

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607026

HERBERT AYERS,
EMPLOYEE

CLAIMANT

TYSON POULTRY, INC.,
SELF-INSURED EMPLOYER

RESPONDENT NO. 1

SECOND INJURY FUND,

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 27, 2010

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

Claimant represented by the HONORABLE MARK FREEMAN,
Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE E. DIANE
GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID B.
SIMMONS, 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 December 17, 2009. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at
the pre-hearing conference conducted on
September 23, 2009, and contained in a pre-
hearing order filed that same date, are hereby
accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury.
3. Respondent #2 has controverted claimant's entitlement to permanent total disability benefits.

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 December 17, 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 respectfully dissent from the majority's finding that the claimant is permanently and totally disabled. In my opinion, the claimant has failed to meet his burden of proof.

Ark. Code Ann. §11-9-102(4) (F) (ii) (a) (Supp. 2005) provides that permanent benefits shall be awarded only upon a determination that the compensable injury

was the major cause of the disability or impairment. "Major cause" is defined as 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) (Supp. 2005); see, Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004). Further, Ark. Code Ann. §11-9-102(4)(F)(ii)(b) provides that if any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

My review of the evidence demonstrates that the claimant cannot show his compensable injury is the major cause of his permanent disability. The evidence shows that the claimant has significant pre-existing degenerative and congenital problems in his back that were completely unrelated to his compensable injury. In fact, the claimant has been diagnosed with degenerative scoliosis, significant degenerative changes at L3-4, milder degenerative changes at L1-2, L2-3, and posterior osteopytes at L3-4 and L4-5, prior to his compensable

injury. These problems were significant enough to require the claimant to take narcotic medication to manage the pain long before he ever sustained his compensable injury.

Dr. Danks, an neurosurgeon, responded to a claims adjuster inquiry in June of 2006 regarding whether the claimant's work restrictions were the result of his injury or his pre-existing conditions. Dr. Danks responded they were due to his pre-existing conditions. Further, Dr. Spann, the claimant's primary care physician, stated that the claimant "would have been disabled at the rate he was going in approximately two years."

At the hearing on wage loss disability, the claimant testified that he could not work for anyone taking the narcotics that he takes. However, the claimant took these same and other narcotics prior to his compensable injury and was still able to work. Moreover, the claimant's present medication does not prohibit the claimant from driving. In finding that the claimant is permanently and totally disability, the Administrative Law Judge, and now the majority, relied upon the claimant's treating physician's comments that the claimant was totally disabled. However, when the

basis for these comments are examined, it is clear that they rely upon the claimant's underlying pre-existing degenerative changes, chronic pain and narcotic usage, all of which pre-dated the claimant's compensable injury. Accordingly, the overwhelming weight of the evidence demonstrates that the claimant's disability is not related to his compensable injury, but his underlying pre-existing condition. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that his compensable injury is the major cause of his permanent disability.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's finding that the claimant is permanently and totally disabled.

KAREN H. MCKINNEY, COMMISSIONER