

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700630

DENISE BISHOP, EMPLOYEE	CLAIMANT
ST. VINCENT HEALTH SERVICE, INC., EMPLOYER	RESPONDENT NO. 1
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2
SECOND INJURY FUND	RESPONDENT NO. 3

OPINION FILED JUNE 19, 2009

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

Claimant represented by the HONORABLE SCOTT A. SCHOLL,
Attorney at Law, Jacksonville, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL E.
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY
KING, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE DAVID
SIMMONS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

The claimant appeals an Administrative Law
Judge's September 2, 2008 opinion finding that the
claimant failed to prove by a preponderance of the
evidence that she sustained a compensable injury on or
about November 15, 2006, in that the claimant has failed

to prove by a preponderance of the evidence that the alleged injury is established by medical evidence supported by objective findings. After a de novo review of the record, the Full Commission reverses the Administrative Law Judge's decision. The Full Commission finds that the claimant did present objective findings of muscle spasms, and has sustained a compensable aggravation injury, therefore, the decision of the Administrative Law Judge is hereby reversed.

I. HISTORY

On November 15, 2006, the claimant was performing her duties as the Director of Surgical Services, when she passed an operating room suite and noticed that the anesthetist was struggling with a patient. The claimant ran into the operating room to assist, and found that the hydraulics on the operating table had collapsed, with an anesthetized and intubated patient on the table and, further, that the patient's airway and IV had become disconnected, causing the patient to bleed and stop breathing.

The patient was very large, weighing in at about 340 pounds, and began to slide off of the operating table as the claimant entered the operating room. The claimant ran into the operating room and caught the patient, grabbing him under the neck and

shoulders, in order to prevent him from falling some three-and-a-half feet to the floor. The claimant then had to hold the patient up so that the anesthetist could reconnect the ventilator to his endotracheal tube. When the claimant caught the patient, she immediately felt a snapping sensation, and experienced pain, numbness, and tingling from her upper neck and shoulders and down both arms.

The claimant sought medical treatment for the injury, and has received treatment from Drs. Almond, Cathey, and Jordan, ultimately undergoing a discectomy with cervical fusion of the C4-C5 level with PEEK intervertebral spacers and Atlas plating by Dr. Jordan on August 23, 2007.

The claimant has had two previous procedures on her neck; one in 1993 (at the C5-C6 level) and the second in 1997 (at the C6-C7 level). Five days before the injury, the claimant had an MRI performed to check the status of her previous cervical fusions. Dr. Jordan testified in his deposition that the November 10, 2006, MRI revealed that the claimant had stable fusions at the C5-C6 and the C6-C7 levels, and that the previous surgeries were successful.

Two days after the injury, on November 17, 2006. Dr. Jordan testified that a new MRI image did not show any significant changes from the first, but that such does not rule out the existence of a new injury, and that he agreed with Dr. Cathey's assessment that, although there were no radiographic changes between the November 10th and November 17th images, that the changes in symptoms evidence that the November 15th injury "is the major cause of [Ms. Bishop's] trouble."

A hearing was held on June 5, 2008, and on September 2, 2008, the Administrative Law Judge filed an opinion which found *inter alia*, that the claimant proved by a preponderance of the evidence that, while performing employment services, she was involved in an incident trying to protect a patient when a surgical bed collapsed under him. However, the opinion continued that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury as a result of that incident, inasmuch as the injury was not established by medical evidence supported by objective findings and that the claimant failed to prove by a preponderance of the evidence that the work-related incident was the cause of her need for medical treatment.

II. ADJUDICATION

A. Compensability

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is itself compensable. Oliver v. Guardsmark, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W. 3d 900 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W. 2d 883 (1996).

Ark. Code Ann. §11-9-102(4)(A) (Repl. 2002) defines "compensable injury":

(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[.]

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) (a) (i). Here, the Emergency Physician Record, dated the same date as the claimant's injury, evidences that she was experiencing muscle spasms in her neck immediately following the incident which resulted in her injury.

Likewise, in his deposition, Dr. Jordan explained that, in addition to "much more" neck and shoulder pain, the claimant suffered "much more neck rigidity" and that the claimant's treatment included the use of muscle relaxants and epidural steroid injections. Further, in his letter dated September 20, 2007, Dr. Jordan noted that the claimant continued to suffer intermittent muscle spasms in the posterior neck.

Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999) is particularly instructive as to the issues raised by the claimant. In Freeman, Mr. Freeman injured his lower back on March 25, 1996, while steadying a ladder that had slipped out from a co-worker. While the co-worker was hanging from the

top of a trailer, Mr. Freeman angled the ladder under him and held the ladder while the co-worker climbed down.

Mr. Freeman claimed that his back started hurting and that his leg "started feeling kind of funny." Mr. Freeman was diagnosed with a lumbar strain and was treated with steroid injections and physical therapy. At a hearing held before an Administrative Law Judge, Mr. Freeman presented only his own testimony and his medical records, which included an MRI report dated February 1, 1990 (6 years prior to the injury), that was "substantially similar" to an MRI conducted seven weeks after the injury on May 14, 1996. The Administrative Law Judge determined that Mr. Freeman was not entitled to benefits, inasmuch as he failed to prove by objective medical evidence that he sustained a compensable injury. The Full Commission reversed, finding that the report of muscle spasms by Freeman's physical therapist constituted objective medical evidence, and the Court of Appeals affirmed. The Court then cited University of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997) in finding that muscle spasms can constitute objective medical evidence. Freeman continued, stating that Hart relied upon Steadman's Medical Dictionary 1304 (23d ed. 1976) as defining muscle spasms as "1. An

involuntary muscle contraction... 1. Increased muscular tension and shortness which cannot be released voluntarily and which prevent lengthening of the muscles involved; [spasm] is due to pain stimuli to the lower motor neuron." The Court, therefore, reasoned that:

[T]he Commission correctly found that muscle spasms constituted objective findings for the purpose of establishing compensability. Accordingly, the similarity between the 1990 and 1996 MRI results are of no moment. It is well settled that an employer takes an employee as he finds him and employment circumstances that aggravate preexisting conditions are compensable.

As in Freeman the claimant's injury cannot be dismissed merely due to the similarity of the two MRI images and the limitations of the technology to be able to create an image of the injury to which one can point to a visual representation of the injury. While Dr. Jordan may have agreed that the MRI image itself did not provide objective and measurable findings of acute injury, the emergency department physician and Dr. Jordan both noted the muscle spasms suffered by the

claimant from the date of her injury through the course of her treatment. As noted by Freeman and Hart, muscle spasms are, by definition, outside of the voluntary control of the patient and are, therefore, objective medical findings, evidencing the claimant's injury and support for her claims of pain. In the case at hand, Dr. Jordan stated in his deposition that his opinions were based upon a reasonable degree of medical certainty. These opinions included the change of symptoms suffered by the claimant, to include, in addition to much more severe pain, muscle spasms and neck rigidity. Dr. Jordan further explained that Ms. Bishop's previous surgeries were indeed successful, and that her occupational injury in November, 2006, was the cause of her current troubles.

These changes in the symptoms suffered by Ms. Bishop are clear, objective evidence that the cause of the claimant's injuries, and the need for treatment, was indeed the "incident" of having to catch a large patient to prevent him from falling from the operating table.

The claimant's symptoms immediately and drastically changed after she caught the falling patient. Even without the opinions of Dr. Jordan and Dr. Cathey, it would be self-apparent that this new injury and the exacerbation of any problems that may

have been pre-existing were more likely than not caused by the stress placed upon her as she struggled to get under and hold over 300 pounds of falling patient. Therefore, the Full Commission finds that the claimant sustained a compensable cervical injury during the patient lifting incident on November 15, 2006.

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) (Repl. 2002). 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). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); Artex Hydroponics, Inc. v.

Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Here, the mere fact that the claimant did not undergo her surgery until the following August cannot negate the causal connection between the injury and her treatment. As noted in the claimant's medical records, the surgery was proposed by Dr. Jordan shortly after the injury. While Dr. Cathey stated that "it would seem reasonable to try to exhaust conservative treatment options...I would certainly not disagree with Dr. Jordan's proposal to proceed with operative intervention..." Further, the preoperative report for Dr. Jordan noted that the indications for the surgery were "failure of conservative treatment." As Dr. Jordan explained in his deposition, the need for surgery was that the claimant was not improving, and conservative treatment had reached an impasse. The Full Commission finds that all of the treatment the claimant has received for her cervical injury, post November 15, 2006, by and at the direction of Dr. Jordan is reasonably necessary medical treatment and a liability of the respondent.

C. Temporary Total Disability

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). A claimant's healing period has not ended when treatment is being administered for the healing and alleviation of the condition. Id.; J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W. 2d 51 (1990). Here, the claimant was released to return back to work on September 21, 2007. The claimant's last visit with Dr. Jordan was November 27, 2007. Dr. Jordan testified in deposition that the claimant was able to work, without restrictions or limitations due to the compensable neck injury. Therefore, the Full Commission finds that the claimant has not proved entitlement to temporary total disability benefits.

D. Permanent Partial Disability

The claimant has had three cervical fusion surgeries. After the first surgery she was given a 12% anatomical impairment rating by Dr. Cathey. Dr. Jordan testified in deposition that the anatomical impairment rating for the first surgery should actually have been 10%, however, the second surgery would have entitled her to an additional 2% had it been a workers' compensation injury. Dr. Jordan testified that the third surgery entitled her to an additional 1% anatomical impairment rating. Therefore, the Full Commission awards the

claimant the additional 1% anatomical impairment rating as testified to by Dr. Jordan in his deposition.

E. Wage Loss Disability

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens, 233 Ark. 786, 346 S.W. 2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W. 3d 848 (2001); Cross v. Crawford Memorial Hosp., 54 Ark. App. 130, 923 S.W. 2d 886 (1996). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W. 2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W. 2d 850 (1995). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W. 2d 276 (1982). The claimant has been unable to return to work earning any wages since her compensable cervical

surgery. Before this surgery the claimant was a high earning nursing supervisor. It is clear from the evidence of record that the claimant will not be able to return to the work force at the same rate of pay. As such, the Full Commission finds that she is entitled to wage-loss disability in the amount of 25% over and above her total anatomical impairment rating of 13%.

F. Second Injury Fund Liability

Liability of the Second Injury Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. See, Mid-State Constr. Co . v. Second Injury Fund, 295 Ark. 1, 746 S.W. 2d 539 (1988). Here, despite two prior cervical surgeries, the claimant was able to work unrestricted before her compensable injury. Although the claimant now has an increased anatomical impairment rating due to her third cervical surgery, as the claimant previously worked unrestricted she is unable to show that any prior impairment has combined with the recent compensable injury to produce the

current disability status. Therefore, the Second Injury Fund has no liability in this claim.

In conclusion, the Full Commission finds that the claimant sustained a compensable cervical injury during the patient lifting incident on November 15, 2006. The claimant is entitled to the reasonably necessary medical treatment provided by and at the direction of Dr. Jordan. The claimant is also entitled to an additional 1% anatomical impairment rating due to her compensable injury. The claimant is hereby awarded 25% wage-loss disability. The claimant has failed to prove entitlement to any temporary total disability benefits. The Second Injury Fund does not have liability in this claim.

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).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the

amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury on November 15, 2006, for which she is entitled to indemnity and medical benefits. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has failed to meet her burden of proof.

It is undisputed that the claimant was involved in an incident at work on November 15, 2006, when she assisted in the operating room to prevent a patient from falling off the operating table when the hydraulics failed and the table gave way. The claimant

sought medical treatment for this incident in the emergency room on that same day. The Triage record indicates that the claimant presented with "c/o pain that radiates down both shoulders. Pt states injured when OR table hydraulic gave out and she had to hold pt on table." The Emergency Physician Record lists claimant's chief complaint as back and neck pain that was both chronic and that started today. The physician noted tenderness in the claimant's lower back and neck as well as muscle spasms in the neck. Claimant was advised to rest, put heat on her back and to not lift over 20 pounds.

Claimant has a long history of cervical problems. In 1993, claimant underwent a cervical fusion performed by Dr. Stephen Cathey at C5-6. In 1997, the claimant underwent a second cervical fusion performed by Dr. Anthony Russell at C6/7. Claimant testified the ever since her second fusion, she continued to have problems with her neck, but that she did not seek medical treatment for these problems. However, prior to her work related incident, the claimant had been complaining about increasing neck pain to Dr. Richard Jordan, a neurosurgeon with whom she worked as the operating room director for respondents. In his deposition, Dr. Jordan testified that the claimant was

an "informal" patient, in that he and the claimant actually "talked about her problems on an informal basis for quite some time before we formalized the relationship" of doctor-patient. Dr. Jordan ordered an MRI of the claimant's cervical spine a week prior to the claimant's work related incident because of the claimant's history of two previous anterior cervical fusions and the fact that the claimant was having more difficulty. This MRI performed on November 10, 2006, revealed the following findings:

C2/3 - The disc space is preserved. There is no evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

C3/4 - Disc space is preserved. No evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

C4/5 - There is very mild relative narrowing of the disc space. The end plates appear intact. There is abnormal high signal identified throughout the C4 vertebral body, and within the superior aspect of the C5 vertebral body. Minimal high signal is identified on T2 imaging within the disc space, likely of no clinical significance. There is a diffuse symmetric posterior disc/osteophyte complex. This abuts the ventral aspect of the cervical cord and causes moderate canal narrowing (7.7mm), This is well seen on series 7, image 7. In addition, bilateral uncovertebral degenerative changes contribute to moderate to severe bilateral foraminal narrowing.

C5/6 - The disc space is poorly defined. Patient may have had prior fusion at this level, with hardware now removed. No evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

C6/7 - Patient is status post anterior cervical fusion. No evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

C7/T1 - No evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

Following her work related incident on November 15th, the claimant underwent x-rays in the emergency room which disclosed claimant's previous fusions, but did not detect the presence of any acute injury or lordic curvature which would be indicative of muscle spasms. After coming under Dr. Jordan's formal care, Dr. Jordan ordered a second MRI which was performed on November 17, 2006. This MRI revealed:

C2/3 - The disc space is preserved. There is no evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

C3/4 - Disc space is preserved. No evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

C4/5 - Again, there is mild relative narrowing of the disc space. Again, best seen on STIR imaging, there is high signal identified within the C4 and C5 vertebral bodies, the appearance of which has not significantly changes compared with November 10, 2006. Again,

degenerative origin is suspected. There is a diffuse, posterior disc/osteophyte complex present which abuts the ventral aspect the cervical cord and contributes to moderate canal narrowing, with AP dimension measuring 7.7 mm (C6 series 7, image 9). As noted previously, this mildly flattens the ventral aspect of cervical cord, but there is no evidence of significant cord signal abnormality. Again, uncovertebral degenerative changes contribute to moderate to severe bilateral foraminal narrowing. C5/6 - There is stable relative narrowing of the disc space. No evidence of significant disc herniation, canal stenosis, or foraminal stenosis. C6/7 - Patient is status post anterior cervical fusion, with associated artifact. No evidence of significant disc herniation, canal stenosis, or foraminal stenosis. C7/T1 - There is mild narrowing of the disc space. No evidence of significant disc herniation, canal stenosis, or foraminal stenosis.

After reviewing the two MRIs, Dr. Jordan testified in his deposition that there was no significant changes between the November 10th and November 17th MRIs. Nevertheless, Dr. Jordan testified that the claimant's symptoms changed in that she now complained of more pain.

The claimant continued to work for nine months after her work related incident, when she underwent a third fusion surgery performed by Dr. Richard Jordan on

August 23, 2007. Dr. Jordan testified that the claimant responded rather well to surgery and was released to return to work.

The majority found that despite the fact that the claimant's pre and post accident MRI's revealed identical findings, the claimant established the existence of her compensable injury with objective medical findings. These findings consist of the emergency room physician's findings that the claimant was experiencing muscle spasms in her neck, as well as Dr. Jordan's findings that the claimant was experiencing "much more" neck and shoulder pain and "much more neck rigidity." With regard to the emergency room physician's findings, it is noted that the emergency room physician did not diagnosis or assess the claimant with "muscle spasms." Rather the emergency room records only diagnosis the claimant with a cervical strain. It is more likely than not that the findings of muscle spasms was merely a response to an inquiry of the claimant as the only place in the medical records referencing muscle spasms is on a diagram that indicates that the claimant complained of tenderness and muscle spasms in her neck and low back. How else could the physician know that the claimant was tender without the claimant advising him that she was tender. Likewise, it

is just as likely that the claimant advised the emergency room physician that she was experiencing muscle spasms as well. Given the fact that the cervical x-rays did not reflect a straightening of the cervical lordotic curvature, which would be supportive of a finding of muscle spasms, I cannot find that the claimant actually presented with muscle spasms when she was examined in the emergency room on November 15th.

With regard to Dr. Jordan's findings, his findings are based purely upon the claimant's history as he readily admitted that he did not formally treat or examine the claimant prior to her work related incident; therefore he could not account for the amount of pain and rigidity in the claimant's neck and back prior to the incident without relying upon the claimant's subjective history. A medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate claimant's claim.

Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Admittedly, muscle spasms may account for objective medical findings as noted by the majority. However, given the claimant's complaints of increased pain just days before her work related incident, it would require speculation and conjecture to conclude that the claimant's muscle spasms noted in the emergency room were the result of the work related incident and not her underlying, pre-existing problems. 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 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). In my opinion, Dr. Jordan's assumption that the claimant's work related incident is responsible for her need for treatment, is just that, an assumption. Clearly, the claimant was in pain before she helped catch the falling patient at work, so much so that she complained to Dr. Jordan for "quite some time" and he ordered an MRI to see what was going on in her neck. Nothing changed from a objective standpoint after the work related incident. Claimant was suffering from degenerative changes that were

clearly present and symptomatic before she ever walked into the operating room to help catch the patient on the broken operating room table. It is simply speculation to conclude that the claimant's efforts on November 15, 2006, resulted in a new injury for which she is entitled to workers' compensation benefits. Moreover, even assuming that the claimant experienced muscle spasms on November 15th when she was seen in the emergency room, there were no findings of spasms when the claimant was examined at Concentra on November 21, 2006, nor were there any findings of spasms when the claimant was examined by Dr. Jordan on December 28, 2006, or Dr. Stephen Cathey on January 3, 2007.

Thus, the presence of muscle spasms on November 15, 2006, while objective, are only evidence of a temporary aggravation of an underlying condition that was clearly symptomatic prior to her work related incident. Therefore, at best, the claimant has only proven that she sustained a temporary aggravation in the nature of a cervical strain, supported by the presence of muscle spasms, that were no longer present when the claimant was examined one week after the incident. Accordingly, I find that the claimant has failed to prove by a preponderance of the credible evidence that she sustained a compensable injury on November 15, 2006,

for which she is entitled to the indemnity and medical benefits awarded. The existence of objective medical findings in the nature of muscle spasms, if indeed an actual finding by the emergency room physician, only supports a finding of a temporary aggravation of an underlying condition that had returned to the pre-incident status by the time the claimant was evaluated on November 21, 2006, at Concentra. This finding is further supported by the fact that the claimant returned to work and continued to work for nine months following her work related incident before she became symptomatic enough to require surgery. The claimant's pre-incident increase in pain and symptoms together with the lapse in time between the claimant's work related incident and her need for surgery severs any causal connection between the work related incident and the claimant's need for surgery and present disability.

Therefore, for those reasons set forth herein, I must respectfully dissent.

KAREN H. MCKINNEY, Commissioner