

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508011

DOROTHY J. JOHNSON, EMPLOYEE	CLAIMANT
CITY OF LITTLE ROCK, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 16, 2006

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

Claimant represented by the HONORABLE LEWIS E. RITCHEY,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed May 18, 2006. The administrative law judge found, *inter alia*, that the claimant "was temporarily totally disabled for the period commencing July 12, 2005, and continuing through the end of the claimant's healing period, a date to be determined." The administrative law judge found that "Medical treatment rendered to the claimant subsequent to July 12, 2005, under the care of Dr. Archie Hearne, as well as referrals therefrom to include Dr. Reza

Shahim and Dr. Amir M. Qureshi, was reasonably necessary and related to the claimant's compensable injury of June 21, 2005." After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. We find that the claimant did not prove she was entitled to additional benefits after July 12, 2005.

I. HISTORY

The testimony of Dorothy Johnson, age 53, indicated that she became a full-time laborer for the City of Little Rock in July 2004. The claimant testified on direct examination:

Q. Tell me this, were you employed on the day of June 21, 2005?

A. Yes.

Q. Did anything unusual happen that day?

A. Yes, sir....Me and another employee was, you know, going about our duties, we were on the on-call truck this day, and there was a chalk board, and really it didn't - it looked like it was just a regular chalk board, but when we bent down to pick it up, we discovered it was made out of iron. And when I came up with it, I felt a pain and burning in my left side and across my back.

Dr. Brenda Covington assessed "acute lumbar strain" on June 21, 2005. Work restrictions were assigned. The claimant testified that the respondent-employer initially provided light work duty.

The parties stipulated that the employment relationship existed on June 21, 2005, "when claimant contends she sustained a work-related back injury, which the parties have stipulated was accepted originally as a medical-only claim, and that some medical benefits were paid."

Dr. John Adametz assessed "lumbar strain" on June 29, 2005. The claimant was referred to physical therapy. Dr. Covington assessed "lumbar strain - resolving" on July 5, 2005. A physical therapist reported on July 11, 2005, "Patient has shown slow, gradual progress. She would benefit from continued therapy to further strengthen and reduce pain....Request continued therapy for two to four weeks. Please advise."

However, the physical therapist noted on July 12, 2005, "City of Little Rock has denied any further physical therapy due to previous motor vehicle accident that was not reported."

Dr. Covington assessed "lumbar strain" on July 12, 2005. Dr. Covington planned continued medication, return to regular duties, continue ice and heat, release from care, return as needed.

The claimant testified that she did not work for the respondent-employer after July 12, 2005. The claimant

testified, "They had told me to go back to full duty but I knew I couldn't do it, I couldn't hardly walk, so I made an appointment with my family physician. I went to see my family physician." The claimant therefore began treating at Hearne Family Practice on July 14, 2005, where the following assessment was made: "1. Low Back Pain, New. 2. Sciatica, New. 3. Acute Lumbar Sacral Sprain, New." Dr. Hearne's document appears to indicate that the claimant was released to return to work, with physical restrictions. The claimant testified, "Dr. Hearne tried to send me back on light duty, and my employer said they don't have light duty, so I couldn't do that, so I had to take off."

The assessment at Hearne Clinic in August 2005 included "acute lumbar sacral sprain, worsening."

An MRI of the claimant's lumbar spine was taken on August 15, 2005, with the following impression:

Grade I anterolisthesis of L4 on L5 with mild disk space height loss and disk desiccation. A broad-based posterior bulge indents the thecal sac and produces prominent left and moderate right-sided neural foraminal narrowing. Clinical correlation requested as to whether the patient has a left L4 radiculopathy. Degenerative facet and ligamentous hypertrophy contributes to narrowing of the spinal canal.

L3/4 with a small posterior bulge with a tiny posterior annular tear, the neural foramen patent bilaterally.

Mild degenerative facet hypertrophy incidentally noted at L5/S1.

The following assessment was given at Hearne Clinic on August 18, 2005: "1. Degenerative disc disease, New. 2. Low Back Pain, Worsening. 3. Sciatica, Worsening."

Dr. Hearne referred the claimant to a neurological surgeon, Dr. Reza Shahim, who examined the claimant on August 30, 2005:

Ms. Johnson is a pleasant 52 year old lady who has been having severe low back pain since June 21, 2005. She associates her back pain to lifting at work. She complains of back pain, pain radiating into both hips, generalized weakness more on the right side, no leg numbness. She has undergone two to three weeks of therapy with no improvement....

I reviewed her lumbar spine MRI and she has a Grade I spondylolisthesis of L4 and L5. There is foraminal and canal stenosis due to the spondylolisthesis. There is also degenerative disc disease at L3-4....

Ms. Johnson is symptomatic from L4-5 spondylolisthesis. I have recommended to her to undergo epidural steroid injections. We will also place her in an Aspen brace which she should wear four hours a day. If her symptoms were to continue she may benefit from surgical decompression and stabilization. She agrees with conservative management at this time.

Dr. Shahim took the claimant off work, beginning August 30, 2005.

The claimant continued to follow up at Hearne Family Practice.

Dr. Amir M. Qureshi began injection treatment in September 2005. The claimant testified that she received two epidural steroid injections. "It was relief for a while," the claimant testified, "but the pain would always come back after a while."

The claimant testified that she was terminated on or about October 5, 2005. "They said I didn't get my paperwork in a timely manner," the claimant testified.

Dr. Qureshi gave the following impression on October 19, 2005: "1. Lumbar spine dysfunction with degenerative disc disease. 2. Status post right epidural injection with good improvement." Dr. Qureshi noted, "The patient has been under my care from September 22nd and October 5th, 2005 for which she has been fired. She is continuing to be under my care for the injections for her care for her lower back....I have again written a prescription for physical therapy. I want her to learn the proper techniques before I release her to work. The patient will be off of work until she sees me back in four weeks."

The claimant sought emergency treatment on November 2, 2005 after a motor vehicle crash. The claimant complained of a headache and pain in her neck, hip, and left femur.

The clinical impression was contusion to the hip, in addition to sprain/strain of the neck, dorsal, and lumbar.

Dr. Shahim noted on November 29, 2005:

I saw Ms. Johnson today. She continues to have significant back and bilateral leg pain. The leg pain is worse on the left side. She has left buttocks pain, which radiates into the posterior aspect of the left leg and left foot....I reviewed her lumbar spine MRI, which shows moderate stenosis at L4-5 and spondylolisthesis at this level. There is also degenerative disc disease at L5-S1....Since Ms. Johnson has failed conservative management, including epidural steroid injections, I have given her the option of undergoing a lumbar decompression at L4-5....

A pre-hearing order was filed on December 19, 2005.

The claimant contended that she "was performing her job duties and injured her back on June 21, 2005, while bending over to pick up trash to put into a truck. She is seeking TTD benefits, the period from and to will be specified at the hearing; medical benefits that were not paid; rehabilitation; and attorney's fees."

The respondents contended that the claimant had been provided "all appropriate benefits to which she was entitled. The claim was initially accepted as compensable and has handled as a medical-only claim and medical benefits were paid until medical records revealed on or about November 2, 2005, that treatment was for a condition which

was not causally related to claimant's employment with the City of Little Rock and her injury of June 21, 2005."

The parties agreed to litigate the following issues: "Claimant's entitlement to additional benefits, those being TTD benefits, medical benefits, rehabilitation and attorney's fees."

The final medical report of record is a chart note from Dr. Shahim dated February 2, 2006:

Ms. Johnson has undergone two epidural steroid injections with some improvement in her symptoms. She does still complain of back, hip and intermittent leg pain. Although she has had improvement in her symptoms she has chronic back and hip symptoms. I reviewed the MR with Ms. Johnson again and she does have a Grade I spondylolisthesis and a broad disc herniation across L4-5. There is mechanical instability at this level and I suspect she will need to have a surgical decompression at some point. She has had a work injury. She does not want to have surgery or further injections at this point. I will be glad to re-evaluate her if her symptoms were to worsen.

The claimant testified that she was unable to pay for surgery from Dr. Shahim.

A hearing was held on February 23, 2006. The claimant contended that she was entitled to temporary total disability compensation beginning July 13, 2005 and continuing until the claimant was released.

The administrative law judge found, in pertinent part:

5. The claimant was temporarily totally disabled for the period commencing July 12, 2005, and continuing through the end of the claimant's healing period, a date to be determined.

6. Medical treatment rendered to the claimant subsequent to July 12, 2005, under the care of Dr. Archie Hearne, as well as referrals therefrom to include Dr. Reza Shahim and Dr. Amir M. Qureshi, was reasonably necessary and related to the claimant's compensable injury of June 21, 2005.

The respondents appeal to the Full Commission.

II. ADJUDICATION

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident[.]" Ark. Code Ann. §11-9-102(12). Whether or not a claimant's healing period has ended is a question of fact for the Commission. *Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

The administrative law judge found in the present matter, "The claimant was temporarily totally disabled for the period commencing July 12, 2005, and continuing through the end of the claimant's healing period, a date to be determined." The Full Commission reverses this finding. We find that the claimant reached the end of her healing period

no later than July 12, 2005, when she was released by Dr. Covington.

The claimant testified that she felt a pain and burning in her left side and across her back after lifting a chalk board on June 21, 2005. Dr. Covington assessed "acute lumbar strain" on June 21, 2005, and the claimant was treated conservatively. Dr. Covington opined on July 5, 2005 that the claimant's lumbar strain was resolving. The physical therapist subsequently agreed that the claimant had shown progress from conservative treatment. On July 12, 2005, Dr. Covington noted that the claimant had sustained a lumbar strain, but Dr. Covington returned the claimant to regular work and released the claimant from further treatment.

The claimant contends that she still remains within her healing period and is entitled to continued temporary total disability compensation. The claimant does not contend that she remains within a healing period from the effects of the lumbar strain diagnosed on June 21, 2005. Instead, the claimant asserts that her pain is the result of a bulging disc at L4/5 and an annular tear at L3/4. We recognize that an MRI was taken in August 2005. That MRI revealed a degenerative condition at L4 on L5 and a small posterior

bulge with a "tiny posterior annular tear" at L3/4. However, the preponderance of evidence in the instant matter does not indicate that these degenerative conditions, including the annular tear, were the result of the June 21, 2005 accidental injury. In fact, it would require conjecture and speculation to causally link the conditions shown on the August 2005 MRI to the June 2005 accident. Speculation and conjecture can never supply the place of proof. *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979).

The Full Commission further notes that no treating physician causally linked the MRI results to the accidental injury. Dr. Hearne specifically opined in August 2005 that the claimant suffered from "Degenerative disc disease, New." Dr. Shahim stated in August 2005 that the claimant was "symptomatic from L4-5 spondylolisthesis." Dr. Qureshi subsequently assessed "lumbar spine dysfunction with degenerative disc disease." Although Dr. Shahim noted in February 2006 that the claimant had sustained an injury at work, no treating physician after July 12, 2005 stated that the claimant's continued pain or symptoms were the result of the June 21, 2005 accidental injury. Nor do the medical records corroborate the claimant's testimony that she was

not even able to walk as a result of the compensable injury. There is no evidence of record indicating that the surgery proposed by Dr. Shahim was in any way the causal result of the claimant's specific incident of June 2005.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant reached the end of her healing period for her lumbar strain no later than July 12, 2005. Temporary total disability compensation cannot be awarded after a claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). The Full Commission therefore reverses the administrative law judge's finding that the claimant proved she was entitled to temporary total disability commencing July 12, 2005. Nor did the claimant prove that any of the medical treatment of record after July 12, 2005, including proposed surgery by Dr. Shahim, was reasonably necessary in connection with the compensable injury. See, Ark. Code Ann. §11-9-508(a). The decision of the administrative law judge is reversed, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the Majority opinion denying the claimant additional medical benefits or temporary total disability benefits. Specifically, I must dissent from the Majority's finding that the claimant's healing period ended no later than July 12, 2005, when she was released by Dr. Covington. After a de novo review of the record, I find that the claimant remained in her healing period and unable to work or substantially replace her wages after July 12, 2005. I further find that the MRI results, which showed bulging discs and an annular tear are a direct result of her compensable injury. Accordingly, I would have affirmed the decision of the Administrative Law Judge.

Temporary total disability for unscheduled injuries is that period within the healing period in which 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).

A claimant who has been released to light duty work but has not returned to work may be entitled temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274 (1984).

_____The Majority denies the claimant temporary total disability benefits based on the determination that the claimant's healing period ended by at least July 12, 2005. In my opinion, this finding is erroneous. In fact, in my opinion, this finding directly contradicts the recommendation of the claimant's physical therapist that she have ongoing therapy. It also fails to consider the other physicians' opinion that the claimant needed ongoing care and fails to attach any weight to the claimant's August 2005, MRI indicating that she suffered from bulging discs and an annular tear.

_____The Majority does not contend that the claimant did not sustain a lumbar strain or a compensable injury as a result of the work-related accident occurring on June 21, 2005. Rather, they find the claimant's healing period ended on July 12, 2005, solely on the finding of Dr. Covington. However, I note that virtually every other physician that

treated the claimant found the claimant had not exited her healing period.

Specifically, I note that on July 11, 2005, the claimant's physical therapist, Amy Brown, found, "Patient has shown slow, gradual progress. She would benefit from continued therapy to further strengthen and reduce pain." She further recommended the claimant undergo an additional two to four weeks of therapy, thereby illustrating that the claimant's condition had not stabilized and that she would have benefitted from additional medical treatment.

Likewise, I find it interesting to note that on July 12, 2005, Amy Brown noted that her recommendation for additional treatment was denied because the claimant had not reported a previous vehicle accident. This is consistent with the somewhat confusing and inconsistent recommendations of Dr. Covington. While the Majority notes that Dr. Covington released the claimant to return to work, it is clear when reviewing the medical record from Dr. Covington, dated July 12, 2005, that the claimant would have benefitted from additional treatment even if one only considers Dr. Covington's recommendations.

The July 12, 2005, note indicates that the claimant reported a reduction of pain, but still had symptoms, particularly in the morning and at night. Likewise, Dr. Covington specifically noted the claimant had

tenderness over her lumbar spine and continued to assess her with a lumbar strain. Interestingly, the note fails to contain any language indicating the claimant's strain had completely resolved.

The note also indicates that the claimant should continue taking Celebrex and using ice and heat. Finally, the note indicated the claimant could return as needed. As on July 12, 2005, Dr. Covington continued to assess the claimant with a lumbar strain and the note contained no language to indicate the claimant's condition had resolved, I cannot find the claimant exited her healing period on that date. Furthermore, the claimant was prescribed additional medication and treatment in the form of ice and heat, had tenderness over her lumbar spine, continued to complain of symptoms, and was instructed to return as needed. Accordingly, I cannot conclude that she had exited her healing period at the time suggested by the Majority.

In addition to the ongoing therapy recommended by the physical therapist and by Dr. Covington, every other physician treating the claimant recommended ongoing treatment. On July 14, 2005, Dr. Hearne assessed the claimant with an acute lumbarsacral strain, with low back pain, and with sciatica. She was instructed to return in one week. Dr. Hearne continued to treat the claimant with Valium and Voltaren sodium and noted improvement.

Additionally, he restricted the claimant from working and referred her for an MRI, which revealed symptoms consistent with the claimant's complaints.

The Majority asserts that the MRI findings were consistent with degeneration and were not related to the compensable injury. In making this finding, the Majority notes the lack of a medical opinion relating the results of the MRI to the compensable injury and opines that it would require speculation to find the results of the MRI are related to the compensable injury.

After reviewing the medical records, I must reject the view of the Majority. While no physician specifically relates the findings of the MRI to the claimant's compensable injury, such proof is not required. See, Wal-Mart Stores Inc. v. VanWagner, 337 Ark. 443, 990 S.W. 2d 522 (1999).

Additionally, while the Majority would assert the claimant's condition was pre-existing, the medical records after the MRI suggest the claimant's degeneration was new. As the claimant had been in no accident between the time of her June 2005 compensable injury and the time of the MRI, one can only infer that the work-related injury was directly responsible for the findings of the MRI. Specifically, I note that on August 18, 2005, Dr. Hearne diagnosed the claimant with, "Degenerative Disc Disease, New".

Furthermore, I note that even if the claimant suffered from pre-existing degenerative disc disease, that does not preclude her from receiving benefits due to an aggravation. Claimant has the burden of proving by a preponderance of the evidence that his condition is causally related to his employment. See Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Workers' Compensation Commission. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 188, 875 S.W.2d 857 (1998). 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 compensation is sought. See Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). As is commonly stated, the employer takes the employee as he finds him. Murphree, supra. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition. However, although a disabling symptom of a

preexisting condition may be compensable if it is brought on by an accident arising out of and in the course of employment, the employee's entitlement to compensation ends when his condition is restored to the condition that existed before the injury unless the injury contributes to the condition by accelerating or combining with the preexisting condition. See Arkansas Power & Light Co. v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

_____ In this instance it is clear the claimant suffered from a history of back pain. However, she had never been diagnosed with degenerative disc disease or any other permanent condition prior to the time of the MRI. Additionally, it is noteworthy that the claimant's complaints growing out of the October 2004 motor vehicle accident were not such as to cause Dr. Hearne to order an MRI scan at that time. As such, it is clear that the claimant's need for medical treatment after July 12, 2005, was not related to the November 2004 injury, but rather was due to the June 2005 accident. Finally, another factor that should be considered, is that the claimant was able to work before the compensable injury, but was rendered unable to work and in need of surgery after the admittedly compensable injury.

Ultimately there is no dispute that the claimant sustained an injury on June 21, 2005. Despite the

assertions of the Majority, I find the medical records and testimony of the claimant clearly indicated that she remained in her healing period and unable to work after July 12, 2005. While the claimant had a history of having back problems, she had never been diagnosed with either disc bulges or an annular tear. Furthermore, even if those conditions existed in advance of the compensable injury, it is clear those conditions were exacerbated by her admittedly compensable injury. Accordingly, I must respectfully dissent.

SHELBY W. TURNER, Commissioner