

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312617

ALISHA WAGGLE,
EMPLOYEE

CLAIMANT

555 AUTO PAINT INC.,
EMPLOYER

RESPONDENT

TRAVELERS INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 13, 2005

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

Claimant appears pro se.

Respondents represented by the HONORABLE PHILLIP
CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed August 13, 2004. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The parties stipulate that the employer-
employee-carrier relationship existed on or
about November 4, 2003.
2. The claimant's compensation rates are
\$177.00/154.00 based on an average weekly
wage of \$266.00 per week.
3. The claimant prove by a preponderance
of the credible evidence that she sustained
a compensable back injury on November 4,

2003.

4. The claimant proved by a preponderance of the credible evidence that the chiropractic treatment provided by Dr. Six and the MRI proposed by Dr. Six are reasonably necessary for treatment of her compensable low back injury.

5. The claimant proved by a preponderance of the credible evidence that she is entitled to temporary total disability compensation November 5, 2003 through the date of the hearing held on June 22, 2004 and continuing to a date yet to be determined, exclusive of that portion of one day for which she attempted to return to work for the respondents.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 13, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is entitled to temporary total disability benefits from the date of her injury through a date yet to be determined. Based upon my de novo review of the entire record, I find that the claimant has failed to prove entitlement to such benefits beyond November 26, 2003.

The burden of proof rests upon the claimant to prove the compensability of her claim and her entitlement to benefits. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no

presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c) (2) (Repl. 1996). In determining whether a claimant has sustained her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The period of temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Thus, an injured employee is entitled to temporary total disability compensation not simply because she has a compensable injury, but rather during

the period of time that she is within her healing period for the compensable injury **and** while she is totally incapacitated to earn wages as a result of that injury.

Arkansas State Highway & Transportation Dept. V.

Breshears, 272 Ark. 244, 613 S.W.2d (1981). Accordingly, to be entitled to temporary total disability benefits, an injured employee must satisfy this two-pronged test.

The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(13) (Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present claim, the only evidence presented which reflects that the claimant is totally incapacitated from earning wages is the claimant's self-serving testimony. The findings of the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). While the claimant continued to visit Dr. Six after November 26, 2003, Dr. Six no longer provided the claimant with "Absence Authorizations." The last such authorization only excused the claimant from work through November 26, 2003. I am not persuaded by the claimant's testimony that she does not have any off-work slips past this date

because she continued to keep in contact with her employer over the telephone.

The claimant carries the burden of proving by a preponderance of the evidence that she remained both within her healing period and totally incapacitated from earning wages. The claimant testified that she saw Dr. Six as recently as the week before the hearing. It would have been very easy for the claimant to obtain a written statement from Dr. Six stating that she was unable to work, however, no such document was ever introduced into evidence. In my opinion, the claimant's self serving testimony is simply insufficient to meet her burden of proving that she was totally incapacitated from earning wages subsequent to the last known off-work slip provided by Dr. Six.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner