SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DAYRON CORPORATION and
THE CLAIMS CENTER,

Petitioners,

vs.

FRANK MOREHEAD,

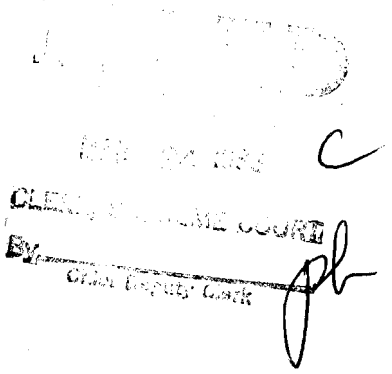
Respondent.
_____/

CASE NO.: 68,234

DCA CASE NO.: BE-435

CLAIM NO.: 174-24-5147

D/A: 8/30/83



RESPONDENT'S BRIEF TO THE FLORIDA SUPREME COURT

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I N D E X

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Petitioners in this case, DAYRON CORPORATION and THE CLAIMS CENTER, will be referred to as the "Employer/Carrier" or by their separate names. The Claimant/Respondent will be referred to either as FRANK MOREHEAD, or the "Claimant".

References to the record on appeal shall be abbreviated as "T" and followed by the appropriate page number.

STATEMENT OF THE CASE

On or about September 23, 1984, the Claimant, FRANK MOREHEAD, filed a Claim for Compensation Benefits resulting from an accident arising out of and in the course and scope of his employment with the Employer herein on August 30, 1983 (T-32). The Claimant was seeking wage loss benefits and rehabilitation (T-32).

Additionally, thereafter, the Claimant filed a Request for Wage Loss Benefits for the period of April 22, 1984 through April 30, 1984 (T-40), May 1, through May 31, 1984 (T-41,46), June 1, 1984 through June 30, 1984 (T-42,47), July 1, 1984 through July 31, 1984 (T-43,48), August 1, 1984 through August 31, 1984 (T-44,49), and September 1, 1984 through September 30, 1984 (T-45,50).

On April 18, 1984, the Employer/Carrier filed a Notice of Termination of Temporary Total Disability Benefits (T-73). The reason for suspending compensation benefits at that time were listed as follows:

> "Claimant released to return to work with restrictions. Employer has no work available with that restriction. Sending wage loss information." (T-73)

On June 4, 1984 the Employer/Carrier filed an Amended Notice of Suspension of Compensation Benefits (T-75). The reason compensation payments stopped was again listed as follows:

> "Claimant released to return to work with restrictions." (T-75)

Furthermore, under remarks, the Notice of Suspension of Compensation listed,

> "Filed to show Employer now has work available for the Claimant to do within the restrictions Dr. has indicated. Dr.'s office was contacted on 5/25/84 and verified Claimant could return to work in the new job capacity." (T-75)

Thereafter, on July 3, 1984, the Employer/Carrier filed a Notice to Controvert the Claimant's Request for Wage Loss Benefits for the months of March, April and May, 1984 (T-57). The reason for controverting was listed as follows:

> "The Claimant's reduction in earnings is due to economic consideration, rather than his industrial accident." (T-57)

Again, on October 12, 1984, the Employer/Carrier filed a Notice to Controvert

the Claimant's Request for Wage Loss Benefits for the period of April 22, 1984 through September 30, 1984 (T-58). The reasons for controverting the claim were listed as follows:

> "Claimant has not performed a good faith job search.
>
> Employee is limiting his ability to earn pre-industrial wages." (T-58)

Thereafter, the hearing on the Claimant's Request for Wage Loss Benefits was held before the Honorable Deputy Commissioner William M. Wieland on November 13, 1984 (T-2). At that hearing, the Claimant was seeking temporary partial or wage loss benefits for the period of April 22, 1984 through September 30, 1984, attorney's fees and costs (T-2). The Employer/Carrier took the position that the Claimant had been paid all benefits due (T-2). They further contended, inter alia, that the Claimant had no permanent physical impairment (T-2).

Thereafter, on January 7, 1985, the Honorable Deputy Commissioner Wieland entered his Compensation Order (T-99-101). In that Order, Deputy Commissioner Wieland specifically found that the Claimant has contacted dermatitis as a result of using cutting oils, and as a result of this he has a permanent physical impairment and is entitled to wage loss benefits (T-100,101). As a result of this finding, the Honorable Deputy Commissioner Wieland ordered the Employer/Carrier to pay to the Claimant wage loss benefits for April, May, June, July, August and September, 1984 (T-101).

Thereafter, on February 4, 1985, the Employer/Carrier appealed Deputy Commissioner Wieland's Order of January 4, 1985 to the First District Court of Appeal (T-30). On December 30, 1985 the First District Court of Appeal entered its Opinion. In that Opinion, the First District Court of Appeal agreed with the Deputy Commissioner that the Claimant has a permanent impairment and affirmed the award of wage loss benefits (Appendix A). Additionally, the First District Court of Appeals' decision in Dayron Corporation and The Claims Center v. Morehead, is reported at 480 So.2d 235 (1st D.C.A. Fla. 1985). Additionally, the First District Court of Appeals in Dayron Corporation and The Claims Center v. Morehead, supra, certified the following

question as one of great public importance to the Florida Supreme Court, to-wit:

> "Do the AMA Guides to the evaluation of permanent impairment apply and preclude a permanent impairment rating where Claimant suffers a disability due to occupational disease which permanently impairs Claimant's ability to work, resulting in economic loss, but does not affect "the activities of daily living"?" (Appendix A at Page 2)

Additionally, the same question was certified by the First District Court of Appeals in the recent case of OBS Company, Inc. v. Freeney, 475 So.2d 947 (1st D.C.A. Fla. 1985).

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

STATEMENT OF THE FACTS

The Claimant/Respondent respectfully submits that the Statement of the Facts as set forth by Petitioner is incomplete, and therefore the Respondent hereby supplements the facts as set forth by Petitioner in their Initial Brief to this Honorable Court.

The Claimant, FRANK MOREHEAD, is 51 years old (T-3). The Claimant went to the 12th grade in school, but got a G.E.D. equivalency diploma (T-3). The Claimant then was in the Air Force for 10 years and 8 months where he worked as a cryptographer, which is a "code man" (T-3,4).

Since getting out of the Air Force, the Claimant has been a machinist, and has worked as a machinist for the past 22 years (T-3).

For the past 5 years, the Claimant has worked on an automatic screw machine, setting them up, designing the tooling, and making the machines run (T-5). The Claimant testified that while working with these machines, he comes in constant contact with a light cutting oil (T-6-8). The Claimant testified that a cutting oil is a coolant that runs on the tools to keep the tools cool while it is machining materials (T-6).

In the summer of 1983, the Employer changed cutting oils, and when they did so, the Claimant's arms swelled up and it burned his hands and he had problems with dermatitis (T-9). The Employer then went back to the old cutting oil in three days but the Claimant continued to break out and have constant problems with his hands (T-21).

The Claimant initially went to Dr. Ballardfor treatment, but continued to work (T-9).

On or about August 31, 1983, the Claimant was seen by Dr. Clifford Lober, a dermatologist in Altamonte Springs, Florida (T-10,78,80). Dr. Lober testified that he first saw the Claimant on August 31, 1983 at which time the Claimant had a history for the past three or four days of having an exacerbation of hand dermatitis (T-80,81). The Claimant indicated that he was a machinist and that he had been

using cutting oils in his occupation (T-81). The Claimant complained that his hands were itching and that he had been unable to sleep because of itching (T-81).

On examination, Dr. Lober found that the Claimant had erythemeous, scaley, fissuring hand eruption (T-81). The Claimant had some swelling in his hands (T-81). Dr. Lober's opinion was that the Claimant had a severe hand dermatitis (T-81). He treated the Claimant with injectible cortisone and antibiotics and topical cortisone medication (T-81).

The Claimant was again seen by Dr. Lober on September 6, 1983 at which time he was doing well and was discharged from Dr. Lober's care to return as needed if he had any further problems (T-81).

The Claimant returned to work and continued working until February 27, 1984 (T-11). On February 22, 1984, the Claimant had returned to see Dr. Lober (T-81). At that time, he was still working as a machinist with cutting oils (T-81). The Claimant had scaling erythemeous, bilateral dermatitis on his hands (T-81). He was again treated with topical cortisone and Dr. Lober discussed doing patch tests on him (T-81,82).

The Claimant was again seen by Dr. Lober's partner on February 28, 1984 because his hands were flaring (T-82). He was advised at that time, and was also advised on February 22nd, not to work with cutting oils any further (T-82). He was again treated with topical cortisone and injectible, anti-inflammatory medication (T-82). It was additionally determined that patch testing should proceed (T-82).

A patch test is a series put out by the American Academy of Dermatology that contains 22 substances which are the most frequent allergens in the United States (T-82).

The Claimant was next seen by Dr. Lober on March 12, 1984 (T-83). All of the standard patch tests were negative (T-83). On March 12th, the Claimant had been off work for two weeks, and was advised that he could return to work with the understanding that he should not come in contact with cutting oils (T-83).

Dr. Lober again saw the Claimant on March 21, 1984 and was again told that

he could perform a job where he didn't deal with cutting oils (T-4). Additional patch tests against the oils in the Claimant's current job were also scheduled, and these tests also were negative (T-85,86).

The Claimant had been off work since February 27, 1984 and Dr. Lober again advised the Claimant that he could return to gainful employment if it did not involve any exposure to cutting oils or solvents (T-85). The reason Dr. Lober kept the Claimant away from cutting oils even though the patch testings were negative, was because oils can be the cause when combined with wetness and alkalinity (T-86). Dr. Lober indicated that patch testing does not necessarily eliminate the oil (T-86). Additionally, Dr. Lober took into consideration the Claimant's history that when he came in contact with the oil he flared up, and when he was away from it, he got better (T-86).

The Claimant again returned on May 7th at which time he had continued to remain off work, but was clinically cleared and Dr. Lober again discussed with him that he should return to work in any job not involving exposure to cutting oils and solvents (T-86,87).

As noted previously, on April 18, 1984, the Employer/Carrier filed a Notice of Termination of Temporary Total Disability Benefits effective April 23, 1984 because the Claimant was released to return to work with restrictions (T-73). Since the Employer had no work available within that restriction, they were sending wage loss information (T-73).

On May 25, 1984, Dr. Lober wrote a letter on behalf of the Claimant to again inform: To Whom It May Concern, that the Claimant,

> "May be released to work in a position that does not involve him working with cutting oils or solvents." (T-63,87)

Thereafter, in June, 1984, the Claimant again returned to work for the Employer (T-11). The Claimant remained at his same job which was setting up machines, and the Claimant was again exposed to the cutting oils (T-11,23). The Claimant testified that he worked on a Friday night and Saturday night his hands broke out again, at which time he went to Dr. Lober, who took pictures and told

him to lay off work for one week (T-12).

Dr. Lober's records indicate that he next saw the Claimant on June 4, 1984, after the Claimant had returned to work as a machinist using the cutting oils and solvents (T-87). Dr. Lober's history indicates that the Claimant had a symptomatic flare within 24 hours of the day he returned (T-87). On examination, the Claimant again had the hand dermatitis consistent with a reaction to the cutting oils (T-87). At that time, he was treated with topical cortisone and taken away from work, which was on June 4, 1984 (T-87). Dr. Lober wrote a letter which stated,

> "Mr. Morehead is to be excused from work until Monday, June 11, 1984." (T-62)

On June 11, 1984, the Claimant testified that he returned to work and was told that they didn't have any more work for the Claimant (T-12). The Claimant testified that Pat Sprouse, the personnel manager for the Employer, told the Claimant that if he was sensitive to oil, they didn't want him in the shop (T-13).

At the time of the hearing, the Claimant had been working for Century 21, a real estate company, where the Claimant did first obtain employment in May, 1984 (T-14,21). The Claimant testified that he doesn't make much money in real estate, and he was currently looking for a job at the time of the hearing (T-21).

The Claimant also testified that ever since he first broke out, he continues to break out whenever he touches any cutting oils, solvents or kerosene (T-18). However, the Claimant testified that he has not had any breakouts since June, 1984, when he stopped working for the Employer herein (T-26).

Dr. Lober indicated that he again saw the Claimant on June 11, 1984, when the Claimant's condition was again 99% clear (T-88). The Claimant was treated with zinc oxide and gloves (T-88). The Claimant was again told he could return to work without contacting cutting oils and solvents (T-88).

Dr. Lober testified within a reasonable degree of medical certainty or probability that the cutting oil that the Claimant came in contact with was causing the Claimant's condition (T-89). Dr. Lober was asked if he had an opinion based

upon a reasonable degree of medical probability as to whether the Claimant would be able to use cutting oil that he was using on the job again, to which Dr. Lober replied, "No" (T-90).

In particular, Dr. Lober was asked if the Claimant had a permanent physical impairment as a result of his condition. Specifically, Dr. Lober was asked the following,

> "Q. O.K. Dr., based on your opinion, based on your experience as a physician, did you have an opinion whether this is a permanent physical impairment, the fact that he cannot come in contact with this oil, this cutting oil, in the future?
>
> A. I need to know exactly what you mean by a permanent physical impairment.
>
> Q. Doesn't have the full use of his body.
>
> ...
>
> A. When you talk physical disability, it is my understanding that generally you are talking about someone loses a finger and can't move or something like this. In this case, if he doesn't contact the offending oil, he should be able to work as productively as anyone else. If he does, he won't.
>
> Think of poison ivey as an analogy. If he is sensitive and doesn't contact it, he is going to be normal as anybody else. If he does contact it, he will be completely able to contact it. It is essentially all or none, if he does or doesn't contact.
>
> Q. Dr., do the AMA Guides to permanent physical impairment have any guidelines as to contact dermatitis?
>
> A. I will have to look into it, I don't know..." (T-90,91).

Dr. Lober then stated,

> "A. ...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, its 100% disability to contact it, if he doesn't, he will be completely normal. Its not to be vague, but its the fact.
>
> Q. But its a condition that prohibits him from doing the type of work with that kind of oil?
>
> A. With the kind of oil he contacts during the periods under the discussion.
>
> Q. And that's a permanent condition, in your opinion?

A. That he would be permanently sensitive to the oil that he was responding to while under observation, yes." (T-92)

A more specific reference to facts will be made during argument.

QUESTION CERTIFIED TO THE FLORIDA SUPREME COURT BY THE FIRST DISTRICT COURT OF APPEAL AS A QUESTION OF GREAT PUBLIC IMPORTANCE:

DO THE AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT APPLY AND PRECLUDE A PERMANENT IMPAIRMENT RATING WHERE CLAIMANT SUFFERS A DISABILITY DUE TO OCCUPATIONAL DISEASE WHICH PERMANENTLY IMPAIRS THE CLAIMANT'S ABILITY TO WORK, RESULTING IN ECONOMIC LOSS, BUT DOES NOT AFFECT "THE ACTIVITIES OF DAILY LIVING"?

ISSUE ON APPEAL BEFORE THE FIRST DISTRICT COURT OF APPEAL AND AS FRAMED BY APPELLANTS IN THEIR INITIAL BRIEF ON THE MERITS:

WHETHER OR NOT THE DEPUTY COMMISSIONER ERRED IN FINDING THAT THE CLAIMANT SUSTAINED A PERMANENT PHYSICAL IMPAIRMENT AS A RESULT OF AN ACCIDENT SUSTAINED BY HIM ON AUGUST 30, 1983, AND IN ORDERING THE PAYMENT OF WAGE LOSS BENEFITS.

SUMMARY OF ARGUMENT

The Claimant/Respondent respectfully submits that the AMA Guides to the Evaluation of Permanent Impairment do not apply in the case at bar and preclude a permanent impairment rating.

Ordinarily, for purposes of determining eligibility for wage loss benefits in accordance with Florida Statute Section 440.15(3)(a) and (b)(1983) the existence and degree of permanent impairment resulting from injuries shall be determined pursuant to the AMA Guides, unless such permanent impairment cannot reasonably be determined under the criteria utilized in the guides, in which event such permanent impairment may be established under other generally accepted medical criteria for determining impairment, Trindad v. Abbey Road Beef and Booze, 443 So.2d 1007, 1012, (1st D.C.A. Fla. 1983). Where the application of a prescribed guide is not feasible, then a physician's qualified expert opinion on permanent impairment may suffice without reliance on a manual or guide, Martin County School Board v. McDaniel, 465 So.2d 1235 (1st D.C.A. Fla. 1984).

Furthermore, where a Claimant has an occupational disease, a Claimant is considered disabled either partially or totally where, because of an occupational disease, he is precluded from performing his work in the last occupation in which he was injuriously exposed to the hazard of such disease, Florida Statute Section 440.151(3)(1983).

In the case at bar, it is respectfully submitted that the Guides do not apply to the case at bar, because the Guides do not address the Claimant's evident economic wage loss which is the basis of the wage loss concept, OBS Company, Inc. v. Freeney, 475 So.2d 947 (1st D.C.A. Fla. 1985).

It is further submitted that in the case at bar, the Claimant has an occupational disease, and that he is clearly prevented, because of his occupational disease, from performing his work in the last occupation in which he was injuriously exposed to the hazards of the disease, to-wit: the cutting oil, and therefore, the Claimant clearly has a permanent impairment pursuant to Florida Statute Section

440.151(3)(1983).

Claimant/Respondent further respectfully submits that even if the Guides are applicable, the Guides would provide that the Claimant has a 0-5% permanent impairment (Page 205, 212 of the AMA Guides to the Permanent Impairment, Second Edition) (attached as Exhibit "B"). Since Dr. Lober clearly testified that the Claimant's reaction to cutting oils and solvents is permanent, and the Claimant is permanently unable to work in jobs where he is exposed to the offending oils, Dr. Lober's opinion constitutes competent substantial evidence that the Claimant has sustained a permanent physical impairment.

QUESTION CERTIFIED TO THE FLORIDA SUPREME COURT BY THE FIRST DISTRICT COURT OF APPEAL AS A QUESTION OF GREAT PUBLIC IMPORTANCE:

DO THE AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT APPLY AND PRECLUDE A PERMANENT IMPAIRMENT RATING WHERE CLAIMANT SUFFERS A DISABILITY DUE TO OCCUPATIONAL DISEASE WHICH PERMANENTLY IMPAIRS THE CLAIMANT'S ABILITY TO WORK, RESULTING IN ECONOMIC LOSS, BUT DOES NOT AFFECT "THE ACTIVITIES OF DAILY LIVING"?

ISSUE ON APPEAL BEFORE THE FIRST DISTRICT COURT OF APPEAL AND AS FRAMED BY APPELLANTS IN THEIR INITIAL BRIEF ON THE MERITS:

WHETHER OR NOT THE DEPUTY COMMISSIONER ERRED IN FINDING THAT THE CLAIMANT SUSTAINED A PERMANENT PHYSICAL IMPAIRMENT AS A RESULT OF AN ACCIDENT SUSTAINED BY HIM ON AUGUST 30, 1983, AND IN ORDERING THE PAYMENT OF WAGE LOSS BENEFITS.

Deputy Commissioner William M. Wieland in his Compensation Order of January 7, 1985, specifically found as follows:

> "I find that as a direct result of the aforementioned accident, that the Claimant has contacted dermatitis as a result of using cutting oils, and as a result of this, he has a permanent physical disability and is entitled to wage loss benefits." (T-100,101)

Furthermore, the First District Court of Appeals in their Opinion in the case at bar specifically stated,

> "...We agree with the Deputy that Claimant has a permanent impairment and affirm the award of wage loss benefits." (Dayron Corporation and Claims Center v. Morehead, 480 So.2d 235 (1st D.C.A. Fla. 1985 at 236)).

Additionally, as noted above, the First District Court of Appeal certified to this Honorable Court the above-referenced question as one of great public importance. It is respectfully submitted by the Claimant/Respondent that the AMA Guides to the Evaluation of Permanent Impairment do not apply to the case at bar, and therefore do not preclude a permanent impairment rating.

Florida Statute Section 440.15(3)(a)3 provides,

> "In order to reduce litigation and establish more certainty and uniformity in the rating of permanent impairments, the Division shall establish and use a schedule for determining the existence and degree of permanent impairment based upon

> medically or scientifically demonstrable findings. The schedule shall be based on generally accepted medical standards for determining impairment and may incorporate all or part of any one or more generally accepted schedules used for such purpose, such as the American Medical Association's Guide to the Evaluation of Permanent Impairment. On August 1, 1979, and pending the adoption, by rule, of a permanent schedule, the Guides to the Permanent Impairment, Copyright 1977, 1971, by the American Medical Association, shall be the temporary schedule, and shall be used for the purposes hereof." Florida Statute Section 440.15(3)(a)3(1983).

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, Morrison and Knudsen/American, etc. v. Scott, 423 So.2d 463 (1st D.C.A. Fla. 1982).

However, the First District Court of Appeal recognized, in the case of Rhaney v. Dobbs House, Inc., 415 So.2d 1277 (1st D.C.A. Fla. 1982), that there are certain injuries and conditions that result in a permanent impairment which are not contained in the AMA Guides. Under these circumstances, the First District Court of Appeal stated,

> "The permanent impairment can be provided by qualified expert testimony based upon the training, experience, and expertise of the witness, or on other accepted medical guides or schedules prepared by specialists, groups or associations, such as the Academy of Orthopedic Surgeons." Rhaney v. Dobbs House, Inc., 415 So.2d 1277 (1st D.C.A. Fla. 1982).

In Trindad v. Abbey Road Beef and Booze, 443 So.2d 1007 (1st D.C.A. Fla. 1983), the First District Court of Appeal held,

> "...That for purposes of determining eligibility for wage loss benefits in accordance with Section 440.15(3)(a) and (b), the existence and degree of permanent impairment resulting from injuries, shall be determined pursuant to the Guides, unless such permanent impairment cannot reasonably be determined under the criteria utilized in the Guides, in which event, such permanent impairment may be established under other generally accepted medical criteria for determining impairment." Trindad v. Abbey Road Beef and Booze, supra, at 1012.

Again, the First District Court of Appeal in Deseret Ranches v. Crosby, 461 So.2d 295 (1st D.C.A. Fla. 1985) stated that when an injury is not covered by the AMA Guides, it is not error for the Deputy to rely on medical testimony of

permanent impairment based upon other generally accepted medical standards.

Furthermore, in Martin County School Board v. McDaniel, 465 So.2d 1235 (1st D.C.A. Fla. 1984) (rehearing en banc) (February 27, 1985), the First District Court of Appeal concluded 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." Martin County School Board v. McDaniel, supra, at 1240,1241.

Furthermore, in situations where there is an occupational disease, another statute dealing with permanent impairment comes into play. Specifically, Florida Statute Section 440.151(3)(1983) provides as follows:

> "Except as hereinafter otherwise provided in this section "disablement" means the event of an employee's becoming actually incapacitated, partially or totally, because of an occupational disease, from performing his work in the last occupation in which injuriously exposed to the hazards of such disease; and "disability" means the state of being so incapacitated."

The First District Court of Appeal in the case of King Motor Company v. Pollack, 409 So.2d 160 (1st D.C.A. Fla. 1982) has previously recognized that where a Claimant because of an occupational disease has been actually incapacitated from performing the last occupation in which he was injuriously exposed, he has established a compensable claim based on loss of wage earning capacity. In the case at bar, it is respectfully submitted that the Claimant does in fact have an occupational disease. The First District Court of Appeal so found that the Claimant's disability was due to an occupational disease. Specifically, the First District Court of Appeal in the case at bar stated,

> "Although the Deputy Commissioner did not specifically find that Claimant's disability is due to an occupational disease, it clearly is, Sunshine Truck Plaza/Camp Oil Company v. Tucker, 395 So.2d 265 (1st D.C.A. Fla. 1981) and a specific finding is unnecessary since compensability was stipulated." Dayron Corporation and Claims Center v. Morehead, 480 So.2d 235 (1st D.C.A. Fla. 1985) at 236, footnote 2.

Indeed, there can be no question but that the Claimant has an occupational disease. Before a Claimant can recover for an occupational disease, the Claimant must prove four things,

(1) The disease must be actually caused by employment conditions that are characteristic of and peculiar to a particular occupation;

(2) The disease must be actually contracted during employment in the particular occupation;

(3) The occupation must present a particular hazard of the disease occurring so as to distinguish that occupation from usual occupations, or the incidence of the disease must be substantially higher in the occupation than in usual occupations;

(4) If the disease is an ordinary disease of life, the incidence of a disease must be substantially higher in a particular occupation than in the general public, Lake v. Irwin Yacht & Marine Corp., 398 So.2d 902 (1st D.C.A. FL 1981).

In the case at bar, Claimant's disease of contacted dermatitis was actually caused by employment conditions that were characteristic of and peculiar to a particular occupation of a machinist (T-7-9,89). The disease was actually contracted during the Claimant's employment in his particular occupation. His occupation clearly presents a particular hazard of the disease in that the Claimant is constantly around cutting oil (T-7). Dr. Lober noted that up to 30% of all patients working with cutting oils can have dermatitis from cutting oils (T-83).

Finally, although there is not testimony as to whether contact dermatitis is an ordinary disease of life, it is respectfully submitted that the incidence of contact dermatitis is clearly substantially higher in the Claimant's occupation than in the general public, if 30% of all persons working with these cutting oils can have dermatitis (T-83).

Furthermore, the First District Court of Appeal has found that contact dermatitis in certain circumstances has constituted an occupational disease, Sunshine Truck Plaza/Camp Oil Company v. Tucker, 395 So.2d 265 (1st D.C.A. Fla. 1981), Phelps v. Gunnite Construction and Rentals, Inc., 279 So.2d 829 (Fla. 1973).

Finally, the Claimant/Respondent would respectfully submit that the question as certified by the First District Court of Appeals presupposes the fact that the Claimant has suffered a disability due to an occupational disease.

Since the Claimant has an occupational disease, and since the Claimant was precluded from performing his work as a machinist with the Employer herein, which

is the last occupation in which the Claimant was injuriously exposed to the cutting oils (T-12), and further, since Dr. Lober has clearly and unequivocally indicated that the Claimant is permanently sensitive to these cutting oils, and will be permanently prohibited from doing the type of work with that kind of oil (T-92), it is clear that the Claimant has a permanent disability pursuant to Florida Statute Section 440.151(3)(1983), King Motor Company v. Pollack, 409 So.2d 160 (1st D.C.A. Fla. 1982).

Indeed, the Employer/Carrier recognizes that the Claimant has limitations and restrictions based upon his injury, as was set out in their Notice of Termination of Temporary Total Disability Benefits (T-73) and as noted in their Amended Notice of Suspension of Compensation Benefits filed June 4, 1984 (T-75). Under both those Notices of termination of disability benefits, the Employer herein recognizes that the Claimant was released to return to work with restrictions, and in particular, on April 18, 1984 noted that the Employer had no work available within the Claimant's restrictions and the Employer was sending wage loss information (T-73).

Although Dr. Lober did not assign an anatomical percentage of disability, this does not preclude an award of wage loss benefits for the Claimant. A Claimant need merely show the existence of some permanent impairment to be eligible for wage loss benefits, and it is not necessary that he show a specific percentage rating of permanent impairment, Rich v. Commercial Carrier Corporation, 422 So.2d 1011, (1st D.C.A. Fla. 1984), Clay Hyder Trucking v. Persinger, 416 So.2d 900 (1st D.C.A. Fla. 1982), Tallahassee Memorial Regional Medical Center v. Snead, 400 So.2d 1016 (1st D.C.A. Fla. 1981). This is particularly true in occupational disease situations, King Motor Company v. Pollack, 409 So.2d 160 (1st D.C.A. Fla. 1982).

The Claimant further specifically contends that the AMA Guides to the Evaluation of Permanent Impairment are not applicable to the case at bar. As the First District Court of Appeal noted in the case of OBS Company, Inc. v. Freeney, 475 So.2d 947 (1st D.C.A. Fla. 1985), the First District Court of Appeal stated,

"Accordingly, although the Guides do not award the permanent

> impairment to Claimant's skin condition, we affirm and agree with the Deputy that, under the particular factual circumstances at bar, the Guides are not exclusively controlling because the Guides do not address Claimant's evident economic loss, which is the basis of the wage loss concept." OBS Company, Inc. v. Freeney, supra, at 950.

Respondent respectfully submits that the Claimant in OBS Company, Inc. v. Freeney, supra, also developed contact dermatitis as a result of exposure to wet cement while working for the Employer.

The First District Court of Appeal in OBS Company, Inc. v. Freeney, supra, relied in part on the First District Court of Appeal's decision in Trindad v. Abbey Road Beef and Booze, 443 So.2d 1007, (1st D.C.A. Fla. 1983) which dealt with an analgous situation (instability of joint but no loss of range of motion). The First District Court of Appeal in the Trindad v. Abbey Road Beef and Booze case, supra, also concluded that the AMA Guides were not exclusively controlling.

Additionally, as noted by the First District Court of Appeal in both OBS Company, Inc. v. Freeney, 475 So.2d 947 (1st D.C.A. Fla. 1985) and Trindad v. Abbey Road Beef and Booze, 443 So.2d 1007 (1st D.C.A. Fla. 1983),

> "We have the obligation of interpreting a statute in a manner consistent with the legislative intent, to the extent it is ascertainable and can lawfully be implemented. We have the further obligation of applying an interpretation upholding the constitutionality of a statute, if such an interpretation is permissible." OBS Company, Inc. v. Freeney, supra, at 950.

In the introduction of the AMA Guides to the Evaluation of Permanent Impairment, copyright 1984, the Guides appear to take into consideration economic loss to the Claimant. Specifically, the introduction states,

> "This Chapter provides criteria for evaluating the effect that permanent impairment of the skin and its appendages has on an individual's ability to perform or participate in the activities of daily living, including occupation." AMA Guides to the Evaluation of Permanent Impairment, copyright 1984, at page 203 (Appendix B attached hereto).

However, the comment on example 3 on page 205 contradicts the apparent inclusion of "occupation" as an "activity of daily living." Specifically, the First District Court of Appeal in the case at bar recognized this contradiction

when concluding that the Second Edition of the AMA Guides still does not cover the type of economic loss apparent in this case. Specifically the First District Court of Appeal in the case at bar stated,

> "We note that the Second Edition of the AMA Guides to the Evaluation of Permanent Impairment, copyright 1984, is not discussed in OBS Company, Inc. v. Freeney, 475 So.2d 947 (Fla. 1st D.C.A. Fla. 1985), purports to address the evident economic loss to this type of Claimant by the inclusion of "occupation" any "activities of daily living." However, the comment on example three on page 205 contradicts the apparent inclusion of "occupation" as an "activity of daily living." In view of this ambiguity, we conclude that the Second Edition of the Guides still does not cover the type of economic loss apparent in this case."

It should also be noted that Florida Statute Section 440.02(9)(1983) which defines disability, states as follows:

> "Disability means incapacity because of the injury to earn in the same or any other employment, the wages which the employee was receiving at the time of the injury."

In the case at bar, it is obvious that the Claimant is unable to earn in the same employment wages which he was receiving at the time of the injury. Furthermore, as noted previously, this has also been recognized by the Employer in their Notice of Termination of Compensation Benefits (T-73,75). Furthermore, there is no evidence whatsoever in the record to show that the Claimant is capable of earning an equal wage to what he was earning at the time of his injury in other employment without further training. The Claimant's average weekly wage for the Employer herein was $488.87 per week (T-38).

Therefore, since Florida Statute Section 440.151(3)(1983) specifically deals with an occupational disease, and specifically indicates that disablement means a Claimant becoming actually incapacitated, partially or totally, because of an occupational disease, from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, it is clear that the legislature intends permanent impairment based on an occupational disease to be based on economic loss as a result of the injury. This is also supported by the general definition of "disability" as set forth in Florida Statute Section 440.02(9)(1983). Since the

applicable section of the AMA Guides does not take into consideration the Claimant's evident economic loss as a result of the Claimant's injury, the AMA Guides are clearly not applicable to the case at bar.

The Claimant would respectfully submit that even if this Honorable Court feels that the AMA Guides are applicable to the case at bar, it is respectfully submitted that there is nevertheless, competent substantial evidence upon which to support a finding that the Claimant has sustained a permanent physical impairment. Page 205 of the AMA Guides to the Evaluation of Permanent Impairment, which is attached as Appendix B herein, indicates that a Class I impairment constitutes a permanent impairment of 0-5%. A patient belongs in Class I when,

> (a) Signs or symptoms of skin disorder are present;
>
> (b) With treatment, there is no limitation or minimal limitation, in the performance of the activities of daily living, although exposure to certain physical or chemical agents might increase limitation temporarily.

Since the Guide provides a 0-5% impairment, it is apparent that there is some discretion in the treating physician. Dr. Lober clearly indicates that the Claimant's condition is a permanent condition and it prohibits him from doing the type of work that he does with that kind of oil (T-92). Since the Claimant is prohibited from doing his former type of work because of his reaction to this oil, the Claimant clearly has a wage loss because of his injury and his condition. Since the AMA Guides provide for a 0-5% impairment, since the Claimant clearly has a permanent condition, and since Florida Statute Section 440.151(3)(1983) provides that a Claimant has a disablement under these circumstances, (see also King Motor Company v. Pollack, 409 So.2d 160 (1st D.C.A. Fla. 1982), there is clearly competent substantial evidence to support Deputy Commissioner Wieland's finding that the Claimant has sustained a permanent disability as a result of his accident on October 30, 1981.

Petitioner's argue in their Brief that the AMA Guides do cover the injury or condition involved. They further argue, that example 3 at page 205 of the Guides specifically provide for a 0% permanent impairment (page 9, 10, Initial

Brief of Petitioners). It is respectfully submitted by Respondent herein, that the AMA Guides do not cover the injury or condition here involved, because the AMA Guides do not deal with the effect that the Claimant's injury has on his occupation, and therefore, does not address the Claimant's evidence economic loss, Dayron Corporation and Claims Center v. Morehead, 480 So.2d 235 (1st D.C.A. Fla. 1985), OBS Company, Inc. v. Freeney, 475 So.2d 947 (1st D.C.A. Fla. 1985). In fact as noted previously, the AMA Guides conflict with themselves, in that the introduction to the portion of the AMA Guides dealing with skin indicates that the Guides will consider the effect of the Claimant's injury on his occupation (page 203 of the Guides attached hereto as Appendix B) yet example 3 as cited by Petitioners in their Initial Brief does not take into consideration the effects of the worker's contact dermatitis on his employment in arriving at a permanent impairment rating. It should be noted, however, that in the comment, the AMA Guides does recognize that even under example 3 the worker may be disabled under some state workers' compensation statutes. The Respondent specifically submits that Florida Statute Section 440.151(3)(1983) which defines disability in a situation of an occupational disease where that occupational disease prevents the Claimant from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, is such a statute which does prescribe that the Claimant is in fact disabled under the circumstances in the case at bar. Therefore, even the AMA Guides recognize that a Claimant under the circumstances set forth in example 3 can be disabled under certain workers' compensation statutes.

Furthermore, as Respondent previously noted, the AMA Guides provide for an impairment rating of 0-5% when the Claimant's injury to his skin falls within Class I. As noted previously, this gives some discretion to the treating physician, and Dr. Lober in the case at bar clearly indicated that the Claimant's condition is a permanent condition. Therefore, Claimant/Respondent respectfully submits that the Guides do not cover the Claimant's situation because they do not take into consideration the effect of the Claimant's injury on his occupation, but even if

it does deal with the Claimant's situation, the Guides are not inconsistent with a finding of a permanent impairment based on the comment under example 3 in the Guides, and based on the fact that a Class I impairment is 0-5% (page 205of the AMA Guides attached as Exhibit B herein).

Petitioners then argue in their Initial Brief that the occupational disease section of the Act is not applicable because the parties stipulated that the Claimant sustained an accident arising out of and in the course of his employment, but the Employer/Carrier did not stipulate that the Claimant sustained an occupational disease (page 12, Initial Brief of Appellants). They argue that the issue of occupational disease was raised for the first time in the Answer Brief of the Appellee.

It is respectfully submitted that when the Employer/Carrier stipulated that the Claimant had, in fact, sustained an accident arising out of and in the course and scope of his employment with the Employer herein on August 30, 1983, they simply eliminated the issue of compensability as one of the issues which would be presented to the Deputy Commissioner. It does not alter the fact that the Claimant has, in fact, had an occupational disease. Therefore, it does not eliminate or preclude consideration of Florida Statute Section 440.151(3)(1983) in determining whether or not the Claimant has in fact sustained a permanent physical impairment entitling him to wage loss benefits.

Petitioners then argue that the record is devoid of any indication that the Claimant has satisfied the requirements for occupational disease (Page 12, Initial Brief of Petitioners). It is respectfully submitted as argued hereinabove, that the Claimant/Respondent has clearly sustained an occupational disease in the case at bar. This was also found to be the case by the First District Court of Appeal in the case at bar, Dayron Corporation and Claims Center v. Morehead, 480 So.2d 235 (1st D.C.A. Fla. 1985), footnote 2 at 236.

CONCLUSION

It is respectfully submitted that the AMA Guides to the Evaluation of Permanent Impairment do not apply in the case at bar and do not preclude the permanent impairment rating.

The Guides to the Evaluation of Permanent Impairment are not applicable to the case at bar, because they do not take into consideration the effects of the Claimant's injury on his occupation. Furthermore, the Guides are inconsistent in this matter in that the introduction to the Guides indicate that the effects of the Claimant's injury on his occupation will be considered in the Guides, but the examples given later in the Guides do not take into consideration the effects of the Claimant's injury on his occupation.

Furthermore, Florida Statute Section 440.151(3)(1983) which specifically deals with occupational diseases, specifically finds that the Claimant has a permanent impairment when the Claimant becomes incapacitated, partially or totally, because of an occupational disease, from performing his work in the last occupation in which injuriously exposed to the hazards of the disease. In the case at bar, the Claimant had his position terminated with the Employer herein because of the Claimant's reaction to oil, and the Claimant can not return to his last occupation because any further contact with the oil will cause another outbreak of the contact dermatitis. The Employer, as set forth in their Notice of Termination of Compensation Benefits, also recognizes that the Claimant was released with restrictions and at on time, the Employer did not have any work for the Claimant within those restrictions.

Finally, even if the Guides are applicable, they do not preclude a finding of permanent impairment in the case at bar.

Wherefore, it is respectfully requested that this Honorable Court affirm the Opinion of the First District Court of Appeal in the case at bar on December 30, 1985 and affirm Deputy Commissioner Wieland's Order of January 7, 1985.

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