BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G908381

RICHARD G. SMITH, EMPLOYEE	**CLAIMANT**
CAL ARK INTERNATIONAL, INC., EMPLOYER	**RESPONDENT**
ARK. TRUCKING ASSN SI FUND/YORK RISK SERVICES GROUP, INC., INSURANCE CARRIER/TPA	**RESPONDENT**

OPINION FILED JUNE 2, 2021

Hearing before Administrative Law Judge James D. Kennedy on the 27th day of April, 2020, in Little Rock, Pulaski County, Arkansas.

Claimant is represented by Michael L. Ellig, Attorney at Law, Fort Smith, Arkansas.

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

STATEMENT OF THE CASE

A hearing was conducted on the 27th day of April, 2021, to determine the issue of additional medical treatment, specifically treatment by Doctor Katy Marino. The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the claim and that an employer/employee relationship existed on November 30, 2019, when the claimant sustained a compensable rib injury. The claimant earned sufficient wages for a temporary total disability (TTD) rate of $695.00 per week. The claimant contends that he is entitled to reasonably necessary medical as recommended by Doctor Katy Marino after the date of November 30, 2019, plus TTD from July 15, 2020, to a date to be determined.

The respondents contend that the claimant was released at maximum medical improvement (MMI) by his treating physician on July 14, 2020. The claimant requested and received a change of physician to Doctor Katy Marino. The initial visit was paid, and

any additional treatments following the initial visit were not reasonable, necessary, or related to the work injury, and therefore not the responsibility of the respondents. The claimant failed and/or refused to return to work following his release without restrictions.

A copy of the Pre-hearing Order was marked "Commission Exhibit 1" and made part of the record without objection. The claimant's and respondents' contentions are set out in their respective responses to the Pre-hearing Questionnaire and made a part of the record without objection. The first witness to testify was Richard G. Smith, the claimant. Leslie Stout testified on behalf of the respondents. From a review of the record as a whole, which included medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. An employer/employee relationship existed on November 30, 2019, when the claimant sustained a compensable work-related injury to his rib. At that time, the claimant earned sufficient wages for a TTD rate of $695.00 per week.

3. The claimant has satisfied the required burden of proof to show that the CT scan of November 16, 2020, was in fact required, reasonable, necessary, and therefore compensable.

4. The claimant has failed to satisfy the required burden of proof to show that the requested additional medical treatment for his rib as recommended by Doctor Katy Marino is reasonable and necessary. Consequently, the requested additional medical treatment is denied.

5. The claimant has failed to satisfy the required burden of proof for TTD from July 15, 2020, to a date to be determined, and consequently additional TTD is denied.

6. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The Pre-hearing Order, along with the Pre-hearing Questionnaires of both parties, were admitted into the record without objection. Additionally, the claimant submitted thirty-eight (38) pages of medical records that were admitted into the record without objection. The respondents submitted twenty-three (23) pages of documents that were also admitted into the record without objection.

The claimant was the first witness to testify. He stated that he was fifty-nine (59) years old at the time of the hearing and went as far as the tenth grade in school, with no GED. He was also trained as a boat mechanic on the river. On November 30, 2019, he was working for the respondents as a truck driver. (Tr. 6, 7) He has worked over the road, on the river, and on the farm. (Tr. 8) The claimant testified that on the date of the accident, he was pulling out of a Love's truck stop and going to go up to the respondents' yard when he was hit head-on by a pickup. The claimant denied he was thrown against his seat belt or the steering wheel due to the fact he had time to brace. (Tr. 10) After the accident, his chest was hurting and he was sent to Concentra, (based on medical records) where he received x-rays, started physical therapy, and received some medication for three (3) fractured ribs, as per his testimony. (Tr. 11, 12) The claimant testified he received additional treatment from Doctor Roman, who put needles in his back. He did not receive any x-rays, MRIs, or CT scans. The claimant denied seeing a thoracic surgeon at the time. He also stated that when Doctor Roman said he was as good as he was going to get, he still had pain in that area. He eventually was evaluated by a thoracic

surgeon at UAMS, who scheduled a surgical procedure which he never received. He also stated that it "still gives me a fit." (Tr. 13 – 15) The claimant has not worked anywhere since the accident and has not drawn any unemployment. In regard to driving a truck, he felt that he could not dolly a trailer up and down. He also denied being able to work on a farm or as a boat mechanic. The claimant admitted he received a Functional Capacity Exam, hereinafter referred to as an FCE. He also testified Doctor Roman kept him off work until July of 2020 and that he was paid while he was off, but payment stopped when Doctor Roman said he was as good as he was going to get. (Tr. 17)

Under cross examination, the claimant admitted he drove seventy-six (76) miles from Plainview to Little Rock for the hearing. (Tr. 18) He also admitted his wife had left the employment of the respondents back in February. (Tr. 19) Additionally, he received CDL training at Tristate Driving School, his CDL had expired after the accident, and his medical card was up the December 4th. (Tr. 20) The claimant was also questioned about the hospital records that provided he only had one (1) fractured rib, and the claimant responded that he was not aware of it. The claimant agreed he treated with Doctor Roman for a "pretty good period" and was released without any restrictions in July following the FCE. He also admitted that he was sitting in the turn lane not moving, waiting to make a left turn, when hit head-on. (Tr. 22) The accident happened Friday night or Saturday morning, and he went to the company doctor Monday morning. (Tr. 23) The claimant was questioned about being told his bone would not heal unless he quit smoking, which he denied, but he volunteered that they did tell him he would die unless he quit smoking. (Tr. 25)

The claimant was also questioned about his FCE and being able to return to work at a medium classification. The claimant asked what a medium classification was and stated this was the first that he had heard of it. (Tr. 26) He admitted that Doctor Roman released him on July 14, 2020, to regular duty. The claimant was asked about returning to the respondents for modified work, and he responded that Doctor Roman was not letting him "do no duty." The following questioning then occurred:

> Q. Okay. Well, there was work, actually modified work, that was offered to you by Cal Ark, wasn't there?
>
> A. Un-huh. And I was supposed to have started it that week.
>
> Q. Okay. And you didn't start it, did you?
>
> A. No, because he released me.
>
> Q. Well, when he released you, why didn't you go back to work at Cal Ark?
>
> A. How am I going to pass the physical?
>
> Q. Sir, you were already released by your doctor to return to regular duty, which is the work you had been doing before any injury, but you didn't go back to them to do it did you?
>
> A. I could not roll the dollies up and down.

The claimant was questioned if he ever told Ms. Stout that he was unable to roll the dollies up or down and he responded "Huh-uh." He admitted he never told anybody at Cal Ark he could not do that part of his job. He also admitted he did not go anywhere and look for work. The respondents had some light work available when he was released, but the light work cancelled. He also testified that he was able to use the Qualcomm. (Tr. 27 - 29) Currently on an average day, he would drive about four (4) miles checking on his cows, clean his house, vacuum, wash clothes, and do the dishes. The claimant also denied being told by Doctor Roman that he had been taken off work for an additional

month due to a burn injury. (Tr. 30, 31) He admitted he had not looked for work since his release in July. (Tr. 32, 33)

On redirect, the claimant testified there was a difference between driving a car or pickup and a semi, because you had "a lot more to be responsible for." He stated you can turn them "pretty easy." Cal Ark's trucks are "good," and you can turn them easily. The steering wheels are easier to turn in a semi than in a car. In regard to the DOT card, the claimant testified he could go in and lie and tell them he does not hurt and pass it. (Tr. 34) The claimant also admitted he had not been making anything since he had not been driving. (Tr. 35) He was also questioned about his FCE and said it felt like it lasted forever, and afterwards, he went home and sat in a bath of hot water. (Tr. 36)

On recross examination, in regard to his DOT physical, the claimant admitted he had not told a doctor he had a fractured rib at one time but had been treated and released "because it isn't fixed." He also admitted he had not attempted to obtain his DOT physical. He denied voluntarily quitting Cal Ark in August after his release. (Tr. 38, 39)

The claimant rested and the respondents called Leslie Stout, an employee of Cal Ark International who testified she was the Director of Safety, which included overseeing the process in workers' compensation claims. She knew the claimant and that he was involved in an accident on November 30, 2019. (Tr. 41, 42) She went on to provide she was usually the first call for a DOT accident, "which is a hearse, nurse, or tow, basically." The claimant did not request medical at the time of her initial call. She also saw him in a follow-up the next Monday, where the accident was discussed, and an appointment was made to have the claimant evaluated at Concentra. The claimant was released to light duty, with the standard operating procedure for light duty being if the driver is within fifty

(50) to one hundred (100) miles of the home terminal in Little Rock, bring them to the terminal to work around the warehouse. There is a bunk house they can stay in or stay in hotels. (Tr. 43, 44) Sometimes, as in this case, the claimant was offered light-duty work with a nonprofit. He never returned or responded to the offer. She testified the claimant did not want to drive to the warehouse. (Tr. 45)

> We weren't hearing anything from him and we weren't getting a lot of responses concerning how his injury was progressing. We then actually reached out to our work comp folks and one of the nurse practitioners to find out what was going on. That is when we found out he had cancelled his - - I don't know if it was physical therapy or just follow ups at that point, but he had cancelled appointments because he said his mother died.

He never came back for the modified work. (Tr. 47) The claimant never contacted the respondents to see if he could be accommodated. (Tr. 48) Ms. Stout stated she saw the form come through from the claimant's dispatcher that he had quit, with no reason given. She also testified it was her understanding that driving a semi was considered medium work. They do not load or unload. They just drive. (Tr. 49)

Under cross examination, Ms. Stout admitted she did not receive a call from the claimant providing he had quit, but the information would normally come through his dispatcher, probably Karen Dennis. (Tr. 51) In regard to truck driving being considered medium duty, "I've heard that through this process it's called medium duty, but it's - - in his position description, it's the same job that he did before - -." She also stated she had dollied a trailer up and down before, and that the ease of this depends on the equipment. (Tr. 52) The respondents have excellent equipment that is well maintained, so most of the trailers are easily dollied up and down. (Tr. 53) Ms. Stout was then questioned about how to get in a truck and she stated, "Three points of contact with one of your legs and both of your arms." (Tr. 54)

Under redirect, Ms. Stout testified the respondents had the option of diversifying loads to accommodate drivers if the drivers needed some type of accommodation. If a driver gets stuck and can not get a dolly up or down, we tell them to stop and make a call and ask for help, or "I'll even call a tow company to come out and dolly the load for you. I would rather pay that invoice than to pay for a work comp claim that takes two years to come to a solution for." These options would have been available for the claimant. (Tr. 57)

The claimant's Exhibit One, which consisted of thirty-eight (38) pages, was admitted into the record without objection. On February 13, 2020, approximately three (3) months after the motor vehicle accident, the claimant presented to Concentra, with the report providing that the claimant was approximately fifty percent (50%) of the way towards meeting the physical requirements for the job. Under assessment, the report provided there was a left chest wall contusion, a closed fracture of one rib of the left side with delayed healing, and left side rib pain. (Cl. Ex. 1, P. 1 – 4)

On March 19, 2020, the claimant presented to Doctor Carlos Roman at Proper Pain Solutions for an Independent Medical Exam (IME). Under history, the report provided that the claimant had a wreck and suffered an anterior left eighth rib fracture. The physical exam provided the claimant had some pain with a deep breath. The report referred to a CT of the chest wall on February 13, 2020, and stated that the claimant presented for evaluation on how to control the anterior chest wall pain at approximately the eighth rib. (Cl. Ex. 1, P. 5 – 6) On March 24, 2020, and also on May 29, 2020, Doctor Roman performed an intercostal nerve block at T8 on the left side due to intercostal pain and a left rib fracture at T8. (Cl. Ex. 1, P. 7 - 9) A clinic note from Doctor Roman dated

June 23, 2020, provided the claimant should remain off of work for a month "to allow him to heal further from the ribs and the burns." It is noted that the burns were not related to the work-related accident. (Cl. Ex. 1, P. 10, 11)

An FCE was performed on July 10, 2020, with the claimant putting forth a reliable effort of fifty-two (52) of fifty-two (52) consistency measures within expected limits. The report provided the claimant demonstrated the ability to perform an occasional bi-manual lift/carry of up to forty (40) pounds and lifting and carrying up to twenty (20) pounds on a frequent basis. The report also provided that the claimant demonstrated the ability to perform work in the medium classification of work as defined by the U.S Department of Labor's guidelines over the course of a normal eight (8)-hour day. (Cl. Ex. 1, P. 12 - 28)

The claimant returned to Doctor Roman on July 14, 2020, with the final diagnosis being status post eighth rib fracture and chest wall pain. No other fractures were seen from x-rays performed on December 2, 2019. The report further provided that the claimant was at MMI. (Cl. Ex. 1, P. 29)

The claimant then presented to the UAMS Surgery Oncology Clinic and Doctor Katy A. Marino on November 10, 2020, with malunion of the left eighth costochondral-rib fracture, after trauma. The report provided that,

> Unfortunately, due to location near the costal cartilage, he is NOT a candidate for rigid fixation with rib plating. I am ONLY able to offer him an excision of the callus that is present. I explained to him that surgical excision does not offer guarantee of relief of his pain, which is likely neurogenic, but since other non-operative options have failed – presents his only surgical option in attempt to remove any unstable portions of the bone that may be causing movement and pain.

Smoking cessation was recommended. The report provided a more updated CT scan would be obtained prior to surgery on November 19th. (Cl. Ex. 1, P. 30 – 34) The claimant

then returned to the UAMS clinic on November 16, 2020, for a CT of the chest without contrast. The report provided that no rib fractures or other rib pathology was noted. (Cl. Ex. 1, P. 35 – 37)

The respondents' Exhibit One, which consisted of twenty-three (23) pages, was admitted without objection. A Concentra report dated December 2, 2019, provided that the claimant presented with rib pain after a motor vehicle accident. The radiology results showed no fractures. The claimant was placed on a lifting restriction of no more than twenty (20) pounds and he could not drive the company vehicle. The lifting restriction was also mentioned in the Form AR-3. (Resp. Ex. 1, P. 1 – 5) The claimant returned to Concentra on December 27, 2019, and the report provided under assessment a left chest wall contusion and closed fracture of multiple ribs of the left side. The report further provided that the claimant could not drive the company vehicle due to limitations but could return to work on December 27, 2019. The Form AR-3 provided the same. (Resp. Ex. 1, P. 6 – 10) The claimant again returned to Concentra on January 16, 2020, and the assessment provided for a closed fracture of one (1) rib of the left side with delayed healing and guarding of the left anterior rib cage. The report again provided that the claimant could not return to work driving a company vehicle. It is noted that the Form AR-3 provided that the claimant could return to work on January 16, 2020. (Resp. Ex. 1, P. 11 – 14) The claimant's last visit to Concentra occurred on January 30, 2020. This report provided for a left chest wall contusion and for a closed fracture of one (1) rib of the left side, with delayed healing.

A hand-written doctor's note dated June 29, 2020, provided that the claimant could return to work light duty. It went on to state that the doctor primarily took him off work for

an additional month due to a burn injury that was not related to the workers' compensation injury. (Resp. Ex. 1, P. 17) A return to work note dated July 14, 2020, provided the claimant had reached MMI and could return to work on July 14, 2020. (Resp. Ex. 1, P. 18)

A Peer Review Report with a referral date of November 18, 2020, provided that the excision of the left rib was not medically necessary. However, due to the claimant's continued pain, a CT scan of the chest without contrast was found to be a medical necessary, for fracture follow up. (Resp. Ex. 1, P. 19 – 22)

DISCUSSION AND ADJUDICATION OF ISSUES

In determining whether the claimant has sustained his required burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704. Wade v. Mr. Cavanaugh's, 298 Ark. 364, 768 S.W.2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The claimant was involved in a motor vehicle accident while driving a semi that was stopped in the middle turn lane, when he was hit head-on by a pickup, on November 30, 2019. The claimant contended that he is entitled to additional medical as recommended by Doctor Marino and TTD from July 15, 2020, to a date to be determined.

ADDITIONAL MEDICAL

The claimant bears the burden of proof in establishing entitlement to benefits under the Arkansas Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. Dalton v. Allen Engineering Co., 66 Ark. App. 201, 635

S.W.2d 823 (1982). Preponderance of the evidence is the evidence having greater weight or convincing force. Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark App. 263, 101 S.W.3d 252 (2003). Further, pursuant to Ark. Code Ann. § 11-9-509(a), medical benefits owed under the Workers' Compensation Act are only those that are reasonable and necessary. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Owens Plating Co. v. Graham, 102 Ark. App. 299, 284 S.W.3d 537 (2008). What constitutes reasonable and necessary treatment is a question for the Commission. Anaya v. Newberry's 3N Mill, 102 Ark. App. 119, 282 S.W.3d 269 (2008). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission filed December 13, 1989 (Claim No. D512553).

It is also noted that 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's credibility and how much weight to accord the person's testimony are solely up to the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 549 (2001). Additionally, the employer takes an employee as he finds him and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robinson, 82 Ark. App. 460. 120 S.W.3d 150 (2003). When a workplace injury

aggravates a pre-existing condition, then the aggravating injury is compensable. Oliver v. Guardsmark, Inc., 68 Ark. App. 24, 3 S.W.3d 336 (1999).

Here, the claimant, after being treated for a work-related compensable injury of a fracture of his left eighth rib, was released by his original treating physician, Doctor Roman, on July 14, 2020, at MMI with the final diagnosis being status post eighth rib fracture and chest wall pain. No other fractures were seen from the x-rays that were performed on December 2, 2019. Later, on November 10, 2020, and after a change of physician, the claimant presented to UAMS Surgery Oncology Clinic and Doctor Katy A. Marino, with the report providing for a malunion of the left eighth costochondral-rib fracture after trauma. The report provided that,

> Unfortunately, due to location near the costal cartilage, he is NOT a candidate for rigid fixation with rib plating. I am ONLY able to offer him an excision of the callus that is present. I explained to him that surgical excision does not offer guarantee of relief of pain, which is likely neurogenic, but since other non-operative options have failed – presents his only surgical option in an attempt to remove any unstable portions of the bone that may be causing movement and pain.

The report went on to provide that a more updated CT scan would be obtained prior to surgery. The CT scan was then obtained six (6) days later, on November 16, 2020, and it provided for no rib fractures and no other rib pathology. There is no report of record providing that the claimant returned to Doctor Marino. However, a Peer Review Report dated November 18, 2020, provided that the excision of the left rib was not medically necessary, but due to the claimant's continued pain, the CT scan of the chest without contrast was found to be a medical necessity for fracture follow ups.

Based upon the above and the applicable law that the claimant bears the burden of proof, and after weighing the evidence impartially, without giving the benefit of doubt

to either party, it is found that the claimant has satisfied the required burden of proof that the CT scan of November 16, 2020, was a reasonable necessity and compensable. However, the claimant failed to satisfy the required burden of proof that the additional requested medical by Doctor Marino, which consisted of additional surgery for the removal of a callus of the rib, is reasonable and necessary. This decision is based upon a combination of the statements of Doctor Marino, the CT scan that occurred after Doctor Marino issued her opinion, the Peer Review Report, along with the failure of the claimant to return to Doctor Marino after the CT scan.

TEMPORARY TOTAL DISABILITY

Temporary total disability (TTD) is that period within the healing period in which an employee suffers a total incapacity to earn wages. Arkansas State Highway and Transportation Department v. Brashears, 272 Ark. App. 244, 613 S.W.2d 392 (1981). Disability means the incapacity because of injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury. Again, the claimant bears the burden of proving both that he remains within his healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. Palazzolo v. Nelms, 46 Ark. App. 130, 877 S.W.2d 938 (1994)

Here, the claimant is contending that he is entitled to TTD from July 15, 2020, which was the date the respondents stopped the payment of the TTD, to a date to be determined. Doctor Roman opined that the claimant reached MMI on July 14, 2020, and released him to regular duty, after he kept the claimant off work for one (1) additional month due to a burn injury that was clearly unrelated to the workers' compensation claim. The claimant admitted he had not looked for work since July and that the respondents had some light work available when he was released, but it was cancelled when he was

available. The claimant also admitted that steering a semi was easier than a pickup or car but that there was more responsibility. Leslie Stout, the Director of Safety for the respondents, and a knowledgeable and believable witness, testified that the respondents' standard procedure for light duty was to bring a driver into the home terminal for light duty work if the driver lived within fifty (50) to one hundred (100) miles of the terminal. The claimant admitting living seventy-six (76) miles from Little Rock. In addition, Ms. Stout testified the respondents offered light duty work at a non-profit for the claimant to work at, but he did not follow up. She testified the claimant never came back for modified work and the respondents were never contacted in regard to modified work. She also stated it was her understanding that the claimant had quit, with the message coming though the claimant's dispatcher.

In regard to the work, Ms. Stout considered the claimant's job "medium" work. It is noted that the FCE provided that the claimant could perform "medium" work. She also provided that the respondents had the option of diversifying the loads to accommodate drivers, if an accommodation was needed. She also testified she had dollied trailers and the respondents had good equipment which made the process easier. The claimant had also admitted the respondents had good equipment. Ms. Stout agreed that there could sometimes be a problem with dollying a trailer and the respondents would even prefer to pay a towing service to assist a driver getting a trailer up or down in an attempt to prevent workers' compensation claims. Based upon the above, there is no alternative but to find that the respondents made modified work available for the claimant and he failed to take advantage of it. Additionally, the claimant was able to perform work in the medium

classification. Consequently, the claimant has failed to satisfy the required burden of proof for TTD from July 15, 2020, to a future date.

CONCLUSION

After reviewing the evidence in this matter impartially, without giving the benefit of the doubt to either party, there is no alternative but to find that the claimant has satisfied the required burden of proof that the CT scan of November 16, 2020 was reasonable and necessary and in fact compensable. However, the claimant failed to satisfy the required burden of proof for additional medical treatment by Doctor Marino and also for temporary total disability (TTD) from July 15, 2020, to a date to be determined.

If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

IT IS SO ORDERED.

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JAMES D. KENNEDY
Administrative Law Judge