

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G900005**

**DAVID A. PARKER,
EMPLOYEE**

CLAIMANT

**COOPER TIRE & RUBBER CO., INC.,
EMPLOYER**

RESPONDENT NO. 1

**SELF-INSURED/CENTRAL ADJUSTMENT CO., INC.,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

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

RESPONDENT NO. 2

OPINION AND ORDER FILED FEBRUARY 2, 2022

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on Thursday, November 4, 2021, in Texarkana, Miller County, Arkansas.

The claimant was represented by the Honorable Paul Miller, Miller, James, Miller & Hornsby, Texarkana, Bowie County, Texas.

Respondent No. 1 was represented by the Honorable Karen H. McKinney, Barber Law Firm, Little Rock, Pulaski County, Arkansas.

Respondent No. 2 was represented by the Honorable Christy L. King, Commission Special Funds Division, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the Prehearing Order filed September 9, 2021, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

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 April 14, 2018, when the claimant sustained a compensable injury to his right shoulder.
3. The claimant's average weekly wage (AWW) is the maximum for 2018, which

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corresponds to weekly compensation rates of \$673.00 for temporary total disability (TTD), and \$505.00 for permanent partial disability (PPD) benefits.

4. The claimant's treating orthopedic surgeon has opined he reached maximum medical improvement (MMI) on March 11, 2020, and assigned him an 11% to the body-as-a-whole (BAW) impairment rating, which Respondent No. 1 has accepted and paid in full.
5. Respondent No. 1 controverts the payment of any wage loss disability benefits in excess of the 11% BAW impairment rating.
6. All the parties specifically reserve any and all other issues for future litigation and/or determination.

(Commission Exhibit 1 at 2; Hearing Transcript at 5-6).

1. Whether the claimant has sustained any wage loss disability and, if so, the extent of his wage loss disability, as a result of his compensable right shoulder injury of April 14, 2018.
2. Whether the claimant's attorney is entitled to a controverted fee on these facts.
3. All the parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 5-6).

The claimant sustained a compensable injury to his right shoulder as he was pulling a reel. Due to a missing/bent pin, the reel fell to the floor as the claimant was holding it, resulting in a injury to his right shoulder. The claimant contends he has experienced significant wage loss as a result of the permanent anatomical impairment and physical restrictions his treating physician has assigned him related to his compensable right shoulder injury. The impairment and job restrictions required his employer to reassign him from a job paying an average of \$45.00 per hour to a job which pays an average of \$24.00 per hour. The claimant specifically reserves any and all other

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issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. 5-6; T. 77-79).

Respondent No. 1 contends they have paid the claimant all benefits to which he is entitled. The claimant sustained a compensable injury to his right shoulder for which he has received medical and indemnity benefits. As the parties stipulated the claimant was released at MMI on March 11, 2020, and assigned an 11% BAW permanent anatomical impairment rating, which Respondent No. 1 has paid in full. The claimant underwent a functional capacity evaluation (FCE) on March 4, 2020, at which time he had a hernia unrelated to his compensable injury. Respondent No. 1 contends the claimant also has preexisting, nonwork-related rheumatoid arthritis in both hands and both knees which continues to progress with the natural aging process. In his most recent visit with Dr. Reynolds, the claimant complained of numbness from his elbow to his fingertips which Respondent No. 1 contends is *not* related to the compensable right shoulder injury, but to the claimant's ulnar nerve problem, a nonwork-related condition. Respondent No. 1 contends the claimant's compensable injury is *not the major cause* of any alleged decrease in his wage-earning capacity; but that the claimant's wage loss, if any, is the direct and proximate result of a combination of the claimant's overall physical conditions, including the aforementioned preexisting conditions, as well as the natural effects of the aging process. Respondent No. 1 specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3; T. 5-6; T. 79-81).

Respondent No. 2 waives appearance at the hearing and defers to the outcome of the litigation. Respondent No. 2 specifically reserves any and all other issues for future litigation/and or determination. (Comms'n Ex. 1 at 3-4; Commission Exhibit 2 at 1-2; T. 6).

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The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto. Note also on pages 82-84 of the hearing transcript, the claimant's and Respondent No. 1's stipulation regarding the amended exhibits which are part of the hearing record. (T. 82-84).

STATEMENT OF THE CASE

The claimant, Mr. David A. Parker (the claimant), is 52 years old. He graduated from Acorn High School in Mena, Arkansas. He has worked for the respondent-employer, Cooper Tire & Rubber (Cooper Tire), for 18 years. Before he started working with Cooper Tire he worked for M & M Milling, Holt CAT, both in Texarkana, and he also worked a short stint with United Parcel Service (UPS) during the Thanksgiving and Christmas holidays. Of the 18 years he has worked for Cooper Tire, he has operated the Calamard machine 16 of them. On the day he sustained his compensable right shoulder injury, April 14, 2018, he was operating the Calamard machine. (T. 9-12).

On April 14, 2018, as he was operating the Calamard machine, the claimant sustained various injuries to his right shoulder, including a torn rotator cuff, SLAP, tear, and partial-thickness biceps tendon tear, among others. After a period of conservative treatment, on December 20, 2018, Dr. Kirk Reynolds, an orthopedic surgeon associated with Arkansas Specialty Surgery Center in Little Rock, performed arthroscopic surgery to repair the various injuries to the claimant's right shoulder. On September 24, 2019, Dr. Reynolds performed a second arthroscopic surgery on the claimant's right shoulder which he characterized as "diagnostic" in order to determine and repair the cause of any condition(s) that may be causing

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the claimant's continued pain complaints of pain, decreased range of motion, and strength. (Claimant's Exhibit 1 at 20-42; T. 13-18).

On September 22, 2021, the claimant underwent a functional capacity evaluation (FCE) at Functional Testing Centers in Mountain Home. The FCE proved to be reliable with the claimant demonstrating "54 of 55 consistency measures within expected limits." (CX1 at 1; 1-19). The FCE revealed the claimant was capable of performing work in the "**MEDIUM**" classification of work as defined by the United States Department of Labor's (US DOL) guidelines over the course of an eight (8)-hour workday with the functional limitations listed on page 2 of the FCE. (CX1 at 3; 2; T. 13-19) (Emphasis in original). The parties stipulated the claimant's treating and operating orthopedic surgeon, Dr. Reynolds opined the claimant reached MMI on March 11, 2020, and assigned the claimant an 11% BAW impairment rating as a result of his 2018 April compensable right shoulder injury.

On both direct and cross-examination, the claimant testified concerning the difference in his wages since the date of his compensable right shoulder injury of April 14, 2018; the differences in his job duties and responsibilities since he returned to work after Dr. Kirk released him; and the differences in the amount of work available and other incentives that affect the ultimate amount of wages he can earn in the two (2) post-injury jobs he has worked. Both the claimant and Respondent No. 1 submitted exhibits reflecting the claimant's earnings, and there was much testimony concerning what the pay records actually reflected as far as the claimant's pre-versus post-injury earnings. (Claimant's Exhibit 2 at 1-15; Respondent No. 1's Exhibit 1 at 1-2; T. 18-77).

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The relevant evidence also revealed the claimant was, of course, a W-2 employee at Cooper Tire. The claimant's various W-2s reflected his W-2 income to be as follows: 2016 - \$110,000; 2017 (the year before his subject April 2018 right shoulder injury) - \$97,000; 2018 (the year of his April 14 injury) - \$94,000; 2020 - \$65,000; and in 2021 (the year of the subject hearing), the claimant had made \$63,000 as of the hearing date, and testified he was on track to make approximately \$72,000 to \$73,000 dollars in 2021. The claimant testified his annual earning potential in his current job "probably" was as much as \$75,000 to \$78,000 in future years. (T. 58-71).

On cross-examination, it was revealed the claimant has some pain, numbness, and tingling in his right hand due to a non-work-related ulnar nerve problem, as well as tennis elbow and rheumatoid arthritis. He also has had hernias, and cervical spine degeneration, herniated cervical discs, and pain in his right and left knees. The evidence revealed the claimant had undergone a total right knee replacement in the past. There exists no evidence any of these conditions are work-related. The claimant denied these conditions affected his ability to perform his job duties. (CX1 at 4-5; 31-34; 38; 41; T. 48-53).

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 on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2021 Lexis Supplement.). The claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to

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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) (2020 Supp.); *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. Hardee's*, 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*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). 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. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Wage Loss Disability

Recognizing that the determination of a claimant's wage loss disability is not an exact science, the Act specifically sets forth the factors the Commission shall use in deciding the amount of a claimant's wage loss disability, if any. Pursuant to *Ark. Code Ann.* Section 11-9-522(b)(1) (2021 Lexis Replacement), when a claimant has a BAW impairment rating the Commission has the authority to increase the disability rating based on wage-loss factors. *Redd v. Blytheville Sch. Dist. No. 5*, 2014 Ark. App. 575, 446 S.W.3d 643 (Ark. App. 2014). The Commission is charged with the duty of determining the percentage of wage loss disability, if any, based on a consideration of the medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001); *Lee v. Alcoa Extrusion*, 89 Ark. App. 228, 201 S.W.2d 449 (Ark. App. 2005); *Ark. State Military Dep't/Pub. Employee Claims Div. v. Jackson*, 2019 Ark. App. 92, 7, 568 S.W.3d 811, 816 (Ark. App. 2019).

When making a determination of the percentage of wage loss 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 ability to earn wages, 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 wage earning ability. Such other matters may include but are not limited to the injured employee's motivation to return to work or lack thereof, 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.

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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 returning to work with his employer, and his lack of interest in pursuing gainful employment, as well as a 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).

Finally, **Ark. Code Ann.** § 11-9-102(4)(F)(ii)(a) (2021 Lexis Supp.) requires 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 50% of the cause, which must be established by a preponderance of the evidence. **Ark. Code Ann.** § 11-9-102(14)(A) and (B) (2021 Lexis Supp.).

In this case while the claimant does in fact have some other admitted non-work-related comorbidities, the preponderance of the medical and other credible evidence of record – including the claimant's own credible testimony, the relevant medical records, and the reliable FCE results

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– prove the “major cause” of the claimant’s current disability is his 2018 April compensable right shoulder injury. There simply exists insufficient evidence the claimant’s documented, admitted comorbidities, either standing alone or in combination with his compensable right shoulder injury, significantly contributed to his physical limitations and restrictions as demonstrated by the reliable FCE results, at least as of this time.

Of course, the natural effects of aging and other non-work-related conditions can and often do adversely affect our physical limitations and restrictions; however, at this time and in this claim, it would constitute sheer speculation and conjecture to assign any of the briefly mentioned “normal” and “natural” comorbidities (concerning which neither the medical evidence nor the FCE provides any detail, much less any relevant and insightful detail) to the claimant’s current disability which, of course, is improper. *See Deana, supra*. Indeed, before the subject 2018 April compensable injury, the claimant was in fact working a more physically demanding job than he is working now, and he was making more money in that job than he has since the subject April 2018 compensable injury.

The determination of the specific amount of a claimant’s wage loss disability, obviously and admittedly, involves some degree of “art”, or subjectivity, as well as the “science” of legal analysis and reasoning in that it requires the Commission to take into consideration the aforementioned statutorily-mandated factors, any caselaw on point, and other matters which may reasonably be expected to affect a claimant’s future ability to earn wages in reaching what certainly is intended, and hopefully results in, a fair and reasonable decision supported by a preponderance of the credible evidence of record. *Ark. Methodist Hospital Hospital, supra*.

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In this case, due to the professionalism, experience, and hard work of the two (2) excellent attorneys who litigated this case; in addition to the medical evidence, FCE results, the claimant's own credible testimony, and the evidence adduced during both direct and cross-examination, the record contains some wage history documentation and testimony which helps more specifically inform a decision concerning the extent of the extent of the claimant's wage loss disability. (CX2 at 1-15; RX1 at 1-2; T. 58-71). The determination of the extent of a claimant's wage loss disability, if any, is not the result simply of a mathematical calculation; but, certainly wage information and history, when combined with the other aforementioned statutory criteria, do in fact provide helpful, more concrete information informing the Commission's wage loss disability determination.

Based on the applicable law as applied to the facts of this case, I find the totality of the credible evidence of record supports a finding the claimant has sustained wage loss disability in the amount of 22% in excess of his 11% BAW permanent anatomical impairment rating as a result of his April 14, 2018, compensable right shoulder injury. My decision is based on the following analysis of the applicable law as applied to the relevant facts in this claim.

First, the 52-year old claimant is a personable, intelligent, credible, hard-working, and long-time, experienced Cooper Tire employee whose testimony and overall demeanor reflected he is in fact motivated to return to work and is incentivized to make as much money as his physical limitations and restrictions will allow, whether in his current job, or any other job which may become available and for which he may be qualified in the future. Second, his 11% BAW impairment rating and reliable FCE results reveal he is capable of performing work within the MEDIUM category pursuant to the US DOL guidelines. Third, the claimant's testimony

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concerning his W-2 income for the years 2016, 2017, 2018, 2020, as well as his actual 2021 earnings as of the hearing date and his reasonably anticipated total earnings for 2021, all support a finding the claimant has sustained 22% wage loss disability in excess of his 11% BAW permanent anatomical rating which Respondent No. 1 already have accepted and paid.

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 September 9, 2021, 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 his compensable right shoulder injury is the “major cause” – *i.e.*, more than 50% of the cause – of his wage loss disability. Strong evidence of this is that before he sustained his compensable right shoulder injury of April 14, 2018, the claimant was able to perform his regular, more physically demanding and higher-paying job duties as a Calemar operator. Consequently, “but for” the compensable right shoulder injury, the evidence reveals he more likely than not would have been earning his pre-injury wages at this time. While the medical records and FCE reference some comorbidities, there simply exists insufficient evidence as to the extent, if any, these largely age-related conditions had any, much less a significant, impact on his physical limitations and restrictions as demonstrated by the reliable FCE test results.
3. Therefore, I find the claimant has met his burden of proof in demonstrating he is entitled to 22% in wage loss disability as a result of his compensable right shoulder injury of April 14, 2018, over-and-above his 11% BAW impairment rating (which Respondent No. 1 already has accepted and paid).
4. The claimant’s attorney is entitled to an attorney’s fee on the additional 22% in PPD benefits (over and above the 11% in PPD benefits Respondent No 1 accepted and paid based on the claimant’s 11% BAW permanent anatomical impairment rating) awarded to the claimant as wage loss disability.
5. Respondent No. 1 shall remain responsible for the payment of any reasonably necessary medical treatment related to the claimant’s April 14, 2018, compensable injury.

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

AWARD

Respondent No. 1 hereby is 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 (2021 Lexis Supp.), 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 ten (10) days of their receipt of this opinion and order.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp