

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701445

MICHAEL DAVIDSON, EMPLOYEE	CLAIMANT
TYSON FOODS, EMPLOYER	RESPONDENT
TYNET, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 20, 2009

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

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

Respondent represented by HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

Respondents appeal from the decision of the Administrative Law Judge finding that the claimant sustained a seven percent (7%) permanent impairment as a result of his compensable injury for which he is entitled to benefits.

Based upon ur de novo review of the entire record, without giving the benefit of the doubt to either party, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a permanent anatomical impairment as a result of his compensable injury.

Therefore, we find that the decision of the Administrative Law Judge must be reversed.

The claimant was employed as a truck driver for respondent when he sustained an admittedly compensable injury on November 28, 2006, when he was lifting at work. The claimant reported his injury on November 29, 2006, but did not seek medical treatment at that time. When the claimant's pain failed to go away, he requested and was provided medical treatment. The record reflects that the claimant filed a formal claim in January 2007, and was directed for treatment at Health Care Plus on January 31, 2007. Claimant reported the following history at that time:

This gentlemen comes in as a Workman's Compensation injury from Tyson. He states that he was doing some heavy lifting 2 months ago. He has had some vague twinging in the low thoracic spine. I do not think he has reported it but told someone today or recently because he is not getting better. They sent him in for evaluation. He is in his usual state of good health.

Upon examination, the claimant was found to have "...some faint muscle spasm, slight swelling and pain in the low paraspinous thoracic upper lumbar musculature. Sitting on the edge of the table straight leg raising to 90 degrees is not remarkable. " Dr. Gerald Morris diagnosed the claimant with lumbar strain and prescribed pain medication,

physical therapy, and lifting restrictions.

The claimant returned to Dr. Morris on February 6, 2007, and advised that he was "much better." Dr. Morris released the claimant to light duty work of driving, but no lifting. Claimant returned to the clinic on February 16, 2007, and was seen by Dr. Lester T. Alexander. Claimant advised Dr. Alexander that upon returning to his regular duties he had an "immediate recurrence of his back pain." Upon examination, Dr. Alexander noted:

Examination reveals tenderness to palpation of the lumbar paravertebral muscles bilaterally as well as the lumbar spine. He does not have any radicular pattern to his pain with straight leg raising or with forward bending, rotation, or lateral bending. He has some palpable muscle spasms.

Dr. Alexander assessed the claimant with "lumbar strain with muscle spasm," placed the claimant on light duty with no lifting over 5 pounds and no repetitive bending or twisting. Dr. Alexander prescribed muscle relaxers, pain medication, and continued physical therapy.

The claimant returned for his follow up appointment on February 23, 2007, complaining of pain in his left lower rib cage and upper lumbar area. X-rays of the

ribs taken at that time were negative. Again, Dr. Morris diagnosed the claimant with lumbar strain, but also assessed the claimant with chest muscle strain. Dr. Morris increased the claimant's physical therapy, and again restricted the claimant's lifting. Claimant was advised to return in three weeks, but was given the discretion to return earlier for work release if the claimant's condition improved.

On the claimant's scheduled return visit on March 16, 2007, Dr. Morris learned for the first time that even though he had been authorizing the claimant to work restricted, light duty over the past couple of months, the company did not have any light duty work available so the claimant had not been working at all. The claimant advised Dr. Morris as of that visit that he "is feeling better now." Dr. Morris further noted that a report from physical therapy stated that the claimant "has progressed quite well and it was his last visit." Additional visits were not requested by the therapist. Upon examination, Dr. Morris noted "some slight pain to palpitation in the left lumbar muscle as it attaches to the 2 or 3 lower ribs." Dr. Morris further noted good flexion and movement with ease of bending. In addition, claimant's pain level had decreased. Dr. Morris released the claimant to regular work at that time for a

couple of days with a return visit to assess the claimant's condition.

On April 4, 2007, the claimant was seen and examined by Dr. Reginald Rutherford, a Little Rock neurologist. Dr. Rutherford recorded the following history:

Mr. Davidson reports that when working in Louisiana he felt a pop in his low back when bending over. This resulted in persistent low back pain. He does not have any leg complaints pertaining to radicular pattern pain, leg weakness, leg heaviness, leg clumsiness or sensory disturbance of the legs. He has not noted change in bowel or bladder function. He has not noted accentuation of pain with coughing, sneezing, or straining. He does note intolerance of forward bending and lifting. He has been under the care of Dr. Gerald Morris. He was treated with Ibuprofen and a muscle relaxer coupled with physical therapy which proved without benefit. He has been off work for nine weeks. There has been no improvement in his symptom complex.

Upon examination, Dr. Rutherford noted normal straight leg raising and range of motion testing. Claimant's neurological exam was, likewise, normal. Dr. Rutherford did not detect any palpable muscle spasms in the

lumbar paraspinal muscles. Dr. Rutherford diagnosed the claimant with "lumbar strain pattern injury" but ordered an MRI study given the claimant's failure to improve with conservative treatment.

The MRI of the lumbar spine performed on May 10, 2007 revealed:

IMPRESSION: 1. MILD
DEGENERATIVE CHANGES OF THE
LUMBAR SPINE WITH DISC
DESICCATION IDENTIFIED FROM
L2-3 TO L5-S1.
2. SHALLOW BASED CENTRAL
DISC EXTRUSION AT L2-3.
3. MILD POSTERIOR DISC BULGE
WITH FACET JOINT
HYPERTROPHY AT L3-4 AND
L4-5.
4. CENTRAL DISC PROTRUSION
AT L5-S1 WITHOUT
SIGNIFICANT CANAL
STENOSIS. MILD FACET
JOINT HYPERTROPHY IS
SEEN.

The claimant was seen on follow-up with Dr. Rutherford on May 16, 2007. After reviewing the MRI study Dr. Rutherford noted that the lumbar spine demonstrated multilevel degenerative change without evidence of nerve root compromise. Additional physical therapy was prescribed and claimant was placed on Celebrex twice a day, and placed on light duty restrictions. In addition, a lumbar epidural steroid injection at the L4-5 level was ordered. On July

18, 2007, the claimant advised that the steroid injection which was administered on June 25, 2007, provided no benefit. Dr. Rutherford advised that no further treatment was considered beneficial for the claimant and ordered a Functional Capacity Evaluation.

The FCE which was performed by Functional Testing Centers, Inc. was conducted on August 2, 2007. The claimant was considered to have given reliable effort and was found capable of performing work within the Heavy Physical Demand Classification. On August 30, 2007, Dr. Rutherford released the claimant to work within the Heavy Physical Demand Classification as outlined in the FCE. For claimant's facet joint arthropathy identified on MRI, Dr. Rutherford recommended that the claimant be examined by Dr. Sundar Krishnan for diagnostic injections.

On January 2, 2008, the claimant came under the care of Dr. Wayne Bruffett, following a change of physician. Upon examination, Dr. Bruffett noted:

On examination, he's 5 feet, 9 inches tall and weighs 206 pounds. Pulse rate is regular at 80 beats per minute. He walks with a normal gait pattern. He has some decreased range of motion of the lumbar spine. His reflexes seem to be intact and

symmetric. Strength and sensation are normal in his legs. Hip range of motion is full and painless. Straight leg raising is negative. There are no upper motor neuron signs.

After reviewing the MRI reports, Dr. Bruffett assessed the claimant with Degenerative disk disease of the lumbar spine. After discussing his findings with the claimant, Dr. Bruffett stated in his report, "It is difficult for me to know exactly what structure is causing his pain." Dr. Bruffett recommended continued conservative treatment of smoking cessation, core strengthening and truck stabilization.

In a report to the adjustor Dr. Bruffett dated January 18, 2008, advised:

I would say within a reasonable degree of medical certainty that his complaints of back pain are related to his work injury on November 28, 2006. This is consistent with his history. He does have pre-existing degenerative changes in his lumbar spine, and it is my opinion that this was rendered symptomatic at the time of his work accident.

Dr. Bruffett again corresponded with the adjustor on February 1, 2008, stating:

Dr. Davidson certainly has preexisting degenerative disk disease in his lumbar spine; however, he relates his current major complaints to a work injury dated November 28, 2006, when he lifted two boxes or crates and felt the sharp pain in his back. Therefore, within a reasonable degree of medical certainty, I would say that the pain he is experiencing now and is the reason to seek medication is based on the exacerbation of his degenerative disk disease.

The claimant followed-up with Dr. Bruffett on February 13, 2008, and advised that while he has not pursued the recommended therapy, his back pain is improving. Dr. Bruffett specifically noted that the claimant did not describe any radicular pain. Dr. Bruffett diagnosed the claimant with "degenerative disk disease of the lumbar spine with probable symptomatic annular tear due to work injury." Dr. Bruffett noted no change in the claimant's examination. After discussing the need for therapy and core strengthening, Dr. Bruffett stated, "I doubt that he has a rateable injury from his work injury."

The claimant returned to Dr. Bruffett on May 28, 2008, reporting no change in his condition. At that time Dr. Bruffett stated:

I think Mr. Davidson is really reaching a point of maximum medical improvement with regards to his work injury. I am going to let him try some Ultracet. I have told him if this is helpful he can probably get it from his primary care physician on his own insurance. I really do not see a problem in his spine of surgical significance. He does not need routine followup with me. I really do not have any restrictions to place upon him. If he does not find that the Ultracet is helpful then he may have to just take over-the-counter medication such as Extra Strength Tylenol and those that are easier on the stomach.

On July 31, 2008, the claimant came under the care of Dr. Brent Sprinkle. Dr. Sprinkle took a thorough history of the claimant's complaints and treatment, as well as, physically examined the claimant at that time. Dr. Sprinkle's physical examination of the Upper and Lower extremities as well as the Cervical Thoracic regions were normal. The Thoracic/Lumbar spine examination revealed mild diffuse lumbar spinal trigger points, slightly decreased range of motion, but no palpable stepoff or scoliosis or gross strength deficits were noted. Dr. Sprinkle diagnosed the claimant with lumbar degenerative disc disease that was

pre-existing to his original work injury. Dr. Sprinkle listed the following findings:

1. He has had fairly extensive conservative care. He has been seen by two surgeons, recently Dr. Bruffett who did not recommend surgical intervention.
2. He is working a new job as a truck driver and says he can do pretty well most days but when he has to do a fair amount of twisting or lifting his back definitely hurts worse. He has some spasms and burning type sensation in his low back.
3. Unfortunately, I think he is at maximum medical improvement currently from his original work injury date.
4. Unfortunately though he does have at least three level degenerative disc disease and I do think this limits his ability to tolerate certain levels of work. His FCE did show at that time he met criteria for heavy demand category but he is clearly seen to have demonstrated historically that heavy demand category is something that he just can't

tolerate.

5. The only logical conclusion at this point is to reason that his degree of degenerative disc disease probably puts him more in the medium category demand than heavy demand category. I don't think that a change to medium demand category is justified solely by his work injury but is more justified by his overall multilevel involvement of degenerative disc disease.
6. His disc herniations that are described on his MRI are most consistent with findings you might typically expect to see with degenerative phenomena. I don't think they would cause any permanent impairment therefore I don't think his work injury justifies any permanent impairment.
7. Hopefully this clarifies any remaining questions.
8. I would not recommend any more epidural injections.
9. Today we did make available Skelaxin that may help on the days that he has exacerbation of symptoms.

10. I would be happy to see him back for routine management of his chronic degenerative disc disease of lumbar spine. Most likely this would need to happen through his regular healthcare insurance.

On September 22, 2008, Dr. Bruffett completed a form for the workers' compensation adjustor stating that the claimant did not sustain any permanent partial disability from the work related injury and that no permanent restrictions were placed upon the claimant.

The claimant filed the present claim contending entitlement to a five percent (5%) permanent impairment rating for disrupted disc/annular tear at L2/3. The respondents contended that the claimant's injury was an aggravation of his pre-existing back condition, which became symptomatic. Claimant's treating physician, Dr. Wayne Bruffett advised that the claimant did not sustained a permanent impairment resulting from his work related injury and thus, claimant is not entitled to any permanent disability benefits.

"Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. Excelsior Hotel v. Squires, 83

Ark. App. 26, 115 S.W.3d 823 (2003). 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. 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.

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).

A.C.A. § 11-9-522(g)(1) provides:

(A) The commission, after a public hearing, shall adopt an impairment rating guide to be used in the assessment of anatomical impairment.

(B) The guide shall not

include pain as a basis for impairment.

The Commission has therefore adopted the Guides to the Evaluation of Permanent Impairment Fourth Edition (1993) published by the American Medical Association. See AWCC Rule 099.34. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. See, Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003), citing Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001). The Commission may assess its own impairment rather than rely solely upon our determination of the validity of ratings assigned by physicians. Id.

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. A.C.A. § 11-9-102(4)(F)(ii)(A). "Major cause" means "more than fifty percent (50%) of the cause and a finding of major cause shall be established according to a preponderance of the evidence. A.C.A. § 11-9-102(14).

The Administrative Law Judge found that the claimant sustained a seven percent (7%) anatomical

impairment rating pursuant to the AMA Guides, Table 75, Section IIC, page 113 which provides:

Unoperated on, stable, with medical documented injury, pain, and rigidity associated with moderate to severe degenerative changes on structural tests; includes unoperated on herniated nucleus pulposus with or without radiculopathy.

In a footnote, this rating is further qualified:

The words "with medically documented injury, pain and rigidity" imply not only an injury or illness has occurred, but also that the condition is stable, as shown by the evaluator's history, examination, and other data, and that a permanent impairment exists, which is at least partly due to the condition being evaluated and not only due to preexisting disease.

In the present matter, we find that the claimant did not prove he sustained any degree of physical anatomical impairment as a result of his compensable injury. The claimant sustained an admittedly compensable injury on November 28, 2006, which was diagnosed as a lumbar strain. An MRI revealed degenerative disc disease at multiple levels. The evidence does not demonstrate that these MRI

findings were the result of the claimant's November 28, 2006, injury. Dr. Morris diagnosed the claimant with a lumbar strain. No evidence of radiculopathy was ever noted by any of the claimant's physicians. Aside from the initial findings of muscle spasms by Dr. Morris, the claimant has consistently had normal examinations by all of his physicians. Both Dr. Bruffett and Dr. Sprinkle found that the claimant's mild degenerative disc disease pre-existed the claimant's compensable injury. Specifically, Dr. Sprinkle stated: "His disc herniations that are described on his MRI are most consistent with findings you might typically expect to see with degenerative phenomena. I don't think they would cause any permanent impairment therefore I don't think his work injury justifies any permanent impairment." Neither Dr. Bruffett nor Dr. Sprinkle found that the claimant's compensable injury resulted in a physical anatomical impairment. The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution, is a question of fact for the Commission. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 949 S.W.2d 695 (1999). In the present matter, the medical evidence is not contradictory. No physician has found that the claimant sustained an

anatomical impairment rating. In our opinion, the opinions of Dr. Bruffett and Dr. Sprinkle are entitled to great weight. Dr. Bruffett was claimant's authorized treating physician and Dr. Sprinkle examined the claimant for a second opinion. Both physicians reached the same conclusion. The claimant's degenerative disc disease pre-existed the claimant's compensable injury. The claimant's compensable injury did not produce any permanent physical impairment.

We find that the claimant did not sustain any permanent anatomical impairment as a result of his compensable back injury. Contrary to the medical evidence the Administrative Law Judge found that the claimant sustained a disc protrusion and annular tear as a result of his compensable injury and awarded a seven percent (7%) anatomical impairment rating. This finding is not supported by the medical evidence. The overwhelming weight of the medical evidence only supports a finding that the claimant sustained a lumbar strain super-imposed upon a pre-existing degenerative disc disease. Moreover, there is no evidence that the claimant's mild degenerative disc disease supports an award of a seven percent (7%) anatomical impairment. The MRI findings were interpreted as "mild degenerative disc

disease." A seven percent (7%) anatomical impairment requires a finding of "moderate to severe degenerative changes." Furthermore, claimant's initial complaints of pain and findings of spasms involved the thoracic-lumbar area, while the positive MRI findings of degenerative disc disease and mild disc bulge are clearly the mid to lower level of the lumbar spine, further supporting the medical diagnosis of all of the claimant's physicians that the degenerative disc disease pre-existed his compensable injury. Contrary to the Administrative Law Judge's finding, there is absolutely no medical evidence that the claimant sustained a herniated or bulging disc as a result of his compensable injury. The medical evidence unequivocally demonstrates that the claimant's compensable injury was a lumbar strain. Not one of the claimant's physicians has opined that the claimant sustained a herniated or bulging disc as a result of his compensable injury. Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a permanent impairment rating as a result of his compensable injury.

Therefore, we find that the decision of the Administrative Law Judge must be reversed and this claim for permanent benefits denied and dismissed.

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IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

PHILIP A. HOOD, Commissioner