

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509243

QUENTIN WITHERSPOON, EMPLOYEE CLAIMANT

TYSON CHICKEN, INC.,
SELF-INSURED EMPLOYER RESPONDENT

TYNET CORPORATION,
INSURANCE CARRIER/TPA RESPONDENT

OPINION FILED JUNE 30, 2011

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

Claimant represented by the HONORABLE GREGORY R. GILES,
Attorney at Law, Texarkana, Arkansas.

Respondent represented by the HONORABLE E. DIANE GRAHAM,
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed, in part,
and reversed, in part.

OPINION AND ORDER

The claimant appeals a decision of the
Administrative Law Judge filed on January 19, 2011,
denying him temporary total disability benefits and
additional medical treatment recommended by Dr. Sharma.
Based upon our de novo review of the entire record, we
find that the claimant has proven that he is entitled to
additional medical treatment, including an MRI of his
back, pain management classes, additional prescription

medication, and a psychological evaluation, pursuant to Ark. Code Ann. Sec. 11-9-508(a). The claimant has not proven his entitlement to temporary total disability benefits. Therefore, the decision of the Administrative Law Judge is affirmed, in part, and reversed, in part.

I. HISTORY

The claimant was thirty-seven years old at the time of the hearing, with an eleventh-grade education. He was not currently employed. The claimant had a history of one episode of acute back pain in 2004, diagnosed as an acute myofascial lumbar strain, with no record of continued care.

The claimant was a chicken-catcher at a farm, putting chickens in a cage for the respondent-employer, when he was injured on August 5, 2005. On that date, a forklift struck his right hip and back area, towards his right buttock, squeezing him between the forklift and a van. The impact was significant enough to require body shop repairs of the van doors, which were rendered inoperable in the accident.

The claimant was initially diagnosed with bilateral hip contusions. He saw a company doctor for three visits, during which time he experienced no

improvement. A change of physician was ordered, to Dr. Sharma, who became the claimant's treating physician. Dr. Sharma, in his deposition testimony, noted his frustration with the claimant's care, because the nurse case manager made appointments with other physicians who treated the claimant without communicating with Dr. Sharma, before or after the appointments, limiting his ability to counsel the claimant and to have a complete understanding of his treatment.

Since his injury occurred, the claimant had consistent complaints of a huge swelling at his right hip, significant low back pain, radicular pain, and a tendency for his leg to buckle. His symptoms of depression, related to his pain and disability and the impact upon his marriage, developed soon after the injury and continued, unresolved, up to the hearing. Dr. Sharma observed low back muscle spasms and the huge swelling at the hip regularly throughout the claimant's treatment. The testimony of the claimant and Dr. Sharma and the medical records reflect that these concerns began upon the occurrence of the accident and have continued through the date of the hearing.

An MRI on September 26, 2005, showed

degenerative disc disease at L4-L5 with a central disc protrusion and generalized disc bulging. On September 27, 2005, Dr. Sharma recommended surgery to the nurse case manager for the claimant's hip, and noted that the claimant had a herniated disc. Dr. Tompkins and Dr. Schmidt performed surgeries on the hematoma and infection, and the claimant underwent physical therapy to heal the significant wound, and then work hardening. Dr. Sharma was not informed of the occurrence of treatment by Dr. Tompkins and Dr. Schmidt, and he disapproved of work hardening without a prior functional capacity evaluation, to establish a baseline. Dr. Schmidt released the claimant to limited duty in early 2006, but Dr. Sharma noted at deposition that there is no indication that Dr. Schmidt was aware of the claimant's disc herniation. The claimant testified that he continued to have low back pain, radicular pain, and leg weakness at that time. These symptoms have not yet resolved.

Dr. Schmidt released the claimant to full duty, with the limitation that he stay in a clean environment, on April 20, 2006. However, the claimant was put back in a "dirty, chicken feces infested

environment," in direct contradiction to his orders and discussion with the nurse case manager. Dr. Schmidt then made explicit work restrictions.

The claimant returned to Dr. Sharma on April 10, 2006. He assessed a herniated disc at L4-5, a large loose mass of fat and muscle at the hematoma site, and depression. Dr. Sharma wanted the claimant to undergo physical therapy for his lower back, then a functional capacity evaluation, then work-hardening, as well as injections. In May, the claimant's symptoms had not improved. His depression was worse, and Dr. Sharma prescribed an antidepressant, which was accepted and paid by the respondents.

After his injury, the claimant was off work. There were many consequences to his injury, including difficulty meeting his personal and financial commitments. His wife left him, and later they divorced. He gained approximately eighty pounds. He was unable to take care of his family, which contributed to his marital problems. His chronic pain also interfered with his marriage. In May 2006, he was depressed and tearful. Dr. Sharma prescribed an antidepressant, for which the respondents paid. The

medication helped. Physical therapy was not approved until after June.

Dr. Sharma treated the claimant's muscle spasms and back pain with medication and physical therapy. He performed trigger-point injections in the claimant's lower back, where he was having pain. The shots were not in his buttock and hip area. Dr. Sharma set up epidural steroid injections, which were not approved.

Throughout Dr. Sharma's care, up to 2010, the claimant had the same symptoms, all of which arose as a result of the accident in 2005, low back pain, radiculopathy, grotesque swelling over the right hip, and depression. Dr. Sharma repeatedly identified the cause of these symptoms as the 2005 accident. Dr. Sharma also noted delays in treatment approval and a lack of communication with him on the part of the nurse case manager as to the claimant's care. Dr. Sharma stated that when the claimant returned to work, his low back pain became exacerbated.

Dr. Anderson, a plastic surgeon, evaluated the claimant's concavity in his buttock in September 2006. The nurse case manager attended this visit as well. Dr.

Anderson recommended that the claimant see an orthopedic and neurology specialist to evaluate his low back and radicular symptoms before he would consider surgery. Dr. Anderson referred the claimant to Dr. Dickson for functional examination of his right leg and hip, with a possible MRI and electromyogram. This was scheduled, but, due to a misunderstanding concerning the nurse case manager's actions in the business area of the doctor's office, the claimant did not remain for the visit. Since that time, an orthopedic evaluation was not performed.

Appointments were apparently made with Dr. Herrold concerning the claimant's right hip, but Dr. Sharma, the claimant, and his attorney, were not made aware of them.

The last visit the claimant had with Dr. Sharma was on May 10, 2010, at which time Dr. Sharma diagnosed, again, chronic anxiety and depression, low back pain, herniated disc at L4-L5, and a right hip hematoma, treated surgically, leaving a large deep indented wound in the right hip. The claimant was given pain medications and an antidepressant.

Dr. Sharma testified at deposition that the

hematoma and the right lumbar radiculopathy were two separate problems as a result of the same accident. A nerve conduction study confirmed the right lumbar radiculopathy. An MRI confirmed the hematoma and a herniated disc at L4-L5. The studies were consistent with each other. Dr. Sharma stated that the herniated disc was the result of the crushing force the claimant sustained on August 5, 2005, based upon the studies, the objective evidence, the claimant's subjective complaints and responses to testing, and the history and mechanism of the accident.

Dr. Sharma also stated that, by 2010, the claimant needed treatment in the form of physical therapy and medications for his injuries and his depression, and other care in the form of "basically respect... I just felt he was getting the runaround and he was just not happy with the whole situation."

At deposition, Dr. Sharma discussed an x-ray performed for a disability determination, a copy of which he received as the claimant's treating physician. The x-ray, performed on June 29, 2009, showed a complete loss of disc space between L5 and S1 and narrowing of the disk space at L4-L5 also. These findings showed

that an MRI is indicated.

Dr. Sharma stated that, by 2010, there was a "very slim chance" of the claimant's ability to return to work, because he had become a chronic pain patient, with chronic anxiety, depression, and fatigue. Dr. Sharma felt that there was a "lot of potential" for the claimant to become more functional if he was to receive the adequate treatment.

In the last visits in 2008, the claimant was not as good as he was going to get from a treatment standpoint. As of May 10, 2010, the claimant was not at the point of maximum medical improvement. He needed an MRI of his lower back and right hip, and the plastic surgery. An x-ray or MRI of the right hip was not performed after the surgeries to the right hip. Trauma to the hip could have resulted in many other complications which Dr. Sharma was unable to treat or address, such as aseptic necrosis. Dr. Sharma wanted the claimant to undergo psychological counseling. Dr. Sharma could address the chronic pain portion of the claimant's counseling needs, but not his depression.

Dr. Sharma stated the claimant's condition was "practically unchanged." He had failed his attempt to

return to regular duty, and he needed to be given appropriate treatment to get him back to work. He needed a psychological evaluation and pain management skills and strategies. The amount of time that had passed meant that the claimant needed more treatment than what he was receiving in 2008 or 2010, when last seen by Dr. Sharma. Medication is only part of pain management, and the fact that the claimant was not regularly using pain medications did not demonstrate that the claimant had learned to manage his pain.

Dr. Sharma noted that the claimant was not referred to pain management in 2005 to 2008, due to other issues taking precedence. The depression was caused first by the right hip deformity, which was still a problem. He reiterated his deep frustration with the nurse case manager's failure to communicate with him, as the treating physician, and how that limited his ability to fulfill his oath as a doctor to his patient.

II. PROCEDURAL HISTORY

The Administrative Law Judge dismissed the claim after making the following findings:

1. The employee/employer relationship existed between the parties on August 5, 2005.

2. The claimant sustained a compensable injury to his low back and right hip on August 5, 2005.
3. The claimant's earned wages as of August 5, 2005, entitled him to a TTD rate of \$363.00, and PPD is \$272.00.
4. The respondent accepted the claimant's injury as compensable and had paid medical expenses incurred through February 6, 2008, and has paid 16 weeks of temporary total disability benefits through January 17, 2006.
5. Any award of additional indemnity benefits in this case would be subject to existing child support liens on file.
6. The respondents are entitled to an offset against liability for temporary total disability for any period of time that the claimant also drew unemployment compensation.
7. The claimant has failed to establish by a preponderance of the evidence that he is entitled to any period of temporary total disability of temporary partial disability benefits on or after April 27, 2007, to the date of the hearing.
8. The claimant has established by a preponderance of the evidence that a specialist evaluation is reasonably necessary to evaluate the cleft and fatty mass residuals of the claimant's admittedly compensable hematoma/seroma.
9. The claimant has failed to establish by a preponderance of the evidence that a psychological evaluation, or an additional MRI of his back, or pain management classes, or additional prescription medication as currently recommended by Dr. Sharma in his deposition taken on June 1, 2010, are reasonably necessary in connection with the claimant's compensable injury sustained on August 5, 2005.

The claimant appealed the decision on the

issues of temporary total disability benefits and additional medical benefits as recommended by Dr. Sharma. The award of a specialist evaluation was not appealed.

II. ADJUDICATION

The claimant is entitled to additional medical treatment, including an additional MRI, pain management classes, and medication. The claimant is also awarded a psychological evaluation under Ark. Code Ann. Sec. 11-9-508(a). However, the claimant is not entitled to additional temporary total or temporary partial disability benefits, as Dr. Sharma had released the claimant to work.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). 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); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). The Court of Appeals has noted that even if the healing period has ended, a claimant may be entitled to ongoing medical treatment if the treatment is geared toward management of the claimant's compensable injury. See Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230; 184 S.W. 3d 31, (2004), citing Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Furthermore, this Commission has found that treatment intended to help a claimant cope with chronic pain attributable to a compensable injury may be reasonable and necessary. See Maynard v. Belden Wire & Cable Company, Full Workers' Compensation Commission Opinion filed April 28, 1998 (E502002); See also Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission Opinion filed June 20, 1991 (Claim No. 704562). Additionally, a claimant does not have to provide objective medical evidence of his continued need

for treatment. Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W. 3d 211 (2000), citing Chamber Door Indus., Inc. v. Graham, 59 Ark. App. 224, 956 S.W. 2d 196 (1997).

The claimant has admittedly compensable hematoma and L4-5 bulging disc injuries sustained on August 5, 2005, while performing employment services for the respondent. Dr. Sharma's reports after the incident contain findings of emotional problems and depression caused by claimant's injury, and those were treated, for the most part, with medication. Treatment for a mental injury or illness can be awarded under Ark. Code Ann. §11-9-508(a), if it is reasonably necessary in connection with the injury received by the employee. Here, in addition to chronic pain from the bulging disc, the claimant has a gross deformity on his backside from the hematoma and the subsequent infection and treatment thereof.

Dr. Sharma has recommended further treatment for depression. As the depression is caused by the compensable injury, the treatment of the depression is reasonably necessary medical care to which the claimant is entitled under Ark. Code Ann. §11-9-508(a).

Dr. Sharma also recommended additional treatment for management of claimant's back injury, including an additional MRI and pain management. The additional MRI is warranted by the claimant's continued and unresolved symptoms and an x-ray showing reduced or absent disc space in the area of his complaints of pain and disc herniation. The pain management recommended by Dr. Sharma is intended to reduce, or enable the claimant to cope with, his chronic pain attributable to his admittedly compensable injury. It is reasonable necessary medical treatment under Patchell v. Wal-Mart Stores, Inc. 86 Ark. App. 230, 184 S.W. 3d 31 (2004.)

Although five years have passed, the claimant still has a herniated disk at L4-5, still has chronic pain, has anxiety and depression as a result of his injury, and the respondent is responsible for the treatment Dr. Sharma recommends to alleviate those problems. Dr. Sharma is the only doctor to opine on the issue of reasonably necessary medical treatment. There is no contradicting doctor's opinion. Dr. Schmidt's release of the claimant was limited to his treatment of the Staphylococcus infection in the claimant's hematoma wound. There is no evidence that Dr. Schmidt was aware

of or considered any of the claimant's other medical issues. There is no evidence to contradict the opinion of Dr. Sharma. 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, 97 Ark. App. 338, 249 S.W.3d 149 (2007). We cannot arbitrarily disregard Dr. Sharma's opinion and substitute our own opinion as to the cause of the claimant's symptoms and need for treatment. 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 Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The claimant has failed to prove his entitlement to

temporary disability benefits, as he had been released to work by Dr. Sharma during the period in question.

The Full Commission reverses the Administrative Law Judge's opinion, in part, on the issue of additional medical treatment, including a new lumbar MRI, pain management, psychological treatment for his anxiety and depression, and additional medications. The Full Commission affirms the Administrative Law Judge's opinion on the issue of temporary disability benefits. The Full Commission does not address those portions of the Administrative Law Judge's opinion which were not appealed by the parties.

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. Sec. 11-9-715 as amended by Act 1281 of 2001. For prevailing on this appeal before the Full Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. Sec. 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

CONCURRING AND 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 he is entitled to temporary total disability benefits. However, I must respectfully dissent from the majority's award of additional medical treatment, including an MRI, pain management classes, prescription medication and a psychological evaluation pursuant to Ark. Code Ann. § 11-9-508(a). I find that the claimant cannot meet his burden of proof.

In my opinion, the evidence does not support a finding that a psychological evaluation, an additional MRI of the back, pain management classes, and additional prescription medication are reasonably necessary medical

treatment. Dr. Sharma's last treatment report of February 6, 2008, makes absolutely no reference to depression, indicates that the claimant is doing much better, and states that the claimant now takes his medication on an as needed basis. Further, the claimant did not seek any additional medical treatment or additional prescription medication from Dr. Sharma or from any other physician for his back for over two years after this February 6, 2008 visit. Moreover, Dr. Sharma did not order a psychological evaluation or an additional MRI or pain management classes at any time during the two and one-half years that he treated the claimant.

The only evidence supporting the claimant's need for additional treatment is Dr. Sharma's testimony and his written report dated May 10, 2010. In my opinion, Dr. Sharma lacks credibility. The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Stone v. Dollar General Stores, 91 Ark. App. 260, 209 S.W.3d 445 (2005); Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this

extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for the medical opinion in deciding the weight and credibility of the opinion and the medical evidence. Maverick Transportation v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000). However, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Hill v. Baptist Med. Ctr., 74 Ark. App 250, 48 S.W.3d 544 (2001).

The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the

opinion. Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion, January 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Moreover, the Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of the Workers' Compensation Law. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

In regard to the surgeries performed by Dr. Tompkins and Dr. Schmidt, Dr. Sharma testified that he would have expected the surgeon to do a better job. However, on cross-examination, Dr. Sharma flatly denied that he had said that he would have expected the surgeons to do a better job.

Dr. Sharma admitted he is not a surgeon, and he does not perform surgery to evacuate hematomas. However, he testified that the two surgeons who performed the surgeries related to the hematoma should have followed the claimant more than one or two times post surgery. He said that "opinion" is based on his experience. However, he readily admitted that surgery is outside his practice area and qualifications.

Dr. Sharma did not select the surgeons, but had he been allowed to do so, he would have selected Dr. Tompkins. He knows both Dr. Tompkins and his partner, Dr. Schmidt, believes they are good surgeons, has confidence in them, and would refer patients. His objection to them was that they should just have seen the claimant a couple of times post surgery and then referred the claimant back to him.

Dr. Sharma testified to things he could not possibly know; i.e., that Dr. Schmidt did not know the claimant had a herniated disc; only to fess up when confronted that he did not know what he was talking about.

Dr. Sharma testified that he relies on specialists to read films, then disagreed with the

radiologist who read the claimant's lumbar MRI because "he does not know the patient." He interpreted the radiologist's reading of the scan to mean the claimant has a herniated disc at L4-5. However, he never referred the claimant to a neurosurgeon because he does not believe the claimant needs to see a neurosurgeon because all he has is some degenerative disc disease, a small protrusion, and some bulging, nothing surgical.

Dr. Sharma lists nine objective findings that lead him to conclude the claimant's lumbar problem was due to a traumatic injury:

- 1) pain radiating in the right lower extremity, the character and location of the pain;
- 2) walking and standing tended to aggravate pain;
- 3) active range of motion was limited;
- 4) the claimant was limping;
- 5) heel walking increased his pain;
- 6) straight leg raising on the right increased lumbar pain;
- 7) Faber's test caused him to say he had pain;
- 8) tenderness; and
- 9) decreased pin prick;

However, there is not one single objective finding on this list.

Dr. Sharma testified after the claimant

returned to him on April 10, 2006, that he noticed the claimant was getting depressed. He quickly concluded it was "related to his injury." The claimant started crying profusely and "he certainly looked depressed" to Dr. Sharma, thereby cinching the diagnosis of depression. Interestingly, Dr. Sharma treated the claimant for two and a half years and never once even hinted that he should be referred to a psychiatrist or a psychologist. He readily admits that he is neither a psychologist nor psychiatrist.

Although Dr. Anderson, a plastic surgeon, felt the claimant needed to be evaluated by an orthopedic surgeon and referred him to Dr. Dickson, Dr. Sharma did not believe that the claimant needed to be seen by an orthopedic surgeon for any reason.

When Dr. Sharma saw the claimant on April 10, 2006, he felt the claimant would need physical therapy for his low back. The claimant had not begun physical therapy by his June 13, 2006 appointment with Dr. Sharma, and Dr. Sharma was surprised it was taking so long. However, according to the physical therapy records, Dr. Sharma wanted to delay physical therapy for trigger point injections and then the physical therapist

had to contact Dr. Sharma five times before getting the orders needed to begin therapy.

Therefore, after considering the evidence of record, I find the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment. Dr. Sharma's records are replete with inconsistencies and cannot support a finding that the claimant is entitled to additional medical treatment. Accordingly, I must dissent from an award of benefits.

KAREN H. MCKINNEY, Commissioner