

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. **H200157**

LINDSEY CRANE, Employee	CLAIMANT
HOBBY LOBBY STORES INC., Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES INC., Carrier	RESPONDENT

OPINION FILED **SEPTEMBER 8, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, Attorney, Fort Smith, Arkansas.

Respondents represented by KEVIN J. STATEN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 26, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 18, 2023, and a pre-hearing order was filed on May 26, 2023. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on December 13, 2021.
3. Claimant sustained a compensable injury on December 13, 2021, but respondent has controverted additional temporary total disability benefits, and additional medical benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant is entitled to additional medical benefits and additional temporary total disability benefits.
2. Attorney fees.

Crane-H200157

At the prehearing conference, the claimant contended that “She is entitled to temporary partial disability benefits from February 27, 2023, until April 18, 2023, and temporary total disability benefits from April 18, 2023, until a date yet to be determined. The claimant contends that she exercised her one time right to change physicians and that her now authorized treating physician, Dr. James Blankenship, has recommended surgery; however, the respondents have refused to authorize that surgery. Accordingly, the claimant contends that she is entitled to additional treatment by Dr. Blankenship, including the recommended surgery. The respondents have been requested to initiate payment of temporary disability benefits and have refused to do so. Accordingly, the claimant contends that any disability benefits not previously paid for which the respondents do not accept liability by the date of May 18, 2023, prehearing conference have been controverted and that the claimant’s attorney is entitled to an appropriate attorney’s fee in regard to such benefits.”

The respondents contended that “The claimant reached the end of her healing period when released by neurosurgeon Dr. Luke Knox with a 5% permanent partial disability rating on July 20, 2022. The respondents further contend that since Dr. Luke Knox opined that no additional neurosurgical avenues would afford any benefit to the claimant’s complaints, that the surgery recommended by Dr. James Blankenship is not reasonable, necessary, and related to her compensable injury of December 13, 2021. Also, since she has reached the end of the healing period, she is not entitled to any additional temporary total disability.”

However, there was another issue raised by respondents prior to the prehearing conference. A motion for an independent medical examination (IME) was filed on April 7, 2023. Claimant objected to the physician suggested by respondents in that motion. During the prehearing conference, the attorneys agreed that Dr. Scott Schlesinger would be acceptable to each party to perform the IME; because of that agreement, that issue was removed from the list of matters to be considered at the

Crane-H200157

hearing. Unfortunately, Dr. Schlesinger failed to cooperate with respondents in scheduling the IME, and on July 14, 2023, respondents renewed their request for an IME to be conducted. Rather than continue the case, the motion for an IME as well as the issues outlined in the prehearing order were heard on July 26, 2023

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 18, 2023, and contained in a pre-hearing order filed on May 26, 2023 are hereby accepted as fact.
3. Respondents have failed to prove that an IME is both reasonable and necessary in order to make a judgment about this claim, and that motion is therefore denied.
4. Claimant has met her burden of proof by a preponderance of evidence that she is entitled to temporary total disability benefits beginning April 18, 2023, and continuing to a date to be determined.
5. Claimant has met her burden of proof by a preponderance of the evidence that she is entitled to additional medical benefits as directed by Dr. James Blankenship for her lumbar back injury.
6. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability benefits from February 27, 2023, until April 18, 2023.
7. Respondent has controverted claimant's entitlement to all indemnity benefits from April 18, 2023, to a date to be determined.

FACTUAL BACKGROUND

As set forth above, the hearing on the motion by respondents for an IME and the claimant's case in chief were combined. The parties understood that if I determined that an IME was reasonable and necessary, no decision would be rendered on the other issues presented. If I decided that the IME was not reasonable and necessary, then a decision on those issues would be rendered.

To make the record complete, the following documents are blue backed to the record:

1. April 7, 2023: Respondents' Motion for an Independent Medical Examination
2. April 20, 2023: Claimant's Response to said Motion.
3. April 21, 2023: Respondent's Reply.
4. April 21, 2023: Email from the Court to the parties.
5. July 14, 2023: Letter from Mr. Staten on behalf of respondents
6. July 18, 2023: Email from the Court to the parties.¹

HEARING TESTIMONY

Paul Crane, claimant's father, testified that claimant was athletic before her injury, and had played as many as four sports while in high school. Since the injury and after claimant was released to return to work, he observed that she was limited in her ability to sit, stand, walk, lie down, and pick up things. He was unaware that Dr. Knox told claimant to return to see him if she had difficulty after he released her from his care.

Because this was accepted as a compensable injury, a detailed discussion of how claimant was injured is not necessary; she said she was unloading a delivery truck when she hurt her back. Claimant was treated by Michael Valentine, PA-C, in Dr. Knox's office before she saw Dr. Knox. She testified that after she was released from Dr. Knox's care, she attempted to return to work, but could not do her previous job and was working only 12 hours a week in a different position with Hobby Lobby. He did not know Dr. Knox was willing to see her again after he released her. Dr. Blankenship took

¹ Mr. Walker's letter of July 17, 2023, was admitted as part of his non-medical exhibits.

Crane-H200157

her off work on April 18, 2023. Activities such as grocery shopping, riding in a car and menial housework caused claimant pain. She felt like she is in the same or worse condition as when she last saw Dr. Knox.

On cross-examination, claimant said she did not know that the results of her Functional Capacity Evaluation were unreliable. Claimant stated that Hobby Lobby tried to work with her to give her jobs she could physically perform.

REVIEW OF THE EXHIBITS

A. Medical exhibits.

After seeing some nurse practitioners and PA-C Valentine, claimant was then treated by Dr. Luke Knox. His record of July 20, 2022, summarized what treatment he offered to claimant while under his care: physical therapy, an MRI, and a lumbar epidural injection. The MRI was performed on March 24, 2022, and showed “multilevel facet arthropathy which is considered to be mild at each level. There is a midline bulging disc at L4-L5 with disc degeneration showing an annular tear. No significant foraminal stenosis noted.” Dr. Knox then made a referral for a Functional Capacity Evaluation on May 22, 2022; when he got the results, his record stated: “close case unreliable results on FCE.” In the clinic note of July 20, 2022, Dr. Knox concluded by saying “Unfortunately, I do not believe any neurosurgical avenues would afford any benefit to her complaints,” and he would follow her on a p.r.n. basis.

Claimant began seeing Dr. Blankenship on February 27, 2023. His impression was that claimant:

“has a posterior disc herniation and annular fissure at L4-L5. Of greater importance she has marked hypersplaying of the posterior disc space in flexion which is grossly abnormal for somebody as young as she is. I told her there is no doubt the disruption of her annulus and the posterior disc herniation have led to significant instability at the L4-L5 level.”

Crane-H200157

Dr. Blankenship was also concerned about claimant's elevated blood pressure, which he attributed to being in pain for over a year. In recommending surgery, Dr. Blankenship recorded the following:

“The medical rationale for the procedure I have offered is:

1. She has failed routine and usual conservative measures with two different rounds of physical therapy with people I know. She has had a LESI. None of these things afforded her any relief and she is getting worse.
2. Despite the fact that she has 36 out of 50 consistency measures, I feel very comfortable in the fact that this patient wants to get better. I think the inconsistencies had to do with fear avoidance because she has been hurting as long as she has.
3. The rationale for what I have offered her surgically has more to do with that she has gross annular fissuring at L4-L5. She has a posterior disc protrusion but more importantly she has marked movement of the disk space in flexion and extension with collapse anteriorly and marked splaying posteriorly in flexion, completely abnormal for a patient her age. I would recommend a lateral approach since her iliac crest is low enough with a lateral interbody arthrodesis at L4-L5 and then posterior BridgePoint clamping with facet disruption and posterolateral arthrodesis.”

On April 18, 2023, Dr. Blankenship took claimant off work until after she had the recommended surgery.² He ordered another MRI prior to surgery to ensure nothing had changed since the one done in 2022. Claimant was seen again on May 8, 2023, and Dr. Blankenship was awaiting authorization from the workers' compensation carrier to operate on claimant.

B: Non-Medical Exhibits

Claimant submitted her June 15, 2023, Request for Accommodation in which she specified what tasks she could not perform. She also provided the letter her attorney sent to this Court and respondent's counsel on July 18, 2023, in which she objected to this matter being continued for an IME, which included three requests for mileage reimbursement and two inquiries about the status of the IME.

Respondent submitted a Record of Communication with Dr. Schlesinger that documented the

² There was no medical record submitted for an office visit of April 18, 2023.

Crane-H200157

attempts to get the IME scheduled, and the FCE that was done on June 8, 2022. As mentioned by Dr. Blankenship, the examiner at the FCE said claimant provided an unreliable effort, with 36 of 50 consistency measures within the expected limits. The conclusion of the FCE was that claimant could work in at least the light classification, but because the examiner deemed that she gave an unreliable effort, her actual capability could be higher than the light classification.

ADJUDICATION

As reflected in my email of July 18, 2023, I determined not to grant a continuance of the hearing on the merits but would first hear arguments for and against the IME, and then claimant could present her case as outlined in the prehearing order. After the parties argued the motion for an IME, I announced that the evidence presented in claimant's case in chief would be considered in ruling on that motion. If I found the IME was reasonable and necessary, the case would be held in suspense until the results of the IME were made available to the parties; if I found the IME was not reasonable and necessary, I would deny the motion and issue an Opinion on the evidence presented.

Therefore, the first question for me to decide is whether an independent medical examination is reasonable and necessary in this matter?

Arkansas Code Annotated section 11-9-511(a) provides, in relevant part:

An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the Commission may require from time to time if reasonable and necessary. The threshold question is whether the examination is reasonable and necessary. (Emphasis Added)

Rule 30 (1) of the Arkansas Workers' Compensation Commission provides:

An independent medical examination shall include a study of previous history and Medical Care information, diagnostic studies, diagnostic x-rays, and laboratory studies, as well as an examination and evaluation. This service may be necessary in order to make a judgment regarding the current status of the injured or ill worker, or to determine the need for further health care.

(Emphasis added.)

In reviewing the medical records, I do not agree with respondent's characterization of the opinions of Dr. Knox and Dr. Blankenship as being "radically different." Those doctors arrived at the same conclusion—claimant has an annular fissure at L4-L5. Dr. Knox concluded no more treatment was required while Dr. Blankenship recommends surgery is necessary for claimant's condition.

As emphasized above, the standard is whether an IME is reasonable and necessary, or if it would be necessary to make a judgment in a case about a claimant's current status. I find respondents met neither criterion.

A. Is it reasonable to order an IME?

I have reviewed the pleadings and correspondence in this matter and note that claimant was willing to cooperate and allow an independent medical evaluation so long as it was performed by a neurosurgeon. However, that was in April 2023. Respondents have not restarted claimant's temporary total disability (TTD) payments despite her authorized physician, Dr. Blankenship, removing her from work. When Dr. Schlesinger did not cooperate in getting the IME scheduled before the hearing of this matter, claimant's objection was that respondent was not diligent in alerting this Court that there was an issue with Dr. Schlesinger and that delaying the matter was creating a hardship for her. I agree with claimant on this point. Respondents did not cause the delay in getting the IME scheduled; I accept as accurate respondents' exhibit showing how frequently Dr. Schlesinger was contacted about scheduling the IME. Still, I cannot find it reasonable to delay this matter longer for an IME when claimant is not receiving TTD, especially since I do not believe the IME to be necessary for a decision to be reached in this matter.

B. Is it necessary to order an IME?

While it is true that Drs. Knox and Blankenship have recommended a different course of

Crane-H200157

treatment, it is obvious from the records of Dr. Blankenship, as well as the testimony of claimant and her father, that the conservative course of treatment provided by Dr. Knox did not solve her issues. A conflict in the opinions of the doctors is no reason in and of itself to order a “tiebreaker” IME. The Commission has authority to accept or reject medical opinion and to determine its medical soundness and probative force. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). I agree with Dr. Blankenship’s assessment that the inconsistent result on the FCE was due to caution by claimant during the evaluation. It appears that Dr. Knox discharged her based on the determination that she didn’t give her best effort (“close case unreliable results on FCE”), without taking into consideration that claimant was self-limiting because of the problem in her back.

Therefore, because I don’t believe an additional delay would be reasonable and because the opinions of the doctors are not different on the cause of claimant’s problem, it is not necessary that an IME be performed; conservative care did not work, and Dr. Blankenship is offering an option that could bring claimant some relief. Respondents’ Motion for an IME is denied.

Turning now to the issues raised in the prehearing order, claimant has requested additional medical benefits as recommended by Dr. Blankenship, TTD, and temporary partial disability (TPD) benefits as well as an attorney’s fee. I will address these separately.

A: Is claimant entitled to additional medical benefits?

The parties stipulated, and I accept as fact, that claimant sustained a compensable injury on December 13, 2021. On this point, then, the question is whether claimant proved by a preponderance of the evidence entitlement to the medical treatment recommended by Dr. Blankenship for that compensable injury, *Johnson Controls, Inc. v. Miller*, 2023 Ark.App. 235. I find that she has done so. Although a claimant's testimony is never viewed as uncontroverted, the Commission need not reject the claimant's testimony if it finds that testimony worthy of belief. *Ringier America v. Combs*, 41 Ark.

Crane-H200157

App. 47, 849 S.W.2d 1 (1993). Having had the benefit of seeing claimant testify, I found her to be credible that her back continues to hurt despite all the conservative treatment she had received up to the date of the hearing. Even considering the natural bias that I would expect a father to have for his daughter, I found the testimony of Paul Crane to be credible on the issues to which he spoke. For these reasons, as well as those expressed in denying the motion for an IME, I find claimant has met her burden of proof that additional medical treatment as recommended by Dr. Blankenship is warranted.

B: Is claimant entitled to TPD benefits from February 27, 2023, until April 18, 2023?

An award of temporary partial-disability benefits is appropriate during the healing period in which an employee suffers a partial incapacity to earn wages. *Amaya v. Newberry's 3N Mill*, 102 Ark. App. 119, 282 S.W.3d 269 (2008). The claimant has the burden of showing by a preponderance of the evidence that she remains in the healing period. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008).

Claimant was released to perform light duty work by Dr. Knox on July 20, 2022, but her employer did not have full time light duty work for her. From the first time Dr. Blankenship saw claimant on February 27, 2023, he did not believe she was out of her healing period. Unfortunately, his record of that date did not specifically address claimant's ability to earn wages; claimant has not attempted to work at other employment that were within the light classification placed upon her by Dr. Knox. While it may have been an oversight on the part of Dr. Blankenship, I cannot speculate on what he intended before he clearly stated that claimant was to be off work completely, and therefore claimant has failed to prove she is entitled to TPD benefits from February 27 until April 18, 2023.

C. Is claimant entitled to TTD benefits from April 18, 2023, until a date to be determined?

To be entitled to TTD benefits for an unscheduled injury, a claimant must prove by a

Crane-H200157

preponderance of the evidence that she remains within her healing period and suffers a total incapacity to earn wages. *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005). On April 18, 2023, and again on May 8, 2023, Dr. Blankenship clearly removed claimant from all work activities. The evidence in this case amply supports that claimant is either again in a healing period or perhaps was never out of one. Therefore, claimant has met her burden of proof that she is entitled to TTD benefits from April 18, 2023, until a date to be determined.

ORDER

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$448.95.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE