

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110249

TRACY W. ESSEX, EMPLOYEE	CLAIMANT
KERR'S CABINETS & DOORS, INC., EMPLOYER	RESPONDENT
ZENITH INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JUNE 15, 2005

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

Claimant represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE AMY S. HUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals and the respondent cross-appeals from a decision of the Administrative Law Judge filed July 30, 2004.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed at all relevant times.

3. Claimant's average weekly wage is \$580.60.

4. Claimant sustained a compensable injury to his low back on August 27, 2001.

5. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to a permanent impairment rating and related benefits. Viewing the record as a whole, including proof of claimant's preexisting symptoms and condition, claimant did not prove that his compensable injury is the major cause of his impairment.

6. Claimant did not sustain his burden of proving entitlement to wage-loss benefits, since he failed to establish entitlement to a permanent impairment rating.

7. Claimant is entitled to a TENS unit at respondents' expense, as a reasonably necessary medical treatment or apparatus in connection with his injury.

8. Claimant is not entitled to an award of an attorney's fee, because the applicable statute does not permit such awards on medical benefits or services.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is affirming and adopting an Administrative Law Judge's decision which denied a claim for permanent disability benefits. In my opinion, this decision is contrary to the Workers' Compensation Act, as it has been

interpreted and applied by the Arkansas Court of Appeals. For that reason, I respectfully dissent.

This claim is being denied because of the Majority's finding that the claimant suffered from preexisting degenerative spinal disease and that it was this preexisting condition, and not the injury the claimant suffered at work, that is the major cause of the claimant's disability. The finding of preexisting spinal disease is based primarily upon the opinion of Dr. Earl Peoples, a consulting physician retained by the respondent to do an evaluation of the claimant. This opinion is set out in a report dated February 4, 2003. In it, Dr. Peoples concluded that the claimant was suffering from degenerative disc disease. In reaching this conclusion, Dr. Peoples noted that a September 2001 MRI of the claimant's back revealed, among other things, annular tears at L3-L4 and L5-S1, as well as degenerative changes at L4-L5. According to the report, Dr. Peoples asked a musculoskeletal radiology specialist to review the MRI scan, and this unnamed specialist also stated that the claimant had a tear in the annular fibers. While Dr. Peoples agreed that a tear would generally be thought of as traumatic, he concluded that tears could also be

described as "fissures" and that a fissure would be the result of normal wear and tear. After finding that a fissure and a tear would be basically the same thing, Dr. Peoples concluded that the tears in the claimant's annulus were "basically a degenerative pattern."

I find Dr. Peoples reasoning to be circular and unconvincing. Without any factual basis whatsoever, he simply renames the claimant's injuries and concluded that they were degenerative in nature. I cannot find that the conclusions of Dr. Peoples can be the basis of any factual findings in this case.

Other than Dr. Peoples' report, there is little support for the contention that the claimant's back problems were primarily degenerative. The claimant testified at the hearing that he felt a sudden onset of pain when he was lifting a four foot by eight foot plywood sheet. In his initial doctor's visit with Dr. Vicki Stancil, on April 30, 2001, her notes state that the claimant, "lifted and twisted 100 pounds and noticed immediate pain in his back that got progressively worse...".

The claimant provided similar information to Dr. Ron Williams, a Little Rock neurosurgeon who saw the claimant on October 3, 2001. In his report of that date, Dr. Williams noted that the claimant had been having difficulty with his back on and off for quite some time. He further stated, "The pain became worse when he injured himself working on August 25, 2001 while lifting some lumber. That produced back pain radiating to the right leg."

The claimant once again reiterated his statement of a specific incident injury to his back when he underwent a functional capacity evaluation in January 2002. In a evaluation report dated January 21, 2002, the following history was noted: "On 8/27/01, he felt a grinding pain in his back and right leg started to hurt; however, he was able to finish the work day."

Throughout his medical treatment, the claimant consistently related to his doctors that, while he may have had occasional back pain prior to his compensable injury, on August 27, 2001, he suffered an immediate onset of severe pain while lifting a plywood sheet weighing approximately 100 pounds. The claimant consistently related this same

occurrence to his doctors and it was the pain following this injury caused him to seek medical treatment.

A review of the evidence reveals that the claimant spent most of his working career in jobs requiring heavy lifting. In the nine years preceding his compensable injury, the claimant was regularly required to bend and twist and lift objects weighing up to 100 pounds. On three instances, he suffered specific injuries to his back. The first two resulted in a minimal amount of medical treatment and no disability. During the five years preceding his compensable injury, the claimant did not receive any medical treatment, miss any work, or in any other way indicate any problems he was having from the degenerative disc disease which the respondent asserts is the major cause of his disability. The respondent's co-owner, who testified at the hearing, said that the claimant was a good employee, who received regular raises, and had not been known to miss work for any physical ailments.

Following his compensable injury in August 2001, the claimant became temporarily disabled and did not reach the end of his healing period until September 2002. He likewise received extensive medical treatment, including

medications, physical therapy, steroid injections, and similar treatments. Undeniably, the symptoms the claimant was suffering from substantially increased after his compensable injury. It is illogical to argue that the permanent impairment the claimant is suffering from is not the result of a compensable injury that caused such a significant disruption in the claimant's work and life style, but is instead primarily the result of an ill-defined degenerative condition, which, prior to the compensable injury, did not cause the claimant to miss any work, did not cause him to seek medical treatment, and did not in any way limit his job or personal activities.

In the recent past, this Commission has, on several occasions, denied permanent disability benefits to claimants who had some degree of preexisting degenerative disc disease. The rationale in those cases has been that the preexisting disease was the major cause of the disability and not the admittedly compensable injury. Fortunately for the injured workers of this State, the Court of Appeals has reversed those decisions with almost routine regularity.

In Parker v. Lennox Research Corporation, Ark. App. ___, ___, S.W.3d (June 30, 2004), the Court of Appeals

reversed and remanded a prior Commission decision. In that case, we had held that where prior degenerative disc disease existed, claimants could not, "as a matter of law" meet the major cause requirement of the Workers' Compensation Act. After explaining that the Commission had applied an erroneous interpretation of the statute, the case was remanded back to us to redetermine if the claimant was entitled to permanent disability benefits.

In Pollard v. Merdian Aggregates, Ark. App. ____, S.W.3d (September 29, 2004), the Court of Appeals also reversed and remanded the claim back to the Commission. In that case, the claimant had a preexisting back condition with two prior surgeries. We had denied his claim for permanent disability benefits because we held that the claimant could not establish that his compensable injury was the major cause of his impairment. The Court held that our Opinion failed to display a substantial basis for denying the requested benefits and our decision was reversed and remanded back to us to reconsider the issue of wage loss disability.

In Michaels v. Keep-N-Teach, __ Ark. App. ____, ____, S.W.3d ____, (March 31, 2004), the Court of Appeals reversed

and remanded our decision denying permanent impairment benefits based upon a preexisting degenerative back condition. In that case, the Court held that the major cause requirement applies to *disability* as opposed to impairment. As the Court explained, the major cause requirement does not apply to the disability benefits a claimant receives as a result of his anatomical impairment. Instead, the statute specifically states that the major cause requirement applies to permanent disability. Permanent disability as it has been defined by Arkansas Appellate Courts in the past, is the effect anatomical impairment has on a claimant's earning ability or, as it is more commonly referred to, wage loss. In this case, the Administrative Law Judge's denial of the claimant's permanent disability benefits was based upon application of the major cause requirement to anatomical impairment rating. This is the precise reason we were reversed in the Michaels decision.

The string of reversals I have listed above is by no means exhaustive. If we affirm the denial of benefits in this claim, we will be adding another case to the list. The Court of Appeals has made it clear that this Commission cannot deny permanent disability benefits, either on a

statutory or factual basis, simply because a claimant had some degree of preexisting degenerative disease. In the present case, the claimant was only noted to have hypertrophy and some mild canal stenosis. It is unlikely that many, if any, workers who are in their 40s do not have at a similar amount of degenerative spinal problems. This is a normal consequence of aging and should not be sufficient to disqualify a worker from recovering permanent disability benefits resulting from a traumatic injury. That conclusion is reinforced because in the present case, the minimal degree of the claimant's degenerative back problems did not ever cause him to miss work, require any medications, or cause him to seek any medical treatment. The Court of Appeals has not hesitated to reverse the Commission when it does not believe that a reasonable person would reach the same result on this issue. In my opinion, the facts of this case simply do not rise to the standard enunciated by the Court of Appeals for denying benefits in these types of cases.

I realize that the respondent could argue that we adopt Dr. Peoples' conclusion that the injuries found in the September 2001 MRI of the claimant's lower spine were all

degenerative in nature and were not caused by any job related accident. I have already indicated that I do not find Dr. Peoples' arguments convincing in this regard. While Dr. Peoples' tautological conclusions regarding the claimant's spinal condition says something about him as a debater, it does not recommend him as a physician. It should also be noted that numerous other physicians who have examined the claimant and reviewed his diagnostic tests have all characterized the damage to his discs as tears. Even Dr. Peoples conceded that tears were traumatic in nature.

Dr. Peoples' objectivity is also called into question when, after suggesting that the claimant is exaggerating his complaints of pain, he states that the claimant should be evaluated by an individual familiar with the "workers' compensation population." That statement implies that Dr. Peoples believes that injured workers are in some type of special category of persons whose complaints of pain and other symptoms are inherently unbelievable. I like to think that a trained medical professional would give unbiased opinions based upon objective medical facts. For that reason, I certainly extend to Dr. Peoples the benefit of the doubt in regard to any possible bias, but his

statement suggests otherwise. In any event, I find that Dr. Peoples's opinion is entitled to no weight whatsoever.

It is the duty of this Commission to follow the law as announced by the Arkansas General Assembly and interpreted and applied by the Arkansas Court of Appeals and Supreme Court. I believe that our decision in this case is contrary to a number of recent opinions from the Court of Appeals reversing decisions similar to the present one. Since the Court of Appeals has repeatedly held that it is unreasonable for us to deny a claim for permanent impairment merely because of the existence of some degree of degenerative disease, I respectfully dissent from the Majority's opinion. I would reverse the Administrative Law Judge's decision and award the claimant permanent disability benefits based upon his anatomical impairment and his loss of future earning abilities.

SHELBY W. TURNER, COMMISSIONER

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