

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303102

ELIZABETH RODEN VINSON, EMPLOYEE CLAIMANT

DOLLAR GENERAL CORPORATION,
A SELF INSURED EMPLOYER RESPONDENT

OPINION FILED MARCH 5, 2008

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

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

Respondent represented by HONORABLE BETTY J. HARDY, Attorney
at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the
Administrative Law Judge filed April 27, 2007.

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

1. The Arkansas Workers' Compensation has jurisdiction of this claim.
2. On March 13, 2003, the relationship of employee-self insured employer-third party administrator exists between the parties.

3. On March 13, 2003, the claimant sustained a compensable injury to her lower back that was in the form of a protruding or herniated disc at L4-5.

4. The claimant has failed to prove by the greater weight of the credible evidence that the medical services recommended by Dr. John Swicegood, in the form of minimally invasive disc decompression or thermoannuloplasty represents reasonably necessary medical services for her compensable injury of March 13, 2003. Specifically, she has failed to prove that these medical services would be necessitated by or connected with her compensable injury and would have a reasonable expectation of accomplishing the purpose or goal for which they are intended (i.e. resolving or reducing her continuing subjective complaints).

5. The claimant has failed to prove by the greater weight of the credible evidence that she was rendered temporarily partially disabled, as the result of her compensable injury, for the period of December 16, 2005 through a date yet to be determined. Specifically, she has failed to prove that she continued within her healing period from the effects of her compensable lumbar injury on and after December 16, 2005.

6. The respondents have controverted the claimant's entitlement to the medical services recommended by Dr. Swicegood

and her entitlement to temporary partial disability benefits from December 16, 2005 through a date yet to be determined.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

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

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority's opinion. Specifically, I agree with the majority's finding that the claimant failed to prove her entitlement to temporary partial disability benefits. However, I respectfully dissent from the majority's finding that the claimant failed to prove that the medical treatment recommended by her treating physician, a provocative discogram, was not reasonable and necessary. Based upon a de novo review of the record, I find that the recommended medical treatment, a provocative discogram, is reasonable and necessary medical treatment, therefore, I must respectfully dissent.

Here, the claimant has an admittedly compensable back injury. The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002).

Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that 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. 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); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

The treatment recommended by Dr. Swicegood, an anesthesiologist providing pain management to the claimant for her compensable back injury, is to perform a provocative discogram to determine the extent of the claimant's disc problem and whether her symptoms are arising from the disc herniation previously noted at L4-L5 or whether at the L5-S1 disc. Depending upon the results of this test, he could perform a thermoannuloplasty, (also referred to as a percutaneous discectomy). This procedure uses heat to burn

away disc material which may be causing nerve root irritation and resulting symptoms. As described by Dr. Swicegood, this is a minimally invasive procedure and would only be performed if it was warranted by the results of the discogram.

Here, the majority, appears to base its denial of the recommended discogram on the opinion of Dr. Michael Standefer, a neurosurgeon who provided the respondent with a "second opinion." Dr. Standefer's opinions are set out in a report dated December 8, 2006. Dr. Standefer's conclusion was that the claimant had, "No evidence of an overt disc pathology which would account for her symptoms" and, "No evidence of any underlying neurosurgical problems." While Dr. Standefer went on to state that the claimant might benefit from physical therapy, and other conservative treatment, he did not believe that she was a candidate for any type of surgical treatment. In reaching those conclusions, Dr. Standefer was relying upon past MRI scans of the claimant, the most recent one being on October 19, 2006. The doctor noted that the 2006 MRI demonstrated only a

small right paracentral disc protrusion at T11-T12. He stated that the prior MRI demonstrated a "minuscule" bulging at L4-L5.

I find that a review of the medical record indicates several problems with the majority's placement of great weight on Dr. Standefer's opinions. First, I note that there are questions about the reliability of the 2006 MRI. The 2006 MRI noted only the disc bulges at T11-T12 and L5-S1. However, the MRI the claimant underwent in 2003 and 2004, both found that the claimant was suffering from a disc protrusion or small herniation at L4-L5. Those MRI's did not detect any defects in L5-S1. Therefore, to a great extent, I find that this question about the 2006 MRI undercuts Dr. Standefer's findings.

Second, the claimant saw another neurosurgeon, Dr. Anthony Capocelli. In a report dated May 10, 2005, Dr. Capocelli discusses the claimant's 2004 MRI stating that it demonstrated a left sided protrusion or small herniation at L4-L5. Dr. Capocelli's conclusion was that if the claimant did not respond to conservative treatment, surgical

intervention should be considered. I find it to be obvious, based on the medical record, that the claimant's ongoing symptoms did not improve following Dr. Capocelli's evaluation. Her symptoms continued to worsen and she did not fully respond to conservative treatment in the form of lumbar epidural steroid injections and physical therapy. Therefore, Dr. Standefer's conclusion on December 8, 2006 that the claimant would benefit only from additional conservative medical treatment is not supported by the medical record.

Third, in a report dated January 19, 2007, Dr. Swicegood explains that Dr. Standefer, in stating that he did not recommend neurosurgical intervention, was most likely referring to the conventional surgery which Dr. Standefer performs. Dr. Swicegood explained that his recommendation was of a different type of procedure and was not a recommendation specifically addressed by Dr. Standefer.

Based on the above concerns, I find that the majority has given too much weight to the opinion of

Dr. Standefer, and not enough weight to the opinions of Dr. Swicegood and Dr. Capocelli. Dr. Capocelli is also a neurosurgeon whose expertise is comparable to that of Dr. Standefer. Dr. Capocelli was of the opinion that if the claimant's symptoms did not improve, surgical intervention might be appropriate. I find Dr. Swicegood's recommendations to be in accordance with the recommendations of Dr. Capocelli, and I find that both opinions should be given greater weight than the opinion of Dr. Standefer. Furthermore, I find that the treatments recommended by Dr. Swicegood are in accordance with accepted medical procedures, and based on the medical record, are entirely appropriate for the treatment of symptoms related to the claimant's compensable back injury.

In conclusion, I find that the claimant has met her burden of proving by a preponderance of the evidence her entitlement to the provocative discogram and related percutaneous discectomy recommended by Dr. Swicegood for her admittedly compensable back injury.

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For the aforementioned reasons, I must respectfully concur, in part, and dissent, in part.

PHILIP A. HOOD, Commissioner