

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H202188**

MARY CUMMINS, Employee	CLAIMANT
ACCURATE HEALTHCARE INC., Employer	RESPONDENT
TRAVELERS INDEMNITY COMPANY, Carrier	RESPONDENT

OPINION FILED **OCTOBER 26, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by DAVID L. SCHNEIDER, Attorney, Springdale, Arkansas.

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

STATEMENT OF THE CASE

On August 24, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 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 this claim.
2. The employee/employer/carrier relationship existed on February 23, 2022.
3. The claimant sustained a compensable injury on February 23, 2022.
4. The compensation rate is \$635.00 for temporary total disability, and \$476.00 for permanent partial disability.

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

1. Whether claimant is entitled to additional medical treatment regarding her back injury.

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2. Whether claimant is entitled to temporary total disability benefits.
3. Attorney's fees.

All other issues are reserved by the parties.

The claimant contends that "She sustained a compensable injury while working for respondent on or about 02/23/22. At that time, claimant was in the course and scope of her employment with respondent when claimant injured her back while delivering medical supplies. Claimant has been treating conservatively with Dr. Randolph in the form of injections, physical therapy, and surgery. Dr. Randolph has now recommended the claimant undergo a L4-5 lateral lumbar interbody fusion and has further stated she should be off work from 04/18/23 to a date to be determined. Respondents have controverted this surgery and temporary total disability benefits."

The respondents contend that "The surgical recommendation is not reasonable, necessary, or related to the work injury and is not the responsibility of the respondents. It was reviewed as required by Commission Rule 30 and denied."

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 her 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 22, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met her burden of proof by a preponderance of the evidence that

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she is entitled to additional medical benefits from Dr. Gannon Randolph for her back injury.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits up to the date of the hearing.

FACTUAL BACKGROUND

In her contentions listed above, claimant sought temporary total disability benefits from April 18, 2023, until a date to be determined. Before the testimony began at the hearing, claimant withdrew that claim, advising that Dr. Randolph had released claimant to return to work and had not said she was back in a period of disability since that release. As such, there can be no award of temporary total disability benefits. Claimant asked that those indemnity benefits begin when Dr. Randolph finds she is again disabled.

HEARING TESTIMONY

Claimant testified that on February 23, 2022, she was unloading a bed from her delivery truck and injured her back while doing so. She developed lower back pain which was radiating on her left side. After having difficulties finding a physician, she was eventually referred to Dr. Gannon Randolph. Dr. Randolph did decompression surgery on June 29, 2022, which improved her condition somewhat, but claimant still had excruciating pain in her lower back. Following the surgery, she was able to sit whereas before the surgery, sitting was painful.

As of the date of the hearing, claimant said the pain in her lower back was getting worse. She said certain movements caused her back to feel as though someone was stabbing it with a knife. She has fallen a few times and was using a cane as of the date of the hearing. While claimant is scared to have the surgery Dr. Randolph is now suggesting, she believes it is necessary for her to improve where she can walk and engage in everyday activities.

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Claimant was asked about Respondent's Exhibit #2 and said that she had never been examined by Dr. Robert Pick, nor had she had any correspondence with him regarding the status of her case.

On cross-examination, claimant testified that she had previously worked for respondent Accurate Healthcare but had to stop working due to fibromyalgia in her arms and shoulders.

Claimant was asked about an EMG nerve conduction study that was done by Dr. Mark Miedema in June 2022 and recalled that test but did not remember having another one in April 2023. She did not know that the second EMG was normal and "Her left decompression has removed all the right sided radicular symptoms she is having." She understood the records reflected that she discussed that EMG with Dr. Randolph, but she did not recall it. She had discussed an intrabody fusion at L4-L5 that Dr. Randolph was recommending.

On re-direct examination, claimant clarified that she was originally having left sided radicular pain but is now having right sided radicular pain. She said that even before surgery, she was having some right sided radicular pain, but it wasn't as bad as the left side until after the surgery. She testified that the right-side radicular pain and the lower back pain is getting worse.

REVIEW OF THE EXHIBITS

Both claimant and respondents submitted records that predated claimant's back surgery of June 29, 2022. Little in those records is relevant to the issue in this case because the focus of that treatment and surgery was the radicular component of claimant's back injury as it affected the left side of her lower extremity. The nerve conduction test performed by

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Dr. Mark Miedema (R.X.1, pages 36-38) was specifically targeted to the left side of her body. There were no “motor left/right comparison done in that study.”

Claimant was asked on cross-examination about a second EMG that occurred after her surgery. There is no report from a post-surgical EMG, but rather a reference to it in Dr. Randolph’s notes. There was an intraoperative neurophysiology test done during the surgery on June 29, 2022. (R.X.1, pages 54,55) While nothing in that report specifies that the left side of claimant’s body was being tested, I note that the report says, “Please see tech notes for details of stimulation and recording,” but those notes were not submitted as exhibits to show which side of claimant’s body was being tested during the surgery; because the surgery was to relieve pain on her left side, it would have been unusual for her right side to have been tested during that procedure.

Following the surgery, claimant did very well on her left side but within six weeks of the surgery, she developed right S1 radiculopathy. She was seen by physician’s assistant Amanda Haas on August 18, 2022, and was given a Medrol dosepak and was prescribed physical therapy. Claimant had an MRI on her lumbar spine on October 11, 2022, which was compared to the March 24, 2022, MRI by Dr. Signe Rebolledo. His report included the following:

“The interval left laminectomy at L4 has improved canal stenosis at the L4-5 level. Residual central disc extrusion and ligamentum flavum thickening contribute to mild persistent canal stenosis at L4-5. There was moderate left and mild right foraminal narrowing, which appears mildly improved on the left.”

Claimant returned to Dr. Miedema on August 25, 2022, and was recertified for physical therapy. It is mentioned that she was having right S1 radiculopathy. It does not appear that Dr. Miedema released her after that visit. (R.X.1, pages 64-69)

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There were no additional records from Dr. Randolph; however, on November 8, 2022, he issued a return to work note that said: "Patient was seen in my office on October 27, 2022. As of October 27, 2022, patient may return to work with no restrictions." It is unclear that Dr. Randolph saw claimant on that date. She was back in his office on February 2, 2023, complaining of continued symptoms of lumbopelvic junction pain radiating down into her right buttock. Dr. Randolph noted that claimant had a "Palpable spasm just inferior medial to the PSIS on the right side which reproduces some of her pain. Dr. Randolph administered a GBR-trigger point injection. It is in this report that it is noted there was an EMG of the lower extremity conducted on January 18, 2023 which was normal. Dr. Randolph concluded his report with:

"Patient is doing relatively well from a radicular standpoint. Still having low back pain. Really my only option for that is an L4-5 lateral lumbar intrabody fusion. She does have a spinal enthesopathy and I will inject that with trigger point injection today. We will see how she does with this. She can call if she gets about fifty percent relief, we could reinject in two weeks. I will see her back in three months."

Her next appointment was scheduled for May 25, 2023; however, claimant did not wait until the scheduled appointment to see Dr. Randolph. She was in his office on April 18, 2023; at the conclusion of that examination, Dr. Randolph recorded:

"Mary has continued low back pain radiating down into the right leg and buttock almost down to the knee but not below the knee. We did an EMG which was normal, and her left decompression has removed all of the left sided radicular symptoms she was having. Likely her remaining symptoms are from her facet joint on the right. Really my only good answer for that is a lateral lumbar interbody fusion at L5-4. With MIS Psif. Patient is interested in proceeding with surgical treatment."

Respondents submitted a physician's advisory report from Dr. Robert Pick who is licensed to practice orthopedic surgery in Maryland, Massachusetts, New York, and Tennessee. Dr. Pick did not examine claimant but reviewed thirty-one pages of records, the

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bulk of which came from Dr. Randolph. Reviewing the records and applying the Official Disability Guidelines to those records that he reviewed, Dr. Pick concluded that the surgery recommended by Dr. Randolph was not necessary.

ADJUDICATION

The only issue to be decided in this matter is whether claimant is entitled to additional medical treatment for her compensable injury of February 23, 2022. Once it has been established that a claimant has sustained a compensable injury—which was a stipulation—she is not required to offer objective medical evidence to prove entitlement to additional benefits, *Ark. Health Ctr. v. Burnett*, 2018 Ark. App. 427, at 9, 558 S.W.3d 408, 414.

The evidence on this point boils down to whether the testimony of the claimant and the opinion of her treating physician is more persuasive than the report of a doctor who only reviewed records provided to him. I found claimant to be a credible witness as to her current condition. I further find Dr. Randolph's recommendation is more credible than the opinion of Dr. Pick which denied that recommendation; both Dr. Randolph and Dr. Miedema attempted conservative care, and it failed to alleviate claimant's medical issues. Therefore, claimant's proof is sufficient to support her request for continued medical treatment for her compensable injury.

The final issue for consideration involves claimant's request for temporary total disability benefits if she has the recommended surgery. As stated above, claimant acknowledged at the hearing that there were no unpaid temporary total disability benefits; instead, claimant is simply requesting temporary total disability benefits with respect to the surgery recommended by Dr. Randolph. A claimant who suffers a non-scheduled compensable injury is entitled to temporary total disability benefits so long as she remains

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within their healing period and has a total incapacity to earn wages. While claimant may become totally incapacitated at some point in the future, as of the time of the hearing she was not totally incapacitated from earning wages and it would be speculative to award temporary total disability benefits at this time. Any ruling on future temporary total disability benefits would be speculative and not based upon the evidence of record. Therefore, no temporary total disability benefits can be ordered at the present time.

ORDER

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Randolph. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as of the date of the hearing.

Pursuant to A.C.A. § 11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. § 11-9-715(a)(4).

Respondent is responsible for paying the court reporter's charges for preparation of the hearing transcript.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE