

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210216

CONNIE BOSWELL, EMPLOYEE

CLAIMANT

FAMILY DOLLAR STORES, INC., EMPLOYER

RESPONDENT

TRAVELERS INDEMNITY CO. OF CT, CARRIER

RESPONDENT

OPINION FILED MARCH 31, 2004

This matter comes before Administrative Law Judge J. Mark White on the record.

Claimant represented by Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Mark A. Peoples, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

Pursuant to the Prehearing Order filed January 26, 2004, the parties agreed to submit consideration of this claim on the record. The stipulated record is comprised of the Prehearing Order filed January 26, 2004; the Commission's letter dated February 10, 2004; a letter brief submitted by the claimant, dated January 27, 2004, with two documents attached; a letter brief submitted by the respondents, dated March 22, 2004; a letter from Dr. John A. Sklar dated July 2, 2003, submitted by the respondents; and the oral deposition of Dr. Sklar taken February 26, 2004.

The parties stipulate that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier relationship

existed at all relevant times, including July 27, 2002; that on July 27, 2002, the claimant sustained a compensable injury; that Respondents accepted the July 27, 2002, injury as compensable and paid benefits; that the claimant was assigned a 5% permanent impairment rating by Dr. John Sklar on July 2, 2003, which has been accepted by the respondents; and that the claimant earned sufficient wages to entitle her to a compensation rate of \$187 for temporary disability benefits. It should be noted that the Prehearing Order erroneously dates Dr. Sklar's rating as being made in 2002, instead of 2003. Dr. Sklar's letter and the parties' prehearing information filings establish the stipulated date as being 2003.

The parties agree that the issues to be presented are whether additional medical treatment is reasonably necessary in connection with the compensable injury, specifically a second opinion to assess the claimant's anatomical impairment rating; in the alternative, permanent impairment; and controversion and attorney's fees.

The claimant contends that the 5% permanent impairment rating assigned by Dr. John Sklar on July 2, 2003, is erroneous; that she is entitled to additional medical treatment in the form of a second opinion to evaluate her anatomical impairment rating; in the alternative, that she is entitled to permanent partial disability benefits in excess of the 5% assigned by Dr. Sklar; and that the respondents have

controverted any permanent disability benefits in excess of the 5% assigned by Dr. Sklar.

Respondents contend that the respondents have accepted and have paid (or are paying) all impairment benefits to which the claimant is entitled; that the respondents have provided and continue to provide all medical treatment reasonably necessary relative to the claimant's compensable injury; and that the respondents have not controverted any compensation or benefit to which the claimant is entitled. Specifically, the respondents contend that no additional anatomical impairment rating should be held to have been controverted until the respondents have had a reasonable amount of time to review the new impairment rating.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to review the testimony of Dr. John Sklar by deposition, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this

claim.

2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment in the form of a second opinion to assess the claimant's anatomical impairment rating is reasonably necessary in connection with her compensable injury.
4. The claimant has failed to prove by a preponderance of the evidence that she has sustained permanent anatomical impairment in excess of the 5% rating assigned by Dr. John Sklar.
5. The respondents have controverted no benefits owed the claimant.

DISCUSSION

This case is essentially a dispute as to which table of the *AMA Guides* should be used to determine the claimant's permanent anatomical impairment. Dr. John A. Sklar has assigned the claimant a 5% permanent anatomical impairment rating to the body as a whole for the claimant's cervical spine based on Tables 70, 71 and 73 contained within Chapter 3 of the *Guides*. The claimant contends she is instead entitled to a 10% rating, based on Table 75 of the same Chapter. The claimant asks

that the Commission either assign a rating on its own or order an evaluation by another doctor to reevaluate the 5% rating assigned by Dr. Sklar.

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). Permanent impairment is to be assessed via the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition. W.C.C. Rule 34 (July 1995). Any finding of permanent impairment must be supported by objective and measurable physical or mental findings. ARK. CODE ANN. § 11-9-702(c)(1)(B).

The Commission is authorized to accept or reject medical opinion and to determine its medical soundness and probative force. *Hill v. Baptist Medical Center*, 74 Ark. App. 250, 48 S.W.3d 544 (2001). The Commission is further empowered to translate the medical evidence into a finding of permanent impairment using the *AMA Guides*. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001); *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Because the Commission is so empowered, and because the evidence herein is sufficient to accurately determine the claimant’s impairment, a second opinion is not necessary. I therefore find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment in the form of a second opinion to assess the claimant’s

anatomical impairment rating is reasonably necessary in connection with her compensable injury.

The contents of the *AMA Guides*, 4th Edition, are excerpted in part as an exhibit to the deposition of Dr. Sklar. The Commission is allowed to consult the *AMA Guides* when determining the existence and extent of permanent impairment, regardless of whether the relevant portions of the *Guides* have been introduced into evidence. *Polk County v. Jones, supra*. Judicial notice is hereby taken of the contents of the *AMA Guides* in their entirety.

The *AMA Guides* provide two methods by which an anatomical impairment rating of the spine may be assessed. The *Guides* state:

For evaluating spine impairments, past *Guides* editions have used a system based on assessing the degree of spine motion and assigning impairment percents according to limitations of motion. Impairment percents related to the range of motion were to be combined with percents based on diagnoses or therapeutic approaches and neurologic impairments.

...

In this edition of the *Guides*, the contributors have elected to use two approaches. One component, which applies especially to patients with traumatic injuries, is called the "Injury Model." This part involves assigning a patient to one of eight categories, such as minor injury, radiculopathy, loss of spine structure integrity, or paraplegia, on the basis of objective clinical findings. The other component is the "Range of Motion Model," described above and recommended in previous *Guides* editions.

...

The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p. 108). ... If none of the eight categories of the Injury Model is applicable, then the evaluator should use the Range of Motion Model.

All persons evaluating impairments according to *Guides* criteria are cautioned that either one *or* the other approach should be used in making the final impairment estimate. If one component were used according to *Guides* recommendations, then a final impairment estimate using the other component usually would not be pertinent or germane. However, if disagreement exists about the category of the Injury Model in which a patient's impairment belongs, then the Range of Motion Model may be applied to provide evidence on the question.

AMA Guides § 3.3 (emphasis in original).

The claimant contends that her impairment should be computed using section (IV)(D) of Table 75. This table is contained within the Range of Motion Model section of the *AMA Guides* chapter regarding the spine. *AMA Guides* § 3.3j. It provides for an anatomical impairment rating of 10% for a single-level cervical spine fusion with residual signs or symptoms. Dr. Sklar determined the claimant's impairment was only 5%, using Tables 70, 71 and 73 contained within the Injury Model section, also referred to as the Diagnosis-Related Estimates Model (DRE). *AMA Guides* § 3.3h.

The *Guides* themselves provide that the Injury Model is to be consulted first,

and that the Range of Motion Model should be used only if the Injury Model is not applicable. *AMA Guides* § 3.3. The medical evidence of record reflects that the claimant has had a previous spine operation; that she displays no loss of motion segment integrity; and that she displays no objective sign of radiculopathy. Table 70, referring to the Injury Model, indicates that such a patient would be in Cerviothoracic Category II, III, or IV. Table 73 narrows this conclusion to show that because the claimant displays no objective sign of loss of motion segment integrity or radiculopathy, she does not meet the criteria for Category III or IV. Therefore, the appropriate category for her injury is Category II, which provides for a 5% impairment rating to the body as a whole.

It is possible to assign the claimant an impairment rating of 5% using the Injury Model. By the *Guides'* own terms, then, Table 75 and the Range of Motion Model cannot be used to assign an impairment rating as the claimant contends. Moreover, the Range of Motion Model takes into account range-of-motion tests and complaints of pain. Under the Workers' Compensation Act, neither of these may be considered in making an assessment of permanent impairment to the spine. ARK. CODE ANN. § 11-9-102(16)(A)(ii).

The claimant is entitled to a permanent anatomical impairment rating of only 5%. Therefore, I find that the claimant has failed to prove by a preponderance of the

evidence that she has sustained permanent anatomical impairment in excess of the 5% rating assigned by Dr. John Sklar.

AWARD

The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional benefits. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge