

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E500479

JACK ESTRIDGE, EMPLOYEE	CLAIMANT
WASTE MANAGEMENT, EMPLOYER	RESPONDENT #1
TRANSPORTATION INSURANCE CO., INSURANCE CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 12, 2004

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

Claimant represented by HONORABLE ROBIN CARROLL and
HONORABLE FLOYD M. THOMAS, JR., Attorneys at Law, El Dorado,
Arkansas.

Respondents No. 1 represented by HONORABLE JUDY ROBINSON
WILBUR, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

Respondents No. 1 appeal the July 16, 2003 opinion
by an Administrative Law Judge finding that claimant has
proven by a preponderance of the evidence that he is
entitled to benefits for a permanent anatomical impairment
of 11% to the body as a whole. After a de novo review of
the entire record, we find that the claimant has met his

burden of proof and, accordingly, the opinion of the Administrative Law Judge is affirmed.

Ark. Code Ann. § 11-9-704(c) (B) (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.” Further, permanent disability “benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” Ark. Code Ann. § 11-9-102(4) (F) (ii) (a) (Supp. 2003). The Commission has adopted the American Medical Association’s Guides to the Evaluation of Permanent Impairment, (4th ed. 1993) for use in assessing the extent of permanent anatomical impairment. Commission Rule 34.

In Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), the Arkansas Supreme Court found that the claimant in the present case sustained a compensable back injury. Although the Court did not use the specific term “aggravation,” it is clear that claimant sustained an aggravation of a preexisting condition. The primary concern was whether there was a causal connection between the lifting at work and the findings at surgery, which revealed basically degenerative abnormalities. The Court found that

such a causal connection exists. This finding is significant because respondent is now arguing that the compensable injury is not the major cause of claimant's permanent anatomical impairment. As noted by the Administrative Law Judge, if the compensable injury caused or necessitated the performance of the surgery and this surgery is the reason for the impairment rating, then the major cause requirement has been met. Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998).

Dr. Mason gave his deposition testimony after assessing the extent of claimant's permanent anatomical impairment pursuant to the Guides. In our opinion, Dr. Mason's testimony, taken as a whole, satisfies the requirement that the compensable injury must be the major cause of the permanent anatomical impairment of 11% to the body as a whole.

Q Pardon me if this gets a little too convoluted. Just tell me and I'll rephrase it.

We defined this -- well, we take these two things, his degenerative disc disease and his injury, and we try to figure out what the major cause of his current condition is.

Legally, we define it as if the second injury or this injury was 50 percent of the problem or more. So

considering that, is 50 percent of his current problem due to the injury he suffered as opposed to the preexisting condition that he had?

A Well, it's a difficult thing to answer. Certainly to develop spondylosis and degenerative changes, it takes a long time for that to develop. Based on the patient's history as it's presented to us, he wasn't having these problems. He was able to work without difficulty.

So what you have to think is that something happened with this lifting injury that caused even worse injury to the disc and based on the patient's history and what he tells us, you would think that, yes, that would be greater than 50 percent what caused his problem, some internal disruption of the disc causing his pain.

Q So his injury on September the 28th, if that's correct, is 50 percent or more of the cause of his current condition?

A Yes, as far as I can determine based on our information from our tests and from the patient's history.

Q Within a reasonable degree of medical certainty.

A Yes, within a reasonable degree of medical certainty.

Based on the above evidence, we find that claimant has proven by a preponderance of the evidence that the compensable injury was the major cause of the permanent

anatomical impairment of 11% to the body as a whole. Accordingly, the opinion of the Administrative Law Judge is affirmed. Respondents No. 1 are directed to comply with the award set forth in the opinion of the Administrative Law Judge. 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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant sustained a compensable injury for which he sustained an 11% permanent physical impairment rating to the body as a whole. Based upon my de novo review of the entire record, and without giving the benefit of the doubt to either party, I find that the claimant has failed to establish by a preponderance of the evidence that his compensable injury is the major cause of the 11% physical impairment rating.

This claim has a long procedural history. After a hearing before an Administrative Law Judge, an appeal to Full Commission, Arkansas Court of Appeals and the Arkansas Supreme Court, a remand to the Full Commission, and an order of benefits, a rescinded order of benefits, and an appeal to the Court of Appeals, this claim is now presently back before the Commission. The Administrative Law Judge rendered an opinion pursuant to our [the Full Commission] November 13, 2001, Order, remanding the claim to the Administrative Law Judge to make more adequate findings on the issue of whether the claimant's compensable injury was the major cause of the 11% permanent physical impairment

rating assigned to the claimant. It is from this decision respondents appeal.

The claimant was found to have sustained a compensable injury to his low back as a result of a specific incident on September 28, 1994, when he was carrying a crosstie which slipped causing the claimant to squat and shift his weight in order to maintain a hold on the crosstie. After initial treatment by his family physician, the claimant underwent an MRI and was referred to Dr. Zach Mason, a Little Rock neurosurgeon. Based upon diagnostic testing, the claimant was thought to have herniated discs. However, during surgery performed by Dr. Mason on January 24, 1995, it was revealed that the claimant did not suffer from any disc herniations. The discharge diagnosis was facet hypertrophy. Following surgery, Dr. Mason's subsequent examinations revealed the claimant to be neurologically intact although the claimant continued to complain of pain.

The claimant eventually came under the care of Dr. Edward Saer, a Little Rock orthopedic surgeon. Dr. Saer attributed the claimant's continued pain complaints to degenerative disc disease. The claimant has received steroid injections, as well as, a radio frequency facet rhizotomy;

nevertheless, the claimant continues to complain of pain. In April of 1996, Dr. Saer offered the claimant the option of a fusion to stabilize the claimant's degenerative spine. The claimant considered this option, but has so far declined to undergo such procedure. Dr. Saer found the claimant to have attained maximum medical improvement as of the claimant's last visit on April 15, 1996.

The claimant returned to Dr. Mason on February 5, 1997. After conducting a physical examination of the claimant, Dr. Mason diagnosed the claimant with post-lumbar foraminotomy bilateral, L4-L5, and L5-S1, on the right.

Dr. Mason further noted:

The patient does have an impairment rating to the body as a whole of 11% based on his surgical changes and the degenerative disc problems that he has at the L4-5 and L5-S1 levels. It is possible that if the patient were to proceed with a lumbar fusion that his impairment rating would be somewhat higher. The rating is based on the AMA Guides to the Rating of Permanent Impairment. Fourth Edition.

In his deposition, Dr. Mason testified that the claimant's injury was 50% or more the cause of the claimant's current condition. Moreover, Dr. Mason was asked the following:

Q. - - - well, we take these two things, his degenerative disc disease and his injury, and we try to figure out what the major cause of his current condition is.

...Legally, we define it as if the second injury or this injury was 50 percent of the problem or more. So considering that, is 50 percent of his current problem due to the injury he suffered as opposed to the preexisting condition that he had?

A. Well, it's a difficult thing to answer. Certainly to develop spondylosis and degenerative changes, it takes a long time for that to develop. Based on the patient's history as it's presented to us, he wasn't having these problems. He was able to work without difficulty.

So what you have to think is that something happened with this lifting injury that caused even worse injury to the disc and based on the patient's history and what he tells us, you would think that, yes, that would be greater than 50 percent what caused his problem, some internal disruption of the disc causing his pain.

Dr. Mason was asked whether the objective findings that are causing claimant's problems and pain existed prior to claimant's compensable injury, to which he responded: "Yes. The objective findings would have preexisted his injury simply because it's impossible to develop these changes in a short period of time."

As I interpret Dr. Mason's testimony, I cannot find that Dr. Mason opined that the claimant's compensable injury is the major cause of the 11% anatomical impairment rating he assigned. Rather, Dr. Mason only related the claimant's compensable injury to the claimant's current condition of pain. Dr. Mason stated in his February 5, 1997, correspondence that the 11% rating was based upon surgical changes and the degenerative disc problems that the claimant has at the L4-5 and L5-S1 levels and that this rating is based upon the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Mason elaborated upon this rating further in his deposition by explaining that the rating was assessed for the spondylotic changes and cord compression for which surgery is performed to decompress the nerve roots.

The record clearly demonstrates that the claimant suffered from preexisting degenerative changes in his lumbar spine. As noted by Dr. Mason, objective findings noted during and after surgery preexisted the claimant's compensable injury. The surgery was intended to alleviate the pain which was thought to be the result of herniated discs, but the actual objective condition which necessitated surgery was clearly degenerative in nature. Accordingly, the

surgery simply ended up addressing the claimant's preexisting degenerative condition. Accordingly, while a causal connection may exist between the claimant's work-related accident and the findings at surgery, I cannot find that the compensable injury is the major cause, or 50% or more the cause for the claimant's permanent impairment rating. The record clearly establishes that the rating was assigned as a result of the degenerative disc disease which was operated on during surgery. The claimant's compensable injury did not cause the claimant's degenerative changes.

After reviewing the record, I find that the claimant is not entitled to the 11% permanent impairment rating assigned by Dr. Mason. The record reflects that the claimant suffered from degenerative disc disease prior to his compensable injury. Dr. Mason assigned the 11% impairment rating based upon the degenerative changes and the surgery to alleviate the pain associated with these changes. As the impairment rating is based upon the claimant's degenerative changes and surgery related to these changes, and since Dr. Mason unequivocally testified that these changes preexisted the claimant's compensable injury, I cannot find that the claimant has established by a preponderance of the evidence that the objective findings

relied upon to assess the 11% anatomical impairment rating are the result of the claimant's compensable injury.

Moreover, Dr. Mason never stated that the claimant's compensable injury was the major cause for the 11% impairment. At best, Dr. Mason only opined that the compensable injury was the major cause of the claimant's current condition which he attributed as pain. Pain is not to be considered when assessing permanent impairment. Therefore, Dr. Mason's opinion regarding major cause is not applicable in considering whether the claimant is entitled to permanent partial disability benefits. As evidenced through Dr. Mason's deposition testimony, the objective findings relied upon by Dr. Mason to assess the 11% impairment rating are not related to the claimant's compensable injury, as they clearly preexisted the compensable event. See, Coleman v. McMillian Blodell Containers, F.C. Opinion filed January 9, 1998 (E608346), Bobby Stevenson v. James River Corp., F.C. Opinion filed January 13, 1998 (E317015), Kendrick v. Classic Contractors, F.C. Opinion filed March 23, 1999, (E609943). Accordingly, I cannot find that the claimant has proven by a preponderance that the compensable injury is the major cause of the 11% rating.

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Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner