

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F604927

DOUGLAS MALLORY, EMPLOYEE **CLAIMANT**

**AMFUEL, SELF-INSURED
EMPLOYER** **RESPONDENT**

**CROCKETT ADJUSTMENT, INC.,
INSURANCE CARRIER/TPA** **RESPONDENT**

OPINION FILED NOVEMBER 1, 2007

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 7, 2007, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing conference was conducted on June 26, 2007, and a Prehearing Order was entered on June 28, 2007. A copy of the June 28, 2007, Prehearing Order was marked as "Commission Exhibit 1" and made a part of the record herein, subject to any modifications made at the full hearing.

At the full hearing, the parties agreed to the following stipulations:

- 1) That the Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) That the employee-employer-carrier relationship existed at all relevant times including December 19, 2005.

DOUGLAS MALLORY - F604927

- 3) That the claimant sustained a compensable lumbar spine injury on December 19, 2005.
- 4) That at the time of the claimant's stipulated compensable injury, his average weekly wage was \$556.00.
- 5) The parties agreed that issue number one outlined in the Prehearing Order would be withdrawn and reserved.
- 6) The parties agreed to reserve all issues not addressed herein.

The parties agreed the sole issue to be presented for determination would be whether the claimant is entitled to a 5% whole body anatomical impairment rating as a result of his compensable lumbar spine injury and attorney's fees.

At the full hearing the claimant contended that as a result of his compensable injury of December 19, 2005, he should be entitled to a 5% permanent impairment rating which has been controverted and attorney's fees should apply.

At the full hearing the respondents contended that the claimant was injured and that the claim was accepted and respondents paid temporary total disability and medical; but that there has been no permanent partial disability and the major cause of any PPD is degenerative in nature. Respondents contend claimant has returned to work for his employer so there is no wage loss and that the discogram is not reasonable or necessary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had the opportunity to hear the testimony of the claimant and to observe his demeanor, and without giving the benefit of doubt to either party, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that he sustained a 5% whole body anatomical impairment as a result of his stipulated compensable injury. As such, respondents should pay the claimant for the 5% whole body anatomical impairment forthwith.
- 4) Respondents have controverted the 5% impairment and therefore the claimant is entitled to the maximum statutory attorney's fees allowed by Arkansas law consistent with the findings herein.

DISCUSSION

The claimant sustained an admittedly compensable back injury on December 19, 2005. The claimant testified as follows regarding the incident of December 19, 2005, that led to his stipulated compensable injury:

- A Well, they got these jigs out there, it's like big jugs that you put cells inside, strap them down so you can check them, and I was inside this cell pulling the strings, running them through the little

DOUGLAS MALLORY - F604927

hoops, pulling them strings, and when I was pulling it, you know, to try to get it to fit, I just felt something like catch back there.

(T. p. 12, lines 3-9).

The claimant testified that prior to his compensable back injury he had never had any back problems, back spasms, or back aches.

Q And did you have a history of back problems when you hired in out there?

A No, sir.

Q How would you describe your health when you hired in at AmFuel?

A. Well, around about eighty-five to ninety percent.

Q Had you ever had back surgery or injections or any treatments like that prior to this injury?

A No, sir.

Q Had you ever in your lifetime, in your adult life, had any kind of back injury which was significant and required medical treatment for more than a couple of weeks at a time?

A No, sir.

Q Had you ever experienced back spasms before?

A No, sir.

Q Had you ever had any kind of chiropractic treatment?

A No, sir.

DOUGLAS MALLORY - F604927

Q Have you ever had - prior to this injury, had you had any periods of time where your back just ached and you had reason to go to the doctor and see about it?

A No, sir.

(T. p. 11, lines 1-25).

The claimant treated with Drs. Peebles, Gati, Akin, and Arnold; and was ultimately found to be at maximum medical improvement by Dr. Akin on July 20, 2006. In Dr. Akin's July 20, 2006, report, he states "...we will declare him at maximum medical improvement. He receives an impairment rating of 5% as per the Guides to Evaluation of Permanent Impairment, 4th Edition." (R. Ex. 1, p. 8). Dr. Arnold in his January 15, 2007, report also assessed the claimant with a 5% whole body impairment rating. (R. Ex. 1, p. 11). On April 13, 2006, an MRI of the claimant's lumbar spine was performed and a report followed which found bulging at L3-4, L4-5, and L5-S1. (R. Ex. 1, p. 1). The MRI report also showed indications of early degenerative disc disease. This finding of early degenerative disc disease on the MRI has caused considerable dispute between the parties with regard to permanent partial disability.

"Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. Excelsior Hotel v. Squires, 83 Ark. App. 26, 115 S.W.2d 823 (2003). Any determination of the existence

DOUGLAS MALLORY - F604927

or extent of permanent impairment shall be supported by objective and measurable physical or mental findings. A.C.A. § 11-9-704(c)(1)(B). A.C.A. § 11-9-102(16) provides: (A)(i) “Objective findings are those findings which cannot come under the voluntary control of the patient. (ii) 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; for the purpose of making physical or anatomical impairment ratings to the spine, straight leg raising tests or range of motion tests shall not be considered objective findings.

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. A.C.A. § 11-9-102(4)(F)(ii)(a) “Major cause” means “more than fifty percent of the cause,” and a finding of major cause shall be established according to the preponderance of the evidence. A.C.A. § 11-9-102(14).

The respondents focused on the degenerative disc disease as a reason for controverting the 5% impairment rating assigned by Drs. Akin and Arnold. However, it must be noted, that Dr. Akin’s report after the MRI of the lumbar spine states “degenerative disk disease of the lumbar spine with a disc bulge and left foraminal narrowing.” (R. Ex. 1, p. 3). Also in another report from Dr. Akin, he specifically

DOUGLAS MALLORY - F604927

states “his back MRI shows evidence of multilevel degenerative disk disease and a disk bulge at L5-S1 that narrows the left foramen.” (R. Ex. 1, p. 2) (emphasis added).

The respondents wish to focus on the degenerative disk disease; however one cannot disregard the disk bulge at L5-S1 that narrows the left foramen. The disk bulge at L5-S1 and the narrowing of the left foramen is an objective finding which cannot come under the voluntary control of the claimant.

I recognize Dr. Akin has gone back and forth regarding his impairment rating evaluation. In Dr. Akin’s July 20, 2006, report, found at Respondents’ Exhibit 1, page 8, Dr. Akin finds that claimant at maximum medical improvement and assigns a 5% rating per the *Guides to the Evaluation of Permanent Impairment*, 4th Edition. Then, on August 17, 2006, Dr. Akin assigns a 0% impairment rating pursuant to that report which was less than a month after his 5% rating. (R. Ex. 1, p. 10). Then, less than a month after his second opinion regarding the permanent impairment, Dr. Akin goes back to his assessment of a 5% permanent partial impairment resulting from the claimant’s compensable injury. That report is dated August 28, 2006, and contained at Claimant’s Exhibit 1, page 1. Then, Dr. Arnold in his January 15, 2007, report also finds that the claimant sustained a 5% whole body impairment based on the 4th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. Arnold bases his opinion not on the MRI review but on outside reports. In any event, it is the duty of

DOUGLAS MALLORY - F604927

this Commission to go to the *Guides* and confirm ratings and not rely solely upon the doctors' assignment. My review of Table 75 to the *Guides to the Evaluation of Permanent Impairment*, 4th Edition, Section 2B, shows a 5% permanent impairment for "unoperated on, stable, with medically documented injury, pain, and rigidity associated with none to minimal degenerative changes on the structural tests, such as those involving roentegenography or magnetic resonance imaging." The MRI contained in the records herein clearly show a medically documented injury with regard to the moderate L5-S1 bulge and the narrowing of the foraminal. Further, Table 72, to the *Guides to the Evaluation of Permanent Impairment*, Category Number 2, further justifies the 5% impairment to the whole person wherein it states "minor impairment, clinical signs of lumbar injury are present without radiculopathy or loss of motion segment integrity." Both tables cited herein to the *Guides* affirm the doctors' assessment of the claimant having a 5% whole body impairment. My finding of a 5% impairment rating does not in any way take into account the claimant's complaints of pain. Therefore, I find that claimant has proven by a preponderance of the evidence that the claimant sustained a permanent partial impairment in the amount of 5% to the body as a whole as a result of his compensable lumbar back injury on December 19, 2005.

I further find that the compensable injury of December 19, 2005, was the major

DOUGLAS MALLORY - F604927

cause of the claimant's 5% whole body impairment. The claimant's testimony and the evidence in the record clearly shows that the claimant had no back problems prior to his December 19, 2005, injury. The claimant didn't so much as have any backaches prior to his compensable injury. Not until after the compensable event did the claimant start having symptoms and MRI findings of any type of back injury.

AWARD

Respondents are herein directed to pay the claimant permanent partial disability benefits equal to a 5% whole body impairment consistent with the findings of fact and conclusions of law outlined herein. Said sums accrued shall be paid in lump sum without discount.

Maximum statutory attorney's fees are herein awarded to the claimant's attorney, the Honorable Kenneth Olsen, pursuant to A.C.A. § 11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. § 11-9-809, until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb