

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F001912

PAMELA KILPATRICK,  
EMPLOYEE

CLAIMANT

SUCCESS STAFFING CORP.,  
EMPLOYER

RESPONDENT

ONE BEACON INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED AUGUST 9, 2004**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE MICHAEL RYBURN, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on June 8, 2004, in Little Rock, Arkansas. A prehearing order was entered in this case on April 22, 2004. A copy of this prehearing 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 this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

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

1. Employee/employer/insurance carrier relationship existed on or about 01/19/00 at which time claimant sustained a compensable injury. The respondents do not stipulate to the existence of a shoulder injury.

2. The compensation rates are \$370/278.

3. Jurisdiction.

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

The claimant's entitlement to recommended medical treatment, payment of permanent impairment benefits and a controverted attorney's fee. Specifically, the issues are compensability of a shoulder condition and whether the claimant is entitled to benefits for a 9% impairment rated to the body as a whole related to her admittedly compensable neck and low back injuries.

The record consists of the June 30, 2004 hearing transcript with the exhibits contained therein, and Mr. Davis' brief filed July 7, 2004, which I have "blue-backed" to designate as part of the record.

#### **DISCUSSION**

The claimant was employed by the respondent as a team driver on January 19, 2000, after she sustained admittedly

compensable injuries as the tractor trailer that she was in flipped. The claimant was asleep in the back when the accident occurred. The accident occurred in New Mexico.

The claimant returned to Arkansas and received treatment from various physicians whose reports are in the record. The claimant ultimately came under the care of Dr. Doug Foster, an orthopaedic specialist. The claimant also had a shoulder evaluation at her own expense performed in January of 2004 by Dr. J. D. Allen.

The claimant did not return to work as a team driver; she has instead opened a restaurant. In the present claim, the claimant seeks additional treatment for her shoulder, including a CT scan recommended by Dr. Allen, and benefits for permanent impairment ratings assigned to her by Dr. Foster for her back and neck. The respondents contend that the claimant has not sustained any compensable anatomical impairment to her low back or neck, and the respondents deny the existence of a compensable shoulder injury.

**1. Compensable Shoulder Injury.**

With regard to any alleged shoulder injury sustained in the accident on January 19, 2000, the respondents' attorney noted during the claimant's cross-examination the nearly complete absence of any reference to shoulder complaints in

the claimant's contemporaneous medical reports in the record. Mr. Ryburn's point was well made.

On the other hand, the claimant testified that she told Dr. Hartmann about shoulder problems, but he seemed more concerned about other parts of her body, i.e., her tailbone and back (T. 35). In assessing the weight to accord the claimant's testimony, I note that Dr. Holt's February 14, 2000 report does reference both neck pain and shoulder pain, although that report goes on to indicate that an examination was performed on the left shoulder, with no reference to the right shoulder for which the claimant now seeks treatment. However, Dr. Foster's August 23, 2002 report does reference right shoulder pain and pericervical pain that had been ongoing for two years.

Furthermore, Dr. Foster's August 23, 2002 right shoulder examination indicated "some mild impingement" which I interpret as an objective clinical determination on Dr. Foster's part.

The claimant testified that she understands her shoulder injury at issue to be a dislocated collarbone. The claimant referred us at the hearing to an indentation or depression between her shoulder and neck on the right side.

Dr. Allen's August 8, 2004 report again records a history of shoulder problems originating in 2000. Dr. Allen diagnosed a positive right shoulder impingement. In addition, Dr. Allen's x-rays suggested an old injury of the sternoclavicular joint. Dr. Allen diagnosed post traumatic impairment with possible cuff damage of the right shoulder, and a sternoclavicular subluxation, if not dislocation.

I find credible Ms. Wanley's testimony that Ms. Kilpatrick has expressed problems with her shoulder since the accident. I also find credible the claimant's testimony that Nick Jones denied her access to additional medical treatment from sometime in 2000 until she received a change of physician order from the Commission in 2002.

The testimony of Ms. Wanley and Ms. Kilpatrick, and the histories obtained by Dr. Foster and Dr. Allen persuade me that the claimant has proven by a preponderance of the evidence that she developed her right shoulder impingement and her sternoclavicular joint abnormality in the accident on January 19, 2000. As discussed above, I also find that each of these conditions are established by medical evidence supported by objective findings.

The respondents are therefore liable for reasonably necessary medical treatment for these conditions, including

but not limited to, the CT scan proposed by Dr. Allen in January of this year.

## **2. Permanent Anatomical Impairment.**

The Arkansas Court of Appeals thoroughly discussed the requirements necessary to establish an entitlement to benefits for a permanent anatomical impairment in Excelsior Hotel v. Squires, \_\_\_ Ark. App. \_\_\_, 115 S.W.3d 823 (2003).

First, benefits for permanent impairment must be based on an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993). When determining anatomical impairment, neither a physician or the Commission may consider complaints of pain. The Commission may review the Guides (4<sup>th</sup> ed.), even if the Guides are not in the record, and the Commission may determine its own impairment rating under the Guides, rather than simply assessing the validity of impairment ratings assigned by doctors. Avaya v. Bryant, \_\_\_ Ark. App. \_\_\_, 105 S.W.3d 811 (2003).

Second, benefits for permanent anatomical impairment shall be awarded only if the claimant's compensable injury is the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). The provisions of Ark. Code Ann § 11-9-102(4)(F)(ii)(b) do not apply in determining a

claim for permanent anatomical impairment. Michael v. Keep & Teach, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_, (CA 03-978 filed June 16, 2004). Major cause means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

Third, a determination of the existence and extent of physical impairment must be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16)(A)(i). When determining the permanent physical impairment, neither a doctor or the Commission may consider complaints of pain. For purposes of assigning impairment ratings to the spine, straight-leg-raising tests and range-of-motion tests do not qualify as objective findings. Ark. Code Ann. § 11-9-102(16)(A)(ii).

**A. Impairment Rating Under The AMA Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed.)**

In the present case, Dr. Foster explained in an October 20, 2003 letter the basis for the impairment ratings he assigned. Dr. Foster indicated that the claimant was asymptomatic in her spine prior to the accident at work, but complains of pain in her neck, thoracic spine, right

shoulder, buttocks, and thighs. In addition, the claimant complained of upper extremity numbness and tingling. With this history, Dr. Foster concluded:

Based on the fact that patient was asymptomatic prior to her MVA and now has symptomology in her lumbar and cervical spine, an impairment rating is assigned as follows:

Her cervical impairment rating is six percent (6%). This is based upon the *AMA Guidelines for the Evaluation of Permanent Impairment*, Table 15-7. Two percent (2%) of this would be pre-existing; thus, apportionment for her cervical spine would be four percent (4%).

Her lumbar spine impairment rating based upon the *AMA Guidelines for the Evaluation of Permanent Impairment*, Table 15-7, is seven percent (7%) with two percent (2%) again being pre-existing. An apportionment would be five percent (5%).

Using the Combined Value Chart, this would be an impairment rating of nine percent (9%) to her spine or body as a whole.

The respondents' attorney noted at the hearing that the fourth edition of the Guides does not contain a "Table 15-7". The claimant's attorney's post-hearing brief suggests that I look elsewhere to determine the origin of Dr. Foster's reference to "Table 15-7". For the same reasons that I identified at the hearing, I decline to do so.

However, in comparing Dr. Foster's conclusions with the information contained in Table 75 (Whole-person Impairment Percents Due to Specific Spine Disorders) on page 3/113 of the Guides (4<sup>th</sup> edition) and the Combined Values Chart in that volume, I conclude that Dr. Foster's conclusions precisely coincide with the impairment ratings assigned under the Guides for unoperated intervertebral disk or other soft-tissue lesion impairments. The 6% and 7% ratings are appropriate impairments associated with moderate to severe degenerative changes, with the 4% and 5% ratings appropriate impairments with none to minimal degenerative changes (i.e., without assigning any impairment for degenerative changes).

I therefore find that appropriate impairment ratings under the Guides (4<sup>th</sup> edition) for the claimant's cervical and lumbar spinal injuries, without consideration of pre-existing degenerative changes, are 4% and 5% respectively, for a combined impairment of 9%.

#### **B. Major Cause**

The Commission and the Courts have addressed the "major cause" requirement in several situations where a worker sustained a injury to a spine that may have prior abnormality or impairment. For example, a majority of the Full Commission has recently indicated that, if a work

related injury aggravates a pre-existing condition causing a need for surgery, and if the surgery forms the basis of an impairment rating under the AMA Guides, then the claimant can establish that his compensable injury was the major cause of the permanent impairment at issue. Estridge v. Waste Management, Full Workers' Compensation Commission, Opinion filed July 12, 2004 (E500479) [citing Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998)].

The Arkansas Courts have also recognized that the "major cause" requirement can be satisfied, even when the compensable injury causes only a minor portion of overall impairment in relation to pre-existing conditions, when a physician is capable of apportioning the overall impairment between a work related injury and pre-existing abnormalities. In Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. app. 167, 72 S.W.3d 889 (2002), the Court affirmed the Commission's award of a 3% rating to the body as a whole caused by a work injury which had aggravated a pre-existing shoulder injury and impairment, and which totaled 30% rated to the body as a whole. The Court affirmed the Commission's finding that a doctor's apportionment established by a preponderance of the evidence that the work injury was the

major cause of the 3% impairment assigned exclusively for the work related injury.

Because both Dr. Foster and Table 75 indicate that the 4% cervical rating and the 5% lumbar rating are appropriate for spinal impairments exclusive of any degenerative disk disease that may also present in the spine, I find that the claimant's compensable cervical and lumbar injuries are the major cause of the 9% combined impairment assigned by Dr. Foster for the work related injuries.

### **3. Objective and Measurable Physical Findings**

However, I find that the 9% impairment rating assigned by Dr. Foster is not supported by objective and measurable physical findings. In this regard, I note that the complaints of pain discussed by Dr. Foster are specifically excluded by statute, and complaints of numbness can (and obviously do) come within the voluntary control of the patient.

Further, the MRI reports in the record document only the degenerative conditions which Dr. Foster apportioned out in determining his impairment ratings. The only reports of either spasm or loss of spinal lordosis occurred in either

January or February of 2000, within weeks of the accident, and are therefore not objective findings of a permanent condition.

For the reasons discussed herein, I am therefore constrained to find that the record fails to support the existence and extent of any permanent anatomical impairment with objective and measurable physical findings.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Employee/employer/insurance carrier relationship existed on or about 01/19/00 at which time claimant sustained a compensable injury. The respondents do not stipulate to the existence of a shoulder injury.

2. The compensation rates are \$370/278.

3. Jurisdiction.

4. The claimant has established by a preponderance of the credible evidence that she sustained a compensable right shoulder injury on January 19, 2000, for which she is entitled to reasonably necessary medical treatment.

5. The claimant has failed to prove that she has sustained a compensable permanent anatomical impairment to her spine. Specifically, the claim for spinal impairment is not supported by objective findings.

**AWARD**

The respondent is directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fees on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondent in accordance with Ark. Code Ann. § 11-9-715; and Death & 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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MARK CHURCHWELL  
Administrative Law Judge