

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E809076**

<b>JERRY M. WILSON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>JENNIFER CONSTRUCTION COMPANY, INC. EMPLOYER</b>	<b>RESPONDENT</b>
<b>CINCINNATI INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED AUGUST 12, 2005**

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

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals and the respondents cross appeal the decision of the Administrative Law Judge finding that the claimant was entitled to permanent impairment in the amount of 5% to the body as a whole for the claimant's compensable back injury, as well as a 25% permanent impairment to the right lower extremity based upon the claimant's compensable post traumatic Deep Vein Thrombosis and chronic lymphedema of the right lower extremity; and the finding that the impairment rating from the abdominal wall injury was not the responsibility of the respondents as it

was not related to the claimant's compensable injury. Based upon our de novo review of the record, we find that the claimant is not entitled to any permanent impairment.

This claim has a very long and varied history before the Commission. It is undisputed that the claimant sustained a compensable injury on July 17, 1998, when while working for the respondent employer, several roof trusses fell on him, striking his right hip and back. The claimant sustained a lumbar back injury, as well as a post-traumatic Deep Vein Thrombosis in the right lower extremity.

A hearing was conducted on September 13, 1999, to determine the claimant's entitlement to further benefits. An Opinion was filed on October 13, 1999, awarding the claimant additional medical treatment while finding that the claimant was not entitled to additional temporary total disability. No appeal was taken by either party from the October 1999 opinion. The respondents had previously controverted the claimant's entitlement to all indemnity benefits beyond those previously paid, including entitlement to permanent disability benefits, if any. A prehearing conference was conducted on May 28, 2003, and a Prehearing Order was filed

on that date. By agreement of the parties, the issues to be presented for determination included:

- 1) Respondents' responsibility for outstanding medical expenses; and,
- 2) claimant's entitlement to permanent impairment benefits.

The claimant contended that all of his outstanding medical expenses were reasonably necessary, as well as related to the claimant's admitted injury and should be paid by the respondents. In addition, the claimant contended that he had sustained an eleven percent (11%) permanent impairment. The respondents contended that it had paid all reasonably necessary, and authorized medical expenses; that following the first hearing, the claimant changed physicians to Dr. Simpson which the respondents accepted and paid, and that any further medical treatment was unauthorized and outside the chain of valid referrals and, therefore, was the claimant's responsibility. The respondents further maintained that the claimant did not sustain any permanent impairment as the result of the admitted injury.

The claimant was the only witness to testify at the August 4, 2003, hearing. Several medical reports were

introduced by both parties as well as the evidentiary depositions of Dr. Robert H. May, and Dr. Jim J. Moore.

An Interim Order and Opinion was filed on September 23, 2003. The Administrative Law Judge ordered an independent medical examination and evaluation of the claimant by Dr. Kenneth Rosenzweig, an orthopedic specialist with Arkansas Specialty Orthopedics. The claimant underwent an independent medical examination and evaluation by Dr. Rosenzweig on November 18, 2003. Dr. Rosenzweig then issued a ten (10) page narrative report assessing the claimant with a 33% permanent impairment rating.

The evidence demonstrates that the claimant has been examined and evaluated by several physicians since his release by Dr. Simpson which was his last authorized physician. The claimant began receiving chiropractic treatment from Dr. Ed Engelhoven on April 2, 2001. Dr. Engelhoven did not assess any permanent impairment while recommending continued chiropractic treatment. He opined that, with proper treatment, the claimant should be able to partially or possibly completely recover from his injury.

The claimant next went to see Dr. Harold H. Chakales, an orthopedic surgeon in Little Rock, Arkansas, on

his own. Dr. Chakales initially examined the claimant on August 20, 2001, at which time he diagnosed a lumbar disc syndrome, as well as deep venous thrombosis involving the right lower extremity by history which was being treated with medication. Dr. Chakales opined that he did not believe the claimant was a candidate for rehabilitation.

The claimant was next examined and evaluated by Dr. Jim J. Moore, a neurosurgeon in Little Rock, Arkansas, at respondents' request. Dr. Moore initially evaluated the claimant on May 16, 2002. He concluded that the claimant's diagnosis was post-traumatic Deep Vein Thrombosis right lower extremity, resolved; musculoligamentous sprain/strain and contusion lumbar; symptoms consistent with radiculitis to the left buttock but without evidence of disk herniation. The claimant had a soft tissue trauma, superimposed on degenerative changes. Because of claimant's deconditioned state he recommended a functional capacity evaluation (FCE), as well as a possible EMG/NCV study of the back and lower extremity which the claimant eventually underwent. Apparently, the FCE indicated that the claimant displayed the ability to perform medium work. Dr. Moore did not change his diagnosis following the additional studies.

The claimant was next examined and evaluated by Dr. Robert H. May. In a report dated July 31, 2002, Dr. May assessed an eleven percent (11%) permanent partial impairment, solely related to the claimant's back injury, Dr. May utilized the AMA Guides to Permanent Impairment, Fifth Edition in assessing impairment, and also included three percent (3%) impairment for pain which is not permissible under the Workers' Compensation Act.

Dr. Rosenzweig evaluated the claimant on November 18, 2003, and issued a ten-page narrative report which is set out in limited part below:

**Permanent Impairment**

He has been rated by Dr. May. According to his visit today, he is a candidate for the following PPI rating:

- Regarding the abdominal wall injury, he is a candidate for a 5% impairment using table 7 on page 247.
- In regard to his crushing back injury, he is a candidate for a 5% impairment using table 72 on page 110.
- In regard to his chronic lymphedema and DVT, he is a candidate for a 25% impairment using table 14 on page 198.

Using the Combined Values Chart, Dr. Rosenzweig stated that the claimant has a total body impairment of 33% as a result of these injuries.

The deposition of Dr. Rosenzweig was taken and he conceded that using the appropriate tables in the AMA Guides to Permanent Impairment, Fourth Edition, (the Guides) the permanent impairment for the claimant's chronic lymphedema and Deep Vein Thrombosis should actually be rated to the right lower extremity as a whole. Dr. Rosenzweig was specifically asked to address the permanent impairment tables.

Q. And I want to make sure that the Commission knows. Table 69 is exactly the same table as Table 14 except it's to the lower extremity, is that correct?

A. Table 69 heading says, "Lower Extremity Impairment Due to Peripheral Vascular Disease."

Q. And that's all we're talking about here, right?

A. Lower extremity impairment. But Table -

Q. I'm talking about the classes and what's listed under the classes and the numbers are all -

A. It appears to be word for word -

Q. Word for word.

A. - the same table.

Q. And as we sit here today, do you know in what situation you would use Table 69 versus Table 14?

A. I don't have a good answer for that.

Q. Okay.

A. I mean, they're the exact same table. The table I used is a little more definitive in its heading than this one.

Q. And definitive is it uses the whole body as opposed to the lower extremity rating, right?

A. Can you refresh my memory of that page number, the one I used?

Q. I think it's - I actually turned to it, 198.

A. All right. On Page 198 compared to -

Q. It uses impairment of the whole person as apposed to impairment -

A. Well, the heading of the table, Table 69, says, "Lower Extremity Impairment Due To Peripheral Vascular Disease," and Table 14, it says, "Impairment of lower Extremity Due to Peripheral Vascular Disease." The discrepancy is in the class definition itself where it says percent impairment of the whole person, and on Table 69 it just says - it doesn't have whole person written down.

Q. It just has parentheses?

A. It just has parentheses.

Q. Let me ask you, if you go -

A. But the heading is the same, both say lower extremity impairment.

Q. Right. If you go up these other tables, would you agree with me that they all have parentheses around lower extremity?

A. Typically a table will have foot, lower extremity, whole person, or the corresponding. And, invariable, if we report - most generally we're asked for a whole person or vice versa.

Dr. Rosenzweig further conceded that the five percent (5%) impairment for the abdominal wall injury was related to a prior hernia injury, the etiology of which was unknown.

Our review of the evidence demonstrates that the claimant's Deep Vein Thrombosis had resolved and the claimant is not entitled to any permanent impairment for his Deep Vein Thrombosis. Dr. Jim Moore evaluated the claimant and he felt that the claimant's Deep Vein Thrombosis had resolved. This opinion was also shared by Dr. May, a physician the claimant went to on his own accord.

The claimant was seen by Dr. Chakales in December of 2001 for back pain only. There is no mention in Dr. Chakales' medical report record that the claimant complained of right lower extremity pain. The claimant was seen by Dr. Engelhoven in April of 2002 complaining of back and left hip pain. Again there is no mention of right extremity pain. Dr. Moore saw the claimant in May of 2002 and he noted that the Deep Vein Thrombosis had resolved. Dr. Chakales saw the claimant in May of 2002 and Dr. Chakales' report fails to mention anything about Deep Vein Thrombosis or right extremity pain. The functional capacity evaluation the claimant underwent was for his back. It specifically listed "lumbosacral sprain/strain and lumbosacral radiculopathy." There is no mention of right extremity pain or Deep Vein Thrombosis. The claimant was seen by Dr. May for his back pain and Dr. May indicated in his report that the Deep Vein Thrombosis had resolved. In a note dated September 25, 2002, Dr. May placed the claimant at maximum medical improvement.

The claimant is merely relying on Dr. Rosenzweig's rating to recover permanent impairment for the Deep Vein Thrombosis. However, Dr. Rosenzweig admitted that the Deep

Vein Thrombosis was not something that he normally treated and, in fact, he stated that he has "limited experience" treating Deep Vein Thrombosis. Dr. Rosenzweig also admitted that the claimant did not complain of right extremity pain when he saw him but that he merely offered a rating on it. Dr. Rosenzweig gave the claimant a rating based upon the swelling he observed and he admitted that the swelling is typically worse at the end of the day as opposed to earlier. It is of note that the claimant was evaluated by Dr. Rosenzweig at the end of the day.

Dr. Rosenzweig considered that the impairment could actually be to the lower extremity rather than the body as a whole. He also admitted that the claimant had been using the support hose and that swelling had been what it was when he viewed by Dr. Moore and others that the rating would be zero to 9% to the extremity. Dr. Rosenzweig also stated that if the claimant had been seen six hours later he might have had a 5% percent rating to the lower extremity. In short, Dr. Rosenzweig is confused on how to issue ratings for Deep Vein Thrombosis and he admitted that he seldom treated it. The claimant has had no testing on the right lower extremity since 1999 and no treatment since 2000. The

claimant had no complaints as evidenced by the medical records. Both Doctors May and Moore have determined that the Deep Vein Thrombosis had resolved and Dr. Rosenzweig merely issued the rating based upon the swelling he observed. Accordingly, we find that the claimant is not entitled to any permanent impairment for his Deep Vein Thrombosis and chronic lymphedema of the right lower extremity. Therefore, we reverse the decision of the Administrative Law Judge.

Dr. Rosenzweig also issued a 5% whole body rating for the claimant's back. The claimant has been treated by Doctors Simpson, Engelhoven, Chakales and Moore, none of which addressed any permanent impairment for the claimant's back. In this regard, Dr. Rosenzweig conceded that his rating was based on what was "probably degenerative in nature." Dr. Rosenzweig testified that when he examined the claimant he noticed spasm. However, he acknowledged that this was something that can vary day to day depending on the claimant's activity level. The claimant advised Dr. Rosenzweig that he was not capable of doing housework; however, this was contrary to the claimant's testimony in his deposition and at the hearing. Therefore, the history

that Dr. Rosenzweig relied upon to conduct his evaluation was incorrect and unreliable.

The overwhelming majority of medical evidence reflected that the claimant was not entitled to a permanent impairment rating to his back. Doctors Simpson, Engelhoven, Chakales and May treated the claimant and not one has assigned a permanent impairment rating to the claimant's back. In fact, Dr. Moore was asked about impairment during his deposition and he responded that using the Guides, the claimant fit into category I for complaints and symptoms of what he termed "a relative lack of objectivity on examination." This correlates to a zero percent impairment rating, according to the Guides. Dr. Rosenzweig used the Class II based upon clinical signs of lumbar injury. Dr. May, a friend of the claimant's brother and clearly an advocate for the claimant, issued a rating using the inappropriate standards and the incorrect edition of the Guides.

Moreover, Dr. Rosenzweig's rating was based upon degenerative changes and an unreliable history provided by the claimant. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony.

Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses' testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Accordingly, the Commission finds that

Dr. Moore's assessment of a zero percent impairment for the claimant's back is the correct impairment rating.

Therefore, for all the reasons set forth herein, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent impairment for his Deep Vein Thrombosis, which has resolved nor is he entitled to any permanent impairment for his compensable back injury. Accordingly, we reverse the decision of the Administrative Law Judge. This claim is hereby denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

**DISSENTING OPINION**

The Majority has found that the claimant is not entitled to permanent disability benefits based upon an admittedly compensable injury. I believe that in reaching

that decision, the Majority has misconstrued the applicable medical evidence and has reached an incorrect result. For that reason, I respectfully dissent from the Majority Opinion.

The claimant's medical history is long and complex. The claimant was initially injured in an injury on July 17, 1998. Over the next several years, he saw numerous doctors for treatment of problems with his leg and lower back. The dispute in this case is not whether the claimant was injured in this job related accident but whether he is entitled to permanent disability benefits for injuries sustained in that accident.

The claimant is alleging that as a result of his accident, he suffered a deep vein thrombosis to his leg and soft tissue damage to his lower back. Despite the admitted complexity of the claimant's medical records, there is no doubt that he has sought medical treatment for his vascular condition and for pain and loss of function in his lower back on innumerable occasions since his injury. Nonetheless, the Majority is rejecting impairment ratings the claimant has received for both of those injuries.

As explained in the Majority Opinion, Dr. Kenneth Rosenzweig evaluated the claimant for any impairments he might have on November 18, 2003. In an extensive report outlining his examination and findings, Dr. Rosenzweig found that the claimant was entitled to a 25% impairment based upon the vascular condition in his leg and was further entitled to a 5% impairment to his lower back based upon soft tissue damage which he was able to visually discern. In evaluating the claimant's vascular condition, Dr. Rosenzweig noted that the claimant had continued to suffer from swelling in his leg as a result of his deep vein thrombosis. He also noted that he was continuing to wear support hose in an attempt to relieve himself of the swelling and pain symptoms.

Clearly, swelling is an objective finding and its presence was verified by Dr. Rosenzweig. Those type of findings can be the basis for an impairment under the Workers' Compensation Act. In fact, Dr. Rosenzweig applied the AMA Guides to the Evaluation of Permanent Impairment, the official rating guide adopted by this Commission in establishing the claimant's impairment rating based upon the claimant's condition. The Majority rejects Dr. Rosenzweig's

evaluation contending that he is not experienced in vascular conditions and that his opinions should therefore be given little weight.

Curiously, the Majority attaches great weight to the findings of Dr. Harold Chakles and Dr. Robert May, both orthopedists, and Dr. James Moore, a neurosurgeon when it comes to the claimant's vascular condition. All of those doctors, in examining the claimant for back problems, noted that his venous condition had "resolved." However, none of them have any experience in treating vascular disorders and they were not seeing the claimant for that problem. Also, as noted by Dr. Rosenzweig in his deposition, the word "resolved" is an inherently ambiguous term which does not have an established medical meaning. Clearly, the claimant had continued to suffer from problems associated with his vascular condition since his injury and it is also undeniably a permanently disabling condition. I do not understand why the Majority is refusing to apply the rating guide we have adopted for evaluation of permanent impairment and to recognize that the claimant has suffered permanent impairment as a result of an admittedly compensable injury. I find that Dr. Rosenzweig accurately applied the AMA Guides

in determining the extent of the claimant's permanent impairment from his vascular condition. I would therefore affirm the Administrative Law Judge's award of permanent impairment based upon Dr. Rosenzweig's conclusions.

I also disagree with the Majority's decision as to the claimant's permanent impairment from his back injury. The Majority dismisses the impairment rating described by Dr. May since they conclude that he was "an advocate for the claimant" and was presumably biased. They likewise dismiss Dr. Rosenzweig, contending that his rating was based upon degenerative changes and an "unreliable history" from the claimant. However, I strongly disagree with both of those conclusions. I do agree that Dr. May's rating was not based upon the AMA Guides but I believe that he did make an objective finding of an injury to the claimant. Specifically, he noticed the presence of a discolored area in the claimant's back which he believed was the result of the claimant's 1998 injury. The objective verifiability of this injury was confirmed when the Administrative Law Judge acknowledged at the hearing that he was also able to visually see the discolored area referred to by Dr. May. Dr. Rosenzweig further confirmed the existence of this condition

when he examined the claimant. As explained by Dr. May in his report and Dr. Rosenzweig in his deposition, the damaged muscle tissue in the claimant's back was almost certainly the result of the roof trusses falling on him in July 1998. Further, this condition is, once again, rateable under the AMA Guides.

I find that the medical evidence in this case undeniably establishes that the claimant has permanently disabling conditions to his leg and lower back. Further, the existence of this impairment is objectively verifiable and the objective findings support a rating and have been identified by more than one doctor, and the impairment has been rated by a physician following the guide approved and adopted by this Commission. In my opinion, the law compels us to award permanent disability benefits to the claimant.

For the reasons set out above, I respectfully dissent from the Majority's decision.

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SHELBY W. TURNER, COMMISSIONER