

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E814356

**FRED L. WILLIAMS,
EMPLOYEE**

CLAIMANT

**HEALTHCARE SERVICES
GROUP, INC.
EMPLOYER**

RESPONDENT NO. 1

**ZURICH INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 2

**DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 3

**PHILIP M. WILSON,
ATTORNEY AT LAW**

INTERVENOR

OPINION FILED MAY 30, 2006,

Pursuant to a hearing conducted March 1, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Fred L. Williams, Little Rock, Arkansas, proceeding without an attorney;

Mr. Lee J. Muldrow, Attorney at Law, Little Rock, Arkansas, representing Respondents No. 1 and 2;
and

Mr. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas, representing Respondent No. 3.

STATEMENT OF THE CASE

This was a hearing to consider the claimant's request for permanent total disability benefits for his admittedly compensable injury.

The claimant was injured November 12, 1998, during his employment in housekeeping and maintenance at Williamsburg Nursing Home operated by the respondent employer on South University Avenue. His injury occurred when he slipped and fell on the floor in a bathroom which he had entered in order to clean.

After a hearing, it was ultimately determined that the claimant sustained a compensable injury. The issue of the extent of permanent disability, if any, resulting from that injury was not addressed. Thus, the claimant currently contends that he should be awarded benefits for permanent total disability, based upon an impairment rating of 35% assessed by Dr. Archie Hearne, together with wage loss disability factors. Other possible issues were reserved.

Respondents No. 1 and 2 contend that the claimant did not sustain permanent impairment or disability as the result of his compensable injury; that his claim for benefits is not supported by objective and measurable findings; that is compensable injury does not represent the major cause of any impairment or disability he may now experience. They further contended that the greater weight of the evidence in this case does not support a finding of work-related accident caused impairment or disability.

The Fund did not take a position concerning the extent of the claimant's permanent disability. However, it contended that, if the claimant is permanently totally disabled, Respondents No. 1 and 2 must first pay benefits for permanent impairment before they are entitled to credit against the \$75,000.00 maximum liability for permanent total disability benefits provided in Ark. Code Ann. §11-9-502(b)(1). They also contended that the claimant could not have been permanently totally disabled before February 19, 1999, the last day he was employed.

The intervenor, who has filed a lien for his services as the claimant's previous attorney, was not required to attend the hearing.

Before the claimant's testimony was taken, he was again advised that he had the burden of presenting evidence and proving entitlement to additional benefits and that he should retain counsel

who is familiar with workers' compensation law, although he has the right to proceed without counsel, if so desired. He testified that he desired to proceed without an attorney.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant suffered a compensable injury November 12, 1998; his wages entitled him to a compensation rate of \$52.00 per week; the law of the case is that the claimant's healing period ended on or before January 19, 1999, and he has failed to prove entitlement to temporary total disability benefits for medical treatment after that date, and respondents are not responsible for medical treatment after that date. At the hearing, it was also stipulated that the last day of work for the claimant was February 19, 1999, the last day of his employment with another employer.

3. The preponderance of the evidence fails to show either that the claimant has been rendered permanently totally disabled or that he has sustained compensable permanent anatomical impairment or wage loss disability, as a result of his compensable injury.

DISCUSSION

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Where, as here, the claimant requests benefits for permanent disability, he is required first to show the existence of permanent anatomical impairment as the result of the compensable injury before the Commission may take into consideration other factors such as age, education, work experience, and other matters reasonably expected to affect the claimant's future earning capacity. Ark. Code Ann. §11-9-522(b)(1); Wal Mart Stores, Inc. v. Connell, 340 Ark. 475 (2000). The law also requires the claimant to show that the compensable injury is the major cause of any impairment or disability he may experience. Ark. Code Ann. §11-9-102(4)(F). The law further requires that the existence and extent of physical impairment is supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c). Objective findings are defined as those which cannot come under the voluntary control of the claimant. Ark. Code Ann. §11-9-102(16). The law also specifically provides that complaints of pain may not be considered by this Commission or by medical providers when determining physical or anatomical impairment. Ark. Code Ann. §11-9-102(16)(A)(ii)(a). In other words, the law does not consider the claimant's complaints of pain

as sufficient proof to establish disability, even though such complaints may be considered by his physicians in making treatment decisions.

At the time of his injury in November 19, 1998, the claimant was employed by two employers. His employment with the respondent employer was terminated for cause a few days following the time of this incident. However, he continued to work at the Cimarron Hotel until on or about February 19, 1999. Nevertheless, he claims that the injury of November, 1998, rendered him permanently totally disabled and does not attribute any of his difficulties to his continuing work at the Cimarron Hotel.

Even though it was determined after a hearing that the claimant's healing period ended January 19, 1999, and that the respondents were not responsible for medical treatment after that date, the claimant continued to seek medical care from time to time. At the time of the hearing, he indicated that the pain in his left hip was a 10 on a scale of 1 to 10. At the hearing, he also reviewed his work history and stated that he was not able to go back to work, but would if he could. He said he had electronic currents running down his back, muscles jumping up in between his groin, and everywhere else, including his head, elbows. He said that he can not even bend his elbow nor lie down in bed without muscles jumping and hitting him all over his hip. He testified that he could not even curl up in his bed without feeling this vertebra move. He said he could hardly even bend down and he has to get down on his knees and crawl to clean his house. He also said he could not stoop and has to walk with a cane.

As noted above, to be entitled to benefits, the claimant must present sufficient proof of an objective basis of his impairment and disability, as well as sufficient proof that the injury is the major cause of his disability. Although he continued to receive medical care and undergo diagnostic

testing, the medical record tends to show that the claimant's treatment was based upon subjective complaints, rather than objective findings.

For example, on November 23, 1998, the claimant's pelvis and hip were x-rayed. The radiologist's report for that study indicates that it provided normal views of the hip and left pelvis. The findings of the radiologist were that the pelvic ring was intact; no focal lytic or blastic disease was demonstrated; both hip joints were well maintained and within range of normal. Thereafter, in response to an inquiry by claimant's counsel, Dr. Derick Lewis indicated that there was no permanent disability from the claimant's work-related injuries. Respondent Exhibit 1 at p. 9. Later, on May 21, 1999, a note from Dr. Philip H. Johnson indicated that the claimant had undergone a lumbar MRI, which proved to be normal. Similarly, a note from Dr. Charles R. Watson dated June 3, 1999, indicated that an MRI scan of the claimant's cervical spine was normal. A letter from Dr. John L. Wilson dated June 15, 1999, indicated that x-rays, AP and lateral of the lumbar spine, were perfectly normal and that he did not find objective evidence of injury at that time.

On March 1, 2000, Dr. Charles R. Watson wrote that the claimant requested an impairment rating but noted that he does not have any objective evidence of injury and only has complaints and symptoms. In his opinion, his impairment was zero. He noted that the patient insisted that he had a normal MRI scan and that meant that he had some objective pathology. He further noted that the patient insisted that there was a conspiracy of his doctors against him and that everybody was out to get him. He also opined that the patient was delusional and paranoid and he recommended that he find another doctor. A report dated March 15, 2000, from Dr. Sunder Krishnan indicated that the claimant's physical examination revealed normal range of motion for the cervical spine; no tenderness over the cervical facet joints or trapezius muscles; a normal lordotic curve in the lower

back, full range of motion, no evidence of paraspinal muscle tenderness or facet joint or sacroiliac joint tenderness. He concluded that he could not find any sort of neurological deficit and could not give the claimant a reason for all his vague pain complaints. He also noted that the claimant requested an MRI and that he informed him that he did not see any indication to get an MRI, but recommended that he follow up with Dr. Hearne. The claimant agreed with this, but the doctor was notified in about an hour by the radiology department that the claimant had appeared there and stated that Dr. Krishnan had ordered an MRI to be done as soon as possible, although Dr. Krishnan had not done so and had advised the claimant that he would not do so.

On April 13, 2000, respondent's counsel wrote to Dr. Watson inquiring about a form purportedly completed at Dr. Watson's office indicating that the claimant was permanently disabled and could not walk without the use of a cane. Dr. Watson responded that the claimant was not permanently disabled and that his impairment was zero for the whole body. Later, at the request of Dr. Hearne, the claimant underwent an MRI of the lumbar spine July 7, 2000, the report of which noted normal findings and stated that the MRI was negative.

In November, 2000, the claimant was again seen by Dr. Krishnan, whose report indicated that the claimant once again reiterated that he would like to get disability and is trying to get workman's compensation benefits for his injury. Dr. Krishnan then noted that the claimant pretty much refused to allow him to perform any examination of range of motion of his cervical thoracic or lumbar spine because it would hurt him. The examination he was able to perform was generally normal, although he noted that the claimant stated that he had increase pain in his back when gentle pressure was applied over his head. Dr. Krishnan again noted that the July 7, 1999, MRI report was completely within normal limits. On May 11, 2004, Dr. Hearne filled out a form indicating that the claimant's

impairment was 35% to the body as a whole, based upon an MRI showing degenerative disc disease of the lumbar spine. He did not further explain which MRI scan was intended or how the degenerative disc disease was related to the claimant's injury.

On December 22, 2005, the claimant was seen by Dr. Earl Peeples, whose report indicated that he had reviewed the claimant's medical record and examined him, ultimately concluding that he agreed with multiple previous treating physicians that no objective anatomic abnormality was identifiable. He stated there was no objective evidence of significant musculoskeletal injury and he did not recommend additional treatment. Dr. Peeples also commented that he asked the claimant to rate his pain on a 1 to 10 scale, with 10 being the most severe pain any human has ever experienced, that is, an absolute maximum for the human race for all of history, and the claimant rated his pain at a 9 constantly and a constant 10 in his left hip since 1998, agreeing that this was the worst pain any human has ever experienced.

Dr. Peeples further noted that Dr. Hearne had found the claimant unable to work due to injuries sustained at work, but that there was no objective medical data provided to substantiate this. He also noted that Dr. Hearne's diagnosis of chronic back syndrome had no specific medical meaning and that Waddell's testing was positive. Dr. Peeples recommended that the claimant return to gainful employment, which has a significant, long-term, positive, health benefit.

In short, the requirement of objective findings to support the claimant's contention that he has anatomical impairment and disability, as well as the requirement of showing that the compensable injury was the major cause of disability, present formidable obstacles which cannot be overcome merely by the claimant's insistence that he has suffered painfully since his injury occurred. At the hearing, the claimant displayed an x-ray and argued that the legend indicated that his disability

was 100%, even though it clearly showed only the date and time of the x-ray exposure and that the scale of the x-ray was 100%. The radiologist report concerning this x-ray fails to state that the study shows any disability or impairment. On this point, the opinion of the radiologist is entitled to greater weight than that of the claimant.

When the entire record is reviewed, it fails to show credible evidence sufficient to establish entitlement to benefits for permanent total disability, due to insufficient objective findings and insufficient proof of major cause.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge