

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H006705

JOHN SCHULGEN, EMPLOYEE CLAIMANT

LOWE'S HOME CENTERS, LLC, EMPLOYER RESPONDENT

SEDGWICK CLAIMS MANAGEMENT
INSURANCE CARRIER/TPA RESPONDENT

OPINION FILED MAY 4, 2021

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE RANDY P. MURPHY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed February 1, 2021. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on November 4, 2020 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. The parties' stipulation that claimant earned an average weekly wage of \$587.40 which entitle him to compensation at the rates of \$392.00 for total disability benefits and \$294.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits for his compensable injury.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore, we affirm and adopt the February 1, 2021 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

After my *de novo* review of the record in this claim, I dissent from the majority opinion, finding that the claimant has failed to meet his

burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits for his compensable injury.

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 bears the burden of proving that he is entitled to additional medical treatment. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984). Reasonable and necessary medical services may include those necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

An employee is not required to prove that his compensable injury is the major cause for the need for treatment unless he is seeking permanent benefits; when the employee has suffered a specific injury and is only seeking medical benefits and temporary total disability, the major-cause analysis is not applicable and the employee need only show that the

compensable injury was a factor in the need for additional medical treatment. *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004).

On October 6, 2018, the claimant sustained a compensable low back injury while loading bags of concrete. The claimant presented to MedExpress on the same day as the accident with complaints of lower back pain. The claimant was diagnosed with sprain of ligaments of the lumbar spine and muscle spasm and prescribed Naprosyn and Zanaflex.

The claimant came under the care of Dr. Thomas Cheyne on November 1, 2018. Dr. Cheyne ordered pelvis and lumbar spine x-rays. The pelvis results were normal. The lumbar spine x-ray revealed the following Impression:

Mild to moderate narrowing of the L5-S1 disc space. Otherwise unremarkable lumbar spine.

Dr. Cheyne diagnosed the claimant with “[a]cute lumbar strain with possible atypical sciatica with underlying mild degenerative disc narrowing at L5-S1”. The plan noted in Dr. Cheyne’s medical record included putting the claimant on a Medrol Dosepak followed by Mobic; prescribing physical therapy for four weeks, and placing the claimant under work restrictions.

The claimant did not undergo physical therapy; however, he began treating with Dr. Lance Clouse on February 21, 2020. Dr. Clouse

performed spinal manipulations and IM injections of Lidocaine monthly through August 2020.

The claimant underwent an MRI on July 13, 2020 which revealed the following:

FINDINGS: Disc desiccation at all levels except L3-4 level. There does appear to be some disc space narrowing probably moderate at L5-S1 level. The bones have normal signal characteristics. No compression fractures noted. A few scattered Schmorl's nodes noted.

L1-2: Slight spurring, otherwise unremarkable.

L2-3: Within normal limits.

L3-4: Minimal degenerative facet changes, otherwise unremarkable.

L4-5: Very small central protrusion present with mild degenerative facet changes. Some mild mass effect on the thecal sac, but no central or foraminal narrowing.

L5-S1: There is a left paracentral disc protrusion into the left lateral recess which contacts and displaces the left S1 nerve root. There is prominent subligamentous extension of a prominent disc fragment behind the L5 vertebral body on the left. Disc fragment measures at least 11 mm x 10 mm x 13 mm. This extends cephalad behind the left side of L5 to superior aspect of the vertebral body just inferior to the inferior end plate. There is probably moderate narrowing of the canal. Foramina are patent. Not clear if the disc fragment is completely connected to the parent disc.

IMPRESSION

1. Left paracentral disc protrusion with extruded disc fragment L5-S1 with subligamentous extension of a prominent fragment behind the L5 vertebral body with cephalad extension as discussed above with moderate narrowing of the canal and prominent mass effect on the left S1 nerve root in the lateral recess.
2. Small central protrusion L4-5.
3. Mild degenerative facet changes.

The claimant saw Dr. James Blankenship on August 10, 2020.

Upon examination of the claimant and review of his lumbar x-rays and MRI,

Dr. Blankenship noted the following:

Impression: He has an S1 radiculopathy by examination. His MRI demonstrates a massive disc herniation at L5-S1 on the left with lateral extension through the neural exit foramen with caudal migration. At L4-5, he has gross annular fissuring to the midline.

Recommendations:

First of all I have told him I think it is extremely unlikely he is going to get over a disc herniation of this size. After a lengthy discussion the gentleman has elected to have a more definitive operation which given the degree of bony decompression he is going to need and also given the degree of instability that he has, I think that is a wise decision. I told him that it is very unlikely that he is going to go very long without having an arthrodesis at this level given the fact that I am going to have to take off quite a bit of his facet joint and he already has significant instability.

Regarding the cause of the claimant's injury, Dr. Clouse, opined the following in a letter dated October 12, 2020:

...I have been treating Mr. Schulgen since June 2017. At that time, we were treating him for anxiety. He had no history of back pain or any other similar condition. He came to see me for his back problem on February 21 of 2020. During the course of his treatment he improved very little. Therefore, a Lumbar MRI was ordered revealing significant disk problems in his lower Lumbar spine warranting surgery. Essentially, his condition did not improve with manual, physical therapy and subsequent prescription medications. He revealed to me upon coming on his first visit that these were the same symptoms he had had since he had injured his back at work in late 2018.

...

It is again noted that he had the same symptoms after the work injury in late 2018 as he did when he came into my office in February 2020. During that time, he was unable to get any form of treatment due to the financial strain of having three young children. Since his condition had not changed any since the initial injury and, subsequently, there was very little improvement with the attempts to treat his condition by myself with, [sic] manual therapy, physical therapy[,] and prescription medications. It is my opinion, to a reasonable degree of medical certainty, that given the severity of the disk injury revealed in the Lumbar MRI that the damage occurred during the initial work comp injury of late 2018. In my opinion, this is the source and cause of his problem.

There was no other injury or insult to his Lumbar spine after the work injury, all of his subjective complaints were the same since the injury and did not improve at all with the treatment at our office. Therefore, his condition, revealed on the Lumbar MRI, essentially had not changed since the initial work injury. The patient is in constant

pain with radiculopathy into the lower extremity that has not changed since the initial work injury, that being said, that disk injury would have to occurred during the initial insult to his Lumbar spine in late 2018. In reviewing the Lumbar MRI, given the patient's subjective and objective findings, it appears that surgical correction is his only option.

Dr. Owen Kelly also offered an opinion regarding causation, to

wit:

...

Mr. Schulgen was seen by Dr. Blankenship and surgical intervention was recommended at the L5-S1. He was taken off of work per Dr. Blankenship at this time.

It is in my opinion, that the surgical treatment for disc herniation at L5-S1 would be indicated. The MRI appears to show nerve compression and large fragments in the canal. Mr. Schulgen would best be treated definitively if he has intractable pain, neurologic compromise, strength or functional loss.

Mr. Schulgen had an injury in October of 2018, continued to work, and then presented well over a year later for treatment and eventual MRI evaluation. It would be difficult to connect the one time isolated injury to his current condition.

The natural history/resolution of disc herniations occurs between 6 months to one year. It is also shown that larger disc herniations resolve faster than smaller ones, and Mr. Schulgen has a large disc herniation. For Mr. Schulgen to work and not seek medical care for a symptomatic disc herniation for well over a year, does not fit his clinical picture. There were likely a multitude of factors that could have occurred over that time

frame – additional lifting injuries, falls, and variable degrees of trauma. It would be hard to definitively ascertain what the cause of his disc herniation is since the MRI is some 1 ½ years after his initial work injury at Lowe's. The likelihood/probability of the MRI findings being related to the initial injury are extremely low.

Drs. Blankenship, Clouse, and Kelly all agree that the surgical intervention recommended by Dr. Blankenship is reasonable and necessary. Thus, the only question here is whether the disc herniation at L5-S1 is causally connected to the claimant's October 6, 2018 work accident.

I credit Dr. Clouse's opinion over that of Dr. Kelly's regarding causation in this matter. Dr. Kelly did not treat the claimant, instead he formed his opinion based on a review of medical records and the claimant's deposition testimony. In contrast, Dr. Clouse treated the claimant's low back pain on several occasions. When medical opinions conflict, the Commission may resolve the conflict based on the record as a whole and reach the result consistent with reason, justice and common sense.

Barksdale Lumber v. McAnally, 262 Ark. 379, 557 S.W.2d 868 (1977). A physician's special qualifications and whether a physician rendering an opinion ever actually examined the claimant are factors to consider in determining weight and credibility. *Id.*

Also, Dr. Kelly indicated that a large disc herniation like that found on the claimant's MRI would usually resolve in 6 months to one year.

However, Dr. Blankenship explained that “it is extremely unlikely [the claimant] is going to get over a disc herniation of this size”. This opinion appears to contradict with Dr. Kelly’s statement. Although it may be accurate that historically disc herniations resolve in 6 months to 1 year, this does not appear to be the case for the claimant’s herniation.

In addition, Dr. Kelly notes that the claimant continued to work after his work accident as part of his reason for concluding that the claimant’s herniation was not caused by his work accident. However, the claimant testified that he left his job with the respondent-employer and switched to a lighter duty job as a lab tech. According to the claimant, his new position required lifting a maximum weight of 20 pounds. Obviously, this position is significantly less taxing on the claimant’s back than his position with the respondent-employer.

Additionally, despite Dr. Kelly’s opinion that there were likely a multitude of factors that occurred between the time of the claimant’s work accident and the time of his MRI, there is no evidence to support such an opinion. The claimant testified that he had not been injured his back in any other way after his work accident. Also, Dr. Clouse noted that all of the claimant’s subjective complaints were the same since the work accident. To reach the conclusion that the claimant injured his back in any incident other than his work accident would require speculation and conjecture on the part of the Full Commission. Speculation and conjecture are not to be

substituted for credible evidence by the Commission. *Dena Construction Company v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979).

Finally, Dr. Kelly's opinion is not stated within a reasonable degree of medical certainty. Medical opinions pertaining to causation must be stated within a reasonable degree of medical certainty, and expert opinions qualified by terms such as "could", "may", or "possibly" lack sufficient "definiteness" to meet that requirement. See A.C.A. §11-9-102 (16)(B); *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000).

The claimant's work accident does not have to be the major cause for the need for treatment, it merely has to be a factor in the need for treatment. The claimant's October 6, 2018 work accident was clearly a factor in the claimant's need for the recommended surgical procedure. Thus, I find that the recommended surgery is reasonable, necessary, and causally connected to the claimant's compensable injury.

For the foregoing reasons, I dissent from the majority opinion.

M. Scott Willhite, Commissioner