

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. G907403**

JIMMY E. KEY III, EMPLOYEE	CLAIMANT
McDONALD'S RESTAURANT, SELF-INSURED EMPLOYER	RESPONDENT
RISK MGMT. RESOURCES, THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED MARCH 9, 2022

Hearing before Administrative Law Judge O. Milton Fine II on December 10, 2021, in Marion, Crittenden County, Arkansas.

Claimant represented by Ms. Kathleen H. Talbott, Attorney at Law, Wynne, Arkansas.

Respondents represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 10, 2021, the above-captioned claim was heard in Marion, Arkansas. A pre-hearing conference took place on August 16, 2021. The Prehearing Order entered on that date pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions were properly set forth in the order.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. With an additional one reached at the hearing, they read:

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/self-insured employer/third-party administrator relationship on November 1, 2019, when Claimant sustained a compensable injury to his lower back.
3. Claimant's average weekly wage of \$121.19 entitles him to compensation rates of \$81.00/\$81.00.
4. If called to testify, Claimant's witness Heather Huddleston would offer testimony that would corroborate him concerning matters within her personal knowledge.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. The following were litigated:

1. Whether Claimant is entitled to additional medical treatment.
2. Whether Claimant is entitled to additional temporary total disability benefits from the date last paid to a date yet to be determined.
3. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties are:

Claimant:

1. Claimant contends that his present condition is caused from an injury sustained from helping a customer off of the floor who had fallen in the lobby of McDonald's Restaurant in Wynne, Arkansas, on November 1, 2019.
2. The claimant further contends that since this injury was caused by duties at work and during the course of employment, he is entitled to an award based on his temporary total disability, permanent partial disability,¹ medical expenses incurred and future medical expenses, mileage, and attorney's fees.

Respondents:

1. Respondents contend that all appropriate benefits have been paid with regard to Claimant's injury sustained on November 1, 2019.
2. Claimant's need for continued medical treatment, if any, is due to a pre-existing condition.
3. Claimant was released to full duty by Dr. Laverne Lovell on December 5, 2019.

¹This was not raised as an issue. For that reason, it cannot, and will not, be addressed. See *Carthan v. School Apparel, Inc.*, 2006 AWCC 182, Claim No. F410921 (Full Commission Opinion filed November 28, 2006)(improper for administrative law judge to address issues *sua sponte*); *Singleton v. City of Pine Bluff*, 2006 AWCC 34, Claim No. F302256 (Full Commission Opinion filed February 23, 2006), *rev'd on other grounds*, No. CA06-398 (Dec. 6, 2006) (unpublished)(same). Instead, it will be considered a reserved issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, deposition transcript, 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, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant's Proffered Exhibit No. 2 will not be admitted into evidence.
4. Claimant has proven by a preponderance of the evidence that he is entitled to additional treatment of his stipulated compensable lower back injury, including the surgery recommended by Dr. Ted Shields. Moreover, Claimant has proven by a preponderance of the evidence that all of the treatment of his stipulated compensable lower back injury that is in evidence was reasonable and necessary.
5. Claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from the date last paid to a date yet to be determined.
6. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee at the expense of Respondents on

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the indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

PRELIMINARY RULINGS

Admission of Claimant's Proffered Exhibit 2

At the hearing, Claimant sought the admission of this proffered exhibit, consisting of screen shots of text messages purportedly between Claimant and someone identified (by his smart phone) as "Nurse Crystal." The text thread relates to Claimant's request for a "second opinion" and a discussion of the circumstances surrounding his last visit to Dr. Laverne Lovell. Respondents' counsel objected to the admission of these documents, stating:

The non-medical packet of the claimant has text messages between Claimant and someone named Crystal. I don't know Crystal's last name, and it's my understanding that she is not here to testify today. So it's our position that that would be hearsay, and even though she's a nurse, that doesn't amount to a medical record.

The analysis of this aspect of the issue falls within the purview of Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2012), which states:

In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or statutory rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner that will best ascertain the rights of the parties.

Under this provision, the Commission is not bound by the Arkansas Rules of Evidence—including the rules governing hearsay and the exceptions thereto. *See Tracor/MBA v. Artissue Flowers*, 41 Ark. App. 186, 850 S.W.2d 30 (1993).

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After consideration of this matter, I find that admission of the text thread would not help to “best ascertain the rights of the parties.” I have no means with which to assess the credibility of “Nurse Crystal” or determine the truthfulness of what she purportedly wrote, since she was not called to testify at the hearing. Thus, Claimant’s Proffered Exhibit 2 will not be admitted into evidence.

CASE IN CHIEF

Summary of Evidence

The witnesses at the hearing were Claimant, Shantel Williams, Kierra Austin and Jackie Frost Turner. As set out above, the parties stipulated to the testimony of Heather Huddleston, obviating the need for her to be called to testify.

In addition to the prehearing order discussed above, admitted into evidence in this case were the following: Claimant’s Exhibit 1, compilation of his medical records, consisting of three index pages and 174² pages thereafter; Respondents Exhibit 1, another compilation of Claimant’s medical records, consisting of one index page and 35 numbered pages thereafter; Respondents’ Exhibit 2, the Form AR-N and the handwritten statements of Shantel Williams and Kierra Austin, consisting of one index page and four numbered pages thereafter; and Respondents’ Exhibit 3, the transcript³ of the deposition of Claimant taken April 9, 2021, consisting of 60 numbered pages.

²The pages of the exhibit are numbered. However, pages 53-54, 87-92, 104, 108, 111, 137, 143, and 164 were not present in the exhibit when it was offered into evidence.

³Per Commission policy, this exhibit, separately bound, has been retained in the Commission’s file.

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Adjudication

A. Additional Treatment

Introduction. The parties have stipulated that Claimant, a worker for Respondent McDonald's, suffered a compensable injury to his lower back in a work-related incident on November 1, 2019. But while Claimant has alleged that he is entitled to, inter alia, additional medical treatment, Respondents dispute this.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The standard "preponderance of the evidence" means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

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A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, 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 that it deems worthy of belief. *Id.*

Testimony. Claimant testified that on November 1, 2019, he was working at his job at the Wynne location of McDonald's when he was ordered to help up a lady who had fallen in the foyer of the restaurant. With only slight help from another person, they were able to get her to her feet. Asked by his attorney at the hearing to estimate the weight of the person who had fallen, Claimant would only say that she was "a bigger woman," and that she weighed more than he did (225 lbs.).

As he accomplished this lift, Claimant heard and felt a series of pops in his lower back. At first, he stated that the pops were "[j]ust [in the] lower back in general." However, he immediately thereafter described them as being on the left side. He told the shift supervisor, Kierra Austin, that he was going to the hospital. After his grandmother picked him up at the restaurant, she drove him to the hospital. There, he was administered medication and referred to a specialist.

Because he was having difficulty being seen for his back, Claimant had to badger Respondents for the workers' compensation paperwork. He next went to Jacobs Clinic.

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Thereafter, he saw Dr. Lovell. In relating what took place there, Claimant testified: “Well, I went in, he treated me like I was a dog, treated me like the worst I’ve ever been treated in my life, hurting.” Claimant admitted that he cursed at Lovell: “When a woman’s in pain, she’s gonna say a bad word when she has a child. I was in a Level 9.” After this confrontation, the doctor released him to full duty. Despite the release, Claimant thereafter was sent to physical therapy.

The following exchange took place:

Q. Had your pain changed or gotten better or worse [at the time of the visit to Dr. Lovell]?

A. It’s stayed at a nine and got worse here and there, but I started walking on a cane about a year-and-a-half ago and I haven’t been able to do anything.

Q. Can you describe the pain at that time?

A. I never felt anything like it.

Q. Like where was it exactly?

A. It was lower left, lower left side of my spine, shooting down the back of my leg.

Q. Shooting down which leg, the left leg?

A. Left leg. I couldn’t—it’s more of an acute type pain, and it’s stopped me from doing—the pain has stopped me from doing so much.

Claimant eventually was introduced to Dr. Ted Shields, a pain management physician at Pain Centers of America in Jonesboro. Shields has recommended that he undergo surgery. However, Claimant has yet to get approval for this from his health insurance. He believes that Respondents should be responsible for it, however. As for

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the other treatments for his back that he has received at Pain Centers of America, Claimant stated that he has been prescribed medications and administered epidural steroid and other injections. However, these have been of limited benefit and duration. It is Claimant's belief that only surgery will fix his back problem.

In describing his ability to recall events, Claimant stated:

I'm gonna be honest with you, I take a lot of medicine, it says it in this [referencing a piece of paper that he was holding]. I even forgot some of it in this, but I take a lot of medicine and it makes me forget . . . I'm gonna tell y'all, it's like I said, I take a lot of medicine and things get foggy.

Prompted by comments such as such and at the request of Respondents, I conducted a voir dire examination of Claimant. He stated that the medications he has been prescribed impair his short and long-term memory and his ability to recall names. Nevertheless, he added that he took no medicine the day of the hearing, and that I could rely on the accuracy of his testimony.

When Respondents questioned him about what occurred during his appointment with Dr. Lovell, Claimant at first took issue with what was contained in the record; he denied telling Lovell that he had no significant radiating leg pain, and denied undergoing a physical examination that day. But when asked whether the report was accurate in stating that he refused to perform a heel walk for the doctor, Claimant responded: "I've taken a lot of medicine since then, so if he wrote that down, I'm not lying to you when I tell you I didn't do it, I'm telling you I have no recollection of it." But inexplicably on redirect examination, Claimant denied that Lovell asked him to heel walk. While Claimant initially agreed with the reference in the report that states that he denied any

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past history of back pain when he saw Dr. Lovell, he later added that he told the doctor about his October 2019 visit to the emergency room concerning his back.

As for his present condition, Claimant became emotional as he related the following: “I can’t even live a normal life . . . I can’t—I can’t put food on the table. I can’t pick up my kid. I can’t live a normal life like everyone else, and I can’t make love to my wife.” He spends his days in his bed. Claimant feels like he went from being the breadwinner to being a burden to his family. In order to cook, he has to sit in a chair beside the stove.

Asked by his attorney about his previous opiate use, Claimant testified that some of it was to address pain he had suffered as a result of fights in which he had been involved while serving as a correctional officer. In addition, the standing requirements of that job had caused him to develop plantar fasciitis.

On cross-examination, Claimant testified that his previous injuries included a gunshot wound, and surgery to his hand. Also, he had a lipoma removed from his upper back by his right shoulder. As for any pre-existing back conditions, the following exchange took place during his deposition:

Q. We were talking about when the pain started in your back, and you had mentioned that you might’ve had a sprain here or there before the injury in—

A. Yeah, but I couldn’t tell you when. Anybody—everybody’s had sprains.

Q. But was it anything that you went for treatment—

A. No.

Q. —for?

A. No. Well, maybe. Yeah. Yeah, it hurt. But that was a long time ago. I couldn't tell you when. And then I went to Wynne hospital when I first got up here for a back sprain, but it was upper by the lipoma, so—

Q. Did you have an injury that led to that?

A. No. Never had a—let me go on record, go on and say this so you don't have to keep repeating yourself. I have never had an injury to my back. Does that help?

Q. Well, you went to the an [sic] emergency room for your back.

A. Yes, I did. But I've never had an injury—

Q. Okay.

A. —to my back.

Q. Either work-related or not?

A. Right. Injury.

Q. What did they do for your at Wynne hospital?

A. they gave me a shot for some kind of steroid. Gave me some medicine. Matter of fact, I think that was the last opiate I took.

Q. That would have been about two years ago?

A. Probably. Yeah. No. Well, that would have been before—before I got hurt at work.

...

Q. Before November 1st of 2019, did you ever call in at McDonald's because of back problems?

A. Yeah, that's when I had that sprain, when I was picking up something. I twisted sideways or—no, no, wait. Well, I was picking up something and I stepped in the pothole, that's what it was. I stepped in the pothole out in the backyard trying to feed the chickens.

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Q. When was that?

A. I don't know. I have no idea.

Q. Did you go anywhere for treatment?

A. That's when—the one we talked about, when I went for treatment.

Q. To Wynne hospital?

A. Yes. That's the only one.

Q. And that was your upper back?

A. Yes.

When he was questioned about this at the hearing, he stated that his deposition testimony was that “I've never had an injury to my back other than a sprain.” Claimant during the hearing repeated his deposition testimony that when he went for back treatment prior to the incident at issue, it was for his upper back. But when shown the CrossRidge Community Hospital Record dated October 6, 2019—less than one month before he picked up the heavysset woman—he presented with lower back pain and radiation to the right leg as a result of working on a house remodeling. He agreed that when he returned to the hospital on November 1, 2019, as a result of the work-related incident, he informed treating personnel that he had a previous back injury. Claimant did not recall also presenting with lower back pain to Dr. Michael McAllister in December 2017.

In his deposition, Claimant estimated that the woman who he helped up from the floor weighed approximately 400 pounds—which is different from his hearing testimony (supra) where he would not give an estimate of her weight other than saying that it was

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in excess of the 225 pounds that he himself weighed. In contrast to his testimony on direct examination, he related that the reason why he went to Jacobs Clinic was that Respondents sent him there.

Called by Respondents, Shantel Williams testified that she has been an employee of McDonalds at the location in question since 2018. She has worked there as the grill manager. Williams related that on October 11, 2019, Claimant returned to work after an absence and told her that he had been off because he had injured his back while working on a house. She wrote out a statement regarding this that is contained in Respondents' Exhibit 2.

On cross-examination, Williams stated that upon Claimant's return, he was able to work. She knows nothing about the work-related incident on November 1, 2019.

Also called by Respondents, Kierra Austin testified that she has been the assistant manager at the restaurant for three years, and an employee there for twelve.

With regard to the work-related incident, she stated:

Well, a lady fell in our doorway to McDonald's, and McDonald's, I have an employee named Dawn. She was like, "Ms. Kierra, a lady just fell." And I recall yelling, "Can somebody come help this lady up?" And Jimmy was the one who ended up coming to help her up. And I'd say he helped her up, and within an hour or so he was like he wanted to go home, his back was hurting, so I let him go home.

According to Austin, the lady who had fallen weighed no more than 200 pounds. Austin prepared a handwritten statement regarding this event, which is part of Respondents' Exhibit 2. While that statement reflects that Claimant did not want to fill out an incident report, Austin stated that she does not have independent recollection of this. In fact, she could not explain why she put this in her statement. She added that Claimant

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worked for approximately one hour after helping the lady up before he asked to go home because his back was in pain.

Respondents' final witness, Jackie Frost Turner, has been with McDonald's for 16 years. At the time of the incident in question, she was the general manager of the restaurant. She was not present at the restaurant on November 1, 2019. However, it was her testimony that a few weeks prior to this, Claimant called and stated that she had injured his back while working on his grandmother's house. His paperwork from the emergency room reflected that he was being taken off work for three to four days.

Medical Records. The medical records in evidence, contained in Claimant's Exhibit 1 and Respondents' Exhibit 1, reflect that on October 6, 2019—26 days before the incident at McDonald's, Claimant presented to CrossRidge Community Hospital with lower back pain and radiation into the right lower leg. He complained of leg weakness as well.

When Claimant returned to the hospital on November 1, 2019, he informed treating personnel that he was suffering from back pain as a result of lifting a person off of the floor. He added that he "had [a] previous back injury." Examination revealed tenderness over the left posterior sacroiliac spine. He was prescribed Hydrocodone and instructed to see his primary care physician for an MRI and a possible referral to a neurosurgeon. He was released to return to work as of November 4, 2019.

On November 9, 2019, he went to Jacobs Clinic and stated that he hurt his back on November 1, 2019, when lifting a 300-pound female. Claimant complained of severe pain in the left lumbar region with pain radiating to the left lower extremity. Examination

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revealed, inter alia, “[l]eft lumbosacral spasm” He was prescribed Hydrocodone and given restrictions of no heavy lifting, carrying, pushing or pulling. An MRI was ordered. As of November 19, 2019, when he returned to the clinic, the MRI had not yet been approved. He reported no improvement in his pain, even with medication. Claimant was taken off work until December 4, 2019.

The lumbar MRI took place on November 12, 2019. The report thereof by Dr. Christopher Ryen reads in pertinent part:

L4-5: Minimal broad based posterior disc bulge with annular fissure. The facet joints are unremarkable. No narrowing of the spinal cord or foramina.

L5-S1: Disc uncovering. Broad-based posterior disc bulge with annular fissure. The facet joints are unremarkable. Mild narrowing of the bilateral neural foramina.

IMPRESSION:

1. Grade I spondylolisthesis of L5 on S1 with suggested pars interarticularis defects, which could be confirmed with lumbar CT, if clinically indicated.
2. Mild broad base posterior disc bulges at L4-L5 and L5-S1. Negative for spinal canal stenosis.

Claimant returned to the emergency room at CrossRidge Community Hospital on November 27, 2019, with severe lower back pain.

Claimant was sent to Dr. LaVerne Lovell on December 4, 2019. His report reads in pertinent part:

HISTORY: Mr. Jimmy Key is a 39-year-old gentleman referred to [m]e by Workers’ Compensation for an injury that occurred 11/1/2019. The patient was working at McDonald’s and a customer fell to the floor. The patient helped lift the customer up off the floor and indicated that he felt a pop in his back and has not worked since that time. He complains of low back pain with no significant radiating leg pains. His description today of his

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back pain indicates that it is bilateral and goes down into the top of the buttocks.

The patient was sent for an MRI of his lumbar spine. That study shows degenerative changes at L4-5 and L5-S1 with mild midline disc bulges. The patient has the appearance of bilateral pars defects on this study and that is noted by radiology report as well. Radiology recommends a CT scan for confirmation.

...

Physical Exam:

The patient is an alert and oriented individual accompanied by his grandmother and his girlfriend. He is less than cooperative in the exam, refusing to heel walk for instance indicating he has too much back pain with that. Straight leg raises cause no radiating leg pain, just a little bit of back pain. He has full strength in psoas, quadriceps, and hamstrings bilaterally. He is able to squat and hold his weight but complains of heightened pain with that maneuver. Reflexes are trace at the knees and ankles. He has a normal lower extremity sensory exam.

...

Impression:

Mild degenerative changes at L4-5 with probable bilateral pars defects at L5. **I suspect the pop that the patient complained of has to do with the pars defects in his case.**

Plan:

The patient is sent for therapy three times a week for four weeks. He will have a **very restricted light duty work** status with 5 pounds lifting and sit or stand as needed with no mopping or sweeping. We will also ask for a CT scan of the lumbar spine to confirm the pars defects in his case so we know all the anatomy that we are working with in the lumbar spine. I will see him in follow-up after the therapy.

Addendum #1: Records provided to me show that Mr. Key was receiving long-term Tramadol throughout the year 2017 and 2018 in Texarkana. I have quizzed the patient today about the use for that medication and he says it was for plantar fasciitis and pain in the right hand where he had been injured by a gunshot. The patient denies any past history of back problems or that any of that medication was related to complaints of back pain. I have no records from that pain clinic or other records to indicate

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any past history of back pain but would be happy to review records if they become available.

Addendum #2. My nurse took the light duty work statement along with the instructions to get started on physical therapy and to get the CAT scan. Mr. Key started screaming at my nurse referring to me as a stupid MFer [sic] and used terms of that nature multiple times and demanded his films back and demanded to leave. I take that as an indication that the patient does not want me to treat him and after that outburst, I refuse to see him again in the future. He is released today to a full duty work status. There are no findings on his MRI that are dangerous for him and none that I consider surgical in nature at this point. I am placing him at maximum medical improvement 12/4/2019 and at a full duty work status without restriction. He may seek other options if he wants to continue health care.

(Emphasis added) Lavell prescribed Claimant 12 sessions of physical therapy. Thereafter, he underwent therapy, and was discharged on January 7, 2020.

On July 29, 2020, Claimant went to Dr. Ted Shields Pain Treatment Centers of America and presented with hip and lower back pain that radiated into his left leg. The report states: “The patient states that the onset of pain was gradual with no known reason . . . [t]he patient has been experiencing this pain for a few years.”⁴ In his questionnaire, Claimant wrote: “I do not prefer opiates.” Dr. Shields recommended that Claimant undergo a lumbar epidural steroid injection. The injection took place on August 11, 2020.

Unfortunately, Claimant reported no improvement following the injection. On October 14, 2020, Dr. Shields wrote the following:

⁴In light of the following language in the Pain Treatment Centers of America report dated October 8, 2020, the above language was likely included in error: “The patient states that the onset of pain was gradual with no known reason. The pain began following an injury/accident that occurred 11/01/2019 . . . The patient has been experiencing this pain for a few years.”

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A request is being made for Lumbar Decompression and Fixation with Stabilink Implant. The patient has a history of moderate lumbar spinal stenosis. He has previously failed conservative and minimally invasive therapies; including but not limited to physical therapy, lumbar epidural steroid injections, NSAIDs and opioid therapies. The patient reports neurogenic claudication symptoms; including pain, tingling, and numbness in the lower back and lower extremities that worsen with lumbar extension (standing or walking) but improve with lumbar flexion (sitting or bending forward) . . . Radiological images of the lumbar spine were reviewed and are consistent with lumbar spinal stenosis at the above stated level.

But on December 21, 2020, Dr. Shields recommended a sacroiliac joint injection. The injection was administered on January 5, 2021.

Claimant underwent another lumbar MRI on January 11, 2021. The reading radiologist, Dr. Ezekiel Shotts, found “[s]mall disc bulge[s]” at L4-5 and L5-S1, and added: “IMPRESSION: No significant change. L4-5 and L5-S1 degenerative disc disease. No significant spinal canal stenosis. Mild bilateral foraminal narrowing at L5-S1. Bilateral spondylolosis [sic] at L5.” As of February 18, 2020, Claimant was given a 10-pound lifting restriction by Dr. James Cathey.

When Claimant returned to Dr. Shields on March 17, 2021, the doctor reviewed the MRI and wrote: “Abnormalities found at L-5, S-1 that do not appear to be congenital in nature.” Claimant reported that the sacroiliac joint injection did not help. Shields again recommended the surgery as outlined above.

However, after Claimant went back to Pain Treatment Centers of America on May 26, 2021, he saw Dr. Howard Bromley, who recommended that he undergo a caudal epidural steroid injection. This came after the doctor learned that Claimant’s insurance declined to approve surgery. This procedure was performed on June 10,

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2021. In his follow-up visit with Dr. Shields on July 26, 2021, Claimant reported that the injection did not benefit him.

Discussion. As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after the healing period has ended, if said treatment is geared toward management of the injury. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of 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. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex, supra*. A claimant is not required to furnish objective medical evidence of his continued need for medical treatment. *Castleberry v. Elite Lamp Co.*, 69 Ark. App. 359, 13 S.W.3d 211 (2000).

As the parties have stipulated, Claimant sustained a compensable injury to his back on November 1, 2019. He testified that the work-related incident that caused his injury was that he helped up a customer who had fallen to the floor. The evidence concerning the weight of the customer was inconsistent, to say the least. Claimant at the hearing stated that she weighed more than 225 lbs. (his weight). In his medical records, he estimated her weight to be 300 lbs.; and he gave the figure 400 lbs. during his deposition. Austin in her testimony placed the customer's weight as being

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approximately 200 lbs. Regardless, the evidence establishes that Claimant was helping lift an overweight individual at the time he hurt his lower back.

Claimant's deposition testimony was somewhat confusing regarding whether he had suffered a previous back injury. While it could be argued that he was differentiating between a mere back strain and an injury, the balance of the evidence (both testimonial and medical) shows that 27 days before the customer-lifting incident, he presented for treatment for lower back pain that radiated into his right leg. However, on and after November 1, 2019, he has consistently complained of lower back pain and radiation into his left lower extremity. Respondents have argued that his claimed need for treatment is related to a pre-existing back condition. But "[b]ecause employers take an employee as he [sic] finds him, employment circumstances that aggravate preexisting conditions are compensable." *Hopkins v. Harness Roofing, Inc.*, 2015 Ark. App. 62, 454 S.W.3d 751 (citing *Ozark Natural Food v. Pierson*, 2012 Ark. App. 133, 389 S.W.3d 105; *Grothaus v. Vista Health, LLC*, 2011 Ark. App. 130, 382 S.W.3d 1). It should also be noted that whatever condition that Claimant's lower back was in prior to November 1, 2019, it did not keep him from working that day before the lifting incident. This changed, however, after the stipulated injury occurred.

Following the work-related incident, Claimant had documented objective findings of his stipulated compensable back injury. These include not only lumbosacral spasms, but also radiological findings of pars defects. Dr. Lovell thought that the "pops" that Claimant has consistently described that he felt while lifting the customer are related to these pars defects.

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After writing this in his report, Dr. Lovell in an addendum stated that because Claimant screamed at his nurse and referred to Lovell in obscene language (which Claimant readily admitted to doing in his testimony), the doctor reversed course from his earlier decision, which was to send Claimant to physical therapy, place him on “very restricted light duty,” and obtain a CT scan of the lumbar spine. Instead, he simply released Claimant to full duty as of the date of the appointment, December 4, 2019, and found him to be at maximum medical improvement. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Based upon a review of the medical records, it is apparent that Lovell’s change was simply a retaliation against Claimant’s deplorable conduct. While I credit the doctor’s earlier findings in his report, I cannot—and do not—credit his findings in the second addendum thereto.

As for the first addendum, which reference Claimant’s previous use of pain medication such as Tramadol, the evidence does not show that its use was tied to a longstanding lower back issue.

In order to prove his entitlement to the requested treatment, Claimant must establish that it is causally related to his stipulated compensable injury of November 1, 2019. See *Pulaski Cty. Spec. Sch. Dist. v. Tenner*, 2013 Ark. App. 569, 2013 Ark. App. LEXIS 601. He has done this. In sum, Claimant has proven by a preponderance of the evidence that he is entitled to additional treatment of his stipulated compensable lower back injury, including the surgery recommended by Dr. Ted Shields. Furthermore, he

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has shown by a preponderance of the evidence that all of the treatment of his stipulated compensable injury that is in evidence was reasonable and necessary.

B. Temporary Total Disability

Introduction. Claimant has also alleged that he is entitled to additional temporary total disability benefits from the date last paid to a date yet to be determined. Respondents are disputing this.

Standards. The compensable injury to Claimant's lower back is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1).

Evidence. In his testimony, Claimant related that prior to working at McDonald's, he had been employed as a corrections officer and also as a journeyman pipefitter. In the latter capacity, he had earned \$50,000 a year. While Respondents paid him temporary total disability benefits for a time after the lifting incident at McDonald's, those benefits were later discontinued. Since November 1, 2019, the only work in which he has engaged by Murray's Healthcare for pay was a stint as his elderly uncle's caregiver. Claimant described his duties:

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I moved down there to take care of him. The only income I had was I made him, I made him breakfast, lunch, and dinner and I counted his pills out, and they paid me for that, but he didn't last very long.

On cross-examination, he elaborated that the stint lasted one to two months, and that he earned "maybe \$116.00 every two weeks or so." In addition, he and his wife during the period in question fixed up bicycles or resell; but only one was purchased. Claimant has a pending claim for Social Security disability benefits.

Under questioning by the Commission, Claimant testified that he received temporary total disability benefits for two to three months or more.

Discussion. The payout history on this claim was not put into evidence. Thus, it is uncertain exactly when the payment of temporary total disability benefits ceased. But notwithstanding Claimant's testimony that he was the recipient of these benefits for perhaps two to three months, the evidence is far more likely that Respondents suspended payment not long after Dr. Lovell on December 4, 2019, wrote that Claimant had reached maximum medical improvement and released him to full duty. For that reason, the period following that date must be scrutinized. As addressed above, I do not credit Lovell's opinion on these two particular matters, which were included in the second addendum to his December 4, 2019, report. Instead, as the medical evidence so clearly shows, Claimant as of the date of the hearing had yet to reach the end of his healing period.

But the question remains: since December 4, 2019, has he continued to suffer a total incapacity to earn wages? Dr. Lovell on the above date, prior to reversing course improperly and releasing Claimant at maximum medical improvement, stated that

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Claimant would “have a very restricted light duty work status with 5 pounds lifting and sit or stand as needed with no mopping or sweeping.” I credit this particular opinion. The evidence establishes that Claimant’s job with McDonald’s had physical requirements in excess of this. Moreover, his capabilities have not improved since then. The physical requirements also are greater than the 10-pound restriction that he was placed on later. A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where insufficient evidence exists that the claimant has the capacity to earn the same or any part of the wages he was receiving at the time of the injury. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). Such is the case here.

As for the temporary job he had as his uncle’s caregiver, that position was of very limited duration and only entailed meal preparation and medication administration. In *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002), the Arkansas Court of Appeals wrote: “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.” The evidence adduced at the hearing, both testimonial and medical, shows that this was this was the situation here. Consequently, Claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from the date last paid to a date yet to be determined.

C. Controversion.

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Introduction. Claimant has asserted that he is entitled to a controverted attorney's fee in this matter.

Standard. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with *See Ark. Code Ann. § 11-9-715* (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

Discussion. The evidence before me clearly shows that Respondents have controverted Claimant's entitlement to additional indemnity benefits. Thus, the evidence preponderates that his counsel, the Hon. Kathleen Talbott, is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to *Ark. Code Ann. § 11-9-809* (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with *Ark. Code Ann. § 11-9-715* (Repl. 2012).

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IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge