

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H103080

JIMMY FOSTER,  
EMPLOYEE

CLAIMANT

BOONEVILLE HUMAN DEVELOPMENT  
CENTER, EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,  
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED MAY 15, 2026

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

Claimant represented by the HONORABLE JARID M. KINDER, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CHARLES H. McLEMORE, JR., Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part, reversed in part.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal an administrative law judge's opinion filed December 23, 2025. The administrative law judge found that the claimant failed to prove he was permanently totally disabled. The administrative law judge found that the claimant failed to prove he was entitled to permanent partial disability benefits "for loss in wage earning capacity." After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove he was permanently totally disabled. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 15%.

We find that the claimant proved the compensable injury was the major cause of his 15% wage-loss disability.

I. HISTORY

Jimmy Glenn Foster, Sr., now age 71, testified that he had been educated through the 12<sup>th</sup> grade. Mr. Foster testified that his employment history included “ a lot of prison work.” The claimant’s testimony indicated that he had worked in various correctional facilities for approximately 13 years. The claimant testified that he had also worked as a “bouncer” and armed security officer in a casino.

The claimant testified that he had formerly been employed with the respondents, Booneville Human Development Center. Mr. Foster testified on direct examination:

Q. And what does BHDC do?

A. They take care of clients that is not able to take care of their self. They feed them. They take care of them. They teach them how to work and they just work with clients that is not privileged to be at home.

Q. What did you do for them?

A. I done the same thing. I bathed them. I shaved them. I brushed their teeth. I made their beds. We fed them. We washed their clothes. We dried them and stuff like that.

Q. How long did you work there?

A. Before I got sick, I think around eight years, nine years. It was going on 10 years, I think. Pretty close....I was full time Monday through Friday and weekends off....

Q. Was your job at Booneville Health, was that a physical job?

A. Yes, sir.

Q. Would you mind describing that for me and the Court.

A. The physical part where we would strip the client's bed, remake them ourselves, mop and sweep the floors, clean the toilets. We would take their clothes down to laundry and wash and dry them and fold them and then put them away. And make sure that they had food to eat at the time of food and we would brush their teeth and shave them....

Q. Now, out of an eight-hour workday, how much of that would you spend on your feet while working?

A. Pretty much the whole eight hours constantly being busy.

The parties stipulated that the employment relationship existed on July 31, 2020, on which date the claimant "sustained a compensable injury."

The claimant testified on direct examination:

Q. When did you contract COVID-19?

A. I want to say it was in August. That's when I got tested and I tested positive at the facility....

Q. How did you contract it?

A. COVID-19 had hit our facility through staff at first and then it spread to the clients. And we had one client that – when I came on duty that morning, we had one client that was quarantined and he had COVID and I had to take care of him. He was quarantined in his room. I had to go feed him. I had to brush his teeth. I had to shave him because he couldn't come out of his room....

Q. When did you first start noticing symptoms?

A. About probably the last week in July and the first week in August. I started losing my breath and feeling really bad....

The claimant testified that he did not return to work for the respondents after July 31, 2020. A physician's diagnoses on August 8, 2020 were "Pneumonia due to COVID-19 virus (Primary)" and "Morbid obesity with BMI of 70 and over, adult."

Dr. Monali Hanmant Patil noted on August 9, 2020, "Jimmy G Foster is a 65 y.o male admitted 8/8/2020 with complaints of shortness of breath.

Patient works [at] human development center in Booneville. Patient had an exposure to COVID patient couple 2 weeks ago. Patient started having symptoms about 8 to 9 days ago. Patient tested positive for COVID.”

A Nurse Practitioner noted on August 25, 2020, “65 yo male admitted 17 days ago with hypoxemic respiratory failure secondary to COVID-19 pneumonia. Sedation was recently weaned and the patient was noted to be unresponsive. He remains critically ill with frequent oxygen desaturation episodes requiring continued sedation.”

The claimant’s testimony indicated that he was hospitalized through approximately October 2020. An APRN noted on November 9, 2020, “His goal is to improve his health so he can return to work.” Dr. Julio F. Schwarz, a cardiologist, diagnosed “Paroxysmal atrial fibrillation” on February 1, 2021.

Rhonda Murphy, an Assistant Claims Determination Manager, corresponded with the claimant on March 31, 2021:

Public Employee Claims Division (PECD) administers the workers compensation benefits for AR Human Development Center – Booneville.

Your claim has been accepted as compensable based on your positive COVID-19 medical status.

The total disability rate is based upon sixty-six and two-thirds percent (66 2/3%) of your average weekly wage at the time [of] the exposure. Based on the wage information we have received, you will be entitled to receive TTD compensation in the amount of **\$\$329.00 per week**. TTD compensation is based on a seven day week.

It is my understanding that you received Director's Leave pay through 1/8/2021. A State Warrant for compensation benefits in the amount of **\$3,948.00** representing payment for the period of 1/9/2021 through 4/2/2021 has been ordered.... Temporary Total Disability (TTD) compensation will continue to be paid to you on a bi-weekly basis until you receive the release letter from AR Department of Health and return back to work.

Kimberly Thomas, a Human Resources Specialist, corresponded with the claimant on August 16, 2021:

You are due for your five-year background checks. Please fill out the attached forms and bring back to Human Resources by Friday, September 10, 2021 along with your driver's license or photo ID. I will get these forms notarized once they are returned.

Julie Street, Assistant Personnel Manager for Booneville Human Development Center, corresponded with the claimant on October 25, 2021:

On August 16, 2021, we sent you the Catastrophic Leave application. We sent follow-up paperwork to correct dates on August 30, 2021. Also, on October 1, 2021, we sent another complete Catastrophic Leave application for your completion. As of today, October 22, 2021, we have not received the completed application to submit to the Catastrophic Leave Committee. I spoke with Tara Barnes with the Office of Finance and Administration regarding your incomplete application on October 12, 2021, and she confirmed after speaking with you that you were having a hard time scheduling an appointment to get additional paperwork updated and would get it to us once completed.

On August 30, 2021, we sent you your five-year Background Check forms to be completed and returned by September 10, 2021. These were not received by the requested date. After speaking with you on September 23, 2021, you stated you could not locate the forms and needed them resent. On October 1, 2021, we resent the forms as requested. As of

today, we still have not received the completed Background Checks.

At this time, we have not received the requested updated application to submit to the committee nor have we received your Background Checks (State, Federal, Adult and Child Maltreatment).

The Catastrophic Leave Committee can not process your application without the requested documentation and will reject if not submitted.

Your Background Checks with our facility are currently out of date and in violation of Office of Long-Term Care regulations. Please return the requested Background Check forms and updated medical information by November 2, 2021 to prevent us from proceeding with termination.

The respondent-employer's Director of Residential Services

corresponded with the claimant on November 30, 2021:

This letter is to inform you that your employment with the Arkansas Department of Human Services is terminated effective November 30, 2021. This notification is provided to you in accordance with DHS Policies 1049 (Resignation or Termination).

Your termination has been coded "Involuntary" based on an internal investigation.

You must immediately return any keys, parking decal, identification badge, and any other DHS property in good working order....

The claimant testified on direct examination:

Q. Were you terminated from this position?

A. Yes, sir, I was.

Q. What was your understanding of why you were terminated?

A. From what I understand, refusing to go have an FBI background check because I wasn't released from the doctor at that time.

Q. Did you go have the FBI background check done?

A. No, sir.

Q. Why did you not?

A. Because I was still under doctor's care and wasn't released to go back to work.

Q. What all did they ask you to do in going about getting that background FBI check done?

A. They sent me some papers to fill out, which I didn't understand them, and I called to personnel and talked to a lady in personnel. And she told me on some things what to fill out and told me what to check, which I had no clue. I was following orders. Other than that, I didn't know nothing about all that paperwork.

Q. As part of the FBI check, were you physically required to go into the Booneville Health?

A. We was physically required to go there at the facility and let them do whatever they do to do the background check.

Q. And that was part of the request back when they asked you to do the FBI check was to come into work?

A. Yes, sir....

Q. Have you worked at all since July 31<sup>st</sup> of 2020?

A. No, sir.

Q. Why not?

A. Because I am not physically able to pass a physical and hold a job.

The respondents' attorney cross-examined the claimant:

Q. Did you ever fill out the forms for the background checks?

A. They sent me some papers to fill out and I didn't quite understand them. And I tried to fill them out, but I just couldn't fill them out. And I just back off on it because I wasn't released to even go to that facility. I was still under a doctor's care.

Q. Well, that is where I am a little confused again. You said you weren't released. Did you understand what the background checks were for?

A. We used to have them every five years to make sure you didn't have no criminal record. I have a perfect record. I worked in prison systems in the past, lockup facilities before I came to BHDC. I have a perfect record. I can buy a firearm without any flaws in my background check.

Q. So you have completed the FBI background check before?

A. While I was at that facility, yes.

Q. Okay. So you already knew what it was?

A. Yes.

Q. Okay. Did you understand that it was required for you to have that job in that facility?

A. Yes.

Q. Okay. So my question is why did you not at least get the background check done so that you could go back to work there?

A. Because I wasn't released from any doctor yet. I was still under doctor's care, wound care, the heart doctor, my physical doctor, and they still had COVID on the hill and I didn't want to risk redoing it again after my lungs were scarred.

The diagnosis of Dr. Schwarz on March 28, 2022 included

“Hypertensive heart disease with chronic diastolic congestive heart failure.”

The claimant participated in a Functional Capacity Evaluation

through Functional Testing Centers, Inc. on April 26, 2022:

Mr. Foster is referred following reports of long term residual effects from Covid

19....Consistency of effort testing obtained during this evaluation indicate

significant observational and evidence-based inconsistencies resulting in self-limiting behavior and sub-maximal effort. The results of the evaluation indicate that an unreliable effort was put forth, with 13 of 53 consistency measures within expected limits....Mr. Foster completed functional testing on this date with **unreliable** results....Overall, Mr. Foster demonstrated the ability to perform work in at least the **SEDENTARY** classification of work[.]...

Mr. Foster reports that he was diagnosed with Covid-19 in July of 2020. He reports that he was admitted into the hospital and remained in the hospital for approximately 2 months before he was transitioned to a long-term facility for another month. Mr. Foster reports he has had multiple complications including a decubitus ulcer which required wound care as well as IV antibiotics for an infection....Mr. Foster reports that he has permanent damage to his lungs

due to Covid. He reports that he can only walk for 100 feet before he has to stop and rest. Mr. Foster reports he has not returned to work and states he was terminated by his employer....

It was also reported at Functional Testing Centers on or about April 26, 2022: "When utilizing the Guides Table 8 (p. 162): Classes of Respiratory Impairments: Mr. Foster does have a class 2 (mild) impairment with a 10% Whole Person Impairment."

The claimant testified on direct examination:

Q. It is also my understanding that you have issues with your lungs from COVID. Is that right?

A. Yes, sir.

Q. Tell me about that.

A. My lungs were scarred real bad. They said I had double pneumonia when I was in Mercy, and I was on the ventilator, and they said my lungs was permanently damaged....I still have problems breathing. I have a thing at home that the doctor prescribed for me. And I can't walk far because of my shortness of breath. I try to make myself do. In other words, I go and try to make myself function more than normal....

Q. And the respondents are paying you for the 10 percent rating to your lungs. Is that correct?

A. I get some kind of check every two weeks or every week, but I don't know what it is for.

The claimant's testimony indicated that he did not receive temporary total disability benefits for the period after May 6, 2022.

Rhonda Murphy, the respondents' Assistant Claims Determination Manager, corresponded with the claimant on May 17, 2022:

We have received a report from Rick Byrd indicating you have reached maximum medical benefit as of 4/26/2022.

Mr. Byrd also stated you have a 10% Permanent Partial Impairment for a mild ventilatory defect. This impairment rating entitles you to 45 weeks of PPD benefits at the weekly rate of \$247.00 for a total of \$11,115.00. PPD benefits are paid bi-weekly, and your first PPD payment will cover the dates 5/7/22 through 5/20/22. You should receive this check in the next few days. The PPD benefits will pay out on March 17, 2023....

Dr. Sara L. Roberson reported on June 17, 2022:

Jimmy G Foster 10/16/1954 is a patient of mine at the family medicine clinic in Waldron. I have been this patient's primary care provider since 2014. He is requesting this letter statement concerning his ability to work. This patient was hospitalized with severe COVID-pneumonia, he has had deterioration in his health that has included diastolic heart failure, pulmonary hypertension, paroxysmal A. fib and respiratory failure. He has had a great deal of trouble regaining his prior level of functioning. I do not believe the patient will be able to return to work and should strongly consider retirement at this time.

Dr. Terry Clark examined the claimant on September 26, 2022 and diagnosed "1. Acute respiratory failure with hypoxia," "2. Other nontraumatic subarachnoid hemorrhage," and "3. Pressure ulcer of sacral region, stage 4." Dr. Clark stated, "Jimmy's recommended work status is Regular Duty. The effective date for this work status is 9/26/2022....Unable to determine work restrictions due to inconsistent/submaximal effort on the FCE."

A pre-hearing order was filed on October 6, 2022. The claimant contended, "1. 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. 2. Sara L. Roberson has taken the claimant off work indefinitely due to his severe COVID-pneumonia and subsequent deterioration of health. 3. To date, the claimant has only been released as at maximum medical improvement for his sacral wound on September 27, 2021 and his lungs (mild ventilatory defect) [on] April 26, 2022. He remains in his healing period and has not been returned to work and thus contends he is owed temporary total disability benefits from May 17, 2022 through a date yet to be determined. 4. Due to the controversion of entitled benefits, the respondents are obligated to pay one half of the claimant's attorney's fees. 5. Claimant reserves the right to raise additional contentions at the hearing of this matter."

The respondents contended, "[T]he claimant reported on August 5, 2020 that he tested positive for COVID, with his last day of work being July 31, 2020. 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. Respondent has provided reasonable and necessary medical treatment for the claimant, including treatment with Dr. Terry Clark, Dr. Delilah Easom for wound care and Dr. Julio Schwarz, cardiac specialist. 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. 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 was assigned permanent anatomical impairment of 10% to the whole person which has been accepted by respondent and permanent partial disability benefits are being 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 respondents reserve the right to raise additional contentions, or to modify those stated herein, pending the completion of discovery."

The parties agreed to litigate the following issues:

1. Whether claimant is entitled to temporary total disability benefits.
2. Attorney's fee. All other issues are reserved by the parties.

A hearing was held on December 6, 2022. The claimant testified that he was not working, because “I am not physically able.”

An administrative law judge filed an opinion on February 9, 2023. The administrative law judge found that the claimant failed to prove his “heart disease” and “right ulnar neuropathy” were compensable conditions. The administrative law judge found that the claimant was entitled to a period of additional temporary total disability benefits. The claimant appealed to the Full Commission and the respondents cross-appealed.

The Full Commission filed an opinion on August 9, 2023. A majority of the Full Commission found that the claimant proved “the diagnosis of atrial fibrillation was a natural consequence of the compensable COVID-19 condition sustained by the claimant.” The Full Commission found that the claimant did not prove the right ulnar neuropathic condition was a natural consequence of the compensable injury. The Commission found that the claimant “did not prove he remained within a healing period or was totally incapacitated from earning wages at any time after April 26, 2022.” The Full Commission found that the claimant “proved he sustained 10% permanent anatomical impairment as a result of the diagnosis of atrial fibrillation.”

The respondents appealed the Full Commission’s opinion to the Arkansas Court of Appeals. The Court of Appeals affirmed the Full

Commission in part and reversed in part. *Booneville Hum. Dev. Ctr. v. Foster*, 2024 Ark. App. 618, 704 S.W.3d 618. The Court of Appeals affirmed the Full Commission's finding that the claimant proved the diagnosis of atrial fibrillation was a natural consequence of the compensable COVID-19 condition sustained by the claimant. However, the Court reversed the Commission's finding that the claimant proved he sustained 10% permanent anatomical impairment as a result of the diagnosis of atrial fibrillation.

Tanya Rutherford Owen, Ph.D. provided a **VOCATIONAL**

**ANALYSIS** on March 17, 2025. Dr. Owen reported in part:

I engaged Mr. Foster in a discussion about work. He has not sought other employment since contracting COVID-19 in 2020, reporting that he is physically unable to do so. He believes that his primary barriers to return to work involve his limited stamina, debility, and shortness of breath. He also cites ongoing memory problems following his illness. In addition to his ongoing medical problems and related physical and cognitive limitations, Mr. Foster also has several vocationally relevant barriers that negatively impact his ability to obtain employment. First, his age is a barrier to employment. Second, he has never performed sedentary work or work that requires computer skills and is not computer literate. Third, Mr. Foster has been out of the workforce for over 4 years. Based upon a review of literature, the probability of returning to the workforce decreases the longer an individual is unemployed....

Following his hospitalization in 2020 and termination from Booneville Human Development Center, Mr. Foster's employment was terminated by BHDC and he applied for retirement benefits. He notes prior to contracting COVID, he was physically fit and lifted weights three times per week, and as such planned to work as long as necessary to maximize

his State of Arkansas retirement benefit. However, after contracting COVID, he took retirement benefits after his termination. He essentially exited the labor market earlier than intended due to his illness....

Mr. Foster's previous positions have consisted of medium strength level work (lifting/carrying/pushing/pulling up to 50 pounds) as an aide and correctional officer and light work (lifting/carrying/pushing/pulling up to 20 pounds) as a security guard. If Dr. Clark's opinions are given the weight of medical evidence, he should have been able to return to full duty and would sustain no loss of earnings capacity.

With either sedentary (lifting/carrying/pushing/pulling up to 10 pounds) work limitations (per the FCE) or the medical opinion of his treating provider, Dr. Roberson, Mr. Foster could not return to past work and could not access transferable skill occupations. Given either of these scenarios, he would be unemployable and sustained, as a result of his condition, a total loss of earnings capacity....

A pre-hearing order was filed on June 2, 2025. The claimant contended, "1. 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. 2. Sara L. Roberson has taken the claimant off work indefinitely due to his severe COVID-pneumonia and subsequent deterioration of health. 3. 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.* 4. 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. 5. Due to the controversion of entitled benefits, the respondents are obligated to pay one half of the claimant's attorney's fees. 6. Claimant reserves the right to raise additional contentions at the hearing of this matter."

The respondents contended, "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 (sic) 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 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.”

The parties agreed to litigate the following issues:

1. Whether claimant is entitled to permanent total disability or, alternatively, wage loss disability.
2. Whether claimant can establish that his compensable COVID-19 injury is a major cause for his permanent disability or alternatively, wage loss disability.

3. Whether claimant refused a bona fide offer of employment of wages equal to or greater than his average weekly wage after he was released at maximum medical improvement.
4. Attorney's fee. All other issues are reserved by the parties.

The parties deposed Dr. Tanya Rutherford Owen on August 19,

2025. The claimant's attorney examined Dr. Owen:

Q. Did you conduct a vocational analysis on Jimmy Foster?

A. I did....

Q. Did you meet with Mr. Foster?

A. My interviews have been by telephone for him....

Q. Do you believe Mr. Foster has any transferable skills to other jobs?

A. No, he has no – he has no transferable skills.

Q. Is it your opinion that Mr. Foster suffered a loss of earning capacity?

A. Yes.

Q. Do you mind explaining that – why – do you mind explaining your basis for that to the court?

A. Sure. So basically when we look at loss of earnings capacity, we look at a number of different factors and those I have outlined on page six and the top of page seven in my report....So before his injury, he did like medium level work, you know, kind of semiskilled work. And post-injury, other than Clark, the most generous opinion that's been offered is sedentary-level work. So he has no past sedentary work and therefore he just can't access employment or whatever is left he's just not going to be competitive for because he doesn't have the skills to do it....

Q. In your review of the records in this case, did you notice any other ailment or condition that was the major cause of Mr. Foster's inability to return to the workplace?

A. No. And I have his pre-event medical history outline on page two. Again, at the time of his injury, he's 65 years old doing a pretty physically demanding job. I mean, working with people with disabilities is pretty physically demanding, and the only thing that I really see is he had hypertension, which lots of people work with, so, no, I don't think there was – I don't think that there was a pre-event medical history factor that caused him to go out of the labor market.

The respondents' attorney cross-examined Dr. Owen:

Q. Of course if someone is not looking for work, they're not going to find work, are they?

A. True. I agree....

Q. And then I think you've also stated your own opinion now that you think Mr. Foster is unable to return to work?

A. I think the most likely scenario, the judge has to determine what happens next, I think the most likely vocational scenario is the one that has already been occurring for five years and given his – you know, his age, his education, his work background, his ongoing health complaints, the opinions from his treating doctor, his lack of computer skills, his lack of performing, you know, sitdown, sedentary type work, I don't think he ever goes back to work, that's my opinion....

A hearing was held on September 29, 2025. The claimant testified that he was not physically able to return to work. The claimant testified on direct examination:

Q. Out of an eight-hour workday, what do you think the most you could stand would be?

A. Maybe a couple of hours, maybe, of trying to do something. I've got to try to function. If I sit down and don't do nothing, I will die.

Q. All right. What is the longest you can stand before you have to sit down, do you think?

A. Maybe in the kitchen, maybe 10 minutes, 15 at the tops.

Q. What do you think the furthest you could walk is?

A. No more than 100 feet, maybe....

Q. What do you think the most you could lift is?

A. Right now, maybe 10, maybe 15 pounds, and that would be a strain on me....

Q. Now, these physical limitations that we just walked through, did you have any of these limitations before?

A. No. I was perfect in every way just about.

An administrative law judge filed an opinion on December 23, 2025. The administrative law judge found that the claimant failed to prove he was entitled to permanent total disability benefits. The administrative law judge found that the claimant that the claimant failed to prove he was entitled to permanent partial disability benefits “for loss in wage earning capacity.” The claimant appeals to the Full Commission and the respondents cross-appeal.

## II. ADJUDICATION

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

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

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

(c)(1) The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.

Ark. Code Ann. §11-9-519(Repl. 2012) provides, in pertinent part:

(e)(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

A. Permanent Total Disability

An administrative law judge found in the present matter, "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."

The Full Commission affirms this finding.

The claimant is age 71 with only a high school education. The claimant's employment history primarily involves work in correctional institutions and private security. The claimant eventually became employed with the respondents, Booneville Human Development Center. The claimant testified that he provided personal care to clients, which included bathing, shaving, and dental hygiene. The claimant's work duties also required occasional manual labor such as mopping and sweeping.

The parties stipulated that the claimant "sustained a compensable injury" on or about July 31, 2020. The claimant contracted COVID-19 in the

course and scope of his employment with the respondents. The claimant testified that he did not return to work for the respondents after July 31, 2020. A physician's diagnosis on August 8, 2020 included "Pneumonia due to COVID-19 virus (Primary)." The claimant's testimony indicated that, as a result of his compensable injury, he was hospitalized through approximately October 2020. Dr. Schwarz diagnosed "Paroxysmal atrial fibrillation" on February 1, 2021.

The respondents terminated the claimant's employment effective November 30, 2021. A representative of the respondent-employer informed the claimant on that date, "Your termination has been coded 'Involuntary' based on an internal investigation." The record indicates that the claimant did not complete a "Background Check" requested by the respondents. The claimant participated in a Functional Capacity Evaluation on April 26, 2022. It was concluded that the claimant's effort during the Functional Capacity Evaluation was "unreliable," and the claimant was released to "the **SEDENTARY** classification of work." The claimant was also assigned a "10% Whole Person Impairment" due his post-injury respiratory condition. The claimant testified that his lungs "were scarred real bad" as a result of the compensable injury and that he suffered from chronic shortness of breath. The respondents accepted the 10% rating assigned on April 26, 2022.

Dr. Roberson opined on June 17, 2022, "I do not believe the patient will be able to return to work and should strongly consider retirement at this time." However, Dr. Clark opined on September 26, 2022 that the claimant could return to "Regular Duty." The claimant testified at a hearing held December 6, 2022 that he had not returned to work because "I am not physically able." Tanya Rutherford Owen, a vocational rehabilitation consultant, stated on March 17, 2025 that the claimant was "unemployable" and had sustained "a total loss of earning capacity." Dr. Owen testified at a subsequent deposition that the claimant had "no transferable skills" with which to secure employment. Dr. Owen stated on cross-examination, "I don't think he ever goes back to work, that's my opinion."

The Full Commission finds that the claimant did not prove he was permanently totally disabled in accordance with Ark. Code Ann. §11-9-519(e)(1)(Repl. 2012). The claimant did not prove by a preponderance of the evidence that he was unable "to earn any meaningful wages in the same or other employment" in accordance with Ark. Code Ann. §11-9-519(e)(2)(Repl. 2012). We recognize the significant physical limitations that have confronted the claimant following the compensable injury that occurred on or about July 31, 2020. The respondents terminated the claimant's employment effective November 30, 2021. The claimant's termination was at least partially related to his failure to complete a

requested Background Check. The evidence also demonstrates that the claimant is now unable to perform his prior work duties as a result of his permanent physical condition. However, unfortunately the claimant has provided no meaningful effort to secure appropriate gainful employment at any time following the compensable injury. The claimant testified that he is able to drive and occasionally serves as a pastoral assistant at his local church. The claimant's lack of interest in returning to appropriate gainful employment impedes the Commission's full assessment of the claimant's wage-loss disability. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). The Full Commission finds in the present matter that the claimant did not prove he was permanently totally disabled.

B. Wage-loss Disability

An administrative law judge found in the present matter, "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 the compensable injury for loss in wage earning capacity." The Full Commission does not affirm this finding. It is the Full Commission's duty to enter findings in accordance with the preponderance of the evidence and not on whether there is substantial evidence to support the administrative law judge's findings. *Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Preponderance of the evidence means the evidence

having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003). When deciding any issue, the Commission shall determine whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. Ark. Code Ann. §11-9-705(a)(3)(Repl. 2012). The Full Commission enters its own findings in accordance with the preponderance of the evidence. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

The Full Commission finds in the present matter that the claimant proved he sustained wage-loss disability in the amount of 15%. The claimant is of relatively advanced age at 71 and has only a high school education. The claimant's employment history consists primarily of corrections and security work. The parties stipulated that the claimant "sustained a compensable injury" on July 31, 2020. The claimant contracted COVID-19 resulting from his work for the respondents and was hospitalized through approximately October 2020. The claimant was provided "Director's Leave pay" through January 8, 2021. The respondents provided temporary total disability benefits beginning January 9, 2021. A Human Resources Specialist informed the claimant on August 16, 2021, "You are due for your five-year background checks. Please fill out the attached forms and bring back to Human Resources by Friday, September

10, 2021 along with your driver's license or photo ID." The claimant testified, "They sent me some papers to fill out, which I didn't understand them, and I called to personnel and talked to a lady in personnel....I was following orders. Other than that, I didn't know nothing about all that paperwork." The respondents terminated the claimant's employment effective November 30, 2021. The respondents did not inform the claimant on November 30, 2021 that his termination was related to purported "Background Checks." Instead, the respondents told the claimant his termination was "based on an internal investigation."

The evidence before the Commission does not demonstrate that the respondents proved they extended a "bona fide and reasonably obtainable offer to be employed at wages equal to or greater than" the claimant's average weekly wage at the time of the claimant's compensable injury. There is no probative evidence demonstrating that the respondents have offered the claimant an appropriate employment position within his permanent restrictions. In order to bar wage-loss disability in accordance with Ark. Code Ann. §11-9-522(b)(2)(Repl. 2012) *et seq.*, there must be an actual offer of employment made by the employer to the employee. *Hope Sch. Dist. v. Wilson*, 2011 Ark. App. 219, 382 S.W.3d 782, citing *Cross v. Crawford County Mem'l Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In the present matter, the Full Commission finds that the respondents'

request for the claimant to complete a Background Check cannot be interpreted as a legitimate “offer of employment” contemplated by the statute. Moreover, the Commission notes that the respondents terminated the claimant’s employment effective November 30, 2021, while the claimant remained within his healing period and was totally incapacitated from earning wages. The claimant did not reach the end of his healing period until April 26, 2022.

The claimant in the present matter is advancing in age at 71. He has only a 12<sup>th</sup> grade education and a history of employment primarily in corrections and security. The claimant now has significant permanent physical limitations as a result of the July 31, 2020 compensable injury. The claimant sustained an atrial fibrillation as a natural consequence of the compensable injury. The claimant sustained a 10% permanent physical impairment for a permanent respiratory condition, accepted and paid by the respondents. The respondents terminated the claimant’s employment effective November 30, 2021, and the evidence does not demonstrate that there was ever a bona fide offer of employment in accordance with Ark. Code Ann. §11-9-522(Repl. 2012). However, the record shows that the claimant has made no effort to return to appropriate gainful employment following the compensable injury. The claimant’s lack of interest in returning to appropriate gainful employment impedes the Commission’s full

assessment of the claimant's wage-loss disability. *City of Fayetteville, supra*. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 15%.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove he was permanently totally disabled. The claimant proved that he sustained wage-loss disability in the amount of 15%. The claimant proved that the compensable injury sustained on July 31, 2020 was the major cause of his 15% wage-loss disability. The respondents did not prove there was a bona fide offer of employment, and the respondents did not prove that the claimant's 15% wage-loss award should be barred pursuant to Ark. Code Ann. §11-9-526(Repl. 2012). The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing in part on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's finding that the claimant proved by a preponderance of the evidence that he is entitled to wage loss disability benefits in the amount of fifteen percent (15%).

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

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

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

Therefore, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission may increase

the disability rating and find a claimant permanently disabled based upon wage-loss factors. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005).

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

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

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

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1)(B). Pursuant to Arkansas Code Annotated section 11-9-102(4)(F)(ii)(a), “[p]ermanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. A finding of major cause shall

be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14)(B).

Here, the ALJ opined:

[i]t 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.

I agree. The issue of major cause for any impairment related to the claimant's heart condition was decided by the Court of Appeals and is res judicata. The Court of Appeals determined the claimant failed to establish major cause for impairment related to his heart condition. The claimant submitted no new medical records, no new physician opinions, and no new impairment evidence to establish that his respiratory impairment is the major cause of his inability to work. Even if we accept Dr. Roberson's opinion that the claimant is unable to return to work, 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.

Because the claimant has failed to submit any medical evidence establishing that his compensable respiratory condition is the major cause of his inability to earn wages, he has failed to meet his burden of proving by the preponderance of the evidence that he is entitled to wage loss disability benefits.

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

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MICHAEL R. MAYTON, Commissioner