

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F511348

EULIS J. BOYD, EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC., EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC., TPA

RESPONDENT

OPINION FILED JUNE 14, 2007

Hearing before Administrative Law Judge O. Milton Fine II on April 13, 2007, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Mr. Curtis L. Nebben, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On April 13, 2007, the above-captioned claim was heard in Mountain Home, Arkansas. A prehearing conference took place on January 29, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. With an additional three stipulations reached at the hearing, they are the following six, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including March 22, 2005.
3. Claimant sustained a compensable injury to his right hand on March 22, 2005.
4. Claimant's average weekly wage was \$515.41, giving him a temporary total disability rate of \$343.00 and a permanent partial disability rate of \$257.00.
5. Respondents have controverted Claimant's entitlement to permanent partial disability benefits.
6. If Claimant's wife, Tina Boyd, were called as a witness at the hearing, her testimony would corroborate that of her husband.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. The addition of the fourth and fifth stipulations resolved two of these issues, leaving the following issue to be litigated:

1. Whether and to what extent the Claimant is entitled to permanent partial disability benefits.

Contentions

The contentions of the parties are as follows:

Claimant:

1. The Claimant contends that he sustained a compensable injury which entitles him to an impairment rating and permanent partial disability benefits.

The Claimant was given a thirteen percent (13%) impairment rating by Dr. Kevin Jackson who is an occupational therapist. The Claimant's treating physician, Dr. Tang, then gave him a five percent (5%) impairment rating and the insurance company denied they owed him permanent partial disability benefits. After the insurance carrier denial of Claimant's entitlement to permanent partial disability benefits, he used his right to a change of physician. The Claimant elected to see Dr. Michael Moore, who specializes in the treatment of arm and hand injuries. Dr. Michael Moore agreed that the Claimant is entitled to an impairment rating and stated within a reasonable degree of medical certainty that Mr. Boyd's impairment is ten percent (10%) to his right hand following his injury.

2. The Claimant further contends that his average weekly wage is \$593.75, which entitles him to a compensation rate of \$395.00 for temporary total disability and \$297.00 for permanent partial disability.

Respondents:

1. The Respondent contends that the permanent anatomical impairment rating assessed by Dr. Peter Tang in a report dated August 26, 2005 is not based on measurable and objective findings and therefore is not a valid impairment rating pursuant to the Arkansas Workers' Compensation Act. The Respondent contends, based on the present medical evidence, that the Claimant has not sustained a permanent anatomical impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant/witness and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits based upon, *inter alia*, an impairment rating that is supported by objective findings.
4. The AMA Guides do not support the assessment of an impairment rating based on the objective and measurable medical findings in the record.

CASE IN CHIEF**Summary of Evidence**

_____ Claimant was the sole witness at the hearing, along with the stipulation that his wife would corroborate his testimony. In addition to the prehearing order discussed above, also admitted into evidence in this case was Joint Exhibit 1, a compilation of his medical records consisting of one index page and 43 individually numbered pages.

Testimony

Eulis J. Boyd. Claimant testified that his full name is Eulis J. Boyd. He is 69 years old, married, the father of two children, and a current resident of Lakeland, Georgia. Claimant served in the military for 30 years, and trained for nine years to be a civil engineer. After his retirement from the military, he moved to northwest Arkansas and took a job with Respondent Wal-Mart as a night maintenance supervisor. He earned \$12.50 per hour in this position. While he has had previous injuries, according to Claimant, he has never previously injured his right hand.

He stated that he was pulling a vacuum motor out of a scrubber when the motor accidentally began running again. When he attempted to catch the motor, its fan blades cut Claimant's thumb and index finger of his right hand. Because the blades were jagged, they shredded as they sliced into him. His understanding was that the muscle that affects these appendages was cut in two. The laceration was three centimeters deep. After the injury, he went to the emergency room of North Arkansas Regional Medical Center in Harrison. Claimant testified that after he was treated by a physician whose name he could not recall, he went back by the store to complete paperwork and then went home.

Claimant said that Wal-Mart sent him to Dr. Leslie, who changed his bandage. After that, Claimant saw Dr. Chu, who recommended that he obtain occupational therapy. Claimant testified that he did go to occupational therapy in order to get back as much use of his thumb as possible. After Dr. Chu, Claimant saw Dr. Tang in Fayetteville. Wal-Mart sent him there. Dr. Tang sent him to an occupational therapist for a rating. That was how Claimant received a five percent (5%) impairment rating. Claimant testified that he also saw, and received a functional rating from, Dr. Kenneth Ness. Through a change of

physician, Claimant next saw Dr. Moore, in Little Rock. He saw Claimant and evaluated his thumb and hand. His only visit with Dr. Moore lasted for one hour. Dr. Moore performed measurements, and Claimant stated that he did his best to follow the doctor's directions. Claimant testified that this was his last appointment. Thereafter, Wal-Mart's adjustor contacted him and told him that he had no further appointments.

According to Claimant, he did not go to work the night after the accident. Wal-Mart's adjustor contacted him the following morning and told him that if he did not return to work, he would lose his job. Thus, he returned to work. However, he testified that he was no longer able to use his right hand at work, which involved the use of big equipment. The adjustor told him that because Claimant was a supervisor, he did not need to be able to use his right hand. But because there was a shortage of personnel, Claimant also worked—and needed the use of his hand. Claimant stated that he just did the best he could with his left hand, and moved his people around when necessary. He left Wal-Mart in May 2006 to move to south Georgia to be closer to family.

Claimant testified that he continues to have trouble with his right hand and thumb. He is right-handed. But because of the loss of grip strength, he must open bottles with his left hand. He can no longer write; he can barely scribble. He is also unable to use his woodworking tools. The pain in the hand and thumb is periodic—not every day.

He stated that Wal-Mart had only paid his medical bills. Claimant asked that he be awarded his impairment rating.

On cross-examination, Claimant testified that he no longer does woodworking because he can no longer handle his tools.

When questioned by me, Claimant described the accident in more detail. The floor scrubber that he was working on was huge, and had a vacuum motor that would draw up water as it scrubbed the floor. The motor weighed about ten pounds. The fan blade was the same diameter as the motor itself. Since the motor was still connected to power when it fell, the fan blades were spinning when they struck Claimant. He displayed a scar that was three quarters of an inch below where thumb meets the hand.

Tina Boyd. As stated above, the parties stipulated that the testimony of Ms. Boyd, the wife of Claimant, would corroborate that of her husband.

Respondents called no witnesses.

Records

The medical records of Claimant that were introduced at the April 13, 2007 hearing and constitute Joint Exhibit 1 reflect the following:

On March 23, 2005 at 12:17 a.m., Claimant presented to the emergency room at North Arkansas Regional Medical Center with a cut right thumb and abrasions to his right hand, which he stated were due to a electric motor from a scrub machine at Wal-Mart falling on the hand. After injected the wound with Lidocaine and cleaning it, the physician sutured it and applied a dressing. He was prescribed Percocet and Cephalexin. X-rays taken of the hand showed arthritis with no fracture or other acute abnormality, according to Dr. Robert Morris. Dr. Allen Jackson gave Claimant the diagnoses of (1) complex laceration of the right thumb and (2) multiple abrasions and contusions to the right hand.

Claimant presented to Dr. Thomas S. Leslie at Eagle Heights Clinic on March 28, 2005 with the inability to use his hand. Dr. Thomas stated that the wound "looks good. He is going to lose part of the skin in the palm of his hand but he is going to otherwise do okay.

Neurovascular/tendon is fine.” According to the doctor, Claimant was going to be off of regular duties for the next couple of weeks. In the meantime, he was to keep his thumb in a splint.

On March 30, 2005, Claimant again presented to Dr. Leslie. He removed every other stitch from the thumb and applied a dressing. Dr. Leslie wrote that the wound “looks actually good.” After reviewing the wound on April 1, Dr. Leslie took a shallow suture out, leaving two deep ones, which were not ready to come out. He wrote:

[Claimant] has fairly good range of motion except with grip. The problem with grip is obviously he transected across that thenar eminence and ended up destroying actually a chunk of the muscle. He has fairly good range of motion. He has great range of motion of his four digits. His thumb he has good extension at the end point which causes a little bit of pain. He has good flexion which is slightly limited secondary to stitches. Abduction is okay. Adduction is a little problematic because that is actually causing problems with the muscle.

Claimant was seen again, by Dr. Chu, on April 5, 2005. The two remaining sutures were removed that day due to fears of infection and foreign body reaction. Dr. Chu stated:

The wound was looked at. It seems to be healing rather well. . . His range of motion is a lot better. His swelling is a lot better. He is having no evidence of any decreased range of motion of his fingers. However, his thumb he is starting to actively start moving that in a passive way . . . He is going to recheck with us in two weeks. At two weeks we are going to make a decision about sending him to occupational therapy. If he is healed and range of motion is not going to break the wound open we can send him to occupational therapy. I think he is going to have some long-term problems as far as grip with his thumb. I think he is going to lose some strength in that. Hopefully, with occupational therapy he is going to gain back the majority of it.

When Dr. Chu next saw Claimant, on April 19, 2005, he referred him to an occupational therapist and continued him on light duty status. He wrote: “The wound site looks great. No signs of infection He has lost quite a bit of thumb strength. He has good grip

strength in his four fingers but grip strength in his thumb as far as abduction and adduction is limited.”

Claimant returned to see Dr. Chu on May 2, 2005. He presented with range of motion and strength still limited, and Dr. Chu directed him to continue occupational therapy.

He stated:

I think he is doing really good from the stand point of cutting probably to transecting at least a third of his thenar eminence . . . Do I think he is ever going to get total 100% function of his thumb back? The answer is, I do not think he will have 100% grip strength but he should have 100% range of motion by the time occupational therapy is done with him.

Dr. Chu's encounter note for June 6, 2005 reads in pertinent part:

He has better range of motion. Most of what is going to happen now is going to be home exercises. He is gradually improving but he is never going to get all of his function back in his hand. He is going to eventually have to be assigned a disability rating. We are going to wait until he is plateaued out . . . Range of motion for him is doing good. Occupational therapist was rather pleased but disappointed in the fact that he did not get better improvement. He is limited by the amount of thenar eminence that was actually cut. Neurologically seems to be doing okay. . . I do think he is going to be limited in the amount of grip strength. He only has probably around three to five pounds of grip strength . . . We are going to get him back into light duty. . . Once he is plateaued out and doing stable we will need to get him assigned a disability rating. . . He is doing the most he can do given his situation. Follow him back in one month for recheck. If he has plateaued, off to see the hand specialist for disability assessment.

When Dr. Chu saw Claimant again on June 27, 2005, he assessed that Claimant had “probably” reached maximum medical improvement, noted that he still had no grip strength and experienced pain upon flexion, and referred him to Dr. Moore, a hand specialist.

On July 7, 2005, Dr. Peter Tang at the Arkansas Orthopedic Hand Center saw Claimant. His examination reads:

He has about a 5cm transverse healed scar about 2cm proximal to the MCP crease of the thumb. There is no redness or signs of infection. At the most

ulnar aspect of the scar, he may have a little sensitivity to deep palpation. Wrist extension is 65°, flexion is 60°. He makes a pretty good fist with his fingers. The thumb MCP joint goes from 0° to 40°, IP hyperextends 30° and flexes 80°. With these maneuvers, he feels pulling from the scar. Thumb palmar adduction is about 50° versus 60° on the other side. He lacks about 2cm to apposition of the thumb to the base of the small finger. He is able to, but he still has a little difficulty with thumb-to-small fingertip apposition; he just feels pulling from the scar.

X-rays reviewed of the right hand shows some decreased joint space and sclerosis with spurring at the thumb CMC and MCP joints.

Dr. Tang noted that while Claimant presented with “residual stiffness and pain and weakness,” he had reached MMI. He referred Claimant to Trinity Therapy to have a formal evaluation conducted to see if he has any permanent restrictions and whether he should be assigned an impairment rating.

On July 11, 2005, Kenneth Ness of Trinity Rehabilitation evaluated Claimant. According to his report, which appears, out of chronological order, at the end of Joint Exhibit 1, he assessed Claimant as having a 13 percent impairment to the body as a whole. In reaching this, he found a six percent impairment of the thumb from opposition testing and converted it to a two percent impairment of the upper extremity. Combined with the 20 percent impairment to the upper extremity that he found based on grip and pinch testing, he assessed Claimant as having a 22 percent impairment to the upper body, which led him to the 13 percent rating to the body as a whole.

When Claimant returned to Dr. Chu on August 5, 2005, he presented with fairly good range of motion, but poor grip strength and pain with extreme range of motion. Dr. Chu found the wound to be well-healed, but the thenar eminence to be “gone.” He kept Claimant on restrictions, and assessed that he “will be forever on five pound grip strength.”

In a letter dated August 26, 2005, Dr. Tang wrote the following in assigning Claimant an impairment rating:

According to the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Mr. Boyd has suffered a 5% whole person impairment. He had sustained open injury to the right thumb with muscle laceration. He is back working. However, he still has some residual stiffness and weak pinch. According to [t]he evaluation by the therapist on 7/26/05, he has 1% impairment from IP joint stiffness according to Figure 10, page 26, 2% impairment from MCP joint stiffness according to Figure 13, page 27 and 3% impairment from CMC opposition stiffness according to Figure 14, page 28. This adds to 6% impairment of the thumb, which converts to 2% of the hand and 2% impairment of the upper extremity, Table 1 and 2, pages 18 and 19. Because of the thenar muscle injury, he has weakness of the pinch documented on the pinch meter. According to Table 34, page 65 and Table 18, page 58, this results in 7% upper extremity impairment. The two [combine] to 9% impairment of the upper extremity which converts to 5% whole person impairment according to Table 3, page 20.

Also on August 26, in his report to Respondent Claims Management, Dr. Tang opined that Claimant has a five percent impairment rating under the Fourth Edition of the AMA Guides and that he reached MMI on July 7, 2005. He also stated that Claimant should limit repetitive use of his right thumb.

On September 2, 2005, Dr. Chu wrote in his assessment that Claimant has a 13 percent impairment rating of the right hand, and that he agreed with Dr. Tang and Trinity that Claimant had reached MMI.

Dr. Moore saw Claimant on March 21, 2006 at the Arkansas Hand Center. In his letter of the same date to Respondent Claims Management, he wrote that he reviewed Claimant's history using the Health Information Sheet. The letter reflects that Dr. Moore examined Claimant's injury, measuring the range of motion of the thumb along with grip and pinch strength, and noted from his review of outside x-rays that Claimant had degenerative changes at the right thumb basilar joint. He wrote:

It is my opinion Mr. Boyd has reached his maximum medical improvement following the right thumb laceration. He does have weakened pinch strength, which is most likely related to injury to the thenar muscles.

It is my opinion Mr. Boyd's right hand or thumb strength would not improve following any further therapy or surgery.

I reviewed the impairment rating performed by Dr. Peter Tang on 08/26/05, which appears to be reasonable for this type of injury. It is my opinion Mr. Boyd has an impairment of 10% to his right hand following the injury. This statement is made within a reasonable degree of medical certainty.

Adjudication

Claimant has alleged that he is entitled to permanent partial disability benefits. In order to be entitled to such benefits, a claimant must prove that the compensable injury, either alone or in combination with the preexisting condition or the natural process of aging, is the major cause of the permanent impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a)-(b) & (14) (Repl. 2002); that the impairment rating is established by objective and measurable physical or mental findings, *Id.* § 11-9-704(c)(1)(B); that any medical opinion is stated within a reasonable degree of medical certainty, *Id.* § 11-9-102(16); and that the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993)(hereinafter "AMA Guides") were used in determining the rating, *Id.* § 11-9-522(g); AWCC R. 099.34. See *Le v. Simmons Foods, Inc.*, 2004 AWCC 127, Claim No. E815277 (Full Commission Opinion filed July 19, 2004).

As Claimant points out in his contentions, he has been given three different impairment ratings: Dr. Tang assessed a five percent impairment to the body as a whole, Kenneth Ness (not Dr. Kevin Jackson as Claimant contends), a certified hand therapist at Trinity Rehabilitation, gave 13 percent rating to the whole body, and Dr. Moore arrived at a 10 percent rating to the right hand.

As stated above, “[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” Ark. Code Ann. § 11-9-704(c)(1)(B). Objective findings are “those findings which cannot come under the voluntary control of the patient.” *Id.* § 11-9-102(16)(A)(1). Examination of the three ratings reveals that none is based on objective findings. The detailed reports of Ness, Tang and Moore show that their findings were based upon grip/pinch and range-of-motion testing. In *Swift Eckrich, Inc., v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998), the Arkansas Court of Appeals stated in a footnote:

Although this court has previously found that objective findings included diagnoses developed by physicians ‘based on results obtained from clinical tests which reveal consistent and repeated responses to specific stimuli,’ *Kellar*, 40 Ark. App. at 98, 845 S.W.2d at 17, such holdings are no longer valid in light of the strict interpretation of the statute which defines objective findings as those not under the voluntary control of the patient. *Duke v. Regis Hairstylist*, 55 Ark. App. 327, 935 S.W.2d 666 (1996). Objective findings do not exist in *Duke* where the findings were based upon patient responses to stimuli even where the tests had built-in safeguards against patient fabrications.

The Commission has declined in the past to find that grip strength tests are objective. See, e.g., *Le, supra*; *Coffman v. Jones Timber Co.*, 1999 AWCC 151, Claim No. E511952 (Full Commission Opinion filed May 13, 1999). There is nothing in the record from which to find that the grip/pinch testing employed was objective.

As for the range-of-motion testing, The AMA Guides provide that “[t]he tables of Chapter 3 [which Dr. Tang stated he used] are based on the *active* range of motion, which is determined with the patient’s full effort and cooperation.” AMA Guides at 14 (emphasis in original). The Guides further state:

In evaluation of restriction of motion of the hand and upper extremity, the full range possible of *active* motion should be carried out by the subject and

measured by the examiner . . . The examiner may check the range of *passive* motion by applying moderate pressure to the joint. However, in the *Guides*, the range of *active* motion takes precedence.

Id. at 15 (emphasis in original). There is nothing in the record that reflects that Ness, Tang or Moore employed passive range of motion testing. In order for a rating such as the ones at issue to be valid, it must be based on passive range-of-motion testing. See *Hayes v. Wal-Mart*, 71 Ark. App. 207, 29 S.W.3d (2000); *Vallor v. Conley Transport, Inc.*, 2003 AWCC 185, Claim No. E905588 (Full Commission Opinion filed October 13, 2003)(hand testing). In *Dept. of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998), the Arkansas Court of Appeals held that “there is authority to suggest that active range-of-motion tests are based almost entirely on the patient's cooperation and effort.” Hence, the ratings of Ness, Tang and Moore may not be used to support the awarding of permanent partial disability benefits.

The Commission may determine its own impairment rating under the AMA Guides, rather than simply assessing the validity of the ratings that have been assigned. *Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003). However, after reviewing the objective and measurable findings in the record, I am unable to award a rating under the Guides.

CONCLUSION

Claimant has the onus of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits based on, *inter alia*, an impairment rating that is supported by objective findings. He has not done this. The AMA Guides do not support the awarding of an impairment rating. Therefore, his claim must be, and hereby is, denied and dismissed.

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IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge