NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412492

EDDIE J. NICHOLS, EMPLOYEE	CLAIMANT
ARKANSAS STATE HIGHWAY & TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MAY 7, 2007

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

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

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

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

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 18, 2006.

The Administrative Law Judge entered the following 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.
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> 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.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies

the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

_____
KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant is not entitled to temporary total disability benefits past October 20, 2005, that he is only entitled to a 12% rating and that he is not

entitled to any wage loss or permanent or total disability benefits because of the respondent's offer of a return to employment at his pre-injury wages.

The first issue I address is the claimant's entitlement to temporary total disability benefits. The Majority contends the claimant's healing period ended as of October 20, 2005. However, I find that it did not end until February 27, 2006.

The task of determining the end of the claimant's healing period is complicated by Dr. Shahim's issuance of a number of contradictory medical reports. In a letter dated September 22, 2005, Dr. Shahim outlined a recent examination of the claimant. The doctor stated that he recommended that the claimant consider retiring; but, if he chose to return to work, then he should go to very light duty with no lifting greater than ten (10) pounds and no bending or twisting. He then made the following statement:

> I would like to put him through a course of physical therapy. He is at MMI. After the physical therapy his impairment rating is 15% impairment of whole person. That includes cervical decompression and signs of cord signal

> change at C3-4 contributing to myelopathy. He is considering retirement. I will plan on following up with him in a month.

Dr. Shahim authored another report dated October 20, 2005, in which he stated as follows:

> Mr. Nichols has gone through nine weeks of physical therapy. He would like to receive more therapy. I will refer him for two more weeks. We will refill his pain medication. I am releasing him at this point. His impairment rating on AMA criteria for a three level cervical laminectomy with disc disease is 12% impairment of the whole person. He is at MMI.

In spite of his statement that the claimant was being released in his earlier report, Dr. Shahim saw the claimant again in January and authored another report dated January 26, 2006. In that report, Dr. Shahim noted that the claimant's x-rays appeared stable, the claimant's implant had not changed position and there was no evidence of spinal subluxation. He also signed a statement that the claimant had been seen in his office on January 26, 2006, and that he had been advised to remain off work for another six weeks.

The claimant's next visit with Dr. Shahim was recorded in a letter dated February 27, 2006, in which Dr. Shahim recounts having reviewed a recent cervical CT myelogram that had been performed on the claimant. After outlining the results of that myelogram, Dr. Shahim stated as follows:

> I have discussed physical therapy with the patient and he does not want that at this point. He says he is continuing to improve. I will refill his pain medication and we will plan on following up with him in a few months. His impairment rating is 15% impairment of the whole person.

Arkansas Courts have held that resolution of this issue turns upon whether an employee is within his or her healing period and is incapacitated from earning wages. Wheeler Construction Company v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 872 (2001). Here, Dr. Shahim's reports consistently provided that this claimant could not return to regular duty through his visit of January 26, 2006, wherein he was directed to remain off work an additional six weeks. It was not until the report of February 27, 2006, that the

doctor removed any mention of remaining off work in his reports. Since the claimant was disabled through February 26, 2006, the question, therefore, is whether he was still within his healing period.

It has been held that the healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying conditions causing the disability have become stable and that nothing in the way of treatment will improve that condition. Johnson v. Latex Construction, 94 Ark. App. 431, ___ S.W.3d ___ (2006). In applying that standard to the present case, I find that the claimant did not reach the end of his healing period until February 27, 2006, the date of Dr. Shahim's final report. Prior to that date, all Dr. Shahim's reports relating to the claimant's maximum improvement and permanent impairment indicated the claimant was still undergoing physical therapy. Significantly, Dr. Shahim's report of September 22, 2005, stated that his impairment rating would not apply until after he had completed his physical therapy. Further, in January 2006, Dr. Shahim was still reviewing the

claimant's x-rays to determine the status of his fusion and even as late as February, was reviewing a CT myelogram of the claimant's neck. Obviously, if Dr. Shahim was still performing diagnostic testing on the claimant through February 2006, the claimant's condition must have still been changing, so as to require the performance of those tests. Additionally, in January 2006, the doctor directed the claimant to remain off work. Earlier, he had discussed the possibility of light-duty work for the claimant, but, obviously, his condition must have deteriorated by January if he was directed to remain totally off work for an additional six weeks. It was not until Dr. Shahim's report of February 27, 2006, that he indicates that the claimant is not going to undergo further physical therapy and that he is only refilling his pain medication. My review of the medical evidence convinces me that the claimant did not reach the point where his condition was stable, without need of further active treatment, until seeing Dr. Shahim for the treatment outlined in his report of February 26, 2006. I, therefore, find that this was the date that the claimant

reached the end of his healing period and his point of maximum medical improvement. He would, therefore, be entitled to receive temporary total disability benefits through that date.

I further find the Majority errs in finding the claimant is only entitled to a 12% rating. The Majority determines that the 12% impairment rating was the correct one. They apparently reached that conclusion by reviewing Table 75 of the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993), and noting that a cervical fusion with residual signs and symptoms equated to a 12% impairment. However, I believe that the Majority does not correctly apply the Guides. It is true that Section IV. (G) of Table 75 of the Guides states that a single level spinal fusion with residual symptoms (which the claimant clearly had) would equate to a 12% whole body impairment. However, Section IV. (E) states that if multiple levels are operated on, 1% per level is added to the impairment rating. Dr. Shahim's operative note of March 30, 2005, states that in addition to a fusion at C3-C4, he performed cervical

laminectomies at C3, C4, and C5. Likewise, in his report of October 20, 2005, the doctor characterizes the claimant's surgery as a fusion and a "three level laminectomy." As I understand Dr. Shahim's medical reports, if Table 75 is used in addition to the 12% impairment for the fusion at C3-C4, the claimant should be awarded an additional 1% for each level of the three level laminectomy, resulting in an anatomical impairment of 15% to the body as a whole.

It is also significant that the same result would be reached if the claimant's impairment is based upon the diagnosis section of the rating guides instead of using Table 75. As has been explained in the past, the Guides provides two methods for evaluating spinal impairment. In the range-of-motion model, Table 74 provides a percentage of impairment based upon a spinal condition and then directs the evaluator to perform certain range-of-motion studies on the claimant. The impairment from the range-of-motion is then combined with the impairment in Table 74 to give a final impairment. Frequently, this Commission has used Table 74, without relying upon the range-of-motion portion

of the impairment rating, since the Arkansas Workers' Compensation Act prohibits using range-of-motion studies. However, the Guides also provide that a spinal impairment can be determined using a diagnosis-based system. The Court of Appeals and the Commission has, in the past, specifically allowed impairment ratings using this section. See Coleman v. Pro Transportation, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (February 7, 2007) and Crawford v. Equity Trucking Company, Full Commission Opinion, February 3, 2006, (F505665). In reviewing the diagnosis rating evaluation system, I note that Cervicothoracic Category III states that where a claimant has neurological impairment verified by electrodiagnostic testing, a claimant could be entitled to a 15% whole person impairment.

While Dr. Shahim did not reference which section of the Guides he was relying upon to derive at the claimant's 15% whole body impairment, it appears to me that under either the DRE model or Table 75 of the range-of-motion model, the claimant would still be entitled to the same impairment rating.

The remaining issue is the claimant's entitlement to additional permanent disability benefits. At the time of hearing, the claimant was 76 years of age. He had been continuously employed throughout his adult life, mostly in the road construction industry, but only had a second grade education. According to the claimant's testimony, his reading and writing abilities were limited to little more than signing his name and reading traffic signs. The claimant possessed no vocational qualifications or certifications other than having been issued a commercial driver's license. While the claimant's work history is long and continuous (including a 21-year stint with one particular employer), all of his jobs have involved manual labor or driving a truck or other piece of heavy equipment.

There does not appear to be any dispute that the claimant's job restrictions would preclude him from all of his former employment. In fact, neither of the respondents have argued that the claimant is capable of returning to any job involving truck driving, heavy equipment operation, or general manual labor. The refusal of the respondent to pay

the claimant any permanent disability benefits is based upon a purported offer of re-employment within his physical restrictions. The Majority finds that the claimant had, in fact, refused such a job offer and held that he was not entitled to any permanent benefits over and above those for his anatomical impairment pursuant to Ark. Code Ann. §11-9-522 (B)(2). That section provides as follows:

> However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

The Majority is correct in stating that the claimant would not be entitled to the requested permanent disability benefits had he declined a chance to return to his former employment at the same wages. However, my review of the testimony convinces me that it is debatable whether

the respondent, in fact, communicated an offer of re-employment to the claimant and, to the extent that such a job offer was made to him, the proposed employment would not have been within his physical restrictions.

Considerable testimony on this point was offered by the claimant, his wife, and Ms. Chris Cole, the claimant's former supervisor. According to Ms. Cole, the Highway Department provided Dr. Shahim a form to complete regarding the claimant's return to work status. Apparently, after the claimant saw Dr. Shahim on or about October 20, 2005, the doctor filled out a Highway Department form and the claimant return it to his employer. The form, among other things, contains a listing of various jobs with yes and no boxes to be checked by a doctor indicating whether or not the claimant can perform those jobs. The form also has a spot for a doctor to enter whatever restrictions they are placing upon the injured worker. On the form in question, Dr. Shahim checked the boxes corresponding with a yes answer that the claimant could flag traffic, pick up litter, and perform repetitive motion. Dr. Shahim also included a

handwritten notation stating that the claimant could not lift over ten (10) pounds. Another handwritten notation on the form, apparently completed by another Highway Department employee, is dated 11/23/05 and states, "Eddie gave form t/Chris on 11/10/05 and he was advised Dept. would find work within his restrictions."

Ms. Cole testified that after receiving the form, she consulted with her supervisor about whether they could provide the claimant full-time employment flagging traffic and picking up trash. When she received authorization to do so, she said that she called the claimant's wife and asked her to have the claimant call her to let her know if he was going to return to work. Ms. Cole further stated that the claimant's wife told her that she did not think that the claimant could return to work for a job picking up trash. Ms. Cole went on to state that she then advised the claimant's wife that if he was not going to return to work, he could retire, and that he needed to come in and sign some paperwork. Later, the claimant was sent a letter dated December 8, 2005, from M. E. Banks, who was identified as

the District 6 Engineer, advising the claimant that the department had assignments within the claimant's restrictions and that if he had not returned to work by December 15, 2005, he would be terminated.

My review of the testimony and medical evidence reflects that there was a considerable amount of confusion over what restrictions the claimant was under and what job had been offered to him. While it is true that Dr. Shahim did state in the Highway Department's form that the claimant could return to work picking up litter, that statement is contradicted by Dr. Shahim's report of September 22, 2005, where he said that if the claimant was able to return to work it would be to very light duty with "no lifting greater than ten (10) pounds and no bending or twisting." Obviously, employment of picking up litter would involve bending and stooping. It also certainly, on occasion, could involve lifting ten (10) pounds or more. Ms. Cole's testimony was that the claimant would be returned to work flagging traffic and picking up litter. At best, it is arguable that even if the claimant could have done the flagging job, it is clear

that he could not have picked up litter and trash because of his bending and lifting restriction. Further, it is significant that in the claimant's visit to Dr. Shahim in January 2006, Dr. Shahim directed the claimant remain entirely off work for six weeks. That fact demonstrates that Dr. Shahim's light-duty release in October 2005 was of a temporary nature and was not intended to be a permanent restriction in regard to the claimant's future work activities.

A more relevant measure of the claimant's permanent work restrictions is set out in a functional capacity report dated February 6, 2006. This report, prepared by Dr. Joe Buford, indicated that the claimant could not perform any lifting. The assessment also states that the claimant could not stand and walk more than two hours in an eight-hour day nor sit more than three hours during a full job day. The report went on to indicate that the claimant could not be required to walk around more than 30 minutes at one time and that he must be allowed the ability to alternate standing, sitting, and walking at

intervals between 5 to 30 minutes throughout the workday.

Ms. Cole testified that she was not aware of the restrictions placed upon the claimant and that her job offer was conditioned solely upon the Highway Department's form completed by Dr. Shahim in October 2005. Also, to the extent that a job was offered to the claimant, it was well before the functional capacity report and was not in contemplation of the final restrictions that would be placed upon the claimant. In fact, Ms. Cole testified that her job offer, such as it was, was based solely upon the Highway Department's form completed by Dr. Shahim.

To deny this claimant permanent and total disability benefits or wage-loss disability benefits because of a supposed refusal to accept offered employment is a harsh result not warranted by the facts of this case. The obvious purpose of Ark. Code Ann. §11-9-522 (B)(2) is to disallow benefits to poorly motivated workers who could return to gainful employment, but do not. Likewise, the statute strongly encourages an employer to provide suitable work to their injured employees so they could avoid

liability for paying additional permanent disability benefits. The statute is not intended to be a trap for the unwary or to allow employers to evade their responsibilities by making nebulous job offers which are not entirely in accord with an injured workers' permanent restrictions. I simply do not believe that whatever job offer was made to the claimant, whether directly to him or through his wife, is the type of bona fide job offer contemplated by the Workers' Compensation Act. I believe that, at the time Ms. Cole contacted the claimant, he was within his healing period and his final, permanent job restrictions had not yet been determined. I also believe that Dr. Shahim's restrictions set out in the Highway Department's form in October 2005 were only intended for temporary light-duty jobs and could not be the basis for a permanent return to work offer. Such permanent restrictions were not established until the claimant's functional assessment was completed in February 2006.

Had the respondent offered the claimant a specific job, within the restrictions detailed by Dr. Buford, I

believe that the respondent might have some merit in their contention that the claimant had refused offered employment. However, the respondent did not offer the claimant a specific job in accordance with the claimant's actual permanent restrictions. Given the vague nature of whatever job offer was made to the claimant, the questions about whether he had reached the end of his healing period, and what his permanent restrictions would be, I do not believe it can be said that the claimant had declined a "bona fide and reasonably attainable offer" of employment at his former wages. Accordingly, I find that the claimant should not be precluded from receiving wage loss benefits.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner