

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H203317

MARK A. AUSBROOKS, CLAIMANT
EMPLOYEE

LEXICON, INC., RESPONDENT
EMPLOYER

TRISTAR CLAIMS MANAGEMENT SERVICES, RESPONDENT
INC., INSURANCE CARRIER/TPA

OPINION FILED JANUARY 9, 2024

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as Modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed June 6, 2023. The administrative law judge found that the claimant proved he was entitled to temporary total disability benefits and medical treatment. After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved the medical treatment of record was reasonably necessary in connection with the compensable injury. The claimant proved that he was entitled to temporary total disability benefits beginning April 8, 2022 until a date yet to be determined.

I. HISTORY

The record indicates that Mark Ausbrooks, now age 52, was hired by the respondent-employer, Lexicon, Inc., on January 21, 2020. Mr. Ausbrooks testified that he had been employed with the respondents as a Sheet Metal Mechanic. The parties stipulated that the employee-employer relationship existed on March 24, 2022, on which date the claimant “sustained a compensable injury.” The claimant testified on direct examination:

Q. What was Lexicon Holdings doing? What’s the job?

A. We were puttin’ HVAC ductwork in the UCA Fine Arts building....

Q. Tell us what happened.

A. I was walkin’ with Joe Minton through the concert hall and there was a board anchored to the floor coverin’ up a electrical place. I was carryin’ a box of cleats and was walkin’ through there and my left foot hit it, and when it did, all my weight came down on my right foot. A loud pop occurred. Joe told me to walk it off, and I looked at him and said, “Joe, this is bad.” He said, “Just walk it off. You can do it.”

Q. Okay. Mr. Minton was your supervisor at the time?

A. Yes, sir.

Q. Okay. So this incident resulted in you needing medical treatment. Is that right?

A. Yes, sir....

Q. Now, there’s a company nurse there at Lexicon, right?

A. Yes, sir.

Q. So you did see the company nurse at Lexicon.

A. Yes, sir....

Q. So you went to the nurse and what did the nurse do for you?

A. She put me on don’t work for a week, go to the office every day and put it on ice[.]...

Q. So did you, in fact, go to work and put ice on your foot?

A. Yes, sir. Five days.

Q. Okay. Now the injury is an Achilles injury, the backside of your right ankle calf area, right?

A. Yes, sir....

Q. You were there for about a week basically doing nothing but icing your leg?

A. I just sat in a chair for eight hours and then they released me to go....

Q. So what happened for a work standpoint?

A. I went back to my work and there's no way I could, you know, do my job.

Q. So how many days did you work after that discussion?

A. I believe it was three 10-hour days.

Q. Okay. And when you were working on those days, what were you doing?

A. The first day I was climbin' up an extension ladder catchin' duct as it came across the safety rail and carryin' it down a hallway, which there was no concrete poured at the time, so it was just raw roof and decking....

Q. And are you carrying items up the ladder?

A. We're not supposed to but yes, sir, I did....

Q. How far do you have to walk?

A. I mean, 50, 75 foot, maybe 100 yards, you know, to the first piece, and then we stage our way out like I said.

Q. All right. And so you did that for three days?

A. Yes, sir.

Q. All right. How were you doing?

A. Not good....

Q. And as far as being on your feet, are you having to be on your feet all day to perform this work?

A. 10 hours a day.

According to the record, the claimant treated at Carter Family

Medicine Clinic on April 5, 2022:

Mark Ausbrooks is a 51 year old male who presents for continued right leg pain. Was at work helping supervisor move equipment on March 28, 2022 when he tripped and felt pop and searing leg pain in his calf.

Pain worse when he tried to put weight on leg or trying to dorsiflex foot.

Was seen at company Health Center by Nurse Practitioner and cleared to return to light-duty. There is no light duty positions at his company.

Since accident his pain is worse, he has to use crutches to ambulate, calf remains tender....

Extremities: normal except for tenderness to palpate right calf, bruise below right calf, swelling of leg.

Dr. Inge Carter diagnosed "Calf injury." Dr. Carter planned an x-ray of the claimant's right lower leg and referral to an orthopedist. Dr. Carter also stated, "Continue to use crutches when ambulating."

The claimant testified that his employment was terminated by his supervisor, Joe Minton, on or about April 6, 2022. Joe Minton testified that he was a Project Manager/Estimator for the respondent-employer, and that he had been the claimant's main supervisor. Joe Minton agreed that the claimant's employment was terminated on or about April 8, 2022. The respondents' attorney examined Mr. Minton at hearing:

Q. Did Mr. Ausbrooks receive any verbal warnings leading up to that termination?

A. He had previously, yes. Several.

Q. For what types of things?

A. Several verbal warnings. Verbal warnings about bein' late, about not comin' in, about the quality of his work, about doin' things right, about conflicts on the jobsite, arguin' with people, stirrin' up trouble on the jobsite[.]...

Q. What made you wait until April 8th to terminate him?

A. Because we were – 'cause we needed help. We were busy and I kept him until I just got to a point where I – I didn't need any more help and I couldn't afford to – to not keep the help.

The claimant's attorney cross-examined Joe Minton:

Q. Would you agree he had at least a week where the nurse had him with the ice just being sedentary, not doing anything?

A. I don't know for sure what she had him doin', but yeah, it was about a week that I know he was under her care.

Q. All right. So after that, he got released by her and he went back to work and worked three days before he got fired, right?

A. Yes, I believe that's about right.

Q. What was he doing on those three days?

A. Tryin' to install ductwork. Not a lot, to be honest.

Q. Well, was he performing – maybe he wasn't performing very well, okay? But to be performing his regular duties, isn't that what he was supposed to be doing?

A. That's correct.

Q. Okay. So he was not being given light duty, and he was not being given sedentary duty, and he was fired without a written warning, right?

A. That's correct.

The record contains a Lexicon Separation Notice indicating that the respondents terminated the claimant's employment effective April 8, 2022. The Lexicon Separation Notice indicated that the respondents terminated the claimant because of "Performance" and "Attendance." The following remarks were written on the Separation Notice: "Mark has a repeated history of tardiness and absences, to the point he could no longer be counted on. Despite being given over two years he still doesn't have all the tools necessary to perform his job and had to borrow from others to be able to perform a task. His production was very slow and his quality was unacceptable. Constant problems with him on the site as well, including conflicts with others, parking issues and lack of respect." The Separation Notice included a Final Employee Evaluation which indicated that the following areas were "Unacceptable": Quality of Work, Productivity,

Dependability, Safety, and Initiative. The claimant's supervisor, Joe K.

Minton, Jr., signed the Separation Notice on April 11, 2022.

A Nurse Practitioner's diagnosis on April 18, 2022 was "Rupture of right Achilles tendon."

Joe Minton corresponded with Danna Gaunt and other individuals via e-mail on May 18, 2022:

- 1) Did he complain about anything related to his injury between the date of the injury and the date of separation? Mark (sic) was cleared and returned to the job site on Monday, April 4th. On Wednesday he told me his leg was swollen the night before but he knew it was because he didn't wear the bandage as instructed and that it was fine that day because he had the bandage on. On Friday he comes to me and says he knows he has been cleared but his leg still hurt. Then he stated that he called Mike Perkins on Thursday and said his leg was still hurt and Mike told him to tough it out until Sunday and if it still hurt he could go to the ER. When I mentioned this to Mike he immediately says that wasn't true. When I told Mark that Mike said it wasn't true, he just shook his head and walked off.
- 2) Did he miss a lot of work and was it documented? Mark missed a lot of time at work and that was one of the primary reasons for his separation, along with the poor quality of his work and lack of production. I've attached copies of his timecard that show 14 tardys, 3 early outs and 2 absences since January. And these didn't show all the times he was late returning from either our morning break or our lunch break.
- 3) Help me justify the reason on the separation for his attendance and performance. Besides the attendance mentioned above, his production and quality were unacceptable. He would show up one day with just a few of the required tools to perform his job and then the next day not have any and say oh I left them at home. On the occasions where we let him make small

decisions about the project he was working on, more time than not we would have to go back and redo the work due to poor quality and bad decisions. Mark has over 20 years' experience and it got to the point where I had two or three year guys leading the projects because Marks work was unacceptable. Numerous complaints from both the mechanical contractor and the general contractor about Marks attitude and treatment towards others, and lack of respect for the work of the other trades on the job. It was mentioned more than once that if he kept on that way, he would be asked to leave the job. As I've mentioned to Steve and Renee, the only reason I did not terminate him sooner was because of our work load and lack of manpower. We had a spell for about two plus months where we had all crews working 7 days a week and 10 hours a day and I needed as many men on the job as possible. We are just now getting back to our regular 40 hour work weeks for the most part although we haven't had any layoffs in manpower, we did get to a point where I could live without him.

Dr. Robert Daniel Martin noted on May 26, 2022:

Patient to follow-up. States minimal improved since last office visit 2 weeks ago. He reports he has been ambulating in the tall walking boot, however, reports some physical therapy states he has no showed that appointment and showed up to another 1 without his boot on. He continues to endorse significant pain from the gastrocnemius muscle down his Achilles tendon and cannot push off with his right foot.... Right ankle examination demonstrates muscle contracture proximally at the myotendinous junction of the gastrocnemius with significant tenderness to palpation, moderate edema, tender to palpate the length of the Achilles tendon as well, pain with resisted plantar flexion, distal neurovascular intact, pain out of proportion on examination....

Dr. Martin assessed "51-year-old male partial thickness Achilles tendon rupture right side, worker's compensation, intermittent noncompliance." Dr. Martin planned, "Went over ports of continue with the

regular physical therapy and tall boot use, we will keep him on sedentary work duty, he is not at MMI currently, follow-up in 1 month. We will possibly transition him out of the walking boot at that time.” The diagnosis was “Achilles rupture, right[.]”

The claimant treated at Baptist Health Therapy Centers on July 19, 2022, where the claimant was diagnosed with “Strain of right Achilles tendon, initial encounter.” It was also noted at that time, “Pt states he is hurting a lot today and states when he got up from a chair on Saturday he heard and felt a pop in his Achilles even with his boot on. Pt states he is not able to do everything today but is icing at home.”

Dr. Justin H. Long corresponded with a Medical Case Manager on August 15, 2022:

I have reviewed the MRI of the right ankle dated 4/21/2022. There is no evidence of acute fracture at the right ankle. There is no mass like abnormal marrow replacement. There is patchy subchondral marrow edema at multiple tarsometatarsal articulations.... There is marked thickening of the Achilles tendon extending from the myotendinous junction distally.... I have reviewed the MRI of the right ankle dated 8/1/2022. There is no acute fracture at the ankle.... In my professional opinion, the patient’s partial thickness Achilles tendon tear could certainly be acute given the history of tripping at work. However, this undoubtedly occurs on a background of chronic Achilles tendinopathy present previous to the acute traumatic event. On the follow-up MRI in August, the partial thickness Achilles tear has largely healed although the features of Achilles tendinopathy remain. With regards to the need for surgery, the imaging findings discussed above could support surgical treatment as an option due to

persistent, chronic tendinopathy and previous tearing. This is assuming the patient was adherent to the nonoperative treatment regimen/rehabilitation but has failed to improve to a sufficient degree clinically. However, by imaging, the acute Achilles tendon partial-thickness intrasubstance and myotendinous tear has undergone significant healing in the interval between the MRI exams suggesting that the surgery would be treating the continued tendinopathy and reducing risk for recurrent tear. Ultimately, the need for surgery should be largely clinical and related to persistent symptomatology in the setting of chronic Achilles tendinopathy and the resultant lifestyle limitations.

On August 19, 2022, the Medical Case Manager queried Dr. James L. Head in part, "After reviewing the second MRI dated 8/1/2022 of M. Ausbrooks right ankle and Dr. Long's comparison of the two MRIs; is it still your professional opinion that Mr. Ausbrooks requires surgical intervention of the right ankle? If so, please opine if your recommendation for surgery is greater than 51% directly related to the acute injury from 3/24/2022?" Dr. Head answered with a question mark and commented, "Exacerbation of pre-existing condition, I can't put a % on that."

The Medical Case Manager corresponded with Dr. Martin on August 25, 2022:

Mr. Ausbrooks requested a change of physician. He saw Dr. Head at Conway Orthopedics on two separate occasions. On 7/27/2022 Dr. Head requested to proceed with surgical intervention, non-insertional Achilles tendinopathy debridement and FHL transfer. The insurance carrier requested a second MRI which was done on 8/1/2022. The insurance carrier requested Dr. Justin Long to compare the two MRIs and then asked Dr. Head's opinion on relatedness of the surgery that he requested.

The insurance has requested your expert opinion as well. I have attached all the medical records since his last visit with you. Would you kindly review and provide your opinion if Mr. Ausbrooks requires surgical intervention of the right ankle? If so, please opine if the surgery is greater than 51% directly related to the acute injury from 3/24/2022?

Dr. Martin answered “No” and commented, “Pt primary c/o pain and IMO this is related to his chronic pre-existing Achilles tendinopathy, his partial Achilles tear has healed on his most recent MRI. The recommended surgery is NOT > 51% directly related to acute 3/24/2022 injury.”

The claimant followed up with Dr. Head on October 28, 2022:

Mark presents for his right Achilles. He reports that he is here for to discuss surgery options. He is ambulating without assistance wearing normal footwear. He was able to transition from the boot but is still experiencing pain when walking. The pain usually occurs while weightbearing. He reports that he has pain with walking on uneven ground. She states that he has not improved in pain since his last visit....
MRI on the Right Ankle on 4/21/22: Tendinosis of the Achilles tendon with medium grade intra-substance partial tear.

Dr. Head’s impression was “Noninsertional Achilles tendinopathy w/partial tear/rupture, right foot....I recommended proceeding with the previously discussed surgery.”

Dr. Head performed surgery on December 6, 2022: “Right debridement of the Achilles tendon with secondary repair and flexor hallucis longus tendon transfer to the calcaneus.” The pre- and post-operative diagnosis was “R Achilles tendinopathy.” Dr. Head planned following surgery, “Nonweightbearing. Follow up in two weeks. Once his wound is

healed, he can begin weightbearing as tolerated in a boot and begin physical therapy.”

Dr. Jason G. Stewart corresponded with Integrity Consulting

Services on January 10, 2023:

The following is a narrative report of the medical file review in the specialty of orthopedic surgery regarding Mark Ausbrooks. I have reviewed the attached the statement of accepted facts and the following medical records. I have been asked by the insurer for my opinion on relatedness....

1. Are the objective findings on the imaging related to an acute work injury or preexisting chronic issues?

I reviewed radiologic imaging studies provided on CD, including MRIs of the right ankle from 4/21/2022 and 8/1/2022. Both MRIs depict evidence of chronic Achilles tendinosis. Achilles tendinosis is an often-misunderstood diagnosis. It is distinct from Achilles tendonitis, insertional Achilles tendonitis, Achilles strain and Achilles rupture. A partial tear of the Achilles tendon, also known as a strain, is an acute, traumatic injury to the tendon, often caused by sudden force or impact. An acute traumatic partial tear of the Achilles tendon typically presents with immediate pain, swelling, and stiffness at the site of the injury, and can make it difficult to walk or stand on the affected foot. On the other hand, tendinosis is a degenerative condition that develops over time, and it is not caused by a specific traumatic event. It is usually caused by overuse or aging and characterized by pain, weakness and stiffness of the affected joint....

The claimant reports that he was “a lot” better with a pain level of 1/10, which led to release from medical care on 4/1/2022. This course of recovery would be appropriate and expected considering the mechanism and nature of injury. The provided records have a 17-day period from the claimant’s recover and release from medical treatment to a visit with a new provider, new claims of worsened swelling, bruising, pain escalation from 1/10 to 7/10 and inability to put weight on the leg and acknowledgement of being fired from his job. Typically, the further one is

temporally removed from the traumatic incident the quality of pain diminishes as recovery occurs, which is what was seen initially. There was no query by the subsequent provider nor the insurer for an explanation of how and why the recovery reversed course so dramatically. An MRI had not been done at this point and neither provider (but nurse practitioners) was aware of a chronic, underlying condition that should have been considered as part of establishing a differential diagnosis.

The ability to compare MRI studies from 1 month and 5 months after the injury is invaluable in this case. The initial MRI findings showing some increased signal intensity of the Achilles tendon which suggested partial tearing approximately one month later would be consistent within this time frame of still having evidence of an injury but also acknowledging there are significant surrounding changes clearly much older than 1 month. The follow-up MRI represents an improvement, the changes initially presumed to be acute are no longer present, while the chronic findings appear to be still present and unchanged in nature. I would interpret this as a recovery to a baseline chronic diagnosis with clear evidence of resolution of the acute injury.

2. Within a medical degree of certainty do you believe the recommended surgery is appropriate and medically necessary for Mr. Ausbrooks' status as reflected on the 8/1/2022 MRI related to the work injury?

I believe withing (sic) a reasonable degree of medical certainty, based on the evidence provided in this medical record, the surgery was not appropriate or necessary to treat the injury on 3/24/2022. The surgical procedures Dr. Head performed were appropriate for the treatment of a chronic condition (Achilles tendinosis). The record indicates an acute aggravation of a chronic problem subjective clinical improvement and objective radiologic evidence of improvement. The progress note immediately before the surgical procedure does not acknowledge the more recent MRI which shows improvement of the appearance of the Achilles tendon. Dr. Head makes no mention of seeing any evidence of an acute or subacute injury, nor the consequence of an injury at the time of surgery. The initial claim is for a strain or low-grade partial

tear of the Achilles tendon, but no mention of tearing appears in the operative note. In fact, the operative note indicates the surgeon debrided (surgically removed) nearly 50% of the Achilles tendon substance. This procedure when combined with a flexor hallucis longus (FHL) transfer is intended to remove degenerative changes in the Achilles tendon, transfer the FHL muscle belly with its rich blood supply to the anterior surface of the Achilles tendon to improve local blood flow and augment the debrided and weakened Achilles tendon. The surgical treatment for an acute Achilles tear is to repair the tear with sutures, not remove half the tendon.

The second MRI confirms resolution of the acute injury. The third medical record from 4/1/2022 indicates an improved and nearly resolved injury. The claimant's own admission of a quick recovery and release from medical care only to reappear 3 weeks later at another medical clinic with symptoms appearing more severe than upon initial presentation lacks a credible/logical premise. There are records from Dr. Martin indicating the claimant not wearing the boot to the visit, which could be interpreted as either noncompliance or symptom resolution. Dr. Martin notes which appeared to be an out-of-proportion pain response to physical exam at approximately 2 months after the injury. Again, this would be considered unusual given the elapsed time from injury and the previous visits where this was not present. Pain behavior out-of-proportion to expected norms could be interpreted as a worsening of the injury process or symptom magnification. The claimant mentions a reinjury at home getting out of his shower with an audible "pop" but there is no evidence of consideration of what role this may have had in leading up to a surgical intervention. These particular medical findings should be examined with a prudent amount of professional skepticism in order to thoroughly understand a logical chain of events from injury to treatment.

A pre-hearing order was filed on March 1, 2023. According to the text of the pre-hearing order, the claimant contended, "Claimant contends that he sustained compensable injuries to his right leg, ankle, and foot on

March 24, 2022. Claimant further contends that he is entitled to payment of temporary total disability (TTD) benefits for the period of March 24, 2022, through a date yet to be determined. That payment of these benefits has been controverted for purposes of attorney's fees. Claimant also contends that he is entitled to payment of medical treatment for December 6, 2022, surgery."

The respondents contended, "Respondents contend that all appropriate benefits are being paid with regard to this matter. The claimant has been accepted at this time as medical only. Respondents provided light duty for claimant and would have continued to do so but for his termination on April 8, 2022, for cause. Respondents further contend that the surgery performed by Dr. Head was not reasonable and necessary associated with the March 24, 2022, injury."

The parties agreed to litigate the following issue: "1. Temporary total disability (TTD)."

A hearing was held on May 4, 2023. Upon examination by an administrative law judge, the claimant testified that he was still "under a doctor's care" and was not working for any employer.

An administrative law judge filed an opinion on June 6, 2023. The administrative law judge found that the claimant proved he was entitled to additional temporary total disability benefits beginning April 7, 2022 until a

date to be determined. The administrative law judge found that the surgery undergone by the claimant on December 6, 2022 was “directly related” to the compensable injury “and shall be paid by the Respondents.”

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a)(Repl. 2012). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat’l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

An administrative law judge found in the present matter, “4. Claimant’s December 6, 2022, ankle surgery is directly related to his March 24, 2022 injury and shall be paid by the Respondents.” The Full Commission finds that the medical treatment of record following the

compensable injury was reasonably necessary. Said reasonably necessary medical treatment included surgery performed by Dr. Head on December 6, 2022.

The parties stipulated that the claimant sustained a compensable injury on March 24, 2022. The claimant's testimony indicated that he tripped and injured his right lower extremity as the result of a work-related specific incident occurring March 24, 2022. A claimant who has sustained a compensable injury is not required to offer "objective medical evidence" to prove he is entitled to additional benefits. *Chamber Door Industries, Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Nevertheless, there were objective medical findings of record following the compensable injury. It was noted at Carter Family Medicine Clinic on April 5, 2022 that there was a bruise below the claimant's right calf and swelling of the claimant's leg. Dr. Carter diagnosed "Calf injury." A Nurse Practitioner's diagnosis on April 18, 2022 was "Rupture of right Achilles tendon." The Full Commission finds that the ruptured right Achilles tendon was causally related to the March 24, 2022 compensable injury and was not the result of a prior injury or pre-existing condition.

Dr. Martin examined the claimant on May 26, 2022 and reported "muscle contracture" in the claimant's right lower extremity as well as "moderate edema." These were additional objective medical findings. Dr.

Martin also reported that the claimant had sustained a “partial thickness Achilles tendon rupture.” We find that Dr. Martin’s diagnosis of “Achilles rupture, right” was causally related to the March 24, 2022 compensable injury and was not the result of a prior injury or pre-existing condition. It was also noted at Baptist Health Therapy Centers on July 19, 2022 that the claimant had suffered a “Strain of right Achilles tendon, initial encounter.” We find that the report of a strained right Achilles tendon on July 19, 2022 was causally related to the March 24, 2022 compensable injury and was likewise not the result of a prior injury or pre-existing condition.

Dr. Long opined on August 15, 2022 that “the partial thickness Achilles tear has largely healed although the features of Achilles tendinopathy remain.” Dr. Martin agreed with Dr. Long and opined on August 25, 2022 that surgery proposed by Dr. Head was not reasonably necessary. Dr. Stewart stated on January 10, 2023 that surgery recommended by Dr. Head was not reasonably necessary.

The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). It is within the Commission’s province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Full

Commission finds that the opinion stated by treating surgeon Dr. Head was most credible. Dr. Head opined on August 19, 2022 that the claimant had sustained an “Exacerbation of pre-existing condition, I can’t put a % on that.” The claimant need only prove that the compensable injury was “a factor” in his need for surgery recommended by Dr. Head. *See Williams v. L&W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). The evidence in the present matter demonstrates that the compensable injury was at least “a factor” in Dr. Head’s recommendation for surgery. We find that Dr. Head’s treatment recommendations are supported by the record and are entitled to more evidentiary weight than the opinions of Dr. Long, Dr. Martin, or Dr. Stewart. The Full Commission therefore finds that the medical treatment of record, including surgery performed by Dr. Head, was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012).

B. Temporary Total Disability

The parties stipulated that the claimant sustained a compensable injury on March 24, 2022. The evidence demonstrates that the compensable injury resulted, among other things, in a rupture of the claimant’s right Achilles tendon and was therefore a “scheduled injury” in accordance with Ark. Code Ann. §11-9-521(a)(4)(Repl. 2012). Act 796 of

1993, as codified at Ark. Code Ann. §11-9-521(Repl. 2012), provides, in pertinent part:

- (a) An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial disability benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury[.]

The Arkansas General Assembly requires that administrative law judges and the Full Commission shall strictly construe the provisions of Act 796. See Ark. Code Ann. §11-9-704(c)(3)(Repl. 2012). The doctrine of strict construction is to use the plain meaning of the language employed. *Holiday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996).

In the present matter, the administrative law judge decided the case in accordance with the appellate standard for adjudicating nonscheduled injuries, viz., *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The administrative law judge erred as a matter of law. For scheduled injuries the injured employee is to receive compensation for temporary total or temporary partial disability during the healing period or until the employee returns to work, whichever occurs first. Ark. Code Ann. §11-9-521(a)(Repl. 2012), *supra*; *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as

the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

In any event, it is the duty of the Full Commission to enter findings in accordance with the preponderance of the evidence and not on whether there is substantial evidence to support the administrative law judge's findings. *Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983), citing *Jones v. Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). The Full Commission reviews an administrative law judge's decision *de novo*, and it is the duty of the Full Commission to conduct its own fact-finding independent of that done by an administrative law judge. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996). The Full Commission makes its own findings in accordance with the preponderance of the evidence. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990). Moreover, the appellate court reviews the decision of the Full Commission and not that of the administrative law judge. *Powers v. City of Fayetteville*, 97 Ark. App. 251, 254, 248 S.W.3d

516, 519 (2007), citing *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

It is the Commission's duty to weigh the evidence, to resolve any conflicts in the evidence, and to assess each witness's credibility. *Walker v. Cooper Standard Auto.*, 104 Ark. App. 175, 289 S.W.3d 184 (2008). The Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *American Greetings Corp. v. Garey*, 61 Ark. App. 19, 963 S.W.2d 613 (1998).

In the present matter, the Full Commission finds that the claimant proved he was entitled to temporary total disability benefits beginning April 8, 2022 until a date yet to be determined. The claimant sustained a compensable scheduled injury on March 24, 2022. The claimant testified that he "iced" his right lower extremity at work, elevating his leg, for approximately a week following the compensable scheduled injury. The claimant testified that he subsequently attempted to return to work but "there's no way I could, you know, do my job." We note that Dr. Carter instructed the claimant on April 5, 2022 to "use crutches while ambulating." The record does not show that that claimant was able to competently perform his job as a Sheet Metal Mechanic while using crutches as advised by a treating physician.

The claimant's supervisor, Joe Minton, terminated the claimant's employment effective April 8, 2022. Mr. Minton asserted on a Separation Notice that the claimant was an "Unacceptable" employee. Yet the evidence plainly demonstrates that the claimant remained within a healing period at the time of his termination on April 8, 2022. A Nurse Practitioner's diagnosis on April 18, 2022 was "Rupture of right Achilles tendon." If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total. *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Ark. Code Ann. §11-9-521(a)(Repl. 2012) was not intended to bar additional temporary total disability benefits following an unsuccessful attempt to return to the workforce. *Id*, citing *Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 858 (1997).

The evidence in the present matter does not demonstrate that the claimant could effectively perform his employment duties for the respondents while the claimant remained in a healing period for his compensable scheduled injury. Along with the diagnosis of a ruptured Achilles tendon, which diagnosis was causally related to the compensable injury, Dr. Martin reported on May 26, 2022 that the claimant "cannot push off with his right foot....Right ankle examination demonstrates muscle

contracture proximally[.]” Dr. Martin agreed that the claimant had sustained an Achilles tendon rupture. Dr. Martin assigned sedentary work and opined, “he is not at MMI currently, follow-up in 1 month.” Dr. Head performed reasonably necessary surgery on December 6, 2022. There is no indication of record that Dr. Head has released the claimant to return to work or has opined that the claimant reached the end of the healing period for the compensable injury.

The respondents cite as authority *Robertson v. Pork Group, Inc.*, 2011 Ark. App. 448, 384 S.W.3d 639 (2011). In *Robertson*, the Arkansas Court of Appeals affirmed the Full Commission’s finding that the claimant did not prove she was entitled to temporary total disability benefits after her employment was terminated. The Court of Appeals agreed that the claimant “unjustifiably refused employment suitable to her capacity and offered her by the respondent-employer” in accordance with Ark. Code Ann. §11-9-526. *Robertson* is inapposite, however, because the respondents do not argue, in accordance with Ark. Code Ann. §11-9-526, that the claimant in the present case unjustifiably refused employment suitable to his capacity. To the contrary, the claimant in the present case was terminated while he remained within his healing period and was physically unable to perform remunerative labor with reasonable consistency. *Farmers Cooperative, supra*.

After reviewing the entire record *de novo*, the Full Commission finds that the medical treatment of record following the compensable injury was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). Said reasonably necessary medical treatment includes surgery performed by Dr. Head on December 6, 2022. We find that the claimant proved he was entitled to temporary total disability benefits beginning April 8, 2022 until a date yet to be determined. In accordance with Ark. Code Ann. §11-9-521(a)(Repl. 2012), the claimant has not successfully returned to work and remains within a healing period. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I respectfully dissent from the Majority's opinion. In my *de novo* review, I find that the claimant's December 6, 2022 surgery was not reasonable and necessary or causally related to the claimant's compensable injury on March 24, 2022. Thus, the claimant is not entitled to additional temporary disability benefits.

Our rules dictate that the respondent must provide any medical treatment "as may be reasonably necessary in connection with the injury received by the employee." Ark. Code Ann. § 11-9-508(a). "A claimant may be entitled to additional medical treatment after the healing period has ended if said treatment is geared toward management of the injury." *S. Tire Mart v. Perez*, 2022 Ark. App. 179, 644 S.W.3d 439 (2022). Such services can include diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Univ. of Cent. Ark. v. Srite*, 2019 Ark. App. 511, 588 S.W.3d 849 (2019). It is a claimant's burden, however, to establish by a preponderance of the evidence that the treatment is reasonable and necessary and bears a causal connection to the work injury. *Cossey v. Pepsi Beverage Co.*, 2015 Ark. App. 265, 460 S.W.3d 814 (2015). What constitutes reasonably necessary treatment is a

question of fact for the Commission. *LVL, Inc. v. Ragsdale*, 2011 Ark. App. 144, 381 S.W.3d 869 (2011). The Commission has authority to accept or reject medical opinion and to determine its medical soundness and probative force. *Cent. Moloney, Inc. v. Holmes*, 2020 Ark. App. 359, 605 S.W.3d 266 (2020). Furthermore, it is the Commission's duty to use its experience and expertise in translating the testimony of medical experts into findings of fact and to draw inferences when testimony is open to more than a single interpretation. *Id.*

In the case at hand, the Achilles tendon surgery performed by Dr. James Head was not related to the claimant's March 24, 2022 compensable injury. The claimant visited Monica Williams, FNP-C on March 28, 2022. (Resp. Ex. 1, P. 13). FNP-C Williams' examination revealed that the claimant's "pain is in the calf and posterior heel . . . Exam reveals minimal swelling and no bruising. Diagnosis: muscle strain." *Id.* By March 29, 2022, the claimant reported that his pain had improved, and FNP-C Williams noted, "swelling decreased, no bruising noted, no pain to palpation, and no pain with heel and toe pressure." *Id.* The claimant was initially released from the clinic by Ms. Williams on April 1, 2022 once he reported that his pain was a 1/10. Ms. Williams went on to state that there was "less swelling and he is very surprised that the pain is gone, and he is able to put on shoes and walk normal." At that point, she discharged him

from the clinic for the strain and noted the claimant had significantly improved with no pain. (Resp. Ex. 1, P. 14).

The claimant returned nearly three weeks later, on April 18, 2022, complaining of “burning, throbbing and tingling pain of 7/10 for 3 weeks.”

Id. Meagan Celsor, NP offered a presumptive diagnosis of a ruptured Achilles tendon and recommended an MRI. *Id.* The MRI, conducted on April 21, 2022, revealed:

The Achilles tendon is markedly enlarged with diffuse increased signal intensity and heterogeneity of the tendon fibers (severe tendinosis of the Achilles tendon.) There is an irregular, intrasubstance intermediate grade tear that begins near the level of the distal myotendinous junction and extends caudally to 4 mm cranial to the insertion. No full-thickness component is appreciated. Surrounding soft tissue edema is present. Low-grade sprains of the anterior talofibular and calcaneofibular ligaments. Mild degenerative changes of the subtalar joints and joints of the midfoot. *Id.*

At a June 17, 2022 visit with Dr. Robert Martin, the claimant reported “stepping out of the shower and feeling a painful pop and increased swelling . . . Pain appears out of proportion on examination.” (Resp. Ex. 1, P. 15).

The claimant requested and was granted a one-time change of physician through the Commission and began treating with Dr. James Head on July 8, 2022. (Resp. Ex. 1, P. 15). The claimant had another MRI on his

right ankle on August 1, 2022. Dr. Justin Long conducted an independent review of the claimant's April 21, 2022 and August 1, 2022 MRIs and determined that:

The patient's partial thickness Achilles tendon tear could certainly be acute given the history of tripping at work. However, this undoubtedly occurs on a background of chronic Achilles tendinopathy present previous to the acute traumatic event. On the follow-up MRI in August, the partial thickness Achilles tear has largely healed although the features of Achilles tendinopathy remain. With regards to the need for surgery, the imaging findings discussed above could support surgical treatment as an option due to *persistent, chronic tendinopathy* and previous tearing . . . However, by imaging, the acute Achilles tendon partial-thickness intrasubstance and myotendinous tear has undergone significant healing in the interval between the MRI exams suggesting that the surgery would be treating *the continued tendinopathy* and reducing risk for recurrent tear. Ultimately, the need for surgery should be largely clinical and related to the persistent symptomatology in the setting of chronic Achilles tendinopathy and the resultant lifestyle limitations. (Resp. Ex. 1, P. 10)(emphasis added.).

Upon review of Dr. Long's opinion, Dr. Head was asked whether his recommended surgery was greater than 51% related to claimant's on-the-job injury, and Dr. Head responded, "Exacerbation of pre-existing condition, I can't put a % on that." (Resp. Ex. 1, P. 11). Dr. Robert Martin, when asked the same question, responded that in his opinion, "this is related to chronic

pre-existing Achilles tendinopathy, his partial Achille's tear has healed on his most recent MRI. The recommended surgery is NOT > 51% related directly to acute 3/24/2022 injury." (Resp. Ex. 1, P. 12).

After Dr. Head performed a debridement of claimant's Achille's tendon, the respondents obtained an additional third-party opinion regarding the two MRIs from Dr. Jason Stewart, a board-certified orthopedic surgeon specializing in foot and ankle care. Dr. Stewart determined that "the surgery was not appropriate or necessary to treat the injury on 3/24/22. The surgical procedures Dr. Head performed were appropriate for the treatment of a chronic condition (Achilles tendinosis)." (Resp. Ex. 1, P. 19)(emphasis in original). Dr. Stewart further stated:

The ability to compare MRI studies from 1 month and 5 months after the injury is invaluable in this case. The initial MRI findings showing some increased signal intensity of the Achilles tendon which suggested partial tearing approximately one month later would be consistent within this time frame of still having evidence of an injury but also acknowledging there are significant surrounding changes clearly much older than 1 month. The follow-up MRI represents an improvement, the changes initially presumed to be acute are no longer present, and while the chronic findings appear to be still present and unchanged in nature. I would interpret this as a recovery to baseline chronic diagnosis with clear evidence of resolution of the acute injury. *Id.*

Dr. Stewart went on to explain that Dr. Head removed nearly 50% of the Achilles tendon substance, which is treatment for degenerative changes and not “evidence of an acute or subacute injury.” *Id.* “The surgical treatment for an acute Achilles tear is to repair the tear with sutures, not remove half the tendon.” (Resp. Ex. 1, P. 20). Dr. Stewart further noted the claimant’s ongoing non-compliance with medical advice, history of symptom magnification, and the claimant’s admission of re-injury at home. *Id.*

It is well settled that the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury trial. *See Cossey v. Gary A. Thomas Racing Stable*, 2009 Ark. App. 666, 344 S.W.3d 684; *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). The Commission is to determine the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005).

In this case, to find that the debridement performed by Dr. Head was reasonable, necessary, or causally related to the claimant’s March 24, 2022 injury is to disregard the independent opinions of Dr. Long, Dr. Martin, and Dr. Stewart. Prior to the surgery, Dr. Long and Dr. Martin each confirmed that the claimant’s Achilles tear had healed and that the planned surgery would only address the claimant’s chronic pre-existing tendinopathy. After

the surgery, Dr. Stewart confirmed the same, and cited Dr. Head's operative report as evidence that no tear was revealed during the surgery. According to Dr. Stewart, the operative report of Dr. Head made no mention of seeing any evidence of an acute or subacute injury, nor the consequence of an injury at the time of surgery, and there was no mention of tearing in the operative note.

While it is true that the treatment provided to the claimant leading up to the surgery performed by Dr. Head was reasonable, necessary, and related to a partial thickness Achilles tendon tear, the weight of the medical evidence proves that the surgical debridement was wholly unrelated to the claimant's work-related injury but rather treated a chronic, pre-existing condition for which the respondents are not responsible.

It is undisputed that the claimant's injury in this matter falls within the provisions set out in Ark. Code Ann. § 11-9-521. Section 11-9-521(a) provides that:

An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time.

In the present case, the claimant's employment was terminated on April 8, 2022. As discussed above, the reports of the physicians interpreting the results of the MRIs agree that the claimant's partial-thickness Achilles tendon tear had healed by August 1, 2022. These physicians agree that any ongoing issues were the result of chronic tendinosis rather than the acute injury in March 2022. (See Resp. Ex. 1, Pp. 10, 19-20). The claimant's healing period had therefore ended by August 1, 2022. Because the December 2022 surgery performed by Dr. Head was not necessary, reasonable, or causally related to the claimant's March 24, 2022 injury, and I do not agree with the Majority's findings that the claimant is entitled to any additional disability benefits arising from that surgery, and any TTD benefits should be limited to the period between March 24 through August 1, 2022.

Accordingly, for the reasons stated above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner