

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H006753

JACOB M. SHOTZMAN,
EMPLOYEE CLAIMANT

WILBERT FUNERAL SERVICES, INC.,
EMPLOYER RESPONDENT

GALLAGHER BASSETT SERVICES, INC.,
CARRIER/TPA RESPONDENT

OPINION FILED DECEMBER 29, 2021

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

Claimant represented by the HONORABLE MICHAEL L. ELLIG, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on July 1, 2021. The Administrative Law Judge found that the claimant has met his burden of proof by a preponderance of the evidence that he is entitled to additional medical treatment from Dr. James Blankenship. After our *de novo* review of the entire record, the Full Commission finds that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment in the form of a

stand-alone anterior lumbar interbody arthrodesis at the lumbosacrum as recommended by Dr. Blankenship. Additionally, the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning on January 20, 2021 and continuing through a date yet to be determined.

I. HISTORY

On August 29, 2020, the claimant was working for the respondent-employer preparing a burial vault for a funeral. According to the claimant, the accident occurred in the following manner:

Q All right. And would you briefly describe to the Judge what happened on August 29, 2020.

A Okay. The burial vault is the container that the casket sets down in, it is a sealed container, and whenever I was – I got it off the truck. We've got this little battery-operated machine that takes it off the side of the truck and it steers through the cemetery. The way you've got to steer it is you've got to have a rock bar and then you kind of wedge it around, you know, to turn the machine.

...

A Okay. I was using the machine and I went to turn the vault to get it line up with the hole and whenever I – I guess I twisted and turned it at the same time wrong and that's when I felt a sharp pain in my back.

The claimant was treated on August 31, 2020 by Dr. James Schmitz. The claimant presented with complaints of lower back pain

radiating down his right leg. The plan noted in the medical record from this visit included lumbar spine x-rays, lifting restrictions of no lifting greater than twenty (20) pounds, an order for physical therapy, and a prescription for Gabapentin. Dr. Schmitz also took the claimant off work for one and one-half week.

The claimant returned to Dr. Schmitz on September 10, 2020. The claimant advised Dr. Schmitz that physical therapy had been discontinued by the therapist after two treatments until workers' compensation began paying for the treatment. Since the claimant continued to be symptomatic, Dr. Schmitz referred the claimant to a specialist.

The claimant was seen by Dr. Mark Miedema at Ozark Orthopedics on September 21, 2020. Dr. Miedema noted the following Assessment/Plan:

1. Low back pain – New Problem (w/u needed) –

Mr. Shotzman presents for evaluation of 3 weeks acute low back pain radiating into his right leg. He had a work-related injury on 8/29/2020 which precipitated his symptoms. He works at a cemetery and does a lot of lifting and pulling. He was putting a vault over an open hole when he was cranking on the handle and doing heavy lifting when he felt immediate onset low back pain radiating into his leg. He has tried physical therapy, TENS, exercising at home and pharmacotherapy with muscle relaxants, anti-inflammatories, neuropathic agents, topicals and opioids without sustained

relief. He is not able to sit or stand for long periods.

On my review of his prior medical records he had x-rays of his lumbar spine on 8/31/2020 at Scholz [sic] family practice and per the report these were normal. ...

2. Lumbosacral radiculopathy – New Problem (w/u needed) –

I educated the patient on conservative treatment options including physical therapy, home exercise program, healthy diet and lifestyle, acupuncture, massage, chiropractic care, pharmacotherapy and injections.

I would recommend a comprehensive spine rehabilitation program for mechanical support and stabilization of the spine. I encouraged the patient on the importance of continuing a home exercise program once physical therapy is completed.

...

RADIOLOGY REFERRAL – Schedule within: provider's discretion Note to Provider: Lumbar MRI w/o contrast

3. Low back strain –

I think he had an acute low back strain as result of this injury. ...

4. Prolapsed lumbar intervertebral disc –

I think he had an acute disc herniation versus annular tear as a direct result of this work injury. His symptoms are in a right L5 distribution. He has positive dural tension and a reduced right Achilles reflex. He [has] tried pharmacotherapy and physical therapy without relief. Given that he is [sic] failed conservative treatments and has

neurological changes I would recommend advanced imaging of the lumbar spine with an MRI to rule out a neural compressive lesion.

...

I do not think he has reached maximal medical improvement. He may return to work at a sedentary level of no bending twisting or lifting.

I will follow-up with him after the MRI to reassess progress. ...

PHYSICAL THERAPY BACK REFERRAL –
Schedule Within: provider's discretion Note to Provider: Please evaluate and treat with range of motion, stretching, and strengthening exercise for the lumbar spine with emphasis on spine stabilization, postural mechanics, core strengthening, and hip girdle flexibility, with progression to independence in a home exercise program. Please minimize passive modalities to <20% of total visit times.
Frequency: 1-2 times per week for 6 weeks.

The claimant underwent a lumbar spine MRI on October 5, 2020 which revealed the following:

Findings:
Motion artifact limits image quality and interpretation. There is anatomic osseous alignment. Osseous marrow signal is normal. The paraspinal soft tissues are unremarkable. The conus medullaris terminates at the L1 level.

L1-2: No canal, lateral recess, or foraminal narrowing.

L2-3: No canal, lateral recess, or foraminal narrowing.

L3-4: Bilateral facet arthropathy with facet joint effusions results in mild bilateral lateral recess and foraminal narrowing.

L4-5: Diffuse disc bulge and bilateral facet arthropathy results in mild bilateral lateral recess and foraminal narrowing.

L5-S1: Diffuse disc bulge, facet arthropathy, and facet joint effusions results in moderate left lateral recess narrowing, mild right lateral recess narrowing, and moderate bilateral foraminal narrowing.

Impression:

Lower lumbar spondylosis, worst at the L5-S1 level where there is moderate lateral recess and foraminal stenosis.

The claimant returned to see Dr. Miedema on October 12, 2020 to review his MRI results. During that visit, Dr. Miedema noted the following plan:

Since he has not improved with conservative treatments we will proceed with right L3-4, L4-5 and L5-S1 facet joint injections for both diagnostic and therapeutic purposes. If this provides temporary relief he could be a candidate for radiofrequency ablation.

I do not think he will require surgical intervention. I do not think he has reached maximal medical improvement. At this time he may return to work light duty of no bending lifting or twisting more than 20 pounds.

I will follow-up with him after the procedure [to] reassess progress. If he has any remaining pain or radicular symptoms we could consider a right L5-S1 transforaminal epidural injection.

The above-referenced facet injections were administered by Dr. Miedema on October 27, 2020. Following these injections, the claimant returned to see Dr. Miedema on November 9, 2020 a follow-up visit. Dr. Miedema noted that the claimant had 50% relief from the facet joint injections and that he would “hold off on another injection for now”.

On November 16, 2020, the claimant exercised his one-time change of physician right from Dr. Miedema to Dr. James Blankenship. The claimant’s initial visit with Dr. Blankenship was on November 23, 2020. During this initial visit, Dr. Blankenship made the following recommendations:

I have recommended that we get him in to start working with the folks at Total Rehab in Fort Smith. I have recommended that we add Lyrica to his current treatment regimen. I am fine with him continuing to work. He has light duty restrictions which he will need to continue until I see him back in six weeks. Concerning further injections we have had a long discussion about the possibility of an LESI versus an isolated lumbosacral facet injection on the right. I have also recommended we get him to see Dr. David Cannon for evaluation. Since we presume he has had facet injections I would consider probably doing an LESI. He had a horrendous experience with his facet injection so I told him I would just sit down and visit with Dr. Cannon and see what he has to say. We will see him back in six weeks. I do want him to continue to work at light duty.

Dr. Cannon performed a LESI; however, the claimant indicated to Dr. Blankenship during his December 31, 2020 visit that it

provided him no relief. Because the claimant had failed “all routine and usual conservative measures”, Dr. Blankenship recommended that the claimant undergo a stand-alone anterior lumbar interbody arthrodesis at the lumbosacrum.

Dr. Blankenship removed the claimant from work by letter dated January 20, 2021 and indicated that the claimant will “need to remain off work until 6 weeks after surgery”¹.

The respondents arranged for the claimant to see Dr. Frank Tomecek for a second opinion. The claimant’s initial visit with Dr. Tomecek was on April 7, 2021. Dr. Tomecek determined that the claimant needed more diagnostic testing and ordered a lumbosacral myelogram.

The claimant underwent the myelogram on April 15, 2021 and returned to Dr. Tomecek to review the results of the test on May 12, 2021.

Regarding the test results Dr. Tomecek noted:

The myelogram, in my opinion, is basically completely normal. The radiologist that read the myelogram stated that the L1-2 level was normal, the L2-3 level was normal, the L3-4 level was normal, the L4-5 level was normal, and the radiologist said that there was a mild disk protrusion without significant canal narrowing at L5-S1. I do not even really see the disk bulge at all. Again, there is absolutely no significant neural impingement or cauda equina compression. There is normal alignment of the

¹ The claimant’s surgery was initially scheduled for February 10, 2021 but had not been performed at the time of the hearing.

spine and no evidence of pars defect or spondylolisthesis. There are no fractures.

A pre-hearing order was filed on April 8, 2021. The claimant contends the following: “The medical treatment recommended by Dr. Blankenship is reasonably necessary medical treatment for his compensable injury.”

Respondents contend that “all appropriate benefits have been paid with regard to this matter. The claimant is scheduled to undergo a second opinion evaluation to address the surgical recommendation and whether the same is reasonable and necessary for the claimant’s acute injury. That evaluation took place on for April 7, 2021, but the report from the evaluation was not available at the time of the prehearing conference. Respondents may amend their contentions after receipt of the second opinion evaluation report to determine whether the surgical recommendation of Dr. Blankenship is reasonable and necessary.”²

The parties agreed to litigate the following issues:

- (1) Whether the claimant is entitled to additional medical benefits specifically treatment from Dr. Blankenship in regard to claimant’s back injury.
- (2) Whether claimant is entitled to additional temporary total disability starting from the date it was last paid.

² By letter dated April 20, 2021, the Respondents’ attorney clarified that their position is that the surgical recommendation by Dr. Blankenship is not reasonable and necessary.

(3) Attorney's fees on controverted unpaid indemnity benefits.

All other issues were reserved.

After a hearing, an Administrative Law Judge filed an opinion on February 12, 2021. The Administrative Law Judge found:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 8, 2021 and contained in the Pre-hearing Order filed the same date, as well as the announced stipulations at the hearing on June 1, 2021, are hereby accepted as fact.
2. Claimant has met his burden of proof by a preponderance of the evidence that he is entitled to additional medical treatment from Dr. James Blankenship.
3. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits, specifically claimant's entitlement to temporary total disability.

Respondents appeal these findings to the Full Commission.

II. ADJUDICATION

A. Additional Medical Treatment

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).

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.*

The claimant sustained a compensable low back injury on August 29, 2020. After he failed conservative treatment, the claimant's treating physician, Dr. Blankenship, recommended that he undergo a stand-alone anterior lumbar interbody arthrodesis at the lumbosacrum. We find that the surgical procedure recommended by Dr. Blankenship is reasonable and necessary.

We note that Dr. Frank Tomecek provided an opinion regarding the claimant's condition, to wit:

IMPRESSION/PLAN: This is a 33-year-old male who injured his back on August 29, 2020 while working for Wilburt Funeral Services, setting up a tent and vault in the cemetery. He has not worked since this injury. He has had over 20 sessions of physical therapy at Total Rehabilitation that only gave him temporary relief. He feels that he is incapacitated and certainly can't work. He had a myelogram CT scan done on April 15th of this year, and it is basically normal. He has no significant structural abnormalities to this spine. He has no significant additional risk compared to anyone else regarding injury to his back, which could cause any kind of neurologic deficit. Again, he is at no risk of paralysis if he continues to work. He is at no risk of increased disability if he continues to work compared to any other male of his age. He is currently neurologically intact. I have nothing further that I can offer him. He is not a surgical candidate and does not have any pathology that would justify proceeding with surgery. He was very upset with my diagnosis. He told me that I was wasting his time. He basically stormed out of the office. I am concerned that this patient has considerably [sic] psychological overlay. His pain is dramatically out of proportion to any radiographic findings that we have seen. His pain with the myelogram is far out of proportion to any radiographic findings that we have seen. His pain with the myelogram is far out of proportion than over 95% of my patients. Nevertheless, I have nothing to offer him, and I believe he is at maximum medical improvement from this injury. He is not totally disabled. I am releasing him from care. He is released to regular, full duty. I would not recommend narcotic pain medication. I don't think he would really benefit from pain management. He asked me if he just had to live with it, which didn't seem to be an acceptable option for him. I actually think that is his best option and to take anti-inflammatories as

needed. Again, he is released to full duty with no restrictions as of today's date, 05/12/2021. I spent 30 minutes assessing the patient, reviewing all his myelograms with him, and talking to him about the results and my recommendations, and examining him as well. I also spent another 10 minutes discussing his care with his Nurse Case Manager.

All of my opinions are based on a reasonable degree of medical certainty.

In response to Dr. Tomecek's opinion, Dr. Blankenship wrote the following:

I understand that Dr. Tomichek [sic] has seen Mr. Shotzman for a second opinion. First of all I have to preference [sic] this, Dr. Tomichek testified against me in a malpractice trial. ... I then reported him to the American Association of Neurologic Surgeons who sanctioned him for his testimony. Any second opinion by Dr. Tomichek in regard to my patients in my regards is invalid.

...

In summary, I completely disagree with Dr. Tomichek's [sic] report. I would question the validity of Dr. Tomichek [sic] seeing any of my patients for a second opinion considering our previous history. ... The bottom line is Mr. Shotzman hurts. He has segmental instability. I have already outlined why I have offered him surgery.

Dr. Blankenship was the claimant's treating physician who provided various treatment modalities in an attempt to provide the claimant with relief for the pain caused by his compensable injury. It was only after

these methods failed that Dr. Blankenship recommended surgical intervention.

Dr. Tomecek was not the claimant's treating physician and, by his own account, spent only thirty (30) minutes reviewing a portion of the claimant's medical records and examining the claimant. The evidence preponderates that Dr. Tomecek based his medical opinion on incomplete medical records.

Based on the aforementioned, we accord the opinion of Dr. Blankenship more weight than that of Dr. Tomecek. We find that the surgical procedure recommended by Dr. Blankenship is reasonable and necessary.

Therefore, the Full Commission finds that the claimant established by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury.

B. Additional Temporary Total Disability Benefits

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. *Ark. State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period

has not ended so long as treatment is administered for the healing and alleviation of the condition. *Breshears, supra*; *J.A. Riggs Tractor Co. v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

The claimant sustained an unscheduled compensable injury on August 29, 2020. Dr. Blankenship excused the claimant from work effective January 20, 2021 and continuing until six weeks after the recommended surgery was performed. Since the surgery has not yet been performed and this work excuse has not been amended, we find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning on January 20, 2021 and continuing to a date yet to be determined. We also find that the claimant's attorney is entitled to a controverted attorney's fees payable as result of the awarding of these benefits.

III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment in the form of a stand-alone anterior lumbar interbody arthrodesis at the lumbosacrum as recommended by Dr. Blankenship. The Full Commission further finds that the claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits beginning on January 20, 2021 and continuing to a date yet to be determined. The claimant's

attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the Claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment recommended by Dr. James Blankenship.

Claimant sustained an admittedly compensable back injury while working for Respondents. Although Claimant continued to work immediately following the workplace injury (according to Claimant, he continued to work despite the pain because it was an early morning funeral and he wanted to finish out the funeral service for the families), he went

home early the day of the workplace injury and was treated at the ER the following day. Claimant then made his way to Dr. Mark Miedema, an orthopedic surgeon, who placed Claimant on light duty and administered an injection and prescribed a round of physical therapy. Dr. Miedema concluded his report by stating, “I do not think he will require surgical intervention.”

Claimant later switched to Dr. Blankenship, who administered epidural injections and continued Claimant on physical therapy (although there was nothing in the record to indicate whether Claimant actually completed the physical therapy). Dr. Blankenship has now recommended surgery.

Respondents submitted an 11-page utilization review by Dr. Gregory Goldsmith. According to that review, the proposed surgery does “not meet the established criteria for medical necessity.” This opinion was supported with several pages of “Clinical Rationale.”

Claimant was then examined by Dr. Tomacek, whose opinion was that Claimant is exaggerating his pain and is perhaps addicted to opioids. In fact, Dr. Tomacek went so far as to tell Claimant that he was faking it. Dr. Tomacek also stated that Claimant’s subjective reports of pain are “dramatically out of proportion to any radiographic findings that we have seen.” At the time Claimant was treated by Dr. Tomacek, he was taking six oxycodone a day, three gabapentin, and some over-the-counter medication;

however, despite this heavy amount of pain-relieving medication, Claimant asserted that he was unable to do anything more than lie down, could not even hold his child for very long, and that his pain level was still 7 out of 10. When confronted on cross examination about his inability to do any activity, Claimant admitted to deer hunting and doing other activities. Respondent submitted evidence that Claimant had killed three deer in the fall of 2020. Ultimately, Dr. Tomacek concluded that the recommended surgery was not reasonable and necessary medical treatment.

When Dr. Blankenship learned that Dr. Tomacek had examined Claimant and offered a countervailing opinion, Dr. Blankenship pointed out that Dr. Tomacek had previously testified against Dr. Blankenship in a malpractice case (that was concluded in Dr. Blankenship's favor) and that there is a conflict between the two doctors that should have disqualified Dr. Tomacek from giving an opinion.

The law requires an employer to provide medical services that are reasonably necessary in connection with the compensable injury received by an employee. Ark. Code Ann. §11-9-508(a). The burden of proving entitlement to additional treatment rests on the claimant. However, a claimant who has sustained a compensable injury is not required to offer objective medical evidence to prove entitlement to additional medical treatment. *Ark. Health Ctr. & Ark. Ins. Dep't v. Burnett*, 2018 Ark. App. 427, at 9-10, 558 S.W.3d 408, 414 (citing *Chamber Door Indus., Inc. v. Graham*,

59 Ark. App. 224, 956 S.W.2d 196 (1997); *Ark. Dep't of Cmty. Corr. v. Moore*, 2018 Ark. App. 60).

What constitutes reasonably necessary treatment is a question of fact for the Arkansas Workers' Compensation Commission. The Commission has authority to accept or reject a medical opinion and to determine its medical soundness and probative force. Likewise, the Commission has the duty to make credibility determinations, to weigh the evidence, and to resolve conflicts in the medical testimony. *Martin Charcoal, Inc. v. Britt*, 102 Ark. App. 252, 284 S.W.3d 91 (2008). Lastly, it is the Commission's duty to use its experience and expertise in translating the testimony of medical experts into findings of fact and to draw inferences when testimony is open to more than a single interpretation.

Dr. Tomacek, Dr. Miedema, and Dr. Goldsmith all agree that the surgery Dr. Blankenship proposes is not reasonable and necessary medical treatment in connection with Claimant's workplace injury. I disagree with Dr. Blankenship's opinion that Dr. Tomacek's opinion should hold no weight because Dr. Tomacek previously testified against Dr. Blankenship. Perhaps Dr. Blankenship would prefer that his opinions only be assessed by doctors who have always agreed with his diagnoses, but the Commission should not ignore Dr. Tomacek's opinion simply because he has previously disagreed with Dr. Blankenship.

Given that Dr. Tomacek, Dr. Miedema, and Dr. Goldsmith all agree that the proposed surgery is not reasonable and necessary treatment I find that Claimant has failed to prove that the proposed surgery is reasonable and necessary medical treatment in connection with his workplace injury. Accordingly, for the reasons set forth above, I must dissent from the majority opinion.

CHRISTOPHER L. PALMER, Commissioner