

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E815277

LONG THANH LE, EMPLOYEE	CLAIMANT
SIMMONS FOODS, INC., EMPLOYER	RESPONDENT
S.B. HOWARD & COMPANY, CARRIER	RESPONDENT

OPINION FILED JULY 19, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE GARY UOUJ, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE J. RODNEY MILLS, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed in part and affirmed, as modified, in part.

OPINION AND ORDER

Respondents appeal from a decision of the Administrative Law Judge finding that the claimant is entitled to an additional 20% permanent impairment rating to the upper extremity over and above the 19% permanent impairment rating to the upper extremity previously accepted by the respondents, and finding that the claimant is entitled to additional medical treatment at the respondents' expense. The Administrative Law Judge also found that the claimant failed to prove that he suffered from reflex sympathetic dystrophy or that he is entitled to wage loss disability. The claimant did not file a cross-appeal with regard to these issues. Based upon our de novo review of the entire record, we find that the decision of the

Administrative Law Judge must be reversed in part and affirmed, as modified in part.

The claimant sustained an admittedly compensable injury to his left upper extremity on December 13, 1998, for which he has received temporary total disability benefits, medical benefits, and permanent partial disability benefits for a 19% permanent impairment rating to the left upper extremity. Claimant filed a claim for additional benefits and a hearing was held on November 1, 2001, from which an opinion was filed by the Administrative Law Judge on March 2, 2002. The respondents appealed and claimant cross-appealed this decision to the Full Commission. In an Order filed January 28, 2003, the case was remanded to the Administrative Law Judge to make specific findings on the compensability of the claimant's alleged reflex sympathetic dystrophy, the claimant's entitlement to additional medical treatment in light of the change of physician arguments made by the parties, to clarify the findings regarding the award of an additional 20% anatomical impairment, and more specific findings regarding the claimant's claim for wage loss disability. Pursuant to our remand order, the Administrative Law Judge issued a new opinion on August 8, 2003, which is now the subject of this appeal. As previously noted, only the respondents filed a notice of appeal with

regard to the opinion before the Commission on appeal. The claimant filed a motion to supplement the record on appeal attempting to introduce additional exhibits since the Administrative Law Judge did not hold a second hearing when the claim was remanded for more specific findings. In a unanimous order filed December 3, 2003, the claimant's motion to supplement the record was denied.

The first issue for consideration is the finding that the claimant is entitled to an additional 20% permanent partial impairment rating over and above the 19% permanent partial impairment rating previously accepted and paid by the respondents. In this regard, the Administrative Law Judge relied upon Dr. Buie's deposition testimony in which he explained that the claimant underwent a series of Jamar grip tests which Dr. Buie felt to be valid. According to Dr. Buie, the claimant gave maximum effort during this test and the results were within a reasonable variation. Utilizing the A.M.A. Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Buie found that the claimant had a 20% permanent impairment for motor strength weakness. Dr. Buie described the grip strength test in his deposition as follows:

A Jamar grip device is a standardized testing device that you grip, and what it has is a dynamometer on the side opposite from the patient so they can't

see it, and you do a series of strength tests, how hard can you squeeze this for a number of times, and you ask the patient to do a maximum effort each time. With that maximum effort that needs to come out within a reasonable variation....

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That's the Jamar test and, again, you know, it's an active type test that I know of no way - I don't know any way that you can passively test for that and that has to be something that you kind of accept as a test that if it falls within an expected range that it's an acceptable thing. If it doesn't, then it's not.

In order to be compensated for permanent partial disability benefits, the 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, A.C.A. § 11-9-102(5)(F) and (14)(Supp. 1997); that the impairment rating is established by medical evidence, supported by objective findings, A.C.A. § 11-9-102(16)(Supp. 1997), WCC Rule 34; that the medical evidence is stated within a reasonable degree of medical certainty, A.C.A. § 11-9-102(16)(Supp. 1997); and, that the AMA Guidelines were used as a guide in determining impairment ratings, A.C.A. § 11-9-522(g)(Supp. 1997), WCC Rule 34.

"Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached."

Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). With regard to a determination of impairment, Ark. Code Ann. § 11-9-704(c)(1) (Repl. 1996) provides that "[a]ny determination of the existence or extent of physical

impairment shall be supported by objective and measurable physical or mental findings." Act 796 of 1993 amended the Arkansas Workers' Compensation Law to define objective findings as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Supp. 1997). In addition, as amended by Act 796, medical providers, Administrative Law Judges, and this Commission cannot consider complaints of pain when determining physical or anatomical impairment. Id.

Furthermore, the amended law provides that, "for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests shall not be considered objective findings."

In Brock v. Swift Eckrich, 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. Objective findings did exist in Daniel v. Firestone, 57 Ark. App. 123, 942 S.W.2d 277 (1997), where the doctor observed a "fibrous mass" in the patient's body.

In Coffman v. Jones Timber Company, Full Commission Opinion filed May 13, 1999, (E511952), after quoting from Brock v. Swift Eckrich at length, the Full Commission specifically found that a grip strength test was based upon subjective findings and therefore declined to award permanent partial disability benefits for a 10% impairment rating. Likewise, in Barnard v. Wal-Mart Stores, Inc., Full Commission Opinion filed April 3, 1998, (E614185), the Full Commission specifically found that grip strength tests, reflex abnormalities, and radicular pain relied upon to determine an anatomical impairment rating "are clearly factors that come under the claimant's voluntary control." Finally, in Fiedorowicz v. First

Financial Bank, Full Commission Opinion filed March 24, 1997, (E518256), the Full Commission found that grip strength testing falls within the voluntary control of the patient and declined to award permanent partial disability benefits.

Although Dr. Buie testified that he felt the Jamar grip strength results were valid, such testimony does not overcome the plain fact that the test itself is dependent upon the claimant's voluntary control. The claimant must make a voluntary effort to participate in the testing and thus the outcome of the test, whether deemed valid or not, is clearly dependent upon the claimant's volitional acts. Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence entitlement to additional permanent partial disability benefits for the 20% impairment rating assigned by Dr. Buie for the claimant's loss of motor weakness. Therefore, we find that the decision of the Administrative Law Judge awarding such benefits must be reversed.

Even if we were to find that the grip strength test was an objective test yielding objective medical findings, a finding we specifically do not make, we further find that the Administrative Law Judge erred in awarding an additional 20% impairment over and above the 19% impairment

previously accepted by the respondents. The AMA Guides to the Evaluation of Permanent Impairment requires that such ratings be combined using the Combined Values Chart.

Utilizing this chart the 20% rating when combined with the 19% rating yields an total rating of 35%.

The second issue for determination is whether the claimant is entitled to additional medical benefits. The Administrative Law Judge found that the respondents controverted the claimant's entitlement to additional medical benefits on October 31, 2000, therefore the claimant did not have an authorized treating physician and could therefore seek additional reasonably necessary medical treatment at the respondents expense. In reaching this finding the Administrative Law Judge relied upon the AR-2 filed with the Commission in which the respondents indicated that they were controverting the claimant's request for all additional benefits, including medical benefits. We must agree with the Administrative Law Judge. Moreover, there is no evidence that the claimant was ever provided with a form AR-N advising him of the change of physician rules and regulations. However, having found that the claimant did not have an authorized treating physician and was free to seek medical treatment from whomever he chose for his compensable injury, we find that not all the additional medical

treatment sought after October 31, 2000, is reasonably necessary.

The claimant was released to return to work by Dr. Martimbeau on November 23, 1999, on light duty, with no heavy lifting more than 20 pounds with his left hand. After a follow-up visit on December 7, 1999, Dr. Martimbeau noted that the claimant's examination did not show discoloration or redness, but that the claimant had edema of the fingers, hand, and forearm. Dr. Martimbeau recommended compression glove for the wrist and forearm. On December 22, 1999, the claimant was examined by Dr. Robert Bebout with the Cooper Clinic. Dr. Bebout noted continued swelling and complaints of some numbness and burning. Dr. Bebout recommended physical therapy, pain medication, and compressive stocking devices. In addition, Dr. Bebout recommended that the claimant continue to work at a light duty status. On his January 5, 2000, examination of the claimant, Dr. Bebout noted that the claimant "could not participate in therapy as he said it hurt him too much to do the therapy exercises and the therapist couldn't do anything with him..." Dr. Bebout referred the claimant to Anesthesia for stellate ganglion blocks at that time. The claimant returned to Dr. Bebout on March 9, 2000, at which time Dr. Bebout noted that the claimant had undergone therapy with Dr. Swicegood for

chronic pain syndrome of this upper extremity. Dr. Bebout noted a decreased swelling in the hand and upper extremity at that time. Dr. Bebout released the claimant from his care with a 19% permanent impairment rating, and with no permanent restrictions.

Subsequent to his release by Dr. Bebout on March 9, 2000, the claimant did not seek any additional medical treatment until he went to Dr. Van Hoang on his own on April 22, 2001. While the claimant obtained an evaluation from Dr. Buie on January 22, 2001, Dr. Buie only examined the claimant and provided an impairment rating, he did not actually treat him. Moreover, Dr. Buie's ratings did not comply with Arkansas law. Accordingly, we cannot find that the claimant's examination by Dr. Buie which was simply an attempt to increase his permanent impairment is reasonably necessary medical treatment. Therefore, we find that the claimant has failed to prove entitlement to medical benefits for the examination conducted by Dr. Buie.

However, we find that the claimant has proven by a preponderance of the evidence entitlement to additional medical treatment for the swelling and pain in his left arm. When the claimant was released to return to work without restrictions he was assessed with a 19% anatomical impairment rating. This rating implies that the claimant's

condition is permanent. Moreover, when the claimant was released he was noted to have some pain and swelling in his left forearm. Although the claimant did not seek any additional medical treatment for over a year after he was released by Dr. Bebout, the claimant possessed the same findings of pain and swelling at that time. Accordingly, we find that the claimant has proven by a preponderance of the evidence that additional medical treatment for the pain and swelling in his left forearm is reasonably necessary in connection with his compensable injury. Therefore, we find that the decision of the Administrative Law Judge finding that the claimant is entitled to additional medical benefits must be affirmed as modified.

With regard to the Administrative Law Judge's findings regarding the non-compensability of the alleged reflex sympathetic dystrophy and the claimant's failure to prove entitlement to wage loss disability, we find that these issues were not properly cross-appealed by the claimant and are therefore, not before the Full Commission on appeal. In this regard, we note that the claimant lodged a cross appeal from the decision of the Administrative Law Judge after the Law Judge issued her first opinion on this claim, but that the claimant did not file a cross appeal following the Law Judge's second opinion. Thus, the claimant

is aware of the proper procedure for bringing an issue before the Full Commission on appeal. Accordingly, we find that issues not properly appealed must be affirmed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

\_\_\_\_\_I concur with the finding that claimant has proven by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the compensable injury. However, I must respectfully dissent from the remaining findings by the majority.

SHELBY W. TURNER, Commissioner