

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F909797

MICHAEL HOLT

CLAIMANT

TYSON FOODS, INC., SELF INSURED

RESPONDENT

OPINION FILED JULY 23, 2010

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondent represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above styled claim on April 26, 2010, in Springdale, Arkansas. The deposition of Dr. Bryan Benafield was taken on March 16, 2010, and has been admitted as Respondent's Exhibit No. 3.

A pre-hearing order was entered in this case on December 28, 2009. 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. Prior to the commencement of the hearing, the respondent announced that they had paid \$9,408.00 in permanent partial disability benefits and had terminated the payment of any further permanent partial disability benefits for permanent physical impairment. The respondent withdrew their stipulation that they were accepting liability for and would pay permanent partial disability benefits for permanent physical impairment ratings of 46 percent to the first finger, 100 percent to the second finger, 28 percent to the third finger, and 11 percent to the fifth or small

finger. A copy of the pre-hearing order with this amendment noted thereon was made Commission's Exhibit No. 1 to the hearing.

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

1. On September 20, 2008, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation benefits are \$522.00 for total disability and \$392.00 for permanent partial disability.
3. On September 20, 2008, the claimant sustained a compensable injury to his left hand.
4. There is no dispute over medical services, at present.
5. No temporary total disability benefits have been paid.
6. The respondents have paid \$9,408.00 in permanent disability benefits and then terminated any further permanent benefits.
7. The respondents are entitled to the offset against any temporary total disability benefits awarded for unemployment benefits paid during the same period.

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

1. The claimant's entitlement to temporary total disability from December 5, 2008 to July 24, 2009.
2. The extent of permanent partial disability benefits for the claimant's compensable injury including whether the

compensable injury should be rated to the hand or fingers.

3. Controversion and attorney's fees, including all permanent partial disability benefits.

In regard to these issues, the claimant contends:

"On July 24, 2009, Dr. Benafield issued impairment ratings to Mr Holt's fingers and to his upper extremity (Exhibit 1).

On or about August 6, 2009, Mr. Holt's attorney sent TyNet these ratings. (Exhibit 2)

On or about November 3, 2009, Mr. Holt hired the attorneys at Lundy, Lundy, Soileau & South, LLP to assist in collecting his impairment rating.

On or about November 13, 2009, TyNet began paying the impairment rating; however, TyNet refuses to pay an impairment rating to the upper extremity and instead is paying an impairment rating for the individual fingers.

It is claimant's contention that he is entitled to an impairment rating to his upper extremity in the amount of 52 percent.

Claimant contends that TyNet has controverted the impairment rating and owes an attorney fee on these benefits."

In regard to these issues, the respondent contends:

"Respondent accepted claimant's injury as compensable and paid appropriate medical treatment. Respondent has furnished all medical treatment claimant has required to him. Respondents are unaware of any issue related to medical treatment in this case. Claimant continued to work for the respondent employer until he was terminated for cause. (Respondent will advise the effective date of termination). Claimant filed for and received unemployment benefits which he continues to receive at this time. Claimant agrees that respondent is entitled to a credit for those

benefits in the event respondent owes any temporary total disability benefits. Claimant was released to return to work regular duty January 15, 2009 after his termination.

Respondent denies that claimant is entitled to temporary total disability benefits. Respondent had work available to the claimant within his restrictions at all times and claimant would have continued to work for respondent had he not been terminated for cause. Additionally, claimant sustained a subsequent injury on October 14, 2008, which respondent is investigating at this time.

Dr. Benafield, the treating physician, initially assigned a 40% permanent partial impairment arising to the left upper extremity on August 5, 2008. The injury was not to the left upper extremity, but to the four fingers on the left hand.

Claimant apparently claims entitlement to permanent impairment based upon the therapist calculation of 52% to the total upper extremity. That is not the physician's rating and is in fact, contrary to the Workers' Compensation Act. The claimant did not sustain any injury to the total upper extremity."

Additionally, the respondent contends:

"Based upon the deposition testimony my client is changing its position and does not accept responsibility for the medical treatment or any impairment that flowed from the motor vehicle accident on October 14, 2008, an independent intervening accident."

The respondent also contends that:

"I am not in a position to state the impairment that the respondent accepts in this case. My client has paid approximately \$9,408.00 in permanent disability benefits to date. Those benefits have been terminated as of today as there is a good possibility that those benefits will equal or exceed the impairment rating for the work-related injury and first surgery."

**DISCUSSION****I. INDEPENDENT INTERVENING CAUSE**

The first matter to be addressed is not an issue expressly identified in the pre-hearing order. This issue arises from the respondent's contentions that it is relieved from being liable for certain benefits under the provisions of Ark. Code Ann. §11-9-102(F)(iii). This appears to include certain medical services, temporary disability benefits, and permanent disability benefits. The respondent alleged two separate independent intervening causes. The first of these is a motor vehicle accident that occurred on October 14, 2008. The second is the claimant's smoking. These alleged independent intervening causes will be discussed separately.

The evidence shows that the claimant was involved in a motor vehicle accident on October 14, 2008. This accident produced sufficient impact to disable both of the vehicles involved and to deploy the air bag in the claimant's vehicle. The accident was in no way shown to be related to any negligence or recklessness on the part of the claimant. The driver of the other vehicle simply failed to yield the right-of-way, and pulled into the path of the claimant's vehicle.

The evidence further shows that four days prior to this motor vehicle accident, the claimant had undergone corrective surgery to repair the digitorum profundus tendon that had been severed in the employment-related accident of September 20, 2008. At the time of the subsequent motor vehicle accident, the claimant had clearly not

completely healed from his initial compensable injury and resulting reconstructive surgery.

The greater weight of the evidence further shows that this motor vehicle accident occurred while the claimant was traveling home from a physical therapy visit that had been scheduled by Dr. Benafield, the claimant's treating physician for the compensable injury. The purpose of this physical therapy visit was to fit the claimant with a specialized splint, which was to protect the injured area of the claimant's finger and maintain it in appropriate alignment, particularly when the claimant was performing his continued employment with the respondent.

In this accident the claimant sustained stress or trauma to the weakened finger causing the surgical repair of the lacerated tendon to fail, and the tendon again separated. As a result, Dr. Benafield was required to again surgically repair or reattach the severed digitorum profundus tendon. Clearly, this subsequent incident not only caused additional damage to the tendon, but also necessitated an additional surgery that resulted in additional stress and damage to the skin tissue of the claimant's index finger, in the area of the PIP flexor crease.

In Preway, Inc. v. Davis, 22 Ark. App. 132, 736 S.W. 2<sup>nd</sup> 21 (1987), the Arkansas Court of Appeals held that injuries sustained by a claimant in a motor vehicle accident were compensable, where the motor vehicle accident occurred while the claimant was traveling to obtain medical treatment for a previous compensable injury. In its Opinion, the Court recognized the concept of

"quasi-course of employment" discussed by Dr. Larson in his treatise on workers' compensation, 1 Larson, 13.11(d). I find Preway to be controlling in the present claim.

Thus, even if the claimant sustained an intervening injury in the motor vehicle accident, this injury was not "independent" from the claimant's initial compensable injury. The claimant's initial compensable injury necessitated the trip to the occupational therapist. But for this required medical service, the motor vehicle accident and second injury would not have occurred. Further, if the tendon had not been weakened by being severed in the employment-related accident of September 12, 2008, it is highly unlikely that it would have been severed by the trauma of the motor vehicle accident.

As in Preway, there is no evidence that the claimant's motor vehicle accident or resulting injury was in any way occasioned by the claimant's own negligence or misconduct. There is no evidence that the claimant had ever been prohibited from driving by any of his treating physicians. There is no also no indication, whatsoever, that the claimant's negligence played any role in the motor vehicle accident, itself.

I would further note that, as in Preway, there is some indication in the evidence of the current case of a deviation by the claimant during his return trip to the doctor (in Preway, there was evidence of a deviation by the claimant on the way to the doctor's office). In Preway, the Court of Appeals held that the deviation by the claimant to drop her son off at his grandmother's

house, on the way to her doctor's appointment, was not violating any express or implied prohibition by her employer and was not "unreasonable". Thus, the Court held that this alleged "deviation" was immaterial.

The same holds true for the present case. There is no evidence that the claimant had been expressly or impliedly prohibited from showing his cast to his wife, on his way home from having it fitted. Nor would the claimant's actions in this regard, be considered "unreasonable". Further, unlike Preway, the evidence shows that the motor vehicle accident, in the present case, occurred after the claimant had ceased any "deviation" and had returned to the regular route for his trip home from the doctor's office.

I would note that the claimant has at least filed a third party action against the driver of the vehicle, whose negligence resulted in the accident and further injury to the claimant. The evidence also shows that the claimant settled this action and received an unspecified amount from the third party. Thus, the respondents may have subrogation rights, under Ark. Code Ann. §11-9-410. However, both parties have requested that this matter be reserved for future determination, if necessary.

Although it did play a causal role in the claimant's difficulties with his left index finger, after October 14, 2008, I find that this motor vehicle accident on that date, was not an "independent intervening cause". Thus, it would not be a basis for

the application of Ark. Code Ann. §11-9-102(4)(F)(iii) to the present claim.

In Highslip v. Helena-Helena West Schools, 74 Ark. App. 395, 48 S.W. 3<sup>rd</sup> 566 (2001), the Court of Appeals addressed smoking as an independent intervening cause. There appears to be one difference between Highslip and the present case. In Highslip, the claimant's treating physician emphatically expressed the opinion that the claimant's smoking was the "major cause" of the claimant's failure to heal properly from the corrective surgery. In the present case, Dr. Benafield only opined that the claimant's smoking was a contributing cause. Dr. Benafield also recognized the obvious fact that the claimant's subsequent difficulties were also caused by the initial compensable injury and the numerous surgical procedures to the same area, which were necessitated by the initial compensable injury.

It is my opinion that the greater weight of the credible evidence establishes that a clear cause of the ultimate break down of the skin and tissue of the claimant's left index finger and the complications that resulted was the repeated trauma and resulting scarring to the exact same area of the claimant's finger. The initial laceration and all of the subsequent corrective surgeries, except the ultimate amputation, were all in the area of the PIP crease of the claimant's left index finger. The skin and underlying tissue in this were repeatedly cut open, allowed to at least partially heal and then cut open again on four separate occasions within a five-and-a-half month period.

Although the claimant continued to smoke through the following period, the medical evidence indicates that the claimant's initial laceration appeared to be healing normally, at the time of his first surgery on October 10, 2008. The location of this surgery appears to coincide with the location of the initial compensable laceration. The medical evidence further indicates that the incision from the claimant's first surgery appeared to be healing normally, at the time of his second surgery to repair the damage from the motor vehicle accident. Again, the location of this second surgery was the PIP crease. Although the claimant appeared to have some difficulty in healing of the incision site following the second surgery, it appears to have healed by the time of Dr. Benafield's evaluation and report on January 15, 2009. There is also evidence in the medical record and the claimant's testimony that these difficulties may have been due to an infection of the incision site. It was only after the initial laceration and three surgeries to the PIP area of the claimant's index finger that he experienced a break down of the skin tissue in this area. It should also be noted that, even though the claimant continued to smoke, his skin appears to have healed normally following the more extensive surgery on his hand for the ray amputation of his middle finger. I would also note that the evidence also shows that the claimant experienced no difficulties with the healing of the initial lacerations to the other three fingers of his hand.

It is my finding that Dr. Benafield's opinion that the claimant's smoking played a causal role in the break down of the

skin tissue on his left index finger and the complications it produced is merely speculative and not entitled to any weight and credit. Therefore, I further find that the respondent has not proven by the greater weight of the credible evidence that the claimant's smoking played a causal role in the subsequent break down of the skin and tissue of the index finger and complications resulting from this event.

However, even if the respondent had proven that smoking did play some causal role in these events, it would still not meet the criteria for an "independent intervening cause", as set out by Highslip. In the present case, as in Highslip, there continued to be a causal connection between the claimant's primary compensable injury and all of his subsequent difficulties and resulting disability involving his left index finger and hand. In the present case, the laceration of the claimant's digitorum profundus tendon of his left index finger, in the employment-related accident of September 20, 2008, clearly necessitated the surgical repair of this tendon on October 10, 2009. The weakened state of this tendon, coupled with the trauma from the motor vehicle accident, necessitated the second surgical repair of October 23, 2008. The initial compensable injury in the two surgical repairs and resulted scarring necessitated the third surgery on March 3, 2009. The initial compensable injury and the various surgical repairs it required resulted in the tissue break down at the last surgery site and the permanent damage to the tendon that necessitated the final amputation.

In Highslip, the Court applied the rule previously announced in Guidry v. J.R. Eads Construction Company, 11 Ark. App. 219, 669 S.W. 2d 483 (1984). This rule provides that where there continues to be a causal connection between the primary injury and the subsequent disability, there is no "independent intervening cause", unless the subsequent disability is triggered by an activity on the part of the claimant would be unreasonable under the circumstances. In its application of this rule, in Highslip, the Court stated that a claimant's smoking does not become "unreasonable", until the claimant has been instructed by his physician to quit smoking as part of this prescribed treatment for the compensable injury.

In the present case, the medical evidence, including the deposition of Dr. Benafield, first shows that the claimant was advised Dr. Benafield of the possible effect of his smoking on his compensable injury on March 13, 2009. Even then, it is not apparent that Dr. Benafield specifically instructed the claimant to cease such an activity. The medical evidence further shows that the break down of the claimant's skin at the incision site and the extensive damage to his tendon had already occurred by March 13, 2009.

In summary, I find that the respondent has failed to establish the occurrence of any independent intervening cause, within the meaning of Ark. Code Ann. §11-9-102(F)(iii). Thus, this subsection is not applicable to this claim and would not relieve the respondent from liability for benefits provided by the Act for the claimant's left index finger and hand difficulties.

II. BENEFITS,

Clearly, the claimant would be entitled to reasonably necessary medical services for his compensable left finger injury and its sequelae, under Ark. Code Ann. §11-9-508. However, the parties have stipulated that there is no dispute over the claimant's entitlement to such services at the present time. Therefore, these benefits will not be specifically addressed.

There is a dispute over temporary total disability benefits from December 5, 2008 through July 24, 2009. In order to be entitled to such benefits, the claimant must first prove that, during this time, he continued within his healing period from the effects of his compensable injury. As the compensable injury involved in the present case is to a portion of the claimant's body that is "scheduled" under Ark. Code Ann. §11-9-521, the claimant must also prove that, during this time, he had not "returned to work".

The issue of the healing period is a medical question that must be resolved on the basis of the greater weight of the medical evidence presented. Ark. Code Ann. §11-9-102(12) defines the "healing period" as that period for healing of the actual physical injury or damage resulting from the employment-related accident. Applicable case law provides that when this actual physical damage or injury has completely resolved or stabilized at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended.

On December 15, 2008, the claimant was continuing to undergo occupational therapy prescribed by Dr. Benafield for his compensable injury. At that time, the physical therapist also noted that the incision wound on the claimant's finger had still not completely healed and that there was an area where it was "weeping out".

In his testimony, the claimant attributed the difficulties with the healing of his incision site to getting his bandage and splint continuously wet in performing his light duty employment position. A fact Dr. Benafield recognized was not conducive to his healing.

In his report of January 15, 2009, Dr. Benafield released the claimant to return to work to "attempt" any activity that he desired. However, it is apparent from this report that it was not the opinion of Dr Benafield that the claimant had achieved the maximum benefit of time and medical treatment and returning to as near his preinjury state as the permanent character of his injury would allow. In this report, Dr. Benafield recorded observations of significant stiffness of the tendons in the claimant's left index finger and opined that further surgery for adhesions from scarring might be necessary to restore this lost function of the finger. Dr. Benafield also instructed the claimant to continue exercises or physical therapy and to return for follow up in two months.

By February 25, 2009, the claimant had returned to Dr Benafield. At that time, Dr. Benafield observed the significant stiffness of the left index finger. On that date, Dr. Benafield

recommended additional surgery to alleviate this problem. This surgery was subsequently performed on March 3, 2009. It was following this surgery that the claimant experienced the break down of the tissue at the incision site and the break down of the tendon that ultimately led to the finger amputation and ray resection on May 12, 2009.

The medical evidence shows that the claimant did not ultimately reach maximum medical improvement until August 4, 2009. The degree of residual permanent physical impairment was assessed by Dr Benafield on the following day.

Based on the medical evidence presented, I find that the claimant has proven by the greater weight of the credible evidence that he continued within his healing period from the effects of his compensable injury of September 20, 2008, during the period for which he now seeks temporary total disability benefits. Thus, he has satisfied the first requirement for his entitlement to these benefits.

The evidence presented shows that shortly after his compensable injury, the claimant returned to limited or light duty employment with the respondent, apparently at wages equal to those he was receiving at the time of his compensable injury. The claimant continued in this limited or light duty employment position until he was terminated by the respondent on December 5, 2008. The claimant testified that he was terminated by the respondent for failure to properly supervise an employee under him and that this lack of proper supervision led to a mistake by this

employee that resulted in an accident. The claimant also testified that he would have been physically capable of continuing his employment position, as a supervisor, had he not been terminated.

Rebecca Burkett, the respondent's claims adjuster for this claim, testified that, had the claimant not been terminated for cause, he would have continued to have been provided by the respondent with an employment position within whatever restrictions that might be set or imposed by his treating physician. Presumably, this employment would have been at wages equal to those the claimant was receiving at the time of his compensable injury.

Clearly, the claimant had actually "returned to work" (albeit, at light duty) prior to December 5, 2008. Thus, pursuant to the provisions of Ark. Code Ann. §11-9-521, his entitlement to temporary total disability benefits would have ceased with this "return to work". Once the claimant had "returned to work", at wages equal to those he was receiving at the time of his compensable injury, he would also be foreclosed from receiving temporary total disability benefits by the provisions of Ark. Code Ann. §11-9-526.

However, applicable case law provides that an actual "return to work" following a scheduled injury, does not, in and of itself, foreclose the claimant from subsequently being entitled to temporary total disability benefits for the scheduled injury. The Appellate Courts have affirmed awards of temporary total disability benefits, upon a showing that the claimant continued within his

healing period and the claimant was no longer able to continue working.

Applicable case law also provides that Ark. Code Ann. §11-9-526 only bars the claimant from receiving temporary total disability benefits, during the period that the claimant continues to unjustifiably refuse suitable employment. As a result, the Appellate Courts have generally held that where there is no continuing offer of suitable employment, there can be no continuing unjustified refusal.

A somewhat grey area exists, when the claimant actually returns to suitable employment and is subsequently terminated. In these cases, the Commission and the Appellate Courts have generally taken the position that when such a change in the claimant's employment status is the result of a termination for good cause or misconduct in connection with the work, the claimant's lack of employment is not a sufficient basis to conclude that he has no longer "returned to work", under Ark. Code Ann. §11-9-521. The Commission and Appellate Courts have also generally taken the position that a termination for good cause or misconduct relieves the respondent from proving a continuing offer of suitable employment, in order to invoke the provisions of Ark. Code Ann. §11-9-526.

In the present case, the claimant testified that he was terminated on December 5, 2008, for failing to properly supervise an employee that had been placed under his supervision by the respondent and that this lack of proper supervision had resulted in

actions by that employee, which caused an accident. The claimant does not appear to dispute these grounds for his termination. Neither the medical evidence nor the claimant's testimony indicate that after December 5, 2008, his compensable injury prevented him from performing any and all types of regular gainful employment, including the position he held at the time of his termination. In fact, shortly after his termination, the claimant applied for and subsequently received unemployment benefits at a weekly rate between \$400.00 and \$460.00. These benefits apparently continued throughout the period that he is now seeking temporary total disability benefits.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence shows that the claimant is barred from receiving the temporary total disability benefits he now seeks by the provisions of both Ark. Code Ann. §11-9-521(a) and §11-9-526. I specifically find that he had been provided suitable employment by the respondent and that he had actually returned to work for the respondent, prior to December 5, 2008. I further find that the claimant's lack of employment, during the period of December 5, 2008 through July 24, 2009, was his termination by the respondent for good cause or misconduct in connection with the work. Therefore, I have no alternative but to deny the claimant's request for temporary total disability benefits.

The next issue is the claimant's entitlement to permanent partial disability benefits for the permanent physical impairment

produced by the compensable injury. The claimant's entitlement to these benefits is primarily controlled by the provisions of Ark. Code Ann. §11-9-521. However, the claimant must also prove that the existence and extent of permanent physical impairment is supported by objective and measurable physical findings, as required by Ark. Code Ann. §11-9-704(c)(1)(B). No consideration can be given to pain or any objective factors, Ark. Code Ann. §11-9-102(16)(A)(ii). Finally, the claimant must also prove that the compensable injury was the "major cause" of the permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii).

It is the duty of this Commission, rather than any medical expert, to determine the existence and extent of any permanent physical impairment in a manner that conforms to the various requirements of the Act. While expert medical evidence remains relevant and helpful, it is not controlling. In fact, in order for expert medical opinion to be considered on this issue, it must be stated within a reasonable degree of medical certainty and conform to the various requirements of the Act.

In the present case, the medical evidence contains two expert opinions on the extent of permanent physical impairment from the claimant's compensable injury. The first of these was an impairment evaluation performed by Dr. Benafield's occupational therapist, at Dr. Benafield's request, on July 24, 2009. The second was an assessment made by Dr. Benafield in a letter dated August 5, 2009.

In the report of July 24, 2009, the occupational therapist assigned a permanent physical impairment to the claimant's left

hand of 9 percent for loss of motion of the claimant's first or index finger, a permanent physical impairment of 20 percent to the hand for the ray amputation of the claimant's second or middle finger, a permanent physical impairment of 3 percent to the hand for loss of motion of the claimant's third or ring finger, and a 1 percent permanent physical impairment of loss of motion of the claimant's fourth or little finger. These would appear to result in a 33 percent impairment to the claimant's left hand. However, the occupational therapist incorrectly calculated the sum of these individual impairments to be 41 percent to the hand (rather than 33 percent). The occupational therapist also assessed a 5 percent permanent physical impairment to the upper extremity for loss of range of motion to the wrist. The occupational therapist failed to indicate whether these range of motion calculations were measured on active or passive range of motion. Finally, the occupational therapist somehow extrapolated all of these impairment ratings (including the clearly erroneous hand rating) into an impairment rating to the upper extremity that exceeded the sum of the impairments to the hand and wrist and then extrapolated this amount into a rating to the body as a whole.

Clearly, there are significant errors in the occupational therapist calculation of the combined impairments to the claimant's hand and, as a result, to the upper extremity. The evidence fails to show that the loss of range of motion of the claimant's first, third, and fourth fingers were supported by or based upon findings beyond the claimant's voluntary control, as required by the Act.

This is also true for the impairment rating to the claimant's wrist. Further, there is no evidence that the claimant's compensable injury in any way resulted in an impairment to his wrist. I find that I can place no weight or credit on the permanent physical impairment assessment made by Dr. Benafield's occupational therapist.

In his report of August 5, 2009, Dr. Benafield referred to the impairment rating performed by his occupational therapist, but assesses a 40 percent permanent physical impairment to the left upper extremity. He gave no assessment to the claimant's hand. In his subsequent report of August 25, 2009, Dr. Benafield assessed permanent physical impairments to the claimant's remaining first, third, and fourth fingers, which were clearly taken from the measurements made by his occupational therapist. However, he again failed to make any assessment of permanent physical impairment to the claimant's hand. In his deposition, Dr. Benafield did explain how the ray amputation of the claimant's second or middle finger could have resulted in a loss of range of motion of the remaining fingers. However, there still remains no evidence to establish that the actual degree or percentage of impairment assessed for this loss was supported by or based upon "objective measurable physical findings", as required by the Act. I would also note, that in his final report of February 23, 2010, Dr. Benafield stated that the claimant had "good range of motion" of his hand or remaining fingers. I must again find that I can place no weight or credit on the permanent physical impairment ratings made by Dr. Benafield.

The American Medical Associations's Guides to the Evaluation of Impairment (Fourth Edition), which is the Commission's official rating guide, assigns a permanent physical impairment of 100 percent to the finger or 20 percent to the hand for the amputation of the second or middle finger at the metacarpophalangeal joint. This guide does not assign any additional degree of permanent physical impairment for a ray amputation or the removal of the metacarpal and accompanying soft tissue. Generally, as appears to be the present case, there is no medical necessity for a ray amputation, as opposed to the amputation of a finger at the metacarpophalangeal joint. However, this type of amputation is generally considered to result in a more normal appearing and better functioning hand.

After consideration of all the evidence presented, I find that the claimant has proven by the greater weight of the credible evidence that his compensable injury of September 20, 2008, was the "major cause" for the ray amputation of the claimant's left or middle finger. This amputation would result in a permanent physical impairment of 100 percent to the finger or 20 percent to the hand, under the rating guide. This degree of permanent physical impairment is clearly based only on "objective" factors, without any consideration to pain or other objective matters. Pursuant to Ark. Code Ann. §11-9-521(a)(8), and Ark. Code Ann. §11-9-501(d)(2)(B), the claimant would be entitled to 37 weeks of permanent benefits at his total disability rate.

III. ATTORNEY'S FEES

The final issue in this case is controversion and appropriate attorney's fees. The claimant contends that the respondent's have controverted his entitlement to any benefits for permanent disability and owe the statutory attorney's fee on all permanent disability benefits awarded. The burden rests upon the claimant to prove controversion.

The respondent concedes that there was an initial delay in the commencement of the payment of permanent disability benefits. However, the respondent contends that this delay was the result of settlement negotiations and for an investigation into the amount of the actual amount of permanent disability benefits to which the claimant was entitled.

The respondent's witness, Rebecca Burkett, testified that she received a letter from the claimant's previous attorney (George Niblock) in August of 2009, expressing an interest in settling the case. Attached to this letter, was the July 24, 2009 permanent physical impairment rating assessed by Dr. Benafield's occupational therapist. Ms. Burkett testified that she then tried to obtain confirmation of this assessment from Dr. Benafield and received Dr. Benafield's report of August 5, 2009. She stated that she then attempted to obtain clarification, as to the appropriate rating for the injured body part. Ultimately, she received Dr. Benafield's report of August 25, 2009, wherein he assessed an impairment rating to the claimant's remaining three fingers. At that point, she attempted to obtain settlement authority from her supervisor and a

computation of the amount of benefits that would be appropriate for the degrees of impairment assessed. Ultimately, she issued a check on November 13, 2009 for permanent disability benefits in the approximate amount of \$4,000.00. Apparently, other permanent disability benefits were subsequently paid, as the stipulations reflect that, the respondent made a total payment of permanent partial disability in the amount of \$9,408.00. However, after payment of this amount, the respondent concluded that they had paid sufficient permanent disability benefits to cover what they believed to be their liability and ceased the voluntary payment of permanent disability benefits.

Clearly, the mere delay in the payment of compensation does not, in and of itself, represent controversion. However, it can certainly be some evidence from which the respondent's actual intent can be inferred.

Although it is unfortunately a common practice in workers' compensation claims, for the claimant's attorney and the respondent to agree to hold off on the payment of permanent disability benefits until a settlement is reached. While this may increase the claimant's attorney fee on settlement, it certainly does no service to the claimant and is expressly contrary to the avowed purpose of the Workers' Compensation Act to timely provide the claimant with all appropriate benefits. However, if a respondent were given permission by claimant's counsel to withhold or delay the permanent disability benefits, pending settlement, this would clearly estop claimant's counsel from receiving or even requesting controverted

attorney's fees on the basis of this delay. Although this is implied in the present case, it was not proven that such an agreement existed.

The respondent clearly has a reasonable period of time to investigate and seek clarification of an impairment rating, especially when the rating appears to involve portions of the body outside that were initially injured in the employment-related accident. In this case, the respondent does not appear to have completed their investigation and reached their conclusion as to the amount of permanent partial disability that they were going to voluntarily accept and pay, until after they had actually paid some \$9,408.00 in permanent partial disability benefits. The respondent's have requested no reimbursement or off set of these benefits, even though their subsequent actions and current position would appear to reflect that they now believe that their liability for permanent partial disability benefits is far less than the amount they have actually paid.

However, after consideration of all the evidence presented, it is my opinion that the claimant has failed to establish by the greater weight of the credible evidence that the respondent intended to controvert or deny the claimant's entitlement to the permanent partial disability benefits that they have already voluntarily paid. Even though there was an initial delay in the commencement of these benefits, I find that, under the circumstances of this case, this delay was not the result of the respondent's intent to controvert the claimant's entitlement to any

permanent disability benefits. Therefore, the claimant's attorney is not be entitled to a controverted attorney's fee on the permanent partial disability benefits previously paid by the respondent.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On September 20, 2008, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On September 20, 2008, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$522.00 for total disability and \$392.00 for permanent partial disability.

4. On September 20, 2008, the claimant sustained a compensable injury to his left hand.

5. There is no dispute, at the present time, over medical services.

6. The claimant has failed to prove that he is entitled to temporary total disability benefits from December 5, 2008 to July 24, 2009. Specifically, the claimant has failed to prove that during this period, he had not "returned to work", within the meaning of Ark. Code Ann. §11-9-521, or that he was actually totally disabled from work by his compensable injury. The claimant's lack of employment, during this period, was solely the

result of his termination for good cause or misconduct in connection with the work.

7. The claimant has proven that he is entitled to permanent partial disability benefits for the total amputation of his second or middle finger, and such benefits are to be paid at the total disability rate. Specifically, the greater weight of the credible evidence proves that the claimant's compensable injury was the major cause of this amputation and the resulting degree of permanent physical impairment, that this degree of permanent physical impairment was calculated in a manner that conforms to the Commission's official rating guide, and that this degree of permanent physical impairment is supported by objective and measurable physical findings with no consideration to pain or other objective matters.

8. The greater weight of the credible evidence fails to prove that the claimant's October 14, 2008 motor vehicle accident, and/or the claimant's smoking represent independent intervening causes, within the meaning of Ark. Code Ann. §11-9-102(4)(F)(iii). Thus, this subsection is inapplicable to the present claim and has no effect on the claimant's entitlement to benefits provided by the Act.

9. The respondent's entitlement to any lien under Ark. Code Ann. §11-9-410, for recovery made in a third party action arising out of the motor vehicle accident of October 14, 2008, is reserved for future determination, if necessary.

10. The respondent has controverted the claimant's entitlement to any temporary total disability benefits and any permanent disability benefits in excess of \$9,408.00. The respondent has not controverted the claimant's entitlement to permanent disability benefits in the amount of \$9,408.00.

11. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent disability benefits herein awarded, which are in excess of \$9,408.00.

ORDER

The respondents shall pay to the claimant permanent disability benefits for the total amputation of the second or middle finger of the claimant's left hand (i.e. 37 weeks of benefits at the weekly rate of \$522.00) and shall be entitled to credit for permanent disability benefits previously paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent disability benefits herein awarded, which are in excess of \$9,408.00.

For the reasons heretofore stated in this Opinion, the claimant's request for temporary total disability benefits and permanent disability benefits in excess of those awarded, must be denied.

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

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

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE