NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F703603

GRANT W. GOODE, EMPLOYEE	CLAIMANT
WALGREEN COMPANY, EMPLOYER	RESPONDENT NO. 1
ZURICH AMERICAN INS. CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 11, 2011

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

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

Respondent No. 1 represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed February 15, 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 over this claim.

2. The stipulations set forth above are reasonable and are hereby accepted.

3. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his thoracic spine.

4. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his lumbar spine.

5. Because of the above finding, all remaining issues, insofar as they relate to Claimant's alleged lumbar spine injury, are moot and will not be addressed.

6. Respondents No. 1 were not provided notice under Ark. Code Ann. § 11-9-701 (Repl. 2002) of Claimant's compensable thoracic spine injury until November 22, 2006.

7. Claimant has proven by a preponderance of the evidence that all of the treatment of his compensable thoracic spine injury reflected in Claimant's Exhibit 1, Respondents No. 1 Exhibit 1 and Respondents No. 1 Exhibit 2 was reasonable and necessary. Respondents No. 1 are responsible for all such treatment after November 22, 2006.

8. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from November 14, 2007, to July 21, 2008.

9. Claimant has proven by a preponderance of the evidence that he is entitled to an impairment rating of five percent (5%) to the body as a whole for his compensable thoracic spine injury.

10. Respondents No. 1 have proven by a preponderance of the evidence that they are entitled to an offset under Ark.

Code Ann. § 11-9-411 (Repl. 2002) for the thoracic spine treatment that Claimant's group health carrier covered, along with the short-term benefits he was paid, in connection with his compensable injury.

11. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee on all indemnity benefits awarded herein to him, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

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 February 15, 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 sustained a

compensable injury to his thoracic spine, awarding permanent anatomical impairment rating of 5%, as well as temporary total disability benefits and medical treatment. My review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

The claimant was employed by the respondent employer as a pharmacist. The claimant had been a licensed pharmacist since 1990, but had let his license lapse before he went to work for the respondent employer on July 31, 2006. At the time of this alleged incident on August 11, 2006, the claimant had to perform 240 hours of working in the pharmacy as a pharmacy tech as well as learning the Walgreen's computer system. The claimant contended that he sustained an injury to his mid and low back while he filled prescriptions. The claimant could not specify any specific incident that precipitated his symptoms. The claimant stated that he was filling prescriptions, and he just felt a tightening up like he had torn a muscle or ripped a muscle in his back. The claimant did not notify his supervisor, store manager or district manager about an injury. The claimant also did not seek any medical attention until August 29, 2006, when he visited Dr. C. Clay Lamey, a chiropractor.

Dr. Lamey’s report from the August 29, 2006 visit, indicates that the claimant used his group health plan to pay for the visit. Dr. Lamey reported that the claimant gave an “unspecified” cause for his current episode that had arisen in the claimant’s thoracic spine region. The claimant continued to work for the respondent employer until he went to the Ukraine for 10 to 14 days.

The claimant met someone on the Internet and went over to the Ukraine to visit with her. The claimant testified that it was a 13 to 20 hour flight one way. The claimant returned to work for the respondent employer following his vacation, and shortly thereafter was reinstated with a pharmacist license. The claimant was then reassigned to work full-time as a pharmacist in the respondent employer’s Russelville store. The claimant worked full duty as a pharmacist until he started missing work in mid-November 2007. It was not until November 22, 2006 that the claimant mentioned to one of the respondent employer’s managers that he had a back injury on August 11, 2006.

During this time period, the claimant sought treatment from Dr. Lamey and from Dr. J. Shawn McGehee, a chiropractor as well. Eventually, the claimant sought treatment from Dr. Ted Ghormley, an orthopedist. Dr.

Ghormley saw the claimant on February 5, 2007, at which time the claimant complained of thoracic discomfort. Dr. Ghormley noted that the claimant had

> 2-5-07 - backpain - no injury-onset about a while or ago - started like a muscle spasm - pain in middle of back!!!

The claimant underwent an MRI at Dr. Ghormley's direction which revealed mild degenerative changes of the thoracic spine. The most affected level was T6-T7, which demonstrated a small focal central disc protrusion and a small annular tear. Dr. Ghormley noted there was no significant spinal canal or neuroforaminal stenosis. Dr. Ghormley did not recommend surgery for the claimant but referred him to Dr. Edward H. Saer, III.

The claimant first saw Dr. Saer on August 28, 2007. According to Dr. Saer's notes, the claimant began experiencing mid-thoracic pain about August 4, 2006. His review of the claimant's thoracic and lumbar films were considered to be "relatively unremarkable". Dr. Saer diagnosed the claimant as suffering from degenerative disc disease of the thoracic spine and recommended that the claimant only do physical therapy and possibly some injections. He did not recommend the claimant undergo surgery for his back ailments.

The claimant, on his own, searched the Internet and found a doctor in Florida that did laser back surgery. The claimant went down there, got an IV in his arm, and decided he did not want to undergo the procedure. Then the claimant found Dr. John C. Chiu, a neurosurgeon in California, that was willing to operate on the claimant's back. On November 15, 2007, Dr. Chiu operated on the claimant's thoracic spine. The claimant had a steroid shot on December 17, 2007.

In February of 2008, the claimant underwent a nerve-blocking procedure by Dr. James D. Thacker, who worked in conjunction with Dr. Chiu. On March 13, 2008, Dr. Chiu operated again on the claimant's thoracic spine. The claimant testified that his mid-back pain had decreased and become more localized after these procedures. Dr. Chiu reported that the claimant could return to work on July 21, 2008. On November 7, 2008, Dr. Chiu released the claimant from his care, finding that the claimant had a 10% permanent anatomical impairment rating.

Ark. Code. Ann. § 11-9-102(4)(A)(i)(Supp. 2009) defines a compensable injury as:

> [a]n accidental injury causing internal or external physical harm to the body... arising out of and in the course of employment and which requires medical services for

> results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code. Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the claimant. Ark. Code. Ann. § 11-9-102(16). Further the employer takes an employee as he finds him.

Act 796 recognizes certain specified exceptions to the general limitation of compensable injuries to those injuries which are caused by specific incident and which are identifiable by time and place of occurrence. These exceptions are set forth in Ark. Code Ann. § 11-9-102(4)(A)(ii) through § 11-9-102(5)(A)(i)(v)(Repl. 2002). Claims for injuries caused by rapid repetitive motion, for back injuries, and for hearing loss are accepted in Ark. Code Ann. § 11-9-102(4)(A)(ii).

To satisfy the definitional requirements for injuries falling under Ark. Code Ann. § 11-9-102(4)(A)(ii), the claimant still must prove by a preponderance of the evidence that he sustained internal or external damage to the body as the result of an injury that arose out of and in the course of

employment, and the employee still must establish the compensability of the claim with medical evidence, supported by objective findings. However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. § 11-9-102(4)(A)(ii), the "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. § 11-9-102(4)(E)(ii)(Repl. 2002).

In my opinion, a review of the evidence fails to demonstrate that the claimant sustained a compensable injury to his thoracic spine on August 11, 2006. The evidence demonstrates that the claimant cannot specify any specific incident that precipitated his symptoms. In a handwritten note from Dr. Ghormley, whom the claimant described as "a good friend" and "almost like his [claimant] family doctor", revealed that there was no injury. In fact, the notes from Dr. Lamey, the first doctor to see the claimant after this alleged incident, indicate that it was unspecified. The other choices were "traumatic", "post-surgical", "work related", "repetitive", and "motor vehicle". There were complaints of new back pain, but no complaints of low back pain.

The evidence demonstrates that the claimant had spinal surgery back in 1984 under the treatment of Dr. Adametz. The claimant was in high school and had a laminectomy at two levels. He testified that he had no further problems. There was evidence in the record that the claimant had several other instances of where he had gone to his family physician, Dr. Brooks Lawrence, complaining one time that a child jumped on him and his back hurt. There was another instance where he was complaining of lower back pain, but the claimant indicated that this was a bladder infection.

The claimant’s March 27, 2007 MRI revealed degenerative changes of the claimant’s thoracic spine. Both Dr. Ghormley and Dr. Saer assessed the claimant as having degenerative disc disease and they did not recommend surgery.

In a letter issued on July 1, 2009, Dr. Brad A. Thomas, a neurosurgeon, after reviewing the claimant’s medical records, rendered the following opinion regarding the claimant’s thoracic ailments:

> The first question that I feel is more important revolving around this case is the causation of the patient’s back problems. [Claimant] reports that his back pain was caused by his work environment as a pharmacist. In my opinion, there is ample evidence to suggest that he has an underlying degenerative

condition with his back and because of this, his problem was caused by this degenerative condition and not by his work environment. There is several important facts about his history that do no support his claim that his work environment caused this injury. The first fact is that [claimant] has a history of degenerative spine problems. He had his first spine surgery in the mid-1980's. This alludes the fact that he has a degenerative spine to begin with. The second factor that supports my feeling that he has an underlying degenerative spine issue is the MRI that he obtained on September 5, 2007. This MRI was an MRI of the thoracic spine and showed the disc degenerative at the T5-6 level. It also showed disc degeneration at the T9-10 and the T8-9 level. The fact that he had degeneration at multiple areas supports the fact that he has an underlying condition that is degenerative in nature and would point to a degenerative cause for the causation and not to the work environment.

After reviewing the entire case, I professionally feel that because of the degenerative issues in his thoracic spine, he had back pain.

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I feel that there is ample evidence that proves that [claimant] has degenerative spine disease, both in the thoracic and lumbar spine. It is very probable that regardless of what occupation he was in, he would ultimately have some form of back pan and discomfort because of this degenerative condition.

Dr. Saer’s July 12, 2009 letter states:

> I agree with Dr. Thomas' record review. [Claimant] had preexisting degenerative disc disease, and I think that is the primary cause of [claimant's] symptoms that started in August 2006, not his employment as a pharmacist. I would be happy to provide a more detailed report if you wish. However, based on the imaging studies that were done (MRI), dated 3/27/07, I think it is clear that the degenerative changes that he had preexisted the onset of his symptoms of August 2006.

In my opinion, this evidence clearly proves that the major cause of the claimant's thoracic ailments did not stem from his employment with the respondents employer, rather the claimant's history of pre-existing degenerative disc disease is the major cause.

It is interesting to note that the claimant was able to go to the Ukraine to visit a woman he met on the Internet and he said that it did not bother his back. The claimant contends he was having problems before he left, but went on a 13-20 hour plane ride to Kiev which he claims did not bother him.

Dr. Chiu has opined that the claimant's thoracic surgery is related to this alleged work injury. However, I give Dr. Chiu's opinion little weight.

Dr. Chiu first visited with the claimant on November 14, 2007, in his office in California. There is absolutely no mention of the March 27, 2007 thoracic MRI

films or report. The only thoracic MRI Dr. Chiu addresses is the September 5, 2007 one, which shows the canal stenosis and cord impingement not present on the March 27, 2007 thoracic MRI. This stenosis and impingement did not come into existence until some time between the first MRI, which was seven months after the alleged injury date, and the second one. The opinions of Dr. Lamey, Dr. Ghormley, and Dr. Saer should be given greater weight because their opinions were made based upon a diagnostic test performed much closer to the date of injury. The opinion of Dr. Chiu was made based upon a much later diagnostic test and without any knowledge that the March 27, 2007 thoracic MRI even existed. The evidence demonstrates that the claimant did not provide Dr. Chiu with the earlier March 2007 thoracic MRI, although he had just recently provided it to Dr. Wolff in Florida. While Dr. Chiu may have, in good faith, believed that surgery was necessary to address the stenosis and impingement he was seeing on the September 5, 2007, thoracic MRI, the failure to provide him with the earlier March 27 MRI, in my opinion, fatally skewed Dr. Chiu’s opinion on causation.

The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Stone v. Dollar General Stores, 91 Ark. App. 260,

209 S.W.3d 445 (2005); Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for the medical opinion in deciding the weight and credibility of the opinion and the medical evidence. Maverick Transportation v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000). However, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Hill v. Baptist Med. Ctr., 74 Ark. App 250, 48 S.W.3d 544 (2001).

The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion, January 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Moreover, the Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of the Workers' Compensation Law. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a

reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Technologies, 343 Ark. 297, 35 S.W.3d 800 (2001).

Medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. §11-9-102(16)(B), which requires that medical opinions be stated within a reasonable degree of medical certainty. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000). In Frances, the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code Ann. §11-9-102(16)(B). The Arkansas Supreme Court held that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000), the Arkansas Supreme Court held that a medical opinion based upon the theoretical possibility of a causal connection did not meet the standard of proof. In Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001), the Arkansas Supreme Court held that

in order for a medical opinion regarding causation to "pass muster" such opinion must be more than speculation, and go beyond possibilities. Accordingly, I find that the opinion of Dr. Chiu is entitled to little weight.

I also do not credit the opinions doctors Lamey, McGehee, and Lawrence. Dr. Lawrence is the claimant's primary care physician, and he has never treated the claimant for any back injuries whatsoever.

Therefore, after considering all of the evidence, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a specific thoracic injury on August 16, 2006, or a gradual onset thoracic injury. Accordingly, I must dissent from the majority's finding. Even if I were to find that the claimant sustained a thoracic injury, a finding I do not make, the claimant's surgery he had under the direction of Dr. Chiu was not reasonable and necessary medical treatment.

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).

In the present claim, the claimant admitted that Dr. Ghormley, his hand-picked treating physician and "good friend [,]", would not even "recommend surgery because of the location of the problem -- in the thoracic spine." The medical records also reflect that Dr. Saer recommended only conservative treatment. Dr. Thomas explained in his July 1, 2009 letter:

> After reviewing the entire case, I professionally feel that because of the degenerative issues in his thoracic spine, [claimant] had back pain. After reviewing all of the medical documentation, including reviewing the films, I felt there was no spinal cord compression or nerve root impingement, especially in the thoracic level, that would indicate any surgery.
>
> I agree with Dr. Ted Saer's assessment and plan. If this was a patient under my care, I would recommend physical therapy for both his thoracic and lumbar spine since he has degenerative problems in both areas and, at most, recommend epidural steroid injections.
>
> After careful review of the indications for surgery that were performed on the patient, I could not find any reason that would fit into the way I practice to substantiate the surgeries that he underwent.

The opinions of doctors Ghormley, Saer, and Thomas overwhelmingly prove that the surgeries the claimant underwent were not reasonably necessary in

light of the claimant’s thoracic condition. Also, it is telling that the claimant sought his reasonably unnecessary surgical procedures from an out-of-state physician, whom the claimant discovered only through the Internet.

Even more indicative that these surgeries were not reasonably necessary is the claimant’s very own behavior and actions while seeking treatment with Dr. Craig Wolff, a Florida physician who had offered to provide a seldom performed laser surgery on the claimant’s thoracic spine. The claimant testified that while being prepped for laser thoracic surgery, the claimant pulled his IV out and elected to not have the risky procedure performed at that time. The claimant’s own behavior and refusal to have the questionable thoracic surgery initially performed by Dr. Wolff is more evidence that the claimant’s surgical procedures were, not reasonable and necessary medical treatment. Therefore, the respondents should not be responsible for the three surgical procedures the claimant received from November 15, 2007, through March 13, 2008.

Further, it is interesting to note that in his September 11, 2007 report, not even Dr. Wolff recommended the claimant undergo the thoracic surgical procedure. Dr. Wolff explained:

> My recommendation for the patient is we do selective nerve root blocks to determine the exact level. Then we can proceed with a nerve root decompression at the exact nerve root. I'm going to refer the patient for a nerve root block and after he gets that done I will see the patient back. Id.

With the sole exception of Dr. Chiu, none of the claimant's treating physicians recommended the surgical procedures the claimant eventually underwent in California. Accordingly, I must dissent from the majority's finding that the treatment by Dr. Chiu was reasonable and necessary medical treatment.

I also find the claimant is not entitled to temporary total disability benefits. The claimant contends that as a result of his alleged injury, he began missing work from the respondent employer on November 14, 2007, and he is entitled to receive temporary total disability benefits for the period of time from November 14, 2007, through November 7, 2008, when he was released from Dr. Chiu's care. Temporary total disability ("TTD") is defined as "that period within the healing period in which the employee suffers a total incapacity to earn wages." King v. Peopleworks, 97 Ark. App. 105, 108, 244, S.W.3d 729, 732 (2006) (emphasis added). The injured employee's healing period is is "that period for healing of an injury resulting

from an accident." Ark. Code Ann. § 11-9-102(12). Stated differently, "'[t]o be entitled to temporary total disability benefits, the claimant must prove that [he] remains within [his] healing period and suffers a total incapacity to earn wages.'" RPC, Inc. V. Hargues, 2011 Ark. App. 264, ___ S.W.3d ___(2011)(*quoting* Smallwood v. Ark. Dept. Of Human Servs., 2010 Ark. App. 466, ___ S.W.3d ___ (2010)). "A question about when (or if) the claimant's healing period ended is a factual one for the Commission to decide." RPC, Inc., *supra* (*citing* King, *supra)*. "If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless, in the opinion of the Commission, the refusal is justifiable." RPC, Inc., *supra* (*citing* Ark. Code. Ann. § 11-9-526).

The claimant admitted to being completely off work for only three weeks each time following each of his surgical procedures. Thereafter, the claimant worked at his family's businesses earning wages. The claimant admitted on cross-examination that subsequent to each of the three week layoffs he gave himself following each of the three surgical procedures administered from November 15, 2007, through March 13,

2008, he was able to work “at least” 20 hours per week between his family’s pest control business and mortgage company. The claimant added that from his family’s pest control business alone, he received about $3600 per month. Additionally, with regard to his family’s mortgage company, the claimant acknowledged that while “it wasn’t on a set thing... [he] could take a little money out of the mortgage business, if it had some, to supplement [his] income from” November 2007 to November 2008. Despite not working for the respondent employer since mid November 2007, the claimant continued to receive income from his other employers for the period of time from November 2007 to November 2008. The claimant also received short-term disability payments. The claimant clearly did not suffer a total incapacity to earn wages and, therefore, he is not entitled to temporary total disability benefits herein. Accordingly, I would reverse the decision to award TTD benefits to the claimant.

According to the claimant’s testimony, the claimant was capable of working -- and, in fact, actually did so -- beginning three weeks after his November 15, 2007 surgery in California. As a result, the claimant is simply not entitled to any award of TTD benefits herein. The claimant failed to prove by a

preponderance of the evidence that he was totally incapacitated from earning wages. Accordingly, I dissent from the majority's award of benefits.

With regard to the permanent partial disability, the claimant was assessed to with a 5% permanent anatomical impairment rating as a whole for his thoracic problems. In my opinion, the claimant has also failed to prove he is entitled to this impairment rating.

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality

which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Crow, supra.

Ark. Code Ann. § 11-9-704(c)(1) (Supp. 2009) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i)(Supp. 2009). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. Ark. Code Ann. § 11-9-102(16)(A)(ii)(a). Furthermore, for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests shall not be considered objective findings. Ark. Code Ann. § 11-9-102(16)(A)(ii)(b). With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is the result of a diagnostic procedure which does not come

under the voluntary control of the patient. Department of Parks & Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998).

This rating clearly stems from not only the claimant's pre-existing degenerative disc disease, but also, to the claimant's election to undergo risky and/or questionable surgical procedure on his thoracic spine. The claimant cannot prove the major cause requirement necessary for proving permanent anatomical impairment. Accordingly, it is improper to award permanent anatomical impairment. As such, I must respectfully dissent from the majority's award of benefits.

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KAREN H. McKINNEY, Commissioner