

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F111849

DANNY BEAVER,
EMPLOYEE

CLAIMANT

LANIER, INC.,
EMPLOYER

RESPONDENT

CANNON COCHRAN MGMT.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 4, 2004

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 WILLIAM C. FRYE,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

Claimant appeals the September 24, 2003 decision
of the Administrative Law Judge denying Claimant's claim for
permanent disability benefits. Based upon our de novo
review of the entire record, we reverse the Administrative
Law Judge's decision because Claimant's permanent impairment
is supported by objective findings.

Claimant brought this claim for temporary total
disability and permanent disability benefits as a result of
a fall down a flight of stairs. The parties have stipulated
that Claimant sustained a compensable injury on October 4,

2001. At the time of his injury, Claimant was a mill supervisor and his responsibilities included packing grain, driving trucks, and working as a grain operator at Respondent's feed manufacturing facility.

At the hearing, Claimant testified that he "was coming down the staircase and water was had laid on the stairs or whatever and it was slick and my feet went out from under me and I remember pulling myself up from the bottom." The emergency room report states that Claimant landed in a seated position and that he does not complain of nausea or vomiting. He testified on cross-examination, however, that he reported to the emergency room that he had hit his head during the fall and was then put in a neck brace. An MRI and CT scan of Claimant's head, cervical and thoracic spine did not evidence injury.

Claimant testified that he has experienced headaches, dizziness, inability to focus his vision, and balance problems since the fall and did not have these symptoms prior to the injury. Claimant testified that he continues to suffer from a loss of balance and that he gets light-headed and dizzy. He explained that these symptoms are worse when he has a headache, which he stated occurs daily.

Claimant was seen by his family doctor, Dr. Daniel Davidson, the following day. Dr. Davidson's records state that Claimant had muscle spasms and tenderness in his entire back. Dr. Davidson also noted muscle spasms on his November 2, 2002, examination of Claimant. On November 16, 2002, Dr. Davidson notes that Claimant is having "tremendous headaches and even vomiting."

Claimant presented to the emergency room on November 28, 2001, with complaints of back pain and headaches. MRIs of Claimant's cervical and lumbar spine and head returned normal. On November 30, 2001, Claimant again complained to Dr. Davidson that he had been experiencing headaches since the fall. Dr. Davidson subsequently referred Claimant to Dr. Annette Meador for an evaluation for pain management.

In a report dated December 17, 2001, Dr. Meador wrote that Claimant described his account of the fall and his subsequent symptoms as follows:

During the accident, he struck his head. He had not syncope, but was dazed for several minutes afterward. He had a headache after the incident and has continued to have headaches, associated with nausea and vomiting which he did not have before. He has had episodes of dizziness. His wife also states that he has had some trouble with his memory and

comprehension. He asked questions about their cattle that he should already know.

Dr. Meador diagnosed Claimant with "T12 compression fracture with radiculopathy, status post fall at work. Left sacroiliac strain, status post fall at work. Postconcussion headaches, cervical flexion and extension injury, and occipital neuralgia, status post fall at work. Probable renal contusion secondary to fall at work." Dr. Meador further explained her diagnosis of postconcussion headaches in correspondence dated December 17, 2001:

I believe that he suffers from postconcussion headaches, as he has dizziness, nausea, and vomiting. He has occipital neuralgia as well, as the occiput struck the steps. He has a cervical flexion and extension injury also. I understand that his worker's comp adjuster has denied treatment of anything other than his back pain. Danny appears to be a very straightforward individual, and I have no doubt that his neck and head pain were associated with his injury.

On March 21, 2002, Dr. Meador stated in correspondence to Dr. Peggy Brown that Claimant's "dizziness has interfered with his physical therapy, as he says he cannot tolerate it. I am referring him to you for evaluation of what appears to be severe post concussion headaches. As an anesthesiologist, I am not equipped to

evaluate the headaches from this standpoint of a possible concussion."

On March 26, 2002, Dr. Peggy Brown, a neurologist, evaluated Claimant. Dr. Brown wrote in correspondence to Dr. Meador that Claimant complained of "severe back pain, numbness in his legs, headaches, dizziness, nausea, off-balance, numbness and tingling in his arms and fingers and sensitivity to light and noise." She also noted that Claimant stated that the pain "starts at the base of his skull and radiates over the top of his skull going behind his eyes." Dr. Brown noted that Claimant had "give-way weakness" throughout the exam, that he stood bent at the knees and hips, and "winces with every step and he falls into furniture on formal testing." "On watching the patient walk away to his truck, he is able to walk across the examining room, go out the door, walk to the truck, open the door and get in entirely unassisted without falling." Dr. Brown also opined that "Mr. Beaver presents with subjective complaints with no objective findings in relating to his headache" and noted that she believed that he "appears to be augmenting his physical examination." Dr. Brown recommended an increase in pain medication, but otherwise stated that she did not think she could help him further. Dr. Brown's

report did not reference the inner ear or the inner ear as a possible source of Claimant's recurrent headaches.

On May 5, 2002, Claimant sought treatment from the emergency room. The emergency room records state that he complained of severe headaches and "migraines since he fell 7 months ago 20 feet, states has hearing problems and balance problems since fall this is worsening, but has appointment this week for diagnostic testing for this." He reported a history of nausea and vomiting. A CT exam of Claimant's head returned normal.

Dr. John R. E. Dickins, an otologist, was the first physician to examine Claimant's inner ear in order to determine whether that was the source of his dizziness and headaches. Dr. Dickins first evaluated Claimant on May 6, 2002, and diagnosed Claimant with uncompensated left peripheral vestibular lesion and left unilateral sensorineural hearing loss, which he testified can occur as a result of trauma. Dr. Dickins explained during his deposition testimony that an uncompensated left peripheral lesion means that the left inner ear has been damaged. Dr. Dickins further explained that the vestibular system is a "complex system made up of vision, sensory input from vision, basically seeing the horizon of the world around us"

and that "the inner ears ... sense head rotation, horizontal and vertical acceleration."

Dr. Dickins conducted three tests to determine whether Claimant's inner ear was the source of his dizziness and balance problems. Dr. Dickins testified that the purpose of the testing is to "try and isolate where weaknesses, where damage, where abnormalities are in that system that might explain the patient's complaints of unsteadiness, dizziness." The first test was a hearing exam from which he concluded that Claimant had a moderate to severe high frequency nerve hearing loss. Second, Dr. Dickins conducted a dynamic posture postureography, which he testified was comprised of six different positions with variations of the feet being apart or together, the eyes being opened or closed, and the platform being stable or swaying in response to the pressure asserted by the individual being tested. The platform consists of electronic sensors that detect the direction and amount of a person's sway while on the platform to evaluate the inner ear's ability to work with the brain to maintain balance.

Dr. Dickins testified that Claimant fell while in the fifth position of the dynamic posture postureography, which is the position where the platform swayed underneath

him while his eyes were closed. This result indicated that Claimant had an uncompensated vestibular problem. As for the objectivity of the dynamic posture postureography exam, Dr. Dickins stated that this exam has electronic sensors that, in essence, enable the examiner to monitor responses and detect false results:

A: ...this is a test that if somebody tries to malingering or falsely give information, it's pretty sensitive to pick that up, because it's hard to volitionally, on your own, create an abnormal pattern. You create the wrong type patterns. So his was very consistent that he tried hard and did everything right.

Q: ...is there some subjectivity in that test because you have to rely on the patient?

A: These tests are pretty objective, provided they didn't load themselves with medication beforehand or do something like that, and there are certain things in there we can pick out if somebody has medicated themselves, and there's no evidence of that.

He further explained that the dynamic posture postureography, however, does not indicate whether the uncompensated vestibular problem is in the brain or the inner ear.

Dr. Dickins testified that he, therefore, conducted an electronystagmogram to determine if the inner ear was the source of the uncompensated vestibular problem. During the electronystagmogram, Claimant looked through goggles with cameras that recorded eye movement. Dr. Dickins described this exam as follows:

A: ...We take him through certain position changes and run warm and cool water into his ear canal to artificially stimulate the balance system on that side, so we can compare the relative strengths of the right ear to the left ear. His left ear is significantly weaker than his right, and he has-

Q: Does he have some weakness in the right side?

A: He had- - it's normal on the right side, but the left side is significantly weaker than the right. And he has throughout the test, as we change his position, what we call right beating nystagmus. It's a quick, jerky eye movement. That's the body's response to the brain being told we're rotating, one inner ear being stimulated. So the eye starts searching spontaneously to try to find something to fix on.

Based upon his observations and these tests results, Dr. Dickins diagnosed Claimant with uncompensated left peripheral vestibular lesion and left unilateral

sensorineural hearing loss. Dr. Dickins ultimately opined that Claimant's permanent impairment was 4-5% to the body as a whole.

Dr. Dickins' report to Dr. Davidson on May 6, 2002, states that he reviewed the November, 2001, MRI of Claimant and describes his vestibular evaluation of Claimant as follows:

VESTIBULAR EVALUATION: This was done on 5/6/02 and showed a severe vestibular pattern on dynamic posturography. This was a very organic test and showed absolutely no evidence of malingering or magnification of his injury. His electronystagmogram showed a significant unilateral weakness to the left side with significant right-beating nystagmus suggesting this is still an active lesion.

MRI SCAN: I reviewed the MRI scan of Mr. Beaver done in 11/01. There is no evidence of fluid in the mastoid. The internal auditory canals [sic] look good. He has a very pneumatized mastoid.

CT SCAN: A CT scan of his temporal bones has not been done and is not indicated at this juncture.

Everything points toward the fact that in addition to his cervical injuries he has suffered significant left-sided cochleovestibular damage. This is certainly not helping his neck as active vestibular lesions tend to create cervical spasm...I also have set up a vestibular therapy evaluation by our vestibular physical therapist. This will

not require intense hands on therapy but a series of visits with home therapy. I am cautiously optimistic that we can improve his symptoms to some degree but certainly the neck and vestibular system feeding on each other are going to cause the recovery of both.

Dr. Dickins testified that Claimant reported to him that he landed on the left side of his head during the fall down the stairs. Dr. Dickins, however, further explained that even if Claimant had landed in a seated position that such fall would be enough trauma to cause inner ear damage:

Q: Now, this type of problem, if it is trauma related, is it a blow to that area that will cause it, or maybe that's a poorly worded question?

A: It can come from a direct blow to that area, it can come from a blow to the opposite side...Sometimes just a strong physical blow, even to the chest or the torso, can change the pressures inside the head enough to create some damage.

Q: ...Would a fall landing in a seated position be the type of-

A: That could potentially cause it, in the fact that you- - that kind of even landing on something, quote, unquote, "soft," like if he landed on a grain-covered floor as opposed to steel, he could potentially have a transient increase of intracranial

pressure, which can- - the fluid pressure can press against the inner ear and cause similar things.

Dr. Dickins also described symptoms of inner ear difficulty:

Q: If he indicated at that time he was not having any dizziness or change in pressure at that point, would that surprise you?

A: A little and not. Sometimes it's immediately after the accident people won't notice the ear symptoms, but they should notice them within four to five days to a week. A lot of times they're so wrapped up in the pain in the back or whatever, that that only becomes clear shortly thereafter, but it should occur shortly thereafter.

Claimant returned to the emergency room on May 23, 2002, with complaints of nausea, vomiting, and headache and was prescribed pain medications. Claimant continued to complain of severe headaches to Dr. Davidson until June 4, 2002, at which time the carrier refused to continue to pay for his visits to Dr. Davidson. Dr. Meador also released Claimant from her care on June 4, 2002, and stated that she had no further treatment options available to Claimant.

Dr. Jim Moore, a neurologist, conducted an independent medical exam of Claimant on September 26, 2002. Dr. Moore testified that he conducted a traditional Romberg exam, which he described as a balance test "achieved by

having the individual stand straight, feet together, eyes closed. Most people are able to maintain their balance steadily or with only a slight amount of wavering but without any specific fall or leaning." He further explained that "I don't go into all of the in-depth audiological evaluation, but these are basically neurologic or nuerosurgical/neurological studies or testing." Dr. Moore also testified that he did not have the machinery to use in conducting the test as did Dr. Dickins. Dr. Moore opined that Claimant's physical impairment rating is 4-5% to the body as a whole.

On September 27, 2002, Dr. Dickins wrote that he evaluated Claimant on September 16th and that Claimant continues to have significant dizziness and that he observed severe cervical muscle spasm. Dr. Dickins opines that "[a]t this time this gentlemen is nowhere near in shape to be able to work and I do not see that this is going to change anytime until his cervical situation is brought under control." Claimant testified at the hearing that he is still being treated by Dr. Dickins.

The Administrative Law Judge held that Claimant was not entitled to temporary total disability benefits and that the impairment rating was not supported by objective

findings. The sole issue raised in Claimant's brief on appeal is that the impairment ratings issued by Dr. Dickins and Dr. Moore were supported by objective findings. Respondents argue that Claimant's injury is not compensable because Claimant's testimony regarding his injury is inconsistent, he had "his tenuous testing observed by Drs. Meadors and Brown," and there are no objective findings showing loss of vestibular function. We reverse the Administrative Law Judge's holding and find that Claimant's vestibular dysfunction and resulting physical impairment rating are supported by objective findings.

Ark. Code Ann. § 11-9-704(c)(1) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are defined as: "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Repl. 2002). With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is not the product of a diagnostic procedure which does not come under the voluntary control of the patient. Dept. of Parks and

Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998).

The Commission has the authority and the duty to weight medical evidence to determine its medical soundness, and we have the authority to accept or reject medical evidence.

Mack v. Tyson Foods, Inc., 28 Ark. App. 299, 771 S.W.2d 794

(1989); Wasson v. Losey, 11 Ark. App. 302, 669 S.W.2d 516

(1984); Farmers Insurance Co. v. Buchheit, 21 Ark. App. 7,

727 S.W.2d 391 (1987). Likewise, the Commission is entitled

to examine the basis for a physician's opinion, like that of any other expert, in deciding the weight to which that

opinion is entitled. However, as with any evidence, we can

not arbitrarily disregard the testimony of any witness. In

making determinations regarding the existence and extent of

anatomical loss of use, we are not limited solely to medical

evidence.

After reviewing the record as whole, we find that

Claimant's permanent impairment rating is supported by

objective findings. The Administrative Law Judge summarily

dismissed the aforementioned evidenced simply because the

testing relied, in part, on Claimant's responses. This

conclusion is contrary to the Court's analysis in Wentz v.

Service Master 75 Ark. App. 296(2001)and Smith v. Country

Market, 73 Ark. App. 333 (2001)

As in Wentz and Smith, supra, we find that the dynamic posture postureography exam is an objective measurement because it electronically records responses that are then analyzed into testing patterns. We further give weight to Dr. Dickins testimony that these electronically produced test patterns that produce irregular patterns when a patient has attempted to manipulate the exam results and that there was no evidence of malingering here.

We also find that the Electronystagmagram produces objective medical evidence by electronically monitoring nystagmus or jerky eye movement. Nystagmus is defined in Dorland's Medical Dictionary as "an involuntary, rapid, rhythmic movement of the eyeball." We find, therefore, that nystagmus is not within an individual's voluntary control. See e.g., Moore v. State, 323 Ark. 529, 546 (1996) (recognizing that the Horizontal Gaze Nystagmus test, which is an accepted method of determining intoxication, measures the involuntary jerking of the eyeball). We find, therefore, that this test produced objective findings of injury to Claimant's inner ear.

For these reasons, we find that Administrative Law Judge's decision should be reversed and that Claimant is entitled to 5% permanent impairment to the body as a whole

because the permanent impairment rating issued by Dr. Dickins and Dr. Moore is supported by objective findings.

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. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.