

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H203473**

PATRICK J. AUSTEN, Employee	CLAIMANT
LOWE'S HOME CENTERS LLC, Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES INC., Carrier	RESPONDENT

OPINION FILED **AUGUST 31, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by RANDY P. MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 6, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 19, 2023, and a pre-hearing order was filed on April 21, 2023. A copy of the pre-hearing order with modifications 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 July 12, 2019.
3. Claimant sustained a compensable injury on July 12, 2019.

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

1. Whether claimant is entitled to medical treatment as recommended by Dr. Blankenship.

All other issues are reserved by the parties.

The claimant contends that "he is entitled to surgery as recommended by Dr. Blankenship."

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The respondents contend that “The proposed surgery is not reasonable, necessary, and related to the compensable injury.”

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 claimant and to observe his 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 stipulations agreed to by the parties at a pre-hearing conference conducted on August 19, 2023, and contained in a pre-hearing order filed April 21, 2019, as modified, are hereby accepted as fact.

2. Claimant has met his burden of proof by a preponderance of the evidence that he is entitled to additional medical benefits from Dr. James Blankenship for his compensable back injury.

#### FACTUAL BACKGROUND

Before the hearing began, there were a couple of changes to the Prehearing Order. As the only matter to be tried was the claimant’s entitlement to additional medical benefits, the issue regarding claimant’s compensation rate was reserved. Also, claimant had included in his contentions that he was entitled to the “medical treatment as recommended by Dr. Tonymon and Dr. Blankenship,” but amended that contention at the hearing to delete the recommendation by Dr. Tonymon.

Respondent had contended in the Prehearing Order that it would “likely have an independent medical examination conducted to obtain a second opinion regarding the proposed surgery.” Respondents submitted a review of the records by Dr. Owen Kelly as that second opinion, and therefore that contention was not pursued at the hearing.

HEARING TESTIMONY

Claimant was the only witness called by either party. He testified that he had worked at Lowe's since June 2017 as an assistant to the delivery driver. On July 12, 2019, he had loaded a refrigerator on the lift gate of the truck; when he jumped in the truck to go to the next stop, he felt a pain in his right side, which he also felt in his groin, hip, and lower back. Although he finished the day working, the pain intensified throughout the night and the next morning he reported it to his supervisor. He was first treated at MedExpress for what was believed to be a groin tear, and then a hernia before he was referred to Dr. Luke Knox. Dr. Knox then referred claimant to Camp Interventional Pain, where he was treated by both Dr. Nicholas Camp and Dr. Nicholas Boris. During the time he was being treated at Camp Interventional Pain, he said his condition remained constant throughout, with some benefit from the treatment from Dr. Boris. During that time, he continued to work in the delivery department at Lowe's, but his job duties changed to where he was transitioned from in-home delivery to a coordinator's role, which was primarily a desk job. Claimant was able to do the in-home delivery job without restrictions while he was going to the chiropractor. If he had an especially rough day, claimant would take the medicine prescribed by Dr. Camp.

Claimant discovered that the desk job brought on more issues for his back because he had trouble sitting for an extended period. As of the date of the hearing, claimant said he had not had any new injuries since July 2019, and that the pain is constant. "I am almost always in some kind of pain, but the location has moved around a little bit, but it is always concentrated in my lower back, my hip, or kind of in my groin area." Claimant believes that his condition is gradually getting worse and that he had done the conservative treatment route but was still having an issue with his back. He hoped to have it fixed once and for all.

Claimant voluntarily left Lowe's because the desk job was harder on him, and he didn't enjoy

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the work as much as doing deliveries. He then worked at Fresh Market in Rogers in receiving and stocking shelves, which was lighter work than appliance delivery.

Claimant testified that he had not had problems with his lower back before July 2019, but affirmed he had been seen by Dr. Knox in January 2019 for an upper back issue that resulted from a non-work-related injury. Claimant said he was released in May 2019 and had been working his regular duty at Lowe's between the time he was released and July 12, 2019. He believed the injury in July 2019 was in a different part of his back than the one from earlier in the year.

On cross-examination, claimant explained that in January 2019 he was lifting a dresser for a friend and felt some pinching and burning in his back. Dr. Knox referred him to physical therapy and recommended claimant purchase an inversion table. Claimant said staying upside down was difficult. Claimant was not aware that the injections he received after the July 2019 incident were at the L1-L2 level, which was the same area treated after he injured himself in January 2019.

Claimant was asked about a statement he gave on July 13, 2019, in which he said, "I am not sure what exactly happened or when it happened." He went on to say, "Like I said, yeah, I went to work that morning feeling fine and somewhere after the stuff that I had mentioned before when I jumped into truck, that's when everything started." Claimant agreed that the pain that he felt when he was first seen at MedExpress was in the lower right quadrant in the abdomen and down into the right testicle. He did not recall saying there was no back pain. Claimant said he left employment at Lowe's in May 2022 and began working at Fresh Market. As of about two weeks before the hearing claimant was only working weekends for Fresh Market, because he had accepted employment with a company called Tesseract, working in the shipping and receiving department. Claimant admitted that he does some lifting in active duty for Tesseract. Claimant said he did not remember having any symptoms in his mid-back after the incident at Lowe's, as the issues have been primarily in his hip, lower back, and

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groin area.

Claimant understood the surgery proposed by Dr. Blankenship was for L4-L5, the lower back. He did not recall any conversation with Dr. Knox following the January 2019 incident about needing surgery in the future. Claimant said the nerve blocks he received after the July 2019 injury helped some, but he did not recall ever being pain free.

On redirect-examination, claimant recalled that he had a jet ski accident which for several days upped the pain but then it “Probably went back to where it was before the accident.” Regarding Page 4 of Claimant’s Non-Medical Exhibit, which was the initial injury report to Lowe’s, claimant said that it wasn’t done in his handwriting. The manager on duty recorded “Patrick came to me explaining he had pain in the groin area. He is unsure where it happened but started around 12:30 to 1:00 the area started to cause pain.” When the form requested claimant describe the injury in detail, it was recorded “Pain in the area stated to occur after working for a while. Unsure of cause other than lifting product.”

On recross-examination, claimant did not remember telling Dr. Blankenship, “Dr. Knox told him he would probably wind up having to have surgery.” Claimant did recall Dr. Blankenship talking to him about an instability in his back. The cross-examination concluded with this exchange:

Question (by Mr. Murphy): Dr. Blankenship wrote “Again the rationale for offering an arthrodesis in this patient is to correct his flat back along with correcting his retrolisthesis and his segmental instability.” You understand he talked to you about some instability in your back?  
Answer (by the claimant): Yes.

Q: Ok, and by the time you got to see Dr. Blankenship and he went over the MRI’s, including one that I think was done in 2022, you were having problems at L4-5. You believe you had those all along since July 2019; is that right?

A: That is correct.

#### REVIEW OF THE EXHIBITS

The parties submitted over three hundred pages of medical records with very little duplication. This review will attempt to summarize those records in chronological order.

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Consistent with claimant's testimony, he was first seen at MedExpress for three visits in July 2019 and then was referred to Dr. Robert Petrino. Dr. Petrino determined that claimant did not have a hernia and referred him to Dr. Luke Knox. (R.X.1-16) Following his first visit with Dr. Knox, claimant was placed on a fifteen-pound lifting restriction for one month and was to be reevaluated after an MRI. Dr. Knox's records of September 16, 2019, included his entries for April 12, 2019, and May 14, 2019, which were from the treatment of the January, 2019 injury. Claimant was released to full duty on May 14, 2019. (R.X.19) The x-ray report noted degenerative changes at L3-4, L4-5, and L5-S1. (R.X.22)

An MRI was performed on September 30, 2019, and the impression was:

“Lower lumbar predominant spondylosis, worse at L4-5 and L5-S1 levels. There is severe right sided foraminal stenosis at L5-S1 level which could result in impingement on the existing right L5 nerve root.” (R.X.23 & 24)

There was no mention of any issues at L1-L2 in the MRI report.

Dr. Knox saw claimant again on October 8, 2019. His record referred to the MRI as “Noted to have foraminal disc at L1-L2 on the right.” Dr. Knox referred claimant to Camp Interventional Pain for a selective nerve block at L1-2 on the right. Claimant was released to work without limitations.

Claimant began his treatment with Dr. Nicholas Camp on October 22, 2019, who noted: “An MRI to the lumbar spine performed recently was revealed disc protrusions, primarily at the right L1-2 level.” Also, Dr. Camp recorded:

“I opened the patient's MRI today during our visit and discussed in detail this patient's underlying pathology and/or treatment approaches available to address this pain... Will schedule a right L1-2 selective nerve root block with fluoroscopy.”

Claimant had the nerve block and returned to see Dr. Knox on December 9, 2019, who recorded in the plan that claimant was to be referred for a neurosurgical consultation of the extreme lateral disc herniation at L1-2 on the right. On December 10, 2019, claimant returned to Dr. Camp to

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continue pain management while he was waiting for approval for surgery.

On December 18, 2019, claimant saw Dr. Brandon Evans at NWA Neuroscience Institute, the aforementioned referral by Dr. Knox. Dr. Evans recommended that claimant continue with non-surgical treatments due to the improvement he had shown at that point.

On January 14, 2020, claimant returned to Dr. Camp for epidural injections at the L4-L5 and L5-S1. In the next six months, claimant continued treatment with Dr. Camp or Dr. Nicholas Boris, a chiropractor associated with Dr. Camp. On June 2, 2020, claimant underwent another MRI; there was diffuse disc bulging from L1 down to S1 and the impression was “Degenerative disc and joint disease with varying degrees of neuroforaminal stenosis as described above. Disc bulge at L5-S1 minimally impinges on the bilateral S1 nerve root.” (R.X.177)

Claimant continued with Dr. Camp and Dr. Boris the next year and another MRI was performed on June 14, 2021. There was no essential canal or neuroforaminal narrowing from T12 through L4. The impression of that MRI was:

1. Mild degenerative changes of the lumbar spine, worse in the lower lumbar spine. At L5-S1 there is a minimal diffused disc bulge and mild facet hypertrophy resulting in mild effacement of the anterior thecal sac, moderate right neuroforaminal narrowing and mild left neuroforaminal narrowing.
2. Mild degenerative disc signal involving all five intervertebral discs of the lumbar spine.

On July 26, 2021, claimant saw Dr. Charles Jones. The reason for the visit was:

“This is a workmen’s compensation related incident. He has been through chiropractic adjustments which helped some. Has not had any lumbar surgery before. He has had previous epidurals from Dr. Camp, these used to help but not so much anymore. I thought about surgery, but he wanted to keep pressing on with non-operative treatments which is fine. He tells me that workers’ compensation is pushing for him to get a second opinion from someone in Springdale that does lumbar disc replacements.”

After reviewing the recent MRI, Dr. Jones was of the impression that an L4-S1 double TLIF would be an option for his condition. Dr. Jones was very candid and advised claimant that he should

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talk with the other surgeons to see what could be offered other than the double TLIF.

Claimant had his first of three visits with Dr. Kenneth Tonymon on July 27, 2021. The plan following that visit was for claimant to return to Dr. Camp for a right L5-S1 transforaminal ESI, after which a discectomy at that level would be considered. Following the ESI, claimant returned to see Dr. Tonymon on September 21, 2021, and reported that he received a great deal of relief from the pain that he had at the L5-S1 level. Claimant reported that he was no longer able to see the chiropractor and that his different job required that he sit for longer periods of time, which was painful. It appears that claimant returned to Dr. Camp for one additional epidural injection on April 6, 2022, before exercising his right to change physicians.

A little over three years from the date of his injury, claimant had his fourth MRI. The impression of the one performed at Imaging Associates of Northwest Arkansas on August 15, 2022, was “Mild multilevel spondylosis, as above. No high-grade canal stenosis at any level. Moderate bilateral neuroforaminal narrowing at L4-5 and L5-S1.”

Claimant then saw Dr. James Blankenship at the Neurosurgery Spine Center. Although Dr. Blankenship did not believe physical therapy was going to offer him any relief, he nonetheless prescribed it for a few weeks; if claimant did not improve, then Dr. Blankenship was going to recommend an arthrodesis at the L4-L5 and L5-S1 level. Claimant agreed with this, as he wanted to continue a conservative treatment plan.

When claimant returned on October 31, 2022, Dr. Blankenship recorded that the workers’ compensation carrier would not approve physical therapy and as a result, claimant’s pain was getting somewhat more intense. Dr. Blankenship expressed his ire at the denial of the physical therapy recommendation and again recommended eight weeks of aggressive physical therapy. This time, the physical therapy was approved, but other than relief by using traction, it did not alleviate his symptoms.



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Dr. Blankenship consulted with the physical therapist and learned claimant was diligent during that course of treatment. Dr. Blankenship again discussed surgery, an anterior lumbar interbody arthrodesis at L4-L5 and L5-S1 with posterior decompression and extreme lateral decompressions at both L4-L5 and L5-S1. Claimant requested time to consider this option. Dr. Blankenship told him to let him know if he decided to go through with the surgery so the precertification process with the workers' compensation carrier would begin. While there was no subsequent record from Dr. Blankenship, the testimony from the claimant was clear that he wants to proceed with the surgery.

The final record submitted was a review of the records performed by Dr. Owen Kelly, a board-certified orthopedic surgeon, who prepared his report on June 28, 2023. The first four pages of the report is a summary of the record, after which Dr. Kelly opined: "The medical documentation, physical exam findings and diagnosis isolate the injury at the L1-L2 segment. The L4-S1 findings do not appear to be related to the injury." Dr. Kelly found there was a documented pathology at L4-S1 which would be related to a degenerative disc disease. He said that it would include the treatment to that point as well as the arthrodesis fusion at L4-S1.

#### ADJUDICATION

The parties stipulated, and I accept as fact, that claimant sustained a compensable injury on July 12, 2019. Consequently, the only issue properly before this court is the Commission's finding that 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.

While the parties were not specific as to the nature of this compensable injury, the testimony and medical records make it clear that the injury was to claimant's low back. Dr. Knox had seen claimant earlier in 2019 for an injury to his back at the L1-L2 level, and in his records in September

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2019, mentioned that prior treatment. However, claimant was released in May 2019 to return to full duty after being treated for that non-work-related injury and was working at full duty on July 12, 2019. The MRI performed on September 30, 2019, did not show any issues at the L1-L2 level but did reveal some significant bulges at L4-S1 levels. For reasons not explained in the records, Drs. Knox and Camp did not begin treatment at L4-L5 or L5-S1, but rather concentrated on L1-L2 during the first few months claimant was treated by them. In the records of his consultation examination requested by Dr. Knox, Dr. Evans mentioned the L4-S1 disc protrusion in December 2019, and Dr. Camp added addressing the issues at L4-S1 to claimant's treatment plan in January 2020.

From the records and the testimony, I am satisfied that claimant injured his back at L4-S1 in July 2019. It is a bit puzzling how the four MRIs claimant has undergone have shown different results at his L1-L2 level. That is, however, largely irrelevant to the issue of the reasonableness of Dr. Blankenship's recommendations, which is for surgery at the L4-S1 level. Claimant was understandably reluctant to undergo a major surgery such as has been suggested to him but has reached the point that it seems to be his only option.

In reviewing Dr. Kelly's report, I give more credibility to the doctor that has examined a patient than I do to one that merely reviewed records. His statement "Although there is documented pathology at L4-S1, the treatment would be related to degenerative disc disease" is irrelevant; "a pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought." *Fulton Cty. Hosp. v. Herring*, 2020 Ark. App. 221, 597 S.W.3d 162. A person with degenerative disc disease without symptoms or limitations is not barred from benefits; claimant was working at his job without restrictions when he was injured. As such, I find he has proven by a preponderance of the evidence that the medical treatment as recommended by Dr. Blankenship is reasonable and necessary.

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ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as recommended by Dr. Blankenship for the injury to his injury.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript.

**IT IS SO ORDERED.**

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JOSEPH C. SELF  
ADMINISTRATIVE LAW JUDGE