

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F800160

BEVERLY THOMAS,
EMPLOYEE

CLAIMANT

JONESBORO PUBLIC SCHOOLS,
EMPLOYER

RESPONDENT

ARKANSAS SCHOOL BOARDS ASSOC. WCT.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 19, 2009

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.

Respondents represented by the HONORABLE MELISSA WOOD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed March 10, 2009. 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 25, 2007, the employee-employer relationship existed between the parties, when the claimant sustained a compensable injury to her low back, and earned wages sufficient to entitle her to weekly compensation benefits at the rate of \$319.00/239.00, for temporary\total/permanent partial disability. (sic)

3. The claimant reached the end of her healing period on October 9, 2008, as a result of the compensable August 25, 2007, low back injury, and has sustained an 8% permanent physical impairment to the body as a whole as a result of same.

4. The respondent shall pay all reasonable hospital and medical expenses arising out of and in connection with treatment of the August 25, 2007, compensable injury.

5. The respondent has controverted the claimant's permanent physical impairment.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the March 10, 2009 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's

decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained an 8% anatomical impairment rating for which she is entitled to permanent partial disability benefits. 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 her burden of proof.

The claimant sustained an admittedly compensable injury on September 25, 2007 to her low back. After receiving therapy, injections, and other conservative treatment, the claimant was deemed to have reached maximum medical improvement by October 9, 2008, and was assigned an 8% "disability rating" by her treating doctor, Dr. Eric Akin. Respondents requested Dr. Gregory Ricca perform a records review of the claimant's medical records. In a letter dated December 12, 2008, Dr. Ricca outlined all the medical records he reviewed, listed the claimant's medical findings, and opined that the claimant sustained a 0% anatomical impairment. In reaching this finding, Dr. Ricca stated:

I reviewed the Guides to the Evaluation of Permanent Impairment, Fourth Edition. Table 75 on page (sic) 3/113 addresses whole-person impairment percents due to specific spine disorders. Dr. Akin states that he used this same table. I agree with Dr. Akin's use of this table as it is the one most appropriate in this case. I see Dr. Akin ascribed an 8% partial impairment of the whole. The only way one can reach an 8% partial impairment of the whole for lumbar pathology is if the person had lumbar surgery. Ms. Thomas did not have lumbar surgery.

Table 75 has four sections. Section I deals with fracture and Section III deals with spondylolisthesis. Both of these Ms. Thomas did not have. Section II deals with intervertebral disk or other soft-tissue lesion and Section IV deals with spinal stenosis. Section IV only gives a rating if a patient had surgery. So the best section to apply to Ms. Thomas is Section II (she had a broad based HNP at L2-3).

Table 75, Section II A, B, and C all deal with unoperated on intervertebral disk lesion. Parts B and C require the patient to have medically documented injury, pain and rigidity. Ms. Thomas does not have these latter findings. The only section that can be applied to Ms. Thomas is Section II A, which is for an unoperated intervertebral disc with no residual signs of symptoms. Ms. Thomas did not have any documented signs and her history is very unreliable (see FCE.)

Based on my review of Ms. Thomas' records and applying the Guides to the Evaluation of Partial (sic) Impairment, 4th edition, Ms. Thomas realizes a 0 (zero) percent impairment of the whole (Table 75. II, A).

Emphasis in Original.

In awarding the claimant an 8% impairment, the Administrative Law Judge relied upon the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 75, Section II, C, which rates unoperated on intervertebral lesion with "pain, and rigidity

associated with moderate to severe degenerative changes on structural tests..." In a recent decision from the Arkansas Court of Appeals, the Court held that it was not error to reduce an impairment rating when the higher rating was based upon Table 75, IV, D which required a finding of residual signs or symptoms and the only such signs or symptoms were based upon subjective responses from the claimant. Enterprise Products Co. v. Leach, ___ Ark. App. ___, S.W.3d ___ (March 4, 2009). In Enterprise Products Co. v. Leach, the Court specifically stated:

Because [the claimant] failed to establish, post-operatively and objectively, the presence of radiculopathy or any other residual sign or symptom independent of his continuing pain, there was substantial evidence to support the 8 percent impairment awarded by the Commission pursuant to section IV(C) of Table 75 of the *AMA Guides*.

It is undisputed that the claimant has degenerative disc disease. It is also undisputed that the claimant continues to experience pain as a result of her compensable injury and degenerative disc disease. However, A.C.A. § 11-9-102(16)(A)(ii)(a) states: "When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the

courts may consider complaints of pain." The only difference between the 0 percent impairment assigned by Dr. Ricca, and the 8% impairment assigned by Dr. Akin is the reliance upon the claimant's pain complaints. I find that it is impermissible error to award the claimant permanent partial disability benefits based upon Dr. Akin's assessment which clearly violates the Workers' Compensation statutes. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner