

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409659

BEVERLY COX, EMPLOYEE	CLAIMANT
HEALTH MANAGEMENT, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 10, 2006

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

Claimant represented by the HONORABLE JAMES A. FIFYAW, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE JAMES ARNOLD II, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed December 6, 2005. 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 August 9, 2004, the relationship of employee-employer carrier existed between the parties.
3. On August 9, 2004, the claimant earned wages sufficient to entitle her to weekly

compensation benefits of \$453.00 total disability and \$340.00 for permanent partial disability.

4. On August 9, 2004, the claimant sustained a compensable injury to her lumbar spine, which was in the form of a small herniated disc at L1-2 and an aggravation of a preexisting disc herniation at L2-3.

5. The medical services rendered to the claimant by and at the direction of Dr. Wendell Ross and Dr. Michael Standefer for the claimant's lumbar and radicular difficulties, on and after August 9, 2004, represents "reasonably necessary medical service" for her compensable injury of August 9, 2004. Such medical services were necessitated by or connected with the claimants compensable injury and had a reasonable expectation of accomplishing the purpose or goal for which they are intended. The respondents are liable for these expenses, subject to the medical fee schedule established by this Commission.

6. The claimant was rendered temporarily totally disabled, as a result of the effects of her compensable injury of August 9, 2004, for the period of August 21, 2004 through March 2, 2004 (sic). Specifically, the claimant has proven that during this period she continued within her healing period from the effects of her compensable injury and continued to be rendered totally disabled from performing regular gainful employment as a result of this injury.

7. Ark. Code Ann. §11-9-411 is applicable to any temporary total disability benefits herein awarded, which accrued during a period that the claimant received benefits under a group disability policy for the disability occasioned by her compensable injury.

8. The claimant's healing period from the effects of her compensable injury of August 9, 2004 ended on March 2, 2005.

9. The claimant has proven her entitlement to permanent partial disability benefits for permanent physical impairment in the amount of 5% to the body as a whole.

Specifically, she has proven that her compensable lumbar 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 Commission's official rating Guides and that this degree of permanent physical impairment gives no consideration to pain, range of motion testing of the spine, or straight leg raising tests.

10. The issue of the claimant's entitlement to permanent partial disability benefits for permanent functional disability or loss of wage-earning capacity is not right (sic) for determination at the present time and should be reserved for future determination, when and if necessary.

11. The claimant has failed to prove that she sustained a "compensable injury" to her neck or cervical spine in the employment related incident of August 9, 2004. Specifically, she has failed to establish by medical evidence, which is supported by objective findings, the actual existence of any physical injury to her neck or cervical spine, as alleged to be the result of the employment related incident on August 9, 2004. Thus, she would not be entitled to any benefits provided by the Act for such an alleged injury.

12. The respondents have denied the occurrence of any compensable injury and have controverted this claim in its entirety.

13. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary total disability benefits and permanent partial disability

benefits herein awarded. This would include an attorney's fee on the temporary total disability benefits initially paid but subsequently controverted by the respondents.

The Commission notes that the Administrative Law Judge, in an apparent clerical error, mistakenly indicated that the August 9, 2004, MRI was performed and interpreted by Dr. Ihmeidan rather than by Dr. N. E. Crow, Jr., who actually interpreted the MRI. However, it appears that both doctors were board certified radiologists, and other than an oversight as to the name of the appropriate radiologist, the Administrative Law Judge appropriately assessed the report. Accordingly, we find that the Administrative Law Judge's use of the wrong name did not alter the analysis or outcome of this claim.

We also note that on page 13 of the opinion, the Administrative Law Judge indicates, "the records of Dr. Knox show she was actually released to return to full duty on March 2, 2005. At that time the claimant was totally asymptomatic..." In fact, Dr. Ross was the doctor responsible for releasing the claimant to return to work and noted the claimant was asymptomatic. However, as this appears to be merely an error that is clerical in nature, it is of no significance and does not affect this claim.

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 December 6, 2005, 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 opinion finding that the claimant sustained a compensable injury to her back on August 9, 2004, for which she is entitled to benefits. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury either to her neck or back.

At the hearing held September 20, 2005, the claimant contended that she sustained a compensable injury to her neck and back on August 9, 2004, for which she is entitled to medical, temporary total disability

and permanent partial disability benefits. Conversely, respondents contended that the claimant did not sustain a compensable injury. I agree with the respondents.

It is undisputed that the claimant was involved in an incident at work on August 9, 2004, when she was lifting a patient with the assistance of two co-workers. The dispute between the parties arises in whether this incident resulted in a compensable injury.

Although the claimant alleges an injury to her neck as a result of the lifting incident, the record is void of any medical records establishing objective medical findings of an injury to the claimant's neck. Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence the existence of a compensable injury to her neck.

With regard to her alleged back injury, the claimant introduced two MRI reports, one which pre-dated the claimant's August 9, 2004, incident, and one which was ordered as a result of this incident. These reports were prepared by two different radiologists. The first report dated May 21, 2004, prepared by Dr. Ishmial Ihmeidan states:

CLINICAL HISTORY: Left lower extremity pain.

MRI OF THE LUMBAR SPINE:

There are mild degenerative disc disease changes at L4-5 and L5-S1 manifested by loss of disc space signal intensity. Mild disc bulging annulae are noted at L1-L2 and L2-L3 levels. There is a focal right central disc herniation of small size at L2-L3 level.

IMPRESSION:

Right posterolateral focal disc herniation at L2-L3 level.

The second report dated August 9, 2004, prepared by Dr. N.E. Crow, Jr., states:

MRI OF THE LUMBAR SPINE:

CLINICAL HISTORY: Back pain after lifting patient.

T1 and T2 weight sagittal images were obtained. Proton density and T2 weighted axial images were obtained of the lumbar disc spaces. Comparison is made to previous exam done 05-21-2004. There is a small right paracentral posterolateral disc herniation at L1-2.

There is more extensive right posterolateral disc herniation at L2-3.

The remainder of the lumbar disc spaces are unremarkable. There are no osseous signal abnormalities. There has been no change since any previous exam.

IMPRESSION:

Right posterolateral disc herniation at L1-2 and L2-3, more extensive at L2-3.

Dr. Crow compared the previous exam which is set out above, with the MRI exam he interpreted on August 9, 2004, and unequivocally stated that "There has been no change since any previous exam." Likewise, Dr. J. Michael Sandefer, the neurosurgeon who examined the claimant, reviewed both the May 21, 2004, MRI studies and the August 9, 2004, MRI studies. After reviewing these two studies, Dr. Sandefer reached the same unequivocal conclusion reached by Dr. Crow and specifically wrote in his November 24, 2004 report, "...it is noteworthy that there is no significant change in the appearance of the lumbar MRI scan when comparing the two dates."

Despite both Dr. Sandefer and Dr. Crow both stating that there are no changes between the pre and post incident MRI, the Administrative Law Judge found that the MRI radiology reports "clearly indicate otherwise." In this regard, the Administrative Law Judge found that the August 9, 2004, MRI revealed a "new small right paracentral posterolateral disc herniation at L1-2." While it is common for the Commission to review and interpret MRI reports when multiple reports are admitted into evidence, it is extremely rare for the Commission to actually receive into evidence and review the MRI studies. Thus, only the radiologists' interpretations

are commonly reviewed. In the present case, however, the actual films or studies, were reviewed by not only the claimant's neurosurgeon, but also by the radiologist who interpreted the post incident MRI. Admittedly, Dr. Crow the radiologist who interpreted the post incident MRI described "a small right paracentral posterolateral disc herniation at L1-2", while Dr. Ihmeidan, who read the pre-incident MRI described only a "mild disc bulging annulae" at the L1-L2 level. However, contrary to the Administrative Law Judge's finding, Dr. Crow did not describe his findings at L1-2 as new. Likewise the difference in the descriptions between Dr. Crow's findings at L2-3 of a "more extensive right posterolateral disc herniation at L2-3," and Dr. Ihmeidan's findings of a "focal right central disc herniation of small size at L2-L3 level" is not sufficient to find any actual change at L2-3 between the May 21, 2004, and August 9, 2004, MRIs. After reading the entirety of Dr. Crow's report, and in particular the "Impression," it is clear that in describing the findings at L2-3 as more extensive, Dr. Crow is comparing the findings of L2-3 to those he made of L1-2, not to the previous MRI. The only comparison Dr. Crow made to the May 21, 2004, MRI is found in the sentence wherein he stated that "[t]here has been no change since

any previous exam." Thus, no conclusion can be drawn with regard to actual size of the herniation at L2-3 when comparing the pre and post incident MRIs other than the fact that Dr. Crow stated that there has been no change.

Moreover, the different descriptions used by the two different radiologists are not sufficient enough to overcome the clear, unqualified statements made by not one, but two competent physicians who have had, not only the benefit of viewing the actual MRI films, but also the expertise and training to read and interpret these films. Both Dr. Crow and Dr. Sandefer opined that the pre- and post-incident MRI studies reveal no changes in the claimant's lumbar spine.

After weighing the evidence impartially, 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 the presence of any objective medical findings to support the existence of a compensable injury. While I do not dispute the obvious findings by the claimant's physician's that she suffers from disc herniations, the overwhelming evidence reveals that these herniations were present prior to the claimant's work-related incident of August 9, 2004. Accordingly, I find that the claimant has failed to meet

her burden of proof. Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner