

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F806829

JACKIE D. JOHNSON,
EMPLOYEE

CLAIMANT

KOHLER COMPANY,
EMPLOYER

RESPONDENT

BROADSPIRE SERVICES, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 1, 2011

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

Claimant appears Pro Se.

Respondent represented by the HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed September 9, 2010. The administrative law
judge found that the claimant proved additional medical
treatment was reasonably necessary. After reviewing the
entire record *de novo*, the Full Commission finds that the
claimant proved she was entitled to additional medical
treatment as recommended by Dr. Courtney.

I. HISTORY

Jackie Johnson, age 50, testified that she became employed with Kohler Company in October 2003. Ms. Johnson testified that her work for the respondent-employer included operating machines, packing, and assembling. The record indicates that the claimant reported an injury to her back while lifting boxes for the respondents on December 3, 2007. Dr. Scott Carle subsequently treated the claimant conservatively for a lumbar strain and released the claimant with no impairment on January 2, 2008.

The parties stipulated that the claimant sustained a compensable low back injury on May 24, 2008. The claimant testified that she felt a "pop" in her lower back while lifting a box: "It was like, when it first happened it was like a sharp pain, just a tightened and sharp pain in the lower part of my back on the left side." Dr. John H. Adametz, Jr. examined the claimant on June 9, 2008:

She feels the pattern of symptoms is no better....Patient has had physical therapy and does not feel better. The pain is located on bilateral thoracic region and lumbosacral region. The pain is described as aching and spasm....

MUSCULOSKELETAL:

Lumbar: Negative bilateral leg raise. No ecchymosis. No erythema. No external trauma....

Dr. Adametz noted "tenderness of both paraspinous muscles at the level of T3, T4, T5, L3, L4, L5, S1 and S2 and the midline LS-spine at the level of L5, S1 and S2."

Dr. Adametz assessed "1. Trapezius strain. 2. Lumbar strain."

Dr. Earl Peeples examined the claimant on July 17, 2008:

Her symptoms center in the spine from about T1 down to L5. She has no pelvis or extremity symptoms, only generalized spinal pain from neck to pelvis....

OBJECTIVE:

Examination was undertaken....She has normal ability to walk without limp. She is able to heel and toe walk. She brings her fingertips to the mid tibia indicating good lumbar flexion. She has 2+ patella and absent Achilles reflexes. Straight leg raising test is negative. She is diffusely tender along the paraspinous muscles.

X-RAYS:

MRI scan of the lumbar spine was performed January 2 and interpreted by Aaron Spann. There is some degenerative desiccation at L4-L5 and bulging. The MRI did not show evidence of any neural impingement....

I indicated to Ms. Johnson that she is very petitely build (sic) and she has classic findings of muscle irritation and ligament strain. I do not think there is any evidence of significant neurological deficit. Her MRI is very reassuring showing only the minor changes of desiccation and ligament strain. I do not think there is any evidence of significant neurological deficit and her MRI is very reassuring showing only the

minor changes of desiccation and disc bulging seen exceedingly commonly in the active population of her age. She has previously used Celebrex and Skelaxin. Both of these are excellent drugs for anti-inflammatory and muscle relaxant effect....I anticipate recovery without permanent impairment of function.

Dr. Peeples assessed "Lumbar strain."

Dr. Peeples reported on October 9, 2008:

SUBJECTIVE:

Ms. Johnson returned for reevaluation along with her workers' comp health nurse. She reports that she is "worse." She has muscle spasm in the center of her back in the scapular region and shoulders. She has sharp pains occasionally in the lower back. She says that work is "terrible." She does not have a positive attitude. She has been able to make shift work. She has no extremity pain. She believes the activities she has been asked to do exceed her 30 lb. weight limit.

OBJECTIVE:

On examination she has mild tenderness along the paraspinous muscles. Straight leg raising is negative. Patellar reflexes are equal. Achilles reflexes are absent equally. She has mildly limited range of motion of the lumbar spine.

Dr. Peeples assessed "Continued musculoskeletal symptoms....In view of the fact that she has only muscular symptoms without evidence of worsening by exam, I suggested to her workers' comp nurse to be certain she is placed in activities which are well within her restrictions and that

she continue working and return for reevaluation in this office in six to eight weeks."

The claimant followed up with Dr. Peeples on November 20, 2008: "On examination she does not display neurological deficit. She can heel and toe walk. Straight leg raising is negative. She is diffusely tender along the spine and shoulder area. She has good range of motion of the shoulders." Dr. Peeples assessed "Musculoskeletal soreness....I think Ms. Johnson may engage in a normal level of employment and usual duties. I told her that, at age 48, with her previous symptoms, she could expect some musculoskeletal symptoms....I believe she is at MMI for her situation and she will return for reevaluation in two months. She is at MMI regarding her current status."

A Functional Capacity Evaluation was done on February 12, 2009, with the conclusions, "Ms. Jackie Johnson completed functional testing on this date with unreliable results. Overall, Ms. Johnson demonstrated the ability to perform work AT LEAST within the MEDIUM Physical Demand Classification as defined by the US Dept. of Labor's guidelines over the course of a normal workday. Her true

functional abilities remain unknown due to unreliable effort on her behalf.

The parties stipulated that "on March 12, 2009, the Medical Cost Containment Division approved a change of physician from Dr. Earl Peeples, orthopedist, to Dr. Michael Courtney, chiropractor." Dr. Michael D. Courtney, D.C., examined the claimant on March 16, 2009:

Her complaints today include pain between the shoulder blades as well as lower back, having onset about 2 ½ years ago. She states that she was lifting a box of toilet seats, she felt a pop in her low back and this was in the center of her low back. She has been symptomatic since this accident 2 ½ years ago. She has pain referring from the low back into the left hip and left foot....She also states that she has upper back pain, pain between the shoulder blades for 2 ½ years....

Muscle spasms are noted in the thoracic and lumbar paraspinals. Muscle spasms are palpable and bilateral with moderate spasm in the lumbar region, mild spasm in the thoracic region....

Based on the available clinical data, patient history, exam and x-ray findings to date my diagnostic impression is that this lady suffers from a lumbar strain/sprain recalcitrant with lumbar segmental dysfunction, disk protrusion L4-5 confirmed by MRI and muscle spasms. She also suffers from sciatic neuritis and radiculitis. My treatment plan for this lady is to see her three times a week for one month. If she is clinically improving, we will then see her possibly twice a week for a second month and if necessary, once a week for a third month. My

treatment goals for this lady is to decrease lumbar segmental dysfunction, decrease disk protrusion, decrease sciatica, decrease muscle spasms, improve thoracolumbar range of motion in all planes of movement, increase her ability to do all activities of daily living and return to work without symptoms. I will discuss this with her as well as with the caseworker on her next visit.

Dr. J. Justin Seale provided a New Patient Consultation on April 28, 2009:

Ms. Johnson is a 48-year-old, African-American female, who presents to my clinic today complaining of low back pain since an injury at work in June 2007, when she carried boxes, twisting and bending with them. Since that time, she has undergone a multitude of conservative treatment and has seen multiple physicians. She has had long periods of physical therapy but has not continued doing exercises because she states "they hurt." She has tried medications, including naproxen, Celebrex, Tylenol, Skelaxin, Flexeril and steroids. She has had intramuscular injections of Toradol and other medications. She has had no epidural steroid injections....

MUSCULOSKELETAL:

Cervical spine - Slight pain with range of motion. I palpate no significant muscle spasms or spinous process step-off or signs of instability. Good strength.

Thoracic spine - Full Range of motion without pain, tenderness, signs of instability or muscle spasms. Good strength.

Lumbar spine - The patient is able to forward flex with the hands to the knees and extend to 10° with moderate low back pain. She has palpable muscle spasms which are very tender in the lumbosacral junction bilaterally, paraspinal. She has no midline tenderness or spinous process step-off palpable. Good strength. No signs of instability....

MRI of the lumbar spine reviewed on the computer and done at St. Vincent's 07/02/08 reveals mild disc desiccation at L4-5 with diffuse degenerative bulge. No significant foraminal or central stenosis. No nerve root impingement. The radiologist at that time read a right focal protrusion. If this is true, it is very mild. I see no annular tears. The above and below levels appear normal.

Dr. Seale's impression was "1. L4-5 degenerative disc disease, mild, with low back pain. This appears to be a preexisting condition worsened by work injury." Dr. Seale's plan was "At this time, I feel she is at maximum medical improvement. I recommend continuing her work restrictions as medium as dictated by the U.S. Labor Department. I am releasing her from my medical care. I did give her some exercises to do on a daily basis. There is no reason for me to see her back. She is definitely a nonsurgical candidate, and I recommend no further conservative treatment for this current work injury."

A pre-hearing order was filed on June 9, 2010. The claimant contended that she remained symptomatic with pain in her back, neck, and legs. The claimant sought additional medical treatment. The respondents contended that the claimant's healing period ended on November 20, 2008 and that additional medical treatment was not reasonably

necessary. The respondents contended that the Functional Capacity Evaluation was unreliable and that the claimant was able to perform work in the medium category.

The parties agreed to litigate the following issues: "Additional medical treatment; compensability (neck or upper back). All other issues are reserved."

A hearing was held on July 23, 2010. Upon questioning by an administrative law judge, the *pro se* claimant agreed that she felt pain "from the base of her neck to the top of her back."

An administrative law judge filed an opinion on September 9, 2010. The administrative law judge found, among other things, that the claimant proved continuing medical treatment was reasonably necessary in connection with the compensable injury. The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (Repl. 2002) provides:

(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental"

only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The burden of proof of a compensable injury shall be on the employee, and the burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i) (Repl. 2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the parties stipulated that the claimant sustained a compensable injury to her low back on May 24, 2008. The parties agreed to litigate the issue of "compensability (neck or upper back)." The Full Commission finds that the claimant proved she sustained a compensable injury to her middle back as well as her lower back. Again, the parties stipulated that the claimant sustained a compensable low back injury on May 24, 2008. Dr. Adametz noted on June 9, 2008 that the claimant complained of pain

and tenderness in her "bilateral thoracic region and lumbosacral region" following the May 24, 2008 compensable injury. Dr. Peeples noted on July 17, 2008 that the claimant suffered from pain symptoms "from about T1 down to L5." Dr. Courtney examined the claimant on March 16, 2009 and observed, "Muscle spasms are noted in the thoracic and lumbar paraspinals. Muscle spasms are palpable and bilateral with moderate spasm in the lumbar region, mild spasm in the thoracic region." A finding of muscle spasms can fulfill the statutory objective-findings requirement. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The Full Commission finds that Dr. Courtney's observation and notation of spasms in the claimant's thoracic and lumbar regions satisfies the objective-findings requirement.

The Full Commission finds that the claimant proved she sustained a compensable injury to her middle back as well as the stipulated compensable injury to the claimant's lower back. The claimant proved by a preponderance of the evidence that she sustained an accidental injury which caused physical harm to her middle back. The accidental injury to the claimant's middle back arose out of and in the

course of employment and required medical services. The injury to the claimant's middle back was caused by a specific incident which was identifiable by time and place of occurrence on May 24, 2008. The claimant established a compensable injury to her middle back by medical evidence supported by objective findings not within the claimant's voluntary control, namely Dr. Courtney's observation of muscle spasms on March 16, 2009.

The claimant did not prove that she sustained a compensable injury to her neck on May 24, 2008. The claimant did not establish a compensable injury to her neck by medical evidence supported by objective findings. The claimant did not prove that there was an accidental injury which caused physical harm to her neck. The claimant did not prove that she sustained an injury to her neck which arose out of and in the course of employment or required medical services. The claimant did not prove that she sustained an injury to her neck which was caused by a specific incident or was identifiable by time and place of occurrence.

B. Medical Treatment

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 employee 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. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

In the present matter, an administrative law judge found that the claimant proved continuing medical treatment was reasonably necessary. The Full Commission affirms the administrative law judge's finding. We have found that the claimant proved she sustained a compensable injury to her middle back as well as the stipulated compensable injury to the claimant's lower back. After Dr. Peeples released the claimant from further treatment, the Commission approved a change of physician to Dr. Courtney. The respondents were required to pay for the claimant's initial visit to Dr.

Courtney in order to fulfill their obligation to provide adequate medical services under Ark. Code Ann. §11-9-508. See *Wal-Mart Stores, Inc., supra*.

The claimant testified that she still felt significant pain in the areas of her middle and lower back following the May 24, 2008 compensable injury. Dr. Courtney recommended a treatment program to reduce the claimant's documented muscle spasms, increase the claimant's activities of daily living, and allow the claimant to work without symptoms of pain. We recognize that Dr. Peeples and Dr. Courtney did not recommend additional treatment for the claimant. Nevertheless, the Commission has the duty of weighing medical evidence and, if the evidence conflicts, its resolution is a question of fact. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999). In the present matter, the Full Commission attaches significant probative weight to the opinion of Dr. Courtney. We find that the claimant proved she was entitled to additional medical treatment as recommended by Dr. Courtney.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a

compensable injury to her middle back as well as her lower back on May 24, 2008. The claimant did not prove that she sustained a compensable injury to her neck. Based on the record currently before us, the claimant proved that she was entitled to additional medical treatment for her middle back and lower back. The claimant specifically proved that she was entitled to additional medical treatment as recommended by Dr. Courtney on March 16, 2009. The Full Commission therefore affirms the administrative law judge's award of additional medical treatment.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her neck on May 28, 2008. However, I

must respectfully dissent from the majority's award of additional medical treatment. In my opinion, the claimant has failed to meet her burden of proof.

In my opinion, the evidence indicates that the claimant is not entitled to additional medical treatment. The claimant has seen numerous physicians and has been released to return to work on several occasions. Dr. Cynthia Almond released the claimant to return to work on July 9, 2008 with no restrictions. Dr. Earl Peeples released the claimant to normal work activities and noted that she was at maximum medical improvement on November 20, 2008. On April 28, 2009, Dr. Justin Seale indicated that the claimant was at maximum medical improvement and released her from his care. In fact, Dr. Seale stated that there was no reason to see the claimant back and he did not recommend any further treatment for the claimant. The claimant underwent a functional capacity evaluation and gave unreliable effort. The functional capacity evaluation noted that the claimant was able to work in at least the medium category.

It appears that the claimant has sought treatment from numerous physicians with no improvement. Dr. Peeples stated that the claimant did not have any significant

neurological deficit and that her MRI showed only minor changes that were common in the active population of people her age.

Therefore, after conducting a de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's award of additional medical treatment.

KAREN H. MCKINNEY, Commissioner