

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F702848

ROBERT JACKSON,
EMPLOYEE

CLAIMANT

ALESSI-KEYES CONSTRUCTION CO.,
EMPLOYER

RESPONDENT

COMPTRUST AGC OF ARKANSAS, INC., C/O CCMSI
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 15, 2010

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed November 23, 2009. The administrative law judge found that the claimant failed to prove he sustained a compensable injury. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant proved he sustained a compensable injury.

I. HISTORY

The record indicates that Robert Lee Jackson, Jr., now age 54, previously sustained a compensable injury to his cervical spine on June 29, 1998, while the claimant was employed with another employer. The claimant testified regarding the June 1998 injury to his cervical spine:

A. I was working over at the new Baptist Hospital there in North Little Rock. We was laying concrete, 16-inch block. And after a period of weeks of lifting them up every day, I sustained a herniated disc in my neck.

Q. Okay. Now, you had surgery on that?

A. I had a surgery on that and they corrected it. And I have been fine ever since, you know.

In an opinion filed December 8, 1999, an administrative law judge indicated that Dr. John Wilson had performed surgery on the claimant's cervical spine and had assigned a 5% whole-body impairment rating. It was stipulated that Travelers Indemnity Co. accepted a 5% whole-body impairment with regard to the June 29, 1998 compensable injury.

The claimant testified that he began working as a bricklayer for the respondent-employer in about 2003. The parties stipulated that the employment relationship existed at all relevant times, including February 27, 2007. The claimant testified that a board fell and struck him on the

head. An emergency triage note on February 27, 2007 indicated, "States he was struck in the back of the head by a 2 x 6 16ft board at work today around 1030 - denies any LOC." According to an ER Nursing Record on February 27, 2007, Musculoskeletal Status showed no deformity, no skin broken, no crepitus, no discoloration, and no swelling.

An emergency physician record on February 27, 2007 indicated that the claimant complained of headache, as well as pain in his neck and low back. Physical Exam of the claimant's neck showed "nml inspection," but the physician's notes appeared to show tenderness in the lower part of the neck and lower back. It was also noted, "Pt declines x-rays and wishes to leave." The Clinical Impression was "Headache," "post-traumatic." Another handwritten diagnosis on February 27, 2007 appeared to be "Traumatic Contusion."

Dr. Michelle Ibsen examined the claimant at Concentra on February 28, 2007:

Patient is a 50 year old male employee of Alessi Keyes Construction who complains about his back which was injured on 02/27/2007 10:30:00 AM.... Patient states: "Someone was working above me and dropped a 2x6 16 foot, landing on my head. Hurting my head, neck, back, arms, and legs." ...

MUSCULOSKELETAL:

Cervical: Bilateral shoulder range of motion normal. Strength normal.

Thoracic: Bilateral shoulder range of motion normal. Strength normal.
Lumbar: FROM. No palpable bony or muscular tenderness. Normal gait....
SKIN: Normal. No lesions....

X-rays of the claimant's skull, cervical spine, thoracic spine, and lumbar spine were negative. The assessment on February 28, 2007 was "1. Concussion without LOC. 2. Contusion head. 3. CS. 4. TS. 5. LS." A physical therapist noted on February 28, 2007: "The patient complains of left sided neck pain without radiation to the arm. He is a brick mason....Observation reveals no significant postural deviation of the cervical or thoracic spine. Head is midline and shoulders are of equal height. Gait is normal and transitional movements are guarded....Sensation to light touch is tested as normal for all cervical dermatomes bilaterally. Palpation of the involved area reveals mild tenderness without evidence of spasm....Upper cervical stability testing is attempted but ms guarding is present."

An MRI of the claimant's cervical spine was done on March 5, 2007:

50-year old gentleman with work related injury suffering direct trauma to the neck and back 2-27-07. Current headache and neck pain with extension

into both upper extremities. History of previous surgery and MRI in 1999, however, neither the operative note or the report are available at the time of this evaluation....

FINDINGS

C0-C1: Marked attenuation of the anterior dura mater/tectorial membrane complex and the posterior dura mater/posterior atlantooccipital membrane complex. This constellation of findings is consistent with hyperextension/flexion/anterior translation stress at the craniovertebral junction, age indeterminate, with incidental notation made of right vertebral basilar system.

C1-2: Hypertrophy of the atlantodental articulation with posterior capsulosynovial proliferation producing mild encroachment into the anteroposterior dimension of the central spinal canal below the foramen magnum without frank cord effacement or alteration of the contour of the cord.

C2-3: Mild asymmetric right foraminal narrowing due to uncovertebral joint and facet hypertrophy.

C3-4: Shallow right lateral disc displacement with uncovertebral joint and facet hypertrophy bilaterally, again slightly greater on the right.

C4-5: Asymmetric right lateral recess and right lateral canal encroachment related to uncovertebral and facet hypertrophy.

C5-6: Minor concentric posterior disc displacement with bilateral facet and uncovertebral joint hypertrophy producing moderate biforaminal narrowing, symmetric in character.

C6-7: Shallow left lateral disc displacement. Bilateral facet and uncovertebral joint hypertrophy results in biforaminal narrowing, again slightly greater on the left. Clinically

significant encroachment upon the C7 nerve rootlet may present with

C7-T1: Normal concave posterior disc margin. Moderate biforaminal narrowing related primarily to facet hypertrophy.

T1-2, T2-3, T3-4, T4-5, and T5-6: No high-grade disc protrusions. Moderate hypertrophy of the facets and ligamenta flava at multiple levels.

IMPRESSION:

1. Low-grade to intermediate grade rightward spondyloarthropathy at C2-3, C3-4, and C4-5 with moderate asymmetric left foraminal narrowing at C6-7.
2. Please see above report for additional and pertinent negative findings as well as level by level analysis.

Dr. Ibsen signed a Form AR-3, Physician's Report, on April 3, 2007. According to the Form AR-3, the diagnosis was cervical strain, lumbar strain, and thoracic strain.

Dr. William Rutledge began treating the claimant on May 30, 2007:

Mr. Jackson is a 50-year-old male who sustained injuries while working on 02/27/07. He was a construction worker up on a scaffold one flight up when workers above him accidentally dropped a 2 x 6 board that hit him on the top of the head. Fortunately, he was wearing a hardhat that was knocked to the ground. He has significant pain and difficulty since the injury....He had some 4-5 weeks of PT, but in spite of this, he is still having daily headaches, elevated blood pressure, and pain in the neck and upper back....This patient was a former patient of mine and he is familiar that I am a general surgeon that take

(sic) care significant amount of traumatic injuries and desires care with me because of continuation of symptoms....

NECK: Supple. The posterior cervical area is tender at the neuro exit sites on the left. Head motion is near complete with maybe some 10-degree loss of rotation to either side. There is some tenseness of the left trapezius muscle. The interscapular area is tender on the left to palpation.

LOWER BACK: Benign....

ASSESSMENT: Closed head injury with persistent headaches, hypertension, neck and upper back pain.

This compression type injury to the top of the head caused a significant strain of the cervical area, which is producing symptoms in both the cervical area and the proximal thoracic region. He also has some limited motion of the cervical spine.

The claimant followed up with Dr. Rutledge on June 20, 2007: "The cervical area is still tender bilaterally. There is still tenseness of the trapezius muscles. The upper thoracic region is less tender than previous exam of 5/30/07. Head motion is still restricted in rotation, flexion, and extension. He can only extend his head some 10 degrees without significant pain." Dr. Rutledge's impression was "1. Contusion to the head with closed head injury without loss of consciousness. 2. Cervical and upper thoracic strain/sprain."

Dr. Rutledge's impression on June 26, 2007 was "Increased muscular spasms, left thoracic region secondary to cervical and thoracic strain." Dr. Rutledge referred the claimant to a physical therapist, Robert C. Tillman, who gave an assessment on September 7, 2007: "This patient presents with biomechanical restrictions from C7-T4 in the facets and connective tissues. I note facet restrictions from C7-T4 as well as in the bilateral first and second ribs with the left side being more involved than the right. I also note muscle guarding and stiffness in the bilateral scalenes and trapezius musculature. The patient reports severe functional restrictions secondary to the above stated issues."

Dr. Rutledge's impression on November 19, 2007 was "Persistent symptoms after a head injury with resulting injury to the thoracic spine musculature." Dr. Rutledge reported on January 7, 2008:

Mr. Jackson was injured when a 2 x 6 struck his head. He suffered injuries to his neck and thoracic spine that has required prolonged treatment. He has been receiving treatment for left parathoracic spasms by Orthopedic Rehab & Specialty Center. He has been quite compliant with his scheduled medicines as well as his therapy. The therapist feels that he can be discharged, but return in the future if necessary.

The patient is doing reasonably well, but he has not tried regular duty for several months now. He does still require medications at times for headache. He is hypertensive now and takes hydrochlorothiazide.

PHYSICAL EXAMINATION: On exam, the cervical area is nontender. There is no thoracic tenderness. Range of motion is near complete.

IMPRESSION: Closed head injury with resulting injury to the cervical and thoracic spine with parathoracic pain.

PLAN: I think it is okay to try Mr. Jackson on regular unrestricted duty. He is to take ibuprofen or over-the-counter analgesics for pain and muscular discomfort, but I would like to see him after he has worked for 2-3 weeks to see if he can tolerate full duty. I am going to schedule an appointment for next month and see how he is doing.

Dr. Rutledge provided a Final Report on January 7, 2008 and diagnosed the following: "Closed head injury with persistent posttraumatic headaches, hypertension, neck, and thoracic pain." On March 11, 2008, Dr. Rutledge provided an Addendum To Final Report:

This is an addendum to the final report dated 01/07/08 concerning Robert Jackson. Mr. Jackson's injuries have resulted in a permanent impairment of 12% of the whole person. This rating is taken from the AMA's Guides to the Evaluation of Permanent Impairment", Fifth Edition. The impairment rating for Mr. Jackson is for his injuries and symptoms related to a blow to the top of the head with resulting compression to the cervical and thoracic spine. Tables 15/4 on page 389 and table 15-5 found on page 392 are used for

this rating. Mr. Jackson's injuries resulted in a DRE Cervical Category II and DRE Thoracic Category II impairment of the cervical and thoracic spine. The rating for cervical dysfunction is 8% and the thoracic spine pathology yields 8% whole person impairment. Next, using the "combined values chart" on page 604 gives this patient a permanent physical impairment rating of 12% of the whole person. Mr. Jackson's clinical history and physical examination findings are compatible with receiving a blow to the top on the head from a 2 by 6 thereby compressing these spinal segments. He has chronic muscular guarding, tenderness and spasms of the paraspinal regions of both the lower cervical and proximal thoracic spine distribution. He has minimal loss of motion and segment integrity. With this, this patient's condition best fits a DRE cervical and thoracic category II impairment. I assign Mr. Jackson's impairment at the upper ends of the 5-8% due to the frequency of complaints as well as the severity of the pain and muscular spasms. Mr. Jackson received a significant blow to the head and is at risk for future problems such as headaches and even the possibility of a seizure disorder. This patient again will likely require future medical care and expense as a result of his injuries.

A pre-hearing order was filed on July 2, 2009. The claimant contended that he sustained "a compensable back injury caused by a specific incident on or about February 27, 2007, when a board fell from above and struck him on the head." The claimant contended that he was entitled to reasonably necessary medical treatment, and that he was entitled to the 12% whole-person impairment assigned by Dr. Rutledge on March 11, 2008. The respondents contended that

the claimant did not sustain a compensable injury, and that the claimant had no objective medical findings.

The parties agreed to litigate the following issues:

- 1) Whether claimant sustained a compensable back injury by specific incident on February 27, 2007.
- 2) If compensability is overcome, claimant's entitlement to medical treatment, impairment rating, controversion, and attorney's fees must be addressed.

After a hearing, an administrative law judge filed an opinion on November 23, 2009. The administrative law judge found that the claimant failed to prove he sustained a compensable injury. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

- (A) "Compensable injury" means:
- (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann.

§11-9-102(4) (D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i) (Repl. 2002).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i) (Repl. 2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, an administrative law judge found that the claimant failed to prove he sustained a compensable "thoracic back injury," and that the claimant failed to prove he sustained a compensable "cervical injury." The Full Commission reverses these findings. The claimant began working for the respondent-employer in about 2003, and the parties stipulated that the employment relationship existed on February 27, 2007. The claimant testified that a board fell from above and struck him in the head. The medical records corroborated the claimant's testimony. An emergency triage note on February 27, 2007 indicated that the claimant "was struck in the back of the head by a 2 x 6 16 ft board today around 1030 - denies any

LOC." Dr. Ibsen's notes on February 28, 2007 indicated that her assessment included cervical strain and thoracic strain.

Dr. Rutledge began treating the claimant for neck and upper back pain on May 30, 2007. Dr. Rutledge's examination of the claimant showed "some tenseness of the left trapezius muscle." Dr. Rutledge also noted "tenseness of the trapezius muscles" on June 20, 2007. Dr. Rutledge's impression on June 26, 2007 was "Increased muscular spasms, left thoracic region secondary to cervical and thoracic strain." Dr. Rutledge noted January 7, 2008 that the claimant had been receiving physical therapy "for left parathoracic spasms."

Muscle spasms constitute objective findings. *Kimbrell v. Arkansas Dep't of Health*, 66 Ark. App. 245, 989 S.W.2d 570 (1999). The definition of muscle spasm approved by the Arkansas Court of Appeals in *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997) is as follows: "1. An involuntary muscular contraction....2. Increased muscular tension and shortness which cannot be released voluntarily and which prevent lengthening of the muscles involved; [spasm] is due to pain stimuli to the lower motor neuron." In the present matter, Dr. Rutledge

reported muscle "tenseness" upon physical examination of the claimant and also diagnosed "muscular spasms."

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The claimant proved that he sustained an accidental injury causing physical harm to his cervical region and thoracic region, *i.e.*, cervical strain and thoracic strain as diagnosed by Dr. Ibsen and Dr. Rutledge. The claimant proved that the accidental injury arose out of and in the course of employment, and that the injury required medical services. The claimant proved that the injury was caused by a specific incident and was identifiable by time and place of occurrence on or about February 27, 2007. The claimant established a compensable injury by medical evidence supported by objective findings not within the claimant's voluntary control, namely, the objective findings identified by Dr. Rutledge.

B. Anatomical Impairment

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4)(F)(Repl. 2002), provides:

(ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition 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....

"Major cause" means 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) (Repl. 2002). Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16) (B) (Repl. 2002). 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).

In the present matter, Dr. Rutledge assigned the claimant a 12% anatomical impairment rating. Dr. Rutledge relied on the *Guides to the Evaluation of Permanent Impairment*, Fifth Edition. We first note that to accomplish the purpose of establishing an impairment rating guide to be used in assessing anatomical impairment, the Commission has adopted the *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). See Workers' Compensation Commission Laws And Rules, Rule 099.34; Ark. Code Ann. §11-9-522(g) (Repl.

2002). Moreover, it is the duty of the Commission to translate evidence into findings of fact. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001), citing *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

The Full Commission finds that the instant claimant did not prove he was entitled to a permanent anatomical impairment rating. The claimant did not prove by a preponderance of the evidence that he sustained a permanent anatomical impairment to his cervical spine or thoracic spine as a result of the February 27, 2007 compensable injury. The claimant testified that he underwent surgery for a herniated disc in his neck as the result of an injury occurring in 1998, while the claimant was working for a different employer. Dr. Wilson assigned the claimant a 5% whole-body impairment as a result of the 1998 injury to the claimant's cervical spine. The Full Commission has determined that the claimant sustained a compensable injury in the form of a cervical and thoracic strain which occurred on February 27, 2007. We note, however, that x-rays taken February 28, 2007 were negative for an acute injury to the claimant's cervical and thoracic spine. The claimant was

treated conservatively with no recommendation for surgery to his cervical or thoracic spine.

An MRI of the claimant's cervical spine was taken on March 5, 2007. We recognize that a number of abnormalities were shown, such as "lateral disc displacement" at C3-4 and C6-7 and "posterior disc displacement" at C5-6. The record does not demonstrate that these abnormalities were caused by the February 27, 2007 cervical and thoracic strain. The impression following the March 5, 2007 MRI was "1. Low-grade to intermediate grade rightward spondyloarthropathy at C2-3, C3-4, and C4-5 with moderate asymmetric left foraminal narrowing at C6-7." The evidence does not demonstrate that the rightward spondyloarthropathy described in the March 5, 2007 MRI was causally related to the February 27, 2007 cervical and thoracic strain. Nor does the evidence support Dr. Rutledge's March 11, 2008 opinion stating that the claimant had sustained "compression to the cervical and thoracic spine" as a result of the February 27, 2007 accident. Even if the Commission were to attempt to extrapolate a permanent impairment rating based on Table 75 or another relevant section of the 4th Edition of the *Guides*, the record does not demonstrate that the February

27, 2007 compensable injury was the major cause of such an impairment.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant failed to prove he sustained a compensable injury. The Full Commission finds that the claimant proved he sustained a compensable injury in the form of a cervical and thoracic strain. The claimant proved that the medical treatment of record was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a) (Repl. 2002). The claimant did not prove that the compensable injury was the major cause of a permanent anatomical impairment to his cervical spine or thoracic spine, and the claimant did not prove he was entitled to any portion of the rating assigned by Dr. Rutledge. For prevailing in part on appeal, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

Commissioner McKinney concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's findings. Specifically, I dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. In my opinion, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. However, if I were to find that the claimant sustained a compensable injury, a finding which I do not make, I agree that the claimant has failed to prove by preponderance of the evidence that he is entitled to any permanent anatomical impairment.

My review of the evidence demonstrates that the claimant did not sustain any permanent anatomical impairment to his cervical or thoracic spine as a result of the February 27, 2007 incident. The findings on the MRI are evidence of nothing more than a degenerative aging process and are neither indicative nor supportive of a permanent impairment rating for the alleged injury. Further, the claimant's pre-existing degenerative condition is the major cause of any permanent impairment not the alleged injury.

See, Hickman v. Kellogg, 372 Ark. 501, 277 S.W.3d 591 (2008). Therefore, I must concur in the majority's finding that the claimant is not entitled to any permanent anatomical impairment.

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I concur in part, but must respectfully dissent in part, with the majority opinion. I agree with the majority that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury and that he is entitled to medical benefits. However, I would award the claimant permanent partial disability benefits based upon his permanent impairment rating.

The majority correctly concludes that the claimant proved by a preponderance of the evidence that he sustained a compensable injury when he was struck on the head by a sixteen foot long, two-by-six board. I agree that muscle spasms were observed, satisfying the requirement for

objective findings. I will add that the medical records also reveal other objective findings of injury, including a contusion to the claimant's head observed on the date of injury, muscle guarding, MRI findings including soft tissue disruption, and trigger points.

The majority determined that the claimant was not entitled to a permanent anatomical impairment rating, because the claimant had pre-existing conditions which were the major cause of his anatomical impairment and not his compensable injury. I disagree.

Ark. Code Ann. Sec. 11-9-102(4)(F)(ii)(a) 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 a preponderance of the evidence. Ark. Code Ann Sec. 1-9-102(14)(A); see Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004). Further, Ark. Code Ann. Sec. 11-9-102(4)(F)(ii)(b) provides that if any compensable injury combines with a pre-existing 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.

In Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 141 (1998), the claimant had a compensable neck injury, a herniation at C5-6, from a car accident and a second neck injury, a compression fracture at C7, which was a compensable aggravation of the original injury. The second injury was the subject of the claim for permanent benefits. Her physician assessed a permanent impairment rating specifically for the herniation at C5-6 and not the compression fracture at C7. The claimant was not entitled to permanent benefits under Sec. 11-9-102, because the compensable injury, the aggravation, was not the major cause of the disability as quantified by the rating.

In Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004), relying upon Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002), the Court of Appeals stated that the aggravation of a pre-existing condition could meet the major cause requirement. In that case, the evidence supported an award of permanent benefits.

The claimant had a pre-existing back condition, which was causing him no problems prior to the compensable injury. The doctor opined that, because he was asymptomatic before the compensable injury and symptomatic after the injury, the injury was the cause of his present condition. The Court stated that it was "clear that the need for surgery and resulting impairment would not have occurred but for the work-related aggravation." In addressing whether the major cause requirement was met, the Court found significant the fact that his pre-existing back disease did not require surgery, or any other medical treatment, prior to the compensable aggravation. The Court noted that there were objective findings to support an impairment, in the form of spinal stenosis, or narrowing of the spine, as well as decompression surgery, which provided some relief.

The current claimant was struck on the head on February 27, 2007. That day, he was diagnosed with a traumatic contusion to the head. He reported pain all over, after being knocked to the ground when he was struck in the back of the head by a sixteen foot long "2 X 6" board at work that morning. He did not lose consciousness but had pain in his neck and low back as well as a post-traumatic

headache. The record notes that he never had problems like this before. Tenderness in the lower part of his neck and low back was observed. The claimant's symptoms and complaints are consistent with the mechanism of injury as well.

I note that the medical records do not reflect any medical treatment whatsoever prior to the February 2007. There is no indication of prior medical history or symptoms other than a Commission opinion, dated December 8, 1999, stating that the claimant sustained a compensable injury to his cervical spine on June 29, 1998, and a pre-hearing order filed October 6, 1999 stating that the claimant had a five percent impairment rating as a result. He was treated by Dr. Wilson who performed surgery and eventually saw Dr. Rutledge to manage his symptoms. There is no indication in the record of the location of the injury in his cervical spine, the type of surgery performed, or of the type of injury, other than the claimant's testimony that he herniated a disk. There are no records to show that the claimant experienced limitations, pain or treatment of his cervical spine or other parts of his spine in the period prior to his injury in February 2007. Dr. Rutledge, the

claimant's current physician, has made no note of any problems related to that old injury or any aggravation of that old injury. The claimant stated in the hours after his injury that his symptoms were unlike anything he had ever experienced before that day. Also of import is the length of time between the 1998 cervical injury and the current injury which occurred in 2007. During those nine years, the claimant was employed as a bricklayer, able to successfully perform those duties, whether he was laying regular brick or concrete block. Since his injury, he was unable to lay brick for an extended time without significant pain, and he was still unable to lay concrete block.

The day after his injury, the claimant was seen by a company doctor, where cervical muscle guarding was observed by his physical therapist. Subjective observations were also made of cervical, thoracic and lumbar pain, tenderness and loss of range of motion. These symptoms are consistent with the incident in which he was struck by the board. There is no evidence that these symptoms, objective and subjective, existed prior to this injury.

The MRI of the claimant's cervical and thoracic spine on March 5, 2007, showed changes such as hypertrophy

which were probably pre-existing, but which had been asymptomatic prior to the incident. This issue regularly comes before the Commission. The claimant had pre-existing degenerative changes in his neck, but he was able to lay brick and concrete block without difficulty or a need for medical treatment, until his injury in February 2007. The claimant had degenerative but asymptomatic changes in his spine, until the date of injury when he was struck in the head and neck by a large board and knocked to the ground, at which time he developed significant symptoms. The causal connection is established, and there is no other cause to which to attribute his symptoms.

The claimant's pre-existing condition is not the major cause of his disability or impairment, because the claimant was asymptomatic and unlimited before the accident. He had a permanent impairment rating of five percent to the body as a whole for an injury in 1998 to his neck. The record is devoid of any evidence of medical treatment arising out of that 1998 injury or of any limitation in the claimant's activities. He was actively working in a physically demanding job, laying brick. The claimant testified that he could lay regular brick and concrete block

before the 2007 injury. The compensable injury may or may not have combined with a pre-existing disease or condition to cause the claimant's disability and need for treatment, but the record demonstrates that the only cause of his disability and need for treatment is the compensable injury. This is because he was asymptomatic and unlimited before the accident but symptomatic and limited afterwards. This claim is very similar to the situation in the Pollard, supra, case, because the pre-existing condition in Pollard was asymptomatic, required no treatment and caused no disability before the accident, but became symptomatic, required treatment and caused disability after the accident. The only difference is that the claimant had a pre-existing injury justifying a five percent permanent impairment rating and which had resolved, so that there is no evidence of any need for treatment or of any disability from 1998 to 2007 when the claimant suffered a compensable injury triggering symptoms, the need for treatment, and disability.

I would award the claimant permanent benefits because his compensable injury in 2007 was the major cause, the only cause, of his symptoms, his need for treatment and his disability. I would also award a permanent anatomical

impairment rating of fifteen percent to the body as a whole, based upon the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment, in particular the DRE Cervicothoracic Category III and Table 75.

After my de novo review of the entire record, I concur in part, but must respectfully dissent in part, with the majority opinion. I agree with the majority that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury and that he is entitled to medical benefits. However, I would award the claimant permanent partial disability benefits based upon his permanent impairment rating.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner