

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. G900188**

**CLAYTON MCWILLIAMS,  
EMPLOYEE**

**CLAIMANT**

**ARKANSAS STATE POLICE,  
EMPLOYER**

**RESPONDENT NO. 1**

**STATE OF ARKANSAS/PUBLIC EMPLOYEE  
CLAIMS DIVISION, INSURANCE CARRIER/TPA**

**RESPONDENT NO. 1**

**STATE OF ARKANSAS  
DEATH & PERMANENT TOTAL DISABILITY  
TRUST FUND**

**RESPONDENT NO. 2**

**OPINION AND ORDER FILED JULY 5, 2023**

Hearing conducted on April 6, 2023, before the Arkansas Workers' Compensation Commission (AWCC), Administrative Law Judge (ALJ) Mike Pickens in El Dorado, Union County, Arkansas. The claimant was represented by the Honorable Gregory R. Giles, Moore, Giles & Matteson, Texarkana, Miller County, Arkansas.

Respondent No. 1 was represented by the Honorable Charles H. McLemore, State of Arkansas, Arkansas Insurance Department, Public Employee Claims Division (PECD), Little Rock, Pulaski County, Arkansas.

Respondent No. 2, is represented by the Honorable David L. Pake, State of Arkansas, AWCC, Death and Permanent Total Disability Trust Fund (the Fund), Little Rock, Pulaski County, Arkansas, who waived appearance at the hearing.

**INTRODUCTION**

In the prehearing order filed June 24, 2022, the parties agreed to the following stipulations, as modified, 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 existed at all relevant times, including January 3, 2019, when the claimant sustained compensable injuries to his

pelvis, both legs, and brain in a motor vehicle accident (MVA).

3. The claimant's average weekly wage (AWW) was \$950.29, which is sufficient to entitle him to weekly compensation rates of \$634.00 for temporary total disability (TTD), and \$476.00 for permanent partial disability (PPD) benefits.
4. Respondent No. 1 accepted the immediately aforementioned injuries and have paid all appropriate medical and TTD benefits to date.
5. Respondent No. 1 has accepted and paid (or is in the process of paying) a 49% to the body-as-a-whole (BAW) permanent anatomical impairment rating based on all the claimant's compensable injuries.
6. Respondent No. 1 controverts the payment of any additional PPD benefits for wage loss, and/or permanent and total disability (PTD).
7. The parties specifically reserve any and all other issues for future determination and/or hearing.

(Commission Exhibit 1 at 2; Hearing Transcript at 5). Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether, and if so to what extent, the claimant is entitled to wage loss disability, or is PTD as a result of his admittedly compensable injuries.
2. Whether the claimant's attorney is entitled to a controverted attorney's fee on these facts.
3. The parties specifically reserve any and all other issues for future litigation and/or determination.

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

The claimant contends he is permanently and totally disabled (PTD) or, alternatively, is entitled to substantial wage loss disability benefits. The claimant further contends Respondent No. 1 should be ordered to pay attorney's fees as provided by law. The claimant specifically

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reserves any and all other issues for future determination and/or hearing. (Comms'n Ex. 1 at 2; T. 5).

Respondent No. 1 contends the claimant has the burden of proving he is in fact PTD and incapable of performing any gainful employment whatsoever or, alternatively, is entitled to additional PPD benefits for wage loss disability in excess of his 49% BAW impairment rating assigned for his traumatic brain injury. Furthermore, Respondent No. 1 contends that, pursuant to *Ark. Code Ann.* Section 11-9-411 (2023 Lexis Replacement), if the Commission awards the claimant additional disability benefits they are entitled to a dollar-for-dollar credit/off-set for any and all disability benefits the claimant's employer, or any and all third-party payor(s) has paid, is paying, or will pay in the future based on his compensable injury. Respondent No. 1 reserves any and all other issues for future determination and/or hearing. (Comms'n Ex. 1 at 3-4; T. 5).

Respondent No. 2 defers to the outcome of the litigation on the subject issues and waived its appearance at the subject hearing. Respondent No. 2 specifically reserves any and all other issues for future litigation and/or determinations. (Comms'n Ex. 1 at 4; T. 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. Clayton McWilliams (the claimant), was 36 years old at the time of the hearing, and he turned 37 years old on June 10, 2023. On January 3, 2019, he was working as an Arkansas State Trooper responding to a call when he was involved in an MVA in which he injured his pelvis and legs and sustained a traumatic brain injury. Respondent No. 1 accepted these injuries

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as compensable and provided, paid for, and continues to provide and pay for all related, reasonably necessary medical treatment, including but not limited to the pelvic surgery Dr. Richard Garrison performed; physical therapy (PT), and in-patient treatment; as well as treatment at the Timber Ridge neurological rehabilitation facility in Benton, and treatment from Dr. Barry Baskin for his traumatic brain injury. Dr. Barry Baskin saw the claimant for an independent medical evaluation (IME) and issued his IME report on October 7, 2020, and an addendum to this report on October 15, 2020, which provide a thorough explanation of the claimant's injuries, including but not limited to his traumatic brain injury. The claimant also spent a period of time at the Timber Ridge neurological rehabilitation facility in Benton, Arkansas. (Claimant's Exhibit 1 at 1-90C; T. 13-33).

The claimant underwent two (2) separate Functional Capacity Evaluations (FCEs), the first on August 28, 2020, and the second May 6, 2021, the results of which were "reliable". The FCEs ultimately revealed the claimant was physically capable of performing "Light" work consistent with the United States Department of Labor's standards' (USDOL standards). (CX1 at 3-21, 59-57).

In addition, Respondent No. 1 provided the claimant vocational rehabilitation and job search assistance, initially via Ms. Heather Taylor, and later via Ms. Keondra Hampton, both of Systemedic. Ms. Taylor conducted her initial evaluation of the claimant on May 24, 2021. In a vocational rehabilitation report dated November 23, 2021, Ms. Taylor opined:

After working with Mr. Williams, communicating with both volunteer places, and observing Mr. McWilliams doing his volunteer work, it is my professional opinion that he is not able to return to competitive employment at this time... If his independence increases over time, he may eventually be able to return to competitive employment, but in my opinion, it would only be in an unskilled occupation.

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(CX1 at 85; 84-85). Thereafter, Ms. Taylor, and then Ms. Keondra Hampton also with Systemedic, continued to follow the claimant's progress through March 21, 2021. In her final report of April 25, 2022, Ms. Taylor stated:

In my professional opinion, I am still not ruling out the possibility that Mr. McWilliams could eventually return to an unskilled/semi-skilled job. his vocational/return-to-work outlook remains guarded and this is based on my experience in working with Mr. McWilliams and also having worked with other clients, in the past, with brain injuries.

(CX1 at 94; 93-94).

Ms. Taylor left her job with Systemedic and the claimant's vocational rehabilitation program was transitioned to Ms. Hampton, a vocational rehabilitation consultant who worked with the claimant in trying to help him find a wage-paying job. In her last report dated March 21, 2023, Ms. Hampton listed a number of employers who had unskilled/semi-skilled job openings. She reported the claimant told her that although he had submitted applications for these jobs, "he did not receive any responses from employers regarding his applications." (CX1 at 120). Ms. Hampton also noted in this report that she was helping the claimant complete job applications and that he was, "eager for employment and will continue to work with me and his newly assigned job coach." (CX1 at 12; 119-120). While the claimant was working a part-time, non-paying volunteer job, as of the hearing date he did not have a wage-paying job or any offers for a wage-paying job.

Dr. Garrison, who treated the claimant's pelvic injury, opined the claimant reached maximum medical improvement (MMI) on July 24, 2020, and released him from his care and treatment. Dr. Baskin opined the claimant reached MMI for the effects of his traumatic brain injury effective March 29, 2021, and assigned him a 49% BAW permanent anatomical impairment rating,

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which Respondent No. 1 has accepted and is in the process of paying. (CX1 at 29).

The claimant and his mother, Mrs. Kay Williams, were the only witnesses who testified at the hearing. Both the claimant and his mother testified concerning his physical limitations and restrictions, and the adverse effects his traumatic brain injury has had on his cognitive abilities; his job search; his inability to find a wage-paying job; and his intention to continue to seek gainful employment. (T. 33-125; 128-171). The claimant has applied, been approved for, and currently is receiving approximately \$365 per month in Social Security disability (SSD) benefits. (T. 55). The claimant is medically retired for the Arkansas State Police, and he also receives approximately \$1,205.59/month from the Arkansas Public Employees State Retirement System (APERS).

## **DISCUSSION**

### **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 on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2023 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence that he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). 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); *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). 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.*

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*v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002).

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 Correc. 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. Hardee's*, 51 Ark. App. 116, 912 S.W.2d 14 (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); and *Farmers' Coop., supra*. The Commission has the duty to weigh the medical evidence just as it does any other evidence, to resolve conflicting medical opinions; 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).

The Act specifically sets forth the requirements for wage loss disability findings. For unscheduled injuries, *Ark. Code Ann.* § 11-9-522 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

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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. *Arkansas 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; *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) 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.



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- (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). “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); 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) 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).

Respondent No. 1 is to be commended for its hard and diligent work in providing vocational rehabilitation and job search assistance to the claimant; however, based on the applicable law as applied to the facts of this case I am compelled to find the claimant has met his burden of proof in demonstrating by a preponderance of the credible evidence that he is in fact PTD within the meaning of the Act as well as the aforementioned applicable precedents.

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The claimant was involved in a serious MVA while responding to a dispatcher's call on January 3, 2019, in which he suffered numerous admittedly and well documented compensable injuries, most notably a traumatic brain injury. The claimant also sustained significant injuries to his pelvis and both legs. (CX1 at 1-120). The claimant, while only 36 years old at the time of the hearing, is now 37 years old, and has been assessed with a 49% BAW permanent anatomical impairment rating, primarily as a result of his traumatic brain injury. Whether attributable to the compensable incident and his serious permanent injuries in this case or some other reason, after the January 3, 2019, MVA the claimant's wife left him. Fortunately, he has met and married another woman who provides both physical and emotional care and support. It is also evident from the claimant's mother's testimony that both she and the claimant's dad have provided him care, love, financial, and both physical and emotional support.

The medical records, as well as the claimant's and his mother's testimony, were credible concerning the serious nature of his injuries, and the physical limitations and restrictions these serious, debilitating injuries have had on his life. Throughout his testimony the claimant expressed a desire to do everything possible to return to gainful employment. With the loving and significant help of his mom the claimant has written a book about his accident and his courageous fight to overcome his significant disabilities which is available for sale on Amazon. He also has given motivational speeches at various churches and other venues. His fellow Arkansas State Troopers and others have shown their care and concern by providing him some financial assistance; however, charitable assistance, while certainly helpful, does not constitute gainful employment.

Of course, of most concern is the claimant's traumatic brain injury. Both the medical

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records and the vocational rehabilitation reports of Ms. Taylor and Ms. Hampton essentially demonstrate the claimant's prospects of finding a wage-paying job in the competitive marketplace are highly speculative at this time. In fact, initially Ms. Taylor – a highly knowledgeable, experienced, credible, and professional rehabilitation specialist well-known to this ALJ and the Commission – as well as Ms. Hampton's thorough, well-written reports, paint a rather bleak picture of the claimant's prospects of returning to gainful employment as of the hearing date. (CX1 at 85; 94; 120).

The claimant's January 3, 2019, MVA, resulting serious injuries, and their consequences represent the very definition of a highly significant, tragic, life-changing event. Still, the overwhelming preponderance of the evidence demonstrates the claimant is highly motivated to stay as active as he possibly can; that he is making and intends to continue to make every effort to find and return to some kind of gainful employment if at all possible. In other words, this claimant is, in this ALJ's humble opinion, a courageous young man who, despite his occasional bouts with situational depression, is eager and highly motivated to attempt to beat the odds and find gainful employment. And if he is unable to do so, he will continue to find ways to use his tragedy and upbeat, positive attitude to try to help others in similar situations deal with their injuries, struggles, and depression, and to live the very best life they can live while, "passing it forward" to others.

This ALJ and the Commission are well aware that recovery from traumatic brain injuries is highly unpredictable: *i.e.*, the claimant's condition "might" improve and, then again, it "might" get worse. As of the hearing date the preponderance of the credible evidence of record conclusively demonstrates that, at this time at least, it would constitute sheer speculation and conjecture to find

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the traumatic brain injury will improve to the extent that the claimant will be able to return to work and be gainfully employed in a competitive marketplace. Of course, speculation and conjecture, even if plausible, do not constitute proof. I pray the claimant's traumatic brain injury will improve with time; however, as of the hearing date as well as the preponderance of the credible evidence of record and what this ALJ observed at the hearing, the claimant is unable to return to gainful employment at this time.

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

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations contained in the prehearing order filed June 24, 2022, which the parties affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has met his burden of proof in demonstrating he is PTD within the meaning of the Act and applicable case law.
3. The claimant has met his burden of proof in demonstrating his compensable injuries are the "major cause" of his permanent disability.
4. Pursuant to *Ark. Code Ann.* Section 11-9-411, Respondent No. 1 is entitled to take a dollar-for-dollar credit/off-set in the amount of any disability benefits any and all third-party payor(s) have paid, are paying, or will pay to the claimant in the future.
5. The claimant's attorney is entitled to a fee on these facts based on the additional 51% in wage loss disability benefits the Commission has awarded to the claimant, and which Respondent No. 1 has controverted.

**AWARD**

The respondents are hereby 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.*

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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. 1998); and *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004).

If they have not already done so, Respondent No. 1 shall pay the court reporter's invoice within twenty (20) days of their receipt of this opinion and order.

**IT IS SO ORDERED.**

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Mike Pickens  
Administrative Law Judge

MP/mp