

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G904646

IRA POLLINS,
EMPLOYEE

CLAIMANT

UNION COUNTY HIGHWAY DEPARTMENT,
EMPLOYER

RESPONDENT

ASSOCIATION OF ARKANSAS COUNTIES
WORKERS' COMPENSATION TRUST,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED FEBRUARY 5, 2021

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an **OPINION AND ORDER FILED AUGUST 7, 2020 GRANTING THE CLAIMANT'S MOTION FOR AN INDEPENDENT MEDICAL EVALUATION (IME)**. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

The parties have stipulated that the employment relationship existed at all relevant times, including March 18, 2019. The parties have stipulated that Ira Pollins, now age 55, "sustained compensable injuries to his right

arm and right shoulder” on March 18, 2019. According to the record, the claimant treated at SAMA Healthcare on or about March 19, 2019: “The patient is a 53 year old male who presents for a Work Related (“WR”) visit. The problem is described as a joint injury (Right shoulder). Date of occurrence: (03/18/2019). The problem is a worker’s compensation claim....Patient was changing a big tire on a diesel and felt something pop in his shoulder.” An APRN assessed “Rotator cuff disorder, right.”

Dr. Kenneth Gati began treating the claimant on April 26, 2019 and diagnosed “Strain of muscle(s) and tendon(s) of the rotator cuff of right shoulder, initial encounter.” An MRI of the claimant’s right shoulder was taken on May 14, 2019 with the following impression:

1. Mild to moderate supraspinatus and infraspinatus tendinosis with small foci of predominantly intrasubstance tearing at the tendon insertions. There is no full-thickness rotator cuff tear.
2. Mild glenohumeral joint osteoarthritis with small joint effusion and mild increased signal in the superior labrum which may reflect labral degeneration. No discrete labral tear is visible on this nonarthrographic exam.
3. Mild intra-articular biceps tendinosis. Increased fluid in the bicipital sheath may be related to the fluid in the glenohumeral joint or could reflect tenosynovitis.
4. Small amount of fluid in the subacromial – subdeltoid bursa suggesting mild bursitis.
5. Moderate acromioclavicular joint osteoarthritis, exerting mild mass effect on the subjacent supraspinatus myotendinous junction.

Dr. Gati performed surgery on August 29, 2019: “1. Right shoulder arthroscopic extensive debridement. 2. Right shoulder arthroscopic distal

clavicle resection of 1 cm.” The pre- and post-operative diagnosis was “1. Right shoulder rotator cuff strain, initial evaluation. 2. Right shoulder degenerative joint disease of the acromioclavicular joint. 3. Right shoulder bursitis.” Dr. Gati arranged and provided follow-up treatment after surgery.

On or about September 4, 2019, the claimant responded to a pre-hearing questionnaire. The claimant contended, “The Claimant’s AWW will be determined by the contract of hire, wage records and Arkansas law. The Claimant contends that he sustained injuries to his right arm and right shoulder in the course and scope of his employment on March 18, 2019 while pulling a tire from a truck. The Claimant is under the treatment of Dr. Gati. Claimant was released to light duty and was terminated by the respondent employer on July 11, 2019. Claimant contends that he is entitled to TTD from July 11, 2019 to a date yet to be determined, continued medical care and treatment, payment of medical expenses, out of pocket expenses, mileage and attorney’s fees. All other issues are reserved.”

The parties stipulated that the respondents “paid medical and temporary total disability benefits.” The respondents contended on September 5, 2019, “This respondent will assert the following defenses: This claim was accepted and all appropriate benefits are being paid. Nothing has been controverted. All medical has been paid. The claimant

has been paid TTD at all appropriate times, including July 11, 2019 to the present. No attorney's fee is owed."

Dr. Gati reported on November 6, 2019:

The patient returns today for follow up. There has been improvement in the symptoms since the last visit.

Arthroscopy shoudler (sic) with debridement. Arthroscopy distal clavicle resection shoulder (SAD). RT SHOULDER PAIN....

He'll finish his outpatient physical therapy and continue with a home exercise program. At this point we'll allow him to work as tolerated without restriction. Based on exam today he is at MMI with no permanent impairment. The patient is instructed to return if pain or symptoms arise.

On or about December 27, 2019, the claimant filed a **MOTION FOR INDEPENDENT MEDICAL EXAMINATION**. The claimant stated, among other things, "5) The Claimant respectfully requests that the Commission Order an Independent Medical Examination with Dr. Barry Baskin, or another independent physician as chosen by the Commission, to have the Claimant's permanent physical impairment evaluated." The respondents objected to the claimant's motion for an independent medical examination.

An administrative law judge subsequently entered an **ORDER FOR INDEPENDENT MEDICAL EXAMINATION (IME) FILED FEBRUARY 5, 2020**. The administrative law judge found in part:

1. Pursuant to the Commission's authority to order an IME(s) as set forth in ***Ark. Code Ann.*** §11-9-511 (2019 Lexis Replacement), I hereby order an IME with Dr. Barry Baskin, 9501 Baptist Health Drive, Suite 800, Little Rock, AR 72205, to determine:

(a) The extent of the claimant's permanent anatomical impairment for his right shoulder injury, if any, based upon objective findings and the ***American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment*** (6th Edition).

The respondents appealed to the Full Commission.

In an opinion filed March 4, 2020, the Full Commission vacated the administrative law judge's order and remanded for proper findings of fact and conclusions of law based on a sufficient record. Also on March 4, 2020, the claimant submitted an amended response to the pre-hearing questionnaire. The claimant contended, "The Claimant contends that he is entitled to an Independent Medical Examination as per the Motion for Independent Medical Examination and the Order entered pursuant thereto. The Motion and Order are attached hereto and incorporated by reference."

An amended pre-hearing order was filed on June 26, 2020.

According to the pre-hearing order, the parties contended the following: "The claimant contends the ALJ had the authority to and properly granted his motion for an IME on these facts to determine whether he has sustained any permanent anatomical impairment. The claimant contends the ALJ's granting of his motion was proper, supported by the applicable law and the facts of this case, and that the Full Commission should uphold the ALJ's IME Order granted herein. The respondents contend the ALJ erred in granting the claimant's motion for an IME based on the facts of this case."

The parties agreed to litigate the following issues:

1. Whether on these facts the ALJ erred in granting the claimant's motion for an IME over the respondents' objection thereto.
2. The parties specifically reserve any and all other issues for future litigation and/or determination.

An administrative law judge filed an opinion and order on August 7, 2020 and granted the claimant's motion for an Independent Medical Evaluation. The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-511(Repl. 2012) provides, in pertinent part:

- (a) 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.

In the present matter, an administrative law judge ordered an Independent Medical Examination on February 5, 2020. The administrative law judge ordered that Dr. Barry Baskin shall evaluate the claimant in order to determine whether the claimant has sustained a permanent anatomical impairment. The respondents appealed to the Full Commission. The Full Commission filed an opinion on March 4, 2020. The Full Commission vacated the administrative law judge's opinion because there was no record for our review.

Following the Full Commission's remand, the administrative law judge and the parties have compiled a limited record for our review. The parties have now stipulated that the claimant sustained a compensable injury to his right arm and shoulder on March 18, 2019. Dr. Gati performed right shoulder surgery on August 29, 2019. The claimant contended on September 4, 2019 that he had sustained injuries for which he was entitled to temporary total disability and medical treatment. The respondents replied that they had provided medical treatment and that they continued to pay temporary total disability benefits. Dr. Gati opined on November 6, 2019 that the claimant had reached maximum medical improvement with no permanent impairment.

The claimant then filed a motion for an Independent Medical Examination. The administrative law judge ordered on February 5, 2020 that Dr. Baskin shall evaluate the claimant for the purpose of assessing permanent anatomical impairment. Following the Full Commission's remand, the administrative law judge filed another opinion on August 7, 2020. The administrative law judge again ordered that Dr. Baskin shall evaluate the claimant for the purpose of assessing permanent anatomical impairment. The respondents again appeal to the Full Commission.

In *Burkett v. Exxon Tiger Mart*, 2009 Ark. App. 93, 304 S.W.3d 2, the Arkansas Court of Appeals held that an administrative law judge improperly

awarded an Independent Medical Examination because the parties “had already litigated their case.” The Court stated, “The plain language of sections 11-9-511(a) and 11-9-811 does not authorize the Commission to, sua sponte, order an IME after the parties have litigated compensability and additional benefits...[W]e hold that the Commission did not err in finding that the ALJ exceeded his authority when he ordered an IME.”

In the present matter, distinctive from *Burkett*, the parties have not “litigated their case.” There has not been adjudication of compensability or additional benefits. The parties have compiled a limited record showing that the respondents voluntarily paid benefits for an admittedly compensable injury. The Full Commission affirms the administrative law judge’s finding that Dr. Baskin may perform an Independent Medical Examination. We find that an Independent Medical Examination performed by Dr. Baskin is reasonably necessary pursuant to Ark. Code Ann. §11-9-511(a)(Repl. 2012). Attorney’s fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded. See Ark. Code Ann. §11-9-715(a)(B)(ii)(Repl. 2012). Because there has not been a controversion or award of benefits in the present matter, the claimant’s attorney to date is not entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012) or Ark. Code Ann. §11-9-715(b)(Repl. 2012).

The Full Commission therefore affirms the administrative law judge's finding that the claimant is entitled to an Independent Medical Evaluation by Dr. Barry Baskin pursuant to Ark. Code Ann. §11-9-511(a)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

M. SCOTT WILLHITE, Commissioner