

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511348

EULIS BOYD,  
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,  
EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,  
TPA

RESPONDENT

OPINION FILED SEPTEMBER 16, 2008

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

Claimant represented by the HONORABLE FREDERICK S.  
SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE CURTIS L.  
NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the  
Administrative Law Judge filed June 14, 2007. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted. (sic)
3. Claimant has not proved by a preponderance of the evidence that he is entitled to permanent partial disability benefits based upon, *inter alia*,

an impairment rating that is supported by objective findings.

4. The AMA Guides do not support the assessment of an impairment rating based on the objective and measurable medical findings in the record.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the June 14, 2007 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion denying the claimant any benefits for anatomical impairment. From a de novo review of the record, I find that the claimant is entitled, as a matter of law, to an award of permanent disability benefits for anatomical impairment.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and conclusions contained in that decision are now the majority opinion. ITT/Higbie v. Gilliam, 34 Ark. App. 154, 807 S.W.2d 44 (1991).

The facts of this case are not in dispute. The claimant is a 69 year old gentleman who worked as a maintenance supervisor for Wal-Mart. On March 22, 2005, he was pulling a vacuum motor from a floor scrubber when the motor accidentally began running. The motor had a jagged fan blade on it and that blade cut the thenar muscle in his right hand, resulting in a jagged slice two centimeters deep. This injury caused significant limitations in the claimants's ability to use his

dominant right hand. He cannot open bottles, he cannot use his woodworking tools, and he can no longer write.

For the permanent damage to his hand, the claimant has been given three different impairment ratings. Firstly, the claimant was referred by Dr. Peter Tang, an orthopedic surgeon, to Kenneth Ness of Trinity Rehabilitation for a formal evaluation to determine permanent restrictions and permanent impairment. After reviewing the test results, Dr. Tang gave the following impairment rating:

According to the AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, Mr. Boyd has suffered a 5% whole person impairment. He had sustained open injury to the right thumb with muscle laceration. He is back working. However, he still has some residual stiffness and weak pinch. According to he (sic) evaluation by the therapist on 7/26/05, he has 1% impairment from IP joint stiffness according to Figure 10, page 26, 2% impairment from MCP joint stiffness according to Figure 13, page 27 and 3% impairment from CMC opposition stiffness according to Figure 14, page 28. This adds to 6% impairment of the thumb, which converts to 2% of the hand and 2% impairment of the upper extremity, Table 1 and 2, pages 18 and 19. Because of the thenar muscle injury, he has weakness of the pinch documented on the pinch meter. According to Table 34, page 65 and Table 18, page 58, this results in 7% upper extremity

impairment. The two combines (sic) to 9% impairment of the upper extremity which converts to 5% whole person impairment according to Table 3, page 20.

Dr. Michael M. Moore, orthopedic surgeon and hand specialist, assessed the claimant's permanent impairment, as follows:

It is my opinion Mr. Boyd has reached his maximum medical improvement following the right thumb laceration. He does have weakened pinch strength, which is most likely related to injury to the thenar muscle.

It is my opinion Mr. Boyd's right hand or thumb strength would not improve following any further therapy or surgery.

I reviewed the impairment rating performed by Dr. Peter Tang on 08/26/05, which appears to be reasonable for this type of injury. It is my opinion Mr. Boyd has an impairment of 10% to his right hand following the injury. This statement is made within a reasonable degree of medical certainty.

The physical therapist, who performed the measurements for Dr. Tang, also estimated a 13% impairment to the body as a whole, but said that his rating was subject to review and approval of Dr. Tang.

There are no medical opinions of record indicating that the claimant's injury did not result in permanent anatomical impairment.

There are a number of statutory provisions which must be considered when determining the existence and extent of permanent impairment under the Act. However, the only one in dispute is Ark. Code Ann. §11-9-704(c) (1) (B), which provides:

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. (emphasis added)

In Singleton v. City of Pine Bluff, 97 Ark. App. 59, 244 S.W.3d 709 (2006), the Arkansas Court of Appeals interpreted Ark. Code Ann. §11-9-704(c) (1) (B) in a case involving a police officer who had suffered a work related gunshot to his ankle. As a result, the claimant was left with bullet fragments in his ankle which affected the mobility of his ankle joint. The claimant's treating physician assessed an 8% impairment based on his antalgic gait. The Commission concluded that the claimant could not be awarded any benefits for permanent impairment because the findings upon which the impairment was based were non-objective findings. Citing Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118,

975 S.W.2d 857 (1998), the Court reversed the Commission decision holding that there is no requirement that medical evidence of impairment be based solely or expressly on objective findings. According to Singleton, impairment ratings can be based, in part, on non-objective criteria as long as the impairment is "supported" by objective findings. The Court considered the observed bullet fragments to be sufficient objective evidence to support a permanent impairment rating which was arrived at by considering the subjective findings of antalgic gait and loss of mobility.

The case at hand is analogous to Singleton and requires the same result. The claimant, in this case, presents with an observed objective finding of a jaggedly sliced muscle in his right hand. This injury has, without question, resulted in significant dysfunction in that appendage from loss of mobility and grip strength. His ratings of permanent impairment are based, in part, on the subjective findings of loss of mobility and grip strength. But because the impairment is supported by the presence of an objective muscle laceration, it is permissible to use the subjective criteria in assessing permanent impairment. Swift-

Eckrich, Inc. v. Brock, supra.; Singleton v. City of Pine Bluff, supra.

While the Administrative Law Judge acknowledged the existence of objective findings, he denied the claimant's entitlement to permanent impairment benefits saying that his ratings were "based on" the subjective findings of loss of range of motion and grip strength and that impairment rating must be "based on" objective findings. Clearly, the Administrative Law Judge misinterpreted the holdings in Swift-Eckrich, Inc. and Singleton which required only that permanent impairment be "supported by", but not "based on" objective findings.

In my opinion, the decisions of the Arkansas Court of Appeals and Supreme Court are not merely advisory in nature. They are not optional light reading, to be disregarded on a whim, but legal precedents which we are obligated to follow. In this case, the majority has affirmed and adopted an opinion of an Administrative Law Judge which is in conflict with recent decisions of our higher courts and a decision which is, on its face, invalid because of this fact. If the majority had applied the facts of this case to the clear and cogent mandates of the Court of Appeals

decisions in Swift-Eckrich, Inc. and Singleton, the claimant would have been found, as a matter of law, to be entitled to the benefits requested. Instead, the majority has chosen to disregard the law. This is the very definition of reversible error.

For these reasons, I must respectfully dissent from the majority opinion.

---

PHILIP A. HOOD, Commissioner