

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F008686/F100390

BATHEL L. CUPPLES, EMPLOYEE	CLAIMANT
ROLLISON SEED COMPANY, EMPLOYER	RESPONDENT
AGRI GROUP-COMP., INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 29, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE GARY DAVIS, Attorney at  
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE BETTY J. DEMORY,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
adopted.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal  
from a decision of the Administrative Law Judge filed  
November 19, 2002. The Administrative Law Judge entered the  
following findings of fact and conclusions of law:

1. The employee-employer-carrier relationship  
existed at all relevant times.
2. The claimant is entitled to the maximum  
compensation rates \$394.00 for temporary  
total disability and \$296.00 for permanent  
partial disability (T-7), and not the \$371.00  
and \$278.00 which had been paid for the  
disability.)

3. The claimant sustained compensable injuries in June 1998 and in July 2000.
4. The claimant was paid a 5% permanent impairment rating at the rate of \$278.00
5. All previous transcripts, Opinions, exhibits and the deposition of Dr. Russell dated July 12, 2001 are admitted and incorporated herein by reference.
6. The preponderance of the evidence reflects that the claimant is entitled to the 5% permanent impairment rating assigned by Dr. Jim Moore. The claimant's attorney is entitled to an attorney's fee for controversion of the 5%.
7. The preponderance of the evidence reflects that the claimant is not entitled to an 18% penalty on the difference in the amount of benefits paid for temporary total disability and permanent partial disability.
8. The preponderance of the evidence reflects that the claimant is entitled to wage loss disability in the amount of 5% over the 5% permanent impairment rating. The claimant's attorney is entitled to an attorney's fee for that amount, for controversion.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact

made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 1996).

For prevailing in part on this appeal before the Full Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

\_\_\_\_\_I concur with the findings in the principal opinion that claimant is entitled to benefits for a permanent anatomical impairment of 5% to the body as a whole

and to benefits for a loss in wage-earning capacity in an amount equal to at least 5% to the body as a whole.

However, I must respectfully dissent from the failure to award benefits in excess of 5% to the body as a whole to compensate claimant for his wage-loss disability.

Claimant is in his mid-40s and weighs approximately 300 pounds. He completed only the seventh grade, but was placed in special education classes as a result of a learning disability. His job history involves heavy manual labor. He uses a back brace and a cane on occasion. He can lift approximately 25 pounds. He is not able to stand, sit, or walk for prolonged periods of time. He must restrict his bending, stooping, pushing, pulling, twisting, reaching, and climbing. Claimant testified that he only experiences approximately two pain free days each month. Claimant has sought employment but was not hired because of the compensable back injury. In my opinion, the award of 5% to the body as a whole for claimant's wage-loss disability is inadequate.

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SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

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DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant is entitled to a 5% permanent impairment rating, as well as a 5% loss in wage-earning capacity. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The majority has awarded the claimant a 5% permanent impairment rating as assessed by Dr. Moore. The majority has also awarded the claimant a 5% loss in wage-earning capacity. I cannot agree with the majority. In my opinion, the 5% rating that was assessed by Dr. Moore on the claimant is not based on objective findings. There is no permanent impairment of the claimant's injury that is supported by objective and measurable physical findings as required by Ark. Code Ann. § 11-9-704(c) (Repl. 2002). Objective findings are defined as "those which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Repl. 2002); see University of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997). Objective findings are based upon observable criteria perceived by someone other than a claimant. Keller v. L.A.

Darling Fixtures, 40 Ark. App. 94, 845 S.W.2d 15 (1992).

Therefore, the claimant's pain may not be considered for the purpose of awarding disability benefits. See Duke v. Regis Hairstylists, 55 Ark. App. 327, 935 S.W.2d 600 (1996).

Dr. P. B. Simpson, who is the last doctor to have examined the claimant, stated that the claimant did not have any permanent impairment. The claimant was examined by Dr. Simpson per the claimant's request. Dr. Simpson reviewed the two MRI studies from 1998 and 2000. He stated that the "only thing I see is that he has a little bit of asymmetrical disc bulging." Dr. Simpson requested a myelogram and post-myelogram CT which was performed on December 31, 2001. Dr. Simpson reviewed the results and stated; "The only thing I see on this study is that he has a spur at L5-S1 on the right side." Dr. Simpson further wrote in January of 2002, "It does not push back the S1 nerve root" and "nothing else is seen on the studies." Further, Dr. Simpson stated in his report:

I have gone over all of this with the patient. He apparently was give (sic) a 5% permanent impairment rating by Dr. Moore. I guess he based this on his pain, but as far as I am concerned he does not have any gross evidence of back problem of organic nature and in my estimation he has no evidence of any permanent impairment.

In my opinion, Dr. Simpson's opinion should be given great weight. Dr. Simpson was the last specialist to see the claimant and he had the most recent diagnostic test performed and reviewed for his opinion. Therefore, I find that the claimant is not entitled to any permanent impairment. In order to receive wage loss disability, the claimant must prove that he has a permanent impairment rating. Because the claimant has no permanent impairment, he is not entitled to any wage loss disability benefits.

Therefore, I respectfully dissent from the majority opinion.

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JOE E. YATES, Commissioner