SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DAYRON CORPORATION and the CLAIMS CENTER	CASE NO.:	68,234
Appellants,	DCA CASE NO.:	BE-435
vs.	CLAIM NO.:	174 24 5147
FRANK MOREHEAD	D/A:	08/30/83
Appellee.		

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APPELLANTS' BRIEF TO THE FLORIDA SUPREME COURT

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Other Texts Cited:

AMA Guides to the Evaluation of Permanent Impairment, Second Edition, Chapter 11, pages 203-212	3, 6, 9, 13, 14

PRELIMINARY STATEMENT

The Appellants, Dayron Corporation and its Workers' Compensation servicing agent, the Claims Center, will be referred to as the "Employer/Carrier". The Appellee, Frank Morehead, will be referred to as the "Claimant".

References to the Transcript will be marked by the symbol "TR" followed by the appropriate number.

STATEMENT OF THE CASE

After the filing of the claim on behalf of Frank Morehead, a hearing was held before Deputy Commissioner William M. Wieland at Orlando, Orange County, Florida on November 13, 1984.

On January 7, 1985, an Order was entered by Commissioner Wieland ordering the employer/carrier to pay the claimant certain wage loss benefits, the costs of the action and retaining jurisdiction to determine the attorney's fee issue.

A timely appeal of the Order was filed on behalf of the employer and carrier. The First District Court of Appeal in case no.: BE-435, Opinion filed December 30, 1985 affirmed the Order of the Deputy Commissioner per curiam. The First District Court of Appeal certified as a question of great public importance the following question:

> Do the AMA Guides to the Evaluation of Permanent Impairment apply and preclude a permanent impairment rating where the claimant suffers a disability due to occupational disease [2] which permanently impairs claimant's ability to work, resulting in economic loss, but does not affect "the activities of daily living?"

This appeal follows pursuant to the certification of the question by the First District Court of Appeal as one of great public importance.

STATEMENT OF THE FACTS

Frank Morehead, a 51 year-old machinist (TR-3) testified at the hearing in this cause that he came into contact with cutting oils in his employment with Dayron (TR-5 & 6), and that in the three months before August 13, 1983 he was in constant contact with the cutting oil (TR-7). In December of 1983, the claimant testified that his arms swelled up and began having problems with dermatitis when the employer changed the type of cutting oil being used in his machinist's work (TR-9).

The claimant admitted he had suffered from dermatitis about five years before this incident in 1979 (TR-18 & 19).

The claimant testified that since he had left Dayron, he had not worked with the type of cutting oil he felt caused his problem, or with any other kind (TR-20).

Following the hearing, by leave of the Deputy Commissioner, claimant took the deposition of Clifford B. Lober, M.D., a dermatologist of Altamonte Springs, Florida (TR-78).

Dr. Lober outlined the examinations and treatments provided to Mr. Morehead as a result of his dermatitis, and indicated that on April 2, 1984, after negative patch testing had been done, specific testing was done with the cutting oil which the claimant felt was the offending agent. Forty-eight hours, seventy-two hours and up to seven days later, the claimant had no reaction to the cutting oil which he had brought from Dayron. Nevertheless, the doctor felt that the exposure to cutting oil could be the cause of the claimant's dermatitis since they are a known allergen, especially when combined with humidity, alkalinity and other tools (TR-86).

Ultimately, claimant's counsel asked Dr. Lober if he had an opinion whether the claimant suffered a permanent physical impairment because he could not come into contact with cutting oil in the future. An objection was made to the question on the basis that it was not properly predicated on the AMA Guides (TR-90). Dr. Lober indicated (TR-91) that he did not know whether the AMA Guides covered contact dermatitis.

Again, claimant's counsel asked the doctor to assume that if there are no guides within the AMA Rating Tables, what percentage would he assign to the claimant because of his dermatitis condition. The doctor indicated he would look into it to determine if there were guides available. He went on to say (TR-92) that "if there are guidelines it will be much easier because the guidelines will tell you how to make a disability. The difficulty will be that if there are no guidelines it may be for the reason I mentioned to you in terms of he is either essentially all or none. If he contacts, it's hundred percent disability to contact it. If he doesn't, he will be completely normal. It's not to be vague, but it's the fact."

The most Dr. Lober would say with respect to permanent physical impairment was that the claimant's sensitivity to the particular kind of oil involved would be permanent (TR-92).

Although Dr. Lober never provided any additional information regarding possible permanent physical impairment under the <u>AMA Guides to the Evaluation of Permanent Impairment</u>, Chapter 11 of the <u>Guides to the Evaluation of Permanent Impairment</u>, Second Edition, promulagated by the AMA, covers the skin, and is appended hereto.

At the hearing held in the claim on November 13, 1984 before Deputy Commissioner Wieland, specific claim was made for temporary partial or wage loss benefits from April 22, 1984 through September 30, 1984. The employer/carrier took the position that the claimant had no permanent physical impairment and was, therefore, not entitled to wage loss benefits (TR-2).

After submission of the testimony of the claimant and the deposition testimony of Dr. Lober, the Deputy Commissioner entered an Order on January 7, 1985, finding that as a result of an accident sustained by the claimant on August 30, 1983 while employed by Dayron, the claimant developed contact dermatitis and suffered a permanent physical disability entitling him to wage loss. Therefore, the employer and carrier were ordered to pay the claimant wage loss benefits for the months of Aprilr through September of 1984 and pay the costs of the proceedings. Jurisdiction was reserved to determine the issue of attorney's fees to claimant's counsel (TR-100 & 101).

ISSUE ON APPEAL

I. THE DEPUTY COMMISSIONER COMMITTED ERROR IN FINDING THAT THE CLAIMANT SUSTAINED A PERMANENT PHYSICAL DISABILITY AS A RESULT OF AN ACCIDENT SUSTAINED BY HIM WITH DAYRON ON AUGUST 30, 1983, AND IN ORDERING THE PAYMENT OF BENEFITS IN THAT THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT SUCH A FINDING AND ORDER.

SUMMARY OF ARGUMENT

It was the position of the Appellants, employer/carrier, that the Deputy Commissioner erred in finding a permanent physical impairment. The treating physician indicated he was uncertain whether the AMA Guides' criteria assigned a permanent impairment rating for contact dermatitis such as that experienced by the claimant. No other evidence of permanent impairment was provided. Examination of the AMA Guides to the Evaluation of Permanent Impairment, page 205, Example 3 (see attached Appendix) specifically indicates that the AMA Guides do not assign an impairment rating. Example 3 notes that allergic contact dermatitis, even when the allergic reaction is confirmed by patch testing, represents a 0% impairment of the whole person. The accompanying commentary indicates that this is the case even though the condition may interfere with certain types of employment, but not with performance of activities of daily living.

Example 3, page 205, of the AMA Guides on its face indicates that this situation is covered by the AMA Guides.

The case law is clear in Florida that where specific tables for assessing impairment are set out in the Guides, the applicable tables must be used, and may not be combined with other subjective factors or guides.

The First District Court of Appeal certified the question of whether the Guides preclude a permanent impairment rating where the claimant suffers a disability which impairs his ability to work, but does not affect the activities of daily living. Examples in the AMA Guides on their face, specifically Example 3 on page 205, clearly indicate that the AMA Guides do preclude

such a rating.

ARGUMENT: ISSUE ON APPEAL

I. DID THE DEPUTY COMMISSIONER COMMIT ERROR IN FINDING THAT THE CLAIMANT SUSTAINED A PERMANENT PHYSICAL DISABILITY AS A RESULT OF AN ACCIDENT SUSTAINED BY HIM WITH DAYRON ON AUGUST 30, 1983, AND IN ORDERING THE PAYMENT OF BENEFITS IN THAT THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT SUCH A FINDING AND ORDER?

It is the position of the employer and carrier that the Deputy Commissioner has committed reversable error in making a finding that the claimant sustained a permanent physical impairment as a result of an industrial injury, which impairment entitled him to wage loss benefits.

This Court, in the case of LeForgeais v. Erwin-Newman Company, 139 So.2d 401 (Fla. 1962), speaking through Justice Thornell said:

> "...Initially the burden is upon a claimant to establish the cause and extent of his injury by direct evidence or justifiable inferences. Foxworth v. Florida Industrial Commission, Fla., 86 So.2d 147; Arkin Construction Company v. Simpkins, Fla. 99 So.2d 557."

The claimant has utterly failed to initially meet his burden of proof in this case.

When the claimant's counsel asked the treating physician his opinion regarding permanent physical impairment, an objection was made to the question on the basis that it was not predicated on any of the AMA Tables (TR-90). The doctor did not know whether the AMA Guides included criteria for determining permanent impairment in contact dermatitis cases, but indicated he would look into it (TR-91).

The doctor was either unwilling or unable to assign a permanent physical impairment rating to the claimant without the AMA Guidelines, and the most he would say was that the claimant was prohibited from doing his regular work "with the kind of oil he contacts during the periods under discussion."

No further effort was made by the claimant, through his counsel, to determine whether or not a permanent physical impairment actually existed under the AMA Guides to the evaluation of permanent disability. Although claimant's counsel appeared to believe the Tables did not contain criteria for an impairment evaluation in a dermatitis case, such a situation is in fact covered by the AMA Guides. (See the Appendix to this Brief.) Review of the pertinent portion of the <u>AMA Guides to the Evaluation of Permanent Impairment</u> indicates that a situation such as presented in the instant case is contemplated by the AMA Guides. At page 205, the Guides specifically present the following example:

> Example 3.: A 27-year-old male worker in a small paint manufacturing company developed acute contact dermatitis of the hands and arms. He related onset and exacerbations to preparation of batches of latex pain. Patch testing revealed a strong, allergic reaction to a 0.1% petrolatum mixture of a non-mercurial preservative, 2-n-4-isothi-azolin-3-one, used by the company in its latex paints. The patient was unable to avoid latex paint completely, and his dermatitis continued. When he left the company to seek other employment, his dermatitis resolved completely.
>
> Diagnosis: Allergic contact dermatitis due to a latex paint preservative.
>
> Impairment: 0% impairment of the whole person.

> Comment: The preservative to which the worker was allergic was manufactured for use only in latex paints. It is used widely in the paint manufacturing industry but not in other industries. The patient was restricted from employment in industries where he would come into contract with the offending chemical but there was no limitation in the performance of activities of daily living. Although this worker has 0% impairment of the whole person, he may be disabled under some state workers' compensation statutes.

It thus appears that the AMA Guides do cover the injury or condition here involved, but specifically provide for 0% permanent impairment. In fact, the factual situation in the case at hand is less compelling than that presented in Example 3, for which the Guides specifically provide a 0% impairment of the whole person. In Example 3 the Guides note that patch testing revealed a strong, allergic reaction. In the instant case, Dr. Lober indicated that on April 2, 1984 the claimant had a negative patch test (TR-86). Dr. Lober further noted that after specific testing was done with the cutting oil which the claimant felt was the offending agent, after forty-eight hours, seventy-two hours, and up to seven days later, the claimant had no reaction to the specific cutting oil which he had brought from Dayron (TR-86). The First District Court of Appeal has held that where specific tables for assessing impairment are set out in the Guides, the applicable table must be used, and it may not be combined with any other table or subjective factor to produce a rating in excess of that permitted by the Guides Morrison and Knudsen/American v. Scott, 423 So.2d 463 (Fla. 1st DCA 1982).

The First District Court of Appeal further concluded in

Martin County School Board v. McDaniel, 465 So.2d 1235 (Fla. 1st DCA 1984) (Rehearing en banc, February 27, 1985) that:

> A physician's qualified expert opinion of permanent impairment may, in some circumstances suffice without reliance on a manual or guide, although application of a prescribed guide remains obligatory to the extent feasible.

If the Deputy Commissioner made a determination utilizing the AMA Guide Tables, it is certainly not set forth or so indicated in his Order. The Deputy Commissioner's finding merely indicates that the claimant suffers a "permanent physical disability" and is therefore entitled to wage loss benefits. There is neither a basis for this finding given, nor is there any indication that the claimant suffered a permanent physical impairment as required by law. This omission alone should require a reversal of the result reached in this matter. The case law is clear that if the AMA Guides cover the injury or condition involved, those guides must be utilized and referred to in determining the existance or non-existance of permanent physical impairment. Trindade v. Abbey Road Beef & Booze, 443 So.2d 1007 (Fla. 1st DCA 1983); Brandon v. Hillsborough County School Board, 447 So.2d 982 (Fla. 1st DCA 1984).

In the instant case it is clear that the Deputy Commissioner had no competent or substantial evidence upon which to base a finding of permanent physical impairment giving rise to a wage loss entitlement. To the contrary, Example 3, previously cited from the AMA Guides, would specifically indicate that the guides would provide for 0% impairment in the factual situation here presented. The Guides specifically provide that even in the

presence of positive patch testing indicating an allergic reaction, the Guides would provide for a 0% impairment. In the instant case, the claimant did not even have a positive patch test or allergic reaction (TR-86).

It should be pointed out that the First District Court of Appeal certified the question of whether the AMA Guides preclude an impairment rating where the claimant suffers a disability due to occupational disease impairing ability to work, but not affecting the activities of daily living. In its footnote, the First District Court of Appeal noted that the Deputy Commissioner did not specifically find that the claimant's disability was due to an occupational disease, but pointed out a specific finding was unnecessary since compensability was stipulated to. The appellants would point out that the employer/carrier stipulated that the claimant had sustained a compensable accident or injury (TR-38). The employer/carrier did not stipulate that the claimant sustained an occupational disease. The issue of occupational disease was raised for the first time in the Answer Brief of the appellee. The most cursory review of the record on appeal shows that no mention was ever made in the proceeding before the Deputy Commissioner of the issue of occupational disease. The Court has clearly indicated in prior decisions that such issues should not be raised for the first time at the appellate level. <u>Sunland Hospital v. Garrett</u>, 415 So.2d 783 (Fla. 1st DCA 1982).

Further, the record is devoid of any indication that the claimant has satisfied the requirements for occupational disease, including demonstrating that 1) the disease is characteristic of

and peculiar to a particular occupation; 2) the disease is contracted during the particular employment; 3) the occupation presents a particular hazard of the disease distinguishing it from usual occupations; and 4) the incidence of the disease is substantially higher in the particular occupation. Lake v. Irwin Yacht & Marine Corp., 398 So.2d 902 (Fla. 1st DCA 1981).

However, it is apparent from review of the AMA Guides themselves, that they do preclude a permanent impairment rating where there is a disability that may impair the claimant's ability to work, but does not affect "the activities of daily living." The comment section of Example 3, page 205, Chapter 11, AMA Guides to the Evaluation of Permanent Impairment, specifically answers the certified question raised by the First District Court of Appeal. The comment notes that the worker has a 0% impairment under the Guides, though commenting that he may be disabled under some state workers' compensation statutes.

It is apparent that such disability does not exist under the Florida Workers' Compensation statute. The AMA Guides to the Evaluation of Permanent Impairment clearly encompasses the factual situation here presented, and the factual situation as framed by the certified question. The case law in Florida is clear that if the AMA Guides cover the injury or condition involved, these Guides must be utilized and referred to in determining the existence or non-existence of permanent physical impairment. Trindade v. Abbey Road Beef & Booze, 443 So.2d 1007 (Fla. 1st DCA 1983).

CONCLUSION

The medical evidence presented in the instant case clearly failed to demonstrate any permanent partial impairment. Examination of Chapter 11, page 205, Example 3, of the AMA Guides to the Evaluation of Permanent Impairment (see attached Appendix) clearly demonstrates the factual situation here presented is covered by the AMA Guides. Example 3 specifically indicates that allergic contact dermatitis, even when verified by a patch test, does not result in an impairment rating. The Guide clearly indicates that even though the condition may restrict the patient's employment in certain industries, the Guides do not contemplate a permanent impairment rating.

Respectfully submitted,

ROBERT G. BRIGHTMAN, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Brief to the Supreme Court has been furnished by U. S. Mail to: Edward H. Hurt, Sr., Esquire, 1000 E. Robinson Street, Orlando, Florida 32801 and Bill McCabe, Esquire, P. O. Box 2226, Orlando, Florida 32802, this 18th day of February, 1986.

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