

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.: G807469

CAROLINA L. TALMON,
EMPLOYEE

CLAIMANT

ARKANSAS DEPARTMENT OF HUMAN SERVICES,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 10, 2021

Hearing was held before Administrative Law Judge Chandra L. Black, in Little Rock, Pulaski County, Arkansas.

The Claimant represented by The Honorable George H. Bailey, Attorney at Law, Little Rock, Arkansas.

Respondents represented by The Honorable Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on January 20, 2021, in Pulaski County, Arkansas. A pre-hearing order was previously entered in this case on December 2, 2020. This pre-hearing order set forth the stipulations offered by the parties, the issues to be litigated, and their respective contentions.

The following stipulations were submitted by the parties, either pursuant to the pre-hearing order, or at the start of the hearing. I hereby accept the following stipulations as facts:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-insurance carrier relationship existed on or about August 17,

2018.

3. The Claimant's average weekly wage on the day of her accidental injury was \$749.43, which yields a weekly compensation rate of \$500.00 for temporary total disability (TTD), and \$375.00 for permanent partial disability (PPD).

4. Per an Opinion of May 3, 2019, filed by Former Chief Administrative Law Judge Andrew L. Blood, he determined that the Claimant sustained a compensable back injury, on August 17, 2018. Per said Opinion, the Claimant was awarded TTD compensation and medical benefits, along with a controverted attorney's fee. The Full Commission affirmed and adopted this decision on October 8, 2018. No appeal was taken from this decision.

5. The Respondents have paid benefits to the Claimant as awarded by the Commission, along with the appropriate attorney's fees to her attorney in accordance with the award of benefits.

By agreement of the parties, the following issues were litigated at the hearing:

1. Whether the Claimant is entitled to an 8% whole body impairment rating as assessed by Dr. Jonathan Reding.

2. Whether the Claimant is entitled to a controverted attorney's fee.

CONTENTIONS

Claimant:

The Claimant contends that she is entitled to benefits in the form of an 8% Anatomical Physical Impairment.

Statutory attorney fees based up all controverted amounts are claimed.

Respondents:

The Full Commission affirmed the ALJ [sic] finding that the Claimant proved she sustained

a compensable back injury on August 17, 2018. The Respondents paid the benefits awarded to the Claimant and the attorney fees owed pursuant to the award. The Respondents contend that the Claimant has received appropriate medical treatment, including surgery, for her compensable back injury.

The Respondents reimbursed Equian, LLC for a subrogation lien for medical expenses paid on behalf of the Claimant and also issued a check to the Claimant in December 2019 for reimbursement of medial payments made. The Respondents invite the Claimant[sic] attorney to submit any reimbursement requests to which he believes the Claimant to be entitled.

The Respondents have sent a letter to Dr. Jonathan Reding inquiring as to the 8% rating assigned. Specifically, the doctor has been asked if the Claimant’s compensable injury is the “major cause” of the rating assigned. A response from the doctor should be received in the next few weeks.

The Respondents reserve the right to amend its contentions pending the completion of discovery.

The documentary evidence submitted in this case consists of the hearing transcript of January 20, 2021, and the documents contained therein. The Oral Deposition of Dr. Jonathan Reding was taken on July 13, 2020. Said deposition has also been made a part of the record. It is retained in the Commission’s file.

The following witness testified at the hearing: Ms. Carolina L. Talmon (the Claimant).

DISCUSSION

As of the date of the hearing, the Claimant was 48 years old. She has worked for the Department of Human Services (DHS) for eight years. The Claimant continues to work for DHS but does so remotely. She has no other employment outside of DHS.

The Claimant sustained a work-related injury on August 17, 2018. She testified that she had gone to pick up a client when she slipped and fell while walking down the

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corridor. The Claimant gave a detailed explanation of her fall. (Tr. 11)

According to the Claimant, the next morning her lumbar area was “just burning.” Throughout the day, the Claimant had a difficult time with her lower lumbar area and even more pain. She was provided medical treatment at Concentra, along with physical therapy. The Claimant had an epidural steroid injection in her lumbar spine in October 2017. She testified that the lumbar injection made a major difference in her pain. According to the Claimant, it relieved a significant amount of her pain. Following the injection, the Claimant testified that she walked around the track at the park trying to lose some weight. The Claimant essentially testified that she did some home exercises and felt pretty good.

Prior to undergoing the injection in October 2018, the Claimant was tender in her lumbar area. She had limited mobility and there were a lot of things she could not do. The Claimant essentially testified that the summer prior to her August 2018 fall, she walked around the park, and gardened in her backyard. According to the Claimant, she was “very, very up” and physical, and able to do things.

The Claimant was asked about her daily activities during the spring and summer of 2018. She essentially testified that she was able to perform her household activities such as mopping, sweeping, and dusting. She was also able to walk and exercise. In a nutshell, the Claimant felt good.

However, the Claimant did not do well between the time when she fell and when she had surgery. Although the Claimant got plenty of relief from the surgery, she was

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given an impairment rating by Dr. Reding in May of 2019. However, the Claimant explained that since May of 2019, her functional abilities have been limited. She is unable to kneel and squat. The Claimant is not able to mop due to the limited range of motion of her lower back area. She used to craft and do all kinds of activities on the floor, but now she cannot do so now.

Regarding her ability to perform her regular on-site job activities for DHS, the Claimant essentially testified that she would not very fair well. According to the Claimant, she is not able to sit for extended periods of time. The Claimant testified that she must alternate sitting and standing because it relieves a lot of pain off her back. Currently, the Claimant's children help her with things around the house. She basically testified that her children carry the bags from the grocery store and other shopping places.

The Claimant essentially testified that she is unable to garden because of her inability to kneel and pull weeds. According to the Claimant, she cannot walk from her apartment to the leasing office without hurting. She denied that anyone ever recommended that she have surgery prior to the time she had surgery by Dr. Reding. She confirmed that she was sent to Dr. Reding on referral from Dr. Hodges.

Under further questioning, the Claimant testified:

Q Do you know what the difference was between your MRI and – your previous MRI and the one you had in 2018?

A I went from mild stenosis to severe stenosis.

Q How did the surgery help you and to what extent did it help?

A Okay. The surgery helped a lot. I was feeling, at the beginning, like, pain free, and I felt back to my old normal self. So I started doing things that I normally did, squatting to -- to -- to -- or kneeling to reorganize containers and the cabinets and doing my shopping.

Q So how long did that last?

A About - - I want to say six to eight months.

The Claimant confirmed that Dr. Reding rendered the impairment rating in May of 2019, a few months after her surgery. At that time, the Claimant testified that she was feeling “okay.” The Claimant testified that she was able to mop, sweep, and do things that she is currently unable to do.

With respect to the things that the Claimant is currently unable to do, she confirmed that she is unable to kneel because her leg cramps, and she cannot get up from a stooping position. The Claimant testified that she has a lot of pain and has not been able to exercise. Per the Claimant’s testimony, she has difficulty pushing heavy things, such as a grocery cart. According to the Claimant, she also has difficulty lifting heavy things. The Claimant maintained that she was able to do these things before she fell at work.

On cross examination, the Claimant was questioned about her prior medical records. She confirmed that she has had ongoing low back pain for many, many years prior to her fall in August 2018. The Claimant verified that her back trouble started in 2006, when she fell in Mexico. However, the Claimant initially denied having previously testified during the first hearing (held on March 20, 2019) that she knew as early as October 2017 that she had a herniated disc in her lower back.

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Next, counsel for the Respondents showed the Claimant a copy of her testimony from the prior hearing, wherein she testified that she was aware of the herniated disc as early as October 2017.

Specifically, the Claimant explained:

Q So are you testifying today that you didn't know as early as October 2017 that you had a herniated disc in your lumbar spine?

A Well, I had -- I had -- when I fell it became herniated. Oh, wait. It became bulging, which is the same as herniated.

Q I'm talking about when you fell.

A Okay. I'm sorry.

Q I'm talking about in October of 2017, which was about ten months before you fell. And my question today is: Are you testifying today under oath -- you know[sic] in October of 2017 that you in fact had a herniated disc in your lumbar spine?

A Yes, sir.

Q You knew that?

A Yes, sir.

She confirmed that she has treated with doctors at Barg Family Clinic for years due to low back pain. Per a medical record from February 2015, the Claimant reported that she had been experiencing pain down her right leg for three months; the Claimant essentially admitted that she recalled reporting these symptoms to the medical staff at Barg Family Clinic. The Claimant confirmed that she also told them she slipped on ice one morning. She agreed that they ordered an MRI of her lumbar spine back in 2015.

The Claimant confirmed that she was seen at the Barg Family Clinic on January 11,

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2017 and complained of sciatic pain. Under further questioning, the Claimant explained sciatic pain: “Sciatica is something that makes your leg tingle. It comes from the back, and it kind of radiates down your leg and is a nuisance.” At that time, the Claimant told medical staff at Barg Family Clinic that she had been moving furniture a few weeks before and started having back pain. However, the Claimant went on to explain that that the furniture was not heavy. According to the Claimant, it was just some boxes that she should have not been moving. She confirmed that at that time, she complained of pain down her leg.

She confirmed in October 2017, she complained to doctors of low back pain for at least one month. As a result, they ordered a cortisone injection. She agreed that this is the first time that doctors ever recommended an injection for her lumbar problems. She confirmed that she had her first epidural steroid injection on October 12, 2017.

The Claimant essentially admitted that she experienced significant lumbar spine pain in 2015 and 2017. In fact, the Claimant reported to medical providers in October 2017, that her pain level was a 9 on a scale of 10. She confirmed that she described her pain as being aching, throbbing, sharp, and burning in nature. However, the Claimant admitted that she testified earlier that if she had to rate her pain during 2017, she would have rated it at a 6.

Under further questioning, the Claimant explained:

Q Okay. But do you disagree with me that somehow or another your doctors in October of 2017 understood you to say your pain was a 9 out of 10?

A That’s correct. It was at that time. I just -- I was trying to compare the

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two different pains.

Q But you're here today telling us you think it was more like a 6?

A It was more like a 6 in comparison to the pain that I had after the fall.

Interestingly, the Claimant maintained that she did not recall receiving a second lumbar spine injection. The Claimant admitted that doctors ordered a second MRI of her lumbar spine in October 2017.

The Claimant admitted that prior to her compensable work-related fall of August 2018, she asked her doctor for help to fill out paperwork for a "handicap parking permit." She confirmed that in January of 2018, she asked her doctor for some stronger medication than hydrocodone for her back pain.

She confirmed that Dr. Stephen Paulus is at the Arkansas Specialty Care Center/OrthoArkansas. The Claimant admitted that Dr. Paulus performed her lumbar injections. She admitted to going to the Arkansas Specialty Care Center in June 2018, a couple of months before she fell. Per a medical report dated June 22, 2018, it was noted that the Claimant gave a history of her pain level over the last week as being an 8 out of 10. The Claimant again described the quality of the pain as being aching, throbbing, sharp, and burning.

The Claimant sought treatment from the Barg Family Clinic one week (August 10, 2018) before her fall at work. It appears that the Claimant was due another injection in two weeks because her back was starting to hurt. The Claimant requested something for back pain until her injection. She confirmed that this occurred one week before she fell at

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work. She admitted that she had more than one epidural steroid injection for her chronic back pain.

She confirmed that doctors told her that her condition was not going to be fixed by injections. According to the Claimant, she was made aware of this by Dr. Paulus. The Claimant denied that she told Dr. Reding about her prior back problems and incidents before he performed surgery. However, the Claimant confirmed that she told Dr. Reding about the pain radiating down her leg. The Claimant specifically denied telling him about the incident of moving the furniture a couple of years before.

The Claimant denied that she was currently taking any kind of pain medication for back. Instead, the Claimant was using only a CBD salve on her lower spine. The Claimant admitted that she recently went to the doctor on the 29th (December 2020) because she had burning in her lower back. She saw Dr. Reding's nurse practitioner, Elizabeth. According to the Claimant, so could not afford to go physical therapy, therefore the nurse practitioner gave her a physical therapy booklet.

During the hearing, the Claimant described pain that was about mid back down around her beltline, which radiated down to her toe. She confirmed telling Dr. Reding about her radiating pain. The Claimant testified that she told Dr. Reding her pain started Saturday morning, after she fell at work, on August 17, 2018. She verified that she did not tell him she had pain radiating down the same right leg dating back to February 2015, nor did she tell him about moving the furniture/boxes.

Regarding the Claimant's physical abilities and limitations, she admitted that she

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is able to walk for five minutes. However, the Claimant is unable to stand for an extended period of time. According to the Claimant she is able stand for 10 to 15 minutes. The Claimant denied that she uses a cane but testified she has considered buying one. She confirmed that a doctor has not prescribed a cane for her. The Claimant does not walk with the help of a walker, and she is able to drive a vehicle. She is also able to take care of all of her personal needs.

The Claimant admitted that when she saw Dr. Paulus in January of 2018, he did not schedule her for any more injections to her lumbar spine. She agreed that the epidural steroid injection mentioned in the record after January 2018 refers to the injection for her neck. The Claimant admitted that she had a total of three epidural steroid injections for her lumbar spine.

Documentary Medical Evidence

A review of the medical records shows that the Claimant sought medical treatment on January 11, 2017 from Barge Family Clinic due to pain down her right leg for three months.

On October 18, 2017, the Claimant was evaluated by Dr. Stephen Paulus due to low back and mid-back pain, along with pain in both legs. The Claimant rated her pain to be at a 9/10, and constant in occurrence. According to these notes, the Claimant reported that she had these symptoms for six months. Dr. Paulus assessed the Claimant with “1. Low back pain. 2. Lumbosacral radiculitis. 3. Degeneration of lumbar intervertebral disc,” which he prescribed a medication regimen.

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The Claimant underwent an MRI of the lumbar spine on October 23, 2017, at Baptist Health Medical Center-Little Rock, on referral from Dr. Reding. Per the MRI report, Dr. Ronald J. Martin rendered the following IMPRESSION:

1. No significant change in the central, right paracentral, and right foraminal extrusion of the L5-S1 disc, the extruded disc impinges on the exiting right L5 nerve root. The extruded disc contacts the origin of the right S1 nerve root.
2. There is mild linear bulging of the L5-S1 disc. There is mild left neural foraminal stenosis at L5-S1 due to bulging of the disc and facet arthropathy.
3. Mild facet arthropathy is present at the L4-5 level.

On September 10, 2018, the Claimant underwent an MRI of her lumbar spine without contrast at Baptist Health Medical Center-Little Rock, with the following IMPRESSION:

- Superiorly-directed disc extrusion extending from the right central to extraforaminal zones at L5-S1 slightly compresses the right L5 root within the traversing stenotic right L5-S1 neural foramen and slightly displaces the traversing right S1 nerve root.
- Moderate circumferential thecal sac narrowing at L5-S1 is predominantly secondary to epidural lipomatosis.

The Claimant was seen by Dr. Reding on October 29, 2018, due to back pain.

The Progress Note of the Claimant's office visit reflects that she had back pain for a long time; but in August she had a fall that made it worse. The Claimant's episode started more than one month ago, but the problem was occurring more constantly. The pain radiated to the Claimant's left knee, left thigh, left foot, right knee, right foot, right thigh. At that time, the Claimant's pain was moderate. The Claimant had tried physical therapy, injections, muscle relaxants and analgesics for her symptoms. The afore treatment modalities provided mild relief.

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On January 15, 2019, the Claimant underwent lumbar surgery by Dr. Reding. The Operative Report of this procedure reads, in pertinent part:

PREOPERATIVE DIAGNOSIS: Right-sided L5-S1 herniated nucleus pulposus with radiculopathy.

POSTOPERATIVE DIAGNOSIS: Right-sided L5-S1 osteophyte with S1 nerve root compression.

PROCEDURE DONE: Right-sided L5-S1 microdiscectomy.

FINDINGS: Hard osteophytic bar with some soft disc fragments and some mild-to-moderate foraminal stenosis.

On May 15, 2019, Dr. Reding assessed the Claimant with an 8% lumbar spine physical impairment rating due to lumbar disc herniation. His assessment of the Permanent Physical Impairment was based upon the AMA Guidelines for Physical Impairments Fourth(4th) Edition, supported by objective findings based upon a reasonable degree of medical certainty.

Deposition Testimony

The Deposition of Dr. Jonathan Reding was taken on July 13, 2020. Dr. Reding has been a neurosurgeon for five years. He verified that he is familiar with the Claimant. Dr. Reding's first encounter with the Claimant was on October 29, 2018. The Claimant presented to his clinic because of chronic low back pain. She reported worsening issues, especially with pain into his right leg. She associated this with a fall in August 2018.

At that time, the Claimant had already done physical therapy and injections. As a result, Dr. Reding discussed with the Claimant the possibility of lumbar surgery. The Claimant had undergone an MRI scan on September 10, 2018, that showed a disc

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herniation on the right side of L5-S1. Ultimately, on January 15, 2019, Dr. Reding performed surgery on the Claimant's lumbar spine on January 15, 2019. The Claimant's preoperative diagnosis was "right side L5-S1 herniated nucleus pulposus with radiculopathy," and her postoperative diagnosis was right sided L5-S1 osteophyte with S1 nerve root compression."

Dr. Reding confirmed that the Claimant followed up with him after her surgery. Dr. Reding testified that at that time, the Claimant reported that her leg pain was much improved, and she was doing quite well. He testified that the Claimant saw his nurse practitioner for a different issue.

Next, counsel for the Respondents presented Dr. Reding with a report that he authored. Per this report, Dr. Reding assigned the Claimant an 8% impairment rating. He testified that he used the chart from the AMA Guides 4th Edition to evaluate the Claimant's rating based on her surgery.

Dr. Reding was shown a report from the Barg Family Clinic dated February 19, 2015. Per this report, the Claimant reported that her chief complaint was "pain going down her right leg for three months." Dr. Reding denied having previously seen these medical records. According to Dr. Reding, the Claimant reported to him that she had chronic back pain, but it was his understanding that the leg pain was a new complaint.

Under further questioning, Dr. Reding testified:

Q Okay. Well, on that same report dated February 19, of 2015, in the middle of that page, it says, "She is also complaining of lower back pain times three months, described as a dull ache that his radiating into the right leg..."

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A Okay.

Q She didn't tell you she'd had that kind of pain prior to the fall at work?

A Well, so as I read my first note, it says she's been having low back pain for years but started to have worse leg pain on the right since her fall in August.

I don't necessarily, I mean, from the words that I used there, maybe she did tell me that she had leg pain in the past, but that it's worse after the fall.

Dr. Reding testified that the medical significance of the Claimant's dull ache in the lower back with pain radiating down into the leg would signify that the "pressure on the nerve that would go down into her leg." The Claimant sought treatment from the Barg Family Clinic in January 2017. Per this report, the Claimant complained of sciatic pain since January 1, 2017. Dr. Reding explained that sciatic pain is how patients describe pain shooting into their leg and is usually indicative of nerve pressure in the spine. The Claimant reported she was moving furniture a few weeks before and might have started her back pain. Dr. Reding did not recall the Claimant mentioning any sort of incident about moving furniture.

Per a medical report from October 2017, from Barg Family Clinic, the Claimant followed up for continued evaluation of low back pain. An MRI of the Claimant's lumbar spine was ordered by her physician due to lumbar spine pain. Dr. Reding explained the significance of the MRI scan: "You're ultimately looking to see if there's any sort of disc herniation or something that is causing her back pain and pain issues in the leg, something that's pushing up against a nerve root..."

The Claimant underwent the lumbar MRI on October 24, 2017. In this report, there is a reference to "Stable tarsal desiccation of the L3 and 4 disc." Dr. Reding was not

sure what they meant by “tarsal.” However, either way, Dr. Reding explained that the stable breakdown of the disc at L3-4 is what they are trying to say.

Dr. Reding testified:

Q Okay. And reading on they say, “There is stable moderate loss of disc height at L5-S1. There is near complete desiccation of the L5-S1 disc. Can you explain?”

A It just means that the disc, which is the soft portion between the bones, has almost completely worn away. Desiccation is kind of a degenerative process where the disc disintegrates.

Q And if that condition occurs in a patient where the disc is more or less completely wears away or almost wears away, what sort of problems can that lead to?

A It doesn't always lead to problems, although it can be related with disc herniation and/or chronic low back pain.

Q Could that explain chronic low back pain, pain radiating down someone's leg, and those things?

A Not so much the disc desiccation and the leg pain, but it just depends on how much, because it's not necessarily talking about the nerve being pinched, but-

Q So the desiccation reference there, is that just more or less to the existence or non-existence of the disc material.

A Right, correct.

Dr. Reding went on to explain that IMPRESSION section states that there is no significant change in the central and right paracentral right foraminal extrusion of the L5-S1 disc. According to Dr. Reding, off to the right side there is disc herniation or bulge, and it impinges on the exiting right L5 nerve root and also the origin of the right S1 nerve root, which could be potentially cause leg pain. He further noted that the “Mild linear bulging of the L5-S1, means that there is bulging on the left, it is just not as significant as

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the right.” Dr. Reding went on to explain that “Mild facet arthropathy is present at the L4-5 level, means arthritis in the joints of the spine. He confirmed that the IMPRESSION section of the MRI report is the type of condition that can sometimes lead to surgery for a patient.

When comparing the two most recent MRI reports, Dr. Reding was unable to say whether the Claimant got worse in 2017 or better in 2018. However, Dr. Reding testified that it sounds like the Claimant had similar issues to her MRI scan from 2018.

Next, Dr. Reding opined regarding his findings of the Claimant’s January 2019 lumbar surgery:

Q Okay. And the postoperative diagnosis that you gave us in that report, the right-sided L5-S1 osteophyte with an S1 nerve root compression, that diagnosis, is that more or less consistent with that MRI impression from 2017?

A Yes, sir, except for, again, they called it an extruded disc, whereas in surgery it was more of a hard osteophyte.

Under further questioning, Dr. Reding was asked if in his opinion whether the “major cause,” of the 8% impairment rating assigned to the Claimant was for her fall at work in 2018 or would be related to the ongoing low back pain she had for several years. Dr. Reding rendered the following opinion: “I would say that the major cause, that the fall at work was likely not the major cause, just based on her long history of issues at the same level and her, you know being evaluated for this even prior to the fall.” He essentially agreed that if you look at the diagnostics in the Claimant’s case and her long history of back pain, it is hard to say that her fall at work is the major cause of the rating.

On cross examination, Dr. Reding was asked about the Claimant’s Operative

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Report. He agreed that there were some soft pieces of herniation. Specifically, Dr. Reding testified that the report should be amended to show that there was a disc herniation and an “osteophyte.” Dr. Reding confirmed that there was right sided L5-S1 herniation nucleus pulposus with radiculopathy even after the surgery. He further confirmed that after he removed those pieces of disc then the foramen was nicely decompressed at that point.

Dr. Reding agreed that when you compare the two MRIs, the one from 2017 and the one from September 2018, there is a difference in the two. According to Dr. Reding, in the 2017 MRI there is moderate to severe right foraminal stenosis, and on the 2018 MRI, there is severe right L5-S1 foraminal stenosis. Dr. Reding agreed that the 2018 MRI sounds to be worse.

On redirect examination, Dr. Reding confirmed, it would be fair to say that prior to her fall at work in August 2018, based on the chart and impairment rating Guides, the Claimant would have been entitled to an impairment rating before her fall at work. Dr. Reding based this opinion on all of the medical records that he reviewed, Claimant’s long history of chronic back pain, with what appears to be disc desiccation and sciatica, and all the other things.

ADJUDICATION

Impairment Rating

The crucial issue for determination is whether the Claimant sustained an 8% permanent partial impairment rating to her lumbar spine due to her compensable back

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injury of August 17, 2018.

Based on the record, without giving the benefit of the doubt to either party, I find that the preponderance of the evidence demonstrates that the Claimant's August 17, 2018 work-related fall was not the major cause of her 8% permanent anatomical impairment, as assigned by Dr. Reding. The basis for my conclusion is outlined below.

An injured worker must prove by a preponderance of the evidence that she is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c)(1). Pursuant to Ark. Code Ann. § 11-9-522(g) and our Rule 099.34, the Commission has adopted the *American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) to be used to assess anatomical impairment.

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a). "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)(A). Preponderance of the evidence means evidence having greater weight or convincing force. Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark. App. 269, 101 S.W. 3d 252 (2003).

Moreover, if any compensable injury combines with a preexisting disease or

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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 if the compensable injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. §11-9-102(4)(F)(ii)(b).

As noted above, this claim has been the subject of a prior hearing on March 20, 2019, which was conducted by Former Chief Administrative Law Judge Andrew Blood. Per said Opinion dated May 3, 2019, he found that the Claimant sustained a compensable back injury on August 17, 2018, for which she was entitled to temporary total disability, medical treatment, and a controverted attorney's fee. The Full Commission affirmed and adopted that decision on October 8, 2019. No further appeal was taken from this Award. The Respondents paid benefits per the Award.

Dr. Reding performed lumbar surgery on the Claimant in January 2019. Following the surgery, Dr. Reding assessed the Claimant with an 8% permanent anatomical impairment due to lumbar disc herniation. This assessment was made on January 15, 2019. Dr. Reding assessed this rating utilizing the *AMA Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). The Respondents have controverted the Claimant's entitlement to this 8% impairment rating.

In that regard, the Claimant contends she is entitled to an 8% whole body impairment rating as assigned by Dr. Jonathan Reding following her lumbar surgery of January 2019. The Respondents contend that the Claimant's work-related back injury of August 17, 2018 is not the "major cause" of the 8% anatomical impairment.

Specifically, it is undisputed that the Claimant suffered preexisting degenerative disc disease and a herniated disc of the lumbar spine that predated her compensable injury of August 17, 2018. In fact, the evidence shows that the Claimant has an extensive history of prior chronic back problems dating back to 2006, when she fell in Mexico.

During the most recent hearing, the Claimant confirmed that she suffered prior chronic back pain and related symptomology. In addition to this, the progressive nature of the Claimant's prior chronic back pain, for which she sought extensive conservative medical treatment is further established by the documentary medical evidence of record.

Specifically, the Claimant complained to medical providers in February 2015, after slipping on ice, for which she underwent a lumbar MRI. At that time, the Claimant complained of pain down her right leg for three months. The Claimant sought treatment for "sciatic pain" in January 2017. She also sought treatment for back pain of October 2017, just ten months before her work-related injury of August 2018. At that time, the Claimant rated her pain to be at a 9 on a scale of 10, and a second MRI was ordered of her lumbar spine. The 2017 MRI revealed a herniated disc and degenerative disc disease.

Furthermore, in January 2018, the Claimant requested medications stronger than hydrocodone for her back. The Claimant also requested a Reserved Parking Permit (handicap parking sticker) due to her back condition. Just two months (June 2018) prior to the Claimant's compensable incident, she complained to doctors of pain for a week. She rated her pain to be at an 8 on a scale of 10.

Significantly, the Claimant sought medical treatment for her chronic back pain on

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August 10, 2018, just one week prior to her fall. At that time, the Claimant asked for pain medications until she could undergo a lumbar epidural steroid injection.

Following the Claimant's compensable injury, she underwent a third lumbar MRI in September 2018. This MRI revealed findings very similar to 2017 MRI. It appears that the 2017 MRI revealed moderate to severe right foraminal stenosis, and the 2018 MRI showed that there was severe right L5-S1 foraminal stenosis.

On July 13, 2020, Dr. Reding's Oral Deposition was taken. At that time, Dr. Reding was made fully aware of the nature and severity of the Claimant's prior chronic back problems, dating back to 2006. Dr. Reding's deposition testimony is fully outlined above. However, in a nutshell, Dr. Reding opined that the Claimant's work-related incident of August 17, 2018 was not the "major cause" of the 8% impairment rating. The basis for Dr.'s Reding opinion of the work injury not being the "major cause" of the rating, included the Claimant's long history of lumbar issues at the same level; and because she was being evaluated for chronic ongoing back problems prior to her fall at work. Hence, Dr. Reding went on to opine that based on the Claimant's medical history and condition, she would have been entitled to an 8% permanent partial disability rating even before her work-related fall. No expert opinion to the contrary was presented.

In light of all of the foregoing, I find that Dr. Reding's expert medical opinion is accurate and well-reasoned. As such, I have attached significant weight to his expert opinion.

During the hearing, the Claimant gave inconsistent testimony concerning the

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severity of her prior back pain. On direct examination, the Claimant testified that she would have rated her prior back pain to be at a level 6 on a scale of 10. However, medical records show that in October of 2017, the Claimant rated her pain level to be at a 9. On cross examination, when present with her prior medical record from October 2017, the Claimant initially denied having reported to doctors that her level of pain was at a 9. Ultimately, the Claimant admitted that she had done so. However, the Claimant then maintained on further cross examination that she would have rated her prior pain level to be at a 6 in comparison to her level pain after her work-related fall.

Hence, the evidence clearly shows the Claimant was experiencing major back pain and other related symptoms, or otherwise she would not have been seeking stronger pain medications and epidural steroid injections. Because of the foregoing inconsistent testimony, and when comparing it with the medical evidence of record, I found the Claimant's credibility to be diminished.

To summarize, given the significant degree and severity of the Claimant's preexisting back problems dating back to 2006; the progressive and chronic nature of the Claimant's back symptoms particularly starting in 2015 and continuing up to the time of her compensable work injury; considering that the Claimant sought medical treatment for her back one (1) week prior to her work injury; that the Claimant was previously diagnosed with a herniated disc and degenerative disc disease; that the Claimant complained of identical symptoms before and after her work injury; given the expert opinion of Dr. Reding (wherein he opined that the Claimant's work was not the "major cause" of the

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Claimant 8% impairment rating); because Dr. Reding was the Claimant's treating physician/surgeon; there being no expert opinion to the contrary, and because the Claimant would have been entitled to an 8% impairment rating prior to her work-related fall, I am persuaded that it would require conjecture and speculation for me to conclude that the "major cause" requirement has been met. Speculation and conjecture do not take the place of proof. Weaver v. Ark. Dep't of Corr., 2015 AR. App. 346, 464 S.W. 3d 133 (2015).

Under these circumstances, I find that the Claimant failed to prove by a preponderance of the evidence that her injury of August 2018 was the "major cause" of her 8% impairment rating to her lumbar spine. Therefore, the Claimant failed to prove by a preponderance of the evidence her entitlement to an 8% permanent impairment rating, as assessed by Dr. Reding in May 2015.

I realize that it is well-settled in workers' compensation law that an aggravation of a preexisting condition is capable of meeting the major cause requirement as long as the work-related aggravation was the major cause of the anatomic impairment. Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W. 3d 738 (2004). However, the preponderance of the evidence shows otherwise in the claim at bar due to all of the foregoing reasons and considering that the Claimant had failed conservative treatment for her back at the time of her compensable injury.

Having found that the Claimant failed to prove her entitlement to an 8% impairment rating for her lumbar injury August 17, 2018, the issue of attorney's fees has been rendered moot. Hence, this claim is hereby respectfully denied and dismissed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the basis of the record as a whole, I make the following findings of fact and conclusions of law in accordance with Ark Code Ann. §11-9-704.

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. I hereby accept the aforementioned stipulations as fact.
3. The Claimant failed to prove by a preponderance of the evidence that she sustained an 8% impairment rating for her compensable back injury of August 17, 2018.

ORDER

This claim for an 8% permanent impairment rating to the body as a whole, is respectfully denied and dismissed in its entirety.

IT IS SO ORDERED.

Chandra L. Black
Administrative Law Judge

clb/bh