

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405695

RHONDA BAKANOFF,
EMPLOYEE

CLAIMANT

AREA AGENCY ON AGING NW,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED OCTOBER 26, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 7, 2005 in Mountain Home, Arkansas. A prehearing order was entered in this case on March 18, 2005. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or during the course of the hearing and are hereby accepted:

1. Employer/employee relationship existed on or about November 12, 2003.

2. This claim has been controverted in its entirety.
3. The claimant's average weekly wage at the time of the alleged injury was \$244.00 per week, entitling the claimant to benefits at a total disability rate at \$162.00 per week if this claim is found compensable and the claimant found to be entitled to disability benefits.
4. The parties stipulate that an incident occurred at the residence of Mr. Paxton on November 12, 2003.
5. The claimant's mother and the claimant's daughter if called to testify would corroborate the claimant's testimony.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited during the course of the hearing to the following:

1. Is the injury compensable (arise out of the course and scope of the claimant's employment with the respondent)?
2. Reasonable and necessary medical treatment.
3. Is the claimant entitled to the treatment recommended by Dr. Blankenship?
4. Unpaid medical bill to Harrison Hospital (MRI billing).

5. Controverted attorney fees.

All other issues, including liability for temporary disability or permanent disability, are reserved.

The record consists of the September 7, 2005 hearing transcript and the exhibits contained therein.

DISCUSSION

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant's testimony, the medical evidence, and the stipulated testimony of the claimant's mother and the claimant's daughter, all persuade me that the claimant had no ongoing back problems before

November 12, 2003. On November 12, 2003, the claimant was working in the home of an Area Agency on Aging client. While assisting the client to stand from a wheelchair, the claimant was required to bear a significant portion of his weight when he started to fall. She experienced pain in the low back area which she initially self-diagnosed as a pulled muscle. She reported the injury the next day, and initially declined an offer to send her to a doctor. However, when her back problems did not resolve, she presented to Dr. Collins on December 22, 2003. Her back problems still did not resolve, and she ultimately stopped working in March of 2004. At the time of the hearing held on September 7, 2005, her back pain had still not resolved.

I find that the act of catching a client from falling was a "specific incident" within the meaning of the Arkansas Workers' Compensation Law. There is likewise no dispute that this incident occurred in the course and scope of Ms. Bakanoff's employment with the Area Agency on Aging. In light of Ms. Bakanoff's lack of back/thigh symptoms before November 12, 2003 and the persistent nature of her symptoms since that date, I find that she has established by a preponderance of the evidence that she sustained a back

injury on that date that has at least required medical treatment.

The more difficult issue is whether the nature and extent of any back injury sustained on November 12, 2003 is established by medical evidence supported by objective findings. The Arkansas Courts have recognized many types of findings adequate to satisfy the "objective findings" requirement of Act 796 of 1993. For example, passive range motion testing (but not active range of motion testing) is by definition an objective finding. Hayes v. Wal-Mart Stores, 71 Ark. Code Ann. 207, 29 S.W.3d 751 (2000). Muscle spasms observed by a physician or a physical therapist are objective medical findings. Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). A fibrous mass observed by a physician is an objective finding. Daniel v. Firestone Building Products, 57 Ark. App. 123, 942 S.W.2d 277 (1997).

Diagnostic test results are objective findings. Thus, soft tissue swelling in the hip indicated by x-ray is an objective finding. Meister v. Safety Kleen, 339 Ark. 91, 3 S.W.3d 320 (1999). Straightening of the normal lordotic curvature of the spine, indicative of muscle spasm, is an objective finding. Estridge v. Waste Management, 343 Ark.

276, 33 S.W.3d 167 (2000). Disc abnormalities identified on diagnostic testing are objective findings. Aeroquip, Inc. v. Tilley, 59 Ark. App., 954 S.W.2d 305 (1997).

However, a physical therapist's report of "muscle tightness" is not equivalent to a physical therapist's observation of "muscle spasms", since muscle tightness can come under the voluntary control of the patient. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001). Likewise, a physical therapist's observation of muscle spasms is distinguishable from a physical therapist's notation of muscle spasms based on symptoms reported by the claimant, since the claimant's report of symptoms comes within the voluntary control of the patient. See e.g., Continental Express, Inc. v. Freeman, supra.

In the present case, Ms. Bakanoff underwent MRI testing of the lumbar spine on January 26, 2004. Dr. Earl Peebles, an orthopedic specialist, performed an evaluation of Ms. Bakanoff and her MRI for the respondent on May 27, 2004. Dr. Peebles interpreted the MRI study as was within normal limits for Ms. Bakanoff's age. Dr. Peebles diagnosed a lumbo-sacral strain in light of localized tenderness over the inter-spinous ligament which he opined should resolve with time and noninvasive management.

However, Dr. James Blankenship, a spine neurosurgeon who evaluated Ms. Bakanoff on referral from her treating physician indicated on March 10, 2004 that Ms. Bakanoff had mechanical signs indicative of radiculitis and a discogenic component to her pain, and Dr. Blankenship summarized the relevance of the MRI to his conclusions as follows:

IMPRESSIONS: I have reviewed her MRI in its entirety. She was concerned that there were some sacral nerve root cysts that were noted. I have reviewed this with her and given my thoughts on the current etiology of her pain. Her plain films do show some mild rotary scoliosis. The patient has five moveable lumbar segments with no dislocation noted. The patient's MRI does show minimal disc space changes at L3-4 and more significantly at L4-5 with some mild lateral recess stenosis. The patient does not have any evidence of significant lateral protrusion, although there is a questionable lateral disc protrusion on the left hand side at 5-1 which is contra-lateral to her leg pain. At present, I do not see a true compressive etiology that would explain her leg pain...

RECOMMENDATIONS:...

...

I have told her that given the disc space changes that are noted on her MRI and her examination that I think that a discogenic cause of her pain is quite likely. I have told her that the following therapy [sic] initiated based on her original injury and the thought that her current problem is more of a discogenic problem...

...

It is my opinion that her current pain syndrome is directly related to her on-the-job injury that she suffered....

In light of the persistent nature of Ms. Bakanoff's symptom's in September of 2005, nearly 1 ½ years after Dr. Peeples predicted a temporary injury that should resolve, I accord greater weight to Dr. Blankenship's opinion that the injury is disc-related than the weight I accord Dr. Peeples' conclusion that the injury was instead a temporary strain.

I also find that the disc injury is established by medical evidence supported by objective MRI findings. In reaching this conclusion, I am not persuaded by the claimant's attorney's argument during the hearing that the MRI finding of "disc dessication" is an objective finding of any acute injury sustained on November 12, 2003. There is no evidence in the record that I can perceive indicating that disc dehydration is a sign or result of any type of acute injury.

However, I note that Dr. Blankenship interpreted the MRI as indicating two levels of disc space changes which he obviously deemed significant and related to the work injury. As discussed above, disc abnormalities identified by diagnostic testing have been interpreted by the Commission and the Courts as "objective" within the meaning of Act 796

of 1993, and as I interpret Dr. Blankenship's report quoted above, these disc space changes are precisely the objective findings which support Dr. Blankenship's medical conclusion that the claimant sustained a disc injury.

While I am not aware of any prior Commission or Court opinions addressing whether MRI findings of disc space narrowing can be objective findings to support a neurosurgeon's diagnosis of disc injury, I note that the Arkansas Court of Appeals has affirmed a finding that a "hot" bone scan can be an objective medical finding of an unseen bone fracture. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). Likewise, the Courts and the Commission have now concluded that straightening of the normal lordotic curvature of the spine during diagnostic testing can be an objective finding of muscle spasm, notwithstanding that muscle spasm was never physically observed by the physician and notwithstanding that straightening can be caused by positional posture of the patient during testing. See generally, Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000).

In light of the conclusions of the Courts in Robison, Estridge, and similar cases, I see no legitimate reason to exclude disc space narrowing from fulfilling the requirement

of an objective medical finding of a disk injury where, as here, a neurosurgical specialist has identified and relied on that specific finding in rendering a diagnosis of disc injury sustained by the patient. In light of Dr. Blankenship's conclusions quoted above, the persistent nature of the claimant's symptom after the work incident, and her lack of symptoms before the work incident, I also find that the claimant has established by a preponderance of the evidence that the objective medical finding of disc space narrowing identified by Dr. Blankenship is causally related to the claimant's work injury.

In light of the persistent nature of the claimant's symptoms, I also find that additional medical treatment is reasonably necessary to treat her compensable back injury, said treatment including, but not limited to, the treatment and possible more focused diagnostic testing that Dr. Blankenship recommended on March 10, 2004. Of course, with the passage of so much time, I note that Dr. Blankenship's recommendations might change completely if the claimant chooses to return to Dr. Blankenship for her further treatment. I also find that the respondent is liable for all other reasonable and necessary treatment sustained to date and required in the future, including, but not limited

to, the possibly unpaid MRI bill for testing performed in 2004.

The claimant has also raised issues regarding the constitutionality of the Arkansas Workers' Compensation Law, and has requested that I recuse from deciding those issues. The Arkansas Supreme Court has indicated that constitutional questions should be avoided where appropriate. In the present case, the claimant stands to gain nothing financially if I were to address the constitutionality of the Arkansas Workers' Compensation Law, or if I were to consider further the claimant's request that I recuse from addressing the constitutionality of the Arkansas Workers' Compensation Law, since I have already above provided the claimant precisely the benefits which she seeks. Under these circumstances, I find that the claimant's constitutional argument and the associated recusal request are moot. See Quinn v. Webb Wheel Prods., 334 Ark. 573, 976 S.W.2d 386 (1998).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Employer/employee relationship existed on or about November 12, 2003.
2. This claim has been controverted in its entirety.
3. The claimant's average weekly wage at the time of

the alleged injury was \$244.00 per week, entitling the claimant to benefits at a total disability rate at \$162.00 per week if the claimant is entitled to disability benefits.

4. The parties stipulate that an incident occurred at the residence of Mr. Paxton on November 12, 2003.

5. The claimant's mother and the claimant's daughter if called to testify would corroborate the claimant's testimony.

6. The claimant proved by a preponderance of the evidence that she sustained a compensable low back injury on November 12, 2003.

7. I find that additional medical treatment is reasonably necessary to treat the claimant's compensable back injury, including but not limited to, the treatment and possibly more focused diagnostic testing that Dr. Blankenship recommended on April 10, 2004.

8. The respondent is also liable for all other reasonable and necessary treatment sustained to date and required in the future, including but not limited to the possible unpaid MRI bill for testing performed in 2004.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

I am without authority to award the claimant's attorney an attorney's fee on these specific medical benefits awarded herein. However, the claimant's attorney will be entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may become entitled as a result of my finding that the claimant proved by a preponderance of the evidence that she sustained a compensable back injury.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge