

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM Nos H005827 & H106715

EARL GLASS, EMPLOYEE

CLAIMANT

vs.

ARK. DEPT. OF CORRECTION, EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION, TPA

RESPONDENT

OPINION FILED 20 MAY 2025

Heard before Arkansas Workers' Compensation Commission Administrative Law Judge JayO. Howe on 12 February 2025 in Little Rock, Arkansas.

The Caldwell Law Firm, Mr. Andy L. Caldwell, appeared for the claimant.

The Arkansas Insurance Department, Public Employee Claims Division, Mr. Charles H. McLemore, appeared for the respondents.

STATEMENT OF THE CASE

A Prehearing Order was filed on 15 October 2024 and admitted to the hearing record without objection as Commission's Exhibit № 1. Consistent with that Order, the parties' prehearing filings, and extensive discussions at the outset of the hearing, the parties agreed to the following:

STIPULATIONS

1. The Commission has jurisdiction over this claim.
2. The employer/employee/third party administrator relationship existed at all relevant times, including on 5 August 2020, when the claimant sustained accepted compensable injuries to his right hip and low back associated with Claim H005827. The same existed on 2 August 2021, when the claimant sustained accepted compensable injuries to his right hip, low back, right knee, and bilateral shoulders associated with Claim H106715.
3. With respect to Claim № H005827, the claimant earned an average weekly wage of \$717.68, which would entitle him to compensation rates of \$478 and

\$359 per week for temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits, respectively.

4. According to the respondents, with respect to Claim № H106715, the claimant earned an average weekly wage of \$616.54, which would entitle him to compensation rates of \$411 and \$308 per week for TTD benefits and PPD benefits, respectively. The claimant agrees that benefits were paid on this claim consistent with these amounts; but he disagrees with the accuracy of the average weekly wage calculation for this claim.
5. The claimant reached maximum medical improvement (MMI) with regard to his accepted compensable right hip injuries on 14 March 2023 and was assigned a fifteen percent (15%) impairment rating to the whole body associated with those injuries. The respondents accepted and paid benefits on that impairment rating.

ISSUES

1. Whether the average weekly wage was miscalculated for the purpose of benefits associated with the claimant's second workplace incident and injuries.
2. Whether the claimant is entitled to PPD benefits associated with his accepted compensable low back injuries.
3. Whether the claimant is entitled to additional medical treatment with Pain Treatment Centers of America for his accepted compensable low back, right knee, and bilateral shoulder injuries.
4. Whether the claimant is entitled to a controverted attorney's fee related to indemnity benefits already provided in relation to his compensable right hip injuries.
5. Whether the claimant's alleged left hip injury is a compensable consequence of his compensable right hip injuries.
6. Whether the claimant is entitled to permanent and total disability benefits or, in the alternative, wage-loss benefits associated with his compensable injuries. He claims that this entitlement relates to either or both claims.
7. Whether the claimant is entitled to an attorney's fee on the additional indemnity benefits being sought.

All other issues are reserved.

CONTENTIONS

The Prehearing Order incorporated the parties' contentions by reference. The claimant's contentions were subsequently amended as follows:

The claimant's average weekly wage (AWW) will be determined by the contract of hire, wage records, and Arkansas law. Upon information and belief, the respondents calculated the AWW and compensation rates resulting in an underpayment of temporary total and permanent partial disability benefits to the claimant. Respondents used the wages paid while the claimant was not back at full duty from his injuries sustained in Claim № H005827 in calculating the AWW for Claim № H106715.

The claimant sustained admittedly compensable injuries to his right leg, right hip, and back on or about 5 August 2020 (H005827). The claimant also sustained admittedly compensable injuries to his right hip, right knee, right shoulder, left shoulder, and low back on 2 August 2021 (H106715). The claimant treated with Dr. Vargas, who diagnosed the claimant with a fractured hip and recommended a total hip replacement. The respondents initially denied the recommendation of Dr. Vargas and refused to authorize the surgery consult as well as the physical therapy ordered. Respondents finally authorized the surgery after [counsel] requested a hearing. The claimant contends the respondents controverted the additional benefits for the hip and that his attorney is entitled to an attorney's fee on any indemnity paid after the controversion, including the impairment rating and any additional indemnity owed. The claimant was placed at MMI for his right hip on or about 14 March 2023, and he was assigned a fifteen percent (15%) rating to the body as a whole. Respondents have paid the impairment rating; but the respondents have not paid any attorney's fees, and the rating was paid at the incorrect PPD rate.

The claimant's right hip injury caused the claimant to favor and rely upon his left hip. The claimant had to put all of his weight on his left hip while he was recovering from the right hip injury. The claimant's left hip was asymptomatic prior to his compensable right hip injuries. As a compensable consequence of the claimant's right hip injuries, the claimant's left hip has become symptomatic and treatment for the same is reasonable and necessary. The claimant is entitled to medical treatment for the same.

Dr. Vargas also treated the claimant's back injury. The claimant was asymptomatic prior to his compensable back injuries. The claimant had documented muscle spasms and a left foraminal disc protrusion at L4-5 that contacted and displaced the L4 nerve root. The claimant is entitled to permanent partial disability for the lumbar injury. The claimant's treatment with Pain Treatment Centers of America is reasonable and necessary medical treatment for his lumbar spine injury.

The claimant has not been able to return to work due to his compensable injuries, and he contends that he is permanently and totally disabled. Pleading in the alternative, in the event the Commission finds that the claimant is not permanently and totally disabled, the claimant contends that he is entitled to wage-loss benefits.

The claimant's attorney is entitled to an attorney's fee on all controverted benefits, and all other issues are reserved.

The respondents contend the following:

... that the claimant reported having an injury when he slipped at work on 5 August 2020 (H005827), which was accepted as compensable by the respondents. The claimant was provided medical treatment for his low back and groin, treated conservatively, and paid TTD while in his healing period and unable to work. The claimant was released to full duty with a zero percent (0%) permanent impairment rating by Dr. Stephen Paulus in his report of 1 October 2020. The claimant returned to work for the respondent-employer.

The respondent contends that the claimant reported having another injury when he slipped on 2 August 2021 (H106715), which was accepted as compensable by the respondents. The claimant complained of injuries to his left middle finger, right knee, low back, and [bilateral] shoulders. The claimant has been, and continues to be, provided medical treatment by the respondent.

The claimant's medical treatment has included conservative treatment with Dr. Victor Vargas, including injections and physical therapy, and a lumbar MRI. The respondent also sent the claimant to Dr. James Tucker and [APRN] Christopher Vinson within the same clinic, who evaluated the claimant and recommended surgery for the claimant's hip fracture and referred him to Dr. Adam Smith who performed the claimant's right hip replacement surgery on 17 November 2021.

The claimant was released by Dr. Adam Smith at MMI on 14 March 2023, with a fifteen percent (15%) permanent impairment to the body as a whole for his [right] hip. Respondent has paid PPD benefits to the claimant for this rating. The claimant was provided with an injection of his left hip on 20 June 2023 and did not seek further treatment for his left hip. Respondent has authorized a return visit to Dr. Adam Smith on 5 September 2024 to evaluate the claimant's hips. Respondent is not responsible for any unauthorized medical treatment the claimant has incurred.

The claimant had been released by Dr. Victor Vargas at MMI on 28 April 2022, and on 12 July 2023, Dr. Vargas assigned the claimant a zero percent (0%) permanent impairment rating for his lumbar spine, with no work restrictions.

The claimant was offered vocational rehabilitation counseling, which he refused at his deposition, but he later agreed to participate.

The respondent contends that the claimant cannot establish that he is unable to work as a result of his compensable injuries or that he is entitled to benefits under Section 11-9-505(a) [this contention was withdrawn at the hearing]...

Respondent has paid benefits to the claimant for each claim with compensation computed on his average weekly wage earned at the time of the accident(s).

The respondent reserves the right to raise additional contentions, or to modify those stated herein, pending the completion of discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole, including the evidence summarized below, and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under Ark. Code Ann. § 11-9-704:

1. The Commission has jurisdiction over this claim.
2. The stipulations as set forth above are accepted.

3. The claimant proved by a preponderance of the evidence that he is owed for underpayment(s) related to a miscalculated average weekly wage associated with his second accident (Claim H106715).
4. The claimant failed to prove by a preponderance of the evidence that he is entitled to PPD benefits associated with his low back injuries.
5. The claimant failed to prove by a preponderance of the evidence that he is entitled to benefits associated with the unauthorized medical treatment he sought through the Pain Treatment Centers of America.
6. The claimant failed to prove by a preponderance of the evidence that the respondents controverted the benefits he received in relation to his compensable right hip injuries.
7. The claimant proved by a preponderance of the evidence that his left hip injury is a compensable consequence of his accepted compensable right hip injuries.
8. The claimant failed to prove by a preponderance of the evidence that he is permanently and totally disabled; but he proved by a preponderance of the evidence that he is entitled to a wage-loss benefit in the amount of twenty-five percent (25%) over and above his fifteen percent (15%) whole-body impairment rating for his accepted compensable right hip injuries.
9. The claimant has proven by a preponderance of the evidence that he is entitled to an attorney's fee on the indemnity benefits awarded in this opinion.

SUMMARY OF THE EVIDENCE

The record consists of the hearing transcript and two volumes of exhibits. The claimant and his wife Isabella Amanda Glass testified at the hearing. Vocational consultants Cecilia Ann Brunson and Keondra Hampton also testified. In addition to Commission's Exhibit № 1, noted above, the following exhibits were entered into the record: Claimant's Exhibit № 1 (four index pages and 440 pages of medical records); Claimant's Exhibit № 2 (two index pages and 111 pages of non-medical records); Claimant's Exhibit № 3 (the claimant's amended prehearing information, which consists of five pages and represents a date of service of 4 February 2025); Respondents' Exhibit № 1 (four index pages and 172 pages of medical records); Respondents' Exhibit № 2 (two index pages and 50

pages of non-medical records); Respondents' Exhibit № 3 (one index page and 9 pages of supplemental records); and Respondents' Exhibit № 4 (the respondents' prehearing information, which consists of four pages and represents a date of service of 29 August 2024).

Additionally, both parties filed post-hearing briefs on 17 March 2025. I have blue-backed those briefs to this opinion, and copies of the same will be served along with this opinion, consistent with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, 2010 Ark. App. LEXIS 549.

ADJUDICATION

The stipulated facts are outlined above and accepted. It is settled that the Commission, with the benefit of being in the presence of a witness and observing their demeanor, determines a witness' credibility and the appropriate weight to accord their statements. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999). A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

The claimant is sixty-six years of age with a bachelor's degree in psychology and a master's degree in clinical psychology. At the time relevant to these claims, he was working for the respondents as a mental health counselor for inmates at multiple facilities within the Arkansas Department of Correction. The claims at issue relate to two separate

workplace incidents—both slip-and-falls. The first occurred on 5 August 2020, when he was walking the prison halls doing his treatment rounds. The second occurred nearly a year later, on 2 August 2021, when he was setting up a rolling computer for virtual therapy visits.¹ The claimant has not worked since the second date of injury. The respondents accepted both claims and began providing benefits. The claimant has requested additional benefits, however, and those claims were the subjects of the hearing.

A. THE AVERAGE WEEKLY WAGE RATE

The claimant contends that the respondents undercalculated his average weekly wage for the purpose of benefits associated with Claim No H106715. He testified that he received a salary increase shortly before his second accident and argues that the respondents' calculations inappropriately included TTD benefits received in relation to Claim No H005827 instead of the claimant's actual wage rate for those weeks in which benefits were paid.

Arkansas Code Annotated § 11-9-705(a)(3) (Repl. 2012) provides that “[c]ompensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.”

The wage records submitted by the claimant for the end of July 2020 show the claimant was earning a bi-weekly wage of \$1,435.71. [Cl. Ex. 2 at 52.] The parties stipulated that the benefits paid on the claimant's 5 August 2020 injuries were based on an average weekly wage of \$717.68, which is commensurate with the bi-weekly amount noted above.

¹ According to the medical records, it was discovered during treatment for the second fall that a fracture in the claimant's right hip was missed during the treatment associated with the first fall. The right hip replacement that he claimant eventually underwent was, thus, associated with Claim No H005827.

The wage records submitted by the claimant for the end of July 2021 show that the claimant was earning a bi-weekly wage of approximately \$1,478.76. [Cl. Ex. № 2 at 58.] His wages for the months preceding July were consistent with those associated with his first accident. The parties stipulated, however, that the benefits paid on the claimant's August 2021 injuries were based on an average weekly wage of \$616.54, a considerable decline from his previous year's wage rate that is not consistent with the increased salary reflected in his last two checks for July of 2021.

The evidence shows that the respondents miscalculated the claimant's average weekly wage for the second claim by including TTD benefits paid in some periods into the wage calculation. His full-time bi-weekly pay rate of \$1,435.71 for 24 pay periods and \$1,478.76 for two pay periods make the applicable average weekly wage \$719.34. The preponderance of the evidence establishes that he is entitled to indemnity benefits associated with his second accident (Claim № H106715) based on this amount, and that the respondents are thus responsible for any underpayments on benefits that were not consistent with that rate.

B. THE CLAIMANT IS NOT ENTITLED TO PPD BENEFITS FOR HIS LOW BACK INJURIES.

Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has been reached. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1). Objective findings are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16)(A)(i). Medical opinions addressing impairment must be stated within a reasonable degree of medical certainty. *Id.* § 11-9-102(16)(B). Permanent benefits shall be awarded only upon a determination that the

compensable injury was the major cause of the disability or impairment. *Id.* § 11-9-102(f)(ii)(a). "Major cause" means more than fifty percent (50%) of the cause. *Id.* § 11-9-102(14).

The claimant experienced low back pain after his initial accident on 5 August 2020. An X-ray report from 9 August 2020 revealed "degenerative changes in the lumbar spine," but "no evidence of acute fracture or dislocation." [Cl. Ex. № 1 at 15.] Dr. Stephen Paulus saw the claimant on 8 September 2020. He assessed "low back pain" and "degeneration of lumbar intervertebral disc" and returned the claimant to work at light duty. [Cl. Ex. № 1 at 38.] On 1 October 2020, Dr. Paulus noted that he would release the claimant back to full duty at MMI with a zero percent (0%) impairment rating the following week.

After the claimant's second accident, he presented to MedExpress on 9 August 2021, where he was assessed with a lumbar sprain and muscle spasm in his back. [Cl. Ex. № 1 at 57.] He was then seen at OrthoArkansas on 19 August 2021 by Nurse Practitioner Christopher Vinson. X-ray imaging revealed, "no change from the last X-rays taken of his lumbar spine taken on September 8, 2020. There are degenerative changes throughout the lumbar spine as well." [Cl. Ex. № 1 at 75.] An MRI was ordered, and the claimant was referred to Dr. Victor Vargas for further consultation.

Dr. Vargas noted on 31 August 2021 that the MRI showed "left foraminal disc protrusion at L4-5 that appears contacting and displacing the exiting left L4 nerve root." [Cl. Ex. № 1 at 86.] The imaging showed a stress reaction of the sacrum and some potential signs related to a hematological disorder, possibly multiple myeloma or another metastatic disease or blood packing disorder. [Cl. Ex. № 1 at 231.] But in his lengthy assessment and planning note from that day, Dr. Vargas states that the claimant has "back pain with degenerative changes" and "[d]efinitely no acute events in the lumbar spine." [Cl. Ex. № 1 at 87.]

On 28 April 2022, Dr. Vargas stated the following:

I am considering with a reasonable degree of medical certainty that the patient has reached max medical improvement and can be released.

No further treatment is necessary.

Patient has had extensive work-up and treatment for his symptomology lower back pain.

The patient [more likely than not]² has a source of his back pain originated at multilevel degenerative disc disease in the lumbar spine and also has underlying hematological process mostly that needs to be treated and followed by different specialty and in coordination with a primary care physician.

In terms of the work related injury the patient can work with no restrictions.

[sic]

[Cl. Ex. № 1 at 243.] In an addendum to that note, he assigned the claimant a “0% permanent impairment in regards to lower back pain.”

The claimant eventually presented to Pain Treatment Centers of America (PTCA) for his back pain, where his pain was suggested as being chronic and likely to last for the remainder of the claimant’s life. He argues that Dr. Vargas’ opinion should be disregarded and that the permanent nature of PTCA’s assessment favors the assignment of a permanent impairment rating. I disagree.

Degenerative changes were noted in the X-ray imaging after the claimant’s initial accident on 5 August 2020. Subsequent X-ray imaging showed the same after the 2 August 2021 accident. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Dr. Vargas worked through various potential causes for the claimant’s back pain and opined that it was most likely related to degenerative disc disease and/or a hematological condition that was not related to the

² The actual text appearing in the note reads, “The patient most likely than no has a source of his back pain originated at multilevel....” The note clearly states that the text “was generated with voice recognition software.” I have bracketed what I reasonably believe was meant in that portion of the note where the transcription is not clear.

claimant's work injuries. I credit his opinion that the claimant was entitled to a zero percent (0%) impairment rating associated with his compensable back injuries. The claimant has, thus, failed to prove by a preponderance of the evidence that he is entitled to PPD benefits associated with his compensable low back injuries.

C. THE RESPONDENTS ARE NOT LIABLE FOR THE CLAIMANT'S
UNAUTHORIZED TREATMENT WITH THE PAIN TREATMENT
CENTERS OF AMERICA.

The claimant seeks benefits associated with the medical treatment he received from PTCA. That treatment began on 17 October 2022, when the claimant was seen for low back pain. Upon subsequent presentations to PTCA, the claimant also made complaints of hip pain and shoulder pain. He does not dispute, however, that the treatment he sought for the same was unauthorized.

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 employer has the right to select the initial treating physician. *Id.* § 11-9-514(a)(3)(A)(i). However, an employee may request a one-time change of physician. *Id.* § 11-9-514(a)(2)(A), (a)(3)(A)(ii), (iii). When a claimant seeks a change of physician, he must petition the Commission for approval. *Stevenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 270, 19 S.W. 3d 36, 39 (2000). Treatment or services furnished or prescribed by any physician other than the one selected according to the change of physician rules, except emergency treatment, shall be at the claimant's expense. *Id.* § 11-9-514(b).

The claimant testified that he believed that he was referred to PTCA by one of the physicians at his own primary care clinic—and not from his authorized treating physician:

Q: Is that some place you decided to go to get some treatment?

A: I think I was referred there.

Q: By who?

A: I think it was UAMS Medical Clinic.

Q: Is that where your family doctor is?

A: Yes.

...

Q: And it was one of those doctors who referred you to the Pain Treatment Centers of America?

A: Yes, sir. Uh-huh.

Q: And that's where you've been getting your pain medication?

A: Yes, sir. That's where the medication is coming from.

Q: Okay. So that's not some place that Public Employee Claims sent you? You went there to get your treatment?

A: Right.

[TR at 95-97.]

The record includes two Form AR-Ns, with the front and back side of each form evidencing the claimant's dated signature. The Form AR-N associated with his 5 August 2020 accident was signed on 13 August 2020 [Resp. Ex. № 2 at 3-4]; and the form associated with his 2 August 2021 accident was signed on 26 August 2021 [Resp. Ex. № 2 at 16-17]. After an employee has received a Form AR-N from his employer, subsequent unauthorized treatment is not the employer's responsibility. Ark. Code Ann. § 11-9-514(c)(3) (Repl. 2012); *Tempworks Mgmt. Servs. v. Jaynes*, 2023 Ark. App. 147, 662 S.W.3d 280.

Having been furnished with notice of the physician change rules via a Form AR-N for each of his claims, the claimant was bound by those rules. He did not, however, comply with those rules before seeking treatment from PTCA. Accordingly, the respondents are not liable for the unauthorized treatment provided to the claimant by PTCA.

D. THE CLAIMANT HAS NOT PROVEN CONTROVERSION OF BENEFITS ASSOCIATED WITH HIS RIGHT HIP INJURIES.

The claimant contended in his amended prehearing information that the respondents were liable for controverting benefits on the claimant's accepted right hip injuries by way of some delay in authorizing the total right hip replacement that was performed 17 November 2021. No evidence was introduced in furtherance of that argument. Instead, the claimant suggested in his post-hearing brief that the Commission take notice

of the timeline of past filings on his claims. In the absence of any record evidence in support of the alleged controversion of benefits, that claim must fail.

E. THE CLAIMANT'S LEFT HIP INJURY WAS A COMPENSABLE
CONSEQUENCE OF HIS COMPENSABLE RIGHT HIP INJURIES.

The claimant asserts that his left hip became problematic as a result of his compensable right hip injuries and/or his right hip replacement in November of 2021. At a follow-up visit for his right hip on 14 March 2023, the claimant reported his right hip was much better, but his left hip was becoming a hinderance with regard to discontinuing the use of a walker. [Cl. Ex. № 1 at 326.] Dr. Smith nonetheless placed him at MMI with no restrictions and assigned a fifteen percent (15%) whole-body rating for his right hip that day. He authored a letter stating the same on 17 April 2023. [Cl. Ex. № 1 at 351.]

On 16 June 2023, the claimant was diagnosed with osteoporosis. [Cl. Ex. № 1 at 389.] On 20 June 2023, Dr. Smith noted that the claimant was doing well with his right hip replacement, but that he was having increasing trouble with left hip osteoarthritis. A left hip injection was provided that day. The claimant returned to Dr. Smith on 17 September 2024, when he was diagnosed with a nondisplaced subtrochanteric left femur fracture. [Resp. Ex. № 1 at 168.] A cephalomedullary nail procedure was recommended to six the fracture. A nurse case manager for the respondents inquired of Dr. Smith in a form letter as to whether that injury was related to his right hip injuries. The questions and answers returned were:

Q: In your opinion, within a reasonable degree of certainty, is the need for the proposed IM hip nailing for the left non-displaced fracture greater than 51% related to the work injury of 08//05/20?

A: No.

Q: Can you state, within a reasonable degree of medical certainty, the reported left hip symptoms and pathology are the direct result of the 08/05/20 work injury or to pre-existing conditions?

A: No.

[Resp. Ex. № 1 at 171.]

These questions, however, are not reflective of the standard that is applied when considering whether an injury is a compensable consequence. The present question is not whether the left hip injury was a “direct result” of the compensable injury itself—and certainly not whether the former was a “major cause” of the latter. When a claimant suffers a compensable injury, every natural consequence of that injury is also compensable. *Hubley v. Best Western Governor’s Inn*, 52, Ark. App. 226, 916 S.W.2d 143 (1996). The inquiry turns on whether there is a causal connection between the two occurrences. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). In *Booneville Hum. Dev. Ctr. v. Foster*, 2024 Ark. App. 618, our Court of Appeals recently explained:

Arkansas Code Annotated section 11-9-508(a)(1) (Supp. 2023) requires an employer to provide an injured employee such medical services as may be reasonably necessary in connection with the injury received by the employee. When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury. *Nichols v. Omaha Sch. Dist.*, 2010 Ark. App. 194, at 5, 374 S.W.3d 148, 151. However, for this rule to apply, the basic test is whether there is a causal connection between the injury and the consequences of the injury. *Id.*, 374 S.W.3d at 151. The burden is on the employee to establish the necessary causal connection. *Id.* at 5-6, 374 S.W.3d at 151. The determination of whether a causal connection exists between two episodes is a question of fact for the Commission. *Ingram v. Tyson Mexican Original*, 2015 Ark. App. 519, at 6.

The claimant testified credibly that he did not have a history of left hip pain before his compensable right hip injuries:

Q: And so while you were getting treatment and recovering after your surgery for the total hip, were you having to put more pressure on your left hip?

A: Yes.

Q: Before these two work injuries, were you having any problems with that left hip?

A: No, sir.

Q: Had you been to a doctor for your left hip?

A: No, sir.

Q: Since these injuries and since having to put this added pressure on [your] left hip, has it started to become problematic for you?

A: Very much so, sir.

Q: And it started to give you discomfort?

A: Discomfort, yes.

Q: And then, you started getting treatment for it?

A: Yes, sir.

[TR at 109-110.]

Dr. Smith managed the care of the claimant's hip replacement and answered the questions *as they were written*. I assign little evidentiary value to his responses to the letter in this circumstance. *See Poulan, supra*. Rather, I find that the claimant proved by a preponderance of the evidence that a causal connection between his compensable right hip injuries and the eventual injury to his left hip.

The claimant denied any history of left hip problems prior to his first work accident. The record is clear that the claimant suffered from an untreated right hip fracture for nearly a year before it was found on imaging related to his 2 August 2021 fall. A report from the respondents' nurse case manager in October of 2021 noted that the claimant did not fully recover from his first accident and had walked with a limp since. [Cl. Ex. № 1 at 124.] A note from a 20 October 2022 visit (after his right hip replacement) with Dr. Smith advises the claimant that "it is going to take him significantly longer to get over his injury as he went 15 months prior to getting surgery. This is going to cause him significant atrophy and trouble." [Cl. Ex. № 1 at 284.] And the claimant began regularly reporting left lower extremity pain in physical therapy appointments at least as early as 9 August 2022. [Cl. Ex. № 1 at 259.]

Given the delay in treatment of the claimant's compensable right hip injuries, the prolonged recovery course for that hip, and his years of reporting an altered gait, it naturally follows that the claimant's daily reliance on and overuse of his left hip resulted in an injury to that hip. Accordingly, I find that he has met his burden in proving that his left hip injury is a compensable consequence of his compensable right hip injuries.

F. THE CLAIMANT IS NOT ENTITLED TO PERMANENT AND TOTAL DISABILITY BENEFITS; BUT HE IS ENTITLED TO A 25% WAGE-LOSS BENEFIT IN EXCESS OF HIS PERMANENT IMPAIRMENT RATING.

It is not disputed that the respondents have accepted the fifteen percent (15%) whole body impairment rating associated with the claimant's accepted compensable right hip injuries. The claimant now seeks permanent and total disability benefits associated with either or both of his claims. Under Arkansas law, "permanent total disability" means an "inability, because of a compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." A.C.A. § 11-9-519(e)(1). The burden of proof is on the employee to prove his inability to earn any meaningful wages in the same or other employment. *Id.* § 11-9-519(e)(2). Permanent total disability must be determined in accordance with the facts. *Id.* § 11-9-519(c).

When a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Milton v. K-Tops Plastic Mfg. Co.*, 2012 Ark. App. 175, 392 S.W.3d 364. Those factors include the claimant's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. A.C.A. § 11-9-522(b)(1). A claimant's motivation to return to work may also be considered. *Milton, supra*.

The law provides:

- (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

A.C.A. § 11-9-102(4)(F)(ii). A “major cause” is more than fifty percent (50%) of the cause and must be established by a preponderance of the evidence. A.C.A. § 11-9-102(14).

The claimant was a credible witness. But he has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. He was released with a zero percent (0%) rating and no restrictions for his compensable back injuries. His release to return to work after treatment for his compensable right hip injuries was “as tolerated,” but without restrictions. The claimant has a bachelor’s and master’s degree in the psychology field and extensive experience in providing mental health counseling services or coordinating care within the healthcare system. He also has academic administrative experience from his time running a charter school in Pine Bluff, Arkansas.

Both of the vocational experts who testified opined that the claimant could work in a sedentary job classification, and multiple job openings at competitive salaries were found during the vocational rehabilitation job search process. They acknowledged that his physical limitations could require accommodations from his employers; but they generally felt that given his education, his experience, and his line of work, he would be able to participate in the workforce in a meaningful way. While he testified that he had not considered working remotely, the claimant added that he was familiar with virtual meetings over Zoom. Indeed, his second accident occurred while he was setting up for facilitating remote therapy sessions for his inmate clients. He would, however, not necessarily be familiar with the clinical software programs and electronic health records used by potential employers.

The claimant testified that he intended to work until he was 70 years old, but he now experiences some significant mobility issues. He stated that he attempted to explore some job postings that were provided through vocational rehabilitation, but the internet links he received would not work when he tried to access the job postings.

The claimant testified that he can drive, but that getting to and from the car takes a lot of time and effort. Respondents' counsel complimented the claimant's professional appearance at the hearing; but the claimant explained that he required assistance in getting himself ready for the day. He testified that he benefits from a special chair at home that is meant to provide ease of access and comfort to people with hip injuries. It is not clear if such a chair would be an available accommodation if he were to return to an in-office setting. According to the testimony, some accommodations may be necessary regarding the claimant's medication regimen and the drowsiness that can occur from some of his medication.

I do not find the claimant to be especially motivated to return to work. But I believe that he was sincere in stating that the transition from a lifetime of working to feeling unable to work has been unanticipated and difficult for him. It was unclear from the testimony the extent that the limitations on communicating with him as a person represented by counsel hindered his ability to actively engage in the job seeking process. There is no exact formula for determining a claimant's wage loss. *Hixon v. Baptist Health*, 2010 Ark. App. 413, 375 S.W.3d 690. To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that he sustained a permanent physical impairment as the result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 373, 326 S.W.3d 415. Here, the claimant has a stipulated accepted permanent impairment based on his accepted compensable right hip injuries. Based on the foregoing evidence, I find that the claimant proved by a preponderance of the evidence that he is entitled to a wage-loss benefit of twenty-five percent (25%) in excess of that impairment. In so doing, I find his stipulated compensable right hip injuries to be the major cause of his wage loss.

G. THE CLAIMANT IS ENTITLED TO AN ATTORNEY'S FEE.

The respondents have controverted the claimant's entitlement to the indemnity benefits awarded in this Opinion. They are, therefore, liable for the allowable fees associated with this litigation. The claimant is entitled to an attorney's fee under Ark. Code Ann. § 11-9-715 on the indemnity benefits awarded in and consistent with this Opinion.

CONCLUSION AND AWARD

The claimant has proven his entitlement to the indemnity benefits outlined above. The respondents are directed to provide benefits accordingly. All accrued amounts shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid. Ark. Code Ann. 11-9-809. *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

The claimant's attorney is entitled to a twenty-five percent (25%) fee on the benefits awarded herein. One-half (1/2) of the fee is to be paid by the claimant, and one-half (1/2) of the fee is to be paid by the respondents, consistent with A.C.A. §11-9-715. *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2012).

IT IS SO ORDERED.

JayO. Howe
Administrative Law Judge