NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611302

EDDIE M. STONE, EMPLOYEE	CLAIMANT
JOHN BOONSTRA'S MOBILE HOME TRANSPORT, EMPLOYER	RESPONDENT NO. 1
WESTPORT INSURANCE/GALLAGHER BASSETT SERVICES, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 24, 2009

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

Claimant represented by the HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent No. 1 represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 did not participate in the hearing due to the issues being litigated.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 16, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer-carrier relationship existed on September 21, 2006, and at all other relevant times.

3. On said date, the claimant sustained a compensable injury to his low back.

4. Respondents #1 accepted the claim as compensable and paid some indemnity and medicals; and they have accepted a 10% rating for the claimant's back injury.

5. This claim for additional medical benefits has been controverted in its entirety.

6. The Act is constitutional. Therefore, the claimant's Motion for Recusal is hereby denied.

7. The claimant's average weekly wage at the time of his injury was $460.00. His temporary total disability rate is $306.00, and his permanent partial disability rate is $230.00.

8. The parties stipulated that if called as a witness, Mrs. Stone would corroborate the claimant's testimony regarding what he has gone through the (sic) during the last couple of months.

9. The claimant has established by a preponderance of the credible evidence his entitlement to additional medical treatment for his compensable back injury of September 21, 2006, as recommended by Dr. Tuck.

10. The issue of permanency is reserved.

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 January 16, 2009, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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

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

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

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

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

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the Arkansas Workers' Compensation Act is constitutional. However, I must respectfully dissent from the finding that the claimant was entitled to additional medical treatment recommended by Dr. Rebecca Barrett-Tuck. After conducting a de novo review of the evidence, I find that the claimant has failed to meet his burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant worked for the respondent-employer moving mobile homes. His job duties required him to perform heavy duty work, which included lifting mobile home tongues or an occasional porch. The claimant sustained an admittedly compensable low back injury on September 21, when he tripped over a pile of axles and fell and hit the trailer, striking his head, shoulder, and back. The claimant continued to work for the respondent employer. A week after his injury he started having numbness in his ankle and it would spread to his toes as he worked during the day and then it slowly started coming up his leg. The claimant sought treatment at the emergency room and was treated by Dr. Bufford. The claimant testified that the numbness had spread almost up to his hip and his entire leg felt like he had pins and needles stuck in it and there was a burning sensation. Dr. Bufford x-rayed the claimant's leg and did an ultrasound of the leg. Dr. Bufford then recommended immobilizing the claimant's leg. The claimant was put on crutches and referred to Dr. Travis Richardson. Dr. Richardson ruled out a leg injury and had the claimant undergo an MRI which indicated a herniated disc in his lower back. Dr. Richardson ultimately performed surgery on the claimant.

The claimant testified that a month or so after the surgery the pain in his leg was pretty much gone, as occasionally he had a little bit. The claimant underwent testing with Dr. Dougherty and he testified that his pain level was elevated and he was extremely tired afterward.

The claimant testified that he his pain level has increased and he wants to undergo the surgery as recommended by Dr. Barrett-Tuck because the pain is getting worse and the numbness down the left leg is getting worse. Although the claimant admitted he no longer has the pins and needles, he continues with numbness down in the middle three toes on the left foot and occasionally up toward the knee. According to the claimant, it has started to affect the right leg to an extent, as he is having pain in the calf.

The evidence demonstrates that the claimant had an automobile accident in November of 1999. The claimant testified that the accident happened as a result a lady rolling a stop sign, which caused him to broadside her just behind the driver’s door of her vehicle. The claimant testified he had no injuries at all, as his air bag did not even deploy from his vehicle. He testified that he had another accident that occurred before his compensable injury that occurred in

July of 2006 wherein he twisted his ankle when he stepped in a hole while mowing. The claimant denied any back pain as a result of this incident. However, he did admit to some prior back difficulties while moving mobile homes, dragging axles, and crawling underneath mobile homes, which caused pulled or pinched muscles. The claimant denied any prior similar back problems such at the kind he has had since the September 21, 2006 incident. He also essentially denied any subsequent accident involving his back.

After his recovery from his back surgery, the claimant started working in a salvage yard, where he was required to lift approximately seventy-five pounds. The claimant worked at the salvage yard for over a year. According to the claimant, he started working at this job in June of 2007, after undergone a Functional Capacity Evaluation (FCE). The claimant agreed that pursuant to the FCE, he could do constant walking, balancing, crouching, work overhead, sitting, and standing, along with frequent stooping and climbing. The claimant admitted that the FCE indicated that he could lift up to eighty-five pounds. The claimant told Dr. Richardson in January of 2007 that he was doing better and did not have the original left leg pain that he had.

He testified that it was in November 2007, when he began to notice all the back problems.

The claimant's brother, Zantar Stone, gave testimony during the hearing. He agreed that he has observed the claimant having difficulties with standing, sitting, bending, stooping and that sort of thing within the last several months.

A review of the medical evidence of record demonstrates that on October 27, 2006, the claimant underwent an MRI of the lumbar spine with the following impression:

> 1. Concentric disk bulge, probably with a small posterior central disk herniation at L5-S1, slightly to the left. This does not appear to cause significant spinal or foraminal stenosis.
> 2. Mild to moderate facet degenerative change bilaterally at L5-S1.
> 3. Resolution of the images is a little decreased due to the patient's body habitus.
> 4. The patient has a congenitally small spinal canal in general.

The claimant saw Dr. Travis Richardson on November 3, 2006. Dr. Richardson diagnosed the claimant with a ruptured L4-5. Dr. Richardson noted that the claimant was having a significant amount of pain in his back, as well as leg. He further noted that

the claimant had a mild history of back pain, but at that particular time he felt the fall had exacerbated his back pain. Dr. Richardson also noted that he felt the fall had also caused the acute disc herniation, which had been seen on the MRI. Given the nature of the claimant's injury as well as the history of his back pain, Dr. Richardson felt that the most sound approach would be to do a transforaminal interbody fusion with a diskectomy.

On January 9, 2007, the claimant returned to see Dr. Richardson. His examination and symptoms remained unchanged. As a result, he noted that they would proceed with a diskectomy at that particular time. The claimant underwent L4-5 bilateral hemilaminotomy with diskectomy, which was performed by Dr. Richardson on January 15, 2007.

Dr. Richardson saw the claimant for follow-up on January 24, 2007. He noted that the claimant did not have the same original left leg pain, but he did have some numbness and tingling on the right side that he did not have before, for which he prescribed a medication regimen.

On March 6, 2007, Dr. Richardson recommended that the claimant wear a brace, as he was now returning to work and was six weeks out from his diskectomy. Dr.

Richardson opined that at the end of a four-week period of physical therapy, the claimant was going to be completely ready to return to any form of work he would like. Although the claimant reported his leg pain was completely gone, he still had a mild backache.

On April 17, 2007, the claimant underwent an FCE. The claimant demonstrated the ability to perform material handling activities at the heavy level with an occasional bi-manual lift/carry of up to eighty-five (85) lbs.

The claimant underwent an independent medical evaluation (IME) on May 9, 2007 with Dr. John Dougherty. At that time, the claimant presented with low back pain that radiated to the right buttock, right posterior thigh, right calf, and right foot. The claimant characterized the pain as constant, moderate intensity, aching, and burning, which started about six months prior. Other associated symptoms included stiffness that was persistent and radicular bilateral leg pain. Dr. Dougherty's assessment was, "low back pain and HNP-lumbar S/P diskectomy L4-L5." Dr. Dougherty noted, "Utilizing the Guides to the Evaluation of Permanent Impairment the patient has experienced a 25% Motor Impairment and a 10% Lumbar Range Motion Impairment, which rates to a 33% Combined Total Impairment."

On January 23, 2008, the claimant underwent initial evaluation with Dr. Rebecca Barrett-Tuck. She noted that the claimant had residual back pain, involving his left knee, and occasional tingling in his left foot. The claimant described this as involving the middle toe and the third toe of the left foot. The claimant reported that the pain was present consistently regardless of activity. Dr. Tuck assessed the claimant with, "Recurrence of low back pain and left lower extremity pain status post lumbar discectomy. We must consider the possibility of a recurrent ruptured disc." Dr. Tuck reported, in pertinent part, the following on February 27, 2008:

> Mr. Stone returns today for follow-up. He continues to have significant pain in the low back and left leg. His MRI shows a very significant broad-based disc protrusion or broad-based herniation at L4-5 with considerable narrowing of the canal. I would recommend a posterior lumbar interbody fusion at L4-L5 using cages, Vitoss, local bone, and marrow aspirate....

The claimant underwent an IME with Dr. John Bruffett on August 18, 2008. His impression was "Postlaminectomy syndrome with recurrent disc herniation, primarily discogenic low back pain." Dr. Bruffett reported that he felt a interbody fusion was

probably a reasonable plan at this point, but he did not feel it was absolutely necessary. However, Dr. Bruffett recommended that prior to undergoing a fusion, the claimant undergo a discography just to get more information as to the exact pain generator and also to confirm that the adjacent discs are not symptomatic. In an attempt to avoid surgery, Dr. Bruffett recommended that the claimant pursue some core strengthening and trunk stabilization in hopes that maybe in time he could get stronger and he could avoid further surgery. In addition , Dr. Bruffett wrote:

> I feel that the disc herniation found on his most recent MRI scan is related to his prior surgery most likely and the natural history of this which is related to his original injury. Therefore, I feel like the treatment he has had and the problems are within a reasonable degree of medical certainty related to his work accident of 09/21/06....

Dr. Barrett-Tuck's deposition was taken on September 23, 2008. Dr. Tuck testified that she would not recommend that the claimant undergo a diskogram because it is obvious which level is the problem. However, she agreed with Dr. Bruffet's opinion wherein he stated:

> The disk herniation found on the claimant's most recent MRI scan is related to his prior surgery most likely and the natural history of this, which is related to the original. Therefore, I feel the treatment that he has had and the problems are, within a reasonable degree of medical certainty, related to the work accident of September 21, 2006.

Dr. Barrett-Tuck stated that her opinions were based upon a reasonable degree of medical certainty. She further opined that the claimant's major need for surgery was related to the compensable incident of September 21, 2006. She also noted that since the claimant had required a bilateral diskectomy and bilateral laminectomy, it leads us to understand that the claimant is going to be at high risk for a recurrent rupture and for continued pain.

The claimant contends that he is entitled to reasonable and necessary medical care recommended by Dr. Barrett-Tuck as it is necessary as a result of the injury he sustained to his back on or about September 21, 2006 while he was performing employment services for the respondent. The respondents contend that the claimant has received all the medical treatment to which he is entitled and that the new disc herniation and the

need for Dr. Barrett-Tuck to perform surgery is not related to his September 21, 2006, injury.

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).

In my opinion, a review of the evidence demonstrates that the claimant cannot prove he is entitled to additional medical treatment as recommended by Dr. Barrett-Tuck. The evidence shows that the claimant underwent an FCE and demonstrated the ability to perform material handling activities at the heavy level with an occasional bi-manual lift/carry of up to eight-five (85)lbs. In fact, the claimant went to work for an auto salvage yard and was pulling parts from vehicles. At times, the claimant was required to get up underneath these vehicles to remove parts, frequently climb, stoop, ben, kneel, crouch, sit, stand and walk,

and use a cutting torch to remove parts. The claimant admitted he was able to do all of these things without problems until November of 2007.

It appears that the claimant has a new disc herniation and the claimant cannot prove that this new herniation is related to his compensable injury. The claimant underwent surgery in January of 2007, at L4-5 and has now been diagnosed with a broad-based disc extrusion at L5-S1. The claimant was doing good when he was released by Dr. Richardson as being at maximum medical improvement on April 6, 2007. Simply put, I cannot find that the new findings are related to the claimant's compensable injury. As such, I would reverse the decision of the Administrative Law Judge. Therefore, for all the reasons set forth herein, I must dissent from the majority's finding that the claimant is entitled to additional medical treatment.

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KAREN H. McKINNEY, Commissioner