

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303745

ROBERT AYDELOTT, EMPLOYEE	CLAIMANT
LOGAN COUNTY, EMPLOYER	RESPONDENT
AAA RISK MANAGEMENT SERVICES, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 13, 2005

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

Claimant represented by the HONORABLE EDDIE H. WALKER JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 29, 2004. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 31, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On March 31, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$243.00 for total disability and \$182.00 for permanent partial disability.

4. On March 31, 2003, the claimant sustained various compensable injuries in an employment related motor vehicle accident, one of these injuries involved his neck or cervical spine.

5. There is no dispute over the claimant's entitlement to temporary total disability benefits. All such benefits, which have accrued to date, have been paid.

6. There is no dispute over the payment of expenses incurred for reasonably necessary medical services, except those incurred for a holter monitor test performed on or about October 29, 2003.

7. The claimant has failed to prove by the greater weight of the credible evidence that the holter monitor test or scan, performed on or about October 29, 2003, represents reasonably necessary medical services for his compensable injuries. Specifically, he has failed to prove by the greater weight of the credible evidence that these services were necessitated by or related to any compensable injury, he sustained in the motor vehicle accident on March 31, 2003. Thus, the respondents would not be liable for the expenses of this service under Ark. Code Ann. §11-9-508.

8. The claimant's healing period from the effects of his compensable injury ended on or about April 2, 2004.

9. The claimant has sustained a permanent physical impairment of 7% to the body as a whole, as a result of his compensable neck or cervical injury. Specifically, the claimant has proven by the greater weight of the credible evidence that his compensable neck or cervical injury was the "major cause" of this degree of permanent physical impairment, that this degree of permanent physical impairment is supported by "objective and measurable" physical findings, that this degree of permanent physical impairment is calculated in a manner that conforms to the official rating guide adopted by this

Commission, and that this degree of permanent physical impairment gives no consideration to complaints of pain, loss of range of motion, or straight leg raising test results.

10. The respondents have controverted the claimant's entitlement to the \$340.00 charge for the holter monitor study or test, performed on October 9, 2003, and his entitlement to any permanent partial disability benefits for permanent physical impairment.

11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded for the permanent physical impairment.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the, October 29, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits for the 7% permanent impairment rating assigned by Dr. Morse. Based upon my de novo review of the record, and without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the evidence that his compensable injury is the major cause of the permanent impairment rating assessed by Dr. Morse.

The claimant sustained an admittedly compensable injury to his neck on March 31, 2003. The claimant received conservative treatment as a result of this injury. In a clinic note dated January 14, 2004, the claimant's treating physician, Dr. Michael Morse, stated:

At this time I would rate him at maximum medical improvement. He is given an impairment rating based upon AMA Guidelines to the Evaluation of Permanent Impairment, Fourth Edition, page 113, table 75, II C, "Unoperated on medically documented injury and pain associated with moderate to severe degenerative changes to structural tests." He has a 6% impairment of the cervical spine based upon one level and an additional 1% based

upon the second level for a cumulative impairment of the whole person of 7%. He is certainly not a surgical candidate....

In a letter written to the nurse case manager,
Dr. Morse stated:

With regard to the impairment rating on Steve Aydelott that was purely based upon his MRI findings. His MRI findings showed degenerative changes in the form of midline disc spur which is pre-existing at C3-4. He has some small midline disc bulges at C4-5 and C5-6. It is impossible to know whether these were pre-existing or not. It is also impossible to tell if these were the pain generators for his neck pain. If one were to use MRI findings, then a 7% impairment rating would be given. If one were to use pain only, then a 0% impairment rating would be given.

I would concur with Dr. Rutherford's evaluation in all other aspects.

As you know, there is very little correlation between MRI findings and degree of pain a patient is having and the only way to know whether the accident caused the MRI abnormality would be to have a scan immediately before the accident and then a scan immediately after the accident.

Although the claimant denied any previous neck injury or neck complaints, the medical records belie this assertion. Just one month prior to the claimant's compensable injury, the claimant was evaluated by C. Wayne Winkle, a psychologist, in relation to his job

application with the Logan County Sheriff's office. Dr. Winkle's report dated February 21, 2003, states in pertinent part:

Test and interview data show this man to have some significant potential problem areas. For example, he has test scores that indicate a significant over-concern with physical pains and discomfort. In talking with him about this specific area, I did learn that he has had a neck injury in the past, which now leads him to have numbness and tingling in his arms and hands, and even perhaps when he is driving. He also reports a significant number of stress headaches and an elevation of his blood pressure at times....

Likewise, although the claimant only reported a prior history of lumbar disc problems and posttraumatic arthritis of the lumbar spine when he was initially examined in the emergency room for his compensable injury, a review of the medical records reveals that the claimant at times has revealed a history of a previous cervical injury. A Neuropsychological Evaluation performed by Dr. Gene Chambers, at the request of the claimant's treating physician reveals:

He denied any significant injuries, but then stated several years previously he fell off a scaffold and bumped his head on a wood floor. He stated as a result, he had to wear a neck brace for a while.

The record reveals that the claimant has a learning disability and a low I.Q. Thus, whether the claimant's failure to testify regarding a previous cervical injury is intentional or not, the medical records contain on at least two separate occasions admissions by the claimant of a previous cervical injury. One such admission came prior to the claimant's compensable injury, and one subsequent to the injury. In reporting the injury to Dr. Winkle, the claimant described radiating pain into his arms and hands as recently as one month before the claimant's compensable injury. In reporting the injury to Dr. Chambers, the claimant described the injury as severe enough to require a neck brace for a period of time.

I find that the claimant failed to prove by a preponderance of the evidence that he is entitled to compensation for a permanent physical impairment. Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Therefore, when considering claims for permanent physical impairments, the Commission must impartially weigh all of the evidence in the record to determine whether the preponderance of the evidence establishes that the worker sustained a permanent physical impairment as a

result of a compensable injury. Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994).

A.C.A. § 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 claimant was assessed a 7% anatomical impairment rating based solely upon the MRI findings of small midline disc bulges at C4-5 and C5-6. Dr. Morse clearly stated that he could not determine whether these disc bulges resulted from the claimant's compensable injury without evidence of an MRI scan immediately before and after the claimant's compensable injury. Although the claimant and his mother both denied that the claimant had any previous cervical injury or problems, I do not find such testimony to be credible. The claimant volunteered to both Dr. Winkle and Dr. Chambers that he had sustained an injury to his neck in the past. The history the claimant provided to Dr.

Winkle of a previous neck injury with radiating pain into his arms and hands prior to the claimant's compensable injury, casts grave doubt over whether the MRI findings of small midline disc bulges at C4-5 and C5-6 resulted from the claimant's compensable injury. Accordingly, to find that the claimant's compensable injury resulted in these MRI findings would require this Commission to resort to speculation and conjecture. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A.C.A. § 11-9-102(4)(F)(ii)(a) requires the claimant to establish by a preponderance of the evidence that his work injury in fact caused some degree of identifiable impairment. While it is undisputed that the claimant sustained a 7% anatomical impairment rating as a result of two small unoperated on bulging discs, I find that the claimant has failed to establish by a preponderance of the evidence that his compensable injury resulted in this impairment. In my opinion, I find that the claimant has failed to establish that his compensable injury was the major cause of his 7%

impairment rating. See Wal-Mart Stores v. Westbrook, 77 Ark. App. 167, 725 S.W.3d. 889 (2002). Therefore, I find that the decision of the Administrative Law Judge must be reversed. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner