

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. G805974**

**LISA CLARK, EMPLOYEE**

**CLAIMANT**

**UNIVERSITY OF CENTRAL ARK.,  
EMPLOYER**

**RESPONDENT NO. 1**

**PUBLIC EMPLOYEE CLAIMS DIV.,  
CARRIER/TPA**

**RESPONDENT NO. 1**

**DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND**

**RESPONDENT NO. 2**

**OPINION FILED MAY 26, 2021**

Hearing before Administrative Law Judge O. Milton Fine II on March 11, 2021 in Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Charles H. McLemore, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, represented by Ms. Christy L. King, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On March 11, 2021, the above-captioned claim was heard in Little Rock, Arkansas. A pre-hearing conference took place on July 27, 2020. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. They are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/ employer relationship existed on April 5, 2018, when Claimant sustained a compensable injury to her right shoulder.
3. Claimant's average weekly wage of \$459.42 entitles her to compensation rates of \$306.00/\$230.00.
4. Claimant was assigned an impairment rating of eleven percent (11%) to the body as a whole in connection with her compensable injury. Respondents No. 1 have accepted and paid this rating.
5. Claimant reached maximum medical improvement and the end of her healing period on March 7, 2019.

Issues

The parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

1. Whether Claimant is permanently and totally disabled or, in the alternative, entitled to wage loss disability benefits.
2. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. On April 4, 2018, Claimant was in the course and scope of her employment with the University of Central Arkansas when she tore her rotator cuff. Respondents No. 1 accepted the injury as compensable, and paid medical and indemnity benefits. Claimant was released by Dr. Tad Pruitt on March 7, 2019; and he assigned her an impairment rating of eleven percent (11%) to the body as a whole. Respondents No. 1 accepted this rating and paid Claimant its value. She has been unable to work since her work injury. She is entitled to be declared permanently and totally disabled, or in the alternative, to be awarded wage loss.
2. All other issues are reserved.

Respondents No. 1:

1. Respondents No. 1 contend that the claimant reported having an injury to her right shoulder, which they have accepted as compensable and have provided benefits to or on her behalf. This has included medical treatment, temporary total disability benefits, permanent partial disability benefits, and vocational rehabilitation.
2. Claimant was treated by Dr. Pruitt, who performed rotator cuff surgery on her. She was released on March 7, 2019, at maximum medical improvement with an eleven percent (11%) impairment rating to the body

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as a whole. Respondents No. 1 have accepted and paid this rating to Claimant.

Respondent No. 2:

1. If Claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. § 11-9-502 (Repl. 2012). Therefore, the Trust Fund has not controverted her entitlement to benefits.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of Claimant and to observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that she is permanently and totally disabled.
4. Claimant has proven by a preponderance of the evidence that she is entitled to wage loss disability of twenty percent (20%).

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5. Claimant has proven by a preponderance of the evidence that she is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

### **CASE IN CHIEF**

#### **Summary of Evidence**

Claimant was the sole witness.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were the following: Commission Exhibit 2, a letter from Respondent No. 2 to the Commission concerning the contents of the Prehearing Order, consisting of two numbered pages; Claimant's Exhibit 1,<sup>1</sup> a compilation of her medical records, consisting of four abstract/index pages and 121 numbered pages thereafter; Claimant's Exhibit 2, vocational rehabilitation reports, consisting of one index page and 29 numbered pages thereafter; Respondents No. 1 Exhibit 1, another compilation of Claimant's medical records, consisting of three abstract/index pages and 59 numbered pages thereafter; and Respondents No.1 Exhibit 2, non-medical records, consisting of two index pages and 47 numbered pages thereafter.

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<sup>1</sup>This exhibit does not comport with the Prehearing Order, which requires that medical records be presented in chronological order, and not simply be grouped by provider. Instead, all of Claimant's therapy records have been placed at the end of the exhibit. Claimant's counsel is cautioned not to do this in the future.

Adjudication

A. Permanent and Total Disability

Introduction. Claimant has contended that as a result of her compensable injury, she is permanently and totally disabled. In the alternative, she has asserted that he is entitled to wage loss disability benefits over and above her eleven percent (11%) whole-body impairment rating. Respondents No. 1 have argued otherwise.

Standard. As the parties stipulated and the record reflects, the accident of April 5, 2018 resulted in a compensable injury to Claimant’s right shoulder. This injury is an unscheduled one. *Cf.* Ark. Code Ann. § 11-9-521 (Repl. 2012). The term “permanent total disability” is defined in the statute as “inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” *Id.* § 11-9-519(e)(1) (Repl. 2012).

Claimant’s entitlement to wage loss disability benefits is controlled by Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2012), 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.

*See Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such “other matters” include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). As the Arkansas Court of Appeals noted in *Hixon v. Baptist Health*, 2010 Ark. App. 413, 375

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S.W.3d 690, “there is no exact formula for determining wage loss . . . .” Pursuant to § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996).

To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The standard “preponderance of the evidence” means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415 (citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947)). The wage loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering factors that may impact a claimant’s future earning capacity, the Commission considers her motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of her loss of earning capacity. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Repl. 2012) provides:

- (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

“Major cause” is more than fifty percent (50%) of the cause, and has to be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14) (Repl. 2012).

“Disability” is the “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” *Id.* § 11-9-102(8).

The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Evidence—Testimony. Claimant, who is 55 years old, testified that she completed the sixth grade, but dropped out of school during the seventh. She was a poor student, explaining: “I just—I have a hard time comprehending stuff. I don’t—I don’t understand exactly how to—how to explain, you know, how I read it.” After three or four unsuccessful attempts to obtain her graduate equivalency degree (“GED”), she ceased



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trying. Claimant stated that she has trouble learning, speculating that she has “some brain damage . . . something neurological or something up there . . . .” But she later clarified that she has not sustained an injury to her brain; she is simply trying to explain that she has reading comprehension issues. She did not serve in the military, and has not undergone any vocational training.

In relating her work history, Claimant testified that around the time she left school, she worked for a city as an unskilled laborer, performing such tasks as raking and mowing. After she married at age 18, she moved from Arkansas to Maine. There, she worked at a shoe factory, performing piecework that involved finishing the shoes and packaging them. The job was hand-intensive, and it required her to be on her feet eight hours a day. Following a divorce, she returned to Arkansas and began work at a greeting card factory. Her job required that she use machines to stamp and fold cards. Claimant packaged the cards as well. After a three-month stint there, she moved to Central Arkansas. Her first job in this area was working for a dry-cleaning establishment in Morrilton, using a press with a 20-pound lid to press jeans. This position, which lasted approximately six months, required that she repeatedly reach overhead to deploy the press. Thereafter, she began working for the parking lot repair/sealing business that her husband’s family owned. Claimant described her duties there:

We cleaned the parking lots with wire brooms, scrapers, to get the grass out of the cracks and everything. Wire brooms to get the dirt off of the asphalt. We cleaned it off with blowers, back-pack blowers and push blowers and got it ready for—well, we sealed the cracks with hot material, and I had a squeegee, it was like a hoe. It’s got like a V shape on it, and I

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would get it and go over the cracks and just twist and turned and all kinds of stuff, and then, we would spray a seal coating on it, and I would hold the hose. While the person that was spraying it with a wand, I would pull the hose to keep it, you know, so he can walk backwards. So pulling 50-foot hose, you know, tugging on it, you know. So I did that for about 13 and a half years.

This job was very physical in nature. While she was never injured while working there, the work took a toll on her body. She stated: “that wire broom will kick your butt.” The parking lot business was seasonal in nature.

Claimant also went to work for a convenience store, performing the following jobs:

I ran the cash register. I cleaned the facility. I stocked the cooler with beer, sodas, milk, you know, just any refrigerator stuff that we sold, and I would bag ice and put it in the coolers. I would clean the bathrooms, sweep and mop the floors, and basically, a lot of cleaning, you know, except for running the cash register.

After eight years in this position, Claimant began her career as a custodian, first for University of Arkansas Community College at Morrilton. She described this job:

I waxed, I buffed, I scrubbed, cleaned classrooms, cleaned the boards, the boards, and I moved desks, furniture, chairs, and everything to do all of my scrubbing, buffing, waxing, dust mopping. Everything that has to do with the floors, I had to move everything[.]

Claimant also worked for a custodial contractor. Eventually, in January 2017, she became employed as a custodian with the University of Central Arkansas (“UCA”). She elaborated:

Basically, the same thing [as the previous position], but they had some extras. I worked at the—they call it the HPER Center. It was health, physical, educational, physical. They had treadmills, swimming pool tennis, or racquetball. They had three racquetball courts, three basketball courts, they have studios for dancing and exercise. They have a room for

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weights and everything, and I did—it was two floors, and I did both floors, practically, the whole time I was there, because they couldn't keep employees, because it should have been, like, a five-person job, there was only three people doing it. We were working, like, seven-day shifts . . . and I did that for a year and a half . . . [t]hey had bathrooms, they had showers, they had dressing rooms.

In summing up this job, Claimant stated that “it took a toll on me physically.” When asked if it was less strenuous than the repaving job, she replied:

No, not really, because I walked five miles. I had one of those step watches. I walked five miles a night. I worked constantly, except for a 30-minute break and a 15-minute break. The asphalt work, I could take breaks, whenever I wanted to. I can do the work on my time, because, I had to have certain things done by a certain time, because, I went to work at eleven o'clock. The campus opens up at six o'clock. So I only had a few hours to clean everything, before they opened up—before they opened up, and we were going through a hard time keeping employees, because there was three of us working.

Nonetheless, she has never been tempted to return to that line of work, since it involves working outside in the heat.

Asked what happened to her on April 4, 2018, Claimant responded:

I was dust mopping in the entry—entranceway, and I was doing this figure-eight motion with a dust mop, and them things are, like, three foot long, and I was just kinda just doing that circular motion, and then, my [right] shoulder popped and that was it.

She reported the injury to her employer.

Respondents No. 1 have covered her treatment. This included the treatment by Dr. Tad Pruitt that month to repair the large rotator cuff tear that was diagnosed. Claimant said that this surgery did not go well: “I suffered a lot . . . .” While she was undergoing physical therapy, she developed frozen shoulder syndrome. Because of this, she had to undergo a manipulation of the shoulder while under anesthesia.

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Thereafter, Claimant returned to therapy for approximately 22 weeks. But eventually, she was discharged from it because no further progress was being made. She felt that it worsened her condition. On March 7, 2019, Pruitt assigned her an impairment rating of eleven percent (11%) to the body as a whole. In addition, the doctor gave her permanent restrictions of no pushing/pulling/lifting more than five pounds and no overhead use of the right upper extremity. Presently, Claimant is undergoing pain management by her personal physician, Dr. Keith Lipsmeyer. This consists of pain medication: Hydrocodone. Respondents No. 1 have been covering this as well. But Claimant is receiving no other treatment.

Questioned about her use of Hydrocodone, Claimant testified that she takes it daily to cope with her right shoulder pain. However, it makes her “drowsy” and “disoriented.” She did not take this medication the morning of the hearing. Claimant related that she cannot drive after she takes it, and that use of it would prevent her from holding a desk job. Later, she acknowledged that she also took this medication before the injury at issue, in connection with her sciatica and left shoulder problems. She still drives on a daily basis.

According to Claimant, UCA did not offer her any work within her restrictions. Instead, personnel in human resources there told her that it would be best if she resigned and went on long-term disability. Claimant did this. Since her release by Dr. Pruitt, she has not performed any work for any money. She feels the need to stay at home during the day to be with her husband, who is disabled.

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Claimant related that she underwent a vocational rehabilitation evaluation by Heather Taylor. Taylor helped Claimant create a resume, and she identified certain positions that she represented that Claimant would be qualified to hold, based upon the evaluation results. One of those jobs was a cashier position. Asked if she could do such a job, Claimant answered in the negative, stating:

Because you have to reach up, bend down, and stoop and stuff and I've got—had surgery on my knee, since I've had my shoulder surgery and I had tore [sic] ligaments, because I have been bending down to do stuff, because I'm not able to reach my arms up and stuff. So it hurts me to stand for eight hours or so. So the jobs that—the cashier jobs that they want me to do, I was doing other things than just a cashier.

But later, she testified:

Actually, it depends on what I had to do. If I had to just stand there and punch a cash register, I could do it, but I wouldn't be able to do it and do it very long because of my knee issues, but if I was at a register, and I was at a store, say, like a convenience store or something, I would have to reach up, turn around, reach behind me, grabbing things like cigarettes or whatever, I would have a very hard time doing those.

She acknowledged that she did not contact any places advertising cashier positions to ascertain the job requirements; she simply surmised what would be required, based on her observations and experience. Claimant stated that she would not know for certain that she could not perform such a job unless she attempted to do so. She added that the cashier jobs that she has held required overhead work in order to stock shelves. Some items were large, such as 30-packs of beer. Her right shoulder condition would not allow her to do this. She testified that she would not be able to scan such large items, either. Similarly, Claimant stated that her shoulder would keep her from carrying a serving tray, so she would not qualify for the restaurant hostess job that Taylor found.

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As a result of her right shoulder, according to Claimant, she could not return to any job she has held in her career. She is right-handed. Claimant is unsure whether a part-time job would be worth her while. She admitted that she has not applied for any job since leaving UCA. Taylor closed her file; they were last in contact in October 2019.

As a consequence of her shoulder condition, Claimant has difficulty playing with her grandchildren. Because she can no longer stretch material, she does not sew or quilt anymore. She is unable to lift cookware and serving pieces in her kitchen. Picking produce from her garden is difficult. Claimant has problems carrying groceries, shaking wet clothing before placing it into the dryer, folding large items, and making her bed. Her son has nicknamed her “T-Rex” because she now keeps her right forearm close to her side. She has to mow her lawn in stages. Claimant now has to use two hands to lift a gallon of milk; she cannot use her right hand alone because of her shoulder issue, and she cannot use her left alone because of her left elbow issue and because of weakness. Furthermore, her shoulder problem keeps her from being able to hang clothing on a rack.

While Claimant knows how to use computers “[s]omewhat,” she has never used one in a workplace. Her jobs have always been physical in nature.

She testified that she has physical problems other than with her right shoulder. Claimant suffers from back and neck problems, and has an issue with her left hip. These have caused her to undergo pain management, including steroid injections in her back. She has undergone surgery on her left elbow and shoulder, and on her right knee. Arthritis is present in her left knee. However, except for the time she spent

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healing from the surgeries thereon, none of these conditions prevented her from working.

The following exchange took place:

Q. Are you planning to look for a job somewhere?

A. If I get to feeling better, yes, but at this point right now, I can't.

Q. Okay.

A. But if I—that's the reason I'm having the shots in my back and stuff and trying to do, but you know, I have to have a full-time job. I mean, I can't live on a part-time job, you know, and I know my body. Like I said, I don't feel like I could hold a[n] eight-hour a day, five days a week job, because, you know, I know my body. But I will give it everything I got.

...

Q. You got a back and a neck and two knees and an elbow and other things, I thought you already said were keeping you from working?

A. Yes, after the shoulder surgery?'

Q. Okay.

A. I mean, the shoulder surgery did prevent me from working, but after that, things started happening. My knee and my back and everything started happening, which I've always had issues with my back and stuff, but these are things that's come up before or after the shoulder surgery.

Notwithstanding the foregoing, Claimant testified that, as she told Taylor, "she is open to returning to the workforce if there are jobs that she could return to."

According to Claimant, she has been awarded long-term disability through her employer. In addition, she has received all of the retirement benefits to which she was entitled through UCA. Claimant has applied for Social Security disability benefits. Her

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application, which is still pending at the time of the hearing, referenced not only her right shoulder injury, but her other physical issues reference *supra* and her depression.

Claimant underwent a functional capacity evaluation on April 5, 2019. Her testimony was that she gave her best effort. Asked if anything other than her compensable right shoulder injury inhibited her performance that day, she responded:

Yes. My left shoulder, because it was—I didn't have the strength, because I compensated this shoulder for that shoulder and that shoulder for that shoulder. So I did have issues picking things up and I tried 100 percent plus, and I did not like the outcome that they put on that report, because I've always done everything 100 plus. I mean, all of my employers, my co-workers, they will tell you, I am the hardest worker they've ever seen, and even though I'm little, small, I try to be the bigger person. I mean, I try to outdo people. I really do, that is because I don't have the book knowledge like some people do. My work knowledge is my experience, and I got hired at UCA for my experience. My work history and the jobs that I've done, the things that I could do, I didn't get 'em, because I didn't have a high school diploma. I mean, they hired me without a high school diploma, because my work history is done physically and hands one. It was not book smart. I mean, that's . . . [a]nd I wish every day I had a high school diploma.

Evidence—Medical Records. Claimant's Exhibit 1 and Respondents No. 1 Exhibit 1 detail the treatment she has undergone in connection with her compensable right shoulder injury.

Claimant presented to Dr. Keith Lipsmeyer on June 8, 2018 with right shoulder pain. On June 21, 2018, she informed Randy Pastor, D.O., at the UCA Student Health Clinic that on April 26, 2018 at around 3:00 a.m., she was using a dust mop and felt a pop in the front of her right shoulder. She stated that she had hoped the pain would improve but that it had worsened. During active range-of-motion testing, popping was palpated near the insertion of the short head of the biceps tendon in the right anterior



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shoulder. Pastor assessed her as having bicipital tendinitis and gave her a 15-pound lifting restriction on the right upper extremity. She told Dr. Tad Pruitt on July 23, 2018 that the injury occurred on April 5, 2018 when she was using the mop in a figure eight motion. He assessed her as likely having a rotator cuff tear and put her on light duty, with no pushing/pulling/lifting more than five pounds and use of the left arm to aid the right. The doctor noted that she had undergone a left rotator cuff repair in 2013 and manipulation thereafter.

An MRI of the right shoulder on August 1, 2018 revealed, inter alia, a full-thickness tear of the supraspinatus and infraspinatus tendons with at least moderate muscular volume loss and retraction of the tendon stumps to the level of the glenohumeral articulation; biceps long head tendinopathy and tenosynovitis; glenohumeral joint effusion decompression into the subacromial/subdeltoid bursa; Buford complex variant anatomy with deficient anterior superior labrum and thickened middle glenohumeral ligament; and moderate acromioclavicular joint osteoarthritis. Claimant on August 3, 2018 presented with worsening pain after physical therapy. Pruitt confirmed the results of the MRI and recommended an open rotator cuff repair with acromioplasty. His assessment of the tear in his report reads that it is “chronic” and “not specified as traumatic.”

Dr. Pruitt operated on September 4, 2018, performing a right shoulder open rotator cuff repair of the infraspinatus and supraspinatus. He assigned Claimant the diagnosis of “[r]ight shoulder rotator cuff tear, massive.” On September 13, 2018, the doctor restricted Claimant to left-arm duty only, with the right arm in a sling. When he

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saw her again on October 4, 2018, Dr. Pruitt assessed her as having adhesive capsulitis and wrote that “[h]er progress will likely be slow due to massive tear + immobilization x 6 weeks[.]” When Claimant began undergoing physical therapy, she had difficulty raising her right arm because it had been immobilized for so long. She was having difficulty dealing with the pain, and the doctor on November 29, 2018 recommended that she undergo manipulation of the shoulder under anesthesia to alleviate the adhesive capsulitis. This procedure (along with a subacromial injection) took place on December 11, 2018.

However, on January 3, 2019, Claimant reported having no improvement with therapy. Dr. Pruitt excused her from work for one month. She was continued on Hydrocodone. On January 31, 2019, Claimant told Pruitt that she would be terminated at the end of the month and that she had signed up for disability. He wrote:

We had a long discussion regarding going ahead and getting on disability and get some type of training or school to find a job she can do with the shoulder she has. We encouraged her to use this time as an opportunity to get a plan to get back into the work field.

He continued her off work.

Claimant on March 7, 2019 told Pruitt that therapy was not helping and that she had plateaued. He wrote:

She has applied for disability. If she does not get this she will need to find another job which should be a sit down job that would not stress her shoulder. We discussed regrouping and getting training or school. Regarding the right shoulder, I do think that the shoulder will improve some and hurt less . . . [w]e discussed evaluating her house and move things down to a lower level so she will not have to reach . . . [w]e will give her a work note for permanent restrictions, no pushing, pulling or lift more than 5 lbs and no overhead use of the right arm.

Impairment Rating: Impairment that is present according to the AMA Guide to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition is best estimated by table 19 joint crepitus, severe, 30% joint impairment, which translates to 18% of the upper extremity or 11% of the whole person.

Work status: Not lifting, pushing or pulling more than 5 lbs with this arm. No overhead use of the right arm.

Maximum Medical Improvement: The patient is now at maximum medical improvement as a result of h[er] work related injuries.

On April 5, 2019, Claimant underwent a functional capacity evaluation. While Claimant demonstrated the ability to work in at least the Light classification, she gave an unreliable effort. The report reads in pertinent part:

The results of this evaluation indicate that an unreliable effort was put forth, with 31 of 54 consistency measures within expected limits. Analysis of the data collected during this evaluation indicates that she did not put forth consistent effort. She produced low and inconsistent grip and pinch strength with each hand with C.V.'s that indicate great variance with repeated trial testing. She also demonstrated significantly higher force with the left hand during rapid grip testing, which further validates that less than full effort was being put forth with standard grip testing. She also produced low and inconsistent strength results with isometric strength trials that also indicate inconsistent effort on her behalf. She also participated in horizontal strength change tests which are designed to determine if she was putting forth full and consistent effort. She faded [sic] all horizontal strength change tests given. It is also noted that she produced an inappropriate ratio when comparing her unilateral arm lift results with her bi-manual test results. Ms. Clark also reported during her RUE lifting test that she was unable to lift the initial 5 lb weight even one time. The weight was then replaced with a different one which she proceeded to perform all lifts through the entire ROM with her RUE. The second weight weighted the same as the initial weight. It is also noted that she demonstrated a maximal lift of only 10 Lbs. during bi-manual dynamic lifting yet was later observed repeatedly lifting a 20 lb weight through the same range with her LUE only and carrying it over a distance of 40 feet. This is not indicative of reliable effort. She also had pain reports that did not correlate with her movement patterns. Her frequent pain report level of "8" does not correlate with the description of this level

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of pain provided to her and she failed to exhibit outward compensatory movements.

Dr. Lipsmeyer saw Claimant on April 8, 2019 and wrote:

[Claimant] continues with pain, right shoulder mainly, that is associated with limited range of motion. She does not believe that she can work again. She has been denied from disability, but is appealing. She has not accelerated the doses of her pain medication.

Dr. Pruitt on April 25, 2019 reported:

The FCE put her in light classification with lifting restrictions occasional lifting 11-20 lbs. Frequent 1-10, negligible weight multiple times during the day. This is pretty close to my previous recommendations. Those will be my new permanent work restrictions reconstruction. I recommended returning back to work if they have a job to accommodate the above.

When Claimant returned to him on July 18, 2019, she told him that she was experiencing increasing pain in the neck as well as the right shoulder. Claimant told Lipsmeyer on September 13, 2019 that she did not believe that she could work again.

On January 9, 2020, Claimant went back to Dr. Pruitt and told him that her pain had increased. It was not only in her shoulder, but in her neck as well.

Evidence—Vocational Rehabilitation Records. Heather Taylor, MRC, CRC, conducted a vocational evaluation of Claimant on May 1, 2019. It reads in pertinent part:

Analysis of Work History and Transferrable Skills

...

Ms. Clark does not have any significant transferrable skills considering all of her work history has been unskilled or semi-skilled in nature. The few skills that she has acquired include customer service, inventory control, cash handling, and cash register operation. Her computer skills are basic in that she is able to operate a personal computer, can operate a tablet,

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type and use email regularly, and can type basic correspondence on the computer or online.

#### Statements Regarding Returning to Work and/or Retraining

Ms. Clark is unsure of her interest in what type of job she would like to perform in the future, but working as a cashier/retail clerk again is one possible interest for her since this is in the light category and she has prior experience in this area. However, she is unsure if or when she would like to return to work but is willing to begin the job search process.

#### Training

Ms. Clark is not a candidate for formal retraining, as she does not have her GED. She reported that she has tried a few times in the past to get her GED but was unsuccessful. Because of her lack of education, she is best suited for on-the-job training.

#### Analysis, Goals, and Recommendations

Ms. Clark has been released to return to work in a light category of physical work demands. Although she has no significant transferrable skills, she should be able to return to other unskilled/semi-skilled Light category jobs. The likely average wage for these jobs would be minimum wage (\$9.25/hour) to \$10.00/hour.

Ms. Clark is agreeable to working with me in the job search process. Therefore, I would recommend that we begin this process. This would entail a follow-up meeting with her to draft her resume, provide her with interview preparation, online job application instruction, and then complete ongoing job market research to try and identify job openings for which she could apply, in an effort to return to the workforce. If the parties are in agreement, I will proceed accordingly with vocational services.

Taylor reported on June 3, 2019:

At this point, [Claimant] is unsure if she will return to the workforce. She does not know if she even wants to, but would rather stay home and retire. However, she is open to returning to the workforce if there are jobs that she could return to. Initial job market research supports there are job possibilities in her area she could pursue that are consistent with her background.

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Also, Taylor took note that Claimant had not yet applied for any job openings that had been identified for her. On July 2, 2019, Taylor reported that Claimant had ceased responding to her attempts to reach her by telephone, email and text. Later, when Claimant finally responded to a letter by Taylor, she informed Taylor that she had not applied for any jobs. She did not express any interest in any of them, either. Claimant told Taylor on September 3, 2019 that her shoulder was bothering her. Nonetheless, Taylor opined that Claimant “is a good candidate for returning to the workforce.” This changed on October 24, 2019, when Taylor recommended that her file on Claimant be closed. She explained:

I have continued to try and maintain regular contact with [Claimant] during this reporting period. She had not communicated with me in several weeks and I sent her a letter on 10/15/19, requesting that she contact me and she responded to this letter by emailing me a few days after that. She reported that she still had not applied for any job openings. She also reported several other issues that she was having unrelated to her work injury, which is her shoulder. She reported issues with her wrist, knee, and elbow. She said that these issues had taken a toll on her mentally and physically.

Discussion. The evidence shows that Claimant is 55 years old. The last grade she completed was the sixth grade. Despite multiple attempts, she has been unable to attain a GED. She has cognitive issues. Claimant never served in the armed forces, and has not received any vocational training. Her work history, as outlined in her testimony and in Taylor’s vocational evaluation, has consisted of unskilled or semi-skilled jobs. This has included stints in, inter alia, a shoe factory, a dry-cleaning establishment, a parking lot refinishing company, and a convenience store. Claimant has also worked as a custodian in two higher education facilities.

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While working for one of these, Respondent UCA, on April 5, 2018, she sustained a compensable injury in the form of a large right rotator cuff tear. This was repaired surgically by Dr. Pruitt. Because her right upper extremity had to be immobilized for an extended period of time, Claimant developed frozen shoulder syndrome and had to undergo manipulation of it while under anesthesia. She underwent physical therapy as well, but it was of limited benefit. Pruitt released her with an eleven percent (11%) impairment rating to the body as a whole. He assigned her restrictions of no pushing/pulling/lifting more than five pounds and no overhead use of the right upper extremity. It is noteworthy that Claimant is right-handed. Following an FCE, which reflects that she gave an inconsistent effort and demonstrated the ability to work in at least the Light category, Dr. Pruitt assigned her permanent restrictions in accordance with the FCE. The only treatment Claimant continues to receive in connection with her stipulated compensable injury is pain management in the form of prescribed Hydrocodone.

After her release, UCA did not offer Claimant work within her restrictions. Claimant resigned. She is receiving disability and retirement benefits. In addition, she has applied for Social Security Disability benefits. Claimant has not worked anywhere since her release. As stated above, Taylor performed a vocational evaluation. She found that Claimant is capable of working in positions that are Light in classification and are semi-skilled/unskilled in nature. This comports with Dr. Pruitt's opinion that Claimant "should [have] a sit[-]down job that would not stress her shoulder." While the doctor encouraged her to obtain some type of formal job training, Taylor in her

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evaluation acknowledged that this would not be possible in light of her education status. Any training would have to take place on the job.

According to Claimant, she did not contact any of the places that Taylor identified as potential places of employment. While Claimant testified that she did not believe any of the identified positions would comport with her restrictions, she admitted that she did not contact any potential employers to confirm this. The evidence before me clearly shows that despite her testimony to the contrary, Claimant is not motivated to return to the workforce. Her documented failure to follow up on leads provided by Taylor, her continued lack of contact with Taylor, and statements made to Dr. Lipsmeyer and others show this.

It is clear that in addition to Claimant's right shoulder problems, she suffers from other ailments that impair her ability to work. This includes issues with her back, neck and knees, as well as her left hip, elbow and shoulder. In her testimony, she specifically identified her knee troubles as being one barrier to her returning to a career as a cashier.

Despite the foregoing, the fact remains that Taylor's projection was that Claimant could earn \$9.25 to \$10.00 per hour—which extrapolates to \$370.00 to \$400.00 per week. Her stipulated average weekly wage was \$459.42.

In this case, after consideration of the foregoing, I find that Claimant has not met her burden of proving that she is permanently and totally disabled. I do find, however, that the preponderance of the evidence establishes that she has suffered wage loss



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disability of twenty percent (20%), and that her compensable right shoulder injury of April 5, 2018 is the major cause of this.

B. Controversion.

Introduction. Claimant has asserted that she is entitled to a controverted attorney's fee in this matter.

Standard. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents No. 1 in accordance with *See Ark. Code Ann. § 11-9-715* (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

Discussion. The evidence before me clearly shows that Respondents No. 1 have controverted Claimant's entitlement to additional indemnity benefits. Thus, the evidence preponderates that her counsel, the Hon. Laura Beth York, is entitled to the fee as set out above.

**CONCLUSION AND AWARD**

Respondents No. 1 are directed to furnish/pay benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to *Ark. Code Ann. § 11-9-809* (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

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Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents No. 1 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

**IT IS SO ORDERED.**

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Hon. O. Milton Fine II  
Chief Administrative Law Judge