

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502430

JAMES BENNETT,
EMPLOYEE

CLAIMANT

YELLOW TRANSPORTATION, INC.,
EMPLOYER

RESPONDENT

SAFETY NATIONAL CASUALTY INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 13, 2008

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

Claimant represented by the HONORABLE THOMAS W. MICKEL,
Attorney at Law, Conway, Arkansas.

Respondent represented by the HONORABLE ERIC NEWKIRK,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed August 29, 2007. The administrative law judge
found that the claimant failed to prove he was entitled to
any anatomical impairment exceeding 2%. After reviewing the
entire record *de novo*, the Full Commission finds that the
claimant proved he was entitled to anatomical impairment in
the amount of 12%.

I. HISTORY

Dr. William F. Hefley, Jr. began treating the claimant for left shoulder pain in January 2005. Dr. Hefley noted, "X-Rays: Of the left shoulder show a Type 3 acromion. There is moderate to advanced AC DJD." Dr. Hefley's impression included, "1. Left shoulder impingement with possible rotator cuff tear."

An MRI of the claimant's left shoulder was taken in February 2005, with the impression, "Suspect a partial tear in the infraspinatus tendon at the attachment to the greater tuberosity on the articular surface side. No evidence for a full-thickness rotator cuff tear. Tendinosis/tendinopathy of the supraspinatus component."

Dr. Hefley noted in February 2005, "MRI Left Shoulder: AC DJD and a partial thickness rotator cuff tear." Dr. Hefley's impression included "1. Left shoulder impingement AC DJD and partial thickness rotator cuff tear." Dr. Hefley planned a left shoulder arthroscopy. Dr. Hefley noted before surgery, "He tells me a week or 10 days ago he was at work picking up a heavy butane tank to put in his truck when he felt a pop in the left shoulder and had increased pain. This injury occurred subsequent to his MRI. The MRI

indicated no full thickness rotator cuff tear and an intact biceps tendon. We'll keep in mind that he may have sustained structural tears subsequent to the MRI and we'll check closely today at arthroscopy." The parties have stipulated that the claimant sustained a compensable injury to his left shoulder on February 11, 2005.

Dr. Hefley performed surgery on February 25, 2005: "Left shoulder arthroscopy, debridement of stump of biceps tendon, subacromial decompression, distal clavicle excision, arthroscopy, rotator cuff repair, implant pain control pump." The post-operative diagnosis was "Left shoulder 2.5 cm full thickness rotator cuff tear, acromioclavicular degenerative joint disease, complete biceps tendon rupture."

Dr. Hefley reported in March 2005:

Mr. Bennett had a MRI of the left shoulder prior to his left shoulder surgery. The MRI was done on 2/04/05 and indicated no full-thickness rotator cuff tear. The subscapularis tendon was in normal position. Then, a week later on 2/11/05, he sustained an injury at work when he was picking up a heavy butane tank and felt a pop in the left shoulder. Subsequently, I took him to the operating room for arthroscopy on 2/25/05 and found a 2.5-cm full-thickness rotator cuff tear and a complete rupture of the biceps tendon.

It is my opinion within a reasonable degree of medical certainty that the injury at work caused the rotator cuff tear and biceps tendon rupture

and caused the majority of the pathology addressed at the time of his surgery on 2/25/05.

Dr. Hefley released the claimant to return to work in May 2005. The claimant testified that he returned to work.

The parties deposed Dr. Hefley on March 16, 2006. The respondents' attorney questioned Dr. Hefley:

Q. Let's talk permanent anatomical ratings based upon the Fourth Edition of the AMA Guidelines. I've seen a number of you (sic) records on a lot of cases, so I know you're very familiar with that. How much do you typically see as far as permanent anatomical impairment ratings for a partial tear procedure, which is what this gentleman had going in? How much would you have expected the gentleman to have sustained, under the anatomically under the Fourth Edition of the AMA Guidelines?

A. You know, I'd have to look that up. I don't know. But I would think, again, it would be perhaps a small increase for the cuff repair and the biceps tendon. The biceps tendon was not repaired, so he has a chronic biceps tendon rupture. But maybe a small increase but not a dramatic change in his MMI and his permanent physical impairment.

Q. From the partial to the full you mean?

A. Right. Not a dramatic change because we - you know, he's got a permanent - his biceps tendon is retracted and it was retracted and we did not chase that down his arm to retrieve it. We simply debrided the piece that was left in his shoulder. And so, he has a little bit of a permanent deformity there in his biceps and, you know, some mild weakness there, so it might have increased in a percent or two, but not a dramatic change because we repaired the cuff.

Q. Right. And the partial tear to the full tear rating would be how many percentage points approximately?

A. Yes. Including the biceps tendon and everything.

Q. Okay. So basically, the major cause of any anatomical rating would be the partial tear in the procedure that you already had scheduled; is that accurate?

A. Yeah, I would think so.

Q. Okay. And then, with the additional finding of a biceps tendon rupture and then the full tear, that would increase any rating that was already in existence by 1 or 2 percent anatomically?

A. Right.

Q. And so, the major cause of any rating in connection with the work incident would be one or 2 percent; is that accurate?

A. Yes....

The parties stipulated that the respondents "have accepted and paid a 2% whole person impairment rating and respondents are entitled to a credit for all benefits paid to date."

An administrative law judge (ALJ) filed an opinion on June 26, 2006. The ALJ found, among other things, that the claimant proved he sustained a compensable injury to his left shoulder. The ALJ found that the claimant was entitled

to reasonably necessary medical treatment, including surgery performed by Dr. Hefley.

Dr. Hefley issued a Permanent Impairment Rating on January 12, 2007:

- This impairment is concerning: James Grant Bennett
- Date of Birth: 4/20/53
- Date of Injury: 2/11/05
- % Of Permanent Impairment is: Concerning the LEFT SHOULDER - 20% upper extremity, 12% Whole Person.
- This is based on the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition.
- MMI has been reached. MMI was achieved on 1/3/07.
- This impairment is based on objective findings.
- The claimant's work related injury is the major cause of the impairment (Greater than 50%).
- My opinion is stated within a reasonable degree of medical certainty.
- The patient was released from care on 1/3/07.

A pre-hearing order was filed on June 5, 2007. The claimant contended, among other things, that he was entitled to permanent partial disability benefits "based upon a 12% whole person impairment assessed by Dr. Hefley." The respondents contended, among other things, that they had paid all permanent anatomical impairment benefits owed to the claimant. The parties agreed to litigate the following issues: "1. Claimant's entitlement to permanent partial disability benefits, based upon a rating from Dr. William

Hefley, beyond the 2% impairment rating accepted and paid by the respondents. 2. Controversion and attorney's fees."

An administrative law judge found, in pertinent part, "7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any impairment rating for his compensable injury to his left shoulder which exceeds the 2% whole person impairment rating accepted and paid by respondents." The claimant appeals to the Full Commission.

II. ADJUDICATION

The Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) to be used in assessing anatomical impairment. See Commission Rule 099.34; Ark. Code Ann. §11-9-519(g) (1) (a) (Repl. 2002). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c) (1) (B) (Repl. 2002). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4) (F) (ii) (a) (Repl. 2002). "Major cause" means "more than fifty percent (50%) of the cause,"

and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14) (A) (Repl. 2002).

In the present matter, an administrative law judge found that the claimant failed to prove he was entitled to anatomical impairment exceeding the 2% rating accepted by the respondents. The Full Commission reverses this finding. We recognize that portion of the deposition testimony when, without having a chance to consult the Guides, Dr. Hefley appeared to agree that any rating that exceeded 2% would be based on a pre-existing condition. The preponderance of evidence of record, however, demonstrates that the claimant proved he sustained a 12% anatomical impairment as a result of his compensable injury. The claimant sustained a compensable left shoulder injury on February 11, 2005, and Dr. Hefley performed surgery on February 25, 2005. The post-operative diagnosis included a full-thickness rotator cuff tear, degenerative joint disease, and complete biceps tendon rupture. Dr. Hefley opined on March 28, 2005 "that the injury at work caused the rotator cuff tear and biceps tendon rupture and caused the majority of the pathology addressed at the time of his surgery on 2/25/05." Dr.

Hefley opined in the deposition that the trauma requiring surgery was caused by the compensable injury.

Dr. Hefley issued a Permanent Impairment Rating on January 12, 2007, which rating was 12% and expressly based on the Guides. Dr. Hefley's 12% rating can be directly extrapolated from Table 3, page 3/20 in the Guides. The Full Commission finds that the 12% rating assessed by Dr. Hefley was based on objective medical findings, and that the compensable injury was the major cause of the rating. The Full Commission finds that Dr. Hefley's January 12, 2007 letter is entitled to significant evidentiary weight.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was entitled to a 12% anatomical impairment rating. The 12% anatomical impairment rating was based on objective and measurable physical findings, including a full rotator cuff tear and biceps tendon rupture. The claimant proved by a preponderance of the evidence that the February 11, 2005 compensable injury was the major cause of the 12% anatomical impairment rating assessed by Dr. Hefley on January 12, 2007. The 12% rating assessed by Dr. Hefley was taken directly from the Guides to the Evaluation of Permanent

Impairment (4th ed. 1993). The Full Commission reverses the administrative law judge's decision. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is entitled to a 12% permanent anatomical impairment as a result of his compensable injury. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party I find that the claimant has failed to meet his burden of proof.

It is undisputed that the claimant had a partial thickness tear in his left shoulder prior to his compensable injury on February 11, 2005. It is further undisputed that the claimant's compensable injury resulted in a complete thickness tear of the rotator cuff and a complete biceps tendon rupture. The claimant was scheduled for surgery to correct his pre-existing partial tear before he ever sustained his compensable injury.

A hearing on the compensability of his shoulder injury was held on March 28, 2006, at which time the parties submitted the deposition of claimant's treating surgeon Dr. William Hefley, Jr. Although the only issue was compensability, respondents' attorney briefly questioned Dr. Hefley on permanent impairment. At that time, Dr. Hefley unequivocally testified that the compensable injury would not dramatically alter the claimant's maximum medical improvement time nor his permanent physical impairment that was expected from the pre-existing partial thickness tear. The last medical report introduced into evidence at the March 28, 2006,

hearing was dated July 29, 2005. In this report Dr. Hefley noted:

He is here in follow-up of left shoulder arthroscopy. He states his shoulder continues to improve, but it is not 100% yet. He just wanted it noted that he is still having some discomfort in the biceps region after the debridement, and still when he uses the shoulder more aggressively he is sore for a day or 2 afterwards. All in all, he seems to be improving nicely. He seems fairly happy with the procedure and feels like he is going to recover as much as possible.

Upon examination, Dr. Hefley specifically noted, "There is full active range of motion with a little bit of discomfort at extremes of motion. Neurovascular status is intact." There is no evidence that the claimant required additional medical treatment subsequent to this evaluation. The only medical report dated after this examination is entitled "Permanent Impairment Rating" and is dated January 12, 2007. This report does not reflect that the claimant was seen or evaluated in conjunction with its preparation. Rather, it appears to be a form in response to specific questions posed regarding the claimant's permanent impairment, major cause, and the reasonable degree of medical certainty.

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.

Ark. Code Ann. § 11-9-704(c)(1) (Repl. 2002) provides that "[a]ny 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 which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i)(Supp. 2005). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. Ark. Code Ann. § 11-9-102(16)(A)(ii)(a). Furthermore, for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests shall not be considered objective findings. Ark. Code Ann. § 11-9-102(16)(A)(ii)(b). With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is the result of a diagnostic procedure which does not come under the voluntary control of the patient. Department of Parks & Tourism v. Helms, 60 Ark. App. 110, 959

S.W.2d 749 (1998). Finally, A.C.A. § 11-9-704(c)(4) requires that the provisions of the workers' compensation statute be strictly construed.

The majority places "significant evidentiary weight" upon Dr. Hefley's January 12, 2007, letter and finds that Dr. Hefley's 12% rating is based upon objective medical findings and that the compensable injury was the major cause of the rating. I do not agree.

The Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of workers' compensation law. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996); Tyson Foods, Inc. v. Watkins, 31 Ark. App. 230, 792 S.W.2d 348 (1990). As our Supreme Court has stated:

The Commission has never been limited to medical evidence only in arriving at its decision as to the amount or extent of a claimant's injury. Rather, we wrote that the Commission should consider all competent evidence, including medical, as well as lay testimony and the testimony of the claimant himself. Further ...while medical opinions are admissible and frequently helpful in workers' compensation cause, they are not conclusive.

Wade v. Mr. C. Cavanaugh's, 298 Ark. 363, 298 S.W.2d 521 (1989). The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, 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). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). However, it is well established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App.

51, 91 S.W.3d 93 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. McClain, supra.

The Commission is never limited to medical evidence in arriving at its decision. Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain, supra.

In the January 12, 2007, letter upon which the majority has placed "significant evidentiary weight" Dr. Hefley merely asserts a conclusion of a 12% impairment, without setting forth the basis for this

finding. At best, Dr. Hefley concluded that the claimant's "work related injury" is the major cause of the impairment; however, he failed to set forth in this report his understanding of the claimant's compensable injury. Given that the last medical report of which we are aware was dated more than a year and a half prior to this ratings report, we are left to speculate whether Dr. Hefley, in fact, considered the claimant's pre-existing partial rotator cuff tear when he assessed this impairment rating. Moreover, Dr. Hefley asserts that the rating is based upon the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition, but he does not set forth the table or chart upon which he relied to reach this finding. A thorough review of the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition section on shoulders reveals that ratings for a shoulder impairment are based upon active range of motion, nerve damage or neurovascular deficits. When claimant was last examined by Dr. Hefley on July 25, 2005, his examination specifically revealed; "There is full active range of motion with a little bit of discomfort at extremes of motion. Neurovascular status is intact." No nerve damage finding is noted in any of the medical reports. The

Guides do not provide a rating for specific shoulder disorders such as a torn or partial torn rotator cuff or a complete biceps tendon rupture. Thus, we are left to again speculate as to just what Dr. Hefley based this 12% rating upon. Rather than speculate, as the majority has done, I find that due to the lack of specific information in Dr. Hefley's January 12, 2007, report, this report is of little or no significance and we must turn to and rely upon Dr. Hefley's deposition testimony to fill in the gaps left by this report. The January 12, 2007, report is inconsistent with Dr. Hefley's testimony. When specifically questioned about both the claimant's pre-existing condition and the compensable injury, Dr. Hefley testified that to a reasonable degree of medical certainty the major cause of any rating in connection with the claimant's compensable injury would only be one or two percent. Thus, when I consider the lack of basis found in the record for the 12% rating assessed by Dr. Hefley, I cannot find that the claimant has proven that he sustained a 12% physical impairment rating as a result of his compensable injury.

Therefore, for those reasons set forth herein, I respectfully dissent.