

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F412492**

**EDDIE J. NICHOLS**

**CLAIMANT**

**ARKANSAS STATE HIGHWAY & TRANSPORTATION  
DEPARTMENT**

**RESPONDENT EMPLOYER**

**PUBLIC EMPLOYEE CLAIMS**

**RESPONDENT NO. 1**

**SECOND INJURY FUND**

**RESPONDENT NO. 2**

**DEATH & PERMANENT TOTAL DISABILITY  
TRUST FUND**

**RESPONDENT NO. 3**

**ORDER AND OPINION FILED JULY 18, 2006**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE GEORGE BAILEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE WILLIAM L. WHARTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on May 24, 2006. A prehearing conference was held on April 20, 2006, and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an October 26, 2004, compensable injury.
2. The compensation rates are \$256/192.
3. Respondent No. 1 has accepted a 12% permanent impairment rating.

The claimant contends he sustained an admittedly compensable injury and is entitled to temporary total disability benefits through February 27, 2006, a 15% impairment rating and permanent and total disability benefits and attorney's fees. The claimant contends the end of the healing period is February 27, 2006.

Respondent No. 1 contends that work was offered to the claimant within his restrictions and he refused the job; therefore, he is unable to demonstrate wage loss. Alternatively, if wage loss is awarded, respondent wants Ark. Code Ann. §11-9-522(f) noted, which limits his disability to a period of 260 weeks because of his age. Respondent stopped temporary total disability benefits October 20, 2005, and began paying the permanent impairment rating. Respondent No. 1 contends the end of the healing period is October 20, 2005.

Respondent No. 2, Second Injury Fund, contends that the claimant's disability is the result of his compensable injury. Respondent No. 2 contends the claimant was hired at age 74 to perform some strenuous duties and was not operating with a disability when he was hired. Respondent No. 2 contends that there is no combination of disabilities of the claimant to hold it responsible for any wage loss benefits. Respondent No. 2 contends, first, that a job was made available to the claimant within his restrictions and he declined such. Respondent No. 2 also contends that Ark. Code

Ann. §11-9-522(f) would limit any wage loss benefits to 260 weeks and further contends the Commission has found that statute constitutional. Respondent No. 2 contends the end of the healing period is October 20, 2005.

Respondent No. 3 contends that Second Injury Fund liability has to be determined first. If the Second Injury Fund has liability, the Death & Permanent Total Disability Trust Fund does not have liability. Respondent No. 3 contends the end of the healing period is October 20, 2005.

### **ISSUES TO BE LITIGATED**

1. Temporary total disability through February 27, 2006.
2. A 15% permanent impairment rating versus the 12% permanent impairment rating accepted.
3. End of the healing period.
4. Permanent and total disability/wage loss benefits.
5. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. There was an October 26, 2004, compensable injury.

2. The compensation rates are \$256/192.
3. Respondent No. 1 has accepted a 12% permanent impairment rating.
4. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from October 21, 2005 through February 27, 2006.
5. The end of the healing period is October 20, 2005.
6. The claimant has failed to prove by a preponderance of the evidence that he is entitled to the 15% permanent impairment rating.
7. The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled or entitled to wage loss benefits.

### **DISCUSSION**

The claimant, 76 years of age, completed the first grade of school and began working in the fields after that. The claimant worked from 1969 to about 1990 for a cement company where he drove a truck, a mixer, and performed other duties. The claimant worked for Pro Window and Door from 1997 to 2002 and he delivered glass, mowed grass, swept and performed other duties. The claimant has held jobs that were physical labor jobs. In 2002, the claimant hit his leg with a sledge hammer and this required about six weeks for him to recover; however, he was experiencing no leg problems when he was hired by the respondent employer. In May 2003, the claimant fell and hurt his shoulder, suffering a rotator cuff tear. There was no surgery involved but the claimant was assigned a 10% permanent impairment rating and his claim was settled. The claimant testified that injury required about nine weeks for him to recover.

Around April 2004, the claimant made application at the respondent employer and began his employment in June 2004. The claimant cut grass near the roads with a weed eater and mowed grass with a tractor and bush hog, as well as picked up trash from the drainage ditches and filled potholes with asphalt. According to the claimant, he was able to perform all his job tasks before the October 26, 2004, injury. According to the claimant, he was a passenger in a double cab pickup that ran off the road and almost rolled over, causing the claimant to be thrown around. The claimant testified he hit the door and window of the truck. The claimant sought medical treatment and underwent cervical surgery on March 18, 2005, after being treated conservatively for a time.

The claimant first contends that he is entitled to temporary total disability benefits from October 21, 2005, through February 27, 2006, while the claimant remained off work. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. *Id.* The healing period is defined as that period for healing of an injury resulting from an accident. *Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Crabtree, supra*. The question of

when the healing period has ended is a factual determination for the Commission.

In the present case, the claimant was deemed to have reached maximum medical improvement on October 20, 2005, as opined by Dr. Reza Shahim, his treating physician. Dr. Shahim assigned a 12% permanent impairment rating at that time. Dr. Shahim also completed a Release to Return to Work form for the employer and indicated the claimant was released to work for duties of a flagger, picking up litter, and repetitive motion duties. He was advised not to lift over 10 pounds. Chris Cole, area maintenance supervisor for the employer, testified that the claimant brought the work release form to her on November 10, 2005 and she reviewed such with her supervisor and on November 14, 2005, she called the claimant's home and offered him a job consistent with his restrictions and he was to report to work on November 15, 2005, and the claimant agreed. According to Ms. Cole, when the claimant did not show up for work on November 15, 2005, she called his home and he advised her his neck was still hurting. On November 21, 2005, Ms. Cole called the claimant's home again and spoke with the claimant's wife and asked that the claimant call her about the job offer. On December 8, 2005, a letter was sent to the claimant giving him a time frame to return to work or his employment would be deemed abandoned. The letter advised there were assignments available within the restrictions. The claimant chose not to report for work.

After considering all the credible evidence, to include the release to return to work and the offer of employment within the restrictions, I find the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and unable to earn wages. The medical documents indicate the claimant had reached the end of his healing period on October 20, 2005. There is a report from Dr. Shahim on

January 26, 2006, that indicates the claimant was x-rayed and the implants had not changed and there was no evidence of subluxation. Dr. Shahim advised the claimant to remain off work for six weeks; however, he did not provide any explanation as to why. I find the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and unable to earn wages because of his compensable injury after October 20, 2005.

The claimant next contends that he is entitled to a 15% permanent impairment rating as assigned by Dr. Shahim, rather than the 12% permanent impairment rating that respondents have accepted that was also assigned by Dr. Shahim. The medical records from Dr. Shahim vacillate between a 12% and a 15% impairment rating.

“Permanent impairment” has been defined as any permanent functional or anatomical loss remaining after the healing period had ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Further, the *AMA Guides* define “permanent impairment” as an “impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment.” The *AMA Guides* further qualify the definition by noting that “[a] permanent impairment is considered to be unlikely to change substantially and by more than [three percent] in the next year with or without medical treatment.” *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Further, the Commission was required to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission has adopted the *AMA Guides* to be used in this assessment. Ark. Code Ann. §11-9-522(g)(1)(A)

(Repl. 2005); W.C.C. Rule 34. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the *AMA Guides*; the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Avaya v. Bryant*, 83 Ark. App. 273, 105 S.W.3d 811 (2003).

Dr. Shahim has not provided specific guidance into how he arrived at the two ratings he has assigned. A review of the *Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Ed.*, indicates that the 12% permanent impairment rating is the more appropriate rating. Table 75 of the *AMA Guides* is more closely aligned with Dr. Shahim's 12% permanent impairment rating. Therefore, I find the claimant has failed to prove by a preponderance of the evidence that he is entitled to the 15% permanent impairment rating; however, I find the 12% permanent impairment rating that respondents have accepted is the appropriate rating.

The claimant next contends the end of his healing period is February 27, 2006, while Respondents Nos. 1, 2 and 3 contend the end of the claimant's healing period is October 20, 2005. After considering all the medical evidence, I find the preponderance of the evidence indicates the claimant reached maximum medical improvement on October 20, 2005, when Dr. Shahim released him to return to work with restrictions and assigned a permanent impairment rating.

The claimant lastly contends that he permanently and totally disabled. When determining the degree of permanent disability sustained by an injured worker, the Commission must consider the degree to which the worker's future wage earning

capacity is impaired. In addition to medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, the Commission must also consider other factors, such as the worker's age, education, work experience, and any other matters which may affect the worker's future earning capacity. Ark. Code Ann. §11-9-522; *Tiller v. Sears*, 27 Ark. App. 159, 767 S.W.2d 544 (1989). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

In the present case, I find the claimant has failed to prove that he is permanently and totally disabled. While the claimant is 76 years of age, he began his employment with the respondents when he was 74 years old. He testified that he had worked all his life and his work history verifies that. The claimant is unable to read and write but has been regularly employed throughout his life. Dr. Shahim discussed with the claimant that he should consider retirement; however, he further indicated that the claimant could go to light-duty work with no lifting above 10 pounds. Dr. Shahim released the claimant on October 20, 2005 and indicated he could be a flagger and he could pick up litter but did not authorize him to drive a truck or tractor. Chris Owen from the respondent employer testified that a job offer was made to the claimant within his restrictions and the claimant decided to decline the offer. The respondent employer, on December 8, 2005, advised the claimant by letter that a job within his restrictions was available and a deadline was given for him to contact them. The claimant did not

accept the offer nor attempt to see if he was capable of performing the job. Ark. Code Ann. §11-9-522(b)(2) provides that if a bona fide job offer is made, the claimant is not entitled to permanent partial disability benefits in excess of the permanent impairment benefits. When all the credible evidence is considered, I find the claimant has also failed to prove by a preponderance of the evidence that he is entitled to any wage loss benefits.

### **ORDER**

The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from October 21, 2005 through February 27, 2006, because of his compensable injury. The end of the healing period is October 20, 2005. The claimant has failed to prove by a preponderance of the evidence that he is entitled to the 15% permanent impairment rating. The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled or entitled to wage loss benefits. The claim for benefits is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL**  
**ADMINISTRATIVE LAW JUDGE**