

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708235

JIMMY D. ROGERS,
EMPLOYEE

CLAIMANT

HYDE'S TERMITE & PEST CONTROL,
EMPLOYER

RESPONDENT

WESTPORT INSURANCE CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 9, 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 GUY ALTON WADE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed January 22, 2009. The administrative law judge found that the claimant was entitled to additional medical treatment, and that the claimant proved he was entitled to temporary total disability benefits beginning March 18, 2008 and continuing through a date yet to be determined. After reviewing the entire record *de novo*, the

Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved he was entitled to additional medical treatment, including surgery performed by Dr. Abraham. We find that the claimant proved he was entitled to temporary total disability benefits from March 18, 2008 through July 7, 2008.

I. HISTORY

Jimmy Dale Rogers, age 52, testified that he became employed with Hyde's Termite & Pest Control in about 2004. Mr. Rogers testified that he was a pest control supervisor, and that his work required spraying for pests in homes and businesses. The parties stipulated that the employment relationship existed at all relevant times, and that the claimant earned sufficient wages to be entitled to a compensation rate of \$347.00 weekly for temporary total disability benefits. The parties stipulated that the claimant sustained a compensable back injury on July 9, 2007. The claimant testified that he stepped in a hole while working and initially felt pain in his ankle. The claimant testified that he at first did not feel pain in any part of his body except his left ankle.

The record indicates that Dr. Bobby A. Thompson, a company physician, provided treatment on July 9, 2007: "Pt was at a customer's house and stepped in a hole with left leg. W/C for Hyde's. Did not fall. Didn't turn ankle over. Happened about noon. Didn't hurt then, but left calf muscle has gradually gotten more painful since then. Able to walk on left leg....sprain of left gastrocnemius muscle....Pt to stay off leg as much as possible and keep it elevated. Pt. to try to work with it. Return in 1 week if no improvement."

The claimant testified that he began experiencing back problems "approximately 20 days after I had seen Dr. Thompson....Early one morning I woke my wife up. My back was hurting severely bad. She took me to the emergency room." The claimant sought emergency treatment for right hip pain on July 29, 2007. The notes at that time indicated that the claimant's condition was "aggravated by riding to Memphis." Physical examination on that date showed muscle spasm in the claimant's back, and the clinical impression was Acute Myofascial Strain, lumbar. Treatment recommendations included medication and "total bedrest."

The claimant gave the following history at a doctor's clinic on July 30, 2007: "Woke up with back pain this past Sunday morning. Went to the ER, they gave him a shot. He is still having pain in the (R) side of his lower back. He is on pain tablets and Soma." It was indicated that the claimant could return to work on August 2, 2007.

Dr. Thompson noted on August 20, 2007, "50 year old male presents with c/o low back pain continues to have severe low back pain....Given the chronicity of pain and worsening of sx's, he needs an MRI of lumbar spine to evaluate for disc pathology." An MRI of the claimant's lumbar spine was taken on August 22, 2007, with the following impression: "1. Degenerative change of lumbar spine at multiple levels. 2. No disk herniation or spinal stenosis."

Dr. Thompson noted on August 23, 2007, "MRI shows disc bulges at multiple levels. Shows bilateral mild neural foramen narrowing at L4-5. No spinal stenosis. This would explain pt's radiculopathy down both legs. Pt did not have this before initial injury. Likely pt had degenerative disc disease before injury, but likely to have worsened due to injury to the point that pt having severe pain. I do not

feel that MRI findings reveal a surgical problem at this time. Will refer to pain management for other treatment options. Due to current pain, I don't think he could tolerate PT at this time."

Dr. John D. Brophy examined the claimant on September 24, 2007:

Mr. Jimmy Rogers is a 50-year-old white male referred at the request of Workers' Compensation for evaluation of back pain. On 9 July, 2007, he stepped in a six inch hole with his right foot. At that time, he primarily complained of right foot pain and also some low back pain. He was evaluated the same day and diagnosed with an Achilles tendon injury. Approximately ten days later, he awoke with significantly increased back pain....Mr. Rogers has been off work sedentary at home for the past six weeks. His chief complaint is back pain localized to the inferior lumbar paraspinal muscles. He has some intermittent bilateral lower extremity pain extending to his heel....

Lumbar MRI dated 22 August, 2007 demonstrates mild multilevel spondylosis without evidence of HNP or nerve root compression.

Dr. Brophy's impression was "Lumbar myofascial pain associated with lumbar spondylosis without clinical evidence of radiculopathy or radiographic evidence of nerve root compression....I have suggested conservative management with a trial of physical therapy/work conditioning program which will be set up near his home....He is cleared to return to

work at light duty with no lifting over 10 pounds and no repetitive stooping or bending."

The claimant was provided physical therapy beginning September 27, 2007. Dr. Brophy reported on October 8, 2007, "Mr. Rogers overall describes 50% improvement in his back pain since initiating a physical therapy/work conditioning program. His worst pain is localized to the left lumbar paraspinal muscles. He reports intermittent left leg pain." Dr. Brophy's impression was "Lumbar myofascial pain associated with lumbar spondylosis without clinical evidence of radiculopathy or radiographic evidence of nerve root compression....I have suggested progression of a home endurance exercise program. He is cleared to return to work today with a 25 pound lifting restriction which will increase to 35 pounds on 15 October, 2007. He will be cleared to return to work at full duty without restriction on 22 October, 2007."

Dr. Brophy stated on October 22, 2007, "In my opinion, there is no indication for surgical intervention. I have suggested continued progression of his home endurance exercise program. He is cleared to return to work today with a thirty pound lifting restriction which will be

increased to forty pounds on October 29, 2007. He will be cleared to return to work at full duty without restriction, November 5, 2007. He will be considered at maximum medical improvement, November 5, 2007, with a PPI rating of 0%. If he is unable to tolerate full duty, we discussed the option of alternative employment or another medical opinion."

The claimant testified that he requested a change of physician, and that the Workers' Compensation Commission selected Dr. Abraham. Dr. Robert E. Abraham examined the claimant on January 11, 2008: "Jim Rogers was referred by WCC....He works for a termite and pest control company when he stepped in a hole on July 9, 2007....Presently, he has pain across the low back and down the left leg all the way into his foot. He states he has a sharp stabbing pain that is constant....He states he has missed no work due to this injury, but has to take pain medication and MR to be able to do so....He is having numbness and tingling that goes all the way into his foot. He feels he has some weakness in his left leg."

Dr. Abraham assessed "1. L Lumbar Radiculopathy." Dr. Abraham planned a lumbar myelogram and continuation of light duty.

Dr. Gregory Lewis reviewed a lumbar myelogram on February 14, 2008 and gave the impression, "This patient has grade I spondylolisthesis at L5-S1 secondary to bilateral spondylolysis of L5. No other significant abnormality is identified." Dr. Abraham noted on February 14, 2008 that a lumbar myelogram revealed "min L foraminal disk bulge at L4/5." Dr. Abraham assessed "1. L Lumbar Radiculopathy" and indicated that the claimant may be a candidate for percutaneous diskectomy.

A claims supervisor informed the claimant on March 14, 2008, "This letter is to confirm our recent telephone conversation of today. At that time I advised you we would not be accepting any further responsibility for your current problems. We will pay for the initial visit to Dr. Abraham on 1-11-08. All medical treatment after that date is your responsibility."

The claimant testified that he did not work for the respondent-employer after approximately March 18, 2008. Jerry Dale Hyde, the respondent-employer's owner/operator, testified for the respondents:

Q. Now, he continued to work for you until roughly March 18th of '08, does that sound right?

A. Yes, sir, it was actually on March the 18th. On the 17th, I believe it was, I asked him - it was either the 17th or 18th, but I asked him if he might be able to do a couple of pest control stops. At that time he was mainly answering the phone and doing light sales, and I asked him if he could do a couple pest control stops if we needed him at the end of the month, and he agreed to do it. Then that afternoon he came in and said that he got a phone call from Shelia Hall, said they weren't going to pay for any more bills, and he said he wasn't going to take a chance on hurting himself, and that he wasn't going to do them.

Q. Okay. So he had been doing some light pest control duties, you were providing light duty, and apparently it was around the time of this phone call that he indicated he wasn't going to do any more?

A.. Yes, sir.

Q. Did you ever refuse to offer him work?

A. No, sir.

Q. Tell him you didn't have any work available?

A. No. On 3/18, he actually decided that he wasn't going to do any more stooping or bending or twisting or anything, and I said, "It might be best to just put you on medical leave until you get over your problem and then come back and go to work."

Dr. Abraham performed a "Left L4-5 Plasma Disc decompression" on April 1, 2008. The pre- and post-operative diagnosis was "Left L4-5 HNP, contained."

The claimant followed up with Dr. Abraham on May 1, 2008: "He states he is doing much better. He is still having some pain. Last week he mowed the lawn and did some weed eating and was very uncomfortable afterwards." Dr. Abraham's treatment plan included "2. Allow work" and return in four months.

Dr. Abraham diagnosed Left Lumbar Radiculopathy on June 4, 2008 and wrote on a Certificate For Return To School Or Work, "Mr. Rogers does not need to return to work until he completes PT/work hardening for 1 month."

The claimant's attorney corresponded with Dr. Abraham on June 27, 2008 and stated, "It is my understanding that you have examined and/or treated Jimmy D. Rogers for his recent back injury. I would like to obtain your opinion, to a reasonable degree of medical certainty (at least 51% probability) as to whether the injury to Mr. Rogers' back resulted from his work accident at Hyde's Termite and Pest Control on July 9, 2007. I have enclosed a form which has two options for your convenience. If one of the opinions meets with your approval I would appreciate it if you would check the appropriate box, sign and date the form, and send it back to me."

The claimant followed up with Dr. Abraham on July 3, 2008:

He is complaining of mid back pain that radiates to his left side since yesterday after therapy. Mr. Rogers is also complaining of L leg pain and tingling and "sometimes just goes out on me." He is not doing any activities except walking. He does not have sharp pain but still hasd (sic) some pain in the mid back and some numbness in his leg. He is unable to build up his L leg but he just cannot do it.

Dr. Abraham assessed "1. S/P L4/5 PDD. Lumbar Spine Pain." Dr. Abraham's plan included "2. Allow back to work with restrictions."

Dr. Abraham indicated on a Certificate that the claimant was able to return to work on July 7, 2008 with the following limitations: "No lifting over 25 pounds. No bending, no stooping."

On July 25, 2008, Dr. Abraham replied to counsel's June 27, 2008 correspondence and checked a line beside the following language:

It is my opinion to a reasonable degree of medical certainty, or at least 51% probability, based upon the information presented to me, including a history given by the patient, that the major cause of Jimmy D. Rogers' lower back injury and need for treatment was his accident on July 9, 2007 while he was working for Hyde's Termite and Pest Control.

A pre-hearing order was filed on October 15, 2008. The claimant contended that the respondents "should be held responsible for all outstanding hospital, medical, and related treatment, including, but not limited to, surgery performed by Dr. Robert Abraham., together with continued reasonably necessary medical treatment; that he is entitled to temporary total disability benefits beginning July 10, 2007, and continuing through the present, maintaining that his healing period has not ended, less credit to respondents for dates worked; and that a controverted attorney's fee should attach to any benefits awarded."

The respondents contended that the claimant "was released to return to work without restrictions, limitations or impairment as of November 5, 2007, and that prior to said date, the claimant's condition and any limitations had been accommodated by the employer. Respondents further maintain that treatment by Dr. Robert Abraham following his initial evaluation was unreasonable, unnecessary, and unrelated to the admitted compensable injury."

The parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment.

2. Claimant's entitlement to additional temporary total disability.

Dr. Brophy noted on November 30, 2008:

Mr. Rogers was evaluated through this office in September 2007 for complaints of back pain. A lumbar MRI from August 2007 demonstrated multilevel spondylosis. He was diagnosed with lumbar myofascial pain and reported 50% improvement in his symptoms three months after his injury. He was cleared to return to work at full duty without restriction on 5 November, 2007 with a PPI rating of zero (0%). On 11 January, 2008, he evaluated by Dr. Abraham for complaints of ongoing low back pain. At that time, he was describing low back and left leg pain associated with numbness and weakness. Medications included Percocet and Skelaxin. Dr. Abraham noted weakness of the left quadriceps and left extensor hallucis longus with symmetric deep tendon reflexes. He reviewed the lumbar MRI which he considered consistent with a left foraminal L4-5 HNP. A follow-up note on 14 February, 2008 indicates that the myelogram demonstrated a minimal left foraminal disc bulge at L4-5. According to a letter from Mr. Wade, the attorney for Hyde's Termite & Pest Control, Mr. Rogers eventually underwent a surgical procedure by Dr. Abraham and has continued to complain of back and left leg pain.

Based on my evaluation, Mr. Rogers did not develop a lumbar radiculopathy related to his work injury in July 2007 nor did his radiographic studies demonstrate evidence of nerve root compression and therefore, he was not considered an operative candidate in October 2007 and was cleared to return to work at full duty. If subsequent radiographic studies in February 2008 demonstrated evidence of nerve root compression that would justify surgical intervention, these findings would not necessarily be related to the work

injury in July 2007. If these radiographic studies were equivocal and surgery failed to improve his symptoms, this would further validate the fact that no structural change occurred related to the lumbar spine as a result of the July 2007 work injury which would warrant surgical intervention.

The claimant's attorney corresponded with Dr. Thompson on December 4, 2008 and stated in part, "I represent Jimmy D. Rogers regarding a workers' compensation claim for injuries he believes resulted from a fall he had at work on July 9, 2007....Mr. Rogers ultimately had surgery for a lower back problem following this accident. I would like to obtain your opinion, to a reasonable degree of medical certainty (at least 51% probability) as to whether the injury to Mr. Rogers' back resulted from his fall on July 9, 2007. I have enclosed a form which has two options for your convenience. If one of the opinions meets with your approval I would appreciate it if you would check the appropriate box, sign and date the form, and send it back to me."

Dr. Thompson checked a line beside the following language provided by counsel:

It is my opinion to a reasonable degree of medical certainty, or at least 51% probability, based upon the information presented to me, including a history given by the patient, that the major cause

of Jimmy D. Rogers' lower back injury and need for treatment was his accident on July 9, 2007 while he was working for Hyde's Termite and Pest Control.

A hearing was held on December 12, 2008. The claimant testified that he had not worked since his April 1, 2008 surgery, "Because my injury hurts so bad." The claimant testified on direct:

Q. Now, you have received, Jimmy, have you not, unemployment benefits during the time you've been off?

A. Yes, sir.

Q. All right. When did you first begin receiving unemployment benefits?

A. I filed for it in March. As far as the date, I cannot give you the date.

Q. And what happened with regard to that employment?

A. Mr. Hyde come out to the truck and explained to me that the sales, the light duty sales that he had me doing, was not working out too good, and he didn't have any more light duty.

Q. Okay. So from that point forward you have not been working at Hyde's?

A. No, sir, I have not....

Q. And how much [employment benefits] are you receiving per week?

A. Two hundred and forty dollars a week....

Q. And has Dr. Abraham or Dr. Greaser released you to go back to a light duty position since the surgery?

A. The last note that I had from Dr. Abraham on the last day I seen him and it was light duty.

Q. Okay. Have you been able to return to a light duty job?

A. No, sir.

Q. Okay. Any reason why? Do you know if there is any light duty at Hyde's?

A. Evidently not.

The claimant testified on cross-examination that surgery had helped "the sharp shooting pain" down his left leg, but that he still had pain in his back and lower leg.

An administrative law judge filed an opinion on January 22, 2009. The administrative law judge found, in pertinent part:

3. The claimant has proven, by a preponderance of the evidence, that his need for treatment, including, but not limited to, surgery performed by Dr. Robert Abraham, was reasonably necessary, as well as causally related to the admitted July 9, 2007, compensable injury.

4. Respondents are responsible for all outstanding hospital, medical, and related treatment, including, but not limited to, all diagnostic testing, treatment, including surgery performed by Dr. Robert Abraham on April 1, 2008, and respondents remain responsible for continued, reasonably necessary medical treatment.

5. The claimant has proven, by a preponderance of the evidence, that he is entitled to temporary total disability benefits beginning on or about March 18, 2008, at which time the claimant stopped working for the employer, and continuing through a date yet to be determined.

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). 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, an administrative law judge found that the claimant proved he was entitled to additional medical treatment, including surgery from Dr. Abraham. The Full Commission affirms this finding. The evidence demonstrates that the claimant sprained his left ankle when

he stepped into a hole while running on July 9, 2007 (during the course of employment). The parties stipulated that the claimant sustained a compensable back injury. Dr. Thompson, the company physician, and Dr. Abraham, the surgeon chosen for the claimant by the Commission, both opined that the claimant's need for treatment was caused by the work-related accident. We recognize Dr. Brophy's opinion that the compensable injury did not result in a need for surgery. Dr. Brophy opined that there was no "structural change" to the claimant's lumbar discs as a result of the compensable back injury of July 9, 2007. We again note, however, the respondents' stipulation that the claimant sustained a compensable back injury. The claimant was not required to provide objective evidence of his continued need for treatment. See *Castleberry v. Elite Lamp Co.*, 69 Ark. App. 359, 13 S.W.3d 211 (2000). See also *Chamber Door Industries, Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997). The Commission has the duty of weighing medical evidence and, if the evidence conflicts, its resolution is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 949 S.W.2d 695 (1999). In the present matter, the Full Commission finds that the opinions

of Dr. Thompson and Dr. Abraham are entitled to more evidentiary weight than the opinion of Dr. Brophy.

The Commission referred the claimant to Dr. Abraham after the claimant requested a change of physician. Dr. Abraham first examined the claimant on January 11, 2008. After the claimant exercised his statutory right to a one-time change of physician, the respondents were required to pay for the initial visit with Dr. Abraham to satisfy their obligation to provide adequate medical services; the respondents were not bound by Dr. Abraham's treatment recommendations. *See Wal-Mart Stores, Inc. v. Brown, supra.* Dr. Abraham performed a surgical decompression at L4-5 on April 1, 2008. The post-operative diagnosis was "Left L4-5 HNP, contained." The medical records corroborated the claimant's testimony that there was some post-surgical improvement. The claimant testified that he still felt pain in his back but that his leg pain had decreased following surgery. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D&B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). The Full Commission finds in the present matter that the claimant proved Dr. Abraham's

surgery was reasonably necessary in connection with the stipulated compensable injury to the claimant's back on July 9, 2007. The administrative law judge's decision awarding additional medical treatment is affirmed.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the employee is as far restored as the permanent character of his injury will permit. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). If the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition, the healing period has ended. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

An administrative law judge found in the present matter that the claimant proved he was entitled to temporary total disability benefits beginning March 18, 2008 and continuing through a date yet to be determined. The Full Commission finds that the claimant proved he was entitled to temporary total disability benefits beginning March 18, 2008 through

July 7, 2008. The parties stipulated that the claimant sustained a compensable back injury on July 9, 2007. The claimant was diagnosed with acute lumbar myofascial strain on July 29, 2007. The claimant began treating with Dr. Abraham on January 11, 2008. Dr. Abraham kept the claimant on light duty. The respondents' owner-operator, Jerry Hyde, testified that he placed the claimant on medical leave beginning approximately March 18, 2008. The record therefore indicates that the claimant remained within a healing period for his compensable lumbar strain and was totally incapacitated from earning wages as of March 18, 2008. Dr. Abraham performed surgery on April 1, 2008.

Dr. Abraham returned the claimant to restricted work on July 7, 2008. The record does not contain any additional treatment recommendations from Dr. Abraham. The Full Commission finds that the claimant reached the end of his healing period for the compensable lumbar strain and surgery no later than July 7, 2008. We recognize the claimant's testimony that he was unable to return to work because of pain. However, the persistence of pain may not of itself prevent a finding that the healing period has ended, providing that the underlying condition has stabilized. *Mad*

Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The Full Commission finds in the present matter that the claimant's condition had stabilized and had become permanent no later than July 7, 2008. Even if it was determined that the claimant remained within a healing period as of July 7, 2008, the evidence does not demonstrate that the claimant was totally incapacitated from earning wages after Dr. Abraham's release on July 7, 2008.

Based on our *de novo* review of the record, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved all of the medical treatment of record, including surgery performed by Dr. Abraham, was reasonably necessary in connection with the stipulated compensable injury to the claimant's back. We find that the claimant proved he was entitled to temporary total disability benefits from March 18, 2008 through July 7, 2008. Temporary total disability shall be payable to the claimant with respect to any week for which he received unemployment benefits, but only to the extent that the temporary total disability otherwise payable exceeded the unemployment benefits. See Ark. Code Ann. §11-9-506(b) (Repl. 2002). The claimant's attorney is entitled

to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant is entitled to additional medical treatment and awarding temporary total disability benefits. In my opinion, the claimant has failed to meet his burden of proof.

The majority has found that the respondents are responsible for the outstanding medical and related treatment including the surgery performed by Dr. Robert Abraham. My review of the evidence demonstrates that the

claimant is not entitled to additional medical treatment. The claimant was seen by Dr. John Brophy, a Memphis neurosurgeon, after being referred by Dr. Thompson. Dr. Brophy reviewed the claimant's MRI and he determined that the claimant had "lumbar myofascial pain associated with the lumbar spondylosis without clinical evidence of radiculopathy or radiographic evidence of nerve root compression." Dr. Brophy treated the claimant conservatively AND cleared the claimant to returned to light duty.

On October 8, 2007, the claimant was seen by Dr. Brophy. Dr. Brophy ordered the claimant to begin a home endurance exercise program. On October 22, 2007, Dr. Brophy again saw the claimant and opined that "there is no indication for surgical intervention." He released the claimant as having reached maximum medical improvement to return to full duty without restrictions and without any permanent anatomical impairment on November 5, 2007.

The claimant requested and was granted a change of physician to Dr. Robert Abraham. A myelogram was performed on February 14, 2008, pursuant to the orders of Dr. Abraham, which revealed "grade one spondylolisthesis at L5-S1

secondary to bilateral spondylosis of L5. No other significant abnormality is identified." The follow up CT revealed the same. These findings, in my opinion, support a conservative approach and certainly do not support surgical intervention.

In addition, the medical evidence and the testimony indicates that the claimant did not complain of any back pain until twenty days after he stepped in the hole. The claimant did not exhibit or reveal any "lumbar radiculopathy" as a result of the incident. The opinions and reports of both Dr. Thompson and Dr. Brophy do not indicate any lumbar radiculopathy and this was confirmed by the MRI and the CT. It is clear that the claimant was not a surgical candidate. It is further of note that the surgery provided little, if any, improvement of the claimant's complaints, thus confirming that said surgery was not reasonable and necessary. Postsurgical improvement is a proper consideration in determining whether surgery was reasonable and necessary. Winslow v. D & B Mechanical Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Simply put, I cannot find that the claimant is entitled to additional medical treatment. There is no evidence of

anything that would require surgical intervention and the claimant had been released to return to work with no restrictions by Dr. Brophy, a well respected neurosurgeon. Accordingly, I must dissent from the majority's award of additional medical treatment.

I additionally must dissent from the award of temporary total disability benefits. The claimant continued to work for the respondent employer for approximately eight months after the injury. The circumstances surrounding the claimant leaving the respondent employer, in my opinion, call the claimant's credibility significantly into question.

The claimant claimed that he was merely "let go" by the respondent employer and told that he would no longer be able to work, even the light duty that had been previously provided. However, Mr. Hyde, the owner of the respondent employer, testified that the claimant informed him that he would not be returning to work after the insurance adjustor called regarding continued benefits. In response to questions posed by the unemployment office, Mr. Hyde confirmed that the claimant left his employment due to medical reasons. The unemployment form indicated "since he refused to do the light duty work, I put him on medical

leave until he gets his problems worked out and I expected him to be back in four-six weeks if the doctors get his problems worked out." It is clear that the claimant was less than truthful when he testified as to the facts surrounding his departure from the respondent employer.

Furthermore, the claimant immediately applied for unemployment benefits after he left the respondent employer. In fact, he completed an application for unemployment on March 19, 2008, one day after leaving. He indicated on the application that he was "discharged" on March 18, 2008. The claimant stated on the application that he could begin work immediately, could work full time and had transportation. Moreover, he stated that he did not have any disabilities that limited his ability to perform normal job duties. The claimant was awarded unemployment benefits in the amount of \$240.00 and continuously received those benefits through his back surgery and thereafter without any periods of non-payment. The receiving of continuous unemployment benefits demonstrates that the claimant held himself out as being ready, willing and able to work at all times. The claimant cannot be totally disabled from working and then hold himself out as being ready, willing and able to work in

order receive unemployment benefits. It is clear to me that the claimant is less than credible based upon his willingness to receive unemployment benefits when was clearly recovering from back surgery. Accordingly, I find the claimant lacks credibility. It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964).

The evidence also demonstrates that the respondent employer had light duty work available to the claimant. It was not the respondent employer's insistence that the claimant quit work. The evidence clearly shows that the claimant left the respondent employer and refused the light duty work available to him on March 18, 2008. After considering the evidence, I cannot agree that the claimant

was entitled to temporary total disability benefits.
Accordingly, I must dissent from the majority's finding.

KAREN H. MCKINNEY, COMMISSIONER