

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400140

MALISSIA STARK,
EMPLOYEE

CLAIMANT

KENNAMETAL/RTW,
EMPLOYER

RESPONDENT

ZURICH-AMERICAN INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 11, 2005

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE CONRAD ODUM,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE E. DIANE
GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed December 2, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The stipulations agreed to by the
parties at the pre-hearing conference
conducted on September 29, 2004, and
contained in a pre-hearing order filed
that same date, are hereby accepted as
fact.

2. Claimant has met her burden of
proving by a preponderance of the
evidence that she is entitled to

additional medical treatment for her compensable injury; specifically, surgery as recommended by Dr. Danks.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the December 2, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by

Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has met her burden of proof that she is entitled to additional medical treatment for her compensable injury; specifically, surgery as recommended by Dr. Danks. A carefully conducted de novo review of this claim in its entirety reveals that the claimant's current medical condition, for which she requires surgery, is caused by a pre-existing condition. Therefore, the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment and the

decision of the Administrative Law Judge should be reversed.

The claimant has an established history of cervical spine problems. For example, the record indicates that the claimant underwent anterior cervical fusion at C6-C7 in June of 2003. Moreover, several sections of the emergency room report from the date of the claimant's injury (October 21, 2003), refer to the claimant's history of chronic neck pain and problems, including spinal stenosis at C5-C6. In addition, x-rays taken at the emergency room on October 22, 2003, showed "degenerative disc disease at C5-6 and C6-7," with "mild reversal of the normal lordosis of the cervical spine." Specifically, in his radiology report, Dr. Chitwood stated:

There is narrowing of the interval disc spaces at C5-6 and C6-7 with anterior osteophytes at C6-7 consistent with degenerative disc disease at these levels.

In regards to her October injury, the claimant was discharged from the ER with a dual diagnosis of degenerative disc disease and cervical neck strain.

The following day, October 22, 2003, the claimant was seen in follow-up by nurse practitioner, S.

Max Beasley. In his report of that visit, Mr. Beasley wrote:

Ms. Stark says she has a history of degenerative disc disease of her cervical spine and had surgical fusion of her cervical spine in June of 2002 by a surgeon in Little Rock, Arkansas. She states she has had residual numbness and tingling in her right arm at times.

Mr. Beasley assessed the claimant with head trauma and neck strain, and with degenerative disc disease of the cervical spine. Upon his examination of the claimant on October 24, 2003, Mr. Beasley noted that she was making good progress towards her recovery.

On exam, she has near full range of motion with rotation of her neck. She is able to flex and extend fully. I feel no tightness or spasm on today's exam.

...

She has a new complaint of low back pain, but there are no objective findings. I have informed her that I believe that she is improving, in-so-far as her neck and shoulder pain are concerned.

By October 31, 2003, the claimant demonstrated full range of motion of her neck, her paresthesias had become "occasional," and she showed marked improvement with regards to her neck pain. Mr. Beasley noted that the claimant was scheduled to see a clinic doctor, namely Dr. Gary Moffitt, in one week.

On November 7, 2003, Dr. Moffitt examined the claimant and confirmed that her condition "seemed muscular in nature." Accordingly, Dr. Moffitt referred the claimant to physical therapy and continued her on unrestricted work duty.

On November 19, 2003, the claimant's physical therapist stated:

The patient demonstrates signs consistent with a cervical strain. She does not demonstrate any disc pathology at this time. She does demonstrate significant spasms consistent with nerve root irritation.

The claimant continued her physical therapy until December 3, 2003, at which time she was released pending further orders from her doctor. In the note of that visit, the claimant's physical therapist wrote that the claimant reported some radiating pain down her arm with numbness in her hand, which he attributed to a long drive she had just taken.

On January 11, 2004, the claimant presented to the North West Medial Center emergency department with complaints of a headache, neck, and back pain. "Nurses Notes" included in the admission records reflect that the claimant reported her history of degenerative disc disease and previous spinal fusion surgery to ER personnel.

Patient states she has DDD, has had spinal fusion ... and the graft has "calcified spurs digging into the spine." Patient relates she has an appt. [with a] neurosurgeon in LR in the upcoming weeks.

As in October, the claimant was again discharged with a diagnosis of degenerative joint disease and cervical neck strain. On February 6, 2004, the claimant sought treatment with Dr. Janelle Potts. A report of that visit reveals that the claimant disclosed her ongoing cervical problems to Dr. Potts as follows:

The patient is a 35-year-old female with hypertension and hyperlipidemia who presents today with neck pain. She has had surgery on her neck, she thinks C6, in the past. Recently she hit her head and that seems to have aggravated her neck problems and she would like a referral back to Dr. Williams, her neurosurgeon.

In his clinic note dated August 16, 2004, Dr. Michael Morse opined that the claimant suffered from a cervical disc herniation "secondary to an on-the-job-injury." Dr. Morse, however, did not elaborate on the basis for his opinion that the claimant's condition was work related. Dr. Morse referred the claimant for a surgical evaluation. X-rays taken of the claimant's cervical spine on August 18, 2004, revealed cervical spondylosis at C5-C6 and C6-C7, with some posterior osteophyte at C5-C6 and anterior osteophyte at C6-C7. Based upon his physical examination of the claimant and

a review of her x-rays, Dr. Kelly Danks assessed the claimant with cervical spondylosis, and neuroforaminal narrowing with radiculopathy. Dr. Danks opined that the claimant would need a "3-level fusion at C4-C5, C5-C6, and C6-C7," but he cautioned that he would not perform said surgery until such time as the claimant quit smoking.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The record reveals that on October 20, 2003, the claimant sustained a cervical strain in the course of her employment with the respondent employer. For almost a year thereafter, the respondent provided the claimant with any and all medical treatment which was reasonably necessary in connection with her compensable injury. According to medical reports, and in contradiction to the claimant's testimony, her condition improved. Throughout the course of her treatment, the claimant repeatedly acknowledged and objective medical tests confirmed, that the claimant suffers from chronic residual symptoms associated with her previous spinal fusion surgery and degenerative disc disease. Yet, the claimant now contends that her current symptoms are a result of her compensable neck strain. During the hearing of November 3, 2004, the claimant testified as follows:

From what I understood, when I hit my head, it jolted it down and knocked and blew out one of the bones to the side. And when it blew that one bone out, it took the top bone, the one right above it and the one right below it, with it so far that it's got to be replaced.

It is well established that a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible

evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The medical record is devoid of evidence which support the claimant's above-stated conclusion. Rather, the medical evidence preponderates in favor of the claimant's current condition being causally related to her pre-existing cervical condition.

During her testimony, the claimant adamantly denied having residual problems with her cervical spine after her surgical fusion in June of 2002. However, as previously discussed, the medial record is wrought with reported statements by the claimant that she suffered from chronic residual symptoms associated with her pre-existing condition and surgery. Furthermore, the claimant testified that she was terminated from her employment with the respondent employer because she was unable to work and ultimately accumulated too many absences. In addition, the claimant testified that she is currently unable to work due to her pain. However, the claimant admitted that she applied for and began receiving unemployment benefits shortly after her employment was terminated. Moreover, the claimant admitted that she applied for social security disability benefits while she was receiving unemployment benefits

and was denied. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. Due to the numerous inconsistencies between statement that the claimant made during testimony and statements she made to medical professionals during the course of her treatment, the claimant's testimony should be given little weight. Unfortunately, the claimant was her only witness and the record is otherwise devoid of objective medical evidence that establishes that the claimant's need for additional medical treatment, specifically spinal fusion surgery, is causally related to the claimant's compensable injury.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner