

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H204763

KIRKLIN V. THOMPSON, EMPLOYEE

CLAIMANT

VS.

**DEN-TEX CENTRAL, INC.
d/b/a DENNY'S CORPORATION, EMPLOYER**

RESPONDENT

**WESCO INSURANCE COMPANY, CARRIER /
AMTRUST NORTH AMERICA, TPA**

RESPONDENT

OPINION FILED FEBRUARY 13, 2024

Hearing before Administrative Law Judge, James D. Kennedy, on the 5th day of December, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant is represented by Beau Duty and Elizabeth Duty, Attorneys-at-Law, Sherwood, Arkansas.

Respondents are represented by William C. Frye, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 5th day of December, 2023, and the parties stipulated that there was an employee/employer relationship that existed on April 30, 2022, when the claimant sustained a compensable injury to his left middle index finger. At the time of the hearing, the respondent provided that the claimant had a twenty-six percent (26%) rating to the finger in question and that a check was being sent. In addition, a sum of \$4,702.00 had been paid in disability benefits. There was no disagreement as to these statements. After a discussion, the claimant contended at the time of the hearing that after the twelve (12) weeks when he received temporary total disability, he was unable to work a full forty-hour shift and was consequently entitled to temporary partial disability, which started on or about May 1, 2022, and ran up and through the end of

January, and possibly longer, based upon the upcoming testimony of Dr. Williams on the day of the hearing. The parties were unable to agree on the average weekly wage. The claimant also contended he was still within his healing period, due to the fact his treating doctor had refused to see him and he was entitled to additional medical benefits, plus attorney fees. A copy of the Prehearing order was marked “Commission Exhibit 1” and made part of the record without objection. The Order provided that the parties stipulated that the Arkansas Workers’ Compensation Commission had jurisdiction of the within claim and that an employer/employee relationship existed on April 30, 2022, the date of the admitted compensable injury to the middle finger.

The claimant’s and respondents’ responses were set out in their respective responses to the prehearing questionnaire and made a part of the record without objection. The witnesses consisted of Dr. Victor Williams, Juan Jose Jackson, and Kirklin Thompson, the claimant. In addition, the claimant submitted a post-hearing brief and the respondent submitted a response and these are blue-backed and made part of the record. From a review of the record as a whole, to include medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Arkansas Code Annotated §11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on April 30, 2022, the date of the admitted, compensable injury to the claimant’s middle index finger on the left hand.

3. The claimant's average weekly wage is found to be \$688.06, sufficient for a temporary total disability/permanent partial disability weekly rate of \$445.00 and \$334.00, respectively.
4. The claimant reached MMI on January 10, 2023, and sustained a twenty-six percent (26%) permanent partial disability rating to the middle finger of the left hand.
5. The claimant had received a disability payment of \$4,702.00 based upon a lower average weekly wage. That based upon an average weekly wage of \$688.06, the claimant has satisfied the required burden of proof that he is entitled to temporary total disability benefits of \$5,340.00.00, less what he has already received and the applicable attorney fees as spelled out by the Arkansas Workers' Compensation Act.
6. That based upon an average weekly wage of \$688.06, the claimant has satisfied the required burden of proof that he is entitled to permanent partial disability payment benefits of \$3,213.08, less what he has already received and the applicable attorney fees as spelled out by the Arkansas Workers' Compensation Act.
7. That the claimant has failed to satisfy the required burden of proof that he is entitled to additional medical by the respondent.
8. The claimant is entitled to attorney fees pursuant to Ark. Code Ann. §11-9-715 and the findings of an additional average weekly wage as spelled out above. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809.
9. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The Prehearing Order, along with the prehearing questionnaires of the parties were admitted into the record without objection. The claimant submitted two (2) exhibits which were admitted without objections. A previous deposition of the claimant was not admitted since the deposition was more involved with an EEOC claim filed by the claimant, the Commission clearly has no jurisdiction in regard to a EEOC claim, and the

claimant was available to testify in regard to his workers' compensation claim. The respondents submitted two (2) exhibits that were admitted without objection.

The initial witness called by the claimant was Dr. Victor Williams, a general and thoracic surgeon, licensed in the State of Arkansas. Dr. Williams originally saw the claimant in December of 2022, after the claimant suffered a fall at Barnhill's. In addition to treating multiple body parts that were injured related to the fall at Barnhill's, Dr. Williams also attempted to specifically treat the claimant's left hand to improve the range of motion. He opined that he felt the claimant still had some limited range of motion as a result of the injury to his finger that could be improved over time with additional therapy. He also felt the claimant had not reached maximum medical improvement due to a continuing limitation of the range of motion and associated pain, when he last saw the claimant in March. He felt that the claimant needed light-duty due to the type of work he performed at the restaurant and his opinion was based upon objective medical evidence. In regard to the claimant's later fall that occurred at Barnhill's, Dr. Williams stated "I thought it was -- more likely than not it was a result of the previous injury that he had to the finger and not at -- not as of the fall that he had in the restaurant. I think the fall exacerbated the injury to the finger." (Tr. 22-26)

On cross-examination, Dr. Williams admitted that although he had performed some surgeries on fingers, he had not performed the number of surgeries on hands that hand surgeon Dr. Grynwald had performed. Dr. Williams also admitted that if the claimant had come to him in regard to the deformity he presented with, he would have made a referral to a hand surgeon. He also admitted he was aware that Dr. Grynwald was a hand surgeon and had placed the claimant at maximum medical improvement but went on to

state the claimant had an issue with finger flexion and extension when he saw him. (Tr. 27-28) He also admitted that he would expect some type of limitation rating but that he would always want to improve the limitation if he could. (Tr. 29)

Dr. Williams was also questioned about seeing the claimant in January when he placed the claimant on light-duty, and that his later medical report of March 2023, when he again saw the claimant, provided that the claimant had spasms in his neck and back but made no mention about the finger. Dr. Williams testified he was aware of that, but thought that there were physical therapy notes at that time that concentrated on the finger as well. Dr. Williams also admitted that when he was referring to Trigger Point injections and the note mentioned starting physical therapy, he was referring to the claimant's back. He agreed the assessments on March 9 and again on March 28, as well as the assessment on April 6 made no mention of the finger. He also admitted the April 6 note mentioned that the claimant was feeling good with a good range of motion of the cervical and lumbar spine and that the claimant, "should slowly return to normal activity over the next few days. I will see him as needed." He agreed this was the last time he saw the claimant and the note made no provision to the finger. (Tr. 30-32)

Dr. Williams was then questioned about the claimant's slip and fall at the restaurant and the need for treatment of his finger. He responded, "You know, I think -- in the fall, I think that -- that he needed treatment for his neck, back, and finger at the same time." He opined that he felt the treatment sought was related to the slip and fall and the workers' comp. "I think the fall exacerbated the previous finger injury that he had." (Tr. 33)

On redirect, Dr. Williams admitted he treated the claimant's hand on multiple occasions with paraffin baths and some sort of needle treatment, with physical therapy. (Tr. 34)

Juan Jose Jackson was then called by the claimant. Mr. Jackson testified that he currently worked as a manager with Cracker Barrels Company in Hot Springs and had previously worked as the District Manager for Denny's, and the claimant worked at one of the seven (7) locations he supervised. He had several phone calls with the claimant, but did not remember the context of those calls. After some discussion, Mr. Jackson remembered the claimant brought in a note indicating that he needed not to work "because he had an accident somewhere. And I contacted Human Resources, and they said, 'Well, when he gets his full release, tell him he can come back to work,' and that's what I told him." He went on to testify he called the claimant and asked if he could return to work because they needed him and he never heard back from him. This conversation took place some time in January. He thought the claimant brought the doctor's note in, around January 12th or the 13th, roughly. (Tr. 35-40)

Mr. Jackson was aware that there was additional litigation involving an EEOC claim between the parties which involved discrimination-based issues. After a brief discussion about the EEOC claim, Mr. Jackson was asked what his relationship with the claimant had been and he responded as follows:

"It was very good. And to answer your question, at many locations, I had to be, if you will a mediator or sit down between a manger and an employee and discuss behavior issues or counseling issues, you know, and so I -- I thought I had a good work relationship with Kirk. Yes, there were several times we sat down to address several issues. I thought Kirk was a good hostess, and I told him that on many occasions, and we needed him Thursday, Friday, Saturday, Sunday, and he did a good job. (Tr. 44, 45)

Under cross-examination, Mr. Jackson testified he no longer worked for Den-Tex, but left on good terms. He admitted having a conversation with the claimant involving the fall at the local restaurant, which was not a work-related issue. Mr. Jackson also testified the claimant was to work as a hostess on Thursdays, Fridays, Saturdays, and Sundays, for ten (10) hours on those days, at the rate of \$15.00 an hour. He admitted he did not have the records of the hours worked in front of him, but the claimant called in and chose not to work. "I was given complete instructions to give 40 hours every week." (Tr. 46-47)

Under redirect-examination, Mr. Jackson testified that if the claimant had a therapy or doctor's appointment, he was allowed to go and admitted that he wasn't aware of the day to day coming and going due to the fact he supervised multiple locations. (Tr. 48-49)

The claimant was then called and testified he had gone to work for Denny's with experience as a cook, cut his finger in April, and after that it seemed his relationship deteriorated. He agreed he had worked 32.42 hours the first week due to the fact he was training but he was never trained. The records then provided that his biweekly work increased significantly with 91.85 hours and 80.25 hours, respectively, after the initial week when he was in cook training. Then his hours decreased significantly per the wage records. He testified, "I feel like once I -- you know, I cut my finger, I felt like I was expendable to them." (Tr. 50-52) He admitted falling at Barnhill's right around the first of December and that the respondents were aware of the injury. He stated that he was still under Dr. Grynwald's care, but started seeing Dr. Williams, because the treatment Dr. Grynwald provided was not working, He went to therapy on January 12th, and received a note he needed to be off work. He then talked to Mr. Jackson on January 18th, where he was told he no longer needed to come work until he talked to Bertha and obtained a

release from the doctor. He was then never called by Mr. Jackson. He attempted to call Bertha in regard to returning to work, but was told he needed to contact the insurance company and she didn't want anything else to do with it. (Tr. 53-54)

In regard to pay periods, they consisted of two (2) weeks, with the first pay period appearing to be from March 24, 2022, to April 6, 2022. The initial pay period provided the claimant worked 32.42 hours, with no records of the exact start date. (Tr. 56)

Under cross-examination, the claimant agreed it sounded about right that his injury occurred on April 30. He was asked about his work records and stated that from April 21 through May 4, he worked more than forty (40) hours per week. He agreed that from May 5 through May 18, he worked forty (40) hours each week, plus 7.78 hours of overtime which was after his injury. He denied being on light-duty at the time. He stated he went to the doctor after that. He was then moved to the hostess job after the surgery on his birthday which was June 28 and was not out of work for very long. "They were working me good even after I cut that finger, they were, and I just couldn't take it no more." (Tr. 56-57) The claimant agreed he was off work from June 1 through July 27, and that was probably the period when he received TTD benefits. He also agreed it sounded about right that he worked twenty-eight and one-half (28 ½) hours from August 3 through August the 10. He was then questioned about the hours he had worked being all over the place, and admitted he had his fall on December 6th, missing work from December 7th through December 14th. (Tr. 58-59) "I was going through therapy with the finger with Dr. Grynwald plus the injury happened." He was asked about therapy on June 15, April 24, June 28, July 5, 12,13, 18, and 20, August 3, 29, and 30, and admitted the therapy lasted between one (1) and one and a half hours (1-1/2). (Tr. 60)_ "If Dr.

Grynwald told me to go to therapy, I worked and I went to therapy.” Denny’s graciously supplied him a cab to go to and from therapy due to the medications he had been placed on. When he was transferred to the host position and light duty, he never received forty (40) hours again. (Tr. 61)

In regard to the slip and fall, the claimant admitted that he had injured his neck, back, shoulder, and finger, due to the fact that he attempted to brace himself when he fell and further contended that x-rays showed nothing else was wrong with his finger. (Tr. 62)

On re-direct, the claimant agreed he was working fewer hours while he was on light-duty. He also agreed that he received the same rate of pay as a hostess that he received as a cook.

The claimant introduced seventy (70) pages of medical records without objection. The claimant presented to Katelyn Saeler, OTR, on June 15, 2022, in regard to a Boutonniere deformity and a laceration of the left finger tendon, while under the treatment of Dr. Grynwald. Therapeutic exercises were performed to resolve decreased joint mobility and joint stability, along with decreased fine motor coordination, dexterity, and strength. (Cl.Ex.1, P.1-4) The claimant returned to occupational therapy on June 24th and June 28th, presenting to William Camden, OTR. (Cl.Ex.1, P. 5-15)

The claimant saw Dr. Grynwald on June 28th, and the report provided the claimant was seen in orthopedic urgent care three (3) weeks after an injury involving a tendon. The finger splint was removed, and the claimant was doing well with no sign of infection. There was no swelling of the finger or erythema. A slight hyperextension of the DIP joint was noted with persistence of the boutonniere deformity. Surgery had occurred on June 3, 2022. In regard to work restrictions, the report provided that the splint must be worn,

but there should be no gripping or lifting with the left hand. Claimant should reach maximum medical improvement approximately three (3) months after his surgery. (Cl.Ex.1,P. 25-28)

The claimant continued occupation therapy with William Camden, OTR, on July 5, 2022, who provided the claimant was right-hand dominant and was still reporting pain in the left long finger. Exercises were performed. (Cl.Ex.1,P. 20-24) The claimant again reported to Dr. Grynwald a few days later, on July 12, 2022. Dr. Grynwald opined that due to the tightness of the PIP joint, the claimant might require a revision and a possible Fowler tenotomy. A left boutonniere deformity was again noted. (Cl.Ex.1, P. 25-28)

The claimant continued with occupation therapy on July 12, 13, 18, 20, and August 3, 2022. (Cl.Ex.1, P. 29-53) On August 29, 2022, the claimant presented to Kristen Roberson, COTA, and numerous exercises regarding the left hand were performed. (Cl.Ex.1, P. 54-58) On August 30, 2022, the claimant received a three-phase bone scan and the report provided the findings were not typical findings for complex regional pain syndrome. (Cl.Ex.1,P.59) The claimant then returned to occupational therapy the following day, August 31, 2022. The report provided there had been an increase range of motion in the left finger and that the patient would achieve a sufficient increase in finger, wrist, and forearm range of motion and hand strength to be independent of ADL's at home and in leisure activities within 3-6 months with a functional limitation percentage of zero percent (0%).

A letter from Dr. Williams dated December 15, 2022, provided that the claimant could return to work on December 19, 2022. A second letter from Dr. Williams dated December 29, 2022, provided the claimant was to return to work on January 2, 2023. A

third letter from Dr. Williams dated February 23, 2023, provided that due to an injury of the claimant's left long finger and left shoulder as a result of a work accident on April 30, 2022, and due to the symptoms of the claimant, it was necessary to continue treatment of the regions to improve range of motion. (Cl.Ex.1, P.65-67) Finally, a report from Kristen Wagner, P.A., dated July 29, 2022, provided there was a limit with the left hand. (Cl.Ex.1, P.68)

The claimant also submitted the respondents' response to the Request for Admissions as claimant's exhibit two and it was admitted without objection

The respondents introduced medical records without objection that consisted of one hundred twenty-nine (129) pages plus an abstracted medical record index, which resulted in a total of one hundred forty-one (141) pages. The records provided that the claimant originally presented to Christopher Vinson, NP, on May 23, 2022, in regard to left hand pain in the left long finger from a knife cut. Swelling and tendon damage were noted with the claimant unable to fully extend the finger at the PIP joint. The problems began on April 30, 2022, when the claimant sustained a laceration over the dorsal aspect of the long finger PIP joint. (Resp.Ex.1, P.1-3) The claimant then presented to Dr. Grynwald on May 25, 2022. The report provided a 15mm oblique scar over the PIP joint of the left finger was noted as well as a boutonniere deformity. The plan was to repair the long finger extensor tendon, with a pinning of the PIP joint. Work restrictions for the left hand were noted as pinch only. (Resp.Ex.1, P. 4-6) Dr. Grynwald's operative note of June 3, 2022, provided the presence of an extensor tendon laceration of the left long finger with a boutonniere deformity of the left long finger. A repair of the left long finger

extensor tendon was performed with an extension pinning of the proximal interphalangeal joint. (Resp.Ex.1, P. 7-8)

The claimant returned to see Kristen Wagner, P.A., on June 15, 2022, for a post-surgery follow-up. The report provided for work restrictions until the left thumb and index finger could be used to pinch items. Maximum medical improvement should take approximately three (3) months, being approximately September 3, 2002. (Resp.Ex.1, P. 9-12) The claimant returned to Dr. Grynwald on June 28, 2022, for another follow-up, where Dr.Grynwald continued the work restrictions and removed the Kirschner wire. (Resp.Ex.1, P.13-18) The claimant again returned to Dr. Grynwald on July 12, 2022, for another office visit as described in the claimant's medical.

The claimant was seen by William Camden, OTR, on July 25, 2025, in regard to occupational therapy. (Resp.Ex.1, P. 23-27) He then presented to Kristen Roberson, COTA, on July 27, 2022, for an improvement of range of motion. Claimant reported pain and hypersensitivity in the DIP joint and manual exercises were limited due to the pain. (Resp.Ex.1, P.28-32) Two (2) days later, the claimant presented to Kristen Wagner, PA. Moderate swelling was noted around the dorsum of the PIP joint. A three-phase bone scan was then ordered with work restrictions to the left hand issued where the claimant was not to lift or grip over five (5) pounds. (Resp.Ex.1, P. 33-36) The claimant then returned to Kristen Roberson, COTA, on August 1, 2022, and again on August 8, 2022. The manual range of motion was better tolerated and although there was moderate swelling, the pain had decreased on the second of the two visits and the second report provided that the work release would be changed. (Resp.Ex.1, P. 37-46) The claimant continued to return to various occupational therapists on the dates of August 10, 15, 17

and the 22. The report of August 22, provided that pain was still noted and the functional limitation was at 86.3%. (Resp.Ex.1, P. 47-67)

The next visit to Dr. Grynwald on August 23, 2022, noted moderate swelling over the PIP joint with hypersensitivity at the dorsum of the PIP joint. A Fowler tenotomy was recommended. A five (5) pound lifting/gripping restriction of the left hand was recommended with no pinching use of the index finger. (Resp.Ex.1, P.68-71) The claimant then returned to William Camden, OTR, on September 26, 2022, and the therapy note indicated finger soreness, but that manual therapy was tolerated. (Resp.Ex.1, P. 72-76) The claimant then again returned to Dr. Grynwald on October 3, 2022, and a procedure was performed where there was an immediate release of the hyperextension of the long finger, coming to rest at neutral. The skin was closed with sutures. A boutonniere deformity was again noted. (Resp.Ex.1, P. 77-79) The claimant then returned to Kristen Wanger, PA, on October 7, 2022, for a post-procedure follow-up where she ordered physical therapy. Active flexion at the PIP and DIP joints was noted. Work restrictions until October 17, 2022, were still in place. (Resp.Ex.1, P. 80-83)

The claimant returned to Dr. Grynwald on October 18, 2022, November 1, 2022, and again on November 21, 2022. On the October 18, 2022, visit, there was 20 degrees of active flexion, and later on the November 1, 2022 visit, with on-going occupational therapy and home exercises, active range of motion was from 20 to 65 degrees. Pain was still noted and there with a two-pound max lift grip extension of the left hand. On the November 21, 2022, visit, an active range of motion of the PIP joint of the long finger was noted at 16-80 degrees. There was no hyperextension of the DIP joint and active flexion

of the DIP joint of 0 to 35 degrees was noted. Work restrictions were the same, but with gradual increasing limitations likely postoperatively. (Resp.Ex.1, P. 84-95)

The claimant returned to Dr. Grynwald on December 5, 2022, the last visit prior to the fall at Barnhill's. The report provided that the active range of motion was much improved with good active flexion and extension and the claimant had the ability to make a composite fist. No hyperextension of the DIP Joint was noted. Two (2) more weeks of therapy were added. The claimant was told he could return to full activity with a work restriction of ten (10) pound max grip and lift restriction for two (2) weeks and then gradually increase over eight (8) weeks. (Resp.Ex.1. P. 96-99)

After the claimant's injury at Barnhill's, he presented to Christopher Vinson NP, on December 7, 2022. The records provided the claimant had slipped and fell hitting his head, neck, lower back, and jamming the index finger of his left hand. He was urged to go to the Emergency Room in regard to the head injury. He was instructed that he could return to work on December 12, 2022. (Resp.Ex. 1. P. 100-104)

The claimant's visit to Dr. Williams was mentioned in the claimant's exhibits. The x-rays were normal but degenerative changes were observed. Finger pain was noted in the left index finger and the palm of the left hand. Decreased range of motion with both flexion and extension of the left middle finger was noted due to the pain. (Resp.Ex.1, P. 105-107) The claimant presented to Meagan Celsor, NP, on December 21, 2022, with complaints of neck and back pain. (Resp.Ex. 1, P.22) The records provided that the claimant returned to Dr. Victor Williams on December 29, 2022, with complaints of pain in the left index finger as well as the cervical and lumbar spine. (Resp. Ex.1, P.111-113)

The claimant then again returned to Dr. Grynwald on January 10, 2023. The report stated the surgical scars had healed and the claimant was able to touch his left long fingertip to his palm with good flexion of 40 degrees of the DIP joint and MPJ flexion to 90 degrees. The claimant was released at maximum medical improvement for a combined rating to the finger of twenty-six percent (26%).

After the last visit to Dr. Grnwald, the claimant returned to Dr. Williams on January 12, 2023, and on January 23, 2023. On the first visit, continued pain of the left long finger and hand as well the left shoulder neck and back with spasms of the neck and back were noted. This report also noted range of motion problems with the DIP joint. An off-work slip for January 12, 2023 to January 15, 2023, was issued with light-duty starting on January 16, 2023. Dr. William's report of January 23, 2023, provided a treatment letter to continue treating the left long finger and shoulder. (Resp.Ex.1, P.119-122)

The claimant continued to return to Dr. Williams on the dates of March 9, 2023, March 28, 2023, April 6, 2023, and May 1, 2023. The reports provided that the claimant was suffering from continued neck and back pain and that the claimant received injections in the bilateral trapezius and right lumbar paraspinous muscle trigger point with the restart of physical therapy. The claimant's range of motion had improved as noted in the April visit. A note to return to work without restrictions was provided on May 1, 2023. (Resp. Ex.1, P.123-129)

The respondent also introduced the claimant's wage records and temporary total disability payment history, without objection, which provided that the claimant's initial pay period began on March 24, 2022, and ran for a two-week period, with a total of only 32.42 hours worked. Beginning for the pay period starting on April 7, 2022, and running through

April 20, 2022, the claimant worked a total of 91.85 hours, which included overtime for the two-week period, and worked overtime until the pay period running from May 19, 2022, and running through June 1, 2022. From that date forward, the records provided that the claimant worked less than a forty (40) hour week, with the last pay period being from January 12, 2023, through January 25, 2023, with only 6.10 hours worked. Temporary total disability payment records were also provided. (Resp.Ex. 2, P. 1-6)

DISCUSSION AND ADJUDICATION OF ISSUES

In determining whether the claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704. *Wade v. Mr. Cavananugh's*, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. *Weldon v. Pierce Brothers Construction Co.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

In regard to the average weekly wage, Ark. Code Ann. §11-9-518(a)(1) provides that compensation shall be computed on the average weekly wage earned by the employee under the contract of hire at the time of the accident and in no case shall it be computed on less than a full-time work week in the employment. The Arkansas Court of Appeals stated that even in cases where the claimant's wage records show that some weeks the claimant worked less than a full week under the contract of hire, the average weekly wage should still be based upon on a full-time work week. *Johnson v. Abilities Unlimited, Inc.*, 2009 Ark. App. 866, 9, 372 S.W.3d 838, 843 (2009). After reviewing the payroll records, it is determined that the initial two (2) weeks of the claimant's employment where the claimant worked less than forty (40) hours per week were for training and these

findings correspond with the testimony of the claimant. After that, the claimant worked overtime during the next two (2) full weeks of employment. Consequently, the average weekly wage is found to be \$688.06, making the temporary total disability benefit rate and the permanent partial disability benefit rate \$445.00 and \$334.00, respectively. Based upon this finding, the claimant is found to be entitled to a total of \$5,340.00 for temporary total disability, less the benefits already paid and the applicable attorney fees, as spelled out by the Arkansas Workers' Compensation Act.

In regard to the issue of the claimant's entitlement to temporary partial disability benefits, an employee has the burden of proving, by a preponderance of the evidence, that he remains in his healing period and that he suffers a partial incapacity to earn wages. *Amay v. Newberry's 3N Mill*, 102 Ark. App. 119, 282 S.W.3d 269 (2008). The healing period is that period for healing from an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit and that ends when the underlying condition causing the disability has become stable and nothing in the way of new treatment will improve that condition. *Farmers Coop V. Billes*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). In the present matter, the primary treating surgeon who performed surgery on the left middle index finger and the follow up, Dr. Grynwald, opined that the claimant reached MMI on January 10, 2023, and that he had suffered a disability rating to the left middle index finger of twenty-six percent (26%), which was accepted by the respondents. Dr. Grynwald is in fact a hand surgeon. During the treatment period, the claimant also began seeing Dr. Williams, a general and thoracic surgeon, after the claimant suffered a slip and fall injury at Barnhill's, injuring his back, shoulder, head, and again injuring his left middle index finger. There was no allegation that the second

accident was work-related. Dr. Williams opined that the claimant remained in his healing period until at least the end of January. Dr. Williams was clearly a caring and talented doctor who felt that the claimant's finger could further improve after he started treating him in regard to the slip and fall. He also agreed Dr. Grynwald was more experienced in regard to hand injuries, and if the claimant had initially presented to him after the work-related knife injury to his hand, he would have referred the claimant to a hand surgeon.

The Commission has the duty of weighing medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. It is well settled that the Commission has the authority to accept or reject medical opinions and to determine the medical soundness and probative force of the opinions. *Williams v. Ark. Dept. of Cmty Corr.* 2016 Ark. App. 427, 502 S.W.3d 530 (2016). Consequently, the opinion of Dr. Grynwald, the hand surgeon who treated the claimant for an extended period of time, is found to be controlling in regard to the claimant reaching MMI on January 10, 2023, and consequently, no additional temporary partial disability payments are due after that date.

In regard to additional temporary partial disability from April 30, 2022, the admitted date of the claimant's work-related injury, to January 10, 2023, the date the claimant reached MMI as determined by Br. Grynwald, an office note of July 29, 2022, by Kristen Wagner, PA, provided that the claimant's work restrictions to the left hand were limited to five (5) pounds lifting and gripping. This would appear to be well within the range of work a hostess would perform. Mr. Juan Jose Jackson, who worked as the district manager for Denny's over seven (7) restaurants at the time of the claimant's injury, and who is now employed by Cracker Barrel, testified that he was instructed to provide the claimant forty

(40) hours of work a week as a hostess. This job would result in work for ten (10) hours a day, four (4) days a week. He felt that the claimant made an excellent hostess and stated that they needed him. The pay was the same for both the cook and hostess jobs, \$15.00 an hour. Mr. Jackson testified that when he called the claimant asking him to return because they needed him, he never heard back from him. During Mr. Jackson's testimony, it appeared that he genuinely liked the claimant, and his testimony was found to be believable. He no longer works for the respondent and therefore is not influenced by the respondent. It is common knowledge that nearly all restaurants have had a difficult time obtaining capable workers since the start of COVID. The employment records provide that the claimant appeared to regularly appear for work after the work-related injury on April 30, 2022, until the date of June 1, 2022, approximately the date of the claimant's initial surgery to his middle index finger of the left hand. It is noted that the claimant's hours actually worked, decreased after the approximate time of the initial surgery, and ended after Dr. Grynwald opined that the claimant had reached MMI and after the slip and fall accident. However, it is found that work at the same pay rate that the claimant could perform was in fact available during this period.

Based upon the above and the wage rate of \$699.06 per week, the claimant is found to be entitled to the difference of temporary partial disability benefits in the amount of \$3,213.08, less what he has already received and the applicable attorney fees as spelled out by the Arkansas Workers' Compensation Act.

Finally, in regard to the issue of additional medical, the law is clear that the employee has the burden of proving, by a preponderance of the evidence, that medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260,

209 S.W.3d 445 (2005). Dr. Grynwald, who originally treated the claimant for the injury of the left middle index finger and performed surgery on it, opined that the claimant had reached MMI on January 10, 2023, and suffered a twenty-six (26%) disability rating to the finger. He ordered no additional medical treatment of any type on claimant's last visit, which was prior to the unrelated slip and fall at Barnhill's. Consequently, it is found that the claimant has failed to satisfy the burden of proof that he is entitled to additional medical treatment by the respondent.

After weighing the evidence impartially, without giving the benefit of the doubt to either party, it is found that the claimant earned an average weekly wage of \$688.06, which would entitle him to a temporary total disability/permanent partial disability rate of \$445.00/\$334.00, respectively. He is found to be entitled to temporary total disability benefits of \$5,340.00.00, less what he has already received and the applicable attorney fees as spelled out by the Arkansas Workers' Compensation Act. Additionally, based upon the determined average weekly wage, he is also found to be entitled to permanent partial disability payment benefits of \$3,213.08, less what he has already received and the applicable attorney fees as spelled out by the Arkansas Workers' Compensation Act. It is further found the claimant has failed to satisfy the required burden of proof that he is entitled to additional medical treatment. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

IT IS SO ORDERED.

JAMES D. KENNEDY
Administrative Law Judge