BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G506221

ROGER GRUBBS, EMPLOYEE	CLAIMANT
SOUTHERN PERSONNEL MANAGEMENT, INC./ CABINET SHOP, INC., EMPLOYER	RESPONDENT NO. 1
AMTRUST NORTH AMERICA, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED MAY 21, 2024

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

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

Respondents No. 1 represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed November 29, 2023. The administrative law judge found that the claimant proved he was entitled to additional medical treatment and temporary total disability benefits. After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove surgery recommended by Dr. Blankenship in accordance with Ark. Code Ann. §11-9-508(a)(Repl.

2012). We find that the claimant did not prove he was entitled to an award of temporary total disability benefits.

I. HISTORY

Roger Grubbs, now age 70, testified that he began performing cabinetry work for the respondent-employer in 1975. Mr. Grubbs described the physical nature of his work for the respondents: "It involved lifting heavy cabinets, lifting heavy sheets of material, laying them on the saw to cut them up, fabrication, crawling in and out of cabinets, moving heavy stuff, delivery, installation."

It was stipulated that the claimant sustained a compensable injury on March 4, 2013. The record indicates that the claimant was involved in a motor vehicle accident on that date. The claimant testified, "I was at a – waiting at a red light waiting for it to turn green and somebody drove into me from behind." Dr. Terry Clark diagnosed "1. Cervical strain" and "2. Thoracic strain." Dr. Clark treated the claimant conservatively and returned him to restricted work duty. The claimant participated in a Functional Capacity Evaluation on October 3, 2013: "The results of this evaluation indicate that a reliable effort was put forth, with 51 of 51 consistency measures within expected limits….Mr. Grubbs demonstrated the ability to perform work in the MEDIUM classification of work[.]" Dr. Christopher

Covington stated on June 9, 2015, "He is at maximum medical improvement from a neurosurgical standpoint."

The parties stipulated that the employment relationship existed on August 7, 2015. The claimant testified on direct examination:

> Q. Did you have a second accident on August 7 of 2015?
> A. Yes.
> Q. Tell us how that accident happened.
> A. Light turned green so I proceeded through the intersection. Someone on my right ran the red light and collided with me from the side….
> Q. Have you done any work at the cabinet shop since that accident?
> A. About three hours.
> Q. How did the August 7, 2015, accident affect your condition?
> A. It made it much worse.

The parties stipulated that the respondents "initially accepted this claim as compensable and paid some temporary total disability benefits."

According to the record, Dr. Gregory M. Loyd examined the claimant on August 12, 2015:

> At the request of and authorization by Southern Personnel Management, we are seeing Mr. Roger Grubbs. The patient presents today for evaluation of injuries to his spine that occurred in an MVA on 08-07-15. He apparently was in a small truck (I can't recall whether this was a company vehicle or not) when he was struck in the passenger side rear fender/wheel area when another vehicle ran a red light. He apparently was wearing a seat belt but was jostled around in his seat….

Dr. Loyd assessed "Acute exacerbation of degenerative arthritis of the cervical, thoracic and lumbar spines related to recent MVA….My overall

general impression is that it is likely that this patient's course will be somewhat prolonged just based on his previous protracted course of care from first MVA."

Dr. Steven L. Cathey corresponded with the respondent-carrier on August 31, 2015:

> Thank you for the medical records you provided, as well as your introductory letter regarding Mr. Roger Grubbs. As you recall, he was seen today for the purpose of an independent medical evaluation. The patient presents with chronic neck, thoracic and lower back pain that actually began after an original occupational injury sustained on March 4, 2013. According to the patient, he was working in a cabinet shop when he was driving a "light truck" that was rear-ended at a four-way intersection….
> Since the original March 2013 injury the patient has worked a limited amount at the cabinet manufacturing facility where he is employed. He has not worked at all since the most recent motor vehicle accident of August 7, 2015. He was given some muscle relaxants and meloxicam by a primary care physician in Ft. Smith and also received a parenteral steroid injection….
> Mr. Jackson, in my opinion, the patient's current diagnosis is degenerative disc disease affecting the cervical, thoracic and lumbar spine. He probably did suffer a thoracic strain superimposed on these pre-existing conditions.
> Unfortunately, he is not a candidate for spinal surgery or other neurosurgical intervention. This opinion is, therefore, consistent with the one he received from Dr. Covington earlier this year. I do not see this problem getting any better long-term.
> The patient is really not interested in physical therapy for treatment of the thoracic strain. Moreover, I believe since he is almost a month out from this event he is at maximal medical improvement and there is really no indication for additional treatment as it relates to this particular motor vehicle accident. He could certainly follow-up with Dr. Covington's

> recommendation and pursue long-term pain management in Tulsa for those symptoms related to the March 4, 2013, MVA. As it relates to this most recent motor vehicle accident there is no impairment rating in the absence of objective findings either clinically or radiographically.
> As far as his job is concerned, I believe he can either return to work at regular duty status, find another line of employment that is not so strenuous or file for long-term disability benefits through Social Security….

The claimant began treating with Dr. James B. Blankenship on November 14, 2016: "The patient's chief complaint is lower back pain. He has multifactorial injuries with a motor vehicle accident in March of 2013, which he never really got better from but then he was also in an MVA in August of 2015….The patient has done multiple different injections and physical therapy." Dr. Blankenship's impression was "1. Low back pain," "2. Fibromyalgia," "3. Pain in thoracic spine," and "4. Cervicalgia."

An administrative law judge filed an opinion on January 4, 2017. The administrative law judge found that the claimant proved he was "entitled to the payment of a 5% permanent impairment rating as assessed by Dr. Holder in October of 2013."

The claimant followed up with Dr. Blankenship on February 9, 2017. Dr. Blankenship stated that new diagnostic testing showed abnormalities in the claimant's lumbosacral spine, and Dr. Blankenship planned, "I have told him the best thing for us to do is to try another aggressive, active, conservative treatment plan. I have recommended we get him in to see Dr.

David Cannon for evaluation and possible ESI. I have recommended we get him started with an aggressive, active physical therapy course with the folks at Summit."

A pre-hearing order was filed on September 13, 2017. According to the pre-hearing order, the claimant contended that he was "entitled to temporary total disability benefits from February 9, 2017 until a date yet to be determined. Claimant contends he is entitled to additional treatment by or at the direction of Dr. Blankenship, including but not limited to physical therapy and pain management treatment. Claimant contends that his attorney is entitled to an appropriate attorney's fee."

The parties stipulated that the respondents "now controverted the claim." The respondents contended that the claimant "has not produced objective, measurable findings of a compensable injury pursuant to A.C.A. §11-9-102. Claimant has had chronic back problems in the cervical, thoracic, and lumbar areas. Claimant was involved in a motor vehicle accident on March 4, 2013. Claimant underwent MRIs of all three areas of the back that showed protrusions and degenerative changes. The claimant underwent a functional capacity evaluation in October 2013 and was restricted to medium duty and was only able to work four hours per day. He was taking Lyrica and described pain in the neck, mid-back, low back and down the legs. He also had moderate spasms in his back due to the

accident. Claimant then went to Dr. Covington in 2014 complaining of back pain. Dr. Covington noted a long history of chronic mid-back pain. The claimant had lost 40% of his work time. He underwent [an] MRI that showed osteophytes and bulges at L3-4, L4-5, and L5-S1. He also had a disc protrusion at L4-5. Claimant returned to the doctor in June of 2015 with the same problems, continuing to have radiculopathy down the leg and moderate spasms. He was seen by the doctor for those conditions the day before the incident of August 7, 2015. He was followed for degenerative arthritis. It is the respondents' position that there are no new objective findings related to the second motor vehicle accident."

The parties agreed to litigate the following issues:

1. Compensability of injury to claimant's cervical, thoracic, and lumbar spine on August 7, 2015.
2. Temporary total disability benefits from February 9, 2017 through a date yet to be determined.
3. Medical benefits as directed by Dr. Blankenship.
4. Attorney's fee.

A hearing was held on January 29, 2018. At that time, the claimant contended that he was entitled to temporary total disability benefits beginning September 30, 2015 through a date yet to be determined. The claimant reserved the issue of his entitlement to permanent disability benefits. An administrative law judge filed an opinion on February 28, 2018. The administrative law judge found that the claimant proved he sustained a compensable injury on August 7, 2015. The administrative law

judge found that the claimant proved he was "entitled to additional medical treatment as recommended by Dr. Blankenship." The administrative law judge awarded temporary total disability benefits. The respondents appealed to the Full Commission and the claimant cross-appealed.

The Full Commission filed an opinion on October 1, 2018. The Full Commission found that the claimant proved he sustained a compensable injury to his neck and back on August 7, 2015. The Full Commission found that "the claimant proved Dr. Blankenship's current treatment recommendations were reasonably necessary in connection with the August 7, 2015 compensable injury to the claimant's neck and back." The Full Commission found, "the claimant proved he was entitled to conservative medical treatment as recommended by Dr. Blankenship, said treatment to be provided by the respondents Amtrust North America. The Full Commission finds that the claimant reached the end of the healing period for his August 7, 2015 compensable injury no later than August 31, 2015. The claimant did not prove he was entitled to temporary total disability benefits beginning September 30, 2015 or any time thereafter."

There was no appeal of the Full Commission's opinion filed October 1, 2018.

A pre-hearing order was filed on November 27, 2018. The claimant contended that, as a result of the March 4, 2013 compensable injury, he

had sustained wage-loss disability in addition to his impairment rating. After a hearing, an administrative law judge filed an opinion on February 13, 2019. The administrative law judge found that the claimant had sustained wage loss "in an amount equal to a 15% impairment and is in addition to the 5% assigned for the anatomical impairment rating to the body as a whole."

The claimant followed up with Dr. Blankenship on April 4, 2019: "Mr. Grubbs first of all only got one visit approved for physical therapy. I told him this is a joke….I have recommended that we get him back in to see Dr. Cannon to inject the upper area where he is hurting….I have also recommended that he get into a comprehensive and active therapeutic program in Van Buren like we recommended. If this is not done, I will not be able to see the gentleman."

On April 9, 2020, Dr. Blankenship performed an arthrodesis, disc resection, and hemilaminotomies. The pre- and post-operative diagnosis was "1. L4-L5 and L5-S1 disc herniations." Dr. Blankenship noted on April 23, 2020, "Overall he is pleased with his surgical outcome so far." Dr. Blankenship reported on July 16, 2020, "He states his pain he is having now in his low back is a different type of pain." The claimant testified that his condition improved following surgery by Dr. Blankenship.

Dr. Blankenship reported on October 22, 2020:

> The patient is in today for follow up from his lumbar fusion. He is now six months post surgery. He is doing great with

> complete resolution of his preoperative pain. He still has some low back pain mostly midline. He rates this only about 20% toward the worst pain imaginable….
> Mr. Grubbs returns to the office today six months postop from his ALIF. He is doing well and states that he has a marked reduction in his preoperative pain. He has noticed that he is still more prone to flare ups and I told him that is just part of the healing process. I do think he is at MMI from the standpoint of his surgery. We have him on no current medications. The patient is 67 and I have advised him that he cannot return to work at what he was doing pre-surgically. He would have permanent restrictions on him but I told him I would really recommend that he retire….

Dr. Blankenship assigned the claimant a 12% whole-body impairment rating. The parties stipulated, "Respondent #1 has accepted and is paying the 12% permanent impairment rating to the body as a whole." The parties stipulated that the claimant "reached maximum medical improvement on October 22, 2020."

The claimant participated in a Functional Capacity Evaluation on November 11, 2020: "The results of this evaluation indicate that a reliable effort was put forth, with 52 of 52 consistency measures within expected limits….Mr. Grubbs completed functional testing on this date with **reliable** results. Overall, Mr. Grubbs demonstrated the ability to perform work in the **LIGHT** classification of work[.]"

A pre-hearing order was filed on March 17, 2021. According to the pre-hearing order, the claimant contended that he "has sustained permanent loss of earning capacity greatly in excess of 12%." The

respondents contended that the claimant "sustained a lumbar injury when he was initially injured on March 4, 2013. He underwent [an] FCE which found that he could no longer work full time and was restricted to no more than 4-hour work days. Claimant was working part-time when he was injured on August 7, 2015. Due to the March 2013 back injury, claimant was assigned a 5% rating to the body as a whole and a 15% wage loss disability. On August 7, 2015, claimant sustained a compensable injury to his cervical, thoracic and lumbar spine. He was awarded temporary total disability and medical treatment. Claimant ultimately had a lumbar fusion and was assigned a 12% rating, which respondent #1 accepted and is currently paying. A new FCE was done that indicated claimant could return to work in the light category. Respondent #1 has provided vocational rehabilitation with Heather Taylor which is ongoing at this time. Respondent No. 1 contends the claimant has sustained no additional wage loss disability above the prior 15% he was awarded."

The parties agreed to litigate the following issues:

1. Extent of claimant's wage loss disability.
2. Attorney's fee.

Dr. R. David Cannon performed injection treatment on April 19, 2021. Dr. Blankenship reported on May 6, 2021, "He had some trigger point injections with Dr. Cannon that afforded him about two weeks of 50% relief….He has done 12 visits of physical therapy in Alma and this does

seem to help with his pain. His greatest pain is mid back pain." Dr. Blankenship recommended additional treatment with Dr. Cannon.

After a hearing, an administrative law judge filed an opinion on June 10, 2021. The administrative law judge found, "2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 30% to the body as a whole as a result of his August 7, 2015 compensable injury."

The parties have stipulated, "The prior opinions in this matter are final."

The claimant treated with Dr. Cannon on August 2, 2021. Dr. Blankenship noted on August 19, 2021, "He got his SI joint injection. He states he got 70% relief and still has relief. He rates his pain anywhere from 20 to 40% toward the worst pain imaginable. He is still having some low back pain but overall he states his pain is somewhat less intense."

Dr. Blankenship reported on September 2, 2021:

> The patient is in today for follow up. He states that his left low back and left buttock pain has gotten significantly worse over the last couple of weeks and he would like to discuss SI joint fusion. He rates his pain now about 80% toward the worst pain imaginable….
> I have offered him left SI joint arthrodesis. After going over the risks and benefits, he wants to proceed on with surgery. Not that there is any question about it, his need for SI joint arthrodesis is directly related because of his lumbar stabilization. His lumbar stabilization was needed because of his work-related injury. Therefore it is directly related to his work-related injury.

Dr. Frank J. Tomecek provided an INDEPENDENT MEDICAL EXAMINATION on December 1, 2021:

> This is a pleasant 68-year-old male who on or about August 7, 2015, while driving a personal vehicle to a job as a cabinet builder and installer was involved in a motor vehicle accident when another car ran a stoplight….He has not worked since this accident. In April of 2020, he underwent an anterior lumbar interbody fusion at L4-5 and L5-S1 with posterior instrumentation by Dr. Blankenship. He states that his surgery relieved a lot of his symptoms. Currently, he has pain in his left buttock and left leg. He states that when he bends over, his pain can be sharp and stabbing. He feels weak in his bilateral legs, left greater than right. His left foot and ankle go numb….He has had a few sacroiliac injections, which helped his radicular pain. He has not had physical therapy since May of 2021, and he feels that this helped him….
> I have been asked by Exam Works Incorporated if the patient's current treatment is reasonable and necessary. I feel that the sacroiliac joint injection he has had is reasonable and was necessary. I also feel that the physical therapy he had after surgery is reasonable. However, I would recommend more physical therapy and at least one more sacroiliac joint injection before committing him to another major operation.
> In regard to causation of his current injury, I don't believe we have definitively established a diagnosis yet. However, if the patient does have left-sided sacroiliac joint pain and sacroiliitis as his primary diagnosis, I would feel that the work-related injury is causally related. The patient reportedly was authorized to have an operation for disk injury at L4-5 and L5-S1, and the motor vehicle accident that has been described in our report was felt to be the major cause leading to this surgery. I do not believe there was a direct injury to the sacroiliac joint in the motor vehicle accident, but it is not an uncommon finding in patients who have had a lumbar fusion to develop sacroiliac joint pain due to the increased stress on the sacroiliac joint from a lumbar fusion. Therefore, if the patient does have a final diagnosis of sacroiliitis on the left or sacroiliac joint pain, at least indirectly, this diagnosis would be

> secondary to surgery that he had that was related and directly caused by the accident.
> The patient has been responding to his current treatment. He has improved with physical therapy and injections. Unfortunately, he did not get significant improvement with his lumbar fusion. He has had persistent disabling low back pain and remains on Celebrex and Tylenol, which do not control his pain enough for him to return to normal function. Again, I feel further diagnostic testing is necessary, as I have previously described. I would not recommend any additional prescription medications until we have finalized his diagnosis. If the myelogram CT scan shows that he has a solid fusion and no residual neurologic impingement from hardware, pseudoarthrosis, or adjacent level disk herniation, then I would recommend further physical therapy on his back and sacroiliac joint and a second left-sided sacroiliac joint injection.
> I do not believe the patient has significant co-morbidities or prior injuries or pre-existing conditions that have impacted his current injury or his current level of function. The patient does not appear to be displaying any Waddell's signs, and I do not feel there are significant psychological diagnoses or psychological overlay that is contributing to the patient's complaint or objective examination findings….
> All of my opinions are based on a reasonable degree of medical certainty.

Dr. Tomecek reported on January 17, 2022:

> I saw Dr. Grubbs in follow-up today. He underwent a myelogram CT scan of the thoracic and lumbar spine. I reviewed all of the films and results with him and his wife, who accompanied him. The myelogram shows no evidence of myelographic block in his lumbar or thoracic spine. There is posterior fusion hardware in place from L4 to the sacrum on the left side only….
> The patient had a thoracic myelogram CT scan, which shows anterior osteophytes at T7-8, T8-9, T9-10, T10-11, and T11-12….There is no cord compression or significant neural impingement.
> He complains about a lot of pain in his low back. He complains of pain over the left sacroiliac joint. He has had

> one sacroiliac joint injection, which gave him some relief. He does not feel like he has a lot of strength in his legs, especially on the left. It is hard to go up stairs leading with his left foot, but this has gotten better. His legs feel heavy when he walks.
> IMPRESSION/PLAN: This is a 68-year-old male who has undergone a unilateral left-sided L4 to the sacrum instrumented fusion with anterior L4-5 and L5-S1 interbody fusion with cages. He has unilateral hardware with pedicle screws on the left, and again, the anterior cages are at L4-5 and L5-S1. Myelogram CT scan done today suggests there is some erosion around the anterior cages, at least at L5-S1, and some erosion around the sacral screws. There is also autofusion of the left sacroiliac joint with a very large osteophyte coming off the sacroiliac joint on the left. It appears to be autofused. I do not agree with Dr. Blankenship's recommendation. I do not recommend a sacroiliac joint fusion on the left, because I believe the patient already has an autofusion there. He might benefit from a sacroiliac joint injection….I believe that his sacroiliac joint injury most likely had a major cause from the accident that occurred on and around August 7, 2015. This is a motor vehicle accident, and with the chronic changes around the sacroiliac joint, certainly the injury could have occurred over six years ago related to this motor vehicle accident. If the large osteophyte is causing some pressure on his inferior lumbosacral plexus and thus causing chronic pain, I do not feel capable of doing a reoperation in his retroperitoneal area when he has had previous surgery with an anterior lumbar interbody fusion. It would be a very high-risk procedure for vascular or other organ injury in the face of previous surgery. I have not done this type of pelvic approach to remove part of the sacroiliac joint. I would probably have to defer to a General Surgeon and an Orthopedic Surgeon. Again, however, I would not recommend a sacroiliac joint fusion on the left, because I believe he already is autofused….
> All of my opinions are based on a reasonable degree of medical certainty.

The claimant saw Dr. Blankenship on February 21, 2022:

> The patient is back in today after his IME that he had with Dr. Tomecek. He tells me that his SI joint pain is completely resolved. He stretched his leg and when he did, his SI joint popped and is no longer hurting. He did have a new myelogram done for his thoracic and his low back pain but that pain has not changed any. He says it is something he can live with. He only rates that pain about 40 to 50% toward the worst pain imaginable….
> Since I saw Mr. Grubbs his SI joint pain is resolved. He saw Dr. Tomecek for an Independent medical evaluation. I really do not know why worker's comp carriers continue to send patients of mine to Dr. Tomecek. I have stated this multiple times. I will state it again. Dr. Tomecek testified against me in a malpractice lawsuit. I reported him to the American Association of Neurological Surgeons where he was sanctioned for his testimony. He obviously in no way can give a true independent medical evaluation on one of my patients. I would never see one of his patients as a second opinion no matter how certain I would be that I could put all of that as a secondary factor. It is just inappropriate. Concerning Mr. Grubb's surgical intervention, I do think he is at surgical MMI….
> I am going to plan on seeing him back in one year for followup since he is going to keep his case open. We will continue him on his intermittent Celebrex. He is going to call us if there are any changes.

The respondents' attorney appeared to state at hearing that the respondent-carrier paid temporary total disability benefits until February 21, 2022.

The record indicates that Dr. Blankenship arranged for an MRI of the claimant's lumbar spine, which was taken on August 2, 2022 with the following impression:

> 1. Status post L4-L5, L5-S1 anterior arthrodesis with posterior decompression and unilateral pedicular fixation on the left.

> No residual or retained stenosis is noted. No gross complications of the orthopedic implants are noted.
> 2. Moderate to severe facet arthropathy at L2-L3 and L3-L4 unchanged from preoperative MRI.
> 3. Mild kyphosis at L3-L4 with degenerative changes that are mild in nature.

Dr. Blankenship noted on September 12, 2022:

> The patient is back in today. He was last seen in February. He states his pain has gotten significantly worse. He is having left-sided low back pain that radiates into the left hip and left buttock. He has left foot numbness. Flexion, reaching, lifting all significantly aggravate his pain. He has not done any conservative treatment since we last saw him. He rates his pain at 100% toward the worst pain imaginable....
> Mr. Grubbs is back in the office today complaining of left-sided lower back pain. He is also having some paresthesias in his left foot and left leg. His MRI looked good. He has well-decompressed neural exit foramina bilaterally with well-placed ENZA implants that appear stable on his x-rays. He does have some adjacent segment facet disease at L3-L4 but this is much higher than [where] he is hurting. His SI joint examination did reveal 5 out of 5 positive findings although it was not marked….
> I have recommended we get him in to see Dr. David Cannon for a left SI joint injection. I told him that after his SI injection a week later I want him to call Rhonda and tell her or send her a screen shot of his flow sheet. If he does not get any relief at all with his SI joint injections, I want him to have an LESI before he comes back in to see me….

Dr. Blankenship noted on September 21, 2022, “Please be advised that the above patient has been a regular patient of this office and has been treated at our office on Sep 12, 2022. Patient will need to remain off work until after recommended injections and patient has followed up."

Dr. Cannon performed an injection on or about November 3, 2022. The claimant testified that Dr. Cannon's treatment "did me a lot of good."

Dr. Blankenship gave the following impression on December 8, 2022:

> The patient underwent a left SI joint injection. By the end of the first week he had gotten a 60% relief of his pain. Unfortunately over the past month or little over a month, his pain is now back to only a 30% relief. We discussed the possibility of getting an LESI but I think this injection coupled with Steve's examination clinically means his pain generator is his SI joint.
> **Recommendations:** I told Roger we could get it injected again but it is unlikely that is going to afford him any long-term benefit. I have gone over the risks and benefits of SI joint arthrodesis and after a lengthy discussion he has elected to do the following.
> He wants to proceed on with left SI joint arthrodesis. He understands the risks and benefits of SI joint arthrodesis and as soon as we get it authorized, we will get him on the schedule.

A pre-hearing order was filed on March 1, 2023. According to the pre-hearing order, the claimant contended, "The claimant contends that his authorized treating physician is recommending additional treatment and has opined that as of September 12, 2022 the claimant remained unable to work. Dr. Blankenship has not released the claimant to return to work pending the claimant's receipt of recommended medical treatment. The claimant contends that the SI joint surgery recommended by Dr. Blankenship is reasonably necessary treatment in view of the fact that Dr. Blankenship and Dr. Cannon have both utilized conservative modalities that

have not adequately addressed the claimant's significant and ongoing problems. Claimant contends his attorney is entitled to an attorney's fee on all indemnity benefits owed to claimant."

The respondents contended, "Respondent #1 contends that claimant is not entitled to any additional benefits."

The parties agreed to litigate the following issues:

> 1. Temporary total disability benefits from September 13, 2022 through a date yet to be determined.
> 2. Additional medical treatment; including SI joint surgery recommended by Dr. Blankenship.
> 3. Attorney fee.

The claimant followed up with Dr. Tomecek on May 4, 2023:

> He presented to clinic today with his wife. He has persistent gnawing pain that waxes and wanes in his left paraspinal area, left gluteal crest that runs laterally to his hip and the back of his legs. He describes it as a deep ache and a bone pain. He also has numbness in his left foot from his ankle down….
> This is a 69-year-old male who continues to complain of left paraspinal pain and left hip pain and pain in the back of his left leg….It is my understanding again that Dr. Blankenship [has] ordered [an] MRI that was done on August 2, 2022 and again he is recommending a left SI joint fusion to treat this patient's atypical paraspinal pain and leg pain and numbness. I have reviewed the MRI from August 2, 2022. It basically shows that the patient has hardware in place on the left from L4 to the sacrum posteriorly and then anterior cages at L4-5 and L5-S1. There is no new herniated disc there is no severe neural impingement or foraminal encroachment. However the status of the patient's fusion is impossible to assess on this MRI. There is nothing on this MRI that would change my opinion that I made on January 17, 2022. I am concerned the patient has pseudoarthrosis at L5-S1. He has some loosening around the S1 screw and I do not see dense bone

> growth posterior laterally at L5-S1 on the left and there is no bone this has been placed (sic) on the right….
> I should mention as an aside that Mr. Grubbs was very frustrated with his current condition and his current care. He expressed extreme doubt in my opinion. He feels convinced that his SI joint is a problem and it frequently pops so he Sterets (sic) his SI joint. I tried to explain to him that his back could pop of (sic) his fusion is not solid and there are other joints in the area that could pop that are not his SI joint. He appears to really want to have this operation of an SI joint fusion almost whether it helps him or not even though he is really doing well under all the circumstances. He was very argumentative and constantly bringing up Dr. Blankenship's opinion and disagreeing with my diagnoses opinions and treatment recommendations. This significantly prolonged our visit. After I went over all the films with him as far as the myelogram CAT scan again and clearly explained that his joint was already fused I believe he left the office with a little bit better understanding of why I do not agree with Dr. Blankenship's opinion of an SI joint fusion.
> All my opinions are based on a reasonable degree of medical certainty.

Dr. Blankenship stated in part on August 10, 2023, "I find Dr. Tomecek's second opinion would be insulting if it were not for the fact that I know Dr. Tomecek. My opinion as far as what Mr. Grubbs should consider is unchanged. Mr. Grubb's decision to proceed on with surgical intervention is unchanged. I think it is probably time we get the guy treated."

After a hearing, an administrative law judge filed an opinion on November 29, 2023. The administrative law judge found that the claimant proved he was "entitled to additional medical treatment, including SI joint surgery recommended by Dr. Blankenship." The administrative law judge found that the claimant proved he was entitled to temporary total disability

benefits "beginning September 13, 2022 and continuing through a date yet to be determined." The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The 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)(Repl. 2012). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 70 (1984).

An administrative law judge found in the present matter, "2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment, including SI joint surgery recommended by Dr. Blankenship." The Full Commission does not affirm this finding. It was stipulated that the claimant initially sustained a compensable injury on March 4, 2013. The claimant was diagnosed with cervical and thoracic strain following a motor vehicle accident. Dr. Covington stated on June 9, 2015, "He is at maximum medical

improvement from a neurosurgical standpoint." An administrative law judge eventually awarded the claimant a 5% permanent anatomical impairment and 15% wage-loss disability as a result of the March 4, 2013 compensable injury.

The claimant sustained another compensable injury on August 7, 2015 as the result of a second motor vehicle accident. A physician's assessment in August 2015 was "Acute exacerbation of degenerative arthritis of the cervical, thoracic and lumbar spines related to recent MVA." Dr. Cathey opined on August 31, 2015, "[T]he patient's current diagnosis is degenerative disc disease affecting the cervical, thoracic and lumbar spine. He probably did suffer a thoracic strain superimposed on these pre-existing conditions. Unfortunately, he is not a candidate for spinal surgery or other neurosurgical intervention….I believe since he is almost a month out from this event he is at maximal medical improvement and there is really no indication for additional treatment as it relates to this particular motor vehicle accident."

Nevertheless, the claimant began treating with Dr. Blankenship in November 2016. Dr. Blankenship recommended "aggressive" conservative treatment and injections performed by Dr. Cannon. An administrative law judge filed an opinion on February 28, 2018 and found that the claimant proved he was "entitled to additional medical treatment as recommended by

Dr. Blankenship." The respondents appealed to the Full Commission, which filed an opinion on October 1, 2018. As we have noted, the Full Commission found that "the claimant proved Dr. Blankenship's *current treatment recommendations* [emphasis supplied]" were reasonably necessary in connection with the August 7, 2015 compensable injury. The Full Commission found that the claimant proved he was entitled to "*conservative medical treatment* [emphasis supplied]" recommended by Dr. Blankenship.

Despite the Full Commission's explicit award of only "conservative medical treatment," the respondents apparently authorized surgery performed by Dr. Blankenship on April 9, 2020. Post-surgical improvement is a proper consideration in determining whether surgery was reasonably necessary. *Winslow v. D&B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). In the present matter, the claimant has not consistently reported relief from surgery performed by Dr. Blankenship on April 9, 2020. The claimant has at times reported a decrease in his back pain but has also reported continued chronic back pain following surgery. In any event, the respondents accepted a 12% permanent anatomical impairment rating assessed by Dr. Blankenship on October 22, 2020. The parties also stipulated that the claimant "reached maximum medical improvement on October 22, 2020."

The claimant continued to receive occasional injection therapy performed by Dr. Cannon, and the claimant was provided physical therapy. Dr. Blankenship reported on September 2, 2021, "I have offered him left SI joint arthrodesis." Dr. Tomecek provided an Independent Medical Examination on December 1, 2021 and opined, "I would recommend more physical therapy and at least one more sacroiliac joint injection before committing him to another major operation." Dr. Tomecek also noted, with support from the record, that the claimant "did not get significant improvement with his lumbar fusion. He has had persistent disabling low back pain and remains on Celebrex and Tylenol, which do not control his pain enough for him to return to normal function." Dr. Tomecek reported on January 17, 2022, "I do not agree with Dr. Blankenship's recommendation. I do not recommend a sacroiliac joint fusion on the left, because I believe the patient already has an autofusion there."

According to the record, the claimant informed Dr. Blankenship on February 21, 2022, "He tells me that his SI joint pain is completely resolved. He stretched his leg and when he did, his SI joint popped and is no longer hurting….Since I saw Mr. Grubbs his SI joint pain is resolved."

In workers' compensation cases, the Commission functions as the trier of fact. *Blevins v. Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). 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 it deems worthy of belief. *Farmers Co-op v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). The Commission also has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

In the present matter, the Full Commission finds that Dr. Tomecek's expert opinion is credible and is entitled to more evidentiary weight than Dr. Blankenship's opinion. The claimant did not prove that a sacroiliac joint fusion proposed by Dr. Blankenship was reasonably necessary in connection with the compensable injury sustained by the claimant on August 7, 2015. The evidence demonstrates that the claimant has not experienced lasting significant improvement in his back pain following surgery performed by Dr. Blankenship on April 9, 2020. The evidence of record supports Dr. Tomecek's opinion that the claimant would benefit from conservative modalities such as physical therapy and injection treatment. This form of conservative medical effective treatment was originally awarded by the Full Commission on October 1, 2018. The Full Commission

has never found that surgery was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). We therefore find that the claimant proved he was entitled to additional physical therapy and injection treatment performed by Dr. Cannon.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12)(Repl. 2012). The healing period continues until the employee is as far restored as the permanent character of the injury will permit. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of when the healing period has ended is a question of fact for the Commission. *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 235, 615 S.W.2d 380 (1981).

An administrative law judge found in the present matter, "3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 13, 2022 and continuing through a date yet to be determined." The Full Commission does not affirm this finding. The claimant sustained a compensable injury on August 7, 2015. Dr. Loyd's assessment was "Acute

exacerbation of degenerative arthritis of the cervical, thoracic and lumbar spines related to recent MVA." Dr. Cathey opined on August 31, 2015 that the claimant had sustained a "strain" of his thoracic spine. Dr. Cathey opined that the claimant had reached "maximal medical improvement." The Full Commission found on October 1, 2018 that the claimant "reached the end of the healing period for his August 7, 2015 compensable injury no later than August 31, 2015. The claimant did not prove he was entitled to temporary total disability benefits beginning September 30, 2015 or any time thereafter." There was no appeal of the Full Commission's opinion filed October 1, 2018, and the parties have stipulated, "The prior opinions in this matter are final."

Nevertheless, as we have noted, the respondents apparently authorized a surgical procedure performed by Dr. Blankenship on April 9, 2020. The parties thereafter entered into a stipulation that the claimant "reached maximum medical improvement on October 22, 2020." The respondents accepted and paid a 12% anatomical impairment rating assessed by Dr. Blankenship on October 22, 2020. Permanent impairment is any functional or anatomical loss remaining after the healing period has been reached. *See Johnson v. Gen. Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). In an opinion filed June 10, 2021, an administrative law judge found that the claimant had sustained wage-loss disability in the

amount of 30% as a result of the August 7, 2015 compensable injury. Although the record indicates that the respondents paid temporary total disability benefits until February 21, 2022, the evidence does not demonstrate that the claimant re-entered a healing period at any time after October 22, 2020. Dr. Blankenship's off-work note dated September 21, 2022 is not probative evidence demonstrating that the claimant re-entered a healing period as a result of the compensable exacerbation or strain sustained by the claimant on August 7, 2015. Temporary total disability benefits cannot be awarded after a claimant's healing period has ended. *Milligan v. West Tree Serv*., 57 Ark. App. 14, 946 S.W.2d 697 (1997).

After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove the "SI joint arthrodesis" recommended by Dr. Blankenship was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). The claimant proved he was entitled to additional physical therapy and injection treatment provided by Dr. Cannon. The Full Commission finds that the claimant did not prove he was entitled to an award of temporary total disability benefits. The Full Commission's award of physical therapy and injection treatment does not extend the claimant's healing period. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004).

IT IS SO ORDERED.

_____
SCOTTY DALE DOUTHIT, Chairman

_____
M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the credible evidence that additional medical treatment is reasonable and necessary and that the claimant is totally incapacitated from earning wages and remains in his healing period entitling him to additional temporary total disability benefits.

The claimant was assigned a 12% impairment rating to the body as a whole after an April 9, 2020 surgery performed by Dr. James Blankenship.

In an opinion entered on June 10, 2021, the claimant was awarded additional permanent partial disability benefits of 30% to the body as a whole.

The parties appeared for a third hearing on November 13, 2023, to determine whether the claimant is entitled to additional medical treatment including SI joint surgery as recommended by Dr. Blankenship and additional temporary total disability benefits from September 13, 2022,

through a date to be determined. The ALJ ruled that the claimant is entitled to the surgery as recommended by Dr. Blankenship and TTD benefits beginning September 13, 2022, and continuing through a date yet to be determined.

Ark. Code Ann. § 11-9-508(a) (Repl. 2012) requires an employer to provide an employee with medical and surgical treatment "as may be reasonably necessary in connection with the injury received by the employee." The claimant has the burden of proving by a preponderance of the evidence that the additional treatment is reasonable and necessary. *Nichols v. Omaha Sch. Dist.*, 2010 Ark. App. 194, 374 S.W.3d 148 (2010). What constitutes reasonably necessary treatment is a question of fact for the Commission. *Gant v. First Step, Inc.*, 2023 Ark. App. 393, 675 S.W.3d 445 (2023). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, the Commission analyzes both the proposed procedure and the condition it sought to remedy. *Walker v. United Cerebral Palsy of Ark.*, 2013 Ark. App. 153, 426 S.W.3d 539 (2013).

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). Furthermore, it is the Commission's duty to use its experience and expertise in translating the testimony of medical experts into findings of fact and to draw inferences when testimony is open to more than a single interpretation. *Id*.

Here, the ALJ favors Dr. Blankenship's opinion, stating that "[w]hile Dr. Tomecek has seen the claimant on three different occasions, Dr. Blankenship has seen the claimant on multiple occasions, and he previously performed surgery on the claimant's lumbar spine in 2020." (Op., P. 7). However, this disregards the claimant's history of subjective complaints arising long after he reported resolution of his preoperative pain as the result of his lumbar fusion.

At an October 22, 2020 follow-up appointment with Dr. Blankenship after his lumbar fusion, the claimant reported that six months post-surgery he was "doing great with complete resolution of his preoperative pain. He has some low back pain, mostly midline. He rates this only about 20% toward the worst pain imaginable." (Cl. Ex. 1, P. 1).

Six months later, the claimant began complaining of pain ranging from a 3/10 to a 9/10 in his lower extremities and presented to Dr. Robert

Cannon for treatment. (Cl. Ex. 1, P. 6). Dr. Cannon provided a left SI joint injection. (Cl. Ex. 1, P. 8).

In May 2021, Dr. Blankenship reported that the claimant's "greatest pain complaint is mid back pain." (Cl. Ex. 1, P. 11). Dr. Blankenship noted that the thoracic MRI conducted in February 2020 revealed no acute pathology and opined that although the claimant was positive for post laminectomy syndrome, "[i]t is not uncommon when someone has had lumbar arthrodesis, or even before this, to have SI joint pain. This does not need to be treated." (Cl. Ex. 1, P. 14).

When the claimant presented with "significantly worse" pain on September 2, 2021, Dr. Blankenship immediately offered the claimant left SI joint arthrodesis without conducting any further treatment or diagnostic studies. (Cl. Ex. 1, Pp. 26-29). However, the record reflects that the claimant's issues are primarily degenerative in nature.

The respondents obtained an independent medical examination (IME) by Dr. Frank Tomecek on December 1, 2021. (Resp. Ex. 1, Pp. 1-5). In his report, Dr. Tomecek noted that an "MRI scan performed on 04/02/2020 showed degenerative disks at L2-3, L3-4, L4-5, and L5-S1. I did not appreciate any significant disk herniations. There was no significant lumbar spondylosis and stenosis, and no cauda equina compression." (Resp. Ex. 1, P. 3). When asked whether the claimant's present diagnosis

can be attributed to his work-related injury, Dr. Tomecek responded that "we do not have a definitive diagnosis," opining that:

> The patient has only had one left-sided sacroiliac joint injection. He has undergone a L4 to the sacrum anterior and posterior instrumented fusion and has only had x-rays done post-operatively. He has chronic low back pain in addition to thoracic pain. He has had a thoracic epidural steroid injection that helped him quite a bit as well. I feel it is a medical necessity that further diagnostic testing be performed. I would recommend a thoracic and lumbar myelogram CT scan with flexion and extension views. The diagnosis for chronic back pain after a lumbar fusion can be very difficult to determine. Before making a final diagnosis, I feel that careful diagnostic testing of the fusion is required. (Resp. Ex. 1, P. 4).

Dr. Tomecek believes it is necessary to undergo further testing, as:

> Malposition of the hardware and pseudoarthrosis can also cause symptoms similar to this patient's symptoms. In addition, it is not uncommon at all for a patient to have adjacent level disease and herniated disks at levels next to the fusion. This patient had degenerative disks on his pre-op MRI at basically every level of his lumbar spine. He could have an adjacent level herniated disk, and this would not be diagnosed on a plain x-ray, which is all that he has had after his operation. *Id*.

More importantly, upon review of the claimant's records, Dr. Tomecek found that the claimant "did not get significant improvement with the lumbar fusion," considering his persistent pain and need for medication.

This, he opines, warrants further diagnostic testing as well. (Resp. Ex. 1, P. 5).

Dr. Tomecek's opinion is clear that performing additional surgery on the claimant without further diagnostic testing would be premature. The claimant's history of extensive pre-existing degenerative disc disease and failure to respond to his previous surgery indicates that there are underlying issues that have not been addressed to date. Further, Dr. Tomecek's review of the claimant's medical records bears greater weight than Dr. Blankenship's, as Dr. Tomecek's findings highlight Dr. Blankenship's ongoing failure to properly investigate or treat the underlying cause of the claimant's concerns prior to recommending an invasive surgery, which itself warrants disregarding Dr. Blankenship's findings.

Dr. Tomecek is correct: there have been no appropriate diagnostic tests that would lead the Commission to the conclusion that the claimant should be entitled to additional surgery without more information. For this reason, I believe the ALJ's findings should be reversed.

Our Rules require that to prevail on a request for additional temporary total disability benefits, the claimant must prove by a preponderance of the evidence that he is totally incapacitated from earning wages and remains in his healing period. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008). The healing period ends when

the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable, and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id*. The determination of when the healing period has ended is a factual determination for the Commission. *Id*.

In his opinion, the ALJ found that the claimant remains within his healing period based on Dr. Blankenship's recommendation for surgery and Dr. Tomecek's opinion that the claimant would need additional medical treatment. (Op., P. 8). However, disregarding Dr. Blankenship's opinion for the reasons set forth above, there is no indication from Dr. Tomecek that the claimant is wholly incapacitated from earning wages. Even if the claimant requires additional treatment, there is nothing in Dr. Tomecek's opinion that states that the claimant is unable to work at this juncture.

Accordingly, for the reasons set forth above, I must dissent.

_____

MICHAEL R. MAYTON, Commissioner