

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106753

JOSEPH A. WAUGH

CLAIMANT

**NATCO
(UNINSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED OCTOBER 16, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE KEITH BLACKMAN, Attorney at Law,
Jonesboro, Arkansas.

Respondents represented by the HONORABLE MICHAEL W. LANGLEY, Attorney at
Law, Paragould, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Jonesboro, Arkansas on August 19,
2003. A prehearing conference was held on March 26, 2003 and a prehearing order
was filed on March 17, 2003. A copy of the prehearing order was marked as
Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on March 23,
2001.

The temporary total disability rate is \$240.

The claimant contends that he is entitled to temporary total disability benefits
from March 23, 2001 to September 7, 2001 and from November 21, 2001 to April 19,
2002. The claimant also contends he is entitled to a 36% permanent impairment rating

assigned to his hand. The claimant requests attorney's fees on all controverted benefits.

The respondents contend that the claimant acted outside the doctor's orders during the time he was off work and this activity exacerbated his injury and impeded the healing and led to the current impairment rating. The respondents further contend that the claimant was released to return to work on August 1, 2001; he returned to work and then quit. The respondents contend that work was available. The respondents are unaware of any medical taking the claimant off work after August 1, 2001. The respondents contend the claimant's activity after he was injured constituted an independent intervening cause relieving the respondents of further liability. The respondents did not have workers' compensation insurance at the time of the claimant's injury but had a form of insurance that paid \$600 per months for six months. An additional \$250 was paid the claimant. The respondents request an offset for unemployment benefits the claimant received. The respondents are now insured.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable injury on March 23, 2001.

2. The temporary total disability rate is \$240.

3. The claimant has proven by a preponderance of the evidence that he is entitled to benefits associated with a 36% permanent impairment rating to his hand assigned by Dr. Michael Moore.

4. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 23, 2001 through August 1, 2001, when he remained in his healing period and had not returned to work.

5. The respondents are entitled to an offset for group benefits paid pursuant to Ark. Code Ann. §11-9-411 and an offset for unemployment benefits paid while the claimant was entitled to temporary total disability benefits pursuant to Ark. Code Ann. §11-9-506.

DISCUSSION

The claimant, 47 years old, worked about a year and a half at the respondent's machine shop. According to the claimant, on March 12, 2001, he was drilling a hole through a part with a lathe when the drill bit stuck. As the claimant was attempting to get the bit out, he bumped the machine in gear and caused the vice grips he was using to go through his hand, damaging a nerve between the thumb and first finger. The claimant immediately sought medical treatment with Dr. Marion Hazzard, an orthopedic surgeon. The claimant has also seen Dr. Spanos, a neurologist, Dr. Bourland, and Dr. Michael Moore, a hand specialist.

The claimant testified that after his hand surgery, he got a job offer at Mounds Neighbors Gin and was given a desk job of one-handed work weighing trucks and writing tickets. According to the claimant, when his employer, NATCO, found out he

was working, they offered him a job so he went back to work for NATCO. According to the claimant, he washed windows, sorted through drill bits and generally cleaned up shelves and cabinets and worked about four days. According to the claimant, Mounds Neighbors Gin had an opening and he went to work there. The claimant testified that he received a check for \$3,040 on October 4, 2001, from the respondents, but his attorney advised him not to cash the check and he had the original check. The claimant began his employment with Mounds Neighbors Gin about September 1, 2001 and worked until November 21, 2001, performing a one-handed job. The claimant testified he was laid off and drew unemployment benefits from November 21, 2001 to April 19, 2002, as the work is seasonal. The claimant returned to work at the gin on April 19, 2002 and continued until November 27, 2002. The claimant drew unemployment benefits after that until March 2003.

According to the claimant, he has no grip, his fingers are numb from the tip of his thumb through the first joint in his forefinger. The claimant stated that the web of the thumb feels like a tight rubber band. He cannot lift anything with any weight with that hand and he has knots in the palm of his hand.

Under cross examination, the claimant confirmed that when the doctor released him on August 1, 2001, for one-handed work, he did not notify his employer. The claimant confirmed that he quit his employer on August 28, 2001, when he went to Mounds Neighbors Gin to work. The claimant also confirmed that he had done seasonal work most of his life. The claimant verified that he has a garden and the garden was larger in 2001 than it was in 2003. The claimant had hand surgery in March 2001 and he testified that he tilled his garden one-handed using a power tiller.

The claimant verified that he usually worked two to three hours in his garden each day and he helped carry vegetables using a one-handed wheel barrow. The claimant verified that while he was drawing unemployment benefits, he only made some personal contacts necessary to keep his benefits. The claimant verified that he wanted to return to the Gin, as he liked seasonal work. The claimant testified that he also helped his brother-in-law who was building a house. The claimant testified that he handed him hammers and nails but did not actually work, although he did help carry paneling or aspenite.

April Lindsey, general manager at the respondent employer, testified that she pays bills, handles all the paperwork and other general duties at the office. Ms. Lindsey testified that for the past 16 years the company has had a policy with American Heritage Life that was a 24-hour accident policy and this policy was the workers' compensation policy. This policy covered the employee off or on the job and paid a portion of their salary and medical. Ms. Lindsey testified the insurance paid the claimant \$250 as well as \$3,040 (\$150 per week) in October 2001, for the claimant's time off work. Ms. Lindsey testified that the claimant came back in the office while he was off work with his hand and he discussed doing plumbing jobs, working on a rent house and working on the farm. On June 1, 2002, the claimant came in and stated he wanted to go on disability and get off unemployment since he wanted to save that. Ms. Lindsey was authorized to cut the claimant a check for \$150. About a week later, according to Ms. Lindsey, the claimant came in and stated he would be off work another 30 days and explained how he had been using a sledgehammer to bust up concrete and also a jackhammer.

Ms. Lindsey testified that the claimant did not come back in after the June 6, 2001, visit. Ms. Lindsey testified that she learned from their lawyer the claimant was released to return to work and they made contact with him about having one-handed work available. Ms. Lindsey testified that when the claimant quit, there was still work available for him to perform.

Russell Gamblin, owner and operator of the respondent employer, testified that the claimant had been a good worker and he would come in to the office while he was off work and tell them what project he was working on at home, such as plumbing, adding on a new bathroom or running the jackhammer. Mr. Gamblin testified that he personally owns a garden tiller and even though it is self-propelled, he cannot run it with one hand. Mr. Gamblin testified that he has personally seen the claimant's garden and it is 15 to 20 rows that are 40 feet long with a corn field that has about 20 rows that are 75 feet long.

The claimant first contends he is entitled to the 36% permanent impairment rating as assigned by Dr. Michael Moore on April 15, 2002. An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4)(F)(ii)(a) (Supp. 2001), 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" means more than fifty percent (50%) of the cause and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14).

In addition, Ark. Code Ann. §11-9-102(16) provides:

(16)(A)(i) 'Objective findings' are those findings which cannot come under the voluntary control of the patient.

(ii) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.

(B) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty;

In the present case, the claimant's injury was a traumatic injury to the left hand and the claimant underwent surgery to help correct the problems. On April 15, 2002, Dr. Michael Moore, a hand specialist evaluated the claimant and assigned a 36% permanent impairment rating based on the *AMA Guides to the Evaluation of Permanent Impairments, 4th Ed.*, and this opinion was stated within a reasonable degree of medical certainty. I find the claimant has satisfied the statutory requirements of the statute for permanent benefits; therefore, I find the claimant has proven by a preponderance of the evidence that he is entitled to the 36% permanent anatomical impairment. While the respondents have contended that the claimant's activities following his surgery were outside the doctor's orders and exacerbated his injury and may have led to the rating, the medical evidence does not support this assertion.

The claimant next contends that he is entitled to temporary total disability benefits from March 23, 2001 through September 7, 2001 and from November 21, 2001 through April 19, 2002. The claimant sustained a scheduled injury to his hand. The claimant is, therefore, entitled to temporary total disability compensation while he/she is

within his/her healing period and has not returned to work. See, Ark. Code Ann. §11-9-521(a)(Supp. 1999); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d. 822 (2001).

In the present case, the claimant remained in his healing period and did not return to work from March 23, 2001 through August 1, 2001. The medical evidence indicates that Dr. Hazzard, on August 1, 2001, released the claimant for one-handed duty work; however, the claimant testified that he did not notify his employer. The employer subsequently contacted the claimant and offered him a one-handed job and he worked four days and then quit and went to work for another employer on a seasonal basis. I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and did not return to work from March 23, 2001 through August 1, 2001. The respondents are responsible for temporary total disability benefits during that period. The evidence reflects that the claimant was released to return to work one-handed on August 1, 2001 and the employer had such employment; therefore, the claimant is not entitled to temporary total disability benefits after August 1, 2001. The evidence further reveals that the claimant returned to work for another employer sometime after he left the respondent employer and the claimant drew unemployment benefits for a period of time. Again, respondents contend that the claimant's activities were outside the doctor's orders and exacerbated his injury and extended his healing period. The medical evidence does not support this assertion.

The respondents paid the claimant some group benefits while he remained off work and are entitled to an offset for those benefits paid pursuant to Ark. Code Ann. §11-9-411. The respondents are also entitled to an offset for any period of temporary

total disability when the claimant received unemployment benefits pursuant to Ark. Code Ann. §11-9-506.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to benefits associated with a 36% permanent impairment rating to his hand assigned by Dr. Michael Moore. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 23, 2001 through August 1, 2001, when he remained in his healing period and had not returned to work. The respondents are entitled to an offset for group benefits paid pursuant to Ark. Code Ann. §11-9-411 and an offset for unemployment benefits paid while the claimant was entitled to temporary total disability benefits pursuant to Ark. Code Ann. §11-9-506.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**