

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. G805579**

KENY SOSA, EMPLOYEE	CLAIMANT
KAWNEER COMPANY INC., EMPLOYER	RESPONDENT #1
INDEMNITY INSURANCE CO. OF NO. AMERICA, CARRIER	RESPONDENT #1
HELMSMAN MANAGEMENT SERVICES, LLC., TPA	RESPONDENT #1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

**OPINION FILED JANUARY 28, 2021**

An opinion was rendered by Administrative Law Judge Katie Anderson, in Pulaski County, Little Rock, Arkansas.

Claimant, Mr. Keny Sosa, was represented by Ms. Evelyn Brooks at the hearing.

Respondents #1 were represented by Mr. Rick Behring, Jr., Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by Ms. Christy L. King, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim before Administrative Law Judge Amy Grimes on October 1, 2020, in Springdale, Arkansas. An Amended Pre-Hearing Order was previously entered in this case on September 18, 2020.

The following stipulations were submitted by the parties, either pursuant to the Amended Pre-Hearing Order, or at the start of the hearing. I hereby accept the following proposed stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the claim.
2. The employee-employer-carrier relationship existed on July 23, 2018.
3. The Claimant sustained a compensable injury to his left knee and back on July 23, 2018.
4. The Claimant was earning sufficient wages to entitle him to the maximum rates of compensation of \$673.00 for temporary total disability benefits and \$505.00 for permanent partial disability benefits.
5. An Agreed Order was filed on January 17, 2019, regarding Claimant's compensable left knee injury.

By agreement of the parties, the issues to be litigated at the hearing were as follows:

1. Whether Claimant is entitled to medical treatment by Dr. James Blankenship, including surgery.
2. Whether Claimant is entitled to temporary total disability benefits from April 1, 2019, to a date yet to be determined.
3. Attorney's fees.

### **CONTENTIONS**

Claimant:

The Claimant contends he is entitled to treatment by Dr. James Blankenship including surgery. Claimant contends he is entitled to temporary total disability benefits from the last date paid to a date yet to be determined. The Claimant reserves all other issues. Claimant contends he is entitled to payment of Dr. Blankenship's treatment during the time period from April 2, 2019, (the day following his visit at the behest of respondents) to a date yet to be determined. Claimant contends Dr. Blankenship at the time of the IME of April 1, 2019, recommended an aggressive work-conditioning program that was not authorized until March of 2020, at which point Dr. Blankenship had recommended surgery. Claimant contends that when additional treatment was denied, he was entitled to seek treatment on his own from Dr. Blankenship.

Respondents #1:

1. The Respondents #1 accepted the back injury as compensable (pursuant to an Agreed Order entered with the Commission).<sup>1</sup>

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<sup>1</sup> The undersigned notes that the January 17, 2019, Agreed Order concerned acceptance by Respondents #1 of only the left knee injury. Per the Agreed Order, the parties reserved the issue of whether Claimant sustained a compensable back injury as a result

2. The Claimant's authorized treating physician has been Dr. George Deimel.
3. The Claimant underwent an IME with Dr. James Blankenship. Dr. Blankenship addressed causation and recommended conservative treatment (e.g. work hardening). The Respondents No. 1 also authorized a surgical consultation (at the bequest of Dr. Deimel). Dr. Daniel Shepherd examined the Claimant and concluded that he was not a surgical candidate.
4. Dr. Deimel released the Claimant as MMI on or about August 15, 2019 and recommended work hardening and a functional capacity evaluation. The Respondents No. 1 have authorized this treatment, but the Claimant has refused to participate.
5. The Respondents No. 1 paid temporary total disability benefits during the appropriate periods throughout the Claimant's healing period while totally incapacitated from earning wages. Specifically, the Respondents No. 1 offered the Claimant work within his restrictions following his return to work on or about November 7, 2018. On or about November 26, 2018, the Claimant attempted to falsify a drug screen by using his child's urine during a routine mobile equipment operator's physical. The Respondents No. 1 ultimately terminated the Claimant for cause. But for the Claimant's actions, the Respondents No. 1 would have continued to offer work within work restrictions (if any). Moreover, the Respondents No. 1 paid temporary disability benefits during those periods of time in which authorized treating physicians found the Claimant within his healing period and totally incapacitated from earning wages. Therefore, the Respondents No. 1 contend that the Claimant is not entitled to any temporary disability benefits other than those already paid by the Respondents No. 1.
6. In the alternative, if it is determined the Claimant is entitled to additional TTD benefits, the Respondents No. 1 hereby request a setoff for all benefits paid by the Claimant's group health carrier, all short-term disability benefits received by the Claimant, all long-term disability benefits received by the Claimant, and/or all unemployment benefits received by the Claimant.
7. To the extent surgical treatment is requested, the Respondents No. 1 hereby request an IME with Dr. Wayne Bruffett.
8. The Respondents No. 1 reserve the right to amend and/or supplement these contentions and assert any applicable defense in accordance with the Prehearing Order.
9. The Respondents No. 1 paid temporary total disability benefits during the appropriate periods throughout the Claimant's healing period while totally incapacitated from earning wages. Specifically, the Respondents No. 1 offered the Claimant work within his restrictions following his return to work on or about November 7, 2018. On or about

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of the incident on July 23, 2018. Per the stipulations in the matter, Respondents #1 have since accepted the back injury as compensable.

November 26, 2018, the claimant attempted to falsify a drug screen by using his child's urine during a routine mobile equipment operator's physical. The Respondents No. 1 ultimately terminated the Claimant for cause. But for the Claimant's actions, the Respondents No. 1 would have continued to offer work within work restrictions (if any). Moreover, the Respondents No. 1 paid temporary total disability benefits during those periods of time in which authorized treating physicians found the Claimant within his healing period and totally incapacitated from earning wages (i.e. from the date of the Claimant's termination on November 26, 2018 through September 10, 2019. The Claimant reached maximum medical improvement on August 15, 2019; therefore, the Respondents No. 1 contend that they are entitled to a credit and/or offset for the overpayment of temporary total disability benefits from August 16, 2019 through September 10, 2019.) The Respondents No. 1 contend that the Claimant is not entitled to any temporary disability benefits other than those already paid by the Respondents No. 1.

10. In the alternative, if it is determined the Claimant is entitled to additional temporary total disability benefits, the Respondents No. 1 hereby request a setoff for all benefits received by the Claimant's group health carrier, all short-term disability benefits received by the Claimant, all long-term disability benefits received by the Claimant, and/or all unemployment benefits received by the Claimant.
11. The Respondents No. 1 reserve the right to amend and/or supplement these contentions and assert any applicable defense in accordance with the Prehearing Order.
12. The Respondents No. 1 contend that, with the exception of the IME, Dr. Blankenship's treatment was unauthorized and not reasonable and/or necessary in relation to the compensable back injury.

Respondent #2:

1. The Trust Fund defers to the outcome of litigation.

The record consists of the hearing transcript of October 1, 2020, and the documents contained therein.

### **DISCUSSION**

During the hearing, Mr. Sosa, ("Claimant," used interchangeably herein) and Mr. Nicholas Nathan were the only witnesses to testify. The relevant testimony is summarized herein.

Claimant was 31 years old at the time of the hearing. He testified that he began working for Kawneer Company, Inc. ("Respondent-Employer," used interchangeably herein) in 2010 or

2011 (he was not quite sure of his start date) and had worked there for many years. He described his job title as “extrusion set-up.” In that position, his job duties included completing safety sheets and equipment “check-off,” checking oil levels, lifting, bending, twisting, and pulling/hoisting a crane. Claimant explained that on a routine basis, he was responsible for lifting dies or tooling (the materials that made the molding for the extrusion) from the nearby racks or from the floor and placing the materials into a ring for heating. The material weighed approximately forty to sixty pounds. While the materials were heating, which would take approximately two and one-half hours, he prepared for the removal of the leftover material and placement of the tooling back on the rack.

Claimant testified that on July 23, 2018, he was performing his regular job duties of setting up the material in the ring for heating, when he turned his back to the machine. He stated that when he returned to face the machine, there was an “explosion,” and he was thrown across the room. Claimant stated, “It was like a big cannon hit me.” Claimant described that he “saw fire hitting [his] knees and [his] legs.” Claimant testified that he was hit with aluminum particles from the machine, but he was not thrown to the ground as a result of the incident. Specifically, Claimant described the following:

Well, I know what hit me. It was the bur that builds up around the container. There is a lot of aluminum that does that, so when the ramp comes and it hits that and there is a little bit of a gap in there, the aluminum blows up because the pressure in the die box. That is what it does. It pushes the metal so that the aluminum comes out like clay, you know what I mean, like clay, so it is so soft. When it did that, the leftovers that was there, it blew up and it hit me.

Claimant stated that he immediately ran for safety and reported the incident to his supervisor. Claimant testified that he asked to go to the hospital for the pain in his left knee and his back; however, Claimant stated that his supervisor told him he could not go to the emergency room at

that time. Claimant stated on direct examination that he finished his shift that day and only worked four hours the next day.

Claimant said he had four or five visits with the company doctor and later saw his family physician. Claimant continued to work while he was being seen by both the company doctor and his family practitioner. Claimant ultimately underwent surgery on his left knee, which was paid for by Claimant's Blue Cross Blue Shield medical insurance supplied by Respondents. Claimant used short-term disability benefits while he was off work for his knee surgery, and he returned to work on November 6, 2018. Claimant testified that at the time he returned to work, his back pain was worse.

With regard to Claimant's complaints of back pain, he testified that he saw Eric Walker, a chiropractor, Dr. Casey Wagner, a sports medicine specialist, and Dr. George Deimel, all of which he paid for through his health insurance. Claimant continued to work during that time. Claimant testified that his employer sent him to Dr. Blankenship in April of 2019. Claimant also underwent two steroid injections and participated in physical therapy, as ordered by Dr. Deimel. Once that treatment was complete, Claimant stated that Respondents did not let him return to Dr. Blankenship. As a result, Claimant used his health insurance to follow up with Dr. Blankenship. Claimant also admitted that when Respondents offered him work hardening, he chose not to participate due to concerns with COVID-19. Moreover, Claimant stated that Dr. Blankenship recommended surgery; however, Claimant said he did not want to proceed with surgery at that time. He testified that his decision about surgery had since changed, and he would now undergo surgery because of the worsening pain in his back.

At the time of the hearing, Claimant was not working for Respondent-Employer. Claimant admitted that he was terminated for cause after he was required to submit to a urine drug test on

November 26, 2018. Claimant admitted that he falsified his drug test by submitting a sample of his son's urine to avoid failing the test. Claimant explained that he was using a cream for his back pain that contained THC (not prescribed by a physician).

Claimant testified that at the time of the hearing, his back was “really bad,” and he was unable to work an eight-hour day. He stated that his back pain interfered with his ability to perform activities of daily living, including household chores, such as vacuuming; however, he continued to try to assist his wife with washing dishes and other household activities. Claimant stated that if he had not been terminated, he would have tried to continue to work for Respondent-Employer.

On cross-examination, Claimant admitted that he did not actually see the incident, and that he only saw the incident via video afterward. Claimant further admitted that despite having mentioned on his direct examination that he saw “flames,” he did not have any burns on his body as a result. While Claimant testified on direct examination that he worked only four hours the day after the incident, Claimant admitted on cross-examination that in his deposition he stated that he worked a full eight hours the day after the incident. Claimant was also questioned regarding his initial report of symptoms. Claimant admitted that he did not list back pain as a symptom at his first visit to the company doctor. Moreover, medical records from the company doctor on July 26, 2018, reveal that Claimant was negative for back pain. Medical records from Dr. Casey Wagner show that on October 24, 2018, just prior to returning to work full time after his left knee surgery, Claimant reported that his back pain “had improved” and that he was “down to taking 1 hydrocodone a day.” However, on cross-examination, Claimant denied reporting an improvement in his back pain. Claimant admitted to working full time after his knee surgery, and he denied working any overtime.

Claimant further confirmed on cross-examination that he refused to participate in work-hardening, despite two physician's recommendations.

Furthermore, when questioned about video footage from April 6, 2020, depicting Claimant cleaning out a vehicle in his driveway, Claimant denied participating in the activity shown in the surveillance video. Claimant testified that he was capable of cleaning out a vehicle "in stages of time," but not without pain in his back. Claimant stated, "I can do a lot of things. I can clean a lot of things, but my back hurts a lot." Claimant also testified that he could drive a vehicle and admitted on cross-examination to driving a truck with a flatbed trailer as recently as August of 2020. However, he stated that he kept the trailer on his vehicle at all times and did not take it on and off of his truck.

On redirect examination, Claimant stated that he did not tell any of his doctors that he was knocked to the ground as a result of the incident in July of 2018. He also said that he reported to his doctors, specifically his chiropractor in October of 2018, that he was experiencing back pain. Claimant stated that he had not injured his back in any other way since the July 23, 2018, incident at work and that his back pain continued to worsen causing him to be unable to work.

Nicholas Nathan, Environmental Health and Safety Manager for Respondent-Employer, also testified. Mr. Nathan described the security footage of Claimant's July 23, 2018, accident as follows:

So the video shows what is known as a press burp. A press burp is – the easiest way to explain it is that it is a sudden release of compressed air. Inside of an extrusion press there is something called a container which is the hollow part. There is a stem, which goes into the container and pushes the billet, B-I-L-L-E-T, which will eventually load product. The billet gets pressed through an extrusion die, so there is a stem that is pushing a billet into a container.

As it is doing that, it is a very tight seal, naturally to build pressure, so there is an air pocket inside of the extrusion press. That air pocket, there is a designed press



burp every push cycle that relieves that air pocket before the metal actually begins to flow through the die in the shape of the manufactured part.

There are infrequent incidents where instead of that occurring in the normal cycle of things because of temperature of the billet, temperature of the press, different thermal variables where that can happen suddenly and before the actual equipment essentially is set to have it happen as a planned event.

Mr. Nathan further explained that the machine:

[D]oes not use air pressure to forge things. It used hydraulic pressure to push a ram which pushes the stem into the container with the billet which is then pressed against the die, the die having the shape of the profile that you want to come out. A lot like, you know, a Play-Doh toy. Children know this idea. So it is hydraulic pressure. It is not air pressure and it's not forging its extrusion.

As for the air that comes out of the burp, Mr. Nathan explained:

No, it's a byproduct. So when the container is - - when the stem pushes the billet into the container, naturally in order to achieve a high level of pressure that has to be sealed. There is naturally always going to be a pocket of air inside of there. A press burp is either deliberately as designed alleviating that air pocket or in an unfortunate event, like periodically occurs, the metal pushes up against the die and begins to extrude before the air is actually given the opportunity to release. As I said earlier, that has to do with a lot of different variables ranging from temperature, pressure, and so on in the extrusion process.

Mr. Nathan stated that a non-designed press burp would have been caused by a release of air pressure. The press burp can be "startling," but clarified that it was not an explosion. He also clarified that there are varying degrees of frequency and severity with the press burps. He stated the July 23, 2018, video of the incident showed Claimant flinch but remain on his feet as he traveled away from the machine. There was also no requirement that an alarm sound when a press burp occurred. He described a press burp as similar to a car backfiring. He had not ever witnessed a situation where a press burp was detrimental to those working around the machine at the time of the burp, nor had he received any complaints from other employees about being injured during an unscheduled burp.

Mr. Nathan testified that press burps happen “from time to time.” Nathan testified that based on the video of the July 23, 2018, incident, he did not believe Claimant was struck by anything other than dust. Nathan testified that he attended the first appointment with Claimant and stated that there was no report of a back injury at that time. He stated that Claimant complained of musculoskeletal discomfort, but no bruising or other visible injury.

On cross-examination, Mr. Nathan noted that there was a company policy that stated that up to forty pounds was a “permissible lift;” however, the process was designed with a hoist crane so that Claimant was not required to routinely lift heavy objects. Nathan also confirmed that per company policy, Claimant was required to take a drug test upon his return to work from his knee surgery. Company policy required that anyone that operated an industrial vehicle, including a crane, undergo a physical evaluation every three years. Claimant had undergone that type of evaluation prior to his accident. On November 26, 2018, Claimant was terminated because he falsified the drug test. Had Claimant not falsified the drug test, Respondent-Employer would have otherwise had work available for Claimant. Mr. Nathan also confirmed that Claimant worked some over-time hours upon his return to work in November of 2018, and to his knowledge, Claimant was not on light duty at the time.

On direct examination on rebuttal, Claimant stated that since starting work for Respondent-Employer, he had not experienced an unscheduled burp. However, on July 23, 2018, Claimant was struck by what he believed to be aluminum during the unscheduled burp. He also stated that on average he would complete forty to fifty set-ups per day that required him to lift and bend for each set-up and each take-down in order to successfully complete his job duties.

When questioned by the Judge, Claimant confirmed that he did not show the doctor any bruising on his shoulder from the incident.

At the conclusion of the testimony, the Court revisited the Amended Pre-Hearing Order. The issues were amended to include: whether Claimant was entitled to medical treatment on his back, including surgery, by Dr. Blankenship; whether Claimant was entitled to temporary total disability benefits from April 1, 2019 (the date of Blankenship's report) to a date to be determined; and attorney's fees.

Medical Exhibits:

After a thorough review of the medical exhibits, the relevant medical records are summarized below.

On July 26, 2018, Claimant completed an Arkansas Occupational Health Clinic Questionnaire, wherein he described the symptoms as "having bad headache[,] shoulder left[,] and left leg." The Medical Care Report Form indicated that Claimant sustained a left knee strain, that he had pain in his left shoulder, but that there was "[n]o fall involved." Dalana Rice, APRN, examined Claimant that day. Her notes indicate that Claimant reported an explosion causing pain to the left side of his body, from the back of his head into his left shoulder and into his leg. Claimant described the pain as stinging, throbbing, and aching. Upon examination, Claimant was negative for back pain and was ultimately diagnosed with a left knee sprain, tinnitus of the left ear, and pain in the left shoulder. Nurse Rice opined that after watching the video, Claimant's left knee injury was related to the incident, but that there was nothing to indicate that the left shoulder was related as there was no blunt trauma or fall involved. He was instructed to take over-the-counter pain relievers and to use heat and ice as needed; he was released to return to work at regular duty.

In October of 2018, Claimant saw Dr. Eric W. Walker, D.C., at Millennium Chiropractic, with complaints of aching, sharp, and stabbing low back pain. Dr. Walker's notes indicate that Claimant was assessed with lumbar facet joint syndrome, and he was treated with in-office therapy.

A October 18, 2018, MRI of Claimant's lumbar spine showed degenerative disc disease at L4-L5 and L5-S1 with mild right-sided neural foraminal narrowing at L4-L5. There was no other significant central canal or foraminal narrowing.

Claimant was seen at Advanced Orthopedic Specialists by Dr. Casey Wagoner on October 24, 2018, for a recheck of his low back pain. Claimant reported to Dr. Wagoner that his back pain had improved and that he was down to taking one hydrocodone per day. Claimant was instructed to return to the clinic as needed.

On November 26, 2018, Claimant underwent a drug test; however, the first urine sample did not register at the required temperature of between 90 and 100 degrees. Claimant did not provide an additional urine sample. Claimant admitted that he used a cream on his back that would cause him to fail a drug test, so as a result, he used his child's urine to avoid failing the test. Claimant was given another opportunity to take a drug test, but he refused and left the clinic.

On December 6, 2018, Claimant saw Dr. Marat Grigorov, a neurosurgeon, with complaints of back pain, numbness, tingling, weakness and pain in his lower extremity. Dr. Grigorov's clinic notes indicate that Claimant's imaging was reviewed; that physical therapy and steroid injections were recommended; and that surgical intervention was not recommended.

On December 13, 2018, Claimant saw Dr. George "B.J." W. Deimel, a sports medicine specialist, who assessed him with low back and bilateral buttock pain, greater on the right, and suspect lumbosacral radiculopathy. Dr. Deimel recommended a steroid injection and physical

therapy (including dry needling) at L4-5 and L5-S1. Claimant received the first steroid injection on February 5, 2019. At a follow-up appointment with Dr. Deimel on February 22, 2019, Claimant reported that the injection had not provided much relief. As a result, Dr. Deimel recommended a second injection and instructed him to continue with his medication management.

On April 1, 2019, Dr. James Blankenship, a neurosurgeon at the Neurosurgery Spine Center, performed an Independent Medical Evaluation on the issue of causation. Dr. Blankenship noted in Claimant's history of present illness that Claimant reported that he was in great shape prior to his injury and was a runner. Claimant also reported that during the incident in July of 2018, he was knocked down by an explosion and had immediate onset of low back and knee pain. Dr. Blankenship noted that Claimant had undergone physical therapy for his low back pain at the recommendation of Dr. Grigorov, but it did not provide any significant relief. Dr. Blankenship also noted that Dr. Deimel had administered two LESI's, with the second injection providing fifty percent relief to Claimant. Lastly, Dr. Blankenship noted that Claimant continued to "do better;" that his pain rating in July when he was injured was about seventy-five percent toward the worst pain imaginable; and that his pain was now at only twenty percent toward the worst pain imaginable. After examination, Dr. Blankenship's impression was that Claimant had some sensory deficits in the right L5 dermatome; that the remainder of his general neurologic examination was unremarkable; that his reflexes were symmetrical; that his piriformis examination was negative; and that his SI joint examination was also negative in all five testings. Dr. Blankenship reviewed the old MRI in its entirety and noted that there were disc space changes noted at L4-5 and L5-S1; that he had an annular fissure eccentric off to the left-hand side at the lumbosacrum; that he had disc space settling; and that he did have some mild segmental instability at the lumbosacrum. Dr.

Blankenship opined that Claimant’s “accident mechanism would be consistent with causation for the problem as [Claimant] describes.” He noted the following:

In light of his negative tests, I think facet etiology for his pain is likely but it is more likely from a segmental instability. The fact that his last ESI afforded him some relief would be consistent with this finding. The patient is significantly better after his last LESI.

Dr. Blankenship suggested that Claimant follow up with Dr. Deimel and continue with his aggressive active exercises. Lastly, Dr. Blankenship concluded that:

Although I was not asked, from the standpoint of treatment, I would recommend that the gentleman get into an aggressive work-conditioning program. He is good at what he does for a living and wants to get back to work but he is significantly deconditioned being off this amount of time. I recommend an aggressive work-conditioning program for the gentleman and then re-evaluation by someone to see if he is ready to go back to his job.

Claimant saw Dr. Deimel on May 16, 2019, for a follow-up appointment. Dr. Deimel noted that in March of 2019, Claimant was noticing near complete resolution of his right low back pain after the steroid injection. Dr. Deimel’s notes indicate that Claimant believed that Dr. Blankenship had suggested a surgical option for him and that Claimant was wanting clarification of his clinical status. Dr. Deimel recommended getting a third and final assessment of surgical options by Dr. Dan Shepherd.

Claimant underwent a lumbar spine MRI on June 5, 2019, which showed lower lumbar spondylosis, worst at the L4-5 level where there was moderate right foraminal narrowing. A July 15, 2019, CT of Claimant’s lumbar spine showed mild to moderate right neural foraminal narrowing at L4-5.

On June 19, 2019, Claimant saw Dr. Daniel Shepherd at the NWA Neuroscience Institute for another opinion. Claimant reported to Dr. Shepherd that his back pain began after a fall at work where he twisted his back and his knee. Dr. Shepherd’s notes indicated Claimant had

previously undergone conservative treatment and had not received any benefit from an epidural lumbar injection. Claimant also reported to Dr. Shepherd that he was counseled by Dr. Blankenship and that Dr. Blankenship recommended surgery if conservative measures failed. Dr. Shepherd assessed Claimant with chronic low back pain, lumbar spondylosis, and bilateral leg numbness. Dr. Shepherd's notes indicate that a review of Claimant's MRI results showed fairly benign degenerative findings; no real nerve root compression that would explain his lower extremity numbness; and some facet arthropathy noted at L4-5 and L5-S1 that may be contributing to some of his pain. However, Dr. Shepherd noted that he was reluctant to recommend a multilevel fusion at Claimant's young age. Dr. Shepherd recommended additional follow up to assess for dynamic instability.

On July 18, 2019, Dr. Shepherd's review notes of Claimant's CT scan and x-rays of his lumbar spine indicated there was no obvious pathology that could be resolved with surgery. Dr. Shepherd's notes indicated that Claimant did not want to undergo additional injections.

Claimant returned to Dr. Deimel on August 16, 2019, for follow up for his lumbar radiculopathy. Dr. Deimel's clinic notes indicated that Claimant had seen Dr. Shepherd, who did not recommend further surgical intervention for Claimant. He noted that Claimant wanted to return to Dr. Blankenship, as Claimant believed that Dr. Blankenship had suggested a work-hardening program as well as surgery for his pain. Dr. Deimel noted that he did not have any other care options to offer Claimant. Dr. Deimel expressed his concern regarding any discussions of surgery between Claimant and Dr. Blankenship. Dr. Deimel suggested that if, in fact, surgery was not a solution for Claimant, then he would move forward with a declaration of maximum medical improvement. Dr. Deimel agreed with Dr. Blankenship that a work-hardening program would be

reasonable and that continuing to advance Claimant toward returning to work would be in Claimant's best interest.

Dr. Deimel wrote on August 30, 2019, that Claimant had seen two surgeons who did not recommend surgery and that although Claimant had not responded to conservative treatment, it seemed Claimant had reached maximum medical improvement. Dr. Deimel recommended initiation of a work-hardening program with a plan to return Claimant to work.

Claimant returned to Dr. Deimel on November 8, 2019, for a follow up. Dr. Deimel's notes again suggest that Claimant believed that Dr. Blankenship had recommended work hardening, therapy, and surgery as "the last resort." Dr. Deimel wrote that he had reviewed Dr. Blankenship's notes, which mentioned work-hardening/therapy program. Claimant reported to Dr. Deimel that he did not feel like he could go back to work. Claimant indicated that he wanted to return to Dr. Blankenship to see if he had any other recommendations; however, Claimant also indicated that he did not want any further surgery or steroid injections.

On December 12, 2019, Dr. Blankenship authored a letter, wherein he stated that he had not seen Claimant since the Independent Medical Examination in April of 2019. He stated that if he saw Claimant for an evaluation at this point, he would need additional imaging and updated records before he could formally evaluate Claimant again, as it had been more than seven months since he had seen Claimant. He also noted that he did not have any records as to whether Claimant participated in the work-conditioning program that he recommended.

On February 3, 2020, Claimant saw Dr. Wayne Bruffett for an Independent Medical Evaluation. After examination, Dr. Bruffett opined:

I would say with a reasonable degree of medical certainty that Mr. Sosa is at maximum medical improvement with regards to his work injury. He has not sustained any objective evidence of injury. He has had more than adequate treatment. He is certainly not a candidate for any surgery. I would recommend that



he return back to work and whatever capacity he feels fit. He certainly has no restrictions. He wants a referral to see Dr. Blankenship again. Apparently, Dr. Blankenship may have made a reference to surgical treatment. Mr. Sosa does not need any surgery.

Claimant had another MRI of his lumbar spine on March 4, 2020, which revealed disc space changes with loss of disc space height and retrolisthesis at the lumbosacrum; marked facet arthropathy; L4-5 mild disc space changes with moderate to severe facet arthropathy; and mild facet arthropathy at the L3-4 level.

Claimant saw Dr. Blankenship again on March 16, 2020, for follow up on his complaints of low back pain radiating to his bilateral hips and bilateral buttocks, as well as complaints of paresthesias in both lower extremities posterolaterally down to the bilateral feet. In looking at Claimant's new imaging and comparing it to the prior imaging, Dr. Blankenship indicated that:

[T]he segmental instability at flexion is significantly worse now with marked anterior collapse of the disc space and anterolisthesis. The patient has now had an advancement to an anterolisthesis of a grade 1 nature. The fact that this was not apparent on his last radiographs is not indicative of the fact that this was not work-related. Given his age and activity prior to this injury, this is an indication that now after two years of pain and the inability to work on his core strengthening, there has developed ligamentous laxity but the original onset of the problem in my opinion was work-related.

Dr. Blankenship further opined that based on Claimant's medical history and the fact that he was two years post injury, Claimant was dealing with more of a segmental instability problem than a simple facet pain problem and that a discussion of surgical intervention was not unwarranted. Dr. Blankenship outlined surgically what he could do for Claimant if Claimant elected to proceed with surgical intervention. Dr. Blankenship assessed Claimant with acute low back pain and gave him abdominal and core strengthening exercises that could be done at home.

On July 28, 2020, Dr. Kenneth Kopacz reviewed Claimant's medical file and opined that surgical intervention was not medically necessary.

On August 6, 2020, Dr. Blankenship authored a letter indicating that he was aware that the surgery he recommended had been denied as not medically necessary.

Dr. Blankenship authored another letter on August 27, 2020, indicating that he saw Claimant for the first time in April of 2019 and that Claimant was to be off work until he had completed an aggressive work-conditioning program prior to getting him back to work. He saw Claimant again in March of 2020, when Claimant's pain had worsened and surgery was recommended for his back pain which was directly related to his work injury from July of 2018.

Non-Medical Exhibits:

Wage records indicated that Claimant returned to work in November of 2018, and that he worked overtime during that period of time.

A document supplied by Respondent-Employer's Human Resources Department indicated that Claimant was terminated from employment effective November 27, 2018.

A surveillance report produced by Devin Perillo, Case Manager for U.S. Compliance and Investigations, revealed that on April 6, 2020, Claimant was observed "walking, conversing, operating vehicles, bending over, carrying items in hand, throwing an object, and using a vacuum to vacuum a vehicle. The CLAIMANT was also observed climbing into the cargo area of a vehicle and wiped it down. The CLAIMANT ambulated in a normal manner. No visible braces or orthopedic devices were observed." Video footage from that day was also obtained and submitted as evidence. The video showed that at 12:36 p.m. on April 6, 2020, "CLAIMANT was observed intermittently over the next several minutes as he climbed into the cargo area of the SUV and began wiping it down before exiting the cargo area and continued to clean the interior before walking out of view and then back into view again and began conversing with a male subject that

approached the rear of the cargo area. During this period of activity, the claimant’s legs dangled while inside the cargo area of the SUV and stood on one foot while wiping the SUV down.”

### **ADJUDICATION**

#### A. Reasonable and Necessary Medical Treatment:

Respondents No. 1 accepted the Claimant’s back injury as compensable and paid for medical treatment and temporary total disability compensation as a result of the July 23, 2018, back injury. Claimant now asserts that he is entitled to reasonable and necessary medical treatment, to include back surgery performed by Dr. Blankenship. Respondent No. 2 has deferred to the outcome of litigation.

The first issue for determination in this matter is whether Claimant is entitled to medical treatment for his back, including back surgery by Dr. Blankenship.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant must prove by a preponderance of the evidence that the medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W. 2d 593 (1995). Preponderance of the evidence means the evidence having greater weight or convincing force. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 442 (1947).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant failed to prove by a preponderance of the credible evidence that the medical treatment, including back surgery by Dr. Blankenship, was reasonably necessary in connection with his compensable back injury of July 23, 2018.

Claimant testified at the hearing that his back pain was “really bad;” that his back pain interfered with his ability to perform daily activities around the house, such as vacuuming and washing dishes; and that he was unable to work a full eight-hour day due to his back pain. I find Claimant’s credibility to be an issue in this matter as much of the evidence presented at the hearing contradicts Claimant’s testimony that he is unable to work due to the intensity of his ongoing back pain.

First, an investigative summary produced from personal observation and video surveillance from March 23, 2020, through April 6, 2020, shows that on two occasions, Claimant left his home in his vehicle and drove his vehicle in an erratic manner. An April 6, 2020 observation note and video footage also show Claimant engaged in laborious daily activities, specifically cleaning and vacuuming the interior of a vehicle. He is observed to ambulate normally, without assistive devices, as he climbed into the cargo area of an SUV, wiped it down before exiting the cargo area, and continued to clean the interior of the vehicle. During this period of activity, the claimant’s legs dangled while inside the cargo area of the SUV, and he stood on one foot while wiping the SUV down. In addition, Claimant also admitted at the hearing that he had been pulling a trailer behind his vehicle.

In addition, there were medical records presented at the hearing that did not support Claimant’s assertion that he was unable to work due to his back pain, and thus, was in need of medical treatment to include surgery by Dr. Blankenship. Of note, I recognize that a claimant is not required to furnish objective medical evidence of his continued need for medical treatment. Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W.3d 211 (2000). Those relevant medical records demonstrated that:

1. Claimant did not initially allege any symptoms of back pain, and instead described symptoms of a headache and pain in his left shoulder and left leg. The records also showed that Claimant was negative for back pain.
2. Claimant's October 2018 MRI results showed minimal findings.
3. As of November of 2018, Dr. Wagner's notes state that Claimant's back pain had improved and that he was able to reduce his pain medication to one hydrocodone per day.
4. Dr. Deimel, Claimant's treating physician, initially recommended steroid injections, and then proceeded with recommending conservative treatment in the form of physical therapy and a work-hardening program. Dr. Deimel did not recommend surgery for Claimant's injury.
5. Claimant was evaluated by neurosurgeons Dr. Grigorov and Dr. Shepherd, neither of which recommended surgery as an option for Claimant. Rather, both recommended conservative treatment for Claimant's complaints of low back pain.
6. Specifically, Dr. Shepherd reviewed Claimant's June 5, 2019 MRI results, which showed fairly benign degenerative findings; no real nerve root compression that would explain his lower extremity numbness; and some facet arthropathy noted at L4-5 and L5-S1 that may be contributing to some of his pain.
7. Dr. Blankenship's April 1, 2019 IME report did not mention surgery. Rather, he recommended that Claimant should follow up with Dr. Deimel, continue his aggressive active exercises, and participate in an aggressive work-conditioning program in order to get him back to work. He also specifically noted that Claimant continued to improve and that his pain rating of only twenty percent (down from seventy-five percent in July) was a significant improvement.
8. In August of 2019, Dr. Deimel opined that while Claimant had not been overly successful with some recommended conservative treatment, he had reached maximum medical improvement. Dr. Deimel expressed his concern regarding Claimant's understanding that Dr. Blankenship had recommended surgery, as Dr. Deimel and two other neurosurgeons had advised that Claimant was not a candidate for surgery. Dr. Deimel was in agreement with Dr. Blankenship that a work-hardening program would be reasonable and that continuing to advance Claimant toward returning to work would be in Claimant's best interest.
9. Dr. Bruffett's IME from February of 2020, confirmed that Claimant was not a candidate for back surgery. Specifically, Dr. Bruffett stated that with a reasonable degree of medical certainty that Claimant was at maximum medical improvement with regard to his work injury; that he had not sustained any

objective evidence of injury; that he had received more than adequate treatment; that he was certainly not a candidate for any surgery; and that he could return to work with no restrictions.

While I acknowledge Dr. Blankenship's more recent opinion that surgery was a possible treatment option for Claimant under his current circumstances, I find it significant that the evidence shows that Claimant had been noncompliant with conservative medical treatment suggestions, in that he had refused to participate in a work-hardening program after it was recommended by his treating physician Dr. Deimel, as well as Dr. Blankenship. When Claimant saw Dr. Blankenship for the first time in December of 2019 (after the April 1, 2019 IME), Dr. Blankenship noted that one of the first things he needed to know was whether Claimant had participated in the work-hardening program that he had previously recommended, as he did not see any evidence in the medical file that Claimant had done so. By Claimant's own admission, he voluntarily chose not to participate in work-hardening.

Moreover, particularly detrimental to Claimant's credibility was the evidence showing that Claimant was terminated from his employment for cause after he falsified his drug test. Claimant admitted that he submitted a sample of his son's urine instead of his own specimen in order to avoid detection of a non-prescription cream containing THC that he was using for his back. As a result, Claimant was terminated for cause by Respondent-Employer on November 26, 2018. Mr. Nathan explained that company policy mandated that Claimant submit to a drug test upon his return to work, post-knee surgery. Claimant was aware of the requirement and had previously undergone similar testing as a crane operator. Nathan confirmed that Claimant was, in fact, terminated for falsifying the drug test and refusing to retake the test when given another option. Furthermore, but for Claimant's action of falsifying his drug test, he would still have employment opportunities with Respondent-Employer.

In sum, based on the record before me, I find that the Claimant failed to prove by a preponderance of the evidence that medical treatment for his back, including surgery by Dr. Blankenship, was reasonably necessary in connection with the injury he received on July 23, 2018.

B. Temporary Total Disability from April 1, 2019, to a date yet to be determined:

Claimant asserts that he is entitled to temporary total disability compensation from April 1, 2019, to a date yet to be determined as a result of his July 23, 2018, back injury.

An injured employee who suffers an unscheduled injury 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).

In this matter, the evidence presented at the hearing shows that Claimant returned to work after his knee surgery in November of 2018, with accommodations being provided by Kawneer, within his physical restrictions. In fact, the evidence showed that Claimant returned to work full time and even earned some over-time hours. Furthermore, but for Claimant's falsifying his drug test (which resulted in him being terminated for cause), testimony showed that Kawneer had work available within his physical restrictions during the period of time in question. Moreover, the evidence showed that Claimant's treating physician, Dr. Deimel, found him to have reached maximum medical improvement on August 30, 2019. Lastly, an investigative summary and video surveillance from the Spring of 2020, showed Claimant engaged in laborious activity in the driveway of his home and that Claimant was capable of pulling a trailer with his vehicle, without him having undergone surgical intervention for his back.

Based on all of the foregoing evidence presented in this case, I find that Claimant failed to prove his entitlement to temporary total disability compensation from April 1, 2019 to a date yet to be determined.

C. Attorney's Fees:

Because Claimant failed to prove his entitlement to any indemnity benefits, the issue of attorney's fees has been rendered moot and is not addressed in this Opinion.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On the basis of the record as a whole, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704.

1. The Arkansas Workers' Compensation Commission has jurisdiction of the claim.
2. The employee-employer-carrier relationship existed at all relevant times, including July 23, 2018.
3. The remaining stipulations set forth above are hereby accepted.
4. Claimant failed to prove by a preponderance of the evidence that medical treatment, including surgery by Dr. Blankenship, is reasonable and necessary in connection to his work-related incident of July 23, 2018.
5. Claimant failed to prove his entitlement to any additional temporary total disability compensation for his back injury of July 23, 2018.
6. Because indemnity benefits were not awarded, the issue of attorney's fees is rendered moot and not addressed in this Opinion.

**ORDER**

For the reasons discussed herein, this claim for medical benefits, including back surgery, and other associated benefits must be, and hereby is, respectfully denied in its entirety and dismissed.



**IT IS SO ORDERED.**

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**KATIE ANDERSON**  
**ADMINISTRATIVE LAW JUDGE**