

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606240

SANDRA S. VAN WYK,
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES,
SELF-INSURED EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,
TPA

RESPONDENT

OPINION FILED MAY 27, 2009

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

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

Respondents represented by the HONORABLE CURTIS L.
NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed November 25, 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 the within claim.
2. The employee-employer relationship existed at all relevant times, including May 29, 2006.
3. At the time of the claimant's injury she earned an average weekly wage of \$202.00, which entitles her to a weekly compensation rate of \$135.00 for

both temporary total disability and permanent partial disability.

4. The claimant has proven her entitlement to a 7% impairment rating for her compensable injury.

5. The claimant is entitled to \$1,750.00 for permanent facial disfigurement pursuant to Ark. Code Ann. §11-9-524.

6. The respondents have controverted the claimant's entitlement to additional benefits.

7. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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 November 25, 2008 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 a 7%

permanent impairment rating as well as entitled to \$1,750.00 for permanent facial disfigurement for her compensable injury.

The claimant sustained an admittedly compensable injury to her face on May 29, 2006, when she tripped and fell during the course of her employment striking the right side of her forehead on a metal filing cabinet. Claimant sustained a bloody nose and a bruise and cut above her right eyebrow. Respondents provided prompt medical treatment and the claimant was removed from work for a couple of weeks. Claimant testified that when she was released to return to work she continued to have facial bruising, a hematoma and a scar across her forehead.

The medical records reveal that claimant was initially treated in the Baptist Health Medical Center Emergency Room in Heber Springs, Arkansas on the day of her injury. An examination of the claimant revealed swelling to the anterior forehead, and contusion to the nose and lower lip. A CT scan of the facial bones performed on May 30, 2006, revealed no fractures or dislocations, but did disclose a "pre-septal hematoma on the right and smaller one on the left. The right one measures approximately 1.4 cm in AP dimension x

approximatley 5.4 cm in transverse dimension." By June 6, 2006, claimant's treating physician, Dr. Frank Bivens, noted that the swelling and ecchymosis on the right forehead covered a 9 cm area, and he ordered physical therapy and referred the claimant to Dr. Dan Lister to discuss surgical drainage of the forehead. On June 8 2006, Dr. Lister described the claimant as having a 7 x 4.7 cm hematoma on the forehead with ecchymosis over the entire face. The claimant declined surgical treatment and opted for conservative physical therapy instead. Upon her return visit to Dr. Lister on June 28, 2006, Dr. Lister noted that the claimant's hematoma was "down substantially from her previous visit." However, the claimant complained about some areas of numbness on her forehead which Dr. Lister explained was not unexpected, and that the feeling may or may not come back. However, he found that there was no evidence of motor damage to the claimant's forehead. Accordingly, Dr. Lister released the claimant back to Dr. Bivens' care. The claimant continued with physical therapy per Dr. Lister's authorization. On July 11, 2006, the claimant returned to Dr. Bivens for follow-up treatment. Dr. Bivens noted that the swelling was down to 5 cm by 5 cm, and that the claimant was still having headaches and

numbness in the right frontal area; however, he noted that the claimant was healing well. Dr. Bivens continued physical therapy at that time. On August 3, 2006, Dr. Bivens noted that the claimant's swelling over the right eye was much improved, but that she did have a mild droop of the right medial eyebrow, and numbness over the right eye into the forehead. Upon a return visit to Dr. Bivens on August 29, 2006, the swelling over the claimant's right eye was down to 3cm by 2 cm and Dr. Bivens noted that the claimant's eyebrow had "a much better range of motion." Dr. Bivens released the claimant to full duty at that time.

After petitioning for a change of physician, the Commission issued a Change of Physician Order, changing the claimant's treating physician from Dr. Bivens to Dr. T. Freyaldenhoven with Arkansas Neurology in Conway, Arkansas. Dr. Freyaldenhoven examined the claimant on February 28, 2007. After taking the claimant's history, Dr. Freyaldenhoven performed a thorough examination of the claimant. Upon examination, Dr. Freyaldenhoven noted that the claimant "...has about a 1 x 2 cm area of swelling above the medial aspect of the right eyebrow with a downward tilt toward the midline. Palpation of the occipital nerve reveals

bilateral occipital nerve tenderness with reproduction of head pain...." Upon further neurologic examination Dr. Freyaldenhoven made the following findings:

Cranial Nerves: Visual fields full to confrontation. Ductions are full in all directions; there is no ptosis. Facial sensation is intact in all three distributions of the trigeminal nerve; however, light touch and pin are decreased about 20% in the distribution of the right supraorbital nerve. Her muscles of mastication are intact. Muscles of facial expression are intact and symmetric. She does not appear to be symmetric in the forehead, however, I am not sure that this is related to weakness. I think it might be more related to the area of swelling and related structural changes. Hearing is grossly normal. Symmetrical elevation of soft palate to phonation. Sternocleidomastoid and trapezius muscles are symmetric and 5/5 in strength. The tongue protrudes in the midline and is without atrophy or fasciculations.

After discussing the claimant's headaches and agreeing that they were not severe enough to warrant daily medication for headache prophylaxis, Dr. Freyaldenhoven opined; "I think her numbness will continue to improve some for the next few months and she will then remain static. I suspect she will have at least a small amount of residual numbness. However, I don't think she will be left with a functional

limitation. I don't know how to advise her on the swelling or whether or not there is scarring there." Dr. Freyaldenhoven issued a letter addressed "To whom it may concern" stating that based upon his clinical examination of the claimant she "has about 20 percent loss of function in her right supraorbital nerve."

"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.2d 823 (2003), citing Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). 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). Ark. Code Ann. §11-9-102(16) (A) (Repl. 2002) provides:

(i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.

(ii) 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; ...
(B) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty[.]

Pursuant to Ark. Code Ann. §11-9-521(h) (Repl. 2002) and Ark. Code Ann. §11-9-522(g) (Repl. 2002), the Commission shall adopt an impairment rating guide to be used in assessing anatomical impairment. The Commission has therefore adopted the Guides to the Evaluation of Permanent Impairment (4th Ed. 1993) published by the American Medical Association. *See, Workers' Compensation Laws And Rules, 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).

Using Table 9, Chapter 4 of the Guides to the Evaluation of Permanent Impairment (4th Ed. 1993), the Administrative Law Judge found that the claimant sustained a 7% anatomical impairment rating. This provision of the Guides provides for impairment of the Trigeminal nerve. If the person has "mild impairment due to uncontrolled facial neuralgic pain" an impairment in the range of 0-14% is warranted. Clearly this section of the Guides only assesses impairments for pain. The

Commission is statutorily proscribed from considering complaints of pain when determining a claimant's anatomical impairment. Ark. Code Ann. §11-9-102(16) (A) (ii). Table 9, of Chapter 4 of the Guides relied upon by the Administrative Law Judge specifically provides an impairment rating only for "uncontrolled facial neuralgic pain." Since the Commission is statutorily prohibited from considering complaints of pain when determining a physical or anatomical impairment, we cannot utilize this section of the Guides in assessing a permanent anatomical impairment.

Even if we were able to use Table 9 of Chapter 4, a finding I do not make, the range of 0 -14% impairment for mild impairment of the Trigeminal nerve does not merit a rating of 7% as found by the Administrative Law Judge. According to Dr. Freyaldenhoven the claimant only sustained a 20% loss of function in the distribution of the right supraorbital nerve. The supraorbital nerve is just a small fraction of the Trigeminal nerve which serves the entire face and branches out into the Ophthalmic nerve, the Maxillary nerve and the Mandibular nerve. The Ophthalmic nerve further branches out into three sensory nerves, the frontal, lacrimal and nasociliary. The frontal nerve

then enters the roof of the superior orbital fissure where it divides into the supraorbital and supratrochlear nerves. See Dorland's Illustrated Medical Dictionary (26th Ed.), and

www.Meddean.luc.edu/lumen/MedED/Gross Anatomy.

Accordingly, a 7% impairment based upon the claimant's 20% loss of function in the distribution of the right supraorbital nerve is excessive.

Although we cannot award the claimant a rating based upon pain, there are objective medical findings of record in the instant matter which support an assessment of a 2% permanent anatomical impairment, based upon the claimant's facial abnormalities. A review of the AMA Guides to the Evaluation of Permanent Impairment (4th Ed. 1993) addresses facial anatomical impairments in Chapter 9 for Ear, Nose, Throat, and Related Structures. Subsection 9.2 entitled "The Face" sets forth Criteria for Facial Impairments on page 229. The claimant falls within "Class 1: Impairment of the Whole Person 0% to 5%." The criteria for this class states:

A patient belongs in class 1 when facial abnormality is limited to a disorder of the cutaneous structures, such as visible scars or abnormal pigmentation....

In order to warrant an impairment greater than 5%, a person must have suffered a loss of supporting structure of part of the face. An impairment greater than 10% is in order when there is an actual absence of a normal anatomic part of the face. The claimant in the present claim, has minimal swelling over her right eye, a slight droop of her right eyebrow and minimal numbness up into her hairline. Claimant's symptoms of minimal swelling and slight drooping place claimant within Class 1 for an impairment between 0 to 5 percent. The claimant's swelling and eyebrow condition are so minimal that even the Administrative Law Judge had a difficult time detecting it. In this regard the Administrative Law Judge stated at the hearing:

Q. [BY MR. OLSEN:] Okay, but you've not been back to see him since 2007?

A. [MS. VAN WYK] No, I have not.

Q. Okay. What other symptoms - or, excuse me - I don't know if I eer got an answer to my question. I wanted you to describe the swelling for which you're asking for the disfigurement. Could you face Judge Hicks and just explain to her what you're asking for.

Q. [sic] Well, I've got all this swelling above my right eyebrow.

JUDGE HICKS: You're referring to all the swelling -

I don't see a lot of swelling.
I see something above here that
...

MS. VAN WYK: That's what
I'm talking about - right up in
here (indicating).

JUDGE HICKS: Okay. But
it's not puffed out. It's a
slight swelling above you're
right eyebrow - is that
correct? Is that what you're
referring to? I want to make
certain that I...

MS. VAN WYK: I guess.

JUDGE HICKS: Okay.

MS. VAN WYK: Right through
here, you know. I'm flat, then
I come out, and I go down like
that.

JUDGE HICKS: Okay.

In her written opinion the Administrative Law Judge described the claimant's facial swelling as noticeable on casual examination. However, the hearing transcript indicates that the area of swelling had to be pointed out to the judge and was rather minimal. Furthermore, it is evident that the Administrative Law Judge, whether intentionally or not, exaggerated and doubled the area of swelling when she described it as "about two inches in length." Dr. Freyaldenhoven described the area of swelling as covering a 1 x 2 cm

area above the claimant's right eyebrow. The claimant testified that the area has remained the same since she was examined by Dr. Freyaldenhoven.

After consideration of the claimant's medical records which last described the claimant's swelling as an area 1 x 2 cm in size, and the actual description of the area as used by the Administrative Law Judge at the hearing of "I don't see a lot of swelling" and "it's not puffed out. It's a slight swelling above your right eyebrow" I find that the claimant has proven that she sustained a 2% permanent anatomical impairment to the body as a whole pursuant to subsection 9.2 of the AMA Guides to the Evaluation of Permanent Impairment (4th Ed. 1993).

With regard to the claimant's complaints of numbness into her hairline, or what Dr. Freyaldenhoven described as a 20% loss of the right supraorbital nerve, Table 4, of Chapter 9, page 230 provides for a 1-4% impairment for mild unilateral total facial paralysis. In assessing permanent impairment to the face for facial disfigurement the Guides state, "Severe disfigurement above the brow line should be deemed to be, at a maximum, 1% impairment to the whole person..." Claimant's disfigurement or numbness into her hairline

is in no way characterized as "severe disfigurement" which only merits a 1% impairment if it is above the brow line. As the claimant's numbness is minor and well above her brow line, into her hairline, I find that the claimant has sustained a 0% impairment rating as a result of the numbness associated with her compensable injury.

Finally, with regard to the award of \$1,750.00 for the for facial disfigurement pursuant to A.C.A. § 11-9-524, I find that the award is excessive. In Fayetteville School District v. Kunzelman, 93 Ark. App. 160, 217 S.W.3d 149 (2005), the Court of Appeal affirmed a finding by the Commission awarding \$3000.00 for facial disfigurement resulting from a serious eye injury. In affirming the award, the Court noted that the claimant's eyes were watery in appearance, red, and had permanently dilated pupils which were quite noticeable and distracted from the claimant's appearance. In another opinion, the Commission awarded \$1750.00 for facial scarring described as affecting the skin and muscles and which was large, deep, and visible scarring causing deep furrows in the forehead. See Jones v. Brehm Insulation, Full Commission Opinion filed October 18, 2001 (E907986). An award of \$1500.00 was given by the

Commission in a claim for facial disfigurement resulting from significant scarring from severe burns to the left side of a claimant's face and ear. See Johnson v. Powell Oil Co., Full Commission Opinion filed August 26, 1999 (E114843). Finally, an award of \$2000.00 was made for facial disfigurement for permanent facial scarring after being severely burned by an exploding furnace. See Chambers v. Regal Ware Canada, Inc., Full Commission Opinion filed May 28, 1997 (E512668). After reviewing these cases, I cannot find that the claimant's 1 x 2 cm area of minimal swelling and slight droop of her right eyebrow are in any way comparable to deep scarring or severe facial burns for which awards between \$1500.00 and \$2000.00 were made. Nevertheless, I do find that the claimant has proven that she has sustained permanent changes to her appearance though minor when compared to the disfigurements described in the cases above. Therefore, I find that the claimant's facial disfigurement of a barely noticeable area of swelling above the right eyebrow and slight droop of the right eyebrow would merit an award of \$500.00 under A.C.A. § 11-9-524. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.