

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F609776 & F609777

TIMOTHY JONES, EMPLOYEE	CLAIMANT
ASC PROPERTY MANAGEMENT, INC., EMPLOYER	RESPONDENT
LEMIC INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 31, 2008

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

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

Respondents represented by the HONORABLE MELISSA WOOD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed August 30, 2007. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this
claim.
2. On May 31, 2005 and October 2, 2005, the
relationship of employee-employer
carrier-third party administrator
existed between the parties.

3. On May 31, 2005, and October 2, 2005, the claimant sustained compensable injuries to his low back or lumbar spine.
4. There is no dispute over the payment of medical expenses incurred through October 27, 2006.
5. The greater weight of the credible evidence establishes that the medical services provided for the claimant for his low back and lower extremity difficulties by and at the direction of Dr. Anthony Capocelli, after October 27, 2006, and the additional medical services and testing recommended by Dr. Capocelli, in his report of December 6, 2006, represent reasonably necessary medical services for the claimant's compensable injury of October 2, 2005. The greater weight of the evidence shows that such medical services were necessitated by or connected with the compensable injury of October 2, 2005 and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.
6. There is no dispute at the present time, over the claimant's entitlement to temporary disability benefits.
7. The respondents have controverted the claimant's entitlement to any additional medical services, after October 27, 2006.
8. As no controverted benefits have been directly awarded to the claimant, no controverted attorney's fee can be awarded to his attorney.

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 30, 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.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer in maintenance. The claimant sustained two separate compensable injuries to his lower back or lumbar spine. The first injury occurred on May 31, 2005, and the second on October 2, 2005. The first of these injuries appears to have been relatively minor in

nature. From the claimant's testimony and the medical evidence presented it would appear that this injury was merely a myofascial strain, which completely resolved within a brief period of time and required only the initial treatment from the emergency room physician. The second injury occurred on October 2, 2005. The medical evidence and the claimant's testimony shows that the claimant's symptoms involved his lower back also included radicular symptoms into both legs. A lumbar MRI was performed on October 5, 2005. The MRI indicated mild disc space narrowing at the level of the L5-S1 disc, with dessication and dehydration of both the L4-5 and L5-S1 discs. The reading radiologist noted: "L4-L5: There is mild diffuse disc bulge at the level of L4-L5 with more focal left paracentral disc protrusion. There is effacement upon the anterior left lateral aspect of the thecal sac. The spinal canal and bilateral neural foramina remain patent."

The claimant testified that after the October 2, 2005 injury, he continuously experienced significant pain and other difficulties with his back and lower extremities. During this time, the claimant received conservative treatment including epidural steroid injections, oral medication, and physical therapy. These

treatments were successful in reducing the claimant's symptoms and complaints. However, he still complained of difficulties with both his back and lower extremities.

A second MRI, was performed on October 27, 2006, and interpreted by Dr. Capocelli as showing a herniated nucleus pulposus of the L5-S1 intervertebral disc that was central and paracentral and was causing some narrowing of the spinal canal and neural foraminal openings (worse on the right than the left). He further indicated that this study showed some degree of "superior migration of the fragment". Following this MRI, Dr. Capocelli continued to be of the opinion that the claimant was still not a surgical candidate, at that time, but should continue conservative treatment modalities.

On September 21, 2006, Dr. Capocelli recommended the claimant undergo a myelogram and discogram. In a report dated December 6, 2006, Dr. Capocelli reported that the claimant needed "a full workup when available. This will include myelography to be done over at the hospital." He also noted that the claimant had been calling "very regularly" for "fairly large amounts of narcotic pain medications." Dr. Capocelli recommended a referral to a chronic pain

management specialist. On December 13, 2006, Dr. Capocelli recommended additional conservative treatment in the form of physical therapy with traction, until the other testing and treatment was authorized. At that time, the claimant was directed to return in three months or when his workers' compensation dispute over this recommended care had been addressed.

In a report, dated May 16, 2007, Dr. Capocelli opined that the claimant's disc herniation at L5-S1, which was noted on the October 27, 2006 lumbar MRI, was likely due to the claimant's job related injury. He further stated that it was his continuing medical opinion that the previously recommended myelography and possible discography were medically necessary.

In June of 2007, the respondents had Dr. J. Michael Calhoun, neurosurgeon perform an independent medical evaluation. On June 13, 2007, Dr. Calhoun authored a report concurring with Dr. Capocelli that the claimant did not appear to be a surgical candidate. He noted the previously provided conservative treatment modalities of epidural steroid injections and physical therapy and agreed that continued treatment modalities might be appropriate. He went on to assess a permanent

physical impairment of 7 percent to the body as a whole for the disc herniation.

The claimant contends that he entitled to additional medical treatment as recommended by Dr. Capocelli. The respondents contend that the claimant has received all the medical treatment to which he is entitled. I agree with the respondents.

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).

The evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment. The claimant has received conservative treatment including physical therapy and injections and this provided some

relief. Both Dr. Capocelli and Dr. Calhoun have opined that the claimant is not a surgical candidate. The claimant was able to continue working full time for the respondent employer until the business was sold in January of 2006. Further, the claimant drew unemployment benefits after losing his job when the business was sold and received the maximum benefits he was allowed to draw. He is now working full time in a liquor store stocking beer. He does his own cooking, cleaning and grocery shopping as well. When I consider all of this evidence, I cannot find that the claimant has proven he entitled to additional medical treatment. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner