

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110145

JUDITH R. MICHAEL,
EMPLOYEE

CLAIMANT

KEEP & TEACH, INC.,
EMPLOYER

RESPONDENT

CANNON COCHRAN MANAGEMENT SERVICES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 10, 2004

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

Claimant represented by HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded the above-styled matter to the Commission for additional findings of fact and conclusions of law. Michael v. Keep & Teach, Inc., CA 03-978 (Ark. App. 6-16-2004). After again reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove she sustained a compensable anatomical impairment pursuant to the provisions of Act 796 of 1993. We therefore affirm the administrative law judge's denial of the claim.

I. HISTORY

The parties stipulated that the claimant sustained a "compensable spine injury" on August 24, 2001. The claimant, a day care worker, testified that while attempting to hold a screaming two-year-old, "The little girl kicked away from me and I almost dropped her and popped forward and it popped my back and I just kind of froze there until I hollered for someone to come and get the little girl." The claimant was assessed with "Acute L-S spine strain" on August 27, 2001.

An MRI of the lumbar spine was taken on August 28, 2001:

The alignment to the lumbar spine is grossly normal....Degenerative disc disease with desiccation is seen at the L3-4, 4-5, and 5-S1 levels. Axial images demonstrate broad-based disc bulges lightly asymmetric to the left at the L3-4 level. No significant central canal stenosis is seen. There is broad-based disc bulge at the L4-5 level with mild to moderate central canal stenosis. Degenerative facet changes with ligamentum flavum hypertrophy are appreciated at the L4-5 level. There is a broad-based disc bulge at the L5-S1 level with no significant central canal stenosis appreciated.

IMPRESSION

Multilevel degenerative disc disease with broad-based bulges in the lower lumbar spine as above. No significant central canal stenosis or focal disc protrusion is appreciated at this time. The alignment to the lumbar spine is grossly normal as above.

The claimant was referred to The Pain Care And Neurology Center for treatment with Dr. Sunder Krishnan

beginning September 19, 2001. Dr. Krishnan treated the claimant with steroid injections.

A neurosurgeon, Dr. Steven L. Cathey, wrote to Dr. Krishnan on January 8, 2002:

Her neurological examination is entirely negative. She specifically has no sign of lumbar radiculopathy and straight leg raising is negative bilaterally. There is point tenderness in the lower lumbar area, but no paraspinous muscle spasm or restriction of movement was noted.

An MRI scan of the lumbar spine is negative to my review. Although I agree with the radiologist, she has "multilevel degenerative disc disease with broad based bulges in the lower lumbar spine", particularly at L4-L5, I believe these changes are expected in a 45-year-old woman. There is certainly no sign of disc herniation, spinal stenosis, nerve root impingement, etc. It is my opinion that these degenerative changes preexisted the injury since the MRI scan was obtained only a few days after.

Sunder, unfortunately, I believe Ms. Michael is the victim of a musculoskeletal injury superimposed on preexisting degenerative disc disease in her lower back. This is certainly not something that is likely to respond favorably to spinal surgery or other neurosurgical intervention. She is going to be calling you to set up a follow-up evaluation, although I don't know if there is anything left to offer her in terms of treatment....

As far as the workers (sic) comp injury is concerned, I do not believe she has sustained any impairment as a result of the August 24, 2001, injury.

Dr. Krishnan pronounced maximum medical improvement on March 21, 2002. Dr. Krishnan completed a To Whom it May Concern form on April 3, 2002:

Judith Michael has an impairment rating of 9% (nine) to the whole body for the work related injury that I have treated.

Dr. Krishan circled the word "is" to complete the sentence, "In my opinion the injury (IS) (IS NOT) greater than 50% of the cause of her impairment."

The respondents paid temporary total disability compensation through April 3, 2002.

Ms. Michael claimed entitlement to additional worker's compensation, and a pre-hearing order was filed with the Commission on June 27, 2002. The claimant essentially contended that she was entitled to the 9% impairment rating assigned by Dr. Krishnan. The respondents contended that the claimant was not entitled to the impairment rating.

After a hearing before the Commission, the administrative law judge found that the claimant was not entitled to benefits for a permanent impairment rating. The claimant appealed to the Full Commission, and we affirmed and adopted the administrative law judge's decision. The case is now back before the Commission on remand from the Court of Appeals.

II. ADJUDICATION

An injured worker must prove by a preponderance of the evidence that she is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia,

Workers' Compensation Commission F100472 (Nov. 20, 2003). Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4)(F)(ii)(a), provides that "Permanent benefits shall be paid only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" means more than fifty percent (50%) of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14).

Ark. Code Ann. §11-9-522(g) directed the Commission to adopt an impairment rating guide to be used in assessing anatomical impairment, which guide could not include pain as a basis for impairment. The Commission therefore adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) published by the American Medical Association. To the extent that the Guides allow the use of subjective criteria for establishing an impairment rating, the Guides must yield to the statutory definition of anatomical impairment as defined by the Arkansas General Assembly. Rizzi v. Sam's Wholesale Club, Workers' Compensation Commission E515370 & E112991 (April 1, 1999). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable

physical or mental findings. Ark. Code Ann. §11-9-704(c)(1).

In the present matter, the Full Commission finds that the claimant did not prove she sustained any anatomical impairment pursuant to the provisions of Act 796 of 1993. Although the parties stipulated that the claimant sustained a "compensable spine injury" on August 24, 2001, the record indicates that the claimant did not sustain a disc abnormality as the result of her compensable injury. An MRI of the lumbar spine taken on August 28, 2001 revealed a "grossly normal" spine. The impression from this diagnostic testing was "Multilevel degenerative disc disease with broad-based disc bulges in the lumbar spine." There is no evidence to show that this multilevel degeneration was the result of the claimant's compensable injury.

Dr. Cathey, a neurosurgeon, informed Dr. Krishnan in January 2002, "An MRI scan of the lumbar spine is negative to my review." Dr. Cathey found no sign of a disc herniation or nerve root impingement. Dr. Cathey opined that the claimant's degenerative changes "preexisted the injury since the MRI scan was obtained only a few days before." Dr. Cathey expressly stated, "I do not believe she has sustained any impairment as a result of the August 24, 2001 injury."

The Commission recognizes that Dr. Krishnan subsequently filled out a form indicating that the claimant had a 9% impairment rating. The Commission is authorized to accept or reject medical opinion and is authorized to determine its medical soundness and probative force.

McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989). In the present matter, Dr. Krishnan's assessment of a 9% impairment rating is entitled to minimal weight when compared to the expert neurosurgical opinion on Dr. Cathey, who expressly determined that the claimant had not sustained any anatomical impairment as a result of the compensable injury. The Commission further notes that Dr. Krishnan did not explain how he derived his assessment of a 9% impairment rating based on the Guides.

There is no evidence in the record to assign a permanent impairment rating for the claimant's compensable injury. The Court of Appeals noted the administrative law judge's finding, "The claimant has failed to demonstrate by a preponderance of the evidence that the compensable injury was the major cause of the permanent disability or need for treatment (9% permanent impairment rating assessed by Dr. Sunder Krishnan.)" Highlighting the language, "permanent disability or need for treatment," the Court determined that the Commission's decision was based on a flawed application

of Ark. Code Ann. §11-9-102(F)(ii). Pursuant to the Court's remand, the Full Commission explicitly finds that the claimant failed to prove she sustained any anatomical impairment pursuant to Ark. Code Ann. §11-9-102(F)(ii). The Commission makes no findings regarding the claimant's entitlement to permanent disability, i.e., wage-loss disability, or medical treatment.

Based on our *de novo* review of the entire record, the Full Commission finds that claimant did not prove she sustained a compensable anatomical impairment pursuant to the provisions of Act 796 of 1993. The Full Commission therefore affirms the administrative law judge's opinion, and we deny and dismiss the claim.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.