

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H006268

JANYL JOHNSON,
EMPLOYEE

CLAIMANT

ACE HARDWARE CORPORATION,
EMPLOYER

RESPONDENT

INDEMNITY INSURANCE COMPANY/ESIS, INC,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 23, 2021

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

Claimant represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondents 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 March 16, 2021. The administrative law judge found that the claimant proved he sustained a compensable injury "to the lumbar region of the lower back." The administrative law judge awarded medical treatment and temporary total disability benefits. After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved he sustained a compensable back injury.

I. HISTORY

The parties stipulated that the employer-employee relationship existed on March 20, 2020 at which time the claimant “was involved in a work-related motor vehicle accident.” The claimant testified, “I was driving west on 82 in Leland, Mississippi driving to one of my stops when a black pickup truck crossed the traffic, the center line and all lanes, and hit me.” The claimant testified, “I injured my neck and my lower back.” The parties stipulated that the claimant “sustained a compensable injury to his neck” as a result of the March 20, 2020 motor vehicle accident.

According to the record, the claimant treated at Pain Relief Chiropractic beginning April 13, 2020. Dr. Christopher Burton, D.C. noted at that time, “This is a new patient with an injury due to a motor vehicle crash.” The claimant’s complaints included “Neck pain” and “Low back pain.” Dr. Burton examined the claimant and noted, “Palpation of the thoracic, lumbar, gluteal and related spinal musculature reveal: Thoracic paraspinals. Erector spinae. Quadratus lumborum hypertonic, palpatory guarding, spasm, and trigger point bilaterally and is mild.” Dr. Burton’s diagnoses included “Sprain of ligaments of lumbar spine, initial encounter” and “Muscle spasm of back.”

Dr. Scott Carle examined the claimant at Concentra on April 15, 2020:

Driving an 18 wheeler almost 4 weeks ago and was hit on the driver’s side by a regular sized truck. No complaints at that

time. About 10 days ago, he states that [he] was leaning over to put something in the back of his SUV and his left knee buckled. It went “out and then back in.” C/o some left and right knee pain since that time. He denies any contusion to the knees on the case date. About 4 days prior to his knee issue (2 weeks ago) he began having some bilateral neck and low back soreness....

Dr. Carle assessed “1. Motor vehicle collision. 2. Neck pain. 3. Back pain. 4. Left knee pain.” Dr. Carle recommended conservative treatment, and the claimant was provided physical therapy.

Dr. Burton examined the claimant on April 17, 2020 and continued to report “spasm” based on physical examination of the claimant’s thoracic and lumbar musculature. Dr. Burton stated, “Examination indicates manifestations of a sprain/strain of the cervical spine. Examination indicates manifestations of a sprain/strain of the lumbar spine.”

The claimant followed up with Dr. Burton on April 27, 2020. Dr. Burton noted at that time, “Patient given a letter for light duty, if light duty is not an option, then excused from work activities for 1 week and will monitor ability to return to work on weekly.” Dr. Burton provided an Authorization for Absence on April 27, 2020: “This is to certify that Janyl Johnson is under my care. In order to avoid aggravation of his condition, I recommend that he be excused from heavy work activity and strenuous work activity starting 04/27/2020 until 05/03/2020. Light Duty is recommended, condition will be re-evaluated weekly.”

Dr. Carle noted on April 29, 2020, “Janyl Johnson is close to being able to do the physical requirements of his job, but not quite all the way yet....The claimant can return to work with the following restrictions on: 04/29/2020. No CMV operation. Restrictions: No lifting more than 30 lbs.” The claimant testified that restricted duty with the respondent-employer was not available, so he was off from work for approximately one week.

Dr. Carle reported on May 6, 2020, “The patient was released from care as maximum medical improvement was reached for the patient’s injury(ies). Functional restoration and post discharge plans were discussed with the patient. The patient expressed understanding.” Dr. Carle assessed “1. Motor vehicle collision. 2. Neck pain. 3. Strain of right levator scapulae muscle.” Dr. Carle stated, “The claimant can return to work with no restrictions on: 05/06/2020. The claimant has suffered no permanent impairment due to his/her work-related injury. The maximum medical improvement date (end of healing period date is): 05/06/2020.”

The claimant testified that he returned to work for the respondents. The claimant continued to follow up with Dr. Burton beginning May 25, 2020. The claimant also continued to occasionally follow up at Concentra with Dr. Carle and Dr. Troy Moore.

Dr. James Adametz reported on August 4, 2020 that the claimant was suffering from neck pain as a result of the motor vehicle accident. Dr.

Adametz assessed “1. Cervical disc disorder with radiculopathy.” Dr. Adametz recommended conservative treatment, and he released the claimant to return to work.

Dr. Adametz noted on September 1, 2020, “He came back to the office on September 1, 2020 he was driving recently had a severe flareup where he is having a lot of pain in his right arm he actually had to take off work since then and is just slightly better he has been getting some physical therapy and thought that was helping a little bit ... I want him to keep doing the physical therapy I will take him off work for a few weeks to try to get this cooled down and then see him again....The worker is unable to return to work because of [his] current condition.”

The respondents apparently paid temporary total disability benefits from September 1, 2020 through September 21, 2020. Dr. Adametz reported on September 29, 2020:

This is a 59 year old male who is following up for Cervical Disc Disorder with radiculopathy (Cervical disc disorder at C5-C6 level with radiculopathy) on the cervical spine.... He came back to the office on September 29 I gave him some medication and he is continued therapy he got better for a little while and that he was not having as much pain and numbness in his hand particularly on the right side but now the symptoms are coming back it affects mostly his middle fourth and fifth finger of the right hand ... I reviewed his MRI scan again he has multiple abnormalities he has disc at C4-5 and C5-6 which are worse on the right side ... I think that is a reasonable next step I take him off work temporarily because he was in a lot of pain when he was driving but he says that there may be some light duty available so I will release him to

do that with driving only and no lifting over 15 pounds if I just get him a little bit better so he can get on with his life I recommend avoiding surgery unfortunately [he possibly] will end up having to do at least 1 and possibly 2 surgeries if I just cannot get [him] better any other way.

Dr. Adametz assessed “1. Cervical Disc Disorder with radiculopathy.” Dr. Adametz released the claimant to “LIGHT DUTY, DRIVING ONLY NO LIFTING OVER 15 POUNDS.”

The claimant testified on direct examination:

Q. You saw Dr. Adametz on September 29th, and at that time you were placed on light duty, does that sound right?

A. Yes.

Q. And what happened with regard to that light duty?

A. Well, when I saw Dr. Adametz that day he asked me do I feel I may be able to do some light duty. Okay, at that time I had had the first injections, so I told him, I said, “Yes, I’ll try.” So I agreed, but I know that my company tells me that if I feel that I may not be able to make that whole run, tell them you can’t do it at all, because it will be hard to get somebody else to try to get that run, because they run such a tight ship. So going forward, that Saturday I was supposed to call in that Sunday morning to do my run.

Q. Call in to work?

A. Call in to work.

Q. Okay.

A. So that Saturday I got to feeling worse. I had a lot of pain going in my arm and everything, so I felt then that I wasn’t going to be able to even do that light duty. So I called my employer that next morning to let him know that I wouldn’t be able to do that light duty because the pain and everything come back. And that Monday morning I went right back to Dr. Adametz and he took me off.

Dr. Adametz noted on October 5, 2020, “The patient was advised to be off work pending injection approval.” The claimant’s testimony indicated

that he had been off work since October 5, 2020, and that the respondents were paying temporary total disability benefits.

Dr. Adametz referred the claimant to Dr. Thomas Hart, who performed a cervical epidural steroid injection on October 28, 2020.

Dr. Adametz reported on November 5, 2020, “He came back to the office on November 5. Dr. Hart did an epidural steroid injection on him about 8 days ago and it has helped some he says the pain in his right arm is about 50% better ... I would suggest we repeat an epidural steroid injection within the next couple weeks and keep him on medicine I will keep him off work until I see him back in 3 or 4 weeks if we can make a little bit more progress then I would probably try to get him some kind of limited or light duty work....The patient is unable to work because of the current condition at this time.”

A pre-hearing order was filed on December 1, 2020. The claimant contended, “The Claimant’s AWW will be determined by the contract of hire, wage records and Arkansas law. The Claimant contends that he sustained injuries to his back, neck, right arm and right hand in the course and scope of his employment on March 20, 2020 when he was hit by another driver. The Claimant is under the treatment of Dr. Carle who has recently taken the Claimant off work pending approval of a recommended injection. Claimant contends that he is entitled to TTD from 4/29/2020 to 5/6/2020, and from

9/1/2020 to a date yet to be determined, continued medical care and treatment to include the recommendation for injections by Dr. Carle. Claimant contends that he is entitled to additional medical treatment, reimbursement of out of pocket expenses, mileage, and attorney's fees. All other issues are reserved."

The parties stipulated that the respondents "have accepted the injury to the neck as compensable and have paid for some temporary total disability benefits and provided medical treatment for the neck injury." The respondents contended, "The claimant was receiving TTD but has recently returned to work. His (sic) is eligible for the maximum compensation rate. His medical expenses for the neck injury are being paid. There is no objective evidence of a hand, arm or back injury."

The parties agreed to litigate the following issues:

1. Whether the claimant sustained compensable injuries to his right hand, right arm, and back.
2. The claimant's entitlement to temporary total disability benefits from April 29, 2020 to May 6, 2020, and from September 1, 2020 to a date yet to be determined.
3. Whether the claimant is entitled to additional medical treatment to include injections by Dr. Carle.
4. Reimbursement of out-of-pocket expenses and mileage.
5. Fees for legal services.

Dr. Hart performed a cervical epidural steroid injection on December 2, 2020. Dr. Hart noted at that time, "He was discharged almost pain free."

A hearing was held on February 4, 2021. At that time, the claimant withdrew his contention that he had sustained compensable injuries to his right hand and right arm. The parties agreed that the claimant sustained a compensable injury to his thoracic spine. The parties' colloquy also indicated that the respondents initially accepted compensability of injuries to the claimant's neck and low back. The claimant contended that he was entitled to temporary total disability benefits "between September 22 and November 5 of 2020."

An administrative law judge filed an opinion on March 16, 2021. The administrative law judge found that the claimant proved he sustained "a compensable work-related injury to the lumbar region of the lower back on March 20, 2020." The administrative law judge awarded reasonably necessary medical treatment, and temporary total disability benefits "from September 22, 2020, up and through the date of November 5, 2020."

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4)(Repl. 2012) provides, in pertinent part:

- (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)(Repl. 2012). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2012).

The employee has the burden of proving by a preponderance of the evidence that he sustained a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(i)(Repl. 2012). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003).

An administrative law judge found in the present matter, “4. That the claimant has satisfied the required burden of proof to show that he sustained a compensable work-related injury to the lumbar region of the lower back on March 20, 2020.” The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back.

The parties stipulated that the claimant sustained a compensable injury to his neck as the result of a work-related motor vehicle accident occurring March 20, 2020. The claimant testified that another vehicle crossed the center line and struck his tractor-trailer. The claimant

contended that, in addition to the stipulated compensable injury to his neck, he also sustained a compensable back injury. The evidence of record demonstrates that the claimant sustained a compensable low back injury as well as the stipulated compensable injury to the claimant's neck. Dr. Burton began treating the claimant on April 13, 2020 and noted that the claimant had sustained an injury as the result of a motor vehicle accident. Dr. Burton reported that the claimant was suffering from neck pain and low back pain. Dr. Burton examined the claimant and reported "spasm" in the region of the claimant's lumbar spine. It is well-settled that a medical professional's report of "muscle spasm" can constitute an objective medical finding establishing a compensable injury. University of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997). Dr. Burton diagnosed "Sprain of ligaments of lumbar spine, initial encounter" and "Muscle spasm of back."

Dr. Carle reported on April 15, 2020 that the claimant had been in a motor vehicle accident, and that the claimant was complaining of neck pain and back pain. The claimant also continued to follow up with Dr. Burton, who continued to note "spasm" based on physical examination of the claimant's lumbar spine. The claimant also treated with Dr. Adametz and Dr. Hart.

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The claimant proved that he sustained an accidental injury causing physical harm to the body, specifically the claimant's low back. The claimant proved that the back injury arose out of and in the course of employment, required medical services, and resulted in disability. The claimant proved that the low back injury was caused by a specific incident and was identifiable by time and place of occurrence on March 20, 2020. In addition, the claimant established a compensable injury to his back by medical evidence supported by objective findings, namely, the reports of muscle spasm in the lumbar region reported by Dr. Burton. It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Full Commission finds that Dr. Burton's reports of muscle spasm were based on physical examination of the claimant's lumbar spine region following the accidental injury and are entitled to significant evidentiary weight.

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. 2012).

The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2002). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

An administrative law judge found in the present matter, “5. That the claimant has satisfied the required burden of proof to show that he is entitled to the reasonable and necessary medical treatment of the lumbar region of the lower back. Additionally, the chiropractic treatment he already received was reasonably necessary.” The Full Commission affirms this finding.

The parties stipulated that the claimant sustained a compensable injury to his neck as a result of the work-related motor vehicle accident occurring March 20, 2020. The Full Commission has found that the claimant also sustained a compensable injury to his low back on March 20, 2020. The evidence demonstrates that the medical treatment of record following the compensable neck and back injuries was reasonably necessary in connection with the compensable injuries, in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). The evidence does not

demonstrate that the medical treatment following the compensable injuries was causally related to a prior injury or pre-existing condition.

The respondents assert that the claimant's treatment with Dr. Burton beginning April 13, 2020 was unauthorized. The respondents contend that the claimant was required to provide written notification of his desire to treat with Dr. Burton in accordance with Ark. Code Ann. §11-9-514(a)(2)(B)(Repl. 2012). Ark. Code Ann. §11-9-514(c)(Repl. 2012) provides, in pertinent part:

(1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's rights and responsibilities concerning change of physician.

(2) If, after notice of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.

In the present matter, the respondents' attorney cross-examined the claimant with regard to a Form N completed by the claimant following the March 20, 2020 compensable injury. However, the respondents did not introduce into the record a signed copy of a Form AR-N. There is no probative evidence demonstrating that the employer or carrier delivered to the employee a copy of a notice explaining the employee's rights and responsibilities concerning change of physician as is required by Ark. Code Ann. §11-9-514(c)(1)(Repl. 2012). There is no Form AR-N in the record before the Commission. Therefore, the change of physician rules do not apply. *See Delargy v. Golden Years Manor*, 2014 Ark. App. 499, 442

S.W.3d 889. The claimant was thus free to seek reasonably necessary medical treatment from Dr. Burton.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved he sustained a compensable low back injury on March 20, 2020. The claimant proved that all of the medical treatment of record, including treatment provided by Dr. Burton, was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). The evidence demonstrates that the claimant was within a healing period for his compensable injury and was totally incapacitated from earning wages from September 22, 2020 through November 5, 2020. The claimant therefore proved he was entitled to temporary total disability benefits from September 22, 2020 through November 5, 2020. *See Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

M. SCOTT WILLHITE, Commissioner