

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO.: G704122**

BROCK MCFARLIN, Employee	CLAIMANT
CRAIGHEAD COUNTY JUDGE, Employer	RESPONDENT
ASSOCIATION OF ARKANSAS COUNTIES WORKERS' COMPENSATION TRUST, Carrier	RESPONDENT
AAC RISK MANAGEMENT SERVICES, TPA	RESPONDENT

**OPINION AND ORDER FILED MAY 31, 2022**

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Craighead County, Arkansas.

Counsel for the Claimant: HONORABLE PHILLIP J. WELLS, Attorney at Law, Little Rock, Arkansas.

Counsel for the Respondents: HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**Statement of the Case**

The above-captioned matter came on for a hearing on March 25, 2022, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on January 18, 2022, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The Employee/Employer/Carrier/TPA relationship existed at all relevant times, including June 1, 2017, on which date the Claimant sustained a compensable lumbar injury for which certain medical and indemnity benefits have been paid, inclusive of a 9% permanent anatomic impairment rating to the whole body and such benefits as were required by virtue of an Agreed Order entered on August 13, 2020, deemed incorporated by reference herein; and,
- (3) The Claimant's average weekly wage on the date of injury was sufficient to entitle him to compensation rates of \$502.00 and \$376.00 for temporary total and permanent partial disability benefits, respectively.

The pre-hearing Order also reflected the issues to be adjudicated, as set forth below:

- (1) Whether the Claimant is entitled to payment of additional medical expenses in relation to his compensable lumbar injury of June 1, 2017, and temporary total disability benefits from June 23, 2021, through a date yet to be determined;
- (2) Whether the Claimant's need for additional medical treatment and additional temporary total disability benefits is related to an alleged independent intervening cause of October 15, 2020; and,
- (3) Attorney's fees in relation to controverted indemnity benefits.

All other issues were reserved. During preliminary discussions, the parties agreed that the issue of additional temporary total disability benefits and attorney's fee thereon were not ripe for adjudication, would be reserved, and that the only issue to be adjudicated was the Claimant's entitlement to additional medical expenses subsequent to October 15, 2020. Following hand-written amendments made to the pre-hearing Order by the undersigned Administrative Law Judge to reflect the sole issue to be adjudicated, the pre-hearing Order of January 18, 2022, was admitted into the record as Commission's Exhibit No. 1 without objection. (TR 5-12) Thereafter, the parties' respective exhibits were likewise admitted into the record without objection. (TR 12-13)

#### **Findings of Fact and Conclusions of Law**

- (1) The parties' stipulations are accepted as findings of fact herein, inclusive of the Commission's jurisdiction over this claim;
- (2) The Claimant has proven, by a preponderance of the evidence, that he is entitled to the additional medical treatment, and expenses associated therewith, rendered by or at the direction of Dr. Rebecca Barrett-Tuck and NP Kelsey Schmidt subsequent to October 15, 2020; and,
- (3) All other issues are reserved.

**Applicable Law**

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3).

Also, Ark. Code Ann. §11-9-102(4)(F)(iii) provides as follows:

Under this subdivision (4)(F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

However, there is no independent intervening cause unless a subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. See *Guidry v. J & R Eads Constr. Co.*, 11 Ark. App. 219 (Ark. App. 1984) and also, *Davis v. Old Dominion Freight Line*, 341 Ark. 751 (Ark. 2000). Further, if an injury is compensable, then every natural consequence of that injury is also compensable. The basic test is whether there is a causal connection between the two events. *Walker v. Fresenius Med. Care Holding, Inc.*; 2014 Ark. App. 322.

In addition, Ark. Code Ann. 11-9-508(a)(1) provides that:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee.

Also, it is long-settled that questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See,

for instance, *Yates v. Boar's Head Provisions Co.*, 2017 Ark. App. 133 (2017). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant's credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)).

Finally, a claimant's testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

### Testimony

#### Brock McFarlin

Upon direct examination, the Claimant testified that he has worked for Respondent Employer for thirteen years, and that prior to June 1, 2017, had not incurred an injury or received any treatment in relation to his lower back. (TR 15-16) With respect to the initially compensable work-related injury of June 1, 2017, the Claimant explained that he fell during a foot-patrol and experienced pain in his lower back the next morning. (TR 16) The Claimant described such as follows:

Q: If you would, describe in your own words how you felt.

A: It started off as just a sharp pain in the back and throughout the day it -- it -- it worsened to a more broad or bigger area of the back, and it started already to radiate down into my right leg. (TR 17)

According to his testimony, the Claimant initially sought treatment on his own at an urgent care facility on June 4, 2017, underwent a CT scan the same day, and then began physical therapy for his lower back. (TR 17-18) Thereafter, the Claimant received a referral authorized

by Respondent Carrier to see Dr. Lovell, a neurosurgeon in Memphis, who advised the Claimant to continue physical therapy. (TR 18-19) Following an MRI of his lower back in December, 2017, the Claimant then presented to neurosurgeon Dr. Tuck and pain management physician Dr. Heberlein, the latter of which provided steroid injections and a nerve block. (TR 19-20) During 2018-19, the Claimant described his back issues as follows:

It had its days. Most days I would -- I would have the pain, a sharp pain in my back, sometimes shifting would relieve it. Anytime I was on my feet for more than an hour it would -- it would start to radiate. It never went away, it just got to the point where it was more manageable. (TR 20-21)

With respect to the alleged independent intervening cause of October 15, 2020, the Claimant testified as follows:

My dad had loaded some railroad ties on a trailer and I was out talking to him, and he was fixin' to leave with them. They were stickin' off the edge of the trailer a little bit, and I just went to push one of [them] farther up on the trailer when I started to experience a more severe back pain than what I was used to. (TR 21)

The Claimant presented to an emergency room on the same day, received a steroid injection and muscle relaxers, and was released given his pending appointment with Dr. Tuck. (TR 22) In his estimation, the Claimant returned to his baseline condition within two or two-and-one-half weeks after the incident of October 15, 2020. (TR 23-24) With respect to the condition of his back thereafter, the Claimant participated in the following exchange:

Q: If you would, describe for the Judge, in May of 2021, the difference between the baseline pain you talked about and how it was doing in May of 2021:

A: In May I would just get a pain that would shoot down my leg, numbness. My right leg got real weak. It got to where I wasn't able to stand outside of my vehicle for more than fifteen (15) minutes, twenty (20) minutes before I'd have to go sit down. The - - let's see -- sittin' at a chair for even a -- a straight-back chair for more than fifteen (14) minutes I'd have to get up and go walk

around. The only thing that would relieve it at that time was to just to lay down flat. (TR 25)

The Claimant further testified that there was no precipitating incident that caused his back pain to become worse in May, 2021, and that the surgery he ultimately received for such on July 23, 2021, was of benefit to his condition. (TR 26)

During cross-examination, in essence, the Claimant acknowledged that he had previously been assigned an impairment rating for his compensable injury, received compensation for such, and had continued to work either light or full-duty prior to the alleged independent intervening incident in October, 2020. (TR 27-28) The Claimant further acknowledged that he was off-work for approximately two weeks following such, which he conceded was not a work-related incident. (TR 28-29) The Claimant agreed that there was a difference in his (lumbar) MRIs before and after the alleged independent intervening cause in October, 2020, and once again denied that any event had led to his increased pain in May, 2021. (TR 30) With further respect to May, 2021, the Claimant testified that "I went to bed at my baseline pain. I woke up with more pain than I was used to." (TR 31) The Claimant also acknowledged that, post-operatively, he has been able to lift fifty-pound bales of hay. (TR 33)

### **Medical/Documentary Evidence**

I have reviewed the entirety of the medical evidence presented herein, the most salient and relevant of which is discussed below in further detail. Medical and documentary evidence duplicated by the parties will only be cited to one parties' exhibit.

The Claimant initially presented to Dr. James Fletcher on June 4, 2017. Dr. Fletcher ordered a CT scan of the Claimant's lumbar spine which reflected "mild broad-based posterior disc bulging at L3-4," along with a "broad-based diffuse disc bulge" at L4-L5, and a "right paracentral and foraminal disc herniation" at L5-S1. (CX 1 at 1-3) At Dr. Fletcher's direction,

the Claimant presented for physical therapy on June 19, 2017. (CX 1 at 4) The attending therapist noted that the Claimant's previous CT scan of the lumbar spine reflected an "HNP at L5-S1," and that the Claimant had been "given a work comp adjuster who has arranged for a referral to Dr. Lavelle (sic) at Campbell Clinic in Memphis." (*Id.*)

The Claimant then presented to Dr. Laverne Lovell on July 12, 2017, who noted that he had experienced "80%" improvement since the date of injury and instructed the Claimant to continue with his physical therapy. (CX 1 at 5-6) Based on his evaluation and the records available to him, Dr. Lovell opined that the Claimant had suffered an acute lumbar strain which was work-related, and also had "incidental" pars defects at L3 and L5 which he did not believe were work-related. (*Id.*)

Eventually, the Claimant underwent a lumbar MRI on December 5, 2017, which generated the following impressions from the reviewing radiologist:

1. Right foraminal disc *herniation* at L5-S1 displacing the exiting right L5 nerve root.
2. Left paracentral disc *herniation* at L4-5 contacting the traversing left L5 nerve root.
3. Right foraminal disc *herniation* at L3-4 contacting the exiting right L3 nerve root. (CX 1 at 7; emphasis added).

The Claimant thereafter consulted Dr. Rebecca Barret-Tuck (hereinafter "Dr. Tuck") on February 20, 2018, who noted his history of injury and that his post-injury back pain had radiated "more right than left." (CX 1 at 8) Dr. Tuck further noted that:

He has continued to work full-time but is impaired in his ability to walk and become more active. He spends most of his time in his squad car [and] this is fairly comfortable for him but he is very anxious to become more active again. He can only walk for about 15 minutes at a time before he has to take a rest. He works with dogs at work and bending over or getting tugged by the dogs increases his back pain. (CX 1 at 8)

The Claimant later returned to Dr. Tuck on June 21, 2018. On that occasion, and in relation to the Claimant's symptoms, Dr. Tuck noted initially that "There is no radiation," but wrote later in the same paragraph that "Location of symptom is right lumbar pain *radiating* to right buttock/hip. Symptom has been existing for 10 months. It is aggravated by exertion." (CX 1 at 9; emphasis added) Subsequently, on August 9, 2018, the Claimant reported to Dr. Tuck with increased pain. The former recorded that the Claimant "has a little right leg pain when sitting but usually not that much right leg pain. He has some numbness and tingling that comes and goes down the right lateral and posterior leg. Denies any weakness but is unable to do things he used to." (CX 1 at 10) Following another return visit on October 11, 2018, Dr. Tuck authored the following history of present illness with respect to the Claimant:

Mr. McFarlin returns today after treatment from PM. He is a police officer who was originally injured over a year ago when he fell down a hill while on duty. He was found to have a disc rupture on the left at L4-5. Also, foraminal stenosis and possible foraminal disc on the right at L5-S1. Reports low back pain today, rarely radiates into the lateral aspect of his RLE. Had radiofrequency denervation on L3-4, L4-5, and L5-S1 from Dr. Heberlein yesterday. He states that standing for 30 minutes causes pain in his back and right buttock area. He reports grocery shopping causes pain to where he has to sit to have relief. He reports he has "good days and bad days." (CX 1 at 11; see also CX 1 at 12 with respect to Dr. Heberlein's notes of October 10, 2018)

On January 11, 2019, the Claimant presented to Nurse Practitioner (hereinafter "NP") Kelsey Schmidt with Dr. Tuck's office and then underwent an additional lumbar MRI on January 31, 2019, which indicated "Spondylosis...with disc abnormalities at L3-4, L4-5, and L5-S1 which are unchanged from the prior study. No disc herniations are identified. Neural foraminal narrowing as indicated." (CX1 at 18-19; 22-23) Subsequent to this scan, the Claimant reported to Dr. Tuck on February 12, 2019, that his symptoms were "about the same since he was last



here," and again described occasional numbness and tingling affecting his right lower extremity. (CX 1 at 19)

The Claimant next presented to NP Schmidt on April 16, 2019. On that date, the Claimant advised that he had experienced increased pain after picking up a trash bag the previous Saturday without bending over and which he had lifted "straight up with his arm...He believes that prior to Saturday his pain was tolerable. Since his pain increased it has not improved at all." (CX1 at 20) NP Schmidt continued conservative care but allowed for the possibility of an additional MRI should the Claimant's increased symptoms not improve. (CX 1 at 21) On July 11, 2019, Dr. Tuck assigned the Claimant a 9% whole-body permanent anatomic impairment rating based on her review of his medical records and the presence of "disc ruptures at L3-4, L4-5, and L5-S1." (CX 1 at 25)

On August 12, 2019, the Claimant reported to NP Schmidt, *inter alia*, that he had begun to notice a "grinding sensation in his lower back, primarily when standing for prolonged periods or when he stands from a seated position." (CX 1 at 26) However, on this occasion, the Claimant denied any recent leg pain and numbness or tingling in his lower extremities. (*Id.*) Thereafter, on November 25, 2019, the Claimant reported to NP Schmidt that he had experienced an increase of the "grinding" sensation in his lower back over the previous two-to-three weeks but prior to an acknowledged recent "road trip." (CX 1 at 29) The Claimant also reported "Intermittent pain in his anterior right thigh which has also started recently." (*Id.*)

Quite some time later, on October 15, 2020, the Claimant presented to the NEA Baptist Emergency Department and reported injuring his "lower back today while picking up and moving a railroad tie, approx 1-2 hours ago. Pt states he has pre-existing lower back problems." (RX 1 at 1) Additional notes from the same date indicate that the Claimant had been "pushing on

railroad ties today...The pain does not radiates (sic). He has no bowel/bladder incontinence. He has no groin numbness.” (RX 1 at 3)

On October 21, 2020, the Claimant returned to NP Schmidt with increased back pain, and advised the latter that “last Thursday he was loading some items into the back of his truck and began to have severe increased pain. He was seen in the ED on 10-15-20 and received a Toradol injection, Norflex injection, and Decadron injection.” (CX 1 at 30) NP Schmidt ordered a lumbar MRI, which was performed on October 27, 2020, and yielded the following pertinent findings in comparison with the Claimant’s previous lumbar MRIs of December 5, 2017, and January 31, 2019:

L3-4: Worsening bilateral facet arthropathy; right intraforaminal disc bulge and borderline intraforaminal L3 root compression; *no significant change*. Disc bulge in the midline and right paracentral area is slightly larger, *but there is no central canal stenosis*. Mild left neural foraminal stenosis, *unchanged*. (RX 1 at 2; emphasis added.)

On November 24, 2020, the Claimant advised NP Schmidt that his symptoms had improved and that he was back to his “baseline pain level” following a “flare-up” that had precipitated his visit of October 21, 2020. (CX 1 at 32) Upon his next follow-up with NP Schmidt on February 21, 2020, the Claimant reported continued pain across his lower back with “the right side being more severe,” but denied any radicular leg pain and any numbness, tingling, or weakness affecting his lower extremities.” (CX 1 at 33) Also, the Claimant advised that he “is not currently making any weight loss attempts. He is in the middle of building a house and believes he may be stress eating. He is planning on moving into the home in 3 weeks and plans on starting to work more on weight loss at that time.” (*Id.*)

Ultimately, the Claimant underwent yet another lumbar MRI on June 6, 2021, which reflected, in pertinent part, “Significant increase in size of right-sided disc herniation at L3-4

with worsening right L3 nerve root compression.” (CX 1 at 35) In follow-up to this, the Claimant related to NP Schmidt on June 9, 2021, that “approximately 4-5 weeks ago he woke up with increased pain. He is unsure what caused the pain to increase...He thinks he just woke up with this new pain but was having some increased pain a couple of days before.” (CX 1 at 36) In addition, the Claimant described right lower extremity pain of a “cramping sensation,” along with weakness that made him feel as if his right extremity is “going to buckle.” (*Id.*) NP Schmidt then wrote as follows:

I reviewed his most recent magnetic imaging and compared it to his last 1 which was completed in October and discussed that he has a *new* right herniated nucleus pulposus at L3-4. Dr. Tuck has not reviewed these images at this time. Discussed that if she agrees that surgery would offer him significant relief when he be eager (*sic*) to proceed and he certainly was eager to do so. Will make her (*sic*) return appointment with (*sic*) Dr. Tuck returns to discuss the option of surgery at that time. (CX 1 at 37; emphasis added.)

In due course, the Claimant presented to Dr. Tuck on June 15, 2021, who opined as follows:

I recommend L3-4 partial hemilaminectomy and discectomy. The disc extends to the midline but also out of the neuroforamen compromising both the L3 and L4 nerve roots. *Abnormalities were seen at this level at the time of his original injury in 2017 but at this time the disc has completely extruded resulting in significant neurologic deficit.* (CX 1 at 39; emphasis added.)

Dr. Tuck also wrote that:

We have also saved 06/28/21 for him in the event workman’s comp does not approve the surgery for Wednesday. I think it is extremely important that his surgery is accomplished expediently as we are taking a risk with permanent loss of function if this surgery is delayed. (CX 1 at 40)

The Claimant underwent Dr. Tuck’s recommended surgery on June 23, 2021. (CX 1 at 41-44). Thereafter, on August 5, 2021, the Claimant reported to NP Schmidt that his lower

extremity pain had resolved and that he desired to return to light duty. (CX 1 at 45) According to additional notes from NP Schmidt dated October 12, 2021, the Claimant did indeed return to light duty in August but had concerns about returning to full duty. In addition, NP Schmidt noted that the Claimant had been “avoiding lifting 50 pound feed sacks.” (CX 1 at 46) On November 22, 2021, the Claimant advised NP Schmidt that he was “ready to get back on the road. He is still concerned about wearing his belt. He has increased his activity at home. He is doing more lifting hay bales.” (CX 1 at 47) Prior to that date, Dr. Tuck had essentially opined on November 1, 2021, that the Claimant’s initial injury of June 1, 2017, was the cause of his eventual need for neurological surgery, and specifically wrote that:

The original injury occurred in 2017 and has continued to worsen with exacerbations in 2019 and 2020 and finally culminating in a full blown rupture in 2020/2021 requiring surgery in June of 2021. (CX 1 at 49)

### **Adjudication**

I note from the outset that I specifically find the Claimant to have been an entirely credible witness. In addition, and as discussed above, I further note that the Claimant’s initial post-injury lumbar MRI of December 5, 2017, reflected a “right foraminal disc herniation at L3-4 contacting the exiting right L3 nerve root.” Following the sole alleged independent intervening cause of October 15, 2020, there was no significant change with respect to the Claimant’s L3-4 spinal level following his lumbar MRI of October 27, 2020. In addition, there is no evidence to suggest that the sole alleged independent intervening cause of October 15, 2020, amounted to unreasonable conduct on the part of the Claimant. Further, the Claimant’s credible testimony is corroborated by the medical records that reflect a return to his baseline post-injury pain level within two or two-and-one-half weeks following the alleged independent intervening cause of October 15, 2020.

I afford substantial weight to the surgical recommendation of Dr. Tuck, authored by her on June 15, 2021, which noted that the Claimant's L3-4 disc abnormality had been seen "at the time of his original injury in 2017." I further note that, although there are some discrepancies in the medical records, the Claimant has, in general, consistently complained of symptoms affecting his right lower extremity and/or thigh.

Given that the alleged independent intervening cause of October 15, 2020, resulted in no appreciable change to the Claimant's L3-4 level, that there is nothing to suggest that his actions on such date were unreasonable under the circumstances, and with substantial weight being afforded to Dr. Tuck's opinions discussed herein, I specifically find that the Claimant has proven, by a preponderance of the evidence, that he is entitled to additional medical treatment, and expenses associated therewith, rendered by or at the direction of Dr. Rebecca Barrett-Tuck and NP Kelsey Schmidt subsequent to October 15, 2020, and that such were a natural consequence of his original compensable injury.

### **ORDER**

Based on the foregoing discussion, including my observation of the witness and his testimony, review of the hearing transcript, the documentary evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find that the Claimant has proven, by a preponderance of the evidence, that he is entitled to the additional medical treatment and expenses associated therewith, rendered by or at the direction of Dr. Rebecca Barrett-Tuck and NP Kelsey Schmidt subsequent to October 15, 2020

The Respondents are ordered and directed to pay benefits consistent with the findings of fact made herein. The Respondents are ordered and directed to pay the Court Reporter's fee within thirty days of billing for such if they have not already done so.

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IT IS SO ORDERED.

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TERRY DON LUCY  
Administrative Law Judge