

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406739

MARILYN D. RITCHIE, EMPLOYEE	CLAIMANT
STEWART PROPERTIES, LLC, EMPLOYER	RESPONDENT NO. 1
EMPLOYERS' MUTUAL CASUALTY CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MAY 22, 2008

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

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 represented by HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 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 March 2, 2007.

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

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) Respondents No. 1's Proffered Exhibits 1 & 2 are hereby admitted into the record.
- 4) Claimant has failed to prove by a preponderance of the evidence that her compensable back injury was the "major cause" of her back disability or 5% impairment rating assigned by Dr. Wilbourn; therefore, claimant has failed to prove entitlement to any permanent partial disability benefits related to her back.
- 5) Claimant's failure to prove entitled to permanent partial disability benefits with regard to her back renders the issues of Second Injury Fund liability, wage loss disability benefits and issue No. 7 outlined herein moot.
- 6) Claimant has failed to prove by a preponderance of the evidence that she is unable, because of her compensable injuries, to earn any meaningful wages in the same or other employment.
- 7) The claimant has, therefore, failed to prove by a preponderance of the

evidence that she is permanently and totally disabled.

8) Neither the Second Injury Fund, nor the Death and Permanent Total Disability Trust Fund have no liability in this claim.

9) Respondents No. 1 are responsible for all medical treatment contained in the record related to the claimant's right knee up to August 25, 2004, only.

10) Respondents No. 1 are responsible for all medical treatment contained in the record for claimant's back injury from March 19, 2004 through March 14, 2005, only.

11) Claimant's pain management for her back after March 14, 2005, was for degenerative conditions not related to her March 2004 compensable injuries.

12) Claimant has proven by a preponderance of the evidence that she is entitled to additional TTD benefits related to her compensable injuries of March 2004 for the period of August 25, 2004 through March 14, 2005, to be paid by Respondents No. 1.

13) The claimant is entitled to the maximum attorney's fees allowed by Arkansas Law consistent on the findings herein.

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.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion affirming and adopting the opinion of the Administrative Law Judge. Based on my de novo review of the record, I find that the Administrative Law Judge's opinion should be reversed and medical benefits and temporary total disability benefits awarded for the claimant's compensable knee and back injuries, with findings concerning permanent impairment, wage loss, Second Injury Fund liability, and Death and Permanent Total Disability Trust Fund liability held in abeyance for future determination.

MEDICAL HISTORY OF THE KNEE INJURY

The claimant sustained admittedly compensable injuries to her right knee and low back in March of 2004. She initially sought treatment with Dr. Rick Brown, a chiropractor. The claimant chose this physician because the employer did not send her to the doctor. She had seen Dr. Brown previously, primarily for neck problems.

Thereafter, the claimant was treated by physicians chosen by Respondent No. 1 or their referrals.

For treatment of her knee injury, Respondent No. 1 first sent the claimant to Dr. W. R. McKiever, who ordered an MRI of the claimant's knee, and referred her to Dr. John O. Lytle, an orthopaedic surgeon. Dr. Lytle interpreted the results of the MRI as showing "a posterior horn medial meniscus tear and probable anterior horn tear" with "a sprain of the medial collateral ligament with a fusion to the knee". Dr. Lytle's impression was that the claimant sustained "internal derangement of the R knee with effusion of the knee" as a result of her March 2004 injury. On June 22nd, 2004, Dr. Lytle performed surgery on the claimant's knee. He continued to treat her and to keep her off work until August 25, 2004. On that date, he released the claimant from his care and rated her knee injury at 22% to the lower extremity. This rating was accepted and paid by the respondent.

The claimant's subsequent difficulties with her knee developed as follows. On December 9, 2004, the claimant

was experiencing problems with her right knee and told Dr. Hart, a physician who was treating her for back problems, that she had a follow-up appointment with Dr. Lytle for these difficulties. On January 11, 2005, the claimant wrote a letter to the insurance company stating:

On Saturday (1/8/05) my right knee swelled and I could not walk on it. I applied ice packs and elevated it until the swelling reduced. I don't know why it swelled so I went to Dr. McKiever yesterday, (1/10/05) to get it checked...

On January 10, 2005, the claimant received treatment from Dr. McKiever who's medical report of that date said that the claimant "continues to have right knee edema". On May 17, 2005, Dr. Hart advised the claimant "to get back with Dr. Lytle, her orthopaedic surgeon, and discuss what is going to be done for the right knee".

For the first time since her rating, the claimant was seen in follow-up by Dr. Lytle on June 14, 2005. In a medical report of that date, Dr. Lytle said that the claimant was experiencing a "new problem" with her knee that "pre-existed her injury" but was "certainly aggravated" by

the injury and that the injury "has caused this to be progressive". Further, Dr. Lytle confirmed that "she will require total knee replacement in the future".

On March 14, 2005, the claimant was sent to Dr. Darin K. Wilburn, physiatrist, by a representative of the workers' compensation insurance carrier, for a second opinion evaluation. Dr. Wilburn examined the claimant and concluded that no additional medical treatment was needed for her knee injury.

Respondent No. 1 denied responsibility for medical treatment and temporary total disability benefits for the knee after August 25, 2004, the date the claimant was released after her knee surgery.

**REASONABLE AND NECESSARY MEDICAL
TREATMENT FOR THE KNEE INJURY**

The Court of Appeals addressed a claim for medical benefits under strikingly similar circumstances as those presented by the case at hand, in Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). There, the claimant suffered a compensable injury to her knee and, as a result, had surgery which was accepted and

paid for by the respondent. When she experienced additional problems and needed further surgery, in the form of a knee replacement, the respondent denied responsibility. The employer took the position was that the additional medical treatment requested was for pre-existing degenerative changes and not causally related to the original compensable injury. The claimant in Williams had significant pre-existing degenerative findings which her doctors agreed were not caused by the injury. The doctors also agreed that the degenerative changes were not the "major reason" for the need for additional treatment and that "most of the cause" for the knee replacement preexisted her injury. However, the medical opinions established that the compensable injury was "a factor" in the claimant's need for surgery. Based on this medical evidence, the Commission denied the claim finding that: (1) the claimant had failed to prove a causal connection between the compensable injury and the requested surgery; (2) that the claimant was symptomatic prior to the incident at work and would have required surgery regardless of the work-related injury due to the progressive nature of

the disease; (3) the surgery was recommended to treat the pre-existing arthritis, not the work-related injury; and (4) there was no evidence that the degenerative disease was worsened by the injury. The Court of Appeals reversed the Commission's decision and remanded the case for an award of benefits, stating:

Both doctors can be fairly said to have testified that appellant's fall at work was not the major cause, but that it was, at least, a factor in her resulting inability to work and need for knee-replacement surgery...the Commission had found that appellant had failed to prove a causal connection between her compensable injury and her need for total-knee-replacement surgery. Moreover, the Commission concluded that '[t]here is no evidence that the degenerative disease was worsened by the work-related injury.' Even reviewing the evidence in the light most favorable to the Commission's findings, we conclude that they are not supported by substantial evidence. Appellees had to take appellant as they found her, and the compensable injury that she suffered was a factor in her need for the additional surgery. (Emphasis added.)

Therefore, in claims for medical benefits and temporary total disability, a causal connection is

established when the compensable injury is found to be "a factor" in the resulting inability to work and need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment.

Williams v. L & W. Janitorial, Inc., supra.

In this particular case, the claimant had surgery for her knee injury on June 22, 2004 and was released and rated on August 25, 2004. By December 9, 2004, the medical reports were showing complaints of continuing knee problems. On January 8, 2005, the claimant's knee began to swell and she was unable to walk. There was no evidence of any additional incident which might have given rise to these problems. Medical treatment for these difficulties began on January 10, 2005. On June 14, 2005, Dr. Lytle, the claimant's treating orthopedic surgeon, identified a "new problem" with her knee and said that it preexisted her injury but was "certainly aggravated" by the injury and that the injury "has caused this to be progressive".

Because of the above mentioned statements from the claimant's treating physician indicating that the

compensable injury aggravated and caused progression of a pre-existing condition, along with the fact that there is no evidence of any other injury or insult of any kind being inflicted upon the claimant's knee , I find that the compensable injury was a factor in her inability to work and need for additional medical treatment. Therefore, the requisite causal connection between her original compensable injury and the second period of medical complications has been established.

The Administrative Law Judge's opinion, adopted by the majority, denied the claimant's entitlement to additional medical treatment for her compensable knee injury. His only rationale was that the claimant had reached MMI on August 25, 2004. The issue in this case is whether the continued medical treatment recommended by the claimant's treating physician is reasonable and necessary as causally related to her admittedly compensable knee injury, not whether she has reached maximum medical improvement (end of the healing period). A claimant may be entitled to ongoing medical treatment even after the healing period has

ended if the treatment is geared toward management of that injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d. 31 (2004). Simply to conclude that medical expenses are not reasonable and necessary because the healing period has ended (MMI), does not form a legal basis for denial.

On appeal, Respondent No. 1 argues that the claimant's need for medical treatment is related to pre-existing degenerative conditions and/or the fact that she is overweight. As discussed earlier, the degenerative conditions are undeniably a factor in the claimant's need for treatment. Her weight may also be a factor. However, as long as the compensable injury is also a factor, then the medical treatment in question will be compensable.

It is also argued by respondent No. 1 that Dr. Lytle's recommendation for knee replacement was "a speculative surgery recommendation". I see nothing speculative about Dr. Lytle's report of June 14, 2005, stating:

We will try to put this off as long as possible. She will require total knee replacement in the future.

In conclusion, I find that the claimant proved by a preponderance of the evidence that her compensable knee injury was a factor in, and causally related to, her need for the additional medical treatment recommended by Dr. Lytle. Based on this finding, I conclude that requested medical treatment is reasonable and necessary within the meaning of the Workers' Compensation Law and the responsibility of Respondent No. 1.

TEMPORARY TOTAL DISABILITY FOR THE KNEE INJURY

After the end of the original healing period for a compensable injury, the claimant may undergo a second healing period if symptoms reoccur and this is true even if permanent disability benefits were paid after the original healing period ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191 (1987). When a second period of medical complications follows an acknowledged compensable injury, creating a second distinct healing period, the employer will

continue to be responsible for the payment of benefits, including temporary total disability benefits , if the second complication is found to be "a natural and probable result of the first injury". Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Stated another way, the claimant must prove a causal connection between the second complication and the original compensable injury. Elk Roofing Co., supra. Causation will be established between a compensable injury and a second medical complication if the compensable injury is "a factor" in the resulting inability to work and need for medical treatment, even though the compensable injury is not the major cause of the disability or treatment. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

The causal connection between the claimants compensable knee injury and her need for treatment has been previously demonstrated and once this has been accomplished, the causal connection to the disability has also been established. Williams v. L&W Janitorial, Inc., supra.

After establishing a causal relationship between the compensable injury and her additional medical complications, the claimant must then satisfy the prerequisites for the payment of temporary total disability benefits. The requirements for recovery of temporary total disability benefits for injuries scheduled in Ark. Code Ann. §11-9-521 are different from unscheduled injuries. For scheduled injuries, Ark. Code Ann. §11-9-521(a) provides:

An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule (Emphasis supplied.)

Interpreting Ark. Code Ann. §11-9-521(a), the Court of Appeals in Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001) said:

We must construe Arkansas Code Annotated section 11-9-521(a) using the plain meaning of the language that the General Assembly employed. The statute expressly

provides that for scheduled permanent injuries the injured employee is to receive compensation for temporary total or temporary partial during the healing period or until the employee returns to work, which ever occurs first. Conspicuously absent from the statute is any indication that the injured employee show an incapacity to earn wages as a requirement to receiving temporary benefits. This absence is key to any construction of the provision. We hold that the plain meaning of the language employed indicates that an employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated that he is actually incapacitated from earning wages.

....

The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended.

See also, Mad Butcher, Inc. V. Parker, 4 Ark. App. 124, 628 S.W.2d. 582 (1982); International Paper Co. v. McGoogan, 255 Ark. 1025, 504 S.W.2d 739 (1974).

Therefore, the claimant will be entitled to temporary total disability benefits for her scheduled knee injury as long as she remains in the healing period and has not returned to work. As previously discussed, in January of 2005, the claimant developed new problems and began additional treatment of the knee under Dr. McKiever. Both Dr. McKiever and Dr. Hart (treating physician for the claimant's back at the time), recommended that the claimant follow up with the orthopedic surgeon, Dr. Lytle, for additional treatment of the knee. Dr. Lytle resumed conservative treatment on June, 14 2005, and said that the claimant would undergo a total knee replacement in the future. Under these circumstances, it can not be said that the claimant has been restored as far as the permanent character of the injury will permit, that her condition has become stable, or that nothing further in the way of treatment will improve her condition. At the time of the

hearing, she was undergoing conservative treatment for her knee and will have additional surgery to restore and improve her condition. She needs a knee replacement and a knee replacement would not be recommended for a stable knee. The claimant's healing period has not ended.

With regard to the claimant's work status, the uncontradicted evidence of record reflects that the claimant has not worked since the date of her knee surgery, June 22, 2004.

The opinion of the Administrative Law Judge, adopted by the majority, denied the claimant's entitlement to temporary total disability benefits for the knee injury based solely on his finding that the claimant's healing period ended for the knee injury on August 25, 2004. As previously determined, this finding is inconsistent with the credible evidence of record.

For the reasons stated above, I find that the claimant proved by a preponderance of the evidence that she experienced a second healing period, causally related to her compensable knee injury, beginning on January 10, 2005. I

find that the claimant has not worked since June 22, 2004. Based on these findings, I conclude that the claimant is entitled to temporary total disability benefits from January 10, 2005 until a date yet to be determined.

MEDICAL HISTORY OF THE BACK INJURY

As with her knee injury, the claimant's primary medical treatment for her back began with Dr. McKiever, a physician selected by the Respondent No.1. Dr. McKiever began to explore the claimant's back problems shortly after she reached maximum medical benefit from the knee surgery. Dr. McKiever had an MRI study of the lumbar spine and a whole body bone scan performed on September 24, 2004. The MRI showed "disc bulging at L4-5 on the left". The bone scan showed "evidence of increased activity in the lower lumbar spine at L4-5".

Based on the MRI findings, Dr. McKiever referred the claimant to Dr. Eric D. Akin, neurosurgeon. Dr. Akin saw the claimant on two occasions. Dr. Akin examined the MRI study and concluded that the claimant had "moderate degenerative changes at L5-S1, but no neural compression".

Dr. Akin did not see anything that would require surgical intervention and recommended that the claimant be referred to Dr. Thomas Hart for epidural steroid injections. On December 3, 2004, Dr. McKiever instituted the recommendations of Dr. Akin and referred the claimant to Dr. Hart.

Dr. Hart first saw the claimant on December 9, 2004, and remained the claimant's treating physician for her back problems from that date until the date of the hearing, an approximate two-year period. Dr. Hart's initial report indicates that he reviewed the MRI and saw lumbar disc problems, as well as problems with the claimant's lumbar facets. In order to delineate between the facet problems and the disc problems, Dr. Hart recommended that diagnostic lumbar facet injections be performed first, and later, if those did not prove diagnostic for facet problems, then discography would be performed to determine whether the claimant's problems were discogenic in nature.

Immediately following the initial evaluation of Dr. Hart, the claimant was seen by Dr. Edward H. Saer,

orthopaedic surgeon, at the request of Dr. McKiever, apparently for surgical evaluation. In his report of December 28, 2004, Dr. Saer concluded that back surgery was unnecessary and that the claimant needed to continue non-operative management.

On December 28, 2004, Dr. Hart performed the previously discussed diagnostic lumbar facet injections. Because the claimant experienced considerable relief following the test, Dr. Hart concluded that at least a part of the claimant's symptoms were related to a facet joint problem. He instituted treatment of the facets, in the form of radiofrequency denervation, on January 13, 2005.

On March 14, 2005, the claimant was sent to Dr. Darin K. Wilburn, physiatrist, by a representative of the workers' compensation insurance carrier, for a second opinion evaluation. Dr. Wilburn examined the claimant, ended her healing period for her back injury, and concluded that no additional medical treatment was needed for her back injury. Dr. Wilburn saw the claimant again on April 27, 2005, at which time he released her to return to work and

rated her impairment at 5% to the body as a whole for her back condition.

On March 29, 2005, Dr. Saer saw the claimant for the second time and he agreed with Dr. Wilburn that she was at MMI. He did not think that she needed surgery but recommended physical therapy.

In a medical report dated May 17, 2005, the claimant's treating physician, Dr. Thomas Hart, commented on the claimant's medical condition and responded to Dr. Wilburn's opinions, as follows:

Apparently she was not considered a surgical candidate but there was some discussion about performing a discography. According to the North American Spine Society, this would be the most appropriate study, i.e., pain beyond four months not delineated by other imaging studies. This is a more sensitive study than an MRI or CT with myelogram. This allows us to objectively, as well as subjectively help delineate discogenic back pain. But apparently she was referred on to a rehab doctor for permanence of a functional capacity evaluation and was given a rating to her back of 5%. This apparently has resulted in her loss now of workers' comp.

We have already clearly established that the lumbar facets, i.e., the true joint/zygapophyseal joints were causing at least a portion of her back pain complaints and that has responded to the radiofrequency. Again, this is not a cure and this is indefinite. This is management. This is also recognized by the rehab specialist who performed her independent medical evaluation. But there was very little emphasis given as to other etiologies for her back pain complaints, i.e., the disc. I find it absolutely amazing that with the overwhelming amount of material in the orthopedic and neurosurgical, pain, physiatry literature pertaining to discogenic back pain. In fact in many article (sic) this is reported as the number (sic) etiology of back pain, but no emphasis was placed on this by this last physician. Apparently also several questions were asked by the insurance company as to her return to work status. She was told that she could return immediately with no emphasis placed on the right knee and no emphasis as to why she has continuing back pain complaints. I find it quite bizarre that a functional capacity evaluation would be performed on a patient who has not reached MMI. So it appears that she is being "rushed through" without several issues being resolved. I state still to a degree of medical certainty and probability what needs to be performed is discography. That will allow us to once and for all determine does she or does she not have discogenic pain. Intervertebral disc disruption or

painful disc is not the same as degenerative changes. So how could one perform a functional capacity evaluation when they still have significant back pain complaints if she truly has discogenic pain. That would be like asking a person who came in with three nails in their foot, one nail is removed and then they are asked to perform with two nails remaining in their foot. That is ridiculous, but apparently that is what Ms. Ritchie has been through. As this physician informed Ms. Ritchie, (Again, according to her history), he didn't work for her, he worked for the insurance company. So after a lengthy discussion today, the plan is basically this, Ms. Ritchie needs to get back with her orthopedic surgeon about her right knee, first and foremost, about what is the next step. Once that is resolved, as to her continued back pain complaints, if she still has continuing pain, I think the most appropriate study would be discography.

On December 22nd, 2005, Dr. Hart performed the discogram discussed above, which demonstrated "intervertebral disc disruption with complete circumferential disruption, a very pain disc at L5-S1". At this time, Dr. Hart recommended repeat radiofrequency denervation and a return visit with Dr. Akin, neurosurgeon, to determine whether or not she

might be a potential surgical candidate for the L5-S1 disc injury.

The claimant was seen by Dr. Akin for the second time on December 29, 2005, at which time he drew conclusions and made recommendations, as follows:

Ms. Ritchie appears to have primarily mechanical back pain. She does have degenerative changes in her lumbar spine and has concordant pain at the L5-S1 level. Unfortunately, due to her size it is not feasible to perform a lumbar fusion at the L5-S1 level. I do feel that weight loss by any means including surgical measures such as a gastric bypass or a gastric banding would be indicated. I think that not only her spine but also her knees are suffering due to her weight, and she is in agreement with this. I will be glad to consider her for surgery once she has been able to come within 50 lbs. of her target weight. The literature shows, however, that surgery for individuals who are greater than 50 lbs. overweight for discogenic pain is not very useful. She states that she is going to look into some means of a weight loss program or possible surgery for weight loss and will be in touch with me. The only thing that I can recommend for the meantime would be to refer her to a pain management specialist.

Following Dr. Akin's recommendations, Dr. Hart continued to treat the claimant with radiofrequency denervation and epidural steroid injections through the date of the hearing.

Eighty-five (85) pages of medical records were introduced at the hearing concerning the claimant's medical treatment prior to her compensable injuries of March of 2004. There is no substantial medical evidence of any prior treatment which would be relevant to the claimant's compensable back injury.

Respondent No. 1 denied responsibility for medical treatment and temporary total disability for the back injury after March 14, 2005, the date of Dr. Wilburn's first report.

**REASONABLE AND NECESSARY MEDICAL
TREATMENT FOR THE BACK INJURY**

If treatment for the back is to be found compensable, a causal relationship must be established between the compensable injury and the medical treatment requested. The issue is whether the treatment rendered by Dr. Hart was related to the compensable back injury or

related solely to pre-existing conditions. If the claimant shows that the injury bears some relation to the need for treatment then the medical benefits will be compensable even if pre-existing conditions are also a causal factor. General Electric Railcar, 62 Ark. App. 120, 969 S.W.2d 667 (1998). Causation is established upon a showing that the compensable injury was a factor in the need for treatment even if the compensable injury is not the major cause. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

The opinion of the Administrative Law Judge, adopted by the majority, found that the claimant's medical treatment was related to degenerative changes as opposed to the compensable injury. It is axiomatic that the employer takes the employee as he finds him and that when a compensable injury aggravates, accelerates, or combines with pre-existing conditions to produce disability or need for treatment then the resulting disability and treatment is compensable. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent

Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

The number of cases involving aggravation, acceleration and combination of pre-existing degenerative conditions in back and neck injuries was explained in the testimony of Dr. C.C. Alkire, orthopedic surgeon, in General Elec. Railcar Repair Servs. v. Hardin, 62 Ark. App. 120 (1998), as follows:

As I'm sure you're well aware having dealt with workers' compensation insurance claims for years, most workers' compensation injuries, particularly those in the cervical spine and lumbar spine are always related to some degenerative process, regardless of the type of injury a patient may have. (emphasis added.)

The facts of this case demonstrate that, while the claimant had pre-existing degenerative changes in the lumbar spine, she was totally asymptomatic prior to her compensable back injury of March 2004. Since the date of injury, she has continued to suffer from back problems, continued to seek medical treatment and still experiences disability because

of her back. She has objective medical findings which show inflammation to the facet joints and damage to the lumbosacral discs at L4/L5 and L5/S1. There was never a point in time where the treating physician ended the healing period and released the claimant from treatment for the back injury. A second opinion physician selected by a representative of the workers' compensation insurance company issued a report ending the healing period and calling an end to medical treatment. This was done at a time when the claimant was continuing to see her treating physician, he was saying that the healing period had not ended, and was recommending additional treatment. Therefore, resolution of the issues involves an assessment of the credibility of the conflicting medical opinions as to the causal relationship between the compensable injury and requested medical treatment.

The Commission has the duty to weigh the medical evidence and if it is conflicting, the resolution is a question of fact for the Commission. Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Dr. Hart

has been the claimant's treating physician since December 9, 2004. She was referred there by Dr. McKiever, the doctor originally selected by the respondent to treat the claimant. Dr. Hart has seen the claimant numerous times and is obviously very familiar with her condition. The orthopedic surgeon, Dr. Sear, recommended continued treatment with Dr. Hart on December 28, 2004 and Dr. Akin also made the same recommendation on December 29, 2005. The opinions of Drs. Hart, McKiever, Saer, and Akin should be given greater weight than that of a second opinion doctor selected by the insurance company. And when the opinions of the treating physicians are considered, the requisite causal connection will be found.

It is also asserted that the claimant's healing period for the back injury has ended and that the treatment being rendered by Dr. Hart is solely for pain management. As stated earlier, the end of the healing period does not necessarily mark the end of compensable medical treatment, if the treatment is geared toward management of the injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184

S.W.3d 31 (2004). Further, pain management can be compensable medical treatment when administered to help the claimant cope with the pain from a compensable injury.

Maynard v. Belden Wire & Cable Co., Full Workers'

Compensation Commission, Opinion filed April 28, 1998 (Claim No. E502002); Billy Chronister v. Lavaca Vault, Full

Workers' Compensation Commission, Opinion filed June 20,

1991 (Claim No. D704562). The medical evidence and the testimony of the claimant establishes that the pain

management offered by Dr. Hart was of great benefit to the

claimant and appropriate under the circumstances. Further, I

find that the evidence confirms that the treatment rendered

by Dr. Hart was not only for pain management but also

directed toward diagnosis and improvement of the condition,

which would also be appropriate and compensable.

Therefore, I find that the claimant's compensable injury was a factor in, and causally related to, her need for the medical treatment requested, that the compensable back injury aggravated, accelerated and combined with pre-existing conditions to produce her need for treatment, and

that the treatment of Dr. Hart was not only for pain management but was also directed toward diagnosis and improvement of the claimant's back problem. Based on these findings, I must conclude that Respondent No. 1 is responsible for the payment of this medical claim.

TEMPORARY TOTAL DISABILITY FOR THE BACK INJURY

The causal connection between the claimant's back injury and her need for treatment has been previously demonstrated and once this has been accomplished, the causal connection to the resulting disability has also been established. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will

improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant's treating physician has stated that she remains in the healing period. From the time of his first visit until the date of the hearing, Dr. Hart was administering treatment and performing diagnostic studies designed to delineate the extent of the claimant's problems and to improve her condition. The neurosurgical evaluation by Dr. Akin indicated that he would consider performing back surgery on the claimant if it were not for her weight. This medical evidence confirms the presence of a healing period for the back injury.

In finding that the claimant reached maximum medical recovery and the end of the healing period, the opinion of the Administrative Law Judge, adopted by the majority, relied on the opinions of Dr. Wilburn and Dr. Saer. As stated earlier, Dr. Wilburn evaluated the claimant twice for the insurance company. Dr. Saer saw the claimant two times for surgical evaluation. Dr. Wilburn said that the claimant reached MMI on March 14, 2005 and Dr. Saer

agreed. On the other hand, Dr. Hart and Dr. McKiever have treated the claimant on numerous occasions and did not determine that the claimant had reached maximum medical improvement. Of course, Dr. McKiever was also the respondent's choice and Dr. Hart was his referral. In addition, the neurosurgeon, Dr. Akin, said that he would consider surgery on the claimant as soon as she lost some weight which would strongly indicate that the claimant had not reached maximum medical improvement. Under these circumstances, the medical opinions of Drs. Hart, McKiever, and Akin should be given greater weight than those of Drs. Wilburn and Saer. Consistent with the weight of the credible evidence, the Commission is compelled to find that the healing period has not ended for the claimant's back injury.

With regard to the claimant's ability to work, it was her testimony that she experiences a significant amount of difficulty as a result of taking pain medication which causes her to be unable to think or function. She has difficulty with standing long enough to cook or wash dishes.

She is unable to sit for prolonged periods. The claimant is unable to clean house, sweep, mop, or do laundry and she has had to hire someone to perform these chores for her. It is also important to note that the claimant suffers from both a knee and a back condition which must be considered in combination when determining her physical limitations. The evidence confirms that the claimant is currently unable to work.

Therefore, I find that the claimant proved by a preponderance of the evidence that her back injury was a factor in, and causally related to, her inability to work; that she remains in the healing period for her back injury; and that she is unable to work as a result of her back and knee injuries combined. Therefore, I conclude that the claimant is entitled, under the Workers' Compensation Law, to temporary total disability benefits from the date of last payment until a date yet to be determined.

ARK. CODE ANN §11-9-526

On appeal, Respondent No. 1 argues that temporary total disability benefits should be denied because the

claimant abandoned her employment with the respondent-employer and refused assistance being offered to her by a vocational rehabilitation counselor. The authority for this proposition, cited by Respondent no. 1, is Ark. Code Ann. §11-9-526, which provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justified.

In order to invoke the sanctions of § 11-9-526, there must be a job offer. In Barnette v. Allen Canning Co., 49 Ark. App. 61, 896 S.W.2d 444 (1995), the Arkansas Court of Appeals considered a case where the employer testified that the claimant would have been given a suitable job had she come in and applied for one. However, the claimant in Barnette was never contacted by the employer and offered a job. Because no offer had been made, the court said that this did not constitute "an offer of employment" as contemplated by Ark. Code Ann. § 11-9-526 and reversed

the Commission's finding that the claimant had unjustifiably refused employment suitable to her capacity. Like the Barnette case, the employer in this case never made a job offer and Respondent No.1 never claimed that they did. Absent an offer, the sanctions of Ark. Code Ann. § 11-9-526 do not apply.

**PERMANENT IMPAIRMENT, WAGE LOSS, SECOND
INJURY FUND LIABILITY, AND DEATH AND
PERMANENT TOTAL DISABILITY TRUST FUND
LIABILITY**

Since the claimant continues to be entitled to temporary total disability benefits, issues relating to permanent impairment, wage loss , Second Injury Fund liability, and Death and Permanent Total Disability Trust Fund liability are premature. Specifically, I find that those issues should be reserved for future determination.

PHILIP A. HOOD, Commissioner