

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F508469

TINA L. STEPHENSON, EMPLOYEE

CLAIMANT

FULTON COUNTY NURSING HOME, EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES, CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 26, 2008

Hearing before Administrative Law Judge O. Milton Fine II on July 1, 2008, in Batesville, Independence County, Arkansas.

Claimant represented by Mr. Jim Burton, Attorney at Law, Jonesboro, Arkansas.

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

STATEMENT OF THE CASE

On July 1, 2008, the above-captioned claim was heard in Batesville, Arkansas. A prehearing conference took place on May 5, 2008. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. With an additional stipulation reached at the hearing, they are the following four, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer/carrier relationship existed on or about August 7, 2005.
3. Claimant sustained an injury to her lumbar spine that was accepted as compensable.
4. Claimant's compensation rate is \$183.00 for temporary total disability and \$154.00 for permanent partial disability.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1.

The following were litigated:

Claimant:

1. Whether Claimant is entitled to additional medical treatment for her cervical spine.

Respondents:

1. Whether Claimant sustained a compensable injury to her cervical spine.

Contentions

The respective contentions of the parties are as follows:

Claimant:

1. Claimant contends that she sustained a compensable injury to her back during the course and scope of her employment with Respondents and she is entitled to additional medical treatment.

Respondents:

1. Respondents contend that Claimant did not sustain a compensable injury to her cervical spine on August 7, 2005. Claimant did injure her lumbar spine

and that condition was accepted. Any treatment to the cervical spine is not related to the accident that was accepted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to cervical spine or about August 7, 2005.
4. Because of the above finding, the issue concerning Claimant's entitlement to reasonable and necessary medical treatment for her cervical spine is moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

_____ The witnesses at the hearing were Claimant and Charlotte Flanagan, the employee of Respondent Risk Management Resources who handled this claim.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit 1, a compilation of

Claimant's medical records, consisting of one index page and 11 numbered pages thereafter; Respondents' Exhibit 1, a compilation of Claimant's medical records, consisting of one index page and 22 numbered pages thereafter; and Respondents' Exhibit 2, the Forms AR-N and AR-C Claimant filed in connection with this claim, consisting of two pages.

Testimony

Tina Stephenson. Claimant testified that she went to work for Respondent Fulton County Nursing Home (hereinafter "Fulton") on January 21, 1999, and worked through the period at issue in this claim. She was a certified nursing assistant, or CNA. On August 7, 2005, she suffered an injury on the job while lifting a patient, an incident that she described as follows:

I was feeding a resident and she asked me could I put her to bed. And I said sure, but let's eat first. She got through eating. I carried her to her room. She was a wheel chair patient. And she had fell [sic]. I was not working that day. And she had hurt her elbow and her leg. And she couldn't really stand too—very good to help me. And I took her out of the wheel chair. I sat her on the bed. And I put my arms up underneath her legs, and I turned her on the bed. And her head wasn't up on the pillow, and she started laughing. She said are you going to leave me like this? And I said well, no, of course not. And she said, well, put me up on the pillow a little bit more. I said, okay. You help me as much as you can. I run [sic] my hand up underneath her, part of her back, part of her buttocks and legs. And I said, okay, now, here we go. And when I did this, I had my legs placed, and I pulled and pushed. And when I did, she went up. And I kind of had a caught [sic], you know, like a pain. And I said, oh, no. She said what. I said, oh, nothing, because I didn't want, you know, to upset her. And she said you're hurt. And I said, no, no, I'll be fine. I walked out of the room. And she was calling me back. She said, no, come here because of the way you're walking. I went down about four rooms and there's another room with a patient named Mary. I laid [sic] down in her bed. She's a plegic [sic] patient. And I laid [sic] down in the bed, and I said, Lord, I said, please, let me not hurt myself, you know. And I tried to lay there. I sat up. And in the meantime, our RN was running around the building. She was the only one there, you know, running and

stuff. And one of the men that work at the front come [sic] down the hall. And I said, Gerald, I said I've hurt myself.

Claimant at the hearing described being at the right side of the bed, with her left arm under the higher portion of the patient and her right under lower portion of the body, when she moved her. At the time Claimant felt the sensation, she had leaned over and lifted the patient, was twisting from the right to the left, and had moved the patient two feet up the bed. She estimated that the bed to be three feet high, and that the patient to weigh 70 pounds.

Respondents accepted her lumbar injury as compensable. Claimant underwent surgery on her lumbar spine by Dr. Scott Schlesinger, and physical therapy for several months thereafter. Schlesinger released her with an impairment rating. She is presently seeing her family practitioner in Cherokee Village, Dr. Brad Bibb, whom she started seeing after the surgery. He is treating her for her neck problem, and like Schlesinger has prescribed her Flexeril. Bibb has given her three injections in her low back but they have not alleviated her symptoms. He has not prescribed additional therapy.

Claimant stated that at the time she was injured, her "whole back," from her neck to and including her low back and rectum, was hurting. She described the pain as severe. Presently, she has headaches that she described as like migraines, which she attributes to her alleged neck injury. The headaches happen often, and Claimant stated that she was having one at the hearing. Even before Dr. Schlesinger operated on her, she started "dragging" her right leg, and the leg and her right foot became numb. The surgery did not improve this condition. On March 20, 2007, Claimant underwent an MRI that revealed a small herniation at C5-6 to the right. Dr. Bibb did nothing else after that. She stated that

the medications Dr. Bibb placed her on for neck pain have helped some, in that they allow her to relax and fall asleep. In June 2008, Claimant underwent a nerve conduction study that showed that she has carpal tunnel syndrome.

Since the date of the incident, Claimant has not worked anywhere. She was terminated by Respondent Fulton. Thereafter, she was approved for Social Security disability.

When questioned by Respondents, Claimant testified that she received her disability determination 18 months ago. She stated that she injured her back 14 years ago, but was fine. After she underwent surgery for it, she received an impairment rating. That was also a workers' compensation claim. Including one for a broken nose and the claim at hand, she has filed three claims.

Based on her claim filing experience, she stated she was fairly sure that the workers' compensation carriers want honesty from a claimant. Despite the fact that the Forms AR-N and AR-C in evidence show that Claimant indicated that only her back was injured, she insisted that she had filed a form that alleged a neck injury. She admitted that the Form AR-C reflects only an alleged back injury. Shown the Form AR-N (both forms comprise Respondents' Exhibit 2), Claimant contended that this recounted a different incident than the one at issue. But she insisted that the incident at issue occurred on August 7, 2005.

Claimant clarified that while her right leg experiences numbness, pain radiates to both of her legs. She reiterated that after the August 7, 2005 incident, she had pain "from [her] neck down to [her] rectum and . . . both legs." The EMG she underwent showed mild carpal tunnel syndrome, but no radiculopathy from her cervical spine. Dr. Bibb is treating her for hypertension and a heart murmur in addition to the problems discussed before.

Claimant stated that when she went to the emergency room, she was unable to sit still because of the pain. She testified that she told the first doctor she saw that her neck was hurting. Later, she stated that "I was hurting so bad, no, I didn't go in there and say my neck's hurting but my back's not, no, I did not." When asked why the body diagram she used to pinpoint the location of the pain did not show the neck, she stated that "you . . . do the best you can do when you're hurting." Later still in her testimony, she added that when asked about the location of the pain, she told the doctor "I don't know where I'm hurt. I know I'm hurt."

After the emergency room visit, the next doctor she told of her neck back was Dr. Schlesinger. Asked why his records do not reflect this, Claimant stated that Schlesinger dictated this each time she saw him and that he had someone named Amy contact the carrier about getting approval for it. Only Schlesinger and Bibb have checked out her cervical condition.

She testified that she has spoken with the adjuster, Charlotte Flanagan, numerous times about her claim. But Claimant stated that she told Flanagan, "Charlotte, I don't know exactly what is hurt, what I have hurt."

On redirect examination, Claimant testified that prior to April 10, 2006, Dr. Schlesinger had referred her for a cervical MRI. She did not remember when she saw him prior to then. As for the incident recounted on the Form AR-N, she stated that it occurred while she was weighing residents. She did not injure her neck during this incident, and did not do so in any other incident, work-related or not, other than the one on August 7, 2005 involving lifting the patient in bed. Claimant stated that she had never had any neck problems before then.

Under further questioning from Respondents, Claimant's testimony was that shortly before the cervical MRI, she had two rotten teeth pulled at the dentist office. Asked whether the procedure hurt her neck, Claimant testified: "Yeah, yeah. I mean, it—I could tell something was there. But far as really [sic] pain, pain, no. I mean, no. No, I can't recall that either. I mean, no."

Questioned further by her counsel, Claimant clarified that her neck hurt prior to the dental procedure.

Charlotte Flanagan. Called by Respondents, Flanagan testified that she has worked for Respondent Risk Management Resources for 12 years. She is the person who has handled the claim at issue. Flanagan took a recorded statement from Claimant. The statement was later transcribed. She stated that when she asked Claimant what part of her body had been injured, she mentioned only her low back and right leg. Later on in the statement, she asked Claimant if anything else had been injured; but Claimant again stated that it was her low back, going down in her right leg. At no time did Claimant mention that her neck was injured. She added that she never received any claim for mentioning a neck injury.

Flanagan, testifying from the transcript, stated that the statement was taken on August 5, 2005. She admitted that this was incorrect, and stated that it was actually taken August 10, 2005, three days after the alleged incident.

Under questioning from Respondents, Flanagan stated that she has worked in the workers' compensation field for about 21 years. She testified that in her experience, while she has encountered instances where a claimant has emphasized an injury and it was later determined that he or she had another injury of clinical significance that was not initially

reported. But she stated that she has not seen a claimant fail to report an injury due to a “pain overlay” from a more severe injury from another body part. She has encountered situations where claimants have not complained about a certain body part for months; but a review of the medical records shows that there was a complaint early on about that part.

Under questioning from me, Flanagan admitted that she did not transcribe Claimant’s statement and did not compare the transcript to the tape recording thereof. Also, she did not place Claimant under oath.

When questioned further by Respondents, Flanagan testified that she also took notes during the statement, and that they agree with the transcript. According to the transcript, Claimant referred to two incidents other than the one at issue; one of these incidents involved the patient weighings. But she still did not mention a neck injury. Flanagan stated that she had independent recollection that matched her testimony from the transcript.

Under further questioning from me, Flanagan stated that her independent recollection only extends to October 2007, when authorization was requested for neck treatment. Flanagan at that time recalled that Claimant had not mentioned her neck before. At the point, she reviewed Claimant’s medical records. She stated that while on the stand, she was looking at the transcript as well as her notes.

Records-Medical

The medical records of Claimant that were introduced at the hearing and are part of Claimant’s Exhibit 1 and Respondents’ Exhibit 1 reflect the following:

Claimant went to the White River Medical Center emergency room on August 7, 2005, complaining of back pain that arose at work that day. Using the anatomical diagram,

she indicated that the pain was in her low back and radiated down her right leg. She related that she had back surgery in 1987. Claimant was noted to have decreased range of motion in her back, along with muscle spasms and vertebral tenderness. She was assessed as having lumbar pain. A lumbar MRI was conducted on August 9, 2005 and read by Dr. David Wadley.

On August 30, 2005, Dr. Stephen Eichert wrote that after examining Claimant, he assessed her as having mechanical low back pain. He placed her at maximum medical improvement.

On April 10, 2006, Claimant saw Dr. Scott Schlesinger. It was noted to be a follow-up visit. He wrote Flanagan that Claimant had had three epidural steroid injections but continued to experience pain in her back and right buttock as well as burning in the right upper thigh. He added, "**She did not get a MRI of the cervical spine.**" (Emphasis added) No neck symptoms are mentioned in the note, but Schlesinger stated, "I may also suggest going ahead and getting a MRI of the cervical spine to decide if cervical epidural steroid injections are indicated." He added, "I would like to get her a traction unit for the lumbar spine and possibly for the cervical spine as well." His May 25, 2006 letter to Flanagan reads in pertinent part: "She also continues to complain of neck pain . . . No treatment or workup has been authorized for the cervical spine by workman's comp." He further wrote: "With regards to her cervical spine, I told her as soon as she gets authorization we would be happy to get a MRI of the cervical spine."

She underwent a lumbar myelogram on May 23, 2006. On July 6, 2006, Schlesinger performed a spinal stenosis decompression bilaterally at L4 and L5 from the right.

Dr. Schlesinger on August 28, 2006 wrote Flanagan another letter that reads in pertinent part: "The patient also complains of neck pain since her injury at work and would like to have a MRI of the cervical spine. We will attempt to get this done as well."

On November 6, 2006, Dr. Schlesinger wrote that he was releasing Claimant and declaring her at maximum medical improvement as of November 15, 2006 concerning her lumbar condition. He assigned her a ten percent (10%) impairment rating for her lumbar condition. Schlesinger added: "She says that her neck was injured with work and she wants to have this covered, but it has not yet been authorized by Workman's [sic] Comp. I told her I would be happy to see her for this if this gets approved."

Claimant presented on March 13, 2007 to Dr. Brad Bibb with neck pain that she said radiates into her right arm. She related that she injured herself lifting a patient at work in August 2005, which resulted in her having neck and low back pain. While she stated that her neck problems were ongoing, no imaging of her neck had taken place. She reported having teeth extracted a few days before. Bibb assessed her as having cervicalgia and ordered an MRI of the cervical spine. The MRI, conducted on March 20, 2007, showed a small right paracentral disc herniation and possible right foraminal extension at C5-6, which Dr. Jeff Mullen, who read the MRI, opined might affect the right C6 nerve root. Bibb had his office notify Claimant on March 21, 2007 that she has a disc herniation and that it may be pressing on a nerve. He instructed the staff to get patient an appointment with her neurosurgeon.

Because Claimant complained of neck pain that radiates down both upper arms with numbness in the hands, Dr. Bibb referred her for electrodiagnostic testing. The NCV/EMG study done on May 16, 2008 reflects bilateral mild median neuropathy, involving the

sensory nerves only, across the wrists. Dr. Yuanyuan Long stated the test results were consistent with mild carpal tunnel syndrome. He noted that there was no evidence of radiculopathy, myopathy, or polyneuropathy.

Records-Nonmedical

Respondents' Exhibit 2. On August 9, 2005, Claimant signed a Form AR-N that reflects that she was allegedly injured on August 6, 2005 while "doing wt." and felt pain in her back and down her right leg. The Form AR-C she signed on September 23, 2005 reflects that she injured her back while putting a resident into bed.

ADJUDICATION

A. Compensability

Claimant is seeking additional medical treatment for her cervical spine. But Respondents contend that the alleged injury is not compensable and did not arise out of the August 7, 2005 lifting incident at Respondent Fulton, when Claimant sustained a lumbar injury that Respondents accepted.

In order to prove the occurrence of an injury caused by a specific incident or incidents identifiable by time and place of occurrence, a claimant must show by a preponderance of the evidence that: (1) an injury occurred that arose out of and in the course of his or her employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) 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).

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003)(citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947)).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Claimant underwent a cervical MRI on March 20, 2007 that reflected a small right paracentral disc herniation and possible right foraminal extension at C5-6, which Dr. Mullen stated might affect the right C6 nerve root. Hence, the medical evidence, supported by objective findings, shows that Claimant at some point sustained a cervical injury. But this is over 19 months after the lifting incident at Fulton, and eight months after the first mention of her cervical spine appears in her records. Not until November 6, 2006, nearly 15 months after the incident, do her records reflect that she even attributed this condition to lifting the patient at Fulton.

Claimant testified in detail about the incident on August 7, 2005 that led to the instant claim. She stated that the pain she felt after moving the resident was severe and

extended from her neck, to her rectum, and down her right leg. Her testimony concerning whether she mentioned the alleged cervical spine injury at the emergency room that day was inconsistent. Claimant first stated that she informed the first doctor she saw that day that her neck was in pain. Later, she retreated from this, stating that she did not specifically indicate that she had neck pain. She explained that this failure was due to the extreme amount of pain that she was suffering. Her records of that visit show that when she was asked to pinpoint on an anatomical diagram where she was hurting, she indicated that only her low back and right leg were affected.

The reports Claimant filed around August 7, 2005, contained in Respondents' Exhibit 2, are also silent as to any involvement of Claimant's neck in the patient-lifting incident. The documents reflect only injuries to the back and right leg.

The absence of cervical complaints contemporaneously with the August 2005 incident continues with Claimant's statement to Charlotte Flanagan, the adjustor. When they spoke on August 10, 2005, three days after the incident and after Claimant received initial treatment, she mentioned only her low back and right leg as being injured. Claimant never indicated to Flanagan that she was having any problem with her cervical spine.

As discussed above, the first instance in which her cervical spine is referenced in her medical records is on April 10, 2006. Dr. Schlesinger wrote on that day that Claimant "did not get a MRI of the cervical spine." She testified that prior to April 10, 2006, Schlesinger referred her for a cervical MRI. However, she did not remember when she the doctor before then.

It is true that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that

the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). But I find that this at least eight-month delay in this case is not reasonable. I cannot attribute her cervical disc herniation to her employment at Respondent Fulton without resorting to speculation and conjecture, which I am not permitted to do. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). She has not proven by a preponderance of the evidence that, *inter alia*, this injury arose out of and in the course of her employment at Fulton. For that reason, she has not proven that she sustained a compensable injury.

B. Reasonable and Necessary Medical Treatment

Claimant has contended that she is entitled to reasonable and necessary medical treatment of her alleged cervical spine injury. However, because she has not proven that this is a compensable injury, this issue is moot and will not be addressed.

CONCLUSION

Claimant bears the burden of proving by a preponderance of the evidence that his alleged cervical spine injury is compensable. She has been unable to do this. Therefore, her claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge