

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H009013**

TERRIE DUERO, EMPLOYEE	CLAIMANT
DOUBLETREE HOTEL, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED **MAY 26, 2021**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF, in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 5, 2021, the above captioned claim came for a hearing in Fort Smith, Arkansas. A prehearing telephone conference was conducted on March 11, 2021, and a prehearing order filed that same date. A copy of the prehearing order has been marked as Commission's Exhibit No. 1 and with modification and no objection is made part of the record.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee/employer/carrier relationship existed on October 23, 2020.
3. The claimant sustained a compensable injury on October 23, 2020 (but see notation in the Factual Background below).
4. The claimant's average weekly wage rate is \$342.80 which would entitle her to \$228.00 for temporary total disability and \$171.00 for permanent partial disability.

The issue to be litigated is limited to the following:

1. Whether claimant is entitled to additional medical treatment.

Contentions of the Parties

The claimant contends that she is entitled to medical care that has been denied by the respondent. Claimant reserves all other issues.

The respondents contend that all appropriate medical benefits have been provided to Claimant, and any such benefits that have been denied are not reasonable and necessary to treat Claimant's injury.

From a review of the record as a whole, to include medical reports, documents, and having heard testimony and observed the demeanor of all witnesses, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing conference conducted on March 11, 2021 and contained in the Prehearing Order filed the same date, as well as the announced stipulations at the hearing on May 5, 2021 are hereby accepted as fact.

2. Claimant has met her burden of proof by a preponderance of evidence that she is entitled to additional medical treatment from Dr. Stephen Smith.

FACTUAL BACKGROUND

Before reviewing the testimony and the medical records, I first want to clarify the date of the injury. In the Prehearing Order, Commission Exhibit #1, October 23, 2020 was listed as the date of injury. I believe this came from the Employer's First Report of Injury which was filed with the Commission on November 10, 2020. However, Form AR-2, filed on November 13, 2020, states the date of injury was October 27, 2020, and Claimant's Form AR-C has "on or about 10-27-2020" for

the date of the accident. Both Claimant and Respondent listed October 27, 2020 in their answers to the Prehearing Questionnaire, and Claimant testified she went to see Dr. Kannout the day of the injury; X-rays were ordered and taken on October 27, 2020.

As I opened the hearing, I recited what was in the Prehearing Order, and neither party objected, since there was no issue raised about the timeliness of the report of injury. As such, even though the parties stipulated to the date of October 23, 2020, I find that the Prehearing Order was inaccurate in using that date, and I *sua sponte* find the correct date of injury is October 27, 2020.

Hearing testimony:

Two witnesses testified for claimant, her mother and herself. Claimant's mother, Edwina Shephard, testified that she recalled the general time period around October 27th when her daughter was hurt at work (TR.6). Ms. Shephard testified that prior to the injury, she had not noticed anything that tended to limit her daughter's activities regarding her right shoulder, but since the injury, she has done most of the driving for her daughter when going to the doctor or physical therapist (TR.7). Ms. Shephard noticed that claimant had problems with her shoulder because of "the mobility of the use of her arm" (TR.8) and now claimant keeps her arm very still (TR.9). Ms. Shephard testified that she previously had problems with her right shoulder and offered a layman's opinion as to how her daughter's condition was similar, but I give that testimony no weight in my evaluation of this case. Ms. Shephard concluded the direct examination by stating that the claimant's activity level has not returned to what it was before she was hurt (TR.10).

Upon cross examination, Ms. Shephard conceded that she is not trained as a doctor or nurse or physical therapist and did not have any specific medical background (TR.11). On redirect, she stated that she was the claimant's mother, and she believed that she could look at her daughter and tell whether she looked like she was hurting (TR.12). Overall, I found Ms. Shephard to be a credible

witness, even considering the inherent bias that a mother would have for her daughter. Her observation of her daughter's lack of mobility with her right arm is consistent with the other evidence in this case.

Claimant then testified on her own behalf. As this injury has been accepted as compensable, a recitation as to how the injury took place is not relevant to the issues in this hearing. She related that she went to Dr. Kannout the day she reported the injury, which was October 27, 2020 (TR.14). Prior to that time, claimant said she did not have any problems with her right shoulder that caused her to seek medical treatment. Claimant testified that she had an MRI on her shoulder, and following the MRI, she was referred to Dr. Steven Smith. Dr. Smith examined her shoulder, reviewed the MRI (TR.15) and referred her to physical therapy. Claimant testified that the physical therapy did not improve her shoulder, and then underwent a second round of physical therapy, which also did not improve her condition (TR.16). Claimant believes she was referred to surgery and wanted to undergo it, but surgery had not been performed at the time of the hearing because it was not approved by respondent. Claimant stated that she is still having problems with her shoulder, as she cannot raise her arm fully over her head and do housework like she had normally done (TR.17). She did not know who Dr. Aaron Humphries is and had not been examined by a doctor from Texas (TR.18).

On cross examination, claimant agreed that she had received medical treatment the day the event happened and received treatment up to her last visit with Dr. Smith (TR.19). Claimant also agreed that she was not taking muscle relaxers or using pain cream at the time of the hearing and had stopped doing that a while back (TR.20). Claimant related that when she first went to Mercy Clinic, she had an MRI and continued to follow-up with Dr. Smith since the MRI. She again related that she did a couple of rounds of physical therapy and went back to work at light-duty in the laundry room (TR.21). She was unable to do one-armed duty as her employer could not accommodate that. Claimant said

that she was waiting for an appointment from Dr. Smith, and as far as she knew, was not receiving any bills for medical treatment (TR.22). Claimant was asked about the results of the MRI and what her understanding of her condition was and why Dr. Smith wanted to do the surgery (TR.24). Claimant was shown the MRI report (discussed in more detail below) by Respondent's counsel, but said that her doctor told her that the surgery was for a rotator cuff tear (TR.26). When asked about physical therapy, claimant said she did get some improvement during therapy, but the relief did not last very long (TR.27).

On redirect examination claimant described the type of therapy she received involved "electricity going through my muscles" and that it made her feel better for a little bit, but it lasted about 15 to 20 minutes. Claimant said that she continued to go to physical therapy as long as it was ordered, despite getting no permanent relief from it (TR.29).

I found claimant's testimony to be credible and consistent with the medical records. To the extent that I allowed claimant to testify to statements made by her treating physicians or physical therapist that are not included in the medical records, I have not given that testimony any weight in reaching a decision in this matter.

Review of the Medical Records

Claimant's exhibits were the only ones introduced that related to her care from the date of her injury until the MRI was performed on December 22, 2020. These consist first of Dr. Kannout's records of October 27, November 1, November 12, and November 15. (CL.X.1-11). Dr. Kannout's records mentioned a referral to orthopedic care in his November 12, 2020 entry, and on claimant's final visit, his "ASSESSMENT and PLAN" (CL.X.9) was to refer her to orthopedic surgery.

Instead of seeing an orthopedic surgeon, claimant was next seen by Arkansas Occupational Health Clinic (AOHC), with her first visit being November 30, 2020. I note that the initial line of the

notes of that visit says that the claimant was there at “the request of an authorization by Charlestown Hotels, Inc.” (CL.X.16). The treatment plan was “ice, heat, Tylenol and follow up in two weeks” (CL.X.17). Claimant returned in two weeks and was referred to an MRI due to lack of progress in her conservative treatment (CL.X.22). The results of the MRI were as follows:

“FINDINGS: Mild AC spurring. No evidence of rotator cuff tear. Trace fluid subdeltoid bursa. Some cystic arthritic change of the humeral head. Motion degrades image quality to some degree. Long head biceps likely intact although proximal portion not well appreciated on the axial or sagittal images due to motion. Blunted labrum with probable labral degeneration/tear.”

“IMPRESSION: Arthritic change of the AC joint and humeral head. No evidence of rotator cuff tear. Degenerated probably torn labrum. Image quality somewhat compromised by motion despite repeating sequences.”

Based on the results of the MRI, claimant was again referred to an orthopedic doctor. (CL.X.30). Claimant was then seen by Dr. Steven Smith on January 14, 2021. At that time, use of her right arm was restricted until she was reevaluated approximately four weeks later (CL.X.35). However, for reasons that are not clear from the records, on January 28, 2021, Patrick Walton, a physician’s assistant in Dr. Smith’s office, released claimant to return to work on February 1ST with a restriction of no lifting greater than 10 pounds until February 11, 2021 when she will be reevaluated (CL.X.36). The only record I was provided of the February 11, 2021 reevaluation states as follows: “this certifies Terrie D. Duero was seen at my clinic on February 11, 2021. Due to medical reasons, no use of the right arm until reevaluated *after surgery* (emphasis added). If unable to accommodate the restriction, will have to be off from work during this time.”

Claimant’s exhibits conclude with a physician advisor report by Dr. Aaron Humphries from an organization called Mitchell (CL.X.38). This report is duplicated in Respondent’s exhibits and will be discussed below in the context of those exhibits.

Respondent’s exhibits included the MRI report referenced above, and a January 14, 2021 Mercy

Clinic Orthopedic note prepared by Patrick Walton, a physician's assistant. The plan for claimant's treatment included "put her through some therapy, keep her on a no use of right upper extremity work restriction and see her back in a month to see how this is working (R.X.6)." Physical therapy began on January 21, 2021 (R.X.7-10) and continued through February 3, 2021 (R.X.11-15) when it ended without any kind of concluding note, such as a discharge summary or referral back to the doctor. Reading respondent's exhibit 14 in connection with claimant's exhibit 36 and 37, however, it is apparent that claimant returned to work on or about February 3, 2021. According to her testimony, she returned to light duty for two weeks, but was then restricted to one-arm duty (CL.X.35) and could not continue to work for her employer with that restriction (TR.21-22).

The final exhibits offered by Respondent were a review of medical records by Dr. Aaron Humphries, prepared for Respondent Travelers Insurance, which denied the request for authorization of surgery (R.X.16-20), and a physician's advisory report prepared by Dr. Sean Lager following an appeal of the denial of payment for the surgery recommended by Dr. Smith (R.X.21-25). These are not particularly helpful, as the doctors, both of whom practice in Texas, used the "ODG criteria" in doing their evaluation. "ODG" stands for "Official Disability Guidelines," which are irrelevant for determining the reasonableness of a course of treatment in Arkansas.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury, *Dalton v. Allen Engineering Co.*, 66 Ark.App.201, 989 S.W.2d 543 (1999). What constitutes reasonably and necessary medical treatment is a question of fact for the Commission, *Wright Contracting Co 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 her burden of proving by a preponderance of the

evidence that she is entitled to additional medical treatment for her compensable shoulder injury as recommended by Dr. Smith.

The course of treatment in this case appears to be reasonable until respondent interfered with the treatment plan recommended by her physicians. Dr. Kannout began with conservative care, ordering an x-ray to ensure no fracture in the shoulder area. After Claimant did not improve under his care, Dr. Kannout referred her to an orthopedic specialist. Rather than approving this referral, respondent instead sent claimant to AOHC, where conservative care continued. After claimant failed to respond to the conservative treatment, a nurse practitioner at AOHC determined that an MRI would be appropriate, and one was performed on December 22, 2020. Following the results of that MRI, the nurse practitioner did what Dr. Kannout had done six weeks earlier: referred claimant to an orthopedic specialist.

Two months after Dr. Kannout had first referred claimant to an orthopedic specialist, she was finally seen by Dr. Smith. Having the MRI results to consider at that time, Dr. Smith determined to try a course of physical therapy. I find claimant's testimony that physical therapy was ineffective in providing her lasting relief to be credible. Given Dr. Smith's "to who it may concern" letter of February 11, 2021 and the fact that he tried to secure authorization for surgery for her, it is apparent to me that Dr. Smith also found Claimant's complaints to be credible. A claimant who has suffered a compensable injury is not required to furnish objective evidence of her continued need for medical treatment. *Arkansas Health Center v. Burnett*, 218 Ark. App. 427, 558 S.W. 3d 408.

I find Dr. Smith is in a better position to determine what kind of treatment is reasonable and necessary for claimant's condition than the doctors in Texas who have not examined her and are using the ODG in denying authorization for this surgery. I further find it was unreasonable for the reviewing doctors to rely so heavily on the MRI report in denying the requested surgery. The report

itself says three different times that the imaging is not of high quality due to motion. Since the doctor preparing the MRI report could not make a firm diagnosis of a labrum tear, the MRI report is couched in terms of the probable, not the definite. That should have been recognized by the reviewing doctors in determining the appropriateness of Dr. Smith's recommendation.

Based upon the testimony at the hearing and the medical records submitted by claimant, I find that she is entitled to return to Dr. Smith for the treatment he deems necessary, including surgery.

ORDER

Claimant has met her burden of proving by the preponderance of the evidence that she is entitled to additional medical treatment as directed by Dr. Smith.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorneys fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." In this case, there was no claim that indemnity benefits have been controverted up to the date of hearing, and as all issues other than medical benefits were reserved, no attorney's fee can be awarded in this matter at this time. Claimant's attorney is free to voluntarily contract with medical provider pursuant to A.C.A. §11-9-715(a)(4).

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$333.90.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE