

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F910099

MARIA CHAVEZ, Employee

CLAIMANT

TYSON POULTRY, INC., Self-Insured Employer

RESPONDENT

OPINION FILED MAY 16, 2012

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

On April 12, 2012, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 25, 2012, 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 employee/employer relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to her lumbar spine on November 10, 2009.
4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$279.00 for total disability benefits and \$209.00 for permanent partial disability benefits.
5. Respondent accepted and paid permanent partial disability benefits based on a 7% rating assigned by Dr. Knox.

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

1. Compensability of injury to claimant's cervical spine.
2. Additional medical for lumbar spine.
3. Medical related to claimant's cervical spine.

The claimant contends she suffered a compensable injury to her cervical spine on November 10, 2009, and is entitled to medical expenses related thereto. She also requests additional medical for her lumbar spine.

The respondent contends it accepted the claimant's November 10, 2009 lumbar spine injury as compensable, provided medical treatment, and paid an impairment rating equal to 7% to the body as a whole. Dr. Knox, claimant's chosen physician, advised that she had reached maximum medical improvement as of April 13, 2011, and there is no indication that claimant needs additional treatment for her compensable back injury. Respondent denies claimant sustained a cervical injury on November 10, 2009 and respondent is not liable for treatment or evaluation of non-compensable conditions. Claimant apparently told Dr. Knox when she first saw him one year after the compensable injury that her neck was injured in the compensable accident. That is contrary to the medical evidence during the preceding one year.

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 January 25, 2012, 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 is entitled to additional medical treatment for her compensable lumbar spine injury.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical spine on November 10, 2009.

4. Respondent is liable for payment of any unpaid medical treatment relating to the claimant's cervical spine. In addition, respondent is liable for payment of a cervical MRI scan and a follow-up visit to Dr. Knox.

### FACTUAL BACKGROUND

\_\_\_\_\_The claimant is a 57-year-old native of Mexico City who has lived in Arkansas for eleven years. Claimant began working for respondent's Chicken Quick operation in Rogers on March 22, 2007. Claimant testified that she works on the production line separating chicken so that it does not stick together while undergoing the cooking process.

Claimant suffered an admittedly compensable injury to her lumbar spine on November 10, 2009, when she slipped and fell on the floor. Claimant testified that when she fell she struck her spine, neck, and head. Employees called a supervisor and claimant was taken by wheelchair to the nurse's station where she was given pain medication. Two days later on November 12, 2009, claimant sought medical treatment from Lela Shipman, a nurse practitioner. Claimant was diagnosed as suffering from back pain following a fall at work and was prescribed medication. When claimant returned to work for the respondent following that evaluation claimant was sent by respondent to Dr. Berestnev for medical treatment.

Claimant was first evaluated by Dr. Berestnev on November 13, 2009, and he diagnosed claimant's condition as low back pain and a history of head trauma with a head concussion. Dr. Berestnev recommended exercises, medication, work restrictions, and that head trauma aftercare instructions be followed.

Dr. Berestnev subsequently referred claimant to physical therapy which apparently did little to improve claimant's condition. When claimant's condition did not improve Dr. Berestnev ordered a functional capacities evaluation which revealed multiple inconsistencies and a significant degree of symptom magnification. Following that functional capacities evaluation Dr. Berestnev ordered an MRI scan which was performed on February 1, 2010, and revealed mild disc bulging at the L5-S1 level. In a report dated February 10, 2010, Dr. Berestnev indicated that claimant's back pain was non-organic in nature with no evidence of disc protrusion or canal stenosis as evidenced on the MRI scan. He released claimant to regular duties and released her from his care.

Following her release by Dr. Berestnev, claimant filed for and received a change of physician to Dr. Luke Knox, neurosurgeon. Dr. Knox first evaluated the claimant on September 29, 2010, and noted that claimant had suffered a fall at work in November 2009 which was causing back pain, right hip pain, and interior leg pain down to the ankle. He also noted that claimant was suffering from neck pain radiating into the right shoulder. During that visit Dr. Knox recommended that claimant undergo a cervical MRI scan. That MRI was subsequently denied by the respondent. In a report dated April 13, 2011, Dr. Knox noted that claimant continued with neck and shoulder pain extending primarily into her right arm. He indicated that since claimant had not undergone the cervical MRI scan he had little else to offer her from a surgical standpoint. Furthermore, with respect to claimant's lumbar complaints, Dr. Knox indicated that claimant had a permanent physical impairment rating in an amount equal to 7% to the body as a whole. In a letter report of that same date, Dr. Knox likewise indicated that claimant had reached maximum medical improvement with respect to her low back complaints.

Claimant has filed this claim contending that she is entitled to additional medical treatment for her compensable low back injury. In addition, claimant contends that on November 10, 2009, she also suffered a compensable injury to her cervical spine as a

result of the fall. She seeks payment of medical treatment relating to the cervical spine injury.

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#### ADJUDICATION

\_\_\_\_\_ The first issue for consideration involves claimant's contention that she is entitled to additional medical treatment relating to her compensable low back injury. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999). 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 meet her burden of proof.

First, I note that Dr. Berestnev's medical reports indicate that claimant's low back pain was non-organic in nature. As a result, he ordered a functional capacities evaluation which was determined to be unreliable due to inconsistencies and symptom magnification by the claimant during the exam. Dr. Berestnev subsequently ordered an MRI scan of the claimant's lumbar spine which revealed mild disc bulging at the L5-S1 level. However, according to Dr. Berestnev's report of February 10, 2010, claimant's low back pain was non-organic in nature and the MRI scan did not reveal any evidence of a disc protrusion or canal stenosis. Accordingly, Dr. Berestnev released claimant from his care and to return to regular duties.

Claimant was subsequently evaluated by Dr. Knox on September 29, 2010. Although Dr. Knox did recommend a cervical MRI scan, he did not recommend any additional medical treatment with respect to claimant's lumbar spine. In fact, once the claimant's cervical MRI scan was denied by the respondent, Dr. Knox in a report dated April 13, 2011, assigned the claimant a 7% impairment rating for her lumbar spine. That same date, Dr. Knox also completed a letter report indicating that claimant had reached maximum medical improvement and that from a standpoint of her low back complaints he

recommended that claimant close out her claim and again reiterated that claimant had a 7% impairment rating.

Based upon the foregoing evidence, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable lumbar spine injury. As previously noted, the functional capacities evaluation was unreliable due to inconsistencies and symptom magnification and Dr. Knox has indicated that claimant has reached maximum medical improvement with respect to her low back complaints. Accordingly, claimant is not entitled to additional medical treatment for her compensable low back injury.

The second issue involves claimant's contention that she suffered a compensable injury to her cervical spine at the time of the fall on November 10, 2009. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical

spine on November 10, 2009.

In reaching this decision, I am certainly aware that the claimant has some credibility issues with regard to her testimony. I am also aware as previously discussed that claimant gave an unreliable effort during the functional capacities evaluation. However, claimant's testimony regarding her neck complaints is supported by other evidence in this case. First, there appears to be no question that claimant struck her head when she fell on November 10, 2009. As previously noted, claimant's first medical treatment following this accident was from Lela Shipman, a nurse practitioner, on November 12, 2009. While Shipman's medical report does not mention any complaints of neck pain, the report does indicate that claimant's cervical spine was examined and it revealed tenderness of muscles in claimant's cervical spine.

Thereafter, as previously noted, respondent sent claimant for an evaluation by Dr. Berestnev. Dr. Berestnev's medical report of November 13, 2009 likewise does not indicate a specific complaint of neck pain. However, Dr. Berestnev's report does indicate that claimant had a history of hitting her head when she fell. In fact, Dr. Berestnev indicated that claimant's treatment should include head trauma aftercare instructions. In addition, his treatment for the claimant also included exercises. Nurse's notes from the respondent indicate that on November 13, 2009, claimant was given back and neck exercises to perform twice a day. Presumably, if claimant was not having any problems with her neck at the time of her visit with Dr. Berestnev, she would not have been given neck exercises to perform.

Dr. Berestnev also eventually ordered physical therapy. While the physical therapist's note of December 1, 2009 indicates that claimant informed the therapist that her neck did not hurt, a subsequent medical report from that same therapist dated December 10, 2009 indicates that claimant complained of pain extending from her neck down to her great toe.

The remainder of Dr. Berestnev's medical records deal primarily with claimant's complaints of low back pain. However, when claimant was evaluated by Dr. Knox on September 29, 2010, he noted that claimant was complaining of neck pain radiating into her right shoulder. He also recommended that claimant undergo a cervical MRI scan which was denied by the respondent. Although that scan was denied by the respondent, Dr. Knox on that same date also performed a cervical x-ray. Dr. Knox indicated that the x-ray revealed prominent uncinete hypertrophy on both the right and left side of C5-6. *Webster's Medical Dictionary* defines uncinete as a hook or hook shaped. Furthermore, *Webster's Medical Dictionary* defines hypertrophy as excessive development of an organ or a part or an increase such as the thickening of muscle fibers. This finding would constitute an objective finding and would also constitute evidence supporting claimant's contention regarding neck pain. Because of these findings Dr. Knox recommended that claimant undergo a cervical MRI scan.

Based upon the foregoing evidence; specifically, the medical evidence which is independent of claimant's testimony and complaints, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical spine on November 10, 2009. First, there appears to be no question that claimant struck her head on the floor at the time of the fall on November 10. Furthermore, at the time of her initial evaluation by Shipman, an exam revealed tenderness of claimant's cervical muscles. Claimant was subsequently evaluated by Dr. Berestnev at respondent's request and he noted that claimant had a history of head trauma with a head concussion. Dr. Berestnev indicated that claimant should follow head trauma aftercare instructions and he also recommended exercises. According to the nurse's notes of respondent, these included both back and neck exercises. Furthermore, while one physical therapist note indicates that claimant denied any pain in her neck, another therapist note indicates that claimant was complaining of pain from neck down to her great



toe. Finally, Dr. Knox performed a cervical x-ray which revealed findings and resulted in his recommendation of a cervical MRI scan.

Based upon this evidence, I find that claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her cervical spine which arose out of and in the course of her employment with the respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury.

Having proven by a preponderance of the evidence that she suffered a compensable injury to her cervical spine, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's cervical spine injury. This medical treatment will include any unpaid medical treatment relating to claimant's cervical spine. In addition, it will also include the MRI scan as recommended by Dr. Knox as well as a follow-up appointment with Dr. Knox after the cervical MRI scan. Given claimant's inconsistency and symptom magnification as reflected on the functional capacities evaluation with regard to her lumbar spine, claimant's additional medical treatment for her cervical spine will be limited to the MRI scan and a follow-up visit from Dr. Knox. After that follow-up visit a determination may be made with respect to whether any additional medical treatment is reasonable and necessary.

#### AWARD

Claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional medical treatment for her compensable lumbar spine injury. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical spine as a result of the fall on November 10, 2009.

Respondent is liable for payment of any unpaid medical treatment relating to claimant's cervical spine and for payment of the recommended cervical MRI scan and a follow-up visit to Dr. Knox after the scan.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$319.75.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE