

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511401

WILLIAM D. PRANTER, EMPLOYEE	CLAIMANT
HERBIE DANIELL; DBA DANIELL HEATING, EMPLOYER	RESPONDENT NO. 1
OHIO CASUALTY INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 9, 2009

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

Claimant represented by HONORABLE JAMES S. STREET, Attorney at Law, Hot Springs, Arkansas.

Respondent No. 1 represented by HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE BRANDON CLARK, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The claimant and the respondents both appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment and a finding that the claimant failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from January 31, 2008, to a

date yet to be determined, and also from August 24, 2006, through January 31, 2008, and awarding the respondents a credit for its over payment of indemnity benefits from August 24, 2005, through January 31, 2008. After conducting a de novo review of the record, we affirm, in part, and reverse, in part. Specifically, we affirm the decision of the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from January 31, 2008, to a date yet to be determined, and also from August 24, 2006, through January 31, 2008, and a finding awarding the respondents a credit for its over payment of indemnity benefits from August 24, 2005, through January 31, 2008. However, we reverse the decision of the Administrative Law Judge finding that the claimant was entitled to additional medical treatment. In our opinion, the claimant has failed to meet his burden of proof.

The claimant, 34 years old, began his employment with the respondent employer in November 2004, where he was

a journeyman electrician. The claimant was involved in a motor vehicle accident on Friday, October 14, 2005. The claimant did not seek immediate medical treatment. However, the night of the accident the claimant began experiencing lower back pain. On Sunday, October 16, 2005, the claimant saw Dr. Roy Puen for the first time and he ordered an MRI. Dr. Puen referred the claimant to Dr. Michael Young. The claimant saw Dr. Young for a couple of visits, received some physical therapy. The respondents requested the claimant see Dr. Scott Schlesinger for an independent medical evaluation on February 10, 2006. Dr. Schlesinger reviewed the two MRIs and performed his evaluation and opined that he did not feel the lumbar spine problem was surgical in nature but did recommend some epidural steroid injections and therapy. Dr. Schlesinger saw the claimant on one occasion.

The claimant next saw Dr. James Arthur and his treatment plan was the same as Dr. Schlesinger's. The claimant began seeing Dr. Arthur and Dr. Arthur referred the claimant for EMG studies for his hands. The EMG studies revealed carpal tunnel syndrome in both wrists and surgery

was performed by Dr. Arthur while the claimant continued ongoing conservative care for his back condition.

On June 28, 2006, the claimant underwent a steroid injection in his lumbar region but relief was only temporary. By August 23, 2006, Dr. Arthur released the claimant to light-duty work with restrictions. The claimant's employer could not meet the restriction requirements; therefore, the claimant did not return to work. The claimant continued with three steroid injections and was still having back pain. Dr. Arthur ordered a discogram and that was performed on October 31, 2006. The claimant testified that he was in a great deal of pain after the discogram and he took Demerol and pain medication and ultimately tried a lumbar corset. Dr. Arthur has recommended surgery based on the claimant's level of symptoms and complaints and the claimant's response to treatments.

The claimant next saw Dr. Reza Shahim for another independent medical evaluation and two additional options were proposed, a facet rhizotomy and an IDET procedure. Dr. Arthur had recommended a disc fusion or a disc replacement surgery. The claimant was not interested in the

disc replacement surgery. The claimant did undergo the facet rhizotomy procedure performed by Dr. Donald Boos in Hot Springs, a left side rhizotomy in September 2007, and a right side rhizotomy in December 2007.

The claimant testified that the rhizotomies helped with arthritic pain but he continues to have the intense back pain. The relief from the rhizotomies was beginning to wear at the time of the hearing. The last visit the claimant had with Dr. Arthur was on December 21, 2007. The claimant tried to cut his grass once a week with a push mower. The claimant testified that he has to rest during the day. The claimant has not sought other employment or additional schooling.

The claimant confirmed that he had previously been involved in some motor vehicle accidents where he had back pain. The claimant confirmed that he was taking Soma in 2001 for back muscle spasms which was changed to Flexeril in 2002. The claimant further confirmed that in 2002 and 2003, he was having pain and numbness and tingling in his arms going down to his hands and fingers and he sought

chiropractic care for this condition. The claimant described his back problems in 2003 and 2004, as muscular tension.

The claimant has not sought other employment following Dr. Arthur's light-duty release in August 2006. The claimant continued to hunt deer, turkey and bear, and he keeps trash off his in-law's property. The claimant has also posted no trespassing signs on his in-law's property which required him to get in and out of his vehicle every 40 feet. The claimant has traveled to Orlando, Oklahoma City, and to Florida for a jewelry convention since his 2005 injury.

The respondents introduced surveillance of the claimant and the claimant described what was going on during one of the surveillance periods. According to the claimant, he had a plumbing pipe that burst and he had two buddies come over to work on it. The claimant was seen turning off the water at the main line and moving up the steps quickly. It is also of note that the claimant looked directly into the camera as if he realized he was being observed.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78

Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Highway & Trans Dept v. Breashers, 272 Ark. 244, 613 S.W.2d 392 (1981). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission. Ark. Highway & Trans. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582

(1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages (citing Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

In the present case, the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from January 31, 2008 through a date to be determined.

Dr. Arthur, on July 12, 2006, assigned the claimant a 10% permanent impairment rating and on August 23, 2006, he placed some restrictions on the claimant and returned him to work. The claimant's employer did not have work within those restrictions, according to the claims adjuster. The claimant testified that he did not seek other employment. The

claimant continued to take medication, had a discogram, and had the facet joint nerve denervation after Dr. Arthur's release. At Dr. Arthur's April 28, 2008, deposition, he stated that the claimant had the same restrictions as of August 23, 2006, and that if he could find work he could tolerate, he could proceed with that. The claimant has proven that he can be active by cutting his own yard and by participating in his hobbies, such as hunting. Both activities are physical and certainly demonstrate the claimant is not totally inactive. In finding the claimant has not proven that he is totally unable to earn wages and still in his healing period, we rely on Dr. Arthur's August 23, 2006, release with restrictions, the claimant's activities at home and for recreation, and his lack of motivation to seek other employment. There were no medical reports after January 31, 2008, taking the claimant off work. The respondents have requested a credit for overpayment of temporary total disability from August 24, 2006 through January 31, 2008.

Dr. Arthur was asked in his deposition what he would assess as a rating for the claimant's carpal tunnel

and he gave a rating. A medical report assigning this rating was not a part of the evidence submitted. The medical in evidence does not indicate that the claimant has reached maximum medical improvement for his back, although Dr. Arthur stated in his deposition that he was trying to get the claimant back to work and he assigned a 10% rating. Dr. Arthur, on July 12, 2006, wrote in his "Plan" the amount of 10% permanent anatomical impairment but he also recommended physical therapy three times a week for four weeks. Finally, on August 23, 2006, Dr. Arthur recommended the claimant return to work with restrictions. Dr. Arthur continued to see the claimant after August 23, 2006, and the claimant had a discogram, tried the lumbar corset, had a rhizotomy and continued to take medication. The claimant testified that his employer did not have a job for him and he did not seek another job. In light of Dr. Arthur's release with restrictions and claimant's activities, we find that the claimant has failed to prove that he remained in his healing period and was totally unable to earn wages from August 24, 2006 through January 31, 2006. The respondents

are entitled to a credit of indemnity benefits for its overpayment.

A review of the evidence demonstrates that the claimant cannot prove that he is entitled to additional medical treatment. The medical evidence demonstrates that the claimant has serious long-standing severe lumbar spine problems which have plagued him throughout the years. In fact, as early as 1991 the claimant sustained an injury to his back from a whiplash injury he had in a car accident for which he received chiropractic treatment. In 1996, the claimant was in another motor vehicle accident and complained of back problems thereafter. He was placed on a spine board after the accident and treated in the emergency room.

Over the following years, the claimant continued to have problems with his back. On one occasion on August 17, 2001, he sought treatment with Dr. Roy Puen, his family doctor, and Dr. Puen noted that the claimant had "LBP" [low back pain] which was allegedly related to "3 motorcycle wrecks." Dr. Puen further noted that the claimant had been suffering through lumbar muscle spasms for a year

and had even been taking Soma for muscle spasms at a rate of thirty pills per month (in addition to 4-5 beers a-day and marijuana). The claimant's treatment for low back pain and muscle spasms continued into May of 2002 and February of 2003.

When the claimant's neck and upper extremity problems got so bad in February of 2003, he sought treatment with chiropractor Dr. Rose Livingston. In her February 24, 2003, intake history sheet, Dr. Livingston recorded that the claimant had been in prior "car accidents" and had "severe 4-wheeler accidents." The claimant also listed his physical complaints to include pain into his hips or buttocks. The claimant continued to see the chiropractor through June of 2004. Despite initially denying under oath at his deposition that he had any prior back problems or treatment, he ultimately admitted at the hearing that his chiropractic treatment was for "bad low back pain".

The claimant was having problems with his low back into August of 2003 when the claimant sought treatment from Dr. Puen for low back pain and muscle spasms and was taking Flexeril. In fact, on August 15, 2004, the claimant's back

pain and spasms were so bad that Dr. Puen recommended a lumbar spine MRI, which the claimant never had done, referred the claimant to a neurosurgeon, to whom the claimant never went to see, and diagnosed the claimant with "L-BP [low back pain] 2^ [secondary to] ? Slipped disc".

The claimant continued to seek treatment for his back. On March 22, 2005, the claimant sought treatment again with Dr. Puen for back pain and spasms and his prescription for Flexeril was renewed. Those problems continued through May and August of 2005. When the claimant sought additional chiropractic treatment in late August of 2005, his chiropractor diagnosed the claimant with lumbar degenerative disc disease at L5/S1. That level is the very same level which is the focus of the claimant's current problems.

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).

Further, when the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury. Wackenhut, supra. The basic test is whether there is causal connection between the two episodes. Id. 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).

The overwhelming weight of the evidence demonstrates that the claimant's lumbar spine problems were preexisting. While the claimant may have sustained a temporary aggravation of those problems, the medical evidence demonstrates that such a temporary aggravation resolved through the conservative care the claimant had through December of 2005. Thereafter, the claimant admittedly had continued problems, but those problems were deemed by Dr. Arthur to be due to the L5-S1 degenerative pathologies, spondylolisthesis, loss of segment integrity, annular bulging, etc.

Dr. Arthur, after reviewing the claimant's MRI in October of 2005, felt that the MRI showed higher signal intensity, water content, and actual disk fragmentation that was not seen on the subsequent MRI. He felt those findings

were suggestive of the claimant's pathology being acute in origin. However, he admitted that those findings were not indicative of the mechanism of injury, whether it be from the October 2005 accident or the many prior accident and injuries the claimant had previously had. He testified in relevant part:

Q. And in terms of the MRIs that you saw when you evaluated him in 2006, does that level of hydration that you saw in the L5-S1 disk give you any kind of time range as to when the acute injury had to have occurred?

A. No. This level of hydration would be much more -- that would be a reach..."

In fact, when presented with the question of whether he could causally relate the claimant's need for surgery to the October 2005 accident, versus the claimant's preexisting problems, Dr. Arthur admitted:

Q. So, with respect to the bone-on-bone aspect of the need for treatment that Mr. Pranter has had, in your opinion is there any way you can state within a reasonable medical certainty whether that aspect of the need for surgery was related to the auto accident on October 0f '05 versus the prior history of pain and symptoms and treatment that he has

had going back to 2012 [sic][should read 2001]?

A. No. I really can't say that.

Furthermore, the claimant repeatedly failed to tell his medical providers of his prior history of back problems. For example, when the claimant saw the orthopedist, Dr. Michael Young, for the first time on November 18, 2005, the claimant claimed he had experienced back pain and symptoms since his car accident, but did not disclose to Dr. Young any history of having had persistent back pain, radicular symptoms and related treatment for the past 9 years. It is of note that the claimant had undergone treatment for those problems as recently as late August of 2005 and he failed to disclose that extremely relevant information to Dr. Young.

On February 10, 2006, when the claimant presented to Dr. Schlesinger for initial evaluation, Dr. Schlesinger's report states: "He says he never had any problems with legs or back before the accident at work." At the hearing before the Administrative Law Judge, when the claimant was confronted about his failure to disclose his previous problems to Dr. Schlesinger, the claimant failed to take any

responsibility but instead claimed that it was Dr. Schlesinger who was "miswording"[sic]. The claimant further failed to disclose his prior problems to Dr. Arthur who testified:

A. I don't have anything in my history about prior back problems when I talked to him. And on our information sheet, past surgical history, wisdom teeth, arthroscopic knee surgery, colonoscopy, bacterial blockage. I don't know what that is. Colitis. I don't have it checked on my medical history list or under neurological. So, I would say based on that and based on my history that he did not tell me about a lower back problem that was chronic.

Q. Do you have any current opinion right now as to whether the back problems for which you have treated Mr. Pranter are causally related to the October '05 accident versus prior injuries or conditions?

A. Well, my opinion is based on my records and my history. He says it's related to the motor vehicle accident.

Q. That's because you don't have any history of there being prior lumbar pain or treatment or diagnosis?

A. That's correct.

At the hearing, the claimant reluctantly admitted that he did not inform Dr. Arthur of any of his prior history of lumbar pain, radicular symptoms, muscle spasms, medical treatment, prior MRI recommendation, prior neurosurgical recommendation, chiropractic treatment or long-running prescriptions for either Soma or Flexeril.

The claimant was also less than truthful during his testimony at the hearing. The claimant stated: "I'd never ever been diagnosed with having any problems with my lower back." The claimant even testified under cross-examination that he had not had treatment for low back pain in the past. Considering the overwhelming medical evidence showing his consistent treatment for low back pain and radicular symptoms since 2001, with some treatment and problems going back as far as 1996, that testimony could not have been further from the truth. We find the claimant not to be a credible witness and give his testimony little weight. 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 constitutionality of the Commission's authority and duty to conduct a de novo review of the record, including issues of credibility, has been established by the court. See, Stiger v. State Line Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. Stiger, supra; see also, White, supra.

Uncorroborated testimony of an interested party is always considered to be controverted. However, the rule also applies to a non-party witness whose testimony might be biased. Burnett v. Philadelphia Life Insurance Co., 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. Id. Moreover, the testimony of an interested party is taken as disputed as a

matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989).

Finally, there is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger, supra. The findings of the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987).

A review of the evidence demonstrates, that at the most, the claimant sustained a temporary aggravation of preexisting condition. The medical evidence demonstrates that the claimant failed to tell all of his medical providers that he had experienced problems with his back as late as August of 2005. Further, the claimant never told Dr. Arthur about all of his various physical activities, which the claimant has performed without any limitations. The claimant has been able to mow his yard and use a weed eater

once a week. Both the mower and the weedeater are started with a pull cord. The claimant is able to sweep and has been able to take care of his four year old son while his wife works. The claimant has also been able to continue to avidly hunt deer, turkey and bear since August of 2006. He has also been able to manage his in-law's 40-acre property by clearing trash off the property and posting signs. It is of note, that the claimant had to stop his Jeep every forty feet to nail signs on trees that state "No Trespassing". The claimant has been able to travel and take vacations including twice driving to Oklahoma City, Oklahoma, and back and flying to Orlando, Florida. He and his wife also go to Magic Springs Crystal Falls in Hot Springs with his son during the summer.

The surveillance video is also very telling. The claimant was shown engaging in various physical activities including taking out the trash, walking up the stairs without a cane, crouching more than once outside of his house to turn off or adjust the water meter and bounding up the stairs of his home. It is significant that the claimant noticed the surveillance person, stops and stares at the

camera. The claimant then goes and tries to mess with the water main outside. When the claimant gets up he grabs his back and is slow going into the house. The claimant again comes back outside. He moves very slow getting down the stairs and is extremely slow going back into the house. He also grabs his back. This was all observed after the claimant had made several trips in and out of the house to that water main, crouched down with no apparent problems and jogged up the stairs. It was not until the claimant noticed the surveillance person that he grabbed his back and was moving significantly slower. The surveillance continued through the next day and the claimant is seen the next day using his cane.

Simply put, we cannot find that the claimant proved by a preponderance of the evidence that he is entitled to additional medical treatment. Accordingly, we reverse the decision of the Administrative Law Judge. When we consider the fact that the claimant was observed going in and out of his house with no apparent problems until he noticed the video surveillance person, the fact that the claimant was less than truthful with his doctors and did not

disclose accurate histories, the opinion of Dr. Schlesinger that the claimant was not a surgical candidate and the fact the claimant had on-going back problems prior to this compensable accident, we cannot find that the claimant has proven that additional medical treatment is reasonable and necessary in connection with his minor compensable aggravation. Accordingly, for those reasons set forth herein, we affirm, in part, and reverse, in part, the decision of the Administrative Law Judge.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After my de novo review of the entire record, I find that the claimant proved by a preponderance of the

evidence that the additional medical treatment recommended by Dr. Arthur is reasonable and necessary. I also find that the claimant proved by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from January 31, 2008 to a date to be determined, and also from August 24, 2006 through January 31, 2008, and that respondents are not entitled to a credit for its overpayment of indemnity benefits from August 24, 2006 through January 31, 2008.

REASONABLE AND NECESSARY MEDICAL TREATMENT

Under Arkansas workers' compensation law, employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark Code Ann. Sec. 11-9-508(a) (Supp. 2005). Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). Injured workers have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 17, 1989 (D612291). 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). Reasonable and necessary medical services may include those necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). A claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

Dr. Arthur treated the claimant for an extended period of time, using conservative measures to treat his compensable injuries arising out of the motor vehicle accident on October 14, 2005. Dr. Arthur was familiar with the claimant himself and with his response to the medications and treatments provided, as well as with his physical condition, over the many months of care. On the contrary, Dr. Schlesinger and Dr. Shahim did not treat the claimant and only had the opportunity to perform a single

evaluation. Dr. Schlesinger objected to a surgical treatment of the claimant's disc pain, based upon his interpretation of the medical literature on the subject, but both Dr. Arthur and Dr. Shahim thought that either a fusion or disc replacement was a viable option for the claimant. I find that Dr. Arthur's recommendation of fusion surgery is reasonable and necessary medical treatment of the claimant's compensable injury.

The majority found that the claimant failed to disclose important medical history to his doctors, thus skewing their opinions. The claimant testified at the hearing that he had no "handicap" and no diagnoses of back problems other than muscle spasms prior to the compensable injury. His history of lower back pain is consistent with his employment as an electrician. His medical records show that he saw Dr. Puen in August 2001 with lower back pain and spasms, and again in November 2001 with complaints of mid-back pain. He was seen again six months later for muscle spasms. On July 21, 2003, the claimant had complaints of mid-thoracic and neck pain. On August 19, 2003, the claimant presented to Dr. Puen with right mid-back pain. A year

later, in August 2004, the claimant presented to Dr. Puen with low back pain. Dr. Puen's notes reflect that he thought there could be "a possible slipped disc," although the claimant testified that he was unaware of this. The claimant was seen in March, May and August, 2005 for muscle spasms. The majority is correct that the claimant had a history of prior intermittent back pain; however, the claimant's medical history is devoid of any reports of pain radiating into his legs until after the date of the compensable injury on October 14, 2005. Furthermore, the claimant testified that his low back pain prior to the compensable injury was "very different" from his pain after the injury.

Importantly, Dr. Arthur's deposition testimony sheds further light on the importance of the claimant's history in this context. While Dr. Arthur does note that a patient's history is important, he explained that the objective testing supported his conclusion that the claimant's herniated disk was causally connected to the motor vehicle accident on October 14, 2005. Dr. Arthur discussed the MRI scans of the claimant's back, stating that the October 2005 MRI showed that the L5-S1 disk was

desiccated, which means that it was herniated and it had lost a tiny bit of its water. In comparison to the October 2005 MRI, the ruptured disk fragment in the February 2006 MRI appeared to be less prominent. This was to be expected, because the ruptured disk would not be hydrated, and it would lose water and shrink. The dessication shown in the first MRI had progressed noticeably at the time of the second MRI. If the claimant had a ruptured disk from his motorcycle accident, by the time Dr. Arthur saw him, the disk would have dried up. It would not have as high a water content as shown in the MRIs. Dr. Arthur stated: "That was an acute ruptured disk fragment. The beauty of the MRI is it can show you things like that." Dr. Arthur explained that he observed an acute ruptured disk in the MRIs, which is consistent with an acute injury and inconsistent with a long history of mild back pain, muscle spasms and "that sort of thing." He stated that the acute disk herniation was consistent with the motor vehicle accident which occurred on October 14, 2005, but that it was "much more likely" to be consistent with a recent trauma such as that motor vehicle accident than with "on and off back problems, back pain." I

find that Dr. Arthur's recommended treatment, the fusion surgery, is reasonable and necessary treatment of the claimant's compensable injury.

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. Breshears, supra; J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The majority has found, based upon Dr. Arthur's release with restrictions and the claimant's post-injury activities, that the claimant was not temporarily totally disabled, from August 24, 2006 to date.

However, at Dr. Arthur's deposition, he explained that he assessed a 10% rating on the claimant's lumbar

spine, because he was optimistic that the claimant was maximum medical improvement, but this optimism proved to be unfounded when the work hardening program was not successful and his complaints of pain remained. Because of the claimant's pain, Dr. Arthur testified that he did not release him and did not remove his work restrictions. Dr. Arthur's recommendation for surgery was based on the level of symptoms and complaints that he consistently gave over the course of treatment:

It's also based on his response to treatments we have given him like epidural steroid injections, his cooperation of the physical therapy, work hardening program and also the observation that I believe was - I believe he saw Lee Sorbuts, which is probably - he probably is one of most experienced physical therapists in town for lumbar problems. And Lee was also impressed with the pain and felt like we should discontinue the work hardening.

It's kind of a combination - I went from trial of work to, well, let's talk about lumbar fusion. It seems like a big jump, but you have to look at the history with this guy. See him come in and, you know, I believe he is hurting.

Dr. Arthur stated that in addition to the claimant's description of his symptoms and the reports of other doctors and physical therapist, as evidence of his symptomatology, Dr. Arthur did a discogram. He explained that sometimes discograms are helpful and sometimes they are not:

But when they are helpful is when you do it at one level and they don't know what you are doing. They can't tell. They're aware talking to you in the operating room. But I did it at one level and he had no pain. He didn't know I was doing it. And then I injected the S1 and he came off the table. ... So, I mean, I think I had localization. The degree of pain he's having everyday - no one can tell but him.

There is no question, based upon Dr. Arthur's testimony, that the claimant remains, to this day, in his healing period.

The majority looked to the claimant's activities in support of the findings that he was not within his healing period and that he was not totally disabled from working. I disagree with the majority's interpretation of the evidence. The claimant explained that he experienced

difficulty in performing household duties. He did mow his yard, but after mowing the front yard, he was forced to recuperate for a couple days before he could do the back yard. He testified that he did some traveling with his family, but that his activities were severely limited by his pain. He explained that caring for his son was difficult because of his pain. He testified that he hunted after his injury, but that for the two years prior to the hearing, he was mainly limited to accompanying hunters for whom he called game.

The majority found that the claimant was not totally incapacitated from earning wages, because he engaged in some household activities and hobbies, addressed above, and because he did not look for work after Dr. Arthur released him. However, Dr. Arthur changed his opinion regarding the claimant's progress when the work hardening physical therapy program was unsuccessful. Dr. Arthur testified at deposition that the claimant's pain was what limited his ability to work and that if he could work in spite of the pain, Dr. Arthur would not object. However, the

claimant's pain prohibited him from working. Dr. Arthur wrote on February 7, 2007, that:

His back pain continues to be incapacitating, prohibiting his from even being able to babysit his child for more than about four or five hours without having significant pain requiring him to become recumbent. . . .

I have not been asked to assign a permanent partial impairment on him as a result of this particular problem, but I would have to assign at least a twenty-five permanent partial impairment in his case if asked to do so. I would also not recommend that he perform any sort of activities that would require him to frequently bend or stoop or to lift or drive any significant distance with his particular back condition. In addition, he is taking analgesics that would interfere with his ability to conduct many activities intellectually. His judgment and emotional stability are probably affected by these medications as well, therefore, twenty-five percent might be a low figure.

The majority focused on the video surveillance of the claimant. The claimant was shown entering and exiting vehicles. The claimant used a cane sometimes, but not in every instance. He climbed into a pick up truck with obvious stiffness. He was observed walking out of his home, down a

short set of steps and kneeling in his yard. He did this several times. He testified at the hearing that he was turning the water on and off while friends of his repaired a plumbing problem. As he rose and turned on one occasion, he hesitated in apparent discomfort. While returning to the house on another occasion, he did appear to be moving faster going back into the house. However, at that time, he was not lifting, not stooping or bending, and was only moving a few footsteps and up a very short flight of steps. On another trip back and forth, he held his back and moved more slowly and deliberately. I disagree with the majority's characterization of the video surveillance.

Based upon the claimant's testimony and the testimony and medical reports of Dr. Arthur, I find that the claimant has proved by a preponderance of the evidence that he has been totally incapacitated from working since August 24, 2006 to date.

The claimant has been within his healing period and totally incapacitated from working since August 24, 2006, and is entitled to temporary total disability benefits from that date to a date yet to be determined. The

respondents are not entitled to a credit for disability benefits paid during that period.

In conclusion, I find that the claimant has proven by a preponderance of the evidence that the treatment proposed by Dr. Arthur is reasonable and necessary medical treatment of his compensable injury, to which he is entitled. I also find that the claimant also proved, by a preponderance of the evidence, that he was within his healing period and totally incapacitated to earn wages from August 24, 2006 to a date yet to be determined, entitling him to temporary total disability benefits. Lastly, I find that the respondents are not entitled to a credit for disability benefits paid from August 24, 2006 to December 31, 2008, because the claimant was indeed entitled to those benefits paid. For the foregoing reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner