

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H109799**

GINA SALLEE, EMPLOYEE

CLAIMANT

UNIVERSAL HEALTH SERVICES INC., EMPLOYER

RESPONDENT

SEDGWICK CLAIMS MANAGEMENT SERVICES INC., CARRIER

RESPONDENT

OPINION FILED **MAY 16, 2024**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by LAUREN A. SPENCER, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 10, 2024, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on February 8, 2024, and a pre-hearing order was filed on February 15, 2024. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The prior opinion of the Full Commission is *res judicata*.
3. The employee/employer/carrier relationship existed on December 7, 2021.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant is entitled to additional treatment for her neck injury.
2. Whether claimant is entitled to additional treatment on her left knee.

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3. Whether claimant is entitled to treatment specifically for a left shoulder injury.¹

All other issues are reserved by the parties.

The claimant contends that “She is entitled to medical treatment as recommended by Drs. Dougherty and Blankenship. The claimant reserves all other issues.”

The respondents contend that “Claimant is not entitled to additional treatment for her neck and left knee and contend the injury to the left shoulder is not compensable and claimant is not entitled to treatment. The respondent reserves all other issues.”

From a review of the entire record including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on February 8, 2024 and contained in a pre-hearing order filed February 15, 2024 are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable neck and left knee injury.

3. Claimant has proven by a preponderance of the evidence that her left shoulder is a compensable injury, and as such, she is entitled to medical benefits for that injury which occurred on December 7, 2021.

¹ While not expressed in clear terms in the prehearing order, the compensability of the left shoulder issue was litigated; respondents contended that it was not compensable, and claimant sought benefits that could only be awarded if it was determined she suffered a compensable injury.

FACTUAL BACKGROUND

This matter was previously tried before me on September 14, 2022. An opinion was issued on November 3, 2022, in which I found that claimant failed to prove that she suffered a compensable injury on December 7, 2021, as she did not provide convincing evidence that she was acting in the course of her employment at the time of the accident. By so finding, I did not have to determine if claimant's injuries at issue at that hearing--to her neck and left knee--were compensable.

On June 9, 2023, the Full Commission reversed that decision, finding claimant did prove by the preponderance of the evidence that she was acting within the course of her employment duties with the respondent on December 7, 2021, when she had an automobile accident. The Full Commission then found that claimant proved she suffered compensable injuries to her neck and left knee. All other issues were reserved.

That decision was not appealed to the Arkansas Court of Appeals and therefore is *res judicata* on the issue of whether claimant suffered a compensable injury on December 7, 2021. The parties agreed that the transcript from the previous hearing, including the medical records, should be considered as an exhibit to this hearing, and I am treating it as such.

At the conclusion of the hearing, I requested the parties submit briefs in support of their position on the issues that were being litigated in this hearing. Those briefs were very much appreciated and are blue backed to the record of this case.

HEARING TESTIMONY

Claimant was the only witness at the hearing. Before she began testifying regarding the issues for this hearing, I advised the parties that I remembered the testimony from the previous hearing and that I had no question that claimant was in a severe automobile accident when she collided with a deer on interstate 40 and as such, she did not need to go into great detail as to the severity of the accident.

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Claimant said she was having pain in her neck, left knee and right shoulder immediately after the accident and went to the emergency room the following day. After seeing other physicians, she was eventually treated by Dr. James Blankenship for her neck and shoulder and Dr. Christopher Dougherty for her knee and shoulder. Claimant testified that on March 14, 2024, she had surgery on her left shoulder which was performed by Dr. Dougherty. She is currently receiving physical therapy; however, she completed a course of physical therapy and is now currently doing home exercises. Dr. Dougherty also has recommended surgery on claimant's left knee but because respondent denied that portion of the claim, the surgery has been delayed.

Claimant stated that she was still treating with Dr. Blankenship for her neck. Epidural injections did not help her, and Dr. Blankenship believes that her alternative is either pain management or surgery. While claimant does not want to have surgery on her cervical spine, she believes that it is a necessity because she is not getting better. She has headaches on a daily basis, and pain from her neck down from the base of her skull to her shoulders and into her left arm. She did not complain of numbness in her hands at this time.

On cross-examination, claimant repeatedly claimed that she could not remember after having immediate recall of the question she was asked on direct examination. However, many of the questions dealt with accidents that claimant had prior to December 7, 2021, and none of the injuries from those accidents were preventing claimant from working at the time of her compensable injury.

DEPOSITION OF DR. JAMES BLANKENSHIP

Dr. James Blankenship was deposed on March 25, 2024. He is a board-certified neurosurgeon who first saw claimant in September 2022. She presented to his clinic with neck pain, suboccipital pain, bilateral shoulder, and subscapular pain, as well as lower left extremity pain down to her hand, bilateral numbness in both upper extremities and had decreased strength. Dr. Blankenship said

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claimant related this to a motor vehicle accident that happened in December 2021 and his information regarding her symptoms came from the claimant. Dr. Blankenship found objective findings such as weakness in the triceps muscles in both arms as well as her hands. Based on the radiographs, he found that claimant had an anterolisthesis, meaning that she did not have good alignment at C4-C5 and C5-6 levels of her cervical spine. The bilateral hand weakness was attributed to pressure on the spinal cord as well. He clarified that he was unaware that claimant had an automobile accident on April 4, 2023, and any entry he made on a form that related to that accident was probably due to him talking too fast and thinking about someone else. It was his opinion that the accident of December 2021 was the one that caused the malalignment of claimant's cervical spine and the disc protrusion that he saw.

Dr. Blankenship testified that his opinion that was expressed in his December 7, 2023, letter to Dr. David Cannon; "I have told her there was not any surgical intervention that is going to help" was no longer his opinion. As claimant has failed multiple attempts at conservative treatment, he believes surgical intervention is now appropriate and recommended a cervical fusion with titanium implants at C4-5, C5-6, and C6-7.

On cross-examination, Dr. Blankenship said other than the disc protrusion, he had no explanation why claimant was having paresthesia and the weakness in her upper extremities, but he did believe that surgery would help resolve the pain complaint that she was having. He agreed that the headaches could be related to the neck issues.

On redirect-examination, Dr. Blankenship was asked if a newer and clearer MRI would help him see any changes that happened after the April 2023 accident. While he was unsatisfied with the previous MRIs that he had seen, he did not believe that that was going to change his offering of surgery because he was able to see a misalignment in the cervical spine.

REVIEW OF THE EXHIBITS

Claimant submitted 150 pages of medical records. However, a detailed review of the records for the neck and left knee injuries is not necessary. For the former, Dr. Blankenship's deposition explained what he had done in treating claimant and that his last entry was not his current opinion; for the latter, Dr. Chris Dougherty answered an inquiry from respondent, Sedgwick, regarding a medical records review conducted by Dr. Owen Kelly (Cl. X 132), and in his response, clearly outlined his opinion as to claimant's condition and outlined his recommended course of treatment (Cl. X. 145). A further examination of the records relevant to the left knee and left shoulder claims will be addressed in the appropriate section of the adjudication.

Respondent submitted as non-medical exhibits claimant's deposition which was taken before the September 14, 2022, hearing as well as some other documents which were a part of that record, and my opinion of November 3, 2022 (the relevance of which is not apparent, as it was reversed by the Full Commission).

ADJUDICATION

Compensable injuries must be established by medical evidence supported by objective findings, Ark. Code Ann. § 11-9-102(4)(D), and objective findings are those that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Complaints of pain are not objective medical findings. *Ark. Sec'y of State v. Young*, 2018 Ark. App. 508, at 8, 559 S.W.3d 331, 336. However, once it has been established that a claimant has sustained a compensable injury, she is not required to offer objective medical evidence to prove entitlement to additional benefits, *Ark. Health Ctr. v. Burnett*, 2018 Ark. App. 427, at 9, 558 S.W.3d 408, 414. The Full Commission found claimant presented objective evidence to support her claim for neck and left knee injuries, which makes it unnecessary for her to provide new objective findings for the treatment she seeks for those injuries.

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A. The neck injury

As summarized above, Dr. Blankenship believes claimant has failed at conservative treatment, and Claimant seeks additional medical treatment for her cervical spine as recommended by Dr. Blankenship. Respondents had Dr. Blankenship's records reviewed by Dr. Owen Kelly, an orthopedist, who offered the opinion that "The isolated accident of 12/7/21 is not responsible for the findings of her cervical spine nor is it responsible for her treatment." Dr. Kelly attributed claimant's condition to degenerative disease of the cervical spine.

In reviewing Dr. Kelly's report, I give more credibility to the doctor that has examined a patient than I do to one that merely reviewed records. Dr. Kelly's statement regarding any degenerative disc disease he saw is irrelevant; "a pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought." *Fulton Cty. Hosp. v. Herring*, 2020 Ark. App. 221, 597 S.W.3d 162. A person with degenerative disc disease without symptoms or limitations is not barred from benefits; the Full Commission's decision in this case was that claimant was working at her job when she was injured, and there is no medical evidence she was restricted in any way before that day. As such, I find she has proven by a preponderance of the evidence that the medical treatment as recommended by Dr. Blankenship is reasonable and necessary.

B. The left knee injury.

Dr. Dougherty had been treating claimant for some time before he recommended surgery for her compensable knee injury. Dr. Kelly reviewed the records from Dr. Dougherty and opined that the MRIs that he examined showed:

“... finding significant with cartilage loss on the medial compartment, degenerative changes, and an intact ACL. Also, two independent radiology readings document an intact anterior cruciate ligament. The treating physician notes she would need to undergo ACL construction. There's no evidence of

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ACL compromise or loss of integrity. The findings noted in her knee are typical of an age-related wear pattern including a degenerative meniscal tear, most specifically on the medial side involving the anterior cartilage.... Ms. Sallee sustained no identifiable injury to the left knee joint or cervical spine at the time of the incident.... The findings noted on the previous imaging are consistent with non-traumatic findings.”

Dr. Daugherty responded to Dr. Kelly’s medical records review in a letter of February 20, 2024, wherein he stated:

1. I have read the opinion of Dr. Kelly and agree with the observations he formulated from her imaging studies. Her clinical exam does not, however, correlate with her imaging studies. She has a clear Lachman’s and anterior drawer on exam indicating an incompetent ACL. Her clinical exam is consistent with a Sherman Type-1 ACL tear which is an avulsion of the femoral side of the ACL without restriction.
2. The car accident has relation to the current injury, and it caused the injury in question, and this did aggravate the condition of the meniscus tear.
3. Without ACL repair, the patient will progress with arthritis and the plan of AC repair is not documented to increase the development of arthritis.
4. Reasonable treatment is ACL repair with post op PT and pre-op labs for surgery.

Dr. Kelly’s medical record review was of little use on this point; he could not possibly give a well-informed opinion on a knee injury without conducting the same physical examination as her treating physician. As the existence of a compensable knee injury has already been established as a matter of law, claimant has met her burden of proof that the recommended surgery to her left knee is reasonable and necessary.

C. The left shoulder injury:

The claim for a left shoulder injury was not litigated in the previous hearing, and therefore, it must be established as (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and*

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More v. Reid, 2011 Ark. App. 450, 384 S.W. 3d 630.

I noted on December 8, 2021, the day after the accident, claimant reported to the Emergency Department at Mercy Hospital in Fort Smith that she was having pain in her neck, left knee and left wrist. During the course of that visit, she both denied any pain in her left shoulder (“Left shoulder: Normal. No swelling or tenderness. Normal range of motion. Normal strength. Normal pulse,”) (Cl. X. 21), and complained of it: (“She is tender to the left cervical paraspinous muscles in the left upper trapezius into the left shoulder.”) (Cl. X. 17) Two weeks later, the records from Dr. Thomas Cheyne state that claimant was complaining of left shoulder pain. He did not do any objective testing during that December 22, 2021, visit, but simply noted that claimant had a “left shoulder contusion.” (Cl. X. 39). On January 6, 2022, Dr. Cheyne recorded that claimant had a “strain of muscle(s) and tendon(s) in the rotator cuff of left shoulder.” Claimant received physical therapy on her left shoulder, and when conservative care did not provide her with relief, Dr. Dougherty performed surgery on that shoulder on March 14, 2024. (Cl. X. 150). In his pre-operative note, he stated without equivocation “Her injury occurred during a car wreck in December 2021.”

I noted in my opinion from the first hearing “it is obvious that claimant will engage in deceptive behavior when she believes it helps her.” Nothing about her testimony in the second hearing changed my mind on that point; she was often evasive in cross-examination and professed to have memory problems (although she had no such issues during direct testimony). However, my belief that claimant will be less than truthful when she thinks it is to her benefit isn’t determinative here; telling the doctors that her left shoulder was injured in the automobile accident and then having to undergo a surgery on that shoulder isn’t particularly beneficial. With no testimony or medical records to the contrary, and with Dr. Dougherty’s conclusion that the accident caused the injury to her left shoulder, I find claimant has met her burden of proof that her left shoulder was injured in

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the automobile accident of December 7, 2021. The Full Commission found this accident occurred during the course of claimant's employment. As there are objective medical findings that she suffered internal bodily harm on this portion of her claim, I find the treatment recommended by Dr. Daugherty is reasonable and necessary.

ORDER

Claimant has proved by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable neck injury as directed by Dr. Blankenship.

Claimant has proved by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable left knee injury as directed by Dr. Dougherty.

Claimant has proved by a preponderance of the evidence that she sustained a compensable injury to her left shoulder on December 7, 2021, and is entitled to medical treatment for that injury as directed by Dr. Dougherty.

Pursuant to A.C.A. § 11-9-715(a)(1)(B)(ii), attorneys fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." In this case, there was no claim that indemnity benefits have been controverted up to the date of the hearing, and as all issues other than medical benefits were reserved, no attorney's fee can be awarded in this matter at this time. Claimant's attorney is free to voluntarily contract with medical providers pursuant to A.C.A. § 11-9-715(a)(4).

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$541.95.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE