BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H105918**

JASON ELLINGBURG, Employee	CLAIMANT
CV'S FOODLINER INC., Employer	RESPONDENT
AMTRUST NORTH AMERICA, Carrier	RESPONDENT

OPINION FILED **SEPTEMBER 15, 2022**

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

Claimant represented by MICHAEL L. ELLIG, Attorney, Fort Smith, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 6, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 30, 2022, 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 this claim.
2. The employee/employer/carrier relationship existed on June 30, 2021.
3. The claimant sustained a compensable injury on June 30, 2021.

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

1. Whether claimant is entitled to additional medical treatment.

The claimant contends that "the additional medical services recommended by Dr. Blankenship are reasonably necessary for his compensable injury. The claimant further contends that by

controverting these medical services, the respondents are controverting all benefits that reasonably arise from an award of these services."

The respondents contend that "claimant has requested a hearing on the issue of additional medical recommended by Dr. James Blankenship. However, respondents have not controverted the recommended medical. In fact, respondents and One Call have been attempting to schedule the MRI with the claimant since on or about May 5, 2022."

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant 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 June 30, 2022, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to additional medical treatment from Dr. James Blankenship for his cervical spine injury, and that respondents have controverted this claim by failing to promptly provide those reasonable and necessary medical benefits.

FACTUAL BACKGROUND

The pre-hearing order contained an error as to the date of the injury, listing it as having happened in 2022 instead of 2021. During the hearing, I modified the order with the permission of the parties to reflect the correct date of injury.

HEARING TESTIMONY

Claimant testified that on June 30, 2021, he was working at respondent CV's Foodliner Inc. store. He was working in the deli and was cooking with the fryer. He slipped on an old towel that was loose causing him to bounce off the table and hit the floor. Claimant testified this caused his neck to "flare-up" which he explained as being on fire from his neck down to his shoulder on his left side. He reported the accident and was sent to Dr. James Schmitz in Charleston. Dr. Schmitz sent him to physical therapy and gave him several medications, but claimant showed no appreciable improvement. Claimant then went to see Dr. James Blankenship who examined him and ordered an MRI. Dr. Blankenship scheduled claimant for surgery but that was cancelled when respondent refused to authorize it. Claimant then saw Dr. Daniel Harwell in Tulsa for an independent medical examination. Claimant said he had not worked since his injury and still wanted the surgery that Dr. Blankenship recommended.

On cross-examination, claimant said that Dr. Schmitz had released him to return to work, but he did not do so because he was still having pain from his injury. He stated he had not been looking for work. He testified that he was getting by because he has a girlfriend. Claimant conceded Dr. Schmitz released him with no restrictions to his activity in September 2021. Claimant had not been taken off work by Dr. Blankenship. He was not interested in an injection, because he wanted the long-term fix for his neck pain.

REVIEW OF THE MEDICAL RECORDS

Respondent provided the records from Dr. James Schmitz and the Wellness Physical Therapy Clinic which began on June 30, 2021. As claimant testified, Dr. Schmitz treated him with conservative care, prescribing Acetaminophen 300mg-codine, Diclofenac Sodium 75mg and Methocarbamol 75mg. Following claimant's visit on August 16, 2021, Dr. Schmitz did a return to work note returning

claimant to full duty on August 31, 2021, but that was extended following the August 30, 2021 visit until September 14, 2021.

Dr. Schmitz last saw claimant on September 14, 2021, and noted that claimant had missed several physical therapy appointments, questioning his motivation. The plan for claimant at that point was to release him for work in two weeks, continue the physical therapy for now and consult with a chiropractor for an adjustment. Claimant was to be rechecked in two weeks, but it does not appear that there was a visit after the September 14, 2021, office visit with Dr. Schmitz. (R.X.35-37)

Claimant was without care from September 2021 until March 14, 2022, when he began seeing Dr. James Blankenship at the Neurosurgery Spine Center. Dr. Blankenship believed that it was necessary for claimant to have an MRI to adequately treat him. (CL.X1-4) The MRI was finally performed on May 10, 2022. Dr. Vanessa Branch at Medical Associates of Northwest Arkansas found "multilevel cervical spondylosis, worst at the C3-4 and C5-6 levels where there is mild to moderate canal and severe foraminal stenosis." (CL.X.5) After reviewing the results of the MRI during his second examination of claimant on July 11, 2022, Dr. Blankenship concluded that claimant needed an anterior cervical arthrodesis and fusion at C4-5 and C5-6. Dr. Blankenship noted that the injury was a year old, and claimant needed to have this authorized and approved quickly by the workers' compensation carrier to get him on the road to recovery.[1] (CL.X.6-9)

Claimant next saw Dr. Daniel Harwell, who agreed with Dr. Blankenship that an anterior cervical discectomy and fusion at C4-5 and C5-6 was appropriate for claimant, but Dr. Harwell is of the opinion that the C3-C4 level should also be a part of that procedure.

[1] Dr. Blankenship noted with obvious ire that respondent refused to allow an MRI before the first visit (CL.X 1) and then following the MRI, he recorded "I recommended an MRI and return to me and of course as usual it took two months to get this done through workers' comp." He also said that if claimant "has any permanent neurological defect, it will be directly related to the delay in treatment by his worker's compensation carrier." (CL.X.8)

ADJUDICATION

Employers are required to promptly provide such medical services as are reasonably necessary in connection with the injury received by the employee, Ark. Code. Ann § 11-9-508(a)(1). Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury, *Dalton v. Allen Engineering Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable 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 his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable neck injury as recommended by Dr. Blankenship.

Respondents initially acted reasonably in sending the claimant to Dr. Schmitz, as he was seen the same day that he fell at work. However, rather than refer claimant to a specialist when it was apparent that a course of conservative care was not working, Dr. Schmitz continued with the same conservative care. I find it interesting that his final note did not discharge claimant, as it mentioned seeing claimant again in two weeks. While claimant testified that he was released to return to work by Dr. Schmitz on September 28, 2021, it appears the situation was the same after the final visit on September 14, 2021, as well as on August 16 and August 30, 2021: Dr. Schmitz set a return-to-work date to coincide with claimant's next visit. If one reads only the return-to-work note from September 14, 2021, it does appear that Dr. Schmitz discharged claimant to full duty on September 28; when looking at all the records, including the September 14, 2021, chart note with a suggestion of chiropractic care in addition to what was already being done for claimant, I conclude that it is Dr. Schmitz's practice to excuse someone from work only between the time he saw a patient and the next

scheduled appointment. For reasons not explained in the record, claimant did not go back to see Dr. Schmitz two weeks after the September 14, 2021, appointment.[2]

The medical evidence from both Dr. Blankenship and Dr. Harwell are unambiguous: Claimant needs surgery on his neck as a result of his compensable injury. Denying medical treatment to claimant after the reports from those two doctors—the second of which was the result of an independent medical examination that respondents requested before authorizing surgery—is inexcusable and seems to continue a pattern of delay on the part of respondents that Dr. Blankenship noted in his chart notes of both March 14 and July 11, 2022. In its contentions in the pre-hearing order, respondents took the position that it had not controverted this claim because it had attempted to schedule an MRI with claimant since May 5, 2022; however, that doesn't explain why nothing was done to get it scheduled between March 14, 2022, and May 5, 2022, or why Dr. Blankenship's recommendation after the MRI was questioned. Additionally, respondents had over a month from the time of the independent medical examination before the hearing in this matter, and still had not authorized the treatment recommended by the neurosurgeons. I therefore reject the respondent's contention that it has not controverted this claim; its actions are inconsistent with its contentions.

ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his cervical spine injury as directed by Dr. Blankenship. Respondent has controverted this claim for all additional benefits by failing to promptly provide reasonably necessary care to claimant.

[2] While not critical to my decision, it was not explained if claimant thought he was being released after the September 14, 2021 visit, if the mention of a chiropractor confused him, if he was frustrated by the lack of progress under Dr. Schmitz's care, if the insurance carrier advised claimant and/or Dr. Schmitz that it was no longer paying for treatment, or if there was some other reason claimant did not return to Dr. Schmitz's care on September 28, 2021.

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 from the date of the previous award, and as such, 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 $291.94.

IT IS SO ORDERED

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE