BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207324

PATRICIA L. POLAND,
EMPLOYEE — CLAIMANT

HOME BOUND MEDICAL,
EMPLOYER — RESPONDENT

FIRSTCOMP INSURANCE CO.,
INSURANCE CARRIER — RESPONDENT

OPINION FILED AUGUST 17, 2007

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

Claimant represented by the HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed October 3, 2006. The administrative law judge found that the claimant failed to prove she was performing employment services when she had a motor vehicle accident. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. We find that the claimant proved she sustained a

compensable injury and was entitled to reasonably necessary medical treatment.

I. HISTORY

The claimant is Patricia L. Poland, age 60. An x-ray of Ms. Poland's chest in April 1992 was essentially negative; an x-ray of the claimant's cervical spine in April 1992 showed the following: "Narrowed fifth and sixth cervical interspaces with localized degenerative change and cervical spondylosis."

The claimant's testimony indicated that she began working for Home Bound Medical in about 2000. The respondents' attorney questioned the claimant (at deposition):

> Q. What was your job description with Home-Bound, what were you supposed to be doing?
>
> A. I worked as an LPN. There were times that I sat with individuals that needed someone to sit with them, and there were times I did skilled care when someone needed a nurse at home to take care of them....
>
> Q. And then the skilled care, what would they have you doing? How did that differ from sitting with the individual?
>
> A. The skilled care is where it requires a nurse, where I would assess them and whatever their needs were. There was a baby that had to have trach care and suctioning and tube feeding. And then

the other person in the home was Mr. Morgan. He was on the vent and required urine catheterization and bathing and adjusting up in his chair, lifting....Helping with physical therapy....

Q. We were talking about what geographical area, and I guess we'll use Calico Rock as that's where you would come from, right?

A. Yes, sir....

Q. The vent case, where was that at?

A. That was in Bethesda.

Q. And how far away is that?

A. Approximately 53 to 55 miles.

Q. Okay. And I understand you were paid $12 an hour. Is that when you're actually in the home?

A. Yes, sir....

Q. And how were you paid on travel?

A. They called it a distance fee.

Q. And do you know how much that was?

A. $1 an hour.

Q. $1 an hour. And about how many hours were you trying to work a week?

A. Approximately 24 hours was about what I wanted....

Q. What was the last skilled job that you had?

A. That was the one in Bethesda with David Morgan....

Q. Would the 24 hours that you're talking about include the $1 distance fee when you were given your 24 hours?

A. I'm sorry, I don't understand your question.

Q. Well, you told me that you were working around 24 hours a week roughly for Home-Bound?

A. Yes, sir.

Q. What I wanted to know was, did that 24 hours - were you including travel time in that, or was that separate from that 24 hours?

A. That was separate.

Q. Okay. So you actually spent 24 hours in peoples' homes -

A. Yes, sir.

Q. - and there was some travel above that?

A. Yes, sir.

Q. About how many hours a week do you think you traveled?

A. Well, I can tell you how much per day at the last job, but I -

Q. That would be fair.

A. Okay. Between an hour and ten minutes to an hour and fifteen minutes one way....so it would be approximately two and a quarter to two and a half hours each day.

Q. Fair enough.

A. For the last skilled job.

The parties stipulated that the employment relationship existed on March 19, 2002. The respondents' attorney questioned the claimant (at deposition):

> Q. Where were you headed that day?
>
> A. I was headed to Morgan's at Bethesda.
>
> Q. And that's what, about a 53 mile drive?
>
> A. Yes....
>
> Q. And what highway do you take out of Calico Rock to go to Bethesda?
>
> A. Five to 56 to 9, and I don't recall the name of the highway going into Bethesda, and then 106.
>
> Q. Do you take 106 in Bethseda?
>
> A. Yes.
>
> Q. What highway were you on when the accident happened?
>
> A. It was called Limedale Road....
>
> Q. Do you take 106 to Limedale Road?
>
> A. No, sir.
>
> Q. Okay.
>
> A. 106, we had a detour because they were fixing part of the road.
>
> Q. So you turned off on Limedale?
>
> A. Yes, sir, that's where I had to take a detour.
>
> Q. Okay. What happened to you on Limedale? What caused the accident?

> A. It was raining. There was a curve in the road, and I went off the side of the road.
>
> Q. Did your car go completely off the road?
>
> A. Yes, sir....It landed 15 to 18 feet down in a creek bed.

A Radiology Report on March 19, 2002 indicated that the claimant complained of pain in the sternum area. The following was shown on the Report: "No fracture of the sternum is identified and no fracture of the anterior rib cage is demonstrated."

On March 20, 2002, the claimant sought treatment for stiffness in her neck following the motor vehicle accident. A physician's examination appeared to show "spasm" with palpation. The impression/diagnosis on March 20, 2002 included "acute cervical strain s/p MVA."

The claimant was treated conservatively.

The impression on March 27, 2002 was "Acute cerv strain, much improved."

The record indicates that Dr. David A. Sitzes referred the claimant for chiropractic consultation and treatment in May 2002.

The claimant saw Dr. Vincent B. Runnels, a neurological surgeon, in February 2003:

> Patricia Poland is a 56-year-old female who was seen for consultation on 02/20/03 with a chief complaint of low back pain, neck pain, and headaches. This all stems from an accident on 03/19/02 in a rain storm. Her vehicle went off the road by a bridge, landed head down in a creek bed. She was stunned but she was not unconscious. She was on her way to work as an LPN where she does home care for patients....
>
> All of her symptoms have virtually subsided. If at one time, her neck and back were 100, the low back pain is gone. The neck is down to 10. Sometimes she notes crepitation when she turns it. She has been having what sounds like vitreous floaters in her right eye. She has seen an eye doctor, though.
>
> Plain x-rays of her neck, though, show rather severe spondylosis at 5-6 and 6-7 with narrow disc spaces and spurs, foraminal narrowing. At 4-5, she has a degenerative slip. In her low back, there were only AP x-rays provided but she appears to have some narrowing at 4-5 and 5-1 discs....
>
> I think she did injure her neck and back. She would be prone to injury with rather severe spondylosis in her neck. It seems to be mostly gone away. I think, though, it would be unwise to put her on work requiring heavy lifting, overhead work....I do not recommend surgery at this time....
>
> For her neck, she should just do the massage and traction, anti-inflammatories, and low back exercises. I have released her from my follow-up. I have recommended she be returned to work but at restricted duty so she does not do heavy lifting or overhead work. There is no permanent disability.

An MRI of the claimant’s cervical spine was taken in September 2003, with the following impression: “Spinal

stenosis in the lower cervical spine as described from degenerative disc change, most prominent at C6-7."

An MRI of the claimant's thoracic spine was taken in May 2004, with the following impression: "Mild bulging of disc at the 4-5 level but this does not cause central canal or neural foraminal stenosis nor does it indent the cord." And an MRI of the lumbar spine was taken in May 2004: "Disc disease involving the L4-5 and L5-S1 level with an inferior end-plate compression change vs Schmorl's node at the L5-S1 level, as well as protruding disc at the L5-S1 level that causes central canal narrowing and left neural foraminal narrowing and impingement on the left to some degree. At the 4-5 level there is flattening of the thecal sac and mild left neural foraminal narrowing also secondary to disc disease."

A physical therapist's evaluation on May 6, 2004 indicated there had been an "Exacerb. 5-4-04." The therapist's goals included reduction of muscle spasm and pain in the claimant's neck.

Dr. Sitzes referred the claimant to a neurological surgeon, Dr. Reza Shahim, who examined the claimant and reported on May 18, 2004:

> I have reviewed her cervical spine MRI and she has severe canal stenosis, particularly at C5-6 and moderate canal stenosis at C6-7. Lumbar spine MR shows lumbar spondylosis with lateral recess stenosis at L5-S1, but without any significant disc herniation....
>
> Ms. Poland is symptomatic from cervical spinal stenosis. I have given her all options and she could receive epidural or trigger point injections, but I doubt those treatments would eliminate her symptoms. She will most likely require cervical decompression anteriorly....At this point she would prefer to be managed conservatively. She is going to continue with therapy....If she chooses not to have surgery then I will plan on following up with her in the clinic in six months.

The claimant continued with physical therapy and follow-up visits with Dr. Sitzes.

Dr. Shahim saw the claimant and stated on November 15, 2004, "Ms. Poland is symptomatic from cervical spondylosis and stenosis. Since she has no clear myelopathy, I have recommended conservative management. I will obtain an MRI of her cervical spine to assess the degree of canal stenosis. I wouldn't be surprised if she requires a cervical decompression at some point."

An MRI of the claimant's cervical spine was taken on November 18, 2004, with the following impression: "Severe canal stenosis at the C5-6 and C6-7 levels secondary to bony

spurring and disc disease. Neurosurgical or orthopedic consult is recommended."

The claimant followed up with Dr. Shahim in December 2004: "We obtained a new MRI of the cervical spine and I reviewed that MRI with her today. She has canal stenosis at C5-6 and C6-7 due to a broad disc herniation and spondylosis at both levels....She mainly complains of neck pain and intrascapular pain....She would benefit from cervical diskectomy and fusion since she has had very chronic shoulder and neck symptoms. Surgery is elective. She could continue to be watched conservatively since she does not have florid signs of myelopathy."

A pre-hearing order was filed on February 27, 2006. The claimant contended that she sustained a compensable injury to her neck and back and was entitled to all related benefits. The respondents contended that the claimant did not sustain a compensable injury.

The parties agreed to litigate the following issues: "1. Compensability of alleged neck and back injury. 2. TTD benefits. 3. Medical expenses. 4. Attorney's fees. 5. Ark. Code Ann. §11-9-526 (Refusal to return to work).

6. Ark. Code Ann. §11-9-506 (offset for unemployment benefits)."

Dr. Bethany Lane Knight stated on March 10, 2006:

> Patricia is a 59-year-old white female whom we have followed in the clinic for several years. On March 19, 2002, Patricia was working when she had an MVA. She was seen in the clinic at that time. She was treated conservatively for her chest pain and neck pain with anti-inflammatories, however, her symptoms did not resolve....It is also important to note that Ms. Poland did return to work fairly soon after her injury, and while lifting a patient on the job on April 1, 2002 she had recurrence of her acute pain. Since that time, she has been unable to work at all secondary to pain in her neck, infrascapular area, shoulders, arms, lower legs and feet. She also has hand numbness.
>
> It is my opinion that the patient has spinal stenosis which was asymptomatic, however, as a result of her motor vehicle accident and her reinjury of April 1, 2002, she has significant pain which is disabling....

A hearing was held on July 5, 2006. At that time, the parties agreed to reserve issues involving temporary total disability, Ark. Code Ann. §11-9-526, and Ark. Code Ann. §11-9-506.

The claimant testified at hearing that her neck pain had gradually and continually worsened following the March 2002 motor vehicle accident.

Jackie Connor, co-owner of Home Bound Medical, testified for the respondents:

> Q. How are they paid?
>
> A. By -
>
> Q. Such as Ms. Poland. How are they paid?
>
> A. By the hour, the number of hours that the shift is scheduled at the home.
>
> Q. And do they use their own vehicles?
>
> A. Yes.
>
> Q. What about this distance payment?
>
> A. Ms. Poland was receiving a distance fee that is not a mileage fee. It is based on the number or hours that is served in the home during the day. And it is, it is $1 an hour. She was working eight hour shifts at the David Morgan residence. Therefore, for $8 a day, a distance fee was paid. And I brought you in a sample of a paycheck, a pay stub that showed where she had worked 24 hours and was paid her distance fee of $24 during that particular week of work.
>
> Q. But her hourly rate does not start until she actually gets to the home; correct?
>
> A. That's correct. At the Morgan residence, normally the shifts were from 8 a.m. to 4 p.m. Therefore, she would be paid from 8 to 4, an eight hour shift.

The administrative law judge found, in pertinent part:

> 7. The claimant has failed to prove by a preponderance of the credible evidence that the travel from her home to Mr. Morgan's home on March 19, 2002 occurred in the course of her employment,

> and the claimant failed to prove by a preponderance of the evidence that she was performing employment services for her employer when she had a motor vehicle accident during that travel.

The administrative law judge therefore denied the claim; claimant appeals to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Ark. Code Ann. §11-9-102(4) provides:

> (A) "Compensable injury" means:
> (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]
>
> (B) "Compensable injury" does not include:
> (iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated[.]

The test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's

interests directly or indirectly. *Pilgrims Pride Corp. v. Caldarera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

Conversely, an employee is generally said not to be acting within the course of employment when she is traveling to and from the workplace. This "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from her place of employment. *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995). The rationale behind this rule is that an employee is not within the course of her employment while traveling to or from her job. *Id.*

A recognized exception to the going and coming rule is where the journey itself is part of the service. An example of travel being an integral part of the job is where the employee must travel from jobsite to jobsite, whether or not she is paid for that travel time. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997), citing 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 16.01 (1996). An additional factor determinative of whether an employee's travel is within the course of employment is whether the employee is required to furnish her own conveyance. "If the employee as part of his job is required

to bring with him his own car, truck or motorcycle for use during his working day, the trip to and from work is by that fact alone embraced within the course of employment." *Id*. The theory behind this principle of law is that the obligations of the job reach out beyond the premises, making the vehicle part of the employment environment and compelling the employee to submit to the everyday hazards associated with road travel, which she would otherwise be able to avoid. Furthermore, such a situation is for the benefit of and service to the employer. *Id*.

When it is evident that an employee was required by the very nature of her job description to submit herself to the hazards of day-to-day travel in her own vehicle, back and forth to the homes of patients, that employee may be acting within the course of her employment when she sustains an injury. *Pettey, supra*.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i).

In the present matter, the Full Commission finds that the claimant proved she sustained a compensable injury on March 19, 2002. The claimant was a licensed practical nurse employed with Home Bound Medical. As part of the claimant's employment, she drove her own vehicle from Calico Rock to the home of a client, David Morgan, in Bethesda. The claimant testified that she was paid $12 hourly for her skilled care provided to Mr. Morgan in his home. Additionally, the claimant testified that she was paid a $1 an hour "distance fee" for the time she spent traveling from Calico Rock to Bethesda. The claimant testified that the distance fee was paid "separate" from the hourly in-home rate. The claimant's testimony in this regard demonstrates that the respondents compensated the claimant for her travel time during the 50-mile drive from Calico Rock to Bethesda. When also considering that the claimant was required to furnish her own conveyance, the Full Commission finds that the claimant's travel was part of her service to the employer. The claimant was being compensated and was at the

least indirectly benefitting her employer at the time of the March 2002 motor vehicle accident.

The Full Commission recognizes the testimony of Jackie Connor. Ms. Connor testified that the "distance fee" was actually "based on the number or hours *that is served in the home during the day* (emphasis supplied)." We find that the testimony of Ms. Connor in this regard is entitled to minimal weight. The evidence before us shows that the respondents compensated the claimant for her travel time from the claimant's home to the home of Mr. Morgan.

The Full Commission finds that the motor vehicle accident on March 19, 2002 was an accidental injury causing physical harm to the claimant's body, namely an acute cervical strain. The claimant's acute cervical strain arose out of and in the course of her employment and required medical services. The injury was caused by a specific incident and was identifiable by time and place of occurrence. The claimant was performing employment services for Home Bound Medical at the time of the accidental injury. The claimant established a compensable injury by medical evidence supported by objective findings, i.e., the palpable muscle spasm shown in the claimant's neck on March 20, 2002.

The evidence does not demonstrate that the claimant sustained a compensable injury to any other anatomic region, including her middle or lower back, thoracic or lumbar spine. The decision of the administrative law judge is reversed.

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. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, the Full Commission finds that the claimant proved she was entitled to all of the medical treatment of record provided her through February 21, 2003. We have determined that the claimant proved she sustained a compensable injury on March 19, 2002, and that the claimant was subsequently diagnosed as having an "acute cervical

strain s/p MVA." A physician noted on March 27, 2002 that the claimant's acute cervical strain was "much improved." Almost one year after the acute cervical strain, on February 21, 2003, Dr. Runnels examined the claimant. Dr. Runnels noted, "All of her symptoms have virtually subsided." Dr. Runnels noted that x-rays showed severe spondylosis, but he did not recommend surgery and there was no permanent disability. Dr. Runnels' recommendations included massage, traction, and anti-inflammatories. The record does not demonstrate that the claimant sought any of these treatment recommendations by Dr. Runnels.

According to the record, the claimant did not seek additional medical treatment until September 2003, when a cervical MRI showed spinal stenosis as a result of degenerative disc disease. A physical therapist reported in May 2004 that there had been an "exacerbation" of the claimant's condition. The claimant began treatment with Dr. Shahim in May 2004. Dr. Shahim opined that the claimant was "symptomatic from cervical spinal stenosis....She will most likely require cervical decompression anteriorly." Dr. Shahim did not causally relate the claimant's degenerative condition or need for elective surgery to the March 2002

motor vehicle accident. Nor does the evidence before the Commission show such a causal connection. Nor were the degenerative abnormalities subsequently shown in the claimant's thoracic and lumbar spine the result of the 2002 motor vehicle accident. In addition, Dr. Shahim did not opine, and the record does not demonstrate, that the claimant's symptoms were the result of an "aggravation" of her pre-existing condition. We thus attach minimal weight to Dr. Knight's implicit opinion in March 2006 that the claimant was still symptomatic from the cervical strain occurring four years earlier.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant sustained a compensable injury in the form of a cervical strain on March 19, 2002. The decision of the administrative law judge is reversed. We find that the claimant proved she was entitled to all of the medical treatment of record provided through February 21, 2003. We note that the parties have reserved the issue of the claimant's entitlement to temporary total disability compensation. For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to a

fee of five hundred dollars ($500) pursuant to Ark. Code Ann. §11-9-715(b)(2)(Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I concur with the Majority's finding that the claimant sustained a compensable neck injury while acting in the course and scope of her employment. However, I disagree with their finding that the claimant did not sustain a compensable injury to any other part of her spine. I also disagree with their finding that the medical treatment the claimant received after February 21, 2003, was not reasonable and necessary medical treatment related to her compensable injury. For those reasons, I must respectfully concur in part and dissent in part.

The Majority's denial of the claimant's requested medical benefits is based entirely upon the opinion of Dr. Vincent Runnels, a Fayetteville neurosurgeon. After his examination of the claimant, Dr. Runnels authored a report dated February 21, 2003, in which he outlined his findings. Among other things, Dr. Runnels concluded that the claimant had sustained an injury to her spine in her job-related accident of March 19, 2002, and that the claimant's symptoms had "virtually subsided." He also opined that the claimant would have no permanent impairment. However, Dr. Runnels' statement that the claimant's symptoms had disappeared and that she had no impairment are belied by the significant restrictions he placed upon the claimant and by his direction that she begin taking pain medication. In fact, he stated that her condition caused her to have "permanent limitations".

While I agree that Dr. Runnels is correct in his belief that the claimant sustained an injury in her job-related accident, I believe that his other findings are overwhelmingly refuted by other evidence. Also, he only saw the claimant on one occasion and his knowledge

of her overall condition is limited. In my opinion, while his report is entitled to some weight, it should not be the absolute basis upon which all decisions are made regarding this claimant's medical treatment.

I note that, following her examination by Dr. Runnels, the claimant saw other physicians who continued treating her for the symptoms related to her original injury. That is, she continued to receive not only chiropractic and physical therapy treatments, but was seen by Dr. Reza Shahim, a Little Rock neurosurgeon. Dr. Shahim was of the opinion that the claimant at some point would need surgery to correct her spinal problem and he also prescribed her various medications and therapy to improve her condition.

I believe that the claimant's continued complaints, and the fact that she received further treatment from doctors for essentially the same complaint that she has had throughout the time following her injury, rebuts Dr. Runnel's conclusion that all of her symptoms had disappeared. I believe that the treatment the claimant received from her other physicians, most specifically Dr. Shahim, is reasonable

and necessary, based upon her condition, and should be the liability of the respondent. I do not believe that the opinion of one consulting physician, who is contradicted by numerous other physicians who saw the claimant and were more familiar with her condition, should be a sufficient basis to allow the respondent to avoid their obligation under the Workers' Compensation Act to provide an injured worker reasonable and necessary medical treatment.

For the reasons set out above, I must respectfully dissent from the portion of the Majority's Opinion finding that the claimant did not sustain an injury to her lower back and that the claimant is not entitled to treatment for her conditions after February 21, 2003.

________________________________

PHILIP A. HOOD, Commissioner