

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H000399

GLENN GREGG, EMPLOYEE CLAIMANT

CITY OF CONWAY, EMPLOYER RESPONDENT

MUNICIPAL LEAGUE WORKERS' COMPENSATION PROGRAM,  
INSURANCE CARRIER/TPA RESPONDENT

OPINION FILED APRIL 19, 2023

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

Claimant represented by the HONORABLE AARON L. MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MARY K. EDWARDS, Attorney at Law, North 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 September 20, 2022. 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. I accept the above stipulations as fact.
3. The Claimant proved his entitlement to a 20% permanent physical impairment to the right upper extremity for his distal bicep rupture on January 7, 2020.

4. The Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. §11-9-715.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's September 20, 2022 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 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. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five

hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents

DISSENTING OPINION

I respectfully dissent from the majority Opinion finding that the claimant proved his entitlement to a 20% permanent impairment rating to the right upper extremity.

It is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical impairment. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994). In order for the claimant to prove he is entitled to permanent benefits, he must prove by a preponderance of the evidence that his workplace injury was the major

cause of his permanent disability. See, e.g., *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008); *Wright Steel & Mach., Inc. v. Heimer*, 2017 Ark. App. 643, 535 S.W.3d 311 (2017). Ark. Code Ann. § 11-9-102(14) defines “major cause” as more than 50% of the cause and a finding of major cause must be established by a preponderance of the evidence.

The ALJ’s findings rely almost entirely on the opinion of Dr. Tom Roberts after isokinetic testing performed in July 2020. Dr. Roberts did not view the extent of the claimant’s injury internally and did not perform surgery on the claimant. In fact, Dr. Roberts did not administer the isokinetic testing on the claimant, but merely read the results to issue an impairment rating using the American Medical Association Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Isokinetic testing is a measure of strength and the AMA Guides state that strength measurements are “influenced by subjective factors that are difficult to control.” (AMA Guides, P. 64). The Guides states that “[b]ecause strength measurements are functional tests influenced by subjective factors that are difficult to control, and the *Guides* for the most part is based on *anatomic* impairment, the *Guides* does not assign a large role to such measurements.” *Id.* (emphasis in original). The Act is clear that impairment ratings must be based on “objective and measurable physical findings” not subject to the claimant’s

control. Ark. Code Ann. § 11-9-704(c)(1)(B). Passive range of motion testing does not fall within a claimant's voluntary control and "is the correct method to determine a claimant's potential impairment rating." *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d. 751 (2000).

The claimant's isokinetic testing was performed "at the therapy place, wherever that was. It was a physical therapy place in Conway." (Hrng. Tr., P. 26). Dr. Roberts did not perform the testing himself, and his only report regarding the claimant's range of motion reflects that the claimant had "full range of motion of his right elbow. . . He ha[d] good forward flexion abduction strength of his shoulder. No significant swelling [was] noted." (Joint Ex, P. 122). In fact, Dr. Roberts noted on four occasions that the claimant had full extension and flexion of his right elbow. (Joint Ex., Pp. 86-89, 103-104, 112-113, 121-122). Dr. Robert's notes reflect that he relied on the claimant's statements regarding his injury rather than objective facts. (See Joint Ex., P. 121). Dr. Robert's impairment rating is given more weight than it is warranted by the ALJ. The unreliable isokinetic testing was not performed by Dr. Roberts and he based the claimant's impairment rating on data that he had not viewed first-hand. Furthermore, the objective testing prioritized by the State reflected that the claimant has no impairment whatsoever.

The ALJ and the Commission have ignored the Claimant's treating physician, Lawrence O'Malley, who was in the best position to evaluate the claimant and render an opinion on permanent impairment. Dr. O'Malley performed surgery on the claimant's right bicep on January 20, 2020, and in his operative report stated he found "no fluid around the tendon, which would be consistent with an acute injury" and extensive scarring which in his opinion indicated an injury greater than six months in age due to the amount of scarring present. (Joint Ex. 1, P. 71). He went on to state, "There is a very short amount of bicep tendon residual left with rounding off of the tendon consistent with a chronic injury." *Id.* Later, in an opinion letter, dated December 2, 2020, Dr. O'Malley opined that the bicep tendon had a chronic tear and there was no fluid surrounding the residual tendon that would normally be found after an acute rupture. (Resp. Ex., P. 6). Dr. O'Malley is of the opinion that the tear was *at least* six months old at the time of surgery. *Id.* In his report dated December 3, 2020, Dr. O'Malley stated the claimant's tendon was chronically torn and that he had been performing his full job as a firefighter with a torn distal bicep prior to his work injury. Dr. O'Malley assessed a 0% impairment rating. (Joint Ex., P.p. 76-80).

The Commission must remember that a claimant's testimony is never uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). Further, the Commission is well within its rights to

decide which medical evidence best translates to a finding of medical impairment. *See Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

The claimant has provided no medical proof of objective findings that he is permanently impaired. In fact, Dr. O'Malley opined that 0% of the claimant's alleged impairment can be attributed to a compensable injury as the claimant's ruptured bicep tendon is a chronic condition pre-dating the alleged injury. These findings of the claimant's treating physician, who performed surgery on the claimant, must prevail over findings of a doctor who did not even perform the subjective testing on which his rating was based.

In the matter at hand, Dr. O'Malley's opinion based on his hands-on findings bear much greater weight than those of Dr. Roberts. Accordingly, for the reasons set forth above, I must dissent.

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MICHAEL R. MAYTON, Commissioner