

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F802998

PAMULA MCCARLEY,
EMPLOYEE

CLAIMANT

SUPERIOR INDUSTRIES,
EMPLOYER

RESPONDENT

REGIONS CLAIMS MANAGEMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 25, 2011

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

Claimant represented by the HONORABLE EVELYN BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed December 20, 2010. In
said order, the Administrative Law Judge made 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
8, 2010, and contained in a pre-hearing order
filed July 8, 2010, are hereby accepted as
fact.
2. The claimant has proven by a preponderance of
the evidence that the recommended medical
treatment by Dr. Daugherty in his May 26,

2010, medical report is both reasonable and necessary medical treatment.

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

We therefore affirm the December 20, 2010 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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 opinion finding that the claimant proved by a preponderance of the evidence that she was entitled to the recommended treatment by Dr. Dougherty in his May 26, 2010 medical report. Based upon my de novo of the record, I find that the claimant has failed to meet her burden of proof.

The medical evidence demonstrates that Dr. Dougherty has determined that the claimant suffers from

thoracic outlet syndrome. Dr. Dougherty is the only physician who has suggested that the claimant suffers from thoracic outlet syndrome. Two other orthopedic surgeons, Dr. Kelly and Dr. Sites have not suggested this diagnosis. The claimant has also been seen by two occupational health doctors, neither of which have found the claimant to have this diagnosis either.

In his December 14, 2009 report, Dr. Sites noted that the claimant required no further treatment for her left and right shoulders. He noted that the claimant's functional capacity evaluation was useless because of her lack of effort. He also noted that there may be other conditions creating ongoing pain and intolerance in her upper extremities and that she needed to be evaluated by a rheumatologist.

On April 2, 2010, Dr. Kelly reviewed the claimant's third functional capacity evaluation and noted that the claimant was not compliant at all. He noted that the claimant failed almost every aspect of the tests and stated,

Obviously, this lady has an attitude of trying to have secondary benefit by doing so poorly on these tests. Needless to say, I cannot, with any reliability, place any sort of permanent restrictions based on these results, and I cannot justify

them, nor do I really think that she has any permanent restrictions that will be required.

Dr. Kelly placed the claimant at the end of her healing period for her hands.

The claimant has had shoulder surgery on both her left and right shoulders, plus she has had carpal tunnel surgery on both hands. She has undergone three functional capacity evaluations. In the second functional capacity evaluation performed July 14, 2009, it was noted on the reliability and consistency of effort section that the claimant

... performed at a level during testing that would not allow her to use her UE's to control vehicle, even though she was observed to drive to and from the evaluation.

In the history section of this functional capacity evaluation, the claimant admitted that she had been diagnosed with fibromyalgia. She also acknowledged that she had osteoarthritis in both shoulders.

In the third functional capacity evaluation on January 11, 2010, under the reliability and consistency of effort section, it was noted:

When formally evaluated, her body mechanics and movement patterns grossly changed and became more stiff and guarded. Ms. McCarley also exhibits inappropriate reports with

conditions unrelated to her shoulder or wrist conditions and self-limited with numerous aspects of testing. For example, she walked at well below a normal pace during the formal walking test, which is totally unrelated to her diagnoses.

It is also of note that in the intake interview for this FCE, the claimant stated that she had no other significant medical history. The claimant failed to mention that had osteoarthritis in her shoulders and fibromyalgia.

Simply put, when I consider the medical evidence and the claimant's functional capacity evaluations, I cannot find that the claimant has proved by a preponderance of the evidence that any additional medical treatment is reasonable and necessary and related to her compensable injury. Therefore, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER