

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H302993

CORY SULLIVAN, Employee

CLAIMANT

ACTIONPAQ, Employer

RESPONDENT

TRAVELERS INSURANCE COMPANY, Carrier

RESPONDENT

OPINION FILED NOVEMBER 6, 2024

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

Claimant represented by LAURI THOMAS, Attorney, Springdale, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 9, 2024, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 15, 2024 and a pre-hearing order was filed on August 19, 2024. 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 back on April 26, 2023.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$440.00 for total disability benefits and \$330.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's cervical spine on April 26, 2023.
2. Temporary total disability benefits from date last paid to a date yet to be determined.
3. Related medical.
4. Attorney's fee.

The claimant's contentions are set forth in his pre-hearing questionnaire which is attached to Commission Exhibit #1 as Exhibit #1.

The respondents contend the claimant did not injure his cervical spine on April 26, 2023. He is not entitled to additional temporary total disability benefits.

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 August 15, 2024 and contained in a pre-hearing order filed August 19, 2024 are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his cervical spine on April 26, 2023.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 27, 2023 through May

22, 2023, as a result of his compensable low back injury. Pursuant to A.C.A. §11-9-110(d)(1) up to 25% of these temporary total disability benefits are to be withheld for satisfaction of claimant's child support obligations.

4. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment recommended by Dr. Blankenship. This includes physical therapy and a referral to Dr. Cannon.

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

#### FACTUAL BACKGROUND

The claimant has a history of physical problems involving his cervical spine following a motor vehicle accident in 2011. After receiving some chiropractic treatment, claimant came under the care of Dr. Tonymon who performed disc replacement surgery on October 15, 2020, at the C5-6 and C6-7 levels. According to claimant's testimony he was subsequently released by Dr. Tonymon and after some period of time was able to perform activities without limitation.

Claimant began working for respondent in March 2022. On April 26, 2023, the claimant was in the process of readjusting a shelf in order to fit a crate on it. While performing this readjustment a beam popped out and claimant testified "I fell straight down between a crate and the side of the rack." Claimant testified that he fell approximately 7 to 7 ½ feet and stated that he hit the back of his head on beams as he was falling.

Claimant testified that after this incident he had pain in his back and his head.

Claimant was taken to the emergency room at Mercy on April 26, 2023 where he underwent CT scans from his head down to his pelvis. Claimant was diagnosed as suffering from fractures of the L1 and L2 transverse processes. Claimant was given medication in the form of Hydrocodone and instructed to receive follow-up care with his neurosurgeon.

Although claimant was released to return to work he testified that he was unable to do so and he eventually returned to see Dr. Tonymon on May 22, 2023. With respect to claimant's lumbar fractures, Dr. Tonymon indicated that no treatment was necessary and claimant should return to his office as needed. Dr. Tonymon also gave claimant an off-work slip from April 26, 2023 through May 22, 2023.

Thereafter, claimant returned to Dr. Tonymon on September 5, 2023, complaining of neck pain as well as low back pain. Dr. Tonymon again indicated that no treatment was necessary for claimant's transverse processes fractures, but stated that if claimant's low back pain persisted he should undergo an MRI scan to assess for further etiology. With respect to claimant's neck pain, Dr. Tonymon indicated he had personally reviewed a cervical x-ray dated May 22, 2023 and it was essentially unchanged from claimant's prior x-rays in October 2022.

Thereafter, claimant filed for and received a change of physician to Dr. Blankenship who evaluated claimant on April 1, 2024. With respect to claimant's cervical spine, Dr. Blankenship ordered an x-ray which according to his report indicated that claimant's implant at C5-6 had completely failed. Dr. Blankenship ordered MRI scans of both the claimant's lumbar and cervical spines. He also recommended that claimant undergo physical therapy for his lumbar spine.

An MRI scan of claimant's lumbar spine dated May 31, 2024 revealed a small disc herniation at the L5-S1 level and multilevel facet arthropathy most significant at L3-4 and L4-5. Following this MRI scan, Dr. Blankenship in a report dated June 6, 2024 recommended that claimant see Dr. Cannon for a possible facet injection. He also ordered physical therapy. The medical records indicate that claimant began physical therapy on June 25, 2024, and completed it on July 31, 2024.

The last medical report from Dr. Blankenship is dated September 23, 2024. In that report he notes that claimant did receive some relief from the physical therapy and recommended that he receive additional physical therapy.

Respondent accepted as compensable an injury to claimant's lumbar spine and has paid some compensation benefits. Claimant has filed this claim contending that he suffered a compensable injury to his cervical spine on April 26, 2023. He also seeks payment of temporary total disability benefits, payment of medical benefits, and a controverted attorney fee.

### ADJUDICATION

Initially, claimant contends that in addition to his lumbar spine injury on April 26, 2023, he also suffered a compensable injury to his cervical spine. Claimant's claim is for a specific injury identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3)

medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his cervical spine on April 26, 2023.

In support of his contention that he suffered a compensable injury, claimant relies significantly on the opinion of Dr. Blankenship. As previously noted, claimant obtained a change of physician to Dr. Blankenship and was evaluated by him on April 1, 2024. Notably, this was almost one year after the claimant's fall on April 26, 2023. Dr. Blankenship performed x-rays in his office on that date and stated:

The patient has undergone artificial disc placement at C5-6 and C6-7. There is marked subsidence through both implants. The implant at C6-7 still appears to be somewhat functional, although there appears to be an autofusion posteriorly. The implant at C5-6 has completely failed with the posterior portion driven up into the vertebral body. (Emphasis added.)

Dr. Blankenship went on to state that claimant had undergone no structural studies of the cervical spine since his injury and as a result ordered an MRI scan. In response to respondent's denial of the claimant's cervical complaints, Dr. Blankenship authored a letter dated May 16, 2024, indicating that although the claimant had a previous surgery, it was his opinion that claimant's current complaints and need for treatment of his neck was related to the injury at work due to a shelf hitting claimant on top of the head. Dr. Blankenship reiterated this opinion in a subsequent report dated June 6, 2024.

First, I note that Dr. Blankenship bases his opinion in part on the fact that it was his belief that a shelf hit claimant on top of the head during the fall. However, claimant acknowledged that he does not know if anything hit him in the head or not during his fall. More importantly, I note that when claimant sought medical treatment from the emergency room on the day of the accident on April 26, 2023, he specifically denied any neck pain. Furthermore, the physical exam portion of that report states the following:

Cervical back: Normal range of motion and neck  
supple.

Comments: **Few scattered abrasions to the back.**  
**Has lower lumbar tenderness. No midline thoracic**  
**or cervical tenderness.** (Emphasis added)

In addition, despite Dr. Blankenship's belief that claimant had undergone no structural studies of his cervical spine since the injury, the emergency room report indicates that claimant did in fact undergo a CT scan of multiple body parts from his head to his pelvis, including a CT scan of his cervical spine. That CT scan was read as showing no cervical spine abnormality.

IMPRESSION: No acute C-spine abnormality is  
Identified.

As previously noted, on May 22, 2023 claimant sought additional medical treatment from Dr. Tonymon, the physician who had previously performed surgery on claimant's cervical spine. Although claimant did report back pain to Dr. Tonymon, his report indicates that claimant reported "no neck pain". Furthermore, Dr. Tonymon's physical examination report indicates that claimant had a normal range of motion of his cervical spine. Also on that date, Dr. Tonymon did order an x-ray of claimant's cervical

spine with the following findings:

Disc prostheses are present at C5-6 and C6-7. The cervical vertebral bodies are normally aligned. No subluxation is present with flexion/extension, no fractures are identified. (Emphasis added.)

It was not until claimant returned to Dr. Tonymon on September 5, 2023, more than four months after his accident, that he began complaining of cervical spine pain to a physician. In his report of that date, Dr. Tonymon notes that he personally reviewed claimant's x-rays from May 22, 2023 and those x-rays were essentially unchanged from prior x-rays following claimant's surgical procedure in October 2020.

Given this evidence, I find that Dr. Blankenship's opinion is entitled to little weight under the circumstances. Contrary to his findings on an x-ray taken almost a year after claimant's accident which apparently shows a completely failed implant at the C5-6 level, the evidence indicates that claimant not only denied neck pain following his accident on April 26, 2023, but a CT scan taken on that date showed no abnormality. Thereafter, x-rays were taken of the claimant's cervical spine on May 22, 2023, and did not have any indication of broken hardware as seen by Dr. Blankenship. Dr. Tonymon specifically stated in his report of September 5, 2023, that he had personally reviewed the x-rays from May 22, 2023 and they were essentially unchanged from claimant's prior x-rays following the surgery in October 2020. Therefore, to the extent that claimant has an implant at C5-6 that has completely failed, I do not find that that condition is related to the claimant's accident on April 26, 2023.

Further, with respect to this issue, I note that claimant testified that he did not have any pain in his neck prior to the fall on April 26, 2023, and that he was not receiving any



medical treatment for his neck prior to that time. However, claimant acknowledged that he was taking the medication Nabumetone and had been taking that medication since 2020 for his neck injury. Claimant acknowledged that he had refilled this medication on April 18, 2023, just before his fall on April 26. Claimant was then asked the following:

Q Why were you still taking medicine then if it wasn't bothering you?

A I have to take that medicine daily. Nabumetone is just – it's a self-proclaimed Ibuprofen. I have to take it for pain and inflammation, and if I don't, I get even worse.

Q So when Dr. Blankenship says you weren't getting any treatment and you weren't having any problems before April 26 of '23, that's not right; is it?

A If I'm taking medication I've been prescribed since the surgery that I have to be on long-term, I don't feel like that's being treated. It's the same as someone who takes like anxiety medicine or something. It's a necessary thing. (Emphasis added.)

Clearly, taking medication for pain and inflammation in the cervical spine is treatment and as acknowledged by claimant, he refilled a prescription for this medication just a few days prior to the fall.

In short, claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable injury to his cervical spine as a result of the fall on April 26, 2023. On the day of his fall claimant was seen at the emergency room and denied any neck pain. Likewise, when he was initially evaluated by Dr. Tonymon, a physician he had previously seen for cervical problems, he again denied any neck pain. A CT scan was taken of the claimant's cervical spine on April 26, 2023, and was read as showing no

abnormality. Likewise, an x-ray taken of claimant's cervical spine on May 22, 2023 revealed no abnormality and this x-ray was personally reviewed by Dr. Tonymon who opined that there was no significant difference in the May 2022 x-ray and x-rays taken after claimant's surgical procedure in 2020. To the extent that x-rays taken by Dr. Blankenship almost one year after the surgery show a failed implant at C5-6, those findings were not present immediately after claimant's accident and I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury or that those findings present on Dr. Blankenship's x-ray are causally related to the fall that occurred on April 26, 2023. Therefore, I find that claimant has failed to meet his burden of proof.

I do find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning April 27, 2023 through May 22, 2023. Claimant sought medical treatment from Dr. Tonymon, and he gave claimant an off-work slip which he backdated to the date of claimant's injury. He continued claimant's inability to work through May 22, 2023. I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages for his compensable low back injury based upon this opinion of Dr. Tonymon. Claimant is entitled to temporary total disability benefits beginning April 27, 2023 and continuing through May 22, 2023.

Claimant acknowledged at the hearing that he is past due on child support. Accordingly, pursuant to A.C.A. §11-9-110(d)(1), up to 25% of claimant's temporary total disability benefits are to be withheld for satisfaction of claimant's child support obligations.

I also 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 lumbar spine injury.

As previously noted, claimant returned to see Dr. Tonymon for his low back complaints. Dr. Tonymon was of the opinion that no treatment was necessary for claimant's transverse process fractures. However, in his report of September 5, 2023, Dr. Tonymon stated that if claimant's low back pain persisted he should undergo an MRI scan to assess the etiology of his complaints. Claimant subsequently sought medical treatment as a result of the change of physician from Dr. Blankenship and he did order an MRI scan of claimant's lumbar spine. That MRI scan was performed on May 31, 2024, and revealed a small disc herniation at the L5-S1 level as well as multi-level facet arthropathy at L3-4 and L4-5. Dr. Blankenship subsequently recommended physical therapy which provided claimant some benefit. Dr. Blankenship recommended that claimant undergo additional physical therapy and also recommended that he saw Dr. Cannon for a possible facet injection. As of the time of the hearing, the evaluation by Dr. Cannon and additional physical therapy had not been accepted by respondent. 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 low back injury as recommended by Dr. Blankenship in the form of physical therapy and an evaluation by Dr. Cannon.

#### AWARD

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his cervical spine on April 26, 2023. Claimant has proven by a

preponderance of the evidence that he is entitled to temporary total disability benefits beginning April 27, 2023 and continuing through May 22, 2023, for his compensable low back injury. Up to 25% of claimant's temporary total disability benefits are to be withheld for payment of claimant's child support obligation. Claimant has also met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as recommended by Dr. Blankenship.

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.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$507.14.

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

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE