

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F007224

RONALD BAKER		CLAIMANT
PERSONNEL MANAGEMENT		RESPONDENT
RELIANCE INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
ARKANSAS PROPERTY & CASUALTY GUARANTY FUND	NO. 2	RESPONDENT

OPINION FILED MAY 20, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by KEVIN O'DWYER, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 8, 2004, in Springdale, Arkansas. The deposition of Dr. Jason H. Pleimann was taken on February 11, 2004, and has been introduced as Respondent's Exhibit No. 1.

A pre-hearing order was entered in this case on September 9, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, certain clerical corrections were made, the respondents announced that they were accepting a liability for a permanent physical impairment of 10% to the leg below the knee, and the sole issue was changed from the issue of rehabilitation to the issue of the degree or extent of permanent physical impairment produced by the claimant's admittedly compensable injury. A copy of the pre-hearing order with those amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On January 12, 2000, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation rates are \$200.00 for total disability and \$154.00 for permanent partial disability.
3. On January 12, 2000, the claimant sustained a compensable injury to his left ankle.
4. There is no dispute over the payment of medial expenses or temporary disability benefits.
5. The healing period ended on or about July 22, 2003.
6. The respondents are accepting liability for a permanent physical impairment of 10% to the leg below the knee.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The degree or extent of permanent physical impairment.

In regard to this issue, the claimant contends that he has sustained a permanent physical impairment of 35% to the foot or leg below the knee as a result of his compensable injury and is entitled to benefits accordingly.

In regard to this issue, the respondents contend:

“Claimant suffered a scheduled injury to his ankle. Dr. Jason Pleimann, M.D. found that the claimant’s injury resulted in a 20% whole person impairment rating. The respondents contest this rating and any wage loss benefits.”

DISCUSSION

_____The sole issue is the issue of the degree or extent of permanent physical impairment that has been caused by the claimant’s admittedly compensable left ankle or foot injury. The burden rests upon the claimant to prove by a preponderance of the evidence that he is entitled to benefits for permanent physical impairment in excess of 10% to the leg below the knee.

Ark. Code Ann. §11-9-704(c)(1)(B) mandates:

“Any determination of the existence or extent of physical impairment shall be supported by objective measurable or physical or mental findings.”

Ark. Code Ann. §11-9-102(16)(A)(i) defines “objective findings” as the independent observations of findings which cannot come under the voluntary control of the claimant.

Ark. Code Ann. §11-9-521(h) requires that all permanent physical impairment ratings be made in accordance with the official rating guide adopted by this Commission. At the present time, this official rating guide is the American Medical Association’s Guides to the Evaluation of Permanent Impairment (fourth edition). However, this subdivision further provides that no consideration can be given to pain as the basis for any assessment of permanent physical impairment. This prohibition against the consideration of pain in determining the existence or extent of permanent physical impairment is echoed in Ark. Code Ann. §11-9-102(16)(A)(ii). Therefore, any methods that may be contained in this Guide, which use pain or other subjective findings in the calculation of permanent impairment must be disregarded.

Although this Commission is no longer conclusively bound by the assessments of permanent physical impairments made by medical experts, such expert medical opinion can not be arbitrarily disregarded. However, in order to be considered any medical opinions addressing the degree or percentage of permanent physical impairment must be stated “within a reasonable degree of medical certainty”, Ark. Code Ann. §11-9-102(16)(B).

In the present case, the only expert medical opinions addressing the percentage or degree of permanent physical impairment are those expressed by Dr. Jason Pleimann. Dr. Pleimann is an orthopaedic specialist and the claimant’s primary treating physician for his compensable ankle or foot injury.

In a report dated June 12, 2003, Dr. Pleimann opines that the claimant has experienced a 7% permanent physical impairment to his “foot” that results from a total loss of inversion and eversion motion in his foot or ankle. Dr. Pleimann attributes this loss to

the claimant's compensable injury. He assesses an additional 10% permanent physical impairment to the "foot" for a "mild loss of range of motion of plantar flexion" (exhibiting a maximum of only 20°). He also attributes this loss to the claimant's compensable ankle injury. These losses of range of motion appear to have been observed by Dr. Pleimann during his various physical examinations . These decreases in motion of the claimant's foot or ankle were also observed and measured during the Functional Capacity Evaluation (FCE) which was performed by Functional Testing Centers, Inc. These measured losses in range of motion were then applied to the method recommended by the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition), tables 43 and 42, page 78. Curiously, Dr. Pleimann did not combine his two separate impairments (as recommended by the Guides,) by means of the Combined Values Chart on page 322 of the Guides. Had he done so, this would have given a combined permanent physical impairment of 16% to the "foot" or leg below the knee.

Dr. Pleimann's next assessment of permanent physical impairment is found in his report of July 22, 2003. In this report he opines that the claimant is entitled to a permanent physical impairment of 20% to the body as a whole. He states that he has arrived at this degree of impairment by using table 36 (page 76) of the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition). A review of table 36 of the Guides shows that a 20% permanent physical impairment is recommended for a "moderate" gait derangement that requires routine use of a cane, crutch, or long leg brace.

Dr. Pleimann's third and final rating is found in his report of December 1, 2003. In this report he opines that the claimant has experienced a 35% permanent physical impairment to his "foot" as a result of his compensable injury. In arriving at this degree or percentage of permanent impairment, Dr. Pleimann first concludes that the claimant's use of a cane and an AFO brace limits the motion and use of his ankle or foot as much as a "pantalar ankylosis (fusion) in good position". As the Guides recommend a permanent

physical impairment of 35% to the “foot” for such a condition (page 81), Dr. Pleimann then concludes that this impairment rating would be appropriate for the claimant’s required use of a cane and an AFO brace in walking.

Clearly, the 35% permanent physical impairment, assessed by Dr. Pleimann in his report of December 1, 2003, was not calculated in a manner that conforms to the Commission’s official rating Guide. This rating Guide, The American Medical Association’s Guides to the Evaluation of Permanent Impairment (fourth edition), does provide for a 35% permanent impairment to the “foot” for a “pantalar ankylosis in good position”. Although Dr. Pleimann may believe that the claimant’s use of a cane and an AFO brace are “effectively” the same as a pantalar ankylosis in good position, the fact of the matter is that the claimant does not have any “ankylosis” or fusion of the bones in his foot or ankle and certainly not a “pantalar ankylosis”. This extrapolation by Dr. Pleimann of a rating for one condition to another condition is not endorsed or recognized by the Guides. Thus, any assessment of permanent physical impairment made in this manner would not satisfy the requirements of Ark. Code Ann. §11-9-521(h).

In arriving at his assessment of a 20% whole person impairment (report of July 22, 2003), Dr. Pleimann derived this percentage of impairment from table 36 on page 76 of the Guides. However, under section 3.2b (the section which explains the use of this table), the Guides expressly notes that ratings of permanent impairment for gait derangement should only be made when the derangement is “consistent with pathologic findings for instance, those seen by roentgenography”. This section goes on to state:

“Section 3.2(b) does not apply to abnormalities (in gait) based only on subjective factors, such as pain or sudden giving-way as with, for example, a patient with low back discomfort who chooses to use a cane to ease walking.” (emphasis mine)

In the present case, there is no evidence of any particular “pathologic” or “objective” findings to support the claimant’s gait abnormality that would require the full time use of a cane and an AFO brace. The medical records of Dr. Pleimann indicate that x-ray studies

of the bones and joints in the claimant's foot and ankle were now essentially normal (office notation of April 7, 2003). It appears from the evidence presented that the claimant's use of a cane and a brace is based solely upon "subjective" factors, which would not meet the requirements set out in the Guides for the use of table 36.

It further appears that the use of table 36 would provide for an assessment of permanent physical impairment that was not supported by "objective findings". Thus, its use would be contrary to Ark. Code Ann. §11-9-704(c)(1)(B).

Finally, it is obvious from his report of June 12, 2003 that Dr. Pleimann's initial assessment of a 7% and a 10% permanent physical impairment to the foot was based solely on a loss of range of motion of the various joints in the claimant's left foot and ankle. Dr. Pleimann expressly states that he utilized table 43 (found on page 78 of the Guides) to ascertain the appropriate corresponding degree of permanent physical impairment. It would also appear that he further employed table 42, which is found on the same page.

Table 43 provides that a limitation of motion in "inversion" of the foot to between 10° and 20° or a limitation of motion of "eversion" of the foot to between 0° and 10° constitutes a "mild" loss and carries a permanent physical impairment rating of 3% to the foot. A limitation in motion of "inversion" to between 0° and 9° constitute a "moderate severe" loss and carries a corresponding permanent physical impairment rating of 7% to the foot.

In his report of June 12, 2003, Dr. Pleimann states that the claimant has "no inversion or eversion" motion to the hindfoot and would fall into the moderate to severe classification of table 43 and would therefore be entitled to a permanent physical impairment of 7% to the foot. However, the physical capacity summary of joint motion contained in the Functional Capacity Evaluation (FCE) (performed on June 3, 2003) showed that the inversion motion of the claimant's left foot was measured at 15° and the eversion was measured at 14°. Dr. Pleimann gives no indication as to whether his

observation of no inversion or eversion was based upon observation of active or passive range of motion. He also gives no indication as to whether any particular measuring equipment was used or any insight into the method or manner of his measurement he used in his conclusions of no or 0% motion on inversion or eversion. He also offers no explanation for the obvious discrepancy between his measurements and those shown on the FCE that was performed at his request.

Table 42, which also apparently was utilized by Dr Pleimann in his assessment of permanent physical impairment on June 12, 2003, provides that a plantar flexion capability between 11° and 20° represents a “mild” loss of range of motion. This table further indicates that a “mild” loss of range of motion of the ankle carries a permanent physical impairment of 10% to the foot.

In his report of June 12, Dr. Pleimann specifically noted that the claimant can achieve only a 20° plantar flexion, which would place him in the “mild” category of table 42. However, the plantar flexion of the claimant’s left ankle was also measured during the Functional Capacity Evaluation on June 3, 2003. At that time, the claimant was noted to have a 36° rotation or plantar flexion of his left ankle. This range of motion would be less than the recognized “normal”, but would not represent a sufficient loss of range of motion to be afforded a permanent physical rating under table 42 of the Guides. Dr. Pleimann’s observation of only a 20° plantar flexion is also inconsistent with his own findings during his evaluation on May 19, 2003. At that time, Dr. Pleimann noted (on physical examination) that the claimant “has good plantar flexion”. Again, Dr. Pleimann offers no insight into how this measurement was made. Again, he offers no explanation between the obvious discrepancy between his June 12, 2003 observation and either the June 3, 2003 FCE results or his prior observations on May 19, 2003.

After consideration of all of the medical evidence presented, it is my opinion that the assessment of permanent physical impairment, which is contained in Dr. Pleimann’s report

of June 12, 2003, is inconsistent with other more credible medical evidence. The evidence also fails to show that the deficits in range of motion, which form the basis for these ratings, constitute “objective findings” as that term is defined in Ark. Code Ann. §11-9-102(16). Thus, his assessment of permanent physical impairment does not meet the requirements of Ark. Code Ann. §11-9-704(c)(1)(B).

The mere fact that Dr. Pleimann’s various assessments of permanent physical impairment do not satisfy the various statutory requirements for an award of benefits for permanent physical impairment does not conclusively settle this matter. It is the duty of this Commission to apply all of the statutory requirements (concerning permanent physical impairment) to the medical evidence presented and make an independent determination of the existence and extent of permanent physical impairment, AVA YA v. Bryant, 82 Ark. App. 273, 1055 S.W. 3rd 811(2003). In the present case, the only physical “findings” to support a permanent loss of function or impairment of the claimant’s left foot and ankle are observations involving a loss of range of motion of the various joints in his left foot and ankle. Applicable case law provides that, under certain circumstances, such losses of in range of motion may constitute “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16). Clearly, the Commission’s official rating Guide provides appropriate methods to translate losses of range of motion of the foot and ankle into findings concerning the existence and extent of permanent physical impairment to this portion of the body.

In the present case, the medical evidence indicates that range of motion testing was performed on the claimant’s injured left foot and ankle during the Functional Capacity Evaluation by Functional Testing Centers, Inc. on June 3, 2003. The evidence further shows that these measurements were derived by evaluating the claimant on an ARCON EG computerized electronic goniometer. This device not only allows for an accurate determination of a range of motion, but also acts to insure reliability by checking

consistency on repeated attempts. It is also important to note, that during the Functional Capacity Evaluation, various tests were performed to insure that the claimant was giving full and consistent effort and was making no attempt to exaggerate or manufacture any deficits. In fact, this is the first of these tests that I have encountered, where the claimant showed a reliable effort on all 48 of the various reliability and consistency checks. In his report, the evaluator states:

“The results of this evaluation suggests that Mr. Baker gave a reliable effort, with 48 of 48 consistency measures within expected limits. Mr. Baker was very consistent throughout the evaluation process. His compensatory movements correlated well with those movements exhibited throughout testing. Mr. Baker passed all criteria for validity and demonstrated no signs of symptom magnification or other inappropriate illness response.”

Therefore, it is my opinion that the evidence presented is sufficient to establish the accuracy and reliability of the range of motion testing performed during the claimant’s Functional Capacity Evaluation and to insure the measurements made during this testing were not “under the voluntary control” of the claimant. Thus, these findings, concerning a loss of range of motion of the claimant’s left foot and ankle, constitute “objective findings”, as the term is defined by Ark. Code Ann. §11-9-102(16)(A)(i) and are sufficient to satisfy the requirements of Ark. Code Ann. §11-9-704(c)(1)(B), Hays v. Walmart Stores, Inc., 71 Ark. App. 207, 29 S.W. 3rd, 751 (2000).

_____ Under table 43, found on page 78 of the Guides, a limitation in ankle inversion of 15° would place the claimant in the category of mild limitation of motion and carry a permanent physical impairment rating of 3% to the foot. Under table 42, also found on page 78 of the Guides, a limitation of ankle dorsi flexion or extension of 2° would place the claimant in the category of mild limitation in motion and carry a permanent physical impairment rating of 10% to the foot. Utilizing the Combined Values Chart, found on pages 322 and 323 of the Guides, these two separate impairments would carry a “combined” impairment of 13% to the foot.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that he has sustained a permanent physical impairment of 13% to the foot or the leg below the knee, solely as the result of the effects of his compensable injury of January 12, 2000. This degree of permanent physical impairment is based upon “objective and measurable physical findings”. It was calculated in a manner that conforms to the official rating Guide adopted by this Commission. It gives no consideration to pain or other subjective matters. Further, the greater weight of the credible evidence shows that the claimant’s compensable injury was the “major cause” of this degree of impairment. Thus, the claimant is entitled to appropriate benefits under Ark. Code Ann. §11-9-521(a)(11) for a 13% permanent physical impairment to this portion of his body.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On January 12, 2000, the relationship of employee-employer-carrier existed between the parties.
3. On January 12, 2000, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$200.00 for total disability and \$154.00 for permanent partial disability.
4. On January 12, 2000, the claimant sustained a compensable injury to his left ankle/foot.
5. There is no dispute, at present, over the payment of medical expenses incurred for reasonably necessary medical treatment of the claimant’s compensable injury.
6. There is no dispute, at present, over the payment of temporary total disability benefits attributable to the claimant’s compensable injury.
7. The claimant’s healing period from the effects of his compensable injury

ended on or about July 22, 2003.

8. The claimant has sustained a permanent physical impairment of 13% to the foot or leg below the knee, as a result of his compensable injury.
9. The respondents have denied the claimant's entitlement to any permanent partial disability benefits in excess of a permanent physical impairment of 10% to the leg below the knee or foot.
10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded, which are in excess of 10% to the leg below the knee or foot.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits equivalent to a 13% permanent partial impairment to the foot or leg below the knee and shall be entitled to credit for all such benefits previously paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded which are in excess of 10% to the leg below the knee or foot. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondents from such benefits.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge

