

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H202652**

**JOSEPH WAYNE POWELL,
EMPLOYEE**

CLAIMANT

**STRUCTURLAM MASS TIMBER U.S., INC.,
EMPLOYER**

RESPONDENT

**EMPLOYERS INS. CO. OF WAUSAU/
LIBERTY MUTUAL INS. CO.,
INS. CARRIER/TPA**

RESPONDENT

**OPINION AND ORDER FILED FEBRUARY 27, 2024, GRANTING RESPONDENTS'
MOTION FOR AN INDEPENDENT MEDICAL EVALUATION (IME)**

In lieu of a hearing, and pursuant to the parties' mutual agreement, the single issue set forth below was submitted for decision to the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on the record.

The claimant is represented by the Honorable Gary Davis, Gary Davis Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents are represented by the Honorable David C. Jones, Newkirk & Jones Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION AND BRIEF FACTUAL BACKGROUND

The ALJ filed an amended prehearing order on February 26, 2024. In lieu of a hearing the parties mutually agreed to submit the single issue in dispute at this time – namely, whether the ALJ should grant the respondents' motion for a second opinion or IME – for decision based on the record, which is enumerated in more detail, *infra*.

In the amended prehearing order filed February 26, 2024, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including February 4, 2022, when the claimant sustained an admittedly compensable injury to his head and his neck/cervical spine for which the respondents paid medical and indemnity benefits, which included payment for one (1) cervical spine surgical procedure.
3. The claimant's average weekly wage (AWW) is \$744.18 which is sufficient to entitle her to weekly compensation rates of \$496.00 for temporary total disability (TTD) and \$372.00 for permanent partial disability (PPD) benefits.
4. The respondents have to date controverted only the claimant's request for the subject second cervical spine surgery Dr. Gallagher has recommended.
5. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Commission Exhibit 1 at 2). Pursuant to the parties' mutual agreement the sole issue to be decided at this time is:

1. Whether the respondents are entitled to an IME concerning whether the second cervical spine surgical procedure the claimant's treating physician, Dr. Gallagher, has recommended is related to and reasonably necessary in light of the claimant's February 4, 2022, admittedly compensable head and neck/cervical spine injuries.
2. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Comms'n Ex. 1 at 2).

In their motion for a second opinion or IME formally filed with the Commission on January 26, 2024 (the motion for an IME, or the subject motion), the respondents contend they are entitled to a second opinion or IME concerning whether the second cervical surgery Dr. Gallagher has recommended is related to and reasonably necessary for treatment of the claimant's admittedly compensable neck/cervical spine injury of February 4, 2022. (Comms'n Ex. 1 at 3; and *see* respondents' motion).

In his response to the respondents' motion (the response, or the claimant's response) filed with the Commission on February 12, 2024, the claimant contends the respondents are not entitled to a second opinion or IME in this case since, prior to initially taking a position controverting the surgery in question, they requested a utilization or peer review from a Dr. Andrew Jackson, a board-certified orthopedic surgeon associated with MediCall. MediCall is associated with Liberty Mutual Managed Care, LLC, Utilization Management and is based in Wausau, Wisconsin. As the claimant's attorney cleverly, humorously, and correctly points out in the claimant's response to the respondents' motion, Dr. Andrew Jackson shares his name with the seventh (7th) President of the United States (POTUS); however, Dr. Andrew Jackson is not licensed to practice medicine in Arkansas. (Comms'n Ex. 1 at 3; and *see* Exhibit A to the claimant's response). Dr. Jackson has opined that the cervical surgery Dr. Gallagher has recommended is, "non-certified." (*Id.*)

To date it appears from the record, as explained in more detail below, no independent, objective, Arkansas-licensed medical doctor who specializes in the diagnosis and treatment of the cervical spine has as yet had the opportunity to examine the claimant's relevant medical records, or to visit with and personally examine Dr. Gallagher's proposed second cervical spine surgery in order

to opine whether the proposed surgery is related to or reasonably necessary in light of the claimant's admittedly compensable February 4, 2022, head and neck/cervical spine injuries.

The record herein consists of the following documents: (1) the amended prehearing order filed February 26, 2024, marked as Comms'n Ex. 1; (2) the respondents' motion for a second opinion or IME, and the medical records attached thereto as Respondents Exhibit 1; (3) the claimant's response to the respondents' motion, and the medical exhibit attached thereto as Claimant's Exhibit 1A; and the respondents' reply email dated Tuesday, February 20, 2024.

DISCUSSION

Ark. Code Ann. §11-9-511(a) (2023 Lexis Replacement) states:

An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the Commission may require from time to time *if reasonable and necessary*.

(Emphasis added). And *see, e.g., Diggs v. Cattlemen's Livestock Mkt., Inc.*, 2009 Ark. App., 306 S.W.3d 20 (2009). Consequently, the Act and relevant precedent make it abundantly clear the ALJ has the authority pursuant to the aforementioned statute to grant a party's – or the parties' – request, or requests, for an IME; and/or to order an IME on his own initiative if the ALJ deems the IME to be, “reasonable and necessary” under the circumstances of a particular claim.

In this case, I do find that an IME with an independent, objective, Arkansas-licensed physician is not only reasonable and necessary on these facts, it will serve to provide more details, and a helpful if not necessary – additional perspective concerning the proposed surgery in question.

The claimant contends the respondents are not entitled to a second opinion or an IME since

Dr. Andrew Jackson has deemed Dr. Gallagher's proposed surgery to be, "non-certified." However, while a physician associated with the respondents' own utilization management company reviewed medical records and determined from them that Dr. Gallagher's proposed second cervical spine surgery does not meet the respondents' certification standards may give the respondents' a cognizable reason to question and/or controvert the proposed surgery, such a utilization review in and of itself is insufficient on these facts to assist in informing either party or the Commission – specifically, the ALJ herein – concerning whether Dr. Gallagher's proposed second cervical spine surgical procedure is either related to or reasonably necessary in light of the the claimant's compensable neck/cervical spine injury.

Indeed, as the respondents' attorney points out in his email reply of February 20, 2024, it appears from the medical records contained in RX1 the claimant has a history of past cervical spine and related problems that no independent, clearly objective Arkansas-licensed physician has yet had an opportunity to review and consider in light of Dr. Gallagher's recommendation for a second cervical spine surgery. These facts and the applicable law compel me to find that a new, independent, objective, Arkansas-licensed cervical spine specialist's review of the claimant's relevant medical records, as well as a new physician having the opportunity to visit with and conduct an in-person examination of the claimant for the purpose of providing an independent, objective opinion as to whether the second cervical spine surgery the claimant's chosen physician, Dr. Gallagher, has recommended is related to and reasonably necessary in light of the claimant's admittedly compensable head and neck/cervical spine injuries of February 4, 2022, is not only reasonable and necessary on these facts and the totality of the record herein, it is also in the very

best interest of the claimant. And it may very well provide the respondents the additional information they require to make an informed decision based on the applicable Arkansas workers' compensation law – and not a peer review/utilization management medical records review that only addressed whether the proposed surgery met the respondent's certification review standards – as to whether the proposed surgery is related to and reasonably necessary in light of the claimant's admittedly compensable injury. Finally, it will definitely serve to help assist and inform the Commission as to whether the recommended surgery complies with the applicable legal standard and, significantly, whether it is more likely than not to be beneficial to the claimant rather than ineffective – or even harmful to him.

In this claim the ALJ is well within the rather broad discretionary authority the Act provides to order an IME in cases such as the one at bar. Therefore, for all the reasons set forth above, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this claim.
2. The stipulations to which the parties agreed are set forth in the amended prehearing order filed February 26, 2024, and hereby are accepted as facts.
3. The respondents' motion for an IME is GRANTED pursuant to the Commission's authority to order an IME(s) as set forth in *Ark. Code Ann.* § 11-9-511. I specifically find an IME to be both reasonable and necessary since it will allow an independent, objective, Arkansas-licensed physician and spine specialist to render what is in essence a second opinion for the edification and benefit of both the claimant and the respondents.
4. I find Dr. Zachary Mason, a neurosurgeon, to be an appropriate physician to perform an IME in this case. Therefore, subject to his agreeing to conduct an IME herein I hereby appoint Dr. Zachary Mason, a neurosurgeon with Neurological Surgery Associates, 5201

Northshore Drive, Suite 100, North Little Rock, Arkansas 72118 as the IME physician. Moreover, I respectfully request Dr. Mason agree to be the IME physician herein, and that he examine any and all relevant medical records including, but not limited to, diagnostic films, and any other relevant test results relating to the claimant's cervical spine condition, and to personally visit with, examine, and evaluate the claimant's current cervical spine condition in order to determine whether the proposed second surgical procedure Dr. Gallagher has recommended is related to and reasonably necessary in light of the claimant's admittedly compensable injury of February 4, 2022.

5. This IME shall in all respects be governed by and conducted in accordance with the applicable provisions of Arkansas law set forth above in Paragraph 3 of these "Findings of Fact and Conclusions of Law". The parties shall submit a copy of this IME order to Dr. Mason, along with any and all relevant medical records including but not limited to the original media of any and all relevant diagnostic test results, as well as any and all other relevant medical records or other documents, if any, they want Dr. Mason to review in order to inform and render his opinion herein.
6. The parties shall in all respects cooperate in scheduling the date and time of the IME with Dr. Mason, and in providing Dr. Mason with copies of all the records set forth in the immediately preceding Paragraph 5.
7. If for some reason Dr. Mason is unavailable and/or unwilling to conduct the IME, the parties shall communicate and attempt to agree on an Arkansas-licensed orthopedic surgeon or neurosurgeon who specializes in the diagnosis and treatment of cervical spine conditions to conduct the IME.
8. If the parties are unable to agree on a physician, they shall jointly agree on and submit a list containing the names of four (4) physicians who have the qualifications and expertise as set forth in Paragraph 6, *supra*, and the ALJ will choose an IME physician from the parties' list.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge