

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E711749 & E905201

SHARRION BARNES ROGERS, EMPLOYEE	CLAIMANT
ALMA SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED JULY 13, 2006

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

Claimant represented by HONORABLE MIKE HAMBY, Attorney at Law, Greenwood, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed August 22, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 19, 2004, 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 suffered a compensable injury to her neck as a result of the incident on July 28, 1997.

3. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable brachial plexus injury as a result of the incident on July 28, 1997.

4. Respondent is not liable for payment of medical treatment provided by Drs. Birky and Capocelli.

5. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable right elbow injury. Dr. Frazier remains claimant's authorized treating physician for that condition.

6. Claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits for her compensable right elbow injury subsequent to November 8, 1999.

7. Respondent has controverted claimant's entitlement to additional medical treatment for her compensable right elbow injury.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs and dissents.

CONCURRING AND DISSENTING OPINION

_____I respectfully concur, in part, and dissent, in part, from the Majority's opinion affirming and adopting the Administrative Law Judge's August 22, 2005 opinion. Based upon my de novo review of the record, I concur with the Majority that the claimant is entitled to additional medical treatment of her elbow and forearm. I respectfully dissent with the Majority's finding that the claimant's cervical spine and brachial plexus condition is unrelated to her 1997 injury.

The claimant was employed by the respondent as a bus driver and maintenance worker. During the approximately

nine years that she was employed by the respondent, she sustained two compensable injuries. The first of these was on June 3, 1996. The injury occurred when the claimant was washing the top of a bus and slipped. She avoided falling to the ground by grabbing a safety hatch, injuring her right shoulder.

_____The second injury happened on July 28, 1997. On that date, the claimant was attempting to lift a ceramic commode onto a table to clean it. When the commode slipped she grabbed it to keep it from falling to the floor and suffered an injury to her right elbow and forearm.

_____The two claims generated considerable litigation. It was eventually determined that the claimant's right shoulder injury was the result of her 1996 injury and that the injury to her forearm and elbow were caused by the 1997 injury. Further, it was found that the statute of limitation barred any benefits due as a result of the 1996 claim but that the claimant was entitled to additional benefits arising from the 1997 injury.

_____ Presently, the claimant is alleging she suffered an injury to her cervical spine and brachial plexus as a result of her 1997 injury. She is requesting appropriate medical and disability benefits for that injury and additional medical treatment for problems associated with her compensable 1997 forearm and elbow injury. The respondent denies liability of any additional benefits contending that the claimant's cervical spine and brachial plexus conditions are unrelated to her 1997 injury and that the requested medical treatment for the claimant's elbow and forearm are not reasonable or necessary.

_____ Following her injury in 1997, the claimant was initially seen by Dr. Robert Bishop, a general practitioner. Eventually, the claimant was referred to Dr. Claude Martimbeau, a Fort Smith orthopedic surgeon. Dr. Martimbeau diagnosed the claimant as suffering from epicondylitis. Dr. Martimbeau prescribed her medication and eventually performed a tendon release on her elbow. After the surgery, Dr. Martimbeau continued to follow the claimant's progress

and provided her pain medication and prescribed physical therapy.

Dr. Martimbeau continued to treat the claimant for over one year. While the claimant did show some improvement after surgery, she quickly reached a plateau in which her surgical scars had healed but she continued to have pain, tenderness, and stiffness in her arm. The claimant sought treatment from a number of physicians beginning in mid 1999, including Dr. Bradley Short, a rehabilitation medicine specialist in Fort Smith, Arkansas. Dr. David Collins, a Little Rock orthopedic specialist, and Dr. Reginald Rutherford, a Little Rock neurologist.

_____ Eventually, as a result of a change of physician granted by the Workers' Compensation Commission, the claimant was seen by Dr. Thomas Frazier, a Little Rock orthopedic specialist. In a report dated March 4, 2002, Dr. Frazier noted that the claimant was still having pain and numbness in both upper extremities and that studies of the median and ulnar nerves were normal. He recommended that the claimant seek evaluation from a neurologist in Fort

Smith to determine the etiology of her extremity pain and numbness. Dr. Frazier indicated that once those problems have been resolved, he would resume treating the claimant for problems with her elbow and forearm.

_____As a result of Dr. Bishop's referral, the claimant came under the treatment of Dr. Duane Birky, a Fort Smith neurologist. Dr. Birky first saw the claimant on June 25, 2002 and, after noting that he felt her prior EMG studies were abnormal, directed that she undergo an MRI scan of her neck. That scan was performed on June 28, 2002, and determined that the claimant had herniated cervical discs at C5-C6 and C6-C7. After reviewing the results of the MRI scan and additional EMG studies performed at his direction, Dr. Birky was of the opinion that the claimant's arm and shoulder problems were caused by not only the herniated cervical discs but by a brachial plexopathy (an impingement of a nerve bundle passing through shoulder).

_____Dr. Birky referred the claimant to Dr. Anthony Capocelli, a Fort Smith neurosurgeon for treatment of her cervical disc condition. The claimant first saw

Dr. Capocelli on December 31, 2002. After having the claimant undergo some additional diagnostic testing, Dr. Capocelli determined that a surgical treatment of her cervical disc injury was appropriate. Consequently, he performed a cervical discectomy and fusion at C5-C6 and C6-C7 on February 3, 2003. Dr. Capocelli released the claimant from his care on December 20, 2004.

_____ In support of her contention that the cervical and brachial plexus injuries were the result of the job related accident of July 28, 1997, the claimant relies on the opinion of Dr. Capocelli, the physician who operated on her neck. In his deposition, Dr. Capocelli testified that the radicular symptoms, including the pain in the shoulder and arm were in accordance with the disc herniation discovered by the MRI which prompted the surgery. He also was of the opinion that the type of accident the claimant was involved in 1997 could have resulted in the injuries to her neck and brachial plexus.

_____ The Majority gives little weight to Dr. Capocelli's opinion. This conclusion is reached because

it is believed that Dr. Capocelli's opinion was based upon inaccurate information provide to him by the claimant. The Majority has interpreted Dr. Capocelli's testimony as saying that had the cervical herniation that Dr. Capocelli treated the claimant for occurred at the time of the 1997 injury, she would have had an immediate onset of neck and arm pain. The Majority has indicated that the claimant had not complained of these conditions at the time of the 1997 injury and that she did not begin complaining of radicular problems until more than two years following the injury. In my opinion, the Majority misinterpreted not only Dr. Capocelli's testimony but the specifics of the claimant's medical history.

Dr. Capocelli did not state that neck pain would always be an immediate result of the type of injury sustained by the claimant. He also stated that radicular pain and similar symptoms in the shoulder and arm could also be a likely result, and he was aware of numerous cases where individuals had suffered joint injuries and the symptoms of that injury predominated over the neurological condition, or

the opposite was true in that the symptoms associated with the radiculopathy masked other problems. Further, during his deposition, Dr. Capocelli reviewed the claimant's past medical records and noted that she had received numerous injections for treatment of her elbow and forearm problems that would certainly have relieved the pain and other symptoms which could be expected from her cervical injuries. Dr. Capocelli also noted that the appearance of radicular symptoms after the 1997 injury strongly suggests that the claimant's neck injury occurred after that time, and not as a result of the 1996 accident.

I also note that the Majority is incorrect in their statement that the claimant did not complain of neck or shoulder pain until a period of some years after her injury. In a progress note dated February 11, 1998, the claimant was complaining to Dr. Martimbeau of radiating pain and burning sensations in her arm and pain in her shoulder. Later, after her elbow surgery, the claimant advised her physical therapist as noted in physical therapy notes of June 17, 1998 and June 27, 1998, that she was having

increasing pain in her neck to the extent that she was unable to sleep.

In my opinion, Dr. Capocelli's opinion, as the physician most familiar with the claimant's neck condition, is entitled to significant weight. Dr. Capocelli is an experienced and competent neurosurgeon who, after fully reviewing the claimant's medical records, was of the opinion that the claimant's cervical neck condition was the result of her 1997 injuries. Further, it is my opinion, that Dr. Capocelli was not relying upon a misrepresentation of the claimant's medical history given to him by the claimant. In fact, Dr. Capocelli had access to the claimant's medical records and, as he made clear in his deposition, he was fully aware of the claimant's past medical history. When these medical records were reviewed at the deposition, the doctor maintained the opinion that the claimant's cervical injury was the result of the 1997 accident.

Based upon my review of the medical evidence, it is my opinion, that the claimant has established that her cervical injuries, for which she received surgical treatment

from Dr. Capocelli, and the brachial plexus condition first diagnosed by Dr. Birky, are both a consequence of her compensable injury of July 20, 1997. I reach that conclusion based upon Dr. Capocelli's opinion regarding causation and the fact that the claimant particularly complained of severe arm pain, throughout her treatment history. While it is true that her initial complaint was focused on her elbow, as treatment caused that condition to resolve, she began complaining of pain in her neck and shoulders as well as radicular symptoms in accordance with a cervical injury. For those reasons, I find that the claimant has met her burden of establishing her entitlement to all appropriate medical and disability benefits relating to her cervical neck injury and brachial plexus condition.

For the foregoing reasons, I respectfully concur, in part, and dissent, in part, from the Majority's opinion affirming and adopting the Administrative Law Judge's August 22, 2005 opinion.

SHELBY W. TURNER, Commissioner