

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F702952

RICHARD LEACH, EMPLOYEE	CLAIMANT
COOPER TIRE & RUBBER COMPANY, SELF-INSURED EMPLOYER	RESPONDENT
REGIONS CLAIMS MANAGEMENT, CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 8, 2011

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

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE WILLIAM G. BULLOCK, Attorney at Law, Texarkana, Texas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals and respondents cross appeals from a decision of the Administrative Law Judge filed July 26, 2010.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.

- 3) The claimant has proven by a preponderance of the evidence that he sustained a compensable back injury while working for the respondent employer on or about March 10, 2007.
- 4) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable head injury while working for the respondent employer on or about March 10, 2007.
- 5) The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment regarding his compensable back injury. Specifically, Dr. Vogan continues to prescribe the claimant with Celebrex to treat his compensable back injury and as such, respondents are responsible for the Celebrex pursuant to Commission Rule 30.
- 6) The claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent partial disability benefits related to his compensable back injury.
- 7) The claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits associated with his compensable back injury.

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.

Thus, we affirm and adopt the 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.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents in part and concurs in part.

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent in part from the majority opinion, because I find that the claimant sustained a compensable head injury for which he is entitled to reasonable and necessary medical treatment and that he is entitled to permanent partial disability benefits and wage loss in the amount of 70%. I concur in the majority opinion that the claimant sustained a compensable back injury on March 10, 2007 for which he is entitled to reasonable and necessary medical treatment.

The claimant suffered a crush injury, asphyxiation and loss of consciousness when a conveyor lowered on top of him, pinning him at the chest and back, for more than a minute.

1. Compensable Head Injury

The claimant sustained a compensable head injury at that time. For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

There was clearly a specific incident identifiable by time and place, the crush injury, which arose out of and in the course of the claimant's employment. There are objective findings of a head injury, in the form of conjunctival and petechial hemorrhaging, discoloration and swelling of the face and eyes, which is consistent with a crush injury, observed on the date of injury. The claimant lost consciousness for an indeterminate time and was unable to see out of one eye for a period of time. The claimant has satisfied the requirements of a

compensable injury to the head.

The claimant began experiencing further symptoms which raised concerns in 2009, first with his unexplained single car accident, and then with headaches and concentration problems. The claimant was evaluated, but no diagnosis was issued. The claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). The claimant, sixty-two at the time, suffered a significant injury in which his chest was crushed, causing him to lose consciousness due to asphyxiation for more than one minute. He suffered hemorrhaging in his face and eyes, as blood was pushed out of his torso and forced into his head. The claimant was temporarily blinded in one eye. The claimant developed further symptoms approximately two years later, with no other cause identified. Dr. Long, who performed a functional capacity evaluation and assessed permanent anatomical impairment, stated that, using Table 4 of the Guides to the Evaluation of Permanent Impairment (4th Ed. 1993), the claimant sustained a five percent impairment for unconsciousness at the time of the injury and residual transit awareness of loss of consciousness after that. I find that the claimant's current symptoms are related to the original injury, for which the claimant is entitled to reasonable necessary medical treatment.

2. Permanent Partial Disability Benefits

The majority found that the claimant's permanent anatomical impairment rating was based upon degenerative change in his back, and therefore the crush injury was not the major cause of his impairment. 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. 11-9-102(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 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.

In Pollard, supra, the claimant sustained a compensable back injury in 2000, for which his employer accepted liability. The claimant had a preexisting back condition, which had required two previous surgeries. The Commission found that the work-related injury caused the claimant's preexisting stenosis, which had been asymptomatic prior to the work injury of 2000, to become

symptomatic, resulting in surgery, but it denied the claimant's claim for benefits for permanent physical impairment. Relying on Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 141 (1998), the Commission concluded that the claimant's 2000 compensable injury was not the major cause of his permanent anatomical impairment and that the claimant's work injury had only aggravated a preexisting condition and had not caused the stenosis which had eventually led to surgery and permanent anatomical impairment. Relying on Wal Mart Stores Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002), the Court of Appeals reversed the Commission and remanded the claim for a determination of benefits.

In Wal Mart, supra, the Court affirmed the Commission's finding that the appellee's most recent compensable injury caused only a fractional percentage of his total assigned impairment rating (which was 30%). This finding was based on the "exacting testimony" of the claimant's physician, who had opined that a specific percentage (10%) of the claimant's current overall permanent physical impairment rating (30%) was attributable to his most current compensable injury, while the remainder of his permanent physical was caused by a preexisting condition. Thus, the appellee had proven by a preponderance of the evidence that the compensable aggravation of his preexisting condition was the major cause of 3% of his overall permanent physical impairment.

In Needham, supra, the Court affirmed the Commission's denial of benefits where the claimant was given a four percent anatomical impairment rating solely for a condition that predated her aggravation. The claimant's subsequent, compensable aggravation did not add to her permanent physical impairment rating. Therefore the Court concluded that there was substantial evidence to deny permanent partial disability benefits, since the claimant suffered no permanent physical impairment from her compensable aggravation.

Prior to March 10, 2007, the claimant did not experience any limitations in his ability to perform his job. The record does not reflect prior back problems or other physical problems. There is no evidence of a prior impairment rating. The claimant testified that he did not have health problems, did not take medications prior to this injury and had never had an injury in his employment. The claimant sustained a compensable injury on March 10, 2007. Dr. Long performed a functional capacity examination and assessed an impairment rating to the whole body in the amount of 18%, based upon the Guides. This rating was based upon multiple levels of degeneration in the thoracic area at T11-12 and in the lumbar area, with spinal stenosis, at T12-L1, and for loss of consciousness.

This situation is very similar to the Pollard, supra, case. The claimants in both cases had preexisting conditions

which were asymptomatic. The evidence in both cases showed that the work-related incidents caused the conditions to become symptomatic. The conclusion of the Court of Appeals in Pollard is inescapable here. The claimant's symptoms, his need for treatment and his impairment would not exist but for the work-related incident on March 10, 2007. Thus, the compensable injury was the major cause of the impairment rating, and the claimant is entitled to permanent partial disability benefits for it.

The majority opinion affirms and adopts the Administrative Law Judge's opinion, in which the remark was made that the impairment ratings to the spine relied upon Table 75, Section C, which "includes unoperated on herniated nucleus pulposus with or without radiculopathy," and that the record is devoid of mention of a herniated nucleus pulposus. Table 75, Section C, does not require that there is a herniated nucleus pulposus, just that if there is one, it would fit in that category. The section is not limited to herniated nucleus pulposi, but it does include them. The claimant's diagnoses fit within the sections of the Guides as applied by Dr. Long.

3. Wage Loss

Arkansas Workers' Compensation law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. A worker who sustains an injury to the body as

a whole may be entitled to wage-loss disability in addition to his anatomical loss. Rutherford v. Mid-Delta, 102 Ark. App. 317, 319, 285 S.W.3d 248 (2008), citing Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude,

interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

For an award of permanent benefits, the compensable injury must be the major cause of the disability or impairment. If the injury combines with a pre-existing disease or condition, or the aging process, to cause or prolong the disability, permanent benefits are available only if the compensable injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. Sec. 11-9-102(4)(F)(ii). Major cause is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. Sec. 11-9-102(14).

In Taggart v. Mid America Packaging and Continental, 2009 Ark. App. 335, the Arkansas Court of Appeals remanded a claim to the Full Commission, stating that where the evidence in the record clearly showed that the most the claimant would be able to earn was \$35,000 per year, almost half of her pre-injury earnings, the record did not support a finding of only twenty percent wage loss. On remand, the Full Commission awarded fifty percent wage loss disability. Taggart v. Mid-America Packaging, Full Commission Opinion Filed June 12, 2009 (WCC No. F406472).

In the current circumstances, the claimant was sixty-four years of age at the time of the hearing with a lifetime of strenuous work history. While the claimant does have a wealth of experience and knowledge, he cannot sit, stand or walk for any length of time. Driving and activity exacerbate his symptoms. He required the use of pain relievers, including a narcotic, on a daily basis. Dr. Vogan stated that he could no longer work in his job with the respondent employer and was permanently disabled. Dr. Calhoun stated that he would continue to have pain. The claimant's condition deteriorated, so that the original functional capacity evaluation was no longer an accurate view of his abilities. The claimant had intended to work as long as possible, and once he retired, had tried without success to remain active at his home. The claimant attempted to find work, applying for three positions. Once he interviewed for the positions, he learned that they were outside his abilities. The claimant's earning capacity diminished from the \$24.43 per hour with the respondent-employer to nothing. I find that the claimant has sustained seventy percent wage loss.

4. Conclusion

While I agree with the majority that the claimant sustained a compensable back injury on March 10, 2007 for which he is entitled to reasonable and necessary medical treatment, I must dissent in part, because I also find that the claimant

sustained a compensable head injury for which he is entitled to reasonable and necessary medical treatment, that he is entitled to permanent partial disability benefits and wage loss in the amount of 70%.

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

PHILIP A. HOOD, Commissioner