

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.: G901314

CALVIN W. KIRKLIN, EMPLOYEE	CLAIMANT
RAILROAD SWITCHING SERVICES, INC., EMPLOYER	RESPONDENT NO. 1
LIBERTY MUTUAL GROUP, INSURANCE CARRIER/ THIRD PARTY ADMINSTRATOR (TPA)	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED APRIL 13, 2022

Hearing before Administrative Law Judge Chandra L. Black, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Stephen L. Curry, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Zachary F. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.
Mr. Pake waived his appearance at the hearing.

Statement of the Case

On January 26, 2022, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A prehearing telephone conference was conducted on December 8, 2021, from which a prehearing order was filed that same day. The prehearing order and the respective responsive filings of the parties have been marked as Commission's Exhibit 1.

Stipulations

During the prehearing telephone conference, and/or at the hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within

claim.

2. The employee-employer-insurance carrier relationship existed at all relevant times, including on or about February 11, 2019.

3. At the beginning of the hearing, the parties stipulated that on the day of the Claimant's accidental injury his average weekly wage was \$640.96. His weekly compensation rates are \$427.00 and \$320.00.

4. Respondents No. 1 accepted this as a medical only claim for compensable injuries to the Claimant's low back (in the form of a back strain) and left lower extremity. In that regard, they paid some medical benefits, which would include those of record, except for the Claimant's treatment with Dr. William Rutledge.

5. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Issue(s)

1. Whether the Claimant is entitled to payment of temporary total disability compensation from February 12, 2019 to a date yet to be determined.

2. Whether the Claimant is entitled to additional medical treatment for his compensable injuries.

3. Whether the Claimant's medical treatment under the care of Dr. William Rutledge was unauthorized.

4. Whether the Claimant's attorney is entitled to a controverted attorney's fee.

Contentions

The parties set forth their contentions pursuant to their prehearing filing and/or during the hearing. Specifically, the parties' respective contentions are set forth as follows:

Claimant:

The Claimant contends that he suffered a compensable injury on February 11, 2019, while under the employment of Railroad Switching Services, Inc. Claimant was switching out the tracks when he was drug by a train causing his body to make contact with the ground and rails/ties. Claimant sustained injuries to his back, left leg, left knee, left calf and the body as a whole. Claimant has not recovered from his injuries and has not reached the end of his healing period. Claimant has not been able to return to work due to his injuries. Based upon his injuries, and the compensability of this claim, Claimant is entitled to reimbursement for medical expenses incurred, future medical care, and temporary permanent disability, rehabilitation, and permanent temporary disability when he has reached the end of his healing, and an award of attorney's fee.

At the start of the hearing, the Claimant's attorney essentially further contended that the treatment the Claimant received from Dr. Rutledge was procured as necessary medical treatment for his injuries. (Tr. 9)

He also contended that the Claimant never completed resolution of his injury. The Claimant was treating for muscle spasms in his left leg and getting injections for his lower back, which is consistent with the original claim submitted by the Claimant and in general terms, the treatment that Dr. Rutledge was providing to him. (Tr. 11)

Respondents No.1: There are no objective findings to support the alleged injury. Any objective findings are not related to the incident at work on 2/11/2019. The Claimant was released to return work on [sic]

At the beginning of the hearing, the attorney for Respondents No. 1 modified their contentions to chiefly argue that the Claimant was released to return to work on February 21, 2019 and April 4, 2021. Counsel further contended that the Claimant was never taken off work. (Tr. 12)

Respondent No. 2: The Fund is not responsible by law for any of the benefits sought at this time, and therefore defers to the outcome of litigation on those issues. The Trust Fund would waive its right to attend the hearing addressing the issues presently before the Commission for consideration.

Based on my review of the record as a whole, to include the documentary evidence, all other matters properly before the Commission, and after having had an opportunity to listen to the testimony of the Claimant and observe his demeanor during the hearing, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. §11-9-704 (Repl. 2012):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The proposed stipulations set forth above are reasonable and hereby accepted as fact.
3. The Claimant failed to prove by a preponderance of the evidence that the medical treatment rendered by Dr. William Rutledge was reasonably necessary in connection with his compensable back strain and left leg injuries of February 11, 2019. He also failed to prove his entitlement to any future medical treatment for his compensable injuries.
4. The Claimant failed to prove by a preponderance of the evidence his entitlement to temporary total disability compensation from February 12, 2019 until a date yet to be determined.
5. The issues of whether the medical treatment rendered by Dr. Rutledge was unauthorized and a controverted attorney's fee have been rendered moot pursuant to the foregoing findings. As a result, they have not been discussed herein this Opinion.
6. All issues not litigated at the hearing are hereby reserved under the Arkansas Workers' Compensation Act.

Summary of Evidence

The Claimant, Mr. Calvin W. Kirklin, was the only witness to testify during the hearing.

Likewise, the record consists of the hearing transcript of January 26, 2022 and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's Exhibit 1 includes the Commission's prehearing order of December 8, 2021, and the parties' prehearing filings; Claimant's Medical Exhibit consisting of forty-six numbered pages was marked as Joint Exhibit 1; and Respondents' Exhibit 1 consists of two pages.

Testimony

Calvin Kirklin/the Claimant

The Claimant, now age 61, has been married to Mrs. Theresa Kirklin for twenty-five years. He testified that he has experience with farm work dating back to eight years of age. According to the Claimant, he left the farm and went to work as a meat cutter for several large grocery stores. Following this employment, the Claimant worked for UPS for twenty years. After leaving there, he went to work for Joshen Paper Company, making out-of-state deliveries to different grocery stores. Next, the Claimant worked for the United States Postal Service as a truck driver, picking up mail from various locations and delivering it to Little Rock. He also worked for Baptist Health Medical Center as a truck driver, delivering baby supplies to hospitals within the state. According to the Claimant, in this job, he had to perform a lot of heavy lifting. Following this position, the Claimant went to work for the respondent-employer/Railroad Switching Services.

With respect to his employment duties with Railroad Switching Services, the Claimant oversaw starting the train and was responsible for checking the oil and fuel. He maintained that occasionally he made repairs to the train. According to the Claimant, he also drove the company truck to a 3M location to have the book signed off on before they could start their workday. He

essentially testified that his employment duties also included switching out the tracks, putting down rails, and drilling in the spikes.

The Claimant testified that he quit his job about three months after his injury because he was physically unable to do the work. Approximately three months later, he went to work part-time for a meter company called Scope. The Claimant maintained he did not have to do any work; he just rode around. However, the Claimant further maintained that it got to the point to where he was unable to walk up the stairs so they then let him go in April 2021. The Claimant denied having work since April.

According to the Claimant, he has not worked since that time because some mornings when getting out of bed, he has to grab hold of something because the pain comes and goes. He testified that sometimes it gets to the point that he stays in the recliner and “lays around to stay off his leg as much as possible.” The Claimant confirmed that he uses a cane. However, the Claimant denied using a walker to ambulate. He essentially testified that he has to grab the end of his bed to get from point A to point B, if he does not have his cane nearby.

Regarding his injury, the Claimant testified that he was switching out the train tracks on the evening of his injury. He testified that the engineer normally slowed down to about two miles per hour so he could jump in the back of the train to do the next switch. The Claimant confirmed that he used a handgrip to get on the train. However, the Claimant testified that when he jumped on the train, the engineer sped up. The Claimant testified that he tried to call the engineer on his radio/walkie talkie, but he was unable get his attention. He further testified that although he called “Red Zone,”¹ the engineer did not stop the train. According to the Claimant, “the train drug him by his left leg across the steel rails and crossties. Finally, the train came to a stop, and the Claimant

¹ The Claimant testified that “Red Zone” means stop.

was able to get down on the ground. He stated a manager named, Corey Pascal, witnessed the incident and asked him if he was hurt.

Under further questioning, the Claimant explained:

Q. Did they make arrangements, your supervisor, to take you to the doctor?

A. Uh, what happened was I told the company, up there at 3M, a Mr. Dennis Davis, what had happened and he called Russellville and told Danny and them that they need to get up here and take me to the doctor.

Q. You're going to have to help us now. Who's in Russellville. Is that the --

A. Railroad Switching Service [sic].

Q. Okay. That's their head office?

A. Yes.

The Claimant further testified that they (someone from management) came and transported him to the hospital. According to the Claimant, they took him to the Emergency Room at St. Vincent. The Claimant testified that at the hospital, they prescribed pain medication for him, which helped a little. He essentially testified that most of his pain is due to a bulging disc. The Claimant further testified that one morning when he got up, it seemed like a bolt of lightning going down his leg. As of the date of the hearing, the Claimant stated that it feels like needles sticking in his foot. He confirmed that Railroad Switching Services paid for six visits of physical therapy. Subsequently, they refused to pay for any more treatment. He testified that he tried to see a chiropractor, but he did not have the money for this care. The Claimant admitted to seeing Dr. Smith at Arkansas Specialty Care Centers. He confirmed that once his physical therapy ended, Dr. Smith released him from his care.

Upon further questioning, the Claimant maintained that he asked to be released from care when Railroad Switching lost their contract to another company, RJ Corman, because they told

him that they were going to make him an engineer. The Claimant confirmed that on April 4th (2019), he was released from care by Arkansas Specialty Care (Dr. Smith). However, the Claimant maintained that RJ Coleman[sic]² did not hire him because he did not get the release from his doctor in time to go to work for them. He maintained that after he was released from care in 2019 by Arkansas Specialty Care Centers, he did not request additional medical treatment from the Respondents because he had been fired by them. Also, the Claimant maintained there was no one for him to call at Railroad Switching because the company lost the contract and was longer there.

The Claimant testified that although he was not able to work, he tried to work part time at Scope because he needed the money. In addition to his employment at Scope, the Claimant also worked part time at UPA reading meters for the light company. The Claimant confirmed that he was fired from that company because he was not able to stand or sit for extended periods.

Subsequently, the Claimant sought medical treatment from Dr. William Rutledge because he was a highly recommended doctor. The Claimant paid for this treatment out of his pocket. He testified that he saw Dr. Rutledge five, maybe six times. According to the Claimant, it is his understanding from Dr. Rutledge that his back and leg will never be same.

Since his work incident, the Claimant denied that he has been able to perform any work around his house. The Claimant confirmed that he lives on a farm. As of the date of the hearing, the Claimant's brother was helping him with majority of the work around his farm. The Claimant admitted that he does not currently have health insurance. He confirmed that he is asking Commission for additional medical treatment for his injuries under the care of Dr. Rutledge.

On cross-examination, the Claimant confirmed that he had a workplace injury about ten years ago to his lower back, on the right side. At the time of his prior injury, the Claimant was

² Here, it appears that the Claimant is referring to RJ Corman Railroad Group.

working for Joshen Paper Company. The Claimant made deliveries to the City Market on 12th Street. The Claimant slipped and fell on concrete, while making a delivery at City Market. He confirmed that he sought treatment due to this prior low back injury. The Claimant did not recall undergoing an MRI for that injury. According to the Claimant, he treated with a chiropractor for six to ten visits due to his prior back injury.

Regarding the Claimant's work injury of February 2019, he testified:

Q. Now the injury that we are here for today, this injury occurred on – and now your Form C lists February 11 of 2019, but your prior testimony stated that you went to the E.R. the same day as your injury. Can you clarify that?

A. I might have. I -- I -- I don't think I went the same day. I think it was the day after when I told the managers at 3M Company, and that's when they insisted on Railroad Switching Service to come down here and take me to the hospital.

Q. Okay. So now you're saying it's the day after your injury is –

A. It could've been the day after. It could have.

Q. Okay. Now, the first date of your E.R. visit listed in the medical that you submitted is February 21st, 2019. That's ten (10) days after February 11th, 2019.

A. Okay.

Q. It wasn't ten (10) days of a delay, was it?

A. I don't think it was. I'm not sure.

Q. Okay.

A. I'm not sure.

Q. So the date of injury most likely February 20th, 2019, or February 21st of 2019.

A. That's not correct.'

Q. Okay. What's correct?

A. That's not correct, 'cause when I got hurt, that next day, if I'm not mistaken on the date I was hurt, that's when they took me to the doc -- the hospital, 'cause I done went back to

work hurting. And after I had told 3M head man my situation, that's when I went to the hospital, that night. I went to the hospital that night.

The Claimant's first ER medical visit of record did not occur until February 21st of 2019. However, he was unsure if he got injured on February 11, 2019. The Claimant testified that the dates might be mixed up.

He confirmed that he underwent an MRI of his back at St. Vincent's on February 21, 2019, which revealed degenerative disc bulges. The Claimant was unable to confirm that he was never taken off work by a doctor. In fact, on February 21, the hospital staff instructed the Claimant to return to normal daily activities without restrictions. He did not recall ever being taken off work by a doctor. However, the Claimant maintained that he asked the doctor to release him back to work and he did so. The Claimant confirmed that the Respondents paid for his medical treatment with Arkansas Specialty Care Center/Dr. Smith and the ER visit.

The Claimant admitted that after he was released from care in April 2019, the contract with Railroad Switching Services had already changed to his new company, RJ Corman. According to the Claimant, he learned of the switch to another employer when he tried to return to work in April. The Claimant again testified that RJ Corman contacted him and gave him a hard hat and wanted him to be an engineer for them. According to the Claimant, he met a with representative from RJ Corman on the parking lot and they told him to let them know when he was ready to come to work for them. However, the Claimant maintained the doctor never released him. The Claimant did not recall the date that this conversation took place.

Under further questioning, the Claimant confirmed that he was released from medical care on April 4th. The Claimant confirmed that he did not ever report to work for RJ Corman.

Specifically, the Claimant explained:

Q Why did you never report to work for R.J. Corman?

A Because he sent me a letter sayin' that if I report to work on a certain day, since I was goin through therapy, that they could not use me. And I had asked them about light-duty and they sent me a letter back and told me there wasn't no light-duty. So they --they didn't -- bring me in.

The Claimant confirmed that he worked part-time for both Scope and Utility Partners of America. He did not recall when he worked for these companies. The Claimant confirmed that his job duties consisted of driving and installing electrical meters. He denied being injured while performing those job duties. According to the Claimant, whenever he had to drive in these positions, he had to pull over a lot because his back and leg would start to hurt. As a result, he worked only three days a week.

Regarding his treatment with Dr. Rutledge, the Claimant testified that he sought treatment from him because the back of his leg started hurting. The Claimant was asked why he sought treatment from Dr. Rutledge rather than going back to Arkansas Specialty Care Centers or the doctors he saw at St. Vincent. He replied, "Because, man, those folks over there were hurtin' me. They were puttin --." The Claimant confirmed that he was referring to the physical therapist. The Claimant testified that they would put him on a machine and leave him there and it seemed as if it would push or pull his body in a different direction. He confirmed that Dr. Rutledge treated him with injections. The Claimant denied he was aware that although he complained of spasms in 2019 and 2021, no medical personnel ever noted that they felt spasms. He admitted that he has not had any diagnostic tests performed on his left leg.

With respect to his date of injury, the Claimant was not sure if his injury occurred on February 11, 2019 or February 21, 2019. The Claimant denied that after he got hurt, he waited ten days, or a week and a half before visiting the ER.

On redirect examination, the Claimant confirmed that he suffered muscle spasms when he saw Dr. Rutledge. He maintained that the spasms resulted from his accident at work. The Claimant agreed that as of the date of the hearing, he continues to experience muscle spasms.

He confirmed again that someone from Railroad Switching Services physically drove him to the doctor. According to the Claimant, he left his car on the parking lot, and they drove him home after his doctor's visit.

Upon questioning by the Commission, the Claimant testified his last day of work at Railroad Switching Services was the day that he had to go to St. Vincent. However, the Claimant proclaimed that he got hurt a few days before they took him to St. Vincent.

He stated that he went to work about a month after his physical therapy ended. Per the Claimant, he worked for Scope for about three months. The Claimant confirmed that he worked for UPA for about a year. He testified that his employment with them ended in April 2021.

On further redirect, the Claimant confirmed that his employment at UPA ended on April 14, 2021. He confirmed that he was terminated from UPA because he was unable to work full-time.

The Claimant testified that the owner of Railroad Switching, drove from Russellville to take him to the doctor. According to the Claimant, they had to come to Little Rock because 3M called the owner and asked him to take him to the doctor.

Medical Evidence

A review of the medical record shows that on February 21, 2019 the Claimant presented to the ER of CHI St. Vincent. The Claimant reported a sharp pain from his left back down into his left calf. According to this report, the onset of symptoms was one day ago. The Claimant gave a history of being dragged by a train on the 11th (of February). Specifically, the Claimant reported

that his injury occurred as he jumped a train to go to the next switch; and he miscalculated the speed of the train and was hanging on it for a minute. A CT scan of the Claimant's lumbar spine was performed with the following impression: "1. No L-spine fracture. 2. Moderate degenerative endplate and disc changes at L5-S1. Moderate left neural foraminal stenosis at this level." Per this report, other findings included but was not limited to a L4-L5 annular disc bulge with mild degenerative disc desiccation and mild bilateral neural foraminal stenosis. At L5-S1 there is mild loss of disc height. Per the RN's triage notes, the Claimant provided the following detailed musculoskeletal comments: "Pt. stated he fell off a train while working; works for a switching company. Occurred 2/11/19 stated he has not been seen previously; he thought 'I could tough it out.' PT states pain while walking, less pain at rest." There is an annular disc bulge asymmetric toward the left." Tom Bozzay, a physician assistant, diagnosed the Claimant with "No fracture/muscle strain," for which he prescribed a medication regimen. The Claimant was discharged from the hospital to his normal daily activities without any restrictions.

The Claimant was seen at Arkansas Specialty Care Centers on March 21, 2019 by Dr. Phillip Smith. At that time, the Claimant provided a History of Present Illness: "Mr. Kirklin reports increased pain since his visit on Tuesday. He thinks the traction pulled him and the leg prop titled resulting in pressure on his left hip and leg. This pain improved over the past 2 days, and he now rates it about 5/10." Dr. Smith assessed the Claimant with "1. Low back pain. 2. Lumbar radiculopathy. 3. Pain in the left lower limb." As a result, Kirk Turnbo, DPT, evaluated and implemented a set course of therapeutic modalities for the Claimant, which included the traction machine, therapeutic exercises, and electrical stimulation. However, the Claimant reported increased pain from the traction machine. The physical therapist noted that when he checked on the Claimant, he was not holding the handles correctly as instructed when he initially set him up,

and as instructed when he checked on him. Therefore, the therapist decided the Claimant would not be placed in traction again. During therapeutic exercises, the therapist opined the Claimant was able to perform increased core stability/mobility and LE flexibility for decreased pain during ADL's. As a result, the therapist opined that the Claimant could return to work as a "breakman [sic]" where he pushes heavy levers. The Claimant's skin was inspected post-treatment with no skin breakdown.

On March 26, 2019 the Claimant returned to Arkansas Specialty Care Centers. The therapist noted that the Claimant continued to have signs of bulging disc in lumbar spine causing left pain, numbness, and tingling. The Claimant reported increased pain at night, which he rated to be at approximately-4-5/10. He rated his pain that morning as being 2-3/10. Although the Claimant felt better, he did not believe he could return to full duty at work. Overall, the Claimant was improving, but he thought chiropractic treatment would be more beneficial because it helped with a similar problem in the past.

The Claimant continued with physical therapy treatment, which included therapeutic exercises and electrical stimulation under the care of a skilled licensed physical therapist. Per the medical notes of record, the Claimant continued to be returned to his full duties as a brakeman.

On April 4, 2019, the Claimant returned to Dr. Smith for a follow-up visit. At that time Dr. Smith reported in relevant part:

HISTORY OF PRESENT ILLNESS: Returns today for lumbar spine and left lower extremity. He has been in therapy for the past 4 weeks and taking a steroid Dosepak and muscle relaxer for radiculitis. He has improved in physical therapy. He is not having any radicular symptoms today.

EXAMINATION: Left lower extremity shows no swelling or deformity. He has full range of motion with not instability. He has good strength. He is neurovascular intact.

RADIOLOGY: NONE.

PLAN: He is going to continue with home exercise. He may return to work without restriction. I told him to use a warm compress and anti-inflammatories as needed for pain. I will see him back as needed. He has met MMI. He will have a 0% impairment rating.

1. Low back strain.

S39.012A: Strain of muscle, fascia and tendon of lower back, initial encounter.

Two years later, the Claimant sought initial treatment from Dr. William Rutledge on May 4, 2021 due to complaints of chronic low back pain and left leg pain. At that time, the Claimant reported to Dr. Rutledge that his symptoms started on February 21, 2021 while working for a railroad switching company. The Claimant told Dr. Rutledge he never had resolution of his symptoms. Per this report, the Claimant described his symptoms as a dull aching pain, sometimes with muscle spasms throughout the entire leg. Also, the Claimant complained of knee distal symptoms, which were very painful with standing, walking, and negotiating stairs. Dr. Rutledge's assessment of the Claimant was: "1. Chronic low back pain. 2. Chronic left leg pain secondary to trauma." Dr. Rutledge wrote:

PLAN: I am going to review his previous treatment records after his trauma suffered in 2019. In the interim, I want him to continue ibuprofen 600 mg three times daily for pain and discomfort and moist heat to the affected areas often. I am going to see him in follow-up in four weeks.

On June 10, 2021, Dr. Rutledge saw the Claimant due to subjective complaints of a difficult time with low back pain and left leg pain. The Claimant reported that he was experiencing tight painful muscle spasms in his lower back. He also complained of his leg hurting constantly and poor sleep hygiene due to pain. Dr. Rutledge injected the Claimant's lumbar trigger points with 4 mg of dexamethasone each. At that time, Dr. Rutledge's impression was "1. Low back pain. 2. Muscle spasms, lumbar spine. 3. Chronic left leg pain. 4. Knee pain," for which he increased the Claimant's ibuprofen to 800 mg three times daily for a week or so, then back to twice daily thereafter and Flexeril 10 mg 2-3 times a day for muscle spasms.

The final medical report of record was authored by Dr. Rutledge on September 16, 2021. At that that time, the Claimant complained of lots of problems with his low back, left leg, and ankle pain. Dr. Rutledge opined that the Claimant was injured in 2019 and simply had not healed. Per this medical report, Dr. Rutledge wrote, in relevant part: “This injury strained his back and he has recurrent muscle spasms in the lower back. Recently, he had experienced some cramping of the left leg when standing and walking. His pain is worse with prolonged standing or walking.” Dr. Rutledge’s impressions was: “1. Low back pain. 2. Muscle spasm, lower back. 3. Contusion to the left leg. 4. Chronic left knee and leg pain. 4. Low back pain.”

Respondents No. 1 furnished the Claimant a Form AR-N/Employee’s Notice of Injury on February 25, 2019. This document bears the signature of the Claimant. During the hearing, the Claimant acknowledged having received and signed the Form N.

Adjudication

A. Additional Medical Benefits

At issue is the Claimant’s entitlement to additional medical treatment under the care of Dr. William Rutledge. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the Claimant failed to prove by a preponderance of the evidence his entitlement to the additional medical treatment that he sought from Dr. Rutledge over two years after his compensable incident of February 11, 2019. Furthermore, the Claimant failed to prove by a preponderance of the evidence his entitlement to any future medical treatment for his compensable injuries.

The 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. Ark. Code Ann. §11-9-508(a) (Repl. 2012). However, the employee has the burden of proving by a

preponderance of the evidence that the medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003).

After having observed the Claimant's demeanor during the hearing, and when comparing his testimony to the medical evidence and in light of his inconsistent statements, I am persuaded that the Claimant's testimony is incredulous. Here, the Claimant gave conflicting and confusing testimony concerning the date of his injury even after having stipulated to an injury date of February 11, 2019. Of note, the date of his injury is central in showing the length of time the Claimant waited before seeking medical attention. I realize the Claimant is not required to provide the precise date of injury. Nevertheless, at one point in his testimony, the Claimant testified his injury occurred on February 11, 2019; and at another point in his testimony, he stated that his injury occurred on February 21, 2019 or maybe the dates got "mixed up." The Claimant maintained that he sought medical treatment on the day of his injury or the next day; however, the first medical record is dated February 21, 2019. At that time, the Claimant reported to the triage nurse that his injury occurred on February 11, 2019. The Claimant told hospital staff he thought he could "tough it out." This leads me to conclude that the Claimant sustained, at best, only soft-tissue injuries since he waited ten days after his incident to seek medical attention. This brings me to my next point, although the Claimant vehemently testified that his leg was "dragged" along the ground and steel rails/ties; however, there is not one documented notation of any swelling, abrasions, or contusions to the Claimant's left leg in any of contemporaneous medical records. I am aware that the Claimant does not have to have objective findings for his continued need for medical treatment.

In that regard, the parties stipulated that the Claimant suffered admittedly compensable injuries to his back (a strain) and left leg on February 11, 2019. The Claimant's injuries occurred while working as a brakeman for Railroad Switching Services. His testimony shows that the incident occurred as he tried to jump onto a moving train. Per the Claimant's testimony, the engineer sped up. The Claimant testified that he "was dragged" across steel rails, crossties, and the ground.

Ten days later, on February 21, 2019, the Claimant first sought treatment for his compensable injuries from the ER at CHI St. Vincent Hospital. At that time, the Claimant complained of back and left leg pain. The Claimant underwent a lumbar CT scan which revealed only pre-existing degenerative disc changes.

Subsequently, the Claimant came under the care of Dr. Phillip Smith on March 21, 2019. He ordered physical therapy treatment for the Claimant. The Claimant underwent a few sessions of physical therapy. He was continued on his regular work duties during this period. Ultimately, on April 4, 2019, the Claimant returned to Dr. Smith for a follow-up visit of his back and left leg injuries. At that time, Dr. Smith pronounced the Claimant to be at maximum medical improvement (MMI) for his compensable injuries. Dr. Smith also opined that the Claimant with a zero percent (0%) impairment rating for his compensable injuries.

Dr. Smith's expert opinions comport with the medical evidence. As such, I have attached significant evidentiary weight to these medical opinions of the Claimant's treating physician. Accordingly, I find that the Claimant reached the end of his healing period on April 4, 2019 for his soft-tissue compensable injuries. I am aware that it is well-settled that a Claimant may be entitled to ongoing medical treatment after the healing period has ended if the medical treatment is geared toward management of the Claimant's injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark.

App. 230, 184 S.W. 3d 31 (2004). However, those circumstances do not exist here due to all of the following.

Specifically, the record does not demonstrate that the Claimant received or requested any additional medical treatment for over two years. Nor is there any documentation of record showing that the Claimant requested additional treatment from Dr. Smith. Yet, beginning on May 4, 2021, the Claimant sought medical treatment on his own from Dr. Rutledge, which amounts to twenty-five months from his last treatment with Dr. Smith. When the Claimant began treatment with Dr. Rutledge in May 2021, the nature and severity of the Claimant's back and left leg symptoms were significantly different. In fact, the Claimant complained of pain in his ankle during his office visit with Dr. Rutledge in June of 2021. What is most shocking is that during the Claimant's last office visit of record with Dr. Rutledge on September 6, 2021, he documented that there was a contusion to the Claimant's left leg. This strongly suggests that the Claimant was involved in a subsequent accident. Considering the two-year gap in treatment; that the nature and severity of the Claimant's symptomatology is significantly altered, and because the Claimant had new objective findings (contusion of the leg) of a subsequent accident, I am persuaded that it would require pure conjecture and speculation to causally link the Claimant's current complaints of his back and left leg to his workplace injury of February 11, 2019. Conjecture and speculation cannot supply the place of proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979).

Therefore, due to all of the above reasons, I find the Claimant failed to prove by a preponderance of the evidence that his treatment with Dr. Rutledge is reasonably necessary in connection with his incident at work on February 11, 2019. Moreover, due to these same reasons, I further find that the Claimant failed to prove by a preponderance of the evidence his entitlement to any future medical treatment for his compensable injuries. Therefore, the issue pertaining to

whether the Claimant's treatment with Dr. Rutledge was unauthorized has been rendered moot and not discussed herein this Opinion.

I realized that Dr. Rutledge has essentially opined, among other things, that the Claimant has not reached the end of healing period for his compensable injuries of February 2019; however, Dr. Rutledge's opinion is based on an inaccurate history reported to him by the Claimant. As a result, I have attached minimal evidentiary weight to Dr. Rutledge's expert opinions.

B. Temporary Total Disability Compensation

The Claimant suffered a scheduled (back strain) and an unscheduled injury (left leg), therefore, both injuries have been addressed herein this Opinion. The Claimant contends that he is entitled to temporary total disability compensation from February 12, 2019 to a date yet to be determined due to these injuries. However, based on my review of the preponderance of the credible evidence, I find that the Claimant failed to prove his entitlement to any temporary total disability compensation for either of his compensable injuries of February 11, 2019.

With respect to the Claimant's back injury, an injured employee who suffers an unscheduled injury is entitled to temporary total disability compensation during the time that he is within his healing period and totally incapacitated to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In that regard, the Claimant sought initial medical treatment on February 21, 2019, at the ER of Chi St. Vincent for his workplace injury of February 11, 2019. This was some ten days after his incident at work. The Claimant underwent diagnostic testing of the lumbar spine which revealed only pre-existing degenerative disc changes. Nevertheless, the ER staff returned the Claimant to his regular work duty without any physical restrictions. Here, there is no probative evidence whatsoever showing the Claimant was ever rendered totally incapacitated to work due to

his compensable back strain. Both Dr. Smith and the licensed physical therapist returned the Claimant to his regular duty work following each visit with them at Arkansas Specialty Care Centers. Remarkably, the record is lacking any physician, including Dr. Rutledge taking the Claimant off work or placing any physical restrictions on him due to his work incident of February 11, 2019.

On April 4, 2019, Dr. Smith released the Claimant from his care and pronounced him to be at maximum medical improvement with a 0% impairment rating.

In a nutshell, there is nothing in the record other than the Claimant's own subjective complaints displaying he was totally incapacitated from working during the time frame temporary total disability is claimed. In fact, the Claimant has worked for at least two companies since his employment ended with Railroad Switching Services.

Accordingly, based on the foregoing, I find that the Claimant failed to prove by a preponderance of the credible evidence that he was rendered totally incapacitated from earning wages due to his back injury of February 11, 2019.

The Claimant also suffered a left leg injury during his work-related incident of February 11, 2019. His lower extremity injury is a scheduled injury. An employee who has suffered a scheduled injury is entitled to compensation for temporary total disability during his healing period or until the employee returns to work, whichever occurs first. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. Id. Whether an employee's

healing period has ended is a factual determination to be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

As previously noted, the documentary evidence lacks any physician or even the physical therapist taking the Claimant off work due to his leg injury. Although the Claimant passionately testified that the train dragged and tossed his leg to the ground and steel railroad crossties during the incident, I am baffled by the fact that there is absolutely no medical documentation in the initial medical reports of any bruising, contusions, abrasions, or swelling involving the Claimant's left leg or other bodily part. Consequently, I am unable to identify any evidence of record demonstrating that the Claimant was ever unable to return to work due to his leg injury, except for his own subjective complaints, which I found to be incredulous and unsupported by the medical records.

Hence, based on all the foregoing, I find that the Claimant failed to prove by a preponderance of the evidence his entitlement to any temporary total disability compensation during the time frame temporary total disability is sought as a result of his compensable leg injury of February 11, 2019.

Having found that the Claimant failed to prove his entitlement to any temporary total disability compensation, the issue of a controverted attorney's fee has been rendered moot and not discussed herein this Opinion.

ORDER

The Claimant failed to prove by a preponderance of the evidence his entitlement to additional medical treatment under the care of Dr. Rutledge. Furthermore, the Claimant failed to prove by a preponderance of the evidence his entitlement to any temporary total disability compensation for his compensable back and left leg injuries of February 11, 2019. Therefore, this

Kirclin – G901314

claim is hereby respectfully denied and dismissed in its entirety. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

IT IS SO ORDERED.

CHANDRA L. BLACK
Administrative Law Judge