

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H204215**

RICHARD G. OLIVER, EMPLOYEE

CLAIMANT

**ARK. DEPT. OF ENVIR. QUALITY,
EMPLOYER**

RESPONDENT

**PUBLIC EMPLOYEE CLAIMS DIV.,
CARRIER/THIRD-PARTY ADMIN.**

RESPONDENT

OPINION FILED SEPTEMBER 28, 2023

Hearing before Chief Administrative Law Judge O. Milton Fine II on August 24, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Mark Alan Peoples, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Charles H. McLemore, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 24, 2023, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on July 31, 2023. 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, issue, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. With two additional ones reached at the hearing, they are the following, which I accept:

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1. The Arkansas Workers' Compensation Commission (the "Commission") has jurisdiction over this claim.
2. The employee/employer/carrier/third-party administrator relationship was in place on May 31, 2022, when Claimant sustained a compensable injury to his back.
3. Respondents accepted this claim as compensable and paid medical and indemnity benefits pursuant thereto.
4. Claimant's average weekly wage entitles him to compensation rates of \$408.00/\$306.00.
5. The change-of-physician rules apply in this matter.

Issue

At the hearing, the parties discussed the issue set forth in Commission Exhibit 1.

The following was litigated:

1. Whether Claimant is entitled to additional treatment of his stipulated compensable back injury in the form of a referral to Dr. Kenneth Rosenzweig for the purpose of assignment of an impairment rating.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following amendment at the hearing, read as follows:

Claimant:

1. Claimant contends that he is entitled to medical treatment relative to his work injuries. This is in the form of a referral to Dr. Kenneth Rosenzweig for the purpose of assigning an impairment rating. Claimant's authorized treating physician, Dr. Ali Raja, was the one who made this referral.

Respondents:

1. Respondents contend that Claimant reported having an injury to his low back occurring on May 31, 2022, which Respondents accepted as compensable and provided medical treatment that was reasonable and necessary for that injury.
2. Claimant was provided treatment with Dr. Michael Cassat by Respondents. This treatment was conservative in nature and included an MRI and physical therapy, which Claimant denied gave him relief. He had a stroke prior to the date of injury, and was thus unable to undergo medial branch block injections and a rhizotomy because he was unable to come off of this anti-coagulation medication prescribed for his atrial fibrillation and cerebral vascular accident. Claimant was released at maximum medical improvement on September 27, 2022, by Cassat with zero percent (0%) impairment and no work restrictions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear

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the testimony of Claimant and to observe his 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 has proven by a preponderance of the evidence that he is entitled to additional treatment of his compensable back injury in the form of a referral to Dr. Kenneth Rosenzweig for the purpose of determining whether he should be assigned a permanent impairment rating.

ADJUDICATION

Summary of Evidence

Claimant was the sole hearing witness.

In addition to the Prehearing Order discussed above, the exhibits admitted into evidence in this case were Claimant's Exhibit 1, a compilation of his medical records, consisting of one (1) index page and twenty-three (23) numbered pages thereafter; Respondents' Exhibit 1, another compilation of Claimant's medical records, likewise consisting of one (1) index page and twenty-three (23) numbered pages thereafter; and Respondents' Exhibit 2, forms, correspondence, and other documentation related to this claim, consisting of one (1) index page and nineteen (19) numbered pages thereafter.

Adjudication

Introduction. As the parties have stipulated—and I have accepted—Claimant sustained a compensable injury to his back on May 31, 2022. In this proceeding, he is seeking additional treatment. This would come in the form of an evaluation by Dr. Rosenzweig for the purpose of determining whether and to what extent he has sustained permanent impairment to his back. Claimant was referred to Rosenzweig by Dr. Raja, his current authorized treating physician. He began treating with Raja via a one-time change of physician. Respondents have denied that Claimant is entitled to this evaluation by Dr. Rosenzweig.

Evidence. In the following exchange, Claimant related how his compensable injury occurred:

- Q. You were working for the Department of Environmental [Quality], is that right?
- A. Yes, sir.
- Q. What was your job there?
- A. I was a maintenance technician.
- Q. Describe, and you don't need to go into a whole lot of depth, but basically what did you do?
- A. Lights and plumbing, moving stuff.
- Q. Moving furniture and things like that?
- A. Yes, sir.
- Q. Okay. And you were performing that job May 31 of 2002, correct?
- A. Yes, sir.

Q. You got hurt. What happened?

A. We were moving an entire floor of cubicles downstairs and out the doors and I hurt my back.

Q. It would be because you were into the process of moving one of the cubicles?

A. Yes, and they're big cubicles. There's big filing cabinets, big pieces of cubicles, the big heavy things. They countertops.

Q. You hurt your low back?

A. Yes, sir.

Q. Okay. And nobody tried to say you didn't get hurt on the job?

A. No, sir.

Initially, Claimant was sent to Healthcare Express. The record of his June 1, 2022, visit to that clinic shows that he was lifting heavy boxes at work the previous day. He awoke the morning of his visit with sharp, severe pain in his lower back. Because he had a cardiac ablation scheduled, he could not be given non-steroid anti-inflammatory medication. Claimant declined to undergo x-rays or physical therapy. On a form supplied by Respondents to the clinic and dated June 1, 2022, treating personnel stated that spasms of the paraspinal muscles of the lumbar spine were observed/palpated.

When Claimant first went to Dr. Cassat on June 7, 2022, he reported that the back pain began in the middle of the night after he had "lift[ed] multiple heavy objects." X-rays were negative for any acute process. The doctor assessed him as having "[c]hronic low back pain without sciatica," and gave him a 15-pound lifting restriction.

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Claimant underwent a physical therapy evaluation on June 22, 2022. He was noted to have tenderness to palpation in the right paraspinals. The physical only helped “[a] little bit,” per Claimant.

On July 28, 2022, Claimant underwent a lumbar MRI. The report reads in pertinent part:

FINDINGS:

...

L3-4: Mild diffuse disc bulge indenting the thecal sac without spinal canal stenosis. There is mild left neural foraminal narrowing.

L4-5: Mild diffuse disc bulge indenting the thecal sac without spinal canal stenosis. The disc contacts but does not displace the transiting left L5 nerve root in the lateral recess. There is mild neural foraminal narrowing. There is mild facet arthrosis.

L5-S1: Mild diffuse disc bulge indenting the thecal sac without spinal canal stenosis. A small [illegible word] paracentral posterior annular fissure is noted without protrusion of disc material. There is no neural foraminal narrowing. There is mild facet arthrosis.

...

IMPRESSION:

Mild lumbar spondylosis at the L3-4, L4-5 and L5-S1 levels without significant spinal canal stenosis or neural foraminal narrowing. Disc bulge at L4-5 contacts but does not displace the transiting left L5 nerve root in the lateral recess.

Cassat’s report of his August 9, 2022, visit with Claimant reads:

He returns today to review his lumbar spine MRI which shows some **small disc herniations** [and] considerable foraminal stenosis. **He has fluid in his facets at multiple levels with some degenerative change present. We discussed that this could be indicative [of] an acute exacerbation [of] some facet pathology. Given that he [had] no significant symptoms before his injury this is greater than 50% likely to be**

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causative [of] his symptoms. We discussed medial branch blocks with rhizotomy. He would like to return to work without restrictions which I think is reasonable.

(Emphasis added) The doctor gave him a full-duty release that same day.

Claimant admitted that he sought a release. He testified that he only returned to work because he was threatened with termination. However, he went on what he termed “very limited duty” when he went back to his job for the Department of Environmental Quality:

Q. What kind of work were you doing?

A. Sitting there. I didn’t really do a lot. Just things that, you had the ability you could go around they’d make people report when something needs to be maintained in the building. I would check it and go do it.

Since that time, he has left employment with the State of Arkansas. Claimant sought employment thereafter through a temp agency, but was unsuccessful. He has filed for Social Security disability benefits, based upon his pre-existing cerebrovascular condition.

On September 27, 2022, Dr. Cassat wrote:

Our discussion today was that he continues to have significant axial back pain with activity [and] has failed conservative treatment measures, cannot tolerate anti-inflammatories and is not currently able to go off of anticoagulation [medication] even with bridging for medial branch blocks or a rhizotomy. At this point [I] have no further treatment options for him, he understands this. He will continue to work on being as active, he will follow up with me if he would like to proceed with intervention in the future. He states that he never will get off of anticoagulation [medication] secondary to stroke risk. He is at MMI with 0% permanent impairment rating. He has no work restrictions. He can follow up with me as needed.

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Claimant obtained from the Medical Cost Containment Division of the Commission on December 9, 2022, an order changing his authorized treating physician from Dr. Cassat to Dr. Raja. After Raja's examination of Claimant on December 15, 2022, he stated in pertinent part:

Assessments

1. Low back pain, unspecified – M54.50 (Primary)
2. Other intervertebral disc displacement, lumbar region – M51.26
3. Spondylosis without myelopathy or radiculopathy, lumbar region – M47.816

Review of Radiological Studies:

MRI of the lumbar spine without contrast done 7/28/2022 at UAMS showed mild lumbar spondylosis at L3-L4, L4-L5, and L5-S1 without significant spinal canal stenosis or neuroforaminal stenosis. There is a disc bulge at L4-L5 that contacts but does not displace the transiting left L5 nerve root in the lateral recess.

Treatment

1. Low back pain, unspecified
Clinical notes: I personally reviewed outside records from the referring physician as well as the patient's past medical, surgical, family, family, and social history and current medications in clinic today. I also personally reviewed the patient's radiological images and imaging reports in clinic today and correlated these with the patient's current symptoms and exam findings to formulate the plan of care.

I had a detailed discussion with the patient regarding findings of the history and physical examination and radiological studies. We discussed the need for lifestyle modifications including the need to be careful with no excessive pushing, pulling, bending, weight lifting, strenuous activities and not lifting anything more than 5-10 pounds.

We also discussed management options and plans including surgical versus nonsurgical measures. We discussed the finding of multilevel degenerative changes without definite neural compromise or evidence of a fracture on the patient's most recent

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MRI of the lumbar spine done 7/28/22 and my recommendation not to proceed with any neurosurgical intervention at this time.

Dr. Raja on May 9, 2023, referred Claimant to Dr. Rosenzweig. The reason that he listed for the referral was “[i]mpairment rating.”

According to Claimant, his back condition is so severe at present that he is incapable of putting on his pants. He is unable to run. While he can walk, sometimes for distances of up to two miles, doing so results in his experiencing a lot of pain. He swims as well. Per Claimant, he is attempting to exercise in or to keep trim. The following exchange occurred on cross-examination:

Q. Well, you don’t look very fat; you look pretty thin.

A. I’m gaining a lot of weight in the last year.

Q. How much do you weigh?

A. About 152 pounds.

As alluded to in the medical records, he takes an anti-coagulant, Eliquis, due to his afebrile condition. Because of this, he is unable to undergo pain management procedures such as rhizotomies. He fears having a stroke.

Discussion. Claimant’s testimony is that he wishes to see Dr. Rosenzweig—the physician to whom his authorized treating physician, Dr. Raja, made a referral. I credit this. 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).

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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.*

Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee “such medical . . . services . . . as may be reasonably necessary in connection with the injury received by the employee.” See *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). The claimant must prove by a preponderance of the evidence that the subject medical treatment is reasonable and necessary. *Id.*; *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). In order to prove his entitlement to the requested treatment, Claimant must also prove that it is causally related to his stipulated compensable back injury of May 31, 2022. See *Pulaski Cty. Spec. Sch. Dist. v. Tenner*, 2013 Ark. App. 569, 2013 Ark. App. LEXIS 601. Dr. Rosenzweig has not been asked to merely conduct a records review; it has clearly been evinced that he will physically examine Claimant, with the results of said examination forming at least part of the basis for his

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determination of whether, and to what extent, Claimant has sustained permanent impairment. Such examination is clearly a “medical service,” falling within the purview of § 11-9-508(a). Reasonable and necessary medical treatment includes, inter alia, services employed to diagnose the “nature and **extent**” of a compensable injury. See, e.g., *Ingle v. Hazen Sch. Dist.*, 2023 AR Wrk. Comp. LEXIS 174, Claim No. H204037 (Full Commission Opinion filed May 24, 2023)(emphasis added).

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); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). Dr. Cassat has opined that Claimant’s impairment rating concerning his stipulated compensable back injury should be zero percent (0%). But I note that while the radiologist who signed off on the lumbar MRI report, Dr. Prashanth Damalcheruvu, identified the findings at L3-S1 to be “[m]ild diffuse disc bulge[s],” Cassat termed them “small disc herniations” (Emphasis added) In light of this apparent discrepancy, and in view of Dr. Cassat’s opinion—which I credit—that Claimant’s work-related injury is the cause of his spinal symptoms, an evaluation by Dr. Rosenzweig to determine whether Cassat’s rating assessment was appropriate is warranted. I credit Claimant’s testimony as outlined above concerning his pain and physical problems caused by the back injury. The preponderance of the evidence establishes that the referral of Claimant to Dr. Rosenzweig for this purpose is reasonable and necessary.

CONCLUSION AND AWARD

Respondents are 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. 2002). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge