

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110272

MARY L. HEISKILL,
EMPLOYEE

CLAIMANT

HARP'S FOOD STORE,
SELF-INSURED EMPLOYER

RESPONDENT

CANNON COCHRAN MANAGEMENT,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 14, 2005

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

Claimant represented by the HONORABLE PHILIP M. WILSON,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E.
RYBURN, 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 November 15, 2004.

In said order, the Administrative Law Judge made 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 compensation rates are \$168.00 for temporary total disability and \$154.00 for permanent partial disability.

4. Claimant sustained a compensable injury on August 24, 2001.

5. Respondent controverts Claimant's assigned permanent impairment rating.

6. Claimant sustained her burden of proving her entitlement to a 5% permanent impairment rating to the whole body for her compensable injury. Claimant's history and the opinions of Drs. Foster and Baskin establish that Claimant's compensable injury is the major cause of her impairment. The MRI of Claimant's lumbar spine performed October 9, 2001 provides objective findings. Based upon the medical records, including Dr. Baskin's rating, and utilizing the Guides, Claimant is entitled to a 5% permanent impairment rating to the body as a whole.

7. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. §11-9-715.

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 November 15, 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 must respectfully dissent from the majority. The sole issue on appeal in this claim is the claimant's entitlement to permanent partial disability benefits based upon a 5% permanent partial physical impairment rating. In his Opinion filed on November 15, 2004, the Administrative Law Judge found that the claimant has proven by a preponderance of the evidence that she is entitled to a 5% permanent partial physical impairment rating to the body as a whole for her compensable injury of August 24, 2001. The respondent was ordered to pay disability benefits in accordance with the Administrative Law Judge's finding, and the respondent now appeals.

The claimant sustained an admittedly compensable back injury on August 24, 2001, while discharging her employment duties for the respondent

employer. The claimant received emergency medical treatment for her injury, and thereafter came under the care of Dr. George Lawrence in Mountain Home. Dr. Lawrence treated the claimant conservatively and ordered an MRI of the claimant's lumbar spine. The results of this MRI, which was done on October 9, 2001, revealed the following:

Degenerative changes at multiple levels, most pronounced at the L4-5 level, where the bulging/protruding disc slightly flattens the thecal sac and mildly narrows the right neural foramen. It does not appear to impinge markedly on the nerve root.

The claimant was subsequently referred to Dr. Doug Foster at the Northwest Arkansas Spine and Orthopedic Associates Group. Dr. Foster assessed the claimant with a new diagnosis of injury at L4-5, which was superimposed on preexisting degenerative disc disease at that level and at L5-S1. In his report of the claimant's follow-up visit with him on November 13, 2001, Dr. Foster stated that his review of the MRI showed degenerative disc disease at multiple levels of the claimant's lumbar spine with evidence of T-two signal changes compatible with acute disc disruption syndrome. Otherwise, the claimant's neurological responses were grossly intact. Dr. Foster referred the

claimant to physical therapy for an erector spinae and trunk stabilization program. In addition, Dr. Foster stated that he recommended conservative care only for the claimant's condition, and he would see her on an as-needed basis.

Due to her continuing complaints, the claimant was eventually referred to Dr. Steven Cathey for a neurosurgical consultation. On November 20, 2001, Dr. Cathey wrote that he felt the claimant had sustained a musculoskeletal injury superimposed on mild preexisting degenerative disc disease, most pronounced at L4-5. Dr. Cathey did not feel as though the claimant needed surgery, and on December 18, 2001, he released her to return to work whenever she felt she could handle regular duty.

In a letter to the claimant's attorney dated March 26, 2002, Dr. Lawrence's opined that the claimant's underlying condition was exacerbated by her work related injury. Dr. Lawrence declined to assign the claimant an impairment rating. On the other hand, in a fill-in-the-blank type letter dated January 17, 2002, which was mailed to Dr. Cathey from the claimant's counsel, Dr. Cathey assigned the claimant with a 0% permanent physical impairment rating. In addition, Dr. Cathey checked "No" as to whether the claimant's work

related injury is the major cause of any impairment she might have sustained.

On February 20, 2003, the claimant was evaluated by Dr. Barry Baskin for the purpose of a second opinion. In his report of that evaluation, Dr. Baskin wrote that the claimant had a ratable back condition of 5% to the body as a whole based upon the AMA Guides. He based this rating, in part, on the history that the claimant gave him of no prior back problems. Dr. Baskin learned from the claimant's medical records, however, that she had sustained a back injury 17 to 18 years prior to her compensable injury of August 2001. Nonetheless, in April of 2003, Dr. Baskin reaffirmed in a fill-in-the-blank type letter from the claimant's attorney, that the claimant had ratable permanent physical impairment of 5% to the body as a whole. In addition, Dr. Baskin checked "Yes" in response to the question as to whether the claimant's work related injury was the major cause of her physical impairment.

In the present claim, four doctors, namely Lawrence, Cathey, Foster, and Baskin, are in basic agreement that the claimant had preexisting degenerative disc disease over which a musculoskeletal injury was superimposed. The opinions of Drs. Cathey and Baskin,

however, conflict concerning the claimant's degree of permanent physical impairment that resulted from her work related injury. Neither doctor offered depositional testimony in this regard. Dr. Cathey, a neurosurgeon who first saw the claimant approximately three months after her work related injury, opined that the claimant sustained no degree of permanent physical impairment as a result of her work related injury. Dr. Cathey indicated to Dr. Lawrence in his report of November 20, 2001, that the claimant's disc disruption at L4-5 was due to degenerative disc disease. More specifically, Dr. Cathey stated:

Her neurological exam is negative. She specifically has no sign of lumbar radiculopathy and straight leg raising is negative bilaterally. An MRI scan of the lumbar spine shows mild degenerative disc disease particularly at L4-5. There is, however, no sign of nerve root compression, spinal stenosis, etc.

Again, during her follow-up appointment with Dr. Cathey in December of 2001, Dr. Cathey stated, "Although the radiologist was concerned about a possible right-sided disc protrusion at L4-L5, I do not appreciate any sign of disc herniation, spinal stenosis, nerve root impingement, or other conditions amenable to neurosurgical intervention."

Approximately 18 months after her injury, the claimant was seen by Dr. Baskin for a second opinion. Although Dr. Baskin mentioned in his report of his one visit with the claimant that Dr. Foster had been of the prior opinion that the claimant's condition was due to a new injury at L4-5, which was superimposed over preexisting degenerative disc disease, Dr. Baskin stopped short of stating that he agreed with that assessment. Rather, Dr. Baskin simply stated, "It is my opinion that this lady did sustain a work related compensable injury on 8/24/01 to her lumbar spine." "Using the AMA Guidelines, Fourth Addition, page 113," added Dr. Baskin, "she would have a 5% whole body impairment based on the unoperated on stable with medically documented injury, pain, and rigidity, associated with minimal changes on structural tests, i.e., MRI scan." Later, in April of 2003, Dr. Baskin gave an affirmative indication in his responses to the claimant's attorney that the claimant's work injury was the major cause of her physical impairment.

The medical evidence convinces me that the claimant's injury of August 24, 2001, caused a temporary aggravation of the claimant's preexisting degenerative disc disease. The claimant's MRI showed degenerative changes to the claimant's lumbar spine, particularly at

L4-5, however the claimant's neurological examinations were otherwise consistently normal. Therefore, the weight of the evidence preponderates in favor of the claimant's disc disruption at L4-5 being attributable to her degenerative disc disease rather than to an acute injury. Furthermore, the opinion of Dr. Cathey, who treated the claimant contemporaneously with her injury, should be given more weight than the opinion of Dr. Baskin, who assessed her condition over a year-and-a-half after she claimed an injury to her back. Even if Dr. Baskin's opinion that the claimant is entitled to a 5% permanent physical impairment rating were found to be correct, a finding with which I specifically do not agree, I find that the claimant has failed to prove by objective medical evidence that her injury of August 24, 2001, was the major cause of this impairment. Rather, the medical records reveal that the claimant's current disability, if any, is due to preexisting degenerative disc disease which is not causally connected to her compensable injury.

Based on the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to a permanent physical impairment rating of 5%. Therefore, for all the

Heiskill - F110272

11

reasons set forth herein, I must respectfully dissent
from the majority opinion.

KAREN H. MCKINNEY, Commissioner