

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F004974

MICHAEL POLLARD, EMPLOYEE	CLAIMANT
MERIDIAN AGGREGATES, EMPLOYER	RESPONDENT NO. 1
RELIANCE NATIONAL INDEMNITY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 10, 2003

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

Claimant represented by HONORABLE LAWRENCE FITTING, Attorney  
at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by HONORABLE J. DAVID WALL,  
Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an opinion and order filed by  
the Administrative Law Judge on January 31, 2003. In that  
opinion and order, the Administrative Law Judge found in  
relevant part that the claimant's compensable injury has  
produced a permanent anatomical impairment of 11% rated to  
the body as a whole. The Administrative Law Judge found  
that the claimant experienced a 20% impairment to his wage-  
earning capacity, and the Administrative Law Judge found

that the Second Injury Fund is liable for the wage-loss benefits awarded.

After conducting a de novo review of the entire record, we find that the claimant has failed to establish by a preponderance of the evidence that an injury sustained at work on April 4, 2000 is the major cause of the claimant's 11% anatomical impairment at issue. Therefore, we find that the Administrative Law Judge's award of benefits for 11% permanent anatomical impairment must be reversed. In addition, because the Administrative Law Judge's award of benefits for permanent anatomical impairment must be reversed, we find that the Administrative Law Judge's award of permanent disability benefits in excess of that 11% anatomical impairment must also be reversed. See Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000).

Ark. Code Ann. § 11-9-102(4)(F)(ii) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

The relevant facts in the present case are not in dispute. The claimant had a stenosis condition in his lumbar spine which preexisted his injury at work on April 4, 2002, and which was asymptomatic prior to that injury. The work injury caused the stenosis to become symptomatic. The claimant underwent surgery to treat the resultant back condition, and the Administrative Law Judge assigned the claimant 11% anatomical impairment rated to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, as a result of the work-related injury and subsequent surgery.

The issue presented in this case is whether or not an injured worker with a lumbar stenosis condition can establish the major cause requirement of Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) by establishing that the stenosis was asymptomatic before a work injury but became symptomatic when the work injury aggravated the preexisting stenosis.

While it does not appear that the Arkansas courts have ever addressed this precise question stated in this precise manner, we understand Section 102(4)(F)(ii)(a) to require the claimant to establish that a work injury in fact caused some degree of identifiable abnormality at issue, and that the claimant has not established his burden of proof where

the preponderance of the evidence instead establishes that the work injury only aggravated a preexisting stenosis condition. Accord Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 141 (1998). Since the claimant has failed to establish by a preponderance of the evidence that his work-related injury caused the stenosis which required surgery, we find that the claimant has failed to establish that his compensable injury was the major cause of the 11% impairment assigned by the Administrative Law Judge for surgical treatment to the spinal stenosis. Because we find that the claimant has failed to establish that he has sustained a compensable anatomical impairment, the Administrative Law Judge's award of disability benefits must also be reversed.

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. The majority holds that as a matter of law a claimant cannot show that a work injury was the major cause

of his or her disability by showing that his preexisting condition was asymptomatic prior to the injury but became symptomatic when the work injury aggravated the condition.

I disagree with this analysis because a finding that an injury was a "major cause" of a claimant's disability turns on factual findings, shown by a preponderance of the evidence, that a work-related injury was more than 50% of the cause of a disability, and, therefore, is not a "matter of law." Ark. Code Ann. § 11-9-102(14) (B) ("A finding of major cause shall be established according to the preponderance of the evidence.").

Further, the majority's analysis here conflicts with the court's holding in Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167 (2002). In Westbrook, the respondent appealed the Commission's award of permanent partial disability benefits to the claimant. The Commission held that the claimant's work-related injury to his right shoulder aggravated an asymptomatic preexisting condition and was the major cause of 3% of the claimant's permanent impairment to the body as a whole. The claimant testified that he had never had any pain or soreness to his right shoulder prior to the incident at work. Unbeknownst to the claimant, however, he had a preexisting chronic rotator cuff

tear and cyst in his right shoulder at the time of the work-related accident. The work-related injury aggravated the claimant's preexisting condition and triggered the claimant's need for subsequent surgery on his right shoulder.

The claimant's treating physician stated that the work-related injury was not the major cause of the claimant's right shoulder pain after analyzing an MRI that revealed a large chronic rotator cuff tear and a cyst in claimant's right shoulder, both of which preexisted the claimant's work incident. The claimant's treating physician opined that the claimant's problems with his right shoulder "began with the work-related injury and that this injury 'aggravated a pre-existing problem with the right shoulder (chronic rotator cuff tear).'" The doctor further stated: "I feel the work-related injury was an aggravating factor, or the straw that broke the camel's back, and this has added to his underlying shoulder problem. With this in mind, I would say the work-related injury added 5% impairment to his shoulder. In other words, 45% of his impairment would be related to the pre-existing injury and 5% could be assigned to the work-related injury." Id. at 170. The Commission concluded that the claimant had shown

"by a preponderance of the evidence that his 'right shoulder difficulties were aggravated by, and thus causally related to, his employment.'" Id. at 171. The Commission then concluded that "'the compensable injury is the major cause of 3% of claimant's total permanent impairment to the body as a whole.'"

The appellate court affirmed the Commission's award of permanent partial disability benefits:

Appellants further contend that the Commission erred in awarding [appellee] permanent partial benefits because Dr. Lipke opined that the compensable injury was not the major cause of appellee's permanent disability or need for treatment... We note, however, that the Commission did not award permanent partial disability benefits based on Dr. Lipke's conclusion that appellee had a 30% impairment to the body as a whole. Rather, consistently with Dr. Lipke's findings, the Commission concluded that the compensable injury was the major cause of 3% of appellee's permanent impairment to the body as a whole, and consequently, the Commission awarded permanent partial disability benefits on that basis. Dr. Lipke's exacting testimony provided the Commission with a preponderance of evidence from which to determine that the compensable injury was the major cause of appellee's 3% impairment. See Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998) (holding that the 'major cause' requirement was satisfied by evidence that an injury necessitated performance of surgery and that this

surgery, at the site of a previous one, was the reason for the additional 2% impairment rating.) We affirm the Commission's award of permanent partial disability benefits.

Id. at 172-73. The court, therefore, upheld the Commission's award of permanent partial disability benefits to a claimant where the claimant's work-related accident merely caused a preexisting condition to become symptomatic.

Here, as in Westbrook, the record reflects that Claimant was asymptomatic, though he had a stenosis condition in his back, and did not become symptomatic until after he sustained the work-related injury that aggravated the stenosis and, thereby, necessitated his back surgery. The majority, however, has announced a rule of law that contradicts Westbrook by holding that a claimant cannot receive a permanent disability benefit award in cases where an asymptomatic preexisting condition becomes symptomatic after a work-related accident because such a transformation from asymptomatic to symptomatic is not "major cause." The majority holds that the statute requires Claimant "to establish that a work injury caused some degree of identifiable abnormality at issue" and that, as a matter of law, "Claimant has not met his burden of proof where the preponderance of the evidence instead establishes that the

work injury only aggravated a preexisting stenosis condition." Westbrook illustrates that a claimant can establish "major cause" by showing that an asymptomatic preexisting condition became symptomatic as a result of a work-related injury without showing a degree of "identifiable abnormality."

Additionally, the majority's reliance on Needham is misplaced and readily distinguishable. In Needham, the claimant's treating physician had given her a 4% impairment rating to the body as a whole due solely to a non-operable herniated disc at C6-7, which she sustained as a result of a nonwork-related car accident. She later sustained an injury at work that caused a small compression fracture at C7. Unlike Westbrook, the opinion does not reflect that her doctor gave her any impairment rating with respect to the subsequent work-related injury. As such, the Court affirmed that Commission's denial of permanent partial disability benefits "because this rating is for the nonwork-related event." Needham, therefore, does not support the majority's holding.

For these reasons, I, therefore, respectfully dissent.

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SHELBY W. TURNER, Commissioner