

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404450

MARILYN W. CLYBURN, EMPLOYEE	CLAIMANT
SUPERMARKET INVESTORS, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INS. CO., CARRIER	RESPONDENT

OPINION FILED OCTOBER 13, 2005

Hearing before Administrative Law Judge J. Mark White on September 13, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Robert Cortinez, Sr., Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 13, 2005, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on July 18, 2005, and a Prehearing Order was entered that same day. A copy of the July 18, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including May 1, 2004; that on May 1, 2004, the claimant sustained a compensable injury to her back; that respondents accepted the May 1, 2004, injury as compensable medical-only; and that the claimant earned wages sufficient to entitle her to a compensation rate of \$173 for total disability benefits and \$154 for permanent partial disability benefits.

The parties agreed that the sole issue to be presented was whether additional medical treatment, specifically the diagnostic testing recommended by Dr. Chakales, is reasonably necessary in connection with the compensable injury.

The claimant contends she is entitled to the diagnostic testing recommended by Dr. Chakales. All other issues are specifically reserved.

The respondents contend that the claimant had a slip and fall accident; that according to the treating physician, the subjective complaints do not match the objective findings; that the claimant has been released to full duty; and that no additional benefits are due.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe her demeanor, the

following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that additional medical treatment, specifically the diagnostic testing recommended by Dr. Chakales for the claimant's back, is reasonably necessary in connection with the compensable injury.
4. The respondents have controverted all benefits sought herein.

DISCUSSION

The claimant sustained a compensable injury to her back on May 1, 2004, when she slipped and fell onto a concrete floor. She received initial treatment at Southwest Hospital, including an MRI exam. She returned to the hospital for additional treatment, and she was then treated at Concentra Medical Centers. After requesting a change of physician from the Commission, she was sent to Dr. Harold Chakales for treatment. Dr. Chakales recommended a repeat MRI exam, and the

respondents controverted his recommendation.

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The medical records submitted by the parties herein do not fully reflect the extent of the medical treatment received by the claimant. The claimant sustained her injury on May 1 and was promptly treated at Southwest Hospital. On May 7, at the direction of a Dr. Loretta Depalo, the claimant underwent MRI exams of her cervical and lumbar spine, which exams revealed osteophytes at C4-5 and C5-6 and an annular tear and herniation at L5-S1. None of Dr. Depalo's records have been introduced, nor any other documents from Southwest Hospital, and the next medical document in the record is a treatment note from Dr. Scott Carle of Concentra Medical Centers dated May 20. An accompanying Form AR-3 completed by Dr. Carle reflects that it is a "first report," suggesting that May 20 was the claimant's first visit to Dr. Carle. Dr. Carle released the claimant from care on May 25, with a regular-duty return-to-work date of June 25. The claimant then saw Dr. William Warren, also with Concentra, in June. After an EMG/NCS test revealed

nothing abnormal, Dr. Warren released the claimant and opined in a letter dated June 16 that none of the claimant's symptoms were work-related.

What is odd about Dr. Warren's letter is his statement, "The patient's subjective complaints of injury are not supported by objective medical evidence." Nowhere in the record before me does Dr. Warren explain why the objective findings of the May 7 MRI exams are not related to her subjective complaints. More to the point, at no point do Dr. Carle or Dr. Warren even *mention* the MRI exams. One can only guess whether Dr. Carle or Dr. Warren were aware of the MRI exam results and discounted their importance, or whether Dr. Carle and Dr. Warren were completely unaware of the MRI. It is certainly plausible that they would not have known about the MRI, since it was performed at the referral of a different doctor in a different facility several weeks prior.

There is no evidence whatsoever that Dr. Warren and Dr. Carle were aware of the MRI exam results, nor is there any evidence they accounted for the MRI exam results in forming their opinions. It is well settled that the Commission is not bound by a medical opinion formulated on the basis of an inaccurate or incomplete history. *See, e.g., Towery v. Hi-Speed Electrical Co.*, 75 Ark. App. 167, 56 S.W.3d 391 (2001). Accepting the opinions of Drs. Warren and Carle as valid would require me to speculate as to their underlying knowledge. It is well established that conjecture and

speculation, even if plausible, cannot take the place of proof. *Ark. Dept. of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Therefore, I give the opinions of Dr. Warren and Dr. Carle no weight.

In contrast, Dr. Chakales has reviewed the claimant's prior medical records, including the original MRI exam, and he has recommended a repeat MRI. His recommendation does not appear on its face unreasonable, and given the questionable basis of the opinions given by Drs. Warren and Carle, Dr. Chakales recommendation is essentially undisputed in the evidence. I find that the claimant has proven by a preponderance of the evidence that additional medical treatment, specifically the diagnostic testing recommended by Dr. Chakales for the claimant's back, is reasonably necessary in connection with the compensable injury.

In making this finding, I first note that Dr. Chakales recommended diagnostic testing for both the lumbar and cervical spine. However, the parties have stipulated only that the claimant sustained a compensable back injury; they have made no such stipulation as to a neck injury, and the neck and back are not one and the same. *Cf. Hapney v. Rheem Manufacturing Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000). Compensability of a neck injury was not an issue identified by the parties prior to the hearing, and thus I decline to make any findings as to Dr. Chakales' recommendations for treatment of the neck.

I also note the documents proffered by respondents at the hearing. The respondents contend that the proffered documents prove a pattern or course of conduct by Dr. Chakales of recommending repeat MRI exams in every case. The records submitted regard only three patients out of an unknown number of patients treated by Dr. Chakales. Three isolated examples do not a pattern make. Even if the proffered documents had been admitted, I would reach the same findings herein.

AWARD

The claimant has proven by a preponderance of the evidence that additional medical treatment, specifically the diagnostic testing recommended by Dr. Chakales for the claimant's back, is reasonably necessary in connection with the compensable injury. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein, and the respondents remain liable for continued reasonably necessary medical treatment for the claimant's back, including treatment and diagnostic testing by Dr. Chakales.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge