

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H204642**

**MARGARET ANNETTE FREEMAN,
EMPLOYEE**

CLAIMANT

**MILLER COUNTY JUDGE,
EMPLOYER**

RESPONDENT

**ASS'N OF ARKANSAS COUNTIES/
AAC RISK MG'T SERVICES, INC./
INS. CARRIER/TPA**

RESPONDENT

**OPINION AND ORDER FILED JULY 15, 2024, GRANTING THE RESPONDENTS'
MOTION FOR AN INDEPENDENT MEDICAL EVALUATION (IME)/SECOND
OPINION WITH DR. CARLOS ROMAN**

In lieu of a hearing, and upon the parties' mutual agreement, the disputed issue was submitted for decision to the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, based on the record.

The claimant is represented by the Honorable Neal L. Hart, Hart Law Firm, L.L.P., Little Rock, Pulaski County, Arkansas.

The respondents are represented by the Honorable Carol L. Worley and Jarrod Parrish, Worley, Wood & Parrish, P.A., Little Rock, Pulaski County, Arkansas.

INTRODUCTION

An amended prehearing order was filed in this claim on May 3, 2024. Pursuant to their mutual agreement, in lieu of a hearing the parties submitted the threshold issue as to whether the respondents are entitled to an Independent Medical Evaluation (IME) for the purposes set forth in the "Issues To Be Litigated..." section, *infra* and, if so, with what medical provider, for decision on the record. (Commission Exhibit 1).

If the parties are able to agree on a physician to conduct the IME, they shall advise the ALJ accordingly, and so stipulate in their initial briefs. If they are unable to agree on an IME physician, the parties shall advise the ALJ accordingly in their initial briefs; and each party shall provide the names, qualifications, addresses and any and all other available contact information of two (2)

physicians they would recommend for the IME, should the ALJ find an IME is appropriate.

In the amended prehearing order filed May 3, 2024, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed at all relevant times including June 15, 2022, when the claimant sustained an admittedly compensable injury to her left ankle, left foot, left leg, and right knee for which the respondents paid medical and indemnity benefits.
3. The claimant's average weekly wage (AWW) was \$727.38, which is sufficient to entitle her to weekly compensation rates of \$485.00 for temporary total disability (TTD), and \$364.00 for permanent partial disability (PPD) benefits.
4. The parties hereby specifically reserve the issue of controversion, as well as any and all issues not specifically litigated herein.
4. The claimant's treating physician, Dr. Ardoin, opined she reached maximum medical improvement (MMI) on January 18, 2024, and assigned her a permanent anatomical impairment rating of 15% to the left lower extremity, which the respondents have accepted and are in the process of paying.
5. The parties specifically reserve any and all other issues for future determination and/or hearing.

(Comms'n Ex. 1 at 2). Pursuant to the parties' mutual agreement, the sole issue submitted for

decision on the record was:

1. Whether the respondents are entitled to an IME concerning whether the spinal cord stimulator Dr. Frankowski has recommended is related to, and constitutes reasonably necessary treatment for, her compensable injuries.
2. The parties specifically reserve any and all other issues for future determination and/or litigation.

Margaret A. Freeman, AWCC No. H204642

(Comms'n Ex. 1 at 3).

The claimant contends she was involved in an admittedly compensable work accident on June 15, 2022, in which she sustained injuries to multiple body parts, including her left foot, left ankle, left leg, and right knee. Thereafter, Dr. Ardoin performed surgery on her left ankle, and the claimant contends she now suffers from residual, documented nerve damage, neuralgia, neuritis, left lower leg weakness, left foot drop, possible complex regional pain syndrome, and neuropathic pain. Dr. Gary Frankowski, a pain management specialist the claimant contends the respondents chose, has opined she requires additional medical treatment in the form of a spinal cord stimulator. The claimant contends Dr. Frankowski's recommendation constitutes reasonably necessary medical care related to her compensable injuries and, therefore, the respondents should be required to provide it. The claimant states she has a scheduled injury. She contends the respondents' chosen physician has recommended additional medical care intended to improve her condition, and that she is not currently working as she is unable to work due to her compensable injuries. The claimant further contends that since the respondents have to date directed all her medical care, on these facts compelling her to see yet another doctor for an IME is not reasonably necessary and, therefore, the respondents' request should be denied. The claimant contends her attorney is entitled to payment of a statutory fee on any and all controverted indemnity benefits; and she respectfully reserves the right to amend and/or otherwise alter the above contentions as discovery progresses. All other potential issues except the specific threshold issue concerning the respondents' entitlement to an IME are expressly reserved for litigation at a later date including, but certainly not limited to, issues involving permanent impairment. The claimant also specifically reserves the issue of

Margaret A. Freeman, AWCC No. H204642

controversion, as well as any and all issues not specifically addressed herein, for future determination and/or litigation. This is a claim for additional compensation, and the claimant hereby renews her request for an award of any and all benefits to which she may be entitled pursuant to the Arkansas Workers' Compensation Act (the Act). (Comms'n Ex. 1 at 3-4).

The respondents contend that Dr. Frankowski is continuing to treat the claimant for pain management, and he has "suggested" a spinal cord stimulator "may" be appropriate. The respondents are simply requesting an IME, which they contend is in essence a second opinion in order to determine whether this invasive surgical recommendation is appropriate for treatment of the claimant's compensable injuries. The respondents further contend the ALJ has the statutory authority to grant their motion for an IME/second opinion, especially based on these facts given the invasive nature and arguably ineffective clinical efficacy of Dr. Frankowski's recommendation herein. The respondents contend they have not controverted any medical or indemnity benefits in this claim to date, and specifically reserve this and any and all other issues not specifically litigated herein for future determination and/or litigation. (Comms'n Ex. 1 at 4).

The record shall include the Amended Prehearing Order filed May 3, 2024 (Commission's Exhibit 1); the claimant's brief and attached medical exhibit (Claimant's Exhibit 1 and 1A, respectively); and the respondents' brief and attached *curriculum vitae* (CV) of Dr. Carlos Roman (Respondents' Exhibit 1 and 1A, respectively).

STATEMENT OF THE CASE

In her brief the claimant outlines her injury and treatment history and, in essence, argues the respondents' have directed all the claimant's care since her admittedly compensable left ankle

Margaret A. Freeman, AWCC No. H204642

injury of June 15, 2022; that Dr. Frankowski has diagnosed the claimant with a nerve injury and has recommended the surgical insertion of a spinal cord stimulator for treatment of the claimant's continued complaints of pain and weakness and, therefore, adding yet another opinion to the record in the form of an IME/second from Dr. Carlos Roman is not reasonably necessary on these facts. In the alternative – and without conceding the aforementioned affirmative contention – the claimant argues that if the ALJ believes an IME/second opinion is reasonably necessary on these facts, either Dr. Brent Walker of OrthArkansas, or Dr. Jonathan Goree of the University of Arkansas for Medical Sciences would be better qualified than Dr. Roman to provide such an IME/second opinion on these facts. (CX at 1-8).

The respondents counter citing relevant Arkansas statutes and case law, and argue that: (1) an IME/second opinion is reasonably necessary in this claims to determine whether the claimant's current complaints are related to the compensable injury, as well as to determine the likely efficacy of the spinal cord stimulator Dr. Frankowski has offered in what appears to be a last-attempt/effort to relieve the claimant's continued complaints of pain and weakness; (2) Dr. Frankowski's recommendation that the claimant undergo surgery for the insertion of a spinal cord stimulator to treat "causalgia" is not based on an objective medical diagnosis; and (3) the fact the respondents' have directed the claimant's care does not preclude the an IME/second opinion to address the aforementioned medical issues. (Responds' Ex. 1 at 1-9).

DISCUSSION

It is well-settled in Arkansas workers' compensation law that the Commission has broad discretionary authority to order an IME/second opinion. *Ark. Code Ann.* §11-9-511 (2024 Lexis

Margaret A. Freeman, AWCC No. H204642

Replacement) states:

- (a) An 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.
- (b) The places of examination and treatment shall be reasonably convenient for the employee.

Moreover, *Ark. Code Ann.* Section 11-9-811 (2024 Lexis Repl.) prescribes as follows:

Upon its own initiative at any time where compensation payments are being made without an award, the Workers' Compensation Commission may and in any case where the right to compensation has been controverted or where payments of compensation have been suspended, or where an employer seeks to suspend payments made under an award o, or on an application of an interested party, the commission shall make such investigation, cause such medical examination to be made, hold such hearings, and take such further action as the commission deems proper for the protection of the rights of all the parties.

And *see, Plants v. Townsend Curtner Lumber Co.*, 247 Ark. 824, 448 S.W.2d 349 (1969). (Note: Act 796 of 1993 did *not* amend the plain language or change the clear meaning of this provision and the cases decided under it prior to the enactment of Act 796.).

Based on the relevant medical evidence in the record, it is abundantly clear the ALJ has the broad discretionary authority pursuant to the aforementioned statutes to both grant a party's request for an IME/second opinion when such an IME/second opinion is reasonably necessary, and/or is proper in order to protect the parties' rights. Here, I find an IME/second opinion by an independent (*i.e.*, a physician who is not so directly invested in the patient's care so as to be

Margaret A. Freeman, AWCC No. H204642

unlikely and/or unable to render an opinion based on objective medical facts and evidence as opposed to subjective factors), qualified physician specialized in pain management treatment.

First, the respondents are correct in their argument that the fact they have the statutory right to direct the claimant's medical care – subject, of course, to the claimant's right to a one (1)-time-only change of physician examination at the respondents' expense – undoubtedly is legally accurate, and is a settled holding in Arkansas workers' compensation law. I do not find the fact Dr. Frankowski is the physician who has recommended the surgical insertion of a spinal cord stimulator into the claimant's body – apparently as a last-ditch, “hail-Mary” effort to treat the claimant's continued complaints of pain and weakness based on a rather vague diagnosis apparently devoid of sufficient objective medical evidence – is dispositive on these facts.

Second, in this case in order to protect the rights of both parties herein – and particularly to protect the claimant against the possibly unnecessary risks of surgery to insert a spinal cord stimulator into her body that has not as yet been demonstrated to more likely than not be effective in order to treat her continued complaints of pain and weakness. Indeed, even the origin/diagnosis of the cause of the claimant's complaints appears to be medically unclear from the record as developed as of this date. An, similarly, it is likewise unclear as to the probability of the efficacy of a spinal cord stimulator. The claimant's inherent right to reasonably safe and effective medical care is not well-served by surgical intervention unless such surgical intervention is more likely than not to effectively treat the underlying condition. And, of course, the claimant's rights must be considered in light of the respondents' right to pay for only such treatment that is related to and reasonably necessary for treatment of the compensable injury. Proposed treatment that is risky or

Margaret A. Freeman, AWCC No. H204642

experimental, or based on insufficient medical evidence demonstrating it is more likely than not to be effective in treating the claimant's underlying condition would appear to be an unnecessary risk for the claimant, and an unnecessary expense for the respondents. Here, on these facts, and despite the claimant's medical tests and treatment to date, we have more unanswered medical questions than we have answers to those questions. Consequently, an IME/second opinion is both reasonably necessary and proper to protect the rights of both the claimant and the respondents based on the aforementioned statutes.

It is imminently fair and reasonable to obtain a truly independent IME/second opinion to ensure the complaints the proposed spinal cord stimulator is intended to treat are related to the claimant's compensable right ankle injury, and that the procedure – which is not without significant risks, including but not limited to the well-known risks of infection, and having to be removed via a separate surgical procedure if it proves to be ineffective in alleviating the claimant's complaints – is reasonably necessary for treatment of the claimant's continued complaints.

Third, while I appreciate the claimant's suggestion of physicians to conduct the IME/second opinion, I am unfamiliar with these physicians. I am, however, well-familiar – as is the Commission – with Dr. Carlos Roman, his professionalism and expertise. Consequently, in this case and on these particular facts, I find Dr. Roman is the most appropriate pain management specialist/physician to provide an IME/second opinion in this case.

Therefore, for all the aforementioned reasons I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this claim.
2. The stipulations to which the parties agreed in the amended prehearing order filed May 3, 2024, hereby are accepted as facts.
3. Pursuant to the Commission's authority to order an IME(s)/second opinion as set forth in *Ark. Code Ann.* Sections 11-9-511 and 11-9-811, *supra*, I find an IME/second opinion in this claim to be both reasonably necessary and proper in order to protect the rights of both parties herein for the reasons set forth, *supra*.
4. I hereby grant the respondents' motion for an IME/second opinion, and find that Dr. Carlos Roman – a pain medicine specialist well-known to this Commission – is the most qualified, independent physician to conduct the IME on the facts of this particular case. Dr. Roman has both the expertise and independence and, therefore, is in the very best position on these particular facts to determine both the risks associated with as well as the probable efficacy of the surgical insertion of a spinal cord stimulator to treat the claimant's continued pain complaints in her left ankle/left lower extremity.
5. The parties shall cooperate in the scheduling of this IME/second opinion with Dr. Roman. Moreover, this IME/second opinion shall in all respects be conducted in accordance with and governed by the applicable provisions of Arkansas law set forth above in Paragraph 3.
6. The parties shall submit a copy of this opinion and IME order to Dr. Roman, along with any and all relevant medical records, as well as both the reports and the original films/results, etc., of any relevant diagnostic tests, and any and all other relevant documents, if any, in order that Dr. Roman shall have the benefit of any and all available medical records and findings in conducting his independent records review and physical examination.
7. I specifically find that the case of *Burkett v. Exxon Tiger Mart, Inc.*, 2009 Ark. App. 93, 304 S.W.3d 2 (Ark. App. 2009) is inapplicable to the facts of this case, and does not prevent the ALJ from appointing an IME on these facts. In *Burkett*, the ALJ ordered an IME *after the parties already had litigated the issues of compensability and the claimant's entitlement to additional benefits, had rested their respective cases, and the record had been closed.* That clearly is not the case here. As the record conclusively demonstrates, both the claimant's and respondents' were given due and proper notice and an opportunity to be heard on the sole issue in dispute herein.

Margaret A. Freeman, AWCC No. H204642

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp