

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H006753**

JACOB M. SHOTZMAN, EMPLOYEE	CLAIMANT
WILBERT FUNERAL SERVICES INC., EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 1, 2021

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF, in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney, Fort Smith, Arkansas.

Respondents represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 1, 2021, the above captioned claim came before the Workers' Compensation Commission in Fort Smith, Arkansas, for a hearing. A prehearing conference was conducted on April 8, 2021, and a prehearing order filed that same date. A copy of the prehearing order has been marked as Commission's Exhibit No. 1 and with modification and no objection is made part of the record.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee/employer/carrier relationship existed on August 29, 2020.
3. Claimant sustained a compensable injury on August 29, 2020.
4. The compensation rate for temporary total disability is \$480.00 and permanent partial disability is not an issue.

The issues to be litigated are limited to the following:

1. Whether claimant is entitled to additional medical benefits specifically treatment from Dr. Blankenship in regard to claimant's back injury.
2. Whether claimant is entitled to additional temporary total disability starting from the date it was last paid.
3. Attorney's fees on controverted unpaid indemnity benefits.

All other issues are reserved.

The claimant contends that the medical treatment recommended by Dr. Blankenship is reasonably necessary medical treatment for his compensable injury. Claimant further contends that respondents have controverted any benefits that are unpaid as of this date, including temporary total disability benefits from the date it was last paid.

The respondents contend that all appropriate medical benefits have been paid and that the temporary disability benefits were stopped when claimant was released to return to work at full duty.

From a review of the record as a whole, including medical reports, documents, and having heard testimony and observed the demeanor of claimant, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing conference conducted on April 8, 2021 and contained in the Prehearing Order filed the same date, as well as the announced stipulations at the hearing on June 1, 2021, are hereby accepted as fact.

2. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to additional medical treatment from Dr. James Blankenship.

3. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits, specifically claimant's entitlement to temporary total disability.

FACTUAL BACKGROUND

Hearing Testimony:

Claimant testified on his own behalf and was the only witness called by either party. He stated that he went to work at respondent, Wilbert Funeral Services, on July 20, 2020. His duties included setting the burial vault over the hole and putting up the tent for the families (TR.8). Claimant said that there was a lot of lifting, with the most weight that he would lift being probably anywhere from 50 to 75 pounds. Claimant said there was a battery-operated machine that took the vault off the side of the truck and steered it through the cemetery. He testified "you have to have a rock bar and you kind of wedge it around, you know, to turn the machine." When he went to turn the vault to get it lined up with the hole, claimant guessed that he twisted and turned at the same time (TR.9) and that is when he felt a sharp pain in his back. Claimant said he called his boss but continued to work because it was an early morning service and he had to finish out the service for the families.

Claimant further described what he was doing at the time he was injured as prying and lifting at the same time (TR.10). At the time, he said it was a sharp sting in his lower back, and it was kind of going around his buttocks, but claimant stayed and finished up for the service. It was starting to get worse during the thirty minutes or so that he finished, by setting up the tent and putting out the chairs (TR.12). Claimant said that the pain in his back got worse by the time the funeral was there. The grave digger arrived and helped him tear down and then he drove back home. Claimant said he went home, proceeded to lie down, and put ice on his back as well as take Tylenol.

The next morning, claimant said that he could hardly move, and his wife took him to the ER (TR.13). Following his emergency room visit, claimant went to Dr. James Schmitz, and saw APN Timbi West. No physical restrictions were placed on claimant other than to “take it easy” (TR.14). Claimant said that he then saw Dr. Schmitz and had been to Wellness Physical Therapy, before being sent to Dr. Mark Miedema, an orthopedic surgeon in Fayetteville (TR.15). Claimant agreed that Dr. Miedema’s records reflected that he should not do any bending, twisting, or lifting more than twenty pounds. Claimant said that the injection that he received seemed to make the condition worse, while the physical therapy helped for that day. However, the next morning, the problem was still there. He said that physical therapy used a TENS unit and taught him some stretches to do (TR.16). The TENS unit provided temporary help for the day that it was used.

Claimant said that he next saw Dr. Blankenship in Fayetteville where he received an epidural injection, but that put him in more pain than the other two and he was down for a week. He continued with physical therapy which provided temporary relief (TR.17). Claimant said that his employer provided light duty for him, but he was earning less money because he was working fewer hours. Claimant said Dr. Blankenship recommended surgery, but the surgery was cancelled because the matter was under review (TR.18).

Claimant related that he has pain in his back every day with radicular pain going down his right leg. He said that every day was about the same. He further testified that Dr. Blankenship took him off work January 20, 2021, and that he has not worked anywhere since then. Claimant desired to have the surgery Dr. Blankenship recommended so that he could start supporting his family again (TR.19). Claimant testified that his inability to work has had a detrimental effect on his family and his life (TR.20). Claimant said that he could walk some but

spent most of his day lying down because that seems to be the only way that he could get relief. He admitted that he was able to drive, and he could hold his three-month-old baby but said he could not pick her up. He had not tested the weight limit that he could lift without experiencing difficulty, but he thought it was no more than twenty-five or thirty pounds (TR.21).

On cross examination, claimant said during his duties for respondent employer, he would not lift anything over fifty to seventy-five pounds (TR.23), but conceded that at his deposition, he said it was nothing over fifty pounds. Claimant admitted that at his deposition he said that he felt a pop but did not think anything about it at the time (TR.24). Claimant said that the TENS unit he has been using gave him the most relief. Claimant said the light-duty work he did with respondent was within the restrictions he had from the doctor. Claimant admitted that he was able to go deer hunting in November (TR.25). Claimant said that he saw Dr. Tomecek in April and at that time he was taking six Oxycodone a day, three Gabapentin and some over the counter medication. Claimant considered his pain level as a seven out of ten at that visit (TR.26). Claimant admitted that Dr. Tomecek informed him that he was faking it and claimant got upset and stormed out of the office. Claimant acknowledged that Dr. Tomecek gave him a full duty release (TR.27).

Review of the Medical Records

Claimant presented records from his treating physicians/nurse practitioner, while respondent's medical exhibits consisted of a utilization review and an independent medical examination as well as the results of a myelogram performed as part of that IME. These records have been reviewed and will be discussed below.

Following claimant's injury, he first went to Schmitz Family Practice in Charleston, where he was seen by APN Timbi West. Claimant was referred to physical therapy, but due to a

lack of authorization from the respondent carrier, he was unable to continue with that physical therapy (CL.X.4). Following the visit on September 10, 2020, claimant was referred to a specialist (CL.X.5) and on September 21, 2020, began seeing Dr. Mark Miedema at Ozark Orthopedic. Following that examination, Dr. Miedema noted the claimant had tried pharmacotherapy and physical therapy without any relief. As the conservative treatments had failed, Dr. Miedema recommended an MRI to rule out a neuro compression lesion (CL.X.12).

An MRI was performed on October 5, 2020 (CL.X.14). There were three different entries regarding L3-4, L4-5, and L5-S1. The overall impression was “lower lumbar spondylosis, worst at the L5-S1 level where there is moderate lateral recess and foraminal stenosis.”

Upon reviewing the MRI, Dr. Miedema made the following entry in his records on 10-12-2020: “His radicular symptoms have improved. He does have some moderate light neuro foramen narrowing at L5-S1 secondary to combination of disc bulging and facet arthropathy. However, at this time his pain is primarily axial. He has facet joint effusions at L3-4 and L5-S1 indicative of acute inflammation and facet arthropathy at L4-L5.” Dr. Miedema then opined “I think his axial back pain is from the facet arthropathy. I think this was a direct result of his work injury.” Because claimant had not improved with conservative treatment, Dr. Miedema recommended facet joint injections. Dr. Miedema closed his report by stating “I do not think he will require surgical intervention. I do not think he has reached maximal medical improvement. At this time, he may return to light duty with no bending, lifting or twisting more than 20 pounds.”

The facet injections were administered on October 27, 2020, (CL.X.20) and claimant returned to see Dr. Miedema on November 9, 2020. While a good portion of Dr. Miedema’s

record was a repeat of the October 12, 2020, office notes, he did add this observation “he is S/P right L3-4, L4-5, L5-S1 facet joint injections on 10-27-20 with 50% relief thus far. We will hold off on another injection for now. I would like him to revisit PT now that he is feeling better.” A referral to physical therapy was done but no records from that treatment were included in the medical records provided at this hearing. It is noted that claimant testified when asked if the treatment from Dr. Miedema helped, said “no sir. The injection, it seemed like it was worse (TR.16).”

The medical treatment then changed from Dr. Miedema to Dr. Blankenship, as claimant exercised his right to change physicians. At the initial office visit with claimant, Dr. Blankenship recorded claimant reported that the facet injections did not provide him any relief “even transiently (CL.X.27).” Dr. Blankenship did have the MRI to review, and while he opined that portions of it were of poor quality, he did note that claimant had “a gross annular fissure eccentric off to the left-hand side with posterior disc bulge.” Dr. Blankenship referred him to Total Rehab in Fort Smith and said that claimant could continue to work with light duty restrictions (CL.X.30). Claimant was referred to Dr. David Cannon for LESI, and claimant went to Dr. Cannon as directed and receive the steroid injections on December 15, 2020 (CL.X.32-34).

When claimant followed up with Dr. Blankenship on December 31, claimant reported that the LESI gave him no relief. As claimant had failed “all routine and usual conservative measures”, Dr. Blankenship recommended a stand-alone interior lumbar intrabody arthrodesis at the lumbosacrum (CL.X.38). Surgery was scheduled for February 10, 2021 (CL.X.40), but as of the date of the hearing, claimant had not undergone surgery.

Before discussing the final two pages of claimant’s exhibits, a review of the respondent’s

medical exhibits is in order. An eleven-page utilization review by Dr. Gregory Goldsmith submitted as respondent's exhibit 1-11 was not persuasive. I note that it was requested on February 2, 2021, and was completed three days later on February 5, 2021. Much of that report appears to be excerpts pulled from medical journals or websites which speak in generalities and not to this specific case.

Claimant was then seen by Dr. Frank Tomecek of Oklahoma Spine and Brain Institute at Tulsa, Oklahoma (although I note on page 27 of the transcript, claimant said he saw Dr. Tomecek in Sallisaw). Dr. Tomecek did what appears to be a thorough examination on April 7, 2021. Because Dr. Tomecek believed that the claimant's pain was out of proportion to what he saw on the MRI, he was concerned that there was a psychological overlay for claimant and that he doubted that claimant would do well with a major lumbar surgery. Dr. Tomecek disputed Dr. Blankenship's conclusion that an anterior lumbar discectomy and fusion was necessary and further found that the recommended back brace and bone stimulator would also be unnecessary. Believing more diagnostic testing was necessary, Dr. Tomecek ordered a lumbar myelogram and CT scan. During the April 7 visit, Dr. Tomecek discussed an alternative treatment for a mildly degenerative disc in the form of a stem cell injection (R.X 12-15).

The myelogram and CT scan was performed at Baptist Health Center in Fort Smith and the impression from that procedure was "mild posterior disc protrusion at L-5, S-1 without significant canal narrowing. Mild bilateral foraminal narrowing" (R.X.17). After seeing the results of the myelogram, Dr. Tomecek found that it was basically normal, and that claimant had "no significant structural abnormalities to his spine (R.X.19). He released claimant to return to full duty with no restrictions (R.X.20).

Returning now to the final two pages of claimant's exhibits, Dr. Blankenship composed a

“To Whom It May Concern” letter dated May 3, 2021 (CL.X.41-42). I note that Dr. Blankenship had only the April 7, 2021, report from Dr. Tomecek when he wrote this letter on May 3, 2021, and had not seen the results of the myelogram. There is apparently a personal and professional conflict between Dr. Blankenship and Dr. Tomecek that Dr. Blankenship fears would cloud Dr. Tomecek’s judgment regarding Dr. Blankenship’s recommendations. The record does not reveal if respondents knew of this conflict between the doctors before selecting Dr. Tomecek to do this IME. It would be puzzling if respondent knew of it and chose him anyway, because the opinion of Dr. Tomecek could be subject to attack for bias, as Dr. Blankenship did, on that basis alone. If Dr. Tomecek did not tell respondent of the conflict between the two, then Dr. Tomecek’s motives in accepting this IME are suspect. However, I am not prepared to say Dr. Tomecek intentionally overlooked or downplayed claimant’s injury to carry on a professional feud with Dr. Blankenship, as such is not necessary for me to decide this matter.

Moving away from the animosity that Dr. Blankenship felt for Dr. Tomecek, Dr. Blankenship expressed his opinion as to the findings of Dr. Tomecek as set out in Dr. Tomecek’s April 7, 2021, report, stating he completely disagreed with Dr. Tomecek’s report (CL.X.42).

Review of Non-Medical Records

With little or no explanation, respondents submitted a record from the Arkansas Game and Fish Commission regarding licenses and game tagged (R.NM.1-5) and a mostly illegible Facebook post (R.NM.6). Regarding the Game and Fish records, claimant admitted that he went deer hunting in November 2020 (TR.25). He further admitted that he had a Facebook account (TR.26). As to the first exhibit, I found it interesting what was not asked. Respondent did not ask if claimant was alone or with others that could have helped him with the deer that he killed. There was no evidence presented that claimant participated in any activity that was above his

restrictions, and I am not going to assume that he did without such proof. Further, I am familiar with Facebook and know that a post that is dated October 2 without a year was posted in the current year; as such, I accept this post was made on October 2, 2020, after the date of claimant's injury. However, while it is impossible to make out the features of any of the three people in the photograph, I can read the words "rest easy uncle Mike." If this is a picture in memorial of a deceased relative, the picture could have been made at any point in time, even years before the photograph was posted. Without a context, this exhibit is given no weight in my determination of the facts of this matter, because I simply do not know what it is supposed to be demonstrating.

ADJUDICATION

Although a claimant's testimony is never viewed as uncontroverted, the Commission need not reject the claimant's testimony if it finds that testimony worthy of belief. *Ringier America v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Having had the benefit of seeing claimant testify, I found him to be credible that his back was hurting the day of the hearing. While I recognize such could be theatrics, claimant requested permission to stand during his testimony (TR.8) and then sat again (TR.16). What I saw was consistent with what he reported to Dr. Tomecek: "He states the pain is nearly constant, despite the fact he is very inactive. He cannot stand more than a few minutes. He cannot sit very long at all before he starts to have severe back pain and buttocks pain. He can only sit for about ten minutes and then his right leg goes numb (R.X.14)." In a hearing that began at 10:40 a.m. and ended at 11:15 (TR.3,28), the record reflects that claimant alternated sitting, then standing, and then sitting again; nothing about it seem contrived as I witnessed it.

Having found claimant's testimony to be credible, this matter then comes down to whether Dr. Blankenship's findings and recommendations are more reasonable than those of Dr.

Tomecek. This presents the binary choice of either believing that claimant needs extensive medical care by way of back surgery or finding that he is fit to return to full duty work with no restrictions. Neither side presented a third option to me to consider in this matter. As such, Dr. Tomecek's finding that claimant could return to full duty in May 2021 is contrary to the other proof in this case, and in light of that evidence, I find that by a preponderance of the evidence that Dr. Blankenship's recommendations are more persuasive than that of Dr. Tomacek.

Had Dr. Tomecek suggested another course of care, I would have given his report more credence. Stating that claimant is ready to return to full duty work, though, is contrary to the other evidence in this case. In addition to claimant's testimony, APN Timbi West referred claimant to Dr. Miedema when he did not respond to the most conservative of care for a back injury. Dr. Miedema's November 9, 2020, report states that while he did not think claimant would require surgical intervention, he also did not think claimant had reached maximum medical improvement. Claimant continued with conservative care in the form of physical therapy as well as the LESI while under Dr. Blankenship's care, and did not respond well to it. Therefore, I find that claimant has proven by the preponderance of the evidence that he is still in need of medical treatment and that the course of treatment recommended by Dr. Blankenship is reasonable and necessary, including a second MRI (Cl.X.30) and surgery (Cl.X.38) if Dr. Blankenship determines such is appropriate for claimant's care.

As for the claim for temporary total disability, an injured employee is entitled to temporary total disability compensation during the time that he is within his healing period and totally incapacitated to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Having rejected Dr. Tomacek's conclusion that claimant be released to full duty as of May 12, 2021, I find that payments of temporary total

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disability should not have ceased based on that recommendation. The parties did not know the precise date of the cessation of payments (TR.4) but believed that could be determined if necessary. Should the parties be unable to agree on when the temporary total benefits ceased, I will conduct a separate hearing on that issue.

ORDER

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

All issues not addressed herein are expressly reserved under the Act.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE