

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412196

JESSICA SPENCER WARREN, EMPLOYEE	CLAIMANT
NEWTON COUNTY NURSING HOME, SELF-INSURED EMPLOYER	RESPONDENT
CANNON COCHRAN MANAGEMENT SERVICES, INC., TPA	RESPONDENT

Opinion filed June 14, 2007

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on April 18, 2007, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by THE HONORABLE Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by THE HONORABLE James A. Arnold, II, Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on April 18, 2007, in Mountain Home, Arkansas. A Prehearing Order was previously entered in this case January 19, 2007. This Prehearing Order set forth the stipulations offered by the parties, the issues to be litigated, and their respective contentions.

Stipulations

The following stipulations were submitted by the parties, either in the Prehearing Order or at the start of the hearing, and are hereby accepted:

1. There was an October 26, 2004, employer-employee relationship.

2. The compensation rates are \$224.00 and \$168.00.

3. The respondent controverted the claim on or about the time Dr. Armstrong recommended a referral to a rheumatologist, which was in February of 2006.

Issues

By agreement of the parties, the issues to be litigated were limited to the following:

1. Constitutionality of the Workers' Compensation Commission.

2. Compensability.

3. Medical benefits.

4. Attorney's fees.

Contentions

Claimant:

1. Compensability of a specific incident injury on October 26, 2004.

2. Entitlement to medical treatment.

3. Temporary total disability is reserved.

4. The claimant also challenges the jurisdiction of the Workers' Compensation Commission to hear workers' compensation matters.

Respondent:

1. Respondents initially paid some medical but investigated the claim and found that the claimant did not sustain a compensable injury within the course and scope of her employment.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order marked Commission's Exhibit No. 1. The claimant's Prehearing Questionnaire was marked as Claimant's Exhibit No. 1, and the medical packet submitted by the claimant was marked as Claimant's Exhibit No. 2. The claimant's Motion to Recuse and Constitutional Issues were marked as Claimant's Exhibit No. 3, and are hereby incorporated by reference, as it has been blue-backed. The respondent's Prehearing Questionnaire was marked as Respondent's Exhibit No. 1, and its medical packet was marked as Respondent's Exhibit No. 2.

The following witnesses testified at the hearing: the claimant.

DISCUSSION

The claimant, age 21(06/10/86), worked for the respondent for approximately seven months performing duties as a certified nurse's aide. According to the claimant, on October 26, 2004, she injured her back while lifting a resident up into a shower chair, as she started to slip, so the claimant grabbed a hold of her to set her on the floor. At which point, the claimant

maintains she felt a twinge in her lower back. The claimant testified she reported the incident to the nurse.

According to the claimant, the respondent sent her to its company doctor, Dr. Jimmy Justice. She testified he gave her pills and referred her to Dr. Kendrick, a neurosurgeon. The claimant testified that after being examined by Dr. Kendrick, she asked for a second opinion, and respondent sent her to Dr. Armstrong, who referred her to Dr. Moshen, a pain doctor. She further testified that Dr. Moshen gave her shots in her back, but she denies that they helped her symptoms.

The claimant testified Dr. Armstrong referred her to Dr. Cannon, who also gave her injections. According to the claimant, these did not help either, as she continues with sharp pains in her back and lower back.

She testified as of the date of the hearing, she was working at Great Southern Operations(a bank), in deposit services, and had been there for three months. Prior to this, the claimant testified she worked for Tire World as a receptionist. According to the claimant, she worked for Tire World a year and a half. She admitted the respondent returned her to light duty work, but she was unable to keep up with the pace, so she quit.

On cross examination, the claimant admitted the respondent made available light duty work within her restrictions. She

further admitted that Debbie Spilman was her supervisor. The claimant admitted prior to the October 26, 2004 incident, she had some low back problems, but she maintains that they went away within about three days, as this resulted from her having slept wrong.

The claimant also admitted to having treated with Dr. Justice prior to October 26, 2004, as he is her family doctor. According to the claimant, she treated more with Dr. Justice's nurse practitioner, Jennifer Shephard.

Upon being questioned about her prior visits with Nurse Shephard, the claimant gave the following testimony:

Q. Do you recall that after having seen her on September 20, 2004, you returned and saw her again on October 4 of 2004 and at that point you were continuing to have back pain, according to Ms. Shephard's notes?

A. I do not remember returning but if it's there I mean I returned.

Q. You wouldn't question that Ms. Shephard would accurately document what you told her when you presented to her office?

A. Right.

Q. Okay. If you don't recall having seen her on October 1st of 2004, do you recall going back to see her again on October 13 of 2004?

A. No.

Q. And if she documents yet again on October 13, 2004, three weeks or so after you first saw her for back pain that at that point you were continuing to have back pain, would you disagree with the accuracy of her records?

A. No.

The claimant admitted that when she saw Nurse Shephard on October 13, 2004 (13 days before her low back injury at work), she directed the claimant to come back to see her again in two weeks, which would have been October 27, 2004. But instead, the claimant went in to see her on October 26, 2004 because of the incident from work. The claimant admitted that the low back problem that she testified to on direct as having lasted for only three days, lasted for a period of over a month up to and continuing until the day she says she injured her back lifting a resident. However, the claimant maintains that the pain was not the same.

The claimant gave the following testimony concerning her deposition testimony:

Q. Do you recall when I took your deposition in your attorney's office on June 6 of 2006, you told me that before October 26 of 2004 you had never had any kind of problems to any extent with your back, hip or leg?

A. I didn't think it was major.

Q. Do you recognize now that what you told me on June 6, 2006 was, in fact, incorrect?

A. Yes.

On September 20, 2004, the claimant was seen at the Rural Health Clinic under the administration of Nurse Shephard due to complaints of lower back and side pain. The claimant rated her pain as being an eight. The claimant was assessed as having

lumbar spine strain, for which she was prescribed Flexeril.

The claimant returned to the clinic on October 1, 2004, due to continued complaints of back pain and other unrelated symptoms of the throat. Nurse Shephard again assessed the claimant as having lumbar spine strain.

She returned to see Nurse Shephard on October 13, 2004 due to ongoing complaints of back pain and symptoms of depression. It was noted that the claimant cried during the discussion about stress and anxiety. The claimant was assessed as having back pain and depression/anxiety, for which medications were prescribed, and the claimant was directed to return to the clinic in two weeks.

On October 26, 2004, the claimant returned to see Nurse Shephard due to injury to her back while trying to transfer a 300 pound patient to a shower chair, as the patient became unsteady and she had to help her to the floor. It is noted that the claimant reported "she felt a very sharp pain in her back before the patient had to be helped to the floor."

An MRI was taken of the claimant's back on October 29, 2004, with the following impression, "Moderate size posterior central HNP at L3-L4."

Physical therapy notes indicate that the claimant underwent physical therapy treatment from November 3, 2004 until December 3, 2004 at the North Arkansas Regional Medical Center. At which

point, the claimant was noted as making progress and that she had one additional treatment pending conclusion of her therapy. However, notes dated December 10, 2004 show that the claimant did not attend any appointments that week and was discharged given her status as described previously.

On July 5, 2005, the claimant underwent evaluation with Dr. Larry Armstrong. He made the following assessment and recommendation:

Assessment:

1. Sacroiliitis, causally related to the patient's work injury.
2. Herniated nucleus pulposus at L3-4 without clinical symptomatology.

Recommendation:

1. Physical therapy.
2. Injections in the SI joint.
3. No surgical interventions.

The claimant returned to see Dr. Armstrong on February 13, 2006. He reported in pertinent part:

I reevaluated Jessica Spencer who presents back from a Worker's Compensation injury in which she experienced and suffered sacroiliitis. Whether her herniated disc at L3-4 occurred at the time of her injury, I cannot tell, but I can certainly determine that her sacroiliitis was caused by her work and this tends to be her worst problem. She is now walking abnormally secondary to the severe pain in her right sacroiliac joint, which has really not been improving with injections. She is suffering from some right trochanteric bursitis and she has positive Patrick Faber's test on the right. She has significant tenderness over the greater trochanter on the right. I am going to send her to a rheumatologist for this to rule out trochanteric bursitis and possible injection in the greater trochanter....

On June 6, 2006, Dr. Justice wrote:

This young lady is a patient of mine and I have been her family doctor most of her lifetime. It is my opinion stated within a reasonable degree of medical certainty that from both the history given to me of no back problems in this young 18 year old girl prior to the injury of October 26, 2004, and my observations and treatment of her as well as the history of lifting a heavy patient in the Newton County Nursing Home while performing duties as a CNA, as well as the results of diagnostic tests run including an MRI which now reveals a herniated disc in her back, that as a result of said injury, it is reasonable and necessary that this lady be permitted to continue her medical care and treatment including but not limited to a the rheumatologist suggested by Dr. Armstrong as well as a neurosurgeon to ascertain whether or not the herniation and the chronic pain can be remedied by surgery.

A. Compensability

The instant claimant maintains that on or about October 26, 2004, she suffered a compensable injury to her back while attempting to keep a resident from falling. Ark. Code Ann. § 11-9-102(4) (A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must also be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102

(4) (E) (i) .

The credibility of witnesses and the weight to be given to their testimony are matters solely within the province of the Commission. Ringier America v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993) .

After a complete review of the entire record, I find that the preponderance of the credible evidence fail to demonstrate that the claimant sustained a compensable back injury on October 26, 2004, while working for the respondent. The medical evidence clearly establishes that the claimant began treating with Dr. Justice (under the administration of Nurse Shephard) on September 20, 2004 due to back pain, which she rated be at the level of an eight. At the time of her alleged work incident of October 26, 2004, the claimant was still undergoing treatment for back pain with Nurse Shephard, as she saw her on October 13, 2004, and was scheduled for a return visit in two weeks, which would have been October 27, 2004. However, during the hearing, the claimant admitted that at her June 6, 2006 deposition, she testified she had never had any problems to any extent with her back, hip or leg. Also during the hearing, the claimant initially testified she had prior problems with her back that last for about three days due to her having slept wrong. However, on cross examination, the claimant admitted that the low back problem that she testified to on direct as having lasted for three days,

lasted for a period of over a month up to and continuing until the day she alleges the work incident of October 26, 2004.

As to the incident, the claimant essentially testified she felt a twinge in her lower back upon grabbing a hold of a resident to help her to the floor. However, in medical notes dated October 26, 2004, Nurse Shephard reported a history that, "Pt felt a very sharp pain in her back before the pt. had to be helped to the floor." Hence, the claimant's initial report of the incident to Nurse Shephard is inconsistent with her testimony.

Due to all of the foregoing, I find that the claimant is not a credible witness. As a result, her testimony should be given minimal, if any, weight. The claimant gave conflicting versions regarding the events that surrounded her alleged work injury, and she was not forthcoming about her prior back problems or the duration of these problems.

The Commission has the duty of weighing the medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). In the present matter, although Dr. Armstrong was unable to opine whether the claimant's herniated disc at L3-4 occurred at the time of her injury, he opined that her sacroiliitis was caused by her work. A review of the basis for Dr. Armstrong's opinion does not reveal the

claimant was forthcoming with him regarding her current back problems and treatment at the time of her alleged work incident. Therefore, Dr. Armstrong's opinion concerning causation should be given little weight since he was not fully informed of the claimant's medical history regarding her back prior to rendering his opinion. While I recognize that Dr. Justice has essentially opined that the findings revealed on the October 29, 2004 MRI, namely, (the moderate size posterior central HNP at L3-L4), establishes the existence of an injury, as a result of the lifting incident at work, I also find that this opinion should be accorded little weight since it is based on an inaccurate medical history. Although, Dr. Justice has been the claimant's family doctor for many years, it appears he was not aware the claimant was being treated by his nurse practitioner, Ms. Shephard, for complaints of back problems prior to and at the time of the October 2004 incident, as he inaccurately reports in his opinion that the claimant had no back problems prior to October 26, 2004. It would require conjecture and speculation to causally link the claimant's sacroiliitis and herniated disc to the alleged October 2004 specific incident. Conjecture and speculation cannot supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

Therefore, based on the record before me, I am constrained to find the claimant failed to prove by a preponderance of the

credible evidence she suffered a back injury on October 26, 2004 during and within the scope of her employment with the respondent.

B. Constitutional Challenges

The claimant filed a Motion to Recuse and a Brief in support of said motion on April 12, 2007. Therein, the claimant sought my recusal from hearing this case, and challenged, *inter alia*, the constitutionality of the Workers' Compensation Act as it provides for administrative adjudication of workers' compensation claims. At the time of the hearing, the claimant renewed this request. With respect to the claimant's Motion for Recusal and the balance of the motion pertaining to the constitutional challenges, I find that the Arkansas Court of Appeals has soundly rejected the same arguments in Long v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (Ark. Ct. App. Feb. 21, 2007). Therefore, the claimant's motion for recusal is hereby denied, and I find his constitutional challenges to be without merit.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed on or about October 26, 2004, and at all other relevant times.
3. The compensation rates are \$224.00 and \$168.00.

4. The respondent controverted the claim on or about the time Dr. Armstrong recommended a referral to a rheumatologist, which was in February of 2006.
5. The claimant failed to prove by a preponderance of the credible evidence she suffered a back injury while working for the respondent on October 26, 2004.
6. The claimant's Motion to Recuse is denied and his constitutional challenges are found to be without merit pursuant to Long v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (Ark. Ct. App. Feb. 21, 2007).

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge

CH/ml