

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC FILE N^o H009640

JAMES WASHINGTON, EMPLOYEE	CLAIMANT
EVERGREEN PACKAGING, EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE Co., CARRIER	RESPONDENT
ESIS, Inc., TPA	RESPONDENT

OPINION FILED APRIL 4, 2023

On hearing before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe, January 12, 2023, Pine Bluff, Arkansas.

Mr. Steven McNeely appearing for the claimant.

Mr. William C. Frye appearing for the respondents.

I. STATEMENT OF THE CASE

The above-captioned case was heard on January 12, 2023, in Pine Bluff, Arkansas, after the parties participated in a pre-hearing telephone conference on October 25, 2022. The subsequent Pre-hearing Order, admitted to the record without objection as Commission's Exhibit N^o 1, was entered on October 26, 2022. The Order stated the following ISSUES TO BE LITIGATED:

1. Whether the claimant is entitled to additional Total Temporary Disability (TTD) benefits, from the time of full duty release without restrictions¹ through November 3, 2021.

¹ The claimant's pre-hearing questionnaire response noted that the claimant was released to full duty on May 24, 2021, and that he should be entitled to additional TTD benefits from that day through November of the same year. The Pre-hearing Order reflected the same. At the hearing, however, the medical evidence presented [Claimant's Exhibit N^o 1 at 163-166 and Respondent's Exhibit N^o 2 at 1-4] shows that the office visit that resulted in the claimant's release to full duty was on June 21, 2021. The hearing testimony squares with

2. When did the claimant reach the end of his healing period?

3. Whether the claimant is entitled to an impairment rating of five percent (5%) to the body as a whole and Permanent Partial Disability (PPD) benefits pursuant to that rating.

4. Whether the claimant is entitled to wage loss benefits.

5. Whether the claimant is entitled to a controverted attorney's fee.

6. All other issues are reserved.

The parties' CONTENTIONS, as set forth in their pre-hearing questionnaire responses, were incorporate by reference into the Pre-hearing Order. The claimant contends:

1. That he suffered a compensable back injury on October 31, 2020, while turning a large valve.

2. That the claim was accepted and medical and treatment and TTD were provided until May 24, 2021,² when Trent Tappan, PA-C, released him to full duty without restrictions following an office visit and report of an incomplete Functional Capacity Evaluation (FCE).

3. That he sought treatment on his own from the VA, where he was seen until October 2021.

4. That his last noted visit at the VA is the correct MMI date and that he is entitled to a 5% impairment rating under the applicable AMA guides for a nonoperative soft tissue lesion under Table 75, § II.B.

the June 21 date also: "Q: ... Trent Tappan. He was with Dr. Bruffett's office... released you from care at that point [on June 21], is that correct? Work. Comp. A: Yes. Q: All right. Then you got treatment on your own with the Veteran's Administration? A: Correct. Q: All right. So from the FCE until the end of October... ." The May 24 date is apparently a scrivener's error, confusing the claimant's month and date of birth, appearing at the top of the visit notes (May 24), with the actual date of the visit resulting in his release from care.

² See FN1.

5. That when he returned to work, he had to take a lighter duty job, reducing his hourly rate from \$32.00/hour to \$28.00/hour, thus entitled him to wage loss.

6. That the denial of these benefits entitles his attorney to a fee under ACA § 11-9-715.

7. That all other issues, including additional medical treatment, are reserved.

The respondents contend:

1. That the claimant has a history of prior low back problems and underwent a surgical laminectomy at L5-S1.

2. That he sustained a compensable lower back injury and was treated by Drs. Wilkins, Saer, and Bruffett.

3. That he underwent an FCE that reported an unreliable effort.

4. That he was released by Dr. Bruffett's office to return to work with no restrictions and no impairment.

5. That he returned to full duty work and that he continues to work.

6. That they are unsure of his requested benefits.

7. That claimant's presentation to the VA was unauthorized and that he received a Form N.

That Order also set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.

2. An employee/employer/carrier relationship existed on October 31, 2020, when the claimant sustained a compensable injury to his lower back.

3. The respondents accepted that injury as compensable and paid medical and indemnity benefits.

4. The claimant's average weekly wage entitles him to the maximum compensation rates.

In addition to the Commission's Exhibit, previously mentioned, three more exhibits were entered into this record. Claimant's Exhibit № 1 consisted of a four-page index of medical records and 208 subsequent pages. Respondents' Exhibit № 1 consisted of one (1) index page and seven (7) pages of non-medical records. Finally, Respondents' Exhibit № 2 consisted of one (1) index page and four (4) pages of medical records, all of which were from the June 21, 2021 appointment with PA-C Trent Tappan, a provider in Dr. Bruffett's office.

Two witnesses provided sworn testimony—the claimant spoke on his own behalf and the respondents called Ms. Tommie Arrington, an Evergreen employee and union official familiar with Mr. Washington's eventual job reassignment.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under ACA § 11-9-704:

1. The AWCC has jurisdiction over this claim.
2. The previously noted stipulations are accepted as fact.
3. The claimant failed to prove by a preponderance of evidence that he is entitled to additional TTD benefits.
4. The claimant failed to prove by a preponderance of evidence that the appropriate date of MMI with regard to his workplace injury was not consistent with the date of his June 21, 2021 MMI placement and release to full duty without restrictions.
5. The claimant failed to prove by a preponderance of the evidence that he is entitled to an impairment rating associated with his workplace injury.
6. The claimant failed to prove that he is entitled to wage loss.
7. Consistent with the above, the claimant's attorney is not entitled to a fee.

III. BACKGROUND and MEDICAL EVIDENCE

On October 31, 2020, the claimant injured his back while working as a waste water operator at the respondent/employer's paper mill and food packaging production facilities. He testified that he worked in that role from around 2009 to the date of injury. Early in the morning of his shift, the claimant was monitoring a number of pumping stations when an alarm notified him of a problem at one of the stations. Believing that the pump had lost its prime, Mr. Washington began a back-washing procedure to remedy that problem that required manually opening or closing a series of large valves. He stated that the valve handwheels were about 20 inches across and two and one-half to three feet off the ground. While working one of the handwheels, the claimant testified, "all of the sudden that's when I heard—I felt this pop in my back and I knew right then, I was like, 'oh.'" He completed a company injury report around 4:25 AM, stating that he suddenly felt a sharp, pinching pain from his back to his calf when turning the valve around 2:15 AM. He rated the pain at 8 out of 10 at the time of the injury and 6 out of 10 at the time of the report. According to the claimant's testimony, he then remained off work for 367 days.

A. Treatment Not with the VA

Mr. Washington presented to the Baptist Health emergency department (ED) in Little Rock just before 2:00 PM on November 2, 2020, complaining of low back pain radiating down his right leg. The ED record notes a history of lumbar surgery for bone spur removal in 2017 and bulging discs. An Xray was ordered and a Toradol injection administered. He was diagnosed with acute right-sided lower back pain with right-sided sciatica. No acute findings were noted on the Xray report, and he was discharged with prescriptions for cyclobenzaprine and naproxen. [Cl. Ex. № 1 at 8-16.]

Prior to the work injury, the medical records reflect two visits to Jefferson Regional Medical Center's Family Health Associates clinic in White Hall, Arkansas. The first was on

October 28, 2019, to establish care. A history of arthritis and back surgery, joint surgery was noted, along with a family history of arthritis. The second was on May 27, 2020, when he complained of pain to his right side and hip rating 8 out of 10 after doing some yard work. Home medications of cyclobenzaprine and ibuprofen were noted, and he noted some relief from the same. [Cl. Ex. № 1 at 1-5.]

Two days after his November 2, 2020 ED visit, the claimant presented to the Little Rock Family Practice Clinic (LRFP), again complaining of back pain and pain down his right side. He was seen by Dr. John Jayroe, who administered intramuscular (IM) steroid injections of Celestone Soluspan and Kenalog. The impression from that day's radiology report (from Radiology Associates, PA ("RAPA")) was that of a negative exam, though Dr. Jayroe assessed minimal degenerative changes, "retrolithesis of L5 on S1 with loss of disc height," and a "narrowing of the foramina at L4-L5." His final diagnosis listed acute right-sided low back pain with right-sided sciatica. Physical therapy was recommended, along with follow up for possible additional imaging if symptoms did not improve. [Cl. Ex. № 1 at 17-20.]

The claimant presented again to LRFP on November 16, 2020, with mostly the same complaints, but additionally complaining about intermittent muscle spasms in his gluteus. Dr. Jayroe assessed acute back pain with radiculopathy, discussed physical therapy, and again noted a possible MRI in the future. [Cl. Ex. № 1 at 24-26.]

Thereafter, the claimant presented to Physical Therapy Plus in Pine Bluff, under the care of Stuart Jones, PT, DPT. His rehab potential was listed as "good" at his initial visit on November 30, 2020. The records reflect at least 11 subsequent physical therapy visits over the month, with the last appearing to take place on December 28, 2020. Mr. Washington reported no change in his symptoms at that last visit. [Cl. Ex. № 1 at 27-46.]

On December 8, 2020, during the course of his physical therapy visits, the claimant underwent an MRI. RAPA's report showed the following findings:

The signal intensity of the bone marrow is normal. Disc desiccation is present at all levels, particularly L4-5. The tip of the conus terminates at L1-2, which is within normal limits.

L5-S1 displays no disc herniation or protrusion. Mild facet hypertrophy is present.

L4-5 with a mild broad-based posterior disc bulge. This mildly indents the anterior thecal sac. The AP diameter of the canal is 9mm. Moderate hypertrophy is present.

L3-4 displays a mild broad-based posterior bulge. There is a left-sided component that has an annular tear. Mild neural foraminal narrowing is present. The AP diameter of the canal is 8 mm.

L2-3 displays no disc herniation or protrusion. The neural foamen are patent bilaterally. The AP diameter of the canal is 9mm.

[Cl. Ex. № 1 at 47.]

On December 30, 2020, two days after his last physical therapy visit, Mr. Washington presented to OrthoArkansas, where he was seen by Dr. Edward Saer. He reported his pain at 10 out of 10. The record reflects that he reported physical therapy starting on November 15, 2020 (although he began therapy on November 30, 2020), and that he'd previously received prescriptions for naproxen and Flexeril (for whatever reason, he appears to have failed to report the three injections he'd received in the preceding weeks). His history of arthritis and lower back surgery were noted. Dr. Saer reviewed a new Xray and the December 8, 2020 RAPA MRI. He assessed a probable lumbar strain or sprain, but did "not see 1 [one] focal finding that would explain all of his symptoms." Mr. Washington was prescribed a steroid dosepak, Meloxicam, and Tramadol. Continued physical therapy was also recommended. [Cl. Ex. № 1 at 48-53.]

The claimant was seen again by Dr. Jayroe at LRFP the next day via telemedicine. The imaging results were discussed, and gabapentin was prescribed. The progress note

stated that Dr. Jayroe offered a referral for an interventional pain opinion and that Mr. Washington was scheduled with a new physical therapy provider per Dr. Saer's referral. [Cl. Ex. No 1 at 55-56].

Mr. Washington then presented to Southeast Arkansas PT on January 6, 2021, with seven additional visits³ over the next two weeks. His history noted arthritis and prior back surgery, while the diagnosis was consistently listed as lumbago with sciatica, right side, muscle wasting and atrophy. At his January 19, 2021 visit, the provider assessed some progress and that the "[i]ssue is just pain down R[ight]L[ower]E[xtremity]." Ten more visits were noted as authorized at that time, and he was to continue the then-current plan of care. [Cl. Ex. No 1 57-81].

The following day, on January 20, 2021, the claimant saw Dr. Saer again, who assessed no need for any surgery. "I suspect he has had a strain or sprain. He seems to be having a lot more pain with this [than] I would expect, however." His pain was reported as 7 out of 10. Continued physical therapy was recommended, along with a follow up visit in three weeks. [C. Ex. No 1 at 83-86.]

The claimant presented again to LRFPP the next day. Minor symptom improvement was noted. His then-current medications, relevant to this claim, were listed as Gabapentin (100 mg, 3x daily), Meloxicam (15 mg, 1x daily), and Tramadol (100 mg, Extended Release, 1x nightly, PRN for pain). Dr. Jayroe assessed acute back pain with radiculopathy, unclear etiology. In the same note, he charted, "[w]e will try taking 300 mg of Gabapentin at nighttime; have given him permission to titrate up to 500 mg daily at bedtime if he tolerates it." The claimant was also to continue with Meloxicam and Tramadol. [Cl. Ex. No 1 at 87-88.]

³ The record reflects physical therapy visits on January 6, 7, 8, 11, 12, 14, 18, and 19, 2021.

Then, on Monday, January 25, 2021, the claimant presented again to the Baptist Health ED in Little Rock, complaining of worsening low back pain. He stated that he aggravated the pain after doing “a lot more activity” than usual at his physical therapy appointment on the preceding Friday (which would have been January 22, 2021). The record before me, however, includes no physical therapy note corresponding with that day. The ED notes reflect that he was given a Toradol injection and dispensed 15 tablets of cyclobenzaprine, 5 mg. Otherwise, the notes reflect “[n]o results found for this visit on 01/25/21.” [Cl. Ex. No at 89-95.]

Mr. Washington next presented again to Dr. Saer on January 27, 2021, complaining of increased pain, spasms, migraines, some nausea, some difficulty voiding urine and some mild constipation. His pain was reported as 7 out of 10. According to the notes, he was in a wheelchair, though no physician appears to have ordered the use of a wheelchair. His previous MRI was reviewed, and Dr. Saer commented on “mild central stenosis with some element of congenital narrowing.” The physician assessed that he was “not sure if something has changed or not in his back. I think we need to find out, and we need to repeat the MRI.” An IM steroid injection and oral dosepak were given. [Cl. Ex. No at 96-104]. The MRI report showed “no acute fracture or aggressive marrow replacing process,” but noted degenerative changes. The report concluded:

1. Moderate to severe spinal canal stenosis at L3-L4 secondary to circumferential disc bulge and ligamentum flavum thickening. There is near complete effacement of the CSF surrounding the cauda and equina at this level.
2. Moderate facet arthropathy at L3-L4 with trace facet effusions, likely reactive. Mild neural foramen stenosis is also present.
3. Prior right hemilaminectomy changes at L5. Mild facet arthropathy at L5-S1 with mild bilateral neural foramen stenosis. Additional less pronounced degenerative changes as above.

[Cl. Ex. No 1 at 105.]

Between February 8, 2021, and March 31, 2021, the claimant attended several more physical therapy visits. [Cl. Ex. № 1 at 106-132.] On February 10, 2021, Dr. Saer ordered another steroid injection. [Cl. Ex. № at 112.] Then, on April 12, 2021, he presented again to Dr. Bruffett, whose note reflects that physical therapy had not been helpful and that the previous injection by Dr. Cayme at L4-5 “was minimally of benefit.” Mr. Washington reported his pain as a 7 out of 10. Dr. Bruffett’s physical exam noted “no frank neurologic deficits” or “upper motor neuron signs.” The MRI findings were noted, along with the claimant appearing “a little down or depressed.” He charted the following assessment/plan:

Postlaminectomy syndrome with stenosis now at L3-4 which may be symptomatic.

Plan is difficult to know the exact cause of his pain. I would recommend another injection... Surgery would consist of a hemilaminectomy for spinal stenosis. My concern about surgery is that he does not have a specific disc herniation... I would only know that intraoperatively... maybe another injection would help us...spoke to him about his degree of job satisfaction. I think he likes his job, but he is not real thrilled about he folks that he works with.

[Cl. Ex. № 1 at 134-138.] Another steroid injection was administered on May 13, 2021. [Cl. Ex. № 1 at 140].

Mr. Washington returned to Dr. Bruffett on May 26, 2021, reporting again a pain rating of 7 out of 10. That visit note stated:

... He has some stenosis at L3-4 and postsurgical changes at L5-S1 but otherwise his MRI really does not show a specific disc herniation or obvious objective evidence of injury... I have told him I think he is at maximum medical improvement with regards to nonoperative treatment. But I really do not think surgery is going to be all that rewarding... surgery is not a good option...I would recommend a functional capacity evaluation.

[Cl. Ex. № 1 at 141-143.]

The functional capacity exam (FCE) was conducted on June 14, 2021, by Functional Testing Centers, Inc., at their Pine Bluff facility.⁴ Per the report, an FCE “evaluates an individual’s capacity to perform work activities related to his participation in employment and consists of a comprehensive battery of performance-based tests that are commonly used to determine ability for work.” The Reliability and Consistency of Effort portion of the report begins:

Consistency of effort testing obtained during this evaluation indicate significant observational and evidence-based inconsistencies resulting in self-limiting behavior and sub-maximal effort. The results of this evaluation indicate that an unreliable effort was put forth, with 37 of 50 inconsistency measures within expected limits. Analysis of the data collected during this evaluation indicates that he did not put forth consistent effort. He also had numerous signs of non-organic symptoms when he participated in a series of tests to identify the presence of non-physiological signs of pain. He produced positive results for all of these tests given. The client also failed to produce a significant cardiovascular response to physical testing that would indicate that a significant degree of effort was being put forth. The client’s walking was not reliable for consistent effort. His walking pace slowed dramatically when he was aware of being timed and his pace was significantly faster as he walked about the facility. It is also noted that he demonstrated a maximal lift of 20 lbs. during bi-manual dynamic lifting yet demonstrated the ability to lift and then carry up to 25 lbs. with just his RUE and just his LUE. He also had pain reports that did not correlate with his movement patterns. His frequent pain report of level 9-10⁵ does not correlate with the description of this level of pain provided to hi[m] and he failed to exhibit outward compensatory movements.

And under Functional Limitations, the report states:

Although Mr. Washington reported and/or demonstrated numerous function limitations during his evaluation, he also exhibited numerous inconsistencies which invalidated his entire evaluation. Therefore, his current functional status remains unknown at this time due to his failure to produce sufficient objective data to substantiate his reported and/or demonstrated limitations.

⁴ Although the record does not reflect that the use of a cane was ordered by a treating physician, the claimant arrived for testing with a cane in his left hand. [Cl. Ex. № 1 at 151.]

⁵ The pain scale utilized during testing rates a pain level of 9 as “Excruciating, Unbearable, You are unable to get out of bed on most days even with medication. You cry and moan uncontrollably.” While a pain level of 10 is described as “Worst pain imaginable; I’m unconscious due to pain.”

The report's conclusion included:

Mr. Washington completed functional testing on this date with **unreliable** results (emphasis in original)... **Since the results indicate an unreliable effort, his actual abilities could be higher than that demonstrated during this evaluation. The overall results of this evaluation do not represent a true and accurate representation of this client's overall physical capabilities** (emphasis in original).

[Cl. Ex. No 1 at 145-147.]

Several specific inconsistencies, noncompliance, or malingering behaviors were noted throughout the report. His pace slowed significantly when he was aware of being tested, he took breaks after every 20 feet of walking, and refused a final repetition of a walking evaluation.⁶ None of his lumbar flexion, extension, or lateral flexion results were valid, and he was observed picking an accidentally dropped item off of the floor in a manner not consistent with his formally measured range of motion testing.⁷ He exhibited exaggerated pain behaviors at light touches and reported muscle spasms when no visible or palpable signs of spasm were present.⁸ He reported a pain level of 9-10⁹ after lifting, although his visible pain behaviors did not correlate to the same, nor did his heart rate.¹⁰ He stopped a frequent lifting evaluation before completion and refused to attempt two out of three cycles of a second walking evaluation.¹¹ After nearly four hours of activity and evaluation, often reporting intense pain, his heart rate and blood pressure (85 BPM, 140/85) were nearly identical to his pre-testing readings (84 BPM, 140/87).¹² Mr. Washington left the facility at a "significantly faster pace than that exhibited throughout

⁶ See Cl. Ex. No 1 at 152.

⁷ *Id.*

⁸ *Id.* at 153.

⁹ See FN 5.

¹⁰ *Id.* at 154.

¹¹ *Id.* at 161.

¹² *Id.* at 151, 161.

testing,” and when walking the approximately 70 feet out of the facility, he no longer needed breaks every 20 feet or so.¹³

The report concludes with observations on his reported post-exertional pain:

Mr. Washington reports that his post-test pain level is a “9-10,” which is the same level of pain that he experiences when performing activities at home... During the exit interview after reporting a 9-10 pain he continued to sit and smile and laugh with the evaluator, which does not correlate to his voiced severe pain at a numerical pain level of 9-10. He made no complaints or made references to any pain or any symptoms which were not related to the condition he was referred from. He also reported no new or difference [sic] areas or regions of pain that he wasn’t experiencing at the start of his evaluation. He reported that the pain he experienced today is similar to his daily pain.

[Cl. Ex. No 1 at 162.]

Following the FCE the claimant returned again to Dr. Bruffett’s office for a 9:00 AM appointment on June 21, 2021, where he was seen by Trent Tappan, PA-C. The notes from that visit are not inconsistent with previous visits. He reported his pain at 8 out of 10. Previous notes and scans were reviewed, with spinal stenosis of lumbar region and post-laminectomy syndrome listed in the assessment. Regarding the FCE and Mr. Washington’s ability to return to work, the note stated, “Mr. Washington did not have reliable results on his functional capacity exam. Therefore I have no restrictions to place upon him. I am going to release him today without any restrictions. Placement [at] maximum medical improvement. No impairment to calculate.” Tappan’s encounter note was reviewed and signed at 10:14 AM. Consistent with the encounter note, his return to work slip provided, “[r]eturn to full duty, no restrictions.” [Cl. Ex. No 1 at 163-167.]

B. VA Treatment

The claimant presented to the VA on February 2, 2021, after calling in on January 29, 2021, with a report of chronic back pain. He reported that his medication had made him

¹³ *Id.* at 162.

nauseous and that it was no longer relieving symptoms. The provider noted, “advised veteran to follow up with specialist who ordered the medication and discuss symptoms with them. Advised it is best NOT (emphasis in original) to have several providers managing the same symptoms due to possible conflicting therapies or not having all the information to treat effectively.” [Cl. Ex. № 1 at 167.]

According to a June 8, 2021 progress note (six days prior to his FCE),¹⁴ the claimant was seen that day for bilateral knee pain. He stated that he “*occasionally*” (emphasis added) experienced low back pain and that he was experiencing “generalized weakness and pain since he has been out of his job *when the COVID started* (emphasis added) and believes his pain has gotten worse after he started resting more.” Under the “Active Non-VA Medications” tab, he apparently reported none of the medications listed on his visits with other providers before or after his FCE. The same note included, “Lumbar Spine Exam: Skin is normal looking, Tenderness absent along L4-L5-S1 spinous processes and absent on SI joint, Paraspinal spasm absent... .” [Cl. Ex. № 1 at 169-172.]

It appears Mr. Washington presented again to the VA’s ED June 21, 2021 (the same day as his release from Dr. Bruffett’s office), sometime before 11:30 AM. [See, generally, Cl. Ex. № 1 at 173-179]. He reported his pain at 9 out of 10 [Cl. Ex. № 1 at 175] and a “longstanding hx of back pain and he is concerned that he should not be working due to symptoms. Seen in ER today for radiculopathy, CT shows spondylosis. He has a hx of back surgery. He asked me if he should be working. Advised him I had no authority to tell him one way or the other.” [Cl. Ex. № 1 at at 179.] He received IM injections of Toradol and Kenalog. Imaging from that day showed the following relevant findings:

Degenerative: The lumbar canal appears congenitally narrow.

¹⁴ According to the pagination from the facility producing the VA records, they are not presented in the exhibit in an order correlating with that pagination. Some notes, therefore, appear incomplete in places.

L2/L3: Disc Bulge effaces with ventral thec sac. Facet arthropathy. Mild to moderate canal stenosis. No significant foraminal stenosis.

L3/L4: Disc bulge effaces with ventral thecal sac. Facet arthropathy. Moderate canal stenosis. Mild bilateral foraminal stenosis.

L4/L5: Disc bulge effaces the ventral thecal sac. Facet arthropathy and ligamentum flavum thickening. Severe spinal canal stenosis. Mild bilateral foraminal stenosis.

L5/S1: Postsurgical change of the right lamina. Minor bulging of the annulus. Facet arthropathy. No significant canal stenosis. Mild bilateral foraminal stenosis.

Impression: No fracture or traumatic subluxation. Congenital lumbar canal stenosis with superimposed spondylosis resulting in moderate canal stenosis L3/L4, suspected severe spinal canal stenosis L4/L5.

Mild to moderate canal stenosis L2/L3.

Varying degrees of neural foraminal stenosis as described.

Postsurgical change of the right lamina L5/S1.

[Cl. Ex. № 1 at 180-182.]

A telephone encounter followed a few days later. The June 24, 2021 note states:

“... *c/o years of LBP with radiation to the left leg and right hip. Hx lumbar back surgery in 2017... Veteran does not recall initial injury that caused pain and unsure if service related.*”

[Cl. Ex. № 1 at 184 (emphasis added).]

The VA records noted above, as well as additional records provided by the claimant, relate to various complaints about back and knee pain.

IV. HEARING TESTIMONY

A. Claimant on Direct Examination by Mr. McNeely

Mr. Washington testified that after graduating high school in 1986, he entered the Army in December of that year. He worked as a truck driver and petroleum specialist before ending his time in service in 1989. He worked a handful of other jobs before

beginning with the respondent-employer in 2008, when he was initially hired as an off-machine coder, before transferring to the Lab divisions Technical Services department. He described the job as testing and quality control work.

At the time of his workplace injury, his title was waste water utility/lift operator. He described monitoring a series of pump stations where water is moved from treatment pond to treatment pond and sampling the water to ensure it is safe for release into the river. According to his testimony, he recovered fully from a lumbar procedure in 2017 and was able to do “everything and anything.” He went on to claim that he “pretty much” worked 364 days a year, only taking off for his mother’s birthday.

Mr. Washington was working the graveyard shift in the early hours of October 31, 2020, when an alarm signaled a problem at one of the pump stations. He was familiar with the pumps losing pressure and performing a procedure to back-wash the pipes and reprime the pumps. This consisted of opening and closing various large valves. While turning a valve handwheel about 20 inches wide and two and a half to three feet off the ground, he heard a pop in his back. He reported the injury and received some OTC medication. “Ibuprofen or something like that or Tylenol or something,” he said.

He went on to describe worsening pain in his lower back that radiated down to his calf, seeking medical attention, and eventually staying off work for 367 days. The claimant described some temporary relief from an injection at some point, but said that the symptoms persisted.

Mr. Washington recalled presenting for an FCE on June 14, 2021. According to his testimony, “I was advised to give it my all; and so, I did the very best I could do. I did—in my opinion, I did really well, considering the amount of pain and the amount of tests that they put you through. I did it so well... .” [TR. at 21-22.] The claimant offered that his condition probably worsened after the testing, but agreed that he was released by Dr.

Bruffett's office shortly after the testing and that he then sought treatment on his own from the VA.¹⁵

He briefly described his condition improving after some treatment at the VA before moving on to the circumstances around his returning to work. Referencing Respondent's Exhibit No 1 at 5, Mr. Washington spoke about receiving a conditional job offer refusal letter in the mail around August of 2021. According to the testimony, the waste water job, in the organizational/reporting sense, was being moved from the Lab department to the Environmental department, and he was given the option to move with the job to the Environmental department or seek placement, as might be available, elsewhere with the company. As evidenced by his signature, dated August 20, 2021, on the letter, Mr. Washington declined the offer to stay with his old job under the new organizational structure. He was still not working at the time, but eventually did return to Evergreen on November 3, 2021.

Upon his return to work, Mr. Washington took on the role of a "relief worker," covering for others in various jobs when they were unable to cover their shifts. The new job paid less ("[the previous job], that was 32 [dollars] and some change [per hour]... that job that I'm working now, it was 27 [dollars] and 66 [cents] or something like that..."). When asked why he chose to switch jobs, he stated, because it's a lot less strenuous and I think, I have longevity." Despite the change in jobs, Mr. Washington went on to say that he lives with back pain every day.

¹⁵ See TR. at 10 (Howe: "... Claimant did go to the VA and [that] medical treatment was unauthorized and a Form N was provided to the Claimant." Frye: "... am I understanding that the Claimant is conceding that the medical at the VA is not authorized?" McNeely: "That is correct, Your Honor. That's not an issue for the Court.").

B. Claimant on Cross Examination by Mr. Frye

Mr. Washington recalled testifying at his deposition that he has a history of knee problems and that he had applied for VA disability relating to his left hand and left knee. Regarding his knees, he stated, “[i]t’s arthritis, stiffness, maybe, pain and stiffness,” that would cause problems standing, walking, and stooping during flare ups. Medications for his knees included NSAIDs and muscle relaxers. The claimant agreed that medical records reflected a May 27, 2020 physician visit where he was prescribed NSAIDs and muscle relaxers for pain in his right hip and leg.

Reviewing the pertinent medical records, the claimant agreed that the notes reflected a possible strain or sprain associated with his back pain. Referencing a physician’s observation about job satisfaction and his not appearing to like the people he worked with, Mr. Washington responded that he did not have to like the people I work with.

Regarding the FCE, Mr. Washington stated, he had not reviewed the report. At his deposition, the claimant explained that he was skeptical about the FCE and its reporting. He testified at the hearing, “Yeah. Yeah, I still feel the same way to this day. No matter how that—how I performed in that test, his outcome or, yeah, it was going to be—it wasn’t going to give me any credit, because I did a really good job doing that. I tried. I really gave an effort...Nobody read that he [the claimant] drug this across the room. I don’t think that’s in there.” [TR. at 40.] When asked about the FCE report indicating that his walk and gate changed during known versus unknown periods of observation, he responded, “I’m not aware that I did that. I’m sorry. ... If you want me to explain it, maybe... because the room ain’t big enough.”

Mr. Washington confirmed that Dr. Bruffett’s office released him without any restrictions and that he similarly received no work restrictions from the VA. Additional questions and responses related to what the medical records reflected.

Mr. Frye then moved on to the job reassignment issue, asking, “from what I understand the job in the Lab was transferred over to Environmental Services, is that correct?” Mr. Washington confirmed that and that he spoke with Evergreen employee and union representative Tommie Arrington about declining the conditional job offer:

Q: Did you tell her that it was because of physical restrictions?

A: If I did, that would be the reason why. Yes, sir.

Q: That’s not what I asked you. I asked you, did you give her that reason for declining the job?

A: Yes, sir. I believe that’s right.

Q: Okay. Would you agree with me that you already expressed to Dr. Bruffett’s office a job dissatisfaction and that this lines up with that; that you did not like the job?

A: I don’t like getting up and going to work every day, but I do it. I’m sorry. I’m sorry.

Q: Well, guess what? I don’t either.

A: I don’t miss a day of work. That don’t mean I got to love it. I’m sorry, but that—that—that’s just people. We don’t—we work because we have to.

Q: Okay.

A: I’m sorry.

Q: But you chose one job over the other, is that correct?

A: Yes, sir. I was given a choice.

Q: All right. And that was your choice, and you made the choice, correct?

A: That’s correct.

...

Q: And at this point, we’re here and you do not have any functional restrictions from the VA, Dr. Sayer, or Dr. Bruffett, correct?

A: That’s correct.

[TR. at 48-49.] After Mr. Frye completed his cross examination, Mr. McNeely rested for the claimant, subject to reserving the right to possibly recall Mr. Washington for rebuttal.

C. Evergreen Employee and Union Representative Tommie Arrington

Ms. Arrington was then called by the respondents. She stated that she was employed as a Day Shift Operator for the Environmental Department, where she was responsible (as earlier described by Mr. Washington when he was in that role) for handling the plant’s waste water and ensuring it was safe for release from the plant. She went on to explain the job and the change in reporting structure. Four employees were impacted by the restructuring, and Mr. Washington declined the move, along with two other employees. She

explained how different pay rates are set for employees in different roles. Specifically regarding the claimant's decision to move jobs, she stated that he did not indicate that his decision was based upon any physical limitations, and she was aware of no restrictions on his activities at the time. She offered that upon seeing Mr. Washington at work from time to time, he seemed fine, was just working, and made no complaints to her about any physical capabilities.

After a brief cross examination and re-direct, Ms. Arrington concluded her testimony. The entire record was incorporated by reference and the matter was submitted for adjudication of the issues presented.

V. ADJUDICATION

The stipulated facts, as agreed during the pre-hearing conference, are outlined above. Additionally, the claimant verified at the hearing that his treatment with the VA was not authorized under AWCC rules. *See* FN 15.

A. Temporary Disability and MMI

Temporary total disability (TTD) is that period within the healing period in which the employee suffers a total incapacity to earn wages. *See Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is "that period for healing of an injury *resulting from an accident*." Ark. Code Ann. § 11-9-102(12) (emphasis added). The healing period continues until the employee is as close to restored as the nature of the injury will permit, and if the underlying condition causing the incapacity has become stable and no further treatment will improve that condition, then the healing period is ended. *See Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). Temporary total disability benefits are not to be awarded after the healing period is ended. *See*

Milligan v. West Tree Service, 57 Ark. App. 14, 946 S.W.2d 697 (1997). Whether the healing period is ended is a question of fact for the Commission. *See Harvest, supra*.

I do not find that the claimant is entitled to any TTD benefits beyond what the respondents have already paid. The claimant was originally seen for a suspected muscle strain or sprain in his lower back. As evidenced throughout his multiple visits afterwards, his complaints, the imaging results, and his in-office discussions with providers focus on the chronic, congenital, and/or degenerative conditions of his spinal process and not on continuing troubles with a strained or sprained muscle. Arthropathy, disc dessication, stenosis, postlaminectomy syndrome... all were noted on imaging reports, and none were causally linked to turning a valve while at work. Even before his June 21, 2021 release, Dr. Bruffett mentioned that the claimant was likely already at MMI with regard to any nonoperative treatment, though he did not feel surgery was a good option either. It is unclear whether Dr. Bruffett, at that time, was speaking directly to the October muscle injury or the ongoing degenerative problems. Regardless, the claimant failed to provide evidence that he was entitled to any TTD beyond his eventual release date of June 21, 2021, when he apparently left Dr. Bruffett's office and contacted the VA, hoping for some differing opinion on whether he should be released to work. The VA provider appropriately advised that she "had no authority to tell him one way or the other." That advice was consistent with earlier instructions from the VA that "it is best not to have several providers managing the same symptoms due to possible conflicting therapies."

According to the June 8 VA note, the claimant experienced only occasional low back pain since COVID started and he was more sedentary. His medications were not consistently reported to providers, and his physical exam on June 8 revealed no tenderness in his back or SI joint. He later stated that he had experienced years of back pain, did not

recall any particular injury responsible for it, and was unsure if that pain was service-related.

The June 14 FCE report clearly indicated an unreliable effort on the claimant's part during his evaluation. An unreliable effort alone may not seriously call one's credibility into question. But (1) his skepticism about the objectivity of the testing, (2) his differing behaviors under known vs. unknown observation, (3) his insisting that his pain should be recorded as 9-10 throughout testing (under a scale that would rate a pain level of 9 as "Excruciating, Unbearable, You are unable to get out of bed on most days even with medication. You cry and moan uncontrollably" and a pain level of 10 as "Worst pain imaginable; I'm unconscious due to pain.") while laughing and carrying on with the evaluator, and (4) his denying any new or different pain or soreness from half-a-day's worth of physical exertion after months of self-reported inactivity... all of those do call into question his credibility. I am assigning greater evidentiary weight to the objective clinical findings that support his release to work without restrictions than to the claimant's own subjective claims that his MMI date should be some time later than June 21, 2021.

Placement at MMI and a release to full duty without restrictions were appropriate and supported by the medical evidence. The claimant failed to prove by a preponderance of evidence that his healing period extended beyond his release without restrictions by Dr. Bruffett's office on June 21, 2021. The claimant's healing period *for a muscle strain* likely ended far earlier, but it certainly ended no later than June 21, 2021. He is, therefore, not entitled to TTD benefits between June 21, 2021, and his return to work on November 3, 2021.

B. Impairment Rating and Wage Loss Claims

Arkansas law provides that a determination of the existence or the extent of a physical impairment shall be supported by objective and measurable findings. Ark. Code

Ann. § 11-9-704(c)(1)(B). Objective findings are those that are not under the claimant's voluntary control. Ark. Code Ann. § 11-9-102(16)(A)(i). Mere complaints of pain may not be considered when determining an impairment rating. Ark. Code Ann. § 11-9-102(16)(A)(ii)(a). Specifically regarding ratings to the spine, straight-leg-raising tests and range-of-motion tests shall not be considered objective findings. Ark. Code Ann. § 11-9-102(16)(A)(ii)(b). Additionally, medical opinions on compensability and permanent impairment *must* be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B) (emphasis added).

Dr. Bruffett's office did not assign an impairment rating, and the claimant presented no medical evidence at the hearing in support of the requested 5% impairment rating. He is, accordingly, not entitled to an impairment rating or PPD benefits.

The claimant also failed to prove by a preponderance of the evidence that he is entitled to any wage loss. "To be entitled to any wage-loss disability in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that she sustained permanent physical impairment as a result of a compensable injury." *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000) (citing *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996)). "In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." Ark. Code Ann. § 11-9-522(b)(1).

However, "any consideration of 'the employee's age, education, work experience, and other matters reasonably expected to affect his earning capacity' may not occur until the

Commission has first determined ‘the percentage’ of permanent physical impairment.”

Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 479, 10 S.W.3d 882, 884 (2000).

As the claimant failed to prove that he is entitled to an impairment rating, his claim for any wage-loss benefits must also fail.

C. Attorney’s Fee

In accordance with the above, the claimant is not entitled to an attorney’s fee.

VI. ORDER

Consistent with the findings of fact and conclusions of law set forth above, this claim is denied and dismissed.

SO ORDERED.

JAYO. HOWE
ADMINISTRATIVE LAW JUDGE