

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303745

ROBERT AYDELOTT

CLAIMANT

LOGAN COUNTY

RESPONDENT

AAA RISK MANAGEMENT SERVICES,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 29, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by GAIL MATTHEWS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 24, 2004, in Fort Smith, Arkansas. A pre-hearing order was issued in this case on June 23, 2004 . This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates, including March 31, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$243.00 for total disability and \$182.00 for permanent partial disability.
3. On March 31, 2003, the claimant sustained compensable injuries in a motor vehicle accident.
4. There is no dispute over the payment of medical expenses, except those incurred for testing by Dr. Biton.
5. There is no dispute over temporary disability benefits.
6. The claimant's healing period ended on or about April 2, 2004.

By agreement of the parties, the issues to be litigated and resolved at the present time were

limited to the following:

1. The existence and extent of permanent physical impairment.
2. Liability for the expenses of Dr. Biton's services.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

- a. The claimant contends that he is entitled to permanent partial disability benefits based upon a 7% impairment to the body as a whole as a result of his cervical spine injury. The claimant contends that issues regarding permanent partial disability relative to other injuries he sustained should be held in abeyance as well as issues regarding wage loss disability.
- b. The claimant contends that he is entitled to additional medical treatment regarding the various injuries that he sustained on March 31, 2003 and that the respondents specifically have controverted a \$340.00 bill regarding a referral that was made by Dr. Biton. The claimant contends that he was referred to Dr. Biton by Dr. Morse for evaluation regarding his job related injury. This referral was in regard to what was thought to be seizure activity.
- c. The claimant contends that his attorney is entitled to an appropriate attorney's fee in regard to all permanent disability benefits.

In regard to these issues, the respondents contends that no PPD benefits are due to the claimant.

## DISCUSSION

### I. LIABILITY FOR UNPAID MEDICAL EXPENSES

\_\_\_\_\_ At the pre-hearing, and in the pre-hearing order, this issue was phrased to indicate that the disputed unpaid medical expenses, in question, were incurred for testing or evaluation of the claimant by and at the direction of Dr. Biton. However, there is no indication that the respondents have failed to pay any charges incurred for Dr. Briton's services. The exhibits (Claimant's Exhibit No. 1, pages 44-45), show that the disputed medical expense of \$340.00 is not owed to Dr. Biton, but is owed to Arkansas Cardiology, P.A. The statement from Arkansas Cardiology, P.A. (in the amount of \$340.00), indicates that it was for a holter monitor scan that was performed on the claimant on October 29, 2003. This test is generally used to determine if an individual is exhibiting any cardiac irregularities. There is no evidence, whatsoever, to indicate that the claimant's motor

vehicle accident and resulting injuries, on March 31, 2003, in any way involved his heart or cardiac functioning. There is also no evidence presented to indicate that this cardiac testing was in any way, necessitated by or related to the claimant's compensable injuries. In fact, there is no evidence to indicate why this test was performed or at whose request it was performed.

Therefore, I find that the claimant has failed to prove that the disputed medical services provided by Arkansas Cardiology constitutes reasonable necessary medical services for his compensable injury. As a result, the respondents are not liable for the disputed \$340.00 medical charge for these services.

## II. PERMANENT PHYSICAL IMPAIRMENT

\_\_\_\_\_The next and primary issue in this case is the question of the claimant's entitlement to permanent partial disability benefits for permanent physical impairment of his cervical spine. The claimant contends that he has experienced a permanent physical impairment of 7% to the body as a whole, as a result of a compensable injury to the cervical spine. The respondents deny that the claimant has sustained any permanent physical impairment, as a result of the effects of the compensable injury to this portion of his body. The burden rests on the claimant to prove the existence of any permanent physical impairment.

In order to meet the burden, the claimant must show that his compensable injury was the "major cause" (more than 50% of the cause) of the alleged permanent physical impairment, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). He must also show that any medical opinions addressing the extent of this permanent impairment are stated within a reasonable degree of medical certainty, Ark. Code Ann. § 11-9-102(16)(B). As the injury involved is to the claimant's spine, complaints of pain, range of motion tests, and straight leg raising tests cannot be considered in determining the extent of this permanent physical impairment, Ark. Code Ann. § 11-9-102(16)(A)(i). Any assessments of permanent physical impairment must also be calculated in a manner that conforms to the current official rating guide adopted by this Commission (i.e. The American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition), Ark. Code Ann.

§11-9-522(g). Finally, the permanent physical impairment must be supported by “objective and measurable” physical findings, Ark. Code Ann. §11-9-704(c)(1)(B).

In his report of January 14, 2004, Dr. Michael W. Morse assessed a permanent physical impairment of 7% to the body as a whole for objectively demonstrable physical defects involving the claimant’s cervical spine, specifically, small midline disc bulges at C4-5 and C5-6. In this report Dr. Morse states:

“He has been given an impairment rating based upon AMA Guidelines to the Evaluation of Permanent Impairment, Fourth Edition, page 113, table 75 II.C. ‘Unoperated on, medically documented injury and pain associated with moderate to severe degenerative changes on structural tests.’ He has a 6% impairment of the cervical spine based upon one level and an additional 1% based upon the second level for accumulative impairment of the whole person of 7%.”

The small midline disc bulges at C4-5 and C5-6, which formed the basis for the 7% permanent physical impairment addressed by Dr. Morse, were shown on two MRI studies, that was performed on the claimant’s cervical spine, the first immediately after his accident and the second on January 14, 2004. These observed permanent meet the criteria for “objective and measurable physical findings”, as required by Ark. Code Ann. §11-9-704(c)(1)(B).

At this point, I would note that the MRI studies also revealed objective evidence of a small midline spur formation at the C3-4 level. However, this osteoarthritic defect was determined by Dr. Morse to pre-exist the claimant’s compensable injury. It is apparent from the reports of Dr. Morse that he gave no consideration to this defect in his assessment of the 7% permanent physical impairment.

Dr. Morse further states that he arrived at this degree of permanent physical impairment by employing the methods recommended by the current official rating guide, He specifically refers to the use of table 75 on page 113, of The American Medical Association’s Guides to the Evaluation of Permanent Impairment Fourth Edition. This table is frequently used by this Commission in assessing permanent physical impairments for spinal injuries. A review of this table indicates that

Dr. Morse accurately arrived at the degree of permanent physical impairment recommended for the objectively documented small midline disc bulges at C4-5 and C5-6. The criteria set out in this portion of table 75 affords no consideration to complaints of pain, loss of range of motion, or straight leg testing results. Thus, his rating satisfies the requirements of Ark. Code Ann. § 11-9-522(g) and § 11-9-102(16)(A)(i).

The only remaining requirement is that the compensable injury must be the “major cause” of the permanent physical impairment assessed. This is where the real dispute arises.

There is a conflict between the claimant’s testimony and the recorded medical histories concerning a prior injury involving the claimant’s neck or cervical spine. At the hearing, the claimant testified that he did not recall any prior accident or injury to his neck or cervical spine and does not know how any history of such a prior injury could have got into his medical records. In her testimony, the claimant’s mother also stated that she was unaware of any prior injury or difficulties involving the claimant’s neck or cervical spine.

However, there is a history of a prior neck injury and continuing difficulties in a narrative report by C. Wayne Winkle (a family psychologist), dated February 21, 2003. Dr. Winkle evaluated the claimant as a result of his application for employment with the Logan County Sheriff’s Department. In this report, Mr. Winkle stated:

“In talking with him about the specific area (test scores that indicated significant over concern with physical pain and discomfort), I did learn that he has had a neck injury in the past, which leads him to have numbness and tingling in his arms and hands, even perhaps when he is driving.”

The second mention of a prior accident and injury is contained in the initial consultation report of Dr. Morse. In this report, he notes:

“He (the claimant) was in a motor vehicle accident 7 years ago. He had some minor neck pain that resolved.”

In a report to the respondents dated, July 21, 2004, Dr. Morse reiterates his opinion that the cervical defects at C4-5 and C5-6 would carry a permanent physical impairment rating of 7% to the body as a whole. However, he further states:

“It is impossible to know whether these (defects) were pre-existing (the compensable injury) or not. It is also impossible to tell if these (defects) were the pain generators for his neck pain. “

However, the Act does not require that the claimant prove to an absolute certainty that his employment related accident (March 31, 2003) caused these objectively documented defects. He need only show that it was the likely cause.

The medical evidence clearly shows that the claimant was experiencing headaches and numbness/tingling in his hands and upper extremities, both prior to and immediately following his motor vehicle accident of March 31, 2003. However, none of the medical evidence presented attributes these symptoms to the disc bulges or herniations at C4-5 and C5-6. In fact, the MRI study showed no impingement by these bulges of either the spinal cord or the exiting roots. Nerve conduction studies performed on the claimant’s upper extremities have also eliminated the possibility that these complaints are radicular in origin. Finally, the claimant has exhibited no other radicular or neurological symptoms involving his upper extremities, such as abnormal reflexes, muscle atrophy, loss of strength, etc.

On the other hand, there is no evidence that the claimant was experiencing neck pain and cervical muscle spasms or rigidity for a considerable period of time prior to March 31, 2003. In fact, the record shows that the claimant was physically capable of performing without difficulties or complaints, his regular strenuous employment activities for this respondent for 3 or 4 years prior to March 31, 2003. However, all of the evidence presented, shows that the claimant exhibited symptoms of pain and muscle spasms or rigidity in his cervical spine immediately following the motor vehicle accident of March 31, 2003. These symptoms can also be indicative of the occurrence of a disc injury, such as that documented on the MRI studies. In summary, not all neurological symptoms are radicular in origin and not all disc injuries produce radicular symptoms.

Clearly, the mechanics of the motor vehicle accident of March 31, 2003, could reasonably and logically produce the objectively documented injuries to the C4-5 and C5-6 intervertebral discs. The MRI study, performed on April 14, 2003, revealed the presence of these defects immediately

following the motor vehicle accident of March 31, 2003. The symptoms of neck pain and muscle spasms, which the claimant experienced contemporaneous with this accident, would be consistent with the occurrence of such discal injuries. Based upon the evidence presented, there is no other reasonable or logical cause for the presence of these objectively documented disc defects. Therefore, it is my opinion that the claimant has presented sufficient evidence to establish that his employment related motor vehicle accident of March 31, 2003 was the “major cause” of his small disc bulges or herniations at C4-5 and C5-6. As this employment related accident was the “major cause” of these defects, it would also be the “major cause” of any permanent physical impairment attributable to these defects. Thus, the claimant has satisfied the statutory requirement of Ark. Code Ann. § 11-9-102(4)(F)(ii)(a).

In summary, I find that the claimant has proven by the greater weight of the credible evidence that he has experienced a permanent physical impairment of 7% to the body as a whole, as a result of the compensable injuries to his cervical spine that were caused by the employment related motor vehicle accident of March 31, 2003. Thus, he would be entitled to permanent partial disability benefits equivalent for this degree of permanent physical impairment, Ark. Code Ann. § 11-9-522(a).

In reaching my decision, in this case, I have considered the reports and records of Dr. Reginald Rutherford. Dr. Rutherford is a neurologist, who is commonly used by respondents to obtain second opinions. This appears to have been his function in the present case. Although Dr. Rutherford recognized that the two MRI studies performed on the claimant after his employment related accident, both showed bulges or “herniations” (his term) of the C4-5 and C5-6 intervertebral discs, he still concludes, that “there is no recommended permanent partial impairment rating.” How he arrived at this conclusion is not entirely clear.

It appears from his reports that he bases this conclusion on the fact that he can ascertain no “medical explanation” for the claimant’s pain, restriction in range of cervical motion, and spasms or rigidity of the neck or cervical spine. Obviously, it must also be his opinion that such symptoms

could not be produced by the objectively documented discal defects at C4-5 and C5-6. It would seem to be his belief that only an “osseous” or bony injury or perhaps a discal injury sufficient to result in impingement of the spinal cord or roots could produce these symptoms. Thus, since the various tests and evaluations of Dr. Morse eliminated a discal injury sufficient to the produced stenosis or impingement of the spinal cord or exiting nerve roots and the SPECT scan (which he performed) eliminated any “osseous” or bony injury to the claimant’s cervical spine, he concludes that there is no basis for the claimant’s cervical symptoms and hence no permanent impairment.

Unquestionably, even minor permanent discal injuries, such as those shown on the claimant’s MRIs, commonly result in chronic symptoms in the muscles in the form of neck or cervical pain, deficits in cervical range of motion, and muscle spasms or rigidity of the cervical spine. The American Medical Association’s Guides to the Evaluation of Permanent Impairment even use the presence of these symptoms in classifying categories of discal injuries. I simply find that Dr. Rutherford’s opinion on the extent of permanent physical impairment is far outweighed by the opinion of Dr. Morse

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On March 31, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On March 31, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$243.00 for total disability and \$182.00 for permanent partial disability.
4. On March 31, 2003, the claimant sustained various compensable injuries in an employment related motor vehicle accident, one of these injuries involved his neck or cervical spine.
5. There is no dispute over the claimant’s entitlement to temporary total disability benefits. All such benefits, which have accrued to date, have been paid.

6. There is no dispute over the payment of expenses incurred for reasonably necessary medical services, except those incurred for a holter monitor test performed on or about October 29, 2003.
7. The claimant has failed to prove by the greater weight of the credible evidence that the holter monitor test or scan, performed on or about October 29, 2003, represents reasonably necessary medical services for his compensable injuries. Specifically, he has failed to prove by the greater weight of the credible evidence that these services were necessitated by or related to any compensable injury, he sustained in the motor vehicle accident on March 31, 2003. Thus, the respondents would not be liable for the expense of this service under Ark. Code Ann. §11-9-508.
8. The claimant's healing period from the effects of his compensable injuries ended on or about April 2, 2004.
9. The claimant has sustained a permanent physical impairment of 7% to the body as a whole, as a result of his compensable neck or cervical injury. Specifically, the claimant has proven by the greater weight of the credible evidence that his compensable neck or cervical injury was the "major cause" of this degree of permanent physical impairment, that this degree of permanent physical impairment is supported by "objective and measurable" physical findings, that this degree of permanent physical impairment is calculated in a manner that conforms to the official rating guide adopted by this Commission, and that this degree of permanent physical impairment gives no consideration to complaints of pain, loss of range of motion, or straight leg raising test results.
10. The respondents have controverted the claimant's entitlement to the \$340.00 charge for the holter monitor study or test, performed on October 9, 2003, and his entitlement to any permanent partial disability benefits for permanent physical impairment.

11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded for the permanent physical impairment.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits attributable to permanent physical impairment of 7% to the body as a whole. These payments shall be subject to the child support lien filed out of Scott County, Arkansas, pursuant to Ark. Code Ann. § 11-9-110.

The respondents shall not be liable for the \$340.00 expense incurred by the claimant, as a result of a holter monitor study or test performed on him on October 29, 2003 by Arkansas Cardiology, P.A.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded . One-half of this fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this fee is to be withheld by the respondents from these benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge

