

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F313557

DOUG N. TOSH

CLAIMANT

**SAIA MOTOR FREIGHT LINE
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED MARCH 12, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on January 23, 2007. A prehearing conference was held on December 12, 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 a compensable September 19, 2003, injury.
2. The compensation rates are \$440/340.
3. Respondents contend the previous awards from the Commission have been paid.

The claimant contends the claimant is entitled to the 11% permanent impairment rating assigned by Dr. William Hefley on April 21, 2006, as well as entitled to attorney's fees.

Respondents contend the rating assigned by Dr. Hefley is based on factors that are not permitted for an impairment rating. Respondents request an offset for group long term disability the claimant is receiving.

ISSUES TO BE LITIGATED

1. Permanent impairment rating.
2. Attorney's fees.
3. Group benefits offset.

From a review of the record as a whole, to include the transcript from previous hearing and opinions following hearing incorporated by reference, 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 a compensable September 19, 2003, injury.
2. The compensation rates are \$440/340.
3. Respondents contend the previous awards from the Commission have been paid.
4. The claimant has proven by a preponderance of the evidence that he sustained an 11% permanent impairment rating as assigned by the treating physician.
5. Respondents are entitled to an offset for group disability benefits paid

pursuant to Ark. Code Ann. §11-9-411.

6. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant sustained a compensable left shoulder injury on September 19, 2003, after having been employed by the respondent employer for about 20 years. The claimant underwent two shoulder surgeries by Dr. Hefley, one on October 16, 2003 and another on February 19, 2004. The claimant continued treatment by Dr. Hefley and on April 21, 2006, had a follow-up appointment with his doctor. The claimant testified that Dr. Hefley's physician assistant actually provided the evaluation used to determine his impairment rating. The claimant testified the physician assistant moved his arm and felt the problems.

The claimant testified that he has constant pain in his left arm and has difficulty lifting, holding onto and carrying objects. The claimant receives social security disability and long term disability benefits from a group policy. The long term disability monthly payment is \$1,300. The claimant testified he returned to work following his first shoulder surgery but did not return to work following his second shoulder surgery.

"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. 2002); 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).

It has been held that passive range-of-motion tests may be proven to be objective findings where the testing was by the treating physician, at least for the limited purpose of assessing permanent impairment caused by a shoulder injury. See, *Hays v. Wal-Mart Stores, Inc.*, 71 Ark. App. 207, 29 S.W.3d 751 (2000). In the present case, the claimant testified that the testing for his shoulder was performed by the physician assistant of Dr. Hefley and the physician assistant felt the range of motion limitations in the shoulder.

Respondents contend that at Dr. Hefley’s deposition on August 19, 2004, he

estimated an impairment rating of 2% to the body as a whole. At the deposition, Dr. Hefley couched his response to the impairment rating on his need to look at the book and preparing some calculations. Apparently, an impairment rating was not requested until sometime in 2006 and on April 21, 2006, Dr. Hefley assigned an 11% permanent impairment to the body as a whole utilizing the *AMA Guides to the Evaluation of Permanent Impairment, 4th Ed.* Dr. Hefley's physician assistant actually did the shoulder/arm movement of the claimant to assess the impairment and Dr. Hefley identified the sections of the *Guides* that he utilized in arriving at the rating. The assignment of a shoulder rating is largely dependent on the motion in the shoulder, flexion and extension and the abduction and adduction of the shoulder. These measurements are best taken by the physician or his assistant and then calculated, using the various tables in the *Guides*. Dr. Hefley has provided such in his April 21, 2006, report. He has identified the tables he used, although he did not give us his detailed calculations and those are not required. Dr. Hefley performed both surgeries on the claimant and has a solid reputation as a treating physician. I give his opinion and his calculations considerable weight after my review of the *AMA Guides*. I find the claimant has proven by a preponderance of the evidence that he sustained a 11% permanent impairment rating as assigned by his treating physician.

Respondents request an offset for benefits paid the claimant under a group disability policy. Ark. Code Ann. §11-9-411 provides that benefits payable to an injured worker shall be reduced, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same period of disability. I find respondents are entitled to

an offset for group disability benefits paid pursuant to Ark. Code Ann. §11-9-411.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained an 11% permanent impairment rating as assigned by the treating physician.

Respondents are entitled to an offset for group disability benefits paid pursuant to Ark. Code Ann. §11-9-411.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**