

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G305023

JOHN W. BOGGS, Employee	CLAIMANT
ARK. DEPT. OF TRANSPORTATION, Employer	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier	RESPONDENT

OPINION FILED DECEMBER 17, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by CHARLES MCLEMORE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 22, 2021, the above captioned claim came on for hearing in Fort Smith, Arkansas. A pre-hearing conference was conducted on September 15, 2021 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 employee/employer/carrier relationship existed among the parties on December 19, 2011.
3. The claimant sustained a compensable injury to his lumbar spine on December 19, 2011.

4. The claimant was earning an average weekly wage of \$803.74 which would entitle him to compensation at the weekly rates of \$536.00 for total disability benefits and \$402.00 for permanent partial disability benefits.

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

1. Claimant's entitlement to stem cell injections by Dr. Tomecek.

The claimant contends that the treatment recommended by Dr. Tomecek is reasonably necessary treatment calculated to avoid complicated multilevel back surgery. All other issues are reserved.

The respondents' contentions are attached as Exhibit 1 to the Pre-Hearing Order which is Commission Exhibit #1 to this transcript.

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 witness 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 September 15, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The claimant has met his burden of proving by a preponderance of the evidence that he is entitled to stem cell injections as recommended by Dr. Tomecek.

## FACTUAL BACKGROUND

Claimant suffered an admittedly compensable injury to his lumbar spine while fixing a flat tire on a backhoe on December 19, 2011. Following his injury claimant came under the care of Dr. Arthur Johnson, neurosurgeon, who recommended surgery at the L4-5 and L5-S1 levels. Claimant requested a second opinion and was seen by Dr. Barry Katz, neurosurgeon, who also recommended surgery. Claimant chose not to undergo surgery, but instead returned to work for respondent. Claimant continued to receive treatment in the form of pain management primarily consisting of medication.

Claimant testified that his back pain has continued to progressively worsen and he attempted to return to see Dr. Katz. However, Dr. Katz had relocated and claimant was sent by respondent to see Dr. Tomecek.

Claimant's initial evaluation with Dr. Tomecek occurred on June 2, 2021, at which time Dr. Tomecek recommended updated testing in the form of an MRI scan as well as flexion and extension x-rays to assess claimant's stability. He indicated that claimant did not need to wear a back brace and gave claimant partial work restrictions.

Claimant underwent the MRI scan and returned to Dr. Tomecek on June 14, 2021. Dr. Tomecek indicated that in order to treat claimant's condition he would need to undergo a bilateral discectomy and fusion from L3 to the sacrum. He also mentioned other options which were non-surgical in nature, one of which included stem cell injections. Dr. Tomecek noted that claimant was interested in the stem cell injections and he stated that prior to recommending those injections he would recommend an L4-5 lumbar epidural injection and physical therapy three times a week for a month.

Dr. Tomecek's next visit with claimant occurred by telemedicine on August 4, 2021. Dr. Tomecek noted that claimant had undergone an epidural steroid injection on June 30, 2021, and that the injection had helped his sciatica "tremendously." He noted that claimant's back pain was not better, but that he had almost no right leg pain. He also noted that claimant had been discharged from physical therapy after missing three appointments in a row. Claimant indicated that he had too much pain to attend and that physical therapy was not helping. He also noted that claimant was interested in the injections and it was his belief that claimant was a candidate for those stem cell injections, particularly at L4-5.

In response to Dr. Tomecek's recommendation of stem cell injections, respondent had a peer review performed by Dr. Raymond Baule, neurosurgeon. In a report dated August 23, 2021, Dr. Baule indicated that the stem cell injections were not indicated or medically appropriate. He further noted that the procedure was considered experimental in nature.

Claimant returned to Dr. Tomecek on September 1, 2021, and he noted that claimant had failed physical therapy and other non-operative treatments. Dr. Tomecek again offered stem cell injections and stated that claimant had a very good chance of improving with those injections.

Claimant's next visit with Dr. Tomecek occurred on October 14, 2021. By the time of this appointment, respondent had authorized the surgery which had been discussed by Dr. Tomecek, but not the stem cell injections. Dr. Tomecek noted that the stem cell injections were not FDA approved and stated that since those injections were not being

approved he would schedule an appointment with the claimant to discuss surgery versus a release.

Claimant's last evaluation by Dr. Tomecek occurred by telemedicine on November 3, 2021. He again noted that the option of stem cell injections had not been authorized and in light of that he proposed surgical treatment.

Claimant has filed this claim contending that he is entitled to stem cell injections recommended by Dr. Tomecek.

### ADJUDICATION

Claimant is requesting approval for stem cell injections recommended by Dr. Tomecek. An 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. A.C.A. §11-9-508(a). Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Dalton v. Allen Engineering Co.*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999). 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).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find under the circumstances of this particular case 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 the stem cell injections recommended by Dr. Tomecek.

First, I note that there is no question that the stem cell injections are not FDA approved. While this is a factor to be considered, no authority has been cited that FDA approval is a prerequisite to a finding that a proposed treatment is reasonable and necessary. It is a factor to be considered.

Perhaps if these stem cell injections were considered in a vacuum, the result in this case might be different; however, in deciding this issue one must consider the alternative treatment. Here, the alternative treatment is a fusion procedure from L3 to the claimant's sacrum. Dr. Tomecek described this procedure as a "very high-risk surgery."

To treat his problem, he would require a bilateral discectomy and fusion from L3 to the sacrum. This is a very high risk surgery. It would take several months for him to recover from this surgery. He would have to be in a back brace for about six weeks. He would probably require post-operative physical therapy. It would probably take at least four to six months for him to reach maximum medical improvement. Again, he would need to wear a back brace post-operatively. There would be high risks, which I explained to him. Risks would include infection, bleeding, failure of fusion, failure of instrumentation, nerve injury that could lead to partial or complete paralysis, chronic pain despite surgery, spinal fluid leak, and medical risks of pneumonia, DVT, pulmonary embolism, myocardial infarction, stroke, and even death. He is aware of all of these things and would like to avoid surgery. I did tell him other options were non-surgical treatments, like physical therapy and an epidural steroid injection. It has been over two years since his last epidural steroid injection. Another option would be intradiscal injection of stem cells. I explained to him that this was not FDA approved, but it was sometimes approved by Workers' Compensation insurance. I've done a number of these stem cell injections, and patients frequently have good outcome and less pain. They can avoid a major reconstructive surgery. The risks are much lower. There is no hospitalization. It is an outpatient procedure. He would only be

required to be off work for a few weeks after a stem cell injection. He would not need to wear a back brace. He is very interested in stem cell injections, especially if there is any chance he can get better regarding his pain with a noninvasive or a minimally invasive procedure. (Emphasis added.)

In assessing whether the proposed stem cell injections are reasonable and necessary under the circumstances in this case, one must consider the pros and cons of each proposed procedure. Here, Dr. Tomecek has indicated that the surgery is a “very high-risk” surgery. On the other hand, he indicated that the injection risks were much lower. He also indicated that the surgery would require several months recovery with claimant being in a back brace for six weeks and undergoing postop physical therapy. He also indicated that it would be at least four to six months before claimant reached maximum medical improvement. On the other hand, with the injections, no hospitalization would be required as the procedure is out-patient in nature. Furthermore, claimant would only be off work for a few weeks and he would not be required to wear a back brace. Obviously, the most important factor cited by Dr. Tomecek is the fact that the surgery is very high risk as opposed to a much lower risk for the injections.

Thus, when the options for treatment are weighed against each other, the stem cell injection does not seem unreasonable. In fact, the stem cell injection procedure is more reasonable based upon Dr. Tomecek’s opinion.

I find that Dr. Tomecek’s opinion is credible and entitled to great weight. While Dr. Tomecek did offer surgery to the claimant, he also offered stem cell injections as an alternative. I find that claimant has met his burden of proving by a preponderance of the evidence that the stem cell injections are reasonable and necessary medical treatment

for his compensable injury under the circumstances presented in this particular case. While the stem cell injections are not FDA approved, that is not a requirement under the law. It is a factor to be considered, but given Dr. Tomecek's opinion, I find that the stem cell injection treatment outweighs the fact that this procedure is not FDA approved.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that the stem cell injections recommended by Dr. Tomecek is reasonable and necessary medical treatment for his compensable low back injury.

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).

Respondents are responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$404.40.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE