BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H000742

DANIEL R. KINNE, Employee	CLAIMANT
CENTRAL STATES MFG., INC., Employer	RESPONDENT
SENTRY INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED MAY 11, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by JARROD S. PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 12, 2023, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 22, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The claimant sustained a compensable injury to his neck and back on October 6, 2019.

3. The claimant was earning sufficient wages to entitle him to the maximum compensation rates of $695.00 for total disability benefits and $521.00 for permanent

partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment in the form of surgery on his back as recommended by Dr. Blankenship.

2. Temporary total disability benefits from December 8, 2021 through August 15, 2022.

3. Attorney fee; including a fee on temporary total disability benefits paid as a result of the neck surgery performed by Dr. Blankenship.

At the time of the hearing claimant indicated that he is no longer requesting payment of any past temporary total disability benefits. Claimant also indicated that if surgery for his lumbar spine is approved and he becomes entitled to temporary total disability benefits that an attorney fee should be awarded.

The claimant contends he is entitled to surgery for his back as recommended by Dr. James Blankenship. Claimant contends his counsel is entitled to an attorney fee on any previously paid temporary total disability benefits paid as a result of the neck surgery performed by Dr. Blankenship. Claimant reserves all other issues.

The respondents contend that it is not liable for the treatment recommended by Dr. Blankenship or a controverted attorney fee on temporary total disability benefits paid as a result of the neck surgery.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on February 22, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment in the form of surgery to his low back as recommended by Dr. Blankenship.

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

FACTUAL BACKGROUND

Claimant is a 50-year-old man who began working for respondent as a long-haul truck driver in May 2016 and on October 6, 2019, he suffered an admittedly compensable injury to his neck and low back. Claimant testified that on that date he was walking on an uneven load, putting a tarp over the load, when he slipped and fell due to rain that was falling.

> And when I slipped and fell, my foot got hung up in a pallet and I fell to the side on the uneven surface and hit the side of the trailer and was hanging upside down until a forklift driver moments later came by and helped me get my foot loose and helped me pull up to get me loose from the load.

After the accident, claimant initially came under the care of Dr. Berestnev who diagnosed claimant with a cervical and lumbar strain. He treated claimant with injections of DepoMedrol and physical therapy. When claimant's condition did not improve he filed

for and received a change of physician to Dr. Blankenship, neurosurgeon. Dr. Blankenship referred claimant to Dr. Cannon for a cervical epidural steroid injection and a possible lumbar epidural steroid injection.

In his report of December 10, 2020, Dr. Blankenship noted that claimant's neck pain was hurting him more than his back pain and he recommended cervical surgery:

> At present he feels like his neck is hurting him worse than his lower back. He has kyphotic angulation at C4-C5 with slight retrolisthesis at C4-C5. This significantly exacerbates an extension and completely reduces in flexion which would be indicative of gross segmental instability at this level. I have offered an anterior cervical arthrodesis and fusion at C4-C5.

Initially, respondent denied this surgery and claimant requested a hearing. Prior to the hearing, respondent accepted liability for the cervical surgery. (This will be discussed in greater detail later in this opinion.) Dr. Blankenship performed the cervical surgery on October 6, 2021, and according to Dr. Blankenship's reports the surgery was successful.

Since the cervical surgery, claimant has continued to complain of low back pain. In his report of December 2, 2021, Dr. Blankenship indicated that claimant did not want to consider surgery at that time but instead wanted to return to work.

> He has marked facet arthropathy at L4-L5. At L5-S1 on his MRI from 2020, he does have marked facet arthropathy. Right now he does not feel like it is time to look at surgery for his lower back. He wants to get back to work.

Claimant's low back pain continued and Dr. Blankenship ordered a new lumbar

MRI scan and in his report of June 23, 2022, he stated:

> He had lower back pain when he initially saw us but now his lower back pain has gotten significantly worse and he has posterolateral leg pain, right much more significant than the left. The patient did physical therapy for his lower back when he did his therapy for his neck. His plain radiographs demonstrate marked disc space settling at the lumbosacrum. He has retrolisthesis at L3-L4 and L4-L5 in extension. Both reduce in flexion. His MRI demonstrates right-greater-than-left foraminal stenosis at the lumbosacrum with severe facet arthropathy. He has significant facet arthropathy with mild bilateral recess stenosis at L4-L5 and has an extreme lateral disc herniation on the right-hand side at L3-L4.

In that same report Dr. Blankenship stated that he discussed with surgery on claimant's lumbar spine but before proceeding he would recommend one last aggressive conservative treatment of a lumbar epidural steroid injection by Dr. Cannon and an aggressive physical therapy program.

In his report of August 4, 2022, Dr. Blankenship indicated that the physical therapy had aggravated claimant's low back pain and stated that medication had provided minimal relief. He recommended a multilevel arthrodesis at L3-4, L4-5, and L5-S1.

Respondent has denied the surgery recommended by Dr. Blankenship on claimant's lumbar spine. As a result, claimant has filed this claim contending that he is entitled to the surgery recommended by Dr. Blankenship.

ADJUDICATION

Claimant contends that he is entitled to additional medical treatment in the form of surgery to his lumbar spine as recommended by Dr. Blankenship. Claimant has the

burden of proving by a preponderance of the evidence that medical treatment is reasonable and 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 Company v. Randall*, 12 Ark. App. 358, 676 S.W. 2d 750 (1984).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proof.

Initially, I note that at his deposition claimant testified that he did not have any prior low back complaints before the accident on October 6, 2019. However, the medical evidence indicates that claimant sought medical treatment for low back complaints from a nurse practitioner on November 18, 2015 and was diagnosed with thoracolumbar back pain. The report also indicated that claimant desired to follow up with neurology with regards to any imaging. There is no indication that any imaging or any follow-up treatment was received at that time.

Claimant again complained of lower back pain to a nurse practitioner on September 9, 2016. Claimant gave a history of lower back pain for two to three months which had begun while driving a truck long distance. Claimant indicated that he had to stop driving and get out to walk around in order to relieve the pain. The report also notes that claimant tried a TENS unit one time at home with some relief.

I note that claimant is not required to prove that his compensable injury is the major cause of the need for medical treatment. When the claimant has suffered a specific injury and is only seeking medical benefits and temporary total disability, the major cause analysis is not applicable and the claimant need only show that the compensable injury

was a factor in the need for additional medical treatment. *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W. 3d 383 (2004). Here, respondent has stipulated that claimant suffered a compensable injury to his low back on October 6, 2019. There is no indication that claimant sought any medical treatment for his low back complaints after September 9, 2016, until after his admittedly compensable injury on October 6, 2019. During that period of time the claimant performed his job duties for the respondent without any apparent difficulty. Based upon the evidence presented, I find that claimant has proven that his compensable injury is a factor in his need for medical treatment.

I also find that Dr. Blankenship's opinion is credible and entitled to great weight. Dr. Blankenship has been claimant's authorized treating physician and has previously performed surgery on claimant's cervical spine. I do note that respondent previously had claimant undergo an IME by Dr. Frank Tomecek on May 12, 2021. While Dr. Tomecek agreed that claimant was in need of surgical treatment on his cervical spine, he was of the opinion that surgery on the lumbar spine was not indicated. I find that the opinion of Dr. Blankenship is entitled to greater weight. First, Dr. Blankenship has treated claimant for an extended period of time and that treatment included cervical surgery. On the other hand, Dr. Tomecek evaluated the claimant on only one occasion. More importantly, Dr. Blankenship's most recent recommendation for lumbar spine surgery is based in part on a new MRI scan that was performed on September 3, 2021. Dr. Tomecek did not have the benefit of that MRI scan at the time of his opinion.

Accordingly, based upon the evidence presented as well as the opinion of Dr. Blankenship, I find that claimant has met his burden of proving by a preponderance of the evidence that the recommended surgery on his lumbar spine is reasonable and

necessary medical treatment for his compensable injury.

The next issue for consideration involves claimant's request for an attorney fee on temporary total disability benefits previously paid as a result of claimant's cervical spine injury.

Dr. Blankenship recommended that claimant undergo a cervical spine surgery in his report of December 10, 2020. Respondent did not accept liability for that surgery and as a result claimant filed a pre-hearing questionnaire on or about January 26, 2021, contending that he was entitled to the cervical spine surgery recommended by Dr. Blankenship. A pre-hearing conference on that claim was conducted on March 10, 2021. In response to the pre-hearing conference, respondent completed a pre-hearing questionnaire dated March 8, 2021, with the following contention:

> Respondents maintain that the surgical recommendation by Dr. Blankenship is not reasonable, necessary or causally related to the events of 10/06/19.

I do note that in the pre-hearing questionnaire respondent did indicate that it might request a possible IME or second opinion evaluation report. Following the pre-hearing conference a pre-hearing order was filed. That pre-hearing order states the following with regard to respondent's contentions:

> The respondents contend that the surgical recommendation by Dr. Blankenship is not reasonable, necessary or causally related to the events of October 6, 2019.

A hearing on claimant's claim was scheduled for May 26, 2021. Prior to that hearing, respondent had claimant undergo an IME by Dr. Tomecek who authored a report dated May 12, 2021, agreeing that claimant was in need of surgery on his cervical spine.

In an e-mail dated May 20, 2021 to this administrative law judge from Attorney Parrish, it was stated:

> Here is the IME report. I have a message in to my client to find out how they want to proceed. Respondent will rely on this report if the hearing goes forward.

On May 25, 2021, one day before the scheduled hearing, Attorney Parrish sent in the following e-mail:

> Based on the IME doctor's opinion, my client is agreeing to pay for the cervical spine surgery.

Claimant eventually underwent the cervical spine surgery and was off work for approximately eight weeks for which respondent paid claimant temporary total disability benefits. However, respondent did not pay claimant's attorney a fee on those temporary total disability benefits. Claimant's attorney contends that she is entitled to a fee on payment of those temporary total disability benefits.

First, I find that respondent controverted claimant's entitlement to the cervical spine surgery. The respondent in its brief to the Commission is correct in noting that the failure of the employer to pay compensation benefits does not, in and of itself, amount to controversion when the carrier accepts an injury as compensable and is attempting to determine the extent of disability or is making a reasonable attempt to investigate. *Osborne v. Bekaert Corporation*, 97 Ark. App. 147, 245 S.W. 3d 185 (2006); *Hamrick v. The Colsen Company*, 271 Ark. 740, 610 S.W. 2d 281 (1981).

As previously noted, Dr. Blankenship recommended that claimant undergo surgery on his cervical spine on December 10, 2020. Respondent did not indicate that it was

attempting to investigate claimant's need for surgery at that time. Instead, almost a month later claimant requested a hearing on his entitlement to cervical spine surgery by Dr. Blankenship. In response to that request, respondent in its pre-hearing questionnaire specifically contended:

> Respondents maintain that the surgical recommendation by Dr. Blankenship is not reasonable, necessary or causally related to the events of 10/06/19.

While respondent did indicate that it was possible it would pursue an IME or a second opinion report, respondent did not indicate that it was simply in the process of investigating claimant's need for surgical treatment. In fact, it was not until the day before the scheduled hearing that respondent agreed to pay for claimant's cervical spine surgery. This was May 25, 2021, more than five months after Dr. Blankenship's recommendation. Based upon these facts, I find that respondent controverted claimant's entitlement to the cervical spine surgery recommended by Dr. Blankenship.

Respondent also indicates that nowhere in the pre-hearing order nor in claimant's pre-hearing questionnaire was temporary total disability benefits or an attorney fee mentioned. That is a correct statement. At the time claimant requested a hearing on his entitlement to cervical surgery, he was continuing to work for the respondent and was not entitled to temporary total disability benefits. Claimant did not begin missing work until respondent accepted the cervical spine surgery and claimant actually underwent that surgery and was taken off work by Dr. Blankenship. A request for temporary total disability benefits at the time of the original pre-hearing conference would have been premature since claimant was not suffering a total incapacity to earn wages.

Respondent also notes it did not deny or resist claimant's entitlement to temporary total disability benefits once he stopped working for the cervical spine surgery. While that is correct, it ignores the fact that respondent initially denied claimant's entitlement to the cervical spine surgery which resulted in his entitlement to temporary total disability benefits.

Finally, respondent contends that because there was no "award" of temporary total disability benefits in this case, an attorney fee is not appropriate pursuant to A.C.A. §11-9-704. However, as noted by the respondent in its brief, the Workers' Compensation Commission and more importantly the Arkansas Court of Appeals have found that under similar circumstances an attorney fee is appropriate. *Walmart Stores, Inc. v. Brown*, 73 Ark. App. 174, 40 S.W. 3rd 835 (2001). In *Brown*, the respondent initially accepted a claim and paid some compensation benefits. However, at a pre-hearing conference the employer controverted claimant's entitlement to temporary partial disability benefits and a hearing was scheduled. Approximately one month before the scheduled hearing the employer indicated that it would accept the temporary partial disability and pay appropriate benefits, but refused to pay an attorney fee on the temporary partial disability benefits. The Court of Appeals affirmed the Commission's decision to award an attorney fee. In doing so, the Court stated:

> The Commission interpreted the requirements of Section 11-9-715(a)(2)(B)(ii) to be that where an employer controverts an injured employee's entitlement to certain benefits, but later accepts liability prior to a hearing on the merits, the employee's attorney may still request a hearing for an attorney's fee on those controverted benefits. The Commission found that when there is no dispute that the employer

> controverted benefits but then paid the benefits on which an attorney fee is sought that the employee has established an award of those benefits for purposes of the employee's attorney seeking an attorney's fee under Ark. Code Ann. Section 11-9-715(a)(2)(B)(ii). The Commission found no requirement in Section 11-9-715(a)(2)(B)(ii) requiring that an award of controverted benefits must precede the employer's payment of benefits for the claimant's attorney to be entitled to a fee. We agree and hold that the Commission's s findings are supported by substantial evidence.

The Court went on to state that it had long been recognized that making an employer liable for an attorney fee serves an legitimate social purpose such as discouraging oppressive delay in recognition of liability, deterring arbitrary or capricious denial of claims, and ensuring the ability of claimant's to obtain adequate and competent legal representation. If the fundamental purpose of an attorney fee is to be achieved, it must be considered that the real object is to place the burden of litigation expenses upon the party which made it necessary. *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W. 2d 529 (1998). The Court went on to note that if the claimant in *Brown* had not employed counsel to assist her, it was reasonable to conclude that her claim for temporary partial disability benefits would not have been properly presented and protected. Likewise, in this case, if claimant had not employed counsel to assist him in approval of the cervical spine surgery, it is reasonable to conclude that he would have never been entitled to temporary total disability benefits.

Based upon the decision in *Brown*, I find that claimant's attorney is entitled to an attorney fee on temporary total disability benefits which were paid as a result of claimant's cervical spine surgery.

While respondent contends that the decision in *Brown* is misplaced and contrary to the plain language of the statute, this administrative law judge is without authority to disregard or ignore prior rulings of the Arkansas Court of Appeals and the Full Commission.

The final issue for consideration involves claimant's attorney's contention that she is entitled to a fee on any temporary total disability benefits which would arise out of the claimant's lumbar spine surgery which has been approved in this opinion. Given the prior controversy over the attorney fee on temporary total disability benefits resulting from claimant's cervical spine injury, this claim is understandable. However, as of the date of the hearing, claimant had not undergone the lumbar spine surgery and at this point is not entitled to temporary total disability benefits. However, should claimant undergo the lumbar spine surgery and become entitled to temporary total disability benefits, claimant's attorney would be entitled to an attorney fee on payment of those temporary total disability benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to lumbar spine surgery as recommended by Dr. Blankenship. Claimant's attorney is entitled to an attorney fee on temporary total disability benefits paid to claimant as a result of his cervical spine surgery.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of $568.45.

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE