

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F902783

ZACKERY CLEMENT, EMPLOYEE	CLAIMANT
JOHNSON SHOWROOM WAREHOUSE, EMPLOYER	RESPONDENT
NATIONAL UNION FIRE INSURANCE CO./ CHARTIS CLAIMS, INC., CARRIER/TPA	RESPONDENT

OPINION FILED JULY 8, 2011

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

Claimant represented by the HONORABLE STEVEN R. McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JARROD S. PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed March 23, 2011.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employee-employer-carrier relationship existed on March 12, 2009, at which time the claimant sustained a compensable injury at a compensation rate of \$277.00/\$208.00. Medical expenses and temporary total disability benefits were paid until May 10, 2010, and again from July 15, 2010, to August 8, 2010. The Medical Cost Containment Division issued

a Change of Physician Order on April 7, 2010, from Dr. Shirley to Dr. Covey.

2. The claimant's request for additional treatment for his hernia is hereby denied as unreasonable and unnecessary. Diagnostic testing shows no recurrent hernia and surgery to explore the scrotum has been ruled out by the claimant's physicians as there is no atrophy, infection or torsion.
3. There is no evidence showing the claimant injured his back on March 12, 2009. Diagnostic testing was performed which ruled out a back injury as the source of the claimant's left groin pain.
4. If they have not already done so, the respondents are directed to pay the court reporter, Linda Parker's, fees and expenses within thirty days of receipt of the bill.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant proved his entitlement to additional treatment for his hernia, that he sustained a compensable injury to his back on March 12, 2009 for which he is entitled to medical and indemnity benefits, and that he is entitled to a second change of physician and temporary total disability benefits from May 10, 2010 to July 14, 2010, and from August 9, 2010 to a date yet to be determined, as well as an attorney's fee.

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). 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).

Under Arkansas workers' compensation law, the employer takes the employee as he is found, and circumstances which aggravate pre-existing conditions are compensable. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990). 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 a causal connection between the two episodes. Id. A causal connection is established when the compensable injury is found to be "a factor" in the resulting need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). Treatment intended to reduce, or

enable a claimant to cope with, chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. Sec. 11-9-508. Billy Chronister v. Lavaca Vault, Full Commission Opinion filed June 20, 1991 (D704562).

The claimant sustained a compensable injury when unloading a refrigerator, causing a hernia. The claimant underwent three surgeries related to this event, and after the third, a scrotal exploration, the urology specialist at UAMS stated that the claimant's problems with his left testicle were not a result of the scrotal exploration, but were the result of the original hernia surgeries. The claimant continued to have pain at the incision site and other pain in his flank, back and leg. Dr. Head, the urology specialist, stated that an exploration of the incision site to rule out compression of the spermatic cord was warranted, by another UAMS medical department. Dr. Head did not do the exploration of the incision to answer the question, because it was not part of the GenitoUrinary Department's responsibility and not because it was not necessary.

The majority, in affirming the Administrative Law Judge's statement that diagnostic testing had ruled out a recurrent hernia, failed to take into account that the claimant could have another problem with the site, as occurred after the first surgery, necessitating the second surgery. The claimant

had difficulty with the mesh used in the first repair "wadding up," and that mesh was replaced with a biologic-type mesh. Whether that was successful is unclear, in light of the claimant's continued symptoms. Furthermore, Dr. Head has suggested spermatic cord compression.

Obviously, there is further treatment available to address the claimant's symptoms, at least in the form of an exploration of the incision site for spermatic cord compression, further evaluation of the original hernia and current status, and in the form of pain management. I would award the claimant additional medical treatment of his hernia, including that exploration and further treatment at the direction of Dr. Redman.

The claimant required a third surgery, on October 8, 2009, to explore a potential testicular torsion, due to objective findings of concern. Once the scrotum was opened, good blood flow was found. On October 11, 2009, the claimant presented to the UAMS emergency room with the worst pain yet after his surgeries. A repeat ultrasound showed infarction, or tissue death due to lack of oxygen due to obstruction of blood flow. (<http://www.merriam-webster.com/medical/infarct>). Doppler studies were performed at bedside, and flow to both testicles was present. The diagnosis was inguinal hernia incision, clean, dry and intact; scrotum erythematous ("abnormal redness of the skin due to capillary congestion (as in inflammation),"

(<http://www.merriam-webster.com/medical/erythema?show=0&t=1308858903>)), with exquisite tenderness to palpation of the left testicle and hemiscrotum. Dr. Young summarized that the claimant had a partial testicular infarction and admitted the claimant for pain control, with the approval of Dr. Delk. An ultrasound on this date showed findings consistent with the infarcted testicle and testicular torsion on October 8, 2009. Interval development of hypodensity and very minimal flow in the left testicle was shown. The impression was that "hypodensities scattered throughout the left testicle along with the minimal intratesticular flow is consistent with left testicular infarct in this patient with recently suspected testicular torsion. A mixed echogenic material surrounding the left testicle is consistent with organizing hematoma."

The respondents' position that the claimant had blood flow to his left testicle which disproved the existence of any problem in that testicle is illogical, misplaced, and unsupported by the record. The majority has ignored the issue entirely. There is significant evidence from ultrasound and physical examination that the claimant had injury to his left testicle in the form of infarct, or tissue death. The respondents focused on the October 11 report that the ultrasound showed blood flow to both testicles. However, that record also shows that repeated ultrasounds revealed testicular infarction, which is tissue death

due to lack of oxygen due to diminished or nonexistent blood flow. The claimant did have damage due to blood flow issues, whether the Doppler test showed some amount of blood flow at a particular time or not. On October 12, the notes reflect that an ultrasound showed decreased arterial flow to left testicle and later, in the same record, states that the Doppler showed "no flow" and possible testicular infarct.

Dr. Paddock and Dr. Delk related the testicular issue to either infarct or severe postoperative swelling, which must relate to the hernia surgery, because the swelling was present on October 6, before the testicular exploration surgery. This is consistent with Dr. Head's statement that the hernia surgeries were the cause of the testicular issue.

Thus the claimant's testicular issue, which had not resolved by the time of the hearing, is a consequence of the reasonable and necessary medical treatment of the original compensable injury, to which the claimant was entitled. The claimant is also entitled to additional medical treatment to assess and treat his testicular issues, including an exploration of the hernia incision site to rule out spermatic cord compression and other treatment at the direction of Dr. Redman.

The claimant has also claimed a back injury. The majority affirmed the Administrative Law Judge's statement that "there is no medical evidence or lay testimony evidence to

support a traumatic work-related back injury." This is untrue.

First, the claimant was standing on the ground, while a refrigerator was being moved out of a truck. When his partner lost his grip, the refrigerator's weight came down on the claimant. The mechanism of the accident is consistent with a back injury. Also, there is no question that there was a specific incident, identifiable by time and place, or that the claimant was performing employment services at the time of the incident.

The claimant suffered immediate pain at the time of the accident. His focus was on his groin, but he immediately had problems with pain and weakness in his leg. Pain and weakness radiating into the leg is a symptom of a back injury. These facts support the causal connection between the incident and his back injury.

The MRI results showed disc displacement at L4-5 and L5-S1, with "no evidence of recent traumatic injury." These results were objective evidence of a back injury. The disc displacement is also consistent with the claimant's original leg problems and with his later low back pain. The fact that there is "no evidence of recent traumatic injury" is not dispositive of this claim. The injury occurred in March and the MRI in September, so the injury was not "recent" in terms of the MRI. The MRI does not reveal trauma, which is a wound or injury, but

it does reveal disc displacement in the low back. The claimant has not stated that he was struck in the back or that he suffered bone breakage. He has pain after a large weight came down on him unexpectedly. Furthermore, the record is clear that the claimant could do his work without trouble before the injury. After the injury, he developed pain, swelling and weakness in his groin and leg, and later his low back and left testicle. Positive straight-leg raise tests were also noted close in time to the incident. These facts also support the causal connection between the incident and the back injury.

The majority's statement that nerve problems were ruled out is inaccurate, because only the ilioinguinal nerve was tested. The claimant's back issues evidenced by the MRI, and his symptoms, including a positive straight leg raise throughout his treatment, were not addressed.

I would award the claimant additional medical treatment for his back injury, in addition to treatment for his symptomatic hernia and testicle.

The claimant sought medical treatment at the direction of Dr. Redman or another physician of the Commission's choice. The respondents argued that the claimant had his one-time change of physician to Dr. Covey, and that it was the claimant's fault that Dr. Covey released him from his care. However, the record reflects that Dr. Covey saw the claimant after a drug screen on

the claimant was positive for marijuana metabolites. In fact, Dr. Covey stated in his initial evaluation that the claimant "agreed to stop [using marijuana for pain] and understood that [Dr. Covey] could write no meds until we had a clean UDS." There is no threat to terminate care in that record. There is no evidence of Dr. Covey's reason for releasing the claimant from his care, other than the respondents' attorney suggestions to that fact. The claimant testified that he thought that the respondents stopped authorizing Dr. Covey to treat him. The conclusion that the claimant was released from Dr. Covey's care due to the positive drug test requires speculation, which is impermissible.

Therefore, the claimant, having received unsatisfactory and incomplete treatment of his compensable injury and the consequences thereof from Dr. Covey, is entitled to an award of a change of physician to Dr. Redman. The facts in this case warrant a change of physician. In St. Joseph's Mercy v. Lamb, 97 Ark. App. 248, 248 S.W.3d 514 (2007), the Court of Appeals found that the Commission had the authority to vacate a change of physician order where that order was not, in fact, effective to provide a new treating physician for the claimant. The change of physician to Dr. Covey was not effective to establish a new treating physician for the claimant, as Dr. Covey discontinued his treatment of the claimant without explanation, while the

claimant remained in need of care.

Furthermore, the claimant's treatment was terminated by the respondents, upon the date of Dr. Covey's release, causing the change of physician rules to no longer apply. In Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985), the claimant's doctor saw her, ignored her increasing complaints of back issues, and released her. A second doctor discovered significant injury to her spine, requiring surgery. The Court, operating under similar language but a much looser construction, upheld the Commission's exercise of discretion to direct a second change of physician. The Commission had noted that the change of physician rules did not apply once medical treatment was denied, and that the fact that the first doctor released the claimant to return to work did not mean that she did not need additional medical treatment.

While the Sanyo case was decided under the old act and liberal construction, the law at issue is the same. The respondents are charged with promptly providing reasonably necessary medical care to an injured worker, and if the respondents fail to do so, the Commission may direct that the worker obtain treatment at the expense of the respondents. Ark. Code Ann. Section 11-9-508(a) and (b). The change of physician rules give injured workers the right to an automatic change once. Ark. Code Ann. Section 514. There is nothing in the act limiting

the Commission from exercising Section 11-9-508(b) to direct the claimant to get reasonably necessary medical care at the expense of the respondents. In fact, the act states that the change of physician rules do not apply once medical treatment has been denied, which occurred in this claim, and where no notice of the rules was provided, as in this claim where there is no N form in the record. I construe the above cases and the statutory language to allow the Commission to direct this claimant to obtain reasonably necessary medical care at the expense of the respondents for his compensable hernia, testicular problems, and back injury under Dr. Redman's care. The fact that the claimant has previously exercised his one-time change does not limit the Commission's authority to make a change where necessary.

I would also award the claimant temporary total disability benefits from May 10 to July 14, and from August 9 to a date yet to be determined. The claimant has remained in his healing period since the date of his incident, as his injuries have been misdiagnosed, less than adequately treated, or even ignored, and exacerbated by treatment. The claimant was also totally incapacitated from earning wages. The claimant's inguinal pain, his testicular pain and swelling, and his back pain which radiated into his left leg with weakness were sufficient to prevent his return to work since the incident. Dr. Redman took the claimant off work on September 15, 2010, due to

chronic left inguinal pain and back pain since his on-the-job incident, and due to his need for further evaluation and treatment. I would award indemnity benefits.

The majority made much of the claimant's credibility. However, I find that the claimant should succeed in this claim.

The claimant's demeanor at the hearing has been noted. The claimant's demeanor at the hearing is not surprising given his history of unsuccessful medical care since March 12, 2009, and given his history of anxiety, depression, and bipolar disorder, none of which would bar his claim.

There is no question that the claimant was a poor historian. However, the claimant suffered a painful injury, the treatment of which caused more painful conditions which did not resolve. The claimant also suffers from bipolar disorder and anxiety which exacerbate his difficulties with his history and are exacerbated by his unresolved pain.

There is also no question that the claimant did not have good judgment on the use of social media, but the photos and posts admitted do not prove that he lied about his drug or alcohol use. In fact, those posts referred to approximately four events in two separate years. Four instances of social drinking does not prove that the claimant used alcohol excessively, or even regularly. I do not find the inclusion of the Facebook images to be inappropriate under the Commission's liberal

approach to evidentiary issues, but I do find them of limited use, to the point of irrelevance, to the issues at hand.

Dr. Covey's initial evaluation reflects that the claimant admitted to using marijuana for pain relief. The respondents' reliance on the claimant's apparent negative answer to whether he used illegal drugs belies the fact that Dr. Covey was aware that the claimant used marijuana on a daily basis for pain at that same appointment.

The focus on the claimant's credibility ignores the facts that:

1. the refrigerator did come down upon the claimant,
2. he had immediate pain,
3. he had pain in his groin and pain and weakness in his left leg,
4. he had a hernia,
5. he had surgery to repair it,
6. the claimant had pain at the incision site going into his thigh, flank and back,
7. an ilioinguinal nerve block did not relieve the pain, which Dr. Cone felt indicated the possibility that a back injury was causing the pain,
8. an MRI showed disc displacement at L4-5 and L5-S1,
9. an EMG/NCS showed no femoral neuropathy or entrapment of the ilioinguinal nerve,
10. the webbing used in the first surgery "wadded up" necessitating a second surgery,
11. subsequently the claimant developed significant swelling and pain in his left testicle,

12. ultrasound testing showed diminished or no blood flow to the testicle,
13. Doppler testing during a surgical exploration of the testicle showed good blood flow, but the diagnosis was testicular infarct before and after the exploration,
14. the claimant was hospitalized with increased testicular pain after the exploratory surgery, and ultrasound showed testicular infarct, while Doppler tests showed "flow,"
15. the claimant required treatment for pain control due to his infarcted testicle and the attendant swelling and hematoma,
16. Dr. Head stated that the scrotal problem was not a result of the exploration, that the claimant had an infarction causing the pain and swelling, and that exploration of left inguinal incision to rule out spermatic cord compression should be done by a different UAMS department, and
17. the possibility of spermatic cord compression has not been addressed, and the claimant's back symptoms have not been addressed.

The claimant's credibility does not impact any of the above facts, supported by the record even absent any testimony, which show that there is a continuous relationship between the incident on March 12, 2009 and the claimant's hernia, his surgeries, his back and leg problems. and his testicular problems.

I would award the claimant additional medical benefits for his hernia and testicular issues as well as for his back, directed by Dr. Redman, as well as temporary total disability benefits from May 10 to July 14, 2010 and from August 8 to a date

yet to be determined. I would also award the claimant an attorney's fee.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner