

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H103439**

JAMES ROGERS, EMPLOYEE	CLAIMANT
MIDAMERICA HOTELS CORP., d/b/a BURGER KING RESTAURANTS, EMPLOYER	RESPONDENT
PREVISOR INS. CO., CARRIER	RESPONDENT

OPINION FILED MARCH 15, 2023

Hearing before Administrative Law Judge O. Milton Fine II on December 16, 2022, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Daniel E. Wren, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 16, 2022, the above-captioned claim was heard in Jonesboro, Arkansas. A prehearing conference took place on October 3, 2022. 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, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. Following an additional one reached at the hearing, they are the following, which I accept:

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer/employee/carrier relationship existed at all relevant times, including the alleged date of injury, April 8, 2021.
3. Claimant's average weekly wage of \$979.57 entitles him to compensation rates of \$653.00/\$490.00.
4. The claim was initially accepted as compensable, with both medical and indemnity benefits paid. However, it was later controverted in its entirety.
5. In the event that Claimant proves his entitlement to indemnity benefits, Respondents would be entitled to an offset under Ark. Code Ann. § 11-9-411 (Repl. 2012) concerning long-term disability benefits that were paid to him in connection with his alleged lower back injury.

Issues

The parties discussed the issues set forth in Commission Exhibit 1. Following a fifth one added at the hearing, the following were litigated:

1. Whether Claimant sustained a compensable injury by specific incident to his lower back in the form of a herniation of L4-5.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits from the date last paid to a date yet to be determined.
4. Whether Claimant is entitled to a controverted attorney's fee.

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5. Whether, in the event Claimant establishes his entitlement to indemnity benefits, Respondents are entitled to an offset under Ark. Code Ann. § 11-9-411 (Repl. 2012) concerning his receipt of long-term disability benefits.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that on or about April 8, 2021, he was preparing sandwiches at the respondent's Burger King restaurant when he felt a sudden pop in his lower back. This caused him to fall to the ground and lose control of his bladder.
2. Claimant has been treated by Dr. Fereidoon Parsioon, and has had an MRI of his lower back. The MRI revealed a right L4-5 paracentral ruptured disc.
3. This claim was accepted, and all benefits were paid until August 13, 2021, when Dr. John Brophy opined that the disc herniation was not related to a work injury.
4. All other issues are reserved.

Respondents:

1. Respondents contend that Claimant's treating physician, Dr. Brophy, determined that Claimant's complaints and need for additional treatment are not related to any claimed work injury. As a result, it is Respondents'

position that Claimant is not entitled to any additional medical or indemnity benefits.

2. Claimant did not sustain a compensable disc herniation at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their 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 sustained a compensable injury to his lower back, in the form of a herniation at L4-5, by specific incident on April 8, 2021.
4. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his compensable lower back injury, including the proposed lumbar fusion surgery and related treatment. Moreover, he has proven by a preponderance of the evidence that all of his lower back treatment on and after April 8, 2021, that is in evidence was reasonable and necessary.

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5. Claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from the date last paid to a date yet to be determined.
6. Claimant has proven by a preponderance of the evidence that his counsel is entitled to a controverted attorney's fee on the indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).
7. In accordance with Stipulation No. 5 and Finding/Conclusion No. 5, Respondents have proven by a preponderance of the evidence that they are entitled, per Ark. Code Ann. § 11-9-411 (Repl. 2012), to an offset concerning long-term disability benefits received by Claimant in connection with his April 8, 2021, compensable lower back injury.

CASE IN CHIEF

Summary of Evidence

The hearing witnesses were Claimant and his wife, Sami Rogers.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation of his medical records, consisting of two abstract/index pages and 38 numbered pages thereafter; and Respondents' Exhibit 1, another compilation of Claimant's medical records, consisting of one index page and 21 numbered pages thereafter.

Adjudication

A. Compensability

Introduction. Claimant has argued that he suffered a compensable injury to his lower back in a specific incident on April 8, 2021, while working for Respondent Burger King. Respondents deny this.

Standards. In order to prove the occurrence of an injury caused by a specific incident identifiable by time and place of occurrence, a claimant must show that: (1) an injury occurred that arose out of and in the course of his employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Id.* This standard 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).

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 Agric. Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The

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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.*

Evidence. Sami Rogers testified that she has been married to Claimant since October 1996. Very shortly thereafter, Claimant went to work for Respondent Burger King. With the exception of a two-year stint in the late 1990s during which he worked for Prestolite, Claimant has worked for the respondent employer. Mrs. Rogers related that in 2019, her husband hurt his back at work. Despite three to four months of physical therapy, his condition did not improve. He ended up seeing Dr. Parsioon, who performed surgery. Thereafter, according to her, Claimant no longer had pain, and was able to resume his normal household duties. At that time, she did not observe him to have any physical limitations. Claimant returned to Burger King in August of 2020. To the extent that Mrs. Rogers was able to observe him while he was on the job, she did not notice him having any problems performing his work duties. He did not have to skip work because of back problems at that time.

Turning to April 7, 2021—the day before Claimant allegedly suffered the injury at issue—Ms. Rogers testified that he closed the store that night. When he came home, she did not observe him to be having any problems. He did not complain of any pain. Claimant opened the Burger King outlet in Paragould the next morning, April 8, 2021. She received a call from him that day. He informed her that he had injured himself again and that he needed to go to the hospital. Because he wanted to go to the hospital

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in Jonesboro as opposed to Paragould, Ms. Rogers picked him up at the Burger King and transported him to the emergency room at St. Bernard Medical Center in Jonesboro. The following exchange occurred:

Q. Where was he having pain and what type of pain was he complaining of?

A. It was in his back and it was exactly like it was before he'd had the first surgery. Pain, burning in his back, burning and numbing down his legs. Exactly the same as before.

No more than 11 days after the alleged incident at work, Claimant returned to Dr. Parsion. As before, Claimant initially underwent physical therapy. But his back problems worsened.

Claimant, who is 47 years old and a college graduate, testified that he was evaluated at a hospital for muscle spasms in his back when he was in the eleventh grade. He has undergone chiropractic treatment in the past.

During the period at issue, he was employed by Respondent Burger King as a store manager. He explained that in this position, he had to be ready to do any job at the location in order to keep the operation running smoothly:

It was the expectation of ownership that we would do whatever it took to make sure our stores were successful. And a lot of times, I call myself "the fireman," because if somebody got behind, I would go put the fire out. I would help them get caught up. I would go and fix whatever the snare was, because the thing with fast food is do it fast. You've got to keep the line moving. When it stops, that's a problem.

His testimony was that in 2019, he hurt his back when he slipped on a wet floor at the store and "fell straight down." He described his symptoms as "[b]urning, numbness, prickly, itching. Various different sensations, but it ached." After physical

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therapy proved unsuccessful in relieving his symptoms, he was referred to Dr. Parsioon. When another round of therapy did not work, the doctor operated. Asked if the procedure worked, Claimant replied:

Apart from the pain of the incision, it was amazing. I started crying, because the pain had left. It was gone. My leg wasn't numb anymore. My ache in my hip was gone. My back was—it felt—it felt amazing.

Prior to this surgery, Claimant kept at his job at Burger King, but with restrictions:

I was not allowed to lift, I believe it was over five pounds. That was the restrictions, but I continued to work. I was on my feet most of the day, just like normal. I did a lot of paperwork and things that would normally wait until I had time to go to the office, but I still worked on the floor. I still expedited, which means I filled orders and got them out to customers. I ran trays out to the tables. I still worked on boards [where sandwiches were assembled]. I still made sandwiches and things like that. I wasn't able to bring product from the freezer out to the floor.

Following the operation, Claimant was off work for about ten weeks. Then, in August 2020, he went back to Burger King and resumed his full role as manager. He was assigned an impairment rating of eight or nine percent to the body as a whole as a consequence of this injury.

Regarding the events of April 8, 2021, Claimant testified that he arrived at the store at 4:50 a.m. He continued working in various capacities. Except for counting the money drawers prior to opening, all of his tasks took place “on the floor” because no other management person was present. At approximately 1:40 to 1:45 p.m., he took over the duties of the sandwich board, an insulated stainless steel workstation approximately 12 feet long where all broiled products of the restaurant were assembled. He related:

I was making sandwiches on the board. I had dropped a bun [into the toaster] and I had to go to the other end to get a . . . wrap and c[o]me back and mark my wrap, because you always mark your wrap while you're waiting on the bun to toast. It saves time. When the bun dropped from the toaster into the tray, I reached—I turned, pivoted at my hips, and reached with my right arm . . . I had to lean. I was too far down the board . . . I felt a pop in my back . . . [i]f you've ever been shocked by an electrical cord or stuck your finger in a light socket, it's a powerful jolt, and I felt that from my back all the way down to the top of my foot. It would be like a strike of lightning hit [descriptive sound] like quick. It was just like that.

