawl. He should not climb to unprotected heights. He has no limitations to his upper extremities. He can drive a motor vehicle....

Dr. Green reported on November 6, 2001:

Mr. Green was re-evaluated at HealthSouth Evaluation Center on 11/06/2001 for an impairment rating....His main complaint today is shortness of breath...

His diagnoses are *compression fractures of T5 and T6, transverse process fractures L2 and L3, and spinous process fractures T6 through T10.*

Based on the definition of maximum medical improvement (MMI), having had appropriate treatment and being at plateau, not likely to improve with future treatment, he is at MMI (from the standpoint of his back) as of 11/06/2001.

Based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, 1993 version, using the DRE Model for diagnostic related estimates (the Injury Model) found on Page 110, Table 72, II, he receives *5% whole person impairment for the lumbar injury*. He definitely has a back injury. Next, we will look at Page 111, Table 74, II (A), and he receives *5% whole person impairment for the thoracic injury*. These are combined for 10% whole person impairment. He has no motor or sensory deficits; thus, Tables 11 and 12 are not used. He has no vascular deficits and no other specific disorders. The injury to his leg will have to be evaluated on its own merits....

The parties stipulated that temporary total disability compensation was paid through November 6, 2001. The parties

have stipulated that the March 2, 2001 compensable injury resulted in a 10% impairment to the body as a whole, which has been accepted and paid. The parties have stipulated that the claimant reached maximum medical improvement on November 6, 2001.

The parties stipulated that the claimant "requested and was granted a change of physician to Dr. Reginald Rutherford by order signed on August 19, 2002, by Pat Capps Hannah."

Dr. Reginald J. Rutherford reported on September 4, 2002:

Mr. Green is seen for the purpose of assuming responsibility as treating physician by order of the Workman's Compensation Commission....

Mr. Green by report and current evaluation appears to have experienced moderately severe extensive trauma. He clearly requires further investigation. He requires pulmonary consultation to further evaluate his chronic cough and intolerance of assuming horizontal position. Referral to Dr. Anthony Giglia is recommended. In conjunction with this he needs a total body bone scan, MRI imaging of the cervica (sic), thoracic and lumbar spine and CT scan of the chest....For present, Mr. Green is incapable of returning to his prior work as a truck driver and has been so advised.

The claimant followed up with Dr. Rutherford on September 11, 2002:

His bone scan and CT scan of the chest demonstrate multiple rib fractures. There is also evidence of

trauma to the left knee. He requires an MRI study of the left knee for the changes noted on the bone scan to be further evaluated. MRI of the cervical, thoracic and lumbar spine demonstrates degenerative change at multiple levels of mild degree. There is no evidence of frank disk herniation, spinal cord compression or nerve root impingement. The principal finding to emerge from testing is that of multiple rib fractures. Mr. Green advised that he was to see Dr. Giglia on the 24th for pulmonary evaluation....

The claimant began consulting with a pulmonary specialist, Dr. Anthony R. Giglia, on September 24, 2002.

Dr. Giglia noted on October 3, 2002:

I am finally in receipt of patient's CT scan of the chest and his bone scan of the whole body dated 09/11/02. Indeed, patient does have several old separated posterior medial rib fractures with irregular fragments projecting toward the pleural surface. These have not healed, and I am not sure what impact they are making on patient's dyspnea.

However, at this time, I know nothing to do to make these heal, especially, since his accident was in April of 2001, which is a year and a half ago. However, again, I think his dyspnea by pulmonary function testing and O² evaluation with walking, may well be cardiac primarily in nature, though I am sure his chest discomfort plays a role. I did not see any aortic dilation or cardiac compromise on his chest CT. However, with his hypertension, his obesity, and his age, I suggest cardiology evaluation on this man because they control his blood pressure. If he has any cardiac compromise that can be improved, will significantly improve his well-being....

The claimant followed up with Dr. Rutherford on October 4, 2002:

Electrodiagnostic testing has been declined by Mr. Green's workman's compensation carrier. At this juncture I am unable to proceed further pertaining to diagnosis....Mr. Green is not capable of working at this juncture....In the absence of further testing, as indicated above I cannot advance Mr. Green's case further....

Respondent No. 1's attorney indicated at the first hearing that the respondents controverted treatment from Dr. Rutherford as of October 16, 2002.

A pre-hearing conference order was filed on February 3, 2003. The claimant contended, among other things, that he was entitled to continued care and treatment by Dr. Rutherford. The respondents contended, among other things, that the claimant had received all benefits to which he was entitled. The parties agreed to litigate the following issues: "(1) Whether additional medical treatment is reasonable and necessary in connection with claimant's compensable injury; (2) Whether claimant is entitled to temporary total disability benefits from September 11, 2002, through a date yet to be determined; (3) Controversion and attorney's fees."

A hearing was held on April 10, 2003. The claimant testified that he had not had the electrodiagnostic testing

recommended by Dr. Rutherford. The claimant testified on direct examination:

Q. But you have other problems that still persist today other than just your back, is that correct?

A. I've got a cough that has lasted all this time. There are ribs on the right side of my chest that are not healed. I can actually feel them moving.

Q. Do you have any problems in your mid-back where you had a fracture there?

A. If I happen to sneeze, I don't know if it's my back or back of my ribs or whatever, but I am in a lot of pain if I sneeze, sometimes so bad that I can't even control my bladder or my bowels either one, and it has gotten to the point that I wear diapers when I go out, under my pants, because I have had an accident before.

Q. Have you returned to work at any time?

A. No.

Q. Have you been able to work at any time?

A. No.

The claimant acknowledged on cross-examination that he had undergone carpal tunnel surgery in 1991, but the claimant denied that he still had problems in his right upper extremity.

An administrative law judge (ALJ) filed an opinion on June 18, 2003. The ALJ found, among other things, that electro-diagnostic testing recommended by Dr. Rutherford was

reasonably necessary in connection with the compensable injury. There was no appeal of the ALJ's June 18, 2003 opinion.

Dr. Rutherford noted on August 22, 2003, "Mr. Green has been seen for electrodiagnostic testing all four limbs. This has proven normal. It is not possible to demonstrate evidence of injury or abnormality of the peripheral nervous system contributory to his complaints....Further treatment recommendations at this juncture comprise return to Dr. Giglia for completion of his prior diagnostic and therapeutic recommendations and referral to Dr. William Ackerman for diagnostic facet joint blocks and pain management. The above recommendations have not been implemented pending approval."

Respondent No. 1's attorney indicated at the second hearing that the respondents paid for treatment from Dr. Rutherford through August 22, 2003. The respondents controverted Dr. Rutherford's referral to Dr. Ackerman. The claimant testified at the second hearing that he did not see Dr. Rutherford after August 22, 2003.

A Social Security Administration law judge found on January 28, 2004 that the claimant was "disabled" within the meaning of the Social Security Act.

A pre-hearing order was filed on January 14, 2005. The claimant contended that he was "entitled to permanent total disability benefits, or, in the alternative, wage-loss disability. That he is entitled to all reasonably related medical benefits; specifically, those provided by Dr. Rutherford and referred by Dr. Rutherford, and attorney fees." A hearing was held on April 12, 2005. At that time, the claimant requested that the parties litigate the sole issue of whether the claimant was entitled to additional treatment and referrals from Dr. Rutherford. The claimant testified that he had undergone surgery to his knees.

Meanwhile, the record indicates that the claimant began vocational consulting with representatives of Intracorp, a disability case management company, on or about April 29, 2005.

A representative of Arkansas Rehabilitation Services wrote the following on May 9, 2005:

I spoke with Mr. Gary Green on April 26, 2005 regarding his ability to return to work. Considering that Mr. Green's back problems are still most significant, I do not believe there is

anything he can be trained to do at this time. The client is not able to sit or stand for extended lengths of time to train or to work.

I questioned Mr. Green concerning his desires, and I feel if client could work, he would. The client is just not able, at this time, to do any meaningful employment.

Dr. Thomas M. Hart examined the claimant on June 8, 2005:

Mr. Green is a 47 year old male who appears much older than his stated age.... He apparently, after a work comp battle was allowed to see a neurologist here in Little Rock....The neurologist wanted him to see a pain physician, Dr. Bill Ackerman, but apparently this has continued to be denied by worker's comp. In the meantime because of his continued back pain complaints and other orthopedic problems, he was seen by Dr. Bryant and is referred today because of his continued back pain complaints.... He had carpal tunnel in 1991, knee surgery 3/2/05. His knee is improving.... Our plan is to proceed with discography....

Dr. Hart performed discography on June 16, 2005. The pre- and post-operative diagnosis was as follows: "Minimal disc protrusion at L4-5, L3-4, L2-3, and L1-2."

Dr. Hart noted on June 27, 2005, "At this point I would like to get a referral to Dr. Reza Shahim for a neurological evaluation."

At the referral of Paul Miller with Intracorp, the claimant applied for employment with Securitas Security Services on June 28, 2005.

An administrative law judge filed an opinion on July 8, 2005. The ALJ found, in pertinent part, "4) Claimant has failed to prove by a preponderance of the evidence that the additional medical treatment requested from Drs. Giglia or Ackerman is reasonably necessary in connection with his March 2, 2001 compensable injury." The claimant appealed to the Full Commission.

Dr. Reza Shahim examined the claimant and reported on July 14, 2005:

I reviewed an MRI of the lumbar spine, which shows multilevel lumbar spondylosis.

There is a lateral recess stenosis at multiple levels. There is also a disc disease at L5-S1 level. The discography was performed, which shows L2-3, L3-4, and L4-5 disc herniations, which are contained....

Mr. Green would benefit from minimal invasive procedures prior to any open surgical treatment. I agree with Dr. Hart if he chose to proceed with epidural steroid injections or percutaneous diskectomies. Open diskectomies should be a last resort for him if he fails minimally invasive treatment. I will refer him back to Dr. Hart for epidural steroid injections or minimally invasive diskectomy or nucleoplasty.

Dr. D'Orsay D. Bryant, III noted with regard to the claimant on August 2, 2005:

I understand he has a request for testing accommodations, and he is a GED candidate. He does have a chronic health disability in that he has severe low back pain. He has bulging discs in the back as confirmed on his MRI. It is difficult for him to sit for prolonged periods of time, and he can sit no longer than an hour to an hour-and-a-half at a time. He must be allowed to walk and move around so that his back will not stiffen and be painful.

Dr. Hart noted on August 5, 2005, "As per Dr. Shahim's recommendation, I think he would be a candidate for a percutaneous discectomy."

The record indicates that Dr. Hart referred the claimant to Dr. Larry Ezell on August 6, 2005.

The record includes a Job Search Record which indicates that the claimant applied for work with six different employers from August 17, 2005 through November 10, 2005.

Dr. Hart performed a percutaneous discectomy on August 31, 2005 and again on September 21, 2005. The record indicates that Dr. Hart began a series of diagnostic lumbar facet injections on December 8, 2005.

Emily A. Smith, a case manager with Intracorp, informed the claimant on December 14, 2005, "I have been asked to close your vocational file."

In an opinion filed April 20, 2006, the Full Commission affirmed the administrative law judge's July 8, 2005 decision in part and reversed in part:

In our opinion, Dr. Rutherford's recommendation to provide the claimant with additional cardiovascular care was solely related to his pre-existing hypertension, age, and obesity. Furthermore, in our opinion there is no evidence to indicate the claimant's admittedly compensable injuries in any way aggravated those pre-existing conditions. Accordingly, we affirm the portion of the Administrative Law Judge's decision to deny the claimant additional medical treatment for his heart conditions. However, we find that the claimant should be entitled to the recommended treatment from Dr. Ackerman. There is no dispute that the claimant suffered multiple fractures to his ribs. He also suffered compression fractures in his lumbar spine and a herniated disc in his lumbar spine....In our opinion, the medical records and the other evidence in the case are indicative that the claimant suffered a compensable injury which requires ongoing treatment in the form of pain management for his back. As such, we reverse the portion of the Administrative Law Judge's decision denying the claimant additional treatment from Dr. Ackerman.

The parties have stipulated that the Full Commission's April 20, 2006 opinion "was not appealed and is *res judicata* to this claim."

Dr. Hart reported on September 20, 2006, "Mr. Green is a 48-year-old male who presents today at his request for radiofrequency denervation/rhizotomy of the right lower

lumbosacral spine due to a diagnosis of multilevel lumbar spondylosis without myelopathy, in which he does have osteoarthritic changes of the facets that have been well documented."

A pre-hearing order was filed on September 29, 2006. The claimant contended that he was "entitled to permanent and total disability benefits, controversion and attorney's fees. In the alternative, claimant contends he is entitled to wage-loss disability benefits. Claimant further contends that respondents are responsible for the reasonable and necessary treatment of Drs. Hart, Shahim and Bryant."

Respondent No. 1 contended, among other things, that the claimant had been provided "all appropriate benefits to which he is entitled....Respondents No. 1 contend the treatment from Drs. Shahim, Hart and Bryant was not the result of a referral from Dr. Rutherford, the claimant's authorized treating physician, and thus said treatment was not properly authorized."

Respondent No. 2, Second Injury Fund, contended that the claimant had received all benefits to which he was entitled. Respondent No. 2 contended that "If claimant has suffered any functional disability, it is attributable to

the 2001 motor vehicle accident in and of itself, and not a combination of conditions. Therefore, the Second Injury Fund does not have exposure in the claim."

The parties agreed to litigate the following issues: "1) Whether the claimant is permanently and totally disabled, or in the alternative, entitled to wage loss disability benefits in excess of his stipulated 10% whole body impairment, plus attorney's fees. 2) Whether the claimant is entitled to additional medical treatment from Drs. Shahim, Hart and Bryant. 3) Second Injury Fund liability."

A hearing was held on December 5, 2006. Counsel for Respondent No. 1 stated at that time, "Respondents have offered treatment from Dr. Brent Sprinkle in response to the Opinion that was handed down on April 20, 2006. The initial Opinion allowing the additional treatment was for treatment from Dr. Ackerman but when the Opinion was filed, Dr. Ackerman was no longer practicing in Arkansas so we had offered Dr. Sprinkle, but the claimant has treated on his own with Drs. Shahim, Hart, and Bryant. We are saying that that is not from an authorized treating physician and therefore not the responsibility of Respondents No. 1."

The claimant testified regarding his efforts to work since the March 2, 2001 compensable injury, "I have been attempting the last several months to work some and I have been able to work for a few hours at a time, but it's not what I call or would consider a real job."

The claimant testified with regard to his post-injury physical condition, "I was having a lot of breathing problems at first. My breathing has improved some but the back problems, they are no better than what they were. If I bend over, I have a hard time straightening back up. I'm in a lot of pain in my lower back. If I happen to sneeze then I have a lot of pain in my upper back. Sometimes the pain is so much that on occasion I have even lost control of my bowels and my bladder."

The administrative law judge filed an opinion on February 28, 2007. The ALJ found, in pertinent part:

- 3) The claimant has failed to prove by a preponderance of the evidence that he is unable, because of the compensable injury, to earn any meaningful wages in the same or other employment.
- 4) The claimant has, therefore, failed to prove ... that he is permanently and totally disabled.
- 5) Upon consideration of all relevant wage-loss factors, I find claimant established a decrease in his wage earning capacity equal to 25% to the whole body, and is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable

injury is the major cause of his decrease in earning capacity. Respondents No. 1 are liable for wage-loss disability benefits in the amount of 25% to the body as a whole, over and above the claimant's 10% anatomical impairment rating.

6) Second Injury Fund has no liability in this claim.

7) Claimant's treatments from Dr. Hart, before April 20, 2006 were during a controverted period and therefore respondent or commission authorization did not apply.

8) Dr. Hart's pain management treatment prior to April 20, 2006, was reasonable, necessary and related to claimant's compensable injury and therefore respondents' responsibility.

9) In light of Dr. Ackerman no longer practicing and the April 20, 2006 Commission Opinion, this claim is hereby referred to the Commission's Medical Cost Division for determination of the proper physician to take Dr. Ackerman's place as claimant's physician for pain management as directed by the Full Commission in its April 20, 2006 Opinion.

10) Claimant's requested treatment from Drs. Shahim and Bryant, was not reasonably, necessary or related to the compensable injury and therefore not respondents' responsibility.

11) The parties so stipulated and res judicata demands that any pain management after the April 20, 2006, Full Commission opinion should have been performed by Dr. Ackerman; therefore, respondents are not responsible for any requested treatment from Drs. Hart, Shahim or Bryant after April 20, 2006. Claimant asked the Commission for Dr. Ackerman and that's what the Commission granted. Claimant knew he was receiving treatment from Dr. Ackerman for the one year the claim was pending before the Full Commission, and took no (sic) action to correct his request.

The claimant appeals to the Full Commission and Respondent No. 1 cross-appeals.

II. ADJUDICATION

A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to requested medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, the respondents do not appeal the administrative law judge's finding that Dr. Hart's treatment prior to April 20, 2006 was reasonably necessary. The respondents assert that the Full Commission should affirm the administrative law judge's findings with regard to reasonably necessary medical treatment, and that the claimant did not prove he was entitled to additional medical treatment after April 20, 2006.

The parties stipulated that the claimant sustained a compensable injury on March 2, 2001. The record indicates

that the claimant's compensable injuries included multiple rib fractures, T5-6 compression fractures, transverse process fractures at L2 and L3, and spinous process fractures of T6 through T10. The claimant was treated conservatively for his compensable injuries and the parties stipulated that the claimant reached maximum medical improvement on November 6, 2001. However, the parties also stipulated that the claimant requested and was granted a change of physician to Dr. Reginald J. Rutherford.

The claimant began treating with Dr. Rutherford on or about September 4, 2002. Dr. Rutherford recommended electro-diagnostic testing, but the respondents controverted Dr. Rutherford's treatment as of October 16, 2002. An administrative law judge found on June 18, 2003 that the EMG and nerve conduction studies recommended by Dr. Rutherford were reasonably necessary in connection with the claimant's compensable injury. Dr. Rutherford subsequently noted that electro-diagnostic testing of the claimant's limbs was shown to be normal. Nevertheless, Dr. Rutherford recommended "referral to Dr. William Ackerman for diagnostic facet joint blocks and pain management." The respondents controverted Dr. Rutherford's referral to Dr. Ackerman. The claimant

testified that he did not treat with Dr. Rutherford after August 22, 2003.

The claimant began treating with Dr. Hart on June 8, 2005. Dr. Hart noted that the referral of the claimant to Dr. Ackerman had been denied. Dr. Hart began performing discography in the claimant's lumbar spine. Dr. Hart also referred the claimant to Dr. Shahim and Dr. Ezell. The record does not demonstrate that Dr. Hart's treatment or referrals provided the claimant any benefit. The claimant testified on December 5, 2006, "My breathing has improved some but the back problems, they are no better than what they were. If I bend over, I have a hard time straightening back up. I'm in a lot of pain in my lower back. If I happen to sneeze then I have a lot of pain in my upper back."

The Full Commission therefore affirms the administrative law judge's finding that the respondents "are not responsible for any requested treatment from Drs. Hart, Shahim or Bryant after April 20, 2006." The Full Commission finds that treatment from these physicians is not reasonably necessary in connection with the claimant's compensable injury. We again note that the claimant was granted a

change of physician to Dr. Rutherford in 2002. Dr. Rutherford referred the claimant to Dr. Ackerman, but for various reasons the claimant was never able to see Dr. Ackerman for treatment. The Full Commission therefore finds that an additional consultation with Dr. Rutherford would be reasonably necessary in connection with the claimant's compensable injury.

B. Wage Loss

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. §11-9-525(b)(1).

The administrative law judge found in the present matter that the claimant had sustained wage-loss disability in the amount of 25%. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury on March 2, 2001. Dr. Green opined in October 2001 that the claimant was physically able to

perform restricted light work. Dr. Green also stated that the claimant was able to drive a motor vehicle. Dr. Green assigned the claimant a 10% whole-person impairment rating on November 6, 2001. The parties have stipulated that the claimant reached maximum medical improvement on November 6, 2001 and that the respondent-carrier accepted and paid a 10% anatomical impairment rating.

The claimant began vocational consulting with Intracorp in April 2005. The record indicates that the claimant cooperated with this employment assistance and applied for several jobs but was not hired. The Full Commission finds that the claimant was a credible witness and was motivated to find work within his physical restrictions. The claimant testified at the latest hearing that he was performing limited part-time work. The record does not demonstrate that the claimant is permanently and totally disabled, and we attach minimal weight to the note from Arkansas Rehabilitation Services asserting that the claimant was unable to work. The claimant is 49 years old with a high school education. His work history consists primarily of driving a truck for different employers. The parties agree that the claimant has sustained anatomical impairment in the

amount of 10%. We affirm the administrative law judge's finding that the claimant sustained additional wage-loss disability in the amount of 25%.

____C. Second Injury Fund

Liability of the Second Injury Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. See, *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

The administrative law judge found that the Second Injury Fund was not liable in the present claim. The Full Commission affirms this finding. The claimant sustained a compensable injury on March 2, 2001. The claimant had a prior impairment to his right hand assessed in April 1991, but the record does not demonstrate that this prior impairment combined with the compensable injury to produce the claimant's current disability status. The claimant credibly testified that he had experienced no problems with

his right hand after 1991. Nor does the record show any other previous disability or impairment which combined with the recent compensable injury to produce the claimant's current disability status. The decision of the administrative law judge is affirmed.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that treatment with Dr. Hart, Dr. Shahim, or Dr. Bryant after April 20, 2006 was not reasonably necessary in connection with the claimant's compensable injury. We find that an additional consultation with Dr. Rutherford, the authorized treating physician, is reasonably necessary. The Full Commission affirms the administrative law judge's finding that the claimant sustained wage-loss disability in the amount of 25%. The claimant did not prove he was permanently and totally disabled. We affirm the administrative law judge's finding that the Second Injury Fund is not liable in the present matter. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing in part on appeal, the claimant's attorney is entitled to an

additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

GLENN JONES, Special Commissioner

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

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I agree that the Second Injury Fund does not have liability in this claim. I also agree that the respondent must pay for additional reasonably necessary medical treatment by or at the direction of Dr. Rutherford, the claimant's authorized treating physician. However, as I find that the preponderance of the evidence of record shows that the claimant is entitled to permanent and total disability benefits, I must disagree with the majority's finding that the

claimant has only suffered wage-loss disability in the amount of 25%. Furthermore, I respectfully disagree with the majority's finding that the treatments the claimant received from Dr. Hart, Dr. Shahim and Dr. Bryant after April 20, 2006 were not reasonable and necessary in connection with the claimant's compensable injury. Based upon a de novo review of the record in its entirety, I find that the claimant has proved by a preponderance of the evidence his entitlement to permanent and total disability benefits. I also find that the claimant has shown by a preponderance of the evidence that the treatments he received from Dr. Hart, Dr. Shahim and Dr. Bryant after April 20, 2006 were reasonable and necessary in connection with the claimant's injury. Therefore, I must respectfully dissent from the majority on these issues.

First, I find that the claimant has shown by a preponderance of the evidence his entitlement to permanent and total disability benefits. Pursuant to Ark. Code Ann. §11-9-522(b)(1) the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical

impairment rating to the body as a whole. See Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Id. In determining wage-loss disability, the Commission may take into consideration such factors as the claimant's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity. Ark. Code Ann. §11-9-522 (b) (1). Such other matters include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), 54 Ark. App. 130, 923 S.W.2d 886 (1996).

Permanent total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-519 (e) (1). Furthermore, the courts have also held that an employee is totally disabled when the services he can perform are so limited

in quality, dependability, or quantity, that a reasonable stable market for them does not exist. Lewis v. Camelot Hotel, 35 Ark. 212, 816 S.W. 2d 632.

At the time of the hearing the claimant was forty-eight (48) years old. It is undisputed that he has a 10% permanent impairment rating due to his compensable back injury. His entire work history consists of manual labor or truck driving with some sales involvement. The very most any vocational expert or functional capacity evaluator could say was that the claimant could do light duty work. Before his injury, the claimant made in excess of \$30,000 a year as a truck driver. No witness could state that the claimant could go back to work as a truck driver.

The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant is not entitled to permanent and total disability benefits because he testified that he sometimes helps his friend "bag ice" and that his friend pays him for his help. I find that the claimant "bagging ice" for his friend cannot be considered as anything other than gratuitous employment, if it can even be considered employment.

Accordingly, the wages the claimant earns, estimated at \$80-\$100 per week, cannot be termed "meaningful wages." Furthermore, it cannot be said that a reasonably stable market exists for the claimant's ice-bagging skills. Therefore, I find that the preponderance of the evidence of record shows that the claimant is, despite the "ice bagging" permanently and totally disabled.

As to the issue of wage-loss disability, if the "ice bagging" is, as the majority finds, actually employment, based on the claimant's ice-bagging "wages", the preponderance of the evidence shows that the claimant's income dropped from approximately \$30,000 a year pre-injury to approximately \$5,200 (based on a high estimate of the claimant's friend giving him \$100 a week every week for a year) post-injury, indicating a wage-loss differential in excess of 50%. Therefore, I find that the majority's determination that the claimant only suffered wage-loss disability of 25% is clearly erroneous.

Second, I find that the claimant has shown by a preponderance of the evidence that the treatments he received from Drs. Hart, Shahim and Bryant after April

20, 2006 were reasonable and necessary in connection with the claimant's injury. The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). 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); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). 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 Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

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 provide objective medical evidence of his continued need for treatment. Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W. 3d 211 (2000), citing Chamber Door Indus., Inc. v. Graham, 59 Ark. App. 224, 956 S.W. 2d 196 (1997).

Here, the claimant saw Dr. Hart on August 14, 2006. Dr. Hart stated:

HISTORY: ... His main reason for his presentation today is that he has had an increase in his left back pain complaints. To his credit though he has started working, not exactly on a full time basis, and his employer allows him some time to

rest his back, but other than that he is out and doing things...
PLAN: Our plan is at his request repeat the radiofrequency denervation. That so far has been the most successful covering the largest portion of his back complaints. We will do the left side, wait a few weeks, and do the right side and try to get him back on a PRN basis. I wrote him a prescription for Tramadol 1 every 6 to 8 hours for the time being until we get his back pain under control Also I gave him a prescription to get his back brace modified since it has been irritating him with his current work status. This is our current plan.

On August 30, 2006, Dr. Hart stated, in an
Operative Report:

As we discussed before, it is not a cure there is no cure for his back pain complaints. It basically boils down to management.... Our plan today is to keep it simple, straightforward and simply repeat the radiofrequency denervation extensively at left L2-3, L3-4, L4-5, and L5-S1. The reason we do multiple levels is 1) the anatomy and physiology of the denervation of the facets, 2) his diffuse back pain complaints for history, physical, and imaging studies, and 3) previous successes at the same levels.

The medical record shows that Dr. Hart
performed the same procedure for the claimant's right

side on September 20, 2006. In this Operative Report, Dr. Hart stated:

Since this is a neurolytic procedure, we can only do one side extensively at a time. We did the left side on 08/30/2006. That side is doing much better, according to his history today....

Based on Dr. Hart's records, I find that the treatments the claimant received after April 20, 2006 were clearly designed to alleviate the claimant's pain, and that the treatments did alleviate the claimant's pain. I disagree with the majority basing its determination that the treatments did not provide any benefit on the claimant's testimony at the December 5, 2006 hearing that his back problems were "no better than what they were." Despite the claimant's testimony that his back still hurts, the medical records clearly indicate that the treatments were a success at what they were intended to do, which was to provide temporary pain relief. Therefore, I find that the claimant has shown by a preponderance of the evidence that the treatments he received from Drs. Hart, Shahim and Bryant after April 20, 2006 were reasonable and necessary in connection with the claimant's injury.

In conclusion, I find, in accordance with the majority, that the Second Injury Fund does not have liability in this claim. I also find that the respondent must pay for additional reasonably necessary medical treatment by or at the direction of Dr. Rutherford, the claimant's authorized treating physician. However, contrary to the majority, I also find that the claimant has shown by a preponderance of the evidence that the treatments he received from Dr. Hart, Dr. Shahim and Dr. Bryant after April 20, 2006 were reasonable and necessary in connection with the claimant's injury. Furthermore, I find that the preponderance of the evidence of record shows that the majority's determination that the claimant only sustained wage-loss disability in the amount of 25% is erroneous, and the claimant is entitled to permanent and total disability benefits.

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

PHILIP A. HOOD, Commissioner