

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F800985

PATRICIA STREET	CLAIMANT
ST. JOHN'S HOSPITAL SELF INSURED	RESPONDENT
RISK MANAGEMENT RESOURCES, THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED **AUGUST 28, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by J. MARK WHITE, Attorney, Bryant, Arkansas.

Respondents represented by GUY WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above styled claim on June 9, 2008, in Springdale, Arkansas. A pre-hearing order was entered in this case on April 21, 2008. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing. (This pre-hearing order contained a clerical error, in the issues, indicating that there were three issues. The clerical error arose in the issue that was initially numbered two. When this clerical error is deleted, only two issues remain).

The following stipulations were offered by the parties and are hereby accepted:

1. On June 15, 2005, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation benefits are \$186.00 for total disability and \$154.00 for permanent partial disability.
3. On June 15, 2005, the claimant sustained a compensable injury to her right foot.

4. There is no dispute over medical expenses incurred to date.
5. There is no dispute over temporary total disability benefits at present.
6. The healing period ended on or about June 15, 2007.

By agreement of the parties, the issue to be litigated and resolved at the forthcoming hearing was limited to the following:

1. The claimant's entitlement to permanent partial disability for permanent physical impairment.
2. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"The claimant contends that she was an employee of the respondent-employer on June 15, 2005, on which date she sustained a compensable injury to her right foot; that as a compensable consequence of her June 15, 2005 compensable injury, she developed complex regional pain syndrome (RSD) in her right lower extremity; that her treating physician's recommendation of Lexapro is reasonably necessary in connection with the compensable injury; and respondents should be liable for the same; that she is entitled to permanent partial disability benefits for the permanent impairment rating of 11 percent to the body as a whole as assigned by Dr. Gary Moffitt; and that she is entitled to attorney's fee as provided by law."

In regard to these issues, the respondents contend:

"Respondents contend that claimant's antidepressant medication is for a condition unrelated to her compensable injury. In addition, respondents contend that claimant's PPD rating is not due to claimant's injury or supported by a sufficient basis."

#### DISCUSSION

\_\_\_\_\_The central issue in this case is the claimant's entitlement to permanent partial disability benefits for permanent physical impairment. The burden rests

upon the claimant to prove all of the facts necessary to establish both the existence and extent of permanent physical impairment.

First, the claimant must show that the existence or extent of physical impairment is supported by objective and measurable physical or mental findings, Ark. Code Ann. §11-9-704(c)(1)(B). Further, any determination of the extent of permanent physical impairment must be calculated in a manner that conforms with the Commission's official rating guide, Ark. Code Ann. §11-9-521(h) and/or §11-9-522(g). Finally, the claimant must show that the compensable injury was the "major cause" (i.e. more than 50 percent) of the permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

However, the claimant need not prove the existence and extent of permanent physical impairment by expert medical evidence. It is now the duty of this Commission rather than any medical expert, to determine both the existence and extent of permanent physical impairment. However, this does not mean that expert medical opinion is not relevant evidence on this issue and cannot be accepted by this Commission in making its determination. Yet, in order to be considered relevant, any expert medical opinion must be stated within a reasonable degree of medical certainty and cannot consider complaints of pain, Ark. Code Ann. §11-9-102(16).

In the present case, the only expert medical opinion offered on the issue of the existence and extent of permanent physical impairment is contained in the report by Dr. Gary Moffitt. This report is dated July 5, 2007 (Claimant's Exhibit No. 1, pages 14-15). In this report, Dr. Moffitt stated that he performed an independent medical evaluation of the claimant, at the respondents' request, on June 14, 2007. He further indicated that he has reviewed the claimant's medical records and test results.

In the report of July 5, 2007, Dr. Moffett concluded that the claimant had reached MMI (maximum medical improvement). He also opined that the claimant had experienced a permanent physical impairment, solely as the result of her compensable injury:

“Utilizing the AMA Guides to the Evaluation of Permanent Impairment, fourth edition she (the claimant) is thought to have an improvement (sic) of sural nerve as well as superficial peroneal, the medial plantar, the lateral plantar, the saphenous, the deep femoral, and the medical calcaneal nerve. She is thought to have a Grade IV sensory deficit of these nerves and is not thought to have a significant motor deficit. Utilizing table 68 on page 3-89, she is thought to have a deficit involving both sensory and dysesthesia. For the sural nerve, she was thought to have a 1 percent whole body deficit and a 2 percent dysesthesia deficit. For the superficial peroneal she was thought to have a 2 percent sensory and a 2 percent dysesthesia deficit. For the medial plantar nerve she was thought to have a 2 percent sensory and a 2 percent dysesthesia, and for the lateral plantar nerve she was thought to have a 2 percent sensory and 2 percent dysesthesia impairment. These numbers are combined and she is found to have a 11 percent whole body impairment rating.”

Dr. Moffitt is a certified rating specialist. He practices at the Arkansas Occupational Health Clinic, in Lowell, Arkansas. Dr. Moffitt and the other physicians at the Clinic act as company physicians for a substantial number of large employers in the northwest Arkansas area. Dr. Moffitt has on numerous occasions evaluated and rated individuals suffering employment injuries at the request of the respondents. He is obviously capable and qualified to perform this service.

In his report of July 5, 2007, Dr. Moffitt made his assessment of permanent physical impairment, based on a permanent neurological deficit (in the form of sensory loss and dysesthesias) that involved several of the nerves

in the claimant's lower right leg, ankle, and foot. However, he found no motor loss of impairment involving these nerves.

He also attributed this neurological defect to a complex regional pain syndrome, which the claimant had experienced as a compensable consequence or complication of her compensable right foot injury of June 15, 2005. Dr. Moffitt's opinion, concerning the presence of a complex regional pain syndrome (CRPS) and its relationship to the employment related accident and injury of June 15, 2005, is supported by the expert medical opinions of the claimant's primary treating physicians for her compensable injury, Dr. Jason Pleimann (an orthopaedic surgeon and foot specialist) and Dr. Benjamin Lambert (a pain management specialist). I would further note that the actual presence of CRPS is supported by "objective findings," which are contained in the medical record. These "objective findings" consist of the visual observation by the claimant's various physicians of a bluish tint to the skin of her right lower leg/ ankle/foot, slight edema on her lower leg/ankle/foot, and a substantial temperature variation of 1.2 degrees between the temperature of the claimant's right foot and to her left foot.

In arriving at his assessment of permanent physical impairment, Dr. Moffitt first concluded that the claimant has a Grade IV sensory deficit of the sural nerve, the superficial peroneal, the medial plantar, the lateral plantar, the saphenous, the deep femoral and the medial calcaneal nerves in her right lower leg/ ankle/foot. Dr. Moffitt does not specifically state how he arrived at this conclusion.

I cannot find in the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition the mention of a Grade IV sensory deficit of a particular nerve. However, the fourth edition of the AMA

guides does contain, under the section on the NERVOUS SYSTEM, a method for classifying the amount of sensory loss of various nerves. This method is found in table 20 on page 4-151 of the guides. This table sets out five distinct "Classes", rather than "Grades" of sensory impairment. Class IV is described as decreased sensation with or without pain or minor causalgia that may prevent activity. This classification carries a sensory impairment of 61 to 80 percent of the affected nerve. The claimant's various symptoms and complaints would appear to coincide with this description. Thus, it would be reasonable to assume that this is the portion of the guides that Dr. Moffitt used in arriving at his conclusion that the claimant was experiencing a "Grade IV sensory deficit."

However, at this point there appears to be an error in Dr. Moffitt's use of the guides. Under the guides, he should have multiplied the impairment rating for the sensory loss or dysesthesia of the affected nerves given in table 68 on page 3-89 of the guides by a specific percentage within the range given for a Class IV sensory abnormality as given in table 20 on page 4/151 of the guides (a range of 61 to 80 percent). However, Dr. Moffitt has clearly taken the impairment suggested by table 68 for a total or 100 percent loss or neurological impairment of each affected nerve listed.

However, this is not the real problem with Dr. Moffitt's expert opinion on the existence and degree of permanent physical impairment, which has been caused by the claimant's compensable injury. The real problem arises in that Dr. Moffitt's assessment of permanent physical impairment is based solely upon subjective factors, such as complaints of pain, numbness, and abnormal feelings or sensations that involve the affected portion of the claimant's leg. Clearly, none of these factors can meet the standard for "objective findings", as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

After consideration of all the evidence presented, it is my opinion that the impairment rating assessed by Dr. Moffitt does not meet the various statutory criteria of the Act. Thus, it can be afforded no weight or credit in determining the existence or extent of permanent physical impairment from the claimant's compensable injury.

This raises yet another problem. The current official rating guide simply does not provide a method or criteria for assessing permanent physical impairment for sensory deficits or dysesthesias that would be objectively supported, as required by the Act. This fact is even expressly recognized by the official rating guide when it states:

"Sensory deficits and dysesthesias are subjective and must be carefully evaluated. Ideally, two examiners should agree."

In summary, I am compelled to find that the claimant has failed to prove that her compensable right foot injury of June 15, 2005, including her subsequent compensable consequence of CRPS that has involved her lower right leg/ankle/foot was the major cause of any permanent physical impairment, which can be calculated in a manner that would conform to the current official rating guide and would be supported by objective and measurable physical findings. Thus, she would not be entitled to any permanent partial disability benefits for permanent physical impairment.

In reaching my opinion, I am aware that the claimant has exhibited "objective findings" that involve her right lower leg/ankle/foot. As previously noted, these findings consist of the visible observation of skin discoloration or color change, slight edema, and temperature change. Although these "objective findings" may be sufficient to establish the actual existence of CRPS, for the purposes of Ark. Code Ann. §11-9-102(4)(D), they would not represent

“objective findings” that would be sufficient to support an assessment of permanent physical impairment.

First, the current rating guide simply does not provide any method for attributing a percentage or degree of permanent impairment merely because of the presence of these abnormal findings. Secondly, these findings are not particularly indicative of the presence of permanent damage or impairment. At best, the record shows that abnormalities appear only periodically. It must be noted that these abnormalities were only observed during two of the claimant’s numerous physical examinations. These abnormalities were not observed on numerous other examinations even though particular care was taken to check for these abnormalities. The claimant’s own testimony also indicates that these objective abnormalities are only occasionally present. Further, the evidence presented indicates that these abnormalities have decreased in magnitude and frequency of occurrence, as time has passed.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 15, 2005, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On June 15, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$186.00 for total disability and \$154.00 for permanent partial disability.
4. On June 15, 2005, the claimant sustained a compensable injury to her right foot.

5. There is no dispute over medical expenses, which have incurred for the claimant's compensable injury, through the date of hearing. All such expenses have or apparently will be paid.

6. There is no dispute, at the present time, over temporary total disability benefits. All such benefits accruing to the date of hearing, have been paid.

7. The claimant's healing period from the effects of her compensable injury ended on or about June 15, 2007.

8. The claimant has failed to prove that she is entitled to receive any permanent partial disability benefits for permanent physical impairment from her compensable injury. Specifically, she has failed to prove that this compensable injury was the major cause of any degree of permanent physical impairment that could be calculated in a manner or method provided by the official rating guide and would be supported by objective and measurable physical findings.

9. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits for permanent physical impairment.

10. As no controverted benefits have herein been awarded to the claimant, no controverted attorney's fee can be awarded to her attorney.

#### ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss the present claim for permanent partial disability benefits attributable to permanent physical impairment.

The respondents remain liable for the expense of reasonably necessary medical services required by the claimant for her compensable injury.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE