

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO.: H008038**

TEREASA WASHINGTON, Employee CLAIMANT

ARKANSAS DEPARTMENT OF CORRECTIONS, Self-Insured Employer RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier/TPA RESPONDENT

OPINION AND ORDER FILED JULY 12, 2022

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in St. Francis County, Arkansas.

Counsel for the Claimant: HONORABLE JOE M. ROGERS, Attorney at Law, West Memphis, Arkansas.

Counsel for the Respondents: HONORABLE CHARLES H. MCLEMORE, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on April 15, 2022, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on January 26, 2022, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The employee/employer/carrier relationship existed at all relevant times, including August 6, 2020, on which date the Claimant sustained compensable bilateral upper extremity injuries for which certain benefits have been paid by the Respondents; and,
- (3) The Claimant's average weekly wage on the date of injury was sufficient to entitle her to compensation rates of \$360.00/\$270.00 for temporary total and permanent partial disability benefits, respectively.

The pre-hearing Order also reflected the issues to be adjudicated, as set forth below:

- (1) Whether the Claimant is entitled to additional temporary total disability benefits for as yet unspecified dates in relation to her compensable bilateral upper extremity injuries of August 6, 2020;

(2) Whether the Claimant is entitled to a 10% permanent anatomic impairment rating to each upper extremity in relation to her compensable bilateral upper extremity injuries of August 6, 2020; and,

(3) Attorney’s fees in relation to controverted indemnity benefits.

All other issues were reserved. During preliminary discussions, the parties advised that temporary total disability benefits were no longer an issue, and that the sole issue to be litigated was the Claimant’s entitlement to permanent indemnity benefits and attorney's fees thereon with respect to her compensable bilateral upper extremity injuries of August 6, 2020. With such amendment noted, the pre-hearing Order of January 26, 2022, was introduced into the record without objection as Commission's Exhibit No. 1. (TR 5-10) The parties' respective exhibits were likewise introduced into the record without objection. (TR 10-13)

Findings of Fact and Conclusions of Law

(1) The parties’ stipulations are accepted as findings of fact herein, inclusive of the Commission’s jurisdiction over this claim; and,

(2) The Claimant has failed to prove, by a preponderance of the evidence, that she is entitled to a 10% permanent anatomic impairment rating to both upper extremities and attorney’s fees thereon in relation to her compensable bilateral upper extremity injuries of August 6, 2020.

Applicable Law

The party bearing the burden of proof in a workers’ compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3). With respect to benefits for permanent anatomic impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a) states that “Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” In turn, “major cause” is defined by Ark. Code Ann. §11-9-102(14)(A) as “more than fifty percent (50%) of the

cause.” Further, Ark. Code Ann. §11-9-704(c)(1)(B) requires that “Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” Also, Ark. Code Ann. §§11-9-102(16)(A)(i)-(ii)(a) and (B) require as follows:

(16) (A)

(i) “Objective findings” are those findings which cannot come under the voluntary control of the patient.

(ii)(a) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain.

(B) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty;

It is well-known that permanent anatomic impairment ratings under Arkansas’ workers’ compensation laws are governed by the American Medical Association’s Guides to the Evaluation of Permanent Impairment, 4th ed., pursuant to Commission Rule 099.34 and per the directive found, among other statutes, at Ark. Code Ann. §§11-9-521(h)(1)(A) and (B):

(A) The Workers' Compensation Commission, after a public hearing, shall adopt an impairment rating guide to be used in the assessment of anatomical impairment.

(B) The guide shall not include pain as a basis for impairment.

It is further well-known that questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar’s Head Provisions Co.*, 2017 Ark. App. 133 (2017)). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant’s credibility. (See *Yates*,

supra. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)). Finally, a claimant’s testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

Testimony

Tereasa Washington

Upon direct examination, the Claimant testified, *inter alia*, that she remains employed with Respondent Employer and has worked for the latter since February 13, 2017. (TR 15) The Claimant acknowledged that, subsequent to her compensable bilateral upper extremity injuries of August 6, 2020, she underwent surgery on her right upper extremity on October 26, 2020, and also received a steroid injection at the same time with respect to her left upper extremity. (TR 20) The Claimant subsequently underwent surgery on her left upper extremity on February 24, 2021. (TR 24; see also CX 1 at 17) Each procedure was performed by Dr. Sean Morrell, who eventually placed the Claimant at maximum medical improvement with 0% permanent anatomic impairment on April 23, 2021. (TR 25; see also CX 1 at 24)

The Claimant thereafter obtained a change-of-physician to Dr. Michael Hood due to ongoing symptoms affecting both upper extremities and which included swelling, numbness, pain, and weakness. (TR 26-30; See also CX 1 at 26) According to her testimony, Dr. Hood ordered physical therapy which was not provided (presumably upon the directive of Respondent Carrier); however, she did perform various exercises that Dr. Hood explained to her. (TR 30-31) Dr. Hood also ordered a Functional Capacity Evaluation which was performed on July 28, 2021, and thereafter assigned her a 10% permanent anatomic impairment rating to both upper

extremities. (TR 32-34; See also CX 1 at 31-51 and RX 1 at 27-28) Following her return to work for Respondent Employer in April, 2021, the Claimant obtained a manager position (also with Respondent Employer) in November, 2021, which has been less demanding on her upper extremities. (TR 34-36)

During cross-examination, *inter alia*, the Claimant participated in the following exchange with respect to her last visit with Dr. Morrell on April 23, 2021:

Q: Did you have a long meeting with Dr. Morrell at that last appointment?

A: No, like five (5) minutes.

Q: Okay. Did Dr. Morrell examine your hands, your wrists, that day?

A: No. (TR 44-46)

Also, when asked during cross-examination whether she had requested a change-of-physician to “get the impairment rating or...more medical treatment,” the Claimant candidly testified as follows:

I asked for it because my hands was still botherin’ me and I wanted to know what was goin’ on with me, an, also, I did want the impairment rating, too, ‘cause I wanted to know what was – what was goin’ on cause he didn’t do – I – well, again, I’m not gonna say nothin’ about the doctor. But I didn’t have – I – I wanted to – to – for somebody else to look at my hands ‘cause I wanted to know why they was continuin’ to swell and still botherin’ me after this long after I had both surgeries. And I thought maybe they shouldn’t of still been botherin’ me, so because I was still havin’ problems, I – I – I wanted a second opinion. (TR 48-49)

In addition, when asked about her first visit to Dr. Hood on June 29, 2021, the Claimant essentially testified that the former had indeed examined her hands and wrists and had also asked her to demonstrate their functionality. (TR 49-50) However, the Claimant conceded that, following her Functional Capacity Evaluation and subsequent final visit to Dr. Hood, the latter

did not examine her hands or wrists. (TR 54)

Discussion of the remainder of the Claimant’s testimony upon re-direct examination and upon inquiry by the Commission is not necessary with respect to the findings of fact herein reached.

Medical/Documentary Evidence

I have reviewed the entirety of the medical and documentary evidence presented herein, the most salient and relevant of which is discussed below in further detail. Medical and documentary evidence duplicated by the parties’ respective exhibits will only be cited to one parties’ exhibit.

By virtue of electrodiagnostic studies ordered by Dr. Morrell and performed by Michael Chesser, the latter concluded on October 7, 2020, that the Claimant was afflicted with “Moderate right carpal tunnel syndrome” and “Mild left carpal tunnel syndrome.” (CX 1 at 3-5) Soon thereafter, Dr. Morrell performed a right carpal tunnel release on October 26, 2020, followed by a left carpal tunnel release on February 24, 2021. (CX 1 at 6-8 and 17-19) As noted during the Claimant’s testimony, Dr. Morrell placed her at maximum medical improvement on April 23, 2021, with the following pertinent comments:

Tereasa Washington is a 54 y.o. female that is s/p left carpal tunnel release, and after a review of the medical history of present illness, and taking into account the physical exam along with pertinent testing conducted today, it was determined after a thorough discussion with the patient that she has improved greatly and has a nice result from the left hand...Patient has returned to full activity and has full improvement of carpal tunnel symptoms. She has a 0% Impairment Rating in my medical opinion and has reached maximum medical improvement. (CX 1 at 23-24)

As also noted during her testimony, and following her change-of-physician request, the Claimant came under the care of Dr. Michael Hood beginning on June 29, 2021. Although the

Claimant reported “swelling” to Dr. Hood as one her symptoms, his examination does not reflect such a finding in either upper extremity on said date, nor upon the Claimant’s last visit to him on August 31, 2021, although he did note a positive “Durkan’s compression test palmar tenderness decreased sensation median [nerve] distribution.” (CX 1 at 26-30) On the latter date, Dr. Hood assigned the Claimant a 10% permanent anatomic impairment rating to each upper extremity based solely on her “loss of strength” pursuant to Chapter 3, Tables 32 and 34, of the American Medical Association’s *Guides to the Evaluation of Permanent Impairment, 4th ed.* (CX 1 at 30)

During the interim between her visits to Dr. Hood, the Claimant had undergone a Functional Capacity Evaluation (hereinafter “FCE”) on July 28, 2021, based upon the former’s recommendation for such. The Claimant was found by the examiner to have put forth a reliable effort, with all fifty-one (51) consistency measures having been met within expected limits. The conclusion reached by the examiner was that the Claimant could perform work in the “medium” classification. Consistent with her testimony, the Functional Capacity Evaluation and “reporting period” lasted slightly in excess of four (4) hours. (CX 1 at 31-51) Claimant’s Exhibit No. 2 reflects that the Respondents accepted the former’s injury as compensable by way of a Form AR-2 filing on October 20, 2020. (CX 2 at 1)

Respondents’ Exhibit No. 1 (medical) is essentially redundant of Claimant’s Exhibit No. 1; although it contains an e-mail purportedly written by Dr. Morrell on October 21, 2021, which was sent to a recipient within the University of Arkansas for Medical Sciences. (RX 1 at 32) It further appears that this e-mail was then forwarded to an “AID PECD Filehandler” by Case Manager Georgette Nkwo, and ultimately found its way to Counsel for the Respondents on January 18, 2022. (RX 1 at 32) In such communication, Dr. Morrell stated as follows:

You asked me to do that second opinion on her after she got assigned that IR by the outside physician? She was a very

problematic patient, and after I treated her carpal tunnel syndrome she continued to not want to return to work. She also continuously bombarded my nurse with feverish e-mails throughout the day which was ironic because her job is typing. Therefore, I did not want to proceed with a second opinion. (*Id.*)

The majority of Respondents' Exhibit No. 2 (documentary) is not pertinent given that temporary total disability benefits are no longer at issue in this matter and that the Claimant's injury was ultimately accepted as compensable; however, I note from Respondents' Exhibit No. 2 that the Claimant's change-of-physician request was granted by way of a Commission Order entered on or about June 10, 2021. (RX 2 at 5-7)

Adjudication

I note from the outset that I found the Claimant to be a polite, courteous, and credible witness during the hearing. Also, the Claimant's continuance of work for Respondent Employer as of the date of the hearing following bilateral wrist surgeries is highly commendable.

Nonetheless, the bilateral upper extremity impairment ratings assigned by Dr. Hood on August 31, 2021, were predicated solely upon a loss of strength – an entirely subjective finding. Dr. Hood's records do not reflect ongoing swelling in the Claimant's hands or wrists as alleged in her testimony, although Dr. Hood did note "palmar tenderness" and "decreased sensation" on both occasions that he evaluated the Claimant. "Decreased sensation" is also an entirely subjective finding, and it is well known that "tenderness" does not amount to an objective finding. (See, for instance, *Marshall v. Ark. Dep't of Corr.*, 2020 Ark. App. 112 (Ark. App. 2020)). The Claimant's FCE of July 28, 2021, regardless of her very credible performance during such, likewise offers no objective findings to support a permanent anatomic impairment rating.

It is well-settled that it is the province of the Commission to weigh conflicting medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Southeast Ark. Human Dev. Ctr. v. Courtney*, 99 Ark. App. 87, 257 S.W.3d 554

(2007). Accordingly, I afford greater weight to Dr. Morrell’s opinion of April 23, 2021, given his role as the initial treating and operative physician, with respect to his assessment of permanent anatomic impairment in the present matter, in comparison with Dr. Hood’s contrasting assessment of such on August 31, 2021, the latter of which is simply not supported by objective findings.

Consequently, I am compelled to find that the Claimant has failed to prove, by a preponderance of the evidence, that she is entitled to a 10% permanent anatomic rating to each of her upper extremities in relation to her compensable bilateral upper extremity injuries of August 6, 2020.

ORDER

Based on the foregoing discussion, including my observation of the witness and her testimony, review of the hearing transcript, the documentary evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find that the Claimant has failed to prove, by a preponderance of the evidence, that she is entitled to a 10% permanent anatomic impairment rating to each of her upper extremities in relation to her compensable bilateral upper extremity injuries of August 6, 2020. The Respondents are ordered and directed to pay the Court Reporter’s fee within thirty days of billing for such if they have not already done so.

IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge

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