

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G907985

TERESA SARNO-LISTY, Employee	CLAIMANT
BENTONVILLE SCHOOL DISTRICT, Employer	RESPONDENT
ARKANSAS SCHOOL BOARDS ASSOC. WCT, Carrier/TPA	RESPONDENT

OPINION FILED MARCH 24, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney, Springdale, Arkansas.

Respondents represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On February 10, 2021, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 2, 2020 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed between the parties on November 6, 2019.
3. The claimant sustained a compensable injury to her low back on November 6,

2019.

4. The claimant was earning an average weekly wage of \$364.06 which would entitle her to compensation at the weekly rates of \$243.00 for total disability benefits and \$182.00 for permanent partial disability benefits.

5. Respondents paid benefits through November 2, 2020.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Additional medical treatment as recommended by Dr. Blankenship.
2. Additional temporary total disability benefits.
3. Attorney fee.

At the time of the hearing claimant clarified that she is requesting temporary total disability benefits beginning November 1, 2020 and continuing through a date yet to be determined.

The claimant contends she sustained a compensable injury while working for respondent on or about November 6, 2019. At that time, claimant was in the course and scope of her employment when she injured her low back. Claimant exercised her change of physician and the Workers' Compensation Commission ordered her to see Dr. Blankenship. The current authorized treating physician is Dr. Blankenship, and he has tried conservative measures including steroid injections. Dr. Blankenship has now recommended surgery.

The respondents contend that to the extent the claimant is or was entitled to any workers' compensation benefits, all appropriate benefits have been paid. Respondents deny that the claimant is entitled to additional compensation benefits of any kind after November 2, 2020.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on December 2, 2020 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that the medical treatment recommended by Dr. Blankenship is reasonable and necessary medical treatment for her compensable injury.

3. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 3, 2020 through a date yet to be determined.

4. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant has a history of prior low back pain following motor vehicle accidents. The first motor vehicle accident was in 2009 and the second on June 8, 2016. As a result of the second accident, claimant sought chiropractic treatment from Dr. Scott Van Wilpe beginning on November 14, 2016. Dr. Van Wilpe's medical records were submitted into

evidence and showed that he treated claimant more than twenty times. In his report of March 14, 2017, Dr. Van Wilpe stated that the claimant had indicated:

I feel like I am almost back to normal. I am ready for re-exam.

In his report of March 16, 2017, Dr. Van Wilpe indicated that claimant was reporting a 95 to 99% improvement overall. Finally, in his report dated March 27, 2017, Dr. Van Wilpe stated that claimant still had some mild residual symptomatology but stated that she had reached maximum medical improvement for the injuries she suffered as a result of the motor vehicle accident on June 8, 2016. Claimant testified that after she was released from chiropractic care she was careful with lifting and doing things because she did not want to reinjure her back. She stated that she gradually resumed normal activities such as biking, hiking, and walking. There is no indication that claimant sought any additional medical treatment for her low back after this release by Dr. Van Wilpe until after her injury with respondent on November 6, 2019.

The claimant began working for respondent as a substitute teacher in the Spring of 2017. After some additional training claimant began working for respondent as a paraprofessional in January 2019. As a paraprofessional the claimant worked one on one with students, helping them with lifting, toileting, and daily activities at school.

In November 2019 claimant was working with a student that weighed 47 pounds. That student would arrive at school in a bus in a “star” seat – similar to a booster seat. Claimant was required to get the student out of the “star” seat and put her in a mobilized wheelchair. Claimant was in the process of transferring the student on November 6, 2019, when she was hit from behind by a first grade student.

Q. When you were hit from behind, were you in the act of lifting and twisting?

A. Yes.

Q. Did you have her full weight?

A. Yes.

Q. And what kind of pain or - - what did you feel?

A. The best way to describe it is like a sharp stabbing pain in my back, like below my pant line.

Claimant reported the injury which was accepted by the respondent and sent for medical treatment at MedExpress. A report from MedExpress dated November 6, 2019 assessed claimant's condition as a strain of the muscle, fascia, and tendon of the lower back. Claimant was prescribed medication and given work restrictions.

Claimant returned to MedExpress on November 13, 2019, and was evaluated by Dr. Morrison. Muscle spasm was noted in claimant's lower back and her condition was assessed as lumbago with sciatica. Claimant was given restrictions of no heavy lifting and instructed to take over-the-counter anti-inflammatories and undergo physical therapy. Claimant began a program of physical therapy on November 26, 2019.

When claimant's condition did not improve, she underwent an MRI scan of the lumbar spine on January 14, 2020. The Impression of that scan is as follows:

1. Minimal degenerative change involving the lumbar disc herniations.
2. No high-grade central canal or neural foraminal stenosis.

Following the MRI scan claimant was evaluated by Dr. Mark Miedema at Ozark Orthopedics on January 21, 2020. Dr. Miedema stated that his review of the lumbar MRI scan revealed mild disc desiccation at L4-5 with the remaining levels unremarkable and no acute disc herniations or neural compression at any level. Dr. Miedema recommended continued physical therapy and paraspinal trigger point injections. Dr. Miedema's diagnosis included a low back strain and he noted:

I think she likely had pre-existent mild disc degeneration at L4-5 and that this work injury has caused an acute lumbar strain. I encouraged her that her lumbar MRI is essentially normal and she should continue to improve with time and conservative treatments.

Dr. Miedema went on to place work restrictions on the claimant and stated that he did not believe her injury would result in permanent impairment.

Claimant returned to Dr. Miedema on February 12, 2020. Dr. Miedema indicated that claimant should continue with a home exercise program that she had been taught by physical therapy and he again recommended that claimant undergo an injection in the SI joint for inflammation. He reiterated that he believed claimant had a pre-existing mild disc degeneration at L4-5 and that her work injury had caused an acute exacerbation of that underlying condition.

Claimant eventually received a change of physician to Dr. Blankenship, neurosurgeon, and her initial evaluation occurred on April 6, 2020. In the history portion of his report, he noted:

She was injured on 11/6/19 when she was picking up and transferring a child out of a booster seat. She was on a school bus that was hit from behind. She has no prior history of pain.

Certainly, this is an incorrect history in that it was the claimant that was hit from behind by a first grader, not the bus, and claimant did have a history of prior back pain.

Dr. Blankenship's report of April 6 contains the following Impression:

Her general neurologic examination is unremarkable. Her SI joint examination is markedly positive in all five testings. Her piriformis examination is also markedly positive. The patient does have some mild disc space changes at L4-L5 but I think the majority of her pain is coming from her SI joint on the right with secondary piriformis findings.

Dr. Blankenship recommended treatment in the form of medication and continued physical therapy. He also referred claimant to Dr. Cannon for an SI joint injection which was given on May 4, 2020.

Claimant returned to Dr. Blankenship on June 18, 2020 and he noted that claimant had undergone 58 visits of physical therapy with no relief. He also noted that she had undergone bilateral SI injections without even temporary relief. Dr. Blankenship's report of that date also contains the following interpretation of an x-ray of claimant's lumbar spine:

The patient has undergone ENZA-A stabilization with partial reduction at the lumbosacrum with bilateral pedicular fixation. The construct is stable without complications.

It is unclear whether Dr. Blankenship was looking at another patient's x-ray or whether this portion of his dictation was placed in claimant's record by mistake given the fact that there is no indication that claimant had undergone any prior surgical treatment on her lumbar spine. It does not appear that Dr. Blankenship made any

recommendations regarding treatment based upon this statement. Instead, Dr. Blankenship's report contains the following Impression:

We saw her back in April. She has done her physical therapy and her injection and has failed conservative treatment. The patient has hyperlordosis of the lateral spine, retrolisthesis at L4-L5. She does have some bulging at this disc space. The retrolisthesis exacerbates in extension. She lines back up in flexion. Her SI joint examination today is once again markedly positive.

Dr. Blankenship again referred claimant to Dr. Cannon for bilateral SI joint injections solely with the use of Marcaine. This injection was performed by Dr. Cannon on July 8, 2020.

Claimant returned to Dr. Blankenship on July 23, 2020, and he noted that claimant had received no relief from the most recent SI joint injections. He noted that claimant's prior MRI scan was grainy at certain levels and recommended that she undergo a new MRI scan.

The new MRI scan was performed on August 10, 2020, and was read by Dr. Blankenship. His Impression in that report contains the following:

1. Mild disc space changes at L4-L5 and L5-S1 with gross annular fissuring laterally on the left at both levels. This is not confirmed on the axial images, however. This may have just skipped over due to the cuts.
2. Multilevel facet arthropathy as described in the narrative.

Claimant's next visit with Dr. Blankenship occurred on August 13, 2020. In his impression, Dr. Blankenship stated:

She has had two injections by Dr. Cannon. She had bilateral SI injections with no relief. She has also had an LESI. She has not had facet injections. I have reviewed her plain radiographs and her MRI. Again, there is an appearance of an annular fissure at L4-L5, also a posterior disc bulge with probable annular fissure at L3-L4 and a midline disc protrusion at the lumbosacrum. The segmental instability that she has is most noted at L4-L5 and L5-S1 with hyperlordosis and retrolisthesis. She has some mild retrolisthesis at L3-L4 but this is significantly higher than where her pain is being generated. Her hip examination is completely negative. Her piriformis examination is positive bilaterally. I think this is secondary to her malalignment in her back.

Dr. Blankenship then referred claimant to Dr. Cannon for facet injections. In doing so, he stated:

I have told her that I think the etiology of her pain since her SI joint injections were negative and she has hyperlordosis standing is probably facet loading and a facet injury. I told her that prior to considering an arthrodesis, I would want her to have bilateral L4-L5 and L5-S1 facet injections to see if we cannot turn this around or at least get a better diagnosis. If the injections help significantly but her pain returns, then a consideration of a rhizotomy would be a much more preferable treatment to a lumbar arthrodesis. Her iliac crest is at the L4-5 disc space and the pain originates at this level and below. Given the degree of segmental instability, I think doing bilateral L4-L5 and L5-S1 facet injections and having her return to see me makes the most sense.

Claimant underwent the injections by Dr. Cannon before returning to Dr. Blankenship on September 17, 2020. He noted that the injections did not even provide claimant any temporary relief. In his Impression, Dr. Blankenship noted in part:

I have reviewed her plain radiographs and her MRI in its entirety. Her plain radiographs demonstrate retrolisthesis at both the L4-L5 and L5-S1 levels with hyperlordosis. This slightly exacerbates an extension and does reduce in flexion. I have reviewed her MRI in its entirety that demonstrates marked facet arthropathy bilaterally at L4-L5 and L5-S1. The patient does have midline disc bulging.

Dr. Blankenship went on to recommend surgery stating:

I told her that although the L3-L4 disc may be contributory to her pain, with her pain localized at the lumbosacrum I think if she elects for surgical intervention my recommendation would be her alignment corrected at these levels which would require an anterior lumbar interbody arthrodesis with posterior pedicular fixation. Her right side hurts her worse than the left. We could do bilateral facet disruption with right-sided screw fixation. I told her she has certainly failed all routine and usual conservative measures. I told her pending worker's compensation approval we will get her scheduled. I did tell her that she needs to understand it is possible that the L3-L4 disc is contributory but I do not want to fuse the entire lower lumbar spine for pain that is localized at the L4-L5 and L5-S1 levels.

On that same date Dr. Blankenship also completed a work note indicating that claimant needed to remain off work until after her recommended surgery.

Respondent did not accept liability for the recommended surgery by Dr. Blankenship. Instead, respondent referred claimant to Dr. Luke Knox, neurosurgeon, for an independent medical evaluation. Dr. Knox authored a report dated October 15, 2020 in which he did not recommend surgery, but instead indicated that claimant should undergo a functional capacities evaluation.

Claimant has filed this claim contending that she is entitled to the additional medical treatment recommended by Dr. Blankenship. She also requests payment of additional temporary total disability benefits.

ADJUDICATION

Claimant contends that she is entitled to additional medical treatment as recommended by Dr. Blankenship; specifically, this includes his surgical recommendation. Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Patchell v. Walmart Stores, Inc.*, 86 Ark. App. 230, 184 S.W. 3d 32 (2004).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proof.

As previously noted, Dr. Blankenship has recommended surgical treatment for claimant's compensable low back injury. Dr. Blankenship set forth his reasoning for his surgical recommendation in a letter dated January 14, 2021, addressing various questions raised by claimant's attorney.

1. The objective findings on the MRI: She has hyperlordosis of the lumbar spine which is too much curvature. She also has retrolisthesis which is a posterior slip at L4-L5 and L5-S1. She has gross annular fissuring laterally at both levels. What this means is that the annular ring around the confined disc has been torn. This typically at her age is traumatic. This can lead to the segmental instability that is noted on her plain films and her MRI.
2. The surgical offering was done because the patient Had failed routine and usual conservative measures. I do feel that her mechanical back pain is related to

her hyperlordosis and instability. She likely has a facet component to her pain but unfortunately she has not responded to treatment for that to the point that I think the facets are the major component. I think it is the malalignment and the posterior slip that are creating increased stress on the facet joints.

3. The surgical procedure that I offered her was an anterior lumbar interbody arthrodesis at L4-L5 and L5-S1. *** I place implants in the disc space at L4-L5 and L5-S1 to establish better alignment and correct her hyperlordosis and slip. She would then undergo a same-day staged posterior operation with disruption of her facet joints as well as unilateral cortical screw placements in the pedicles to stabilize her from behind.
4. The procedure that we offered her is designed to correct her malalignment as well as disrupt the facet joints.*** The main purpose of the surgical procedure is to correct her alignment and her segmental instability with the retro-listhesis.

In response to Dr. Blankenship's opinion, respondent contends that his opinion is based on "findings" that do not exist based upon the opinions of other physicians as well as inconsistent or contradictory statements in Dr. Blankenship's own reports. Respondent notes that the findings from the imaging reports have been interpreted one way by Dr. Blankenship and another by Drs. Knox, Miedema, and Hronas. Dr. Hronas is a radiologist who initially reviewed both the MRIs of January 14, 2020 and August 10, 2020 before writing a report dated October 19, 2020 wherein he stated:

In summary, there are mild degenerative changes at L4/5 with no evidence of focal disc protrusion, canal stenosis or foraminal narrowing. Specifically, there are no objective findings of an acute injury of the lumbar spine as the result of the injury described on 11/06/2019.

Thereafter, he had the opportunity to review x-rays of the lumbar spine and pelvis dated October 15, 2020. In an addendum dated November 1, 2020, Dr. Hronas stated:

In summary, additional radiographs show no evidence of instability of the lumbar spine with flexion or extension. There are no objective findings of an acute injury of the lumbar spine based on review of the previous MRI exams or the recent radiographs.

First, with regard to Dr. Hronas' opinion that there are no findings of an acute injury, I note that the issue in this claim is not compensability. Respondent has accepted as compensable an injury to claimant's low back on November 6, 2019. A claimant who has sustained a compensable injury is not required to furnish objective medical evidence of her continued need for medical treatment. *Arkansas Health Center v. Burnett*, 2018 Ark. App. 427, 558 S.W. 3d 408.

Furthermore, I note that as opposed to Dr. Blankenship, Dr. Hronas has not physically examined claimant and while he is a highly qualified radiologist, Dr. Blankenship is a neurosurgeon who is also qualified to read and interpret imaging studies.

With respect to Dr. Miedema, I note that he has not stated an opinion regarding the surgery proposed by Dr. Blankenship, but do note that he did not recommend surgery and believed that claimant would respond to conservative treatment. More importantly, Dr. Miedema has not reviewed the August 10, 2020 MRI scan or the radiographs taken by Dr. Blankenship.

Dr. Knox has had the opportunity to review all of the relevant imaging studies and has opined that he does not believe that surgery will benefit claimant. Instead, he is of the opinion that claimant should undergo a functional capacities evaluation. At his

deposition, Dr. Knox testified that he did not observe the findings noted by Dr. Blankenship – gross annular fissuring, retrolisthesis, or evidence of segmental instability on the MRI scans or flexion and extension films where it would typically be seen.

Certainly, imaging studies are subject to interpretation and reinterpretation. While respondent notes that Dr. Blankenship's interpretation of the imaging studies has changed, I also note that Dr. Knox likewise changed his interpretation of the most recent MRI scan.

Following his opportunity to review imaging studies, including the MRI scan, Dr. Knox authored an addendum dated October 26, 2020 in which he stated:

Concerning the imaging studies and radiographs and reviewing her MRI scan demonstrating mild disc space changes, Dr. Blankenship's report was reviewed and, likewise, demonstrated basically mild disc space changes at the 4-5 and 5-1 levels. Annular fissuring was noted. His report was basically very similar to my evaluation of her MRI scan dated 08/10/20.

At his deposition, Dr. Knox acknowledged that even though he originally did not disagree with Dr. Blankenship's evaluation in which he noted the presence of annular fissuring, upon further review he did not see annular tearing.

A. I have a hard time appreciating that annular tear. I think there is a report in there that I did not disagree with Dr. Blankenship's evaluation. He noted annular tears. I did not disagree with him at the time, but having looked at it, I have a hard time appreciating that at this time.

Q. After you did your initial intake, did the nurse case manager, Jill Brown, come back to you and ask you for an addendum based on the statement you said that you agreed with Dr. Blankenship?

A. I think it was a week later.

Q. Okay.

A. I dictated an addendum on 10/26/20 concerning the image studies. Is that what you are talking about?

Q. Yes. I will show you. I have got it right here.

A. I have got it. I believe I am saying annular fissuring was noted. I believe that was Dr. Blankenship's report. I thought his report was, basically, very similar to my evaluation from the MRI scan, but looking at it now, I am hard-pressed to say that I appreciate annular fissuring.

In this case, Dr. Blankenship has interpreted the imaging studies differently than the other physicians and based on his interpretation, his examination of the claimant and her response to conservative treatment, he has proposed a surgical procedure. From my review of the totality of the evidence presented, I find that Dr. Blankenship's opinion is credible and entitled to great weight. Dr. Blankenship treated claimant on multiple occasions as opposed to Drs. Knox, Miedema, and Hronas. Based upon his opinion, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to the additional medical treatment recommended by Dr. Blankenship.

In reaching this decision, I do note that Dr. Blankenship was provided an incorrect history in that his report states that the bus was actually struck, not the claimant. In reality, claimant was struck by a first grader, the bus was not struck from behind by another vehicle. However, I do not find that the mechanism of claimant's injury is the basis for Dr. Blankenship's recommendation for surgery. Furthermore, I note that Dr. Knox acknowledged that this type of injury could have resulted from the claimant's accident.

Dr. Knox was questioned during his deposition:

Q. And in your opinion, if you are bent over lifting and twisting and you get hit, is that a vulnerable situation for your low back?

A. I believe that is, yes, you are correct.

Q. Okay. And is someone susceptible to injury in such an incident?

A. I believe that can be a fair statement, yes.

Q. And whether this produced - - this injury produced an acute tear or aggravated a preexisting condition, either way, does that cause pain?

A. It could, yes.

Q. And do you agree that being in that bent-over state while twisting and lifting and being bumped could either cause a tear or aggravate a preexisting tear to cause pain, numbness, and tingling?

A. I believe that is a fair statement.

Likewise, I note that Dr. Blankenship's medical reports contain an incorrect history that claimant had no prior history of low back pain. Again, this is incorrect in that as previously noted, claimant had low back pain resulting from a motor vehicle accident in 2009 and again in 2016. Following the 2016 injury the claimant underwent extensive chiropractic treatment from Dr. Van Wilpe. However, according to Dr. Van Wilpe's medical records, claimant reached maximum medical improvement and indicated that she had a 95 – 99% improvement overall. There is no indication that claimant sought any additional medical treatment for low back complaints after her release by Dr. Van

Wilpe on March 27, 2017 until after her admittedly compensable injury on November 6, 2019.

The final issue for consideration involves claimant's request for temporary total disability benefits. The parties stipulated that respondent paid benefits through November 2, 2020. A claimant is entitled to temporary total disability benefits while they are within their healing period and they suffer a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, claimant remains within her healing period for her compensable injury given that surgical treatment has been recommended by Dr. Blankenship. In addition, Dr. Blankenship in a note dated September 17, 2020 indicated that claimant needed to remain off work until after her recommended surgery. Based upon that medical report, I find that claimant has remained within her healing period and that she has suffered a total incapacity to earn wages since November 3, 2020 and continuing through a date yet to be determined.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment as recommended by Dr. Blankenship. In addition, claimant is entitled to additional temporary total disability benefits beginning November 3, 2020 and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the

claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$390.75.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE