

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605216 (05/05/06)

JAMES SIMPSON, EMPLOYEE	CLAIMANT
TAYLOR & STUCKEY, INC., SELF-INSURED EMPLOYER	RESPONDENT #1
AG-COMP SIF, TPA	RESPONDENT #1
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JULY 2, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 18, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE GARLAND L. WATLINGTON, Attorney at Law, Jonesboro, Arkansas.

Respondent #1 represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style claim to determine the claimant's entitlement to additional workers' compensation benefits. On January 29, 2008, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties contentions relative to the afore. The Pre-hearing Order is

herein designated a part of the record as Commission Exhibit #1.

The testimony of James Simpson, the claimant, Barbara Tacker, Jessica Tacker, Debra Wilson, Tamalyn Wortham, Tammy Hester, and Junior Reed, coupled with medical reports, photographs, video surveillance DVD's, and other documents comprise the record in this claim.

The Second Injury Fund was joined as a party to this claim as Respondent #3, with one of the issues scheduled to be addressed during the course of the hearing being that of second injury fund liability. Following completion of discovery Respondent #3, the Second Injury Fund, was dismissed as a party to the claim. Respondent #2, the Death & Permanent Total Disability Trust Fund, waived its appearance and participation in the schedule hearing.

DISCUSSION

James Simpson, the claimant with a date of birth of June 30, 1953, completed the eighth grade and entered the ninth grade before dropping out of school and beginning his employment history. The claimant testified that while he can read some and spell, he is unable to sit down and write a letter or note to someone. The testimony of the claimant reflects that he was 16 years old at the time he quit school, lied about his age and got a job driving a tractor on a farm. Claimant maintains that from the time he started working at the age of sixteen he has continuously worked until his May 5, 2006, work-related accident in the employment of respondent #1.

Claimant testified that farm work primarily comprised his work history. Claimant picked up his knowledge of mechanics from hands-on experience. The testimony of the claimant reflects that while he was in prison for approximately five (5) years, and while there he entered a vocational technical school, during which time he tried heavy farm equipment, mechanics, diesel engine mechanics and electrician courses.

Claimant commenced his employment with respondent #1 on February 22, 2006, performing maintenance and mechanical work on big trucks and fertilizer rigs. Claimant explained that in performing his duties he had to climb up on equipment. Claimant performed maintenance and repair on an assortment of farm equipment and vehicles to include trucks, tractor trailer rigs, fertilizer spreaders.

In addition to climbing, walking, bending, and standing, claimant lifted substantial weights in the routine discharge of his employment duties. Claimant's testimony reflects that he enjoyed his job:

I like doing that kind of work. You know, I like to take things apart and put them back together and put them back in operation. (T. 18).

The testimony of the claimant reflects that but for the residuals of his compensable injuries he would be performing the type work he was doing in the employment of respondent #1:

If this leg wasn't messed up, if this right ankle wasn't all messed up like it is, I'd enjoy getting back into it again.

That right ankle and I'm scared to death of it. I come in the world with both of my feet, and I'd like to leave out the same way. (T. 18-19).

Claimant commenced his employment with respondent-employer in February 2006. The claimant sustained the May 5, 2006, compensable accidental injuries when he fell a distance of approximately nine (9) feet while working on equipment and landing on the surface with injuries to his right leg, right arm, and left wrist. Claimant testified that he broke both bones in his right leg, shattered his ankle, and his left wrist. The claimant was earning \$10.00, per hour, and has not been employed by anyone since the May 5, 2006, accident.

The testimony of the claimant reflects that at the time of his May 5, 2006, accident, he

was living separate and apart from Ms. Barbara Tacker, whom he had previous lived with. Ms. Tacker has a daughter, Jessica. Claimant maintains that following his accident and discharge from the hospital Ms. Tacker asked him to move back into her residence. Claimant maintains that once he moved back in things started going down in that Ms. Tracker would grip about any and every thing. The testimony of the claimant further reflect:

. . . . Then when that girl got up in [my] face and blowed up like that, I made up my mind right then i had to do something. I had people calling me on the phones wanting money on my bills and I couldn't pay, so I decided to go ahead and file a bankruptcy on everything. What I was getting from workmens' comp was basically being spent there, so I just got out here and started looking around and found a trailer and started hauling scrap iron from that point. (T. 21-22).

Claimant maintains that the trailer was equipped with a three-ton wench which was used when loading real heavy items. The testimony of the claimant reflects that helped by his son, James Davis, and Junior Reed. Claimant added that occasionally there were a couple of other fellows that would join in and do a little bit. Claimant testified the he use the money he earned from the scrap iron to pay for his attorney to file bankruptcy.

Claimant testified that he is able to mow his yard using a riding lawnmower. Claimant also performs the required maintenance on the lawnmower. The claimant acknowledged that he is the individual pictured in the still photographs from the video surveillance. (RX. #1, p. 108-118). Claimant also provided testimony regarding his activities in the photographs. (T. 24-34).

The claimant estimated that he earned enough money in the scrap metal hauling to pay for his bankruptcy cost of \$1,000.00. The testimony of the claimant reflects, respect to the earnings from the scrap mental efforts:

Total amount of money, I don't know. But splitting the

money up, paying my son, paying Mr. Reed and the other fellows, just splitting the money, at times we made fair. At times we didn't make just barely over gas money and enough to put groceries on the table or pay some other bill. (T. 37-38).

Claimant maintains that he did the scrap metal hauling for "right about a month". (T. 38). The claimant testified that once he got his bankruptcy declared, the only hauling he did was for his son who paid for the gas. Claimant also acknowledged earning \$15.00, for mowing a neighbor's yard, however added that he gave part of that money to his son.

The testimony of the claimant reflects that his major problem, attributed to the May 5, 2006, compensable accidental injury, is his ankle. Claimant noted that at times "that leg bone hurts where they got those plates or braces on". (T. 39). Claimant elaborated:

If I stay on it a good period of time, that ankle will commence to throbbing. That leg bone there - - if I don't watch how I step, then it will start giving me some trouble around those braces that they got on it. (T. 39).

The testimony of the claimant reflects that he experienced similar difficulties with his ankle while hauling the scrap iron, to include pain and swelling, however he had to get the money to get rid of the harassment and the phone calls. Claimant testified that he used some of the money he earned hauling scrap iron when he relocated/moved from Drove Lane to 621 Monroe.

Regarding the residual problems from his wrist injury, growing out of the May 5, 2006, accident, claimant testified:

It's got fairly good motion in it. There's some soreness still in it. It's not no where as stout as it was. There's nerve damage in the arm and around that arm. It's dangerous. I don't have the grip that I used to have in it. (T. 40).

Claimant's testimony reflects that if his May 5, 2006, injury was confined to his wrist alone he

would still be able to work.

The claimant filed for social security disability benefits and was awarded same. The testimony of the claimant reflects that his award of social security disability benefits was based on the injuries he suffered in the May 5, 2006, compensable accident. Claimant denied that he had any other conditions or problems prior to the May 5, 2006, accident. Claimant added that he always thought he was in pretty good health until after the work-related accidental fall.

The testimony of the claimant reflects that approximately twenty-two (22) years earlier he sustained injuries when a "big round roller" fell on him resulting in cracked ribs, back injury injuries and bruises around his heart and lungs. Claimant was performing farm work at the time of the accident. Claimant was hospitalized for a period of time and off work for approximately two (2) months. The testimony of the claimant reflects that he was unable to do heavy lifting for about four (4) years following the accident. Claimant testified that his son who is now 31 years old was seven years old at the time of the accident. Claimant eventually healed from the injuries and was able to return to unrestricted physical labor.

The claimant also suffered a prior injury to his left knee, which was broken while cutting wood. Claimant's testimony reflects that he was unable to work for three (3) weeks as a result of left knee injury. Claimant testified, regarding the afore:

All it did was it broke that knee joint in two and they put a cast on it and I got - - didn't have no money coming in and I had three weeks of that. I took up my crutches and my cast and myself and went out there on a tractor and started driving a tractor. (T. 44).

Claimant's testimony reflect that the left knee eventually healed.

While the claimant denies that he has had any other accident since the May 5, 2006,

accident, he testified that he now has high blood pressure, which he did not have prior to the accident. The claimant testified that he has health problems that he needs to get checked out, to included stiffness on the left side of his neck and pain around his chest. Claimant acknowledged that the afore is not related to the May 5, 2006, accident.

On cross examination, the claimant the claimant acknowledged that in May 2006 he lived at the Dover Lane address with Barbara Tacker and her daughter, Jessica. Claimant acknowledged that he did not start the ninth grade before dropping out of school, which was contrary to his testimony during his September 26, 2007, deposition.

Claimant acknowledged that after his discharge from the hospital following his May 5, 2006, compensable accident he moved back in with Ms. Tacker and her daughter. Claimant again moved out of the residence of Ms. Tacker in May 2007. Claimant moved in with his ex-wife and ex-mother-in-law.

Claimant has been employed by respondent-employer for approximately three (3) months at the time of his May 5, 2006, accident. The accidental fall resulted in injuries to the claimant's right foot, right ankle and left wrist. Claimant treated with Dr. Jason Brandt for the left wrist injury and with Dr. Kulik for the right ankle.

The testimony of the claimant reflects, with respect to his wrist injury, that he is able to use small tools and perform maintenance of his riding lawnmower. With respect to his ankle injury residuals, the claimant testified that he has difficulty with standing, and that he limps when he walks. As a consequence of the afore, claimant testified that he attempts to limit his activities around the house.

Claimant acknowledged that he is able to kick and stomp using his injured right ankle.

During the course of the September 26, 2007, deposition the claimant testified, with respect to physical capability, “there’s no kicking and there’s no stomping”. The testimony of the claimant reflects that the change in the afore is the product of having seen video surveillance gather by respondent-employer. During the course of the September 2007, deposition claimant also testified that he could not perform a driving job because he was terrified. Claimant added that he would “still” be terrified of trying to drive a big truck or a tractor or farm tractor. Claimant concedes that he has driven “all over Northeast Arkansas and Missouri pulling a trailer with a pickup truck”. (T. 53).

When released with respect to his injuries by his treating physician claimant was directed not to lift over 25 pounds, and no climbing. The claimant was questioned regarding the accuracy of his contention that he only hauled scrap iron of a month:

I did what I needed to do within a month to get the money to where I could file bankruptcy. Outside of that, the stuff that I hauled, I was hauling it for that son of mine and what stuff Mr. Reed could come up with, I hauled it for him, because they didn’t own a trailer, and they don’t own a truck. (T. 54).

Claimant concedes that he has been hauling scrap iron for a while. There is evidence that the claimant commenced hauling scrap iron to Hummelstein’s in September 2006. Claimant also hauled to Bill’s Salvage in Kennett, Missouri. Claimant was paid by check by Hummelstein’s and by cash by Bill’s Salvage. Claimant acknowledged that he did not notify respondent-employer that he was earning money doing anything on the side while he being paid his workers’ compensation indemnity benefits.

Claimant acknowledged the he has not looked for work anywhere. The claimant is not presently taking any prescription medication relative to the injuries sustained in the May 5, 2006,

accident.

The testimony of the claimant reflects that while hauling the scrap metal sometimes he worked the boot on his right ankle, along with a brace on that leg that belonged to Ms. Tacker. Claimant acknowledged that he did not always wear boot. The testimony reflects that in the scrap metal job the claimant sometimes used a cutting torch and a sledgehammer.

Claimant acknowledged assisting his attorney in providing answers to interrogatories propounded by the respondent. Responsive to the interrogatory regarding any prior accident or personal injury, the document reflects a response of “no”. The testimony reflects that the claimant failed to acknowledge/disclose the prior knee injury and the back/rib/chest injury.

The evidence in the record reflects that the claimant’s bankruptcy petition was filed on April 20, 2007. Claimant asserts that he informed his attorney of the money he was making from the scrap metal hauling. Claimant maintains that he disclosed to his attorney all of his assets for the bankruptcy petition.

The evidence in the record reflects that the claimant applied for social security disability benefits in July 2007. The claimant listed the injuries sustained to his right ankle, right leg and left wrist in the May 5, 2006, accident as the basis for the social security disability claim. Further, the claimant responded in the filing that he had not worked any time since his injuries or conditions first bothered him. Claimant acknowledged that he did not relay information about the scrap metal hauling. (T. 66-67). Claimant concedes that he was aware that hauling the scrap metal was “working”.

Claimant testified that his biological son, James, was involved in two automobile accidents, one of which resulted in him having some mental disorder. Claimant denies that he cut and sold

firewood in the winter. Claimant offered, regarding the afore:

My son and my nephew have. I've used my truck to haul it with, used my trailer to haul it with. (T. 68).

The testimony in the record reflects that the claimant testified in bankruptcy court during a 341 hearing in which he conceded that he had been working during the workers' compensation claim hauling scrap metal and had not reported it. (T. 69).

On re-direct examination, the claimant testified that while he has had previous injuries to his knee and his back/chest/ribs, he had never suffered a crush injury to his ankle or his wrist prior to May 5, 2006, accident in the employment of respondent-employer.

Junior Reed, a resident of Trumann, Arkansas, testified on behalf of the claimant. Mr. Reed testified that he was with the claimant during the scrap metal hauling and that he had viewed the video surveillance. Regarding the accuracy of the events depicted in the surveillance, Mr. Reed testified:

They're not fully what it showed to be because we had cables and chains and stuff that we used. We didn't manhandle what they showed there. It need all of it. (T. 76).

Mr. Reed's testimony reflects that the surveillance appeared to be spliced together. Mr. Reed testified that while he and the claimant's son performed work, the video surveillance does not so reflect. Mr. Reed testified that the claimant had to take "quite a few breaks" which was not depicted in the video surveillance. Regarding the claimant's breaks, Mr. Reed testified:

He'd have to sit down. He would be out of wind and his ankle was hurting pretty bad. Sometimes we had to go home because he just got to hurting so much. (T. 77).

Mr. Reed also testified regarding the earnings from the scrap metal sales:

It wasn't a whole lot, that's for sure. By the time you pay for the gas and the wear and tear on your vehicle, you know, we didn't really make enough to support paying me anyway. (T. 77).

During cross-examination, Mr. Reed testified that he and the claimant had been friends for about 30 years. Mr. Reed estimates that the scrap metal hauling venture lasted four to five months. Mr. Reed testified that he was unaware that at the time he was hauling the scrap metal iron that the claimant was being paid temporary total disability benefits.

Ms. Barbara J. Tacker, who resides at 11628 Dover Lane, Trumann, Ar., testified that the claimant resided at the address with her during a period of time in 2006 and the early part of 2007. The testimony of Ms. Tacker reflects that she and the claimant were together for approximately 15 years. The testimony in the record further reflects that in March 2006 the claimant moved in with his daughter from Alabama. Ms. Tacker testified that after the claimant was injured in May 2006, his daughter moved back to Alabama.

The claimant then returned to Ms. Tacker's residence. Ms. Tacker explained the claimant's return based on the fact that he was not able to take care of himself at the time. The testimony of Ms. Tacker reflects:

It was - - I would say more than likely it was a fifty-fifty thing because when he got hurt, I got a phone call about the day he got hurt, and me and Jessica both stayed at the hospital with him from the time he got hurt till he got out of the hospital.

Then he moved back to the house and we more or less just nursed him back up on his feet. (T. 82).

The claimant moved out of the home of Ms. Tacker in March 2007.

Ms. Tacker's testimony reflects that she went to every one of the claimant's doctor appointments except one. Ms. Tacker worked the night shift at her job, 11:00 p.m. to 7:00 a.m.,

at Quebecor World. In describing the progress of the claimant's recovery while the two of them were together following his injury, Ms. Tacker testified:

Well, for one thing, if he was told by workers' comp asked him to do, he would have progressed a lot better, but he wasn't doing any of the things that he was asked to do. He wouldn't stay off of his foot. He wore his cast completely out by out working. He would take socks and cover his cast up, and on top of the socks on top of the cast, he would also take ace bandages and wrap around the cast. He went to several doctor's appointments where the cast would be completely wore off the bottom of his foot. (T. 83).

Ms. Tacker identified the afore period as August/September 2006. Ms. Tacker attributes the activity of hauling scrap iron to causing the claimant to wear out the bottom of his cast.

Regarding her observation of the claimant engaging in the scrap iron hauling activity Ms. Tacker's testimony reflects:

Junior Reed and James - - James started into it first, then he got Junior reed in with him. Junior was coming out to the house, and we've got a small ditch back right across the house from where he lived on the other side. That ditch bank looked like you know what Sanford and Son looks like on TV? I'm not exaggerating one bit. That's what that ditch bank looked like with just junk, scarp iron, old lawnmowers that they was getting out there working on, tearing apart. I mean, it was unreal. (T. 84).

Ms. Tacker maintains that the claimant took the tires and parts off of the lawnmowers before he could take it to Hummelstein's.

Ms. Tacker's testimony reflects that by the time she arrived home at 7:30 a.m., for her job at Quebecor World, the claimant would already be up and gone completely. Ms. Tacker noted that the claimant would not return home until 6:00 or 7:00 p.m. Ms. Tacker observed that the afore was the case from August/September 2006 and up until the time the claimant moved out in March 2007.

Ms. Tacker testified that the claimant cut the lawn plus weedeater at their residence. Ms. Tacker also maintains that the claimant was cutting and selling firewood. Ms. Tacker asserts that the claimant earned between \$600.00 to \$700.00, per week from the scrap iron venture. Ms. Tacker confirmed that the claimant saved money, “rat-packing”, for his bankruptcy filing.

During cross-examination, Ms. Tacker testified that she did not go to bed until late in the afternoon, 1:00 p.m., and that she usually got up between 5:00 and 6:00 p.m. Ms. Tacker testified that she did not have to follow the claimant around to know his activities because he was “bringing the stuff [scrap iron] out there to the house”. (T. 88). Ms. Tacker acknowledged that she did not see the claimant physically cutting and loading the wood or scrap metal/iron, however added that she was just going by the claimant’s own works.

Ms. Tacker denies that she is angry at the claimant because he moved out, or that she was being paid to testify at the hearing. Further, Ms. Tacker denies that the fifteen year relationship with the claimant ended badly. Ms. Tacker disputes that either she or her daughter had arguments with the claimant while he resided at the residence. When questioned regarding the reason for the claimant leaving, Ms. Tacker testified:

Ask him. I don’t know. All I know is whenever I got ready for bed that afternoon after we had been out to eat dinner, it was on the 23rd day of March. We had been out to eat dinner that day. I got ready for bed. I got in the bed. He come back there and he said, “I’m going to start today.” I said, “You’re going to start what today?” He said, “I’m going to start moving out my things today.”

I told him whenever he said he was going to start moving his things today, I said, “wait just a minute. Let me get up. We won’t drag it out. You going to start today. We’re going to finish it today.” (T. 90-91).

Ms. Tacker estimated that the claimant wore out two to three casts throughout the time

that she saw him, noting that the bottoms kept getting wore off. Ms. Tacker also testified that the claimant did not wear the stimulator half of the time.

Ms. Jessica Nicole Tacker, the daughter of Ms. Barbara Tacker, testified that the claimant resided at their residence from May 2006 until March 2007. Regarding her observation of the claimant's activities during the afore period Ms. Jessica Tacker testified:

He would bring to the house trailers full of scrap iron and motors and stuff and lawnmowers and breaking them down in front of the house.

He would use like a crowbar or a hammer or like wrenches and stuff taking the screws out. (T. 96).

Ms. Tacker noted the above started roughly in September 2006, and continued until the claimant moved out. Ms. Tacker confirmed that the claimant mowed their lawn using their riding lawnmower and that sometimes he would weedeat around the fence and around the trailer.

Ms. Jessica Tacker maintains that she observed the claimant physically unload the trailer loads of scrap iron. Ms. Tacker acknowledged that Junior Reed and his wife were also around at the time of the afore. Ms. Tacker got home from school at 4:00 p.m. Ms. Jessica Tacker's testimony reflects:

Yes. It would start - - I would get up and go to school at about 5:00, 5:30, and sometimes he would already be gone from the house.

Yes, a.m., and then whenever I got home he would be out there unloading the stuff, and wh would do it all - - I would come in and cook supper and he would still be doing it until dark around 8:30, 9:00 o'clock. (T. 97-98).

During cross-examination, Ms. Jessica Tacker denied that she and the claimant argued. Further, Ms. Tacker denied that her mother and the claimant argued, offering:

They didn't really talk because she worked third shift, and whenever she's at work, he's in the bed, and when she's home, she's asleep and he's gone working. (T. 98).

Ms. Tacker noted that it was the claimant's choice to come back to the residence after his injury.

Ms. Tacker acknowledged that some of the parts removed from the scrap iron that was unloaded were small. Ms. Tacker also testified:

Little pieces, big pieces. They brought even cars, wrecked trucks, breaking down the motors, all that. (T. 99).

Ms. Debra Jean Wilson, an employee of Medical Case Management of Arkansas, testified regarding her job duties and responsibilities:

I'm a Registered Nurse and serve as Nurse Case Manager, a liaison between the doctor, the patient, the employer, the work comp adjuster who provided medical treatment and care. (T. 101).

Ms. Wilson worked on the case involving the claimant. Ms. Wilson testified that she attended the claimant's physician appointments, and was present during the examination. Ms. Wilson testified regarding her concerns, based on her observation of the claimant during the doctor's visits:

Once he was placed in the cast, the cast was worn on the bottom up into - - worn out, and when I asked him, he said that he'd been dragging it, not walking, but he's suppose to be non-weight-bearing.

And the cast was worn completely through on one occasion, and on the second one it was halfway worn through, and the doctor - - well, we were all concerned if the had been weight-bearing on it. (T. 102).

Time-wise, Ms. Wilson testified that the claimant had his initial surgery in June 2006, work an external fixator throughout July 2006, and then was put in a cast. The testimony of Ms. Wilson reflects that her observations regarding the claimant's cast were in September 2006. Ms.

Wilson noted that there were two physician visits in which she noted problems regarding the claimant's cast wearing out. Ms. Wilson testified that the claimant received a new cast on each one of his physician visits. The testimony of Ms Wilson reflects that the claimant had at least three casts.

Ms. Wilson testified that the claimant's crutches were replaced once due to the fact that the rubber stopper on the bottom was worn out. The claimant responded to Ms. Wilson's inquiry that he had been using the crutches when he was ambulating around. Ms. Wilson's testimony reflects that during the period in question the claimant was "mostly non-weight-bearing in the wheelchair and crutches". (T. 104). Claimant informed Ms. Wilson that the wearing off of the cast was the product of dragging it while he was in the wheelchair. Ms. Wilson testified that the claimant never indicated to her that he was out working.

During cross-examination Ms. Wilson acknowledged that the services of Medical Case Management of Arkansas in the present claim were paid for by respondent. Ms. Wilson concedes that while he attended the claimant's physician appointment pursuant to direction of the respondent, she also provided the claimant with any equipment he needed, and medical direction. Ms. Wilson elaborated regarding the afore:

No. When a doctor recommended an external bone growth stimulator, tracked it down and had it delivered to him. When he needed a wheelchair, I got him a wheelchair. (T. 105).

The testimony of Ms. Wilson reflects that the claimant had the wheelchair from the time he was initially discharged in May 2006, until he started using the crutches more. The claimant had both the wheelchair and crutches through September/October 2006.

Ms. Tamara Wortham testified that she is an investigator and was responsible for taking

pictures and videos of the claimant's activities. Ms. Wortham's testimony reflects that the photographs entered into evidence depict her observation of the claimant's activities. Ms. Wortham also testified that she, along with Danny Wortham, was responsible for generating the written reports, which are also include in the record. Regarding the time settings on the side of the reports, Ms. Wortham testified:

That's our investigator report and that keeps a time track on everything that happens, significant or nonsignificant. (T. 109-110).

The testimony of Ms. Wortham reflects that when doing surveillance usually they are told the nature of the injury of the subject, however they are told to record whatever activities that the subject is engaged in. In the instant claim, Ms. Wortham testified that she had been informed that the claimant's injury was to his right leg. The testimony of Ms. Wortham reflects that she did not limit her observation of the claimant's activity to his injured right leg. Ms. Wortham testified that everything that she observed of the claimant is set forth in the investigation report.

Ms. Wortham testified that she very seldom observed the claimant just sitting around not doing anything and watching everybody else:

Very seldom. He was always involved and very active, more active than your average person. (T. 111).

Ms. Wortham further testified regarding her observation of the claimant:

There was one incident he was working, he had crawled up with his belly across the side rail of his pickup to reach an object and when he dropped back to the ground, he landed on both feet, but on that right foot, you could tell that he did experience pain. He started hobbling around for a little bit, and then he did, you know, get back to work and kind of overrode it.

Well, that day he was a little more careful with it, but previous to that, he had just gone on like nothing was going on, and the next day

after that, he was back to normal. (T. 111).

Ms. Wortham's testimony reflects that she observed the claimant jumping off of the trailer.

Regarding her observation of the claimant stomping or kicking, Ms. Wortham testified:

Yes. He accidentally started a fire at one point when they were salvaging scrap metal, and he started stomping the fire out with both feet.

And also he would cross the trailer tongue to make a shortcut out of it and step up on the trailer kind of with his right foot and sometimes land on his right foot when he come down on the other side. (T. 112).

The testimony of Ms. Wortham reflects that she obtained photographs of the claimant using a sledgehammer. Ms. Wortham testified that she did not observe the claimant having difficulty using his arms, wrists, or hands. Regarding any observation of the claimant wearing a boot or some kind of brace on his right lower extremity, Ms. Wortham's testimony reflects:

No, he was not. The only time I saw him wearing his boot was when he visited one of his attorneys and at a doctor's appointment. Otherwise, he did not have a boot on. (T. 112).

During cross-examination, Ms. Wortham testified that she has been in the investigative business for twenty-two years. Ms. Wortham testified that in the instant claim she used more video tape than any other subject, noting five to eight hours of video over the five days. Ms. Wortham's testimony reflects, regarding the afore:

Well, it started out at his house. Well, actually in the first house he was in in Trumann, and he was mowing the back yard when I first sighted him. He had already been mowing on the riding lawnmower quite a bit, and from there he went to the grocery store after he finished mowing and got a few items, and the next morning I followed him all the way from his house to Missouri where - -

It's all everything whether it's boring or significant, it's there. Any time he was outside of his vehicle or in the public eye, we videoed and we

kept it all intact.

If it's edited at all, it would be long times of him just standing around doing nothing.

Very seldom. He was very busy most every day. He kept us hopping.

Yeah, I think there was once incident where he was just standing around talking and I did edit some out. (T. 113-115).

Ms. Tammy Jane Hester, branch manager claims representative for respondent, testified that she has been handling the claimant's claim since its inception. The testimony of Ms. Hester reflects that the present claim was accepted as compensable and that all of the medical benefits related to the injuries to the left wrist and the right ankle have been paid.

With respect to the payment of temporary total disability benefits to the claimant, Ms. Hester testified that the same was paid from the date of injury until April 1, 2007. Ms. Hester noted the temporary total disability benefits were not suspended until after the claimant's activities had been investigated by Mr. and Mrs. Wortham. The surveillance investigation actually commenced on April 1, 2007. Ms. Hester explained the mechanics of the payment of temporary total disability:

When we pay TTD, because there's a waiting period in the beginning, usually when you pay TTD through that time period, you're a week behind, so by the time I would have paid him for the week of April 1st, I already had the information from them on the surveillance because he wouldn't have got paid for the April 1st until the next week. (T. 121).

The evidence in the record reflects that the claimant's activities were under surveillance for the period April 1, 2007, through April 5, 2007.

Ms. Hester testified that respondent received the results of the impairment rating relative

to the claimant's left wrist prior to the time that the temporary total disability benefits were suspended, noting that for a time the claimant was receiving two indemnity checks, one for temporary total disability and one for permanent partial disability. The records of respondent reflects that indemnity benefits to correspond with the left wrist impairment rating were commenced in October 2006 and continued through June 14, 2007.

The testimony of Ms. Hester reflects that although she disagreed with the amount of the left wrist rating respondent begin payment of same until another opinion could be obtained. Ms. Hester arranged for the claimant to be evaluated by Dr. Michael Moore, a Little Rock orthopedic hand specialist. Dr. Moore's impairment rating of the claimant's left wrist, 14%, was significantly less than that generated by Dr. Braden, 33%. Ms. Hester's testimony reflects that by the time respondent received the rating of Dr. Moore, it had paid 8.34 weeks of indemnity in excess of the rating to the claimant.

The medical in the record reflects that on October 25, 2006, Dr. Jason Brandt, an orthopedic surgeon, assessed the extent of the claimant's anatomical impairment relative to the left wrist at 30% to the left upper extremity or 54.9 weeks of indemnity benefits. (CX. #1, p. 26). A November 15, 2006, Office Note of Dr. Terence P. Braden assessed the extent of the claimant's anatomical impairment relative to the left wrist at 33% impairment to the upper extremity or 60.39 weeks of indemnity benefits. (CX. #1, p. 35). In his June 19, 2007, report, Dr. Michael M. Moore assessed the extent of the claimant's impairment relative to the left upper extremity at 14% or 25.63 weeks of indemnity benefits. (RX. #1, p. 17).

With respect to the claimant's compensable right ankle injury, Ms. Hester testified that Dr. Kulik assessed a 20% impairment to the lower extremity. The testimony of Ms. Hester

reflects that indemnity benefits were instituted regarding the right ankle impairment because respondent felt it was due a credit for the 8.38 weeks of overpayment to the claimant regarding the upper extremity, as well as a credit on the temporary total disability benefits paid based on knowledge of the claimant earning wages from scrap metal dating back to September 2006. Ms. Hester's testimony reflects:

Yes. We had paid him TTD from - - the first copy of payment that we have from the scrap metal place showing they issued him a check was September '06. So from September '06 til April 1st, '07, we felt we were due a credit. (T. 125).

Ms. Hester testified that based on what the respondent overpaid in temporary total disability benefits to the claimant, taking a credit for same against the impairment to the claimant right ankle, an overpayment remained. Ms. Hester reasoned that respondent is entitled to a credit for overpayment of indemnity benefits it has paid to the claimant:

Because between the PPD that we had overpaid for the wrist, the TTD that we had paid during the time that he was earning wages from the scrap metal or various employment, we added up the overpayment of the PPD, the TTD for that time from September '06 til April 1st, 07 - -

Well, I going to say we had overpaid by \$9,943.70. If you subtract then the 26.2 weeks of PPD he was entitled to, we still had an overpayment of \$3,891.00. (T. 127).

During cross-examination, Ms. Hester testified that respondent paid total indemnity benefits for temporary total disability to the claimant in the amount of \$14,795.00, and total in permanent partial disability in the amount of \$7,623.00. While the evidence reflects that respondent accepted the lowest impairment ratings for the claimant's left wrist and right ankle, Ms. Hester's testimony reflects:

Well, the rating on the wrist, we did not send him for the IME

on the wrist until after we knew of he activities or we had been told of activity, and our understanding was that he couldn't do anything, so we thought, "Well, maybe this 33 percent is correct." But when we knew of the activities and things that he was doing, we did send him for an IME on the rating the wrist. (T. 128).

The testimony of Ms. Hester reflects that the \$14,785.00, in temporary total disability benefits represent the total of such benefits paid to the claimant and not just that paid during the disputed period, between September 2006 and April 1, 2007.

The medical in the record reflects that the claimant treated initially primarily with Dr. Jason Brandt, an orthopedic physician, for his injuries growing out of the May 5, 2006, compensable accident. Claimant was admitted to NEA Medical Center from May 5, 2006, through May 9, 2006, with primary diagnoses of right distal tibial pylon and fibula open fracture, and left distal radius fracture. (CX. #1, p. 27). The claimant followed up in treatment with Dr. Brandt for the left upper extremity injury and was referred to Dr. Steven A. Kulik for the lower extremity. In an October 25, 2006, Office Note Dr. Brandt assessed the extent of the claimant's impairment at 30% impairment of the left upper extremity based on the American Medical Association Guide to Evaluation of Permanent Impairment. (CX. #1, p. 26).

On November 6, 2006, the claimant was evaluated by Dr. Terence P. Braden, III, D.O., regarding a permanent impairment rating of the left wrist and hand. Following his examination of the claimant, Dr. Braden assessed a permanent physical impairment of 18% to the left upper extremity. (CX. #1, p. 32-34). In an Office Note of November 15, 2006, Dr. Braden explained that the claimant's prior impairment rating of November 6, 2006, did not list the claimant's strength examination for the left upper extremity, which was felt to be important in his overall impairment evaluation. As a consequence of the afore, the November 15, 2006, office note

concluded that the extent of the claimant's impairment was 33% to the upper extremity. (CX. #1, p. 35).

On May 8, 2007, the claimant was evaluated by Dr. Michael M. Moore at the Arkansas Hand Center, relative to his left wrist at the request of respondent. (RX. #1, p. 11-13). The impairment rating of Dr. Moore included the results of a Semmes-Weinstein monofilament secondary examination of the radial sensory nerve and measurements of the left wrist and forearm performed by Mr. Paul Cooper, a therapist in Jonesboro. (RX. #1, p. 14). In a June 19, 2007, report Dr. Moore assessed the claimant with a 14% to the left upper extremity. (RX. #1, p. 17).

The medical in the record reflects that the claimant was referred to Dr. Steven A. Kulik, Jr., by Dr. Jason Brandt relative to the right lower extremity injury commencing May 17, 2006. Dr. Kulik's medical records reflect that touchdown weightbearing with a boot was not recommend for the claimant until December 7, 2006. (CX. #1, p. 18). The claimant was seen by Dr. Kulik on April 26, 2007. The medical report relative to the afore reflects, in pertinent part:

ASSESSMENT:

1. Postoperative with healing of distal tibial pilon fracture.
2. Ankle arthritis.

RECOMMENDATION:

1. Mr. Simpson has reached maximum medical improvement. He will require permanent restriction of no standing greater than 2 hours without a 1 hour break. He is to do no climbing or lifting greater than 50 pounds. He is to do no pushing or pulling.
2. He qualifies for arthritis to decrease in cartilage interval. This would give him an 8% whole person, 20% lower extremity, and 28% foot impairment rating. This is according to the Americal Medical Association Guide to Permanent Impairment. (CX. #1,p.21).

The evidence in the record reflects that the claimant filed his bankruptcy petition on April 20, 2007. (RX. #1, p. 18-55). The claimant filed for social security disability on June 20, 2007. (RX. #1, p 56-73). Pursuant to the Social Security Administration rules, the claimant was found to be disabled as of May 5, 2006. (CX. #1, p. 42-65).

The record reflects the presence of detailed surveillance notes covering the period April 1, 2007 through April 5, 2007, and April 12, 2007, as well as a detailed summary investigative report of April 17, 2007. The video surveillance reflects that the claimant was routinely performing physically strenuous activities during the surveillance period. The only instances of the claimant wearing a support boot on the injured right lower extremity reflected in the video surveillance were April 4, 2005, during a visit to the office of his bankruptcy attorney, Joe Barrett, and an April 12, 2007, office visit to Dr. Steven Kulik. A 2:25 p.m. April 2, 2007, entry in the surveillance notes does reflect that the claimant was wearing the bone stimulator on his right leg.

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports, photographs, video surveillance DVD, and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim, and on May 5, 2005, the employment relationship existed when the claimant sustained injuries to his left wrist and right ankle arising out of and in the course of his employment with respondent #1.

2. On May 5, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$308.00/\$231.00, for total/permanent partial disability.

3. The claimant was temporarily totally disabled for the period May 6, 2006, and continuing through on or before August 31, 2006.

4. The claimant reached the end of his healing period on or before April 26, 2007.

5. The claimant has a permanent physical impairment in the amount of 20 % to the right lower extremity below the knee as a result of the May 5, 2006, compensable injury.

6. The claimant has a permanent physical impairment in the amount of 33 % to the left upper extremity as a result of the May 5, 2006, compensable injury.

7. The claimant has failed to prove by a preponderance of the credible evidence that he has been rendered permanently totally disabled pursuant to Ark. Code Ann. §11-9-519.

8. Respondent #1 shall pay all reasonable hospital and medical expenses arising out of and in connection with the claimant's May 5, 2006, compensable injuries.

9. Respondent #1 has controverted the claimant's entitlement to permanent partial disability benefits in excess of 14 % permanent physical impairment to the left upper extremity.

CONCLUSIONS

It is undisputed that the claimant sustained compensable injuries to his left upper extremity and right lower extremity as a result of a May 5, 2006, work-related fall. The claimant asserts that as a result of the afore he is entitled to additional workers' compensation benefits. Specifically, claimant maintains that he is entitled to addition temporary total disability benefits; additional indemnity benefits to correspond with his assessed permanent physical impairment rating, and that he has been rendered permanently totally disabled and is entitled to

corresponding workers' compensation benefits as well as controverted attorney fees. Respondent #1 asserts that all appropriate workers' compensation benefits have been paid, and that it is entitled for a credit of overpayment of indemnity benefit, due to the fact that the claimant improperly received indemnity benefits when he was not entitled to same.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to additional workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

Temporary Total Disability Benefits

In the instant claim, the claimant's injuries growing out of the May 5, 2006, accident were to his right lower extremity and left upper extremity. The injuries suffered by the claimant are scheduled injuries pursuant to Ark. Code Ann. §11-9-521.

The evidence preponderates that the claimant was paid temporary total disability benefits by respondent #1 from May 6, 2006 through April 1, 2007. The parties have stipulated that the claimant reached the end of his period on or before April 26, 2007. The healing period is that period of healing of an injury which continued until the employee is as far restored as the permanent character of the injury will permit.

Temporary total disability is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Accordingly, entitlement to temporary total disability benefits for an unscheduled injury is contingent upon a showing that the claimant is completely incapacitated from earning wages and remains within his healing period. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Georgia-Pacific Corporation v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). However, an

employee who has suffered a scheduled injury is entitled to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822.

The credible evidence in the record reflects that the claimant returned to gainful employment on or before August 31, 2006, prior to the end of his healing period. Corroborative of the afore is the testimony of Barbara Tacker, Jessica Tacker, Junior Reed and that of the claimant. Further, the medical in the record is supported to the testimony of Barbara Tacker and Jessica Tacker in terms of the claimant's engagement in gainful employment activities. At the time of the claimant's August 31, 2006, visit to Dr. Steven Kulik, the medical report reflects that the bottom of the cast on the claimant's right lower extremity was "completely worn out".

The claimant acknowledged that he was paid in cash and by check for the scrap metal he hauled. Respondent #1 was able to ascertain the claimant's wage earning based on a check issued by Hummelstein in September 2006. The only testimony in the record regarding an approximate amount of the claimant's weekly earnings from his scrap metal hauling is that of Ms. Barbara Tacker, who placed the same at \$600.00.

Respondent #1 last paid temporary total disability benefits to the claimant on April 1, 2007. The claimant received \$308.00, per week in temporary total disability benefits from May 6, 2006, through April 1, 2007, totaling \$14,785.00. While the claimant was entitled to temporary total disability benefits for the period May 6, 2006, through August 31, 2006, thereafter he was engaged in gainful employment, and not entitled to temporary total disability benefits. The claimant has failed to sustain his burden of proof by a preponderance of the credible evidence that he was entitled to the payment of temporary total or temporary partial

disability subsequent to August 31, 2006. The claim for additional temporary total disability benefits is respectfully denied.

Appropriate Permanent Physical Impairment

The claimant's initial primary treating physician for the scheduled injuries growing out of the May 5, 2006, compensable accident was Dr. Jason Brandt, a Jonesboro orthopedic surgeon. In his operative report Dr. Brandt noted, with respect to postoperative plan, that injury was very severe, and treated definitively via the external fixator with plans to consider possibly ankle fusion in the future. While Dr. Brandt referred the claimant to Dr. Steven A. Kulik, Jr., a Little Rock Orthopedic physician, for further treatment of the lower right extremity injury, he continued to treat the left upper extremity injury.

In a report of October 25, 2006, Dr. Brandt, utilizing the American Medical Association Guide to Evaluation of Permanent Impairment assess the amount of the claimant's impairment at 30% to the left upper extremity. Respondent commenced the payment of indemnity benefits to the claimant in accordance with the rating.

On November 6, 2006, the claimant was evaluated by Dr. Terence P. Braden, III, D.O., FAAPMR, for an impairment rating relative to the left upper extremity. After performing diagnostic studies and obtaining measurements, Dr. Braden relayed in his November 6, 2006, report:

Impairment:

Mr. Simpson's impairment is calculated utilizing the AMA Guides to Evaluation of Permanent Impairment IV Edition.

For flexion and extension of the wrist, utilizing figure 26, page 36, this would correspond to a 10% impairment to the upper extremity.

Radial and ulna deviation using figure 29, page 38, this would correspond to a 4% impairment to the upper extremity.

For his supination of 60 degrees, this would correspond to figure 35, page 40, which is a 1% impairment to the upper extremity.

For his superficial radial nerve to the dorsum of the hand, this would be covered by Table 15, page 54, which would be a 5% impairment to the upper extremity multiplied by a 60%, based on Table 11, page 48, which would give me a 3% impairment to the upper extremity.

Adding the impairments to the wrist would be a 10% impairment for flexion and extension with a 4% impairment for radial and ulna deviation, which would be a 14% impairment to the upper extremity. Combining with the elbow impairment, would be a 15% impairment to the upper extremity and then combining the 15% impairment for the upper extremity with the 3% impairment for the sensory loss of the superficial radial nerve would be an 18% impairment to the upper extremity. (RX. #1, p. 3-4).

In an Office Note of November 15, 2006, D.r Braden revised the claimant's impairment rating relative to the left upper extremity. The office note reflects, in pertinent part:

Mr. Simpson was bought back in today on November 15, 2006 and utilizing a Jamar dynamometer, grip strength was checked utilizing the most comfortable and effective grip position which was grip position number 2.

His right hand was measured on four separate trials with 40 kilograms of force.

His left hand and grip strength was measured four separate trials and elicited 20 kilograms of force. There was no abnormality from test, re-test.

His strength loss index as calculated utilizing the AMA Guides to Evaluation of Permanent Impairment IV Edition, page 65, is a 50% strength loss index.

Table 34 of the guides equates a 50% strength loss index to 20% impairment to the upper extremity.

Combining the 20% impairment to the upper extremity for his strength loss index with his hand, with the 18% impairment to the upper extremity for the radial nerve injury and the range impairments would be a 33%

impairment to the upper extremity.

A 33% impairment to the upper extremity would correlate with a 20% impairment to the whole person based on Table III, page 20, of the Guides. (RX #1, p. 5).

The testimony of Ms. Tammy Hester reflects that after obtaining information regarding the claimant's employment activities, the decision was made to have the claimant evaluated by Dr. Michael M. Moore, a Little Rock Orthopedic surgeon. (T. 128). The claimant was initially seen by Dr. Moore on May 8, 2007, during which time his left upper extremity was examined. Dr. Moore deferred issuing a rating until receipt of the results of a Semmes-Weinstein monofilament sensory examination of the radial sensory nerve and measurements of the left wrist and forearm to be obtained from Paul Cooper, a Jonesboro physical therapist. In his June 19, 2007, report regarding the claimant, Dr. Moore relayed:

. . . He underwent an impairment evaluation which was performed on June 19, 2007. I agree with Dr. Braden's that the impairment to Mr. Simpson's left wrist is 10%. The impairment of the elbow is 2%. The impairment of the upper extremity is 11% related to decreased motion following the fracture. In addition, Mr. Simpson had a radial sensory nerve injury. The impairment related to the deficit of the radial sensory nerve is 5%. The impairment was multiplied by 25% based on Table II, page 48. The radial sensory nerve deficit results in a 1% impairment to the upper extremity. The combined impairment of the left upper extremity related to the stiffness and sensory deficit is 14%. The impairment is based on the *AMA Guide to the Evaluation of Permanent Impairment*, 4th Edition. These statements are made within a reasonable degree of medical certainty. (RX. #1, p. 17).

Respondent #1 takes the position that the extent of the claimant's permanent physical impairment relative to the left upper extremity is 14%, pursuant to the evaluation of Dr. Moore. Claimant maintains the impairment to the left upper extremity is 33% pursuant to the evaluation of Dr. Braden. The evidence reflects that both physicians utilized the AMA Guide to the

Evaluation of Permanent Impairment, 4th Edition, in rating the claimant's impairment. Dr. Brandt also rated the claimant's permanent physical impairment utilizing the AMA Guide, 4th Edition, which was placed at 30% to the left upper extremity.

The evidence preponderates that the rating assessed by Dr. Braden was based on objective finding and measurements. Further, Dr. Braden's evaluation was based on his personal hands-on examination and involvement of each facet of the evaluation of the claimant. The claimant was seen and examined/evaluated on two (2) separate occasions by Dr. Braden. The evidence preponderates that the claimant sustained a permanent physical impairment in the amount of 33% to the left upper extremity as a result of May 5, 2006, compensable injury. Respondent #1 has controverted the claimant entitlement to permanent disability in excess of that corresponding to 14% to the left upper extremity.

On April 26, 2007, Dr. Steven A. Kulik, Jr., a Little Rock orthopedic surgeon, who treated the claimant's right lower extremity injury growing out of the May 5, 2006, compensable accident assessed the extent of the claimant's anatomical impairment at 20% to the lower extremity, or 28% to the foot, or 8% to whole person, according to the AMA Guide to the Evaluation of Permanent Impairment. It is clear that the injury to the claimant's lower extremity involved that portion of the right leg below the knee and into the ankle. Accordingly, the appropriate impairment is 20 % to the lower extremity.

Credit/Off-set

It is undisputed that respondent #1 paid temporary total disability benefits to the claimant at a weekly rate of \$308.00, for the period commencing May 6, 2006, through April 1, 2007, totaling \$14,785.00. The evidence preponderated that the claimant, though within his healing

period for the compensable scheduled injuries, engaged in gainful employment on or before August 31, 2006. Thereafter, the claimant was no longer entitled to the payment and receipt of temporary total disability benefits. Respondent #1 appropriately asserts entitlement to credit a for the temporary total disability benefits paid to the claimant for the period September 1, 2006, through April 1, 2007. The amount of the credit may be off-set against any unpaid permanent partial disability benefits to which the claimant may be entitled.

As noted above the extent of the claimant's permanent physical impairment as a result of the compensable left upper extremity injury is 33%. Respondent #1 initiated the payment of the corresponding permanent partial disability benefits to the claimant upon receipt of the October 25, 2006, rating by Dr. Braden. Respondent #1 suspended the payment of the afore benefits upon receipt of the June 19, 2007, impairment rating of the claimant by Dr. Moore, accepting the 14% rating and maintaining an overpayment of 8.34 weeks of permanent partial disability benefits.

Respondent #1 made a total payment in permanent partial disability benefits to the claimant in the amount of \$7,623.00. The 33% impairment to the left upper extremity entitled the claimant to 60.39 weeks of indemnity benefits totaling \$13,950.09. The claimant sustained a 20% permanent physical impairment to the right lower extremity entitling him to 26.2 weeks of permanent partial disability benefits totaling \$6,052.20.

The claimant is entitled to a total of payment of \$20,002.29, in permanent partial disability benefits as a result of the residual anatomical impairments growing out of the May 5, 2006, compensable injuries. Respondent #1 is entitled to credit for the payment of temporary total disability benefits as the weekly rate of \$308.00, for the period September 1, 2006 through April 1, 2007, or \$8,624.00. Once the prior payments of permanent partial disability benefits

(\$7,623.00) is applied to the total obligation of respondent #1, the remaining balance owed to the claimant in permanent partial disability benefits is \$12,379.29. After applying the credit for the overpayment of temporary total disability benefits (\$8,424.00) to the claimant by respondent #1, the balance owed to the claimant in indemnity benefits is \$3,755.39. Respondent #1 has controverted the payment of the afore remaining indemnity benefits to the claimant.

Permanent Total Disability

Permanent total disability is defined as the inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or any other employment. Ark. Code Ann. §11-9-522 (e)(1). The burden of proof is placed on the claimant/employee to prove inability to earn any meaningful wage in the same or other employment.

The has either an eighth or ninth grade education and an employment history of heavy manual labor. The claimant has also acquired experience and training heavy equipment maintenance and repair. The evidence preponderates that the claimant is and has been capable of gainful employment earning meaningful wages since on or before August 31, 2006. The claimant has failed to sustain his burden of proof by the credible evidence that he has been rendered permanently totally disabled, pursuant to Ark. Code Ann. §11-9-522, as a result of the May 5, 2006, compensable injury. The claimant's claim for permanent total disability benefits is respectfully denied and dismissed.

AWARD

Respondent #1 is herein ordered and directed to pay to the claimant permanent partial disability benefits to correspond with the claimant's permanent physical impairment ratings of 33% to the left upper extremity and 20% to the right lower extremity below the knee, at a weekly

compensation benefit rate of \$231.00, as a result of the May 5, 2006, compensable injuries.

Respondent #1 may claim credit for sums heretofore paid toward the afore obligation and for overpayment of temporary total disability benefits to the claimant. Said sums accrued shall be paid in lump without discount.

Respondent #1 is further ordered and directed to pay all reasonably necessary, hospital, nursing, medical and other expenses growing out of the claimant's compensable injuries of May 5, 2006, to include medical related travel.

Maximum attorney fee is herein awarded to the claimant's attorney on the controverted portion of the indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE