

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA11-124

GUILLERMINA PADILLA BRISENO
APPELLANT

V.

GEORGE'S, INC., and CROCKETT
ADJUSTMENT
APPELLEES

Opinion Delivered SEPTEMBER 7, 2011

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F901600]

AFFIRMED

CLIFF HOOFFMAN, Judge

Appellant Guillermina Briseno appeals from the Arkansas Workers' Compensation Commission's (Commission) decision, affirming and adopting the findings of the Administrative Law Judge (ALJ) that Briseno is not entitled to additional medical treatment in connection with her admittedly compensable shoulder injury. On appeal, Briseno argues that the Commission's decision is not supported by substantial evidence. We affirm.

Briseno, who was fifty-two years old at the time of her injury, was employed by appellee George's, Inc., during two separate time periods, with the most recent period beginning on February 25, 2008. Her job duties required her to pack boxes with five pounds of frozen chicken. On October 14, 2008, Briseno was walking down a flight of stairs at George's when she fell and injured her right shoulder. Because it was late in the evening at the time of the incident, Briseno was sent the following day for medical treatment from Dr. Konstantin Berestnev. Dr. Berestnev diagnosed Briseno with a right-shoulder strain and

treated her with an injection and medication. He also restricted her to lifting five pounds or less with her right arm and instructed her to avoid working at a level at or above her shoulders. Briseno continued to work at George's with these restrictions, although she was moved to a different processing line that involved no lifting.

Briseno continued to see Dr. Berestnev, and when her shoulder condition did not improve, he ordered two separate rounds of physical therapy. Dr. Berestnev also ordered an MRI of the shoulder in December 2008 due to Briseno's continued complaints of pain and her decreased range of motion in her shoulder. He noted at that time that Briseno's complaints were "in excess of the clinical findings." The MRI showed some thickening of the distal portion of the rotator cuff, which suggested chronic tendonopathy, but no full thickness tear. He also noted some subdeltoid bursal fluid indicating an inflammatory change. After Briseno then complained of weakness in her right arm and of dropping items, Dr. Berestnev ordered a nerve conduction velocity (NCV) study, which was within normal parameters. In his January 23, 2009 report, Dr. Berestnev stated that his prognosis for Briseno was guarded "due to the nonorganic nature of her symptoms." In his February 6, 2009 report, Dr. Berestnev noted that Briseno's range of motion was improved but that she was "actively resisting my examination." The physical therapist's reports from February 11 and 13, 2009, also indicated that Briseno was "guarded" with her shoulder and that she hardly let the therapist move it. The reports note that Briseno moved her shoulder more easily when she was distracted than when the therapist attempted to move it passively and that there were "clinical inconsistencies present during her treatment." The therapist indicated

that he was concerned that she would develop adhesive capsulitis if she continued to resist moving her shoulder and that he was not making much progress with her therapy. In a report from February 20, Dr. Berestnev stated that Briseno was “still actively resisting the examination” and that she had multiple grievances and work dissatisfaction. He noted that Briseno wished to see a shoulder specialist to receive a second opinion.

Briseno was referred to Dr. Marcus Heim, an orthopaedist, on February 25, 2009. After reviewing her medical records and MRI, Dr. Heim diagnosed her with adhesive capsulitis in her right glenohumeral joint and recommended arthroscopic surgery followed by aggressive physical therapy. The surgery was performed on March 9, 2009, and Dr. Heim indicated that he expected Briseno to get most of her range of motion back very quickly. In the operative report, it was also noted by Dr. Heim that Briseno appeared to have a poor pain tolerance because she was complaining of significant pain in her shoulder even after she had received anesthesia in the form of an interscalene block.

Briseno began her third round of physical therapy on March 11, 2009. Again, the physical therapy notes indicated that Briseno was “guarding” against movement of her shoulder. In Dr. Heim’s report of April 29, 2009, he stated that the physical therapist had indicated that it was like “pulling teeth” to get Briseno to move her arm. After physical therapy failed to lessen Briseno’s complaints of pain and weakness, Dr. Heim referred her to another doctor for pain control. Briseno then sought and was granted a change of physician to Dr. Christopher Arnold.

At her initial visit with Dr. Arnold on July 9, 2009, Briseno complained of pain over

her whole body, although the medical report stated that she was only approved for an evaluation of her right shoulder. Dr. Arnold gave Briseno an AC joint injection, which the report stated gave “near complete relief.” Dr. Arnold recommended that Briseno return in six weeks and mentioned the possibility of more surgery if her symptoms did not improve. Even though George’s refused to pay for further medical treatment after this visit, Briseno returned to see Dr. Arnold’s partner, Dr. Wesley Cox, on August 19, 2009. In his report, Dr. Cox stated that Briseno was “guarding” during his examination and that it was “difficult for [him] to discern between her effort on the examination and muscle weakness itself.” Dr. Cox further stated that he could not explain the weakness in Briseno’s right arm or her dropping things and noted that her EMG was normal. He gave Briseno another injection and recommended a follow-up visit in one month to monitor her progress. The report from her follow-up visit in September 2009 indicated that the shot gave Briseno relief for only one day.

Briseno filed a claim for additional medical treatment from Dr. Arnold, and a hearing before the ALJ was held on November 19, 2009. Briseno was the only witness to testify at the hearing. According to Briseno, her right shoulder hurts constantly, although it is worse when she moves it. She testified that she has difficulty performing housework and other daily activities and that she has not received much benefit from any of the treatment she has received, including the injections. George’s introduced a surveillance video of Briseno from June 2009, which shows her moving both of her arms while doing errands and regular activities, including raising her arms above shoulder height while looking at clothing, all

without apparent pain or discomfort. Dr. Heim also reviewed the video, and in his report dated August 17, 2009, he stated that his objective findings from his last office visit with Briseno were inconsistent with the objective findings on the surveillance video. Dr. Heim specifically opined that Briseno is “more likely than not exercising a malingering problem.” In a subsequent letter dated September 16, 2009, Dr. Heim stated that he would not recommend any further diagnostic testing or treatment of Briseno’s shoulder.

After hearing all of the evidence, the ALJ found that the opinion of Dr. Heim was credible and entitled to great weight. Not only had Dr. Heim performed surgery on Briseno’s shoulder and continued to evaluate her after the surgery, he was also the only physician to review the surveillance tapes. The ALJ further noted that much of the remaining medical evidence also indicated that Briseno’s complaints were out of proportion to the findings by her physicians and therapists. Based upon all of the evidence presented, the ALJ found that Briseno had failed to prove by a preponderance of the evidence that she was entitled to additional medical treatment for her compensable right-shoulder injury; the Commission agreed, affirming and adopting the ALJ’s opinion. Briseno now appeals the Commission’s decision.

When reviewing a decision of the Workers’ Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Evans v. Beamis Co.*, 2010 Ark. App. 65, 374 S.W.3d 51. We must affirm the decision of the Commission if it is supported by substantial evidence. *Id.* Substantial evidence is that evidence which a reasonable mind might accept as

adequate to support a conclusion of the Commission. *Id.* We only reverse the Commission's decision if we are convinced that fair-minded persons could not have reached the same conclusion with the same facts before them. *Id.* Questions regarding the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Id.* When the Commission affirms and adopts the ALJ's findings, this court considers both the ALJ's decision and the Commission's opinion. *Montgomery v. J & J Lumber Co.*, 2011 Ark. App. 129.

Arkansas Code Annotated section 11-9-508(a) (Supp. 2009) requires employers to provide such medical services as are reasonably necessary in connection with the injury received by the employee. The injured employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. Ark. Code Ann. § 11-9-705(a)(3) (Supp. 2009); *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonable and necessary treatment under section 11-9-508(a) is a factual question for the Commission. *Goyne v. Crabtree Contracting Co.*, 2009 Ark. App. 200, 301 S.W.3d 16. A workers' compensation claimant may be entitled to ongoing medical treatment after the healing period has ended if the treatment is geared toward management of the compensable injury. *Id.*

Briseno primarily argues on appeal that the Commission's decision that she is not entitled to additional treatment is not supported by substantial evidence based on her testimony and the medical evidence that showed that she has consistently complained of pain in her right shoulder since her accident at work. While it is true that Briseno has been consistent in her complaints of pain and weakness throughout her medical treatment, many

of her medical records, including those from Dr. Berestnev, Dr. Heim, Dr. Cox, and her physical therapists, indicate that her complaints were inconsistent with and in excess of the clinical, objective findings. These same physicians noted on many occasions that Briseno was actively guarding or resisting their examination of her shoulder, and her physical therapist also noticed that her range of motion was suddenly improved when she was distracted and energetically demonstrating an event. This inconsistency was confirmed by Dr. Heim's review of the surveillance video, wherein Briseno was performing movements with her right shoulder without apparent discomfort, which was directly at odds with her subjective complaints and the objective findings during her office visits. The ALJ found Dr. Heim's opinion that Briseno was malingering and should not be entitled to additional medical treatment to be credible and entitled to great weight. As the ALJ also noted, Briseno has been through extensive medical treatment, including several rounds of physical therapy, surgery, medication, and injections. According to Briseno, none of these treatments have improved her symptoms. Thus, there is substantial evidence in this case to support the Commission's decision that Briseno has failed to prove that she is entitled to further medical treatment related to her compensable right-shoulder injury, and we affirm.

Affirmed.

WYNNE and MARTIN, JJ., agree.