NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F001124

LARRY D. COUCH, EMPLOYEE	CLAIMANT
FIRESTONE TIRE CO., EMPLOYER	RESPONDENT NO. 1
INSURANCE COMPANY OF PENNSYLVANIA, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JULY 19, 2011

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

Claimant represented by the HONORABLE AARON MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas. Ms. King was excused from participating in the hearing.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of the Administrative Law Judge filed April 7, 2011. 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 relationship existed at all relevant times, including January 10, 2000.

3. The claimant sustained a compensable injury to his left shoulder, right shoulder, and neck/cervical spine, on January 10, 2000.

4. The claimant was assigned an 18% anatomical impairment rating to the body as a whole for his neck injury, a 9% anatomical impairment rating to the body as a whole for his left shoulder, and a 3% anatomical impairment rating to the body as a whole for his right shoulder injury. These ratings have been paid by respondents no. 1.

5. The claimant reached maximum medical improvement on September 29, 2003.

6. The claimant was found to be permanently and totally disabled by Order of an Administrative Law Judge on September 23, 2004.

7. The claimant has been provided benefits pursuant to prior Opinions in this case.

8. The claimant’s average weekly (sic) was $671.04, which yielded a temporary total disability rate of $394.00, and $296.00 for permanent partial disability benefits.

9. The prior Opinions are the law of the case.

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

11. The claimant proved by a preponderance of the evidence his entitlement to

additional medical treatment for his compensable injury of January 10, 2000.

12. The claimant's attorney is entitled to a controverted attorney's fee on the benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715.

13. All other issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

14. All other issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

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 April 7, 2011, 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 dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment. Based upon my de novo review the record, I find the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury on January 10, 2000, to his left and right shoulders and cervical spine. The claimant underwent two neck surgeries as well as surgery on his left and right shoulders, and was ultimately assessed with an 18% permanent anatomical impairment rating for his neck injury, a 9% permanent anatomical impairment rating for his left shoulder, and a 3% permanent anatomical impairment rating for his right shoulder. All of these ratings were to the body as a whole. The claimant was found to be permanently and totally disabled pursuant to an order by an Administrative Law Judge on September 23, 2004.

The claimant had been undergoing pain management and was receiving treatment in the form of prescription narcotic medication. The respondents paid for the claimant's medication through August of 2010. At that point, the respondents quit paying for the

claimant's prescription narcotic pain medication due to the claimant being released from his pain physician's care because he violated his drug contract with the physician.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a)(Supp. 2009). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Owens Plating Co.v. Graham, 102 Ark. App. 299, 284 S.W.3d 537 (2008). What constitutes reasonable and necessary treatment is a questions of fact for the Commission. Id. Anaya v. Newberry's 3N Mill, 102 Ark. App. 119, 282 S.W.3d 269 (2008). 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. Treatments to reduce or alleviate symptoms resulting from a compensable injury, to maintain the

level of healing achieved, or to prevent further deterioration of the damage produced by the compensable injury are considered reasonable medical services. Foster v. Kann Enterprises, 2009 Ark. App. 746 __ ,S.W.3d ___(2009). Liability for additional medical treatment may extend beyond the treatment healing period as long as the treatment is geared toward management of the compensable injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004),

On November 9, 2008, the claimant was evaluated by Dr. Scott Carle for an Independent Medical Examination. On January 9, 2009, Dr. Carle issued a report, which included a lengthy history and review of previous medical treatment for the claimant. The diagnostic impression by Dr. Carle was "chronic pain disorder associated with psychological factors and a general medical condition."

On January 16, 2009, the claimant was evaluated by Dr. Judy White Johnson, a psychologist. Dr. Johnson noted in her report:

> His personality style is marked by optical hypochondrical and histrionic features. His personality profile is associated with an increase in physical complaints under stress.
>
> He is highly resistant to questions regarding daily activity, exercise

> routines and even walking. Raising three grandchildren, especially at their ages, would require more activity than he is acknowledging. It is highly unlikely he would cooperate and follow recommended exercises and/or medical regime. It is recommended the prescribing of narcotic medication be conservatively administered and carefully followed medical guidelines for same. It is not an appropriate medication for coping with stress.

The claimant continued to see Dr. Garlapati, his pain physician, and on July 14, 2010, he was given a refill of OxyContin 60 mg to be taken three times per day. On August 10, 2010, Dr. Garlapati sent a letter to the claimant informing him:

> ... we will no longer be able to provide medical care for you. Unfortunately, we cannot write medications for you when you were getting them from multiple pharmacies."

The claimant was also warned in that letter that appropriate action would be taken if he came within 100 feet of Dr. Garlapati's office. Respondents ceased payments for the claimant's medical treatment. The claimant had taken percocets that were given to him by a dentist. The prescription had been filled at a pharmacy other than the pharmacy listed in the claimant's pain management contract. Under that contract, the claimant

was required to fill all his prescriptions at a specific pharmacy.

The claimant then went to his family physician, Dr. Dennis Berner on August 27, 2010. Dr. Berner acknowledged that the claimant a broken his pain management contract with Dr. Garlapati by taking more Oxycodone from another source, but began prescribing narcotic medication for the claimant.

On September 10, 2010, the claimant was seen by Dr. Kenneth Rosenzweig for an Independent Medical Evaluation. Dr. Rosenzweig authored a report which stated with regard to the claimant's pain management treatment:

> It appears that the claimant is undergoing chronic pain management with the use of long-acting narcotics. However, the reports submitted as part of the medical records state that the claimant uses up his medication early and has withdrawal symptoms and then does without medication until he could get a monthly refill. If the claimant truly spends half of the month overusing medication and half a month tolerating without medication, it does not appear that he needs ongoing medical management. He is not a candidate for anti-inflamatories due to peptic ulcer disease. He may benefit from modalities of muscle relaxers, ice, heat, and over-the-counter analgesics such as Tylenol.

The claimant continues to obtain narcotic medication from his family physician. It is of note that in the December 23, 2010 report by Dr. Berner, he acknowledged that he is giving the claimant his OxyContin a few days early. He was again early for his OxyContin prescription in February 2011. These type notes are consistent with the testimony of claimant’s ex-wife, Cathleen Couch.

The claimant testified that he did not misuse his narcotic medication and he denied being able to engage in much activity. However, Ms. Couch testified otherwise. Ms. Couch testified that she and the claimant had lived together beginning June 1998 and were married in October 2007. She also testified that during the time they lived together until June 2010, she had tried to oversee his use of medication. Ms. Couch stated it was the source of many arguments between them because the claimant would take more than the prescribed dosage, and he would even search the house to find where she would hide them from him. She stated she had witnessed the claimant violate the pain contract. He would try to find other pills and if not, he would get irate with her and had been physically violent with her to try to get her to give him more pain medication. Ms. Couch testified that she obtained a safe deposit box to

keep the pain medication in May 2009. She would keep the keys to the safety deposit box so the claimant could not get the medication, and she would give them to him according to the prescription. Ms. Couch tried to go to the safe deposit box once a week, but had to switch to going on a daily basis, because if the claimant found the week's supply of the medication, he would take them before the week ran out. Additionally, Ms. Couch testified that the claimant would go to different doctors to get prescription pain medication including his dentist, Dr. Tucker and Dr. Monfee.

The claimant testified that he kept the medication in a safe deposit box to keep it away from Ms. Couch. However, the access sheet from the bank showed that Ms. Couch was the one that accessed the safe deposit box. Further evidence that his testimony is not credible is the fact that the claimant keeps his medication at his mother's home after Ms. Couch moved from the residence. The claimant travels to his mother's home three times a day to take his medication. That activity is not consistent with the activity of person who does not misuse narcotic medication.

Ms. Couch also testified that the claimant was not as incapacitated as he indicated. She stated that while they were together, they had a farm and that the

claimant worked with the cows and horses. He worked in the hay and he would fix the tractors and ride them. The claimant was also able to travel to Florida and go on deep-sea fishing trips where he would reel in big fish. Ms. Couch further testified that she and the claimant would run trot lines on the lake from a boat. Finally, she testified that the claimant was able to work on automobiles.

My review of the evidence demonstrates that the claimant cannot prove by a preponderance of the evidence that he is entitled to additional treatment in the form of pain management. The claimant has been treated by his personal physician, Dr. Berner, who is prescribing the claimant his narcotic pain medication because the claimant was released by Dr. Garlapati for violating his drug contract. Dr. Bernard acknowledged that the claimant had broken his pain contract and, in fact, noted several times in his medical records that the claimant was receiving his prescriptions early. Further, all the testimony regarding the safety deposit box and the prescription drugs makes absolutely no sense. The claimant's testimony that he got the safety deposit box and his wife went and put the drugs there is suspect at best. Her testimony that she got the safety deposit box and put the drugs in there to keep the

claimant from taking more than what his prescription makes more sense since she is the one that accessed the box every single time. The claimant and his ex-wife were involved in a contentious divorce, so it is difficult to ascertain who is the more credible of the two regarding the testimony that they gave. However, I find Ms. Couch to be the more credible witness than I do the claimant.

Therefore, when I consider the Independent medical Evaluation of Dr. Carle, the Independent Medical Evaluation of Dr. Rosenzweig, the neuropsychological evaluation by Dr. Judy White Johnson, the testimony of the claimant, the medical records of Dr. Berner, and the testimony of the claimant's ex-wife, Ms. Couch, I cannot find that the claimant proved by a preponderance of the evidence that he is entitled to additional medical treatment. In my opinion, the claimant's burden of proof cannot be met. The claimant appears to be a drug addicted individual who cannot manage his pain medication, which is further evidenced by the fact that the claimant goes to his mother's house three times a day to get his pain medication. Simply put, I cannot find that the claimant has proved by a preponderance of the evidence that he is entitled to additional medical treatment.

Accordingly, I must respectfully dissent from the majority’s award of benefits.

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KAREN H. McKINNEY, Commissioner