

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G506221

ROGER GRUBBS, Employee	CLAIMANT
SOUTHERN PERSONNEL MANAGEMENT, INC., DBA CABINET SHOP	RESPONDENT #1
AMTRUST NORTH AMERICA Carrier/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED NOVEMBER 29, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

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

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

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas; although not participating in hearing.

STATEMENT OF THE CASE

On November 13, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 1, 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 prior opinions in this matter are final.

At the pre-hearing conference 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 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.

Respondent #1 contends that claimant is not entitled to any additional benefits.

Respondent #2 defers to the outcome of litigation and waives its right to attend the hearing.

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 March 1, 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, including SI joint surgery recommended by Dr. Blankenship.

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.

4. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant has worked for the owners of the Cabinet Shop since 1975, performing carpentry work. While working for respondent claimant suffered two compensable injuries as a result of motor vehicle accidents. The second motor vehicle accident occurred on August 7, 2015, and is the subject of this particular claim.

Following a hearing on January 29, 2018, an opinion was filed on February 28, 2018 by this administrative law judge finding that claimant had proven a compensable injury to his cervical, thoracic and lumbar spine on August 7, 2015. In that opinion claimant was awarded additional medical treatment recommended by Dr. Blankenship. That decision was appealed to the Full Commission which in an opinion filed August 1,

2018 affirmed the finding of compensability and award of medical treatment by Dr. Blankenship. Dr. Blankenship performed surgery in the form of a fusion on claimant's lumbar spine on April 9, 2020 and assigned claimant an impairment rating in an amount equal to 12% to the body as a whole as a result of that injury.

A second hearing on this claim was conducted on May 3, 2021, and in an opinion filed June 10, 2021 this administrative law judge found that claimant was entitled to additional permanent partial disability benefits in an amount equal to 30% to the body as a result of his August 7, 2015 compensable injury. That opinion was not appealed and the parties have stipulated that all prior opinions are final.

Since the time of the last hearing claimant has continued to treat with Dr. Blankenship for spinal complaints. In a report dated May 6, 2021, Dr. Blankenship noted that claimant was having some low back pain on his lefthand side. He stated that an SI joint examination was positive in all five testings. Dr. Blankenship further stated that it was not uncommon for someone who had undergone lumbar arthrodesis to have SI joint pain. It was his opinion that claimant needed additional medical treatment for this condition and he referred claimant to Dr. Cannon for a left SI joint injection.

Claimant returned on August 19, 2021 to Dr. Blankenship following the injection. Dr. Blankenship's report indicated that claimant achieved 70% relief as a result of the injection and he recommended that claimant continue home exercises and return in eight weeks.

Claimant returned to Dr. Blankenship on September 2, 2021, indicating that his low back and left buttock pain had gotten significantly worse over the last couple of weeks. Based upon claimant's failure to respond to exercise and the injection, Dr. Blankenship

recommended a left SI joint arthrodesis. Dr. Blankenship indicated that the arthrodesis was directly related to claimant's lumbar stabilization which was necessitated by claimant's work-related injury.

Respondent did not approve the surgical procedure by Dr. Blankenship, but instead sent claimant for an evaluation by Dr. Tomecek. Dr. Tomecek in a report dated December 1, 2021 recommended further diagnostic testing in the form of a thoracic and lumbar myelogram CT scan. He also indicated that if claimant did have SI joint pathology, he would recommend more physical therapy and an additional injection before surgery. However, it was his opinion that absent additional diagnostic testing there was no definitive diagnosis.

Claimant underwent the myelogram CT scan of his thoracic and lumbar spine and returned to Dr. Tomecek on January 17, 2022. Dr. Tomecek noted that there was some erosion around the anterior cages and around the sacral screws. It was also his opinion that claimant had an autofusion of the left sacroiliac joint with a large osteophyte on the sacroiliac joint. Accordingly, he did not agree with Dr. Blankenship's recommendation, but instead recommended non-operative treatment which would include an injection and referral to surgery for removal of the large osteophyte.

Shortly after this evaluation by Dr. Tomecek, claimant again returned to Dr. Blankenship. Claimant testified that prior to this visit he stretched his left leg, it popped and as a result, his SI joint pain resolved. Dr. Blankenship's report of February 21, 2022 indicates that claimant informed him that his SI joint pain had completely resolved and was no longer hurting. As a result, Dr. Blankenship no longer recommended surgery but instead indicated that claimant had reached surgical MMI.

Claimant returned to Dr. Blankenship on September 12, 2022 indicating that his pain had significantly worsened. Dr. Blankenship's report of that date indicates that claimant rated his pain as 100% of the worst pain imaginable. Dr. Blankenship indicated that his SI joint exam again revealed 5 of 5 positive findings and he again sent claimant to Dr. Cannon for a left SI joint injection.

This injection was performed by Dr. Cannon on November 14, 2022, and claimant returned to Dr. Blankenship on December 8, 2022. Dr. Blankenship indicated that claimant obtained some relief from the injection, but it was temporary in nature. Dr. Blankenship opined that another injection was unlikely to provide any long term benefits and as a result, he recommended that claimant proceed with a left SI joint arthrodesis.

Claimant was again seen by Dr. Tomecek on May 4, 2023, and again Dr. Tomecek disagreed with the surgical procedure recommended by Dr. Blankenship. Finally, in a report dated August 10, 2023, Dr. Blankenship again noted that claimant's SI joint exam was positive and stated that there was no question that claimant had SI pathology that was causing his pain and he again recommended the SI joint arthrodesis.

Claimant has filed this claim contending that the surgery proposed by Dr. Blankenship is reasonable and necessary medical treatment for his compensable injury. He also seeks payment of temporary total disability benefits from September 13, 2022 through a date yet to be determined.

ADJUDICATION

Claimant 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 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 proving by a preponderance of the evidence that he is entitled to additional medical treatment, including SI joint surgery as recommended by Dr. Blankenship.

It is clear from a review of the reports from Dr. Blankenship and Dr. Tomecek that they have totally different views of the source of claimant's complaints as well as the recommended treatment. Dr. Blankenship's opinion is based upon his physical examination of the claimant as well as claimant's response to injections provided by Dr. Cannon. On the other hand, Dr. Tomecek's opinion is primarily based upon a myelogram CT scan which he ordered and reviewed. Based upon his reading of that test, Dr. Tomecek is of the opinion that claimant already has an autofusion of his SI joint; therefore, surgery on the SI joint is not recommended.

I find that the opinion of Dr. Blankenship is entitled to greater weight than the opinion of Dr. Tomecek under the circumstances. While 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 claimant's lumbar spine in 2020. Since that time, he has continued to treat claimant for various spinal ailments and he has now recommended an SI joint fusion. Under these circumstances, I find that the opinion of Dr. Blankenship is entitled to greater weight and based upon his opinion 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 injury. This treatment includes the SI joint surgery recommended by Dr. Blankenship.

In reaching this decision, I note that Dr. Blankenship has opined that Dr. Tomecek's opinion regarding any of Dr. Blankenship's patients are invalid because Dr. Tomecek previously testified in a malpractice claim against Dr. Blankenship. According to Dr. Blankenship, Dr. Tomecek was subsequently censored by a neurological association for that testimony. I do not find any of these accusations to be controlling in this particular case. Instead, my decision regarding Dr. Blankenship's opinion is based upon the fact that he has been claimant's treating physician for several years and has previously performed surgery on claimant's lumbar spine.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional temporary total disability benefits beginning September 13, 2022 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

Based upon Dr. Blankenship's opinion, I note that claimant remains within his healing period based upon his recommendation for surgery. In fact, even though Dr. Tomecek disagrees with Dr. Blankenship's recommendation for surgery, Dr. Tomecek also indicated that claimant was in need of additional medical treatment. Accordingly, I find that claimant has remained within his healing period.

I also find that claimant has suffered a total incapacity to earn wages. Claimant

was seen by Dr. Blankenship on September 12, 2022, at which time Dr. Blankenship recommended that claimant return to Dr. Cannon for a left SI joint injection. In a work note dated September 21, 2022, Dr. Blankenship noted that claimant had been treated on September 12, 2022 and stated:

Patient will need to remain off work until after recommended injections and patient has followed up.

Claimant did undergo the injection which provided only temporary relief and as a result Dr. Blankenship has now recommended the SI joint fusion. Based upon this evidence, I find that claimant has suffered a total incapacity to earn wages since the day after his evaluation by Dr. Blankenship on September 12, 2022.

Accordingly, I find that claimant is entitled to temporary total disability benefits beginning September 13, 2022 and continuing through a date yet to be determined. I do note that at the hearing there was some discussion that respondent paid some additional temporary total disability benefits subsequent to September 13, 2022. Obviously, respondent would be entitled to a credit for any temporary total disability benefits paid after that date.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. This includes the recommended surgery by Dr. Blankenship. Claimant is also entitled to temporary total disability benefits beginning September 13, 2022 and continuing through a date yet to be determined. Respondent is entitled to a credit for any temporary total disability

benefits paid subsequent to that date. Respondent has controverted claimant's entitlement to any unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$335.80.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE