NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H200157

LINDSEY CRANE, EMPLOYEE	CLAIMANT
HOBBY LOBBY, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 27, 2024

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

Claimant represented by the HONORABLE EDDIE H. WALKER, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE KEVIN J. STATEN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The respondents appeal and the Claimant cross-appeals an opinion and order of the Administrative Law Judge filed September 8, 2023. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The stipulations agreed to by the parties at a pre-hearing Conference conducted on May 18, 2023, and contained in a pre-hearing order filed on May 26, 2023 are hereby accepted as fact.

3. Respondent have failed to prove that an IME is both reasonable and necessary in order to make a judgment about this claim, and that motion is therefore denied.

4. Claimant has met her burden of proof by a preponderance of evidence that she is entitled to temporary total disability benefits beginning April 18, 2023 and continuing to a date to be determined.

5. Claimant has met her burden of proof by a preponderance of evidence that she is entitled to additional medical benefits as directed by Dr. James Blakenship for her lumbar back injury.

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6. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability benefits from February 27, 2023, until April 18, 2023.

7. Respondent has controverted claimant's entitlement to all indemnity benefits from April 18, 2023, to a date to be determined.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's September 8, 2023 decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. § 11-9-715(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 finding. After my *de novo* review of the file, I find that the respondent's motion for an independent medical examination is warranted and that the claimant has not proven by a

preponderance of the credible evidence that she is entitled to additional medical treatment and additional temporary total disability benefits.

The claimant was an employee of the respondent employer when she was injured on December 13, 2021, lifting "large pieces of wall decor, having to take them off the top and carry them down and load them onto a – like a freight cart and then having to push them across the store." (Hrng. Tr., P. 25). The claimant initially treated at MedExpress in Fort Smith before being referred Conservative Spine Clinic in Fayetteville, where treatment began on January 19, 2022. (Cl. Ex. 1, P. 3). After a lumbar MRI was conducted, the claimant was diagnosed with "[a]nnular fissure with small central disc protrusion" at L4-L5. (Cl. Ex. 1, P. 12). The claimant then began treating with Dr. David Knox, a neurologist with NWA Neurosurgery Clinic on March 30, 2022. (Cl. Ex. 1, P. 17).

A functional capacity evaluation was conducted on June 8, 2022, and the examiner noted that the claimant's efforts were unreliable, noting her actual abilities could be higher than that demonstrated during the evaluation, ultimately determining that the claimant is capable of working in the light category. (Resp. Ex. 1, P. 3). He went on to state the overall results of the examination do not represent a true and accurate representation of the claimant's overall physical capabilities. *Id.* On July 20, 2022, Dr. Knox concluded that "I do not believe any neurosurgical

avenues would afford any benefit to her complaints," saying that he would continue to treat claimant on an as-needed basis as he did "not believe we have anything to offer her." (Cl. Ex. 1, P. 23). Pursuant to the Change of Physician Order, the claimant transferred her care to Dr. James Blankenship, who recommended surgery after seeing the claimant only one time and took the claimant off work on February 27, 2023. (Cl. Ex. 1, Pp. 24-29).

In April 2023, the respondent filed a motion requesting an independent medical examination by Dr. Owen Kelly. (Hrng. Tr, P. 5). The claimant objected and the parties agreed to an examination by Dr. Scott Schlesinger. *Id*. There were difficulties in setting up the examination with Dr. Schlesinger's office and the parties were unable to obtain the independent medical examination prior to the hearing. *Id*. The claimant ultimately objected to an IME citing an alleged delay in temporary total disability benefits that would result from waiting for an exam to be scheduled. The ALJ ultimately agreed and denied the respondent's motion for an independent medical examination and found the claimant was entitled to additional medical treatment and additional TTD benefits. I disagree.

The threshold question in this appeal is whether the independent medical examination (IME) requested by the respondents is reasonable and necessary as required by our rules, which state that:

[a]n injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the commission may require from time to time if reasonable and necessary. Ark. Code Ann. § 11-9-511(a).

In his September 8, 2023 Opinion, the ALJ appears to equate the respondents' denial of additional temporary total disability (TTD) benefits with the reasonableness of ordering an IME, agreeing with the claimant that "delaying the matter was creating a hardship for her." (P. 8). While highlighting that the respondents did not *create* the delay in scheduling an IME, the ALJ, without more, states that he "cannot find it reasonable to delay this matter longer for an IME when claimant is not receiving TTD, especially since I do not believe the IME to be necessary for a decision to be reached in this matter" *Id*.

This approach, however, does not answer the question of whether an IME would be reasonable and necessary in this case. While the ALJ holds that Dr. Knox and Dr. Blankenship's opinions are not "radically different," because each arrived at the conclusion that the claimant has an

annular fissure at L4-L5, this disregards the way the doctors wish to treat the claimant. On July 20, 2022, Dr. Knox concluded that "I do not believe any neurosurgical avenues would afford any benefit to her complaints," saying that he would continue to treat claimant on an as-needed basis as he did "not believe we have anything to offer her." (Cl. Ex. 1, P. 23). Dr. Blankenship, however, recommended surgery, stating that:

1. She has failed routine and usual conservative measures with two different rounds of physical therapy with people I know. She has had a LESI. None of these things afforded her any relief and she is getting worse.

2. Despite the fact that she has 36 out of 56 consistency measures, I feel very comfortable in the fact that this patient wants to get better. I think the inconsistencies had to do with fear avoidance because she has been hurting as long as she has.

3. The rationale for what I have offered her surgically has more to do with that she has gross annular fissuring at L4-L5. She has a posterior disc protrusion but more importantly she has marked movement of the disk space in flexion and extension with collapse anteriorly and marked splaying posteriorly in flexion, completely abnormal for a patient her age. I would recommend a lateral approach since her iliac crest is low enough with a lateral interbody arthrodesis at L4-L5 and then posterior BridgePoint clamping with facet disruption and posterolateral arthrodesis. (Cl. Ex. 1, P. 28).

Because these opinions vary so greatly in their conclusions regarding the claimant's current state, it is wholly reasonable to require that the claimant undergo an IME to serve as a third opinion when one specialist has opined no surgery is recommended, and the other specialist has recommended a lumbar fusion. It defies logic for the ALJ to find the opinions of these two doctors are not "radically different". It is hard to imagine two more radically different opinions, which makes the reason for an independent medical examination even more important in a case such as this.

Regarding the question of whether an IME would be necessary, the ALJ again emphasizes the delay that obtaining an IME would require. Once again, this does not answer the call of the questions regarding whether the examination would be reasonable and necessary, specifically in a case where the medical opinions could not be more different. The ALJ focuses, not on the facts of the case at hand, but rather which doctor correctly evaluated the claimant's inconsistent effort on her functional capacity evaluation (FCE) and which avenue could "bring claimant some relief." (Opinion P. 9).

At their barest, the facts reflect one medical opinion from the claimant's primary treating physician, Dr. Luke Knox, stating that there is no further treatment that would benefit the claimant after reviewing the results

of her MRI. Dr. Blankenship, after a single visit and based entirely on his own beliefs regarding the FCE, recommended surgery and determined that the claimant is unable to work. It is clearly necessary to require the claimant to submit to an IME when such wildly different results have arisen from the same set of facts and for these reasons, it is clearly both reasonable and necessary to require an IME under these circumstances.

Arkansas Code Annotated section 11-9-508(a) (Repl. 2012) requires an employer to provide an employee with medical and surgical treatment "as may be reasonably necessary in connection with the injury received by the employee." The claimant has the burden of proving by a preponderance of the evidence that the additional treatment is reasonable and necessary. *Nichols v. Omaha Sch. Dist.*, 2010 Ark. App. 194, 374 S.W.3d 148 (2010). What constitutes reasonably necessary treatment is a question of fact for the Commission *Gant v. First Step, Inc.*, 2023 Ark. App. 393, 675 S.W.3d 445 (2023).

In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, the Commission analyzes both the proposed procedure and the condition it sought to remedy. *Walker v. United Cerebral Palsy of Ark.*, 2013 Ark. App. 153, 426 S.W.3d 539 (2013).

The Commission has authority to accept or reject medical opinion and to determine its medical soundness and probative force. *Gant v. First Step, Inc.,* 2023 Ark. App. 393, 675 S.W.3d 445 (2023). 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.*

We are left to consider which provider's opinion should bear greater weight. Although the ALJ relies heavily on Dr. Blankenship's report, believing that surgery would bring claimant "relief," Doctor Knox was the claimant's treating physician for four months between March 30, 2022 and July 20, 2022, personally treating and examining the claimant before reaching the conclusion that there were no further treatment options for the claimant. (See Cl. Ex. 1, Pp. 3-23). Doctor Blankenship, however, within a single visit on February 27, 2023, determined that the claimant would need to undergo surgery, including a fusion,. (Cl. Ex. 1, Pp. 24-29). In doing so, Dr. Blankenship took the claimant off work, disregarding the results of the FCE. *Id*.

While Dr. Blankenship believes that the claimant cannot work until she undergoes surgery, her FCE examiner stated that the claimant "demonstrated the ability to perform work **in at least the LIGHT** classification," stating that "[s]ince the results indicate an unreliable effort,

her actual abilities could be higher than that demonstrated during this evaluation. The overall results of this evaluation do not represent a true and accurate representation of this client's overall physical capabilities." (Resp. Ex. 1, P. 3)(emphasis in original). Dr. Blankenship, during his initial visit with the claimant and later the ALJ, each hypothesize that the cause of the claimant's unreliable results on her FCE were due to "self-limiting because of the problem in her back" and "fear avoidance because she has been hurting as long as she has." (Opinion P. 9; Cl. Ex. 1, P. 28). In providing rational for why the claimant's effort was unreliable in her FCE, both Dr. Blankenship and the ALJ engage in spurious conjecture, which is well settled to not be a substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002);. There is no basis for these assertions and no evidence in the record to support them. While Dr. Blankenship was "comfortable" making this determination, he was not the claimant's treating physician until well over two years after the date of the claimant's compensable injury. Dr. Knox is much better suited to make such a determination and did so, finding that the claimant's treatment was complete.

It is unreasonable to rely on Dr. Blankenship's opinion that the proposed surgery in this matter is necessary or reasonable. This decision was made after a single visit and in contradiction to all previous treatment

the claimant received. When balancing the two medical opinions, as well as the results to the claimant's functional capacity evaluation, it is clear that any surgery is unreasonable under the circumstances and the claimant failed to meet her burden of proof.

To prevail on a request for additional temporary total disability benefits, our rules require that the claimant must prove by a preponderance of the evidence that he is totally incapacitated from earning wages and remains in his healing period. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id*. The determination of when the healing period has ended is a factual determination for the Commission. *Id*.

The record here is clear that the claimant was neither in her healing period nor unable to work once released from Dr. Knox's care on July 20, 2022. Dr. Knox, who was best positioned to determine the claimant's medical needs, determined that the claimant should be released from care. There were no additional treatment options for the claimant. The FCE results established that even if the claimant was exerting her best effort, which the examiner doubted, the claimant could work in at least the light

category. She is not unable to work, and Dr. Blankenship's opinion to the contrary is unreliable and contrary to the weight of the evidence.

Accordingly, for the reasons set forth above, I must dissent.

MICHAEL R. MAYTON, Commissioner