

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E700242

TOM H. WILLIAMS, EMPLOYEE	CLAIMANT
WILLAMETTE INDUSTRIES, INC., SELF-INSURE EMPLOYER	RESPONDENT

OPINION FILED JULY 7, 2004

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

Claimant represented by HONORABLE SILAS H. BREWER, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE NORWOOD PHILLIPS, Attorney at Law, El Dorado, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision of the Administrative Law Judge filed on October 27, 2003, finding that the claimant is entitled to a 34% whole body physical impairment rating and that the claimant is entitled to a 50% wage loss disability. Based on our de novo review of the entire record, we find that the claimant has failed to prove by a preponderance of the evidence entitlement to an impairment rating to the body as a whole or wage loss disability. Therefore, we find that the decision of the Administrative Law Judge should be reversed.

The claimant sustained an admittedly compensable injury on January 5, 1997, when his right foot, ankle and lower leg were crushed by a large forklift driven by a co-

worker. As claimant was healing from this injury, he fell causing serious injury to his left leg. The left leg injury was accepted by respondents as a compensable consequence of the compensable right leg injury. Claimant has received appropriate medical benefits, temporary total disability benefits, and permanent partial disability benefits for the physical impairment ratings assigned to the claimant's lower extremities. The only issues are whether the claimant is entitled to a permanent impairment rating assigned to the body as a whole and whether the claimant has suffered a decrease in his wage earning capacity as a result of his compensable injuries.

The claimant initially treated with Dr. Michael Young, an orthopedic specialist in Hot Springs, Arkansas, prior to coming under the care of Dr. Young's partner, Dr. Robert Olive. Under the care of Dr. Olive, claimant underwent multiple surgeries on his left leg, developed infections and osteomyelitis in his leg, and underwent more surgeries to address this condition. Claimant eventually requested a second opinion and he came under the care and treatment of Dr. James Lillich in Shreveport, Louisiana. Dr. Lillich performed a bone graft and placed fixtures in claimant's left leg. Claimant developed a staph infection in his left leg while treating with Dr. Lillich. In order to

treat the staph infection, Dr. Lillich employed Dr. Paul Davis to perform a rectus abdominus free flap placement after debridement of claimant's wound. The operative report for this procedure was not introduced into evidence and there are no medical records which address the amount of abdominal tissue harvested for this procedure or the care and treatment of the abdominal wound. Unfortunately, this rectus abdominus flap procedure did not cure the staph infection and ultimately on June 24, 1999, the claimant had to undergo an amputation of his left leg below the knee.

In December of 1999, the claimant was found to have attained maximum medical improvement and he was released to return to work for the respondents. At the time of his injury, claimant earned approximately \$12.20 per hour. When he returned to work for the respondents in December of 1999, the claimant passed a test and was permitted to enter the Millwright apprentice program. The claimant earned \$14.20 while in this program. However, after two months in the program, the claimant concluded that he was not able to climb on and around all the equipment, so he requested to be let out of the program. The claimant returned to his job as a forklift operator earning \$12.84 per hour. The claimant was given a forklift with an unairconditioned cab. Due to the heat in the cab, the

claimant's leg would sweat in his prosthesis, requiring him to empty the pool of sweat that accumulated several times a day. Claimant requested an accommodation pursuant to the American's with Disabilities Act. Before the accommodation could be implemented, the claimant was fired for an attempted theft. Claimant adamantly denies the attempted theft and he brought a wrongful termination action against the respondents which was settled before trial.

In May of 2000, Dr. Lillich authored a progress report in which he referenced a "previous note of March 15th." Dr. Lillich's March 15th note was not admitted into evidence. In the May 17, 2000, report, Dr. Lillich assessed the claimant with an 8% impairment of the whole person and a 20% impairment of the lower extremity for the degenerative arthritis of claimant's left knee. In addition, Dr. Lillich assessed an 8% impairment to the body as a whole "based on the palpable defect in the supporting structures of the abdominal wall, which place him in a Class I type impairment." Dr. Lillich utilized the combined values chart to arrive at an over all impairment rating of 34% to the body as a whole for the "the below the knee amputation, the arthritis present within the left knee and the defect in the abdominal wall from his previous surgery. Also, this

includes the previous arthrodesis of the foot and early degenerative arthritis of the ankle...."

"Permanent impairment" is defined as any permanent functional or anatomical loss remaining after the healing period had ended. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

Ark. Code Ann. § 11-9-522(g) provides that the Commission shall adopt an impairment rating guide to be used in the assessment of anatomical impairment and specifically provides the guide shall not include pain as a basis for the impairment. In compliance with this statutory mandate, the Commission adopted The AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Commission Rule 34 specifically states:

That The Guides are adopted "exclusive at any section which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine."

The Commission has adopted The Guides and to the extent that The Guides allow the use of subjective criteria for the establishment of an impairment rating, The Guides must give way to the statutory definition of objective findings as defined by the General Assembly. The portions of The Guides which are based upon subjective criteria cannot

supersede the statutory definition established by the General Assembly. Therefore, to the extent that there is a conflict, the statutory definition as established by the General Assembly takes precedence over any subjective criteria set forth in The Guides. See W.C.C. Rule 34.

The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. Johnson v. General Dynamics, supra.; Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001) Moreover, the Commission may assess its own impairment rating rather than rely solely on ratings assigned by physicians. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

In Polk County v. Jones, supra., the Arkansas Court of Appeals addressed the Commissions ability and authority to refer to the AMA Guides to the Evaluation of Permanent Impairment and stated in relevant part:

Thus, in all cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, it is the Commission's duty to determine, using the AMA Guides, whether the claimant met his burden of proof. This being the case, we hold that the Commission can, and indeed, should, consult the AMA Guides when determining the existence and extent of permanent impairment, whether or not the relevant

portions of the Guides have been offered into evidence by either party.

In his brief, claimant argues that Dr. Lillich is in a far better position, by virtue of this training, to apply The Guides. However, as noted above, the Commission is charged with translating the medical evidence into findings of fact. "Thus, the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians." Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

It is well established that absent a showing of total disability, a scheduled injury cannot be apportioned to the body as a whole. See Hill v. White-Rodgers, 10 Ark. App. 402, 665 S.W.2d 292 (1984); Taylor v. Pfeiffer Plbg. & Htg. Co., 8 Ark. App. 144, 648 S.W.2d 526 (1983); Haygood v. Belcher, 5 Ark. App. 127, 633 S.W.2d 391 (1982); Anchor Const. Co. v. Rice, 252 Ark. 460, 479 S.W.2d 573 (1972). The only impairment ratings in the record appear in Dr. Lillich's May 17, 2000, progress report. Clearly the 8% whole body impairment for the lower extremity is for a scheduled body part. As there is no evidence that the claimant is totally disabled, the claimant is only entitled to permanent partial disability benefits in accordance with the schedule for the lower extremity injury. A.C.A. § 11-9-

521; 11-9-522. Therefore, we find that the claimant has failed to prove by a preponderance of the evidence entitlement to permanent partial disability benefits for an impairment rating assessed to the body as a whole for the injury to claimant's left lower extremity.

With regard to the 8% impairment rating assessed for the abdominal wall defect, we find that the claimant has failed to prove entitlement to any permanent partial disability benefits associated with this injury. As previously noted, the record is void of any relevant discussion concerning the claimant's abdomen or the procedure in which a flap of tissue was removed from claimant's abdomen. In fact, the only medical record to address this procedure or the claimant's abdomen is the Willis-Knighton Medical Center discharge record with an admission date of 10/23/98 and a discharge date of 11/09/98 which states in pertinent part:

...Dr. Paul Davis was consulted for his evaluation and recommendations regarding this open wound. He had recommended rectus abdominus flap after debridement of the wound was initially carried out....He underwent initial debridement of the ankle followed later on by a rectus abdominus free flap performed by Dr. Davis. Postoperatively he has done relatively well except for a need for return to the OR to check vascularity of the flap and possible internal bleeding from around the graft harvest site....

With regard to the actual assessment of an impairment rating to the abdomen, Dr. Lillich assessed an impairment "based on the palpable defect in the supporting structures of the abdominal wall." The record is silent with regard to any such defect. Moreover, Chapter 10.9 of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, and more specifically Table 7, refers to impairment for "Hernias of the Abdominal Wall" and "Classes of Hernia-related Impairment." The evidence unequivocally fails to support a finding of an abdominal wall hernia. The claimant testified that upon lifting he occasionally experienced pressure on the opposite side of his abdomen from where the tissue flap was removed. However, there is no evidence that the claimant ever experienced any protrusion or discomfort at the site of the tissue graft. Furthermore, the claimant testified that the diagnostic testing failed to support any evidence of a hernia. We do not find Dr. Lillich's statement in the May 17, 2000, progress report which mimics the language in the AMA Guides for a hernia related impairment to be evidence of hernia, since the record fails to disclose any objective medical evidence that the claimant suffers from such a condition. As the claimant has failed to present any evidence of a hernia associated with the abdominal graft

site or resulting from the removal of abdominal tissue, we find that the claimant has failed to prove by a preponderance of the evidence entitlement to an impairment rating for any treatment associated with his abdominal wall. Granted, the claimant underwent a surgical procedure to remove a flap of tissue from his abdomen, however, the Guides adopted by the Commission for the assessment of permanent impairment do not provide for an impairment rating for an abdominal defect absent a finding of a hernia. Since the claimant failed to present any credible objective medical evidence of a hernia, let alone the remaining criteria for a hernia impairment, the claimant has failed to prove by a preponderance of the evidence entitlement to an impairment rating associated with the rectus abdominus flap procedure.

Since we find that the claimant has failed to prove entitlement to permanent partial disability benefits for an impairment rating assessed to the body as a whole, we further find that the claimant has failed to prove entitlement to any wage loss disability benefits. Pursuant to the plain language of section 11-9-522 (b) (1), "the percentage" of permanent physical impairment to the body as a whole *must* be established before the Commission can even consider a claim for permanent-partial disability benefits

"in excess of the employee's percentage" of permanent physical impairment. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 375, 10 S.W.3d 727 (2000).

Accordingly, for those reasons set forth herein, we find that the decision of the Administrative Law Judge is hereby reversed and this claim for additional permanent partial disability benefits is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the majority opinion finding that Claimant has failed to prove entitlement to an impairment rating to the body as a whole or wage-loss disability benefits.

Claimant testified that during the abdominal tissue harvesting procedure, which is undisputedly related to his compensable injuries, that an eight inch incision was made in his abdomen and that the amount of tissue removed

was about the size of a fist. He also testified that as a result of the absence of tissue on his right side of his abdomen, which is where the tissue was harvested, he experiences discomfort on the left side of his abdomen when we attempts to pick up large objects. He further testified that as a result of this loss of muscle from his abdomen that he is not able to lift as much as he could previously and can rarely lift anything over 40 pounds.

On May 17, 2000, Dr. Lillich opined that Claimant had an 8% impairment rating to the body as a whole as a result of the defect in his abdominal wall that is admittedly related to Claimant's compensable injury:

In reference to my previous note of March 15th, I failed to include the impairment ratings for ...impairment related to his abdominal surgery where the previous rectus graft was taken. Again based on the MA [sic] Guide Evaluation of Permanent Impairment 4th Edition, ...based on the palpable defect in the supporting structures of the abdominal wall, which place him in a Class I type impairment with an 8% impairment of the whole person.

The Majority reasons that Claimant is not entitled to the 8% impairment rating assigned by Dr. Lillich because Claimant did not have a hernia and there is no compensation for palpable abdominal wall defect unless it is related to a hernia. I disagree. Claimant's loss of abdominal tissue,

which is undisputedly and directly related to medical treatment he underwent for his compensable injury, is an unscheduled injury. Table 7 on page 247 of the Guides defines a Class 1 impairment to the abdominal wall as follows:

Class 1:

0%-9% impairment of the whole person

Palpable defect in the supporting structures of abdominal wall;

and

Slight protrusion at site of defect with increased abdominal pressure; readily reducible;

or

Occasional mild discomfort at site of defect, but not precluding normal activity.

Though Claimant has not had a hernia, he has the same side effects, that of defects in the abdominal wall, as a result of the compensable grafting procedure as does a person who has a hernia removed and has a resulting abdominal wall defect. It is evident that Dr. Lillich relied on that portion of the Guides in assigning the 8% impairment rating for Claimant's loss of abdominal tissue, which is the same type of abdominal tissue loss that a claimant's whose hernia had been removed would have incurred. I find,

therefore, that Claimant is entitled to compensation for this permanent impairment.

The Majority also reasons that the medical records do not sufficiently support the explanation of the grafting procedure. I find that relevant discussion of the procedure is established here where the Respondents paid for and have not disputed the validity or occurrence of the procedure, the procedure is described referenced in the discharge summary contained in the record, and Claimant has credibly testified regarding the procedure.

I also find that Claimant is entitled to a wage-loss disability award as a result of the permanent impairment in his abdominal wall. Claimant, age 52, has a high school education and has predominately worked in manual labor positions, including currently working as a boiler operator 16 hours each week at a rate of \$10.84 per hour and in the past as a machinist, delivery driver, saw operator, and fork lift driver. Claimant also worked as a auto parts store manager for six years. He began working for Respondent in 1987 and worked up until his discharge in 2001 with exception of time off due to his compensable injuries from 1997 to 1999. Claimant last earned \$12.84 as a fork lift driver while in Respondent's employ. Respondents have contended that Claimant would still be working at Respondent

Willamette as a fork lift operator had he not been discharged. It is evident from the record, however, that Claimant was not discharged from Willamette for misconduct and that the misconduct allegations are suspicious at best. Claimant testified that he cannot lift more than 40 pounds due to his loss of abdominal muscle and the strain that lifting weight puts on his remaining abdominal muscle tissue.

For these reasons I find that Claimant is entitled to an impairment rating to the body as a whole and to wage-loss disability benefits. I, therefore, respectfully dissent from the Majority opinion.

SHELBY W. TURNER, Commissioner