

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F100218, F400082, F400083

LYDIA G. PALASOTA, EMPLOYEE	CLAIMANT
CHANDLER INTERIORS, EMPLOYER	RESPONDENT
UNION STANDARD INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 8, 2006

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

Claimant represented by HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

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

Decision of Administrative Law Judge: Affirmed, in part, and affirmed as modified, in part.

OPINION AND ORDER

This case comes on for review by the Full Commission from appeals by both parties to this claim. On February 16, 2005, 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 sustained compensable work related injuries on September 15, 2000; March 23, 2001; and September 25, 2001.

4. Claimant's 2000 average weekly wage was \$887.00; her 2001 average weekly wage was \$720.06.

5. Respondents controvert benefits from July 15, 2004.

6. I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to an 8% permanent impairment rating to the body as a whole, related to her cervical spine. Claimant did not experience any problems with her neck prior to her first compensable injury. Shortly after that first compensable injury, an MRI revealed three disc bulges or protrusions at C3-4, C4-5, and C5-6. Utilizing Table 75 of the Guides, an 8% rating is appropriate for these objective and measurable findings.

7. I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to a 5% permanent impairment rating to the body as a whole, related to her lumbar spine. Again, Claimant did not experience any problems with her low back prior to her compensable injuries; subsequent to her first compensable injury, no other incidents are recorded other than her remaining two compensable injuries. Examination revealed

straightening of Claimant's normal lumbar lordosis and, on more than one occasion, spasms. Utilizing Table 75 of the Guides, Claimant is entitled to a 5% permanent impairment rating to her lumbar spine.

8. Utilizing the Combined Values Chart from the Guides, based upon the preceding two findings, I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to permanent partial disability benefits based upon a 13% impairment rating to the body as a whole.

9. I find that Claimant did not sustain her burden of proving that she is entitled to wage-loss disability benefits. Claimant's inability to do heavy lifting is due to a restriction related to her 1998 injury; it preexisted her three compensable injuries involved in this claim. These compensable injuries are not the major cause of any wage-loss disability.

10. I find that Claimant did not sustain her burden of proving that Dr. Rosenzweig's examination resulting in the June 29, 2004 letter constitutes reasonably necessary medical treatment. The record reflects that the examination was undertaken for the purpose of ending this claim, not medical treatment or care.

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

Our carefully conducted de novo review of this claim in its entirety reveals that the Administrative Law Judge was correct in finding that the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage-loss disability benefits. Moreover, the Administrative Law Judge was correct in finding that the claimant's examination by Dr. Rosenzweig on June 29, 2004, was not reasonable and necessary for the treatment of her compensable injuries. Therefore, the decision of the Administrative Law Judge regarding these two issues is hereby affirmed. However, the claimant has failed to prove by a preponderance of the evidence that she is entitled to an 8% permanent impairment rating to the body as a whole regarding her cervical spine; to a 5% permanent impairment rating to the body as a whole regarding her lumbar spine; or to a 13% combined permanent physical impairment rating to the body as a whole. Therefore, this portion of the

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Administrative Law Judge 's decision is hereby modified pursuant to Dr. Schlesinger's rating of 4% for the claimant's cervical spine, only.

The parties stipulated to the compensability of the claimant's three alleged injuries. The claimant, who is an interior designer, alleges that she sustained her first compensable injury on September 15, 2000, when she was lifting a heavy decorative tree. The claimant began receiving treatment for that injury on September 29, 2000, under the direction of Dr. William F. Blankenship. During his initial examination of the claimant, Dr. Blankenship noted that cervical spine films showed normal alignment, no fractures or other abnormalities, and no evidence of abnormal widening or narrowing of the lateral and the intervertebral joints. However, there was evidence of some straightening of the cervical lordosis. Otherwise, the claimant's cervical spine appeared to be normal. Dr. Blankenship diagnosed the claimant with cervical and thoracic strain, for which he prescribed

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anti-inflammatories, physical therapy, and he temporarily restricted her from lifting. The claimant continued to work for the respondent employer.

During her examination by Dr. Blankenship on November 3, 2000, the claimant reported that she had developed lower back pain approximately ten days earlier. X-rays taken of the claimant's cervical spine revealed no changes since her last visit. Further, x-rays taken of the claimant's lumbar spine revealed no abnormalities. A physical examination of the claimant's cervical and lumbar spine revealed no spasms, and her neurological responses were within normal limits. Dr. Blankenship discontinued the claimant's physical therapy, but he continued her lifting restrictions.

Although the claimant's neurological responses were within normal limits during her physical examination on November 21, 2000, the claimant reported no change in her symptoms. On November 29, 2000, the claimant underwent an independent neurosurgical evaluation by Dr. Jim Moore.

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Based upon his review of the records and a physical examination of the claimant, Dr. Moore agreed with Dr. Blankenship that the claimant had sustained soft tissue injuries. An MRI of the claimant's lumbar spine conducted on November 30, 2000, showed a minimal disc bulge at L1-2, but was otherwise unremarkable. An MRI of the claimant's cervical spine taken at the same time revealed a small broad-based central disc protrusion at C5-6, a small broad-based central disc protrusion at C4-5, and a "tiny" central protrusion at C3-4. Otherwise, the claimant's neurological examination was normal.

In his report of the claimant's follow-up visit dated December 4, 2000, Dr. Blankenship stated:

Ms. Palasota returns to the clinic for her continued complaints. She still states she is doing about the same as she was previously. Her pains remain in the cervical spine, left upper extremity, lower back, and mainly right lower extremity.

After describing the results of the claimant's recent MRI's, Dr. Blankenship continued:

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Today in re-examining this lady's cervical spine, I don't find any paraspinal muscle spasms. I find no change in range of motion of the cervical spine in any planes. Her neurological examination is and remains in normal limits.

Dr. Blankenship's examination of the claimant's lumbar spine also showed normal results.

On February 8, 2001, the claimant was examined by Dr. Steven Cathey, who agreed with the claimant's other physicians that spinal surgery or other neurosurgical treatment was not indicated for the claimant's condition.

In February of 2001, the claimant came under the care of Dr. Rosenzweig, who continued to treat the claimant conservatively with medications and physical therapy. In spite of the claimant's continued subjective complaints to Dr. Rosenzweig of pain in her cervical and thoracic spine, he repeatedly noted no neurological defects.

The claimant was seen again by Dr. Cathey on March 13, 2001. Like Dr. Rosenzweig, Dr. Cathey found no neurological defects of the claimant's cervical and lumbar

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spine which indicated the need for surgical intervention. More specifically, Dr. Cathey reported, "Her neurological examination remains entirely negative." Dr. Cathey further reported:

There is specifically no sign of cervical myeloradiculopathy, lumbar radiculopathy, etc. There is full range of motion of both cervical and lumbar spine without paraspinous muscle spasm.

Dr. Cathey stated that a review of the claimant's MRI scans revealed early degenerative disc disease in the claimant's lumbar and cervical spine. Otherwise, these studies were negative for cord compression, nerve impingement, or other conditions amenable to spinal surgery.

In conclusion, Dr. Cathey encouraged the claimant to "resume a full and active lifestyle without restrictions."

On March 23, 2001, the claimant was a passenger in a company owned van that became involved in a multi-car accident. Upon the van being rear-ended, the claimant testified that she felt immediate pain in her lower back,

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hips, and pelvic area. Dr. Rosenzweig assessed the claimant with an exacerbation of her existing condition and prescribed the claimant a dose pack for her neck, and referred her for physical therapy. When the claimant reported that this treatment was ineffective, Dr. Rosenzweig referred her to Dr. Ackerman for a spinal injection. The claimant continued to work after this accident.

At of her May 22, 2001, visit with Dr. Rosenzweig, the claimant reported that her chronic back and neck pain persisted, and that her low back had become more problematic than her neck. While taking into consideration the claimant's recent motor vehicle accident, Dr. Rosenzweig indicated that it was unusual for her to still be experiencing her reported level of chronic musculoskeletal pain eight months after her first reported injury. "It [her neck and back condition] may have been aggravated by her MVA," stated Dr. Rosenzweig, "but nevertheless she should be making significant improvement with the medication and therapy." Dr. Rosenzweig further commented that the

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claimant's neck condition, particularly her underlying degenerative disc disease, was non-surgical at that time. Dr. Rosenzweig continued the claimant on a conservative treatment course.

On June 19, 2001, Dr. Rosenzweig reported that the claimant's "organized" physical therapy had been discontinued by her physical therapist, and that she should continue therapy on an at-home basis. At that juncture, Dr. Rosenzweig opined that the claimant exhibited symptoms consistent with fibromyalgia.

On exam, she has multiple trigger points at the traps, pectoralis, low back, lateral trochanters, etc., and all of this may be a signal of fibromyalgia more so than residual aches and pains from her aggravation from her MVA in March. She has had epidurals.

An MRI showed significant disease for her young age in her neck and this may or may not be her pain.

In order to rule out a "hot facet" or other pain generator, Dr. Rosenzweig recommended a bone scan with SPECT imaging of the claimant's neck. When the results of this

study revealed findings within normal limits, Dr. Rosenzweig referred the claimant to Dr. Scott Schlesinger for a second opinion. After his examination of the claimant on July 9, 2001, Dr. Schlesinger reported that, aside from a "very small right C5-6 disc protrusion" the claimant's neurological findings were normal. Dr. Schlesinger agreed with Dr. Rosenzweig that the claimant was not a surgical candidate. On July 18, 2001, Dr. Rosenzweig reported that the claimant had "exhausted what appears to be a full gamut of conservative treatment... ." Dr. Rosenzweig stated he would continue the claimant on her current medications "in hopes that over time things will settle down for her."

On September 25, 2001, the claimant sustained her third back injury when a co-worker fell off of a ladder on top of her. On September 26, 2001, Dr. Rosenzweig diagnosed the claimant with a contusion of her lower extremity and he stated, "This appears to be just a transient exacerbation of underlying degenerative changes." Dr. Rosenzweig anticipated that the claimant's healing time for this injury should be

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10 to 14 days. The claimant testified that she missed two days of work as a result of this injury.

The claimant continued to complain of unresolving neck and back pain. Per the claimant's request, in November of 2001, Dr. Rosenzweig referred her for cranial sacral massaging. In addition, Dr. Rosenzweig felt that the claimant would benefit from the Med-Ex protocol offered at the Arkansas Spine and Sports Institute. On December 12, 2001, Dr. Rosenzweig reported that this treatment modality was effective in providing the claimant relief from her symptoms. On January 30, 2002, Dr. Rosenzweig stated that in spite of the claimant's treatment, her "symptomatology persists."

The claimant's examination on April 3, 2002, showed "no improvement or significant deterioration of her presenting symptoms and/or findings over the past several months." However, Dr. Rosenzweig did not believe that the claimant had reached maximum medical improvement as of that date. On May 8, 2002, an MRI of the claimant's lumbar spine

showed slight straightening of the lumbar lordosis, but was otherwise unremarkable. Surprisingly, the bulge previously seen at L1-2 had "spontaneously regressed and improved." Dr. Rosenzweig opined that with the "proper stretching and strengthening program and medications to help reduce the inflammation and spasms", the claimant's prognosis and recovery appeared "excellent". After several more months of conservative treatment, including a series of lumbar epidural steroid injections, the claimant demonstrated objective signs of improvement. In spite of this improvement, however, the claimant continued to present with subjective complaints of pain; primarily in her lower back. The claimant requested an x-ray of her hip and pelvis in order to determine the cause of her continuing pain. In the meantime, the claimant continued to work for the respondent employer with modifications until she was terminated in December of 2002.

Finally, on February 18, 2003, Dr. Rosenzweig opined that the claimant had reached maximum medical

improvement for her injuries, and aside from continuing medical management, he released her from his care. More than one year after she was released by Dr. Rosenzweig, on June 24, 2004, the claimant returned to him seeking a permanent impairment rating. Using Table 75IIC of the AMA Guides to the Evaluation of Permanent Impairment, 4th. 1993 ("the Guides"), Dr. Rosenzweig assessed the claimant with an 8% permanent physical impairment rating for her neck for two levels. Using Table 75IIB, he assigned her a 5% permanent physical impairment rating for her lumbar spine. Using the Combined Values table, Dr. Rosenzweig stated that the claimant would have a total permanent partial impairment of 13%.

On October 6, 2004, Dr. Schlesinger conducted a comprehensive neurological examination of the claimant for the purpose of assigning her with a permanent impairment. At the conclusion of his detailed, four page report, Dr. Schlesinger assessed the claimant with a 4% permanent physical impairment of her cervical spine, and 0% permanent

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physical impairment of her lumbar spine. Like Dr. Rosenzweig, Dr. Schlesinger based these ratings on the Guides, Table 75. Dr. Schlesinger explained his rationale for these ratings as follows:

The lumbar spine had a normal study and therefore there would be no objective rating for the lumbar spine. In the cervical spine there was a small C5-6 disc protrusion that would warrant at most a 4% rating. One could certainly argue that her findings were pre-existing degenerative changes, but the highest potential rating one could offer would be 4%. In the lumbar spine, there was an essentially normal study. The radiologist did interpret a minimal diffuse annular bulge at L1-2, but her pain was really in the lower lumbar spine and the change is so minimal that I would call it normal and not offer a disability rating for the lumbar spine.

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. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur,

the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Crow, supra. Moreover, Ark. Code Ann. § 11-9-704(c)(1) provides that any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Objective findings are those

findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16).

The Commission has the authority and the duty to weigh medical evidence to determine its medical soundness, and we have the authority to accept or reject medical evidence. Mack v. Tyson Foods, Inc., 28 Ark. App. 299, 771 S.W.2d 794 (1989); Wasson v. Losey, 11 Ark. App. 302, 669 S.W.2d 516 (1984); Farmers Insurance Co. v. Buchheit, 21 Ark. App. 7, 727 S.W.2d 391 (1987). Likewise, the Commission is entitled to examine the basis for a physician's opinion, like that of any other expert, in deciding the weight to which that opinion is entitled. However, as with any evidence, we can not arbitrarily disregard the testimony of any witness. In making determinations regarding the existence and extent of anatomical loss of use, we are not limited solely to medical evidence.

In the present claim, the claimant has failed to prove by a preponderance of the evidence that she is entitled to a 5% permanent physical impairment rating for

her lumbar spine and an 8% permanent physical impairment rating for her cervical spine, for a combined total of 13% permanent partial physical impairment. On November 18, 2004, Dr. Rosenzweig testified by deposition as follows:

Q. What was the purpose of the visit in June of 2004?

A. At this time, she was, I believe working on the settlement of the ending of her worker's comp claim and was asking for an impairment rating.

Q. ... Where you ever able to document that the disc herniations that you saw on the MRI were related to any of her particular traumas?

A. I don't - - I can't say with a reasonable medical certainty that the MRI findings at the time of the complaints were related to her injury, other than the fact that they were when her injury was evaluated. And, therefore, the impairment rating, as the treating physician, is often based on those findings.

In other testimony, Dr. Rosenzweig admitted that had he approached the claimant's impairment rating as an IME doctor, as opposed to the claimant's treating physician, his

rating would have been different. Dr. Rosenzweig also admitted that he did not "disagree" with Dr. Schlesinger's 4% cervical spine rating. Dr. Rosenzweig agreed that the difference between a treating doctor and an IME doctor in terms of assigning an impairment ratings, is that an IME "can be a little more objective." As the claimant's treating physician, Dr. Rosenzweig defined his role as a "patient advocate." Furthermore, Dr. Rosenzweig stated that the 5% impairment rating that he assigned to the claimant's lumbar spine was based on the disc bulge at L1-2. As previously mentioned, this particular bulge later resolved.

Q. And the five percent rating that you gave in the lumbar area - -

A. That was based on the disc changes at L1-2 at the time of her presentation.

Q. That went away later?

A. Correct.

Q. If they go away, does that go back to a zero like Dr. Schlesinger said?

A. I don't have an argument with that.

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Finally, Dr. Rosenzweig admitted that his relationship to the claimant as her treating physician probably skewed his opinion regarding her impairment rating. More specifically, Dr. Rosenzweig stated:

And one of the pitfalls for a treating physician offering an impairment rating is that they have a relationship with the patient. And there's an inherent possibility that a treating physician may be more generous than an examining physician, although the information that I extracted using the Fourth Edition Guide, I think can be clearly correlated. I don't think I was making anything up to help Ms. Palasota, but just clearly extracting all the information available to provide the answer that she was asking for.

Dr. Rosenzweig admitted that an independent medical examiner does not have the same "obligation" to his patients, as does their treating physician. Moreover, Dr. Rosenzweig admitted that he considered the claimant's pain when basing the claimant's cervical rating on three-level disc disease, in spite of his awareness that under Arkansas worker's compensation law, pain cannot be

considered in the assessment of a claimant's permanent physical impairment. Had he approached the claimant's impairment rating from an IME position, Dr. Rosenzweig stated that he would have considered only the claimant's protruding disc at C5-6 when assessing her degree of impairment, and given her a 6% permanent physical impairment rating for her cervical spine based upon a finding of moderate disease. Dr. Schlesinger based his 4% rating of the claimant's cervical spine on a single level disc herniation with a minimal disease factor.

The record clearly indicates that the claimant sustained, at most, a minimal amount of damage to her cervical spine at C5-6 as a result of her first injury in September of 2000. Moreover, it is highly likely that the claimant's "small disc protrusion" at C5-6 was present prior to her first compensable injury, and that this accident merely exacerbated or temporarily aggravated her preexisting degenerative disc disease, causing it to become symptomatic. Moreover, numerous diagnostic studies conducted throughout

the course of the claimant's treatment demonstrate that the claimant's condition was not objectively worsened by her two subsequent injuries. Rather, the claimant's condition was temporarily aggravated by her subsequent accidents which resulted in an extended healing period. Furthermore Dr. Rosenzweig admitted that his impairment ratings were biased in favor of the claimant, and that he would not have given her as high a rating had he not been her primary treating physician. Certainly, 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). Considering that even Dr. Rosenzweig could not disagree with Dr. Schlesinger's basis for assigning the claimant with a 4% permanent impairment rating to her cervical spine, Dr. Schlesinger's opinion should be given greater weight. Therefore, the claimant's permanent impairment rating for her cervical spine is hereby modified from 8% to 4%. Concerning the claimant's lumbar spine impairment, the preponderance of the

evidence demonstrates that the claimant's annular bulge at L1-2 resolved. Therefore, Dr. Schlesinger was correct in assessing the claimant with a 0% permanent physical impairment rating for her lumbar spine. Once again, given that the claimant's lumbar disc bulge has resolved, Dr. Rosenzweig could not disagree that Dr. Schlesinger was correct in assigning the claimant a 0% rating for her lumbar spine. Therefore, the claimant's permanent physical impairment rating for her lumbar spine is hereby reduced from 5% to 0%. Overall, the claimant is hereby awarded a 4% permanent physical impairment rating for her cervical spine.

In terms of wage loss disability, the Administrative Law Judge was correct in finding that the claimant has failed to prove her entitlement to wage loss benefits. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Furthermore, the Commission is charged with the duty of determining disability based upon a

consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, supra. The claimant was never taken off of work due to her injuries. She continued to work for the respondent employer until her termination in December of 2002. Thereafter, the claimant chose to become self-employed in the same line of work. Whereas the claimant was earning a \$8.15 per hour plus 1½% commission with the respondent employer, she testified that she now charges \$65.00 for her services, potentially earning \$2,800.00 per week. Currently, even hiring occasional help, the claimant's hourly wage exceeds her wages with the respondent employer. Although as with any new business, the claimant's business revenues are currently low, she anticipates future earnings well in excess of \$100,000.00 per year. Furthermore, the claimant is young, educated, and her activities have not been restricted. Therefore, the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage-loss benefits, and the

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Administrative Law Judge was correct in denying the claimant those benefits.

Finally, employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). According to Dr. Rosenzweig, the claimant reached maximum medical improvement on February 18, 2003, at which time he released her from his active care. On June 29, 2004, the

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claimant returned to Dr. Rosenzweig for the sole purpose of obtaining a permanent physical impairment rating. Because the record clearly shows that at the time the claimant sought an impairment rating from Dr. Rosenzweig she had reached maximum medical improvement and had been released from his active care for over a year, it is evident that the claimant did not return to Dr. Rosenzweig in order to pursue "treatment" for her compensable injury. Nor did the claimant return to Dr. Rosenzweig in order to remedy a condition caused by her compensable injury. Rather, the claimant return to Dr. Rosenzweig purely to obtain an impairment rating, which does not constitute "reasonable and necessary medical treatment" under the guidelines of Ark. Code Ann. §11-9-508(a). Therefore, the claimant acted at her own peril in seeking services from Dr. Rosenzweig strictly for the purpose of obtaining an impairment rating, as this doctor's visit was not reasonably necessary for the treatment of the claimant's compensable injury. Moreover, this case is clearly distinguishable from the Brown case, in that

Dr. Rosenzweig readily admitted that he was not performing an Independent Medical Evaluation on the claimant's behalf, whereas Dr. Schlesinger was solicited solely for that purpose. See, Brown v. Hope Brick Works, Full Commission Opinion filed November 8, 2000 (E804329). In addition, Dr. Rosenzweig admitted that his opinion, as the claimant's treating physician was skewed in her favor. Had he been conducting his June 29, 2004, examination for the purposes of an Independent Medical Evaluation, Dr. Rosenzweig confessed that his impairment rating would have been more conservative. Accordingly, the Administrative Law Judge was correct in denying medical benefits in this regard.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to a 13% permanent physical impairment rating to the body as a whole, which includes a 5% rating for her lumbar spine, and an 8% rating for her cervical spine. Rather, the preponderance of the evidence shows that the claimant is entitled to a 4% permanent

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physical impairment rating for her cervical spine. Therefore, the Administrative Law Judge's award of 13% permanent physical impairment is hereby modified to 4%. Furthermore, the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage-loss disability benefits, and to medical benefits for her examination by Dr. Rosenzweig on June 29, 2004. Therefore, the decision of the Administrative Law Judge is hereby affirmed regarding these two issues.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority affirms the Administrative Law Judge's denial of wage loss disability benefits and his

finding that the respondent is not liable for Dr. Rosenzweig's final examination. However, they modify the Judge's finding that the claimant had sustained a 13% anatomical impairment as a result of her compensable injuries to an impairment rating of 4% to the body as a whole. Based upon my de novo review of the evidence developed at the hearing and the Administrative Law Judge's Opinion, I find that the Judge should have been affirmed as to his finding in regard to the extent of the claimant's permanent impairment but that his denial of wage loss disability benefits and his finding that the disputed medical treatments was not the liability of the respondent should have been reversed. For these reasons, I must respectfully dissent.

In considering the medical treatment issue, I note that it has long been held that evaluations to determine an injured worker's physical status are reasonable and necessary medical treatment and are the responsibility of the respondent. In Gansky v. High Tech Engineering, 325 Ark.

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163, 924 S.W.2d 790 (1996), the Arkansas Supreme Court held that a Functional Capacity Examination which the claimant's doctor had directed the claimant to undergo was reasonable and necessary medical treatment and concluded that the Commission erred in not requiring the respondent to pay for the assessment. Similarly, in Arkansas Department of Corrections v. Holybee, 46 Ark. App. 232, 874 S.W.2d 420 (1994), the Court of Appeals held that diagnostic testing to determine whether a claimant had been infected, even though it did not constitute actual treatment of his injury, was reasonable and necessary medical treatment and that the respondent were required to pay for the testing. Lastly, in Brown v. Hope Brick Works, Full Commission Opinion, November 8, 2000 (E804329), this Commission held that a claimant was entitled to an independent medical evaluation for the purposes of determining the extent of his permanent anatomical impairment at the expense of the respondent.

In the present case, the disputed medical treatment was the examination of the claimant performed by

Dr. Kenneth Rosenzweig, the claimant's treating physician. Dr. Rosenzweig is an orthopedic specialist who, in the past, provided the claimant a substantial amount of treatment for her back and neck condition. In a report dated June 29, 2004, Dr. Rosenzweig stated that he had seen the claimant "in follow-up one last time to discuss an impairment rating that should be issued regarding injuries sustained in her work related activity dating back to September 15, 2000." Dr. Rosenzweig went on to recount his examination of the claimant and set out his opinion that the claimant sustained an anatomical impairment in an amount equal to 13% to the her whole body.

In my opinion, this type of evaluation is exactly what was contemplated by the Supreme Court in Gansky and this Commission in Brown. I also note that the respondent has paid for independent examinations by Dr. James Moore and Dr. Scott Schlesinger, both Little Rock neurosurgeons. It seems incongruous to me that the respondent has no hesitation in paying for the independent medical

examinations of doctors who provide the claimant no treatment but are refusing to pay for an evaluation by a doctor who has seen the claimant on numerous occasions and has been providing her treatment for a period of years. This incongruity is even more pronounced when it is remembered that Dr. Rosenzweig is in a much better position to evaluate her condition than two doctors who only saw her briefly on one occasion and who stated their opinions based, primarily, upon opinions and findings of other medical providers. Accordingly, I find, without hesitation, that the treatment rendered to the claimant by Dr. Rosenzweig in connection with his June 29, 2004 report is reasonable and necessary medical treatment which should be the financial responsibility of the respondent.

The next issue is the extent of the claimant's anatomical impairment. As indicated above, Dr. Rosenzweig opined in his June 2004 report that the claimant had been sustained a 13% impairment to her whole body. That impairment rating was based upon an 8% impairment to the

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claimant's cervical spine and a 5% impairment to her lumbar spine. According to Dr. Rosenzweig's medical reports and his deposition, he was basing those impairment ratings on the MRI of the claimant's lumbar and cervical spine taken on December 30, 2000. The claimant's cervical MRI found that she had a central disc protrusion at C3-C4, a small broad based posterior central disc protrusion at C4, C5 and a small broad based right paracentral disc protrusion at C5-C6. Dr. Rosenzweig stated that his evaluation of the cervical injury, which included herniations at multiple levels, entitled the claimant to an 8% permanent impairment rating, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Rosenzweig also considered the claimant's lumbar MRI which demonstrated an annular disc bulge at L1-L2 which, when using the same AMA Guides, would entitle the claimant to a 5% impairment to the body as a whole. When combining those two impairment ratings, Dr. Rosenzweig assessed the claimant with an impairment rating of 13% to the body as a whole.

I do not believe that there would be any real dispute regarding this impairment rating but for the report of Dr. Scott Schlesinger, dated October 6, 2004. In that report, Dr. Schlesinger summarized the claimant's physical status and then set out his evaluation of the claimant's permanent impairment. Dr. Schlesinger, in assessing the claimant a 4% impairment based upon his cervical spine condition, only considered the protrusion at C5-C6, which he stated, "that would warrant at most a 4% rating." He also mentioned the claimant's bulge at L1-L2 but that stated that, "her pain was really in the lower lumbar spine," and, on that basis, did not believe that she was entitled to any disability rating on her lumbar spine.

In my opinion, Dr. Rosenzweig's evaluation of the claimant is more complete and accurate. As her treating physician, Dr. Rosenzweig was fully aware of the claimant's condition and her past medical history. In his deposition, Dr. Rosenzweig specifically discussed the claimant's past medical history and his knowledge of her complaints and

symptoms. As he explained, being her treating physician, he was in a much better position to evaluate her than that of a doctor performing an independent medical examination. This is significant since Dr. Rosenzweig devotes a considerable part of his practice to performing these types of independent medical examinations in workers' compensation cases and other situations. According to Dr. Rosenzweig, a doctor performing an independent medical examination is frequently limited by his lack of prior knowledge and, consequently, will base his or her opinion almost entirely upon the information that is gleaned in one brief visit and a review of the existing medical records. However, in the present case, Dr. Rosenzweig applied his greater knowledge of the claimant's medical condition and was more accurately able to assess the extent of her permanent impairment.

The Majority also refuses Dr. Rosenzweig's evaluation of the claimant's lumbar injury because of a later lumbar MRI which indicated that the disc injury previously identified had reabsorbed (contracted back into

the disc). The Majority therefore contends that the claimant is no longer entitled to any impairment rating based upon this condition.

Dr. Rosenzweig testified that disc injuries are frequently dynamic conditions which are subject to change. However, once such a disc injury has occurred it is likely to reappear in the future. On that basis, he found that the claimant was entitled to a degree of permanent impairment based upon that previously detected condition.

Even Dr. Schlesinger did not adopt the Majority's viewpoint. While he did not assess any impairment for the defect at L1-L2, he did note its presence and did not attach any importance to the fact that it did not appear in later MRI's. His conclusion was not that the disc injury was not present, merely that it was not significant enough to warrant an impairment rating. However, as indicated above, I believe that Dr. Rosenzweig's evaluation of the claimant's lumbar disc condition was more accurate and was based upon a fuller understanding of the claimant's medical condition.

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For those reasons, I also find that Dr. Rosenzweig's assessment of a 5% impairment, based upon the claimant's lumbar disc injury, is valid.

For the reasons set out above, it is my opinion that Dr. Rosenzweig's medical reports should be the basis of awarding the claimant's permanent impairment rating. I therefore find that she sustained an 8% impairment to her cervical spine and a 5% impairment to her lumbar spine. When combined, those two impairment ratings entitle the claimant to receive permanent and partial disability benefits based upon a 13% anatomical impairment rating to her body as a whole.

The final issue is the claimant's entitlement to wage loss disability benefits. The Majority finds that she is not entitled to any of these benefits because she had returned to work in the design industry. However, the claimant testified that her earnings are substantially limited at this time because she is unable to perform many of the normal duties of a person in her occupation.

Specifically, she cannot lift any significant weight and is unable to do the frequent bending or stretching often times required. In order to accomplish this part of her job she must hire outside help. This clearly reduces her income potential.

Also, it does not appear that there is any real dispute that her employer, at the time of the injury, would not continue to employ her with the restrictions that she sustained in her injuries. While it is true that her income potential as a self-employed designer may be equal to or greater than her pre-injury income, she has not yet been able to return to that status. While she is clearly not totally disabled, it appears to me that she has suffered a clear and undeniable loss of earning because of her injury. Further, this earning loss is almost certainly going to continue on into the foreseeable future.

In this case, the claimant clearly does not lack motivation. However, she does lack the functional ability to carry out all of the duties required by her chosen

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occupation. While employed by the respondent, these shortcomings could have been accommodated by the employer's other staff members. However, since the employer was not willing to continue her in her job or accommodate her restrictions, she was forced to seek employment elsewhere. Since the same limitations that would have made her an undesirable employee for the respondent also apply to other potential employers, her only recourse was to start her own business. Clearly, the claimant's restrictions impede her ability to reach her goal of restoring her pre-injury income. I believe this is a clear case where her wage earning ability has been significantly impaired by her job related injuries. I therefore find that she should be awarded wage loss disability benefits in an amount equal to 15% to her body as a whole.

In summary, I find that the medical treatment the claimant received from Dr. Rosenzweig for the purpose of evaluating her condition is reasonable and necessary medical treatment and should be found to be the responsibility of

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the respondent, and I would have reversed the Administrative Law Judge's denial of this benefit. On the other hand, I find that the Administrative Law Judge correctly evaluated the extent of the claimant's permanent impairment and I would have affirmed his award of permanent partial disability benefits based upon an anatomical impairment rating of 13% to the body as a whole. Lastly, I would have reversed the Judge's denial of wage loss disability benefits and awarded her benefits in excess of her anatomical impairment in an amount equal to 15% to the body as a whole.

For the aforementioned reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner