BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E711749/E905201

SHARRION BARNES ROGERS, Employee	CLAIMANT
ALMA SCHOOL DISTRICT, Employer	RESPONDENT
RISK MANAGEMENT RESOURCES, Carrier	RESPONDENT

OPINION FILED AUGUST 22, 2005

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

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On July 25, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 19, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked 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 her right shoulder on June 3, 1996.

3. The claimant sustained a compensable injury to her right elbow on July 28, 1997.

4. The prior opinions of the Administrative Law Judge, Full Commission, and Court of Appeal are final.

5. Respondent has paid temporary total disability benefits from March 29, 1999 through November 8, 1999.

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

1. Whether claimant suffered compensable injuries in the form of a brachial plexus injury and an injury to her cervical spine in 1996 and/or 1997.

2. Medical treatment from Drs. Birky and Capocelli relating to the brachial plexus and cervical spine.

3. Temporary total disability benefits from November 9, 1999 through a date yet to be determined.

4. Whether claimant's continued symptoms of numbness in her right arm are causally related to her compensable right shoulder or right elbow injury.

5. Attorney fee.

At the time of the hearing the parties made several changes and clarifications to the issues. First and foremost, claimant contends that her brachial plexus injury and the injury to her cervical spine are causally related to the compensable injury which occurred in 1997. Claimant makes no claim for benefits relating to the compensable right shoulder injury which occurred in 1996. Claimant has also raised as an issue her entitlement to permanent partial disability benefits based upon a 10% rating assigned by Dr. Capocelli. Finally, claimant also requested a reservation of the issue of her entitlement to benefits for wage loss.

The claimant contends that she suffered compensable injuries in the form of a brachial plexus injury and an injury to her cervical spine on July 28, 1997. As a result, claimant seeks payment of medical treatment for this conditions from Drs. Birky and Capocelli. Claimant also contends that she is entitled to additional temporary total disability benefits from November 9, 1999 through a date yet to be determined. Claimant also seeks additional medical treatment relating to her compensable right elbow injury as a result of the 1997 incident. Claimant also requests permanent partial disability benefits and an attorney fee.

The respondents contend claimant's healing period for her July 28, 1997 right elbow injury ended on or before November 8, 1999. Respondents deny that claimant's current problems are due to the 1997 compensable injury. The finding that her right shoulder problem is not related to the 1997 injury is res judicata. In 2002, Dr. Birky opined that claimant had a brachial plexus injury associated with hyper extension of her shoulder when she fell off the school bus and caught herself. This is the 1996 injury for which additional benefits are barred by the statute of limitations and that finding is res judicata. In 2003, claimant was diagnosed with a herniated disc, osteophytes at C5-6 and C6-7. Respondents deny this condition is causally related to claimant's injury five and one-half years ago. The only medical treatment to which the claimant was entitled was for her right elbow injury. The Full Commission in its opinion dated July 3, 2000 affirmed the law judge's order allowing the claimant to change physicians to Dr. Frazier. That decision was not appealed by the respondents; however, the claimant sought no medical treatment from Dr. Frazier until one and one-half years ago. Then she saw him a couple of times and he provided no treatment for the right elbow.

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 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 the pre-hearing conference conducted on May 19, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her neck as a result of the incident on July 28, 1997.

3. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable brachial plexus injury as a result of the incident on July 28, 1997.

4. Respondent is not liable for payment of medical treatment provided by Drs. Birky and Capocelli.

5. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable right elbow injury. Dr. Frazier remains claimant's authorized treating physician for that condition.

6. Claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits for her compensable right elbow injury subsequent to November 8, 1999.

7. Respondent has controverted claimant's entitlement to additional medical treatment for her compensable right elbow injury.

FACTUAL BACKGROUND

The claimant is a 53-year-old woman with a 10th grade education who obtained her GED in 1980. Claimant began working for the respondent as a school bus driver in 1992. After beginning her employment with the respondent the claimant also began performing a second job for the respondent as a custodian. These were two separate jobs with separate contracts. As a custodian the claimant performed general custodial duties cleaning the student union and administration building during the school year. During summer months claimant's custodial job turned into a maintenance job which required different job duties such as painting and cleaning buses.

The parties have previously stipulated that claimant suffered a compensable injury to her right shoulder on June 3, 1996. On that date, the claimant was washing the roof of a school bus when she slipped and fell. Claimant broke her fall by grabbing the emergency hatch, but injured her right shoulder in the process. Claimant sought medical

treatment from Dr. Bishop, her family physician, on one occasion. Claimant was placed on light-duty work for a period of time but did not seek any medical treatment other than the one visit with Dr. Bishop.

Claimant suffered a second compensable injury on July 28, 1997. Claimant testified that the bathrooms at the respondent's high school were being remodeled and all bathroom fixtures had been removed for cleaning. Claimant testified that as she was lifting a toilet bowl to put it on a table to clean her hand slipped and the bowl started to fall. Claimant testified that she caught the bowl with her knee and placed it on the table, but injured her right forearm and elbow in the process.

Claimant again returned to Dr. Bishop who placed claimant on light duty for a period of time. In the fall of 1997 claimant returned to driving a school bus but was unable to continue performing that job because she could not open and close the bus door. Based upon claimant's continued complaints of pain, Dr. Bishop referred claimant to Dr. Greg Jones who treated claimant conservatively. Claimant was unhappy with treatment from Dr. Jones and after a discussion with Karen Podgornick, a rehabilitation nurse, claimant sought medical treatment from Dr. Claude Martimbeau who diagnosed claimant as suffering from epicondylitis. Although Dr. Martimbeau initially treated claimant conservatively, he eventually performed a tendon release on March 5, 1998. Dr. Martimbeau subsequently released the claimant from his care with physical restrictions and a permanent physical impairment rating in an amount equal to 4% to the right upper extremity. Benefits associated with that rating were accepted and paid by the respondent.

Claimant subsequently returned to maintenance work following her release by Dr. Martimbeau and to the custodial work that fell within her restrictions. However, claimant could not return to work as a bus driver. Claimant eventually returned to Dr. Martimbeau for additional medical treatment and he took claimant off work for an additional period of time before again releasing her with restrictions in January 1999.

Following her release by Dr. Martimbeau claimant was evaluated by Dr. G. Thomas Frazier, an orthopaedic surgeon in Little Rock. In a report dated March 29, 1999, Dr. Frazier discussed various physical problems involving claimant's upper extremity. With respect to claimant's right elbow, it was Dr. Frazier's opinion that claimant had suffered from a right elbow flexion contracture and that she might wish to consider surgical treatment to improve her elbow extension. Following her visit to Dr. Frazier claimant again sought medical treatment from Dr. Martimbeau who recommended that claimant undergo physical therapy in order to increase her range of motion. In a report dated June 30, 1999, Dr. Martimbeau indicated that claimant was not making progress with her physical therapy and noted that surgery might be necessary in order to improve extension of her arm.

Subsequent to these evaluations a hearing was conducted on November 8, 1999. At that time the claimant was requesting various additional compensation benefits. Significantly, claimant contended that her right shoulder complaints were the direct result of either the 1996 injury, the 1997 injury, or a compensable consequence of the surgical treatment for her compensable right elbow injury. That hearing resulted in two ALJ opinions, two Full Commission opinions, and an opinion from the Arkansas Court of Appeals. Those prior opinions held, *inter alia*, that claimant's right shoulder condition and depression were not compensable; that Dr. Frazier was the authorized treating physician for claimant's compensable right elbow; and that claimant was entitled to additional medical treatment for her right elbow.

