

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H000742

DANIEL R. KINNE,
EMPLOYEE

CLAIMANT

CENTRAL STATES MFG., INC.,
EMPLOYER

RESPONDENT

SENTRY INSURANCE COMPANY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED OCTOBER 4, 2023

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

Claimant represented by the HONORABLE EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE JARROD S. PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondent appeals an opinion and order of the Administrative Law Judge filed May 11, 2023. 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 February 22, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment in the form of surgery to his low back as recommended by Dr. Blankenship.

3. Claimant's attorney is entitled to attorney's fees on temporary total disability benefits previously paid to Claimant as a result of his cervical surgery.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's May 11, 2023 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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2012).

For prevailing on this appeal before the Full Commission, Claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (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 Mayton dissents

DISSENTING OPINION

I respectfully dissent from the majority's opinion. In my *de novo* review of the file in its entirety, I find that the claimant has not proven by a preponderance of the credible evidence that he is entitled to additional medical treatment in the form of surgery to his low back as recommended by Dr. Blankenship. I also find that Claimant's attorney is not entitled to attorney's fees on temporary total disability benefits previously paid to claimant as a result of his cervical surgery.

Claimant is a 50-year-old over the road truck driver for the respondent employer. On October 6, 2019, he suffered an admittedly compensable injury to his neck and low back. Claimant testified that on that date he was walking on an uneven load, putting a tarp over the load, when he slipped and fell, getting caught up in and hung from a rope, due to rain that was falling. (Hrng. Tr., P. 6). After the accident, claimant initially came under the care of Dr. Berestnev who diagnosed claimant with a cervical and

lumbar strain. (Cl. Ex. 1, Pp. 3-5). He treated claimant with an injection of DepoMedrol. *Id.* On a change of physician order, claimant began treating with Dr. James Blankenship on June 22, 2020. (Cl. Ex. 1, Pp. 47-52).

The claimant requested a hearing on his entitlement to cervical spine surgery as recommended by Dr. Blankenship and a pre-hearing conference was held. Prior to the hearing, respondents accepted liability for the cervical surgery. (Resp. Ex. 2, P. 3). Dr. Blankenship performed the cervical surgery on October 6, 2021, and according to Dr. Blankenship's reports, the surgery was successful. (Cl. Ex. 1, Pp. 76-79).

After surgery, claimant continued to complain of low back pain. In his report of December 2, 2021, Dr. Blankenship indicated that claimant did not want to consider surgery at that time but instead wanted to return to work. (Cl. Ex. 1, Pp. 89-93). Claimant's low back pain continued, and Dr. Blankenship ordered a new lumbar scan. In his report of June 23, 2022, Dr. Blankenship stated that he discussed lumbar surgery with the claimant but before proceeding, recommended one last aggressive conservative treatment trial consisting of a lumbar epidural steroid injection and an aggressive physical therapy program. (Cl. Ex. 1, Pp. 103-108). In his report of August 4, 2022, Dr. Blankenship indicated that the physical therapy had aggravated claimant's low back pain and stated that medication had provided minimal relief. He recommended a multilevel

arthrodesis at L3-4, L4-5, and L5-S1. (Cl. Ex.1, Pp. 110-114). Conversely, in an IME report dated May 12, 2021, Dr. Frank J. Tomecek, stated that claimant's lumbar myelogram CT scan "showed minimal facet arthropathy at L4-5 and L5-S1. There were no fractures, no disk herniations, no neural impingement, and no central or foraminal stenosis. It was essentially a normal myelogram for a 48-year-old male." (Resp. Ex. 1, P. 16). Dr. Tomacek's findings indicated that the claimant "has facet arthropathy that is mild . . . I do not believe that lumbar rhizotomy is reasonable or necessary in this patient . . . I definitely would not recommend this type of surgery on this patient... I see no indication for surgery on his back." (Resp. Ex. 1, P. 17). Accordingly, the respondents denied the claimant's request for lumbar spine surgery.

It is within the Commission's province to weigh all the medical evidence, to determine what is most credible, and to determine its medical soundness and probative force. *Sheridan Sch. Dist. v. Wise*, 2021 Ark. App. 459, 637 S.W.3d 280 (2021). In weighing the evidence, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *Id.* However, the Commission has the authority to accept or reject medical opinions. *Williams v. Ark Dept. of Community Corrections*, 2016 Ark. App. 427, 502 S.W. 3d 530 (2016). It is well settled in this State that a medical opinion based on an unreliable history provided by a

claimant should be disregarded. *Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983); see e.g., *Towery v. Hi-Speed Electrical Co.*, 75 Ark. App. 167, 56 S.W.3d 391 (2001).

The claimant began treating with Dr. James Blankenship on June 22, 2020 after a change of physician request was approved by the Commission. (Cl. Ex. 1, Pp. 47-52). At each visit, the claimant was given the opportunity to report on his medical history. Each visit, that history is listed as “unremarkable. Prior surgeries include bilateral carpal tunnel release, orthopedic surgery (knee) and lymphoid surgery” until the claimant underwent surgery on his cervical spine with Dr. Blankenship on October 6, 2021. (Cl. Ex. 1, Pp. 48, 58, 67, 76). Dr. Blankenship never reports any knowledge of the claimant’s relevant history of low back pain. (Cl. Ex. 1, Pp. 48, 58, 67, 76, 85, 90, 97, 104, 111). At the April 12, 2023 hearing, claimant testified that he never told Dr. Blankenship about his history of back problems. (Hrng. Tr., Pp. 15-16).

Q (by Mr. Parrish): You will agree with me under medical history as far as what you did or didn’t tell Dr. Blankenship, there is absolutely no mention or documentation of you ever having low back problems that required a TENS unit or any low back problems that stopped you from working?

A: No, sir.

Q: So, every time we look at Dr. Blankenship’s medical history, there is going to be nothing there talking about any prior low back problems that he was aware of. Agree?

A: Yes.

Q: And Dr. Blankenship operated under the understanding that you have never had any low back pain or radiating pain into your right leg before. Based on what we know now, you will agree he would be operating with inaccurate or incomplete information; correct?

A: Yes. *Id.*

For this reason alone, we must disregard Dr. Blankenship's recommendation for lumbar surgery. At the time Dr. Blankenship provided his recommendation that the claimant undergo back surgery, he was not armed with the relevant facts concerning the claimant's October 16, 2019 injury and the claimant's low back pain. Because Dr. Blankenship's opinion is unreliable, we can therefore only rely on the opinion of Dr. Frank Tomecek who found that regarding the claimant's lumbar spine, "he has facet arthropathy that is mild . . . I do not believe that lumbar rhizotomy is reasonable or necessary in this patient . . . I definitely would not recommend this type of surgery on this patient...I see no indication for surgery on his back." (Resp. Ex. 1, P. 17).

Arkansas Code Annotated § 11-9-508(a) states that an employer shall provide "such medical . . . services . . . as may be reasonably necessary in connection with the injury received by the employee." What constitutes reasonable and necessary treatment under this section is a question of fact for the Commission. *Georgia Pacific Corp. v. Dickens*, 58 Ark. App. 266, 950 S.W.2d 463 (1997). It is within the Commission's

province to weigh all the medical evidence, to determine what is most credible, and to determine its medical soundness and probative force. *Sheridan Sch. Dist. v. Wise*, 2021 Ark. App. 459, 637 S.W.3d 280 (2021). In weighing the evidence, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *Id.* However, the Commission has the authority to accept or reject medical opinions. *Williams v. Ark Dept. of Community Corrections*, 2016 Ark. App. 427, 502 S.W. 3d 520 (2016).

The claimant's credibility as a witness is the key issue in determining whether the lumbar surgery proposed by Dr. Blankenship is reasonable, necessary, and causally related to the claimant's October 16, 2019 injury. Importantly, a claimant's testimony is never uncontroverted as a matter of law. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). It is within the exclusive province of the Commission to determine the credibility of a witness and the weight to be given to his testimony. *Wade v. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989).

As seen above, the claimant has a history of omitting important facts or being outright untruthful in regard to the nature of his claim. This can be seen throughout his medical records as well as his testimony at his deposition which was inconsistent. In November 2015, the claimant sought treatment at Mercy Clinic in Rogers for complaints of low back pain

radiating into his right hip. (Resp. Ex. 1, P. 4). At that time, Melanie Martin, APRN opined that the claimant's complaints likely originated "from heavy lifting and overuse," and noted that the claimant requested a follow-up with neurology for imaging. *Id.* In September 2016, the claimant again treated at Mercy Clinic for complaints of right lumbar pain radiating to his right hip and foot. (Resp. Ex. 1, P. 7). The claimant reported that this pain had begun two to three months prior and that he had tried a TENS unit at home with some relief. *Id.*

Despite this history, when asked at his deposition whether, prior to the work-related injury on October 6, 2019, he had a history of back pain, right lower lumbar pain radiating distal to his right foot...which caused him to stop driving and use a TENS unit to relieve the pain, the claimant responded, "No, sir, I didn't recall." (Hrng.Tr. P. 14). At the hearing, the claimant testified:

Q (by Mr. Parrish): Mr. Kinne, you told me at your deposition that you never had any injury, problem, symptom or condition in your low back before October 6, 2019.

You admit that; right?

A: Yes.

Q: And it was true testimony?

A: Yes, at the time, I thought, you know, I didn't remember anything before then.

Q: Okay. There are other instances in the deposition where you give me that answer. You tell me you don't remember something, or you don't recall. You'll agree with that, right?

A: Yes.

- Q: That is not what you did when I asked you this specific question about a specific body part that is, in fact, in litigation here whether you had any prior problems with your low back before October 6, 2019. You specifically answered me “no”; right?
- A: I guess.
- Q: And you remember me at the beginning of the deposition telling you if you didn’t understand a question or you needed clarification on a question that you were to stop me and let me know?
- A: Yes.
- Q: And you didn’t indicate any confusion or hesitancy or equivocate at all in telling me flatly, “no;” did you?
- A: No.
- Q: So, if I walked out of that deposition and didn’t do my homework and get your medical records and I based what I believed on what you told me, my understanding would be that there was no medical history of any back problems before this accident; wouldn’t it?
- A: Yes. (Hrng. Tr, Pp. 12-14).

Once again, the claimant’s lack of credibility leads us to rely on the medical evidence alone. AN MRI conducted on September 18, 2020 revealed:

(1) Lumbosacral disk protrusion with annular fissuring with midline disk bulging with marked facet arthropathy. (2) Milder changes at the L4-5 level with significant arthropathy. (3) Bilateral lateral recess stenosis with midline disk bulging at L3-4. (4) Multilevel facet arthropathy as described in the narrative. (Cl. Ex. 1, Pp. 55-56).

A later MRI of the claimant’s lumbar spine conducted on May 20, 2022 reflected additional changes, including “a right foraminal disk bulge effaces, without displacing, the foraminal aspect of the exiting right L3 nerve

root” and a “tiny central disk protrusion.” (Cl. Ex. 1, P. 102). Mild disk bulging and facet joint arthropathy at L4-L5 and L5-S1 mildly narrow the left neural foramen at L4-L5 and mildly to moderately narrow the right neural foramen at L5-S1.” *Id.* Dr. Blankenship would later characterize these results as

Right-greater-than-left foraminal stenosis at the lumbosacrum with severe facet arthropathy. He has significant arthropathy with mild bilateral stenosis at L4-L5 and has an extreme lateral disc herniation on the right hand side at L3-L4. (Cl. Ex. 1, P. 106).

In contrast, upon reviewing the claimant’s records from Dr. Frank J. Tomecek, a lumbar myelogram CT scan from May 2021 showed

“minimal facet arthropathy at L4-5 and L5-S1. There were no fractures, no disk herniations, no neural impingement, and no central or foraminal stenosis. It was essentially a normal myelogram for a 48-year-old male.” (Resp. Ex. 1, P. 16).

Although it has been previously established that Dr. Blankenship’s records should be disregarded due to the claimant’s untruthful medical history, it is also important to note the vast distinction between Dr. Blankenship’s 2022 MRI findings and Dr. Tomecek’s 2021 report. The 2022 MRI findings indicate significant changes from the earlier MRI in 2020. Dr. Blankenship indicates “severe herniation” at L3-L4 that was not noted previously with additional disk protrusions and annular fissuring. (See Cl. Ex. 1, Pp. 55-56, 102, 106). These findings completely differ from Dr.

Tomecek's findings that the myelogram CT of claimant's lumbar spine was "essentially normal." Dr. Blankenship makes no effort to explain these extreme changes over the course of two years and how they may be related to the claimant's 2019 injury, and this alone indicates that his findings are unreliable. Without more, it is not possible to attribute changes that appear three years after an injury to that injury, and there is no medical opinion that even attempts to do so. Without more, we are left to rely on the claimant's own testimony regarding the source and extent of his pain. Given the nature of claimant's unreliable testimony, we are simply unable to say that he has established by the preponderance of the evidence that his low back pain was caused by the 2019 injury, exacerbated by it, or that any related treatment is reasonable and necessary in relation to that injury.

Arkansas Code Annotated §11-9-715 provides that attorney's fees "shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded." In this matter, the question of fees specifically regards whether the cervical spine surgery conducted by Dr. Blankenship was controverted. There have been two pre-hearing orders issued in this matter, the first of which listed the sole issue for litigation as "Claimant's entitlement to surgery as recommended by Dr. Blankenship." There was no mention of disability benefits or attorney's fees in that order.

While the ALJ contends that the respondent employer initially denied the surgery leading the claimant to request a hearing, it is clear that any delay in approving this surgery was in the course of investigating the claimant's original claim. The respondents coordinated with Dr. Frank Tomecek for an IME which took place on May 12, 2021. (Resp. Ex. 1, Pp. 1-18). The respondents received Dr. Tomecek's report on May 20, 2021 and approved the claimant's surgery on May 25, 2021. (Resp. Ex. 2, P. 3). Subsequently, the ALJ cancelled the hearing on this issue. Once surgery took place, the respondents did not deny claimant's entitlement to temporary total disability benefits and paid them accordingly, and the issue of disability benefits was never litigated.

There is simply no statutory rationale for granting the claimant attorney's fees for an issue in which neither controverted nor litigated. The respondents investigated the nature of claimant's allegations and acted swiftly to pay appropriate benefits once their investigation was completed and the claimant is, therefore, not entitled to attorney's fees on the disability benefit paid as a result of the cervical surgery. Accordingly, for the reasons set forth above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner