
UTAH LABOR COMMISSION

MAGDALENA JIMENEZ,

Petitioner,

vs.

**MARRIOTT COURTYARD and
WORKERS COMPENSATION FUND,**

Respondents.

**ORDER SETTING ASIDE
ALJ'S DECISION AND
DENYING BENEFITS**

Case No. 05-0870

Marriott Courtyard and its insurance carrier, Workers Compensation Fund, (referred to jointly as "Marriott") asks the Utah Labor Commission to review Administrative Law Judge Marlowe's preliminary award of permanent total disability benefits to Magdalena Jimenez under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Commissioner exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Ms. Jimenez claims workers' compensation benefits from Marriott for a work accident that occurred on August 30, 2003, allegedly injuring her low back and right leg. After holding an evidentiary hearing, Judge Marlowe found Ms. Jimenez was permanently and totally disabled from her work injury and awarded benefits.

In its motion for review, Marriott argues that Ms. Jimenez is not entitled to permanent total disability benefits because she failed to show that she is permanently and totally disabled or that her work injury is the direct cause of her permanent and total disability.

FINDINGS OF FACT

The Commissioner adopts Judge Marlowe's findings of facts as they are consistent with this decision. The facts relevant to the issue in the motion for review, including supplementation from the record, can be summarized as follows:

Ms. Jimenez worked as a housekeeper for Marriott, cleaning an average of 17 to 20 hotel rooms a shift. On August 10, 2003, Ms. Jimenez was pulling sheets from a bed when her legs got twisted in the sheets and she fell backward, hitting her low back on the base of the bed with her arms and legs sprawled out. Ms. Jimenez was initially diagnosed with low back, right hip and knee strain,

ORDER SETTING ASIDE DECISION/DENYING BENEFITS
MAGDALENA JIMENEZ
PAGE 2 OF 6

and was referred for physical therapy. She was also placed on modified work duty of no lifting more than five pounds and to limit bending or twisting.

On August 25, 2003, the diagnosis from a WorkMed doctor was "Follow up low back and hip strain with signs of magnification," and her lifting restriction was raised to no more than 20 pounds. By September 9, 2003, WorkMed released Ms. Jimenez to regular duty with no limitations and she returned to work shortly after. However, she returned on September 17, 2003, complaining of pain in her right leg, primarily between the knee and foot. She was placed on modified work duty again and was referred to Dr. Fotheringham.

Dr. Fotheringham evaluated Ms. Jimenez on October 7, 2003, noting no further need for diagnostic treatment. He recommended continuing physical therapy and recommended maximal lifting of 40 pounds, frequently lifting 20 pounds, and no repetitive kneeling, stairs or climbing. By January 5, 2004, Ms. Jimenez was reporting increased pain in the groin area and knee. Dr. Fotheringham reviewed x-rays taken of Ms. Jimenez's hips and knees and found "very minimal degenerative changes" and no significant changes that would explain her current symptoms. Dr. Fotheringham found Ms. Jimenez was at maximum medical improvement (MMI) at this time and changed her temporary restrictions to permanent restrictions of maximum lifting of 25 pounds, frequent lifting of 10-15 pounds, and alternate sitting and standing every hour. He issued a 3% whole person impairment.

On August 2, 2004, Ms. Jimenez was seen again by Dr. Fotheringham, complaining of radiation down the right leg and minimally down the left leg. He noted that Ms. Jimenez had returned to work and that her work sometimes increases her pain. His assessment was "I strongly suspect some nonorganic contribution with elevated Waddell's scale, the nonanatomical sensory changes, and the objective findings not substantiating a subjective complaint of a 6-7." He recommended an MRI of the back to rule out radiculopathy. On August 24, 2004, after reviewing the results of the MRI, Dr. Fotheringham noted that none of the findings from the MRI explain the patient's right leg radiation and no evidence of radiculopathy or neuropathy. Dr. Fotheringham indicated Ms. Jimenez's permanent restrictions were at maximal lifting of 40 pounds and frequently lifting of 20 pounds.

By September 27, 2004, Dr. Fotheringham found her at MMI, with 40 pound maximum and 20 pound frequent lifting restrictions. After being laid off from Marriott, she returned to Dr. Fotheringham and asked that her permanent restrictions be lifted so she could find work. Dr. Fotheringham acquiesced, stressing that Ms. Jimenez was to exercise good judgment when it came to heavy lifting. On October 19, 2004, Dr. Fotheringham stated ". . . I still feel that if the patient was careful, she could do her normal and regular duty, but I have to admit that she is at increased risk unless she is very careful."

Dr. Colledge first evaluated Ms. Jimenez on January 24, 2005, noting that Ms. Jimenez moves with obvious discomfort and observed an abnormal gait, antalgic on the right. After

**ORDER SETTING ASIDE DECISION/DENYING BENEFITS
MAGDALENA JIMENEZ
PAGE 3 OF 6**

obtaining x-rays of her lower back and pelvis, Dr. Colledge noted the x-rays were “essentially normal” and diagnosed lower back and right leg pain of unknown etiology. Dr. Colledge continued to treat Ms. Jimenez over the next year. On January 26, 2006, Dr. Colledge noted that Ms. Jimenez was walking with a cane, reporting significant pain, and soreness wherever he touched her.

By March 13, 2006, Dr. Colledge’s diagnosis of Ms. Jimenez was “[s]evere **complaints** of lower back and right leg pain, situational depression, and inorganic signs present.” (Emphasis added.) He noted that the bone scan was normal, that the MRI showed some degenerative changes without significant nerve root displacement, no relief from a selective nerve block, all of which led him to believe that surgery would not be a good option for her. He agreed with Dr. Fotheringham’s recommendation regarding her date of medical stability and that her restrictions would be around 20 pounds. He issued a 5% whole person impairment rating.

Ms. Jimenez was born on March 5, 1950. Her employment history included work in Mexico at a pharmacy counter, as a street vendor, and cutting hair. She came to the U.S. in 1998 and worked at a beauty salon performing manual labor before working for Marriott as a housekeeper. She primarily speaks Spanish and is unable to read or write in English. At the hearing, Ms. Jimenez testified that she had not applied for any other jobs since her last day working at Marriott.

DISCUSSION AND CONCLUSION OF LAW

The issue before the Commissioner is whether Ms. Jimenez qualifies for permanent and total disability compensation. Under Section 34A-2-413(1)(B) of the Utah Workers’ Compensation Act, Ms. Jimenez is entitled to these benefits provided that she can prove that (1) she sustained a significant impairment or combination of impairments as a result of the work accident; (2) she is permanently and totally disabled as further determined under a four-part test set forth under § 413(C); and (3) the work accident was the direct cause of her permanent total disability. In its motion for review, Marriott contends that Ms. Jimenez did not meet the test for proving permanent and total disability and that the work injury did not directly cause Ms. Jimenez’s alleged permanent total disability.

To prove that she is permanently and totally disabled, § 413(C) of the Act requires Ms. Jimenez show that (i) she is not gainfully employed; (ii) she has an impairment or combination of impairments that limit her ability to do basic work activities; (iii) the work caused impairment(s) prevent her from performing the essential functions of the work activities that she had been qualified to do up until the work injury; and (iv) she cannot perform other work reasonably available taking into consideration her age, education, past work experience, medical capacity, and residual functional capacity.

There is no dispute that Ms. Jimenez is not gainfully employed and therefore satisfies the first element. On the second element, the Commission has recognized that basic work activities refers to common activities shared in a wide variety of occupational settings, not just one particular

**ORDER SETTING ASIDE DECISION/DENYING BENEFITS
MAGDALENA JIMENEZ
PAGE 4 OF 6**

position or field of positions. These activities may include an employee's ability to report to work and remain there throughout a shift or an employee's comprehension and ability to communicate, all of which are common requirements for a broad range of jobs. Although Ms. Jimenez's primary language is Spanish, prior to the work injury, she was able to work and communicate sufficiently with her minimal English skills; thus, this does not bear any weight during this analysis. The Commission has reviewed the evidence and finds that Ms. Jimenez has not provided any medical evidence that shows she has any limitations in her ability to work, other than not being able to lift more than 20 pounds on a frequent basis. Therefore the Commission finds that Ms. Jimenez has not proven that her back or right leg impairments limit her ability to perform common activities shared in a wide variety of occupational settings and therefore cannot meet the second element to proving that she is permanently and totally disabled.

Failing to meet one of the elements necessary to establishing entitlement to permanent total disability compensation makes further analysis of the remaining elements unnecessary. However, the Commission notes that Ms. Jimenez did not provide convincing evidence that shows she would satisfy other elements for a claim of permanent total disability benefits. Ms. Jimenez's only physical restriction, as supported by the medical evidence, is that she can not lift more than 20 pounds frequently. The Commission does not find that this restriction alone indicates that she cannot perform other work reasonably available taking into consideration her age, education, past work experience, medical capacity, and residual functional capacity. Further, Ms. Jimenez did not apply for any other position, thus making it difficult to find support for this contention.

Finally, Ms. Jimenez's self-imposed limitations (such as walking with a cane or a back brace) were not imposed on Ms. Jimenez as a result of her work injury. Neither Dr. Fotheringham nor Dr. Colledge could identify an explanation for Ms. Jimenez's subjective complaints of pain, after almost three years of treatment. The Commission therefore also finds that Ms. Jimenez has not proven that her work injury was the direct cause of her alleged permanent total disability.

Based on the foregoing reasons, the Commission finds Ms. Jimenez has not established that she is entitled to permanent total disability compensation and therefore sets aside Judge Marlowe's preliminary order for such benefits. The Commission also notes that because this decision makes moot any argument regarding the necessity of providing a vocational plan, the Commission will not further address that claim from Marriott's motion for review.

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**ORDER SETTING ASIDE DECISION/DENYING BENEFITS
MAGDALENA JIMENEZ
PAGE 5 OF 6**

ORDER

The Commission hereby sets aside Judge Marlowe's award of permanent total disability compensation. Accordingly, the Commission dismisses Ms. Jimenez's claim for permanent total disability compensation with prejudice.

Dated this 30th day of April, 2009.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

**ORDER SETTING ASIDE DECISION/DENYING BENEFITS
MAGDALENA JIMENEZ
PAGE 6 OF 6**

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Setting Aside ALJ's Decision and Denying Benefits in the matter of Magdalena Jimenez, Case No. 05-0870, was mailed first class postage prepaid this ____ day of April, 2009, to the following:

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