

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307385

RANDY LACROIX	CLAIMANT
METAL BUILDING SUPPLY	RESPONDENT
ARGONAUT INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 26, 2005

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

Claimant represented by WESLEY COTTRELL, Attorney, Rogers, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 8, 2005, in Springdale, Arkansas.

A pre-hearing order was entered in this case on May 11, 2005. 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. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On June 30, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
3. On June 30, 2003, the claimant sustained a compensable

injury to his left elbow.

4. There is no dispute, at present, over the payment of medical expenses or temporary disability benefits.
5. The respondents have accepted and paid permanent partial disability benefits for a permanent physical impairment of 5% to the arm.

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

1. The extent of permanent partial disability for permanent physical impairment.
2. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that he sustained an injury, which arose out of and in the course of his employment with the respondent/employer. The claimant is entitled to additional temporary total disability benefits, additional permanent partial disability benefits, rehabilitation, additional medical expenses, and attorney's fees. All other issues will be reserved."

In regard to these issues, the respondents contend:

"The claimant injured his elbow on June 30, 2003. The claimant was treated by Dr. McKenzie and Dr. Moore. Dr. Peebles performed an IME which indicated the claimant had a 5% rating and could return to work. The respondents contend that they have paid all appropriate benefits."

#### DISCUSSION

\_\_\_\_\_The central issue in this case is the specific degree or percentage of permanent physical impairment that the claimant has experienced as a result of his compensable elbow injury. The

extent of permanent physical impairment must be supported by objective and measurable physical findings, Ark. Code Ann. §11-9-704(c)(1)(B). In determining the percentage or degree of permanent physical impairment, no consideration can be given to subjective findings, particularly pain, Ark. Code Ann. §11-9-102(16)(A)(ii). The specific degree or percentage of permanent physical impairment must also be calculated in a way that conforms to the Commission's official rating guide, which at the present time is the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, Ark. Code Ann. §11-9-521(h). Finally, it must be proven that the compensable injury was the "major cause" of the degree or percentage of permanent physical impairment assessed, Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

It must also be noted that the assessment of the specific degree or percentage of permanent physical impairment is no longer solely within the realm of medical experts, and this Commission is no longer bound by expert medical evidence in its determination of the exact extent of permanent physical impairment. It is now the obligation of this Commission to determine or calculate the appropriate degree or percentage of permanent impairment for a compensable injury in a manner that conforms to the Act. However, expert medical opinion on this issue still remains helpful.

In the present claim, the 144 pages of medical evidence tendered contains two expert medical opinions on the extent of the claimant's permanent physical impairment. The first of these opinions is stated by Dr. Earl Peebles, an orthopaedic surgeon. The

second of these expert opinions is that of Dr. Theodore Sandow, Jr., also an orthopaedic surgeon.

In his report of June 10, 2004, Dr. Peeples states:

“In view of the slight loss of motion and in view of the well documented dislocation, I believe it is appropriate to award him (the claimant) a 5% impairment of the left upper extremity relating to the post traumatic and post surgical anatomic changes present in the left elbow.”

However, there is no indication as to how Dr. Peeples arrived at this degree of permanent impairment, specifically whether or not he employed a method provided by the official rating guide. It would also appear that he may have given some consideration to loss of range of motion. There is no indication whether this loss of range of motion was “active” or “passive” nor is there evidence of any other factor that would make this loss an “objective” finding. The record shows that Dr. Peeples was an expert selected by the respondents solely to perform this evaluation.

In his report of April 13, 2005, Dr. Sandow makes the following statement:

“Using the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition, specifically, Tables 16,18,19, and the Combined Values Table and, finally, Table 3, Mr. LaCroix has a 22 percent permanent partial impairment of the left upper extremity, which is equivalent to a 13 percent permanent partial impairment of the body as a whole.”

Although Dr. Sandow refers to using the Commission’s official rating guide, it is difficult to determine just how he employed it. Table 16 of the guides, to which he refers, only sets out various

structural components of the upper extremity and gives the relationship of these components in a percentage of the upper extremity and a corresponding percentage to the “whole person” (i.e. a 100% impairment to the elbow would correspond to a 70% impairment of the upper extremity and a 42% impairment of the “whole person”). Table 18, to which Dr. Sandow also refers, provides for impairments of the upper extremity due to carpal instability patterns. It is difficult to fathom what relationship the claimant’s compensable elbow injury would have on any carpal instability. Finally, Dr. Sandow refers to Table 19 on page 47 of the guides. (However, Dr. Sandow’s assessed percentage of permanent impairment does not coincide with any of the percentages recommended by Table 19).

This Table could be used in assessing the degree of the claimant’s permanent physical impairment for his compensable elbow injury. In fact, it is most likely the method that would be the most appropriate. This method is clearly based solely upon objective findings with no consideration of any subjective or potentially subjective findings, such as pain, loss of range of motion, etc. Table 19 of the guides provides for assessments of permanent physical impairment based only upon the fact that the compensable injury has required or resulted in a surgical reconstruction of a joint (i.e. arthroplasty). This Table is divided into two basic categories. The first of these is a simple “resection arthroplasty” and the second is an “implant arthroplasty” or a surgical joint reconstruction employing the use

of an artificial implant. These two categories are then broken down into the “level” of the arthroplasty. However, instead of merely denoting the level as the “elbow”, this chart denotes two “levels” or classification of arthroplasties involving the elbow. The first is denoted as a “total elbow” and the second as a “radial head (isolated).”

The greater weight of the evidence convinces me that the use of Table 19 of the guides is the appropriate method in which to assess the permanent physical impairment produced by the claimant’s compensable injury. Clearly, the claimant’s compensable injury required an arthroplasty or surgical reconstruction. This procedure was performed by Dr. McKenzie on December 3, 2003. Obviously, this invasive procedure to reattach the claimant’s torn lateral collateral ligament to his lateral epicondyle by the use of bone anchors would have some effect on the natural functioning abilities of this joint. There is also no evidence in the medical record of any other objective factors that would act to increase the impairment solely for this surgical procedure itself, such as instability, arthritic changes, etc. Thus, no other tables or methods would be involved in arriving at the claimant’s degree or percentage of permanent physical impairment.

However, the difficulty arises in the fact that the guides do not provide any definitions or descriptions of what would represent a “total elbow” and what would represent a “radial head (isolated).” Absent some guidance on this by a medical expert, it would be difficult to employ this Table in a manner that would

insure an assessment that would be accurate and fair to all parties concerned. As previously noted, Dr. Sandow's assessment of permanent impairment does not coincide with any of the percentages or degrees of permanent impairment recommended in Table 19. Thus, his report is of no assistance in determining into which category this claimant's elbow arthroplasty would fall.

Clearly, the claimant's left elbow arthroplasty would fall under the category of resection arthroplasty only. However, the discrepancy between a "total elbow" and a "radial head (isolated)" is substantial (i.e. 28% vs. 8 %). Thus, it is my finding at the present time, that the claimant has proven by the greater weight of the credible evidence presented that his compensable elbow injury of June 30, 2003, has resulted in a permanent physical impairment of no less than 8% to the arm below the shoulder and no more than 28% to the arm below the shoulder.

In order to accurately arrive at a more definite assessment, the respondents are directed to obtain from Dr. McKenzie a report stating his expert opinion as to which of the two categories is applicable to the claimant's elbow arthroplasty. I find that Dr. McKenzie is the appropriate physician to make this determination, as he was the claimant's treating physician and performed the actual surgery. He is also a competent qualified orthopaedic surgeon and his expertise would match, if not exceed, that of any of the other orthopaedic surgeons involved in this case. A determination on the exact percentage of the claimant's permanent physical impairment must be reserved until the opinion of Dr.

McKenzie has been obtained. Both parties will also be allowed the right to cross examine Dr. McKenzie on this opinion.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 30, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On June 30, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$440.00 for total disability and \$330.00 for permanent partial disability.
4. On June 30, 2003, the claimant sustained a compensable injury to his left elbow.
5. There is no dispute, at the present time, over the payment of medical expenses or temporary disability benefits and all such appropriate benefits to date have been paid.
6. The respondents have accepted and paid permanent partial disability benefits equivalent to a permanent physical impairment of 5% to the arm below the shoulder.
7. The claimant has proven by the greater weight of the credible evidence that his compensable injury of June 30, 2003, was the "major cause" of a permanent physical impairment of no less than 8% to the arm below the shoulder and no more than 28% to the arm below the shoulder. However, based upon the evidence presented, it

is impossible to determine the exact degree or percentage of permanent physical impairment in a manner that would be fair to all parties concerned. A ruling on the exact degree of permanent physical impairment must be reserved for future determination, upon receipt of the necessary medical evidence previously identified in this Opinion.

8. The respondents have controverted the claimant's entitlement to any permanent disability benefits for permanent impairment in excess of 5% to the arm below the elbow.
9. A reasonable fee of the claimant's attorney would be the maximum statutory attorney's fee on all permanent partial disability benefits for permanent physical impairment that may be ultimately awarded in excess of 5% to the arm below the shoulder.

#### ORDER

The respondents are directed to obtain from Dr. McKenzie a report stating his expert medical opinion on whether the surgical procedure he performed on the claimant, on December 3, 2003, would represent a resection arthroplasty of the "total elbow" or a resection arthroplasty of the "radial head (isolated)" as those terms are used in Table 19 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Both parties will be allowed the opportunity of cross examination in regard to this report.

Upon receipt of this report, a determination will be made in

regard to the specific degree or percentage of permanent physical impairment produced by the claimant's compensable injury of June 30, 2003.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge