

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406774

DAVID R. WILLIAMS,  
EMPLOYEE

CLAIMANT

NABCO,  
EMPLOYER

RESPONDENT

ACIG INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 16, 2008

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,  
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE BETTY J. HARDY,  
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 November 14, 2007. The administrative law judge found that the claimant proved surgery was reasonably necessary in connection with the compensable injury. The administrative law judge found that the claimant proved he was entitled to temporary total disability benefits and an anatomical impairment rating. After reviewing the entire

record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove he was entitled to additional temporary total disability benefits or an anatomical impairment rating.

I. HISTORY

The testimony of Robert David Williams, age 48, indicated that he began working as a pipe welder for NABCO in about 2002. The parties stipulated that the claimant filed a claim for a back injury occurring on June 16, 2004, which injury was initially accepted as compensable. The claimant testified, "I was picking up some tenage (sic) nineties from under a scaffold to put on a dock and I felt my back go out. I picked up two of them. The second one I felt my back go out. And I was injured from then on."

An MRI of the claimant's lumbar spine was taken on June 21, 2004, with the following impression: "1. Minimal central disc protrusion at the L4-L5 level producing slight concavity along the ventral margin of the thecal sac. No spinal stenosis or foraminal narrowing is seen. 2. Small left paracentral disc protrusion at the L5-S1 level

producing effacement of the epidural fat but no mass effect upon the thecal sac or nerve roots."

Dr. Scott M. Schlesinger examined the claimant on July 14, 2004 and stated, "I have carefully reviewed the multiple images of the MRI of the lumbar spine independent of the radiologist and have requested and compared this to the radiologist's interpretation. There are degenerative changes at L4-5 and L5-S1. There is a small L5-S1 disc protrusion. There is no neural compression noted on this study, but it does abut the subarachnoid space on the left....In this case, it is my neurosurgical consultative opinion that his back pain and leg pain are probably coming from an aggravation of lumbar degenerative disc disease with very minimal disc protrusion at L5-S1....I anticipate him being off perhaps 2-4 more weeks. I do not feel he is going to need any form of surgery."

Dr. Schlesinger informed Dr. Lackey G. Moody on August 4, 2004, "Mr. Williams called on 8/4/04 stating he got no relief with his epidural steroid injection and physical therapy. There is really nothing further I can do. I think he has reached maximum medical improvement with regards to his work related aggravation of his lumbar degenerative disc

changes. I will release him from further care. There is nothing to give him a disability rating for."

The claimant began treating with Dr. Thomas M. Ward on October 13, 2004. The parties stipulated that the claimant "was provided appropriate workers' compensation benefits until he was discharged by his authorized treating physician, Dr. Thomas Ward, on October 21, 2004."

The record indicates that Dr. Gary E. Sherwood provided emergency treatment on October 26, 2004: "Today, he was released to go back to work. He did try to work today and his back hurt worse. He describes pain down his left leg....MRI films and plain films were reviewed with Dr. Minor Gregory. There is no obvious disc protrusion that we see on the films. His plain x-rays showed normal alignment. No 'spondylosis.'" The physician's assessment was "Acute exacerbation of chronic low back pain....I recommended he be off work for 48 hours....I recommended absolutely no heavy lifting."

An MRI of the claimant's lumbar spine was taken on December 15, 2004:

The vertebral body height in the lumbar spine is normal. The intervertebral disk spaces are well maintained except at L5-S1 where there is loss of signal in the disk representing dessication.

There is also focal disk herniation on the left at this level. Reviewing the transaxial images shows a fairly broad based disk herniation extending into the spinal canal and causing minimal compressive effects on the thecal sac, but more significantly contacts the left S1 nerve rootlet within the canal causing mild compressive effects. The L5 nerve rootlets exit normally at this level without evidence of neurological sequelae. The right S1 nerve rootlet appears to be spared contact. The remaining levels in the lumbar spine show no evidence of additional disk bulging or herniation and no spinal canal stenosis or neuroforamen narrowing....

IMPRESSION: Focal disk herniation left paracentral L5-S1 with compressive effects on the left S1 nerve rootlet as described.

Dr. Patrick D.S. Chan performed an operation on April 19, 2005: "1. Left L5-S1 partial hemilaminectomy, partial medial facetectomy, lateral recess decompression and foraminotomy. 2. Left L5-S1 microdiscectomy. 3. Microscopic decompression of thecal sac and nerve roots. 4. Injection of lumbar epidural steroid." The pre- and post-operative diagnosis was "Left L5-S1 herniated nucleus pulposus, degenerative disc disease and lateral recess stenosis."

The claimant testified regarding this surgery, "I didn't get much benefit at all out of it. It didn't help."

An administrative law judge (ALJ) filed an opinion on June 14, 2005. The ALJ found, among other things, that the claimant proved "treatment he received from Dr. Moody and Dr. Chan between November 1, 2004 and January 3, 2005 was reasonably necessary for treatment of his compensable back injury....Since Dr. Chan has not proposed a definite course of treatment as of January 3, 2005, I find that any conclusion as to what form of additional treatment might or might not be reasonably necessary for the claimant's compensable injury after January 3, 2005 is a premature issue as of the date of the hearing." The ALJ found that the claimant failed to prove he was entitled to any additional temporary disability compensation "after October 21, 2004 through March 22, 2005. Specifically, the claimant has failed to prove ... that he was incapacitated from earning during any period at issue after October 21, 2004."

The claimant followed up with Dr. Chan on August 10, 2005: "Refer to Dr. Merritt for pain management. No more surgery. I think this pt will have chronic pain & is incapable of gainful employment." The claimant was a "No Show" for treatment with Dr. James Merritt on September 27, 2005.

In an opinion filed January 10, 2006, the Full Commission affirmed and adopted the administrative law judge's June 14, 2005 decision. The respondents appealed to the Arkansas Court of Appeals the Commission's finding that the claimant was entitled to further medical benefits. The claimant cross-appealed the finding that he was no longer temporarily totally disabled. In an opinion delivered December 20, 2006, the Court of Appeals reversed on direct appeal and affirmed on cross-appeal. The Court reversed the Commission's award of additional medical benefits and affirmed the denial of additional temporary total disability. The parties have stipulated that "the opinion of the administrative law judge dated June 14, 2005, Full Commission opinion dated January 10, 2006, and Court of Appeals opinion dated December 20, 2006 are *res judicata* and the law of the case."

Beginning March 31, 2006, the claimant began seeking medical treatment for increased back pain. The claimant presented to Dr. James M. Merritt on June 26, 2006 for pain management. The claimant sought emergency treatment for low back pain on July 7, 2006.

A pre-hearing order was filed on July 30, 2007. The claimant contended, among other things, that he was entitled to temporary total disability benefits and an anatomical impairment rating. The respondents contended, among other things, that the claimant had been provided all appropriate benefits. The parties agreed to litigate the following issues: "1. Whether Claimant is entitled to additional temporary total disability benefits. 2. Whether Claimant is entitled to a permanent impairment rating. 3. Claimant specifically reserves the issue of wage loss and permanent and total disability."

A hearing was held on August 30, 2007. The claimant testified regarding Dr. Merritt's treatment, "He just gives me medication." The medicines prescribed by Dr. Merritt "relieve the pain some. I just got a constant pain all the time."

The administrative law judge found, in pertinent part:

3. Claimant's April 19, 2005 surgery was reasonable and necessary for the treatment of, and thereby related to, his June 19, 2004 work-related injury.
4. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 19, 2005 to August 10, 2005....
6. Claimant has proven that he is entitled to the award of a permanent ten percent (10%) impairment

rating to the body as a whole under page 113, Table 75, IV(B) of the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4<sup>th</sup> ed. 1993) (hereinafter "AMA Guides") for a "Single-level [lumbar spine] decompression *with* residual signs or symptoms."

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) (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). 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).

An administrative law judge found in the present matter, "Claimant's April 19, 2005 surgery was reasonable and necessary for the treatment of, and thereby related to, his June 16, 2004 work-related injury." The Full Commission reverses this finding. The claimant testified that he felt his back "go out" after lifting at work on June 16, 2004.

The respondents initially accepted the resulting claim as compensable. A lumbar MRI taken June 21, 2004 showed a minimal disc protrusion at L4-L5 and a small disc protrusion at L5-S1. Dr. Schlesinger reviewed the MRI and described the changes in the claimant's lumbar spine as degenerative. Dr. Schlesinger opined that the claimant had aggravated a degenerative condition but that the claimant would not need surgery. Dr. Schlesinger treated the claimant conservatively and pronounced maximum medical improvement on August 4, 2004.

An MRI taken December 15, 2004 showed a "Focal disk herniation left paracentral L5-S1 with compressive effects on the left S1 nerve rootlet as described." The record before the Commission does not demonstrate that the focal disk herniation shown in December 2004 was causally related to the June 16, 2004 accidental injury. Dr. Chan performed surgery on April 19, 2005. The record does not demonstrate that surgery performed by Dr. Chan was causally related to the June 16, 2004 injury or was reasonably necessary in connection with the injury. We also note the claimant's testimony that he received no benefit at all from Dr. Chan's surgery. Post-surgical improvement is a proper

consideration in determining whether the surgery was reasonably necessary, and the Court of Appeals has affirmed the Commission's denial of surgery when no post-surgical improvement took place. See, *Winslow v. D&B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

The preponderance of evidence in the instant matter shows that surgery performed by Dr. Chan was not reasonably necessary in connection with the compensable injury.

B. Temporary Disability

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve the condition, the healing period has ended. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The determination of the end of the claimant's healing period is a question of fact for the Commission.

*Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

An administrative law judge found in the present matter that the claimant proved he was entitled to temporary total disability benefits from April 19, 2005 to August 10, 2005. The Full Commission reverses this finding. The claimant sustained an accidental injury on June 16, 2004. Dr. Schlesinger subsequently opined that the claimant had sustained an aggravation of lumbar degenerative disc disease and that the claimant would not need surgery. Dr. Schlesinger treated the claimant conservatively and pronounced maximum medical improvement on August 4, 2004. The Full Commission finds that the claimant reached the end of his healing period no later than August 4, 2004. Temporary total disability benefits cannot be awarded after a claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

The Full Commission recognizes an administrative law judge's previous finding that the claimant was not entitled to additional temporary total disability compensation after October 21, 2004. The administrative law judge did not adjudicate the extent of the claimant's healing period;

rather the ALJ determined that the claimant was not incapacitated to earn wages after October 21, 2004. The claimant contended that he was entitled to additional temporary total disability beginning April 19, 2005. The record before us does not demonstrate that the claimant re-entered a healing period at any time after Dr. Schlesinger's release on August 4, 2004 or after the ALJ's finding that the claimant was not incapacitated to earn after October 21, 2004. The Full Commission also reiterates our finding that the surgery performed by Dr. Chan on April 19, 2005 was not reasonably necessary in connection with the June 16, 2004 compensable injury.

C. Anatomical Impairment

Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). The Commission has adopted the Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993) to be used in assessing anatomical impairment. See, Commission Rule 099.34; Ark. Code Ann. §11-9-522(g) (Repl. 2002). Permanent benefits shall be awarded only upon a determination that the

compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(F)(ii)(a)(Repl. 2002).

In the present matter, an administrative law judge found that the claimant had sustained a 10% anatomical impairment rating. The Full Commission reverses this finding. We have determined *supra* that the claimant did not sustain a herniated disc as a result of his June 16, 2004 compensable injury. Dr. Schlesinger determined, "There is nothing to give him a disability rating for." We find that Dr. Schlesinger's opinion is entitled to significant weight. Further, since Dr. Chan's April 19, 2005 surgery was not reasonably necessary in connection with the claimant's compensable injury, we are unable to assign a compensable anatomical impairment rating as a result of this surgery. The claimant did not otherwise prove that he sustained a compensable anatomical impairment as a result of the compensable injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove that surgery performed on April 19, 2005 was reasonably necessary in connection with his compensable injury. The claimant did not prove that he was entitled to additional temporary total

disability benefits or a permanent anatomical impairment rating. The Full Commission reverses the administrative law judge's findings and we dismiss this claim.

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's opinion. The majority, by reversing the Administrative Law Judge, finds that the treatment the claimant received from Dr. Chan was not reasonably necessary in relation to his compensable back injury. The majority also denied the claimant additional temporary and permanent disability benefits. After a de novo review of the record in its entirety, I find that the treatments the claimant received from Dr. Chan were reasonably necessary medical treatment. Furthermore, I also find that the claimant has proved by a

preponderance of the evidence of record his entitlement to additional temporary total disability benefits and permanent partial disability benefits based upon a 10% anatomical impairment to the body as a whole, therefore, I must respectfully dissent on these issues as well.

The claimant sustained an admittedly compensable injury, for which the respondent has provided a substantial amount of benefits. The case has also been extensively litigated, resulting in a decision from the Arkansas Court of Appeals. The claim for benefits presently before us turns almost entirely upon whether the lumbar surgery performed on the claimant by Dr. Patrick Chan was, while unauthorized, reasonable and necessary medical treatment for the claimant's compensable injury. The majority concludes that it was not, and that the claimant is, therefore, not entitled to any temporary or permanent disability benefits arising from that surgery. After a de novo review of the record, I find that the majority's conclusion is contrary to the medical evidence developed at the hearing, and therefore, I must respectfully dissent.

The majority relies primarily on the opinion of Dr. Scott Schlesinger, which is set out in a report dated July 14, 2004, and a radiology report relating to an MRI performed on June 21, 2004. However, I find that neither this MRI nor Dr. Schlesinger's opinion are sufficient to justify the majority's conclusion that the surgery performed by Dr. Chan was not reasonable and necessary.

The report relating to the claimant's lumbar MRI did not denote any abnormalities at the levels of L1-L3. In regard to the L4-L5, L5-S1, the report states as follows:

"1. Minimal central disc protrusion at the L4-L5 level producing slight concavity along the ventral margin of the thecal sac. No spinal stenosis or foraminal narrowing is seen.

2. Small left paracentral disc protrusion at the L5-S1 level producing effacement of the epidural fat but no mass effect upon the thecal sac or nerve roots."

Dr. Schlesinger saw the claimant for consultative examination. He rendered a report regarding this examination dated July 14, 2004. After extensively reviewing the claimant's physical condition, Dr. Schlesinger made a number of findings and recommendations. In regard to the etiology and treatment of the claimant's condition he stated:

"In this case, it is my neurosurgical consultative opinion that his back pain and leg pain are probably coming from an **aggravation** of lumbar degenerative disc disease with very minimal **disc protrusion at L5-S1**. (Emphasis added).

I have had a lengthy discussion with the patient about the options from treatment. This includes conservative care with physical therapy, chiropractic treatment, and anti-inflammatory medicines, steroid medications and epidural steroid injections."

Dr. Schlesinger also concluded that he did not believe that the claimant would need any further surgery.

After referring to the radiology report and Dr. Schlesinger's opinions as set out above, the

majority essentially decided to ignore the medical record relating to the surgery performed by Dr. Chan. Of particular interest is a radiology report relating to an MRI performed on the claimant on December 15, 2004. This radiology report reflects the progression of the claimant's injury:

"The vertebral body height in the lumbar spine is normal. The intervertebral disk spaces are well maintained except at L5-S1 where there is loss of signal in the disk representing desiccation. There is also focal disk herniation on the left at this level. Reviewing **the transaxial images shows a fairly broad based disk herniation extending into the spinal canal and causing minimal compressive effects on the thecal sac, but more significantly contacts the left S1 nerve rootlet within the canal causing mild compressive effects.** The L5 nerve rootlets exit normally at this level without evidence of neurological sequelae. The right S1 nerve rootlet appears st be spared contact. The remaining levels in the lumbar spine show no evidence of

additional disk bulging or herniation and no spinal canal stenosis or neuroforamen narrowing. There is no evidence of nerve root compression or impingement. Signal intensity of the bone marrow, remaining disks, thecal sac and paraspinous muscles and soft tissues is normal." (Emphasis added)

The first MRI, which was performed only a few days after the claimant's injury, shows only the beginnings of nerve root compression. However, six months later, the progression had continued and had begun to effect the claimant's nerve root. As would be expected with this condition, the claimant was complaining of radiating pain into his legs. This subjective complaint is fully corroborated by this objective finding.

Dr. Chan authored a report of April 19, 2005 and discussed the claimant's condition further. He noted that the claimant was suffering from severe left lower extremity pain and that his prior MRI demonstrated a herniated disc affecting his S1 nerve root. The

doctor also noted that non-operative treatment had not succeeded in relieving the claimant's symptoms.

The only reason given by the majority for disregarding the second MRI and the findings of Dr. Chan is their conclusion that a surgery performed by Dr. Chan was not successful. While I agree that the success of a surgery, or any medical procedure, is an indication that the treatment was related to the condition being treated, such a finding is not a prerequisite for concluding that treatment is reasonable and necessary. Sometimes, as is the case here, a surgery has a poor result. But, despite the poor result, given that the claimant had a herniated disc that was compressing his nerve root and causing pain and related symptoms, the surgery carried out by Dr. Chan was reasonable, necessary, and related to the claimant's injury. Further, I note that, in past decisions, the Full Commission has almost routinely found that this type of surgery is appropriate for the claimant's condition.

In conclusion, I find that the treatments the claimant received from Dr. Chan, including surgery, were reasonably necessary medical treatment. Furthermore, I

also find that the claimant has proved by a preponderance of the evidence of record his entitlement to additional temporary total disability benefits and permanent partial disability benefits based upon a 10% anatomical impairment to the body as a whole.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner