

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G702370

JOE ARNOLD, Employee	CLAIMANT
ARKANSAS DEPT. OF TRANSPORTATION, Employer	RESPONDENT #1
PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED FEBRUARY 22, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by AARON L. MARTIN, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by ROBERT H. MONTGOMERY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas; although waiving appearance at hearing.

STATEMENT OF THE CASE

On January 26, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 17, 2021 and an amended pre-hearing order was filed on January 19, 2022. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed between claimant and respondent #1 on March 29, 2017.

3. The claimant sustained a compensable injury to his left shoulder, lumbar spine, right ankle and other body parts on March 29, 2017.

4. The claimant was earning an average weekly wage of \$602.69 which would entitle him to compensation at the weekly rates of \$402.00 for total disability benefits and \$302.00 for permanent partial disability benefits.

5. Claimant reached maximum medical improvement on January 20, 2020.

6. The claimant began receiving disability retirement benefits in February of 2021 and the claimant receives \$829.68 per month (\$191.46 a week).

7. Respondent #1 contributed 68% and the claimant contributed 32% for the claimant's disability retirement benefits.

8. That an estimate from A.S.H.E.R.S. estimated the claimant would be entitled to \$657.12 per month (\$151.64 a week) in early retirement benefits had he chosen Option A, 10 year Certain and Life annuity or \$676.55 per month (\$156.13 a week) for Option B, a Straight Life Annuity.

9. Respondents are entitled to an offset under A.C.A. §11-9-411 in an amount to be determined by the Commission.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent total disability benefits.
2. Respondents' offset amount under A.C.A. §11-9-411.
3. Attorney's fee.

The claimant's contentions are as follows:

First, the Claimant will contend that he is permanently and totally disabled. The Claimant's date of birth is 11/3/57 and he is currently 63 years old. The Claimant has a diagnosed reading disorder and disorder of written expression (Claimant Medical pg. 8). The Claimant will contend that he has a general unskilled work history at the heavy exertional level. The Claimant will further contend that he has no significant transferrable skills (Claimant Non-Medical pg. 8). The Claimant worked for Respondent 1 from 2003 to 2017 performing general roadside debris removal.

Next, the Claimant sustained multiple prior compensable injuries with Respondent 1. On 9/25/07, the Claimant was involved in a single vehicle tractor accident, falling off a wall and injured his right shoulder, right hip and right ribs (Claimant Medical pg. 1-5). On 3/15/11, the Claimant fell from his truck and injured his right hip, right knee, and sustained a right ankle fracture (Claimant's Medical Exhibits pg. 14). On 3/15/11, the Claimant stepped in a hole and re-injured his right ankle and injured his left knee (Claimant's Medical Exhibits pg. 20, 41). The Claimant sustained another fall in 2014 and injured his lower back (Claimant's Medical Exhibits pg. 85). On 9/13/15, the Claimant underwent a discectomy and fusion at the C3-C5 levels (Claimant's Medical Exhibits pg. 150). The Claimant's last compensable accident was on 3/29/17 and it was reported that he sustained "multiple injuries." Respondent 1 only accepted injuries to the Claimant's lower back, left knee, and left shoulder. This claim for permanent and total disability benefits was filed on 1/31/20, and pursuant to Ark. Code Ann. §11-9-525(e), Respondent 1 is responsible for the possible combined effects of all prior injuries.

Prior to the 3/29/17 accident, the Claimant had undergone one surgery to his neck, two surgeries to his right foot/ankle, three surgeries to his lower back and one surgery to his left knee. After the 3/29/17 accident, the Claimant underwent an additional two surgeries to his lower back, two surgeries to his left shoulder, another surgery to his neck and another surgery to his right foot/ankle.

On 1/20/20, Dr. Mangles assigned the Claimant a total of 18% impairment to the body as a whole for his lower back. On 1/29/21, Functional Testing Centers assigned the Claimant had a 21% rating to the lower extremity and 9% rating to the body as a whole

for his right ankle/foot (Claimant's Medical Exhibits pg. 460-462). On 2/4/21, Functional Testing Centers assigned the Claimant a 37% rating to the upper extremity and a 22% rating to the body as a whole for his left shoulder injury (Claimant's Medical Exhibits pg. 463-467). On 2/10/21, Functional Testing Centers assessed a total combined impairment rating of 36% to the body as a whole (Claimant's Medical Exhibits pg. 468). The Claimant previously underwent a Functional Capacity Evaluation on 2/6/20. The FCE showed that the Claimant gave a reliable effort with 48/49 (Claimant's Medical Exhibits pg. 398). The FCE also found that the Claimant was unable to lift 10lbs and that he ultimately "did not demonstrate the ability to perform work at any Physical Demand Level" (Claimant's Medical Exhibits pg. 400). Vocational Expert Heather Taylor completed an evaluation for Respondent 1, which found that the Claimant "does not have any return-to-work/vocational options" and that "based on his FCE, there would not be any jobs available to him." (Claimant's Non-Medical Exhibit pg. 9). Therefore, the Claimant contends that he is entitled to permanent and total disability benefits.

The claimant contends that the respondents are only entitled to an offset on the difference between the claimant's disability retirement benefits of \$191.46 a week and his early retirement benefits of \$151.64 a week (difference of \$39.82 a week) pursuant to *Mills v. Arkansas State Highway & Transp. Dept.* (2012 Ark. App. 395). In addition, the claimant would contend that because he paid for 32% of the disability retirement policy, the respondent's offset would also be reduced by the amount the claimant paid for this policy. Therefore, the claimant would contend that the respondent's total offset under §11-9-411 would be \$27.08 per week.

Finally, the Claimant will contend that he is entitled to a controverted attorney fee. In addition, if Respondent 1 is afforded an offset or credit, the Claimant contends that the attorney fee should be based on the total benefits awarded before applying any offset or credit. See *Arkansas Game & Fish Comm'n v. Gerard*, 2018 Ark. 97, 541 S.W.3d 422 (2018).

Respondent #1 contends the claimant is not permanently and totally disabled as a result of his on the job injury sustained on March 29, 2017. The claimant is currently receiving permanent partial disability benefits in payment of permanent impairment

ratings assigned for his compensable injuries. Respondent #1 contends that A.C.A. §11-9-411 provides for an offset in payment of workers' compensation benefits an injured worker receives for the same period of disability. Furthermore, pursuant to *Brigman v. City of West Memphis*, 2013 Ark. App. 66, an employer is entitled to an offset for that portion of the disability retirement policy for which it paid. Respondent #1 contends that it is entitled to an offset for disability retirement benefits claimant is receiving from the Arkansas Department of Transportation and the offset is to be calculated at 68% which is that portion of the policy which was paid by the Highway Department. For fiscal year 2022 the offset equates to \$130.20 per week deducted from the claimant's applicable compensation rates of \$402.00 for total disability and \$302.00 for partial disability.

Respondent #2 defers to the outcome of litigation and waives its right to attend the hearing.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on November 17, 2021 and contained in an amended pre-hearing order filed January 19, 2022 are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury.

3. Respondent #1 is entitled to a weekly offset in the amount of \$27.08 pursuant to A.C.A. §11-9-411.

4. Respondent #1 has controverted claimant's entitlement to permanent total disability benefits.

FACTUAL BACKGROUND

The claimant is a 64-year-old man who worked for respondent #1 as a Highway Maintenance Aide/Laborer since October 2013. The claimant has a history of injuries and medical issues which have resulted in multiple surgical procedures over the years. Medical records introduced into evidence show that claimant was diagnosed with a torn rotator cuff by Dr. Kaler in 2009. In 2011, the claimant injured his right ankle which resulted in a surgery by Dr. Griffey on June 13, 2011. Dr. Griffey also performed surgery for a meniscus tear in claimant's left knee on January 21, 2013.

Claimant also underwent surgery on his lumbar spine on June 24, 2015, and on July 8, 2015 for an infection relating to the lumbar surgery. On May 3, 2016, claimant underwent a right great toe sesamoidectomy and debridement of ulcer subcutaneous tissue of his right foot.

The claimant had previously filed a workers' compensation claim for injuries resulting from an accident on March 15, 2011. The current claim involves an accident that occurred on March 29, 2017, when claimant tripped and fell over tree roots growing through a sidewalk. The parties have stipulated that as a result of that accident claimant suffered compensable injuries to his left shoulder, lumbar spine, right ankle, and other body parts. His treatment for the left shoulder has included a rotator cuff repair surgery

by Dr. Benafield on May 12, 2017; a revision left shoulder rotator cuff repair by Dr. Benafield on September 25, 2017; and a left reverse total shoulder arthroplasty and left subpectoral biceps tendon transplant by Dr. Cox on May 21, 2018.

For his lumbar spine injury, claimant's treatment has included a fusion at the L2-3 level by Dr. Mangels on October 18, 2018, and removal of hardware at the L2-3 level by Dr. Mangels on July 18, 2019. In addition, claimant has received treatment for his right ankle in the form of injections and he continues to receive pain management treatment from Dr. Green for chronic pain attributable to his injuries.

On January 29, 2021, claimant underwent an Impairment Evaluation for his compensable injuries which determined that claimant had a combined rating equal to 36% to the body as a whole. Respondent #1 contends that it is currently paying benefits in accordance with the impairment ratings.

Claimant has filed this claim contending that he is permanently totally disabled as a result of his compensable injuries. He also seeks an appropriate attorney fee.

ADJUDICATION

Claimant contends that he is permanently totally disabled as a result of his compensable injuries. A.C.A. §11-9-519(e)(1) defines permanent total disability as the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Claimant has the burden of proving the inability to earn any meaningful wage in the same or other employment.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proof.

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

This claimant is 64-years-old and according to his testimony he completed the third grade. According to the Vocational Rehabilitation Report completed by Heather Taylor, Vocational Rehabilitation expert, the claimant has a documented learning disability, specifically in reading. She further noted that he was in remedial classes, but did obtain a GED in 2011 with special learning accommodations. She also noted that his actual reading ability is at the fourth grade level.

Claimant testified that his prior jobs included working at Walmart in its fixture shop and warehouse. He also drove a yard truck for Walmart moving semitrailers, driving forklifts and unloading trucks. Claimant also testified that he worked for Fulton Sanitation for approximately five to six years pulling trash containers as well as big roll off containers. Most recently, the claimant worked at the International Truck dealership picking up and delivering trucks for Cannon Express, J.B. Hunt, and Walmart. Claimant also performed some janitorial work when he was not driving a truck. He began working for respondent as a maintenance aide/laborer in 2003.

As previously noted, claimant underwent an Impairment Evaluation which determined that he had a combined impairment rating of 36% to the body as a whole. It was the opinion of claimant's primary care physician, Dr. Hugh Donnell, that claimant was incapable of returning to work:

He should be regarded as permanently disabled and will not improve or recover enough to return to work.

Claimant also underwent a functional capacity evaluation. The FCE report dated February 26, 2020 indicates that it was valid with 48 of 49 consistency measures within expected limits. The report notes that claimant demonstrated an occasional bi-manual lift of up to 10 pounds, but he did not demonstrate the ability to carry weight. The report also indicates that claimant's balance is impaired, that he showed significant difficulty with standing and did not demonstrate the ability to stand above the occasional level. Most notably, the report concluded:

Overall, Mr. Arnold did not demonstrate the ability to perform work at any Physical Demand Level when considering a normal 8 hour workday with limitations as noted above.

At respondent #1's request, claimant was evaluated by Heather Taylor, a vocational rehabilitation expert. In her report dated May 19, 2020, she initially noted that claimant had no transferrable skills:

Based on Mr. Arnold's past relevant work history, over the last twenty years, he has not acquired any transferrable skills as he has performed semi-skilled and unskilled labor work.

Taylor also determined that claimant was not a candidate for retraining:

Considering records reviewed, his work history, and Educational history, in my opinion Mr. Arnold is not a candidate for any type of formal training for the purpose of skill acquisition, particularly because of his educational deficits.

Finally, Taylor summarized her analysis as follows:

First, Mr. Arnold has only performed semi-skilled and unskilled work for the past twenty years and this has not afforded him the opportunity to acquire any significant transferrable skills. Second, although he received his GED through an accommodation, he has a documented learning disability, specifically reading. This, in my opinion, would prevent him from being able to acquire skills through formal training such as vo-tech or college. Lastly, he did not meet any physical demand level on his FCE, meaning that he is not even capable of performing even Sedentary work, which is the least physically demanding category of work demands. Therefore, based on his FCE, there would not be any jobs available to him.

I find that the opinion of Taylor is credible and entitled to great weight.

After consideration of the foregoing evidence, including all of the relevant wage loss factors, I find that claimant has proven by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injuries. Claimant underwent a valid FCE which determined that he was not capable of performing work at any physical demand level during an 8-hour day. In addition, Dr. Donnell was of the opinion that claimant was permanently totally disabled and finally, Heather Taylor, a vocational rehabilitation expert, indicated that claimant had no transferrable skills, was not a candidate for any type of formal training, and based on his FCE there were no jobs available to him. Accordingly, I find that claimant is permanently totally disabled as a result of his compensable injury.

The second issue for consideration involves Respondent #1's entitlement to an offset pursuant to A.C.A. §11-9-411(a)(1) which states:

(a)(1) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

When claimant left his employment with respondent #1 after the 2017 accident, he had the option to take Disability Retirement or Early Retirement. Claimant testified that he chose the Disability Retirement option. The parties have stipulated that claimant is receiving \$829.68 per month or \$191.46 per week in disability retirement benefits. Both parties agree that respondent #1 is only entitled to an offset for that portion of the weekly benefits which were paid by the employer. The parties have stipulated that respondent #1 contributed 68% and claimant contributed 32%. Accordingly, respondent #1 contends that it is entitled to an offset of \$130.20 per week (68% of \$191.46).

However, respondent #1's calculation ignores the decision by the Arkansas Court of Appeals in *Mills v. Ark. State Highway & Transportation Department*, 2012 Ark. App. 395. In *Mills*, the claimant also worked for the Highway Department and was awarded wage loss benefits. The Commission found that Mills had failed to prove that she was entitled to receive payment of her 30% wage loss benefits without an offset for the disability-retirement benefits she was receiving. On appeal, Mills argued that her wage loss benefits should not be offset by all of her retirement benefits, but only for the amount that her disability retirement benefits exceeded her early retirement benefits. Mills

submitted into evidence documents from the Arkansas State Highway Employees Retirement System showing the amount of her early retirement benefit and the amount of her disability retirement benefit. The Court found that:

We thus hold that rather than offsetting her wage-loss benefits with the entire amount of her retirement benefits, only the amount that Mills received as a result of her disability over and beyond her early-retirement benefits should offset her wage-loss benefits.

Likewise, in this case claimant has been awarded wage loss benefits (permanent total disability) and he had the option of choosing early retirement benefits or disability retirement benefits. Claimant chose disability retirement benefits and is receiving \$191.46 per week. Respondent #1 is not entitled to an offset of 68% of the weekly benefit of \$191.46. Instead, pursuant to the ruling in *Mills*, respondent #1 is entitled to an offset only on the amount claimant's disability retirement benefits exceed his early retirement benefits. The parties have stipulated that based on an estimate from A.S.H.E.R.S., claimant would have been entitled to early retirement benefits of \$151.64 per week.

Claimant is receiving \$191.46 per week in disability retirements as opposed to the \$151.64 he would have drawn in early retirement. The difference in the weekly amount is \$39.82. 68% of that amount is \$27.08. Pursuant to the decision in *Mills*, respondent #1 is only entitled to a weekly offset in the amount of \$27.08.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injuries. Respondent

#1 has controverted claimant's entitlement to all benefits in excess of those previously accepted or paid. Respondent #2 has not controverted claimant's entitlement to compensation benefits and is therefore not liable for payment of an attorney fee. However, respondent #2 is to withhold claimant's portion of the attorney fee from benefits it will pay claimant at the appropriate time in the future. Pursuant to the decision in *Arkansas Games & Fish Comm'n. v. Gerard*, 2018 Ark. 97, the attorney fee is to be calculated based upon the amount owed to claimant (PTD) prior to any offset.

Respondent #1 is liable for payment of the court reporter's expenses for preparation of the hearing transcript in the amount of \$865.40.

All sums herein accrued are payable in a lump sum and without discount.

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

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE