

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H103080**

JIMMY FOSTER, EMPLOYEE	CLAIMANT
BOONEVILLE HUMAN DEVELOPMENT CENTER, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER/TPA	RESPONDENT

OPINION FILED **DECEMBER 23, 2025**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JARID M. KINDER, Attorney, Fayetteville, Arkansas.

Respondents represented by CHARLES H. MCLEMORE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 29, 2025, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 2, 2025, and a pre-hearing order was filed on that same date. 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 this claim.
2. All prior Opinions *are res judicata*.
3. The employee/employer/carrier relationship existed on July 31, 2020.
4. Claimant sustained an occupational disease on July 31, 2020.

By agreement of the parties, the issues to be litigated and resolved at the forthcoming hearing were limited to the following:

1. Whether claimant is entitled to permanent total disability or, alternatively, wage loss disability.
2. Can claimant establish whether his compensable injury is a major cause for his permanent disability regarding COVID 19.
3. Did claimant refuse a bona fide offer of employment.
4. Attorney's fee.

All other issues are reserved by the parties.

The claimant contends that: "The claimant, Jimmy Foster, sustained compensable injuries following a COVID-19 injury on August 6, 2020, while working for Booneville Development Center in Booneville, Arkansas. Said injuries, include, but are not limited to: a respiratory disorder, sacral wound, paroxysmal atrial fibrillation, dyspnea on exertion, essential hypertension, hypertensive heart disease, left ventricular diastolic dysfunction, pulmonary hypertension, left ventricular dilation, trivial nonrheumatic mitral insufficiency trivial nonrheumatic tricuspid insufficiency, a subarachnoid hemorrhage, and hemiparesis. Sara L. Roberson has taken the claimant off work indefinitely due to his severe COVID-pneumonia and subsequent deterioration of health. The claimant was evaluated by a vocational expert, Tonya Owen, PHD, and she determined that due to his workplace injuries, the claimant "would be unemployable and sustained, as a result of his condition, a total loss of earnings capacity." *A summary of her report is attached as Exhibit 1.* The claimant contends that he is permanently and totally disabled as a result of his workplace injury and is owed benefits for said total disability. In the alternative, the claimant contends he is owed wage loss benefits. Due to the controversion of entitled benefits, the respondents are obligated to pay one half of the claimant's attorney's fees. Claimant reserves the right to raise additional contentions at the hearing of this matter."

The respondents contend that “The claimant tested positive for COVID, and that respondent did accept this claim as compensable pursuant to Ark. Code Ann. §11-9-601 [Effective from March 11, 2020, and until May 1, 2023] and respondent has provided benefits to or on behalf of the claimant for this claim. The claimant was paid his salary by his employer until January 8, 2021, at which point the claimant was paid temporary total disability benefits by the respondent from January 9, 2021, until May 6, 2022, when the claimant was released at maximum medical improvement by his treating physician, Dr. Terry Clark. The claimant tested unreliably in the sedentary classification of work at a Functional Capacity Evaluation on April 26, 2022, with 13 of 53 consistency measures, and Dr. Clark was unable to determine work restrictions due to the claimant’s inconsistent/submaximal effort on the FCE. The claimant was assigned permanent anatomical impairment of 10% to the whole person which has been accepted by respondent and permanent partial disability benefits were paid to the claimant for this impairment rating. The claimant would not return to work and would not complete his mandatory background checks for his job. The claimant’s employment ended November 30, 2021. The claimant testified at the December 6, 2022, hearing that he is not looking for work. The claimant has, in fact, retired and collects his pension in addition to his Social Security retirement. The claimant had a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, therefore, he is not entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment pursuant to Ark. Code Ann. §11-9-522(b)(2). The Full Commission found that the claimant did not prove a right ulnar nerve neuropathic condition was a natural consequence of the compensable injury and that he did not prove that he remained within a healing period or was totally incapacitated from earning wages at any time after April 26, 2022. The claimant demanded additional permanent impairment ratings but was not awarded any additional impairment rating beyond the 10% already accepted and paid by the respondent. These decisions are now res judicata and the law of the case. Respondents contends that

the claimant cannot meet his burden of proving that he is permanently and totally disabled or unable to earn any meaningful wages at the same or other employment. Respondent further contends that the claimant lacks motivation to return to the workforce and cannot meet his burden of proving that he is entitled to disability benefits in excess of his anatomical impairment rating for wage loss. The respondents also contend that the claimant cannot meet his burden of proving that a compensable injury is the major cause of his permanent disability. Respondent also contends that if the claimant establishes that he is disabled, his compensation should be reduced and limited to the proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability as the occupational disease as a causative factor bears to all the causes of the disability, pursuant to Ark. Code Ann. §11-9-601(c) (1) [Effective from March 11, 2020 and until May 1, 2023]. The respondents reserve the right to raise additional contentions, or to modify those stated herein, pending the completion of discovery.”

From a review of the entire record including medical reports, documents, a deposition and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant 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 June 2, 2025, and contained in a pre-hearing order filed on that same date are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent total disability benefits pursuant to A.C.A. § 11-9-519.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits as a result of his compensable injury for loss in wage earning capacity.

FACTUAL BACKGROUND

This claim has substantial procedural history. Following a hearing before me on December 6, 2022, I issued an Opinion on February 9, 2023, finding claimant was not entitled to impairment ratings for his heart condition or right ulnar nerve neuropathy because he had failed to prove his compensable COVID-19 illness was the major cause of those conditions. I awarded temporary total disability benefits from May 7, 2022, through September 26, 2022.

The Full Commission, in its Opinion filed August 9, 2023, reversed in part and affirmed in part. The Commission agreed that the right ulnar nerve neuropathy was not compensable, but reversed my decision regarding the heart condition, holding claimant's atrial fibrillation was a compensable natural consequence of his COVID-19 illness and awarded a 10% permanent anatomical impairment rating. The Commission also reversed my TTD award, finding claimant reached maximum medical improvement on April 26, 2022, rather than September 26, 2022. The Commission further found that "the claimant did not prove he remained within a healing period or was totally incapacitated from earning any wages at any time after April 26, 2022." The Commission determined that claimant "is asymptomatic during daily activities" and able to "drive a vehicle, shop, and occasionally preach and lead music at his local church."

Respondents appealed to the Arkansas Court of Appeals, which issued its Opinion on December 11, 2024. The Court affirmed that claimant's atrial fibrillation was a compensable consequence for purposes of medical treatment. However, the Court reversed the 10% impairment rating for atrial fibrillation, holding that proving a causal connection is not the same as proving "major

cause" for purposes of a permanent impairment rating. The Court of Appeals stated: "Evidence supporting a major-cause determination is required. In this case, no lay witness or doctor has opined that Foster's COVID-19 illness was the major cause of his atrial fibrillation. Moreover, the medical records show that Foster has a preexisting history of hypertension and obesity that could have caused his atrial fibrillation."

HEARING TESTIMONY

Claimant was the only witness to testify at the hearing. He was 70 years old at the time of the hearing. He worked for Booneville Human Development Center (hereinafter BHDC or respondent) for approximately 13 years as a dorm officer, which involved supervising residents of the center, ensuring their safety, documenting incidents, and keeping count of clients. His job duties included giving baths, brushing teeth, washing clothes, and making beds for clients who couldn't do these things themselves.

Claimant contracted COVID-19 at work on or about July 31, 2020, and was hospitalized for approximately eight days. Since recovering from the acute illness, claimant testified that he experienced ongoing respiratory problems, heart problems, and other complications. He recounted that he has difficulty breathing, particularly with any physical exertion, has shortness of breath when walking, standing for extended periods, or performing household tasks. Claimant said his heart "tends to run away with itself" and he experiences irregular heartbeat. Claimant testified he experiences memory problems that he attributes to COVID-19.

Claimant sleeps in a recliner most nights because lying flat causes breathing difficulties. He positions a fan to blow air on his face to help with breathing. He can stand for approximately 10 to 15 minutes before needing to sit down. He cannot lift more than 10 to 15 pounds due to his shoulder pain and breathing problems.

When asked about his education and past work experience, claimant said he was a high school graduate. He had worked in detention centers and as a bouncer at a casino before working at BHDC. He also had done sandblasting and welding work. Claimant professed to be unable to do computer work; he said he didn't know how to send an email, because his wife did that for him.

Claimant said before he contracted COVID-19, he did not have any health complications that prevented him from working, nor has he developed any new conditions after he was released from his doctor's care for COVID-19.

Claimant said he was terminated from BHDC on November 30, 2021 for failing to complete mandatory FBI background check fingerprinting. He has not worked since that time, and has not applied for any jobs since that time. Claimant spoke to a deputy sheriff about potential employment at the Sheriff's Office, but did not fill out an application. He has made no contact with BHDC about available positions. He explained that he has not looked for work because he does not believe he is physically capable of working.

On cross-examination, claimant testified he has had no medical treatment since April 26, 2022, when his treating physicians released him. He stated he has only the basic Medicare coverage that accompanies Social Security and cannot afford additional coverage or private insurance. He takes a daily low-dose aspirin and occasional Tylenol for pain but no prescription medications. Claimant has high blood pressure but cannot afford medication. At the hearing, he weighed 235 pounds, down from 250. He continues to experience pain in his right shoulder that now extends into his left. The shoulder pain, along with his lung problems, causes sleep disturbance. Claimant reported he lacks hand strength and can no longer open jars or grip strongly with two fingers of his right hand since receiving a spinal injection. He estimated he can lift only 10 to 15 pounds, depending on position. Claimant performs light household tasks such as sweeping, dishwashing, and limited cooking primarily

to keep his mind active. His wife handles the laundry. He described himself as a Louisiana-style cook and explained the sink in his home is high enough that he can do dishes without stooping.

Claimant and his wife have custody of their seven-year-old great niece, who has been in their care since age two through a court order. He watches her while she plays outside, although he cannot play ball or engage in strenuous activity. He and his family attend services at Apostolic Lighthouse Pentecostal Church in Waldron, about nine miles from his home on Wednesday, Friday, and Sunday morning and evening. Claimant serves as assistant pastor and is able to drive to and from the church building.

Claimant acknowledged BHDC required an FBI background check. He testified that he either never received the form or could not remember receiving. However, he maintained that if he had received it, he would have completed it. At that time, COVID-19 concerns prevented him from traveling to the facility for fingerprinting. Claimant was unaware he could complete the process at a police station. He understood he was terminated for failure to complete the background check. Claimant then filed for state retirement benefits and receives approximately \$475 per month from the State of Arkansas and \$1,300 per month in Social Security retirement. His wife receives retirement income from the school district and plans to begin drawing Social Security. His great niece receives survivor's benefits from her deceased father, held in an account managed by claimant and his wife.

Regarding his physical condition, claimant added to his previous testimony that he sometimes experiences throbbing headaches, a rupture around his navel that causes occasional pain, and continuing difficulty swallowing since hospitalization. He no longer uses a cane or walker but explained he sometimes has balance problems and must sit on the bed or lean against a wall to dress or remove shoes.

Claimant recognized all treating physicians released him from care in April 2022. The only written opinion restricting him from work was provided by his family physician, Dr. Sara Roberson, who prepared a letter on June 17, 2022, that opined claimant would not be able to return to work and should consider retiring.

Dr. Tanya Owen, a certified rehabilitation counselor and vocational expert, testified by deposition on behalf of claimant. She reviewed claimant's medical records, functional capacity evaluation, and conducted a telephone interview with claimant. She then prepared a vocational analysis based on two conflicting medical opinions. Using Dr. Terry Clark's September 26, 2022, opinion which released claimant to regular duty with no restrictions, she determined claimant could return to his past work with no loss of earning capacity. However, if she accepted Dr. Roberson's June 17, 2022, opinion that claimant cannot sustain competitive employment combined with the April 26, 2022, functional capacity evaluation indicating sedentary capacity, then claimant would have no transferable skills to sedentary work and would be unemployable with total loss of earning capacity.

Dr. Owen identified several barriers to claimant's employability: age (70), time out of the workforce (over four years), lack of computer skills, no sedentary work experience, and lack of transferable skills. She cited studies showing disability leads to faster decline in employment starting in workers' 40s, with 50% employment reduction by age 60 for individuals with disabilities. She noted the probability of returning to work decreases with time out of the workforce: 50% probability after six months, 25% after one year, and 1% after two years. Dr. Owen opined claimant would not return to competitive employment based on the barriers she identified.

On cross-examination, Dr. Owen confirmed she does not issue medical opinions. She conducted no in-person observation of claimant. She recognized claimant has demonstrated capacity

for church attendance, childcare, cooking, and household tasks. She was aware that claimant has made no job search efforts since his termination.

On redirect examination, Dr. Owen clarified that activities of daily living do not necessarily translate to ability to work eight hours per day, five days per week in competitive employment.

Dr. Owen acknowledged on recross-examination that her analysis did not distinguish between claimant's compensable and non-compensable medical conditions.

EXHIBITS

In addition to the inclusion by reference to the exhibits and testimony from the first hearing, claimant submitted 38 pages of non-medical records, the bulk of which were the deposition of Dr. Owen and her report. Respondent's only exhibit was its second amended pre-hearing information sheet, the relevant contents of which are outlined above.

ADJUDICATION

The parties stipulated that all prior decisions are *res judicata*. In reviewing the decision of the Court of Appeals, these facts are established:

Claimant's atrial fibrillation is compensable as a natural consequence for medical treatment, but claimant failed to establish COVID-19 was the major cause of any permanent impairment related to his heart condition. Claimant has preexisting obesity and hypertension, which the Court of Appeals identified as alternative causes for his atrial fibrillation.

The following findings from the Full Commission opinion were not appealed and are final:

Claimant's right ulnar nerve neuropathy is not compensable. He reached maximum medical improvement on April 26, 2022, and did not prove he remained within a healing period or was totally incapacitated from earning any wages at any time after that date.

Claimant is asymptomatic during daily activities and able to drive a vehicle, shop, and occasionally preach and lead music at his local church.

The only permanent impairment rating that remains in effect is 10% to the whole person for claimant's respiratory condition, assessed on April 26, 2022, accepted by respondents, and never disputed.

It is against that background that the two principal issues in this case must be decided: Whether claimant is permanently and totally disabled and if not, whether he is entitled to wage loss benefits in excess of his permanent physical impairment.

Is claimant permanently and totally disabled?

Permanent total disability (PTD) is defined as the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519(e)(1). The burden of proof is on the employee. A.C.A. § 11-9-519(e)(2). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. A.C.A. § 11-9-102(4)(F)(ii)(a). "Major cause" means more than 50% of the cause. A.C.A. § 11-9-102(14).

The Court of Appeals held claimant failed to establish major cause for his heart condition, stating: "Evidence supporting a major-cause determination is required. And in this case, no lay witness or doctor has opined that Foster's COVID-19 illness was the major cause of his atrial fibrillation.

Moreover, the medical records show that Foster has a preexisting history of hypertension and obesity that could have caused his atrial fibrillation."

Claimant presented no new medical evidence at the 2025 hearing. Dr. Tanya Owen, a vocational expert, opined claimant is not employable, but she is not a medical provider and cannot establish the medical basis for permanent total disability. As noted above, her analysis did not distinguish between claimant's compensable and non-compensable medical conditions.

Claimant argues that because respondents accepted the 10% respiratory impairment rating, major cause is established for permanent total disability. I disagree. Respondents' acceptance of the 10% respiratory impairment established that COVID-19 was the major cause of that particular anatomical impairment, but not that the respiratory condition is the major cause of claimant's inability to earn meaningful wages. A 10% impairment rating reflects measurable anatomical loss; permanent total disability requires proof of complete inability to work.

Dr. Roberson's June 17, 2022, letter states claimant cannot return to work but attributes his decline to multiple conditions: "diastolic heart failure, pulmonary hypertension, paroxysmal A. fib and respiratory failure." She did not state the compensable respiratory condition is the major cause of his inability to work. The Full Commission's finding that claimant was not totally incapacitated from earning wages after April 26, 2022, is *res judicata*. Without new proof that the respiratory impairment itself has caused claimant to now become totally incapacitated from earning wages, the finding of the Full Commission remains the law of this case, and the claim for permanent total disability is denied.

Is claimant entitled to wage loss disability benefits?

Arkansas Code Annotated § 11-9-522(b)(1) provides that in claims for permanent partial disability benefits exceeding permanent physical impairment, the Commission may consider age, education, work experience, and other matters reasonably expected to affect future earning capacity.

Claimant contends he is entitled to wage loss benefits based on his age (70), limited education (high school), lack of transferable skills, significant physical limitations from his compensable COVID-19 occupational disease, and Dr. Owen's opinion that he is not employable. Claimant argues that respondents' acceptance of the 10% respiratory impairment rating establishes major cause, and his testimony combined with Dr. Owen's vocational analysis proves wage loss disability.

Respondents contend claimant is not entitled to wage loss benefits because they extended a bona fide offer of employment at wages equal to or greater than claimant's average weekly wage, which claimant refused. Respondents further contend claimant has demonstrated no motivation to return to work, having made no job search efforts since his termination nearly four years ago despite his demonstrated activities including church attendance four times weekly, caring for a child, cooking, and performing household tasks.

It is unnecessary for me to reach a decision on whether a bona fide job offer was extended or whether this claim would fail due to claimant's lack of motivation to return to the job market, because claimant has failed to meet the threshold requirement of proving his compensable respiratory condition is the major cause of any wage loss disability, *Thompson v. Mountain Home Good Samaritan Village*, 2014 Ark. App. 493.

Arkansas law requires that a compensable injury and any permanent anatomical impairment be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102; § 11-9-704(c)(1). Respondents accepted a 10% whole-person respiratory impairment on that basis, and those benefits have been paid. Claimant presented no new medical records, no new physician opinions, and no additional impairment evidence beyond this 10% respiratory rating.

The Court of Appeals determined claimant failed to establish major cause for any impairment related to his heart condition, noting obesity and hypertension as alternative causes. As with the claim

for PTSD, claimant presented no new medical records, no new physician opinions, and no additional impairment evidence to establish the respiratory impairment as the major cause of claimant's alleged inability to work. Even if the Commission were to accept Dr. Roberson's opinion that claimant cannot return to work, as noted in the previous section of this opinion, Dr. Roberson attributed claimant's decline to multiple conditions—"diastolic heart failure, pulmonary hypertension, paroxysmal A. fib and respiratory failure"—without stating the compensable respiratory condition is the major cause of his inability to earn wages.

While it is not necessary for me to decide claimant's motivation to return to work, I note that the report from Dr. Owen lists several causes for her finding that claimant is unlikely to reenter the job market, most of which are due to non-compensable factors. That further undercuts the claimant's position that his 10% respiratory impairment is the major cause of his inability to work.

Without medical evidence establishing that the compensable respiratory condition is the major cause of claimant's inability to earn wages, any award would rest on speculation and conjecture, which cannot be substituted for proof. *Ark. Dep't of Career Ed. v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable occupational disease.

Claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits in excess of his permanent physical impairment.

As no indemnity benefits have been awarded, no attorney's fee is awarded.

Respondent is responsible for paying the court reporter's charges for preparation of the hearing transcript.

All issues not addressed herein are expressly reserved under the Act.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE