

DIVISION II

CA07-30

September 26, 2007

ACTRONIX, INC. and THE  
HARTFORD  
APPELLANTS

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION [NO. F302839]

V.

PATRICIA K. CURTIS

APPELLEE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellants Actronix, Inc. (Employer) and the Hartford (Carrier) bring this appeal from the October 24, 2006 decision of the Workers' Compensation Commission (Commission) affirming and adopting the administrative law judge's (ALJ) findings that appellee Patricia Curtis established by a preponderance of the evidence that on February 4, 2003, she sustained a compensable cervical injury in addition to her admittedly compensable injuries to her left shoulder and lower back, and that a neurosurgical referral for her neck injury is reasonably necessary medical treatment for that injury. On appeal, appellants argue that the Commission's decision is not supported by substantial evidence. We affirm.

Appellee, who was fifty-three at the time of the ALJ hearing, was working for Employer on February 4, 2003, when she was injured while moving a three-wheel barrel full of power cables. The barrel apparently became caught on an object such as a jacket, cable cover, or crack in the floor, at which time one of the wheels caught and caused appellee to

fall with the barrel falling on top of her. She sustained injuries to her back, neck, and left shoulder, and complained of pain in all of those areas on the date of the incident. She was taken to the emergency room by ambulance, and examined by Dr. Richard Burnett. An MRI scan of her left shoulder was performed, and she was subsequently treated by Drs. Thomas Knox, Gregory Ricca, J.M. Tullis, William Landrum, and Safwan Sakr for her various injuries.

On February 19, 2003, Dr. Knox had a cervical spine MRI scan performed with apparently normal results, other than minor degenerative changes. On February 27, 2003, Dr. Knox reported that a February 24, 2003 lumbar MRI scan reflected a herniated disc at L4-5 accentuated to the left, and planned to refer her to a neurosurgeon. Dr. Ricca, a neurosurgeon, performed a microdiscectomy L4-5 left on October 23, 2003, approximately eight months after the incident, after which Dr. Knox repaired her torn rotator cuff on June 9, 2004, and referred her to a rheumatologist. She was also referred to Dr. Sakr, with whom she treated from March 4, 2004, until appellants controverted further treatment. She had a subsequent cervical MRI scan performed on October 5, 2004, which showed low-grade degenerative changes, traction spurring, altered disc signal, and disc bulging around C4-C-5, C5-C6, and C6-C7. Dr. Tullis expressed in an October 5, 2004 opinion that a neurosurgical referral seemed appropriate since appellee continued to have pain referable to C5-6 and C6-7. In a November 4, 2004 report, Dr. Tullis indicated that the increased degenerative change reflected in the 2004 MRI results might be due to the fact that the latter was performed using a high resolution scanner at the hospital rather than the office-based scanner. Dr. Sakr's

January 20, 2005 report recommended a neurosurgical referral in light of appellee's neck pain that started on February 4, 2003, and the nature of the abnormalities identified in the 2004 MRI results. Appellee then sought permission from the ALJ to obtain reasonable and necessary medical care relating to her neck injury, including a referral to a neurosurgeon as recommended by Dr. Sakr on January 20, 2005.

A hearing was held before the ALJ on August 3, 2005, and the issues to be litigated and resolved at that time were: (1) the compensability of the neck injury; (2) whether the referral to a neurosurgeon and related treatment recommended by Dr. Sakr constituted reasonable and necessary medical treatment; (3) controverted attorney's fees. The following stipulations were submitted by the parties: (1) on February 3, 2003, appellant received admittedly compensable injuries to her left shoulder and lower back; (2) the compensability of the claimed neck injury, depression, and related benefits have been denied and are fully controverted by respondents; (3) if her husband, Mr. Tim Curtis, were called to testify, he would corroborate appellee's testimony. The ALJ found that appellee established by a preponderance of the evidence that on February 4, 2003, she sustained a compensable cervical injury, in addition to her admittedly compensable injuries to her left shoulder and lower back and that a neurosurgical referral for her neck injury was reasonably necessary medical treatment for that injury.<sup>1</sup> On

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<sup>1</sup>Because appellant's injury occurred after July 1, 2001, the ALJ was without statutory authority under Ark. Code Ann. § 11-9-715 to award her attorney an attorney's fee on the additional medical benefits specifically awarded; however, he did find that her attorney would be entitled to a twenty-five percent attorney's fee for any indemnity benefits to which she may become entitled as a result of her compensable neck injury.

October 24, 2006, the Commission affirmed and adopted the ALJ's decision. This appeal followed.

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S. W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *See Branum, supra*. Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

In reviewing decisions from the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). If reasonable minds could reach the conclusion of the Commission, its decision must be affirmed. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). We cannot undertake a de novo review of the evidence and are limited by the standard of review in these cases. *Id.* The Commission has the duty of weighing medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). It is well settled that the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Oak Grove Lumber Co. v.*

*Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or not; and when it does so, its findings have the force and effect of a jury verdict. *Id.* The Commission is not required to believe the testimony of any witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief; once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). Speculation and conjecture cannot substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, *supra*.

In order to prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i). Medical evidence used to establish the existence of the injury must be supported by objective findings, and the burden of proof of a compensable injury shall be on the employee. Ark. Code Ann. § 11-9-102(4)(D) & (E).

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); *Fayetteville Sch. Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Id.*

Appellants contend that the Commission's conclusions were not supported by the evidence because appellee failed to establish the neck injury by medical evidence supported by objective findings. They assert that the decision was based upon a misunderstanding of the report from Dr. Tullis dated November 4, 2004, from which the ALJ used a non-existent "resolution" problem with the different MRI machines as a way to ignore or overlook the obvious, or attempted to explain away the fact that the original cervical MRI performed on February 19, 2003, was normal. Appellants argue that the Commission also failed to mention that the February 24, 2003 cervical examination performed by Dr. Knox was normal and simply concluded that the subsequent 2004 MRI furnishes the necessary objective medical evidence of the alleged neck injury. They claim that the ALJ and Commission misconstrued Dr. Tullis's report regarding a resolution difference in the machines, which he put forth merely as a possibility for the difference in measuring the degree of progression of appellee's cervical-degenerative-disc disease.

Appellants point out that the October 5, 2004 MRI scan was performed one year and eight months after the alleged injury. The abnormalities identified on the 2004 MRI included low-grade degenerative changes, traction spurring, altered disc signal, and disc bulging around C4-C-5, C5-C6, and C6-C7. The cervical MRI performed on February 19, 2003, two weeks after the incident of February 4, 2003, reflected only minor degenerative changes without significant abnormality. Appellants assert that at the time of appellant's fall, there was absolutely no objective evidence of an injury to appellee's cervical spine. Dr. Knox, in his report of February 24, 2003, stated, "her MRI scan of cervical spine is normal . . . the patient obviously has shoulder bursitis with a normal cervical evaluation."

Subsequently, on March 4, 2004, appellants maintain that there was no objective evidence of a cervical injury, only of degenerative changes. Dr. Knox requested that appellant be evaluated by Dr. Sakr, a rheumatologist, for her continued neck pain. Dr. Sakr's report noted that the results of appellant's previous MRI scan of her cervical spine were normal. His impression was "neck pain of muscular origin."

Additionally, Dr. Tullis, the radiologist, compared both the MRI of February 19, 2003, and the one performed on October 5, 2004. In his report dated November 4, 2004, Dr. Tullis stated that the 2003 MRI reflected degenerative changes and the 2004 MRI demonstrated some progression of the insignificant degenerative disease from the 2003 MRI, especially at C6-7. Dr. Tullis said that the apparent change might be due to the fact that the later scan was performed on a higher resolution scanner at the hospital rather than the office scanner. Apparently, neither Dr. Ricca nor Dr. Knox had questioned the resolution of the

findings on appellant's lumbar MRI that was performed five days later than the cervical MRI on the exact same equipment. Dr. Tullis did not question the resolution or the validity of the original 2003 MRI but merely suggested that higher resolution of the 2004 was a possibility for the difference in the extent of the progression of appellee's cervical-degenerative-disc disease.

Appellants maintain that it required nothing short of "sheer speculation" to read into Dr. Tullis's report that the original 2003 MRI would have, could have, or should have provided objective evidence of a cervical injury. They state there is not one word of medical evidence to support that appellee's neck complaints were caused by, or related to, the February 4, 2003 incident, and that the only objective medical evidence in the record is of her cervical- degenerative-disc disease or possibly a neck injury that occurred subsequent to the 2003 MRI. Because appellee failed to prove, by medical evidence supported by objective findings, that she suffered a cervical injury on February 4, 2003, they reassert that there is no substantial evidence supporting the Commission's decision.

Appellee contends that she proved her cervical spine injury by objective medical findings and met all the criteria set out in Ark. Code Ann. § 11-9-102. She points out that her medical history, hearing testimony, and medical records establish that she had no neck problems prior to the February 4, 2003 compensable injury. She indicates that the evidence in the record shows that she complained of an injury to her neck as far back as the actual date of that compensable injury and specifically notes that Dr. Knox's records dating as far back as February 13, 2003, confirm her ongoing complaints of neck pain.



Additionally, appellee maintains that even if there was evidence that she had cervical-degenerative-disc disease in her neck prior to the injury, it did not bother her until after the compensable work injury occurred. At a minimum, she claims that the February 4, 2003 compensable injury triggered, aggravated, or accelerated the weakness in her neck causing her to have severe pain that required medical intervention. A preexisting 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 workers' compensation is sought. *Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003). An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003).

As to the misinterpretation of Dr. Tullis's November 4, 2004 report, appellee contends that neither the ALJ nor the Commission erred in relying upon that report regarding their respective determinations of what caused the difference in the two MRI scan results. She argues that it was not conjecture or speculation for him to suggest that the quality of the resolutions of the two MRI films was the result of the different types of scanners used. She expresses that he is a board-certified radiologist with more than thirty years' experience, which gives him the expertise to comment on the issue.

Under our standard of review, it is the province of the Commission to weigh conflicting medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. See *Kunzelman, supra*. The issue is not whether we might have reached

a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp County Sheriff's Dep't v. Ozark Acres Improvement Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001). We hold that the record in the instant case contains substantial evidence to support the findings of the Commission; accordingly, its decision must be affirmed.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.