

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F601214

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|---------------------------------------|------------|
| NORMA PARHAM, Employee                | CLAIMANT   |
| FAYETTEVILLE PUBLIC SCHOOLS, Employer | RESPONDENT |
| RISK MANAGEMENT RESOURCES, Carrier    | RESPONDENT |

OPINION FILED NOVEMBER 16, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On November 1, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 13, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties at all relevant times.
3. The respondent has paid all medical expenses.

At the time of the pre-hearing conference the parties also agreed to stipulate that claimant suffered a compensable injury to the right side of her face and eye on February 10, 2005.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to benefits for permanent impairment.

## 2. Attorney fee.

The claimant contends that as a result of her compensable injury she is entitled to receive benefits for permanent impairment and an attorney's fee.

The respondents contend, based on the present medical evidence, that all appropriate benefits have been paid to the claimant. The respondents contend that the impairment ratings assessed by the physicians are not based on measurable and objective findings and therefore the claimant is not entitled to an award of a permanent anatomical impairment.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 13, 2006 are hereby accepted as fact. This includes the stipulation that claimant suffered a compensable injury to the right side of her face and eye on February 10, 2005.

2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits as a result of her compensable injury.

### FACTUAL BACKGROUND

The claimant is a very nice 72-year-old woman who has been working for the respondent seven years in food service, primarily preparing pizza and sub sandwiches. Claimant suffered a compensable injury on February 10, 2005, when she fell to the floor after tripping while coming out of a walk-in freezer. Claimant landed on her right side and

struck the right side of her face on the concrete floor.

Claimant was seen by Dr. Berestnev on the date of her injury with bruising noted and a diagnosis of a right orbital trauma. Dr. Berestnev's treatment consisted of an ice compress, medications, and instructions to receive follow-up treatment in one week. Claimant continued to receive medical treatment from Dr. Berestnev and in his report of September 2, 2005, he noted that the claimant was complaining of pain and paresthesias in the trigeminal distribution. Dr. Berestnev diagnosed claimant's condition as right-sided trigeminal neuralgia, prescribed medication, and referred claimant to a neurologist for further evaluation.

Claimant's neurological evaluation occurred on September 9, 2005, when she was evaluated by Dr. Michael Morse. Dr. Morse noted that none of the findings on an MRI scan performed were pertinent. It was his impression that the claimant had bruised her right infraorbital nerve where it exited claimant's face. Because of the time which had passed Dr. Morse stated that he suspected claimant's condition would be permanent. Dr. Morse prescribed medication for claimant's treatment and indicated that future Botox injections might be necessary. Claimant returned to Dr. Morse on October 4, 2005, at which time he changed claimant's medication due to an allergic response. Claimant again returned to Dr. Morse on November 14, 2005, at which time he noted that the medication had not been beneficial and prescribed another medication. When that medication was not beneficial Dr. Morse gave claimant a Botox injection which also was not beneficial. As a result, Dr. Morse referred claimant to Dr. Danks for a neurosurgical evaluation. Dr. Danks evaluated claimant on January 24, 2006, and assessed claimant's condition as "Probable damage to the infraorbital nerve." Dr. Danks went on to indicate that he did not believe there was anything that could be done for claimant's condition and that this was a permanent injury.

Claimant has subsequently received permanent impairment ratings from both Dr.

Morse and Dr. Danks as well as from Dr. Rutherford who has reviewed claimant's medical records. Dr. Morse assigned the claimant a 20-percent impairment rating to the body as a whole based upon moderately severe uncontrolled facial neuralgia pain. Dr. Danks in a report dated February 6, 2006 assigned the claimant a 10-percent impairment rating. Finally, Dr. Rutherford after reviewing claimant's medical records stated in a report dated April 24, 2006 that he would agree that claimant's medical records "indicate moderately severe pain rather than mild pain"; therefore, he agreed with Dr. Morse's impairment rating of 20-percent to the body as a whole.

Claimant has filed this claim contending that she is entitled to permanent partial disability benefits as a result of her compensable injury.

#### ADJUDICATION

As previously noted, claimant has received impairment ratings from three physicians. Arkansas Workers' Compensation law requires that any determination of the extent of physical impairment be supported by objective and measurable physical findings. A.C.A. §11-9-704(c)(1). The law specifically excludes the consideration of complaints of pain in the determination of physical or anatomical impairment. A.C.A. §11-9-102(16)(A)(ii)(a) states:

When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain.

In this case, the impairment ratings assigned by the physicians are not based upon objective findings but rather are based upon complaints of pain. In fact, the chart contained in the *AMA Guides* relating to impairment for the trigeminal nerve rely upon the amount of pain in assessing the correct impairment rating. All three physicians relied upon

the amount of pain in assessing claimant's impairment.

Specifically, Dr. Morse in his report of February 9, 2006 assigned the 20-percent rating based upon his opinion that the claimant suffered from moderately severe pain. Likewise, Dr. Rutherford, a neurologist who reviewed the claimant's medical records, also agreed that claimant suffered from moderately severe pain as opposed to mild pain; therefore, he agreed with Dr. Morse's impairment rating.

By letter dated April 4, 2006, Dr. Morse acknowledged that the trigeminal nerve primarily supplied sensation, so by default any damage to that nerve as going to involve pain or numbness. Likewise, Dr. Rutherford in a letter dated May 4, 2006, indicated that the impairment rating was based entirely upon claimant's subjective complaints because there was no objective abnormality identified.

Finally, it also appears that Dr. Danks' impairment rating is based upon claimant's complaints of pain which he believed fell into the mild category as opposed to moderately severe.

In summary, in order to be entitled to permanent disability benefits for a compensable injury, claimant has the burden of proving by a preponderance of the evidence that the existence and extent of a physical impairment is supposed by objective and measurable physical findings. The Arkansas Workers' Compensation law specifically states that complaints of pain may not be considered when determining physical or anatomical impairment. Here, the impairment ratings assigned by the treating physicians are based upon pain. There are no objective and measurable physical findings which would support the existence or extent of physical impairment. Accordingly, even though I find claimant's testimony to be credible and believe that she suffers from a great deal of pain as a result of her compensable injury. the Arkansas Workers' Compensation law specifically prohibits an award of permanent benefits based upon pain.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent disability benefits as a result of her compensable injury. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE