

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H008920**

**JOHN KUNKEL,
EMPLOYEE**

CLAIMANT

**LEAFFILTER NORTH, LLC,
EMPLOYER**

RESPONDENT

**ARCH INS. CO./PMA MG'T CO.,
CARRIER/TPA**

RESPONDENT

**OPINION AND ORDER GRANTING RESPONDENTS' MOTION TO COMPEL
FUNCTIONAL CAPACITY EVALUATION (FCE)
FILED MAY 17, 2023**

Submitted for decision on May 1, 2023, on the parties' briefs and designated record pursuant to the parties' mutual agreement, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in Little Rock, Pulaski County, Arkansas.

The claimant, Mr. John Kunkel, is represented by the Honorable Andy Caldwell, Caldwell Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents are represented by the Honorable Lee J. Muldrow, Wright, Lindsey & Jennings, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

The parties mutually agreed to submit the issue of whether the ALJ should grant the respondents' motion to compel the claimant to submit himself for an FCE. The respondents' filed their motion concerning the FCE on or about April 12, 2023; and the claimant filed his response thereto, along with an exhibit consisting of attached medical records, on or about April 14, 2023. The ALJ scheduled and conducted a prehearing teleconference on April 18, 2023, and the prehearing order was filed the same day, April 18, 2023. The respondents filed their letter brief on May 1, 2023, and the claimant filed his response thereto on the same day, May 1, 2023. Therefore, the case was deemed as submitted for decision on May 1, 2023.

The record shall consist of the prehearing order filed April 18, 2023, as well as the parties' respective motion and response thereto, and briefs, *supra*, as well as any and all exhibits attached to the aforementioned filings. In addition, the record shall consist of the Commission's entire file in this claim.

STATEMENT OF THE CASE

The claimant, Mr. John Kunkel (the claimant) sustained an admittedly compensable injury to his left ankle on November 2, 2020. The respondents accepted the claim as compensable and paid both medical and temporary total disability (TTD) benefits. Dr. Phillip Smith, the claimant's treating orthopedic surgeon, treated the claimant from November 2020 through March 2, 2021, at which time he ordered an FCE, which was performed on March 12, 2021. This FCE was determined to be, "unreliable." On April 6, 2021, Dr. Smith opined the claimant had reached maximum medical improvement (MMI) and released him.

Thereafter the claimant exercised his statutory right to a one (1)-time-only change of physician (COP) to Dr. Gregory Ardoin. Dr. Ar. Doin ultimately performed arthroscopic surgery on the claimant's left ankle on February 1, 2022, after which the claimant underwent cortisone injections and physical therapy (PT). Dr. Ardoin opined the claimant reached MMI as of November 14, 2022, and released him. At this time Dr. Ardoin also provided the claimant the generalized work restrictions, stating specifically the claimant should, "avoid uneven ground, no stooping or squatting and avoid ladder climbing." (Claimant's Response to the Respondents' Motion to Compel FCE, Exhibit A, at page 6). In addition, Dr. Ardoin summarily assessed the claimant three (3) separate permanent anatomical impairment ratings, and cited the *American Medical Association Guides to the Evaluation of Permanent Impairment* (AMA, 4th Edition, 1993) (the *Guides*). (*Id.*).

Among other benefits, the claimant is requesting the Commission to determine the extent of the claimant's permanent anatomical impairment, the claimant is requesting vocational rehabilitation benefits pursuant to *Ark. Code Ann.* Section 11-9-505 (2023 Lexis Replacement) (Section 505 benefits).

DISCUSSION

It is well-settled that the Commission may require the claimant to submit to such examinations as may be necessary to assist the trier-of-fact to have sufficient evidence to rule on issues that require the ALJ and/or Commission to determine the extent of a claimant's permanent impairment, as well as his entitlement to wage loss disability benefits, if any. FCE's are commonly used for these purposes, especially where the existing medical evidence is conclusory, incomplete, and/or conflicting. *See, e.g., North Hills Surgery Center v. Otis*, 2021 Ark. App. 468, 638 S.W.3d 323 (Ark. App. 2021); *Eldridge v. Pace Industries, LLC, et al*, 2021 Ark. App. 245, 625 S.W.3d 734 (Ark. App. 2021).

In this case, especially in light of the fact the impairment ratings Dr. Ardoin assigned the claimant are conclusory and do not explain the basis for the ratings (other than summarily citing the *Guides*); as well as the fact the claimant is requesting Section 505 benefits, this ALJ is of the opinion that any and all additional information – and on these facts, particularly an FCE – would be beneficial to both the parties' and the ALJ in determining the extent of the claimant's impairment, as well as what the exact nature of his permanent physical limitations and restrictions are and, therefore, what type of jobs he is able to perform. Moreover, in the interest of fundamental fairness and completeness of the ultimate hearing record, I am of the opinion the respondents are entitled to the additional factual information such as that/those a current, post-surgery FCE will undoubtedly provide.

Therefore, after a thorough consideration of the facts, issues, the applicable law, and other relevant matters of record, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties' stipulations contained in the prehearing order filed April 18, 2023, hereby are accepted as facts.
2. The respondents' motion requesting the claimant should be compelled to submit himself for a current FCE at the respondents' expense should be and hereby is GRANTED.
3. The claimant's and respondents' attorneys shall confer and cooperate in scheduling and ensuring that the claimant attends an FCE with Mr. Rick Byrd, of Functional Testing Centers, Inc., at their earliest possible convenience.

Of course, if the claimant fails and/or refuses to comply with the terms of this opinion and order, he may be subject to a show cause hearing for contempt and, if justified, appropriate sanctions. I trust this will not be necessary.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp