

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H202874**

**TODD O. GRIFFIN,
EMPLOYEE**

CLAIMANT

**MILBANK MFG. CO.,
EMPLOYER**

RESPONDENT

**STANDARD FIRE INS. CO./
TRAVELERS INS. CO.,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED MAY 15, 2024

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission) before Administrative Law Judge (ALJ) Mike Pickens on November 14, 2024, in El Dorado, Union County, Arkansas.

The claimant was represented by the Honorable Laura Beth York, Rainwater, Holt & Sexton, Little Rock, Pulaski County, Arkansas.

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The respondents were represented by the Honorable Guy Alton Wade, Friday, Eldredge & Clark, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the prehearing order filed November 21, 2023, the parties agreed to the following stipulations, which they affirmed on the record:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship including April 4, 2022, when the claimant sustained an admittedly compensable injury to his left hip.
3. The claimant's average weekly wage (AWW) wage was \$831.84, which is sufficient to entitle him to weekly compensation rates of \$557.00 for temporary total disability (TTD), and \$418.00 for permanent partial disability (PPD) benefits.

4. The respondents accepted and paid (and/or are paying) PPD benefits based on the claimant's 15% to-the-body-as-a-whole (BAW) permanent anatomical impairment rating.
5. The respondents controvert the claimant's claim for permanent total disability (PTD), and/or wage loss disability benefits.
6. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Comms'n Ex. 1 at 1-2; Hearing Transcript at 4-5). Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether the claimant is entitled to additional PPD benefits based on PTD or, alternatively, wage loss disability in an amount to be determined.
2. Whether the claimant's attorney is entitled to a controverted fee on these facts.
3. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Comms'n Ex. 1 at 2; T. 4-5).

The claimant contends that on April 4, 2022, he was descending a ladder within the course and scope of his employment when he fell and landed on his left hip. The respondents accepted this left hip injury as compensable and paid both medical and indemnity benefits. The claimant contends he is PTD or, alternatively, he is entitled to significant wage loss disability benefits as a result of his admittedly compensable left hip injury. The claimant further contends his attorney is entitled to a full controverted statutory attorney's fee. (Comms'n Ex. 1 at 2; T. 4-5).

The respondents contend they accepted this claim as compensable and have paid and/or are paying any and all applicable medical and indemnity benefits to which the claimant is entitled pursuant to the Act. In addition, the respondents contend the claimant is not PTD, nor is he entitled to any amount of wage loss disability pursuant to the Act and applicable case law. The respondents reserve the right to supplement their contentions and assert any and all other applicable defenses

and arguments upon the completion of necessary investigation and discovery. The respondents reserve any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 2-3; T. 4-5).

The record consists of the hearing transcript, and any and all exhibits contained therein and/or attached thereto.

STATEMENT OF THE CASE

The claimant, Mr. Todd O. Griffin (the claimant), is 59 years old. He graduated from high school and attended one (1) year of college. He completed six (6) to eight (8) months of vocational-technical (vo-tech) training in air conditioning and refrigeration (AC). After he completed this vo-tech training the claimant worked for a few Lion Oil Company shut-down operations that lasted a few weeks, or a month or two (2); he worked for Worsham Wholesale, a food and grocery company; and at an aluminum boat company. He testified the work he performed at these jobs was not "skilled", as he generally worked assisting other people, and he worked as an assistant electrician at one (1) of these jobs. The claimant testified he worked "a lot of little odd jobs", and "at Walmart two (2) days." He testified he had no special computer training. (T. 9-14; 17).

The claimant began working at Milbank Manufacturing Company (Milbank) in July of 1992. He explained his understanding is Milbank is the "oldest manufacturer" of electric commercial and residential meter sockets in the United States. He testified he originally worked the night shift at the end of the assembly and paint line, taking the fully assembled and painted electric residential and commercial meter sockets of different shapes and sizes off the line/conveyor belt. He performed this job for approximately 90 days. (T. 14-16).

The claimant testified that at the time of his April 4, 2022, compensable left hip injury he was working as the paint booth operator. This job required him to perform a number of different job

functions, including operating the computer controlling the paint machine. (Please *see* the claimant's detailed description of his job duties at pages 16-19, and 39-49 of the hearing transcript.). At the time of his compensable left hip injury on April 4, 2022, the claimant had climbed and then was descending a ladder to straighten some of the meters coming down the line when he missed a step on the ladder and fell about four (4) feet onto his left side, injuring his left hip, which eventually required him to undergo a total left hip arthroplasty (hip replacement) surgery. (T. 19-25). The claimant testified he underwent a total knee replacement in his left knee – which is unrelated to the April 4, 2022, compensable left hip injury – some two (2) weeks before the date of the subject hearing. The claimant explained this is why he was wearing shorts at the hearing. (T. 20-22).

On February 14, 2023, the claimant underwent an FCE which demonstrated he is able to perform job duties within the “MEDIUM” category of work as defined by the United States Department of Labor guidelines (US DOL guidelines). (Respondents' Exhibit No. 1 at 4-23; 6). The FCE examiner also opined the claimant was entitled to a 15% BAW permanent anatomical impairment rating related to his compensable injury. (RX1 at 24-27; 27).

In a report dated September 13, 2023, the claimant's treating orthopedic surgeon, Dr. James K. Rudder of the Magnolia Orthopedic Clinic in Magnolia, Arkansas, states as follows: “I do agree with the functional testing center that the patient has a good result albeit close to fair. I agree with the range of motion and otherwise testing. Therefore [sic], the patient's permanent impairment based on the 4th edition of the American Medical Association guides to the evaluation of permanent impairment as is used by the Arkansas worker's compensation, would be 15% of body impairment rating.” (RX1 at 28) (Bracketed material added). The parties stipulated the respondents' accepted and paid, or are paying, PPD benefits based on the 15% BAW impairment rating. (Claimant's Exhibit 1 at 1-27).

Thereafter, the respondents offered the claimant a job consistent with his FCE results; however, the claimant did not accept this job. He returned to Dr. Rudder who apparently – after initially agreeing with the FCE results – later placed additional physical restrictions on the claimant. Milbank was unable to accommodate the claimant based upon the additional/post-FCE physical restrictions Dr. Rudder placed on the claimant. The claimant testified the Milbank job offer he refused was based on the FCE results that were based on an eight (8)-hour workday rather than a ten (1)-hour workday. After Dr. Rudder placed the additional post-FCE restrictions on the claimant, it appears Milbank advised they were unable to accommodate the claimant based upon Dr. Rudder's additional, post-FCE – and post-initial job offer – restrictions. (T. 26-39; 39-49; Claimant's Exhibit 1 at 1-5; RX1 at 28).

The claimant testified he planned to retire when he was 65 years old. He said he used to run a lot but that he has been unable to jog as he had in the past since his hip (and apparently his non-work-related left knee) surgery. The claimant testified he has not looked for employment since his compensable injury. When his attorney asked him if he thought there were "...any jobs out there that you could do?", the claimant candidly responded, "I honestly don't know..." (T. 39; 37-39).

On cross-examination, re-direct, and in response to the ALJ's questions the claimant again admitted he considers himself to be retired, and that he has not made any efforts to seek gainful employment, nor has he looked into or requested retraining or vocational rehabilitation, etc. . The claimant has applied for a receives social security disability benefits (SSD) in the amount of \$1,675 per month (based on the subject left hip injury *as well as* his non-work-related left knee problems for which he underwent surgery before the hearing), which he testified allows him to meet his monthly living expenses. The claimant further testified he has been fortunate enough to have saved some money through the years, as he has an employer-sponsored 401(k) plan through Milbank. The

claimant has two (2) cars and is able to drive himself wherever he needs/wants to go. He said he drove himself from his home in Magnolia to Little Rock for his deposition in this claim; that he is able to wash his cars, and to perform all his household chores. (T. 49-71).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2024 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). *Ark. Code Ann.* Section 11-9-704(c)(3) (2024 Lexis Repl.) states that the ALJ, the Commission, and the courts “shall strictly construe” the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2024 Lexis Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers’ compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep’t of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission’s exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees*, 51 Ark. App. 116, 912

S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Wage Loss Disability

The Act specifically sets forth the requirements governing the Commission's findings related to wage loss disability. For unscheduled injuries, *Ark. Code Ann.* § 11-9-522 (2024 Lexis Repl.) controls an injured worker's entitlement to permanent disability benefits. The payment of compensation for permanent disability compensation is appropriate where the permanent effects of a work-related injury incapacitate the worker from earning the wages he was receiving at the time of the injury. *Id.*

The Commission is charged with the duty of determining a claimant's wage loss disability, if any, based upon consideration of the medical evidence and other matters affecting wage loss. *Lee v. Alcoa Extrusion*, 89 Ark. App. 228, 201 S.W.2d 449 (Ark. App. 2005). When making a determination of the degree of disability an injured worker has sustained as the result of an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's physical anatomical impairment adversely affects his earning capacity, as well as other

factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect his future earning ability. Such other matters may include, but are not limited to: motivation, post-injury income, credibility, and demeanor. *Ark. Methodist Hospital v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (Ark. App. 1993); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App 313, 663 S.W.2d 946 (Ark. App. 1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (Ark. App. 1990).

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the relevant evidence to determine whether a claimant is entitled to wage loss disability. *Henson v. General Electric*, 99 Ark. App. 257, 257 S.W.3d 908 (Ark. App. 2007). A claimant's lack of interest in pursuing employment with his employer, and negative attitude in looking for work are impediments to the Commission's ability to assess wage loss disability. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (Ark. App. 2005). A claimant is not entitled to wage loss disability benefits for a scheduled injury. *Ark. Code Ann. § 11-9-521* (2024 Lexis Repl.); *Moser v. Ark. Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (Ark. App. 1993).

Specifically with respect to PTD benefits, *Ark. Code Ann. § 11-9-519(e)* (2024 Lexis Repl.)

states:

- (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.

PTD "shall be determined in accordance with the facts." *Ark. Code Ann. § 11-5-519(c)* (2024 Lexis Repl.). "In considering a claim for permanent disability, the commission and the courts shall not

consider the odd-lot doctrine.” *Ark. Code Ann.* § 11-5-519(f) (2024 Lexis Repl.); and *see, American Eagle Airlines v. Donald Berndt*, 2012 Ark. App. App. 220 (Ark. App. 2012), citing *Patterson v. Ark. Dep’t of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (Ark. App. 2000).

As previously cited, *supra*, *Ark. Code Ann.* § 11-9-102(4)(F)(ii)(a) (2024 Lexis Repl.) requires further that:

- (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.

(Emphasis added). The Act specifically defines the term “major cause” to mean more than fifty percent (50%) of the cause, which must be established by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-102(14)(A) and (B) (2024 Lexis Repl.).

Based on the applicable law as applied to the facts of this case, I find the claimant has sustained wage loss disability in the amount of five percent (5%) based on his compensable left hip injury of April 4, 2022.

There exists insufficient medical or other evidence in the record demonstrating the claimant is physically incapable of any gainful employment whatsoever. Indeed, the claimant’s treating physician, Dr. Rudder, agreed with the FCE results that demonstrate the claimant is in fact capable of performing job duties that fall within the US DOL guidelines for “MEDIUM” physical demands. The US DOL guidelines define “MEDIUM” physical demands for work as follows:

Medium Work

Medium Work involves exerting 20 to 50 pounds of force occasionally or 10 to 25 pounds of force frequently or an amount greater than negligible And up to 10 pounds constantly to move objects. Physical demand requirements are in excess of these for Light Work.

(US DOL guidelines, Office of Workers' Compensation Programs (OWCP) Form ME-OW, Page 2). Again, in his letter dated September 13, 2023, Dr. Rudder agreed with the FCE results, as well as the FCE examiner's opinion assigning the claimant a 15% BAW impairment rating. Milbank offered the claimant a job that fit within this description, which the claimant apparently declined since his understanding was the FCE examiner's opinion was based on an 8-hour workday, and not a 10-hour workday. Thereafter, the claimant went back to see Dr. Rudder, who apparently placed some additional restrictions on him over and above those as demonstrated in the FCE, and Milbank was unable to accommodate the claimant in light of these post-FCE additional restrictions.

Even when Milbank offered him a job consistent with the FCE findings/restrictions, the claimant did not attempt to return to work, or attempt to perform the job Milbank offered him. Instead, he went back to see his hometown treating physician, Dr. Rudder, who – although he initially agreed with the FCE restrictions (RX1 at 28) – thereafter, placed additional restrictions on him that Milbank was unable to accommodate. Still, significantly, there exists no evidence – medical or otherwise – that demonstrates the claimant is incapable of performing *any* type of gainful employment; or that the claimant is unable to perform work that falls within the US DOL's MEDIUM work restrictions for an 8-hour workday. Indeed, from his own testimony concerning what he can and cannot do, it appears the claimant is in fact capable of working a MEDIUM duty job; however, since to date he has not taken any steps to find employment.

It is well-settled in Arkansas workers' compensation law that a claimant's motivation to return to work – or his lack thereof – is a factor to consider in determining whether and to what

extent the claimant is entitled to wage loss disability. *Meadows v. Tyson Foods, Inc.*, 2013 Ark. App. 182 (Ark. App. 2013). Here, the claimant candidly admitted he: considers himself to be retired; is physically capable of performing his household chores, and of driving his two (2) cars as needed; rides motorcycles and an exercise bike; has always been a runner/jogger (as was evident by the claimant's physical appearance which gave the appearance of a person who was "in shape", not overweight, etc.); draws SSD benefits which allow him to "stay in the black" as far as his living expenses are concerned; has made no effort whatsoever to look for gainful employment, or to request vocational rehabilitation, or retraining. (T. 49-71). All of the aforementioned admissions – as well as the medical record, FCE report, and other relevant, credible evidence of record – mitigate strongly against the claimant's contention that he is either PTD or is entitled to significant wage loss disability. And the claimant's admitted lack of motivation to return to work (he considers himself to be "retired", etc. (*see, supra*)) makes it difficult to determine the extent of his wage loss disability, if any.

The claimant is an obviously intelligent, articulate, amiable person. He has a high school diploma, as well as one (1) year of college. He makes a good appearance, both physically and intellectually. Consequently, based on all the credible evidence of record it is abundantly clear the claimant is not PTD, and that he is entitled to only minimal wage loss disability attributable to his April 4, 2002, admittedly compensable left hip injury.

Therefore, for all the aforementioned reasons I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The stipulations contained in the prehearing order filed November 21, 2023, hereby are accepted as facts.

1. The claimant has failed to meet his burden of proof in demonstrating that he is PTD.

2. The claimant has met his burden of proof in demonstrating he is entitled to an additional five percent (5%) in PPD based on wage loss disability.
3. The claimant's attorney is entitled to a controverted fee based on the aforementioned 5% wage loss disability finding.

AWARD

The respondents hereby are directed to pay benefits in accordance with the "Findings of Fact and Conclusions of Law" set forth above. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to *Ark. Code Ann.* Section 11-9-809, and *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett*, 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 98); and *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004).

If they have not already done so, the respondents' shall pay the court reporter's invoice with 20 days of their receipt of this opinion.

IT IS SO ORDERED.



Mike Pickens
Administrative Law Judge

MP/mp