BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G708197

JOSE PEREZ, EMPLOYEE **CLAIMANT**

SOUTHERN TIRE MART, LLC, EMPLOYER **RESPONDENT**

LIBERTY INSURANCE CORP,
INSURANCE CARRIER/TPA **RESPONDENT**

OPINION FILED JANUARY 26, 2021

Hearing before Administrative Law Judge, James D. Kennedy, on the 8th day of December, 2020, in Little Rock, Arkansas.

Claimant is represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents are represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 8th day of December, 2020, to determine the sole issue of additional medical treatment, specifically a procedure called a "superion procedure" outpatient surgical treatment. A copy of the Pre-hearing Order was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided that the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the within claim and that an employer/employee relationship existed on October 13, 2017, the date the claimant suffered a compensable injury.

The claimant's and respondents' contentions are set out in their respective responses to the Pre-hearing Questionnaire and made a part of the record without objection. The sole witness to testify was the claimant, Jose Perez. The claimant submitted two (2) exhibits of medical records without objection. Claimant's Exhibit One

consisted of forty-one (41) pages and Exhibit Two consisted of ninety-one (91) pages. The respondents submitted one (1) exhibit of medical records, which consisted of three (3) pages, without objection. From a review of the record as a whole, to include medical reports and other matters properly before the Commission and having had an opportunity to observe the testimony and demeanor of the witness, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. That an employer/employee relationship existed on October 13, 2017, the date that the claimant suffered a compensable injury.

3. That the claimant has failed to prove by a preponderance of the credible evidence that the medical treatment which he requested and that consists of the "superion procedure" is causally related to and reasonably necessary for the treatment of the compensable work-related back injury. Consequently, the treatment is denied.

4. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The claimant, Jose Perez, testified that he was forty-eight (48) years old at the time of the hearing and has a fourth-grade education obtained in Mexico. (Tr. 6) The claimant admitted that the respondents had paid some benefits due to his injury that occurred while working on a service truck, when he injured his back while moving a large tire. (Tr. 7, 8) The claimant admitted that, at the time of the previous hearing, he had been treating with Doctor Olaya, and had been referred by Doctor Qureshi, who worked in the same clinic. (Tr. 9) The claimant testified that he had been having pain in his lower back and had been laid off from his work. (Tr. 10) He further stated that he had been having pain every

single day since his injury and had trouble sleeping. He was questioned if the pain was a dull pain or an aching pain like a toothache and he stated that it was worse. "The - - Like when I lay down, it helps me, but if I start moving or standing a lot, it hurts so hard, it's get so hard they - - it's very hard. I mean, that's still with the medication I can't standing much…And I walk - - When I walk, you know, I try - - I walk a little bit, but several times I have to sit down. That's from the point that they hurt." He went ahead to state that he was hoping that the treatment recommended by Doctor Olaya would get him back to work, because he needs to work. (Tr. 11, 12) The claimant stated that he had received some injections, but they did not work and Doctor Olaya had mentioned the surgery. (Tr. 13)

Under cross examination, the claimant admitted that the awarded pain management from the earlier hearing did not help him. The current pain medication he was taking also was not helping. (Tr. 14) When asked, "So you don't need these medications anymore," his response was:

> Well I need to have something to help me - - I need something to help me for this pain, because the medication that he give me, the pain is so stronger I can't work. That's why I haven't work since May because it gets to the point that I can't stand much or when I bend it or move it, it's give me so hard that the medication - - I need something big, better, because they don't help. It's so - - the pain so strong, and the medication, I don't feel like it help me enough for this pain. (Tr. 15)

He went on to state that he takes the medication every day. (Tr. 15) He was specifically asked why he continued taking the medication if was not doing him any good and was causing him problems, and he stated, "They - - they - - He been waiting to hear to change it because he wait a long time ago and they not approve it. He's been waiting to figure out what's going on, because he - - he requested for y'all to change to the - - something else going and they not approve it, so we're waiting to see what's going on." (Tr. 16) In

regard to the medication he was taking, he admitted to taking Tylenol, oxycodone twice a day, meloxicam once a day, and Belbuca every twelve (12) hours. (Tr. 17) He also admitted taking these medications for three (3) years. The claimant denied he was addicted to opiates when asked. (Tr. 18)

The claimant testified under further cross examination that after leaving the respondents, he had worked at the Microtel Motel cleaning and then gone to work in a restaurant washing dishes. He stated that he had to leave work at 5:00 p.m. due to his back pain and denied being laid off due to Covid-19. (Tr. 19) He quit the restaurant in May due to the pain and had not worked since. (Tr. 20) The claimant was also asked about the specialty of Doctor Olaya, who is an anesthesiologist, and why he did not want the doctor who was going to perform the surgery to be a surgeon. The claimant responded that he did not understand the question, but that Doctor Olaya was the doctor who gave him the injections. He guessed that either Doctor Olaya or Doctor Qureshi, the doctors in Little Rock, were the doctors that were going to perform the surgery, which involved a superion. (Tr. 21) The claimant admitted that he did not know what a superion was.

The claimant was questioned about an MRI dated October 31, 2017, which showed the L3–4 disc and provided that the disc at that level was normal, with mild ligamentum flavum hypertrophy, and why would he need surgery on the disc. The claimant responded that, “Well, it’s the same thing I had, sir, same pain. I mean, I’m not a doctor. You know, I have pain. I’ve had it since I had the accident.” (Tr. 23) The claimant was also questioned about an MRI dated June 5, 2020, which showed a shallow disc osteophyte, no disc protrusion, and no canal stenosis, and why he would require a

superion at L3–4, when there was no stenosis there to fix. The claimant again referred to the pain and that he had the same trouble with the pain since the accident. (Tr. 24, 25) In regard to being laid off by the respondent, the claimant testified he thought that he had been laid off maybe a year after the accident, in maybe February or March 2020. (Tr. 27)

Under redirect examination, the claimant testified the location of his pain was in the same place that it was back in 2017, and that he had seen Doctor Olaya multiple times. (Tr. 29)

The claimant was then questioned under recross and asked if he realized that after the accident and even before the prior hearing, he was released to full duty with no permanent impairment and that he returned to work. The claimant responded that he had tried to work. (Tr. 30, 31)

The claimant's Exhibit One provided that the claimant had received a lumbar epidural steroid injection on April 5, 2018, from Doctor Olaya, due to a diagnosis of lumbar radiculopathy, lumbar degenerative disc disease, lumbar disc herniation, and lumbago. (Cl. Ex. 1, P. 1) On May 2, 2018, the claimant presented to the Arkansas Spine and Pain Clinic and Doctor Olaya, with low back pain that was intermittent and with sudden onset. The pain was aching, pressure-like, sharp, throbbing, and radiated to the back. The claimant was prescribed hydrocodone, acetaminophen, Robaxin, and Medrol. (Cl. Ex. 1, P. 2 – 5) The claimant returned to Doctor Olaya on May 30, 2018, and was instructed to use the pain medications directly as prescribed. (Cl. Ex. 1, P. 6 – 10) On November 1, 2018, the claimant received another bilateral sacroiliac joint injection by Dr. Olaya. (Cl. Ex. 1, P. 11) He received another lumbar epidural steroid injection on February 14, 2019, with the diagnosis of lumbar radiculopathy, lumbar spondylosis and lumbar degenerative

disc disease. (Cl. Ex. 1, P. 12) Two (2) weeks later, the claimant again returned for another lumbar epidural steroid injection on the date of February 28, 2019. (Cl. Ex. 1, P. 13) Approximately seven (7) months later on September 5, 2019, and also on September 12, 2019, the claimant again returned to Doctor Olaya for lumbar facet medial branch blocks, with a post-operative diagnosis of lumbar facet arthropathy, lumbar spondylosis, and lumbar facet arthropathy. (Cl. Ex. 1. P. 14 – 17) On October 24 and October 31, 2019, and later on May 7 and May 14, 2020, the claimant again presented to Doctor Olaya for caudal epidural steroid injections. (Cl. Ex. 1, 18 – 21) Also on May 14, 2020, the claimant received another lumbar facet medial branch block by Doctor Olaya. (Cl. Ex. 1, P. 22, 23)

On June 5, 2020, the claimant presented for an MRI. This report provided there was minimal spondylosis without spinal canal stenosis with minimal right neural foraminal stenosis at L3–4. The report further provided a left hemisacralization of L5 with pseudoarthrosis and likely congenital, mild L5–S1 disk space narrowing, and mild dextroscoliosis. (Cl. Ex. 1, P. 24, 25)

On July 15, 2020, the claimant presented for a follow-up to Doctor Olaya. The report provided under assessment and plan that the claimant had chronic pain syndrome with lumbar axial pain and with a limited range of motion. The report further provided that the claimant was currently taking Belbuca, oxycodone, and meloxicam. (Cl, Ex. 1, P. 26 – 31) The claimant returned to Doctor Olaya on September 9, 2020, still with a complaint of low back pain with sudden onset. (Cl. Ex. 1, P. 32 – 37)

On October 14, 2020, the claimant's representative contacted Doctor Olaya in reference to a new procedure referred to as "superion", requesting what was involved

with the procedure and why the procedure was recommended for the claimant. (Cl. Ex. 1, P. 38) On November 26, 2020, Doctor Olaya issued a letter that provided that the claimant needed the superion procedure because it was a proven technique that was very effective in the treatment of foraminal stenosis, ligamentum flavum hypertrophy and spinal stenosis. Superion was covered by Medicare and Medicaid.

> I can attest that this procedure is effective based on the results that I have had with my patients. I had the privilege of performing the first superion procedure in the state of Arkansas on April 13, 2018. Since then, I have performed this procedure on 93 separate occasions with positive results correcting the painful neuropathic pain these conditions trigger…Mr. Jose Perez had an accident during his working hours when he and a co-worker were carrying a very heavy truck tire. His co-worker lost the grip of the tire and Mr. Perez had to hold the tire by himself. Shortly after, he felt a "pop" in his lumbar area. This caused the injury that he has been suffering with ever since…The last lumbar MRI dated 6/05/2020, showed minimal spondylosis, minimal right neural foraminal stenosis and mild degenerative changes at L5–S1. (Cl. Ex. 1, P. 39, 40)

The claimant's Exhibit Two consisted of the transcript of the hearing held in this matter on January 19, 2019, as well as the documents that were made part of the record. The exhibit consisted of ninety-one (91) pages. In a review of the medical that was introduced into the record of the transcript that was made part of the record of this hearing, the claimant presented to the White County Medical Center with the complaint of low back pain on October 13, 2017. The discharge provided for sciatica and back pain, and the patient was discharged home in a wheelchair. A three view lumbar spine series provided no fracture or subluxation. (Cl. Ex. 2, P. 1 – 6)

On October 23, 2017, the claimant presented to Sherwood Urgent Care. The report provided that the posture of the claimant was abnormal with an abnormal back examination. Under assessment, the report provided that the claimant had a sprain of ligaments of the lumbar spine. Under discharge, the report provided that the claimant

should not lift over five (5) pounds at any time and there should be no twisting, bending, stooping or straining. (Cl. Ex. 1, P. 7 – 11) The claimant returned to Sherwood Urgent Care on October 31, 2017. The claimant presented with back pain. Under assessment, the report provided that the claimant remain off work and return for a recheck on Friday, with no strenuous activity. (Cl. Ex. 1, P. 12 – 15) The claimant presented for an MRI on the same date. Under impression, the MRI report provided there was an annular tear within a central protrusion involving the L4–L5 disc without mass effect on the nerve roots. Mild facet degenerative changes were seen throughout the lumbar spine. There was no evidence that canal or neural foraminal stenois was noted. (Cl. Ex. 1, P. 16, 17) An MRI of the sacrum was also obtained on October 31, 2017. The report provided under impression that no acute sacral abnormality was noted. There was a Grade 1 muscle strain involving the gluteus maximus. (Cl. Ex. 1, P. 18) Claimant returned to Sherwood Urgent Care on November 9, 2017, and the report provided under assessment that the claimant was suffering from a sprain of the ligaments of the lumbar spine and that the claimant was discharged with instructions of no twisting, bending, stooping, or straining and to not lift over five (5) pounds at any time. (C. Ex. 1, P. 19 – 22) Claimant returned to Sherwood Urgent Care on November 20, 2017. Under the assessment, the report provided that after reviewing the MRI, it was suggested that the claimant see orthopedics to look at the images of an annular tear. (Cl. Ex. 1, P. 23 – 25)

On November 27, 2017, the claimant presented to the Arkansas Spine and Pain Center and Doctor Qureshi with a complaint of low back pain, and the report provided that the referral was for pain management. The report mentioned pain in the lower back and shoulders. Palpation of the lumbar facet revealed tenderness on both sides at L3–

S1 region, and pain was noted over the lumbar intervertebral spaces. The claimant was diagnosed with myofascial pain syndrome, bilateral sacroilitis, and lumbar degenerative disc disease. The claimant was prescribed Tylenol-Codeine. (Cl. Ex. 1, P. 26 – 29)

On January 4, 2018, the claimant again presented to the Arkansas Spine and Pain Center and Doctor Qureshi. The report provided that the claimant would be referred to neurosurgery for a surgical opinion, as he had an annular tear in his disc and had pain directly over that area. (Cl. Ex. 2, P. 1 – 5) The claimant again presented to the Arkansas Spine and Pain Center on February 5, 2018. Tenderness at the thoracic paraspinal muscles and facet joint lines were noted. Palpation of the lumbar facet revealed tenderness on both the sides at L3–S1 region, and pain was noted over the lumbar intervertebral spaces on palpation. Palpation of the bilateral sacroiliac joint areas revealed right- and left-sided pain. Anterior lumbar flexion caused pain. The claimant again did not bring his pills for a count, and he again promised to bring them next time. (Cl. Ex. 2, P. 6 – 10) The claimant again returned to the Arkansas Spine and Pain Center on March 7, 2018. Pain was described as a four (4) on a 1-10 scale. The medical review in the report appeared to be identical to earlier reports at the Center. (Cl. Ex. 1, P. 11 – 14) On April 5, 2018, the claimant received a lumbar epidural steroid injection at the Central Arkansas Surgery Center. (Cl. Ex. 2, P. 15)

On July 26, 2018, the claimant presented to Doctor Carlos Roman. The report mentioned the earlier MRI had “demonstrated basically a normal exam.” Further, the report provided, “There was a small central disc protrusion at L4–5 without a mass effect on any of his nerve roots. There was no stenosis. There were some mild facet changes compatible with his age and a small annular tear. He was then referred to Arkansas Spine

and Pain, where he underwent evaluation and had several injections including some trigger point injections done." The report went on to conclude that:

> The main issue here is he had a lumbar sprain. I see no indication for further procedures. He is obviously not a surgical candidate. He has gone through physical therapy. He has overmedicated. They put him on way too much opiates. He has been on those way too long and obviously has developed some habituation to them […] My plan would be to address his opiate dependency […] I will see him back in about four weeks and see if we can get this gentleman off his medications and find other modalities to control pain while he continues to work. As it pertains to his injury, the impairment rating would be 0% and he would not require long term use of medication. I may look at doing some gluteal bursa injections when he comes back, but he does not need chronic treatment for this injury for a lumbar sprain. (Resp. Ex. 1, P. 1, 2)

The respondents submitted one (1) exhibit, which consists of three (3) pages and was admitted into the record without objection. An MRI report dated October 31, 2017, provided under findings that the sacral segments demonstrate normal contour, signal and alignment. No sacral fracture was seen. The SI joints were symmetric and there were no erosive changes noted. There was increased signal seen in the right gluteus musculature, likely representing gluteus strain. Under impression, the report provided that no acute sacral abnormality was noted. There was a Grade 1 muscle strain involving the gluteus maximus. (Resp. Ex. 1, P. 1) An exam description dated October 31, 2017, provided that in regard to alignment, normal lordosis was maintained and there was evidence of spondylolysis or listhesis. The vertebral bodies were normal in height and signal. The L4-L5 disc was degenerated. At L1–2, no disc bulge or protrusion was present. Mild facet degenerative changes were seen. There was no canal or foraminal narrowing. At L2–3, mild facet degeneration was noted. There was no disc bulge or protrusion, canal or foraminal narrowing. At L3–4, the disc at this level was normal. Mild ligamentum flavum hypertrophy was noted. At L4–5, a small focal central protrusion was

seen at this level with a central annular tear. There was no mass effect on the adjacent nerve roots. The facet joints showed mild degeneration. At L5–S1, rudimentary disc was noted at this level. There was no canal or foraminal stenosis and the visualized paraspinal soft tissues appeared normal. The report provided under impression an annular tear within a central protrusion involving the L4–L5 disc without mass effects on the nerve roots. There were no mild facet degenerative changes seen throughout the lumbar spine. No neural foraminal stenosis was noted. (Resp. Ex. 1, P. 1 – 3)

DISCUSSION AND ADJUDICATION OF ISSUES

In the present matter, the parties stipulated that the claimant sustained a compensable injury on October 13, 2017. The claimant is therefore not required to establish "objective medical findings" in order to prove that he is entitled to additional benefits. Chamber Door Indus., Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

However, when assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation filed December 13, 1989 (Claim No. D512553). The respondent is only responsible for medical services which are causally related to the compensable injury. Treatments to reduce or alleviate symptoms resulting from a compensable injury, to maintain the level of healing achieved, or to prevent further deterioration of the damage produced by the compensable injury are considered reasonable medical services. Foster v. Kann Enterprises, 2009 Ark. App. 746, 350 S.W.2d 796 (2009). Liability for additional medical treatment may extend beyond the treatment healing period as long as the

treatment is geared toward management of the compensable injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 180 S.W.3d 31 (2004).

The claimant bears the burden of proof in establishing entitlement to benefits under the Arkansas Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. Dalton v. Allen Engineering Co., 66 Ark. App 260, 635 S.W.2d 543. Injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Owens Plating Co. v. Graham, 102 Ark. App 299, 284 S.W. 3d 537 (2008). What constitutes reasonable and necessary treatment is a question of fact for the Commission. Anaya v. Newberry's 3N Mill, 102 Ark. App. 119, 282 S.W.3d 269 (2008).

The claimant injured his back in a work-related injury on October 13, 2017, and the claim was accepted as compensable. The claimant continued to suffer from lower back pain. An MRI was performed on October 31, 2017, and the report provided that there was an annular tear within a central protrusion involving the L4–L5 disc without mass effect **on** the nerve roots. The report went on to provide that there was no evidence that canal or neural foraminal stenosis was noted. An MRI of the sacrum was also obtained on the same date and no acute sacral abnormality was noted. A Grade 1 muscle strain of the gluteous maximus was noted. The claimant was referred to the Arkansas Spine and Pain Center and Doctor Qureshi for pain management on November 27, 2017. The report mentioned pain in the lower back and shoulders. Palpation of the lumbar facet revealed tenderness on both sides at the L3–S1 region, and pain was noted over the

lumbar intervertebral spaces. The claimant was diagnosed with myofascial pain syndrome, bilateral sacrolitits, and lumbar degenerative disc disease.

The claimant continued to receive treatment from Doctor Olaya, receiving lumbar epidural steroid injections, facet medial branch blocks, and oral pain medications which included hydrocodone, acetaminophen, Robaxin, and Medrol. The claimant contended he received little relief from his pain. A second MRI was performed on or about June 5, 2020, and the report provided it showed a shallow disc osteophyte, no disc protrusion, and no canal stenosis. More specifically, the report provided that there was minimal spondylosis, without spinal cord stenosis, and with minimal right neural foraminal stenosis at L3–L4. Additionally, the report provided a left hemisacralization of L5 (this is where the bottom lumbar did not fully form or separate from the sacrum during development), pseudoarthritis, and likely congenital mild L5–S1 disc narrowing and mild dextroscoliosis (the abnormal curvature of the spine to the right side of the body).

On November 26, 2020, Doctor Olaya issued a letter that recommended the "superion procedure" for the claimant because it was very effective for the treatment of foraminal stenosis, ligamentum flavum hypertrophy and spinal stenosis.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. Powers v. City of Fayetteville, 97 Ark. App. 251, 248 S.W.3d 516 (2007). Where there are contradictions in the evidence, it is within the Commissions' province to reconcile conflicting evidence and to determine the true facts. Cedar Chem. Co. v. Knight, 99 Ark. App. 162, 258 S.W.3d 394 (2007). The Commission has authority to accept or reject medical opinion and to determine its medical soundness and probative force. Oak Grove Lumber Co. v. Highfill,

62 Ark. App. 42, 968 S.W.2d 637 (1998). However, the Commission may not arbitrarily disregard the testimony of any witness. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004).

In the present matter, the MRI of June 5, 2020, provided no evidence of disc protrusion and no canal stenosis with minimal right neural foraminal stenosis at L3–L4. The MRI further provided that there was left hemisacralization of L5 and congenital mild L5-S1 disc narrowing with mild dextroscoliosis. These findings of hemisacralization and dextroscoliosis appear to be congenital, along with the finding of the claimant suffering from pseudo arthritis. These back issues are not causally related to the compensable work-related injury and consequently, the medical treatment requested, which consists of the "superion procedure", is not causally related and reasonably necessary for the treatment of the compensable work-related injury.

After reviewing all of the evidence, without giving the benefit of the doubt to either party, there is no alternative but to find that the claimant has failed to prove by a preponderance of the credible evidence that the medical treatment which is requested and consists of the "superion procedure" is causally related and reasonably necessary for the treatment of the compensable work-related back injury. Consequently, the treatment is denied.

IT IS SO ORDERED.

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JAMES D. KENNEDY
Administrative Law Judge