

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F602142**

**CECIL A. NELSON, EMPLOYEE**

**CLAIMANT**

**ARKANSAS HIGHWAY &  
TRANSPORTATION DEPARTMENT, EMPLOYER**

**RESPONDENT**

**PUBLIC EMPLOYEE CLAIMS,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED SEPTEMBER 26, 2007**

Hearing before Chief Administrative Law Judge David Greenbaum on August 24, 2007 at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Jim Burton, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. William L. Wharton, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted August 24, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on July 25, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced without objection as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the parties at all relevant times, including December 7, 2005; that the claimant sustained a compensable injury to his left elbow on said date; that he earned

Nelson - F602142

sufficient wages to entitle him to the maximum applicable compensation rates; that respondents paid appropriate temporary total disability; that the claimant's healing period ended on or before June 12, 2006, at which time claimant returned to work for the employer herein; that respondents accepted and paid a ten percent (10%) impairment to the left upper extremity; and that respondents had controverted any permanent impairment in excess of the benefits previously paid. As set out further below, all of the proposed stipulations cannot be accepted as fact.

By agreement of the parties, the primary issue presented for determination concerned the extent of claimant's extent of permanent impairment.

Claimant contended, in summary, that he was entitled to thirty percent (30%) impairment to the left upper extremity as assessed by Dr. Gregory Ricca issued by a supplemental report on June 7, 2006; and that a controverted attorney's fee should attach to any additional impairment benefits awarded.

The respondents contended that the claimant's treating physician, Dr. Ricca, initially declined to assign an impairment rating in association with the claimant's left ulnar entrapment surgery of March 7, 2006; that respondents undertook to determine the appropriate impairment rating based upon Table 16 of the *Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition (Table 16, Page 3/57) and based on Dr. Ricca's post-operative comments and clinical notes, it determined that a "mild" impairment of ten percent (10%) to the left upper extremity was appropriate

Nelson - F602142

under the *Guides*, and that it had accepted and paid this amount. Respondents further maintained that the claimant presented the Dr. Ricca on June 7, 2006, asserting that he “deserved more than 10%”; that the subsequent assignment of a thirty percent (30%) rating to the left upper extremity was a product of the claimant’s own urging and was not supported by the remaining medical evidence. Respondents pointed out that the claimant underwent additional surgery for the left ulnar nerve entrapment performed by Dr. Michael Moore on October 16, 2006; that Dr. Moore subsequently assigned a ten percent (10%) impairment to the “left hand” on May 15, 2007, and that based on the foregoing, the respondents maintained that the claimant was entitled to no more than a ten percent (10%) rating to the left upper extremity in association with his left ulnar nerve entrapment surgeries.

The claimant testified in his own behalf. Doris Taylor was called as a witness by respondents. The record is composed solely of the transcript of the August 24, 2007 hearing containing numerous exhibits.

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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On December 7, 2005, the claimant sustained a compensable injury arising out of and during the course of his employment with the Arkansas Highway and Transportation Department, at which time he earned sufficient wages to entitle him to the maximum applicable compensation rates.
3. The claimant's initial healing period ended on or before June 12, 2006 at which time the claimant returned to work for the employer herein. The claimant underwent a second left cubital tunnel release with intramuscular transposition of the left ulnar nerve on October 16, 2006 performed by Dr. Michael Moore. The claimant's second healing period ended on or before May 15, 2007. Respondents paid all appropriate temporary total disability to which claimant is entitled, to date.
4. A preponderance of the credible evidence reflects that the claimant sustained a ten percent (10%) impairment to the left upper extremity as a result of his December 7, 2005 compensable left elbow injury and subsequent surgeries..
5. Respondents have paid either a ten percent (10%) impairment to the left hand or ten percent (10%) to the left upper extremity below the elbow. Accordingly, the claimant is entitled to an additional 6.1 weeks of permanent

Nelson - F602142

impairment because his ten percent (10%) impairment to the upper extremity entitles him to 24.4 weeks of permanent impairment. Respondents accepted and paid 18.3 weeks.

6. Respondents have controverted any permanent impairment benefits in excess of those previously paid.
7. Claimant's attorney, Jim R. Burton, is entitled to the maximum statutory attorney's fee on all additional permanent impairment benefits.

#### DISCUSSION

The relevant facts in this case are basically undisputed. Further, respondents' payment of appropriate temporary total disability as well as its acceptance and payment of impairment benefits following the claimant's left elbow surgeries by two separate physicians is confirmed by the stipulations as well as documentation submitted at the hearing. (Resp. Ex. 2-3)

However, I feel compelled to point out that the stipulations are correct only in part. Doris Taylor, respondents' case manager, testified and the aforementioned exhibits confirm, that respondents paid 18.3 weeks of permanent impairment, which represents the scheduled loss of either the hand or upper extremity below the elbow rather than the more appropriate 24.4 weeks, which would represent a ten percent (10%) to the entire upper extremity, which in my opinion is the appropriate impairment rating for the claimant's scheduled loss. The confusion can be attributed in part to the reports from Dr. Michael M. Moore, who performed the

Nelson - F602142

claimant's second ulnar nerve transposition surgery following a less than successful initial surgery performed by Dr. Gregory F. Ricca. Further, the record reflects that in addition to elbow surgery, Dr. Ricca had previously performed bilateral carpal tunnel surgeries as a result of prior injuries which are not subject to the within claim. Nevertheless, it is apparent that Dr. Moore compounded any confusion by addressing the impairment ratings previously attributable to the carpal tunnel releases without adequately addressing the left ulnar nerve surgeries which were performed first by Dr. Ricca on March 7, 2006. Dr. Ricca assessed an impairment rating which has been disputed. The claimant then underwent a second or recurrent left cubital tunnel release with intramuscular transposition of the ulnar nerve by Dr. Moore on October 16, 2006. Following Dr. Moore's second surgery, the claimant's symptoms improved significantly. Accordingly, Dr. Ricca's assessment of impairment on June 7, 2006 was of little value.

A review of the medical evidence is illuminating. As previously noted, Dr. Ricca, a neurosurgeon in Jonesboro, Arkansas, initially treated the claimant's left elbow injury. Dr. Ricca performed a left ulnar nerve decompression at the elbow on March 7, 2006. Dr. Ricca released the claimant as having reached maximum medical improvement on May 7, 2006, two months post-surgery, without assessing any permanent impairment, indicating that he did not own a copy of the *AMA Guides*, 4<sup>th</sup> Edition, and declined to assess impairment. (Jt. Ex. A, pp. 10-12)

Nelson - F602142

As reflected by the testimony of Doris Taylor, after Dr. Ricca declined to give an impairment rating, respondents reviewed the *AMA Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition, Table 16, P. 3/57, and determined that the claimant was entitled to a ten percent (10%) upper extremity impairment based upon the surgery performed and the degree of severity, apparently determining on their own that the claimant had a "mild" degree of severity. The claimant returned to Dr. Ricca on June 7, 2006 with increased complaints. Dr. Ricca's clinical notes indicate that the claimant was scheduled to return to work; but that the claimant reported his hands still did not function normally, complaining "I still cannot open a bag of chips." The claimant apparently stated, "I feel I deserve more than 10%." At that time, Dr. Ricca, utilizing the same Table relied upon by respondents, assessed a thirty percent (30%) partial impairment of the left upper extremity, which is the appropriate rating based upon a moderate degree of severity. (Jt. Ex. A, P. 9)

I feel compelled to point out that Dr. Ricca determined that the claimant had a moderate degree of upper extremity impairment without performing any additional diagnostic studies. Specifically, Dr. Ricca did not order a post-surgical EMG study. Because of the claimant's continued complaints, respondents exercised good faith in meeting its obligations by sending the claimant to Dr. Michael M. Moore, an orthopedic surgeon in Little Rock, Arkansas, specializing in hand and upper extremity injuries. Dr. Moore determined that the claimant required a second

Nelson - F602142

surgery. As previously noted, a second surgery was performed on October 16, 2006, at which time respondents suspended payment of permanent impairment and reinstated temporary total disability. Respondents paid appropriate temporary total disability until the claimant returned to work for the employer herein. The claimant candidly acknowledged that the surgery performed by Dr. Moore significantly improved the function of his left upper extremity. Further, Dr. Moore referred the claimant to Dr. Reginald Rutherford for a post-surgery EMG, which was conducted on February 13, 2007. Actually, the claimant returned to work prior to undergoing the additional diagnostic studies. Dr. Moore's January 2, 2007 report is set out in its entirety below:

Mr. Cecil Nelson was seen at the Arkansas Hand Center on January 2, 2007, approximately 3 months following a left cubital tunnel release with intramuscular transposition of the ulnar nerve. Mr. Nelson reports the numbness in the ring and small fingers has resolved. He does describe mild pain symptoms over the medial aspect of the left elbow. He understand the pain symptoms should gradually improve. In addition, he was given ketoprofen gel to apply to the elbow as needed for pain.

The review of systems referable to the musculoskeletal system was otherwise unremarkable and unchanged from the previous appointment of November 30, 2006.

Mr. Nelson has reached maximum medical improvement. He can resume regular activities, including work. Mr. Nelson will see Dr. Reginald Rutherford in 2 months for a postoperative NCV/EMG study of the left ulnar nerve. The results of the study will be used to determine whether Mr. Nelson has an impairment of his left arm related to the cubital tunnel syndrome and will be based on the AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edith, page 57, Table 16. These statements are made within reasonable degree of medical certainty. (Jt. Ex. A, P. 5)

Nelson - F602142

On May 15, 2007, Dr. Moore issued a confusing report wherein he addressed impairment ratings attributable to the prior bilateral carpal tunnel injuries as well as the claimant's left ulnar nerve injury following Dr. Rutherford's EMG study. His report to Ms. Taylor states:

It is my understanding Mr. Nelson has been given an impairment of 10% to his left upper extremity, which was determined by Dr. Gregory Ricca. On 07/19/05, he assigned a 10% impairment of the left upper extremity following a left carpal tunnel release. The total impairment was 20% to the left upper extremity. Mr. Nelson also underwent right carpal tunnel surgery. On 01/13/07, Dr. Reginald Rutherford performed a nerve conduction and EMG study of both hands and arms, which revealed mild, residual abnormality of the median nerves bilaterally. The left ulnar nerve was normal.

Based on the results of the study, Mr. Nelson would have an impairment of 10% to the right hand and 10% impairment to the left hand. The impairment is based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, page 57, Table 16. The impairment should not be added to the previous impairments given by Dr. Ricca. These statements are made within a reasonable degree of medical certainty. (Jt. Ex. A, P. 1)

First, I feel compelled to point out that Table 16 relied upon by Dr. Moore in the aforementioned report assesses impairment to the entire upper extremity rather than to the hand or the upper extremity below the elbow. Based upon my review of the Table, together with the medical opinions of record, it is apparent that the proper impairment for the claimant's elbow injury and two surgeries is a ten percent (10%) impairment to the entire upper extremity rather than to the hand or the extremity below the elbow which has been accepted and paid by respondents. Accordingly, I hereby make the following award:

Nelson - F602142

AWARD

Respondent, Public Employee Claims Division, is hereby directed and ordered to pay to the claimant an additional 6.1 weeks of permanent impairment at the maximum rate of \$350.00 per week, entitling the claimant to a lump sum payment of \$2,135.00.

Additionally, claimant's attorney, Jim R. Burton, is hereby awarded the maximum statutory attorney's fee on this entire award, one-half to be paid by respondents and one-half to be deducted from the claimant's benefits pursuant to Ark. Code Ann. § 11-9-715.

This award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

---

DAVID GREENBAUM  
Chief Administrative Law Judge