

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H000295

TAQUILA GREEN, EMPLOYEE	CLAIMANT
HALL MFG., LLC, EMPLOYER	RESPONDENT
ACCIDENT FUND GEN. INS. CO., CARRIER	RESPONDENT

OPINION FILED APRIL 22, 2021

Hearing before Administrative Law Judge O. Milton Fine II on April 8, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Andy L. Caldwell, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Karen H. McKinney, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 8, 2021, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on March 1, 2021. The Prehearing Order entered on that date pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. After an amendment of Stipulation No. 4 at the hearing, they are the following, which I accept:

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer/employee/carrier relationship existed on September 30, 2019, when Claimant sustained a compensable injury to her bilateral wrists.
3. Respondents accepted this claim as compensable and paid certain benefits pursuant thereto, including \$7,695.00 in permanent partial disability benefits.
4. Respondents have controverted Claimant's entitlement to additional permanent partial disability benefits.
5. Claimant's average weekly wage of \$806.44 entitles her to compensation rates of \$538.00/\$405.00.

Issues

The parties discussed the issue set forth in Commission Exhibit 1. After an amendment of the second at the hearing, the following were litigated:

1. Whether Claimant must submit to another functional capacity evaluation to determine the extent of her impairment.
2. Whether Claimant is entitled to additional permanent partial disability benefits in connection with her stipulated compensable left wrist injury.
3. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that she sustained compensable injuries to her left and right wrists in the course and scope of her employment on September 30, 2019, when she fell.
2. The claimant has treated with Dr. Richard Wirges and another doctor.
3. On August 12, 2020, Dr. Wirges assigned the claimant a twenty-one percent (21%) left upper extremity rating.
4. Respondents have controverted the twenty-one percent (21%) impairment rating to the left upper extremity.
5. Claimant contends that she is entitled to the payment of permanent partial disability and attorney's fees.
6. All other issues are reserved.

Respondents:

1. Respondents contend that the claimant sustained a compensable injury on September 30, 2019, for which she has received all benefits to which she is entitled.
2. The claimant was ultimately treated for her compensable injuries by Dr. Wirges, who performed surgery on the claimant's left wrist for a triangular fibrocartilage tear on January 8, 2020. Dr. Wirges found that the claimant had reached maximum medical improvement as of July 9, 2020. He also

advised that he had nothing else to offer the claimant and referred her to one of his partners, Dr. Jeanine Andersson.

1. Dr. Andersson examined Claimant on October 19, 2020, and recommended additional testing. Respondents have attempted to schedule this testing, but the claimant refuses this treatment.
2. Without re-examining her, Kristen Wagner, PA, assessed Claimant with a twenty-one percent (21%) impairment to the left upper extremity using subjective grip strength and active range of motion testing from the functional capacity evaluation (“FCE”) that the claimant did undergo. PA Wagner also assessed a zero percent (0%) impairment for the claimant’s right upper extremity using the same FCE results.
3. Respondents have requested an examination by the Functional Testing Centers to determine the proper impairment rating for both Claimant’s upper extremities using objective medical findings as required by the Arkansas Workers’ Compensation Act. The claimant has refused to undergo such testing.
4. Respondents have accepted and paid a ten point three eight percent (10.38%) impairment to the upper extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, I hereby make the following

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findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704

(Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The evidence does not preponderate that the twenty-one percent (21%) impairment rating to the left upper extremity that Claimant was assigned was based on objective and measurable findings.
4. The evidence preponderates under Ark. Code Ann. §§ 11-9-511 & 11-9-811 (Repl. 2012) that Claimant should submit to an evaluation by Dr. Barry Baskin—or another qualified practitioner upon which the parties can agree—for the purpose of determining whether she has sustained permanent impairment to her left upper extremity and, if so, to what degree under the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993). In so doing, such practitioner shall base any impairment rating(s) on objective and measurable findings.
5. Because of Findings/Conclusions 3 and 4, *supra*, the remaining issues—whether Claimant is entitled to additional permanent partial disability benefits and a controverted attorney's fee—are not yet ripe and will be considered reserved.

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

Along with the Prehearing Order discussed above, the exhibits admitted into evidence in this case were Claimant's Exhibit 1, a compilation of her medical records, consisting of one index page and 28 numbered pages thereafter; Respondents' Exhibit 1, another compilation of Claimant's medical records, consisting of two index pages and 262 numbered pages thereafter; and Respondents' Exhibit 2, non-medical records, consisting of one index page and seven pages thereafter.

Adjudication

A. Permanent Partial Disability Benefits

Introduction. In this proceeding, Claimant is seeking a higher impairment rating than that accepted by Respondents, and permanent partial disability benefits thereto, in connection with her stipulated compensable left wrist injury of September 30, 2019. In particular, she is asking that the Commission find that she is entitled to the twenty-one percent (21%) impairment rating to the left upper extremity that was assigned to her. In turn, Respondents have conceded that Claimant has some degree of permanent partial impairment, accepting and paying permanent partial disability benefits equal to an impairment to the upper extremity of ten point three eight percent (10.38%). But they deny that the twenty-one percent (21%) rating is valid, contending that it was not based on objective and measurable findings. They assert that Claimant should undergo a

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second FCE “to determine the proper impairment rating,” but allege that Claimant has refused to undergo such testing.

Standards. Permanent impairment, generally a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). Pursuant to Ark. Code Ann. § 11-9-522(g) (Repl. 2012), the Commission adopted the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993) (hereinafter “AMA Guides”) as an impairment rating guide. See AWCC R. 099.34. A determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2012). “Objective findings” are “those findings which cannot come under the voluntary control of the patient.” *Id.* § 11-9-102(16)(A)(i). Permanent benefits are to be awarded only following a determination that the compensable injury is the major cause of the disability or impairment. *Id.* § 11-9-102(4)(F)(ii)(a). “Major cause” is defined as “more than fifty percent (50%) of the cause,” and a finding of major cause must be established by a preponderance of the evidence. *Id.* § 11-9-102(14). This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947). Any medical opinion must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B) (Repl. 2012).

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A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Discussion. Claimant's twenty-one percent (21%) impairment rating was assigned by Kristen Wagner, PA, PASUP, on August 12, 2020. The report that she authored concerning this reads:

To Whom It May Concern:

Ms. Taquila Green was last seen in clinic on July 9, 2020 by Dr. Wirges at which point he found that she was at maximum medical improvement from her left wrist arthroscopy with synovectomy and peripheral TFCC repair. He recommended that the right side be evaluated for a second opinion for the right hand pain. She completed a functional capacity exam (FCE) on July 22, 2020 with reliable effort. This exam found that "Ms. Green demonstrated the ability to perform work in the median classification of work as defined by the US Department of Labor's guidelines over the course of a normal 8-hour workday." (FCE, p. 3). Using the measurements performed in the FCE, she did demonstrate mildly decreased motion if [sic] the left wrist and upper extremity through supination and pronation – 4% (Figure 29, p. 38). Repeat grip strength testing was also performed as a component of the FCE (pp. 12, 15, 19). These measurements were averaged for the left hand, revealing 24.6 kg of force with the nondominant left hand. This is representative of decreased strength of the nondominant hand for a female of her age (Table 32, p. 65). Based on the normative values she has a 12% loss of left hand grip strength which is equivalent to a 10% left upper extremity impairment (Table 34, p. 65). Motion and strength of the right upper

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extremity were found to be within normal limits. Left upper extremity impairments for motion and strength were combined revealing a 21% left upper extremity impairment, equivalent to a 13% whole person impairment (Combined Values Chart, p. 322; Table 3, p. 20).

This shows that Wagner rated Claimant based on FCE findings concerning (1) range of motion (both supination and pronation) and (2) grip strength.

With respect to the range-of-motion testing, the July 22, 2020 FCE report states:

The client was evaluated using a hand held goniometer. This device is designed to quantify an individual's range of motion (ROM) for the spinal column and other joints. These values are then compared to recognized population norms for AROM. Inconsistent end range points with repeated trial testing results in invalid ROM test results according to AMA Guidelines . . . Ms. Green demonstrated significant limitations with the [e]ft wrist motion as well as limited pronation and supination . . . [p]ost - test, Ms. Green demonstrated no changes in movement ROM or quality of movement when comparing her post-test AROM with that noted at the onset of testing.

In *Burks v. RIC, Inc.*, 2010 Ark. App. 862, 2010 Ark. App. LEXIS 867, the Arkansas Court of Appeals wrote:

While the statute and [C]ommission rules require that impairment ratings be based upon the AMA Guidelines, Fourth Edition, not everything in the Guidelines is admissible under the Act. Arkansas Code Annotated Section 11-9-704 requires that the extent of physical impairment be supported by objective and measurable physical findings. Objective findings are those which cannot come under the voluntary control of the patient, and specifically exclude pain, straight-leg-raising tests, and range-of-motion tests. In other words, although pain, **active range-of-motion**, and straight-leg-raising tests are criteria used in the Guidelines, **they may not be used in Arkansas for assessment of impairment in workers' compensation cases.**

(Emphasis added) Consequently, in determining the extent of Claimant's impairment in this case for purposes of determining her entitlement to permanent partial disability benefits, active range-of-motion tests cannot be utilized.

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Nothing in the FCE report shows whether the range-of-motion testing employed active or passive range of motion. I am forbidden to engage in speculation and conjecture. See *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). However, I note that Claimant testified that when the movement of her wrists was tested, she “was in control of everything.” Moreover, the AMA Guides provide that “[t]he tables of Chapter 3 [which Wagner stated she used] are based on the *active* range of motion, which is determined with the patient’s full effort and cooperation.” AMA Guides at 14 (emphasis in original). The Guides further state:

In evaluation of restriction of motion of the hand and upper extremity, the full range possible of *active* motion should be carried out by the subject and measured by the examiner . . . The examiner may check the range of *passive* motion by applying moderate pressure to the joint. However, in the *Guides*, the range of *active* motion takes precedence.

Id. at 15 (emphasis in original). Thus, I am unable to find that this portion of the impairment rating is valid.

As for the grip-strength testing, the FCE report reads:

The client was evaluated using the JAMAR grip strength testing system using a digital dynamometer. This system is designed to quantify an individual’s grip strength in a standard grip position and to compare such strength to recognized population norms. Test results one or more standard deviations above or below the norm indicate a high or conversely low grip strength. Coefficient of Variation (C.V.) as well as Rapid grip testing are calculated and performed to assess for consistency of effort. Studies on rapid grip indicate that the results should be +/- 15% of her standard position test results . . . Ms. Green completed all trials with no visible pain behavior but did report increased pain in both hands with the right greater than the left.

The Commission has declined in the past to find that grip strength tests are objective. See, e.g., *Le v. Simmons Foods, Inc.*, 2004 AR Wrk. Comp. LEXIS 215, Claim No.

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E815277 (Full Commission Opinion filed July 19, 2004). There is nothing in the record from which to find that the grip strength testing employed was objective in nature. To the contrary, Claimant testified as follows:

Q. And part of this test tests your ability to grip. Do they have you gripping things with your hands?

A. Yes.

Q. And you were in control of that gripping with your hands, correct?

A. Yes.

Consequently, I cannot find that this portion of the rating was valid, either. The evidence does not preponderate that the twenty-one percent (21%) impairment rating to the left upper extremity that Claimant was assigned was based on objective and measurable findings.

The Commission may determine its own impairment rating under the AMA Guides, rather than simply assessing the validity of the ratings that have been assigned. *Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003). However, after reviewing the evidentiary record, I find that I am unable to award a rating under the Guides.

Respondents have instead asked that the Commission direct that Claimant submit to another FCE in order to determine the nature of her impairment. Claimant objects to this. In addressing this issue, Ark. Code Ann. § 11-9-511 (Repl. 2012) provides:

- (a) An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified **physician**, designated or approved by the Workers' Compensation Commission, as the Commission may require from

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time to time if reasonable and necessary.

- (b) The places of examination and treatment shall be reasonably convenient for the employee.
- (c) Such physician as the employee, employer, or insurance carrier may select and pay for may participate in the examination if the employee, employer, or insurance carrier so requests.
- (d) In cases where the commission directs examination and treatment, proceedings shall be suspended, and no compensation shall be payable for any period during which the employee refuses to submit to examination and treatment or otherwise obstructs the examination or treatment.
- (e) Failure of the employee to obey the order of the commission in respect to examination or treatment for a period of one (1) year from the date of suspension of compensation shall bar the right of the claimant to further compensation in respect to the injury.

(Emphasis added) *See generally Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997)(Arey, J., concurring). Further, Ark. Code Ann. § 11-9-811

(Repl. 2012) states in pertinent part:

Upon its own initiative at any time where compensation payments are being made without an award, the Workers' Compensation Commission may and in any case where the right to compensation has been controverted or where payments of compensation have been suspended, or where an employer seeks to suspend payments made under an award, or on application of an interested party, the commission shall make such investigation, cause such medical examination to be made, hold such hearings, and take such further action as the commission deems proper for the protection of the rights of all parties.

If the proposed evaluation is determined to be reasonable and necessary, under § 11-9-511(a) it is for the Commission to designate or approve a physician. *See King v. Willow Oaks Acres*, 2001 AR Wrk. Comp. LEXIS 658, Claim No. E903202 (Full Commission Opinion filed January 25, 2001). After careful consideration of this matter,

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I find that it is reasonable and necessary under the above-quoted statutes for Claimant to submit to an evaluation by Dr. Barry Baskin—or another qualified practitioner upon which the parties can agree—for the purpose of determining whether she has sustained permanent impairment to her left upper extremity and, if so, to what degree under the AMA Guides. In so doing, such practitioner shall base any impairment rating(s) on objective and measurable findings.

Because of the foregoing, the remaining issues—whether Claimant is entitled to additional permanent partial disability benefits and a controverted attorney’s fee—are not yet ripe and will instead be considered reserved.

CONCLUSION

Judgment is hereby entered in accordance with the findings of fact and conclusions of law set forth above.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge