BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H400848

KERRY THARPE, EMPLOYEE	CLAIMANT
CITY OF NEWPORT, EMPLOYER	RESPONDENT
MUNICIPAL LEAGUE WC PROGRAM, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED OCTOBER 15, 2026

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

Claimant represented by the HONORABLE PHILLIP J. WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MARY K. EDWARDS, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as Modified.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed May 19, 2026. The administrative law judge found that the claimant proved he was entitled to permanent anatomical impairment in the amount of 9%. The administrative law judge found that the claimant proved he was entitled to wage-loss disability in the amount of 5%. After reviewing the entire record *de novo*, the Full Commission finds that the claimant sustained permanent anatomical impairment in the amount of 9%. The claimant proved he sustained wage-loss disability in the amount of 10%.

I. HISTORY

Kerry Tharpe, now age 65, testified that he was a high school graduate and attended college for one year. The claimant testified that his work history included agricultural labor for several years. The claimant testified that he had worked for Jackson County Road Department, where he operated heavy machinery. The claimant then served as Jackson County Judge for four years. The claimant thereafter owned a small trucking firm for about seven years, and he subsequently operated heavy machinery for other employers.

The claimant testified that he became employed as City Supervisor for the respondents, City of Newport, in about 2019. The claimant described his job duties for the respondent-employer: "I would overseen (sic) the Public Works Department, which was the garbage, mowing crew, limb/debris pickup, maintenance parts of equipment."

The parties stipulated that the employment relationship existed on or about January 27, 2024. The parties stipulated that the claimant "sustained a compensable injury to his pelvis, left elbow, and left shoulder" on or about January 27, 2024. The claimant testified on direct examination:

> Q. In your own words, tell the judge what happened?
> A. Well, I was, we was expecting a rain, a big rain, and it was coming in and I was, went to check the floodgates….So I climbed up the ladder, which is, looked like a horseshoe, handhold, and climbed up to the top. You had to reach up over the edge, put your hand on another handhold, and pull yourself up so you can get your leg on where you could get up on the platform. As I got my right leg up on the next rung of

> the ladder, I twisted just a little bit to get my leg up there, because it was raining and it was slick. And my shoulder hit the guardrail, the guardrail broke. It was raining. I could, my left arm, I hadn't got it on the platform yet, so I was hanging by my right arm. And then about three to five seconds, I couldn't hold on no more. I fell.
> Q. How far did you fall?
> A. 20 feet.

According to the record, Dr. Robert L. Garrison reported on January 28, 2024, "Mr. Tharpe is a pleasant 62-year-old male who was admitted to our trauma service and is otherwise stable for care of multiple fractures. He sustained a highly comminuted fracture of the left proximal humerus involving the humeral head, which will likely require arthroplasty. He also has a lateral compression type injury of his pelvis and a left open olecranon fracture."

Dr. Garrison performed surgery on January 28, 2024:

> 1. Irrigation with sharp excisional debridement utilizing scalpel, curette and rongeur for left open olecranon fracture, grade 2, to bone level.
> 2. Open reduction with internal fixation of left open grade 2 olecranon fracture.

The pre- and post-operative diagnosis was "Left olecranon fracture, grade 2 open."

Dr. Regis L. Renard performed surgery on January 29, 2024:

> 1. Percutaneous treatment of left sided sacral fracture.
> 2. Percutaneous left sacroiliac joint fixation at the S1 level.
> 3. Dynamic fluoroscopic stress examination of the pelvic ring injury.

The pre- and post-operative diagnosis was "1. Closed pelvic ring disruption with left root of ramus and left sided posterior sacral fracture."

Dr. Renard performed surgery on January 31, 2024: "1. Open treatment with plate and screw fixation of left proximal humerus fracture." The pre- and post-operative diagnosis was "1. Closed left multi-part proximal humerus fracture."

The claimant testified that he was provided with physical therapy for 11 months.

Dr. Renard returned the claimant to restricted work on June 26, 2024. The claimant testified on cross-examination, however, that he did not return to work for the respondents.

The record indicates that Dr. Justin Marc Rabinowitz performed surgery on August 26, 2024: "Left shoulder manipulation under anesthesia with arthroscopic debridement for posttraumatic frozen shoulder." The claimant testified that he benefitted from surgery performed by Dr. Rabinowitz.

The claimant followed up with Dr. Renard on October 2, 2024: "He can return to work full weight bearing with restrictions on climbing, crawling, squatting, nothing heavier than 20 lb. He is at MMI for workers compensation purposes for his pelvis. Ultimately his LUE MMI will be determined with conjunction with Dr. Rabinowitz."

Dr. Rabinowitz stated on December 17, 2024, "Patient is at maximum medical improvement. Work restrictions unchanged….He will be on a 20 lb lifting restriction [permanently]."

The parties stipulated that the claimant "reached maximum medical improvement" on December 17, 2024.

The respondents' attorney cross-examined the claimant:

> Q. Now I understand you were on the payroll till December 20, 2024, which is when you were terminated. Is that correct?
> A. I didn't receive a check from the City.
> Q. Okay. But you've no longer worked for them, officially, since December 20, 2024. Is that correct?
> A. Yes, ma'am.

The claimant was provided an Impairment Rating at Functional Testing Centers, Inc. on December 30, 2024:

> Mr. Tharpe reports injury at work when he was climbing a ladder, and he reports the guard rail he leaned against broke and he fell approximately 25 feet to the ground….
> Mr. Tharpe reports continued functional difficulty with lifting with his LUE, walking for prolonged periods, or bending….
> According to the *Guides to the Evaluation of Permanent Impairment, Fourth Edition"*:
> Mr. Tharpe *has a permanent impairment rating of the* Left *Upper Extremity as noted below:*
> 12% Upper extremity impairment converts to a Whole person percent of: 7%....
> The 7% WPI due to his Left upper extremity and the 2% WPI due to his pelvis injury would then be combined using the combined values chart on page 322, resulting in the below impairment.
> Mr. Tharpe *has a permanent impairment rating of the* Whole Person *as noted below:*
> <u>Mr. Tharpe has a 9% whole person impairment based on his work related injuries</u>.

Dr. Renard signed the December 30, 2024 Impairment Rating document on January 15, 2025. The parties stipulated that the respondents paid "permanent partial impairment benefits based on a 9% impairment rating."

Terry L. Barnett, DC corresponded with the claimant's attorney on December 2, 2025:

> On November 1, 2025 your client, Kerry Tharpe, presented in our office for the purpose of an examination for an evaluation and determination of a whole person impairment, (WPI), for injuries he sustained on January 27, 2024 while working for the city of Newport, Arkansas. The following are my findings based on the information that was provided and the physical examination that was performed.
> **History:** Mr. Tharpe stated on January 27, 2024 he was working for the city of Newport at about 12 PM when he was closing a floodgate when the guardrail gave way and he fell approximately 23 to 25 feet. He stated at the time of the accident it was raining; he was transported to Unity Hospital in Newport and then transported to UAMS in Little Rock by ambulance. He stated he was admitted and spent approximate (sic) 14 days during which time he had left shoulder surgery, left elbow surgery, and bilateral pelvis surgery. He stated after the surgery he began physical therapy at UAMS, was discharged, sent home, and prescribed physical therapy at Tuckerman Arkansas for approximately 11 months. He is now doing home therapy every day for approximately 45 minutes....
> **Impairment rating:** Based on the *American Medical Association; Guides to the Evaluation of Permanent Impairment, fourth edition*, this patient should receive a 29% whole permanent impairment (WPI)….

A pre-hearing order was filed on March 16, 2026. The claimant contended, "That the 9% impairment rating accepted by the Respondent is

low and that he is entitled to a 29% permanent partial impairment rating based on the Fourth Edition to the Guides to the Evaluation of Permanent Impairment. The Claimant also contends that as a result of his compensable injuries, he's not able to earn the same wages at the time of his injury and therefore is entitled to significant wage loss disability benefits."

The respondents contended, "That they have paid for all of Claimant's medical treatment. Claimant primarily treated by Dr. Renard and Dr. Rabinowitz at UAMS. In a visit dated December 17, 2024, Dr. Rabinowitz placed Claimant at MMI. He was sent for an impairment rating evaluation at Functional Testing Centers and was assigned an impairment of nine (9%) to the body as a whole, which included all three body parts. Respondents have paid this rating in full. Of note, Dr. Renard signed off on the rating on January 15, 2025. Claimant cannot prove he is entitled to a higher impairment rating. Further Claimant cannot prove by a preponderance of the evidence he is entitled to wage-loss disability benefits."

The parties agreed to litigate the following issues:

> 1. Whether Claimant is entitled to a higher impairment rating and whether he is entitled to wage loss disability benefits.
> 2. Whether Claimant's attorney is entitled to a controverted attorney's fee. All other issues are reserved.

A hearing was held on March 27, 2026. The claimant testified that he experienced difficulty in reaching with his left arm. The claimant testified that he was unable to sit or stand for long periods of time.

An administrative law judge filed an opinion on May 19, 2026. The administrative law judge found that the claimant was "entitled to wage-loss disability in the amount of 5% in addition to Claimant's 9% permanent anatomical impairment." The administrative law judge ordered the respondents to pay benefits in accordance with the findings of fact. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Anatomical Impairment

Permanent impairment is any functional or anatomical loss remaining after the healing period has been reached. *Johnson v. Gen. Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). The Commission has adopted the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) to be used in assessing anatomical impairment. *See Commission Rule 34*; 11 CAR §25-129; Ark. Code Ann. §11-9-522(g)(Repl. 2012). It is the Commission's duty, using the *Guides*, to determine whether the claimant has proved he is entitled to a permanent anatomical impairment. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(Repl. 2012). Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2012). Although it is true that the legislature has required medical evidence supported by objective findings to establish a compensable injury, it does not follow that such evidence is required to establish each and every element of compensability. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). All that is required is that the medical evidence be supported by objective medical findings. *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006). Medical opinions addressing impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B)(Repl. 2012).

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(F)(ii)(a)(Repl. 2012). "Major cause" means "more than fifty percent (50%) of the cause," and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14)(Repl. 2012). Preponderance of the evidence means the evidence having greater weight or convincing force.

Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark. App. 269, 101 S.W.3d 252 (2003).

The Full Commission reviews an administrative law judge's decision *de novo*, and it is the duty of the Full Commission to conduct its own fact-finding independent of that done by an administrative law judge. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996). The Full Commission enters its own findings in accordance with the preponderance of the evidence. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

The Full Commission in the present matter affirms the administrative law judge's finding that the claimant did not prove he was entitled to greater than a 9% permanent anatomical impairment rating. As we have discussed, the parties stipulated that the claimant sustained a compensable injury to his pelvis, left elbow, and left shoulder on January 27, 2024. Dr. Garrison reported on January 28, 2024 that the claimant had sustained a highly comminuted fracture of the left proximal humerus, a compression-type injury of the pelvis, and a left open olecranon fracture. The claimant thereafter underwent surgeries performed by Dr. Garrison, Dr. Renard, and Dr. Rabinowitz. The parties stipulated that the claimant reached maximum medical improvement on December 17, 2024.

The claimant was provided an Impairment Rating at Functional Testing Centers, Inc. on December 30, 2024. After an evaluation of the claimant's compensable injuries, the claimant was assigned a 9% whole-person impairment. The evaluators at Functional Testing Centers concluded, "12% Upper extremity impairment converts to a Whole person percent of: 7%....The 7% WPI due to his Left upper extremity and the 2% WPI due to his pelvis injury would then be combined using the combined values chart on page 322, resulting in the below impairment." The evaluators at Functional Testing Centers, Inc. assigned the claimant a 9% whole-person impairment. Dr. Renard, a treating surgeon, indicated on January 15, 2025 that the agreed with the assessment of a 9% whole-person rating. The parties stipulated that the respondents paid "permanent partial impairment benefits based on a 9% impairment rating."

The claimant states that he is entitled to a 29% permanent partial impairment rating as assessed by Dr. Barnett on December 2, 2025. The claimant asserts that Dr. Barnett's rating was properly calculated based on passive range of motion. The claimant argues that Dr. Renard's assessment of permanent partial impairment was not based on a "goniometer" measurement. Nevertheless, the assessment of 9% anatomical impairment at Functional Testing Centers plainly shows that a "goniometer reading" was included in the assessment of permanent

impairment. Finally, the claimant asserts, with no corroborating evidence, that Dr. Barnett's rating was more thorough than the 9% rating assessed at Functional Testing Centers and agreed to by Dr. Renard.

The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999). It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Full Commission finds that the claimant was properly assessed with a 9% permanent anatomical impairment rating. We find that the 9% rating assessed at Functional Testing Centers, Inc. on December 30, 2024, and assented to by Dr. Renard, is corroborated by the record and is entitled to more evidentiary weight than Dr. Barnett's 29% whole-person rating.

The Full Commission finds that the 9% permanent anatomical impairment rating is consistent with the 4th Edition of the *Guides* using the Combined Values Chart at p. 322. The 9% rating is supported by objective and measurable physical findings. These objective medical findings include a highly comminuted fracture of the left proximal humerus; a lateral compression-type injury of the pelvis, and a left open olecranon fracture. The Full Commission finds that the 9% assessment of permanent

anatomical impairment was stated within a reasonable degree of medical certainty. Finally, we find that the compensable injuries sustained by the claimant on January 27, 2024 were the major cause of the 9% permanent anatomical impairment rating. The claimant did not prove that he sustained permanent anatomical impairment greater than 9%.

B. Wage-Loss Disability

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Grimes v. North Am. Foundry*, 316 Ark. 395, 872 S.W.2d 59 (Ark. 1994). Ark. Code Ann. §11-9-522(b)(Repl. 2012) provides, in pertinent part:

> (1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

In the present matter, an administrative law judge awarded "wage-loss disability in the amount of 5%." The claimant is relatively advanced in age, 65 years old. The claimant is a high school graduate and attended college for one year. The claimant's work history includes a significant amount of manual labor and operation of heavy machinery. The claimant testified that he had Commercial Driver's Licenses.

The parties stipulated that the claimant sustained a compensable injury to his pelvis, left elbow, and left shoulder on January 27, 2024. The claimant subsequently underwent several surgeries and was declared to be at Maximum Medical Improvement on December 17, 2024. Dr. Rabinowitz assigned a permanent 20-pound lifting restriction, and the claimant was assessed with a 9% permanent anatomical impairment rating. The respondents terminated the claimant's employment effective December 20, 2024.

The Full Commission reiterates that the claimant has permanent physical restrictions as a result of the traumatic compensable injuries he sustained on January 27, 2024. The claimant has sustained a 9% permanent anatomical impairment rating as a result of his compensable injuries. The claimant testified that he has trouble sitting and standing for lengthy periods of time, and that he has difficulty in reaching with his left arm. However, the claimant also testified that he is physically able to play golf on a daily basis.

The claimant is 65 years old and has a limited formal education. The claimant was terminated following the finding of maximum medical improvement on December 17, 2024. The claimant has a permanent lifting restrictions and suffers from difficulty in sitting and standing for long periods. However, the claimant is physically able to engage in strenuous

activities such as golf. In considering these wage-loss factors, the Full Commission finds that the claimant proved he sustained permanent anatomical impairment in the amount of 10%.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant sustained permanent anatomical impairment in the amount of 9%. The claimant did not prove he sustained anatomical impairment greater than 9%. The claimant proved he sustained wage-loss disability in the amount of 10%. The evidence demonstrates that the compensable injury was the major cause of 9% permanent anatomical impairment and 10% wage-loss disability. The respondents contended in the pre-hearing order of record that the claimant could not prove he was entitled to wage-loss disability benefits. The record therefore shows that the respondents made litigation necessary by controverting the claimant's entitlement to wage-loss disability. *See Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1976). With regard to the award of wage-loss disability in the amount of 10%, the claimant's attorney is thus entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing in part on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's finding that the claimant is entitled to wage loss disability in the amount of ten percent (10%).

When a claimant sustains an injury not scheduled in Ark. Code Ann. §11-9-521, permanent disability benefits are controlled by Ark. Code Ann. §11-9-522(b)(1), which states:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Other factors may include, but are not limited to, motivation to return to work, post-injury earnings, credibility, and demeanor. *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

When a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission may increase the disability rating and find a claimant permanently disabled based upon wage-loss factors. *Lee v. Alcoa Extrusion, Inc*., 89 Ark. App. 228, 201 S.W.3d 449 (2005).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Enterprise Products Company v. Leach*, 2009 Ark. App. 148, 316 S.W.3d 253 (2009).

Our courts also consider the claimant's motivation to return to work since lack of interest in pursuing employment impedes the assessment of the claimant's loss of earning capacity. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Taggart v. Mid America Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643 (2009).

Here, the claimant is sixty-four years old. He received a high school diploma and completed one year of college at Southern Baptist College in

Walnut Ridge. He has extensive farm experience driving tractors, combines, and trucks and holds a CDL license. Upon leaving the farming industry, the claimant ran road graders, excavators, and dump trucks for the Jackson County Road Department. He served for four years as the elected Jackson County Judge, managing the County's general fund, the courthouse, the landfill, and the road department. For a time, he owned his own dump truck business, earning approximately $60,000 per year after expenses.

At the time of his injuries, the claimant served as the City Supervisor for the City of Newport overseeing the Public Works Department including the garbage, mowing crew, debris pickup, and maintenance of parts and equipment. Claimant's responsibility was to ensure that City work was being done properly, which involved payroll, disciplining employees, and using a computer. He reported directly to the Mayor.

While the Majority relies on the claimant's age and "limited formal education" as a basis for a ten percent (10%) wage loss award, it disregards his extensive experience in administrative roles and his willingness to play golf on a daily basis. The Majority does not address the fact that the claimant has never spoken to an employment agency, applied for any secretarial or supervisory jobs, or completed any online job

applications. In fact, the jobs the claimant asserts he has applied for are outside of his permanent work restrictions.

It seems the ALJ agrees with respondents' position that the claimant is uninterested in returning to work, stating that the claimant "has not professed a strong desire to continue working. Rather, he has shown an exceedingly strong desire to golf" and that "[m]oreover, and without question, the claimant's dedication to golfing is substantially greater than his desire in finding meaningful employment."

The ALJ observed the claimant at the hearing and, in his opinion, questioned the claimant's credibility stating he felt it was staged behavior by the claimant when during his testimony he constantly sat and stood during his testimony. Also, in his opinion the ALJ pointed out that while the claimant testified that he could only sit on soft surfaces for 30 minutes and hard surfaces for 20 minutes he admitted later in his testimony riding in his car for 45 minutes to an hour driving to the hearing. All this coupled with the fact the ALJ felt the claimant only applied for jobs nearly a year after being released because of the upcoming hearing confirms the claimant was not a truthful witness and should not be awarded for this behavior.

The ALJ was acutely aware of the claimant's attempts to game the system and lacked the motivation to return to work, stating that he

"believe[d] these job applications came because of the upcoming full hearing, not because the Claimant was wanting to work." I agree.

The claimant, in this matter, has shown no interest in returning to work, relying on self-imposed limitations to remain out of the work force. There is no basis for an award of wage loss in this matter, let alone a ten percent (10%) award as granted by the Majority.

The claimant has relevant experience in sedentary roles that fit well within his work restrictions. He has simply not sought these jobs, preferring to golf instead. Because of the claimant's lack of interest in returning to the work force, his staged behavior at the hearing, and his less than truthful testimony, I believe the claimant should be limited to the five percent (5%) wage loss award ordered by the ALJ.

Accordingly, for the reasons stated above, I respectfully dissent.

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MICHAEL R. MAYTON, Commissioner