

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H005620**

JERRY OLIVER, Employee	CLAIMANT
ARKANSAS FORESTRY COMMISSION, Employer	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier	RESPONDENT

**OPINION FILED OCTOBER 21, 2025**

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney at Law, Fort Smith, Arkansas.

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

**STATEMENT OF THE CASE**

On July 31, 2025, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 9, 2025, and a Pre-hearing Order was filed on June 10, 2025. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The relationship of employee-employer-carrier existed between the parties on August 10, 2020.
3. The claimant sustained a compensable injury to his left shoulder, left elbow, and low back on or about August 10, 2020.

4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$499.00 for temporary total disability benefits and \$374.00 for permanent partial disability benefits.

5. Respondents have accepted 8% impairment for his compensable lumbar spine injury and 2% impairment for his compensable left shoulder injury.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant is entitled to wage loss disability.
2. Whether Claimant's attorney is entitled to an attorney fee.

The claimant's contentions are as follows:

“The claimant contends that he is entitled to additional permanent partial disability benefits for loss of wage earning capacity and may be entitled to additional permanent partial disability benefits for increased permanent physical impairment.”

The respondents' contentions are as follows:

“The Respondents contend that the claimant sustained a compensable injury on August 10, 2020 for which he has been provided medical and indemnity benefits by Respondent. The claimant reported injuries to his left shoulder and low back.

The claimant was provided medical treatment by Respondent, including treatment for his lumbar injury with Dr. Frank Tomecek who performed a surgery January 9, 2021 to remove hardware from a prior non-work related surgery. The claimant was released at MMI by Dr. Tomecek for his lumbar on July 7, 2021 with 8% permanent anatomical impairment.

The claimant was seen by Dr. Jeffrey Johnson for his left elbow, who treated the claimant conservatively including an MRI and injection. The claimant was released at MMI by Dr. Jeffrey Johnson on July 26, 2021 for his left elbow with 0% permanent impairment.

The claimant was provided treatment for his left shoulder including therapy and MRI, and was seen by Dr Bolyard who had

performed surgery previously on the claimant's left shoulder. Dr. Bolyard commented that there were no known postsurgical changes to the left shoulder, and released the claimant for his left shoulder November 20, 2020, stating no surgery was indicated.

The Respondent agreed to provided the surgery recommended by Dr. Andrew Heinzelmann on the claimant's left shoulder, performed March 16, 2022. The claimant was released by Dr. Heinzelmann at MMI to full activity without restriction on May 17, 2022. The claimant was assigned a 2% impairment to the body as a whole by Dr. Heinzelmann, which Respondent accepted and has paid to the claimant, with attorney fee.

The claimant was terminated for cause by his employer after he had been offered accommodation to return to work. 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). Furthermore, the claimant had been provided vocational rehabilitation counseling after his injury and back surgery. Subsequent to his left shoulder surgery, the claimant has again been offered vocational rehabilitation counseling by Respondent.

The Respondent contends that the claimant, now age 51, cannot establish that he is entitled to permanent disability benefits related to his work injury in excess of his permanent impairment ratings already assigned by his treating physicians or in the form of wage loss disability. The claimant, who runs his family farm operation, was terminated for cause, ad also had been provided vocational rehabilitation counseling previously but did not have an interest in pursuing it, he has instead pursued Social Security Disability benefits as well as disability benefits through the Veterans Administration. The Respondent further contends that claimant has a history of preexisting conditions, unrelated to a work injury, for which he already receives disability benefits and the claimant cannot establish the work injury for the major cause of additional permanent disability benefits he demands.

A hearing was set in this matter on November 9, 2023, but the file was returned to the Commission's general files on November 1, 2023, with no activity until after Respondent filed its Motion to Dismiss for Want of Prosecution, when the claimant demanded a hearing. Respondent's Motion to Dismiss is still pending.

The Respondent reserves the right to raise additional contentions, or to modify those stated herein, pending the completion of discovery.”

The claimant in this matter is a 51-year-old male who sustained compensable injuries to his left shoulder, left elbow, and lower back on or about August 10, 2020. The parties have stipulated that the claimant sustained whole body impairment ratings of 8% regarding his lumbar spine and 2% whole body impairment regarding his left shoulder. It is for these injuries that the claimant has asked the Commission to determine whether he is entitled to wage loss disability.

On August 10, 2020, the claimant was performing employment services on a piece of private land when he slipped and fell due to moss-covered rock. The claimant received medical treatment for his injuries by multiple doctors due to the variety of his injuries. The claimant’s work-related injuries eventually resulted in his receiving an impairment rating of 8% to the body as a whole regarding his lumbar spine and 2% to the body as a whole regarding his left shoulder. The claimant testified that he did not receive any restrictions related to his left shoulder, but restrictions were placed on his back. Following is a portion of the claimant’s direct examination testimony:

Q I just want to know if they gave you any restrictions.

A Yes.

Q Was that the only restriction?

A Yes, sir. They gave me zero for my elbow.

Q And did you –

THE COURT: Mr. Ellig, just for a point of clarification. Could you inquire about which doctor that was? What body part that doctor was that gave the restriction?

A (Witness continues.) Dr. Frank Tomecek was the back doctor for my eight percent.

THE COURT: Okay.

Q (Mr. Ellig continues.) Did he give any other restrictions, like bending, or stooping, or twisting, or anything like that?

A Not after the six months. Before that, I did, yes.

Q And at six months, he just said no lifting over 30 pounds on a regular basis?

A Yes, he said, yep, put me on a weight limit. He told me to just be careful, you now, don't do stuff to hurt it.

Q Don't do something that hurts?

A And that happens sometimes.

Q How about your shoulder?

A It still – I still have a lot of pain in my shoulder.

Q Did he give you – did the doctor impose any limitations on you using your shoulder when he treated you for your shoulder, Dr. Heinzelmann?

A No, he gave me just a clear – clear to go.

The claimant was asked on direct examination about his ability to perform his job duties for the respondent/employer after his release as follows:

Q How much could you lift after you were released by Dr. Tomecek?

A Thirty pounds or less.

Q Did you try to stick with those limitations?

A Yes, at first it was hard. You know, I would unload a bag of dog food, but that felt like 80 pounds so I just made myself stop because it put me in bad back pain when I would do that.

Q At that time, when you were released by all your doctors, do you believe you were physically capable of performing your job for the forestry service?

A No, sir. I was even told by two different back surgeons that I should never get on a bulldozer.

MR. MCLEMORE: Objection, that would be hearsay.

THE COURT: Sustained.

MR. ELLIG: Judge I'm just – just try to answer my question.

THE COURT: I understand.

Q (Mr. Ellig continues.) We don't need to know necessarily what someone told you unless they put it in writing. I just need to know what difficulties would you have had in doing the forestry service job?

A Well, I could not be a dozer operator anymore. If we were very – I could walk –

Q What would have bothered you about being a dozer operator?

A Well, it beats you to death. I mean, the rocky terrain and running over downed burnt trees and stuff.

Q The vibrations?

A On, the vibration. There's no shocks on a dozer, I mean it's, it's very –

Q What other activities?

A Well, walking a long ways. Trying to even climb a ladder to fix something, if I needed to, on my house.

Q I'm trying to just stick with what you couldn't do at –

A At forestry?

Q -- the forestry service.

A Well –

Q Couldn't climb a ladder?

A No. I mean we –

Q Could not walk on uneven ground for distances?

A Yes, sir. Could not get on a lot of uneven ground. I mean, it's rough, like I say, and we have – a lot of time we are out there after dark and you trip on stuff, fall on stuff, and we are raking fire lines with rakes and, you know, putting fires out with our flappers, and we got chainsaws, trying to cut stuff down, and that stuff right there just doing that and bending trying to cut them logs and do all that work. There's no way I could do that.

Q By the time you had been released by the doctors, were you still employed by the forestry service?

A No, sir.

The claimant was terminated by the respondent on or about January 11, 2021. The claimant testified that he was never offered a job by the respondent within his restrictions as follows:

Q Now, after you were released by your doctors, has the forestry service ever offered you a job within your restrictions?

A No, sir.

Q Have they ever obtained for you a job within your restriction that would pay the same or greater wage than you were earning at the time you got hurt?

A No, sir.

On cross examination, the claimant was asked about the respondent offering work after his work-related injury as follows:

Q Did you ever go back to work for the forestry commission after that day of the accident?

A No, sir. They called me in November of 2020 and told me to go get a drug test, and I said “What for?” They said, “Because.” I said, “Okay. I’m on workmen’s comp I don’t know how this works.” So, I called the workmen’s comp woman and she said, “Yeah, you go do that.” And I said, “Okay.” So I went on over to Chaffee, did a blood test. Coming back they called and said, “Hey,” my district supervisor from Clarksville, and he said, “I need you in Clarksville Monday morning.” And I said, “Okay, what are we doing?” He said, “You’re coming back to work down here.” And I said, “Chuck,” – it was November – my back surgery was coming up in less than two months. I said, “What am I going to do?” He said, “You’re going to shred papers.” And I said, “Do what?” I said, “Chuck, I’m not driving to Clarksville. I’ve got a 1988, 454 big-block that’s going to get five miles to the gallon.” I said, “I can’t do that.” And he said, “Spence, please, get these monkeys off my back. Please come down here.” That’s his exact words.

So I go home and called my workmen’s comp counselor, and she said, “Well, you don’t have to do that.” She said – I said, “Ma’am, I can’t do that.” And she said, “You don’t have to. It ain’t no big deal.” She said, “You just won’t draw your workmen’s comp.” And I said, “I’m fine with that.” And never heard from no one again until they called me to terminate me.

Q So shredding papers was what they offered you?

A Yes, sir.

Q Would that have been inside an office?

A Their office was connected to a shop thing. He said, “You are going to sit out in that shop and shred papers.” I said, you know, I was just – I don’t understand it, I don’t know why, but that is what I was told.

Q So that was November of 2020?

A Yes, sir.

Q So you don’t know about the shredding papers because you never actually did that?

A No, no, legally I didn't have to because of what workmen's comp told me. I think it was, honestly, made them want to fire me.

Q Well, of course, no one can force you to do something, but you were offered the job shredding papers, and you told them you didn't want to do that, correct?

A Yes, I did.

On January 11, 2021, the claimant was sent a letter of termination by the respondent, which is found at Respondents' Exhibit 2, pages 13 and 14, which in part states:

Let this serve as notification that your employment with the Arkansas Department of Agriculture (Department) is being terminated effective immediately, due to violations of the Employee Discipline Policy, specifically:

Insubordination – An employee shall promptly obey any lawful order of, and follow all reasonable instructions issued by, a supervisor or superior.

Professionalism – While on the job, an employee shall demonstrate professionalism as follows: Courteous, Patient and Respectful Attitudes. An employee shall be patient, courteous, and respectful when dealing with other employees and the public. An employee shall be tactful in the performance of his or her duties, control his or her temper, exercise patience and discretion, and not become involved in inappropriate arguments even in the face of provocation.

Your supervisors have attempted to contact you by telephone on several occasions over the past two months and have requested a return call, but you failed to return any of the calls. A request from your supervisor for you to return phone calls is a reasonable instruction. Therefore, your failure to return the calls is Insubordination under the Employee Discipline Policy.

When you finally did contact your supervisor on January 11, 2021, you were discourteous and disrespectful.

The claimant was asked on cross examination about his termination and at one point discusses a back surgery that was upcoming. I note that that back surgery the claimant references

is unrelated to the claimant's workers' compensation claim. Following is the claimant's cross examination testimony about his letter of termination:

Q And then, was Chuck Primeaux your supervisor?

A He was our district supervisor, yes, sir.

Q District in Clarksville and it was after that that you were terminated, correct?

A Yes, two days before my back surgery.

Q I've got a letter here from your termination.

MR. MCLEMORE: May I approach?

THE COURT: You may.

MR. MCLEMORE: This is page 13 of Respondents' –

THE COURT: Page what? I'm sorry.

MR. MCLEMORE: Page 13 of Respondents' Exhibit 2.

THE COURT: Thank you.

Q (Mr. McLemore continues). Just take a look at that and tell me if you recognize it.

A My letter didn't have all this in it that I got, and it's a lie.

Q Well, I'm going to have to ask you, you've already given your address on the record and this address is different.

Can you read that?

A Uh-huh, that's my mom's address.

Q Did you live at that address?

A I've lived on the farm, across the pasture from her for 25 years. But, at one time my mail did go down there because I didn't have a mailbox on Special Bond Road. I just used it, and there's about 12 mail boxes there so I moved mine out of there because

there was too many kids, teenagers, and hands down there, and I thought, man, I'm moving my mail box.

Q Okay, so Whippoorwill Lane is your mother's –

A Yes.

Q -- house on the family farm property?

A It's on the east side of where there's a dead end dirt road where that is, and I'm on the west side of the road.

Q Okay.

A And the not answering the telephone you see there, when I asked Chuck, "How could you fire me," he said, "Because you didn't answer your telephone." I said, "Chuck, no one has called me, no one." From the time I got hurt to the time of my back surgery, I talked to my counselor ranger once when she called and said, "You need to go get a drug test." She didn't say, "Hi, hello, how is your back. Go get a drug test."

Then I talked to Chuck when he called about shredding papers, and I called him back and I told him, I said, "workmen's comp said I didn't have to do this." And I said, "It's legal." And he is like, "Okay." And then, I talked to Chuck the day he called and told me Little Rock wanted to terminate me and I said, "What for?" And he said, "Not answering the telephone." And I kind of started laughing, I thought he was just being silly. And he goes, "No, I'm serious, Spence." And I said, "Chuck, that's a bunch of BS and you know it." So I like how he put it there, being disrespectful to my supervisor. At that phone call, I was fired at 8:30 something in the day, and I talked to him about 11:00, so I wasn't even an employee then, so.

Q Well –

A It's on the letter that I got.

Q Okay.

A Or what he told me "You're terminated" at 8:30, 8:34. And I believe it's on the letter that I got. But my letter is different than yours.

The claimant was also provided the opportunity for vocational rehabilitation by the respondent, which he initially participated in. Following is a portion of the claimant's initial vocational rehabilitation evaluation document with Heather Taylor, MRC, CRC:

**Report Summary**

At the request of Public Employee Claims Division, I met with Mr. Jerry Oliver to complete a vocational rehabilitation assessment, preliminary to exploring his return-to-work options. We met at the library in Van Buren on 08/11/21.

Prior to beginning the meeting with Mr. Oliver, I explained my role as a vocational rehabilitation counselor and provided a Systemedic disclosure informational pamphlet, which he acknowledged receipt and understanding.

Mr. Oliver has completed medical treatment and has been released to return to the workforce by his physician. He will not be able to return to his job of injury, but in my opinion should be able to return to the workforce in the future to a different job that is within his work restrictions.

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

Mr. Oliver did express in interest in seeking additional employment. He has proven to manage multiple jobs at one time over the course of his career.

He did express a couple of different interests as it relates to finding a new/different job in the future. He expressed an interest in parts sales and service as he has done this in the past and this would be consistent with his functional work restrictions. He also expressed an interest in starting another business (self-employment) as a nuisance animal removal technician or weed control technician (as he has a current required pesticide license for his farming operation). These options would also be consistent with his work restrictions.

But he is also open to exploring any other options in the labor market that might be in interest to him.

Mr. Oliver is in a unique position in that he does not “need” to obtain another job from an income standpoint as he indicated that with his rental properties, cattle farm operation, and most recently

his VA disability award, he has sufficient income to “live.” He also is in a unique position to not required a job that provides insurance/benefits and he said all of his medical is provided by the VA. In my opinion, this will allow Mr. Oliver to be more selective with the next job that he takes or even allow him the ability to start another small business.

**Analysis, Goals, and Recommendations**

Considering all of the relevant medical and vocational factors reviewed to date, it is my opinion Mr. Oliver is a good candidate for returning to the workforce. He has skills from his past experience that he will be able to utilize in returning to a new or similar position that is more consistent with his current functional abilities.

He is agreeable to working with me in the vocational rehabilitation/job search process. Going forward, I would recommend completing follow-up meetings with him to update/finalize his resume, provide him with interview skills training and preparation, complete mock interviews with him prior to any interview that he receives, provide online job application instructions, complete weekly job market research to identify job openings he can apply for, update his online job search profile with the State of Arkansas, and update and upload his resume information to additional job search sites.

He is agreeable to this course of action. Therefore, we will proceed accordingly.

The claimant, after his initial vocational rehabilitation consultation, stopped responding to the rehabilitation specialist. Following are the bodies of three letters that were sent to the claimant about vocational rehabilitation after his initial consultation:

As you may recall, we are scheduled for a follow-up vocational rehabilitation meeting on 09/02/21, but you had to cancel due to your COVID exposure. I advised I was leaving on vacation in a few days and would contact you upon my return to reschedule. I returned to my office from vacation on 09/20/21, and I have tried to reach you several times by telephone/text but have not heard from you.

Therefore, I am writing to let you know that if I do not hear from you in four weeks (by 11/19/21) then I will assume you are no

longer interested in vocational rehabilitation/return-to-work services, and I will close out your vocational rehabilitation file.

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This letter is regarding vocational rehabilitation services for your open workers' compensation case. Your adjuster, Marie Woodman, with Public Employee Claims Division, referred your case for vocational services. I am the vocational rehabilitation consultant with Systemedic. I would like to schedule a meeting with you for your initial vocational interview. My job as a vocational rehabilitation consultant is to provide an appropriate level of assistance, based on assessed needs, necessary to achieve a meaningful and sustainable employment outcome.

I have attempted contacts via telephone on 08/24/23, 08/25/23, 08/31/23, 09/05/23, and 10/04/23. I also sent letters in the mail on 08/25/23 and 09/05/23, but have been unsuccessful in reaching you. I am attempting to provide vocational rehabilitation services and in order to initiate vocational rehabilitation services, communication from you will be required. Please contact me to schedule an appointment as requested by your workers' compensation insurance company.

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Thank you for contacting me on October 18, 2023, regarding your vocational rehabilitation referral. I was able to inform Public Employee Claims Division (PECD) of the discussion between you and I regarding your upcoming surgery, and if continuing forward with vocational rehabilitation services is warranted. After discussing this with PECD, it is advised to move forward with offering vocational rehabilitation services.

I would like to schedule to meet with you soon for your initial vocational rehabilitation interview. I attempted to contact you by telephone on 10/20/23 and 10/23/23 with no response. Please contact me to schedule an appointment as requested by your workers' compensation insurance company.

I again note that the surgery referenced in the October 23, 2023, letter to the claimant is not associated with his workers' compensation claim. The respondent in this matter employed the services of a private investigator to follow and video the claimant during his daily activities.

While the testimony of the investigator and video certainly show the claimant being active, I do not believe it showed the claimant performing activities above his lifting restriction of 30 lbs.

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Commission is charged with assessing wage loss on a case by case basis. Factors to be considered in assessing wage loss include the claimant's age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the worker's future earning power such as motivation, post-injury income, bona fide job offers, credibility or voluntary termination. *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 (1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); and *Hope School District v. Charles Wilson*, 2011 Ark. App. 219, S.W.3d (2011). The award of wage loss is not a mathematical formula, but a judicial determination based on the Commission's knowledge of industrial demands, limitations, and requirements, *Henson v. General Electric*, 99 Ark. App. 129, 257 S.W.3d 908 (2008).

Pursuant to A.C.A. §11-9-522(b)(1), when considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors including the percentage of impairment as well as the employee's age, education, work experience, and all other matters reasonably expected to affect his future earning capacity.

After considering the evidence and testimony submitted by the parties in this matter, alongside the Arkansas Workers' Compensation Act and the factors set forth in case law, I find the claimant to be entitled to wage loss in an amount that would be equal to a whole-body impairment of 5%. The claimant's

motivation to work seems exceedingly low, with the claimant even having made clear to Heather Taylor, the vocational rehabilitation specialist, that he really doesn't need to work. The claimant was offered employment within his restrictions by the respondent but refused that employment and was eventually terminated. The claimant certainly does have a 30 lb. lifting restriction regarding his back and an anatomical impairment to his lower back and left shoulder, but given the totality of the circumstances, I find that a wage loss in an amount that would be equal to a 5% whole-body impairment is appropriate in this matter.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on June 9, 2025, and contained in a Pre-hearing Order filed June 10, 2025, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he is entitled to wage loss disability in an amount that would be equal to a 5% whole-body impairment.

3. The claimant has proven by a preponderance of the evidence that his attorney is entitled to an attorney fee in this matter.

**ORDER**

The respondent shall pay the claimant wage loss disability in an amount that would be equal to a 5% whole-body impairment rating.

Respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on

the benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits pursuant to Ark. Code Ann. §11-9-715.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

**IT IS SO ORDERED.**

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**HONORABLE ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE**