

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F806009

TIMOTHY McCARTNEY,
EMPLOYEE

CLAIMANT

KING ELECTRICAL CONTRACTORS,
EMPLOYER

RESPONDENT

FEDERATED MUTUAL INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 5, 2010

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE ERIC NEWKIRK,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed August 12, 2009. The administrative law judge
found that the claimant was entitled to additional medical
treatment as recommended by Dr. Blankenship. The
administrative law judge found that the claimant proved he
was entitled to temporary total disability benefits from
November 21, 2008 through March 11, 2009. After reviewing

the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

The parties stipulated that Timothy McCartney, age 44, sustained a compensable injury to his low back on October 15, 2007. Mr. McCartney testified, "I was hanging a ceiling fan atop of a stepladder. I had carried the ceiling fan up to the top of the ladder. When I went to turn to hang it in the bracket is when I felt a pain in my lower back." The claimant testified that he sought medical treatment within a day or two but that he continued to work for the respondent-employer.

A Form AR-3, Physician's Report dated November 12, 2007 stated, "left lower extremity paresthesia. Pt states his back is better but his left leg is still numb, he has had 1 PT visit to date." Dr. Cathleen E. Vandergriff signed the Form AR-3 and indicated the claimant could return to work on November 12, 2007. Dr. Vandergriff did not clearly identify on the Form AR-3 any work restrictions.

The claimant continued to participate in physical therapy at Arkansas Occupational Health Clinic. A physical therapist noted on November 30, 2007, "The patient states he

does feel like he has improved significantly through his right flank....He does report decreased numbness through his left lateral thigh. The patient has exhausted his six visit script. He is scheduled to see the doctor following today's visit. He is discharged from physical therapy."

Dr. Vandergriff signed a Form AR-3 on November 30, 2007: "Pt states he has finished 6 PT visits and he has 'noticeable improvement.'" Dr. Vandergriff indicated on the Form AR-3 that the claimant could return to work on November 30, 2007 with no restrictions.

Dr. Vandergriff corresponded with the respondent-employer on February 21, 2008: "At the request of and authorized by King Electrical Contractors, Inc., we are seeing Mr. Timothy McCartney....his low back pain has returned as of three days ago. He cannot recall any specific cause that caused the back pain to return. He reports that his left leg numbness never really went away. The date of injury is October 15, 2007...." Dr. Vandergriff assessed "Low back pain with left lower extremity paresthesia. Plan: I will put him in physical therapy and he needs to do range of motion exercises and take ibuprofen. I would also like to check an MRI due to the paresthesia. I

will see him back in two weeks' time and he can return to work with the restriction of no lifting greater than 25 pounds."

Dr. Robert J. Tomlinson, Jr. examined the claimant on February 29, 2008:

Tim is a 42-year-old gentleman who sustained an injury to his low back when he fell off a 10-foot ladder on October 15, 2007, while working for King's Electric as an electrician. He experienced immediate pain in his low back and numbness in his thigh. He had a cortisone injection, which resolved his low back pain about a week later; however, he has continued to have numbness in the lateral aspect of his left leg....

Evaluation of lumbar spine shows mild tenderness to palpation of L1-2, left greater than right....Evaluation of his x-rays reveals moderate disc space narrowing, L1, L2, and L3.

The claimant agreed at hearing that he did not actually fall from the ladder at the time of the admitted compensable injury. In any event, Dr. Tomlinson's impression on February 29, 2008 was "Herniated nucleus pulposus, L1-2, with radiculopathy, L2-3, on the left." Dr. Tomlinson planned an MRI scan of the lumbar spine and assigned the following Work Status: "He may return to work. No lifting or carrying greater than 10 pounds."

An MRI of the claimant's lumbar spine was done on March 7, 2008, with the following impression:

1. Far lateral left sided focal disc herniation at the L5-S1 level that probably compresses the left L5 nerve root within the neural foramen.
2. Otherwise unremarkable MRI of the lumbar spine.

Dr. Tomlinson wrote to the respondent-carrier on March 12, 2008:

Timothy McCartney returns with his MRI scan, which shows no significant disc herniation. He has minimal, if any disc bulging at L1-2, 2-3, 3-4, and 4-5. Tim says he is no better. In fact, he is a little bit worse. He is tender over the PSIS on the left. He has diffuse numbness down his left leg, behind but not past the knee....

Plan: I would like to set Tim up for the disc regenerative therapy program. I would like him to be seen as per their protocol. I will see him back in a month.

Work Status: He may return to work. No lifting or carrying greater than 10 pounds.

Dr. James B. Blankenship began treating the claimant on April 8, 2008:

Mr. McCartney is a very pleasant 42-year-old gentleman who was injured in October of 2007. He was on top of a ladder and twisted and when he came down he had left-sided lower back pain. He subsequently was given an IM injection of cortisone and started on some physical therapy. Some of the abdominal strengthening was very appropriate, although he was placed with throwing a weighted ball with twisting. The gentleman states his back pain went away for about six weeks and then returned. He then requested to see a different physician and Dr. Tomlinson recommended some disk regenerative therapy which the insurance company would not approve and

referred him in to see me. He is currently taking Ibuprofen as needed along with Ultracet. He is currently doing light duty work. He has missed some work, but he has done this on his own time....

His myofascial examination reveals some positive piriformis findings and some SI joint findings also.

Dr. Blankenship's impression was "I think the majority of his back pain is a combination of SI joint pain and Z-joint pain. His leg discomfort is most likely piriformis in nature. I have reviewed his MRI in its entirety.

RECOMMENDATIONS: I will plan on seeing him back in six weeks. If he is not improved at that time, then a consideration of injection therapy by Dr. Cannon would be appropriate. As a last resort, provocative discography would be appropriate at the L5-S1 and L4-5 levels, but hopefully we will not get to that point. The gentleman agrees with this overall game plan and we will see him back in six weeks."

Dr. Blankenship noted on May 21, 2008, "Tim is back in the office today for followup. He has been working diligently with Steve in physical therapy with a good flexion-oriented program. He states that his pain is significantly less than it was on his initial visit. He has had good improvement to the point that the consideration of

injection therapy is not needed." Dr. Blankenship's impression was "Resolving mechanical lower back pain with a probable zygapophyseal joint etiology to this pain.

RECOMMENDATIONS: I have recommended another month of active therapy. He is liberalizing his work and has continued to work. I will see him back in four weeks likely for a disability determination examination and he will be at MMI at that time. I would like for him to continue to work between now and then and continue with his therapy."

The claimant's testimony indicated that he was physically unable to work beginning approximately June 15, 2008. The respondents' attorney cross-examined the claimant:

Q. When you first, I guess, stopped getting or stopped being allowed to work in June, was it because the doctor had given you some restrictions, or what happened in June that caused you to start missing work in June?

A. I had been given work restrictions quite a while before that, but my pain had increased and I guess the restrictions were changed a bit, maybe. I don't know.

The hearing testimony indicated that the respondents paid temporary total disability benefits beginning June 16, 2008. Christopher King, the respondent-employer's owner, agreed that the claimant had work restrictions beginning in

June 2008. Mr. King testified, "the first thing that we got was a light duty restriction to return to work, which was couldn't lift over ten pounds, couldn't stoop, couldn't bend, couldn't climb ladders, couldn't do multiple things that as an electrician he would be required to do in his daily duties."

The claimant agreed on cross-examination that, as of August 2008, he was able to perform various physical activities such as lifting objects greater than 10 pounds, bending, stooping, mowing his yard, riding a four-wheeler, driving a boat, and camping. Christopher King testified that he drove past the claimant's house on or about August 13, 2008. Mr. King testified that he observed the claimant "on a lawn mower, riding a lawn mover (sic); he was picking up debris and different things. At one point, there was a trailer with a drop-down tailgate that him and the other fellow lifted up and put on the trailer. He was using a sledge hammer, driving a pin to hold that tailgate onto the trailer. And some of those things were, you know, that seemed to go against what the doctor had given me a note saying."

Dr. Blankenship noted on August 14, 2008, "Mr. McCartney has actually had worsening pain since we saw him last....I have recommended having Dr. Cannon see him again for a Z-joint injection on the left and then subsequent physical therapy for two weeks with Steve and then back in to see me in about four weeks. There is nothing at work that he can do that does not involve a significant amount of twisting and at present I do not feel like that he can work, and we have written him an off-work note until I see him back in four weeks." Dr. Blankenship's impression was "I still feel like the gentleman's primary pain etiology is Z-joint in nature and this is confirmatory by the injection he had."

The respondents' attorney questioned Christopher King:

Q. The next day, what happened, if you recall, on August 14th?

A. On August 14th, Tim - on August 13th, Tim called into the office that morning and Kevin King, my brother, which is his supervisor, basically told him, "We have not received a release for you to come back to work so, you know, we can't put you back to work. We don't have the light duty." On the 14th, I received a letter from I believe it was Dr. Blankenship, the doctor, that basically said "No work." There was no restrictions on it; it just said "No work."

Q. Okay.

A. And when I seen that, it flustered me pretty bad because the day before, I obviously seen him do some stuff, so I just didn't understand the doctor doing that at all....

Mr. King testified that he again saw the claimant performing physical activities at the claimant's home on August 18, 2008.

Respondents' Exhibit Three is a DVD showing surveillance taken of the claimant on August 27, 2008. The surveillance shows the claimant riding on and steering a tractor/mower, with no apparent physical problems. The surveillance footage shows the claimant driving the tractor over a flat surface with no excessive bouncing.

Dr. Blankenship noted on September 11, 2008, "At his Worker's Compensation Carrier's request, I have reviewed surveillance information on Tim....We had released him to work with restrictions, but unfortunately those restrictions could not be complied with. The fact that he is able to do things only indicates that he is doing what I have told him to do. I have told him that I want him to stay as active as he can and do things in the appropriate fashion. Concerning his mowing, he generally outlines the fields and then has his son finish the mowing but I have looked at the pictures of the tractor and the mower and it does appear to be a

fairly well cushioned seat so I do not have any problems with this....In summary, I would state that I have certainly been wrong before but in Mr. McCartney's situation I feel like that the things that he was doing he was certainly doing in pain. I have not seen any indications that he has had any non-organic findings on his examination and he has always been very diligent and reliable with his physical therapy....although I can see how the surveillance would lend some concerns about Mr. McCartney I still feel like that he is a very reasonable individual that is trying his best to get better. I do not see anything on his surveillance that would preclude me being able to continue treating him. I have reviewed surveillance before and fired patients, but in this situation I do not see anything that is inconsistent with what he has been telling me."

The claimant followed up with Dr. Blankenship on September 11, 2008:

IMPRESSION: I think that he most certainly has a strong Z-joint component to his overall pain complaints, but given the fact that his injections have not afforded him any more significant relief than they have I think we now have got to consider that the L5-S1 disk is also a culprit. I have addressed in a different narrative my response to his surveillance. It does not change my opinion concerning Mr. McCartney nor his continued need for treatment and the appropriateness of his

treatment and his complaints. If his employer can outline some light duty work for him, I would be happy to get him back to work but at the present I cannot release him to full duty work with the myriad of things that he would have to do in the electrical field.

RECOMMENDATIONS: We are going to do some new flexion extension x-rays on him today to see if there is any motion at either the L4-5 or L5-S1 disk space. I also am recommending a new lumbar MRI on the gentleman. The big dilemma is whether we are going to need to address any further the gentleman's validity to his complaints. I really do not want to have to spend his carrier's money in getting a functional capacity evaluation or a neuropsychological evaluation. What I would rather do is continue to treat the gentleman as I see fit and see if we cannot get him better. We will talk with his case manager today and see what their response to my narrative concerning his surveillance was and then see where we are going to go from there.

Dr. Blankenship provided a Radiographic Interpretation on September 11, 2008:

The AP and lateral radiograph demonstrates that the patient has five moveable lumbar segments. The neutral standing radiograph raises the question of whether there is a grade I anterolisthesis. There is no forward movement on flexion, although there is significant flattening of the disk space at that level. He does not have any significant retrolisthesis in extension. The amount of motion in the anterior portion of the disk space would raise the question of segmental instability and raises the question of whether there is more disk space disruption than his original MRI indicated. A new MRI is recommended.

The record contains a lengthy report from National Comp. Care, Inc., based in Springdale, Arkansas, dated October 7, 2008. W. Ray Jouett, MD, Medical Director, wrote in the October 7, 2008 report:

This is a file review of Timothy McCartney, an employee of King Electric Contracting, Inc. The first information of a medical nature that appears in this chart is in reference to an office visit by Mr. McCartney to the services of, Cathleen Vandergriff, MD. Mr. McCartney stated that on 10/15/07 he was on a ladder and twisted with his arms above his head doing some work and the next day had pain in his back. He states that the day after the pain started, he noticed tingling in his left lower extremity including the lateral side of his leg down to his knees....

Summary: Thomas McCartney, employee of King Electric, describes standing on top of a ladder on 10/15/07 and twisting himself with his arms up over his head and developed some discomfort in his left thigh area and about the buttock, down to his knee. Since that time there has been a fairly constant saga of difficulties with various forms of treatment having been extended by four physicians; an occupational medicine specialist, an orthopedic surgeon, a neurological surgeon and a pain management specialist. The patient gives a history of a period of some six weeks, at which time he was without pain and the numbness however, remained in the outer thigh, down to the knee. In spite of all efforts to return him to work, he states the company has not been able to find light work of which he could do. Several questions have been presented to the reviewer for answers.

Question #1:

1. Is medical treatment to date reasonable and necessary in regard to the nature and extent of the accident on 10/15/07?

The treatment, so far as I can determine from the material, has consisted of physical therapy, injection about a facet joint and perhaps also the Z-joint, although I am not sure of that injection. The diagnostic studies that have been performed reveal no evidence of a mass lesion, no evidence of a nerve compression that would be causing the difficulty and in my opinion this is an example of an over treatment, for at the most, perhaps a lumbar muscle strain problem which with the passage of time should have long time ceased. I am also aware of the fact that some patient's personality is such that they are very difficult to deal with and this certainly may very well be one of the cases in which the physicians have gone overboard trying to be of value specifically to a problem that has been addresses (sic), in my opinion, but appropriately, but a length. Also, in my opinion, this case should have been closed and settled some time ago. I do not see anything at the present time that requires treatment beyond what has already been provided and the main finding is that nothing has been determined to be treated. My recommendation would be to cease treatment and to have an FCE to be performed on the patient with neuropsychological evaluation.

2. What is your opinion of Dr. Blankenship's opinion following his review of surveillance video?

I really have no opinion concerning Dr. Blankenship's opinion. The thing that one must consider is that this is a patient that has periods in which he has been without pain, times in which he is better, a time in which the patient drives from Arkansas to San Antonio, Texas, and times when he is noted, over a lengthy period in which he is noted riding a tractor, mowing uneven ground.

That certainly does not appear to me to reveal evidence of an illness to keep someone from working. Tractors are rough. Tractors shake a

individual's whole body. Riding from N.W. Arkansas to San Antonio with a bad back such as he describes likewise is not a situation that seems reasonable unless there is an absolute necessity or emergency. One gets the impression that pain becomes less when there is something specifically the patient wishes to become involved with....

Looking at the summary at a distance it would appear that this is long overdue to be settled and the matter should come to rapid attention and bring this to a close as it appears that there is no evidence of workman's comp with any type of disability being made from the information gathered.

Dr. Earl Peeples corresponded with the respondent-carrier on November 20, 2008:

Timothy McCartney, a 43-year-old male, was seen for the purpose of an independent medical examination November 20, 2008. I indicated to him that the purpose of our encounter was for me to examine him and prepare a report to a third party. I explained that, based on our encounter, I would not replace or become his treating physician....

Mr. McCartney indicated that while working October 2007 as an electrician, he twisted while installing an overhead object and felt low back pain near the belt line, left side greater than right side. He subsequently developed lateral thigh numbness, which he describes as on the lateral aspect of his thigh. On questioning it stops at the midline anteriorly and the midline posteriorly and stops just above the knee. (This distribution is consistent with the lateral femoral cutaneous nerve.) He does not have radiating pain extending to his foot....

He has not worked since June 2008 as his employer does not have limited duty....

RADIOGRAPHS:

Radiographs were obtained in this office. There is a marker present over the L5-S1 facet on the left. Views did not show any evidence of gross spondylolisthesis. The left sacroiliac joint showed some question of sclerosis or narrowing, although this could be projection....

SUMMARY:

Mr. McCartney has, I think, two conditions: one is a decreased lateral femoral cutaneous nerve sensibility of unknown etiology. He has incomplete but definitely decreased sensation in this peripheral nerve, which is beautifully diagrammed by marking his skin with a pin where his sensation changes and which literally corresponds to the textbook diagram of the lateral femoral cutaneous nerve distribution. This requires no treatment and is, as far as I can tell, unrelated [to] a twisting injury of the back and of unknown cause.

Regarding the spine, he appears to have some tenderness in the left L5-S1 facet, but structurally his situation is satisfactory with a far lateral L5-S1 disc abnormality. However, there is no evidence of neurological compromise identified by myself, Dr. Tomlinson, or Dr. Blankenship. Operative intervention is not indicated.

In view of the comments in the medial (sic) records regarding the surveillance copies and in view of his pain, I believe an MMPI evaluation would be appropriate. This is likely to be normal.

I do not identify any structural abnormality which would prevent Mr. McCartney from engaging in his normal employment. The presence of pain does not prevent employment. The release from treatment does not guarantee employment without repeat injury or new injury. As at present there is no

identifiable anatomic abnormality, based on the exam by multiple physicians on which to base a permanent impairment rating and since pain the State of Arkansas is not a ratable condition, in my opinion, he has no ratable impairment of function.

I think it would be advisable to perform a triple phase bone scan with particular attention to the low spine and pelvis to see if there is evidence of a sacroiliac or facet abnormality. This is most likely to show degenerative change, which would not be specifically trauma related. The mere fact that the onset of pain occurred at work following a normal maneuver, that is, a mild twisting while standing, is not proof of anatomic injury. "Post hoc ergo propter hoc" (after the thing therefore because of the thing) is false logic and is not a basis on which to attribute subsequent pain.

Mr. McCartney seemed forthright. I see no reason he could not be returned to employment and every effort should be made to work with his employer for assigning tasks which he could complete. I see no specific activity from which to restrict him. I do not agree with eight to ten hydrocodone daily in the absence of an undiagnosed, unidentified anatomic causation.

I would be happy to make additional comments following the results of bone scan and MMPI testing, if these are, indeed, performed. If MMPI testing is performed, I would recommend Dr. Winston Wilson of Little Rock as an individual who performs a thorough forensic test.

Dr. Peeples opined that the claimant had reached maximum medical improvement for his October 15, 2007 work injury but stated, "I do not have a specific date on which to define MMI." Dr. Peeples further stated, "I believe he

may resume his basically normal employment. He should, of course, be prudent in his lifting. I have no specific physical restrictions to apply based on his twisting incident October 15, 2007."

The parties stipulated that there was "no dispute over temporary total disability benefits accruing through November 20, 2008."

A triple-phase bone scan of the claimant's lumbar spine and hips was done on December 12, 2008, with the following findings: "There is normal uptake in the lumbar spine, sacroiliac joints, facets, osseous pelvis, and hips. Opinion: Normal study."

The parties stipulated that there was "no dispute over medical services provided through January 11, 2009."

Dr. Richard D. Back, a psychologist, evaluated the claimant on January 12, 2009 and diagnosed "Axis I: Pain Disorder Associated with Both Psychological Factors and a General Medical Condition."

Dr. Peeples informed the respondent-carrier on January 14, 2009, "Regarding his physical findings, he needs no specific treatment of the lateral femoral cutaneous nerve. I do not recommend surgical intervention. I recommend

continued conservative measures of support and observation of his neurological status. I will report on the triple phase bone scan when it becomes available."

The claimant testified on cross-examination that he contacted the respondent-employer in about mid-January 2009, "seeing if they were ready for me to come back to work....That's when I found out that I had been released to work."

Dr. Peeples stated on February 11, 2009, "I do not identify a physical abnormality which would prevent Mr. McCartney from being employed in whatever occupation he desired. Some arthritic change and minor anatomic abnormalities are not a contraindication to normal employment....The normal status of his bone scan would tend to deny a diagnosis of any significant degenerative changes or underlying skeletal injury."

The claimant agreed at hearing that he returned to full-duty work for the respondent-employer on or about March 12, 2009.

A pre-hearing order was filed on March 17, 2009. The claimant contended, among other things, that he was entitled to temporary total disability benefits "from January 12,

2009 until a date yet to be determined and additional treatment by or at the direction of Dr. Blankenship."

The respondents contended, among other things, that the claimant had been paid all benefits to which he was entitled. The respondents contended that the claimant was not totally incapacitated to earn wages beyond November 20, 2008. The respondents contended that the claimant was overpaid temporary total disability benefits from November 21, 2008 through January 11, 2009 at a rate of \$368.00 per week for a total credit of \$2,733.71. The respondents contended that if the claimant needed additional medical treatment, then said treatment was related to pre-existing abnormalities rather than the compensable injury. The respondents contended that they were entitled to an appropriate offset pursuant to Ark. Code Ann. §11-9-411.

The parties agreed to litigate the following issues:

1. The claimant's entitlement to additional medical services after January 11, 2009, specifically those prescribed by Dr. Blankenship.
2. The claimant's entitlement to additional temporary total disability from November 21, 2008 through a date yet to be determined.

Dr. Blankenship noted on April 2, 2009, "I have told Tim today that prior to any surgical consideration I want to perform an L4-5 and L5-S1 discography. I told him that

before we really even started heading down the road with surgical intervention, we need to try to get things settled back down. He has had a significant myofascial spread to his pain, and I would like to go ahead and start treating him again and get him on Decadron Dosepak and Lyrica at 75mg twice a day. Unfortunately, since now Blue Cross/Blue Shield is paying for his healthcare they will not authorize Lyrica, despite the fact that it is a very good medication for him with his myofascial component, so we will provide some 75mg samples. We will have him start working with Steve and with some E-stimulator and try to get his myofascial component to his pain settled down....Hopefully, we can get this settled down and maybe even still avoid surgical intervention. He agrees to this plan."

The claimant followed up with Dr. Blankenship on April 29, 2009:

He states that the myofascial disease he had had has settled down significantly the steroid medication, the Lyrica, and most importantly, the aggressive active physical therapy that he has been doing with Steve. He has been working diligently with Steve. He still is requiring OxyContin and Hydrocodone. The Lyrica afforded him significant relief. There are some problems with his workers' comp carrier at present, so we are going to go ahead and give him some samples today to make sure that he does not run out, and I do want him continuing to do physical therapy with

Steve. Right now, he is working and cannot miss work because of financial situations. He thinks that he does want to proceed on with discography for further evaluation, but he wants to wait and make that decision early in June....

IMPRESSION: Improvement of his myofascial disease with aggressive active physical therapy.

RECOMMENDATIONS: Continue OxyContin, Hydrocodone, Lyrica, and physical therapy. He is going to return in June, and at that time, if he has continued to have persistent pain, we are going to consider multilevel discography.

A hearing was held on May 18, 2009. At that time, an administrative law judge announced that the parties agreed the appropriate compensation rates were "\$402 for total disability and \$301 for permanent partial disability. The claimant contended at hearing that he was entitled to temporary total disability benefits from November 21, 2008 through March 11, 2009. The claimant testified on direct examination:

Q. Has there been any point in time after you got injured at King Electrical Construction where you felt like your condition had recovered so that you were back to the condition that you were in before you got hurt?

A. No, sir.

Q. What kinds of problems have you had since this injury at King Electrical Construction as far as your symptoms are concerned? What kind of symptoms have you had?

A. Lower back pain; left hip, just a few inches from the spine; I've had numbness in my leg, my left leg, between my hip and my knee, on the outside of my leg; and then numbness in my left four toes....

Q. Are you supposed to go back and see [Dr. Blankenship] in the future?

A. I am.

Q. What is he doing for you?

A. It was quite a while that I had seen him, it had been a pretty broad time, and my pain had gotten broader in area, and I hadn't gone to therapy, and so he put me back in therapy, put me on some steroids, increased my medications, and put me on a couple of new medications to get the pain localized again.

Q. Now, how are you able to see Dr. Blankenship if the workers' compensation people are not authorizing your medical treatment?

A. I'm paying for all that myself.

Q. Do you have health insurance?

A. I do....

Q. Now that you're back under Dr. Blankenship's treatment, are you noticing any difference in your condition?

A. Definitely....The pain is not as bad and it's more localized to a smaller area.

An administrative law judge filed an opinion on August 12, 2009. The administrative law judge found, among other things, that "3. On October 15, 2007, the claimant earned

wages sufficient to entitle him to weekly compensation benefits of \$402.00 for total disability and \$301.00 for permanent partial disability....” The respondents do not appeal that finding. The administrative law judge found that treatment recommended by Dr. Blankenship subsequent to January 11, 2009 was reasonably necessary, and that the claimant proved he was entitled to temporary total disability benefits from November 21, 2008 through March 11, 2009.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The injured employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. Ark. Code Ann. §11-9-705(a) (3) (Repl. 2002); *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a

question of fact for the Commission. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996).

In the present matter, an administrative law judge essentially found that the medical treatment recommended by Dr. Blankenship subsequent to January 11, 2009 was reasonably necessary in connection with the compensable injury. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury to his low back on October 15, 2007. The claimant received authorized treatment for his compensable injury from Dr. Vandergriff. The claimant participated in physical therapy. Dr. Vandergriff noted that the claimant's back pain had decreased following conservative treatment, but that the claimant continued to have numbness in his left leg following the compensable injury. Dr. Tomlinson examined the claimant in February 2008 and stated that the claimant had a "Herniated nucleus pulposus, L1-2, with radiculopathy, L2-3, on the left." An MRI of the claimant's lumbar spine in March 2008 confirmed a focal disc herniation at L5-S1 "that probably compresses the left L5 nerve root within the neural foramen." Dr. Tomlinson's treatment plan included a "disc regenerative therapy program," but the record

indicates that the respondents would not authorize said treatment.

Dr. Blankenship began treating the claimant in April 2008. Dr. Blankenship noted the history of the compensable injury and opined, "I think the majority of his back pain is a combination of SI joint pain and Z-joint pain. His leg discomfort is most likely piriformis in nature." Dr. Blankenship treated the claimant conservatively, which treatment eventually included injections and another round of physical therapy. The respondents presented testimony at the hearing and surveillance footage showing the claimant performing some physical activity at home in August 2008. Dr. Blankenship reviewed the surveillance and stated, "I feel like that the things that he was doing he was certainly doing in pain. I have not seen any indication that he has had any non-organic findings on his examination and he has always been very diligent and reliable with his physical therapy....although I can see how the surveillance would lend some concerns about Mr. McCartney I still feel like that he is a very reasonable individual that is trying his best to get better. I do not see anything on his

surveillance that would preclude me from being able to continue treating him."

Dr. Blankenship continued to treat the claimant conservatively. Dr. W. Ray Jouett, Medical Director of National Comp Care, Inc., performed a file review on October 7, 2008. Dr. Jouett opined that the claimant had been "over-treated" for "perhaps a lumbar muscle strain" which "should have long time ceased." Dr. Jouett recommended a Functional Capacity Evaluation, a neuropsychological evaluation, and settlement of the case. Dr. Earl Peeples conducted an independent medical examination on November 20, 2008. Dr. Peeples recommended additional conservative modalities, including a bone scan. A triple-phase bone scan of the claimant's lumbar spine and hips on December 12, 2008 was normal. Dr. Peeples thereafter recommended "continued conservative measures of support and observations of his neurological status." The claimant also continued to follow up with Dr. Blankenship.

Dr. Blankenship's notes in April 2009 indicated that the claimant was benefitting from conservative treatment arranged by Dr. Blankenship. Dr. Blankenship noted on April 29, 2009 with regard to the claimant, "He states that the

myofascial disease he had had has settled down significantly" and "the steroid medication, the Lyrica, and most importantly, the aggressive active physical therapy that he has been doing with Steve." Dr. Blankenship's impression was "Improvement of his myofascial disease with aggressive active physical therapy." The claimant credibly testified that he had benefitted from Dr. Blankenship's treatment recommendations.

It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Manufacturing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Full Commission finds that Dr. Blankenship's opinions and recommendations for treatment are entitled to significant evidentiary weight. We find that Dr. Blankenship's treatment modalities were causally related to the compensable injury and were not causally related to a pre-existing condition or abnormality. Although we find that Dr. Blankenship's reports are entitled to more probative weight than the findings of Dr. Jouett and Dr. Peeples, we note that even Dr. Peeples recommended continued conservative treatment for the claimant. The Full

Commission affirms the administrative law judge's award of additional medical treatment as recommended by Dr. Blankenship. The respondents are liable for all of the medical treatment of record provided to the claimant, including treatment provided by Dr. Blankenship through April 29, 2009.

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). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12) (Repl. 2002). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and 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. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a factual determination for the Commission. *Id.*

An administrative law judge found in the present matter, "8. The claimant has proven that he continued to be temporarily totally disabled, as the result of the effects of his compensable back injury from November 21, 2008 through March 11, 2009." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury to his low back on October 15, 2007. The claimant subsequently received reasonably necessary medical treatment from Dr. Vandergriff, Dr. Tomlinson, and Dr. Blankenship. The claimant continued to work for the respondent-employer. The claimant testified that he was physically unable to work for the respondents beginning June 15, 2008. The record indicates that work restrictions had been imposed as a result of the claimant's compensable injury. Christopher King, owner of the respondent-employer, agreed that restricted work as an electrician was not available for the claimant.

The Full Commission recognizes that the claimant was observed performing some physical activities at his home beginning in August 2008. Surveillance showed that the claimant could drive a riding mower and lift some objects. Despite the claimant's apparent ability to be somewhat

physically active, Dr. Blankenship noted on August 14, 2008, "There is nothing at work that he can do that does not involve a significant amount of twisting and at present I do not feel like that he can work...." Christopher King testified that the claimant's supervisor would not allow the claimant to return to work at restricted duty. Dr. Blankenship reviewed the surveillance yet opined that the claimant was a credible employee who was trying to improve his physical condition following the compensable injury. Dr. Blankenship noted on September 11, 2008, "I cannot release him to full duty work with the myriad of things that he would have to do in the electrical field."

Dr. Peeples opined on November 20, 2008 that the claimant had reached maximum medical improvement but concluded, "I do not have a specific date on which to define MMI." Dr. Peeples opined that the claimant could resume normal employed but "be prudent in his lifting." The claimant testified that he was not allowed to return to full-duty work for the respondent-employer until on or about March 12, 2009. We find that the claimant proved he was entitled to temporary total disability benefits beginning June 16, 2008 through March 11, 2009. The evidence does not

demonstrate that the claimant remained within his healing period and was totally incapacitated from earning wages after March 11, 2009.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was entitled to additional medical treatment as recommended by Dr. Blankenship. The claimant proved that the medical treatment of record, including treatment with Dr. Blankenship through April 29, 2009, was reasonably necessary in connection with the compensable injury. The respondents are liable for the costs of said treatment pursuant to the Commission's fee schedule. The claimant proved that he was entitled to temporary total disability benefits from November 21, 2008 through March 11, 2009. The respondents do not appeal the administrative law judge's finding that the correct weekly rate was \$402 for temporary total disability. Temporary total disability shall be payable to the claimant with respect to any week for which the claimant received unemployment benefits but only to the extent that the temporary total disability otherwise exceeded the unemployment benefits. See Ark. Code Ann. §11-9-506 (Repl. 2002).

The Full Commission therefore affirms the administrative law judge's findings of fact. 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, 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 must respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that additional medical treatment is reasonable and necessary and finding that the claimant is entitled to additional temporary total disability benefits. Based upon my de novo review I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury for which he has received more than adequate care.

In fact, after sustaining his injury on October 15, 2007, the claimant was treated by Dr. Cathleen Vandergriff and was released to return to work on November 30, 2007, without any restrictions. The claimant returned to Dr. Vandergriff in February 2008 advising that his low back pain returned "three days ago." The claimant then came under the care of Dr. Robert Tomlinso, an orthopedic specialist, who noted "mild tenderness to palpation of L1-2, left greater than right." Accordingly, Dr. Tomlinson assessed the claimant with a herniated nucleus pulposus at L1-2 with radiculopathy, and L2-3 on the left. An MRI was ordered which revealed "minimal if any disc bulging" from L1-2 through L4-5. At L5-S1 "a far lateral left sided focal disc herniation that appears to be compressing the left L5 nerve root within the neural foramen" was noted. After reviewing the MRI results, Dr. Tomlinson noted that the claimant had no significant disc herniations but did state that upon examination the claimant had "diffuse numbness down his left leg, behind but not past the knee." Thereafter, the claimant came under the care of Dr. James Blankenship, a neurosurgeon. Upon examination, Dr. Blankenship noted that the neurologic exam was unremarkable, but opined that the

claimant's leg discomfort was most likely piriformis in nature. Dr. Blankenship ordered physical therapy at that time. Despite the claimant's treatment, the claimant returned to Dr. Blankenship in August of 2008 complaining that his pain had worsened.

Respondents sought and obtained a medical records review from Dr. Ray Jouett who recommended an FCE and a neuropsychological evaluation. Respondents also obtained a second opinion from Dr. Earl Peeples. Upon examination, Dr. Peeples specifically stated:

...I took an ink pen and using light touch outlined an area of decreased sensation over the left lower extremity. It corresponds in a textbook pattern to the distribution of the lateral femoral cutaneous nerve and, in fact, I presented an anatomy textbook to him and his wife demonstrating the difference between the distribution of the lateral femoral cutaneous nerve, which is matched, and the dermatomal pattern, which as not matched. No neurological deficit exists in the left or right lower extremity with intact reflexes, negative straight leg raising and good muscle strength. He had adequate flexion, but some pain in the lower lumbar spine with extension. On palpation of the lumbar spine he was found to have tenderness to the left at what appeared to be the L5-S1 facet. This was, indeed, marked by a BB and all radiographs were obtained. It does correspond to the area of palpable tenderness. He is not tender in the midline.

The remainder of the orthorthopedic exam was unremarkable.

Dr. Peeples diagnosed the claimant with two conditions. First, Dr. Peeples opined that the claimant had a decreased lateral femoral cutaneous nerve sensibility of unknown etiology. In this regard, Dr. Peeples stated, "He has incomplete but definitely decreased sensation in this peripheral nerve, which is beautifully diagrammed (sic) by marking his skin with a pin where his sensation changes and which literally corresponds to the textbook diagram of the lateral femoral cutaneous nerve distribution." Dr. Peeples noted that this condition was not related to the claimant's compensable back injury and that no treatment was required. Next, Dr. Peeples assessed the claimant with "tenderness in the left L5-S1 facet" without any evidence of neurological compromise identified by either Dr. Peeples, Dr. Tomlinson or Dr. Blankenship. Dr. Peeples further opined that the claimant had reached maximum medical improvement by the time of his examination and that the claimant could return to work. However, as a precaution, Dr. Peeples advised that a triple phase bone scan should be performed to see whether the claimant had any sacroiliac or facet abnormality.

Accordingly, a triple phase bone scan was performed on December 12, 2008, which revealed normal uptake.

When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

It is clear from Dr. Peeples's examination that the claimant's lower extremity numbness is not related to the claimant's compensable back injury. As explicitly detailed by Dr. Peeples, the claimant's nerve damage is beautifully diagramed and literally corresponds to the textbook diagram of the lateral femoral cutaneous nerve distribution. There has been no allegation and no evidence that this condition is related to the claimant's lower back injury. Accordingly, I cannot agree with the majority that any additional treatment for this condition is reasonable and necessary medical treatment in connection with the claimant's compensable injury. Furthermore, the claimant's

does not have any evidence of neurological compromise identified by either Dr. Peeples, Dr. Tomlinson or Dr. Blankenship. Accordingly, any treatment other than conservative maintenance for a lumbar muscular injury is not reasonable and necessary medical treatment and I am unable to find that even any additional conservative treatment is necessary.

With regard to temporary total disability, I find that the claimant has failed to prove by a preponderance of the evidence that he has been both within his healing period and totally incapacitated from earning wages. The claimant owns his own electrical company. His earnings for 2008 were greater than his earning in 2006 and almost as much as his earnings for the entire year of 2007. When I consider these earnings together with the claimant's physical activities on the surveillance tape, I am persuaded to find that the claimant was not totally incapacitated from earning was during the period of time for which he is requesting disability benefits.

Therefore, for those reasons stated herein, I must respectfully dissent.

KAREN H. MCKINNEY, COMMISSIONER