

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312612

HARV WELCH	CLAIMANT
GREENWOOD SCHOOL DISTRICT	RESPONDENT
ARKANSAS SCHOOL DISTRICT RAMSEY, KRUG, FARRELL & LENSING, TPA	RESPONDENT

OPINION FILED APRIL 30, 2007

Before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JOE BYARS, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A pre-hearing order was entered in this case on February 28, 2006. This pre-hearing order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Subsequent to the entry of this pre-hearing order, both parties requested that this matter be submitted for a decision upon consideration of the pre-hearing order and an agreed record in the form of the May 11, 2006 deposition of Dr. Greg Jones and attached exhibits. As both parties have waived their right to a hearing in this case, the matter has been considered only on the agreed record.

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

1. On November 17, 2003, the relationship of employee-self insured employer-TPA existed between the parties.

2. The appropriate weekly compensation benefits are \$440.00 for total disability and \$330.00 for permanent partial disability.

3. On November 17, 2003, the claimant sustained a compensable injury to his right knee.

4. There is no dispute over the payment of medical expenses, at the present time.

5. There is no dispute over temporary disability benefits, at the present time.

6. The healing period ended on or before November 7, 2004.

7. Respondents have accepted liability for permanent partial disability benefits for a permanent physical impairment of 31 percent to the leg below the hip.

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 physical impairment and permanent partial disability.

2. Appropriate attorney's fees.

In regard to these issues, the claimant contends that he is entitled to permanent partial disability benefits for a permanent physical impairment, as assessed by Dr. Greg Jones, in the amount of 60 percent to the leg below the hip. The claimant further contends that the respondents have controverted all permanent partial disability benefits in excess of 31 percent to the leg below the hip and that his attorney is entitled to the maximum

statutory attorney's fee on all permanent partial disability benefits herein awarded, in excess of that amount.

The respondents contend that they initially accepted liability for permanent partial disability benefits attributable to a permanent physical impairment of 31 percent to the body as a whole, based upon the reports and records of Dr. Jones. However, subsequent to Dr. Jones' deposition, the respondents have accepted liability for permanent partial disability benefits for a permanent physical impairment of 36 percent to the body as a whole. The respondents maintain that their initial acceptance of the 31 percent permanent physical impairment was based upon errors in Dr. Jones' report that he subsequently corrected during his deposition. Thus, they contend that they have not controverted and are not liable for controverted attorney's fees on the 36 percent permanent partial disability they have now accepted.

DISCUSSION

I. EXTENT OF PERMANENT PARTIAL DISABILITY FOR PERMANENT PHYSICAL IMPAIRMENT

The first issue to be addressed concerns the extent of permanent partial disability benefits to which the claimant is entitled for a permanent physical impairment resulting from his compensable knee injury. The claimant has the burden of proving the extent of this permanent physical impairment. Further, the law requires that any permanent physical impairment must be supported by "objective and measurable physical or mental findings", Ark. Code Ann. §11-9-704(c)(1)(B). No consideration can be given to

pain or other subjective findings, Ark. Code Ann. §11-9-102(16)(A)(ii)(a). The degree or percentage of permanent physical impairment must also be calculated in a manner that conforms to the Commission's official rating guide (the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment), Ark. Code Ann. §11-9-521(h). In order to be considered, expert medical opinions on the existence and extent of permanent physical impairment must conform to the various statutory requirements heretofore set out in the Act and must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B). However, although expert medical opinion is to be considered, it is not controlling. Rather, it is the duty and obligation of this Commission, rather than any medical expert, to determine the existence and extent of permanent physical impairment in a manner that conforms to the various requirements of the Act.

In the present case, the only expert medical opinion offered to the extent of permanent physical impairment is that by Dr. Greg Jones. Dr. Jones is a highly competent orthopaedic surgeon with considerable expertise in the area of medicine associated with the claimant's compensable injury. He was also the claimant's primary treating physician for the majority of his care. It is apparent from reports and his deposition of Dr. Jones that he has made a thorough and good faith attempt to accurately ascertain the degree or percentage of the claimant's permanent physical impairment. However, it is also apparent that he has had extreme difficulty in arriving at the appropriate percentage or degree of permanent

physical impairment. He further acknowledges that this in part is due to the unusual severity of the claimant's injury and to his unfamiliarity with the legal aspects and requirements of such a determination.

Dr. Jones opined that the claimant's compensable injury had resulted in a 60 percent permanent physical impairment to the entire leg. While there is no doubt that the claimant sustained an unusually severe injury to his knee and has experienced significant permanent impairment as a result thereof, the Commission's official rating guide (the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment) assigns only a 67 percent permanent impairment for a total fusion or ankylosis of the knee in optimal position. Clearly, the claimant still has substantial use and mobility of the knee joint, as indicated by Dr. Jones in his reports and deposition. Such an extent of retained function would reasonably appear to be more than would justify a rating within 7 percent of a total fusion.

In his deposition, Dr. Jones assigned a 30 percent permanent physical impairment for significant laxity of both the anterior cruciate ligament and the collateral ligament. It was his expert opinion that this degree of laxity lay between the moderate and severe classifications set out in table 64 on page 85 of the official guide. (In his prior reports he had stated that the laxity lay between mild and moderate). Under this table, an impairment of 25 percent is assigned for laxity in the moderate category and a 37 percent impairment assigned to the severe category. Thus, Dr.

Jones' determination of a 30 percent impairment would appear reasonable. In fact, the respondents do not deny that this degree of permanent physical impairment would be appropriate for this particular permanent damage.

Dr. Jones also assessed a 7 percent permanent physical impairment to the leg or lower extremity because of documented post-traumatic arthritic changes to the chondral surfaces of the claimant's knee joint. He stated that in determining this degree of permanent physical impairment he measured the narrowing of the chondral surfaces from these arthritic changes as shown on plain x-rays. In reaching his assessment he relied upon table 62 of page 83 of the official guide. Again, the respondents do not dispute that this assessment of a 7 percent permanent physical impairment would be appropriate for this particular permanent damage.

Dr. Jones has also assigned a further diagnosis based assessment of permanent impairment of 2 percent to the leg for the "meniscal injury" and resulting surgical repair. In making this assessment he again used table 64 on page 85 of the guides. However, his assessment of a 2 percent permanent physical impairment would coincide with a meniscectomy for a partial tear of either the medial or lateral meniscus. Clearly, this assessment of permanent physical impairment is based upon objective and measurable physical findings with no consideration be given to pain or other subjective matters. It was also calculated in a manner that conforms to the Commission's official rating guide. I find this diagnosis based rating to be appropriate. In fact, the

respondents also concede this degree of permanent physical impairment as being appropriate.

Next, Dr. Jones assigned a 10 percent permanent physical impairment for loss of range of motion of the claimant's knee. In arriving at this degree or percentage of permanent physical impairment Dr. Jones relied upon the tables for loss of range of motion due to ankylosis of the knee.

Under current case law, loss of range of motion may or may not be an "objective finding". In the present case, it is difficult to determine from the evidence presented whether the loss of range of motion that was considered by Dr. Jones would meet the criteria an "objective finding".

Dr. Jones also stated that in arriving at his assessment of permanent physical impairment for loss of range of motion, he employed table 53 on page 80 of the guides, which provide a percentage or degree of impairment for ankylosis or actual fusion of the knee joint in various positions. This method of computation is clearly erroneous, as the claimant's knee is in no way fused or ankylosed. If the claimant had experienced some objectively supported loss of range of motion of his knee, the appropriate method for computing such permanent impairment would be table 1 on page 78 of the guides.

It is my opinion that the assessment of permanent physical impairment made by Dr. Jones for a loss of range of motion of the claimant's knee has not been shown to be supported by objective and measurable physical findings. Nor, was it calculated in a manner

that conforms to the Commission's official rating guide. Therefore, Dr. Jones' assessment of permanent physical impairment for this loss of range of motion would not support an award of permanent partial benefits for this degree of permanent physical impairment.

Finally, there is the matter of Dr. Jones' assessment of a 10 percent permanent physical impairment to the leg for a gait abnormality. In his deposition, Dr. Jones recognized that a person's gait to a great extent, falls under the patient's voluntary control and would be "subjective". However, it was his opinion that the abnormal gait demonstrated by the claimant would be compatible with the injury he sustained. It would further appear that in assigning a permanent physical impairment for the claimant's gait, Dr. Jones also considered such matters as the claimant's ability to stoop, squat, and get into various positions which had previously been a part of the claimant's work. These latter factors would not be commonly considered as involving a person's gait.

More importantly, the guides specifically provide that the rating provided for a gait derangement under Section 3.2b is an alternative to the other rating methods provided and is not to be used in conjunction with these other methods. The guides go on further to specifically recommend that, if at all possible, the more "objective" other rating methods are to be employed.

As Dr. Jones indicated in his deposition, this latter caveat is likely due to the highly subjective nature of gait derangements. However, there is another obvious reason that the guides mandate

that gait derangements “stand alone” and should not be in conjunction with the other rating methods given. This would be to prevent double or repetitive ratings for the same impairment. This same rationale would equally apply to assessing ratings for loss of range of motion in conjunction with other diagnosis based ratings for the very conditions that have resulted in the loss of range of motion.

In the present case, the claimant’s gait abnormalities and loss of range of motion are directly attributable to the instability of his knee caused by the permanent damage of the various components or structures of the knee joint. As Dr. Jones recognized in his deposition, the claimant’s gait abnormalities and loss of range of motion are primarily the result of the laxity of his anterior cruciate and collateral ligaments, his meniscal damage and the traumatic changes to the chondral surfaces of his knee. These same defects have already been separately rated.

After consideration of all the evidence presented, it is my opinion that Dr. Jones assessment of a permanent physical impairment for the claimant’s gait abnormalities is not appropriate. This rating was not derived in a manner that conforms to the Commission’s official rating guide and has not been shown to be based upon objective and measurable physical findings. Therefore, this assessment of an additional 10 percent permanent physical impairment would not be appropriate under the Act.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that he sustained a permanent

physical impairment of 30 percent to his leg below the hip for anterior cruciate and collateral ligament laxity, a 7 percent permanent physical impairment for traumatic chondral changes, and a 2 percent permanent physical impairment for a partial lateral meniscectomy. These various impairments are supported by objective and measurable physical findings with no consideration given to pain or other subjective matters. These ratings are also calculated in a manner that conforms to the methods espoused by the Commission's official rating guide. The greater weight of the evidence presented further shows that the claimant's compensable injury was the "major cause" of these various permanent impairments. When these various permanent impairments are combined in the manner espoused by the Commission's official rating guide (i.e. the combined values chart on page 322 of the guide), a total permanent physical impairment of 36 percent to the leg below the hip is properly calculated. I find that the claimant has proven his entitlement to permanent partial disability benefits for a 36 percent permanent partial disability to his leg below the hip, but has failed to prove his entitlement to permanent partial disability benefits for any permanent physical impairment in excess of this amount.

II. CONTROVERSION AND ATTORNEY'S FEES

The final matter to be addressed is the matter of controversion and appropriate attorney's fees. At the time of the previous pre-hearing conference, the respondents stipulated that the claimant was entitled to permanent partial disability benefits

for a permanent physical impairment of 31 percent to the leg below the hip. However, the evidence shows that following the October 21, 2004 report of Dr. Jones, the respondents had consistently accepted liability for the degree of permanent physical impairment given by the official guide for the diagnosed anterior cruciate and lateral collateral ligament laxity, the traumatic chondral surface changes, and the meniscal damage and surgical repair (meniscectomy). They have also consistently denied liability for and have controverted the claimant's entitlement to any permanent partial disability benefits for permanent physical impairment attributable to loss of range of motion or gait changes.

In his report of October 21, 2004, Dr. Jones assessed a 30 percent permanent physical impairment to the lower extremity for the laxity of the claimant's anterior cruciate and lateral collateral ligaments. However, in this same report he goes on to express the opinion that the claimant's laxity of these ligaments falls between the mild and moderate categories of table 64 page 85. Under table 64 on page 85 of the guides, the category of mild laxity does not even appear in regard to laxity of both the anterior cruciate and the collateral ligament. Instead, there are only assessments of impairment for "moderate" and "severe" laxity of these ligaments. By letter dated November 16, 2004, the respondents requested clarification from Dr. Jones in regard to this apparent discrepancy. On November 18, 2004, Dr. Jones responded to this inquiry, but did not offer any real clarification. Instead, Dr. Jones merely stated that if the

claimant was limited by law to 25 percent for this laxity, then he concurred that such a degree or percentage of impairment was appropriate. It would appear that no actual clarification was obtained by the respondents, until Dr. Jones' deposition on May 11, 2006. In this deposition, he indicated that the claimant's laxity fell between the moderate and severe categories of the section dealing with laxity of both the anterior cruciate and the collateral ligaments and for this he assigned a 30 percent impairment.

In their brief, the respondents contend that they advised the claimant that they were accepting liability for 36 percent permanent physical impairment, rather than a 31 percent permanent physical impairment a little over two months following Dr. Jones' deposition. Although I do not doubt the statements of respondents counsel, in his brief, there is no direct evidence presented to indicate when or if this additional 5 percent permanent partial disability was accepted or paid.

However, the burden rests upon the claimant to prove controversion. As previously stated, the evidence presented shows that the respondents have consistently accepted liability for the degree or percentage of permanent physical impairment properly attributable to the ligamentous laxity, the traumatic chondral changes, and the meniscal damage and repair. It further appears that the respondents were misled by the initial records and reports of Dr. Jones to believe that the impairment for ligamentous laxity was 25 percent rather than the initially assigned 30 percent. Thus,

they accepted liability for permanent partial disability benefits attributable to this degree of permanent physical impairment. The respondents are entitled to rely on the reports and records of Dr. Jones, including his report when he appeared to change his opinion and concur that a 25 percent permanent physical impairment for the ligamentous laxity was appropriate (the report of November 18, 2004). The mere delay in payment of these additional benefits is also insufficient to prove controversion, in this case. Based upon the respondents prior conduct, there is no other evidence to lead one to reasonably believe that the respondents ever intended to deny liability for the proper degree or percentage of permanent physical impairment due to the ligamentous laxity. When Dr. Jones (at his deposition) again assessed a 30 percent permanent impairment for this condition and indicated that his initial report was wrong in regard to the degree of the laxity (i.e. that it was between moderate and severe, not mild and moderate).

It is simply my opinion that the claimant has failed to prove that the respondents have controverted his entitlement to permanent partial disability benefits for a permanent physical impairment of 36 percent to the leg below the hip. Thus, his attorney would not be entitled to any controverted attorney's fee on the permanent partial disability benefits herein awarded.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On November 17, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On November 17, 2003, the claimant earned wages sufficient to entitle him to weekly benefit of \$440.00 for total disability and \$330.00 for permanent partial disability.

4. On November 17, 2003, the claimant sustained a compensable injury to his right knee.

5. There is no dispute, at the present time, over the payment of medical expenses or temporary disability benefits.

6. The claimant's healing period ended on September 7, 2004.

7. The respondents have accepted liability for permanent partial disability benefit for a permanent physical impairment of at least 31 percent to the leg below the hip.

8. The claimant has proven that he has sustained a permanent physical impairment of 36 percent to this right leg below the hip. Specifically, he has proven that this degree of percentage of permanent physical ligament is supported by objective and measurable physical findings without any consideration of pain or other subjective factors and was calculated in a manner that conforms to the Commission's official rating guide. He has also shown that the compensable injury was the major cause of this degree or percentage of permanent physical impairment. He is entitled to permanent partial disability for only this degree or percentage of permanent physical impairment.

9. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits for permanent physical impairment in excess of 36 percent to the right leg below the hip.

10. As no controverted benefits have been awarded to the claimant, no controverted fee can be awarded to his attorney.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits for a permanent physical impairment of 36 percent to the leg below the hip and shall be entitled to credit for any such benefits previously paid.

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

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE