

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005665

ARONDA D. CRAWFORD, EMPLOYEE	CLAIMANT
EQUITY TRUCKING COMPANY, EMPLOYER	RESPONDENT NO. 1
RELIANCE NATIONAL INSURANCE COMPANY and THE ARKANSAS PROPERTY & CASUALTY GUARANTY FUND, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 3, 2006

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

Claimant represented by HONORABLE RICHARD WHIFFEN, Attorney at Law, Sikeston, Missouri.

Respondent No. 1 represented by HONORABLE CAROL L. WORLEY, and HONORABLE MELISSA ROSS-CRINER Attorneys at Law, Little Rock, Arkansas.

Respondent NO. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part, as modified and reversed in part.

OPINION AND ORDER

Respondent No. 1 appeals a decision of the Administrative Law Judge filed on May 25, 2005. On or about April 19, 2000, the claimant sustained a compensable injury in the course and scope of her employment with the respondent employer. The compensability of this injury is not disputed at this time. Accordingly, the respondent

carrier, Reliance National Insurance Company, has paid any and all appropriate benefits associated therewith, including 16% permanent physical impairment rating to the claimant's body as a whole. In addition, the claimant has been found to be permanently and totally disabled as a consequence of her compensable injury, and the Second Injury Fund has accepted liability for all wage loss benefits above the claimant's permanent physical impairment rating.

In an opinion filed on May 25, 2005, the Administrative Law Judge found that the claimant is entitled to a 25% permanent physical impairment rating versus the 16% already accepted and paid by the respondent carrier. From this finding, the respondents appeal.

A carefully conducted de novo review of this claim in its entirety reveals that the Administrative Law Judge erred in assigning the claimant a 25% permanent physical impairment rating, which is 9% above that already accepted by the respondent carrier. Therefore, and for the reasons set forth below, the decision of the Administrative Law Judge should be modified to reflect a 16% permanent physical impairment rating to the claimant's body as a whole.

Suffice it to say that the procedural history surrounding the claimant's injury is long and somewhat complicated; the end result being that compensability of this claim has been accepted and all appropriate benefits to date have been paid. Therefore, the sole remaining issue on appeal is the degree of permanent physical impairment to which the claimant is entitled. The parties have stipulated that the claimant's healing period ended on March 28, 2002. Subsequently, the claimant has been evaluated for permanent physical impairment by three qualified physicians. First, on April 25, 2002, Dr. Gordon W. Eller, an orthopedic specialist who performed the claimant's lumbar fusion surgeries, assessed the claimant with a 16% permanent physical impairment rating to the body as a whole based strictly upon the AMA Guides to the Evaluation of Permanent Impairment, 4th edition. However, in a clinic note dated May 9, 2002, Dr. Eller stated the following:

... I agree that the strict guide line rating would be 16% partial permanent disability of the lumbar spine and thus the body as a whole because of related considerable discomfort and continued leg pain in spite of the attempts to fix her. I think her rating of 16% is really 35% partial permanent disability of the

lumbar spine and that is the body as a whole.

The above statements reflect that Dr. Eller was taking pain into consideration when opining that the claimant was actually entitled to a 35% partial permanent physical impairment rating to the body as a whole, rather than a 16% rating. Several sections of the Arkansas Code Annotated, including §11-9-102(16)(A)(ii), clearly state that for purposes of assigning physical or anatomical impairment, medical providers (including physicians), administrative law judges, the Commission, and the courts may not consider complaints of pain. Moreover, 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. See, Ark. Code Ann. §11-9-102(16)(A)(ii). (Emphasis added) Objective findings are defined by Ark. Code Ann. §11-9-116(A)(i), as those findings which cannot come under the voluntary control of the patient.

Therefore, Dr. Eller's suggestion that 35% permanent physical impairment is the more appropriate rating for the claimant is clearly not in compliance with Arkansas

Workers' Compensation Law. Further, as previously mentioned, the respondent carrier accepted Dr. Eller's correct assessment of 16% permanent physical impairment to the claimant's body as a whole, and has paid benefits based thereupon.

Second, the record reflects that on April 20, 2004, the claimant was examined by Dr. Joseph C. Boals, III, who assessed her with a permanent physical impairment rating of 44% to the body as a whole. When calculating this impairment rating, however, Dr. Boals attributed 17% to the claimant's multilevel surgical procedures and residuals, and the remainder of the rating to the claimant's loss of range of motion and chronic pain syndrome. In addition, Dr. Boals' rating was determined using the AMA Guides, 5th edition. According to Rule 34 of the Arkansas Workers' Compensation Commission Rules, the Commission has adopted the AMA Guides, 4th edition, exclusive of any sections which refer to pain and straight leg raising tests, or range of motion tests, when making physical or anatomical impairment ratings to the spine. Therefore, Dr. Boals' April 20, 2004, assessment of the claimant's permanent physical impairment is clearly erroneous, and is of little to no value in terms of this

appeal. However, a comparison of Dr. Boals' rationale for determining the claimant's degree of permanent physical impairment reveals that, other than his erroneous inclusion of range of motion and pain factors, he was in agreement with Dr. Eller concerning the basis for his opinion. Essentially, utilizing Table 15-7 of the Guides, 5th edition, Dr. Boals assigned the claimant with 17% physical impairment based upon the multiple operations that she had undergone to her lumbar spine. Dr. Eller used Table 75 of the 4th edition, which is the predecessor to Table 15-7, and which, in comparison, is exactly the same in terms of the percentages assigned for each listed condition. Utilizing the correct table (Table 75 of the 4th edition), 12% is given for the claimant's first surgery, which was a lumbar spinal fusion with decompression and residuals. Because two levels, L4-L5 and L5-S1, were involved in this first operation, an additional 1% is added according to Table 75 for the second level, bringing the total for the first operation to 13%. The claimant's second surgery was an extension of the original fusion to L3-L4. Thus, according to Table 75 of the 4th edition, an additional 2% is added for the second surgical procedure, and an additional 1% is

added for the additional level. These percentages added together equal a 16% permanent physical impairment rating to the claimant's body as a whole. Dr. Boals obviously erred in assigning the claimant a 17% permanent physical impairment rating because he apparently considered the claimant's first surgical procedure to be a first and second operation, since two levels were involved. Notwithstanding that Dr. Boals used the wrong edition of the AMA Guides upon which to base his rating, had he used the correct calculations, his rating and Dr. Eller's rating would have been identical.

Finally, on July 8, 2002, the claimant was evaluated and assessed with a 10% permanent physical impairment rating by Dr. John D. Brophy. Dr. Brophy considered pre-existing conditions which were aggravated by the claimant's compensable injury when making his assessment. Suffice it to say that the Administrative Law Judge was correct in stating that Dr. Brophy's assessment of the causal relationship of the claimant's impairment is inconsistent with Arkansas law. Furthermore, the respondent carrier accepted the 16% impairment as assigned by Dr. Eller. Therefore, Dr. Brophy's impairment rating is inconsequential to this review, other than the fact that he,

like Dr. Eller, chose to use Table 75 of the 4th edition of the Guides in order to make this determination.

It is well established that injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). In the present claim, the Administrative Law Judge stated that the respondent carrier's argument that the Arkansas Legislature has eliminated range of motion tests as a basis for physical or anatomical impairment ratings to the spine by definition, is partially flawed. More specifically, the Administrative Law Judge reasoned that, although the Legislature has eliminated range of motion tests as objective findings when they come under the voluntary control of the patient/claimant (or, active range of motion tests), this is not to say that passive range of

motion tests, where the physician manipulates the claimant's range of motion during testing, cannot be considered objective findings. This is only partially correct. In Duke v. Regis Hairstylists, 55 Ark. App. 327, 935 S.W.2d 600 (1996), the Court stated the following:

In passing Act 796 of 1993, which made far-reaching changes in Arkansas workers' compensation law, the legislature made it plain that the provisions of that law were to be strictly construed by the Commission and the courts.

The Court, quoting from the General Assembly, stated further:

In the future, if such things as the statute of limitations (which was the primary issue in Duke), the standard of review by the Workers' Compensation Commission or the courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

According to the above, Arkansas Workers' Compensation Law must be strictly construed. Furthermore,

pursuant to Ark. Code Ann. §§11-9-519(h), 11-9-521(h), and 11-9-522(g), 11-9-522(g), the Commission is mandated to adopt an impairment rating guide to be used in the assessment of anatomical impairment. This guide is subject to review by the General Assembly. In keeping with this mandate, the Commission has adopted the AMA Guides to the Evaluation of Permanent Impairment, 4th edition, which was published in 1993. (See, Rule 34 of the Arkansas Workers' Compensation Rules.) Moreover, the above cited statutes specifically state that this guide shall not include pain as a basis for impairment. In addition, according to Ark. Code Ann. §11-9-102(16)(A)(ii), for the purpose of making physical and anatomical impairment ratings to the spine, straight leg raising tests of range of motion tests shall not be considered objective findings. In keeping with these requirements, and as previously mentioned, Rule 34 states that the AMA Guides, 4th edition, is to be used exclusive of any sections that refer to pain, straight leg raising tests, and range of motion tests when making physical impairment ratings to the spine. Also, as previously mentioned, objective findings are those which cannot come under the voluntary control of the patient/claimant. Since the passage

of Act 796 of 1993, the courts have carved out a narrow exception concerning range of motion testing that can be considered objective findings. For example, in Hayes v. Wal Mart Stores, 71 Ark. App. 207, 29 S.W.3d 751 (2000), the Court found that a range of motion test performed on the claimant's shoulder was not one where the limb was moved *actively* by the claimant, but rather, the claimant's limb was moved *passively* by the examiner. Because this type of range of motion test can be "objectively and consistently measured by qualified physicians with reasonable accuracy and reproducibility", the Court found it this constituted objective findings. However, this narrow finding does not automatically extend to range of motion testing regarding the spine, which has been clearly statutorily excluded from consideration in terms of objective findings. Therefore, although the Administrative Law Judge was correct that range of motion testing can be considered objective findings in some specific instances, at present this does not apply to impairment ratings of the spine. And as we read the statute, we are clearly prohibited by Ark. Code Ann. §11-9-102(16) (A) (ii) from extending the Court's holding in Hayes to cases involving permanent impairment to the spine.

Finally, upon being advised of his error in using the 5th edition of the AMA Guides, in a letter dated June 30, 2004, Dr. Boals reassessed the claimant's impairment rating using the 4th edition. Utilizing the DRE model (or, Injury Model), Dr. Boals placed the claimant in a level V category, and assigned her with a 25% impairment rating. The Administrative Law Judge accepted this impairment rating, stating that the claimant's hardware constituted objective findings of diminished range of motion. The Administrative Law Judge erred for the following reasons. First, although there is no statutory preclusion for using the DRE Model of the Guides, as opposed to the Range of Motion or Functional Model (which utilizes Table 75), generally the latter is used for spine impairment ratings because it tends to provide a more pertinent and precise measure of spinal impairment for purposes of workers' compensation claims. The Guides, itself, gives us guidance concerning which model to use for assessment of spine impairment ratings, as follows:

The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p. 108). That model, for instance, would be applicable to a

patient with a herniated lumbar disk and evidence of nerve root irritation. If none of the eight categories of the Injury Model is applicable, then the evaluator should use the Range of Motion Model.

Further, the Guides caution that all persons evaluating impairments should use either one or the other approach in making the final impairment estimate. It further states that "If one component were used according to Guides recommendations, then a final impairment estimate using the other component usually would not be pertinent or germane."

Dr. Boals justified his revised impairment rating of 25% based upon the following statements:

The impairment for the multilevel structural compromise with ongoing neurologic or motor compromise is 25% impairment to the whole person. This is supported by DRE Lumbosacral Category V, page 102 and by Table 70, page 108. Structural compromise would be the multilevel fusion performed. Ongoing neurologic compromise is the radiculopathy evidenced by ongoing constant tingling in the back of her legs with numbness in the anterior leg bilaterally. When using the Fourth edition in this manner the impairment rating is not as well documented as in the newer Fifth Edition. No provision is made for the loss of motion present or the chronic pain syndrome which are significant functional losses.

Clearly from this explanation, Dr. Boals was again attempting to consider pain, and to some degree, range of motion in his assessment of the claimant's impairment. Further, assuming *arguendo* that the DRE Model was the most appropriate model by which to assess the claimant's impairment, Dr. Boals placed the claimant into the incorrect category. According to the Guides, in order to fall under Category V of this model, significant lower extremity impairment must be indicated by atrophy or loss of reflexes, numbness with an anatomic basis, or electromyographic findings. Upon his examination of the claimant on July 8, 2002, Dr. Brophy found that the claimant suffered from residual back and leg pains status post three level posterior lumbar interbody fusion without definite clinical evidence of radiculopathy. Since that examination, the claimant has received a morphine pump to help manage her chronic pain. Other than muscle spasms, there have been no objective observations of neurologic deficits reported by the claimant's medical providers since her last surgery. Therefore, there is no objective evidence which supports Dr. Boals' most recent assessment of claimant's impairment.

A review of the Range of Motion Model, which implements the Functional Model, reveals that this model is the most accurate in terms of describing the claimant's current functional impairment. More specifically, due to the specificity of the claimant's spine disorder, and because the Functional Model takes into consideration the claimant's multilevel fusion surgeries and her residual symptoms, such as muscle spasms, without considering the claimant's pain and range of motion, this model provides a more precise estimate of the claimant's true physical impairment. Therefore, Dr. Eller's assessment of the degree of permanent physical impairment that the claimant sustained due to her compensable injury, which, of course, he derived using the Functional Model, should be given more weight than that of Dr. Boals. Furthermore, because it offers the most accurate assessment, the Commission should utilize the Functional Model in determining the claimant's degree of permanent physical impairment.

Based on the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that she is entitled to a 25% permanent physical impairment rating. Rather, the evidence preponderates in favor of the claimant

receiving a 16% permanent physical impairment rating as assigned by Dr. Eller. Therefore, the Administrative Law Judge's decision should be modified to reflect that the claimant is awarded a 16% permanent physical impairment rating to the body as a whole. Moreover, the respondents have already paid attorney fees based upon this 16% permanent physical impairment. Therefore, the award of additional attorney's fees is hereby reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

KAREN H. MCKINNEY, Commissioner