

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F802328 & F803309

TIMOTHY FITTIN,  
EMPLOYEE

CLAIMANT

FIRST PRESBYTERIAN CHURCH,  
EMPLOYER

RESPONDENT

CINCINNATI INDEMNITY CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 1, 2009

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

Claimant represented by the HONORABLE EDDIE WALKER, JR.,  
Attorney at Law, Fort Smith, Arkansas.

Respondent 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 January 7, 2009. The administrative law judge found that the claimant did not prove he suffered compensable injuries. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant proved he sustained compensable injuries, and that the claimant proved he was entitled to reasonably necessary

medical treatment and temporary total disability benefits.

I. HISTORY

Timothy Fittin, age 49, testified that he first began suffering from low back problems while working for the respondent-employer in April 2006. Mr. Fittin testified that while helping to move a large tree, "I just heard a pop in my back and felt something kind of give."

Dr. Von Phomakay, D.O., saw the claimant on May 1, 2006: "The patient is a 45-year-old white male complaining of low back pain without any radiation since April 14, 2006, after he was lifting a heavy tree at his church....X-ray was ordered but no obvious acute process seen." Dr. Phomakay's impression was "Low back strain." Dr. Phomakay prescribed medication for pain, bed rest, and continuation of a low back brace. The claimant was returned to work on May 4, 2006.

The claimant testified that he sustained an injury at home in January 2008: "I was moving some furniture and I pulled the upper muscle in my upper back and upper right shoulder." Donnelle Wagner, A.P.N., saw the claimant at Adult Medicine Specialists on January 30, 2008 and took the claimant off work until February 4, 2008. Ms. Wagner wrote,

"The above pt. may not lift anything over 10 lbs. until back is healed." Ms. Wagner gave the claimant a note on January 31, 2008 indicating that the claimant would begin physical therapy at Health South Rehabilitation Hospital on February 5, 2008.

The parties stipulated that the claimant "fell at work on February 4, 2008[.]" The claimant testified, "I slipped on the stairs and fell on - on my - fell and hit my back on the stairs." An MRI of the claimant's lumbar spine was done on February 5, 2008, with the impression, "1. Normal MRI examination of the lumbar spine."

The record indicates that the claimant was seen by Dr. Jon D. Harper on February 6, 2008, at which time the claimant complained of "Back pain, fell while working 2-4-08." Dr. Harper's notes indicated that the claimant "Suffered a fall at work and injured back. Having a lot of pain." Examination of the Spine/Ribs/Pelvis showed "R>L severe lumbar spasms." Dr. Harper assessed "1) Lumbosacral spasms."

The parties stipulated that the claimant "fell again on February 8, 2008." The claimant testified that he slipped on a wet floor and fell: "I hit my head, my neck, shoulder

and all down into my back and leg." The record contains a Patient Care Report dated February 8, 2008:

Responded to 116 N 12<sup>th</sup> St. Fort Smith, AR. On arrival the patient was lying in the floor of the kitchen of the church. The patient stated that he had fallen on a wet floor. The patient complained of neck and low back pain....No obvious injury was noted on examination.

The claimant received emergency treatment on February 8, 2008: "The patient is a 47 years old Male who presents with fall. The occurrence was 30 minutes prior to arrival....Location of pain: Neck back....Pt reports he slipped on a wet floor landing on his back and hitting his head. Pt c/o neck and low back pain since." Examination of the claimant's back showed "Normal alignment. Lumbar tenderness." X-rays of the claimant's cervical spine and lumbar spine were normal. The claimant was diagnosed with cervical strain and lumbar contusion. The claimant was discharged home to follow up with his primary care physician.

The claimant testified that he was unable to work following the February 8, 2008 accident: "The month of February into March, I couldn't actually straighten myself up. I was bent over all - 24 hours a day." Dr. Harper saw the claimant on February 29, 2008 and noted that the

claimant had fallen on February 8. Dr. Harper indicated that he observed "spasms" upon examination of the Head & Neck and Spine/Ribs/Pelvis. Dr. Harper assessed "1) Severe muscle spasms."

The claimant's testimony indicated that he attempted to return to work on or about May 27, 2008: "I carried my ladder over and reaching up, I kind of twisted and my whole back locked up and just went into spasms." The claimant testified that the church's pastor allowed him to go home, and that he had not returned to work since that time.

A pre-hearing order was filed on May 30, 2008. The claimant contended that he fell while performing employment services on February 4, 2008, and that as a result medical expenses were incurred which were the respondents' liability. The claimant contended that he fell while performing employment services on February 8, 2008, and that as a result he was entitled to temporary total disability benefits until a date yet to be determined, medical treatment, and attorney's fees. The respondents essentially contended that post-accident objective diagnostic testing was normal.

The parties agreed to litigate the following issues:

1. Compensability.
2. Medical treatment regarding the February 4, 2008, accident.
3. Temporary total disability and medical treatment regarding the February 8, 2008, accident.
4. Attorney's fee.

Dr. D. Luke Knox reported on September 4, 2008:

Timothy Fittin was seen in the Neurosurgery Clinic for independent medical evaluation on September 4, 2008. He presents with complaints of both back and bilateral leg pain, being worse on the right than the left. He describes 60% of his pain extending into his right leg. He also has significant neck and bilateral arm pain, worse on the right than the left.

To summarize his history, he is a 45-year-old, right-handed, white male who was originally injured at work in March of 2006 when lifting and moving trees. He felt something pop in his low back area. He had a second injury, which resulted from a fall on the stairs at work, causing an injury to his back and neck, on February 4, 2008. He developed immediate onset of neck and back pain following this fall. He had a third injury four days later, when he slipped on a wet floor at work, injuring his back and neck. He had undergone an MRI scan just prior to this injury. We have reviewed this while he was in the clinic today. I agree with the radiologist report, which was read out as normal by Dr. Neil Crow. I also reviewed his plain films, which were also detailed as being normal.

Apparently, his back pain radiates into his hips, posterior legs, and down to his knees and occasionally to his ankles, with numbness extending into the plantar aspect of his feet....Neck pain extends into his shoulders, mesoscapular borders, triceps, and radial aspect of his arms. He has generalized bilateral hand

numbness....He has only been able to work one day since his last injury....

As noted, his last MRI scan was prior to his third injury. I believe it is imperative that Timothy undergo both cervical and lumbar MRI scans to further review the anatomy of his discs. In the clinic today, we had him do cervical spine films only, which demonstrated no anatomic abnormality. I asked Debbie Blaylock to arrange for his MRI scanning of both cervical and lumbar spine. I plan to follow him up after he has had a chance to complete the above.

Dr. Harper wrote on September 21, 2008, "Mr. Fittin is able to return to work on light duty."

Dr. Knox corresponded with Debbie Blaylock on September 23, 2008:

I had the opportunity to review Mr. Timothy Fittin's MRI scan of both lumbar and cervical spine as well as the radiologist's report. I have also had the opportunity to review his plain films including cervical, thoracic, and lumbar spine. In answer to your multiple questions as dictated in your correspondence dated August 12, 2008, his diagnosis continues to include neck pain and back pain. Objective findings on exam and diagnostic testing include multiple posterior Waddell findings. He was unable to increase his range of motion with knee flexion. He had severe pain to light touch. Hip rotation and axial loading both cause significant pain syndromes. I had him complete cervical and lumbar MRI scans. I agree with the radiologist's report. The lumbar MRI scan was normal. The cervical MRI scan did demonstrate right-sided foraminal narrow of C3-4 from facet to generation and mild spondylosis and mild foraminal narrowing at C4-5, all of which indicates degenerative findings which are probably

nonconsequential. They certainly are not supported by the patient's findings and complaints.

Treatment recommendations at present include a recommendation that he close out his workers' compensation claim. There are no further diagnostic studies needed. His anticipated date of maximum medical improvement is today, September 23, 2008. According to the Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, Page 113, Table 75, II, Section B, he would qualify for a 4% permanent partial disability under the subheading of cervical. Obviously, this percentage could be mitigated in the face of his multiple Waddell findings and lack of true neurologic deficits. His current work status with any restrictions which may apply for the current duration - there is nothing noted on his cervical and lumbar MRI scan that would keep him from pursuing gainful employment.

I suspect his pain syndrome is such, however, that Mr. Fittin is unable to pursue employment due to his current pain syndrome. It may be worthwhile to go through a formal functional capacity evaluation to see if formal definitive restrictions may apply....

A hearing was held on October 9, 2008. The claimant testified, "Every day, I - I have to get on my traction machine before I can really start my day to pull myself apart. And I usually wear my TENS unit during the day to keep the muscle spasms from going crazy. I still have severe spasms. I have a lot of sharp pain in my back, my lower back. My neck bothers me quite a bit."

An administrative law judge filed an opinion on January 7, 2009. The administrative law judge found, among other things, that the claimant failed to prove he suffered compensable injuries on February 4, 2008 and February 8, 2008. The claimant appeals to the Full Commission.

## II. ADJUDICATION

### A. Compensability

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).

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

greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The parties stipulated in the present matter, "3. The claimant fell at work on February 4, 2008 and fell again on February 8, 2008." The administrative law judge found, "2. The claimant failed to prove by a preponderance of the evidence that the February 4, 2008, and February 8, 2008, incidents occurred." This finding was manifest error and is not affirmed by the Full Commission. A stipulation is the equivalent of undisputed proof. *Brown v. Keaton*, 232 Ark. 12, 334 S.W.2d 676 (1960). The respondents never sought to withdraw the stipulation that the claimant fell at work on February 4, 2008 and February 8, 2008. See *Ozark Rustic Homes v. Albright*, 269 Ark. 696, 600 S.W.2d 420 (1980). The respondents on appeal in fact agree that the administrative law judge erred in finding that the claimant did not prove the stipulated incidents occurred. (The respondents have not abandoned their contention that the claimant did not prove he sustained a compensable injury.)

In any event, the administrative law judge otherwise found that the claimant "failed to prove by a preponderance of the evidence that he suffered compensable injuries on

February 4, 2008, and February 8, 2008." The Full Commission reverses this finding. The record shows that the claimant first reported low back problems beginning in April 2006 while helping to move a large tree for the respondent-employer. The parties stipulated that the claimant fell at work on February 4, 2008. The claimant testified that he slipped, fell, and hit his back on a set of stairs at work. An MRI of the claimant's lumbar spine taken February 5, 2008 was normal. However, Dr. Harper examined the claimant on February 6, 2008 and reported "severe lumbar spasms." Muscle spasms can constitute objective medical findings as required by Ark. Code Ann. §11-9-102(16). See *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999). In the present matter, we find that the muscle spasms reported by Dr. Harper on February 6, 2008 were causally related to the specific incident at work which occurred on February 4, 2008. There is no report of muscle spasm in the record prior to the February 4, 2008 accident.

Therefore, the Full Commission finds that the claimant proved he sustained a compensable accidental injury on February 4, 2008. The accidental injury caused physical harm to the claimant's low back, the injury arose out of and

in the course of employment, and the injury required medical services. The injury was caused by a specific incident and was identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings not within the claimant's voluntary control, namely Dr. Harper's February 6, 2008 report of severe lumbar spasms.

The parties stipulated that the claimant fell again on February 8, 2008. The claimant testified that he slipped and fell on a wet floor on the respondents' premises. X-rays of the claimant's cervical and lumbar spine on February 8, 2008 were normal. The claimant was diagnosed as having a cervical strain and a lumbar contusion. Dr. Harper saw the claimant on February 29, 2008 and reported severe muscle spasms in the claimant's neck, spine, and pelvis. We find that Dr. Harper's February 29, 2008 report of muscle spasms constituted objective medical findings and were causally related to the February 8, 2008 accident.

Therefore, the Full Commission finds that the claimant proved he sustained a compensable accidental injury on February 8, 2008. The accidental injury caused physical harm to the claimant's neck and low back, the injury arose

out of and in the course of employment, and the injury required medical services and resulted in disability. The February 8, 2008 injury was caused by a specific incident and was identifiable by time and place of occurrence. The claimant established a compensable injury to his neck and low back by medical evidence supported by objective medical findings, namely Dr. Harper's February 29, 2008 report of severe muscle spasms in the claimant's neck, spine, and pelvis. The muscle spasms observed by Dr. Harper were causally related to the February 8, 2008 compensable accidental injury.

B. 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). The healing period continues until the employee is as far restored as the permanent character of his injury will permit; when the underlying condition causing the disability becomes stable, and when nothing further will improve that condition, the healing period has ended. *Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 528 (1997). The determination of

when the healing period ends is a question of fact for the Commission. *Carroll General Hospital v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

In the present matter, the claimant contended that he was entitled to temporary total disability benefits beginning February 8, 2008 until a date yet to be determined. The Full Commission finds that the claimant proved he was entitled to temporary total disability benefits beginning February 8, 2008 and continuing until September 23, 2008. We have determined that the claimant proved he sustained a compensable injury to his neck and low back on February 8, 2008. The claimant testified that he was physically unable to perform his employment duties following the February 8, 2008 accidental injury. The claimant testified that he attempted to return to work for a short time on or about May 27, 2008, but that his back "locked up" and he was allowed to leave and return home.

Dr. Knox independently examined the claimant beginning September 4, 2008 and recommended additional diagnostic testing. Meanwhile, Dr. Harper opined on September 21, 2008 that the claimant was able to return to work at light duty. Dr. Knox noted on September 23, 2008 that a cervical MRI

showed degeneration but that diagnostic testing was otherwise normal. Dr. Knox opined that the claimant had reached maximum medical improvement as of September 23, 2008. We find that Dr. Knox's opinion is supported by the record and is entitled to significant evidentiary weight. The Full Commission therefore finds that the claimant reached the end of his healing period for the February 8, 2008 compensable injuries no later than September 23, 2008. Temporary total disability 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). We also note Dr. Knox's opinion on September 23, 2008 regarding the claimant, "there is nothing noted on his cervical and lumbar MRI scan that would keep him from pursuing gainful employment." Dr. Knox's opinion shows that the claimant was no longer incapacitated to earn wages after September 23, 2008. We reiterate Dr. Harper's opinion on September 21, 2008 that the claimant was able to return to work at least at light duty. Any assertion that the claimant is entitled to continuing temporary total disability benefits after September 23, 2008 is not based on a credible analysis or review of the record before the Commission.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained compensable injuries on February 4, 2008 and February 8, 2008. The administrative law judge's decision is reversed. The claimant proved that the medical treatment of record following February 4, 2008 was reasonably necessary in connection with his compensable injuries. See Ark. Code Ann. §11-9-508(a). The Full Commission finds that the claimant proved he was entitled to temporary total disability benefits from February 8, 2008 through September 23, 2008. The claimant reached the end of his healing period no later than September 23, 2008 and is not entitled to continuing temporary total disability benefits after that date. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury to his low back on February 4, 2008, and a second compensable injury to his neck and back on February 8, 2008. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof.

The parties stipulated that the claimant slipped and fell at work on February 4, 2008, and again on February 8, 2008. However, I find that the claimant has failed to prove by a preponderance of the evidence that these incidents resulted in compensable injuries for which he is entitled to benefits. In this regard, I note that the claimant sought medical treatment for a back injury he sustained at home the last week of January 2008, when he was moving a loveseat. This incident resulted in the claimant being removed from work for several days, lifting restrictions placed upon the claimant, and his physician ordering physical therapy and an MRI. Moreover, the claimant admitted that he suffered from muscle spasms as a result of this non-work related incident right up until he slipped and fell at work. Given the fact that the claimant

was injured the week prior to his alleged compensable injury, and was suffering from the identical symptoms, I find that it would require speculation to find that the muscle spasms detected after the slip and falls at work were the result of the slip and falls and not the pre-existing non-work related lifting incident. 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 Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Accordingly, I find that the claimant has failed to prove that the symptoms he complained of after his slip and fall incidents at work for which he has sought medical treatment as well as prove that the only objective medical findings of muscle spasms are causally related to these slip and falls and not his non-work related lifting incident..

Therefore, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner