

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H108549

JOSE BETANCOURT, Employee	CLAIMANT
BHI ENERGY, INC., Employer	RESPONDENT
STARR INDEMNITY/SEDGWICK, Carrier/TPA	RESPONDENT

OPINION FILED OCTOBER 21, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

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

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 2, 2024, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 19, 2024 and a pre-hearing order was filed on that same date. 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 the within claim.
2. The claimant sustained a compensable injury to his back on September 14, 2021.
3. Respondent paid permanent partial disability benefits based on an 8% impairment rating to the body as a whole.

4. Claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$675.00 for total disability benefits and \$507.00 for permanent partial disability benefits.

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

1. Claimant's entitlement to surgery recommended by Dr. Randolph.
2. Temporary total disability benefits as a result of the surgery.
3. Attorney's fee.

Respondent has also raised as an issue claimant's correct permanent physical impairment rating as a result of the surgery performed by Dr. Randolph in April 2022. Respondent contends with respect to this issue that while it accepted and paid an 8% impairment rating, the correct rating should have been 2%. Accordingly, respondent requests a credit. Claimant contends that the impairment rating is 8% which was paid by the respondent.

The claimant contends that two surgeons are recommending that the claimant undergo additional back surgery and the medical records indicate that the need for surgery is due to a recurrent condition arising out of the September 14, 2021 injury. The claimant contends there will be a recovery period following the surgery and that he is entitled to temporary total disability benefits from the date of surgery until his then treating surgeon releases him from active treatment or until he returns to work, whichever occurs sooner. The claimant contends his attorney is entitled to an attorney's fee on any indemnity benefits not previously paid.

The respondents contend claimant injured his lumbar spine on September 14, 2021, and his claim was accepted. He had surgery and was released to return to work

with no restrictions. He is currently working. He received an 8% PPD rating which was paid. The 8% PPD rating should have been 2% per the AMA Guide. He is not entitled to additional benefits.

From a review of the record as a whole, to include 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 stipulations agreed to by the parties at a pre-hearing conference conducted on August 19, 2024 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment in the form of surgery as recommended by Dr. Randolph.

3. Claimant is not entitled to payment of additional temporary total disability benefits at this time.

4. Claimant's impairment rating attributable to his compensable injury equals 2% to the body as a whole. Respondent is entitled to a credit for permanent partial disability benefits paid in excess of that 2% impairment rating.

#### FACTUAL BACKGROUND

Claimant is a 36-year-old man who performed construction work for the respondent. Claimant has a history of non-work related back problems that resulted in

surgery at the L5-S1 level in 2014. Claimant testified that after approximately a years' recovery he returned to work performing his regular activities which included heavy lifting.

The parties have stipulated that claimant suffered a compensable injury to his low back on September 14, 2021. After some conservative treatment claimant underwent a "revision left L5-S1 micro decompression" by Dr. Gannon Randolph in April 2022. (See Gannon report of May 14, 2024.)

Following that surgery Dr. Gannon released claimant to return to work without restrictions on July 19, 2022. At some point respondent paid claimant permanent partial disability benefits based on an 8% impairment rating to the body as a whole.

Claimant testified that he returned to work for respondent and performed his regular job duties despite continuing to have low back pain. Also at some point claimant changed jobs to work as an electrician which he testified was lighter duty because it did not require heavy lifting.

Claimant sought additional medical treatment for his low back complaints and was eventually referred by respondent to Dr. Jared Seale. Dr. Seale recommended a fusion procedure for a recurrent disc protrusion at the L5-S1 level. Claimant was subsequently evaluated by Dr. Randolph who in a report dated May 14, 2024 also agreed that claimant was in need of a fusion procedure.

Claimant has filed this claim contending that he is entitled to additional medical treatment in the form of surgery as recommended by Dr. Randolph. He also requested temporary total disability benefits as a result of the surgery and a controverted attorney fee. In addition, as previously noted, respondent has raised as an issue claimant's correct impairment rating as a result of his September 14, 2021 injury.

## ADJUDICATION

Claimant contends that he is entitled to additional medical treatment in the form of fusion surgery as recommended by his treating physician, Dr. Randolph. Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W. 3d 445 (2005). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Company v. Randall*, 12 Ark. App. 358, 676 S.W. 2d 750 (1984).

As previously noted, claimant was sent for an evaluation by Dr. Seale on October 4, 2023. Dr. Seale noted that claimant had a work-related injury in September 2021 that had resulted in a recurrent disc protrusion on the left at L5-S1 level and that he underwent a subsequent revision decompression procedure on April 6, 2022. He further noted that claimant had some improvement of his pain, but had continued to have persistent pain in his left buttocks and leg. He also noted that claimant had a remote history of a non-work related injury approximately ten years ago. Dr. Seale did not believe further injections would benefit the claimant, but instead recommended that claimant undergo another MRI scan and determine whether he had an active nerve compression on the left side.

Following that MRI scan Dr. Seale in a report dated November 8, 2023 stated that the MRI scan revealed a recurrent disc protrusion causing moderate to severe compression at the S1 nerve root. Dr. Seale went on to recommend a fusion procedure and indicated that claimant's condition was related to his work injury.

The patient's MRI does reveal a disc protrusion. This is an objective finding of injury that matches the patient's subjective complaints of symptoms. The patient's

symptoms began on and after the work injury. The patient has no history of pain in the low back or down the leg prior to the work injury. Therefore, it is within a certain degree of medical certainty that at least 51% of the patient's current symptoms and need for fusion are directly related to their work injury.

Claimant subsequently returned for an evaluation by Dr. Randolph on May 14, 2024. In his report, Dr. Randolph stated:

He had a revision left L5-S1 micro decompression in April 2022, but unfortunately his leg pain never completely resolved and has increased over the past year. He continues to be significantly bothered by his back and leg pain despite 2 surgeries and physical therapy. He had a surgical consultation with Dr. Seale in Little Rock who did offer a L5-S1 fusion, but it looks like this may have been denied?

Dr. Randolph then went on to also recommend a fusion procedure.

At this point really the only option is a fusion procedure of the affected disc. Therefore, I have recommended L5-S1 ALIF with MIS psif.

The record does not contain any evidence that the claimant has suffered a new injury since September 14, 2021. Based upon the opinions of Dr. Seale and Dr. Randolph, which I find to be credible and entitled to great weight, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment in the form of surgery as recommended by Dr. Randolph.

Although claimant initially raised temporary total disability benefits as a result of the surgery as an issue, I do note that claimant acknowledged at the hearing that he is currently working and he is not claiming entitlement to any temporary total disability

benefits at this point. Accordingly, no temporary total disability benefits are being awarded.

The final issue for consideration involves claimant's impairment rating. The parties have stipulated that respondent paid permanent partial disability benefits based on an 8% impairment rating to the body as a whole. It is not known exactly when this impairment rating was made; however, the respondent introduced into evidence an impairment evaluation summary dated June 24, 2024, from the Functional Testing Centers, Inc., which based on the *AMA Guides Fourth Edition* assigned claimant an 8% impairment rating to the body as a whole for a surgically treated disc lesion without residual signs or symptoms pursuant to Table 75 of the *AMA Guides*. However, claimant's surgery in April 2022 was the second surgical procedure on his lumbar disc according to the medical records, not the first. Therefore, claimant's first surgical procedure in 2014 would have resulted in an 8% impairment rating to the body as a whole. According to Table 75, a second operation adds an additional 2% impairment rating to the lumbar spine. Accordingly, while claimant had an 8% rating as a result of his non-work related injury in 2014, the surgery in April 2022 resulted in only an additional 2% impairment pursuant to the *AMA Guides*. Therefore, respondent is entitled to a credit for permanent partial disability benefits paid in excess of the 2% impairment rating. Obviously, if claimant does proceed to undergo additional surgery, he may be entitled to additional permanent impairment as a result of the third surgical procedure. However, that is not an issue at this time.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that

he is entitled to additional medical treatment in the form of surgery as recommended by Dr. Randolph. Claimant has continued to work and is not requesting temporary total disability benefits at this time. Claimant's permanent physical impairment rating as a result of his compensable injury on September 14, 2021 is 2% pursuant to the *AMA Guides*. Respondent is entitled to a credit for any benefits paid in excess of this amount.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$438.95.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE