

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508340

JENNIE HESTER,  
EMPLOYEE

CLAIMANT

MEXICO CHIQUITO,  
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INS. COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 30, 2008

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

Claimant represented by the HONORABLE KENNETH A. OLSEN,  
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE JARROD S. PARRISH,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed July 30, 2007. The administrative law judge  
found that discography as recommended by Dr. Hart was  
reasonably necessary for the claimant's compensable injury.  
The administrative law judge found that the claimant was  
entitled to additional temporary total disability benefits  
from October 9, 2006 until a date to be determined. After

reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the instant claimant did not prove she was entitled to discography, and that the claimant did not prove she was entitled to temporary total disability after June 2, 2006.

I. HISTORY

Fern Hester, age 60, reported in November 1987 that she had fallen and had twisted her back after stepping off a porch. The claimant was assessed with "lumbar strain vs. herniation." The claimant complained of back and left leg pain in July 1994. The claimant reported in February 1996 that she had pulled a muscle in her back as the result of coughing. The claimant complained of back pain after a reported fall in September 1998. It was noted at that time, "X-ray is obtained and Dr. Tracy was consulted. There is evidence of a subluxation of the tip of her coccyx, however, this appears old. The sacral area appears normal without fracture." The claimant was assessed with "1. Bruised sacrum."

The claimant was assessed with low back pain in June 2000. A physician assessed osteoarthritis, lumbosacral spine and cervical spine in July 2001. A physician assessed

sacroilitis and lumbar sprain in April 2002. The claimant was assessed with acute lumbar strain in May 2003.

The parties stipulated that the claimant sustained a compensable lower back injury on July 30, 2005 and that the respondents paid benefits. An x-ray of the claimant's lumbar spine was taken on July 30, 2005: "No acute fracture, dislocation or bone destruction. There is aortic calcification. There are some degenerative changes."

The claimant received a physical therapy referral on August 12, 2005 for lumbar strain. It was noted on August 18, 2005 with regard to the claimant, "Low back pain was better but pulled it again at grocery store. Not as bad as before."

An MRI of the claimant's lumbar spine was taken on September 16, 2005:

Slightly hypolordotic curvature of the lumbar spine with discopathy of the mid three lumbar disc levels and lower thoracic levels but without high-grade focal disc protrusions or critical canal stenosis noted. Close approximation of the spinous processes at L4-5 consistent with developing Baastrup phenomenon (Baastrup phenomenon is the close approximation and contact of adjacent spinous processes (kissing spine) with resultant enlargement, flattening, and reactive sclerosis of apposing interspinous surfaces). Termination of the conus medullaris documented at the thoracolumbar junction....

IMPRESSION:

1. Shallow disc displacements involving the middle three lumbar levels without high-grade focal disc protrusions, or markedly asymmetric rightward pathology to correlate with the patient's current right lower extremity clinical syndrome.

2. Please see above report for additional and pertinent negative findings as well as level by level analysis along with the supplement on Baastrup phenomenon....

Dr. Steven L. Cathey corresponded with Dr. Alan Johnston on November 1, 2005:

Thanks for allowing me to see Ms. Hester today in consultation. As you recall, this very pleasant 58-year-old female slipped and fell while working at Mexico Chiquito on July 30, 2005. She noted the immediate onset of pain in her lower back. She tells me she has injured her lower back "several times" over the past few years....

Her neurological examination is negative. She specifically has no sign of lumbar radiculopathy, and straight leg raising is negative bilaterally. There is some point tenderness in her low back on the right. I did not, however, identify any paraspinous muscle spasm or restriction of movement.

The patient and I reviewed plain lumbar spine films obtained the day of injury. The plain radiographs reflect some degenerative changes in the thoracolumbar area. There is, however, no evidence of compression fracture, spondylolisthesis, etc. An MRI scan of her lumbar spine is also unremarkable. Mild degenerative changes are noted in her lower, back but there is certainly no sign of disc herniation, spinal stenosis, nerve root impingement, etc.

Dr. Johnston, I believe Ms. Hester suffered a musculoskeletal injury at the time of her fall on July 30, 2005....We certainly have now ruled out an indication for lumbar disc surgery or other neurosurgical intervention. The patient is going to finish out physical therapy and will also talk to her boss about finding something she can do while she is "on the mend". I would certainly allow her to return to work without restrictions whenever she feels she can handle herself there....

Dr. Brent Sprinkle evaluated the claimant on December 21, 2005 and gave the following impression: "1. Right greater trochanter bursitis. 2. Right piriformis syndrome. 3. Preexisting lumbar degenerative disc disease." Dr. Sprinkle reported, "I did a right bursal injection and a trigger point injection. Post injection her pain is improved....She can go back to work at light-duty limiting her walking to no more than ½ mile total per shift and limit bending to 50 reps per shift....I would agree that she does not need surgery."

An EMG study of the claimant's right lower extremity on January 10, 2006 was normal. Dr. Sprinkle's impression on January 10, 2006 was lumbar strain and foraminal narrowing at L5-S1. Dr. Sprinkle planned the following on June 2, 2006: "1. I did one more trigger point injection. 2. Beyond this, there is nothing else to offer her. 3. I think that most of the changes on the MRI scan are

consistent with preexisting changes. 4. She has a 0% permanent impairment rating. 5. I think she is at maximum medical improvement. 6. There is not objective evidence, in my opinion, to justify permanent work restrictions. If she does not feel like she can tolerate her job, it would be more related to just sequelae from degenerative disc disease than anything specifically related to her work injury."

The claimant testified that she worked approximately two days per week following the June 2, 2006 release. The record indicates that the claimant's employment was terminated on August 3, 2006 for allegedly falsifying daily report information on July 25, 2006. The claimant contended that she was entitled to additional temporary total disability beginning August 3, 2006.

The parties stipulated that there was "a change of physician from Dr. Brent Sprinkle to Dr. Thomas M. Hart, pursuant to a Change of Physician Order issued September 22, 2006."

Dr. Hart examined the claimant on October 9, 2006 and stated, "I think the appropriate study which is more sensitive than an MRI or CT myelogram is discography according to the North American Spine Society's Protocol pain beyond 4 months not delineated by any other imaging

studies....If she has a contained herniation, she may be a candidate for a nucleoplasty."

Dr. Hart informed the claimant's attorney on January 4, 2007, "Ms. Hester's first and only presentation was on 10/9/06, please see that extensive 4 page note....Ms. Hester is a legitimate candidate for discography, again, according to the North American Spine Society's Protocol Commission to help delineate her back pain complaints....Discography is a well established diagnostic study. It is supported by the majority of board certified orthopedic spinal specialists, as well as neurosurgeons in this state. It will allow us, again, to once and for all determine does she or does she not have discogenic pain. It will allow us both objective and subjective information, which is more sensitive than either an MRI or CT myelogram."

In a lengthy chart note dated March 6, 2007, Dr. Sprinkle opined that a lumbar discogram was not reasonably necessary.

A pre-hearing order was filed on April 24, 2007. The claimant contended that she was entitled to "the expenses of a diskogram recommended by Dr. Thomas Hart and additional temporary total disability benefits from August 3, 2006 until a date to be determined." The respondents contended

that the requested medical treatment was not reasonably necessary in connection with the claimant's compensable injury. The respondents contended that the claimant reached the end of her healing period on June 2, 2006 and that the claimant was not entitled to additional temporary total disability benefits.

Dr. Sprinkle reiterated his opinions concerning discography in correspondence dated May 30, 2007. Dr. Cathey also wrote on May 30, 2007, "In my opinion, discography will add absolutely nothing to Ms. Hester's management."

A hearing was held on June 13, 2007. The claimant testified that her physical condition had not improved since the compensable injury.

The administrative law judge found, in pertinent part:

3. The preponderance of the evidence shows that discography, as recommended by Dr. Thomas M. Hart, is reasonably necessary for the claimant's compensable injury, within the meaning of the Act, and should be performed at the expense of the respondents.

4. The preponderance of the evidence shows that, as the result of her compensable injury, the claimant remained in her healing period and was totally incapacitated to earn wages, so that she is entitled to additional temporary total disability benefits, from October 9, 2006, until a date to be determined.

The respondents appeal to the Full Commission.

## 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 she is entitled to additional 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, an administrative law judge found that discography as recommended by Dr. Hart was reasonably necessary and should be performed at the respondents' expense. The Full Commission reverses this finding. The parties stipulated that the claimant sustained a compensable lower back injury, but the record does not demonstrate that the claimant sustained an injury requiring back surgery. Dr. Cathey opined in November 2005 that the claimant had suffered a musculoskeletal injury, but Dr. Cathey ruled out any indication for lumbar disc surgery. The claimant was eventually granted a change of physician to

Dr. Hart. Dr. Hart examined the claimant on October 9, 2006 and the respondents were required to pay for this initial visit pursuant to Ark. Code Ann. §11-9-514(a)(3)(A)(ii). *See, Brown, supra.* Dr. Hart recommended discography to treat the claimant's condition. It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Full Commission finds the opinions of Dr. Cathey and Dr. Sprinkle to be more credible than the opinion of Dr. Hart. Dr. Sprinkle opined that a lumbar discogram was not reasonably necessary in connection with the claimant's compensable injury. Dr. Cathey stated that discography would "add absolutely nothing to Ms. Hester's management."

The Full Commission reverses the administrative law judge's finding that discography as recommended by Dr. Hart was reasonably necessary for the claimant's compensable injury.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v.*

*Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether or not a claimant's healing period has ended is a question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

The administrative law judge found in the present matter that the claimant was entitled to temporary total disability benefits from October 9, 2006 until a date to be determined. The Full Commission reverses this finding. The parties stipulated that the claimant sustained a compensable lower back injury on July 30, 2005. Physicians treating the claimant included Dr. Cathey and Dr. Sprinkle. Dr. Sprinkle stated on June 2, 2006 that the claimant had sustained zero percent permanent impairment, and that the claimant had reached maximum medical improvement. The Full Commission therefore finds that the claimant reached the end of her healing period no later than June 2, 2006. An employee is not entitled to temporary total disability benefits after the end of her healing period. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). The claimant testified that she returned to part-time work following Dr. Sprinkle's release. There is no evidence of record

demonstrating that the claimant subsequently re-entered a healing period and Dr. Hart's reports do not show that the claimant re-entered a healing period.

Based on our *de novo* review of the entire record, the Full Commission finds in the present matter that discography was not reasonably necessary in connection with the claimant's compensable injury pursuant to Ark. Code Ann. §11-9-508(a). The claimant did not prove she was entitled to temporary total disability benefits after the end of her healing period on June 2, 2006. The decision of the administrative law judge is reversed, and this claim is denied and dismissed.

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**

The majority has reversed a decision of an Administrative Law Judge awarding the claimant certain additional medical and disability benefits. In doing so, the majority has not followed the Arkansas Workers'

Compensation Act as interpreted by the Appellate Courts of this State. In my opinion, had they done so, the claimant would have been awarded the benefits she requested. Therefore, I must respectfully dissent from the majority's Opinion.

The first issue is the claimant's entitlement to additional medical treatment. The treatment in question is a discogram recommended by the claimant's treating physician, Dr. Thomas Hart, a doctor specializing in pain management and treatment of chronic medical conditions. The claimant was seeing Dr. Hart at the direction of the Commission's Medical Cost Containment Division pursuant to a change of physician request filed by the claimant.

Dr. Hart first saw the claimant on October 9, 2006. After extensively reviewing the claimant's past medical history, he stated that her prior physician, Dr. Brett Sprinkle, had noted the presence of an annular tear and degenerative disc disease in her lumbar spine, particularly at the L3-L4 level. Dr. Hart also mentioned that Dr. Sprinkle described pronounced radicular symptoms in the form of pain radiating into the claimant's right leg, but that his diagnosis of the

claimant's lumbar symptoms were vague on the precise location of her spinal problem. He also noted that she had undergone injection therapy both from Dr. Sprinkle and from Dr. Kenneth Rosenzweig, a Little Rock orthopedist. Overall, Dr. Hart was of the opinion that Dr. Sprinkle's treatment notes were vague and inconsistent with his recommendations and treatment.

Dr. Hart was of the opinion that the claimant needed additional diagnostic testing to more precisely determine the cause of her ongoing pain and radicular symptoms so as to better formulate a treatment plan. Dr. Hart's precise reasoning for this recommendation is set out in his report of October 9, 2006, and states as follows:

**PLAN:** I think the appropriate study which is more sensitive than an MRI or CT myelogram is a discography according to the North American Spine Society's Protocol pain beyond 4 months not delineated by any other imaging studies. This gives us both objective information, i.e., the morphological appearance of the disc, as well as pressure volumes. This is objective information and

cannot be faked, versus and compared with the subjective information, does it reproduce concordant pain. If we find an abnormal disc, we will inject interdiscal steroids, which are more effective followed by post CT imaging. If we do determine an abnormal disc, then the question is what do you do about it. If she has a contained herniation, she may be a candidate for a nucleoplasty. There is information in the Journal of Neurosurgery that just came out in January that is effective for discogenic pain. If on the other hand, she has large annular tears or significant circumferential disruption, then again she may require a surgical consultation by a surgeon who understands discogenic pain and out of the work comp scenario! So after history, physical and reviewing her imaging studies I showed Ms. Hester in the textbooks the difference between a disc, a joint, referred pain versus radicular pain. Again, I don't understand Dr. Sprinkle's logic that nothing else can be done if she fails epidural steroid injections and how he

tries to relate it to preexisting degenerative changes. I discussed with Ms. Hester that we all degenerate but degenerative disc disease and annular tears are not the same. This can be supported in the medical literature.

The respondent refused to provide the claimant the recommended discography. As a result of that refusal, Dr. Hart was asked to elaborate on his reasons why he was recommending a discography. In a letter dated January 4, 2007, Dr. Hart stated that discographies were a well established form of diagnostic studies that were widely used by orthopedists and neurosurgeons. He stated that it was a more sensitive study than either MRI or CT scans and that it was important in the claimant's case because it was necessary to determine precisely whether the source of her pain was discogenic or the result of some other problem. According to Dr. Hart, resolution of this issue would determine what future treatment was available for the claimant. He was of the opinion that until the discography study was performed, it would not

be possible to evaluate the claimant's treatment options.

In a second letter dated April 6, 2007, Dr. Hart responded to criticisms of discography, in general, made by Dr. Sprinkle in a letter obtained by the respondent. Dr. Hart extensively reviewed medical literature which establishes the usefulness and acceptance of discographic studies, and points out that discography is the "standard" tool for diagnosing discogenic pain. This letter extensively cites a variety of articles appearing in medical journals establishing the acceptance and usage of discography studies to diagnose spinal injuries.

As indicated above, the Administrative Law Judge found that Dr. Hart's explanation as to why a discographic study was necessary for the claimant was persuasive, and ordered the respondent to provide this medical treatment. However, the majority has reversed that decision in reliance upon the opinions of Dr. Sprinkle and Dr. Steven Cathey, a Little Rock neurosurgeon. In reaching their decision, the majority does not address any of the issues regarding the reasonableness or necessity of Dr. Hart's recommended

discographic studies. Instead, the majority merely states in cursory fashion that the opinions of Drs. Cathey and Sprinkle are "more credible" and reversed the Administrative Law Judge.

In attempting to resolve the question of whether the discographic diagnostic study recommended by Dr. Hart is reasonable and necessary medical treatment, a review of the relevant decisions of the Arkansas Appellate Courts leads me to conclude that the answer is a resounding yes. In Williams v. L. W. Janitorial, Inc., 85 Ark. App. 1, 145 S. W. 3d 383 (2004), the Commission denied a requested knee replacement surgery in reliance upon medical opinions which had stated that the need for the surgery was not caused solely by a compensable injury. The Court of Appeals reversed. In doing so, the Court noted that the physician had not applied the proper analysis in determining whether the claimant was entitled to medical treatment. The Court held that the standard was whether the compensable injury was a factor in the need for medical treatment. In other words, the compensable injury does not have to be the sole, or even the major cause of the need for treatment. The claimant only has to show that there is

some causal connection between his injury and the need for treatment.

I find that Dr. Hart makes a compelling case for why the claimant needs to undergo a lumbar discogram. However, even if Dr. Hart's reports are not considered, I find that sufficient justification for ordering the respondent to provide this procedure can be found in Dr. Sprinkle's statements. In his letter of March 6, 2007, Dr. Sprinkle says:

I think her work injury **exacerbated** her degenerative disc disease, but I do not think it caused it." (Emphasis added).

Later, in the same report, Dr. Sprinkle states further:

If Dr. Hart feels that a discogram is helpful to identify the most symptomatic levels for consideration of spinal fusion, that is a reasonable consideration; however, the indications for the discogram and maybe even fusion or disc replacement in my opinion would be **more related to her preexisting degenerative disc disease** and could not be justified in my opinion **based solely**

***on the exacerbation.***  
(Emphasis added).

Obviously, Dr. Sprinkle is of the opinion that the discogram would be appropriate only if the compensable injury is the sole or primary cause of the injury. However, that is not the case. As indicated above, the Courts of this State have consistently held that, in order for medical treatment to be appropriate, it must only be related to the compensable injury. It is not necessary to establish that the compensable injury is the major cause for the need for treatment. As Dr. Sprinkles' report makes abundantly clear, he is primarily disagreeing with the necessity of a discography because of his belief that the claimant only sustained an exacerbation of her previous condition and this exacerbation, by itself, is not a basis for performing further diagnostic studies. He also acknowledges that there is a possibility that the claimant might need further surgery and he even states that it would "reasonable" to perform a discogram to evaluate that possibility. In short, it is evident that even Dr. Sprinkle believes that the claimant's current problems are due, at least in part, to an exacerbation

of her preexisting condition. Since the only requirement that the claimant has to prove to be entitled to receive the requested medical treatment, is that her admittedly compensable injury is some of the cause of her need for treatment, I find that she has met her burden of proof, even if the only medical reports we consider are those the majority found to be "more credible."

Another report relied upon by the majority in denying this claim is from Dr. Steven Cathey, a Little Rock neurosurgeon. Dr. Cathey saw the claimant pursuant to a referral from Dr. Allen Johnston, the physician who initially saw the claimant. In his report of November 1, 2005, Dr. Cathey concluded that the claimant was not a surgical candidate. However, I note that his opinion is based upon his belief that the claimant had improved with conservative treatment and that she was not experiencing any radicular leg pain or related symptoms. However, as a review of the medical records from her other physicians establishes, that belief is clearly erroneous. In fact, the reason the claimant began seeing Dr. Sprinkle, and later, Dr. Rosenzweig, was for treatment of the pain radiating into her right leg.

Even Dr. Sprinkle related this to an annular tear she had in her lower back. No weight should be given to Dr. Cathey's report since it is based on a clearly erroneous conclusion.

When Dr. Hart's recommendation for a lumbar discogram is weighed against the contrary opinion of Dr. Sprinkle, it is obvious that the claimant has met her burden of proof. Dr. Sprinkle's objection to the procedure seems to be based primarily upon his belief that the claimant's accident was not the primary necessitating factor in the procedure. However, as indicated, above, this is not the standard for awarding this type of benefit. I find that the medical authorities cited by Dr. Hart are much more persuasive than the limited medical literature relied upon by Dr. Sprinkle and his objections to discograms in general. After carefully weighing the medical evidence in this case, it is my considered opinion that the claimant has more than satisfied her burden of establishing the reasonableness and necessity of the discographic studies recommended by Dr. Hart and that the respondent should be ordered to provide those services to her.

The remaining issue is the claimant's entitlement to temporary total disability benefits. I find that the majority has also erred in denying the claimant these benefits. It is readily apparent that her condition has never improved significantly since she began seeing Dr. Sprinkle, and the respondent's denial of temporary disability benefits is based on Dr. Sprinkle's determination that he did not have any other treatment to offer her. However, it is obvious that the treatment he did provide her was of little help, and, as outlined above, his determination as to what treatment is appropriate is colored by his misunderstanding of the Arkansas Workers' Compensation Act. Dr. Sprinkle obviously believes that the only treatment that can be prescribed to the claimant is that which primarily results from her job-related injury. However, that is not correct and, simply because Dr. Sprinkle refuses to continue treating an obviously injured worker, does not mean that this worker is not entitled to further disability benefits.

This Commission directed the claimant to seek additional treatment from Dr. Thomas Hart. Dr. Hart is firmly of the opinion that the claimant could benefit

from additional treatment but, he cannot determine exactly what that treatment is until his recommended lumbar discogram is completed. The claimant has clearly not progressed beyond the condition she was in when she last saw Dr. Sprinkle. Until her treatment options are more clearly defined, she will not progress any further.

As has been held on many occasions, a claimant remains within his or her healing period as long as they are still within the time frame from which they are recovering from their injury, and until nothing further in the way of treatment will improve their condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S. W. 2d 582 (1982). Since Dr. Hart is still trying to develop treatment options for the claimant and has stated that she is not able to work at the present time, I believe the claimant has met all of the requirements to establish that she is entitled to the requested temporary total disability benefits.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner