

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405695

RHONDA BAKANOFF, EMPLOYEE

CLAIMANT

AREA AGENCY ON AGING NW,
SELF INSURED EMPLOYER

RESPONDENT

OPINION FILED JUNE 28, 2006

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

Claimant represented by the HONORABLE FREDERICK R.
SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE CURTIS L.
NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed October 26, 2005. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. Employer/employee relationship existed on
or abut November 12, 2003.
2. This claim has been controverted in its
entirety.
3. The claimant's average weekly wage at the
time of the alleged injury was \$244.00 per
week, entitling the claimant to benefits at a
total disability rate at \$162.00 per week if
the claimant is entitled to disability
benefits.

4. The parties stipulate that an incident occurred at the residence of Mr. Paxton on November 12, 2003.
5. The claimant's mother and the claimant's daughter if called to testify would corroborate the claimant's testimony.
6. The claimant proved by a preponderance of the evidence that she sustained a compensable low back injury on November 12, 2003.
7. I find that additional medical treatment is reasonably necessary to treat the claimant's compensable back injury, including but not limited to, the treatment and possibly more focused diagnostic testing that Dr. Blankenship recommended on April 10, 2004.
8. The respondent is also liable for all other reasonable and necessary treatment sustained to date and required in the future, including but not limited to the possible unpaid MRI bill for testing performed in 2004.

The Commission notes that in Finding of Fact Number 7 there appears to be a clerical error. The Administrative Law Judge, in part, awarded diagnostic testing that, "Dr. Blankenship recommended on April 10, 2004." However, Dr. Blankenship recommended focused diagnostic testing on March 10, 2004 rather than on April 10, 2004. We find that since this was an error that was clerical in nature, it has no bearing on the outcome of the case.

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 October 26, 2005 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 proved by a preponderance of the evidence that she sustained a compensable low back injury on November 10, 2003, and awarding additional medical treatment. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer as an aide. The claimant assisted elderly individuals with personal care. The claimant contended that on November 10, 2003, she injured her back while she was assisting a patient. The claimant continued to work after this incident and took some Advil. She reported the incident the following day, but she refused medical treatment. The claimant worked for several weeks

without incident. On December 22, 2003, approximately six weeks after the alleged incident, the claimant saw Dr. Ken Collins. She reported pain and stiffness in her lower back and right leg. Dr. Collins x-rayed the claimant, but these x-rays were unrevealing. He diagnosed her with a low back sprain, prescribed Skelaxin and Celebrex and removed the claimant from work for one week.

The claimant returned to Dr. Collins on December 29, 2003, where she reported that the pain in her leg was gone, her back had improved, but she was still sore. Dr. Collins returned the claimant to regular duty. She returned to Dr. Collins on January 5, 2004, for a re-check, but reported no improvement. Dr. Collins stated that the claimant needed to continue her Celebrex and she could return to work on light duty. The claimant underwent physical therapy on January 6, 7, 12, and 14th.

The claimant sought treatment again from Dr. Collins on January 19, 2004. Dr. Collins noted that she had been working light duty but experienced pain in her back, right buttocks and right thigh towards the end of the day. He ordered an MRI and stated that if the findings were normal she could continue light duty. There is no indication in the medical records that the

claimant returned to Dr. Collins. The claimant underwent an MRI on January 26, 2004, which revealed several cysts and dissection of disk material at L4-5 with a mild annular bulge at this level. The MRI was negative for herniated nucleus pulposus or spinal stenosis.

The claimant sought treatment from Dr. James Blankenship due to the concerns about the cysts. He noted that "the patient's neurological examination was essentially normal. She does have mechanical signs indicative of radiculitis and a discogenic component to her back pain." Dr. Blankenship noted that after reviewing the MRI he did not see any compressive etiology that would explain her back pain. He concluded that the cysts were unrelated to her pain. He recommended an injection of Decadron, Celebrex and an aggressive physical therapy program. On March 22, 2004, the claimant voluntarily quit her employment claiming that she was unable to work.

On May 22, 2004, the claimant underwent an independent medical evaluation with Dr. Earl Peeples. Dr. Peeples examined the claimant, reviewed the MRI and noted that the claimant's cysts were not causing the pain. He stated that the claimant's pain was discogenic. He stated that the MRI was normal considering the age of the claimant, that no major destructive processes or

significant disk abnormalities were present, and that neuro-structures appeared normal. He also noted that the claimant's bone scan that he requested she undergo was negative. Dr. Peeples opined that there was no specific objective radiographic finding that was attributable to the claimant's incident at work. He identified no specific physical problems that would keep the claimant from working as long as there was not heavy lifting involved.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of 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; and (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. If the claimant fails to establish

by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In my opinion, a review of the evidence fails to demonstrate that the claimant can prove by a preponderance of the evidence that she sustained a compensable injury. Although, the evidence does demonstrate that there was an incident at the home of one the claimant's patients on November 12, 2003, when the claimant was trying to lift the patient into a wheelchair, there is no objective medical evidence of an injury. The MRI conducted on January 26, 2003, showed small sacral nerve root cysts, dissection of the disk material at L4-5 and to a lesser degree at L3-4 with no evidence of herniated nucleus pulposus or spinal stenosis. The claimant's MRI revealed that she had several cysts, including a right renal cyst. Dr. Blankenship concluded that the cysts were not the source of the claimant's pain.

Furthermore, Dr. Earl Peeples opined that the MRI scan was normal for the claimant's age and stated, "I am unclear from Dr. Blankenship's report what physical findings he feels would suggest a discogenic

origin to her pain." He also concluded that, "There is not a specific objective radiographic finding that is attributable to her incident at work."

The evidence demonstrates that the claimant continued to go about her daily household routine. She testified that she was confined to the house except to go to the store, that she didn't drive for more than an hour without extreme pain and that she didn't do anything for longer than an hour without a break for at least 20 minutes. However, at the hearing, the claimant testified that her trips to the store involved a 24-mile round trip and she shopped for an hour to an hour and a half. She also cleaned all of her 1800 sq. foot home and does all of her own cooking. She has driven to Tulsa as well as flown to Oregon since her incident. When the claimant went to be seen by Dr. Peeples in Little Rock, instead of staying the night, she turned right around after the appointment and drove for three and a half hours home. Significantly, it is of note that the claimant wore high-heeled shoes to the hearing.

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury supported by objective

findings. Accordingly, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner