

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405776

JAMES WATTS, EMPLOYEE	CLAIMANT
NELSON UTILITY CONSTRUCTION, INC., EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 3, 2007

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

Claimant represented by HONORABLE STEVEN R. McNEELY,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the
Administrative Law Judge filed February 2, 2007.

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

1. The employee-employer-carrier relationship existed on May 7, 2004 and at all relevant times.
2. The claimant sustained a compensable back injury on May 7, 2004.
3. The claimant's average weekly wage is \$750.00.

4. The respondents controvert permanent benefits.

5. The February 18, 2005 Administrative Law Judge's Opinion and the June 30, 2005 Full Commission Opinion are law of the case and res judicata.

6. The claimant's temporary total disability benefits and attorney's fees have been paid for the period from May 28, 2004 to July 17, 2004.

7. The claimant has failed to establish by a preponderance of the evidence that he is entitled to any period of temporary partial disability or temporary total disability for any period after his release to return to light duty work on July 17, 2004.

8. The claimant has failed to establish by a preponderance of the credible evidence that he sustained a compensable permanent anatomical impairment as a result of his admittedly compensable low back injury.

9. The claimant has established by a preponderance of the evidence that the medical treatment he received at Boston Rural Medical Health Center Inc. from May 28, 2004 through December 30, 2005 was reasonably necessary for treatment of the claimant's compensable back injury and complications from non-steroidal medicine.

10. The claimant has failed to establish by a preponderance of the evidence in the present record that pain management is reasonably necessary for his

compensable low back injury at this time.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

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

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

The claimant sustained an admittedly compensable injury on May 7, 2004. The Majority, by affirming and adopting the Administrative Law Judge's opinion, found that the claimant proved by a preponderance of the evidence that medical treatment he received at Boston Rural Medical Health Center Inc. from May 28, 2004, through December 30, 2005, was reasonably necessary for treatment of the claimant's compensable back injury and complications from non-steroidal medicine. However, the Majority also found that the claimant failed to prove by a preponderance of the evidence that he was entitled to temporary total disability from July 17, 2004 to a date yet to be determined. The Majority also found that the claimant failed to prove by a preponderance of the evidence that pain management is reasonably necessary for his compensable low back injury. The Majority also found that the claimant failed to prove by a preponderance of the evidence that he sustained a permanent anatomical impairment. After a de novo review of the record, I find the evidence shows that the claimant is entitled to the

requested medical treatment in the form of pain management and to a permanent impairment rating. As such, I respectfully concur in part and dissent in part.

This first hearing on the present matter was held on September 21, 2004. At that first hearing, the claimant testified that he injured himself on May 7, 2004.

We were working in Ralston, Arkansas, down in south Arkansas. And I'd been running the dozer for Matt [Claimant's boss], and I was pulling him on - - he was on a dozer and I was on a dozer, and I was pulling him. And I was turned around, watching him, and then, you know, I was twisting and turning, you know. And, when I turned back around, I just felt, you know, like a sharp pain in my back. Just, you know, all the way down my legs. And I got off and told Matt I hurt my back. And he could see, you know, that I hurt my back. And that's pretty much what happened then.

At the emergency room, Claimant received medication and underwent an x-ray. His study resulted in an impression finding "irregularities... but an acute process or specific cause for back pain is not definitively appreciated." Claimant was scheduled for an MRI and referred to Dr. Sarah Sullivan. Claimant underwent an MRI of his

lumbar spine on May 28, 2004. This study resulted in the following impression:

Protruding disc at the L3-L4, L4-L5, and L5-S1 levels, most pronounced at the L4-L5, where this causes central canal and mild bilateral neural foraminal narrowing. The L3-L4 level indents the thecal sac, but it does not cause severe central canal stenosis nor does it at the L5-S1 level.

These findings were called in to Dr. Sullivan.

Dr. Sullivan examined Claimant on that same date, May 28, 2004. She explained her understanding of Claimant's MRI.

I felt it was consistent with his pain. He has an L-3, L-4 indentation of the thecal sac and that can certainly cause a lot of pain, cause it's impinging on the nerve. At L-4, L-5 he has disc herniation with foraminal narrowing, so I do feel that this could be a cause of pain also.

Dr. Sullivan prescribed medications and physical therapy, and recommended consultation with an orthopaedic surgeon.

Claimant presented to Susan Housley for physical therapy on July 9, 2004. Among other observations, she noted

a "slight increase in lumbar lordosis." She also observed "palpable spasms present in (R) LB."

Claimant presented to Dr. Sullivan for a second time on July 17, 2004. Claimant reported an improvement in his pain, and that it had localized "on the right side of the lumbar spine approximately L5." Dr. Sullivan found "tenderness to palpation" upon examination, but did not report spasms. Claimant requested a release to light duty work; Dr. Sullivan recalled: "I was very concerned because of the findings of his MRI. I felt he should not go back to work but he really wanted me to give him a release, so I gave him one for light duty only."

Claimant apparently attempted to work from July 19, 2004 until August 6, 2004. He had trouble working; the respondent employer did not have "a whole lot of construction work that you can do that's really called light duty...."

Claimant presented to Dr. Sullivan a third time on August 7, 2004. He reported that "his pain is continuing. He does have periods where he is without pain." Upon examination, Dr. Sullivan observed "tenderness to palpation

in the L3-L5 region. Some soft tissue swelling is noted over the spine itself." She prescribed medications, continuing physical therapy, and light duty at work; once again, she recommended an orthopaedic referral.

Claimant again presented to the physical therapist on August 10, 2004. This time, she noted "decreased lumbar lordosis" and "[p]alpable spasming present throughout (R)lumbar paraspinals." She opined that Claimant's "[s]igns and symptoms appear to be consistent with diagnosis" of "L3/L4/L5 herniated discs."

At the hearing, Claimant testified that he last presented to Dr. Sullivan "last month," and that all she can do for him is provide pain pills. He confirmed that he quit seeking medical treatment because he has difficulty paying for it. However, Dr. Sullivan testified that Claimant would have been seen regardless of his financial condition.

As to his current condition, Claimant testified that his back is "doing better, but if - - you know, if I try to, you know, walk around a lot or do a lot during the day, then it hurts at night, you know. You can barely sleep, you know." He reiterated upon cross-examination that

"[s]ometimes it's better than others. Sometimes I don't have it shooting down my legs."

In her deposition, Dr. Sullivan explained that Claimant's disc at L3-4 indenting the thecal sac is problematic, because "any touching of the thecal sac will cause pain." She believes Claimant's complaints of pain to be reasonable.

A. And he has not been what I would consider a major complainer, he's tried to go back to work and I don't feel that his complaints of pain are out of line.

Q. Okay, and as far as his complaints of pain and the subjective complaints, are those consistent with the objective findings that you see on that MRI, radiologist report?

A. If anything his pain should be worse, from reading the MRI, but you know, as we discussed, it's hard to say whether this is an incidental finding but it's very, very consistent with his physical findings. The pain is where it is shown on the MRI.

Dr. Sullivan recommended a referral to an orthopaedic surgeon "every time I saw him." Even now, "if he was to call me and say I am still having pain, I would say,

I still recommend you see the orthopedic surgeon, I would not require him to come in for me to send him to one."

The Administrative Law Judge in the first hearing determined that the claimant did in fact sustain a compensable injury. The case was appealed to the Full Commission where it was determined by on June 30, 2005, that there were objective findings in the form of an MRI which revealed protruding discs at three levels in the claimant's lumbar spine and a finding of muscle spasms.

The present matter came before the Administrative Law Judge on November 13, 2006 to determine additional temporary total disability benefits, a permanent impairment rating, additional medical benefits, and pain management.

The claimant testified that he did not receive any benefits from Dr. Sprinkle, and that he still has problems with his back. The claimant testified that he has good days and bad days and that some days are better than others, but essentially his symptoms had not changed.

Dr. Sprinkle began treating the claimant in December of 2004. Dr. Sprinkle is a physician specializing in non-operative care of the spine and electrodiagnostic

testing. In a note dated February 9, 2006, Dr. Sprinkle noted:

I last saw him in March of 2005. He had some degenerative changes and an annular tear at the first visit which was December 7, 2004. He hurt his back operating a bulldozer. He had an MRI in September of 2004. He had some degenerative changes at L3-4, L5-S1 but not severe. He is still having back pain. It is going to his left leg and left thigh. We need to make sure there is no significant disc herniation there with an MRI. The trigger point injection helped a little bit. He tried Celebrex with no response.

However, Dr. Sprinkle's impression was that the claimant suffered from lumbar degenerative disc disease, a lumbar strain, lumbar myofascial pain, and lumbar annular tears. Dr. Sprinkle also ordered an MRI.

Another MRI was performed on February 14, 2006. Dr. Al Alexander, a radiologist, reviewed the results of the MRI, noting that the claimant suffered:

Moderate spinal stenosis at L3-4 due to bulging disk and posterior element hypertrophy.

Small-to-moderate central disk herniation at L5-S1 which extends into the anterior epidural fat and abuts the

anterior surface of the thecal sac, but does not cause nerve root impingement.

Bulging disk at L4-5 slightly more prominent to the right of midline.

Despite these findings, Dr. Sprinkle assessed the claimant with a 0% impairment rating.

The AMA Guides to the Evaluation of Permanent Impairment, (4th Ed. 1993) was introduced into evidence. Table 75 of the Guides, page 113 provides a 5% rating for the first inoperative disc and an additional 1% for each additional level.

The Majority found that the claimant failed to prove by a preponderance of the evidence that pain management is reasonably necessary for his compensable low back injury, and that the claimant failed to prove by a preponderance of the evidence that he sustained a permanent anatomical impairment. The Majority's findings are simply not consistent with the Full Commission's previous finding that the claimant sustained protruding discs at three levels in the claimant's lumbar spine, which would lead to the reasonable conclusion that the claimant should be entitled to pain management for this compensable injury.

Additionally, the Majority erroneously disregarded the Full Commission's finding that the claimant sustained protruding discs at three levels in the claimant's lumbar spine and failed to assign an impairment rating.

First, the claimant is entitled to reasonable and necessary medical treatment for his compensable injury. Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d The Court of Appeals has noted that even if the healing period has ended, a claimant may be entitled to ongoing medical treatment if the treatment is geared toward management of the claimant's compensable injury. See,

Patchell v. Wal-Mart Stores, Inc., 86 Ark App. 230; 184 S.W.3d 31, (2004), citing Pippin, supra. Furthermore, this Commission has found that, treatment intended to help a claimant cope with chronic pain attributable to a compensable injury may be reasonable and necessary. See, Maynard v. Belden Wire & Cable Company, Full Workers' Compensation Commission Opinion filed April 28, 1998 (E502002); See also, Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission opinion filed June 20, 1991 (Claim No. 704562). 845 (1983). Additionally, a claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

The claimant's testimony reveals that his symptoms have not changed since the injury. The claimant testified that he did not receive any benefits from Dr. Sprinkle, and that he still has problems with his back. The claimant testified that he has good days and bad days and that some days are better than others, but essentially his symptoms had not changed. As such, he is in need of treatment geared toward pain management to reduce or alleviate symptoms

resulting from the compensable injury. Additionally, pain management will aid the claimant in coping with the chronic pain attributable to a compensable injury. As pain management is reasonable and necessary, the Majority erred in not awarding this reasonable and necessary medical treatment.

Second, the claimant is entitled to an impairment rating, and the Majority erroneously disregarded the Full Commission's previous findings in denying an impairment rating. Claimant underwent an MRI of his lumbar spine on May 28, 2004. This study resulted in the following impression:

Protruding disc at the L3-L4, L4-L5, and L5-S1 levels, most pronounced at the L4-L5, where this causes central canal and mild bilateral neural foraminal narrowing. The L3-L4 level indents the thecal sac, but it does not cause severe central canal stenosis nor does it at the L5-S1 level.

On June 30, 2005 the Full Commission determined that there were objective findings in the form of an MRI which revealed protruding discs at three levels in the claimant's lumbar spine and a finding of muscle spasms. In the present matter,

the Majority ignored this finding. Rather, the Majority incorrectly relied on Dr. Sprinkle's assessment that the claimant did not sustain an impairment rating.

Dr. Sprinkle is not credible and therefore his opinion should not hold any weight. Dr. Sprinkle is not credible due to the fact that even though the MRI in 2004 and 2006 established that the claimant had protruding disks at the L3-L4, L4-L5, and L5-S1 levels, he determined that the claimant only suffered from lumbar degenerative disc disease and a lumbar strain. Dr. Sprinkle was hired by the respondents and it is painfully obvious that he did not assign an impairment rating due to the fact that the respondents did not want him to assign the claimant an impairment rating. Dr. Sprinkle deliberately ignored the objective findings from the MRI in order to come to the respondent's desired results. As such, the Majority erred in relying on his opinion.

The Commission has the power to assign an impairment rating on its own. In the present case, under the Guides, the claimant is entitled to a 7% impairment rating. Relying on Johnson v. General Dynamics, 46 Ark. App.

188, 878 S.W.2d 411 (1994), the Court of Appeals held in Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001), that the Commission was authorized to assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. Specifically, this court in Polk County stated that:

The Workers' Compensation Act of 1993 directed the Commission to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission adopted the *AMA Guides*. Thus, in all cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, it is the Commission's duty to determine, using the *AMA Guides*, whether the claimant met his burden of proof. This being the case, we hold that the Commission can, and indeed, should, consult the *AMA Guides* when determining the existence and extent of permanent impairment, whether or not the relevant portions of the *Guides* have been offered into evidence by either party.

Polk County also contends that the Commission exceeded the scope of its authority when it assessed its own impairment rating rather than relying solely on its determination of the validity of ratings assigned by physicians. We disagree. It is the duty of the Commission to translate evidence into findings of fact. Johnson v.

General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). In the instant case, the Commission was authorized to decide which portions of the medical evidence to credit, and translate this medical evidence into a finding of permanent impairment using the AMA Guides. Polk County, 74 Ark. App. at 164-65, 47 S.W.3d at 907-08.

The AMA Guides to the Evaluation of Permanent Impairment, (4th Ed. 1993) was introduced into evidence. Table 75 of the Guides, page 113 provides a 5% rating for the first inoperative disc and an additional 1% for each additional level. The claimant, in the present case, has protruding discs at the L3-L4, L4-L5, and L5-S1 levels. As such, the claimant is entitled to 5% for the first disc, 1% for the second disc, and 1% for the third disc, for a total of a 7% impairment rating. The Majority therefore erred as a matter of law in not relying on the previous findings of the Full Commission and not assigning an impairment rating, when clearly the claimant is entitled to one.

In conclusion, I concur with the Majority's opinion that the claimant proved by a preponderance of the evidence that medical treatment he received at Boston Rural Medical Health Center Inc. from May 28, 2004, through

December 30, 2005, was reasonably necessary. However, I find that the claimant established by a preponderance of the evidence that he is also entitled to reasonable and necessary medical treatment in the form of pain management and that he is entitled to a 7% impairment rating.

For the aforementioned reasons, I must respectfully concur in part and dissent in part.

PHILIP A. HOOD, Commissioner