Following those hearings claimant again returned to Dr. Frazier on February 25, 2002 complaining of pain in her right elbow. Dr. Frazier referred claimant to Dr. Rutherford for an EMG/NCV study which was essentially normal. As a result, Dr. Frazier referred claimant to a neurologist in Fort Smith for a determination of the etiology of left upper extremity complaints and stated that once that determination had been made additional

treatment for her right elbow could be considered. Claimant underwent this evaluation by Dr. Birky, a neurologist in Fort Smith. Dr. Birky ordered an MRI scan of the claimant's cervical spine which revealed a disc herniation at C5-6 and C6-7. Dr. Birky also opined that in his opinion the claimant might suffer from a brachial plexus injury. Dr. Birky referred claimant to Dr. Capocelli, neurosurgeon, for treatment of claimant's cervical disc herniations. Dr. Capocelli performed surgery on claimant's cervical spine on February 3, 2003.

Claimant has filed this claim contending that she suffered a brachial plexus injury and an injury to her cervical spine as a result of the incident on January 28, 1997. Claimant does not claim any compensation benefits associated with the June 1996 incident. Claimant also seeks payment of medical treatment provided by Drs. Birky and Capocelli, temporary total disability benefits, and additional medical treatment for her compensable right elbow injury.

ADJUDICATION

COMPENSABILITY OF CERVICAL SPINE INJURY.

Initially, claimant contends that she suffered a compensable injury to her cervical spine in the form of herniated discs as a result of the incident which occurred on July 28, 1997. In support of her contention claimant relies primarily upon the opinion of Dr. Capocelli, the neurosurgeon who performed surgery on claimant's cervical spine. In a report dated July 7, 2004, Dr. Capocelli stated that he believed the claimant suffered the herniated disc in her cervical spine at the time of the incident with the toilet bowl on July 28, 1997. Dr. Capocelli reiterated that opinion in his deposition of June 30, 2005.

After reviewing all of the evidence presented, I find that Dr. Capocelli's opinion regarding causation is entitled to little weight and find that claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her cervical

spine as a result of the incident with the toilet bowl on July 28, 1997.

First, I believe it is important to note that Dr. Capocelli testified that his opinion regarding the relationship between claimant's cervical condition and the incident in July 1997 is based upon the history given to him by the claimant. Dr. Capocelli testified that claimant gave a history to him of immediate pain in her arm and neck while lifting the toilet bowl. Dr. Capocelli also testified that he would expect neck complaints within a few weeks after the accident if it resulted in herniated discs at two levels. A review of the medical evidence does not support Dr. Capocelli's belief that claimant had immediate neck pain while lifting the toilet bowl or within a few weeks after the incident.

First, claimant testified at the hearing on July 25, 2005 that after the incident on July 28, 1997, she only reported an injury to her right arm and elbow. Claimant also admitted that she completed an AR-C form on May 13, 1999 and made no mention of any injury to her neck.

Prior to the first hearing claimant testified at a deposition on July 15, 1999. Claimant was specifically asked at that deposition whether she had injured any other parts of her body besides the right elbow and forearm on July 28, 1997.

> Q. Any other part or parts of your body were hurt at that time?
>
> A. Not that I am aware of.

Furthermore, a review of the hearing transcript from the first hearing conducted on November 8, 1999 fails to reveal any testimony from the claimant regarding an injury to her neck in July 1997.

In addition to the fact that claimant never reported or testified as to any neck injury through the date of the first hearing, I note that the medical records likewise indicate that claimant did not report any neck problems until a significant period of time after the incident in July 1997. For instance, after the injury in July 1997 claimant sought medical treatment

from Dr. Bishop and continued to see him on various occasions because he was her family physician. Dr. Bishop's medical records do not contain any mention of a neck injury until July 24, 2002, almost five years after the July 1997 incident.

The medical records also indicate that claimant was evaluated for her compensable elbow injury by Dr. Greg Jones on November 18, 1997, October 16, 1997, and November 19, 1997. Dr. Jones' medical reports contain no mention of any neck complaints. The first medical report of any type which mentions neck complaints is a physical therapist note of June 17, 1998. This was almost one year after the incident in July 1997. Also, as previously noted, claimant came under the care of Dr. Martimbeau who performed surgery on claimant's right elbow. Claimant began seeing Dr. Martimbeau in January 1998 and continued to be evaluated by him until she was released in September 1999. The only mention of any neck complaints by Dr. Martimbeau is contained in a report dated June 22, 1998, some five days after the physical therapist's note of June 17. However, Dr. Martimbeau notes that claimant had no neurological symptoms at that time and stated that claimant had never had any neck problems or a neck injury.

Following her treatment and release by Dr. Martimbeau, claimant came under the care of Dr. Frazier. Dr. Frazier's medical reports of March 29, 1999, February 25, 2002, and March 4, 2002, make no mention of any neck problems or complaints. At claimant's deposition in 2003 she was asked if she informed Dr. Frazier about her neck condition and she answered, "I don't think so. I don't remember."

In summary, while Dr. Capocelli has related claimant's cervical condition to the injury in 1997, his opinion is admittedly based upon the history given to him by the claimant. According to Dr. Capocelli's testimony, claimant gave a history of immediate pain in her neck while lifting the toilet bowl in July 1997. However, according to claimant's own testimony, she did not report an injury to her neck following the incident in July 1997. Furthermore, the claimant completed an AR-C form on May 15, 1999 and made no

mention of a neck injury. At a prior hearing conducted on this claim in November 1999, claimant gave detailed testimony regarding the July 1997 injury and her subsequent problems. At no time during that hearing did claimant mention any complaints of neck pain. Furthermore, as previously noted, the medical records of Dr. Bishop, Dr. Jones, and Dr. Frazier contain no mention of any neck problems or complaints. The first mention of any neck pain does not occur until June 1998, almost one year after the incident. Furthermore, that report of neck pain appears to have been an isolated incident since neck pain is not again mentioned in a medical report until 2002, more than four years later. Finally, as previously noted, Dr. Capocelli did not evaluate and treat the claimant until more than five and one-half years after the incident of July 28, 1997.

Accordingly, for the foregoing reasons, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical spine on July 28, 1997.

COMPENSABILITY OF BRACHIAL PLEXUS INJURY.

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 she suffered a brachial plexus injury as a result of the incident in July 1997. The diagnosis of a potential brachial plexus injury was made by Dr. Birky, a neurologist, in a report dated October 3, 2002. Although a prior EMG/NCV performed in March 2002 had shown no evidence of a brachial plexopathy, Dr. Birky ordered a repeat NCV/EMG study. In a report dated October 28, 2002, Dr. Birky stated that the study was abnormal with evidence of chronic denervation that might be indicative of a brachial plexus injury. However, it is important to note that Dr. Birky had stated in his October 3, 2002 report that any brachial plexus injury would have been associated with the injury which occurred in 1996, not the injury of 1997. As previously noted, claimant is not making any claim for

additional compensation benefits associated with the June 1996 right shoulder injury. Instead, claimant's claim is for a brachial plexus injury as a result of the incident in July 1997. According to Dr. Birky, any potential brachial plexus injury would have occurred when claimant fell and caught herself on the emergency door handle in June 1996.

Claimant has the burden of proving by a preponderance of the evidence that she suffered a compensable brachial plexus injury as a result of the incident in July 1997. I find insufficient evidence that claimant suffered a brachial plexus injury as a result of the July 1997 incident.

MEDICAL TREATMENT FROM DRS. BIRKY AND CAPOCELLI AND IMPAIRMENT RATING ASSIGNED BY DR. CAPOCELLI.

In short, the only compensable injury which claimant has been found to have suffered as a result of the incident with the toilet bowl on July 28, 1997 is an injury to her right elbow. The medical treatment provided by Drs. Birky and Capocelli was not provided for treatment of her right elbow condition, but rather was provided for treatment of various other complaints, including a potential brachial plexus injury and the cervical disc herniations. I find insufficient evidence that Drs. Birky and/or Capocelli provided any medical treatment for the claimant's right elbow injury. Therefore, respondent is not liable for payment of any of their medical treatment.

In addition, having found that claimant did not suffer a compensable injury to her cervical spine, respondent is not liable for payment of any permanent impairment rating assigned by Dr. Capocelli as a result of her cervical spine injury.

ADDITIONAL MEDICAL TREATMENT FOR RIGHT ELBOW.

Claimant also contends that she is entitled to additional medical treatment for her compensable right elbow injury. After reviewing the relevant evidence, I find that claimant

has met her burden of proof. The medical records indicate that even after the claimant had surgery on her right elbow by Dr. Martimbeau, she continued to have complaints of right elbow pain. As a result, claimant sought medical treatment from Dr. Frazier in Little Rock and Dr. Frazier was approved as the claimant's authorized treating physician for her compensable elbow injury by the Commission. Claimant was evaluated by Dr. Frazier who in a report dated March 29, 1999, discussed various physical problems involving the claimant's upper extremity. With respect to claimant's right elbow, it was Dr. Frazier's opinion that claimant suffered from a right elbow flexion contracture and that she might wish to consider surgical treatment to improve her elbow extension. Shortly after this visit with Dr. Frazier the claimant's claim went into litigation and resulted in a hearing and various opinions by this administrative law judge, the Full Commission, and the Arkansas Court of Appeals.

Claimant returned to Dr. Frazier on February 25, 2002, again complaining of pain in her right elbow. Dr. Frazier indicated that he would check with the workers' compensation carrier to determine whether any additional medical treatment for the right elbow was approved. Dr. Frazier also referred claimant to Dr. Rutherford for an EMG/NCV study. Following that study which was essentially normal, Dr. Frazier referred claimant to the neurologist in Fort Smith for a determination of the etiology of left upper extremity complaints. This eventually resulted in the surgery on claimant's cervical spine which was performed by Dr. Capocelli. However, Dr. Frazier in his report of March 4, 2002 noted that once those other complaints had been addressed and treated, claimant should consider a release of her right elbow. Following her referral to the physicians in Fort Smith for treatment of the non-work related conditions, claimant has not returned to Dr. Frazier.

I find based upon the evidence presented that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Frazier for her compensable right elbow injury. The medical evidence

reflects that claimant has consistently complained of additional pain in her right elbow subsequent to the surgery which was performed by Dr. Martimbeau in 1998. Claimant was granted a change of physicians to Dr. Frazier who has recommended that claimant consider a surgical release of her right elbow. According to Dr. Frazier's report of March 4, 2002, claimant's right elbow would be treated after the other physical conditions had been addressed. Now that those conditions have been addressed, the claimant may return to Dr. Frazier for treatment of her compensable right elbow injury.

Even though I have found that claimant is entitled to additional medical benefits in the form of an additional evaluation by Dr. Frazier for her compensable right elbow injury, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits for her compensable right elbow injury subsequent to November 8, 1999, the date temporary total disability benefits were last paid by the respondent. Even if one assumes that claimant remained within her healing period for her right elbow injury subsequent to that date, I find insufficient evidence that claimant was temporarily totally disabled from working as a result of her compensable right elbow injury. Claimant may have been totally incapacitated from working due to other non-work related conditions, but claimant has the burden of proving by a preponderance of the evidence that she was totally incapacitated from working as a result of her compensable right elbow injury. I find that claimant failed to meet that burden of proof and therefore find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits for her compensable right elbow injury.

AWARD

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her cervical spine or a brachial plexus injury while employed by

the respondent on July 28, 1997. Respondent is not liable for payment of medical treatment from Drs. Birky and/or Capocelli. 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 an evaluation by Dr. Frazier for her compensable right elbow injury. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits subsequent to November 8, 1999 for her compensable right elbow injury. Respondent has controverted claimant's entitlement to an additional evaluation by Dr. Frazier.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the respondents but with no fee forthcoming from the claimant since no benefits are being paid directly to the claimant.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE