

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F709541

JAMES KING,
EMPLOYEE

CLAIMANT

STAFFMARK INVESTMENTS, LLC,
EMPLOYER

RESPONDENT

AMERICAN HOME ASSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 18, 2009

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, Arkansas.

Respondent represented by the HONORABLE MELISSA WOOD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part;
reversed in part.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed October 14, 2008. The administrative law
judge found that the claimant was entitled to a period of
temporary total disability benefits, and that Dr. Barrett-
Tuck's diagnostic recommendations were reasonably necessary.
After reviewing the entire record *de novo*, the Full
Commission finds that the claimant did not prove he was

entitled to temporary total or temporary partial disability benefits. We find that the claimant proved he was entitled to the diagnostic studies recommended by Dr. Barrett-Tuck.

I. HISTORY

The record indicates that James Russell King, age 38, became employed with Staffmark on or about June 14 2007. Mr. King testified that he worked approximately one-half day at Arkansas Glass and was then sent to International Paper. The claimant described his work at International Paper: "I just worked on the end of the assembly line, throwing cardboard boxes into a machine to make the boxes." The parties stipulated that the claimant sustained a compensable injury to his low back on June 20, 2007. The claimant testified, "I had been over to get the last of the boxes next to the conveyor - the last stack - and when it did, the load of boxes behind it had flipped over on me." The claimant testified that he was struck "Basically from my head to my lower back....I was bent over."

The claimant treated with Dr. Michael Lack on June 22, 2007: "Pt has worked for Staff Mark at IP for two weeks. Pt was bent over and had a stack of boxes fall over on him. Most stack could weigh is 40-50 pounds....Pt is complaining of numbness in both hands, all fingers....Pt has no bruises

or abrasions." Dr. Lack assessed "Numbness, Hand" and "Contusion, Back." Dr. Lack also commented, "No objective findings. Complaints not anatomical." Dr. Lack returned the claimant to work on June 22, 2007 with the following restrictions: "No heavy manual labor, No stooping, crawling or bending, Not to lift/push or pull > 5 lbs."

The conclusion from imaging of the claimant's cervical spine on June 27, 2007 was "Negative study." However, the claimant informed Dr. Lack on June 28, 2007 that he was experiencing numbness in his hands, arms, and legs, and that "when sleeping at night whole body is numb." Dr. Lack returned the claimant to work with the restrictions, "No heavy manual labor, No stooping crawling or bending, Not to lift/push or pull >5 lbs."

On June 28, 2007, the claimant was given a Staffmark Acknowledgment of Alternate/Modified Work: "This letter serves as notice to you that Alternate/Modified duty is available as of 6-28-07 and you should report to work at the Staffmark Office at 8:00 am on 06-28-07 for your assignment. Failure to report will be considered an unexcused absence, and you will not be paid for any days missed. Staffmark has made a strong commitment to providing gainful employment to our injured employees during their recovery from work

related injuries, and we would appreciate your cooperation." The claimant signed the Acknowledgment on June 28, 2007 and indicated, "I decline."

The claimant testified regarding his refusal to sign the Acknowledgment of Alternate/Modified Work: "I was complaining with my neck problem of the injury, and [Nikki White] wanted me to stand out on the highway and hold a sign over my neck that said welders needed, and I told her I'd rather not do that until I had seen a physician, cause of my headaches and numbness and the hurt in my neck." The claimant did not believe that this activity complied with his physical restrictions because "Just basically having something - the pressure that the sign, whether it be a pound of (sic) five pounds, just on my shoulders, and standing out on the concrete with the sign on my shoulders."

Nikki White, Senior Staffing Specialist for Staffmark, testified for the respondents:

Q. How do you know Mr. King?

A. I interviewed Mr. King when he first came in. I placed him in his first assignment, and then placed him in his last assignment. And I was the lead person for workman's comp in the office and so I dealt with him with that....

Q. You're aware that he had an injury while working at International Paper on June 20th, 2007 - is that correct?

A. Yes, ma'am....

Q. Okay, when they bring the paperwork back to you from the doctor, what happens then, as far as their work duty?

A. I look at the modified duty - it's modified duty, and we always offer modified duty assignments. And the State of Arkansas lets them be off seven days without compensation, so we always wait until the seventh day to bring people in. I filled out the modified duty form and we tell people that they can be doing anything from counting paper clips to watching videos, and they will be, weather appropriate, standing outside, if that meets their limitations, holding the welding sign. They do not have to drape it over their neck or shoulders. It is a sandwich board sign that weighs less than a pound, and it has ropes that make it available to do that for people that have arm injuries that can't hold it, but you're perfectly capable of holding the sign with both hands without draping it over your shoulder, and standing out at the road, on our sidewalk, advertising for welders, which is a need that we consistently have.

Q. Is that the light-duty position you discussed with him?

A. Absolutely.

In any event, Dr. Lack referred the claimant to a physiatrist, Dr. Terence P. Braden, III, D.O. Dr. Braden consulted with the claimant on July 30, 2007 and recommended an MRI scan of the claimant's cervical spine.

The claimant testified that he was informed on July 31, 2007 that his employment had been terminated effective July 3, 2007.

Dr. Braden noted on August 13, 2007, "His MRI scan of his cervical spine reveals degenerative changes throughout. There is no evidence of disc herniations. There is noted to be moderate to severe bony neuroforaminal stenosis on the left side C3 through C6. I explained to Mr. King the finding of his scan as well as its meaning. I think that participation in an outpatient therapy environment would certainly be appropriate. He can do an alternate duty as previously outlined."

The claimant treated with Dr. Sunil Gera, a pain management clinician, who performed epidural steroid injections. Dr. Gera reported on November 27, 2007, "He had cervical epidural steroid injections and states he did not have relief. He has been calling for narcotics....Patient again stated he cannot work. Again, in my opinion there is no cause for him to not work. He does not have herniated disk or neuroforaminal compromise, no pinched nerve and should be able to work. I will leave this to the judgment of Dr. Braden as the patient is not satisfied with his results....I will not refer him to a neurosurgeon. No need for stronger narcotics....I will discharge him and allow him time to think about continuing treatment. If he decides to continue treatment I will be glad to see him as needed."

Dr. Braden noted on December 4, 2007, "Mr. King comes in for a follow up visit....He's requesting a change to another physician from me. I explained to him that this would be through his case manager or through the Workers Compensation Commission but I could see no need for neurosurgical input at this time....He has marked subjective complaints of pain that I cannot completely objectify by the evidence that has been presented."

Dr. Braden wrote on December 19, 2007 that the claimant had reached maximum medical improvement as of that date, that the claimant could return to work at full duty, and that the claimant's anatomical impairment was 0%.

The claimant testified that he was granted a change-of-physician to Dr. Rebecca Barrett-Tuck. The claimant consulted with Dr. Barrett-Tuck on March 26, 2008:

James King is a 37-year-old gentleman who comes today for evaluation of severe neck pain, bilateral arm pain, and headache. Mr. King was apparently a Staffmark employee June 20th working for International Paper. When he bent over next to the conveyor belt, multiple boxes apparently fell off the conveyor landing on his head and shoulders and knocking him to the floor....He immediately reported a severe headache and numbness in his hand. He was working the evening shift, and the next day he was sent to see his physician. From there, he was referred to Dr. Braden for treatment and thereafter to Dr. Gera. After several blocks, Mr. King felt that he was not getting relief with the spinal injections; therefore, he requested a referral

to a neurosurgeon. Apparently, this was not honored by Dr. Gera; therefore, he requested a change in physicians so that he could undergo a neurosurgical evaluation. He continues to have pain in the neck, the trapezius areas, and both arms. He also complains of severe numbness and tingling involving his hands as well as weakness in his hands. Since the injury, Mr. King has attempted to improve his condition by losing weight. He is now down to approximately 275 pounds from 320 pounds. Unfortunately after the accident, Staffmark asked him to take a job with a sign that strapped around his neck while he stood out on Nettleton Avenue. He did not feel he would be able to do that due to his severe neck pain, and he was fired from that company....

MRI of the cervical spine shows no clear-cut lesion that will require surgical intervention; however, there are some mild findings that I think could be better evaluated through a myelogram and post-myelogram CT scan, particularly considering the continued severe pain.

Dr. Barrett-Tuck assessed "1. Severe persistent neck pain and bilateral arm pain, not responding to conservative treatment, questionable significant abnormalities on MRI. 2. Probable carpal tunnel syndrome." Dr. Barrett-Tuck planned "1. Myelogram and post-myelogram CT scan of the cervical spine. 2. EMGs and nerve conduction studies of upper extremities. 3. I will see Mr. King back thereafter."

The claimant testified that he had not undergone the diagnostic testing recommended by Dr. Barrett-Tuck.

A pre-hearing order was filed on June 3, 2008. The claimant contended, among other things, that he sustained a compensable injury to his neck on June 20, 2007. The claimant contended that he had been off work since the accident and was fired in July 2007. The claimant contended that he was entitled to additional benefits as outlined in the medical notes of Dr. Barrett-Tuck, and that he was entitled to temporary total disability benefits and attorney's fees. The respondents contended that all appropriate benefits had been paid. The respondents contended that the claimant "was released as having reached maximal medical improvement on 12/19/07. He was released to full duty work and assigned a zero percent permanent partial impairment." The respondents contended that the claimant was not entitled to additional medical treatment as recommended by Dr. Barrett-Tuck.

A hearing was held on July 18, 2008. At that time, the claimant contended that he was entitled to temporary total disability benefits from June 20, 2007 until December 19, 2007, or alternatively, that he was entitled to temporary partial disability for four hours daily during that period. The claimant reserved the issue of temporary disability beyond December 19, 2007. The respondents contended that

they made light duty available for the claimant during the requested period of temporary disability.

The claimant at hearing described his symptoms: "I still have the headaches daily, and numbness pretty much 24-7 in my arms. It's just worse at times, like when I lay down on my neck. I'm more comfortable when I sit up because of my neck."

An administrative law judge filed an opinion on October 14, 2008. The administrative law judge found, among other things, that the claimant "was temporarily totally disabled for the period beginning June 21, 2007, and continuing through December 19, 2007." The administrative law judge found that the diagnostic studies recommended by Dr. Barrett-Tuck were reasonably necessary in connection with the compensable injury. 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 requested 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).

In the present matter, the parties stipulated that the claimant sustained a compensable injury on June 20, 2007. The claimant testified that a stack of boxes fell and hit the claimant's head, neck, and back. The claimant testified that since the compensable injury he has subsequently suffered from headaches and pain, in addition to numbness in his upper extremities. The medical records corroborated the claimant's testimony in this regard. Dr. Lack saw the claimant on June 22, 2007 and noted that the claimant suffered from numbness in his hands and a contusion to his back. The claimant thereafter treated with Dr. Braden and Dr. Gera. Dr. Gera pronounced maximum medical improvement as of December 19, 2007. However, Dr. Barrett-Tuck noted on March 26, 2008 that the claimant was suffering from post-injury headaches and numbness in his upper extremities. Dr. Barrett-Tuck reported, "MRI of the cervical spine shows no clear-cut lesion that will require surgical intervention; however, there are some mild findings that I think could be

better evaluated through a myelogram and post-myelogram CT scan, particularly considering the continued severe pain."

A claimant may be entitled to on-going 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). In the present matter, the record shows that Dr. Barrett-Tuck's treatment recommendations are reasonably necessary in order to ascertain the source of the claimant's continued pain and to better assess the claimant's post-injury physical condition. Commissioner McKinney's dissent states that there is no connection between carpal tunnel syndrome and the claimant's work related injury. The Full Commission has not found that there is a connection between the claimant's compensable injury and a possible diagnosis of carpal tunnel syndrome. The Full Commission is simply noting the obvious evidence of record demonstrating bilateral hand numbness following the stipulated compensable injury. The claimant began complaining of pain in his hands shortly after the stipulated compensable injury and continued to report such pain through the time of the hearing before the administrative law judge. The Full Commission is simply

allowing Dr. Barrett-Tuck, an expert neurosurgeon, to more clearly attempt to ascertain the source of the claimant's complaints of pain. The Full Commission therefore affirms the administrative law judge's award of additional medical treatment in the form of diagnostic testing by Dr. Barrett-Tuck.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages, whereas temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Ark. Code Ann. §11-9-526 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 justifiable.

In the present matter, the parties stipulated that the claimant sustained a compensable injury on June 20, 2007. Dr. Lack began treating the claimant on June 22, 2007 and assigned work restrictions of no heavy manual labor; no

stooping, crawling, or bending; and no lifting, pushing, or pulling greater than five pounds. Dr. Lack reiterated these work restrictions on June 28, 2007. The respondent-employer attempted to provide the claimant appropriate modified work on June 28, 2007. The claimant testified, and Nikki White agreed, that the respondents asked the claimant to hold and/or carry a sign advertising the need for welders. Ms. White credibly testified that the sign weighed less than one pound, and that other appropriate duties could be assigned the claimant. The claimant expressly declined this appropriate modified work duty. The evidence shows that the claimant on subsequent dates began throwing items, yelling, and cursing to such an extent that the respondents obtained a restraining order. The claimant testified that he subsequently pled guilty to the charge of criminal trespassing on the respondents' premises.

The instant claimant did not prove that he was totally incapacitated or partially incapacitated from earning wages at any time after the June 20, 2007 compensable injury. The evidence shows that the respondent-employer offered the claimant appropriate work within the claimant's physical restrictions, and that the claimant declined this offer. The record therefore demonstrates, pursuant to Ark. Code

Ann. §11-9-526, that the claimant refused suitable work offered to him, and that such refusal was not justifiable. The claimant therefore did not prove that he was entitled to any period of temporary total or temporary partial disability benefits.

Based on our *de novo* review of the entire record currently before us, the Full Commission finds that the claimant proved he was entitled to the diagnostic recommendations set forth by Dr. Barrett-Tuck in her March 26, 2008 correspondence. The claimant proved that these treatment recommendations were reasonably necessary in connection with his compensable injury. The claimant did not prove that he was entitled to any period of temporary total or temporary partial disability benefits. The Full Commission therefore affirms the administrative law judge's findings in part, and we reverse in part. For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

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

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority's opinion finding that the claimant has failed to prove by a preponderance of the evidence entitlement to temporary total disability benefits from June 21, 2007, through December 19, 2007, and finding that treatment recommendations of Dr. Barrett-Tuck for additional diagnostic testing is reasonable and necessary medical treatment for which the respondents are responsible. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the credible evidence entitlement to these additional benefits. Therefore, I must concur, in part, with the finding denying additional temporary total disability benefits, but must dissent, in part, with the award of additional medical treatment. In a recent published opinion the Court of Appeals clearly held that merely because a change of physician doctor orders additional diagnostic testing, such recommended treatment is not automatically compensable. See Goyne v. Crabtree Contracting Co., ___ Ark. App. ___, ___ S.W.3d ___ (March 18, 2009) The Court in Goyne noted that the controlling factor was not the change of physician statute but whether the recommended treatment or testing is

reasonable and necessary for the treatment of the compensable injury. The Administrative Law Judge did not examine the claimant's previous medical treatment and testing to determine whether the additional testing recommended by Dr. Barrett-Tuck was reasonable. Rather, he merely found that since she ordered additional testing, more diagnostic testing was reasonable. Pursuant to Goyne, it is for the Commission to determine, based upon all the medical evidence, which medical evidence to assign greater weight to and to determine the reasonableness of the recommended treatment.

The claimant was employed as a temporary employee for respondents' temporary staffing agency. Claimant's first assignment was to work for Arkansas Glass earning \$10.00 per hour. After only working half a day for Arkansas Glass, the claimant called respondents advising that since he had a previous conflict with a permanent employee of Arkansas Glass which involved a verbal altercation he could not work there. The claimant was assigned to another employer, International Paper, as a general laborer earning \$8.00 per hour. A better position earning \$9.00 opened up with International Paper, and he was placed in this job. The claimant was working in this position on June 20, 2007, when

he sustained an injury when he was struck in the neck and back by a stack of cardboard as he bent over near a conveyor line. The claimant's injury was accepted as compensable. Respondents arranged for the claimant to undergo a drug screen that morning by a local physician and inquired whether the claimant needed medical attention. Assuming that a little rest was all he needed, the claimant declined medical treatment at that time. However, by the next morning, the claimant called respondents and advised that he needed to go to the doctor for treatment.

An appointment was scheduled for the claimant to see Dr. Michael Lack on June 22, 2007. The medical report from this office visit revealed complaints of "numbness and tingling in both hands. Pt reports the tingling in both hand is constant. When he sits or lies down he has tingling in his entire back." Dr. Lack further noted that the claimant complained of "a headache which is resolving." Contrary to the assertion by the majority that the claimant had a contusion to his back, when claimant was examined by Dr. Lack he observed that the claimant did not have any bruising or abrasions from his accident, that the claimant's reflexes were normal and that he had no weakness or drift in his arms. Dr. Lack found that the claimant did not have any

anatomical explanation for his complaints nor were there any objective medical findings of an injury. Dr. Lack prescribed Ibuprofen and heat and recommended that the claimant not perform heavy manual labor with no stooping, crawling, or bending and no lifting or pushing over five pounds. The claimant was scheduled to return for a follow-up visit on June 28th. X-rays were performed on the claimant's cervical spine on June 25, 2007 which were unremarkable and described by the radiologist at a negative study.

When the claimant returned to Dr. Lack on June 28th, his complaints increased to include bilateral leg numbness and pain in his left shoulder and neck. However, Dr. Lack's physical examination again yielded no objective findings and all diagnostic testing was normal. Nevertheless, Dr. Lack now included Darvocet and physical therapy to the claimant's treatment regime. Again, Dr. Lack released the claimant to work with no heavy manual labor, no stooping, crawling or bending and no lifting or pushing over five pounds. A return visit was scheduled at that time for July 6th.

Although the respondents promptly provided the claimant with reasonable and necessary medical treatment, and although he was receiving treatment from Dr. Lack, the

claimant sought medical treatment from the emergency room at St. Bernard's Medical Center on June 30th and July 3rd.

Claimant did not introduce the actual medical records from his visits to the emergency room. The only records from these visits which were introduced in to evidence are the Home Care Instructions provided to the claimant upon his discharge. These instructions reveal a diagnosis of "Neck Strain" or "Neck Pain" for which he was prescribed Vicodin and Indocin for pain, however the documents do not contain the claimant's complaints or the nurse and physician's examinations and findings.

The claimant returned to Dr. Lack on July 6th, for his follow-up visit. There is no indication in Dr. Lack's medical report from this date that the claimant advised him of his emergency room visits or of the narcotic medications prescribed to him by the emergency room physicians. After examining the claimant and noting no changes other than an increase in the claimant's subjective complaint of pain, Dr. Lack continued the claimant's medication and again released him to light duty. However, Dr. Lack did make arrangement to refer the claimant to a physiatrist at that time.

Upon referral by Dr. Lack, the claimant was examined and treated by Dr. Terence Braden on June 20, 2007.

Dr. Braden recorded the following history:

Mr. James King is a 37 year old male who is employed through Staffmark and worked at International Paper when on 6-20-2007 he was picking up a piece of cardboard to load it into the machine and a load of cardboard fell on top of him, hitting him in his head and his upper back area. He says it knocked him down. He really didn't have much discomfort. He was working the midnight shift, he went to see Dr. Lack that morning and said he was complaining of his feet and his hands being numb, neck pain, and upper back pain. X-rays were done which did not reveal any evidence of distinct abnormality. As time went by he began to have more varied complaints: numbness in both his hands, all of his fingers, difficulty with his feet feeling tingly. He evidently had an x-ray done of the lumbosacral spine which did not reveal any evidence of an abnormality. He was tried on some medications but did not have any distinct improvement. He is now seen today at the request of Dr. Lack for a consultation only for numbness in the hands and back contusion. He reports he's never had any injury to his neck or upper back before, he's never had any difficulty with his hands. He was employed for a few months with Staffmark before he was injured. He said that he never had any previous employment and that he said he's been incarcerated on and off since the year 2000.

After conducting a thorough examination of the claimant which did not reveal any muscle spasms or other objective medical findings, Dr. Braden noted, "I cannot find on his examination an objective cause for his entire right arm numbness in the circumferential manner and the left dorsum of his hand being numb." Accordingly, Dr. Braden ordered a cervical spine MRI to rule out a central disk herniation even though the claimant's physical examination was not indicative of a herniated disc. Finally, Dr. Braden opined, "I don't think any of the medication that needs to be added to his regimen. He has multiple and varied complaints that are difficult to correlate with the injury that he reports to have sustained."

The claimant sought treatment again from the emergency room on August 9, 2007. The Home Care Instruction sheet that was the only documentation of this hospital visit lists a diagnosis of "Cervicalgia" and reveals that the claimant was prescribed Lortab and Flexeril.

Claimant returned to Dr. Braden on August 13, 2007, with continued vague complaints of pain. Dr. Braden reviewed the claimant's cervical MRI which revealed "degenerative changes throughout. There is no evidence of disc herniations. There is noted to be moderate to severe

bony neuroforaminal stenosis on the left side C3 through C6." After explaining these findings and their meaning to the claimant, Dr. Braden recommended that he claimant undergo outpatient therapy.

No medical records of claimant's physical therapy were introduced into evidence. However, the claimant testified that he attended physical therapy on August 21st, 22nd, 27th, 29th, 31st, and September 4th.

The claimant was referred to Dr. Sunil Gera for cervical epidural steroid injections. Although all of Dr. Gera's medical records were not introduced into evidence, the claimant testified that he was treated by Dr. Gera on October 11th, 18th, November 6th, 13th and 27th. The first office note from Dr. Gera which was introduced into evidence is dated November 6, 2007, and refers to the claimant having been under his care long enough to have had at least two epidural steroid injections. In his office visit notation from November 6, 2007, Dr. Gera noted that after having two cervical epidural steroid injections the claimant was "no longer complaining of pain to the arm." However the claimant reported pain in his neck and headaches. After examining the claimant, Dr. Gera stated:

1. Patient has osteophytosis and spondylosis at multiple levels, it

is highly likely during his injury he may have injured these joints. He has axial pain with tenderness in the facets and has not responded to the epidural. He is no longer complaining of radicular pain so I will not proceed with epidural steroid injection. I will rule out the cervicogenic cause of headache by giving left C2-3, C3-4 medial nerve branch block and with the third occipital nerve block. Procedure was explained in detail using the spinal model and he agreed.

2. We had a detailed discussion regarding narcotics, I explained I do not think he is a candidate for stronger narcotics. He said these give him relief, however, I explained he has been taking narcotics from different doctors. If he does not agree with my plan that I will be glad to discharge him, however, I do not think he is a candidate for narcotics for nonmalignant pain. He can take Ultracet. I will give muscle relaxant Zanaflex which should also help with sleep.

3. In the meantime we will have the results of the diagnostic block. Patient did understand and left happily.

The claimant returned to Dr. Gera on November 26, 2007, at which time Dr. Gera noted the following history:

Mr. King has been followed in my clinic for his neck pain of multiple etiology. He had cervical epidural steroid injections and states he did not have

relief. He has been calling for narcotics. We gave diagnostic block for left C2-3, C3-4 to rule out the cervicogenic cause of headaches. **Patient has written a pain score of 8 went to 0,0,0**, then was 5,8,8. Today in the office patient states he does not think the injections are helping him, he is having constant headaches, and cannot work. Patient wants me to refer him to a neurosurgeon.

(Emphasis in original)

Upon examination, Dr. Gera noted that despite the claimant's written score of pain at 8, the claimant did not appear to be in acute distress. Dr. Gera explained to the claimant that after examining him that he did not feel that the claimant had a cause for a neurosurgical referral, but that he would leave that determination up to Dr. Braden. Dr. Gera again advised the claimant that he would not prescribe stronger narcotics. While the claimant stated that he could not work, Dr. Gera noted in this report, "in my opinion there is no cause for him to not work. He does not have herniated disk or neuroforminal compromise, no pinched nerve and should be able to work." Finally, Dr. Gera noted that the claimant's diagnostic test for left C2-3,C3-4 was positive and he discharged the claimant back to Dr. Braden's care.

The claimant testified that while he was treating with Dr. Gera he made several visits to the emergency room because Dr. Gera would not give him pain medication. However, it is noted that the claimant was also under the care of Dr. Braden, yet he did not attempt to go to Dr. Braden with these pain complaints. Moreover, the Home Care Instructions introduced into evidence by the claimant reflect emergency room visits on September 30th, October 19th, 24th, 30th, and November 4th. There is no record of the claimant seeking treatment from the emergency room after Dr. Gera successfully administered the cervical epidural steroid injections which eliminated the claimant's arm pain.

The claimant was last examined by Dr. Braden on December 4, 2007, after he was discharged from Dr. Gera's care. Dr. Braden noted that the claimant was "very distraught" about his last visit with Dr. Gera. Nevertheless, the claimant admitted that the injections gave him some improvement although the back of his head was numb. The claimant complained, however, that once the block wore off, his pain returned. After the claimant requested a referral to a neurosurgeon, Dr. Braden wrote in his report:

I discussed with Mr. King during this lengthy visit, I'm accompanied by Barbara, my nurse, that the scan that was done of the cervical spine revealed

some degenerative changes which pre-existed his injury. I could not find distinct cause for his ongoing symptoms although Dr. Gera's injections did give him improvement. Mr. King reiterates that he was so numb the entire back of his neck that he couldn't feel anything and couldn't tell if it really improved him or not.

He's requesting a change to another physician from me. I explained to him that this would be through his case manager or through the Workers Compensation Commission but I could see no need for neurosurgical input at this time.

Dr. Braden started the claimant on Neurontin and advised that if the claimant did not receive any distinct improvement from this medication, then there was nothing further that he had to offer the claimant for his subjective complaints of pain. The claimant was advised to contact Dr. Braden in 10 days to report on any progress in his symptomatology. In a hand written note dated December 18, 2007, Dr. Braden advised that the claimant was at MMI with a 0% permanent impairment rating and that he could return to work full duty.

After receiving a Change of Physician Order from the Workers' Compensation Commission, the claimant was seen by Dr. Rebecca Barrett-Tuck, a Jonesboro neurosurgeon, on March 26, 2008. Upon examination, the claimant complained of

"pain in the neck, the trapezius areas, and both arms...severe numbness and tingling involving his hands as well as weakness in his hands." The claimant reported that he was currently taking Hydrocodone-Acetaminophen 500 Mg caplets. Dr. Barrett-Tuck's physical examination yielded complaints of headache, but no dizziness or numbness, and some tenderness across the trapezius areas. Dr. Barrett-Tuck reviewed the MRI scans and noted that they revealed "no clear-cut lesions that will require surgical intervention; however, there are some mild findings that I think could be better evaluated through a myelogram and post-myelogram CT scan, particularly considering the continued severe pain." Dr. Barrett-Tuck assessed the claimant with severe persistent neck pain and bilateral arm pain and probable carpal tunnel syndrome. She ordered a myelogram and post-myelogram CT scan of the cervical spine and an EMG and nerve conduction studies of the upper extremities.

Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Employers are

only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). In workers' compensation cases, the burden rests upon the claimant to establish his claim for compensation by a preponderance of the evidence. Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board, 47 Ark. App. 181, 888 S.W.2d 314 (1994). 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. Deborah Jones v. Seba, Inc., Full Commission Opinion, Dec. 13, 1989 (D512553).

Although the claimant contends that he was in severe pain and required the services of a neurosurgeon, both of his treating physician, Dr. Braden and Dr. Gera did not believe that the claimant's symptoms and findings warranted a referral to a neurosurgeon. Moreover, the claimant did not display any hesitancy to visit the emergency room over eight times between June 30, 2007, and November 4, 2007, even when he was under the active treatment of at least two physicians. However, the claimant's subjective pain complaints never caused him to

seek emergency room treatment after his last visit with Dr. Braden on December 4, 2007. Dr. Braden and Dr. Gera both opined that the claimant's diagnostic MRI only revealed degenerative disc disease. Likewise, Dr. Barrett-Tuck was unable able to note the presence of any surgical lesion on the claimant's cervical MRI. However, because the claimant continued to complain of pain, Dr. Barrett-Tuck recommended additional testing.

I do not find the claimant's continued complaints of pain to be credible. First, as noted above, the claimant's alleged severe pain was not significant enough to cause him to seek treatment for it for over five months. The claimant had no qualms about going to the emergency room for treatment when he thought he needed treatment, yet he did not do go to the emergency room after he was released by Dr. Barrett-Tuck. Moreover, the claimant's pain complaints were thoroughly examined and investigated by both Dr. Braden and Dr. Gera. Neither of these physicians found the claimant's subjective pain complaints were supported by objective medical findings. The claimant's pain was treated through medication, physical therapy, and injections. Dr. Gera noted that the claimant's complaints were not in accordance with a pinched nerve or a herniated disc.

Moreover, despite the claimant's testimony to the contrary, the claimant actually received improvement from the cervical epidural steroid injections as he reported no pain in his arms when he was examined by Dr. Gera on November 6, 2007, nor did the claimant complain of arm pain or numbness when he was last seen by Dr. Gera on November 27, 2007, or by Dr. Braden on December 4, 2007.

While the claimant may be entitled to ongoing medical treatment after the end of his healing period in order to maintain his present level of healing, I find that the claimant has failed to prove by preponderance of the evidence that the additional testing recommended by Dr. Barrett-Tuck is reasonable and necessary in connection with his compensable injury. The claimant has undergone diagnostic testing as well as diagnostic and therapeutic injections. The claimant received benefit from the cervical epidural steroid injections, although he now contends that his pain never improved. The respondents have provided appropriate medical treatment, physical therapy, pain management, and medication. No surgeon, including Dr. Barrett-Tuck, has opined that the claimant is a surgical candidate. Furthermore, part of the recommended testing by Dr. Barrett-Tuck is an EMG and nerve conduction study for

possible carpal tunnel syndrome. Clearly, there is no connection between possible carpal tunnel syndrome and the claimant's work related injury. Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that the treatment recommended by Dr. Barrett-Tuck is reasonable and necessary in connection with his compensable injury. Therefore, I must respectfully dissent from the majority opinion awarding additional medical treatment.

With regard to the claimant's request for temporary total disability benefits, I find that the claimant was released to light duty and that he declined a reasonable offer of light duty; therefore, he is not entitled to any benefits. Accordingly, I concur with the majority opinion finding that the claimant was offered modified duty within his restrictions on June 28, 2007, but unjustifiably declined the offer. Therefore, for all the reasons set forth herein, I respectfully concur, in part, and dissent, in part, from the majority opinion.

KAREN H. MCKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

As I find the claimant is entitled to reasonable and necessary medical treatment, by and at the direction of Dr. Rebecca Barrett-Tuck, I concur with the majority's award of those medical benefits to the claimant. However, I disagree with the majority's denial of temporary disability benefits. Therefore, I must respectfully dissent from that portion of the Opinion.

The crux of the dispute regarding the claimant's request of temporary total or temporary partial disability benefits revolves around an alleged offer of re-employment made to the claimant and his supposed refusal of it. The section of the Workers' Compensation Act relevant to this issue is Ark. Code Ann. §11-9-526. This section provides as follows:

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 justifiable.

According to the testimony of Ms. Nikki White, who testified she was the senior staffing specialist with the respondent, a written offer of re-employment was made to the

claimant June 28, 2007. The offer, entitled Acknowledgment of Alternate/Modified Duty Work and dated June 28, 2007, was signed by the claimant, indicating he was declining an offer of modified duty. When Ms. White's entire testimony is considered, it becomes apparent the respondent's offer was both disingenuous and self-serving.

As outlined above, the claimant's injury occurred at approximately midnight on January 20, or the early morning hours of January 21, 2007. He saw the respondent's designated physician, Dr. Michael Lack on January 22, 2007. The doctor released the claimant to return to work with restrictions of no heavy manual labor, stooping, crawling, or bending, and not to lift, push, or pull anything in excess of five pounds. The report also noted the claimant was also suffering from a constant numbness and tingling in both hands.

Ms. White indicated she received the report from Dr. Lack shortly after the claimant saw him. However, in describing the respondent's return to work policy, she stated offers of modified duty were always made to injured workers and that: "The State of Arkansas lets them be off seven days without compensation, so we always wait until the seventh day to bring people in." As noted by the Administrative Law Judge during the hearing, the respondent employer had no reason for

not making a return to work offer to this claimant, or other injured workers, prior to the passage of seven days. If the respondent employer was as interested in the beneficial effects of returning injured workers to employment as Ms. White indicated, it would seem they would want to do so immediately and not wait seven days. The delay built into the employer's system, and the make work nature of the jobs made available, suggests the employer had no intention of providing any meaningful employment to the claimant or other injured workers. Rather, the respondent was merely attempting to negate some of their obligations to these individuals.

Clearly, the claimant declined the offer of re-employment made on June 28, 2007. However, as he indicated, the job described to him would have required him to stand outside the respondent's office with a sign draped around his neck advertising work opportunities for welders. As the claimant testified, standing in one place for long periods of time exacerbated the symptoms of his injuries, and having the sign draped around his neck would be pressing on the injured part of his body. Likewise, holding the sign would have been difficult for him because, while it was not of a particularly great weight, he was suffering from near constant tingling and

numbness in his hands. For that reason, the claimant simply did not believe he could carry out this job function.

In her testimony, Ms. White elaborated on other jobs available to the claimant such as counting paper clips or watching videos. However, the claimant testified he was not aware of these other jobs. I also note in the document the claimant signed, no job descriptions are included.

I find the claimant's refusal of the offered employment was justified. As indicated above, his neck injury would have made it extremely uncomfortable for him to stand for long periods of time with a sign draped around his neck. Likewise, he would have had a hard time holding a sign with his hands. While Ms. White asserted other jobs were offered to the claimant, the evidence does not support this conclusion. For example, the claimant, in follow-up doctor visits, told his doctor he was only offered light duty holding a sign. Further, the document the claimant signed does not indicate any particular job duties he would be offered. It also appears likely the claimant would have accepted modified duty had it involved him sitting in the office or performing some other job not having a sign draped around his neck.

Even if the claimant was found to have declined an offer of re-employment on June 28, he clearly had withdrawn that refusal the following week. In this regard, I note the above quoted statute specifically states an injured worker is not entitled to compensation only during the "continuance of the refusal. . . ." Clearly, the claimant's refusal would have ended the following week, on July 6, 2007, when he refused to sign the second document regarding his refusal or acceptance of light duty work.

It is at this point that certain discrepancies begin to appear in Ms. White's testimony, casting doubt on her credibility. Ms. White stated she advised the claimant he was terminated from further employment on July 3, 2007. According to her, she advised the claimant of this in a telephone conversation. However, the claimant was still required to return to the respondent's office, which he did on July 6, 2007. In the majority Opinion, the acrimonious disputes that arose between the claimant and Ms. White are outlined. However, it appears Ms. White was still offering the claimant a return to light duty work even though she testified he had been terminated effective July 3. If Ms. White had advised the claimant he was terminated on July 3, it is unlikely she would then offer him a return to work three days later. In

fact, the claimant's attempt to find employment on July 6 and again on July 31, supports his testimony that he was not advised of any termination until July 31, 2007.

Ms. White attempted to explain the apparent incongruity in terminating the claimant yet still offering him a return to work, by stating she would have placed him through one of their other offices or found some other job for him to do. However, I find her testimony only establishes the respondent could have provided the claimant a job had they chosen to do so.

The medical reports from Dr. Lack, Dr. Gera, and other physicians treating the claimant clearly establish he was under a disability from his injury at least through December 19, 2007, the date the claimant was fully released by Dr. Braden. While I realize that pursuant to Ark. Code Ann. §11-9-526, a good faith offer of suitable re-employment would prohibit the claimant from receiving temporary total disability benefits, I do not believe the respondent made such a bonafide offer to the claimant. Obviously, the offer was being made to limit the respondent's liability, not to provide the claimant any meaningful work. Also, even though Ms. White suggested various make work tasks were made available to the claimant, the only specific job mentioned to

the claimant was standing outside holding a sign draped around his injured neck. I believe the claimant's refusal of re-employment, under the circumstances of this case, was reasonable and, therefore, his actions do not prohibit him from receiving appropriate temporary total disability benefits. I believe the claimant's subsequent actions clearly indicate he never intended to refuse an offer of suitable employment. I therefore find the respondent should be held liable for providing the claimant temporary total disability benefits at the rate of \$240.00 per week as calculated by the Administrative Law Judge.

For the reasons set out above, I concur with the majority's award of medical benefits to the claimant but I must respectfully dissent from their denial of temporary disability benefits.

PHILIP A. HOOD, Commissioner