

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. G905969**

PATRICK PENNINGTON, EMPLOYEE

CLAIMANT

**FEDEX FREIGHT, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

**SEDGWICK CLAIMS MGMT. SVCS.,
THIRD PARTY ADMINISTRATOR**

RESPONDENT

OPINION FILED DECEMBER 15, 2022

Hearing before Administrative Law Judge O. Milton Fine II on September 23, 2022, in Marion, Crittenden County, Arkansas.

Claimant represented by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 23, 2022, the above-captioned claim was heard in Marion, Arkansas. A pre-hearing conference took place on August 1, 2022. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. With an amendment of Stipulation No. 6 at the hearing, they are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

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2. The employee/self-insured employer/third party administrator relationship existed on August 21, 2019, when Claimant sustained a compensable injury to his left shoulder.
3. Respondents accepted the claim as compensable.
4. Claimant's average weekly wage entitles him to compensation rates of \$695.00/\$521.00.
5. Claimant reached maximum medical improvement and the end of his healing period on May 25, 2021.
6. Claimant was assigned an impairment rating of twenty-eight percent (28%) to the body as a whole in connection with his left shoulder. Respondents have controverted this rating.

Issues

The parties discussed the issues set forth in Commission Exhibit 1. After the addition of Issue No. 4 at the hearing, the following were litigated:

1. Whether Claimant is permanently and totally disabled.
2. In the alternative, whether Claimant is entitled to an impairment rating and permanent partial disability benefits pursuant thereto, along with wage loss disability benefits.
3. Whether Claimant is entitled to a controverted attorney's fee.
4. Whether Respondents are entitled to a credit for group short and long-term disability benefits that were received by Claimant in connection with his stipulated compensable left shoulder injury.

All other issues have been reserved.

Contentions

After amendments at the hearing, the respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that on August 21, 2019, he injured his left shoulder in the scope and course of employment. Respondents accepted the claim as compensable. Claimant has undergone multiple surgeries as a result. On March 25, 2021, he was released by his authorized treating physician and given a twenty-eight percent (28%) whole-body impairment rating and permanent restrictions. To date, this rating has not been paid.
2. Claimant also contends that he is permanently and totally disabled or, in the alternative, that he is entitled to a twenty-eight percent (28%) whole-body impairment rating and wage-loss disability benefits.
3. Claimant further contends that his attorney is entitled to a controverted attorney's fee.
4. Finally, Claimant contends that Respondents are not entitled to a credit for any disability benefits that he may have received because the alleged lienholder, The Hartford, comes into this matter with unclean hands.
5. All other issues have been reserved.

Respondents:

1. Claimant had a total shoulder replacement in 2018 that was not work-related. He returned to work, injured the same shoulder, and had another total shoulder replacement in 2019.
2. The AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993) (hereinafter, the “AMA Guides”) gives a rating of twenty-four percent (24%) to the body for a total shoulder. Since Claimant already had a twenty-four percent (24%) permanent partial disability rating, the second rating is a duplicate; and there is no additional rating for a second procedure. He has no permanent partial disability from the second operation that exceeds what he had from the first operation.
3. There is no permanent partial disability from the August 21, 2019, accident. Without permanent partial disability, there can be no wage- loss or permanent total disability.
4. Respondents contend that the credit for group disability payments is a matter of law, and thus can be addressed at any time because it is in the law and is something to which they are entitled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, I hereby make the following

findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits at the expense of Respondents that are equal to ten percent (10%) to the body as a whole.
4. Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled.
5. Claimant has proven by a preponderance of the evidence that he is entitled to wage loss disability of thirty percent (30%).
6. Claimant has proven by a preponderance of the evidence that his counsel is entitled to a controverted attorney's fee on the indemnity benefits awarded herein pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).
7. Respondents have proven by a preponderance of the evidence that they are entitled under Ark. Code Ann. § 11-9-411(a)(1) (Repl. 2012) to an offset concerning an amount equal to the percentage of short and long-term disability benefits that Claimant has received in connection with his compensable injuries that matches the percentage that Respondent FedEx Freight contributed toward the policies.

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the prehearing order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation of his medical records, consisting of six abstract/index pages and 113 numbered pages thereafter; and Claimant's Exhibit 2, his Form AR-W, consisting of one index page and one page thereafter.

In addition, I have blue-backed to the record the post-hearing briefs of Claimant and Respondents, filed on October 13 and 11, 2022, respectively, and consisting of 34 and three pages, respectively.

Adjudication

A. Impairment Rating

Introduction. In this proceeding, Claimant is seeking an impairment rating and permanent partial disability benefits in connection with his stipulated compensable left shoulder injury of August 21, 2019. In particular, he is asking that the Commission find that he is entitled to the impairment rating of twenty-eight percent (28%) to the body as a whole that Dr. Christopher Pokabla assigned him. In turn, Respondents have argued that Claimant cannot establish his entitlement to a rating of any size because, inter alia, he had undergone a total left shoulder replacement procedure prior to suffering the injury at issue.

Standards. As the parties stipulated and the record reflects, the accident of August 21, 2019, resulted in a compensable injury to Claimant’s left shoulder. This injury is an unscheduled one. *Cf.* Ark. Code Ann. § 11-9-521 (Repl. 2012).

Permanent impairment, generally a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). Pursuant to Ark. Code Ann. § 11-9-522(g) (Repl. 2002), the Commission adopted the AMA Guides as an impairment rating guide. *See* AWCC R. 099.34. A determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2012) (“Objective findings” are “those findings which cannot come under the voluntary control of the patient.” *Id.* § 11-9-102(16)(A)(1)). Permanent benefits are to be awarded only following a determination that the compensable injury is the major cause of the disability or impairment. *Id.* § 11-9-102(4)(F)(ii). “Major cause” is defined as “more than fifty percent (50%) of the cause,” and a finding of major cause must be established by a preponderance of the evidence. *Id.* § 11-9-102(14). This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947). Any medical opinion must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16) (Repl. 2012).

A claimant’s testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness’

credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Evidence. Claimant on November 30, 2018, underwent a left total shoulder replacement and biceps tenodesis. This, of course, pre-dates the shoulder injury at issue. As Claimant testified—and I credit—he was off work for eight weeks for this. When his surgeon, Dr. Pokabla, discharged him from treatment in late January or early February of 2019, he released him to full duty. No impairment rating was assigned in connection with this. This stands to reason, since this pre-existing condition was not the subject of a workers' compensation claim. Claimant continued to work in a full-duty capacity. Asked how his left shoulder was performing during this time, he responded: "It was as if they hadn't done anything to it. It was functioning great. I was able to do my job without pain, without any trouble, so I figure it was 100% fixed."

However, this changed around six months later, on August 21, 2019, while Claimant was working for Respondent FedEx Freight as a road driver. He related at the hearing:

I was finishing up my run for the day. I had returned to the West Memphis yard. I was taking apart a set of doubles while pulling a king-pin latch release. I tore my sub-scapula muscle, fell backwards, and caught myself on my left elbow on what's called a DOT bumper. That slowed my fall. And then I went on down to the ground.

Respondents accepted this injury and paid for Claimant's treatment. A CT arthrogram, reviewed by Pokabla on September 18, 2019, reflected disruption of the subscapularis and contrast noted anteriorly at the location of the subscapularis tendon. The doctor recommended surgical treatment, and performed an arthroscopic diagnostic procedure and then an open rotator cuff repair of the subscapularis tendon in the left shoulder on October 2, 2019. The post-operative diagnosis assigned by Pokabla was "[t]raumatic subscapularis tear, left shoulder in the setting of a total shoulder arthroplasty performed back in November 2018."

Asked how he fared after this operation, Claimant responded:

I was extremely weak. I did not bounce back from that surgery like I have from others, and I was in a lot of pain from it, too . . . I was not getting any strength in it, I was not getting any range of motion, and it was hurting really bad.

He underwent physical therapy.

Unfortunately, Claimant's shoulder problems did not improve. Dr. Pokabla ordered another CT arthrogram on January 6, 2020. He wrote that he believed that the subscapularis repair did not heal, and that Claimant would need a revision to his reverse shoulder prosthesis. The January 17, 2020, arthrogram showed "what is likely a full-thickness subscapularis tear." Despite the doctor's agreement with the findings and his belief that another shoulder replacement would have to take place, Claimant expressed the wish to initially try conservative measures. But on February 21, 2020, the doctor wrote that surgery should proceed, and if acute inflammation was not found,

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“we will proceed with revision to a reverse prosthesis with potential bone grafting of the glenoid.” Claimant on April 7, 2020, elected to go forward with the operation.

Eventually, on June 26, 2020, Claimant underwent a “left revision shoulder arthroplasty from anatomic total shoulder arthroplasty to reverse shoulder arthroplasty” by Pokabla. The post-operative diagnosis was a “[r]ecurrent thickness subscapularis tear.” On July 28, 2020, Claimant was diagnosed as having a staphylococcus aureus infection of the hardware of the left shoulder; and the treatment changed from oral antibiotics to intravenous ones plus oral suppressive therapy. Thereafter, he again underwent physical therapy. But this did not result in his gaining any additional strength or range of motion in the left shoulder.

Claimant underwent a functional capacity evaluation (“FCE”) on January 14, 2021. The FCE report shows that he gave a reliable effort, with 52 of 54 consistency measures within expected limits, and demonstrated the ability to perform work in the Light category. On May 25, 2021, Dr. Pokabla found that Claimant reached maximum medical improvement as of May 24, 2021. In assigning Claimant a permanent impairment rating, he wrote:

AMA [G]uides to the [E]valuation of [P]ermanent [I]mpairment
Fourth [E]dition
Chapter 3: The Musculoskeletal System

Page 43
Figure 38
Flexion Angle = 60 degrees
Flexion Impairment % = 8%
Extension Angle = 20 degrees
Extension Impairment % = 2%
Flexion 8% + Extension 2% = 10%

Page 44

Figure 41

Abduction Angle = 60 degrees

Abduction Impairment % = 6%

Adduction Angle = 30 degrees

Adduction Angle % = 1%

Adduction 6% + Abduction 1% = 7%

Page 45

Figure 44

Internal Rotation Angle = 60 degrees

Internal Rotation Impairment % = 2%

External Rotation Angle = 35 degrees

External Rotation Impairment % = 1%

Internal rotation 2% + External rotation 1% = 3%

Total upper extremity impairment

10% + 7% + 3% = 20% Total upper extremity impairment

Table 3, page 20

Whole person impairment = 12% Whole person

Patients may also be rated by Impairment of the Upper Extremity after Arthroplasty of Specific Bones or Joints

Table 27 (page 61)

% Impairment of the Upper Extremity = 30%

Whole person impairment = 18%

In the presence of decreased motion, motion impairments are derived separately and combined with arthroplasty impairments using the Combined Values Chart (p. 322)

18% (Arthroplasty) and 12% (ROM) intersect at 28%

Therefore, the rating would be 28% Whole Person

Discussion. I credit Dr. Pokabla's opinion quoted above, and find that Claimant's impairment rating should be twenty-eight percent (28%) to the body as a whole. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*,

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79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999).

That said, the question that remains is what portion of this rating, with the attendant permanent partial disability benefits, are the responsibility of Respondents?

Under Ark. Code Ann. § 11-9-525(b)(3) (Repl. 2012):

If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage or impairment that would have resulted from the last injury had there been no preexisting disability or impairment.

The thrust of this provision—that Respondents are liable only for that component of Claimant’s current, permanent impairment that is attributable to the stipulated August 21, 2019, work-related event—comports with § 11-9-102(4)(F)(ii)(a)-(b), which provides:

- (ii)(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.

Table 27, Page 3/61 of the AMA Guides makes clear that despite Claimant’s remarkable recovery from his first total shoulder arthroplasty, his permanent impairment attributable to that is thirty percent (30%) to the upper extremity. Under Table 3, Page

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3/20, that translates to a rating of eighteen percent (18%) to the body as a whole. However, only twenty-eight percent (28%) minus eighteen percent (18%), or ten percent (10%) to the body as a whole, has as its major cause the stipulated compensable August 21, 2019, left shoulder injury. Thus, in accordance with the above referenced authorities, I find that Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits at the expense of Respondents that are equal to ten percent (10%) to the body as a whole.

B. Permanent and Total Disability

Introduction. Claimant has further contended that as a result of his compensable left shoulder injury, he is permanently and totally disabled. In the alternative, he has asserted that he is entitled to wage loss disability benefits over and above his impairment rating. Respondents have argued otherwise.

Standard. The term “permanent total disability” is defined in the statute as “inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2012). Claimant’s entitlement to wage loss disability benefits is controlled by § 11-9-522(b)(1) (Repl. 2012), which states:

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

See *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such “other matters” include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). As the Arkansas Court of Appeals noted in *Hixon v. Baptist Health*, 2010 Ark. App. 413, 375 S.W.3d 690, “there is no exact formula for determining wage loss” Pursuant to § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996).

To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The wage loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering factors that may impact a claimant’s future earning capacity, the Commission considers his motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of his loss of earning capacity. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, as discussed above, § 11-9-102(4)(F)(ii) provides that permanent benefits can only be given to a

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claimant if the compensable injury was the major cause of the disability or impairment. “Disability” is the “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” Ark. Code Ann. § 11-9-102(8) (Repl. 2012).

Evidence. In addition to what was set out *supra*, the credible evidence adduced at the hearing shows that after Claimant had to quit school in tenth (10th) grade to go to work full-time as a cashier at a grocery store. He did this because his brother became injured, and their family needed the income. Later, around 1978, Claimant obtained his graduate equivalency degree (“GED”). He obtained a degree from truck-driving school. Claimant is 62 years old. His plan had been to retire at age 68.

The cashier job involved pricing and stocking merchandise, checking people out, and taking their groceries to their vehicles. He has also worked in retail, as a t-shirt screen printer, and as a construction laborer. The retail position consisted of Claimant manning a leather goods kiosk at a shopping mall, and stamping some of the goods with a hammer and a stamping tool. In printing t-shirts, Claimant applied emulsion to screens, transferred images onto those screens, and then used a squeegee to force ink through the screen onto the shirts. While he was eventually promoted to the position of manager of the screen printing operation, he was still required to perform the printing.

As for the construction job, he testified:

I carried a lot of steel on the job site. I was involved in hand-raising steel up to the upper parts of the building, was involved in making connections to the steel, cleaning up the job site, and just anything that they needed a laborer on, they called me.

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Then, in 2014, Claimant became a truck driver.

After he was given light-duty restrictions following his compensable shoulder injury, Claimant initially was given work of this nature:

At that time, basically all I did, I worked in Dispatch. I would take papers off of a computer printer, staple them together, fold them in half, put them on the table for the drivers to pick up. And that was basically all I was allowed to do.

However, this work was ended abruptly by his employer in February 2020. When Claimant later contacted his supervisor, Dwight Terry, about returning to work, Terry informed him that because of his restrictions, there was no work that the company could offer him. Claimant had checked into this himself, looking up available positions at Respondent FedEx Freight. No light-duty jobs were listed. After Claimant was found to be at maximum medical improvement by Dr. Pokabla and was released from treatment, he again contacted Terry. However, the response was the same; the employer had nothing available within Claimant's restrictions. The following exchange took place:

- Q. Now, what actually happened with your employment with FedEx? Were you terminated, did you quit, are you still employed there? What was the status?
- A. They called and offered to let me quit. I told them if they didn't want me there, they would have to fire me. I was threatened by Human Resources that I was going to get fired because I wasn't showing up for my job. I asked them what my job was. They never replied. I have been placed in the inactive employee list. So I'm basically still employed by FedEx.

Claimant has sought employment elsewhere. He related: "I was getting on employment websites looking at supervisory positions and others that I might could do within my restrictions, but I couldn't find anything that would let me work under those

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restrictions.” Respondents did not send him for a vocational evaluation; nor did they offer him any aid in landing a job elsewhere.

Asked about whether he felt that he could return to any of his former professions, Claimant explained that he could no longer serve as a cashier “[b]ecause it takes two arms to handle the bags and to ring up sales, and I can’t really use my left arm for any of that.” Construction work is heavy in nature, and thus outside his restrictions. Likewise, the screen printing position entailed “too much heavy lifting.” Thus, he “wouldn’t be able to get near it.” With regard to truck driving, Claimant testified that he has not had to undergo a DOT physical since his accident. It is his belief that he could no longer pass such an examination. He now can use only one hand when driving. For that reason, he keeps trips in his personal vehicle short and infrequent.

Claimant testified that although he has looked for work in a light-duty capacity in retail, his body has become weak as a result of his shoulder injury and treatment, and he has trouble with extended periods of walking and standing. He added: “I walk 10 feet, I have to sit down and then get up and finish my journey.” The weakness began after his first surgery for the injury at issue. After that first surgery, when he had a significant amount of antibiotic treatment for injection, the weakness remained.

Questioned about the condition of his left upper extremity/shoulder, Claimant testified:

- Q. Okay, Mr. Pennington. If you lift something that is five pounds with that left arm—
- A. Yes.

- Q. —what happens to your arm?
- A. It will hold the five pounds, but if I try to do anything heavier, it goes straight down to full extension by my side. It will not hold it up, it will not lift it up.
- ...
- Q. What are some other things that you used to be able to do that you can no longer do?
- A. I used to be able to pick up my grandchildren. I can't do that safely anymore because of the instability in my left arm. I used to hunt a lot. I can't do that anymore; I can't raise the gun . . . I can no longer fish because I can't hold the rod when it catches the fish. I used to every Sunday cook a large family dinner for all of my kids and everybody. I can't do that anymore because I can't lift the pots and because I'm not strong enough to stay in the kitchen long . . . [t]here's just so many things that I can't do now.

In Claimant's opinion, his shoulder condition has worsened since Dr. Pokabla released him in May 2021. Elaborating, he testified: "I have lost more range of motion in the shoulder. It has become weaker, and it hurts terribly all the time." He has returned to the doctor since his release.

Because of his shoulder condition, Claimant now relies on his son to perform any chores outside the house. Describing a typical day that he now experiences, Claimant stated:

Basically, I get up, I fix a pot of coffee, I go watch some TV or something to help the time pass. I prop my arm up in my chair on some pillows. I'll get on the internet. I find if I keep my mind busy it makes the day go faster. And I get up, go to the grocery store, I pick up something for me and my son for dinner, and then I come back home, continue watching TV or using the computer, and then I will cook a light dinner for me and my son, and that's about the summation of my day.

Claimant is right-handed. For that reason, he is still able to perform such tasks as handwriting and brushing his teeth. In addition, he is able to use a computer to conduct internet searches. When he was managing the t-shirt printing concern, he inputted employee hours and printed out their paychecks with a computer. The following exchange took place:

Q. Now, if you look online and you see that there are some jobs available that are light duty, such as just sitting at a computer all day long, would you be able to do a computer job?

A. No.

Q. And why not?

A. I cannot hold my left arm, I can't get it up to desk height, and so I wouldn't be able to use the one arm only.

Q. So when you're talking about getting it up to desk height—

A. Right.

Q. —you are currently sitting in a chair and there's a desk in front of you about midway up your chest, is that correct?

A. Right, yes.

Q. But would you be able to prop your arm up on some pillows to possibly work at a computer?

A. No.

Q. Why not?

A. The arm won't go that high without excruciating pain.

...

Q. Do you think there's any employment that you could perform?

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- A. Not really. They don't really advertise for light duty. I can't do computer work because I can't use my left arm at desk height. I can't lift anything. I don't see any options.

As discussed previously, Claimant previously underwent shoulder replacement surgery. The cause of it was not an injury; it “[j]ust wore out.” Yet again, he stated that after this, he had no problems with his left shoulder until the incident at issue in August 2019. In his testimony, Claimant also acknowledged that he suffers from physical maladies that are unrelated to his left shoulder. He has Type II diabetes and has undergone open-heart surgery to place six stents. Moreover, he has chronic obstructive pulmonary disease (“COPD”), and had a one-level cervical fusion. But he added that none of these things kept him from passing his DOT physical and working his heavy-duty truck driving job. However, he again had surgery on his cervical spine in 2020—a multi-level fusion procedure in this instance—after FedEx Freight stopped offering him light-duty work and before he lost his group health insurance there. His testimony was that his cervical condition did not affect his shoulder symptoms; and he was not assigned any lifting restrictions after the fusion surgery. He has no issues with either his right arm or with his lower extremities.

Claimant's FCE contains the following statement:

FUNCTIONAL LIMITATIONS

Mr. Pennington demonstrated functional limitations during his evaluation in the area of material handling as he exhibited the ability to perform an Occasional bi-manual lift/carry of up to 35 lbs. and a Frequent material handling ability up to 10 lbs. He also demonstrated limitations with unilateral lifting as he exhibited a maximal RUE lift of 25 lbs. as compared to 10 lbs. with the LUE when lifting unilaterally from floor to shoulder level. He also demonstrated functional limitations with Pushing/Pulling a Cart as he performed these activities only at the Occasional level when taking into

account a normal workday. He did demonstrate restricted motion with the LUE and he did not demonstrate the ability to perform any Overhead activities with the LUE. He is not safe to climb ladders as well.

Discussion. The evidence reflects that Claimant—who I find to be a credible witness—is 62 years old. Despite leaving school in the tenth (10th) grade to help support his family, he was eventually able to obtain his GED. He is a truck-driving school graduate. His work history consists of stints as a grocery store cashier, as a worker at a retail kiosk, the manager/worker at a t-shirt printing business, a construction laborer, and a truck driver.

Claimant's stipulated compensable left shoulder injury resulted in his having to undergo multiple surgical procedures, with the last being a revision total replacement. Along the way, he suffered complications that included a post-surgical infection that necessitated intravenous antibiotics. Dr. Pokabla, his surgeon, assigned him a rating of twenty-eight percent (28%) to the body as a whole. As discussed extensively *supra*, only ten percent (10%) of this is the responsibility of Respondents. Claimant gave a reliable effort in his FCE, and demonstrated the ability to work in the Light category. He also demonstrated multiple functional limitations as outlined above.

It is without question that Claimant's limitations caused by his compensable injury foreclose his returning to work as a construction laborer or a truck driver. As he pointed out, the permanent problems he will suffer with his left upper extremity would keep him from driving a tractor/trailer rig. For all intents and purposes, he no longer has a position with Respondent FedEx Freight. The condition of his left shoulder would pose numerous problems with his going back to any other previous line of work as well.

As for other employment possibilities within his restrictions, Claimant does have some computer skills. But as he testified, he would have difficulties working at a desk because of, inter alia, his inability to raise his left arm or even use it at desk height.

As catalogued above, Claimant has other physical issues unrelated to his shoulder. These include Type II diabetes, COPD, fused cervical vertebrae, and heart problems. But as he pointed out, he basically was dealing with these and yet was able to work as a truck driver (passing his DOT physical) before he hurt his shoulder at FedEx Freight.

Claimant has made some efforts to find other employment. But these efforts have not been very aggressive. The evidence as recounted above shows that Claimant is only marginally motivated to return to the workforce. However, after consideration of the foregoing, this does not prevent me from finding that while he has not met his burden of proving that he is permanently and totally disabled, the preponderance of the evidence establishes that he has suffered wage loss disability of thirty percent (30%). In so doing, I find that Claimant's compensable August 21, 2019, left shoulder injury is the major cause of his disability.

C. Controversion

As set out above, I have found that Claimant is entitled to an impairment rating and permanent partial disability benefits pursuant thereto, along with wage loss disability benefits. Furthermore, I find that Respondents have controverted Claimant's entitlement to these indemnity benefits. His attorney is thus entitled to a controverted attorney's fee on those benefits pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012), at

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the expense of Respondents. See *Goodwin v. Phillips Petroleum Co.*, 72 Ark. App. 302, 37 S.W.3d 644 (2001).

D. Offset/Credit

Introduction. Respondents have asserted that they are entitled to a credit for short and long-term disability benefits that were paid to Claimant. Claimant, on the other hand, has argued that Respondents are not entitled to this.

Standard. Arkansas Code Annotated Section 11-9-411 (Repl. 2012) provides in pertinent part:

(a)(1) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, **a group disability policy**, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

(2) The reduction specified in subdivision (a)(1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy.

(Emphasis added)

Subsection (a)(2) was added in 2009. In interpreting the application of this provision in *Brigman v. City of West Memphis*, 2013 Ark. App. 66, 2013 Ark. App. LEXIS 73, the Arkansas Court of Appeals held that in situations where both the respondent employer and the Claimant paid a portion of the premium of the policy in question, the respondent employer is entitled to an offset against indemnity benefits owed by them to the extent that they contributed. It is Respondents' burden of proving their entitlement

to an offset/credit by a preponderance of the evidence. See Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012).

Evidence. Under examination by the Commission, Claimant gave the following testimony:

Q. And I understand your testimony correctly that you don't know for certain whether or not you paid for the insurance premiums on this. I guess there was a long-term and a short-term disability policy you had with The Hartford, or with Aetna?

A. **I cannot say for sure that I paid for it or that they paid for it without seeing one of my old check stubs, but from the fact that they've changed it over to saying it's a group policy, I believe FedEx paid for the policy.**

Q. All right. And that was what I was going to ask you, if you ever recall looking at the deductions on any of your pay stubs to see if there was anything on there that reflected that money was being taken out of your pay to pay for any portions of this?

A. I do not recall it. I do know that my health insurance was taken out of my paycheck, my 401(k). **I can't remember the other deductions they took[.]**

Q. Okay. And just to rehash something you said right before we continued this line of questioning, is it your belief today that this was, that your policies through The Hartford for the long and short-term policy was a benefit that was provided by FedEx, **that FedEx paid for it?**

A. **I do believe now that they did.**

Q. All right. And just to clarify this, you didn't go out and get a policy on your own with The Hartford like this, did you?

A. No.

Q. And that wouldn't foreclose you paying for part of the premiums, but I wanted to close the door on that. We were at least certain of that?

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A. Yes.

(Emphasis added)

Discussion. I credit the above testimony. Claimant is unsure how much Respondent FedEx Freight paid toward the premiums on the disability policies. But he was at least certain that these were policies that FedEx Freight procured and that they paid at least a portion of the premiums. Therefore, under *Brigman, supra*, Respondents have proven by a preponderance of the evidence that they are entitled to an offset concerning an amount equal to the percentage of short and long-term disability benefits that Claimant has received in connection with his compensable injuries that matches the percentage that Respondent FedEx Freight contributed toward the policies, pursuant to § 11-9-411(a)(1).

CONCLUSION AND AWARD

Respondents 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 a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

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IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge