

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511595

DERRICK L. FLOWERS, EMPLOYEE	CLAIMANT
ARKANSAS STATE POLICE, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 7, 2009

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

Claimant represented by the HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas, and HONORABLE DON CHANEY, Attorney at Law, Arkadelphia, Arkansas.

Respondents represented by the HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed November 24, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 26, 2005, the relationship of employee-employer-carrier existed among the parties when the claimant sustained injuries arising out of and in the course of his employment.

3. On August 26, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00/\$350.00, for temporary total/permanent partial disability.

4. The claimant's healing period ended on September 8, 2006, as a result of the August 26, 2005, compensable injuries.

5. The claimant has a permanent physical impairment in the amount of 8% to the body as a whole as a result of injuries suffered in the August 26, 2005, compensable accident.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of August 26, 2005.

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.

Therefore we affirm and adopt the November 24, 2008 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.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

The majority is affirming and adopting an Administrative Law Judge's decision which limited the claimant's award for permanent partial disability benefits to 8% to the body as a whole. In my opinion, the claimant sustained a greater degree of permanent impairment and the Administrative Law Judge's award was in error. For that reason, I must respectfully dissent from the majority's opinion.

The claimant, who is a State Trooper, sustained an admittedly compensable injury in an automobile accident while he was on motor patrol. As a result of this accident, the claimant sustained injuries to his cervical and lumbar spine. The respondent provided the claimant appropriate medical treatment, primarily from Dr. Steven Bennett, a chiropractic physician in North Little Rock, Arkansas.

The dispute in this case centers on conflicting medical opinions on the extent of the claimant's permanent impairment. Dr. Bennett authored three reports. The first is dated September 20, 2006, the second November 9, 2006, and the final one December 19, 2006. The first report, which in the form of a letter directed to the claimant's attorney, stated the claimant had a 34% permanent impairment to his body as a whole based upon the AMA Guidelines. The second report, which was considerably more detailed, was set out in a letter to a claims adjuster for the respondent. It contained a specific breakdown of the particular injuries and impairments the claimant suffered and once again stated the claimant's impairment rating was 34% to the body as a whole. The final report in this series was also a letter to the respondent's claims adjuster and, in it, Dr. Bennett advised he was amending his previous assessment because of a recently discovered mathematical error to 33% to the body as a whole.

After receipt of Dr. Bennett's evaluation, the respondent directed the claimant to undergo a consultative exam performed by Dr. Barry Baskin, a Little Rock physician practicing rehabilitative medicine. In his report of January 23, 2007, Dr.

Baskin assessed the claimant has having an 8% impairment to his whole body, based only upon his lumbar condition. Dr. Baskin stated the claimant did not have any cervical spinal impairment.

In my opinion, the majority is compounding the Administrative Law Judge's error in awarding the claimant permanent impairment benefits based upon Dr. Baskin's report. I find the report of Dr. Bennett is more comprehensive, accurate, and objective and is entitled to more weight.

In comparing the reports, it is clear Dr. Bennett's report is much more detailed and displays a much greater understanding of the AMA Guides and how they are to be applied. Dr. Bennett used the latest technology to develop comprehensive and accurate assessments of the claimant's condition. This testing included radiographic studies of the movement of the claimant's lumbar and cervical spine, as well as advanced computer programs to measure the consistency in the claimant's loss of muscular movement and strength. Dr. Bennett fully evaluated all aspects of the claimant's impairment, including both his cervical and lumbar spine. As explained by Dr. Bennett in his trial testimony, he used up-to-date, modern equipment and

technology to obtain detailed findings regarding the claimant's range of movement, loss of strength, and vertebral integrity and alignment. The use of radiographic studies allowed a precise determination of misalignments in the claimant's spine resulting from a damaged ligament and other physical abnormalities in the claimant's body. It is also significant that Dr. Bennett was the claimant's treating physician for a period of almost three years prior to the date of the hearing. As Dr. Bennett outlined in his testimony, the length of time he spent treating the claimant gave him a particular insight into the nature and extent of the claimant's problems. This knowledge augmented Dr. Bennett's understanding of the AMA Guides and how they should be applied. As indicated above, I find Dr. Bennett's report to be comprehensive, authoritative, and convincing.

By contrast, Dr. Baskin only saw the claimant on one occasion. Further, his report contained several factual errors and inconsistencies. Dr. Baskin commented during the report his belief the claimant was involved in a "minor" traffic accident. According to Dr. Baskin, the claimant advised him that such was the case. However, it seems highly unlikely the claimant,

considering the extent of his injuries, his extended period of disability, and his extensive need of medical treatment, would have described his accident as being "minor." Dr. Baskin also prominently mentioned the claimant's participation of sports, while in the Navy, particularly football and basketball. However, as the claimant testified, his only involvement in those activities while in the service occurred through use of basketball hoops in the hanger of the aircraft carrier he was stationed on. As the claimant stated, on breaks, he and his fellow sailors would shoot baskets and occasionally throw a football around. It is unlikely this activity would have resulted in serious injury or impairment to the claimant. Dr. Baskin also was inconsistent on his explanation of the claimant's range of motion, at one time describing it as being good, and later saying it was excellent. Also, Dr. Baskin measured the claimant's movement simply by having him turn his head and bend over, and tested his muscle strength simply by touching the claimant and providing resistance when the claimant tried to move.

I find Dr. Baskin's methodology to be less precise and thorough than the procedures used by Dr. Bennett. Dr. Baskin relied on his entirely subjective

evaluation of the claimant's impairment. His history was inaccurate and he did not fully evaluate all of the claimant's symptoms. Specifically, he did not think the claimant had any cervical impairment when Dr. Bennett's radiographic evidence clearly displayed a loss of vertebral integrity and misalignment. Because Dr. Baskin did not thoroughly use the radiographic and MRI evidence in this case, he was unable to appreciate the extent the claimant was actually injured. Since Dr. Baskin's report could not accurately evaluate the extent of the claimant's impairment, I do not give his conclusions as much weight as Dr. Bennett's.

I find, the claimant has sustained a 33% impairment to his body as a whole, as evaluated by Dr. Bennett. His evaluation is far more persuasive than Dr. Baskin's, which was relied upon by the majority and I must, therefore, respectfully dissent from their opinion.

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PHILIP A. HOOD, Commissioner