

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F100218, F400082, F400083

LYDIA G. PALASOTA, EMPLOYEE

CLAIMANT

CHANDLERS INTERIORS, EMPLOYER

RESPONDENT

**UNION STANDARD INSURANCE
COMPANY, CARRIER**

RESPONDENT

OPINION FILED FEBRUARY 16, 2005

A hearing in this case was conducted on December 1, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by John Bartelt, Attorney at Law, Jonesboro, Arkansas.

Respondents were represented by William C. Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on September 28, 2004; a Prehearing Order was filed in this matter 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 these stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing; the parties agreed to the remaining stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed at all relevant times.
2. Claimant sustained compensable work related injuries on September 15, 2000; March 23, 2001; and September 25, 2001.
3. Claimant's 2000 average weekly wage was \$887.00; her 2001 average weekly

wage was \$720.06.

4. Respondents controvert benefits from July 15, 2004.

_____At the December 1, 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. Whether Claimant is entitled to permanent partial disability benefits.
2. Whether Claimant is entitled to wage-loss disability benefits.
3. Whether Respondents are liable for Dr. Rosenzweig's examination that resulted in the June 29, 2004 letter, as a reasonably necessary medical expense.
4. Whether Claimant is entitled to an attorney's fee.

Claimant contends that she is entitled to benefits based upon a 13% permanent impairment rating assigned by Dr. Rosenzweig on June 29, 2004. She contends that the three compensable injuries sustained while she worked for the respondent employer affected her ability to earn wages, so that she is entitled to wage-loss disability benefits. She argues that Respondents should be liable for the expense of Dr. Rosenzweig's June 29, 2004 examination, that resulted in her permanent impairment rating; she argues that this examination was reasonably necessary medical treatment.

Respondents contend that Claimant is not entitled to permanent partial disability benefits, or in the alternative, that she is entitled to a 4% permanent impairment rating assigned by Dr. Scott Schlesinger on October 6, 2004. They argue that Claimant's ability to earn wages was unaffected by her three compensable injuries. Finally, Respondents contend that Dr. Rosenzweig's June 29, 2004 examination does not constitute medical treatment that must be provided under the statute.

DISCUSSION

In 1996 Claimant began working for the respondent employer, an interior design firm. Claimant did some designing, but she had other duties as well. She described a typical day's list of assignments as follows:

Q. And what might that list typically be?

A. Shopping for clients, picking out their furniture, choosing fabrics at the fabric store. Mainly I was a shopper, what he calls a shopper.

Q. And what are the physical demands of being a shopper generally?

A. Physically being a shopper, you don't do a lot of loading and lifting of the merchandise you choose, because he has a large support staff that also pick up furniture I pick, put it in a van, and take it to where he is.

Q. At times, would you be required generally on a typical day to, however, maybe move some furniture or do some things?

A. Yes, rugs. Sometimes I would be a team of ten people to lift a piano, carry furniture in and out of the house, you know, things like that.

Claimant sustained an injury to her elbow in 1998; this injury is not at issue in this proceeding. The 1998 injury was accepted as compensable, all benefits were paid, and Claimant returned to work after a short period of time. However, her injury resulted in a thirty pound lifting restriction that prevented Claimant from lifting heavy furniture. At the hearing, Claimant agreed that this restriction existed prior to the three compensable injuries involved in this claim and that the restriction remains in place.

On September 15, 2000, Claimant sustained her first compensable injury involved in this claim.

I was at Dr. Cathey's house doing some landscape design. We were installing cypress trees around their fountain and around their pool in the backyard. And he sent me and two other guys to go and install these trees.

...

I was on the retaining wall around the fountain, and I was lifting the tree - -
I was handed the tree and lifting it into the container.

...

I heard a pop, and I felt shooting pains to my neck and stiffness in my lower
back.

Claimant was 26 years old at the time; prior to this date, she had never been treated for
any neck or lower back pain, nor had she experienced any particular problems with her
neck or lower back.

Claimant received conservative medical treatment. She presented to Dr. William
Blankenship on September 29, 2000; he diagnosed “[t]horacic and cervical strain.” Her
subsequent course of treatment included medications and physical therapy; she was not
believed to be a candidate for surgery. Claimant continued to experience pain primarily
in her neck and upper back; her lower back pain was not as bad at this time.

Claimant undertook two studies on November 30, 2000. The study of her lumbar
spine resulted in the following impression: “Minimal diffuse annular disc bulge at L1-2.
Otherwise unremarkable MRI of the lumbar spine.” The MRI of Claimant’s cervical spine
resulted in this impression:

1. Small broad-based right paracentral disc protrusion at C5-6, with mild
cord compression (with no underlying signal change in the cord), and
moderate central canal stenosis.
2. Small broad-based central disc protrusion at C4-5, with mild central canal
stenosis.
3. Tiny central protrusion at C3-4.

Dr. Blankenship noted these studies on December 4, 2000, and remarked that Claimant’s
“neurological examination is and remains in normal limits.” Electrodiagnostic studies
performed on December 12, 2000 were normal.

Claimant began seeing Dr. Kenneth Rosenzweig on February 12, 2001; Claimant described him as her primary treating physician since that time. She reported back and neck pain, with no or minimal relief from therapy and medications. Concerning Claimant's studies, Dr. Rosenzweig commented: "These MRI findings are quite significant for her young age and most likely do represent her pain. She denies any significant neurologic component to her pain, but she has not been able to do lifting or get any relief." He prescribed medications and left the door open to a possible epidural injection.

Claimant sustained her second compensable injury on March 23, 2001. While riding in a company van driven by her boss, they became "the third car in a four-car pileup. And I remember it as being hit from behind first, and then we hit car two, but I think the findings were different." Claimant immediately experienced pain in her hips, lower back, and pelvis area. Her low back pain increased as compared to prior to this second compensable injury.

Claimant continued to receive conservative treatment for her injuries. Despite medications, physical therapy, epidural steroid injections, and the passage of time, Claimant continued to experience pain in her neck and back. She continued to work with some modification to the amount of travel assigned to her. A bone scan dated June 20, 2001 was "[w]ithin normal limits."

Dr. Scott Schlesinger examined Claimant on July 9, 2001. He noted Claimant's neck and back pain, and the absence of radicular pain. He characterized Claimant's cervical MRI as depicting "a very small right C5-6 disc protrusion"; he characterized the lumbar MRI scan as "normal." He agreed that Claimant was not a candidate for surgery, and suggested that Claimant repeat her MRI studies. Claimant reported to Dr. Rosenzweig

on July 18, 2001 that she “did not feel that she had sufficient time with [Dr. Schlesinger] to fully explore all the issues of her case.”

On September 25, 2001, Claimant sustained her third compensable injury.

We were at a client’s house in Little Rock, and I was assisting a guy... to hang a picture. He was on a ladder, and the ladder supports broke, and he fell on me. We fell on a slate floor, and I got slammed into the corner where the television was.

...

That caused the same pain, just to worsen it, just exacerbated it.

Claimant missed a day or two of work, but returned to work and continued with the same conservative medical treatment previously provided. She testified that during the year 2002, she “continued to work, you know, had some pain, but continued to go to work and use medication to kind of subside the pain.”

Claimant’s subsequent medical records indicate that her pain continued, but that she did not experience any substantial relief. On November 14, 2001, Dr. Rosenzweig noted that Claimant “has been worked-up and treated conservatively with medications, injections, therapy, and time, and she has never really made a full recovery from her first injury, much less the subsequent injuries.” Claimant reported pain in her neck and low back during a November 19, 2001 examination at the Arkansas Spine and Sports Institute; she was diagnosed with “[l]umbar pain with mild cervical muscle pain.” Claimant reported “multiple sites of discomfort from her neck to her back and leg” to Dr. Rosenzweig on December 12, 2001; she also reported that “[s]he is working without difficulty, although she is not traveling, to avoid prolonged rides in the van.”

On May 8, 2002, Claimant underwent an MRI of her lumbar spine. This study found “slight straightening of the normal lumbar lordosis” as well as “resolution of a minimal

anular disc bulge at L1-2 when compared to the prior examination.” The study recorded the following impression: “Straightening of the normal lumbar lordosis. Otherwise, unremarkable MRI of the lumbar spine. There appears to be interval resolution of a minimal anular bulge at L1-2.” Dr. Rosenzweig had noted “mild spasms present” in Claimant’s lumbar triangle area on April 3, 2002. Interpreting this latest MRI, Dr. Rosenzweig noted on May 13, 2002 that “[t]here is still straightening of the normal lumbar lordosis, consistent with spasms, but for the most part, it is an unremarkable MRI....”

Again, Claimant continued with conservative treatment. She reported neck and low back pain to Dr. Chuck Mason on May 30, 2002. After several sessions of physical therapy, she again reported pain in her neck and back on September 25, 2002; upon examination, Dr. Mason observed “some mild spasms in her lower lumbar spine.” A lumbar epidural steroid injection and two nerve root blocks did not provide complete relief; a medical record from the North Hills Family Medical Center dated December 5, 2002 records “a great deal of pain and spasm” upon examination.

The respondent employer terminated Claimant’s employment in December of 2002, claiming that she was “unable and unwilling” to do her job. Following part-time work in a doctor’s office in 2003, Claimant began her own interior design firm in January 2004. As of December 1, 2004, she had earned between \$9,500.00 and \$10,000.00 for the year. Claimant testified that her injuries have “hindered my ability to work everyday.”

Q. Tell the Judge how the injuries that you have now cause you to lose earnings or cause you to not be able to earn as much as you might otherwise if you were in the same health that you were in prior to the first injury in this case.

A. Well, I have to hire outside help to, you know, do my lifting, and I pay them out of my hourly wage. So that is about a - - I pay them anywhere from

ten to twelve dollars, and I usually have two people helping me. And that's happened on a couple of jobs. And a couple of other jobs, I've had family members helping me where I haven't had to pay them.

Q. Do you have an estimate of basically how much having to hire people to come in and do the heavy work for you and do the lifting and the moving, as to how much that would generally reduce your income?

A. Well, my hourly rate is \$65.00 an hour, so if I work an eight-hour day, it's about \$500.00. And I usually pay them about \$100.00 each person to help me.

Claimant testified that, while working for the respondent employer, people to help with the lifting were "were there anyways"; she thought she may have worked with them more often due to her injuries. She did not lift anything heavy, "[p]robably anything over about 25 to 30 pounds." As noted above, this amount is within the restriction stemming from Claimant's preexisting 1998 injury.

On cross-examination, Claimant testified that she is attempting to build her business.

Q. So if you're able to build your business like you anticipate you're going to, you're going to be making more, are you not, than the 37 to 46 thousand dollars you made with [the respondent employer]?

A. In the future, yes, I think I will.

Q. And that's even if you have to have somebody help you with furniture?

A. Well, if I get that busy, I'll have to have a staff to help me.

Q. And the staff would do the things that they were doing for you at [the respondent employer's], right?

A. Yes.

When asked if she could perform her job as an interior designer, Claimant replied: "I am, the same that I was doing at [the respondent employer's]."

Claimant continued with her conservative medical treatment. On January 22, 2003, Dr. Rosenzweig observed that “[d]iagnostics include MRI, bone scan, x-rays and revealed minimal disease as far as any pre-existing conditions” and that Claimant “does not appear to have a surgical condition and she has somewhat plateaued in her conservative management....” He believed that Claimant’s neck injury had “eventually subsided so that the bulk of her complaints have been low back and lower extremity.” Dr. Rosenzweig observed on February 18, 2003 that Claimant’s “neck complaints are fairly mild, compared to her back complaints.” He believed Claimant “most likely is at maximum medical improvement in the definition that she is maximally medical improved despite all of these efforts, and can be released in regard to these injuries....”

Claimant returned to Dr. Rosenzweig on June 29, 2004 “to discuss an impairment rating that should be issued regarding an injury sustained in her work-related activity dating back to September 15, 2000.” After briefly summarizing her injuries, Dr. Rosenzweig recorded Claimant’s complaint of “persistent pain in both hips, up into her neck and down into her low back.” He examined Claimant. He then wrote:

Using the Arkansas workers’ compensation guides and the fourth edition of the American Medical Association’s Guides, it appears that [Claimant] has the following injuries regarding her neck, back, and hip areas.

For her neck, using table 75 IIC for 2 levels on page 113, she is a candidate for an 8% impairment. For her back, using table 75 IIB on page 113, she is a candidate for a 5% impairment. Using the Combined Values table, she would have a total permanent partial impairment of 13%[.]

Dr. Rosenzweig opined that it did “not appear that [Claimant] has had a successful recovery....”

Despite seeing Claimant as a patient earlier, Dr. Schlesinger performed an

independent medical evaluation on October 6, 2004. He recorded Claimant's "neck and back pain without radicular symptoms." He performed a neurological examination of Claimant and reviewed her studies. Dr. Schlesinger then opined:

With regards to the question of the disability rating, I would state that the rating for the cervical spine would be approximately 4%. There would be no rating for the lumbar spine. This would be a rating based on The American Medical Association publication Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 75, page 113. The lumbar spine had a normal study and therefore there would be no objective rating for the lumbar spine. In the cervical spine there was a small C5-6 disc protrusion that would warrant at most a 4% rating. One could certainly argue that her findings were pre-existing degenerative changes, but the highest potential rating one could offer would be 4%.

...

This opinion is based upon the report of the studies I reviewed when I saw this patient in 2001. I cannot state whether there have been subsequent objective findings that would be new at this time.

The parties deposed Dr. Rosenzweig on November 18, 2004. He noted that the amount of disease found in Claimant's neck "seemed premature for her age." He admitted that, in several ways, Claimant's physical examination did not correlate with her November 30, 2000 studies. He was asked to explain this.

Q. ... [B]ut how could a bulging disc cause the kind of pain and range of motion limitations that in fact were reported by [Claimant]?

A. The discogenic pain concept is that the enervation, or the nerve fibers that enervate or service the disc are highly concentrated around the perimeter of the disc where the annulus or the rim and the ligaments surround that. There's not a whole lot of sensation in the center of the disc. So if you have a bulging disc that's stretching those nerves or a protruding disc that may have torn or damaged a nerve, then you can generate pain sensation directly related to that disc wall itself the same way that you can drop something on your foot and have a painful toe, but the x-rays are normal.

And in her case, the quote, discogenic pain, would be a plausible explanation for her discomfort, but no physical findings for a radicular nerve root

impingement.

He believed this was a “viable explanation why she was hurting, but didn’t have any demonstrable findings.” Dr. Rosenzweig believed Claimant’s complaints of pain.

[Claimant] was not drug-seeking, she was not taken off work, she was not demonstrating any magnified symptoms or dubious behavior that would lead the examiner to question her motivation. At no point during my care of [Claimant], did I question that she was hurting.

As to Claimant’s May 8, 2002 MRI, Dr. Rosenzweig recalled that “the bulge at L1-2 was not visible. She had some flattening or straightening of the lordosis, which could indicate spasm, but there was no finding to suggest disc herniation....” This raised a question concerning Claimant’s lumbar impairment rating.

Q. And the five percent rating that you gave in the lumbar area - -

A. That was based on the disc changes at L1-2 at the time of her presentation.

Q. That went away later?

A. Correct.

Q. If they go away, does that go back to a zero like Dr. Schlesinger said?

A. I don’t have an argument with that.

Dr. Rosenzweig agreed that this bulge might reappear if Claimant underwent another MRI, but he characterized this as “speculation” and concurred that “[y]ou can have massive disc extrusions that resorb, yes.”

Concerning Claimant’s cervical spine, Dr. Rosenzweig noted that “[y]ou wouldn’t expect to see multi-level disc disease in a 26-year-old, and not that you can’t. It’s a little surprising to see a disc herniation like that and multi-level central disc bulges in a previously asymptomatic 26-year-old woman who was not participating in contact sports

and did not give a history of chronic neck pain....” Dr. Rosenzweig was then examined concerning the cause of these cervical problems.

Q. So do I understand you then to say that in fact lifting a tree is something that could cause an aggravation of this nature and can explain the MRI findings?

A. I believe that [Claimant] had a significant strain on this particular date that made her symptomatic. And she had been employed in this position for, I believe, many years prior to this injury. So I suspect that there was an event on that day that made her symptomatic.

...

Q. Those opinions that you just gave me, are those within a reasonable degree of medical certainty?

A. Yes, sir.

Dr. Rosenzweig confirmed that he had not changed his opinion as a treating physician from that offered on June 29, 2004.

Both parties inquired about the distinction between ratings given by treating physicians, and ratings given by independent physicians. Dr. Rosenzweig confirmed “an inheritant possibility that a treating physician may be more generous than an examining physician....” He was asked to put on his “IME hat” for a moment.

Q. Okay. Well, let me say this; I’m asking you not to interpret Arkansas law. I’m asking you to merely interpret AMA Guidelines Fourth Edition, because we may have some disagreement concerning that.

A. I probably would - - you know, as I’m asked to wear a different hat, and based on my experience as an IME doctor, I believe I would have chosen II C and given six percent, but not added the additional two percent for the additional two levels.

Q. All right. And why would you have taken the additional two levels away?

A. I believe I would’ve taken them away because they were not very large and just more of a radiographic finding that may have not had a factor. I believe that they were there, but I believe that the disc herniation at 5-6 was

the source of pain.

Q. Is it your opinion that the incident of September 15, 2000 was the precipitating factor which caused the need for treatment in this case?

A. Absolutely, yes.

Dr. Rosenzweig also discussed the purpose for Claimant's June 29, 2004 visit, that resulted in his impairment rating.

Q. One last thing. You talked about secondary gain, and certainly, from what I'm understanding, she came back to you solely for a disability rating to settle her case?

A. June 29th, that was my understanding of her visit. It was not to seek further treatment or further care, but to end this claim.

Q. I thought I heard you say to get a rating and help settle her case. Did you not indicate that?

A. That's what I mean, end the claim, yes.

A. Permanent Impairment Benefits

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 to Permanent Impairment (4th ed. 1993) (hereinafter “Guides”). 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).

1. Rating Related to Cervical Spine

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to an 8% permanent impairment rating to the body as a whole, related to her cervical spine.

Claimant’s September 15, 2000 compensable injury is the major cause of her cervical spine impairment. Claimant credibly testified that, prior to this date, she had neither experienced, nor been treated for, problems with her neck or lower back. The record is silent concerning any other injury between September 15, 2000 and November 30, 2000, the date of Claimant’s cervical spine MRI reflecting disc protrusions at C3-4, C4-5, and C5-6. Thus, Claimant proved by a preponderance of the evidence that her first compensable injury is the major cause of her cervical spine impairment. See Polk County v. Jones, 74 Ark. App. 159, 165, 47 S.W.3d 904, ___ (2001).

The record contains objective and measurable physical findings supporting the existence or extent of Claimant’s cervical spine impairment. Specifically, the MRI of Claimant’s cervical spine taken November 30, 2000 reveals three disc bulges. While Dr. Schlesinger and Dr. Rosenzweig may disagree as to the severity of these bulges, they do,

in fact, exist.

Utilizing the Guides, I find that Claimant is entitled to a permanent impairment rating of 8% to the body as a whole, based upon her cervical spine permanent impairment. Dr. Rosenzweig repeatedly remarked on the severity of these findings in light of Claimant's age, noting that they "are quite significant for her young age" and that it's "a little surprising to see a disc herniation like that and multi-level central disc bulges in a previously asymptomatic 26-year-old woman...." With regard to Claimant's disc protrusion at C5-6, the November 30, 2000 MRI notes "mild cord compression... and moderate central canal stenosis." Referring to Table 75 on page 113 of the Guides, II.C, a 6% impairment rating is appropriate for the C5-6 disc protrusion. Utilizing that same table, at II. F, 1% should be added for each of the other two levels. Thus, the 8% rating is appropriate based upon the record and the Guides.

2. Rating Related to Lumbar Spine

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to a 5% permanent impairment rating to the body as a whole, related to her lumbar spine.

Again, Claimant's compensable injuries are the major cause of her impairment in her lumbar spine. She testified that she did not experience any problems with, or seek treatment for, her low back, prior to her compensable injuries. However, Claimant has sought treatment for her low back since her first compensable injury. No incidents are noted in the record subsequent to her first compensable injury, other than her remaining two compensable injuries. And, when asked if Claimant's incident of September 15, 2000 was the precipitating factor which caused the need for treatment in her case, Dr.

Rosenzweig replied “[a]bsolutely, yes.”

The record contains objective and measurable physical findings supporting the existence or extent of Claimant’s lumbar spine impairment. It is correct that the disc bulge at L1-2 noted on Claimant’s November 30, 2000 lumbar spine MRI resolved itself as demonstrated by Claimant’s May 8, 2002 lumbar spine MRI. However, this second MRI noted “[s]traightening of the normal lumbar lordosis.” Dr. Rosenzweig concluded that “[t]here is still straightening of the normal lumbar lordosis, consistent with spasms” on May 13, 2002. Further, examinations of Claimant revealed the presence of spasms as reflected in medical records dated April 3, 2002 (“around the lumbar triangle area”); September 25, 2002 (“some mild spasms in her lower lumbar spine”); and December 5, 2002. The straightening of Claimant’s normal lumbar lordosis, as well as these repeated findings of spasms, constitute objective findings in support of the existence of Claimant’s lumbar spine physical impairment. See Murry v. Riceland Foods, Full Workers’ Compensation Commission Opinion filed January 20, 1999 (E516632) (muscle spasms of a continuing nature); Risner v. J. C. Penny Construction Company, Full Workers’ Compensation Commission Opinion filed September 15, 1998 (E513459) (straightening of the normal lordotic curvature due to muscle spasms); Self v. Trans States Lines, Inc., Full Workers’ Compensation Commission Opinion filed July 13, 1994 (E118612) (loss of lordosis); compare Estridge v. Waste Managment, 343 Ark. 276, 33 S.W.3d 167 (2000) (straightening of the lordotic curve and muscle spasms are objective findings that support compensability).

Utilizing the Guides, I find that Claimant is entitled to a 5% permanent impairment rating to the body as a whole, based upon her lumbar spine permanent impairment.

Referring to Table 75 on page 113 of the Guides, II.B, a 5% impairment rating to the body as a whole is appropriate for Claimant's lumbar spine impairment. She is unoperated on; the record reflects that her condition is stable; and the findings of lordotic straightening and muscle spasms constitute the required medical documentation.

3. Summary

It is appropriate to note Dr. Schlesinger's contrary rating, and the occasional equivocation expressed by Dr. Rosenzweig in his deposition. Despite the treating physician's equivocation, Claimant's impairment is clearly established by the studies and other medical records in evidence. In addition, Dr. Rosenzweig's opinion is entitled to greater deference, because of his role as Claimant's primary treating physician. Claimant is entitled to permanent partial disability benefits based upon a 13% impairment rating to the body as a whole.

B. Wage-loss Disability Benefits

Since this opinion assigns Claimant a permanent impairment rating to the body as a whole, the Commission may consider her claim for wage-loss disability in excess of her permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1). The wage-loss factor is the extent to which a compensable injury has affected the Claimant's ability to earn a livelihood. Emerson Elec. v. Gaston, 75 Ark. App. 232, 237, 58 S.W.3d 848, ___ (2001).

In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment

of wage-loss.

McKinney v. Plastics Research & Development, Full Workers' Compensation Commission Opinion filed November 10, 2004 (E901881); see Ark. Code Ann. § 11-9-522(b)(1). In addition, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a); see McKinney, supra. "Major cause" is defined as more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A).

Based upon the major cause requirement, I find that Claimant has not sustained her burden of proving by a preponderance of the evidence that she is entitled to wage-loss disability benefits. Claimant believes her three compensable injuries affected her ability to do heavy lifting; this is the only manner in which she testified that her compensable injuries affected her ability to earn wages. However, Claimant agreed that her thirty pound lifting restriction preexisted these three compensable injuries, since it stemmed from her 1998 injury (that is not a part of this claim). This lifting restriction already prevented Claimant from lifting heavy furniture. Her testimony is that otherwise she is able to do the same job she performed for the respondent employer. Thus, the evidence of greater convincing force demonstrates that her three compensable injuries that are the subject of this claim are not the major cause of any wage-loss disability.

C. Medical Benefits

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Reasonably necessary medical services "may include that necessary to accurately diagnose the nature and extent of the compensable injury; to

reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Patchell v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (May 19, 2004).

I find that Claimant did not sustain her burden of proving that Dr. Rosenzweig’s examination that resulted in the June 29, 2004 letter constitutes reasonably necessary medical treatment in connection with her injury. As Respondents argue, Dr. Rosenzweig’s examination and subsequent letter do not constitute medical treatment. The letter itself notes that Claimant presented for the purpose of “discuss[ing] an impairment rating that should be issued” to Claimant. Dr. Rosenzweig’s deposition testimony of November 18, 2004 confirms that Claimant wanted to obtain a disability rating: “[T]hat was my understanding of her visit. It was not to seek further treatment or further care, but to end this claim.” In light of this evidence, Respondents are not liable for Dr. Rosenzweig’s examination that resulted in the June 29, 2004 letter, under Ark. Code Ann. § 11-9-508(a).

D. 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). This opinion awards Claimant permanent partial impairment benefits based upon a 13% impairment rating to the body as a whole. The parties stipulated that Respondents controverted

benefits from July 15, 2004; this would include the permanent impairment benefits awarded herein. Thus, Claimant is entitled to an award of an attorney's fee pursuant to the statute to be paid by Respondents.

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 sustained compensable work related injuries on September 15, 2000; March 23, 2001; and September 25, 2001.

4. Claimant's 2000 average weekly wage was \$887.00; her 2001 average weekly wage was \$720.06.

5. Respondents controvert benefits from July 15, 2004.

_____6. I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to an 8% permanent impairment rating to the body as a whole, related to her cervical spine. Claimant did not experience any problems with her neck prior to her first compensable injury. Shortly after that first compensable injury, an MRI revealed three disc bulges or protrusions at C3-4, C4-5, and C5-6. Utilizing Table 75 of the Guides, an 8% rating is appropriate for these objective and measurable findings.

7. I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to a 5% permanent impairment rating to the body as a whole, related to her lumbar spine. Again, Claimant did not experience any problems with her low back prior to her compensable injuries; subsequent to her first compensable injury, no other incidents are recorded other than her remaining two compensable injuries.

Examination revealed straightening of Claimant's normal lumbar lordosis and, on more than one occasion, spasms. Utilizing Table 75 of the Guides, Claimant is entitled to a 5% permanent impairment rating to her lumbar spine.

8. Utilizing the Combined Values Chart from the Guides, based upon the preceding two findings, I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to permanent partial disability benefits based upon a 13% impairment rating to the body as a whole.

9. I find that Claimant did not sustain her burden of proving that she is entitled to wage-loss disability benefits. Claimant's inability to do heavy lifting is due to a restriction related to her 1998 injury; it preexisted her three compensable injuries involved in this claim. These compensable injuries are not the major cause of any wage-loss disability.

10. I find that Claimant did not sustain her burden of proving that Dr. Rosenzweig's examination resulting in the June 29, 2004 letter constitutes reasonably necessary medical treatment. The record reflects that the examination was undertaken for the purpose of ending this claim, not medical treatment or care.

11. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715.

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 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 Respondents, in accordance with Ark. Code Ann. § 11-9-715 and Death and 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