

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507688

IVAN LAMBERT, EMPLOYEE	CLAIMANT
PEPSI AMERICAS, EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 7, 2008

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

Claimant represented by HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE MICHEAL L. ALEXANDER, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed on December 20, 2007.

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

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on June 28, 2005

Lambert - F507688

at which time the claimant sustained a compensable injury.

2. The claimant has failed to prove by a preponderance of record that a third surgery as recommended by Dr. Chakales is reasonable and necessary medical treatment pursuant to Ark. Code Ann. §11-9-508.
3. The claimant has permanent nerve damage as evidenced by an abnormal EMG/NCV study. If the claimant wishes to pursue Dr. Cathey's recommendation for pain management, the respondents are directed to pay those expenses within thirty days of receipt pursuant to Rule 30.
4. The respondents are directed to pay court reporting fees and expenses to Ms. Linda Parker pursuant to Commission Rule 20.

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.

Lambert - F507688

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 finding that the claimant was not entitled to additional medical treatment prescribed by Dr. Harold H. Chakales in the form of a discogram and possibly a lumbar laminectomy and fusion.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and

conclusions contained in that decision are now the majority opinion. Death & Permanent Total Disability Trust Fund v. Branum, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

#### **HISTORY**

The facts of this case are not in dispute. The claimant suffered a prior back injury in the employment of another employer on April 29, 2003. This injury resulted in a herniated disc at L5-S1 for which surgery was performed by Dr. Steven L. Cathey, a neurosurgeon. The claimant obtained a good result from this surgery and returned to work without limitations.

On June 28, 2005, the claimant sustained a compensable injury in the employment of the respondent. The injury resulted in a recurrent disc herniation at L5-S1. Dr. Cathey again performed surgery. However, the claimant did not get a good result from this surgery. Post-surgery reports from Dr. Cathey indicated that the claimant continued to suffer from back and leg pain with his left leg burning and "giving away." Nerve problems in the claimant's left leg continued after surgery and were objectively documented by a depression of the left ankle reflex. In addition, the claimant required the use of a transcutaneous

electronic nerve stimulator and narcotic pain medication for the resulting pain and muscle spasms. He was required to use a cane in order to ambulate. Dr. Cathey said that he was "disappointed in Mr. Lambert's progress". In the report of his final evaluation of the claimant, dated September 22, 2005, Dr. Cathey said that there was nothing further he could do for the claimant and offered him the option of filing for Social Security. In a hand-written note dated September 26, 2005, Dr. Cathey summed up his treatment of the claimant as "**failed lumbar surgery**".

The claimant was next seen by Dr. Harold H. Chakales, orthopedic surgeon, who was appointed by the Workers' Compensation Commission after a change of physician request.

Dr. Chakales conducted a physical examination and had additional diagnostic studies performed. Physical examination showed "quite a bit of pain, spasm and tightness in the back, with positive sciatica". An MRI revealed "evidence of previous left-sided surgery, with enhancement of the scar". EMG/NCV studies demonstrated "chronic S1, L5 and L4 nerve root irritation". Based on these findings, Dr.

Chakales recommended a lumbar discogram and possible surgery for spinal stabilization.

The employer obtained an opinion from Dr. Eric D. Akin, a neurosurgeon. He said that he did not think that a lumbar discogram would be useful. Dr. Cathey wrote a letter to the respondent's attorney and said that he did not believe that the claimant would benefit from additional operative intervention.

The deposition of Dr. Chakales was taken on September, 12, 2007. In that deposition, he explained the purpose of the discogram, as follows:

What you do is you take him to the operating room and you stick a needle into the intervertebral disc space at L3-4, L4-5, and L5-S1. We know that the L5-S1 will be abnormal. What I'm trying to see was whether or not the L4-5 and L3-4 levels are bad. If they're not bad, then I would not do that lev-- would not operate on those levels. So I think what you do is you do a discogram, and if it's abnormal, you operate; if it's not, you leave it alone and just do the primary level, which is L5-S1.

Dr. Chakales described the proposed surgery, as follows:

I would do an extensive decompression laminectomy, decompressing it wide and out laterally, and then doing a fusion using pedicle fixation, the pedicles of L5 and the pedicles of S1.

Dr. Chakales described what he intended to accomplish, as follows:

Q. And I note in your August 6 letter to Mr. Wilson you make the statement that, in the first paragraph, "I feel he will receive enough relief from his pain to make the surgery worthwhile."

A. Yes.

Q. Can you define for me, Dr. Chakales, what is enough relief? Is there any way to quantify that?

Q. Absolutely. Relief of most of the sciatic pain or nerve root irritation pain, as well as some back pain, because the thing that bothers these people that have bad discs in their back is the intractable sciatica, where somebody feels like somebody is pounding their buttocks with a spike, hot spike. And what we do with this type of

procedure is take away a lot of that pain. I'm not saying I'm going to cure him completely, but I can improve his quality of life, and I think that's my job as a doctor.

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Q. Is there any way for you to indicate before surgery the relative degree of success you would have in relieving the pain?

A. Oh, I think I can improve these people 60, 70 percent.

Dr. Chakales was asked to comment on the opinions of Drs. Akin and Cathey that additional surgery was not indicated. He responded, as follows:

Q. I gather you are aware that Dr. Akin does not agree that Mr. Lambert needs additional surgery.

A. Well, that's Dr. Akin's philosophy.

Q. Okay.

A. But he's a very young surgeon and hasn't been around very long.

Q. And do you know that Dr. Cathey, likewise, does not believe that --

A. Yeah, but he was the original operating surgeon. Most operating surgeons fall in love with their surgery. They don't want to have to repeat that -- admit that other surgery has to be done. And I don't think Cathey does this type of surgery.

#### **ANALYSIS**

The Arkansas 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). Furthermore, it is well-settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the treatment is geared toward management of the claimant's injury. 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). More aggressive treatments that may alleviate an individual claimant's pain can be reasonably necessary. White Consolidated Industries v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001).

In summary, the claimant is a young man, now only 38 years old. Dr. Cathy performed a successful back surgery in 2003, after which the claimant was able to resume his normal activities and return to work. Unfortunately, the second surgery performed by Dr. Cathy was a failure. Dr. Cathy has given up on improving the claimant's condition except to recommend pain management. Of course, the second opinion doctor, selected by the respondent, has agreed. The claimant wants to get better and return to work. Dr. Chakales has offered a reasonable orthopedic solution for which a majority of patients show 60 to 70 percent

improvement. With this degree of improvement, the claimant might be able to return to work.

The Administrative Law Judge denied the claimant the additional medical treatment recommended by Dr. Chakales. In so doing, she relied on the opinions of Drs. Cathey and Akin. Both Dr. Cathey and Dr. Akin are neurosurgeons and the procedure recommended by Dr. Chakales is an orthopedic procedure. At the time of the hearing in this case, it had been over two years since Dr. Cathey had seen the claimant. Dr. Cathey is the doctor from whom the claimant sought a formal change of physician. He was the architect of the claimant's failed lumbar surgery. While Dr. Cathey certainly acknowledged that the claimant was not in good condition when he concluded his treatment, he committed himself to the position that nothing further could be done to improve the claimant's state of health. Under these circumstances, it is not surprising that Dr. Cathey would not readily concede that additional surgery, by another surgeon, might be appropriate. If additional surgery resulted in improvement then it would become obvious that Dr. Cathey both failed to perform a successful surgery and then failed to take any further steps to correct the

problem. With regard to the opinion of Dr. Akin, he was a "one-shot" doctor hand-picked by the respondent to perform a cursory examination and render an opinion to bolster a defense to the payment of medical expenses. His opinion was not persuasive.

Under the above-mentioned circumstances, the majority erred in not holding the respondent to its statutory obligation to provide reasonably necessary medical treatment aimed at returning this legitimately injured worker to the workforce. For this reason, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner