

ARKANSAS COURT OF APPEALS

DIVISIONS I & II

No. CA10-675

MICHAEL BURKS

APPELLANT

V.

RIC, INC. and BRIDGEFIELD
CASUALTY INS. CO.

APPELLEES

Opinion Delivered December 15, 2010

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F703943]

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Michael Burks suffered a crush injury to his right hand on April 9, 2007. His ring finger, little finger, and thumb were almost completely severed from his hand. Burks had to undergo surgery to reattach the digits to his hand. He was assessed a three percent permanent impairment rating for his thumb, which appellee RIC paid. RIC also accepted and paid the ratings assigned to his other two fingers. However, RIC controverted Burks's entitlement to the additional thirty percent anatomical impairment assigned to Burks for loss of sensation to the thumb. The administrative law judge (ALJ) denied Burks's request for benefits holding that the two-point discriminations conducted by Dr. Varela did not satisfy the statutory requirement that a finding of impairment must be supported by objective

physical findings. The Commission affirmed and adopted the decision of the ALJ. This appeal followed. We affirm.

Burks testified that Dr. Varela conducted a sensory test to see how much nerve damage he had suffered to his thumb. According to Burks, Dr. Varela took his right hand and had him look off toward the wall. Dr. Varela would then touch certain parts of Burks's finger and wait on Burks to tell him if he could feel it or not. On cross, Burks stated that during the test, "it wasn't like, do you feel this? He would do this test and I would have to say, I feel that. It might be a second before he touches me the next time - I feel that. I cannot see what he is doing. . . . At no time did he let me know when he was touching my finger." Burks testified that the test was based upon what he told Dr. Varela and that he did not believe that the instrument was hooked up to anything.

In a questionnaire from RIC, Dr. Varela stated that he used the AMA Guidelines for his impairment rating. He also stated that he felt that the test performed on Burks was objective because during the evaluation he "specifically performed two-point discriminations repeatedly to assess the accuracy of the sensory deficits, and [Burks] was found to be anesthetic over the radial border of the length of the thumb."

The ALJ denied Burks's request for benefits for the thirty percent sensory impairment, finding that the test was based "entirely on [Burks's] ability to determine touch stimuli." The ALJ afforded Dr. Varela's reports minimal weight. The Commission affirmed and adopted the ALJ's decision. This appeal followed. For reversal, Burks contends that the Commission erred

by concluding that the sensory test conducted by Dr. Varela did not constitute objective findings.

In reviewing decisions from the Workers' Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms if that decision is supported by substantial evidence.¹ Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.² The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we must affirm the decision.³

While the statute and commission 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.⁴ 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.⁵ In other words, although pain, active range-of-motion, and straight-leg-raising tests are criteria used in the Guidelines,

¹*United Farms, Inc. v. Gist*, 2009 Ark. App. 717.

²*Id.*

³*Id.*

⁴Ark. Code Ann. § 11-9-704(c)(ii)(B) (Repl. 2002).

⁵Ark. Code Ann. § 11-9-102(16)(A) (Repl. 2002).

they may not be used in Arkansas for assessment of impairment in workers' compensation cases.⁶

Here, the evidence supports the Commission's decision. By Burks's own testimony, he had to tell the doctor when he felt the stimuli. There was no other independent means to confirm Burks's statements. Although the two-point discrimination is "the most value" for determining sensory loss under the AMA Guidelines, not everything under the Guidelines is admissible under the statute. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings.⁷ Accordingly, we affirm.

Affirmed.

VAUGHT, C.J., and GLADWIN and HENRY, JJ., agree.

HART and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. This case only involves whether a two-point discrimination test can constitute an objective finding to support medical evidence of impairment under our workers' compensation law. I would reverse and remand, holding that the results of a two-point discrimination test would not, as a matter of law, always constitute subjective findings, but could, under the facts of this case, constitute objective findings.

⁶See *Wilson v. Smurfit Stone Container*, 2009 Ark. App. 800; *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d 751 (2000).

⁷*Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996).

Appellant Michael Burks suffered an admittedly compensable injury to his right ring finger, little finger, and thumb. Appellee paid permanent-partial disability benefits for the ring and little fingers. The Commission assigned appellant's thumb a 3% impairment rating, rather than the 33% that appellant claims, based on its refusal to recognize the results of a two-point discrimination test as "objective findings."

Appellant was treated for his injury by Dr. Charles Varela. In his report, Dr. Varela stated that he used the *AMA Guides to the Evaluation for Permanent Impairment* (4th Ed. 1993), in giving appellant a 3% impairment rating to his thumb due to range of motion and 30% to his thumb due to sensory impairment. The 30% rating was based on a two-point discrimination test that Dr. Varela used to assess the accuracy of the sensory deficits. Appellant stated that in Dr. Varela's administration of the procedure, appellant turned his head so that he could not observe the doctor as he was performing the test. The Commission adopted and affirmed the ALJ's decision in holding that the two-point discrimination test is not an objective finding.

The statute and Commission rules require that impairment ratings be based upon the *AMA Guidelines*; however, although pain, active range-of-motion, and straight-leg-raising tests are criteria used in the Guidelines, they may not be used for assessment of impairment in workers' compensation cases. Ark. Code Ann. § 11-9-102(16)(A) (Supp. 2007); see *Flowers v. Ark. State Police*, 2010 Ark. App. 99, 377 S.W.3d 339. The issue here is whether the two-point discrimination test is more akin to the foregoing excluded tests or to tests that may

constitute objective findings. For instance, we have stated that muscle spasms can constitute objective findings, even when detected by someone other than the physician. *See Denning v. Wal-Mart Assoc., Inc.*, 2009 Ark. App. 842. In contrast, we have also held that a patient's description of sensations produced by various stimuli performed by a physician leading to a medical finding of carpal-tunnel syndrome were under the voluntary control of the patient and that such test results do not constitute objective findings. *See Duke v. Regis Hairstylists*, 55 Ark. App. 327, 330, 935 S.W.2d 600, 602 (1996). However, we should not hold that *any* tests voluntarily described by a patient are not, as a matter of law, objective.

I would instead hold that where, as here, the test is clinically observable, capable of measurement, and not included in the list of excluded tests set forth in section 11-9-102(16)(A) of the Code, such tests may constitute objective findings. Dr. Varela, who evaluated appellant, also was the physician who reattached appellant's thumb. As is apparent from the medical records, Dr. Varela was aware of the extensive damage to appellant's hand. Dr. Varela, in conducting the test, made clinically observable findings that supplemented the knowledge that he gained from performing the surgery. Medical evidence need not be based solely on objective findings, but must contain supporting objective findings. *See Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006). Given Dr. Varela's knowledge gained from observing the extent of the injury and performing the surgery and implanting two stable transfixing screws during his reconstruction of the nearly severed thumb, coupled with the clinically observable findings Dr. Varela made during the test, I would conclude that

Cite as 2010 Ark. App. 862

the Commission erred in finding that the two-point discrimination test is per se subjective. This is particularly true where, as here, the test was administered in such a way as to ensure, insofar as possible, that appellant could not control the results.

HART, J., joins.