

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F110272**

**MARY L. HEISKILL, EMPLOYEE**

**CLAIMANT**

**HARP'S FOOD STORE,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**CANNON COCHRAN MANAGEMENT  
SERVICES, CARRIER/TPA**

**RESPONDENT**

**OPINION FILED NOVEMBER 15, 2004**

A hearing in this case was conducted on August 18, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Mountain Home, Baxter County, Arkansas.

Claimant was represented by Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

Respondent was represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held on this claim on November 25, 2003; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to four stipulations. Three of the stipulations are set forth in the Prehearing Order, and were confirmed by the parties at the hearing. The fourth stipulation was agreed to at the hearing. The stipulations that follow are hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant times.
2. Claimant's compensation rates are \$168.00 for temporary total disability and \$154.00 for permanent partial disability.

3. Claimant sustained a compensable injury on August 24, 2001.
4. Respondent controverts Claimant's assigned permanent impairment rating.

At the August 18, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Is Claimant entitled to the 5% permanent impairment rating?
2. Is Claimant entitled to an attorney's fee?

All other issues are reserved.

Claimant sustained a compensable injury on August 24, 2001; she contends that she is entitled to benefits based upon an assigned 5% impairment rating. She contends that her compensable injury is the major cause of her impairment, either as an injury or an aggravation of a pre-existing condition. Respondent contends that the major cause of any permanent impairment is not Claimant's injury sustained on August 24, 2001, but is instead her degenerative disc disease.

### **DISCUSSION**

At the hearing Claimant described her August 24, 2001 injury.

I was checking out a customer, and she had a case of soda in the bottom of her basket, down on the very bottom of it. And I bent over and reached down to pull that out from under there, and when I started up with it, something popped in my back, and it was so painful. Well, then it went down my leg, and then I couldn't even get back up. I mean, I fell to the floor, and that's basically what happened.

An ambulance was called to take Claimant to the emergency room.

Claimant testified that she has not sustained another back injury requiring a doctor's visit, either prior to or after her compensable injury. She denied having any problems with

her back during her four years of employment with the respondent/employer. She denied experiencing a car wreck, slip-and-fall, or anything of that nature. Dr. Barry Baskin's second opinion evaluation note dated February 20, 2003, states that "[h]er emergency room report indicates that she had had a history of a back injury 17 to 18 years ago, but she states she had not been receiving any care for her back during the interval time." At the hearing, Claimant denied this history, stating "I never had a car wreck. Never been in a car wreck." None of the other medical records reflect a history of a car wreck or another back injury.

Claimant testified that the symptoms she experienced immediately after her compensable injury have remained the same, with the exception of occasional shooting pain in her right leg. She testified that "[i]t's a constant pain in my lower back.... But then, when it goes down my leg, that puts me in bed...." Claimant's treatment subsequent to her compensable injury included physical therapy and medication; she has not had surgery. Additional treatment is recommended, but has not yet been pursued.

An MRI of Claimant's lumbar spine was performed on October 9, 2001, shortly after her August 24, 2001 compensable injury. That study produced the following impression:

Degenerative changes at multiple levels, most pronounced at the L4-L5 level, where the bulging/protruding disk slightly flattens the thecal sac and mildly narrows the right neural foramen. It does not appear to impinge markedly on the nerve root.

At the August 2004 hearing, Claimant testified that she undertook a second MRI a month prior to the hearing; this study was not introduced into evidence. Claimant testified without objection that she was told by Dr. George Lawrence that this second MRI "basically, showed the same thing that it did in the beginning. Nothing was changed."

Dr. Doug Foster examined Claimant on November 13, 2001. In his clinic note of that same date, Dr. Foster observed that Claimant “has been released to return to work although she complains bitterly of back pain.” Following a physical examination and review of Claimant’s MRI study, Dr. Foster recommended continued treatment. He noted: “In my medical opinion, this is related to an on-the-job injury; however, at the present time, I would recommend conservative care only.” In a letter dated March 26, 2002, Dr. Foster noted that Claimant’s degenerative disc disease existed prior to her injury.

[H]owever, the on-the-job injury resulted in her sustaining an additional injury at the L4/5 level consisting of an annular tear and disc disruption. Because of this, she now has symptomology and pain which is significant and which did not exist prior to her injury.

In my medical opinion, her underlying condition was exacerbated by her on-the-job injury as well as the creation of a new diagnosis. This is within the realm of medical certainty.

Dr. Foster recommended continuing conservative care, with the future possibility of injections or surgery.

Claimant was also treated by Dr. Steven Cathey. On December 18, 2001, concerning Claimant’s MRI study at L4-5, Dr. Cathey wrote:

I reviewed an MRI scan of her lumbar spine that showed mild degenerative disc disease at L4-L5. Although the radiologist was concerned about a possible right-sided disc protrusion at L4-L5, I did not appreciate any sign of disc herniation, spinal stenosis, nerve root impingement, or other conditions amenable to neurosurgical intervention.

Dr. Cathey remained “convinced that she is the victim of a musculoskeletal injury superimposed on mild, preexisting degenerative disc disease at L4-L5.” On a form dated January 17, 2002, Dr. Cathey indicated that Claimant’s work related injury was not the major cause of her impairment; he stated his opinion within a reasonable degree of

medical certainty.

As noted above, Dr. Baskin undertook a second opinion evaluation; his note is dated February 20, 2003. Dr. Baskin examined Claimant and reviewed her MRI study. He noted “a degenerative disc with disc protrusion, right paracentral at the L4-5 level.” Taking into account Claimant’s history, Dr. Baskin stated: “It is my opinion that this lady did sustain a work related compensable injury on 8/24/01 to her lumbar spine.” He also assigned an impairment rating to Claimant.

I think Ms. Heiskill has a ratable back condition. Using the AMA Guidelines Fourth Edition, page 113, she would have a 5% whole body impairment based on the unoperated on stable with medically documented injury, pain and rigidity, associated with minimal changes on structural tests, i.e., MRI scan.

Dr. Baskin recommended epidural steroid injections, a stabilization program, and a home exercise program. Dr. Baskin completed a form on April 4, 2003, confirming his belief that Claimant’s work related injury is the major cause of her impairment; he stated his opinion within a reasonable degree of medical certainty.

Claimant argues that she is entitled to a 5% permanent impairment rating to the whole body for her low back injury. There are three statutory requirements to establish an entitlement to benefits for a permanent impairment. See Excelsior Hotel v. Squires, 83 Ark. App. 26, 33-34, 115 S.W.3d 823, \_\_\_ (2003); Schalski v. Family Cleaners & Laundry, Full Workers’ Compensation Commission Opinion filed March 3, 2004 (E711809). First, it must be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). “Major cause” means more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A). Second, any determination of the existence or extent of physical impairment shall be supported by objective and

measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). Third, benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993). Ark. Code Ann. § 11-9-522(g); Workers' Compensation Commission Rule 34.

A claimant must prove by a preponderance of the evidence that she is entitled to an award of permanent physical impairment. Schalski, supra; see Ark. Code Ann. § 11-9-704(c)(2). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

Based upon the record as a whole, I find that Claimant has sustained her burden of proving by a preponderance of the evidence that she is entitled to benefits based upon a permanent impairment rating of 5% to the body as a whole. I also specifically find that Claimant is a credible witness, based upon my opportunity to observe her at the hearing and to compare her testimony to the medical evidence.

Claimant's August 24, 2001 compensable injury is the major cause for her impairment. The record does reflect the preexisting presence of degenerative disc disease in Claimant's lumbar spine. However, Claimant credibly testified that she was asymptomatic prior to her compensable injury, but that she has remained symptomatic since the injury. Dr. Foster opined that Claimant's underlying degenerative disc disease "was exacerbated by her on-the-job injury as well as the creation of a new diagnosis." Similarly, Dr. Baskin opined that Claimant's work related injury is the major cause of her impairment; he stated his opinion within a reasonable degree of medical certainty. An aggravation of a pre-existing condition is capable of meeting the major cause requirement.

See Pollard v. Meridian Aggregates, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (September 29, 2004). Although Dr. Cathey credits Claimant's impairment to her preexisting degenerative disc disease, I find that Claimant's credible testimony concerning her asymptomatic condition prior to the injury and Dr. Baskin's opinion are of greater convincing force.

The record contains objective and measurable physical findings supporting the existence or extent of Claimant's lumbar spine impairment. Specifically, the MRI of Claimant's lumbar spine performed October 9, 2001, shortly after the compensable injury, provides objective findings. Dr. Foster interpreted these findings as "an annular tear and disc disruption." Dr. Baskin noted a "disc protrusion."

Based upon the medical evidence, and utilizing the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993) (hereinafter "Guides"), I find that Claimant is entitled to a permanent impairment rating of 5% to the whole body. Dr. Baskin specifically referenced Table 75 of Page 113 of the Guides; his rating corresponds to a category "associated with *none to minimal* degenerative changes on structural tests, such as ... magnetic resonance imaging." This is proper. Again, upon review of the medical evidence (including Dr. Baskin's rating), and utilizing the Guides, I find that Claimant is entitled to a 5% impairment rating to the body as a whole, pursuant to Table 75 on Page 113 of the Guides.

#### **B. Entitlement to an Attorney's Fee**

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). Here, the parties stipulated that Respondent has controverted Claimant's assigned permanent impairment rating. This opinion awards indemnity benefits based upon the impairment

rating. Thus, Claimant is entitled to an award of an attorney's fee pursuant to the statute.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed at all relevant times.
3. Claimant's compensation rates are \$168.00 for temporary total disability and \$154.00 for permanent partial disability.
4. Claimant sustained a compensable injury on August 24, 2001.
5. Respondent controverts Claimant's assigned permanent impairment rating.
6. Claimant sustained her burden of proving her entitlement to a 5% permanent impairment rating to the whole body for her compensable injury. Claimant's history and the opinions of Drs. Foster and Baskin establish that Claimant's compensable injury is the major cause of her impairment. The MRI of Claimant's lumbar spine performed October 9, 2001 provides objective findings. Based upon the medical records, including Dr. Baskin's rating, and utilizing the Guides, Claimant is entitled to a 5% permanent impairment rating to the body as a whole.
7. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715.

### **AWARD**

Respondent is directed to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by

Respondent in accordance with Ark. Code Ann. § 11-9-715 and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III  
Administrative Law Judge

DFA/ml