

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613791

LINDA DART, EMPLOYEE	CLAIMANT
ST. EDWARDS MERCY MEDICAL CENTER, EMPLOYER	RESPONDENT NO. 1
SISTERS OF MERCY HEALTH SERVICES, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 13, 2009

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

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

Respondent No. 1 represented by the HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed April 14, 2009, awarding the claimant benefits for a compensable injury sustained on October 5, 2006. 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. We therefore affirm the April 14, 2009, decision of the Administrative Law Judge, with the Full Commission hereby making the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 30, 2008, and contained in a pre-hearing order filed July 31, 2008, are hereby accepted as fact.
2. The claimant's need for lumbar surgery performed by Dr. Standefer, lumbar injections by Dr. Swicegood, and associated treatment are the result of the claimant's admittedly compensable injury on October 5, 2006.
3. The respondents are responsible for the costs of the claimant's surgery, lumbar injections, and associated medical treatment that was caused by her admittedly compensable injury on October 5, 2006.
4. The claimant is entitled to temporary total disability benefits from January 29, 2008, to a date yet to be determined at the rate of \$488.00 per week.
5. That the claimant's attorney is entitled to an attorney's fee in this matter as set forth in the Arkansas Workers' Compensation Act.

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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding. The respondent appeals a decision by the Administrative Law Judge finding that the

claimant proved by a preponderance of the evidence that she is entitled to additional treatment and temporary total disability benefits. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. Accordingly, I would reverse the decision of the administrative law judge.

The claimant was employed by the respondent employer as a nurse in the labor and delivery area at the respondent employer's hospital. On October 5, 2006, the claimant was walking into a part of the hospital when she slipped and fell on some water. The claimant sustained an admittedly compensable lumbar spine injury. It was accepted by the respondents as compensable and they paid medical benefits associated therewith. At this time, the claimant contends that she is entitled to payment for the lumbar surgery performed by Dr. Standefer and lumbar injections performed by Dr. Swicegood and associated treatment.

The Claimant had a history of lower back pain dating back to August 4, 2000. The claimant presented to Dr. Capocelli as early as August 4, 2000, complaining of severe lower back pain radiating into her right hip.

At that time she could barely get
out of a chair and complained of
severe right lower back pain
radiating into the right hip . . .

She also reported having some tingling and numbness of the lateral toes of the left foot and some tingling around her left elbow.

Based on Dr. Capocelli's initial evaluation of the claimant, she was diagnosed with having degenerative disc disease of her lumbar spine. At that time, the claimant began receiving treatment for her lumbar spinal pain. During this same time period, the claimant complained of severe cervical pain. This was treated with a surgical cervical fusion before 2004.

On December 13, 2004, the claimant again presented to Dr. Capocelli complaining of low back pain, radiating into her left leg. Dr. Capocelli's note stated:

However, several weeks ago she began to have difficulty with low back pain radiating into her left upper thigh area, down to about the knee, and associated numbness in the toes of the left foot. This has been fairly severe, exacerbated by straining or any kind of movement. She describes it as a burning pain.

She has had a recent MRI which has shown degenerative disc disease and mild disc bulging at L1-2, L2-3 and L3-4 with mild spondylosis . . . At this point she has remained fairly severely symptomatic.

Based upon X-rays and an MRI study, Dr. Capocelli diagnosed the claimant with degenerative disc disease of

her lumbar spine. Nerve studies were ordered to rule out any neuropathological problems.

On January 17, 2005, the claimant underwent electrodiagnostic studies related to her complaints of lower back pain that "'grabs and catches' resulting in pain in the left LE (radiates to the posterior thigh, anterior knee)." The claimant also complained of "popping in the left hip and difficulty swinging left LE forward with walking." Dr. Capocelli's progress note indicated that the claimant continued to have severe sciatic pain down her left leg and sent her to Dr. Swicegood for spinal injections. Dr. Capocelli indicated that "further consideration may be for a discogram if the CT myelogram is not definitive in showing us the pathology." An MRI was conducted of the claimant's lumbar spine on March 7, 2005. The impression from that MRI indicated:

- (1) Findings suspicious for left lateral disc protrusion in addition to moderate diffuse disc at L1-2 and mild retrolisthesis of L1 with respect to 2; probably due to degenerative change of the facets.
- (2) Moderate disc bulges at L2-3, L3-4. Small central bulging component at L4-5.

On April 1, 2005, a progress note by Dr. Capocelli stated that "at this point, we have done a host of tests without any definitive diagnosis for the origin."

On October 5, 2006, the claimant sustained a compensable injury. An MRI conducted on November 6, 2006, revealed no change from the MRI conducted in March 2005. This lumbar spine MRI revealed:

Impression - Degenerative endplate changes at L1-2. Also, disc space narrowing 1-2, 2-3 and 3-4 levels. Some anterior osteophytes. Diffuse disc bulges L1-2, 2-3 and 3-4 levels. No left sided focal protrusions or herniations identified.

On December 28, 2006, Dr. Capocelli noted that:

Recent MRI is unchanged from MRI study in 2004 which is multi-level degenerative change. No obvious severe canal or foraminal impingement. Plain X-rays just show mild osteopenia and mild multi-level degenerative change.

Another progress note of Dr. Capocelli on May 9, 2007, stated that the claimant "has been undergoing a non-operative intervention for low back degenerative disease." At this point, Dr. Capocelli indicated that the claimant would like to pursue surgical intervention.

On May 29, 2007, Denise McCormick with the respondent employer sent the claimant a letter stating that after receiving and reviewing her medical records from Dr. Capocelli, it appeared that claimant had been treated for low back pain since 2004. Because the MRI was unchanged from 2004 to 2006, following her fall, her

condition was pre-existing and the respondent opted to no longer cover her expense under Workers' Compensation payments.

The claimant stopped working for the respondent employer around January 2008, just before her lumbar spine surgery. The claimant underwent lumbar spine surgery performed by Dr. Standefer on January 29, 2008. Following that surgery, the claimant began to receive lumbar spine injections from Dr. Swicegood. The claimant has not worked since this spinal surgery and receives social security disability.

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.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that her lumbar spine surgery and lumbar spine injections were the result of her compensable injury on October 5, 2006. The evidence demonstrates that the claimant has received extensive medical treatment for lower back pain problems since 2000. The claimant's medical records indicate that she began complaining of severe lower back pain and numbness in her lower extremities in 2000. This was confirmed in 2004 and again in 2005, almost a year before the October 5, 2006 slip-and-fall. Dr. Capocelli's progress notes document the claimant's complaints and detail her symptoms before and following the compensable injury. They were nearly identical. In addition, Dr. Capocelli noted that the MRI conducted in 2006, following her injury, showed no change in condition following the claimant's injury. The claimant testified that she rarely had problems with her back before 2006, despite extensive medical documentation to the contrary.

The claimant has undergone multiple MRI's and X-ray. The doctor's notes indicate that the claimant

had a pre-existing lower back condition before her compensable injury which steadily got worse. This condition was in existence for nearly six years before her injury. Following her injury, MRI's revealed that there had been no change from her prior MRIs.

The Claimant's prior lumbar spine difficulties are well documented as a degenerative disease process which progressively caused a gradual increase in her lumbar spinal pain. This can be seen from the changes that occurred between her 2000 visit to Dr. Capocelli and her 2004 visit to Dr. Capocelli and finally her 2006 visit to Dr. Capocelli following her injury. The claimant has a long history of severe lower back pain with associated symptoms of numbness in her lower extremities. There is simply nothing beyond unreasonable speculation offered by Dr. Standefer to connect her degenerative disease process to her compensable injury. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Therefore, after I consider all the evidence, I find that the claimant has failed to meet her burden

or proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner