

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613418

BOBBY CLARK,
EMPLOYEE

CLAIMANT

BOBBY CLARK CONSTRUCTION,
EMPLOYER

RESPONDENT

CINCINNATI INDEMNITY COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 12, 2009

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

Claimant represented by the HONORABLE AMANDA COX,
Attorney at Law, Greenwood, Arkansas.

Respondents represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed February 11, 2009. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. In March and April 2005, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00 for total

disability and \$350.00 for permanent partial disability.

4. In March and April 2005, the claimant sustained a compensable injury to his lumbar spine that was in the form of a herniated intervertebral disc at the L5-S1 level.

5. There is no dispute over liability for the expense of medical services provided to the claimant through the visit with Dr. Christopher Boxell on May 30, 2007.

6. The medical services provided to the claimant and recommended to the claimant by Dr. Boxell, after May 30, 2007, represent "reasonably necessary medical services" for the claimant's compensable lumbar injury. Specifically, the claimant has proven by the greater weight of the credible evidence that these medical services were necessitated by or connected with his compensable lumbar injury and have a reasonable expectation of accomplishing their various intended purposes or goals.

7. There is no dispute, at the present time, over the claimant's entitlement to temporary benefits.

8. At the present time, the respondents have accepted liability for a 10 percent permanent partial disability to the body as a whole for permanent physical impairment.

9. The respondents have controverted the claimant's entitlement to any additional treatment by Dr. Boxell, after May 30, 2007.

10. As no controverted benefits have been awarded to the claimant, no controverted attorney's fee can be awarded to his attorney.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a

preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the February 11, 2009 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in

accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment recommended by Dr. Boxell after May 30, 2007. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury on April 15, 2005. The claimant ultimately underwent surgery for a left-sided disc herniation at L5-S1 on April 24, 2006. Dr. Michael Standefer performed that surgery after conservative treatment failed. The claimant received a 10% permanent anatomical impairment rating which was accepted and paid by the respondents.

In a report dated July 25, 2006, Dr. Standefer noted that the claimant had developed focal pain in the left paravertebral region of his lumbar spine with some radiation in his hips which claimant reported began on July 3, 2006. He reviewed an MRI ordered by Dr. Griggs and opined that it showed only "post operative changes" in the lumbar region and that the claimant's physical examination was "unremarkable". Dr. Standefer recommended continued conservative treatment in the form of oral anti-inflammatories and physical therapy. He stated that these residual symptoms in the claimant's lumbar spine and into the leg were "most likely related" to the effects of the claimant's surgery. He indicated that epidural steroid injections might be appropriate and scheduled the claimant for a return appointment. The claimant never returned to Dr. Standefer.

The claimant sought treatment from Dr. Christopher Boxell in Tulsa, Oklahoma on August 9, 2006. Dr. Boxell opined that the claimant's low back and left leg complaints were the result of physical damage and resulting scarring that involved the L5-S1 intervertebral disc and surrounding structures, including the body of the L5 vertebra. Dr. Boxell stated that two treatment modalities had a reasonable

expectation of further reducing or alleviating the claimant's pain. The first of which was a spinal fusion of the L5 and S1 vertebra and the second being the replacement of the damaged disc with a prosthetic or artificial disc. After further testing, Dr. Boxell concluded that the claimant was an candidate for disc replacement surgery and that this was a "reasonable and medically necessary" procedure.

The claimant requested the surgery and the majority has found that the surgery is reasonable and necessary medical treatment. My review of the evidence demonstrates that this finding is in error.

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the

treatment of the compensable injury. Wal-Mart, supra; GEO Specialty Chemical v. Clinqan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Gardner v. Area Agency on Aging, Full Commission Opinion, January 4, 2006 (Claim No. F302438); Jones v. Seba, Inc., Full Commission Opinion, December 13, 1989 (Claim No. D512553).

There are two conflicting medical reports in this case. In his deposition, Dr. Boxell stated that the claimant would probably have a 70 percent change of significantly reducing or alleviating the chronic pain in his lower back and his leg. Dr. Standefer, who was the claimant's neurosurgeon that performed the prior

surgery, stated in his deposition that he not see anything in his last visit with the claimant that would indicate that the claimant was a candidate for disc replacement. The majority has given more weight to Dr. Boxell's opinion. However, I find the opinion of Dr. Standefer should be given more weight.

First and foremost the evidence indicates that Dr. Boxell was told by the claimant at his initial evaluation that he had an inability to do all his normal activities. The video surveillance of the claimant shows otherwise. The claimant is seen bending and stooping without difficulty. Most telling, however, is Dr. Boxell's examination of the claimant. Dr. Boxell found that the claimant had full range of motion and a normal neurological examination. At one point, Dr. Boxell stated that the purpose of the recommended surgery was to get the claimant's function back. However, when he examined the video and photos of the claimant, he then stated that the surgery was not to regain function but was for pain relief. Dr. Boxell did admit that his examination of the claimant was the same as Dr. Standefer's in that it was "unremarkable". He went on further to admit that most people undergoing artificial disc replacement have fairly normal exams.

He also admitted that, in agreement with Dr. Standefer, that a positive discogram in and of itself would not mean that the claimant was a candidate for surgery.

Dr. Standefer, on the other hand, was the claimant's neurosurgeon who performed the claimant's initial surgery. He did not miss any disc fragments and did a repeat MRI which found no recurrent disc material. He felt that the claimant had a good result from the surgery. The claimant had full range of motion and his neurological examination was normal.

Therefore, when I consider the opinions of both Dr. Boxell and Dr. Standefer, I give more weight to the opinion of Dr. Standefer who was the claimant's treating physician and did his initial surgery. The claimant had a normal neurological examination and this was even noted by Dr. Boxell. The claimant had full range of motion, also noted by Dr. Boxell as well. There are major risks associated with artificial disc surgery including partial or complete paralysis, impaired bowel or bladder function, impaired sexual function, injury to intraabdominal structures, infection, deep venous thrombosis, pulmonary embolism, myocardial infarction, pneumonia, bladder infection, stroke and possibly death. Dr. Boxell noted that the

claimant's treatment was for degenerated disc. After reviewing the video and pictures, Dr. Boxell recognized that the claimant was clearly able to function. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that the artificial disc replacement surgery is reasonable and necessary medical treatment. Accordingly, I must dissent from the majority's award.

KAREN H. MCKINNEY, COMMISSIONER