

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403429

CHRISTINE HANCOCK,  
EMPLOYEE

CLAIMANT

STAFFMARK,  
EMPLOYER

RESPONDENT

AMERICAN HOME ASSURANCE CO.,  
CARRIER

RESPONDENT

**OPINION FILED NOVEMBER 14, 2005**

Hearing before Administrative Law Judge Mark Churchwell on July 26, 2005 in Searcy, White County, Arkansas.

Claimant appeared pro se.

Respondents represented by Honorable Melissa Ross Criner, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on July 26, 2005 in Searcy, Arkansas. A Prehearing Order was entered in this case on June 15, 2005. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the Prehearing Order and are hereby accepted:

1. The employee/employee relationship on 3/13/04, when claimant fell off a ladder and injured her lower back and right shoulder.

2. That at the time of her injury, the claimant's average weekly wage of \$328.00 entitled her to TTD benefits in the amount of \$219.00 per week and PPD benefits in the amount of \$164.00 per week.

3. A change of physician order was entered in this matter on 10/6/04, for the claimant to be seen by chiropractor Six.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited as follows in the Prehearing Order:

Claimant:

1. TTD.
2. Seven percent (7%) impairment rating.
3. Permanent wage-loss disability.
4. Additional medical treatment.
5. Vocational rehabilitation.
6. Benefits under Ark. Code Ann. § 11-9-505(a).
7. Admissibility of written witness statements.

Respondents:

1. Claimant's entitlement to additional benefits associated with her workers' compensation claim.

The record consists of the July 26, 2005 hearing transcript and the exhibits contained therein, except to the

extent that certain exhibits and testimony are specifically excluded below.

### **DISCUSSION**

#### **1. Evidentiary Objections**

In Claimant's Exhibit No. 3 and in Claimant's Exhibit No. 4, claimant has offered in lieu of live witness testimony written statements prepared by Sharlene Brunsfield and by Dewayne Brewer. The respondents' attorney objected to introduction of witness statements unless the witness is present to testify at the hearing. The claimant failed to present any reasonable justification for failing or refusing to produce her witnesses at the hearing, and the respondents were therefore denied an opportunity to cross-examine the claimant's witnesses as they are entitled to do. Under these circumstances, I find that Claimant's Exhibit 3 and Claimant's Exhibit 4 should be excluded from the hearing record.

On page 29 of the hearing transcript, Ms. Hancock testified that throughout the time she was under a doctor's care, she kept calling Staffmark to see if they could put her on light duty and she was told that they had nothing. Ms. Criner objected on hearsay grounds. However, I note that Ms. Hancock was testifying as to comments allegedly made to her by an employee of the respondent. I note that

Ms. Hancock identified the employee, and I note from Ms. Clayton's testimony that the respondent apparently had in place a computer system to document when calls were made by employees. To the extent legally relevant to any of the issues addressed below, I am accepting into the record under these circumstances Ms. Hancock's testimony at issue on page 29 of the hearing record.

On page 32 of the hearing transcript, Ms. Hancock testified in part that she also called in after her physician's release on June 17, 2004, and that she was told that Staffmark would call her when they had something. Ms. Hancock also testified that approximately five weeks after her release, the people at the unemployment office told her that she was no longer employed with Staffmark. Respondents again objected to the claimant's testimony, apparently on hearsay grounds. I find Ms. Hancock's testimony regarding what she was told by Staffmark after her June 17, 2004 release admissible into evidence for the same reasons that I find admissible her testimony regarding what Staffmark employees told her before June 17, 2004. I find Ms. Hancock's testimony regarding statements of an individual at the unemployment office admissible and relevant to Ms. Hancock's state of mind and motivation for the various actions that she took when she was indisputably not returned

to work by Staffmark shortly after her release by Dr. Warnock on June 17, 2004. I do not find that hearsay testimony admissible to establish that she was no longer considered by Staffmark an employee of Staffmark.

On page 34 of the hearing transcript, Ms. Hancock testified that she heard on the radio advertisements for job placements at Maytag. Since this evidence is hearsay and was intended to prove that Staffmark had jobs open at Maytag during the relevant period for which Ms. Hancock seeks benefits under Ark. Code Ann. § 11-9-505(a), Ms. Criner's objection is sustained and Ms. Hancock's testimony regarding radio advertisements that she may have heard will not be considered as part of the record and will not be considered in rendering a decision in this case.

## **2. Temporary Disability Benefits**

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 healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present case, I find that a preponderance of the evidence establishes that the claimant's healing period ended on June 17, 2004, at which time the respondents terminated temporary disability compensation, when Dr. Warnock released Ms. Hancock with no restrictions and no scheduled follow-up appointments. In reaching this conclusion, I recognize that when Dr. Six treated Ms. Hancock for a short period in October of 2004, Dr. Six observed muscle spasm in Ms. Hancock's lower back and provided a short period of treatment for her condition prior to assigning a permanent anatomical impairment rating on December 18, 2004. However, I also note that Dr. Six's treatment clearly did not resolve Ms. Hancock's ongoing back problems and, in fact, when issuing a permanent anatomical impairment rating, Dr. Six indicated that Ms. Hancock would require long-term supportive care. Under these conditions, I find that Dr. Six's treatment at issue was intended to provide relief from a permanent injury, and a preponderance of the evidence establishes that Ms. Hancock's injury was as far restored as the permanent nature of the injury would permit by June 17, 2004.

Because I find that a preponderance of the evidence establishes that Ms. Hancock's healing period for purposes of assigning temporary disability ended on June 17, 2004, I

find that Ms. Hancock has failed to establish that she is entitled to any period of temporary disability beyond that date.

### **3. Additional Medical Treatment**

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); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Medical treatment intended to reduce or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Tina Haskins v. TEC, Full Workers' Compensation Commission, June 20, 1991 (D704562). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition

after the healing period ends. Artex Hydrophonics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In addition, the Full Commission explained in Wells v. Wal-Mart Associates, Full Workers' Compensation Commission, Opinion filed May 22, 2002 (W.C.C. No. F100849):

[W]e note that an injured worker is not required by law to establish a need for ongoing medical treatment through evidence of objective medical findings. Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). However, we note that the presence or absence of ongoing objective pathology can be a relevant factor.

In the present case, the respondents did not at the hearing contest their legal liability for Dr. Six's initial evaluation performed pursuant to a Commission Change of Physician Order. However, the respondents contend that the respondents have no medical documentation indicating a need for additional medical treatment with regard to the claimant's workers' compensation injury, and the respondents contend that there are no objective findings to support anatomical impairment. However, I respectfully point out that in his initial evaluation, Dr. Six appears to have recorded objective medical findings both through the use of surface electromyography diagnostic testing and through his own observation of muscle spasms. Furthermore, the claimant's testimony, as essentially corroborated by the medical records, indicates that she was experiencing severe

ongoing symptoms at the time that she presented to Dr. Six for chiropractic care. In light of Ms. Hancock's persistent low back symptoms, which I find are causally related to the injury she sustained at work in March of 2004, I find that the chiropractic treatment provided by Dr. Six documented in the medical record was reasonably necessary to treat Ms. Hancock's admittedly compensable injuries.

Furthermore, in light of the persistent nature of Ms. Hancock's symptoms as documented both by Dr. Six and in the nurse's notes from Land O'Frost, where Ms. Hancock unsuccessfully tried to return to work after treatment from Dr. Warnock and Dr. Six, I find that Ms. Hancock is entitled to additional medical treatment in the future which may be reasonably necessary to maintain her level of healing from her admittedly compensable injuries.

**4. Benefits Under Ark. Code Ann. § 11-9-505(a)**

In order to prove entitlement to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1), the employee must establish (1) that she sustained a compensable injury; (2) that suitable employment within her physical and mental limitations was available with the employer; (3) that the employer refused to return the employee to work; and (4) that the employer's refusal to return the employee to work

was without reasonable cause. Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

In the present case, there is no dispute that Ms. Hancock sustained a compensable injury, and there is no dispute that Staffmark did not place her in any new work after Dr. Warnock's release without restrictions on June 17, 2004. In light of the undisputed evidence that Ms. Hancock contacted Staffmark between two and five times after her release, and in light of her release without restrictions by Dr. Warnock, I find that Staffmark's refusal to return her to work on this record was without reasonable cause. However, I find that Ms. Hancock has failed to establish that suitable employment within her physical and mental limitations was available with Staffmark at any point after her release by Dr. Warnock on June 17, 2004. Therefore, I find that Ms. Hancock has failed to establish one of the essential requirements necessary to prove her entitlement to benefits under Ark. Code Ann. § 11-9-505(a).

#### **5. Seven Percent Impairment Rating**

The claimant must prove by a preponderance of the evidence that she is entitled to an award of permanent physical impairment. Act 796 of 1993, as codified at Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Supp. 2003), provides that "Permanent benefits shall be awarded only upon a

determination that the compensable injury was the major cause of the disability or impairment." "Major cause" is defined as more than fifty percent (50%) of the cause, and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14). Further, any determination of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c)(1)(B). In addition, pursuant to Ark. Code Ann. § 11-9-522(g), the Commission has adopted the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, for assessing anatomical impairment, "exclusive of any sections which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine." See Commission Rule 099.34.

The Commission is required to weigh the medical evidence and to translate this medical evidence into an appropriate finding regarding permanent impairment using the AMA Guides. Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001). Thus, the Commission may assess its own impairment rating using the Guides rather than relying solely on its determination of the validity of ratings assigned by physicians. Id.

Among the other criteria governing assignment of an anatomical impairment rating, it must be determined when the condition, particularly a soft tissue injury, becomes "permanent." The Guides define a "permanent impairment" as an "impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment." See AMA Guides, 4<sup>th</sup> Ed., page 315. Accord AMA Guides, 4<sup>th</sup> Ed., page 9 ["An impairment should not be considered 'permanent' until the clinical findings, determined during a period of months, indicate that the medical condition at issue is static and well stabilized."]

As discussed above, in the present case, Dr. Six assigned Ms. Hancock a seven percent (7%) impairment rating under the AMA Guides, 4<sup>th</sup> Edition, Table 75. There appears to me to be some question as to whether or not Dr. Six based that 7% impairment rating on the abnormalities in Ms. Hancock's lumbar spine only, or instead based the rating on abnormalities in the lumbar spine and cervical spine. Furthermore, I note that Ms. Hancock has questioned the validity of some of the findings regarding her head and neck in Dr. Six's December 20, 2004 final medical report. Considering only the lumbar spine, I interpret from Table 75 of the 4<sup>th</sup> Edition of the AMA Guides that Ms. Hancock's

appropriate impairment rating for her admittedly compensable lumbar injury with documented ongoing muscle spasm should be 5% to the body as a whole rather than 7% to the body as a whole. In reaching this conclusion, I recognize that under some circumstances, Table 75 does in fact assign a 7% rating to the body as a whole for a permanent lumbar injury. In this regard, Table 75, Section II.C provides a 7% impairment rating for either an unoperated on stable intervertebral disk or soft tissue lesion with moderate to severe degenerative changes, including an unoperated on herniated nucleus pulposus with or without radiculopathy. In the present case, no physician has indicated that Ms. Hancock has sustained a herniated nucleus pulposus, and as I understand Commission precedent, the appropriate impairment rating for an unoperated soft tissue lesion is 5% to the body as a whole for the lumbar spine pursuant to Table 75, Section II.B, rather than II.C., since II.B. assigns a rating without consideration of any degenerative changes which might also be present. See Edmondson v. Mid Ark Auto Auction, Full Workers' Compensation Commission, Opinion filed November 24, 1999 (E800680).

Alternatively, applying Table 74 instead of Table 75, Commission precedent would again indicate that the claimant's appropriate impairment rating is 5% to the whole

body based for her permanent lumbar condition with muscle spasm, which equates to a DRE category III impairment. See Murry v. Riceland Foods, Full Workers' Compensation Commission, Opinion filed January 20, 1999 (E516632).

In light of the seven-month period which elapsed between the date of Ms. Hancock's compensable low back injury and the date on which Dr. Six documented ongoing muscle spasms in her low back, and in light of Dr. Six's indication that the condition he observed has become permanent, I find that Ms. Hancock has established by a preponderance of the evidence that her lumbar spine injury has, in fact, produced impairment which has become permanent. The 5% impairment rating which I am assigning pursuant to either Table 75, Section II.B, or Table 74 DRE Category III is also established by objective and measurable findings, consisting of the muscle spasms which Dr. Six observed seven months after the injury. See Murry, supra.

In light of the permanent and persistent nature of Ms. Hancock's low back symptoms after the injury in March of 2004, and her lack of ongoing symptoms or documented ongoing low back abnormalities before the fall at work in March of 2004, I further find that Ms. Hancock has established by a preponderance of the evidence that her work-related injury

is the major cause of her 5% permanent anatomical rating to the body as a whole awarded herein.

## **6. Vocational Rehabilitation or Wage Loss Benefits**

Arkansas Code Annotated § 11-9-505(b)(1) provides regarding vocational rehabilitation:

In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or reemployment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee.

In Floyd v. Pradco, Full Workers' Compensation Commission, Opinion filed February 3, 1997 (E400060), the Commission identified a series of questions used to determine whether an injured worker is a candidate for vocational rehabilitation:

- (1) Can the claimant return to his old job, if modified?
- (2) Can the claimant be re-employed by the same employer, in a different job?  
If not:
- (3) Does the claimant have transferrable skills which would enable him without a special retraining program to be gainfully employed in his community in a job paying similar wages to those received prior to the injury?  
If so:

- (4) Does the claimant need reemployment assistance (such as placement assistance for on-the-job training) in order to help him obtain a job transfer to such employment?

Once it is determined that the claimant cannot return to work for a respondent and that he has no transferrable skills which would enable him to be gainfully employed without special retraining, there are three additional questions which should be considered. These are:

- (5) Can the claimant be retrained? If so;
- (6) Is a suitable retraining program available within a claimant's intellectual and aptitudinal abilities? If so;
- (7) Which retraining program(s), if successfully completed by the claimant, is most likely to result in suitable gainful employment?

With regard to Ms. Hancock's claim for permanent wage loss disability, I note that for unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which she was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the

worker's anatomical disabilities impair her earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, the employee is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides that:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent

disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

**A. Vocational Rehabilitation**

In the present case, the minimal evidence on point in the record indicates to me that Staffmark either could not, or would not, attempt to place Ms. Hancock in her old job site or at any new job site staffed by Staffmark after her release by Dr. Wornock in 2004. However, on her own initiative, Ms. Hancock attempted to return to work in an industrial environment at Land O Frost but was physically unable to do so. Ms. Hancock has also recently found work in retail at the Dollar Store. In addition, I note that Ms. Hancock has some degree of training and years of prior work experience in a sedentary office environment performing bookkeeping, and I note that neither Dr. Wornock or Dr. Six has provided Ms. Hancock with either permanent work restrictions or a recommendation for vocational retraining.

In light of Ms. Hancock's transferrable job skills in office work, her lack of physician-assigned permanent work restrictions, and the lack of any physician recommendation for vocational retraining in the record, I find that the preponderance of the evidence in the record does not

establish that a vocational rehabilitation evaluation would be appropriate in the present case.

**B. Permanent Wage Loss Disability**

Ms. Hancock was 47 years old at the time of the hearing. She completed high school and attended at least part of one year of college. She has also attended trade schools in certified nursing type work, and bookkeeping and accounting. Ms. Hancock worked almost 10 years in the credit office of Walloch before the business closed. Ms. Hancock has also worked for the state police performing data entry and putting fingerprints into the computer.

In the three years since Ms. Hancock moved to Searcy, she worked at a gas station convenience store, in a restaurant, and in factory work through Staffmark until after her compensable back and shoulder injury in March of 2004. In addition, Ms. Hancock has home-schooled her twin 12 year old children.

Since her release by Dr. Wornock in June of 2004, Ms. Hancock has returned to work as farm labor on a sporadic basis, as labor in chicken houses on a sporadic basis, in a factory setting at Land O Frost for a short period, and recently in retail at the Dollar Store. In addition, she drew unemployment benefits when Staffmark did not return her

to work in June of 2004 and when Land O Frost terminated her for her inability to meet job standards.

After considering Ms. Hancock's age, education, and work experience, the nature and extent of her injury and permanent physical impairment, her motivation to return to work after her injury, her inability to perform to standards at Land O Frost, her documented problems with her back at Land O Frost, and all other relevant factors, I find that Ms. Hancock has sustained a six percent (6%) impairment to her wage earning capacity in excess of her 5% impairment to the body as a whole established by the medical evidence.

#### **7. Offset For Unemployment Benefits**

Arkansas Code Annotated § 11-9-506 provides:

(a) Any other provisions of this chapter to the contrary notwithstanding, no compensation in any amount for temporary total, temporary partial, or permanent total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment insurance benefits under the Arkansas Employment Security Law, § 11-10-101 et seq., or the unemployment insurance law of any other state.

(b) Provided, however, if a claim for temporary total disability is controverted and later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits.

In the present case, the benefits awarded herein being permanent partial disability benefits, and not temporary disability benefits or permanent total disability benefits, I find that the respondents are not entitled to an offset under Ark. Code Ann. § 11-9-506 for any payments of unemployment benefits that Ms. Hancock has received.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee/employee relationship existed on 3/13/04, when claimant fell off a ladder and injured her lower back and right shoulder.
2. At the time of her injury, the claimant's average weekly wage of \$328.00 entitled her to TTD benefits in the amount of \$219.00 per week and PPD benefits in the amount of \$164.00 per week.
3. A change of physician order was entered in this matter on 10/6/04, for the claimant to be seen by chiropractor Six.
4. The preponderance of the evidence establishes Ms. Hancock's compensable injuries became permanent on June 17, 2004. Therefore, Ms. Hancock has failed to establish that she is entitled to any additional period of temporary disability compensation after that date.
5. The preponderance of the evidence establishes that

the disputed medical treatment provided by Dr. Six in October of 2004 was reasonably necessary to maintain Ms. Hancock's condition even though her healing period had previously ended. Ms. Hancock is also entitled to such additional medical treatment as will be reasonably necessary to maintain her level of healing of her compensable back injury in the future.

6. Ms. Hancock has failed to establish by a preponderance of the evidence that suitable employment within her physical and mental limitations was available with Staffmark at any point after her release by Dr. Wornock on June 17, 2004. Ms. Hancock has therefore failed to establish one of the requirements necessary to prove her entitlement to benefits under Ark. Code Ann. § 11-9-505(a).

7. The preponderance of the evidence establishes that Ms. Hancock is entitled to benefits for an eleven percent (11%) permanent disability which consists of a five percent (5%) permanent anatomical impairment rated to the whole body and a six percent (6%) permanent impairment to her wage earning capacity in excess of her permanent anatomical impairment established by the medical evidence.

8. The preponderance of the evidence fails to establish that a vocational rehabilitation evaluation would be appropriate in the present case.

9. Arkansas Code Annotated § 11-9-506 does not provide the respondents an offset against the permanent partial disability benefits awarded herein for any unemployment insurance benefits that Ms. Hancock has previously received.

**AWARD**

The respondents are directed to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

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HONORABLE MARK CHURCHWELL  
Administrative Law Judge