

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F306434

DARRELL KING, EMPLOYEE

CLAIMANT

BRYCE CORPORATION, EMPLOYER

RESPONDENT

**ROYAL INSURANCE COMPANY
OF AMERICA, CARRIER**

RESPONDENT

OPINION FILED SEPTEMBER 13, 2004

The hearing was conducted in this case on June 17, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondent was represented by Andrew M. Ivey, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 17, 2004, the above-captioned claim came on for a hearing at Little Rock, Arkansas. A prehearing conference was held on May 11, 2004, and a Prehearing Order was filed on May 12, 2004.

The following agreed stipulations are set forward in the Prehearing Order, were confirmed by the parties at the hearing, and are hereby accepted:

1. Claimant suffered a compensable injury on October 14, 2002.
2. The employee-employer-carrier relationship existed at all relevant times.
3. Claimant's compensation rate for temporary total disability is \$425.00 per week; his compensation rate for permanent partial disability is \$319.00 per week.

By the terms of the Prehearing Order, and as confirmed by the agreement

of the parties at the start of the hearing, the issues to be litigated and resolved are limited to the following:

1. Whether Claimant's injury was the major cause for his impairment.
2. Whether attorney's fees should be awarded to Claimant

Claimant contends that he has been assigned an impairment rating of 5% to the body as a whole, and that Respondents should pay permanent disability benefits based upon this rating. Respondents contend that Claimant cannot establish that his injury is more than 50% of the cause for his herniation in the lumbar spine, upon which the 5% rating is based.

DISCUSSION

A. Permanent Impairment Rating

The parties stipulated that Claimant suffered a compensable injury on October 14, 2002. On that date, Claimant was ascending a ladder when a rung on the right side broke; he fell about six or seven feet and landed on his right side on the concrete floor. Claimant has experienced pain in his low back and numbness in his right leg since this incident. Claimant testified that, before this incident, he never had these kinds of problems. He did identify two prior medical problems. In 1997, Claimant pulled a muscle in his back without any lasting effect or loss of time at work. In 1988, Claimant underwent surgery to his neck; one clinic note references "cervical disk surgery x 2 in the 80's."

A radiology report dated December 4, 2002, interprets an MRI of Claimant's lumbar spine performed that same date. This report notes:

Bone marrow signal is normal. No evidence of fracture. There is low signal in the disks at L2-3 and L5-S1 secondary to degenerative disk disease.

There is mild narrowing of the disk at L5-S1. There is minimal disk herniation L5-S1 but it appears to be sub-ligamentous and not causing thecal sac indentation. Do not see any other disk herniations.

Dr. Curtis Williams addressed this report in a letter dated October 1, 2003. In response to a question from Respondent's Counsel, Dr. Williams wrote:

The degenerative changes noted at L2-L3 and L5-S1 consisting of disc narrowing and disc dessication [sic] and spurring are certainly degenerative in nature and of long standing. The minimal midline subligamentous disc herniation at L5-S1 could be due either to the long standing degenerative changes or could be due to trauma of everyday living or could be due to injury. It is not possible to determine from the MRI the exact cause of the herniation.

Dr. Williams noted that his response was stated within a reasonable degree of medical certainty.

Claimant presented to Dr. Anthony Russell on October 8, 2003 for an initial evaluation of his on-going low back pain. Dr. Russell was unable to detect any clear cut abnormalities upon physical examination of Claimant. Dr. Russell was not satisfied with the quality of Claimant's prior MRI, and scheduled a second MRI scan to assist in making further treatment recommendations.

Claimant underwent this second MRI on October 13, 2003. A report notes the following impressions:

1. Disc desiccation at the L5-S1 level.
1. [sic] Focal central disc herniation at the L4-L5 level. There is moderate facet joint hypertrophy present. There is mild relative canal stenosis seen at this level by a combination of facet joint hypertrophy and focal disc protrusion.
2. [sic] Small focal central disc herniation at the L5-S1 level.

Dr. Russell interpreted this MRI in a letter to Claimant's Counsel dated October 13, 2003.

He wrote in part:

Mr. King continues to complain of pain in the right leg with radiation into the calf area and foot. The MRI scan that accompanied the patient shows two level lumbar disk disease, most prominent at L4/5 and L5/S1. The L4/5 disk has a left sided component that does appear to be causing some minor irritation of the S1 nerve on the left. The L4/5 disk on the other hand, is a major right sided component. It does appear to be causing direct compression of the nerve root at it's base.

I believe that the L4/5 disk is responsible for Mr. King's ongoing low back and lower extremity pain. ... I believe that this is an acute finding that dates back to the injury ascribed to Mr. King's work related incident. I do not believe that he is currently symptomatic from the L5/S1 disk. ... These opinions are stated within a reasonable degree of medical certainty. This is based on the fact that prior to the incident Mr. King had no back pain and especially no radicular pain. I believe that more likely than not he will ultimately require surgical intervention for the L4/5 disk, if not for the L5/S1 disk as well.

Dr. Russell's handwritten notes on an October 23, 2003 letter from Respondent's counsel demonstrate that Dr. Russell relied upon Claimant's history in his determination of causation.

On February 12, 2004, Dr. Russell assigned an impairment rating to Claimant.

According to the AMA guidelines for impairment, Mr. King has a 5% partial impairment rating based on lumbar disk disease without a clear-cut disk herniation. The objective findings noted in this case would be the patient's MRI scan. He had no objective physical findings that would support the abnormality.

On a statement signed the following day, Dr. Russell, in response to a request to identify the objective and measurable findings related to Claimant's injury, wrote: "MRI evidence of lumbar disk protrusion. No objective physical findings noted."

Dr. Russell elaborated on the foregoing in his deposition dated March 31, 2004. He confirmed that his findings included lumbar disk disease at L4-5 and L5-S1 as

well as a disk protrusion at L4-5 on the right side. Dr. Russell believed that the problems at the L4-5 disk are responsible for Claimant's low back and lower extremity pain.

Dr. Russell noted that "If you didn't have the patient's history, you couldn't make a reasonable decision regarding the causation of the abnormalities." He observed that "we're solely dependent on the patient's history for making a decision about the source of the pain and trying to locate the etiology of the pain, as well." When asked if Claimant had been "an honest and straightforward individual with you," Dr. Russell responded, "[h]e seemed to be, yes."

Dr. Russell explained that the reference to "no objective physical findings" in his reports referred to findings upon physical exam. He affirmed that Claimant had objective findings on the MRI scan of disk herniations. Dr. Russell confirmed that he utilized the AMA Guides, Fourth Edition, in determining Claimant's extent of permanent impairment. The following exchange addressed causation:

Q. And again, Doctor, this condition, I think you testified just a moment ago, is probably related, based upon everything you know - and everything you know is history and the MRI findings and the examination that you conducted. Based on everything you know, that disc which results in an impairment of 5 percent to the body as a whole is probably related to the accident of October of 2002; is that right?

A. That's correct, yes.

Dr. Russell confirmed that his opinions were offered within a reasonable degree of medical certainty.

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, ___ S.W.3d ____, ____ (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 50% 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 he 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 his burden of proving by a preponderance of the evidence that he is entitled to benefits based upon an impairment rating of 5% to the body as a whole. Respondents specifically contend that Claimant cannot establish that his compensable injury is the major cause of his herniation in the lumbar spine, upon which the impairment rating is based. However, Claimant credibly testified that he did not experience pain in his low back and numbness in his right leg prior to his compensable injury, but that he has experienced these problems since then. Further, Dr. Russell wrote in part: “I believe that the L4/5 disk is responsible for Mr. King’s ongoing low back and lower extremity pain. ... I believe that this is an acute

finding that dates back to the injury ascribed to Mr. King's work related incident." Dr. Russell's records and deposition demonstrate that he attributes Claimant's abnormality at L4-5, which is causing nerve root compression, to Claimant's work injury. The record as a whole establishes that Claimant's compensable injury was the major cause of his impairment.

Claimant sustained his burden of proof on the other two statutory requirements, as well. The October 13, 2003 MRI impression of a "focal central disc herniation at the L4-L5 level" constitutes an objective physical finding not within Claimant's control. Further, Dr. Russell clearly made use of the Fourth Edition of the Guides in qualifying Claimant for a 5% impairment rating to the body as a whole. Upon review of the Guides and the record, I find that Claimant is entitled to this 5% impairment rating to the body as a whole, pursuant to Table 75 on Page 113 of the Guides.

B. Entitlement to Attorney's Fees

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). The real object of this statute is to place the burden of litigation expenses upon the party which made it necessary. Cleek v. Great Southern Metals, 335 Ark. 342, 345, 981 S.W.2d 529, ___ (1998). Assuming a position which requires an employee to retain the services of an attorney to take the actions necessary to assure that the employee's rights are protected may constitute controversion. Icenhower v. DeQueen School District, Full Workers' Compensation Commission Opinion filed June 14, 2004 (F002583); see Cleek, 335 Ark. at 345, 981 S.W.2d at ___.

I find that Respondents have controverted the payment of benefits based

upon Claimant's impairment rating. Respondents made this litigation necessary; Claimant was forced to engage the services of counsel in order to secure these benefits. 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. Claimant suffered a compensable injury on October 14, 2002.
3. The employee-employer-carrier relationship existed at all relevant times.
4. Claimant's compensation rate for temporary total disability is \$425.00 per week; his compensation rate for permanent partial disability is \$319.00 per week.
5. Claimant is entitled to benefits based upon his impairment rating of 5% to the body as a whole. Claimant's testimony concerning his lack of symptoms prior to the compensable injury and the onset of symptoms afterwards, together with Dr. Russell's statements, prove that Claimant's compensable injury is the major cause of his impairment, a disk protrusion that is causing nerve root compression. The findings of Claimant's October 13, 2003 MRI constitute objective physical findings, and Claimant's benefits are based upon an impairment rating using the Fourth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.
6. Claimant's attorney is entitled to the statutorily prescribed attorney's fee found in Ark. Code Ann. § 11-9-715 on any indemnity benefits due or to become due to Claimant. Respondents controverted Claimant's entitlement to benefits based upon his impairment rating.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee on any indemnity benefits due or to become due, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 and Death and Total Permanent Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml