

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507280

ANA ALMODOVAR,
EMPLOYEE

CLAIMANT

TWIN RIVERS GROUP, INC.,
EMPLOYER

RESPONDENT

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 28, 2008

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

Claimant represented by the HONORABLE EDDIE WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE JAMES A. ARNOLD, II,
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed May 23, 2007. The administrative law judge found that the claimant did not prove she was entitled to additional medical treatment. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding as modified. The Full Commission finds that the claimant did not prove a

discogram/CT was reasonably necessary in connection with the claimant's compensable injury.

I. HISTORY

The parties stipulated that the claimant, age 50, sustained a compensable injury to her low back on May 20, 2005. A Radiology Report was done on May 23, 2005: "Lumbar Spine, Three Views: Findings: 1. Mild marginal osteophytes/spondylosis at multiple levels. 2. No compression fractures or acute findings."

Dr. Terry L. Clark examined the claimant on May 23, 2005: "This is a 47-year-old female who slipped on a metal sheet and fell onto her low back. She complains of pain in her low back. She denies radicular symptoms and denies pain or injury elsewhere. She specifically denies neck or thoracic back pain....X-ray of her L-spine shows no acute bony injury." Dr. Clark's impression was "Lumbar strain and contusion." Dr. Clark prescribed medication and returned the claimant to restricted work.

An MRI of the claimant's lumbar spine was taken on June 6, 2005:

Examination assumes five lumbar vertebral bodies. Prominent anterior spurs and disc protrusion seen at T11-12 of questionable clinical significance. There is loss of T2 disc signal at L4-5. Mild degenerative bulge seen L4-5, left paracentral

disc bulge seen L4-5 without definite protrusion. Other levels unremarkable. Marrow signal and conus normal.

IMPRESSION:

Degenerative disc changes and disc bulge L4-5. No changes of fracture noted.

Dr. Holder's impression on June 13, 2005 was "Lumbar strain with lumbar spondylosis. The patient's complaints of pain outweigh the objective findings." Dr. Holder planned continued medications and a home exercise program.

An x-ray of the claimant's pelvis was taken on June 14, 2005, with the impression, "Possible periosteal thickening irregularity of the left femoral neck. Differential considerations as above. Nonspecific but if pain is localized to this area, recommend additional correlation with MRI and possibly bone scan."

Dr. Clark's impression on June 14, 2005 was "Lumbar strain and degenerative disc disease."

An MRI of the claimant's left hip was taken on June 22, 2005, "1. Small lesion in the left femoral head with generally a benign appearance. Could just be a bone cyst. Correlation with plain films may be helpful. 2. Probable uterine fibroid and Nabothian cysts on the cervix."

Dr. Clark noted on June 28, 2005, "She had a bone scan on 06/21/2005, which showed increased uptake in the left

femoral head and neck compared to the right....It is my feeling that her discomfort is most likely coming more from the femur than from the low back....I have advised Ms. Almodovar via a translator that it would be wise for her to follow-up with an Orthopedist. However, I have also advised her that I do not feel like this discomfort at the present time is secondary to her original injury. I have advised her that I would be happy to help her set up an appointment with Orthopedics, but there is a possibility that this will be taken out of the realm of Worker's Compensation and placed in the category of her private insurance. She seems to understand this concept, although I am not sure that she totally agrees with it. We will go ahead and attempt to make an appointment with Orthopedics for her."

Dr. Robert G. Bishop noted on or about July 22, 2005, "I feel her symptoms are a result of her lumbar strain resulting from a fall at work on May 20, 2005."

An orthopaedist, Dr. Frankie M. Griffin, examined the claimant on September 15, 2005:

Ms. Almodovar is a 47-year-old woman who reports that on 05/20/05 she slipped on some metal plates at work and fell on "slick chicken grease" backwards onto her buttocks. Since that time, she has had persistent low back pain and left hip pain that radiates down her leg. She has also had "tingling" and mild numbness along the buttock all

the way down to the foot for the last four months since the injury....She understands that she is being seen here in my office today only for her left hip. It was explained to her and her husband before the visit that I am not a back specialist and that I would see her only for her left hip symptoms....

X-rays of the left hip show some slight lucency in the inferior femoral neck in the same area as this cyst that is noted on the MRI. The patient does have an MRI from Cooper Clinic dated 06/22/05 that reveals a "small lesion in the left femoral head." The radiologist felt that it might be a "bone cyst"....

First I would reiterate that I agreed to see the patient only for her left hip symptoms. I think that the majority of her complaints may be related to her lower back in some type of nerve root compression syndrome. I would reiterate that I would recommend that she see a back specialist for further evaluation of her lumbar spine. Regarding the left hip, she clearly seems to have some pain with range of motion of her left hip. Her x-rays and MRI, however, only reveal a benign appearing cyst. The cyst is in her femoral neck, but I do not see any definite fractures at this point. She has been walking around on this hip for four months now. If it is some type of structural consideration in that area, I would think that it would be more visible at this point even on a plain film. We repeated the plain film today and there are no obvious fractures again today. I, however, would recommend that she remain strictly nonweightbearing on the left, lower extremity with a walker. I would refer her to a hip specialist, specifically Dr. Lowry Barnes in Little Rock, for his opinion regarding this patient's hip. She was given a prescription for a walker as well and understands that she should remain strictly nonweightbearing on the left, lower extremity until she sees Dr. Barnes....

Dr. Bishop noted on November 21, 2005, "Be advised Anna Almodovar has a benign cyst left femur on left hip. This existed way before her work injury and before she developed acute low back pain. She has a primary back injury that radiates into her hip. Her hip is well."

Dr. Arthur M. Johnson, a neurosurgeon, examined the claimant on December 15, 2005: "The MRI scan of the lumbar spine shows that she has a small central disk herniation at the L4-5 level with what appears to be an angular tear. IMPRESSION: Small central disk herniation at L4-5 with low back pain and left lower extremity radiculopathy." Dr. Johnson planned lumbar epidural steroid injections and stated, "It is my impression that the patient's pain onset was related to the fall by history and the small central disk herniation at the L4-5 is related to this as well."

A note from Dr. Johnson's office dated March 9, 2006 indicated that the claimant was "to have discogram."

A neurosurgeon, Dr. James B. Blankenship, provided an Independent Medical Evaluation on March 29, 2006:

The intent of this Independent Medical Evaluation is to see if there are any changes in her MRI and also document what type of changes are noted at the L4/5 level, since there has been discrepancy in the readings concerning exactly what is going on at L4/5 and also whether this causation of her

injury is work related or is related to some other etiology....

IMPRESSION: The patient does have degenerative changes at L4/5 with a midline disc bulge. No frank disc herniation is noted and no marked increased signal posteriorly that would be indicative of annular tearing is noted. Currently, I think she has a significant myofascial component to her back pain. She also has what appears to be somewhat of an inappropriate illness behavior with the Waddell signs. This in no way indicates that I think this is volitional. I think she has a lot of guarding and a lot of fear of movement due to her pain, which is consistent with deconditioning with only five sessions of physical therapy over the past year.

RECOMMENDATIONS: First of all, I have told them that this is an independent evaluation and I am not her treating physician. I do feel like the patient would benefit from an extensive exercise oriented reconditioning program. At present, I do not feel like surgical intervention is something that she would benefit from. Given the Waddell signs that are present on her examination, I would not recommend even working this up with discography, unless something changes in her clinical condition.

Concerning the questions that were forwarded to me, first of all, I do feel like the patient's current back complaints are directly related to her work related injury. I do not feel like she has any primary hip pathology. Dr. Lowrey Barnes seemed to agree with this. I have informed Ms. Suggs that the patient does have some concerning findings on examination with non-physiologic findings on different types of testing. I also told Ms. Suggs that I always believe in giving the patient the benefit of the doubt on this, especially with long standing pain and a consideration that this may be guarding secondary to deconditioning.

Concerning clarification of her MRI, I do not see an acute disc herniation. I also do not see an obvious annular tear. It is my opinion, presently, that surgical intervention is not warranted in this patient and continued conservative treatment is. My recommendation would be an aggressive hands on exercise oriented physical therapy program. The patient lives in Alma. My recommendation would be that this initiate at Performance Physical Therapy and then at the end of this, a six week course, she have a Functional Capacity Evaluation, which may lend more information concerning inappropriate findings on examination....

Dr. Blankenship reviewed a lumbar MRI on March 29, 2006 and gave the following impression: "1. Small midline disc bulge L4/5 with degenerative changes noted at the L4/5 level. 2. Thoracolumbar junction degenerative changes. 3. Possible arachnoiditis."

On April 3, 2006, the claimant was given an appointment slip to have a discogram/CT on April 12, 2006. The claimant testified that she was unable to pay for a discogram.

The claimant was evaluated at Performance Physical Therapy on April 24, 2006: "Pt. will be seen 3X per week for 6 weeks for rehabilitation of the Lumbar spine. Pt. is scheduled for a FCE after PT is completed." The record indicates that the claimant participated in physical therapy.

The claimant underwent a Functional Capacity Evaluation on July 6, 2006: "Based on the results of the Functional Capacity Evaluation performed on 7/6/06 it is recommended that Mrs. Almodovar not return to her pre-injury job at this time. She may be able to return to a 4 hour shift at a Sedentary to Light physical demands level which is lifting up to 15 lbs. from 36 to 60 inches on an occasional basis. She may benefit from additional rehabilitation but the medical cause of her injury may need to be addressed before any further progress can be made."

Dr. Blankenship reported on July 18, 2006, "Based on the MRI that I have reviewed once again with small midline disc bulge, my stance concerning my recommendations and treatment are the same. At present, I do not feel like any further work up for surgery is warranted....The patient is well versed in her home exercise program, which she should continue. I feel like from a standpoint of treatment that has been provided, the patient has reached Maximum Medical Improvement."

Dr. Blankenship noted on July 20, 2006, "I failed to dictate on the chart concerning an impairment rating. Based on the IV Edition AMA Guidelines, which are the current Worker's Compensation guidelines in Arkansas, the patient

would not qualify for an impairment rating. She does not have any objective findings that would allow me to rate her. This is based on physical examination and review of her MRI that showed only a minimal disc bulge, which would be considered physiologic."

A pre-hearing order was filed on February 20, 2007. The claimant contended, among other things, that she was entitled to continued treatment with Dr. Johnson. The respondents contended that the claimant was not entitled to further medical evaluation and treatment by Dr. Johnson. A hearing was held on April 12, 2007. The claimant testified, "What I'm interested in is a doctor that will get rid of the pain and make me well, but to tell the truth."

An administrative law judge found, among other things, that the claimant "has proven by a preponderance of the evidence that she is not entitled to additional medical treatment for her compensable low back strain." The claimant appeals to the Full Commission.

II. ADJUDICATION

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The

claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

An administrative law judge found in the present matter, "7. The claimant has proven by a preponderance of the evidence that she is not entitled to additional medical treatment for her compensable low back strain." The Full Commission affirms the administrative law judge's finding as modified. We find that the claimant did not prove discography/CT was reasonably necessary in connection with her compensable injury.

The parties stipulated that the claimant sustained a compensable injury to her low back on May 20, 2005. Dr. Clark examined the claimant and noted that x-ray showed no acute bony injury. A subsequent MRI showed mild degenerative bulge at L4-5 without definite protrusion. Dr. Clark assessed lumbar strain and degenerative disc disease, and the claimant was treated conservatively. Dr. Johnson's impression was "Small disk herniation at L4-5 with low back pain and left lower extremity radiculopathy." Dr. Johnson

eventually recommended treatment in the form of discography. Dr. Blankenship, a neurosurgeon like Dr. Johnson, noted that the claimant had degenerative changes at L4-5 with no frank herniation and no evidence of an annular tear. Dr. Blankenship proposed continued conservative treatment and did not recommend discography. Resolution of conflicting medical evidence is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Full Commission in the present matter attaches more weight to the opinion of Dr. Blankenship.

The claimant post-hearing has filed a Motion To Submit New Evidence. The claimant seeks to introduce into the record the results of a Medical Imaging Consultation performed on January 28, 2008. Before allowing submission of newly discovered evidence, the Commission must consider four prerequisites: (1) Is the newly discovered evidence relevant? (2) Is it cumulative? (3) Would it change the result? (4) Was the movant diligent? *See, Haygood v. Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982), citing *Mason v. Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960). In the present matter, the newly discovered evidence includes a CT scan post-discogram which essentially shows degenerative

changes with a herniation at L4-5. The diagnostic impression in these documents is substantially the same as the diagnostic impressions already included in the record. The newly discovered evidence would not change the result of the case and the Full Commission denies the claimant's motion.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding as modified. The Full Commission finds that the claimant did not prove discography/CT was reasonably necessary in connection with the claimant's compensable injury. The respondents in the present matter are not liable for the costs of discography.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority finds that the claimant

did not prove that discography/CT was reasonably necessary in connection with the claimant's compensable injury. The majority also denied the claimant's Motion to Introduce Additional Evidence, specifically, the results of the discography/CT. Based on a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence her entitlement to the discography/CT recommended by her treating physician, Dr. Arthur Johnson. Furthermore, as I would grant the claimant's Motion to Introduce Additional Evidence, I must respectfully dissent on this issue as well.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. Ark. Code Ann. § 11-9-508(a) (Repl. 2002); American Greeting Corp. v. Garey, 61 Ark. App.18, 963 S.W. 2d 613 (1998). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to

prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Every doctor the claimant has seen has noted that she has objective medical findings of a lumbar disc injury, and has recommended additional reasonably necessary medical treatment. Dr. Clark noted the MRI showed degenerative disc changes and a disc bulge at L4-5, diagnosing the claimant with lumbar strain and degenerative disc disease. Dr. Bishop, took the claimant off work due to the symptoms of the "acute lumbar strain and lumbar radiculitis" from the fall and recommended a lumbar CT myelogram and physical therapy. Dr. Griffin, an orthopedic surgeon, noted that an MRI performed at Prime Medical Imaging, dated 8/30/05 reveals a "small central disc protrusion at L4-5 with mild impression on the ventral thecal sac" and opined that the majority of the claimant's complaints may be related to her lower back in some type of nerve root compression syndrome and recommended that she be seen by a back specialist. Dr. Johnson, a neurosurgeon, diagnosed "small central disc

herniation at L4-5 with low back pain and left lower extremity radiculopathy" and recommended that the claimant undergo lumbar epidural steroid injections. Dr. Johnson also prescribed medications, recommended that the claimant stay off work, and recommended discography/CT. Even Dr. Blankenship, the respondent's IME doctor, noting the herniated disc and the claimant's long-standing pain, recommended an extensive exercise oriented reconditioning program, stating that the source of her pain could not be determined until the reconditioning and an FCE were completed.

The claimant testified that she has complied with every treatment recommendation by every doctor, without any relief, and that she now wants to pursue the discography/CT recommended by her treating physician, Dr. Johnson. Since the medical records clearly indicate that the claimant sustained injury to her lumbar spine when she slipped and fell on May 20, 2005 and also indicate that she required active medical treatment for several months but exhibited no permanent improvement, I find that the preponderance of the evidence shows that the claimant is entitled to pursue, as reasonably

necessary medical treatment, the discography/CT recommended by Dr. Johnson.

The essential dispute in this case arises because Dr. Johnson has recommended discography/CT and Dr. Blankenship has opined that he would not recommend discography/CT unless something changes in the claimant's condition. While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v. Pro-transportation, ____ Ark. App. ____, ____ S.W.2d____, (2007).

Here, I find that the majority has erred by placing greater weight on the recommendation of Dr. Blankenship over the recommendation of her treating physician, Dr. Johnson. Dr. Johnson is a neurosurgeon who has been consistently providing treatment to the claimant, and his opinion and recommendations should be given greater weight than those of Dr. Blankenship.

Furthermore, I find that the majority has misinterpreted Dr. Blankenship's findings. Dr. Blankenship evaluated the claimant on March 29, 2006 and

in that evaluation he specifically indicated that he was not the claimant's treating physician. He specifically noted the claimant's objective findings of an L4-5 herniated disc, although he was of the opinion that it was "physiological." He stated that due to the claimant's pain response, which he cautioned should not be considered "volitional" he did not recommend discography/CT at that time. Dr. Blankenship did not specifically state that he felt discography/CT was not reasonably necessary, he stated that it would not be useful until the claimant had gone through exercise reconditioning and a Functional Capacity Evaluation to further evaluate the claimant's pain response.

In addition to finding that the claimant is entitled to the discography/CT as reasonably necessary medical treatment for her compensable injury, I would also grant the claimant's motion to introduce additional evidence. The evidence the claimant seeks to introduce, the results of the discography/CT confirms the accuracy of Dr. Johnson's diagnosis and calls into question the diagnosis of Dr. Blankenship. As the majority has specifically based its findings on Dr. Blankenship's findings versus the findings of Dr. Johnson, I find that

the evidence the claimant seeks to introduce would change the result of the case.

In conclusion, I find that the claimant has proved by a preponderance of the evidence her entitlement to the discography/CT recommended by Dr. Johnson. Furthermore, as I find that the evidence the claimant seeks to introduce, the results of the discography/CT, would change the result of the case, I would grant the claimant's Motion to Introduce Additional Evidence.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner