

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312617

ALISHA WAGGLE,
EMPLOYEE

CLAIMANT

555 AUTO PAINT, INC.,
EMPLOYER

RESPONDENT

TRAVELERS INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 22, 2006

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.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed February 6, 2006. The administrative law judge found that the claimant proved she was entitled to additional temporary total disability "from June 23, 2004 through the date of the November 29, 2005 hearing, and continuing to a date yet to be determined." The administrative law judge found that the claimant proved "that the few chiropractic treatments provided by Dr. Six

after September 6, 2005 were reasonably necessary for treatment of her compensable low back injury." After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

The testimony of Alisha Michelle Waggle, age 26, indicated that she had suffered from pre-existing back problems for which she had treated with a chiropractor, Dr. Hulvey. Ms. Waggle testified that she became employed with 555 Auto Paint, Inc. in about 2000. The claimant testified that she "made deliveries, mixed paint, and did a little cleaning around there, and waited on customers. Just pretty much anything that needed to be done." The parties stipulated that the employment relationship existed on November 4, 2003. The claimant testified that while lifting a trash can, "I felt a sharp pain in my lower back, and the pain went down sort of into my legs. It was just a sharp pain." The claimant described the trash can as "One like you'd sit out for the trash man to come pick up your trash, about that tall and on wheels....And it was full."

The record indicates that the claimant began treating at Total Health Chiropractic Clinic on November 5, 2003. The claimant testified that she treated at the Clinic with

Dr. Larey Six, and that she did not return to work after seeing the chiropractor.

The claimant agreed on cross-examination that she resigned from her employment on January 21, 2004. The administrative law judge examined the claimant:

Q. Can you tell me why you filled out a letter of resignation in January of 2004?

A. Yes, sir, because I didn't feel that I would be able to return to that job at all, and I didn't want Jerry to be waiting for me to come back.

Q. And who is -

A. Jerry McKay, my boss.

It was noted in April 2004 that the claimant needed an MRI.

A pre-hearing order was filed on June 3, 2004. The claimant contended that she injured her low back at work on November 4, 2003. The claimant contended, "She cannot yet work and has been treating with Dr. Six each week." The respondents contended that an "off-the-job" injury was responsible for the claimant's complaints.

The parties agreed to litigate the following issues: "1. Compensability (lower back injury). 2. Unpaid medical bills from Dr. Six and future medical treatment (including proposed MRI). 3. Temporary total disability benefits."

A hearing before the Commission was held on June 22, 2004. The administrative law judge examined the *pro se* claimant:

Q. Do you feel that you've been able to return to work at any point since you had this injury?

A. No, sir. I went in one day - it was probably about a week or two after I hurt my back initially - and tried to do some desk work up there and I could not stand to sit in the chair and do the computer work....So I went home early that day....

Q. Can you describe for me what medical treatment that you've had since this injury occurred?

A. Yes, sir. I've just been going to Dr. Six for treatments and - do you want me to say what he's been doing to me or -

Q. Don't tell me anything he said, but you can - just some general idea of the type of treatment that he gives you.

A. He puts electrodes on my back to ease the muscle pain and an ultrasound on my back and he adjusts my back and stretches me on the table. I'm not sure what it's called.

Q. There is some reference to muscle spasm in these records. If you know, were you having any muscle spasms immediately before this incident on November 4th of 2003?

A. I've have had them in the past, yes, but they normally just go away. I mean, if I go - like if I went to Dr. Hulvey, he would fix me.

Q. In our - in our prehearing order, you had indicated that there was a proposed MRI that you have not undergone. Have you undergone that MRI?

A. No, sir....

Q. Are you still in the same type of pain that you were in, say, shortly after November 4th of 2003?

A. It is not as bad as it was, but it is still bad, yes, sir, on some days.

The record indicates that Dr. Six noted on July 2, 2004, "I am taking patient off work due to her condition, until further notice." Dr. Six continued to take the claimant off work in follow-up visits occurring approximately monthly.

The administrative law judge filed an opinion on August 13, 2004. The ALJ found, in pertinent part:

3. The claimant proved by a preponderance of the credible evidence that she sustained a compensable back injury on November 4, 2003.

4. The claimant proved ... 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 ... that she is entitled to temporary total disability compensation November 5, 2004 (sic) 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.

The respondents appealed to the Full Commission. In an opinion filed January 13, 2005, the Full Commission affirmed and adopted the administrative law judge's decision. No appeal was taken to the Court of Appeals, so the

Commission's order is now final. Ark. Code Ann. §11-9-711(b).

An MRI of the claimant's lumbar spine was taken on June 10, 2005, with the following impression: "Lower thoracic and lower lumbar degenerative disc changes with no foraminal or canal stenosis demonstrated."

Dr. Jim J. Moore wrote to the respondents on September 6, 2005:

This is a 25 year 11 month right handed white female seen today for Neurosurgical IME as requested. I have been provided an MRI that was accomplished on the patient. I have also been given some reports generated by her treating chiropractor. I have also obtained a history from the patient who confirms that her problems developed on or about 11-04-03 when while at work as a paint store delivery person, she was emptying a large heavy trash barrel into a dumpster and in doing so developed severe pain in the low back which has persisted to the present time....

I do not palpate any spasm along the paraspinal muscle masses cervical, thoracic or lumbar....

The MRI is reviewed. This is dated 6-10-05. This study does show evidence of disk degeneration especially at L4/5 and L5/S1 and to a somewhat lesser extent at T10/11 and T11/12. There is no evidence of nerve root compression nor any particular bulging. The radiologist's interpretation lower thoracic and lower lumbar degenerative disk changes without foraminal or canal stenosis demonstrated.

RECOMMENDATIONS: I believe this patient has sustained a soft tissue injury to the lumbar spine. I feel that the chiropractic therapy was

helpful but at the present time I believe she needs something more than passive therapy. I think some active therapy and exercise is going to be important for her ultimate benefit. Ongoing use of the TENS unit perhaps supplemented with Lidoderm patches and I talked with her about having her family physician consider prescribing these. I do not see any evidence that the patient has a surgical situation although the patient does complain of pain in the back with aching radiational sharp shooting pain mostly into the buttocks but not into the lower extremities. I do not believe any further diagnostic testing at this time would be helpful. I do not think that a Functional Capacity Evaluation would be of particular benefit as I am sure that she is deconditioned and that could be benefited by a strengthening exercise program to include swimming although it is a little late in the year to consider this at this time. MMI could occur within 2-3 months if above recommendations were to be carried out. Rating would be minimal. It is felt that TTD is appropriate to continue.

Dr. Moore diagnosed "Lumbosacral sprain and strain, Lumbar DDD."

The parties deposed Dr. Moore on September 22, 2005.

The respondents' attorney questioned Dr. Moore:

Q. Of course, your impression as to the reason for her complaints was soft tissue injury to the lumbar spine. Tell me what you mean by soft tissue injury.

A. For example, muscles sprained and strained would be a soft tissue injury. Pulling the various and sundry ligaments, not necessarily in the muscles themselves but in the supporting tendons and attachments in the spine itself, that's a soft tissue injury.

Q. In your experience, assuming that there is no further injury to the low back, how long does it normally take for a soft tissue injury to resolve?

A. A year or two.

Q. Again, we're getting close to two years. Assuming that there is no further injury, would you expect that it would have normally resolved by now?

A. I think she's deconditioned. I don't think that she has been - she has not been forced into doing certain things to strengthen the muscles. That may be kind of a mean thing to say to a person, but it is important to strengthen those muscles; and that takes a lot of effort by the individual.

Q. You mean physical activity, exercise and that sort of thing?

A. Yes.

Q. Does that mean, however, that the soft tissue injury itself would not have resolved, even if you are deconditioned?

A. Well, in one sense of the word, yes. I would look at it more that the injury itself precipitated a situation in which she has avoided stressing the musculature, such as in an intense physical therapy program. She did have manipulation, but it was all basically passive; and I think there is the problem.

Q. With a soft tissue injury of this duration, would you generally expect to see accompanying physical findings such as spasms or trigger points?

A. That could come and go. I mean she might have spasms two hours from the time I examine her. That's an inconstant finding. It's not necessarily a constant finding....

Q. You mentioned that you thought the chiropractic treatment was helpful. If it was helpful, why would you think that she still suffers from self-described severe pain almost two years after the injury?

A. Well, it wasn't that helpful. By her own admission, the manipulation did give her relief, at least for a certain period of time.

Q. Temporary relief?

A. Temporarily.

Q. So there's no permanent fix from that then?

A. No, I don't think so. That's the reason I didn't recommend that it should be continued. The only thing I suggested was a stressing situation such as can be accomplished in the physical therapy environment....

Q. How long would you think - if she embarked on an active program of assisted physical therapy under the guidance of a physical therapist, how long would something like that need to run?

A. I think it would be a couple of months, two or three months.

Q. Now, you also mentioned in your letter that MMI could occur within two to three months if the above recommendations were carried out. Do you feel that this would be sufficient time if it would occur?

A. Yes.

Q. What if after that regimen, she still complains of the same pain?

A. Well, she'll have to get over it.

Q. All right. I asked you in a follow-up letter to your report, and you appended a response to my inquiry as an addendum to your letter. You say, "Continuing temporary disability would be appropriate." As I mentioned in the letter I sent you, my client paid Ms. Waggle temporary disability benefits for the period beginning from the date of the injury, which was November of '03, until a hearing in this matter in June of '04. What I'm really wanting to know, in your opinion, has she been able to do any sort of work from June of '04 until now?

A. Well, I don't know. She hasn't. She continued to - the history that I got from her indicated that every time she attempted to do something, it would increase her pain. In my mind, she was not given proper supervision that would have allowed her to have improved more progressively than she did.

Ms. Waggle's testimony indicated that she did not receive treatment from Dr. Six after September 23, 2005.

Another pre-hearing order was filed on September 30, 2005. The parties stipulated at that time that the claimant "suffered a compensable injury to her low back on or about 11-4-03 and that temporary total through June 22, 2004 and medical benefits have been paid." The parties also stipulated, "All findings in the ALJ's and Full Commission's prior opinions are *res judicata*." The respondents contended that they had paid temporary total disability compensation through the date of the prior hearing in the matter, and

that the claimant was not entitled to additional temporary total disability.

According to the September 30, 2005 pre-hearing order, the parties agreed to litigate the following issues: "1. Additional chiropractic treatment after September 6, 2005 (possible issue). 2. Claimant's entitlement to continuing temporary total disability benefits after June 22, 2004."

The claimant testified that she began physical therapy in October 2005.

The parties deposed Dr. Six on November 15, 2005. Dr. Six testified that his treatment of the claimant included adjustments, ultrasound, and electric therapy. The respondents' attorney questioned Dr. Six with regard to the MRI taken in June 2005:

Q. Now, up to the time that you received this, had it been your working diagnosis that what was being dealt with was a nerve being irritated, specifically nerves from the L4-L5 region?

A. Due to a disc indication, though.

Q. Due to -

A. A disc, D-I-S-C, indication.

Q. Indication?

A. Uh-huh.

Q. Now, what do you mean by that? Due to a disc indication?

A. Okay. When you say irritation, irritation can be actually from a trauma, from a fall, whatever. But any time something lasts for a longer period of time, it goes beyond the sprain-strain type thing and it could be a disc. Sort of like here (indicating), could blow out in through here and actually put pressure on a nerve.

Q. It impinges or can do so on a nerve root?

A. Impinging on the nerve, right....

Q. And so, before you had benefit of this MRI, you thought perhaps what you were looking at was a disc causing compression of the nerve root?

A. Uh-huh.

Q. Now, in looking then at the results of this MRI, would that remain your conclusion?

A. What you've got to remember, this is two years post-trauma.

Q. Right.

A. I was still going to the fact that this was taken - at the time of the accident - incident - it would have probably shown disc bulge. Two years later, you can not say what went on, whatever. If you're Jesus Christ you can. Other than that, you can not....

Q. So, really, when looking at this, you would conclude that a nerve is not being affected by the disc?

A. Not now....

Q. I think she has now recently embarked on physical therapy with the Assisted Physical Therapy here in Searcy - the physical therapy group. Would that be the sort of thing that she would need?

A. That would be the thing for her to do.

Q. All right. Do you think that there is any more chiropractic treatment that would benefit her at this point, or is what she's learning there what she needs to do?

A. It wouldn't hurt, maybe, like once a month now maybe come in and get adjusted and stuff like that. Or every two weeks, it would be beneficial to her. But again, the main thing right now is strengthening and stretching those muscles. She's got to have this. If she don't, you're going to put her in a position she's going to have pain every time she gets up in the morning, a.m. pain, and have a quality of life that's probably 30 percent what she had before....

Q. Now, during the time that we talked about, essentially two years from November '03 to now, was she able to do work within any kind of limitations? I mean, was she physically able to do any work?

A. Huh-huh. (Witness shaking head from side to side).

Q. And why would that be?

A. Too much sitting would produce pain, too much walking would produce pain, any twisting motion with rotation like this (indicating) would actually put a twisting in that area and cause her to have pain.

Another hearing was held on November 29, 2005. The administrative law judge questioned the claimant:

Q. Is your physical therapy completed yet or are you still in physical therapy?

A. I'm still in physical therapy.

Q. Do you recall - what is your understanding of how many physical therapy visits you're supposed to undergo?

A. I believe they said it was two months worth, and I go three times a week.

Q. Are you coordinating this through Dr. Moore's office?

A. Yes, sir....

Q. Have you made any attempt to return to any type of work since we had our last hearing?

A. No, I haven't.

Q. Have you filled out any applications?

A. No, sir.

Q. Why do you feel that you have not been able to go back to work since July of 2004?

A. Because when I do simple things just around the house, my back tires very easily. I can only do a few things for a little while before I have to rest. It's just off and on. I feel that if I had a job to report to every day, I couldn't stay like I was supposed to.

The claimant testified, "I believe the physical therapy is starting to help. I do feel better than I did before."

The administrative law judge filed an opinion on February 6, 2006, and found:

4. The claimant proved by a preponderance of the evidence that she is entitled to additional temporary total disability compensation from June 23, 2004 through the date of the November 29, 2005 hearing, and continuing to a date yet to be determined.

5. The claimant proved ... that the few chiropractic treatments provided by Dr. Six after September 6, 2005 were reasonably necessary for treatment of her compensable low back injury.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Temporary Disability

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). The healing period has not ended so long as treatment is administered for healing and alleviation of the condition, and the healing period continues until the employee is as far restored as the permanent character of her injury will permit. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997). Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In the present matter, the Full Commission affirms the administrative law judge's award of additional temporary disability and medical treatment. The claimant sustained what the parties now stipulate was a compensable injury on November 4, 2003. The Full Commission notes Dr. Moore's opinion that the claimant's injury was a soft tissue or muscle injury, not a disc injury. The claimant began treating with Dr. Larey Six, a chiropractor. Dr. Six did not want to "aggressively" treat the claimant's low back because he thought the claimant may have had a "free floating" disc. Dr. Six apparently recommended an MRI in April 2004. The administrative law judge awarded the MRI in August 2004, and the Full Commission affirmed and adopted in

January 2005 with no appeal to the Court of Appeals, but the MRI was not taken until June 2005. Nevertheless, there is no evidence before us indicating that the respondents acted in bad faith, nor does the claimant ask for a statutory penalty.

We note that the record contains some 14 pages of off-work slips from Dr. Six. Dr. Six kept the claimant off work from July 2, 2004 until August 3, 2005. Dr. Moore agreed in September 2005 that the claimant remained temporarily totally disabled. Dr. Moore also essentially opined that the claimant remained within her healing period for the soft tissue injury.

In addition, the medical evidence corroborate the claimant's testimony that she had been unable to work during this time. The record also indicates that the minimal additional chiropractic treatment awarded by the administrative law judge was reasonably necessary in connection with the claimant's compensable injury.

Based on our *de novo* review of the entire record currently before us, the Full Commission finds that the claimant proved she was entitled to temporary total disability compensation from June 23, 2004 through the date of the November 29, 2005 hearing, and continuing to a date

yet to be determined. We find that the chiropractic treatment provided by Dr. Six after September 6, 2005 was reasonably necessary in connection with the claimant's compensable injury. The Full Commission therefore affirms the opinion of the administrative law judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant was entitled to additional temporary total disability benefits as well as a finding that the claimant was entitled to additional chiropractic treatments. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

A review of the evidence demonstrates that Dr. Larey Six, the claimant's chiropractor, stated that his initial diagnostic testing essentially consisted of active range of motion testing, relying upon "...the apprehension look...they'll squint their eyes because it hurts to move...this is what I look for." Nearly all of the testing discussed by Dr. Six was based on pain and relied on verbal or facial evidence of perceived pain. The only findings of Dr. Six that could be considered objective were the muscle spasms which Dr. Six says he palpitated from L1 through L5/S1.

Dr. Six treated the claimant in a conservative fashion due to his concern that the claimant had a herniated disk. After the claimant underwent an MRI, he believed that if the MRI had been conducted at the time of the accident it probably would have shown a disk bulge. However, he acknowledged that the MRI showed no disk protrusion. When he was asked about no nerve root compromise, and questioned about why the claimant had continuing complaints of pain, Dr. Six stated, "adhesion could be developing there or arthritis." Dr. Six testified that he did not believe the claimant was able to do any work from November 2003, until November 2005, because sitting and walking would cause her

to have pain. He admitted that he could not measure this objectively and he could only confirm by "the apprehension look".

Dr. Jim J. Moore performed an independent medical evaluation on the claimant. In his deposition taken on September 22, 2005, he noted that his examination revealed no atrophy, atoney, or fascilation, nor was he able to detect any spasm in the claimant's back. He stated that the claimant's reflexes were normal at all levels and there was nothing abnormal present on examination. He found that the claimant was deconditioned which would cause discomfort along the spinal axes but this discomfort was subjective in nature. Dr. Moore reviewed the claimant's June 5, 2005, MRI and stated that it showed disk degeneration at L4-5 and L5-S1. He confirmed that there was no evidence of nerve root compression or stenosis. He opined that the basis for the claimant's complaints was a soft tissue injury to the lumbar spine. He testified that barring further injury this condition normally resolves in a year or two. He said, that aside from the claimant's complaints of severe pain, there was no objective way to confirm that she still suffered the residual affects of a soft tissue injury. He further stated

that the diagnosis of soft tissue injury relied solely on the claimant's complaints of pain.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) specifically defines a compensable injury as an injury "caused by a specific incident and ... identifiable by time and place of occurrence." The Commission has held that complaints of pain while at work are not sufficient to prove by a preponderance of the evidence that the pain is work-related. Jerry Caves v. Riverside Furniture Corp., Full Commission Opinion filed August 12, 1999 (Claim No. E714394). In Hapney v. Rheem Manufacturing Co., 342 Ark. 11, 26 S.W.3d 777 (2000), the Arkansas Supreme Court affirmed the Full Commission's finding that when a claimant cannot recall anything specific happening, did not know how she was injured, did not associate her pain with any particular, specific incident, then a specific incident injury claim is meritless.

The Full Commission likewise found in Ruth Howard v. Wal-Mart, Full Commission opinion filed November 3, 1999 (Claim No. E814194) that the claimant had failed to satisfy the specific incident element of compensability when she was "unable to identify any particular activity which caused her symptoms, and testified that she was merely hurting at the

end of a long work day, and that there was no specific work-related incident." Dr. Moore further went on to say that the claimant's soft tissue injury should have resolved by now.

The evidence fails to demonstrate that the claimant ever had a disk problem and it would require conjecture and speculation to reach that conclusion. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). The claimant apparently suffered what is a soft tissue injury that was treated over a two-year period by a chiropractor whose primary diagnostic technique is something to be characterized as "...the apprehension look." Dr. Moore concluded, on the basis of his examination and an MRI, that the claimant had a normal physical profile and that the diagnosis of a soft tissue injury was based upon his reliance on the claimant's complaints of pain. There is nothing in the findings of either Dr. Six or Dr. Moore, in my opinion, which would preclude the claimant from attempting to return to work. The claimant is not unable to work. She has not tried to work nor has she inquired about

work, but based upon her own self determination she claims she is unable to work. The claimant suffered what is a soft tissue injury and two years later is still trying to receive temporary total disability benefits. Dr. Moore has opined that the claimant should have been over this by now, as soft tissue injuries will resolve with a year or two. Simply put, I cannot find that the claimant can prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits or additional chiropractic treatments. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner