

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412196

JESSICA SPENCER WARREN, EMPLOYEE	CLAIMANT
NEWTON COUNTY NURSING HOME, A SELF INSURED EMPLOYER	RESPONDENT
CANNON COCHRAN MANAGEMENT SERVICES, INC., TPA	RESPONDENT

OPINION FILED JULY 31, 2008

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

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

Respondent represented by HONORABLE JAMES ARNOLD, II,
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 June 14, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed on or about

October 26, 2004, and at all other relevant times.

3. The compensation rates are \$224.00 and \$168.00.

4. The respondent controverted the claim on or about the time Dr. Armstrong recommended a referral to a rheumatologist, which was in February of 2006.

5. The claimant failed to prove by a preponderance of the credible evidence she suffered a back injury while working for the respondent on October 26, 2004.

6. The claimant's Motion to Recuse is denied and his constitutional challenges are found to be without merit pursuant to *Long v. Wal-Mart Stores, Inc.*, ___ Ark. App. ___, ___ S.W.3d ___ (Ark. Ct. App. Feb. 21, 2007).

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 Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant failed to prove the compensability of an injury occurring on October 26, 2004.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and conclusions contained in that decision are now the majority opinion.

On October 26, 2004, the claimant was working as a nurses' aide for Newton County Nursing Home. On that date, she was attempting to lift a patient into a shower chair, when the patient began to slip, so the claimant "grabbed a hold of her and sat her to the ground". As a result, the claimant felt a twinge in her lower back and began hurting so badly that she started crying. The injury was reported immediately and the claimant was sent to the company doctor,

Dr. Jimmy Justice, who was also the claimant's family physician.

The initial medical report from Dr. Justice's office is authored by Dr. Justice's nurse practitioner, Jennifer Shepherd. Nurse Shepherd's Progress Note of October 26, 2004, states the following:

Injury to back today lifting patient @ work. Rebecca M. and Pt. were trying to transfer approx 300 lb. pt to shower chair - she became unsteady and they had to help her to the floor. Pt. felt a very sharp pain in back before the pt. had to be helped to the floor. . . pain Rad to Rt. Buttock . . . Back pain - ? HNP . . . CT L S Spine - off work - rev c Dr. Justice.

Three days later, on October 29, 2004, Dr. Justice ordered an MRI scan which showed a "moderate size posterior central HNP at L3-L4". According to the Office Notes of Dr. Justice dated November 3, 2004, claimant continued to experience back pain with pain into the right hip and the thigh. The physical therapy clinical record of November 4, 2004, also indicates that the claimant had been experiencing right lumbar pain with sciatica that radiates from her back

to the lateral mid-thigh since the date of injury. The physical therapy assessment was: "Pt. with R sciatica status post lifting injury at NH." On November 18, 2004, Dr. Justice's Progress Notes again indicated that the claimant continued with sharp pains down the right side. In the physical therapy clinical record of December 3, 2004, it was noted that the claimant was "still having some pain in her low back extending into the R buttocks". On December 9, 2004, the Office Notes of Dr. Justice indicate back pain with pain down the leg.

On July 7, 2005, the claimant was seen by Dr. Larry Armstrong, a physician selected by the respondent. On that date, Dr. Armstrong drew the following conclusions:

I reviewed the patient's MRI findings with her and her father in detail. . . .
I explained to the patient that we should be conservative with her care, that she does not require any type of surgical intervention as she has absolutely no radiculopathy from the herniated disc, which is present, and she falls into the category of 40 percent of the population with a herniated disc without any clinical symptomatology. She suffers predominately from sacroiliitis, which

is what she injured when she bent over the patient, and this makes good physiologic sense with her injury as well as her clinical symptomatology.

On February 13, 2006, Dr. Armstrong elaborated on the above stated opinion, as follows:

I reevaluated Jessica Spencer who presents back from a Worker's Compensation injury in which she experienced and suffered sacroiliitis. Whether her herniated disc at the L3-4 occurred at the time of her injury, I cannot tell, but I can certainly determine that her sacroiliitis was caused by her work and this tends to be her worst problem. . . . She still lacks clear radiculopathy and suffers mostly from right sacroiliitis, which is still severe and debilitating as well as pain in her right hip.

On June 6, 2006, Dr. Justice stated his opinion on the work-related injury, as follows:

This young lady is a patient of mine and I have been her family doctor most of her lifetime. It is my opinion stated within a reasonable degree of medical certainty that from both the history given to me of no back problems in this young 18 year old girl prior to the injury of October 26, 2004, and my observations and treatment of her as

well as the history of lifting a heavy patient in the Newton County Nursing Home while performing duties as a CNA, as well as the results of diagnostic tests run including an MRI which now reveals a herniated disc in her back, that as a result of said injury, it is reasonable and necessary that this lady be permitted to continue her medical care and treatment including but not limited to a the rheumatologist suggested by Dr. Armstrong as well as a neurosurgeon to ascertain whether or not the herniation and the chronic back pain can be remedied by surgery.

During a period of approximately one month preceding her injury, the claimant was seen in Dr. Justice's office on three occasions. She was having back pain and was diagnosed as suffering from a back sprain. When the claimant was deposed by respondents' attorney before the hearing, she did not mention this treatment when asked about prior problems with her back, hip, or leg.

The claim was initially accepted as compensable but later denied after respondents discovered the medical records prepared prior to the date of injury. The respondents took the position that the medical treatment

requested was due the preexisting conditions for which she was receiving treatment prior to the reported injury.

A finding of compensability calls for proof, by a preponderance of the evidence, of an accidental injury caused by a specific incident, identifiable by time and place of occurrence, arising out of and in the course of employment, causing physical harm to the body, requiring medical treatment or resulting in disability, which is established by medical evidence and supported by objective findings. Ark. Code Ann. §11-9-102 (4) (E) (i); §11-9-102(4) (A) (i); and §11-9-102(4) (D).

A fair review of the medical evidence demonstrates that the claimant met her burden of proof on all elements of compensability. The accident was reported instantly and the claimant was sent to Dr. Justice, the company doctor, on the day of injury. Dr. Justice's nurse immediately identified signs of a herniated disk, recommended a CT scan, and took the claimant off work. From day one, the claimant was experiencing back pain radiating into her right buttock. An MRI performed, three days later, showed a herniated disk at

L3-L4. Dr. Justice authored a report saying that he had been the claimant's family physician for most of her life and that it was his opinion that the claimant sustained a herniated disk as a result of the lifting incident at Newton County Nursing Home on October 26, 2004. Dr. Armstrong said that the lifting incident caused sacroiliitis.

The Administrative Law Judge denied the compensability of this claim for three reasons. Firstly, she found that the claimant was not a credible witness because "the clamant gave conflicting versions regarding the events surrounded (sic) her alleged work injury". This factual allegation was described by the Administrative Law Judge, as follows:

As to the incident, the claimant essentially testified she felt a twinge in her lower back upon grabbing a hold of a resident to help her to the floor. However, in medical notes dated October 26, 2004, Nurse Shepherd reported a history that, "Pt felt a very sharp pain in her back before the pt. had to be helped to the floor." Hence, the claimant's initial report of the incident to Nurse Shepherd is inconsistent with her testimony.

I have carefully studied the two descriptions of the incident, cited by the Administrative Law Judge, and can not see any significant difference between them.

Secondly, the Administrative Law Judge questioned the claimant's credibility because "she was not forthcoming about her prior back problems or the duration of these problems". It is true that the claimant did not divulge information concerning this treatment when she certainly should have. However, the compensability issue in this case does not turn on the claimant's testimony. There is no dispute that the accident occurred just as the claimant testified and that, as a result, she suffered from the symptoms she described. There were numerous witnesses to the accident and none were called to rebut the claimant's account. The sole issue in this case is whether the incident of October 26, 2004 was causally related to the medical treatment rendered thereafter or related to preexisting conditions. We do not have to rely on the claimant's testimony to determine whether there was a causal connection between the injury and the treatment rendered. This is a

medical question. And the medical evidence of record clearly establishes that the treatment requested by the claimant is related to the October 26, 2004 injury and not to preexisting conditions. The medical reports prepared prior to the injury show only a diagnosis of a back sprain and complaints limited to back pain. The very first medical report, following the injury, documents radicular symptoms and the diagnosis of a herniated disk. The pre-injury reports contain no recommendation for diagnostic studies, not even an X-ray. The initial post-injury reports recommend a CT scan. The claimant was not taken off work during her treatment for pre-existing problems but was instructed to cease working as of the date of her injury. And finally, while they disagreed on the diagnosis, both doctors who commented said that the medical treatment was related to the injury and not to preexisting conditions. Under these circumstances, causation is established even if the claimant's testimony is totally ignored.

And finally, the Administrative Law Judge chose to totally disregard the opinions of Dr. Armstrong and

Dr. Justice, both of whom opined that the claimant had a compensable injury. She rejected their opinions because she said that neither of these physicians knew about the preexisting back problems at the time they gave their opinions. With regard to Dr. Justice, he had been the claimant's family physician for "most of her lifetime" and all of the treatment for the prior back problems had been in his office. To say that Dr. Justice was unaware of the claimant's previous medical treatment is incredible. With regard to Dr. Armstrong, he made his diagnosis based on examinations and diagnostic studies. It defies reason to conclude that his opinion would change based on information that the claimant had a simple back sprain before the lifting incident, with no lost time and no tests. And it should also be noted that there were no medical opinions indicating that the claimant's problems were related to preexisting conditions.

For the reasons stated above, I find that the claimant proved, by a preponderance of the evidence, that she sustained a compensable injury on October 26, 2004.

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Therefore, I must respectfully dissent from the majority opinion denying the compensability of this claim.

PHILIP A. HOOD, Commissioner