Thereafter, Claimant leaned over, and then squatted, in an effort to relieve the tension in his back. But this proved fruitless; his back “started knotting up and cramping.” Two co-workers noticed his movements and asked him if he was okay. His response was that he back was “on fire,” that he was unsure what was wrong. Claimant related that his intention was to continue making sandwiches. However, the co-worker whom he had relieved returned to the workstation. So Claimant went to his office and “tried to collect [him]self, because [he] was scared.” Asked why he had become frightened, he responded: “Because I had felt this pain before . . . [i]n 2019, when I injured my back the first time.” It was at this point that he had noticed that he had accidentally urinated on himself.

It was Claimant's testimony that his symptoms were in the “[s]ame general area”—a palm-sized spot—as that affected in the 2019 incident. The following exchange took place on cross-examination:

- Q. Now you had indicated to me before [during Claimant's deposition] that your back was doing like it did before or felt like it did before?
- A. I was having symptoms that were very close to what I was having before [in 2019], yes.

Per Claimant, he contacted his supervisor, District Manager Amy Ketchum, and informed her that he had hurt his back. When she asked him if an ambulance was needed, he responded that he would have his wife transport him so that he could treat at St. Bernard. While waiting for his spouse to arrive at the store, Claimant filled out an accident report regarding his injury. As he was leaving with her, he “was bent over almost parallel to the ground . . . [unable to] stand up straight. Mrs. Rogers took his arm to support him during the walk to their vehicle, and then helped him get into his seat.

At the hospital, Claimant was transported inside in a wheelchair. He related to treating personnel what had happened. Claimant underwent an MRI. Because a neurologist was not on duty at St. Bernard, Dr. Parsioon was contacted.¹ He was given an off-work slip for three days. While he was at home during that time, he took Ibuprofen, applied ice to his back, and performed the therapy exercises he had been given previously.

Claimant went back to work the following Monday. The day began with his catching up on restaurant paperwork as well as filling orders in the front. However, this changed when his assistant manager had to leave. The following exchange occurred:

Q. Tell me what you had to start doing now?

A. I was filling orders for drive-thru and front counter both at the same time, so there were three of us up front and two in the kitchen. We normally have a first window, a second window, and a bunch of other people, but I was in the middle and I had to fill every single order that was coming through.

Q. And what was your pain like?

¹I note that this is at odds with the record of this visit, which reflects that Dr. Harry Friedman was consulted. *See infra.*

A. It was intense. It was very high.

Claimant alerted his supervisor of this situation and his fear that the restaurant's level of service was suffering. The vice president of company operations, John Echimovich, called him. After being informed that while Claimant had been taken off work for three days, he had been instructed to see Parsioon as soon as possible, Echimovich told him that he had to leave work. Claimant did as he was told; and his testimony was that he has not returned to work there since then.

When Claimant saw Dr. Parsioon, he first underwent conservative treatment in the form of four weeks of physical therapy. Thereafter, the doctor referred him to Dr. Brophy. It was Claimant's understanding that Parsioon did not perform spinal fusions, but that Brophy specialized in them—and that this was the reason for the referral. According to Claimant, after he saw Dr. Brophy, a representative of the respondent carrier called him to inform him that his workers' compensation claim was being denied. Since then, he has returned to Parsioon for a follow-up visit. The following exchange took place on cross-examination:

Q. Have you used [your health insurance] to go back to any doctor in relation to any of these back complaints for treatment?

A. I haven't received treatment from a doctor because I've just been on wait for this [the hearing process] to happen, for us to go through the process of workman's comp.

In turn, the following occurred on redirect:

Q. Do you know if—if you were even to try with Medicaid, if they would pay for your surgery?

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A. I was afraid to ask them for it because I thought that I might get in trouble for fraud by claiming an injury from a previous thing and I knew that there was litigation. So I was hesitant to even ask.

...

Q. Do you want to have surgery?

A. Yes.

Medical Records. The records in evidence reflect that Claimant underwent a lumbar MRI on April 29, 2015, that showed moderate bilateral spondylosis at L4-5. He underwent another MRI on February 11, 2019—the same day that, per his testimony, he hurt his back previously at Burger King. In that instance, the report read in pertinent part:

L4-L5 has bilateral pars defects. Midline to right-sided disc extrusion extending 7 mm superior to the disc space. There is compression of thecal sac. With ligamentous thickening there is moderate stenosis but CSF is still seen surrounding the nerve roots. The right S1 nerve root appears more compressed than the right. Very similar to previous CT. CSF is also bulging. Anteriorly from the pars defect on the left side producing mild effect on the thecal sac. Is also some significant right or left foraminal stenosis. Worse on the right.

...

IMPRESSION:

Extruded disc herniation at L4-5 with compression of thecal sac in the right S1 nerve root.

Another MRI on September 12, 2019, showed:

Redemonstration of diffuse disc bulge at L4-L5 with superimposed central disc extrusion with cranial migration. This mildly narrows the spinal canal. Bilateral neural foraminal stenosis at this level with contact of the exiting bilateral L4 nerve roots.

One performed on March 11, 2020, reflected the following:

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L4-L5: There is broad-based disc bulging at this level with slight superior extrusion of the bulging disc, as well as facet joint hypertrophy. This results in mild to moderate spinal stenosis to 7mm as well as bilateral foraminal stenosis.

. . .

IMPRESSION: Multilevel degenerative changes with spinal stenosis and bilateral neural foraminal stenosis at L4-L5.

On July 9, 2020, Claimant returned to Dr. Parsioon and stated that his leg pain had resolved completely. Only mild lower back pain (which the doctor said was muscular in nature), right hip pain, and numbness in the right knee area remained. The doctor instructed him to undergo four weeks of physical therapy prior to a final evaluation and release from treatment. Thereafter, on August 26, 2020, Parsioon found him to be at maximum medical improvement as of August 20, 2020, and released him. In so doing, the doctor assigned him an impairment rating of eight percent (8%) to the body as a whole. On that date, he was noted to have only “minimal low back pain.”

Following the incident at issue, on April 8, 2021, Claimant presented to St. Bernard Medical Center. The report of his emergency room visit shows that he related to treating personnel that he had been “at work and felt a sudden pop in his low back . . . [w]hich caused him to lose control of his bladder. He had sharp pain that radiated down the right lower extremity.” As part of this visit, he underwent yet another lumbar MRI. The report² thereof reads in pertinent part:

²This report has handwritten notations on it. The Prehearing Order includes the following language:

[T]he parties are advised that exhibits should not be highlighted, underlined, or contain any marginal notations. If exhibits are altered in

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At L4-L5, broad-based diffuse disc bulge with more focal right paracentral and foraminal disc herniation. There is additional central disc component with some superior migration of disc material. There is severe narrowing of the right lateral recess and right neural foramina. There is moderate left neural foraminal narrowing.

...

Impression:

1. Broad-based disc bulge with more focal right paracentral and foraminal disc herniation at L4-5. There is severe narrowing of the right lateral recess and right neural foramina. There is moderate left neural foraminal narrowing.

The emergency room physician, Dr. Jonathan Frego, consulted with Dr. Harry Friedman, who was the neurosurgeon on-call for Dr. Parsioon, and recommended a steroid dose pak and pain control as needed.

On April 22, 2021, Claimant went to Dr. Parsioon, as had been recommended during the aforementioned emergency room visit. Parsioon's report reads in pertinent part:

HISTORY OF PRESENT ILLNESS: This is a 45-year-old gentleman whom I initially saw on February 27, 2020, for evaluation of back and right lower extremity pain after an on-the-job injury on February 11, 2019. I sent him for an MRI of the lumbar spine which showed a lateral ruptured disc at L4/L5. He has since undergone a right lateral L4/L5 microdiscectomy on May 26, 2020. He did very well after surgery with resolution of his symptoms and weakness. He was released to work with regular duties at MMI and an 8% PPI rating based on *American Medical*

any fashion, it will be necessary to substitute those pages before the transcript is prepared. Failure to comply with the above directives may result in sanctions, including the exclusion of the medical records from evidence.

The notations were not discovered until after the record was closed. There is no way for me to determine who made them. I am not permitted to engage in speculation and conjecture. *See Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). For these reasons, I am giving no weight whatsoever to the notations.

Association Guides to Evaluation of Permanent Impairment, Fourth Edition on August 8, 2020.

He has been referred back to me for evaluation of a new on-the-job injury on April 8, 2021, of the back and right lower extremity. He states that on the date of injury he was making sandwiches and turned sideways to pick something up and felt a pop in his back. He started having a burning sensation in the lumbar area. He went to the office and noticed he had wet his pants with urinary incontinence without noticing it; however, he states that was just one episode and has not happened since then.

He went to the Emergency Room in Jonesboro, Arkansas that day. He was evaluated with an MRI of the lumbar spine and told him he has two ruptured discs. Since there was no neurosurgeon on call for the Emergency Room in Jonesboro and I was out of town they apparently talked to Dr. Harry Friedman, who told them to start him on steroids, give him medication, and make an appointment for him to come and see me. Three days later after the injury, he went back to work with limited duties and his boss let him work for two days, but then said that he needed to go home till he sees me since his work restrictions were only for those days. He has not worked since those few days of restricted-duty work.

On today's visit, he is here with his wife. He still has back pain and the burning sensation in the lumbar area. The pain [g]oes down his right lower extremity to the top of his right foot. He states the right lower extremity feels weak to him. He states his pain is severe and increases with activity and long periods of sitting and standing. The only thing that relieves the pain and makes it better is when he lays down in bed. He also complains of some numbness in the lateral aspect of the right thigh, and right lower extremity. He says that the area over the lateral aspect of the right thigh from the hip to the mid thigh itches all the time. He also gets spasms in his lumbar spine. He says his MRI of the lumbar spine was done with-and-without contrast.

Parsioon noted that he did not have a CD of the MRI that had been performed after Claimant's alleged new back injury, nor the records of his April 8, 2021, visit to the emergency room. He performed x-rays, which showed, inter alia, grade 1 spondylolisthesis at L4-5. The doctor opined that this particular condition was "[c]hronic

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and pre-existing, and instructed Claimant to obtain the CD of his MRI along with the emergency room records.

When he went back to Dr. Parsioon on April 29, 2021, Claimant brought the aforementioned items. The report of this visit reads in pertinent part:

REVIEW OF RECORDS: I reviewed this patient's old records that were available to me today.

REVIEW OF STUDIES: I reviewed an MRI of the lumbar spine with-and-without contrast dated April 23, 2021, which showed postoperative changes of the right L4-L5 lateral discectomy with spondylosis, bilateral pars defect, and grade 1 spondylolisthesis at this level. The review seems to show that there is a new ruptured disc over the right paracentral area at L4-L5 level with moderate foraminal stenosis.

I had the previous CDs of his multiple lumbar MRIs in the office and I reviewed all of them today: [Emphasis in original]

I reviewed an MRI of the lumbar spine dated February 11, 2019, which was before surgery. This showed a small right paracentral disc bulge at L4-L5, a lateral ruptured disc on the right side at L4-L5, and spondylosis.

I reviewed an MRI of the lumbar spine March 11, 2020, which showed a small central L4-L5 disc bulge and right lateral L4-L5 ruptured disc without any paracentral component to the disc rupture or disc bulge.

IMPRESSION: 1. Comparing those two MRIs with this recent MRI of April 23, 2021, it definitely looks like he has a right L4-L5 paracentral ruptured disc. This has caused foraminal stenosis for him. **In my opinion, this is a new problem.** [Emphasis added]

A May 13, 2021, electrodiagnostic study showed no evidence of right lumbosacral radiculopathy. Claimant next underwent a lumbar myelogram, along with a CT.

The findings thereof included:

Right L4 pars defect . . . L4-5 spinal canal stenosis. Spinal instability at the L4-5 level with increase in L4 spondylolisthesis on L5 between flexion and extension views of more than 3 mm in upright position. L4 anterolisthesis of up to 9 mm with patient in upright position with flexion,

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compared to supine position . . . [r]ight lateral of posterolateral disc bulge at L4-5. Soft tissue opacity within the right L4-5 neuroforamen that may represent disc material versus epidural scar. Lumbar spine MRI without and with contrast enhancement may add further information.

When Parsioon saw Claimant once more on May 24, 2021, the doctor wrote:

I reviewed a CT myelogram of the lumbar spine with a mixed injection according to the report by the radiologist who performed it. I reviewed the CT myelogram and the report, which showed a pars interarticularis defect at L4-L5 level. There was also spondylolisthesis at L4-L5 level and is apparently with some motion when they did the study in supine position with movement. There was some vacuum disc phenomenon at L4-L5 level. The previous surgery on the right with postoperative changes was seen and also the partial facetectomy. **Again, this in my opinion, just like on his MRI, was suggested that there might be a right L4-L5, paracentral and foraminal disc at this level which may be new. However, because of the mixed injection, previous scar tissue formation, and spondylolisthesis that he has at L4-L5 level, it is very difficult to 100% say that he has this.** [Emphasis added]

Claimant again saw Dr. Parsioon on July 12, 2020. The doctor wrote that the CT myelogram “showed the question of another ruptured disc at the same area on the right at L4-L5 level,” and that the pars defect and the spondylosis that were found are “old.”

He added:

[Claimant] says physical therapy helped some of his pain, but when he walks, he gets back pain which radiates down to the right lower extremity and he has to stop walking. He also complains of some jerky movements in the muscles of the lateral aspect of the right thigh, which is also present on examination today. I believe these are fasciculations. The atrophy of the right leg, which improved almost back to normal after the first surgery, has worsened again, and he has started losing muscle in the right leg and is weak in the right thigh . . . [h]e also complains of numbness in the lateral aspect of the right hip all the way down laterally to the right ankle area.

Parsioon informed Claimant that an epidural block would not help his pain; and that due to his failure to respond to conservative treatment and to the nature of his previous

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surgery, he was now “a candidate for an L4-L5 decompression and fusion.” The doctor recommended that he see Dr. Brophy for this.

Brophy saw Claimant on August 19, 2021. The report of that visit reads in pertinent part:

Neurodiagnostic Assessment

Lumbar MRI, with, and without contrast, dated 8 April, 2021 demonstrates a right paracentral L4-5 HNP extending slightly superior to the disc space. The previous far lateral disc herniation has been removed. There is a possible L4 pars defect. Other levels demonstrate no significant abnormalities. The MRI does not demonstrate definite evidence of spondylolisthesis.

...

Impression:

Chronic back and right lower extremity radicular pain secondary to an L4-5 Grade 1 spondylolisthesis with L4 pars defects and a right paracentral L4-5 HNP.

Plan:

The results of the radiographic studies and clinical situation were reviewed in detail with Mr. Rogers and his family. We discussed the option of continued activity modification, anti-inflammatories and consideration of alternative employment versus a lumbar epidural steroid injection on the right at L4-5. Based on the severity of his pain and his desire to return to work at full activities as soon as possible, he is requesting surgical intervention. The L4-5 posterior lumbar interbody fusion procedure was described . . . **[w]ith regard to causation, in my opinion, the etiology of his disc herniation, and ongoing back pain is related to his pre-existing L4 pars defect and Grade 1 L4-5 spondylolisthesis which is not related to a work injury or work activities. In my opinion, further treatment would be more appropriately handled through his personal insurance.** [Emphasis added]

Claimant’s counsel wrote Dr. Parsioon on October 19, 2022, requesting that he respond to the opinion of Dr. Brophy highlighted above. That reply, which Parsioon authored on November 28, 2022, states in pertinent part:

This is written in response to your letter of October 19, 2022, regarding the above-mentioned individual who is a patient of mine. I reviewed your letter and also reviewed all of his medical records to be able to answer your questions . . . I also was not upset about Dr. Brophy's recommendation, as you know, doctors are entitled to their medical opinion. I was basically disappointed that he did not feel that this was coming from his work injury but, because **in my opinion, this new ruptured disc in his back is definitely related to his new date of injury of April 8, 2021. I still disagree with Dr. Brophy's opinion that this problem is not work related to his new injury, which is evident on the MRI after the new injury.** I still believe that this gentleman needs to have the recommended discectomy and fusion. [Emphasis added]

Discussion. In this case, the evidence is clear that Claimant has objective findings of an injury to his lower back. These findings come from an MRI that took place³ on the alleged date of injury, April 8, 2021, and reflect that Claimant suffered a right paracentral herniation at L4-5.

As for whether this lumbar condition arose out of and in the course of his employment at Respondent Burger King, and was caused by a specific incident that is identifiable by time and place of occurrence, the evidence shows that before the April 8, 2021, incident, Claimant was able to perform the physical requirements of his managerial job without any problems. Mrs. Rogers corroborated Claimant's testimony on this matter. She added that she did not observe him to be having any physical problems when he came home from work the night before the incident in question.

However, this changed the afternoon of April 8, 2021. Around 1:40 to 1:45 p.m., he began working the sandwich board. While performing the duties at this workstation,

³As set out above, Dr. Parsioon twice stated in his April 29, 2021, report that this MRI took place on April 23, 2021. But no MRI report bearing this date is in evidence; and Parsioon does not reference the April 8 report despite his notation that he had

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he pivoted and reached to retrieve a bun that had dropped out of the toaster when he felt his back “pop.” Once the sandwich maker whom he was covering returned to work, Claimant went to his office and called his supervisor to inform her of the injury. He had his wife pick him up at the restaurant and drive him to the hospital. Mrs. Rogers corroborated this. The records of the emergency room visit are in evidence and have been discussed above. I credit the testimony of these witnesses.

A causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). That is certainly the case here.

Respondents have sought to highlight the opinion of one of Claimant’s treating physicians concerning the cause of Claimant’s disc herniation. Dr. Brophy wrote: “[I]n my opinion, the etiology of his disc herniation, and ongoing back pain is related to his pre-existing L4 pars defect and Grade 1 L4-5 spondylolisthesis which is not related to a work injury or work activities.” Taking the opposite tack was Dr. Parsioon, who opined not only was “the new ruptured disc . . . definitely related to [the] new date of injury of April 8, 2021,” but that he disagrees with Brophy regarding this.

Claimant’s radiological reports. Thus, I have concluded that the references are a mere scrivener’s error, and that he was in fact referring to the April 8 report.

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In *Cooper v. Textron*, 2005 AR Wrk. Comp. LEXIS 32, Claim No. F213354 (Full Commission Opinion filed February 14, 2005), the Commission addressed the standard when examining medical opinions concerning causation:

Medical evidence is not ordinarily required to prove causation, i.e., a connection between an injury and the claimant's employment, *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. See, *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

Based on my review of the totality of the evidence, I credit the opinion of Dr. Parsioon over that of Brophy. As the medical records reflect, Brophy saw Claimant on only one occasion: August 12, 2021. Parsioon, on the other hand, has been treating Claimant for years—and has performed spinal surgery on him. Moreover, the opinion of Dr. Parsioon that the work-related incident of April 8, 2021, was the cause of Claimant's herniation comports with the balance of the evidence as discussed *supra*. 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*,

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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).

In making this finding, I am well aware of Claimant's previous back problems. As Respondents pointed out and Claimant acknowledged, the pain that he experienced on April 8, 2021, was in the same area as his 2019 injury—pain that disappeared following his microdiscectomy. But I note that an employer under the Arkansas Workers' Compensation Act takes an employee as the employer finds him. Employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Comm. v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990). A pre-existing infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *St. Vincent Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). "An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury." *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). This includes the prerequisite that the alleged injury be shown by medical evidence supported by objective findings. See *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). Again, objective findings of a new lumbar injury are readily present here.

In summary, the evidence shows that Claimant sustained an injury to his lower back that arose out of and in the course of his employment with Respondent Burger King. The injury aggravated, accelerated, or combined with Claimant's pre-existing

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lumbar spine condition to produce the disability for which compensation is being sought. The injury caused internal or external harm to Claimant's body that required medical services. The injury has been established by medical evidence supported by objective findings. Finally, the injury was caused by a specific incident and is identifiable by time and place of occurrence: his work at the sandwich board station on the afternoon of April 8, 2021. Claimant has, consequently, proven by a preponderance of the evidence that he suffered a compensable lower back injury by specific incident.

B. Medical Treatment

Introduction. Claimant has alleged that he is entitled to reasonable and necessary medical treatment in connection with his alleged lower back injury. Respondents disagree.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the

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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).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after the healing period has ended, if said treatment is geared toward management of the injury. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex, supra*.

Discussion. I find that Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his compensable lower back injury, including the proposed lumbar fusion surgery and related treatment. In so doing, I credit Claimant's testimony that he wants to have this operation. Moreover, I have reviewed his treatment records that are in evidence, and I find that he has proven by a preponderance of the evidence that all of the treatment of his compensable lower back injury that is in evidence—on and after April 8, 2021—was reasonable and necessary.

C. Temporary Total Disability

Introduction. Claimant has also alleged that he is entitled to temporary total disability benefits from the date last paid to a date yet to be determined. Respondents disagree with this.

Standards. The compensable injury to Claimant's lower back is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1).

Evidence/Discussion. During the hearing, Claimant testified that Respondents paid him temporary total disability benefits until around the time Dr. Brophy opined that Claimant's L4-5 herniation and back pain were not work-related. That opinion led to a representative from the respondent carrier calling him to inform him that his workers' compensation benefits would cease. The payment to him of temporary total disability benefits did end at that point.

The evidence establishes that Claimant at that point was still in his healing period—and that he has remained so. Neither Dr. Brophy nor Dr. Parsioon—or any other provider, for that matter—has released him from treatment since that time. The

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last treatment he underwent in connection with his back was with Parsioon on September 16, 2021. The doctor wrote:

From my standpoint, there is nothing else that I can do for him surgically, because again, I do not perform this type of surgical procedure. He had been taken off work by me since April 22, 2021, and **I believe that he needs to stay off work due to the severity of his pain and condition.**

(Emphasis added) As I did regarding the matter of causation (see *supra*), I credit this opinion by Dr. Parsioon.

In making this finding, I note that Claimant's credible testimony on this point corroborates what Parsioon wrote in the above report. According to Claimant, he has not worked anywhere during the period at issue. Ms. Rogers confirmed this. The following exchange took place during Claimant's direct examination:

Q. What's keeping you from working?

A. Pain.

Q. Specifically?

A. The more I move, the more I hurt. When I bend, it hurts. When I try to lift anything, it hurts. Even when my daughter sits on my lap, I have to lean back against the couch for her to lean against me because I can't support her weight. I have a lot of pain in my lower back. I have numbness down my right leg and the more I move and the more I do, the worse that becomes.

Q. Can you sit in one position for a long period of time?

A. No, sir. In fact, right now, it hurts right now just to sit in this chair because I've been sitting there and sitting her and not moving. I have—even when I go to church, I have to get up and walk during the sermon.

Q. Do you still want the surgery [the L4-5 posterior interbody fusion]?

A. Yes, sir.

...

Q. Are you able to do the household chores that you were doing before this incident on April the 8th?

A. We have a riding lawnmower now, and I try to use the riding lawnmower. Before, I used a push mower and a weed eater and all those things. I can sometimes sit in a chair next to the dishwasher and take things from the—from the table, but I can't like lift over my head real high with any kind of weight at all. My arms start shaking. I have difficulty doing pretty much everything.

His wife corroborated this testimony. He added that his back pain keeps him from sleeping well. This discomfort has led him to ration the doses of Tramadol that he has left, saving them for when his pain is especially severe. Otherwise, he takes four to five Ibuprofen tablets at a time.

Claimant has a bachelor's degree in social science. His original intention was to become a teacher and a coach after college. But his education certificate has expired. He worked for Burger King in various capacities. This included being a traveling manager. In this position, he went to franchises owned by the respondent employer in Arkansas, Illinois, Kentucky, and Missouri, training assistant managers and employees. Later, he became a district manager and then a store manager. It was while serving in this latter job that he hurt his back in April 2021. Even when Claimant was working as a district manager, he had extensive physical duties. He related:

There was a lot of overseeing. It also came—we had to clean. We had to scrub walls. We had to do dishes. We were working managers, even the district manager. There was many days where I would be on boards or I would be on a headset. You know, the store manager would have interviews, so I would run her store while she was doing interviews.

As for the store manager position, he testified:

Well, the store managers are responsible for the entire property, from boundary to boundary, on the operations, everything: hiring, firing, scheduling, money, safety procedures, food safety, taking temperatures, ordering trucks, cleanliness. That was huge. Any time somebody didn't do a job, it was up to me to get it done. If we didn't have a porter, I had to find a porter. If we had somebody not show up for truck, I had to unload trucks. You know, it was just whatever was required . . . [i]t was the expectation of ownership that we would do whatever it took to make sure our stores were successful . . . I had to work boards, making sandwiches. I had to work the broiler, cooking food. I had to bring stock in from the freezer into the kitchen to the smaller freezers, boxes of Whoppers, you know, boxes of French fries, frozen product. Those ranged in weight from, you know, two pounds to 40 pounds, depending on what the product was. I had to scrub floors. I had to get on ladders and change lightbulbs. I had to pressure wash outside. I had to take the trash out. If there was a job to be done in that restaurant, I did it.

The physical requirements of being a store manager at Burger King are best exemplified by the fact that Claimant hurt his back while working at the sandwich board—not while doing paperwork.

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where insufficient evidence exists that the claimant has the capacity to earn the same or any part of the wages he was receiving at the time of the injury. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). In *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002), the Arkansas Court of Appeals wrote: “If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total.” The medical evidence recounted above shows that this was the situation here. During the time

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period at issue, Claimant suffered from a total incapacity to earn wages. This is ongoing. Consequently, he has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from the date last paid until a date yet to be determined.

D. Controversion

Introduction. Claimant has asserted that he is entitled to a controverted attorney's fee in this matter.

Standard. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with *See Ark. Code Ann. § 11-9-715* (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

Discussion. The evidence before me clearly shows that Respondents have controverted Claimant's entitlement to temporary total disability benefits. Thus, the evidence preponderates that his counsel, the Hon. Daniel E. Wren, is entitled to the fee as set out above.

E. Offset

As the parties have stipulated—and I have accepted—were Claimant to prove that he is entitled to indemnity benefits, Respondents would be entitled to an offset under Ark. Code Ann. § 11-9-411 (Repl. 2012) concerning long-term disability benefits

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that were paid to him in connection with his alleged lower back injury of April 8, 2021. He has proven not only that this alleged injury was compensable, but that he is entitled to temporary total disability benefits in connection therewith. Thus, Respondents have shown that they are entitled to the offset⁴ as outlined above.

CONCLUSION AND AWARD

Respondents are hereby 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. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge

⁴In *Brigman v. City of West Memphis*, 2013 Ark. App. 66, 2013 Ark. App. LEXIS 73, the Arkansas Court of Appeals held that in situations where both the respondent employer and the Claimant paid a portion of the premium of the policy in question, the respondent employer is entitled to an offset against indemnity benefits owed by them to the extent that they contributed toward the premium.