

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304774

LARRY W. MCCURRY, EMPLOYEE	CLAIMANT
FIRST PRESBYTERIAN CHURCH, EMPLOYER	RESPONDENT NO. 1
CHURCH MUTUAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED NOVEMBER 3, 2008

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

Claimant represented by the HONORABLE ROBERT L. DEPPER, JR,  
Attorney at Law, El Dorado, Arkansas.

Respondents No. 1 represented by the HONORABLE FRANK B.  
NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID 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: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed January 11, 2008. The administrative law

judge found that treatment from Dr. Hart was reasonably necessary. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant did not prove treatment provided by Dr. Hart after September 7, 2006 was reasonably necessary.

#### I. HISTORY

Larry Wayne McCurry, age 64, began working for the respondent-employer in about 1997. The claimant injured his back twice while working for the respondents and underwent surgery from Dr. Schlesinger. The parties stipulated that the claimant sustained another compensable back injury on April 28, 2003. The claimant testified that he "felt something give" in the lower part of his back while lifting a large screen and camera. An MRI of the claimant's lumbar spine was taken on April 30, 2003, with the Conclusion, "L2-3, L3-4, L4-5 and L5-S1 degenerative disc disease described in detail above with evidence of previous L4-5 partial discectomy and some scarring about the left neural foramina. All of this appears relatively unchanged from November 21, 2001 examination except for the progressive healing of the L1 compression fracture."

The claimant began treating with Dr. Thomas Hart on September 5, 2003. Dr. Hart's impression was "Multilevel, multifactorial back pain complaints. Previous surgery at the L5 level with minimal improvement. Multilevel herniations at 3-4 and 5-S1 which are probably symptomatic....I think it would be appropriate to proceed on with a properly placed epidural steroid injection to reduce the inflammation around his back." The record indicates that Dr. Hart initially planned a series of three epidural steroid injections, and that the last such injection took place in January 2004. Dr. Hart performed diskography in December 2003.

Dr. Edward H. Saer provided an Independent Medical Evaluation on March 5, 2004:

Mr. McCurry has a history of work-related injury in about 1997. This ultimately lead (sic) to surgery by Dr. Schlesinger at L2-3....He apparently had two injuries to his back in 2001....He saw Dr. Peebles in December 2001 and was noted to have compression fracture at L1 at that time. He was managed nonoperatively and apparently improved and returned to work.

He most recently injured his back April 28, 2003. He developed severe pain in his back at that time and said it "locked up" on him. He has been managed nonoperatively again and did improve. He tried to return to work but found that he could not supervise or climb stairs due to the pain and was ultimately terminated from his job in August

2003. He most recently has been followed by Dr. Hart. He had a series of three epidural steroid injections. He also had a discogram done in December 2003 and was noted to have some disc abnormalities. He has actually been more symptomatic since that procedure.

He describes pain in the lower back with some radiation to the left lower extremity....

RADIOGRAPHIC REPORT:

AP and lateral lumbar films show multilevel degenerative changes. He has evidence of superior compression at L1. It looks like he has had inferior facetectomy at L2-3 on the left from his prior surgery. He has slight narrowing at that level. The L3-4 and L4-5 disc levels show well preserved height, but L5-S1 is quite narrow. There is no evidence of spondylolisthesis.

MRI films done 04/30/03 were reviewed. He indicates that he had a recent MRI, but that is not available. I also reviewed the MRI done in El Dorado on 11/21/01. The film done in November 2001 shows marrow changes at the superior endplate at L1 suggestive of a subacute compression fracture. He has a small round of lesion of the body of L4. It looks like there is some desiccation of the L2-3 disc but no evidence of recurrent herniation, probable annular tear or central tear at L3-4 and L4-5, and a very narrow disc at L5-S1. The more recent MRI shows basically the same findings, although there are no marrow changes at L1. The report indicates that there has been prior laminotomy at L4-5 on the left, but the report really does not mention the bony lesion of the body of L4. His prior surgery looks like it was at the L2-3 level though.

The discogram report by Dr. Hart done 12/18/03 was reviewed. The L2-3, L3-4, L4-5 and L5-S1 levels were all tested and all show various abnormalities and various degrees of pain. The L5-S1 level shows significant disruption, very low pressure

and moderate pain. L4-5 showed extension of contrast to the outer third of the annulus but no apparent leak. This level was the most painful and pressure did not exceed 40-50 psi. At the L3-4 level there was also a large posterior tear with low pressures and moderate pain. L2-3 showed a small tear, very high pressures and moderate pain....

His April 2003 injury, at least at this point, appears to be primarily a soft tissue injury such as a strain or a sprain. I would estimate a 10% whole body impairment for his 1997 disc herniation and surgery. I would estimate a 5% impairment for his L1 compression fracture that occurred in 2001. I cannot assign any additional impairment for the April 2003 injury at this time. He has sustained two different injuries at different locations in the spine, the disc herniation at L2-3 on the left and the compression fracture at L1, at different times....

I do feel that Mr. Curry will need additional medical care, but at least at this point, pending MRI evaluation, I do not think he will need any surgical treatment.

The parties have stipulated that the claimant reached maximum medical improvement no later than March 5, 2004. Dr. Saer noted on April 26, 2004, "I explained to him that he does not have a problem that surgery is going to help. I think the best plan is to get him in to see someone who specializes in nonoperative management. We will make that referral." The record indicates that the respondents initially controverted additional medical treatment after July 29, 2004. Dr. Hart performed a right lumbar facet

injection in August 2004. Dr. Hart administered a "radiofrequency" injection in September 2004.

A pre-hearing order was filed on October 6, 2004. The claimant contended, among other things, that he had not reached maximum medical improvement and that he was entitled to additional medical treatment. The respondents contended, among other things, that the claimant reached the end of his healing period no later than March 5, 2004. Issues the parties agreed to litigate included "whether medical treatment is reasonably necessary in connection with a compensable injury."

Dr. Hart performed a radiofrequency denervation/rhizotomy for multi-level lumbar spondylosis in October 2004. Dr. Hart noted in November 2004, "Basically I have discussed with Mr. McCurry and his wife at this time that since he is doing relatively well, I will see him on an as needed basis. The radiofrequency denervation is not a cure. There is no cure for his back. It basically boils down to management. Sometimes this procedure can be repeated once and possibly twice a year, depending on his activities....I did review with Mr. McCurry and his wife the recent imaging studies, i.e., the Sony permanent prints from

his last procedure demonstrating that he has multilevel lumbar spondylosis, his disc disease, his failed back surgical syndrome in which we have shown an abnormal epiduralgram with adhesions and fibrosis."

A hearing was held on February 1, 2005. The claimant testified, "I'm hurting all the way across my back from my neck down, down my left leg, across my buttocks." The claimant testified that his pain had improved since treating with Dr. Hart: "Well, after I had the shots in August I got tremendous relief. I hurt very little as long as I didn't do anything. Like if I just walked and walked on a flat surface and did my steady exercise, I was doing real good, and then in the last 30 days it's got back worse, getting worse and worse and worse. I've been in the bed for three weeks on heat."

Dr. Hart performed a series of injections in February 2005 and April 2005.

The administrative law judge (ALJ) filed an opinion on April 28, 2005. The ALJ found, in pertinent part, "The claimant has proven by a preponderance of the evidence that additional medical treatment in the form of pain management from Dr. Thomas Hart is reasonably necessary in connection

with the compensable injury." The ALJ stated in the Award section, "The respondents are ordered to provide medical benefits for the claimant with regard to his low back pain management from Dr. Thomas Hart only."

The parties have stipulated that the administrative law judge's opinion filed April 28, 2005 was *res judicata* and the law of the case.

Dr. Hart continued his injections of the claimant in August 2005. Dr. Hart performed a radiofrequency denervation/rhizotomies in January 2006, February 2006, July 2006, and August 2006. Dr. Hart noted in August 2006, "To a degree of medical certainty and probably (sic) he is a candidate for radiofrequency denervation due to his lumbar spondylosis." Dr. Hart performed another injection procedure on September 7, 2006.

The respondents controverted Dr. Hart's treatment on or about September 7, 2006.

Dr. Hart noted on October 13, 2006:

I found it very alarming today that he demonstrated a letter from the work comp attorney quoting me that his own interpretation of the medical records that Mr. McCurry is no longer a candidate for radiofrequency denervation or interventional spine procedures. As I reviewed the note that he quoted there is no such mentioned on my part that Mr. McCurry is not a candidate.

As discussed before Mr. McCurry's back is very complicated. He has four levels of intervertebral disc disruption. That is well documented. He has multilevel lumbar spondylosis. He has intractable back pain complaints. He may require further surgical intervention in the future if he develops any signs of instability, nerve root compression, bowel or bladder incontinence. He will require updated imaging studies. His main complaint today, since his back was improved with the radiofrequency, i.e., at least a portion of it, the morning stiffness and the range of motion have improved. He still has a radicular component to his pain into the posterior lateral thigh and to the knee. I discussed with Mr. McCurry that in the past when I did the radiofrequency denervation which is, again, well documented (I hope the attorney also evaluates and reads and understands) that I did not perform this time epidural steroid injections as I did in the past. We simply performed radiofrequency denervation of the facets. That only helps the facets, the posterior elements, i.e., the joints and did not help his disc, nor did it help his radicular pain....

Mr. McCurry, as I have mentioned above and has been well documented, has multilevel multifactorial back pain complaints with extensive lumbar disc disease, intervertebral disc disruption with multilevel lumbar spondylosis. Unfortunately there is not one surgical procedure, one interventional spine procedure, medication or technique that is going to cure or resolve all of his pain complaints. Unfortunately attorneys should not be rewriting the medical journals or medical literature. To a degree of medical certainty and probability I think that he is an appropriate candidate for a transforaminal. If he does not improve, then obviously he is going to require some updating imaging studies and possible surgical consultation. This is our current plan.

Dr. Hart performed an injection on October 17, 2006 and a "repeat left L4 transforaminal" on October 31, 2006.

An adjuster informed Dr. Hart on November 10, 2006, "I am forwarding the procedure invoices since September 7, 2006 to the patient for payment since we have not approved any medical treatment and procedures since September 7, 2006. We did approve the August 24, 2006 procedure and that bill has been submitted for audit and processing. However, you will need to look to the patient for payment of any medical bills of September 7, 2006 and after that date since we have not approved any treatment since September 7, 2006."

An MRI study of the claimant's lumbar spine on November 29, 2006 showed the following: "Posterior disc bulging at L3-4 and L4-5. Disc space narrowing at L5-S1 without significant disc herniation. Schmorl node at L1 as described above."

Dr. Hart performed radiofrequency denervations and transforaminal epidural steroid injections on March 6, 2007, March 13, 2007, April 3, 2007, and in June 2007.

A pre-hearing order was filed on July 12, 2007. The claimant contended, among other things, that "despite demands for payment of pharmaceutical expenses, medical

mileage expenses, and medical expenses, the respondent has failed to pay all of said expenses." The respondents contended, among other things, that they had paid all medical benefits owed. The respondents contended that the claimant was not entitled to additional medical care from Dr. Hart, "such care not being reasonably necessary medical care for claimant's compensable injuries." The relevant issues the parties agreed to litigate were, "1. Past due medical expenses and past due travel expenses. 2. Whether claimant is entitled to additional medical treatment from Dr. Hart."

Dr. Hart performed additional procedures in August 2007 and September 2007.

A hearing was held on October 16, 2007. The claimant's testimony essentially indicated that he suffered from chronic pain and that he was totally disabled. The claimant testified that Dr. Hart's treatment "eases the pain tremendous." Dr. Hart's treatment eased the claimant's pain "Sometimes two months, sometimes a month, and then sometimes I can go and the weather changes real drastic and it's the next day, you know, until the change takes it back up."

The administrative law judge found, among other things, that the claimant proved he was entitled to continuing treatment from Dr. Hart. The respondents appeal to the Full Commission.

## II. ADJUDICATION

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) (Repl. 2002). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). A claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). 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 "additional and future pain management from Dr.

Hart" was reasonably necessary in connection with the claimant's compensable injury. The Full Commission reverses this finding. The parties stipulated that the claimant sustained a compensable back injury on April 28, 2003. The evidence does not demonstrate that the claimant sustained a herniated disc as a result of the compensable injury. Nor did any treating physician recommend surgery. Dr. Saer opined on March 5, 2004 that the claimant's compensable injury appeared to be "primarily a soft tissue injury such as a strain or a sprain." Dr. Saer assigned a permanent rating and the parties stipulated that the claimant reached maximum medical improvement no later than March 5, 2004.

In an opinion filed April 28, 2005, the administrative law judge found that the claimant proved Dr. Hart's treatment for pain management was reasonably necessary. The parties have stipulated that the ALJ's April 28, 2005 opinion was *res judicata* and the law of the case. *Res judicata* means a thing or matter that has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction. *JeToCo Corp. v. Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980). Freely translated, *res judicata* means, "the matter has been

decided." The doctrine of *res judicata* applies to the decisions of the Commission. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). Nevertheless, the respondents argue in the present matter that the ALJ's 2005 opinion cannot be interpreted to mean that Dr. Hart can continue, year after year, to perform costly and painful injections, rhizotomies, denervations, and so on with no permanent or lasting relief for the claimant. We recall Dr. Saer's opinion in 2004 that the claimant had sustained "a soft tissue injury such as a sprain or strain....I do not think he will need any surgical treatment." Yet Dr. Hart stated in 2006 that the claimant might need "further surgical intervention" and "updated imaging studies." The record does not support Dr. Hart's conclusion in this regard. Dr. Hart stated in October 2006 that he was treating the claimant for "multifactorial back complaints with extensive lumbar disc disease, intervertebral disc disruption and multilevel lumbar spondylosis." None of these conditions described by Dr. Hart were reasonably connected to or caused by the claimant's 2003 soft tissue sprain.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant proved he was entitled to continuing treatment from Dr. Hart. We find that the claimant did not prove Dr. Hart's treatment after September 7, 2006 was reasonably necessary in connection with the claimant's compensable soft tissue sprain.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

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

**CONCURRING AND DISSENTING OPINION**

I agree with the majority's finding that the claimant is entitled to the medical expenses associated with his treatment by Dr. Thomas Hart through September 7, 2006. However, I must respectfully dissent from the majority opinion finding that the claimant did not prove that the continuing treatment from Dr. Hart after

September 7, 2006 was reasonably necessary for the treatment of his acknowledged compensable injury.

The claimant sustained an admittedly compensable back injury on April 28, 2003. He had previous injuries resulting in a compression fracture at the L-1 vertebrae, and a prior back surgery at L4-L5. As a result of his April 28, 2003 injury, the claimant suffered an aggravation of pre-existing degenerative disc disease and the other preexisting conditions in his lumbar spine. The primary medical treatment received by the claimant, for the injury in question, has been from Dr. Thomas Hart, a pain management specialist. Dr. Hart has treated the claimant with epidural steroid injections and radiofrequency denervation. On October 13, 2006, Dr. Hart explained the claimant's current condition and his recommendations for treatment, as follows:

Mr. McCurry's back is very complicated. He has four levels of intervertebral disc disruption. That is well documented. He has multilevel lumbar spondylosis. He has intractable back pain complaints. He may further require surgical

intervention in the future if he develops any signs of instability, nerve root compression, bowel or bladder incontinence. He will require updated imaging studies. His main complaint today, since his back was improved with the radiofrequency, i.e., at least a portion of it, the morning stiffness and the range of motion have improved. He still has a radicular component to his pain into the posterior lateral thigh and to the knee. I discussed with Mr. McCurry that in the past when I did the radiofrequency denervation which is, again, well documented (I hope the attorney also evaluates and reads and understands) that I did not perform this time epidural steroid injections as I did in the past. We simply performed radiofrequency denervation of the facets. That only helps the facets, the posterior elements, i.e., the joints and did not help his disc, nor did it help his radicular pain. Again, previously we performed the radiofrequency with a transforaminal epidural injection. To a degree of medical certainty and probability, I think Mr. McCurry is an appropriate

candidate and hopefully reduce some inflammation around the disc. Is this a cure? No. One cannot replace the spine like one can a hip or a knee.

The above-mentioned treatment has been recommended by two independent specialists, Dr. Scott Schlesinger, a neurosurgeon, and Dr. Edward H. Saer III, an orthopedic spine specialist. Dr. Schlesinger performed the claimant's prior back surgery and Dr. Saer conducted an independent medical examination.

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 sustained an admittedly compensable back injury superimposed on a severely damaged spine. His injury, in combination with multiple defects demonstrated on the diagnostic studies, has created a seriously painful and disabling condition, for which there is no cure. The only treatments available to the claimant are modalities designed to

alleviate his pain. Pain management has been recommended by Dr. Saer and Dr. Schlesinger. No doctor has indicated that the claimant does not need this treatment. Dr. Hart has provided this treatment and, for unsubstantiated and arbitrary reasons, the respondents have decided that they should be relieved of their responsibility to provide this medical care. The Administrative Law Judge has disagreed with the respondents' position in two previous opinions. The majority has now reversed the Administrative Law Judge's decision on this issue, in an opinion which is as invalid and capricious as the respondents' denial. The majority has attempted to cheapen the seriousness of the claimant's injury by referring to it as a "soft tissue sprain". It is true that the April 28, 2003 injury did not result in a disc herniation or a vertebral fracture. However, it was not in dispute that the injury aggravated equally serious conditions in the claimant's lumbar spine, resulting in intractable pain. In short, all of the evidence of record indicates that the claimant has sustained a serious back injury and that he is in need of the additional medical treatment offered

by Dr. Hart. And it was quite ignoble of the majority to have so demeaned the gravity of the claimant's injury in an effort to justify its denial of medical treatment.

For the reasons stated above, I must respectfully dissent from the majority opinion finding that the claimant is not entitled to medical treatment from Dr. Hart after September 7, 2006.

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PHILIP A. HOOD, Commissioner