

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E814766

HOWARD H. HARPER, EMPLOYEE	CLAIMANT
ARKANSAS REHABILITATIVE SERVICE, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIV., CARRIER	RESPONDENT

OPINION FILED DECEMBER 30, 2003

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

Claimant represented by HONORABLE SILAS H. BREWER, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE THOMAS J. PENDOWSKI, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed January 21, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the stipulations agreed to by the parties at the pre-hearing conference conducted on September 19, 2002, and contained in a pre-hearing order filed September 19, 2002, as well as those at the hearing herein, are hereby accepted as fact.

3. That the extent of the aggravation injury which Claimant sustained on September 16, 1998, was a temporary aggravation of his pre-existing fibromyalgia/muscle spasm condition and that Claimant has been restored to his pre-injury condition as of the time of the first hearing herein, June 28, 2000.
4. That the Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary medical treatment which is causally related to his right hip, right leg, and right shoulder injury of September 16, 1998, as well as the temporary aggravation of his preexisting fibromyalgia/muscle spasm condition, through the date of the initial hearing herein, June 28, 2000.
5. That the Claimant has failed to prove by a preponderance of the medical or non-medical evidence that the prescriptions for Valium, both oral and injectable, are reasonably necessary for the treatment of his fibromyalgia/muscle spasm condition, or any compensable injury of September 16, 1998, for which the respondent should be liable; additionally, in view of his pre-existing fibromyalgia/muscle spasm condition, he has failed to prove that his compensable injury of said date is the major cause of his need for Valium treatment; that since the time of the initial hearing on June 28, 2000, the Claimant's condition was restored to the condition that existed before the injury, and the Claimant has failed to prove that his compensable injury has precipitated or caused the need for additional medical treatment for any

period beyond the time of the initial hearing on June 28, 2000, for which the respondent should be liable.

6. That Claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent disability benefits; specifically, there is no impairment rating in the record, no opinion as to "major cause", and no "objective findings" of any permanent impairment.
7. That the Claimant has failed to prove by a preponderance of the evidence that the compensable injury of September 15, 1998, was the major cause of any permanent impairment or disability sustained by him; specifically, Claimant had been diagnosed with pre-existing conditions of a chronic nature, namely muscle spasms and fibromyalgia, was prescribed medications for such conditions prior to his compensable injury, and has failed to prove by a preponderance of the evidence that there was any new or additional degree of impairment or disability experienced by him which was causally related to his compensable injury.
8. That the Claimant has failed to prove by a preponderance of the evidence [sic] that he is entitled to any penalty pursuant to Ark. Code Ann. § 11-9-802 beyond which has already been accepted and paid by the respondent.

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.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I must respectfully dissent from the majority opinion finding that claimant sustained only a temporary aggravation of his preexisting fibromyalgia and is not

entitled to any benefits subsequent to June 28, 2000, the date of the first hearing. I would reverse the opinion of the Administrative Law Judge.

On September 16, 1998, claimant sustained an admittedly compensable injury to his right hip, right shoulder, and right leg, when he was standing on a chair and fell. These particular injuries were accepted by respondent.

In 1992, claimant was injured in a nonwork-related boating accident. He was eventually given a diagnosis of, and treatment for, fibromyalgia.

Dr. Joe Lee Buford, claimant's family doctor, testified that fibromyalgia is a collection of systems with a poorly understood cause. There are no diagnostic tests to confirm it and it is basically a diagnosis of exclusion. Respondent points to the opinion of Dr. J. K. Smelz, a physiatrist, who saw claimant briefly on one occasion in May 2002. Dr. Smelz opined that claimant does not suffer from fibromyalgia. However, Dr. Buford's diagnosis was confirmed by Dr. Jack Fendley, as well as Dr. Laura B. Trigg, a rheumatologist, which I point out is a medical speciality usually involved in the diagnosis and treatment

of fibromyalgia. Additionally, I note that in an opinion filed March 28, 2001, the Administrative Law Judge found that claimant's muscle cramps were causally related to the compensable injury, and that the compensable injury aggravated claimant's preexisting fibromyalgia. These findings were affirmed and adopted by the Full Commission on February 21, 2002. Thus, there is no merit to respondents' argument that claimant does not suffer from this condition.

The Administrative Law Judge, and now the majority, have chosen the arbitrary date of June 28, 2000, as the date claimant is no longer entitled to benefits for fibromyalgia because the aggravation was only temporary. In my opinion, there is insufficient evidence in the record to support this conclusion.

Admittedly, claimant was experiencing symptoms and being treated for muscle spasms prior to the compensable injury. However, claimant was continuing to work and function in his other daily activities. Further, Dr. Buford, who has provided extensive treatment for claimant's condition, testified that claimant's symptoms "certainly" intensified after the work-related injury (i.e.,

more frequent and severe). Dr. Buford added that prior to the work-related injury, claimant's condition seemed to be stable without "major problems," that claimant's condition did not require very much medication, and that claimant was not restricted in his daily activities. Dr. Buford testified that since the compensable injury, claimant cannot function on a daily basis and certainly cannot engage in any gainful employment. Although Dr. Buford was unable to quantify the extent of claimant's permanent anatomical impairment, he testified that the compensable injury was "a large portion of it" and "a major factor with him." The greater weight of the evidence indicates that claimant's tremors and muscle spasms have increased in frequency and intensity following the work-related injury.

Based on the above evidence, I find that claimant has proven by a preponderance of the evidence that his preexisting fibromyalgia was permanently aggravated by the compensable injury and that he is entitled to additional benefits for this condition.

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SHELBY W. TURNER, Commissioner