

## NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706791

WILLIAM EVERETT NELSON, JR., EMPLOYEE	CLAIMANT
CONESTOGA WOOD SPECIALTY CORPORATION, EMPLOYER	RESPONDENT
PENNSYLVANIA MFGRS ASSOC. INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 28, 2009

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

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, 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 March 2, 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 over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.

3. Respondents' Proffered Exhibit 2 shall be admitted into evidence and be given due weight.
4. Claimant's testimony concerning statements made by to him by Victoria Powell shall be admitted into evidence and given due weight.
5. Claimant has proven by a preponderance of the evidence that he is entitled to the surgery recommended by Dr. Phillip Kravetz.
6. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 10, 2007 to a date yet to be determined.
7. Due to Claimant's receipt of unemployment benefits during the period in question and per Ark. Code Ann. § 11-9-506(b) (Repl. 2002), his receipt of temporary total disability benefits for the period of September 10, 2007 through December 31, 2007 shall be payable in the amount of \$84.00 per week, and for January 1, 2008 through October 4, 2008 in the amount of \$50.00 pwr week. Thereafter, his temporary total disability benefits shall be payable at his full stipulated rate of \$252.00 per week.
8. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee.

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 March 2, 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.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney Dissents

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the treatment recommended by Dr. Phillip Kravetz, including but not limited surgery, is reasonable and necessary medical treatment in connection with the claimant's compensable injury and finding that the claimant is entitled to additional temporary total disability benefits from September 10, 2007, and continuing through a date yet to be determined. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove entitlement to these benefits by a preponderance of the evidence.

Claimant sustained an admittedly compensable injury to his low back on June 28, 2007, for which he received medical treatment, temporary total disability benefits through September 5, 2007, and permanent partial disability benefits for a 5% anatomical

impairment rating. After receiving conservative treatment from Dr. Eric Atkin, who had ordered an MRI and determined that the claimant was not a surgical candidate, the claimant was released to return to work. Dr. Atkin described claimant's MRI as revealing minimal degenerative changes. He ordered physical and medication therapy, as well as epidural steroid injections. After ordering a Functional Capacity Evaluation in which the claimant provided an unreliable and inconsistent effort, Dr. Atkin opined that the claimant had reached maximum medical improvement by September 5, 2007. In a letter assessing the claimant's anatomical impairment, Dr. Atkin wrote, "...under the circumstances, I do not think surgery or further invasive treatment would be successful."

The claimant then petitioned the Commission for a Change of Physician which was granted. The Commission issued an order changing the claimant's physician to Dr. Jay Lipke, but he was soon referred to Dr. Phillip Kravetz. Dr. Kravetz's prescribed basically the same treatment as Dr. Atkin, namely, epidural steroid injections, medication and physical therapy. After Dr. Kravetz's opined that the claimant was not at maximum medical improvement and recommended surgery, the

claimant was seen by Dr. Scott Schlesinger for a second opinion. After reviewing claimant's old MRI, which did not reveal the presence of any condition which would account for the claimant's present symptoms, Dr. Schlesinger ordered a new MRI. The second MRI performed on April 16, 2008, revealed evidence of a right L4-5 annular tear and bulging disc, but Dr. Schlesinger stated that it did not reveal any evidence of neural compression. Dr. Schlesinger, still wanting to determine the source of claimant's complaints, then ordered a myelogram and CT scan. These diagnostic procedures were performed on April 22, 2008. After reviewing the results of these tests, Dr. Schlesinger issued a report on April 23, 2008 stating:

There is a bulging disc at L4-5 without neural compression. There is no evidence of indication for any surgery. There is no indication, in my opinion, for discography as I do not believe in lumbar fusions for degenerative bulging discs.

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. Clingan, 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).

Only Dr. Kravetz has recommended surgery for the claimant. The Majority opinion, by affirming and adopting the decision of the Administrative Law Judge, has discredited the opinions of Dr. Atkin and Dr. Schlesinger primarily on the basis of their reliance upon the Functional Capacity Evaluation. In so finding, the Administrative Law Judge placed great emphasis upon the claimant's self-serving testimony that the functional capacity evaluation examiner was "inattentive during the evaluation, and kept stepping out to use his cell phone as the evaluation was underway." Many Functional Capacity Evaluations rely upon the examiner's observations of the patient while the patient assumes that they are not being observed. Thus, it is highly likely that the claimant may have only assumed that the examiner was "inattentive." While the claimant may have been a credible witness, claimant's one-sided, self-serving testimony about the "inattentiveness" of the FCE examiner is not sufficient to completely disregard this examination. Claimant was clearly speculating that the examiner was inattentive; he cannot know whether the examiner was discretely watching from afar. Therefore,

I find that it is error for the majority to place any weight upon this self-serving testimony and to discredit the opinions of Dr. Atkin and Dr. Schlesinger based upon this unsubstantiated speculation of the claimant.

The Commission is faced with three opinions regarding the claimant's need for surgery. Dr. Atkin unequivocally stated that he can "...find no obvious surgical indications." Likewise, Dr. Schlesinger stated that after reviewing the claimant's records he "...didn't see anything surgical...." Only Dr. Kravetz has recommended surgery. As an orthopedic surgeon, Dr. Kravetz even recommended the possibility of surgery during his first visit with the claimant.

When I analyze the proposed procedure of decompression of the L4-5 disc as recommended by Dr. Kravetz, I cannot find any evidence in the record that this procedure will remedy the claimant's condition. Both Dr. Atkin and Dr. Schlesinger are of the opinion that the claimant's degenerative condition is not surgical in nature. Dr. Kravetz hopes to alleviate the claimant's back pain, but it is well recognized that discectomies and laminectomies are not treatments for back pain. If back pain is alleviated with these surgeries, it is considered a big plus, but the goal is

to alleviate radicular pain. The objective diagnostic tests clearly reveal that the claimant does not have any neural compression to address through surgery. Thus, the need for the surgery is not clearly addressed in any of Dr. Kravetz's records. On the other hand, both Dr. Atkin and Dr. Schlesinger have clearly explained that the claimant's physical complaints and objective findings do not warrant surgery. As such, I cannot find that the recommended surgery is reasonable and necessary medical treatment.

With regard to the award of additional temporary total disability benefits, I find that the claimant has failed to prove by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages after he was deemed to be at the end of his healing period by Dr. Atkin in early September of 2007. Claimant was released to return to work by Dr. Atkin. Claimant attempted to work, but claimed his was in pain. After leaving his place of employment, however, he immediately applied for unemployment benefits holding himself out to be physically capable of working. Only Dr. Kravetz has stated that the claimant has not achieved maximum medical improvement. Dr. Kravetz hopes to operate on

the claimant. Since I find that the surgery is not reasonable and necessary, I cannot find that Dr. Kravetz's opinion that the claimant has not reached maximum medical improvement is entitled to any weight. Moreover, even if I were to find that the claimant is still in his healing period, I cannot find that the claimant is totally incapacitated from earning wages. Dr. Kravetz released the claimant to perform sedentary work during his first examination of the claimant. Since the claimant was released to work in some capacity, the claimant is not totally incapacitated from earning wages.

Accordingly, for those reasons set forth herein, I must respectfully dissent from the majority opinion.

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Karen H. McKinney, Commissioner