

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H005630

CHARLES WINGARD, EMPLOYEE	CLAIMANT
QUITMAN SCHOOL DIST., SELF-INSURED EMPLOYER	RESPONDENT
ARK. SCHOOL BOARDS ASSN., THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED FEBRUARY 12, 2021

Hearing before Administrative Law Judge O. Milton Fine II on December 10, 2020 in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Steven McNeely, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 10, 2020, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on October 19, 2020. 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. 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 relationship existed on February 25, 2020, when Claimant sustained a compensable injury to his right shoulder.
3. Claimant's average weekly wage of \$294.33 entitles him to compensation rates of \$196.00/\$154.00.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. After the amendment of the first issue, the following were litigated:

1. Whether Claimant is entitled to additional temporary total disability benefits.
2. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following an amendment at the hearing, are as follows:

Claimant:

1. Claimant contends that he suffered a compensable right shoulder injury on February 25, 2020 while lifting a school bus hood.
2. Claimant contends he has been on light duty with restricted use of his right arm since the date of injury. However, Respondents continued to pay his wages until his contract ended on May 31, 2020. At that point, he was fired.

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3. Claimant contends he is entitled to temporary total disability benefits from June 1, 2020 through a date to be determined, minus the five days Respondents agreed to pay, September 24-29, 2020. Because of his restriction, he is unable to work any meaningful job other than light duty.
4. Claimant contends these benefits have been denied and that he is entitled to a controverted attorney's fee.

Respondents:

1. Respondents contend that Claimant's wages were continued through May 31, 2020. His job was then eliminated due to COVID issues. Respondents indicate they could have accommodated Claimant for light duty but for his job elimination. In light of this, it is Respondents' position that Claimant's off-work status is associated with the economic issues related to COVID and not to this work-related injury, and that they are not liable for temporary total disability benefits in light of this.
2. Claimant refused suitable employment offered by Respondents.

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 witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

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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 additional temporary total disability benefits from May 23, 2020 to a date yet to be determined—minus the period in September 2020 that Respondents have already paid him such benefits.
4. Claimant has proven by a preponderance of the evidence that his counsel is entitled to a controverted attorney's under Ark. Code Ann. § 11-9-715 (Repl. 2012) on the indemnity benefits awarded herein.

CASE IN CHIEF

Summary of Evidence

The hearing witnesses were Claimant and Dennis Truxler.

Along with the prehearing order discussed above, the other exhibits admitted into evidence in this case were Claimant's Exhibit 1, a compilation of his medical records, consisting of two abstract/index pages and 65 numbered pages thereafter; Respondents' Exhibit 1, another compilation of Claimant's medical records, consisting of one index page and 14 numbered pages thereafter; and Respondents' Exhibit 2, non-medical records, consisting of one index page and six numbered pages thereafter.

In addition, I have blue-backed to the record the post-hearing briefs of Claimant and Respondents, filed on December 10 and 23, 2020, respectively, and totaling three pages.

Adjudication

A. Temporary Total Disability

Introduction. Claimant, who was employed as a school bus driver for Respondent Quitman School District, sustained a compensable injury to his right shoulder on February 25, 2020. Respondents continued to pay his wages until his contract with the school district ended in May 2020. The contract was not renewed. Respondents have only paid Claimant temporary total disability benefits for the period of September 24-29, 2020. He has alleged that he is also entitled to such benefits from the end of the contract through a date to be determined—minus the five days already covered. Respondents have denied their responsibility for such benefits, contending that Claimant was eliminated due to COVID-19 issues. They have further argued that that even if he has otherwise proven his entitlement to additional temporary total disability benefits, Ark. Code Ann. § 11-9-526 (Repl. 2012) would foreclose him from receiving them.

Standards. Claimant’s compensable shoulder injury is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must

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demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1). Claimant must prove his entitlement to temporary total disability benefits by a preponderance of the evidence. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012). 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).

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, who is 60 years old, testified that he is a high school graduate and possesses a psychology degree from the University of Central Arkansas. He has previously held factory jobs, and been self-employed as a handyman. Although he was began collecting Social Security Disability benefits 17 years ago, he has since held part-time jobs. This has included driving clients of a senior citizens center and delivering meals-on-wheels. He went to work for Respondent Quitman School District in 2011 as a substitute teacher. Thereafter, in 2012, he became a bus driver there. This required that he work approximately 90 minutes in the morning and 90 in the

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afternoon, five days a week. Over ten years ago, he underwent surgery on his right shoulder. It was his testimony that prior to suffering his stipulated injury, he was not having any problems with the shoulder.

Asked what happened on February 25, 2020, Claimant related:

I was preparing to do the pre-trip to the bus, which is required. We have to check underneath the hood of the bus. When I released the two catches on the sides of the bus hood, you have to pull on one side of that particular bus's fender hood part of the hood, and it jerked, pulled back, and it pulled—caused my arm to hurt, the shoulder hurt. And I told my supervisor when I got over to where he was at. And went from there.

Claimant began undergoing treatment, which included surgery by Dr. Kirk Reynolds on September 17, 2020.

After suffering this injury, Claimant continued to perform the bus driver job until approximately March 15, 2020, when the Quitman School District closed due to the COVID-19 outbreak. Notwithstanding this, he continued to receive his full wages throughout the period of his contract with the district, which ended on May 22, 2020. They were paid on a 12-month basis. Prior to the pandemic-related closure, Claimant had signed a letter of intent that indicated that he would be returning for work there during the 2020-21 school year. But in late April or early May of 2020, Dennis Truxler, the superintendent of the school district, contacted him and told him that his contract was not being renewed because his bus route was being combined with another route.

The following exchange took place:

- Q. Did Mr. Truxler offer you any other kind of light-duty work, office work, or—
- A. No.

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Q. Did he say anything about if you could drive they have a job for you?

A. Yes.

Q. Explain that to the judge.

A. Well, the first conversation we had, because when the doctor said light-duty work, me and Mr. Truxler had a conversation, and I asked him about light-duty work, and he said driving a bus was light-duty work to him. And then here recently, last week, Mr. Truxler contacted me and so did Keith Rooney about coming back to take a position as a bus driver because they had someone leave.

...

Q. Now, as of last week, can you physically drive a bus with your right arm the way it is?

A. No.

He later elaborated on the above answer:

Q. As far as you, what kind of problems would you have because of your right arm driving a school bus?

A. I have problems shifting gear, putting it in gear, using the parking brake, which is all required to park a bus, to drive it. With one arm not 100 percent, you would have a problem with activating the caution lights as you stop and let children—pick children up and let them off the bus, because you have to let go of the steering wheel with one hand to activate the switches for that.

Q. So, basically, you are a one-armed man; is that correct?

A. Pretty much.

Other than the recent bus-driving offer, Quitman School District has not afforded him the opportunity to return to work there. He believes he is capable of working there as, inter alia, a substitute teacher. Claimant has not drawn unemployment benefits

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since his contract was not renewed; and he has not worked anywhere else. His testimony was that he applied for a job with another school district, but never heard anything. He has not suffered any other injury to his shoulder since the stipulated incident.

Claimant is right-hand dominant. He testified that since being injured, he cannot reach with his right upper extremity to do such things as fasten his seat belt. Also, he cannot reach his arm about shoulder height or reach behind his back. A four-pound lifting restriction has been assigned to his arm. For a two-month period following his surgery, he used a sling.

On cross-examination, Claimant stated that while he continued to drive a school bus after his injury until the pandemic-related shutdown, he had not yet seen a physician during this period. But he agreed that he was basically driving with only one arm at that time. The following exchange took place:

Q. And back then, for, I think, approximately 25 to 26 days—or 25 to 26 trips, you are running the bus, you are shifting the bus, you are putting the bus in gear, you are opening the door, you are closing the door, you are putting the stop sign out so the kids can cross, you are doing all that stuff with this limited arm; right?

A. At that time, yes, sir. Before the doctor gave me any restrictions.

Q. And you agreed with me unequivocally in your deposition that you can drive a bus with one unimpaired arm because you did it for—

A. Yes.

Q. --basically half a month in February and March of 2020; right?

A. Yes, sir.

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Claimant acknowledged that even though he never drove a bus once school dismissed in May, in no year did he seek other employment during the summer months. He stated that he has no reason to believe that the school district consolidated bus routes and eliminated his position because of his shoulder injury.

During a five-day period in September 2020, Respondents paid him temporary total disability benefits when Dr. Reynolds took him completely off work. These ended on September 28, 2020, when the doctor gave him light-duty restrictions. At that point, he was no longer under contract with the school district.

Called by Respondents, Truxler testified that he is the superintendent of Respondent Quitman School District. He related that after Claimant sustained his injury, he only missed one day due to his injury—on March 14, 2020 for a medical appointment—prior to the district being shut down on March 16, 2020 due to COVID-19. For the rest of the 2019-20 school year, the buses there did not run. So, Claimant did not work. However, he was paid his salary per his contract with the district through the end of the contractual period/school year.

Truxler's testimony was that due to mandated teacher raises and the drop in the assessment, the Quitman School District experienced a budget crunch. Cuts in staff had to be made. Prior to his injury, Claimant's bus route had been targeted as one to be consolidated with the routes driven by others. Even Truxler, who drives a bus in addition to his superintendent duties, took some of that route. As a result of the consolidation, Claimant's contract was not renewed for the 2020-21 school year; his job was eliminated in May 2020. The testimony of Truxler was that an art teacher position

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and a second-grade teacher position were among the others eliminated; and Claimant's injury was not the reason for his position being cut as well.

Truxler stated that but for the COVID-19 shutdown, Claimant could have worked light duty through the end of the 2019-2020 school year. Moreover, but for the budgetary cuts, he could have resumed driving in the fall of 2020. When Claimant made inquiries about returning at that time, he was told that there was nothing available. However, the week prior to the hearing, the school district offered Claimant the opportunity to come back and drive for the school district. The reason for this is another driver resigned. However, after consulting with his physician, Claimant stated that he could not do so until after December 28, 2020, and possibly not then. However, the district is not aware of Claimant having any work restrictions after September 28, 2020. Later, having been made aware of Dr. Reynold's note, Truxler testified that he would have been able to begin driving again, based on the fact that he was able to do so for 14 days after his injury until the shutdown.

On cross-examination, Truxler stated that the bus driver position was the only light-duty position that was offered to Claimant. He is not aware of any other drivers driving with restrictions.

When questioned by the Commission, Truxler stated that the contention by Respondents that Claimant's position was "eliminated due to COVID issues" is incorrect; it was due to the budget constraints outlined above. He explained that while Claimant was recently offered another bus driving position with the school district, he agreed that Claimant does not currently have a contract with the district.

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His testimony that a bus driver has to use his right upper extremity to hold the steering wheel, put the bus in or out of gear, and operate the air brakes. When it is time to let a child on or off the bus, the driver will use the right hand to hold the steering wheel while using the left to activate the button that flashes the lights and opens the door. Truxler agreed that the driver's hand needs to remain on the steering wheel. While he again stated that Claimant was able to operate the bus in the spring of 2020 after his injury, he acknowledged that he could not safely do so after Dr. Reynolds had him wear a sling "at all times" and gave him the restriction of no use of his right upper extremity. Had the district been aware of these restrictions, Claimant would not recently have been offered the opportunity to return as a driver.

The medical records in evidence reflect that Claimant underwent an MRI of his right shoulder on March 13, 2020. This revealed chronic full-thickness tears of the distal supraspinatus and infraspinatus, superior subluxation of the humeral head with a type 2 acromion, insertional tendinopathy with partial tearing of the subscapularis, biceps tendinopathy, and a degenerative SLAP tear. On May 22, 2020, Dr. Reynolds gave him the restrictions of no lifting, pushing, pulling, tugging or overhead work with his right upper extremity. From there, he underwent a course of physical therapy. The restrictions were modified on July 13, 2020 to no lifting, pushing or pulling with the right upper extremity and no work above shoulder level. A CT scan of the right shoulder on August 6, 2020 showed, inter alia, an acromial undersurface abutment of the humeral head. Dr. Reynolds on August 13, 2020 added to Claimant's work restrictions to include

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the following wording: “NO DRIVING SCHOOL BUS AT THIS TIME.” (Emphasis in original)

On September 16, 2020, Dr. Reynolds wrote that Claimant was to undergo surgery the next day and should be excused from work until September 28, 2020. Claimant underwent a right reverse total shoulder arthroplasty on September 17, 2020. His pre-operative and post-operative diagnoses were

- (1) Right shoulder rotator cuff arthropathy
- (2) Right shoulder biceps tendinitis
- (3) Right shoulder massive, irreparable rotator cuff tear

That same day, Dr. Reynolds wrote that Claimant was to use a sling for the next four weeks. On September 28, 2020, Reynolds issued the following restrictions: “NO USE OF RIGHT UPPER EXTREMITY. SLING AT ALL TIMES.” (Emphasis in original)

Thereafter, Claimant began undergoing another course of physical therapy. The medical records in evidence do not indicate that Dr. Reynolds has yet found Claimant to be at maximum medical improvement and/or released him from treatment.

Discussion. The evidence shows that except for one day that he used to undergo medical treatment, Claimant continued to work after his compensable February 2020 shoulder injury until the respondent school district shut down due to the pandemic. He received his full pay through the end of his 2019-20 school year contract, which was May 22, 2020. That same day, he was assigned work restrictions of no lifting, pushing, pulling, tugging or overhead work with his right upper extremity. Truxler testified that a bus driver must utilize his right upper extremity to hold the steering wheel, put the bus in

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or out of gear, and operate the air brakes. I credit this. The gear function clearly requires pushing, pulling and/or tugging. Thus, at that point, Claimant was incapable of performing his job. A claimant who has been released to light-duty work but has not returned to work may be entitled to temporary total disability benefits where insufficient evidence exists that he has the capacity to earn the same or any part of the wages he was receiving at the time of the injury. *Breshears, supra; Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). Such is the case here. Consequently, Claimant began suffering a total incapacity to earn wages as of May 23, 2020, the first day after the end of his contract.

A claimant's failure to return to work, for purposes of being entitled to temporary total disability benefits, must be for reasons related to the work-related injury. *Fendley v. Pea Ridge School District*, 97 Ark. App. 214, 245 S.W.3d 676 (2006). The evidence establishes this to be the situation in this matter. This remained so when Dr. Reynolds on July 13, 2020 modified the restrictions to no lifting, pushing or pulling with the right upper extremity and no work above shoulder level. These restrictions, like those imposed on May 22, 2020, would have prevented Claimant from performing his bus-driving job. He still had a total incapacity to earn wages. This unquestionably continued on August 13, 2020, when the doctor modified the restrictions to make clear that Claimant could not drive a bus, and on September 16, 2020, when he was unambiguously taken off work. This restriction gave way on September 28, 2020 to one that specifies that Claimant must wear a sling at all times and cannot use his right upper extremity at all. As Truxler acknowledged, this would not allow Claimant to drive a bus.

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This particular restriction remains in place; and Claimant has not as of yet reached the end of his healing period. Consequently, he has proven that he is entitled to additional temporary total disability benefits from May 23, 2020 to a date yet to be determined—taking into account, of course, the dates in September 2020 that Respondents have already paid such benefits.

Respondents have argued that in the event that Claimant has shown his entitlement to additional temporary total disability benefits, Ark. Code Ann. § 11-9-526 (Repl. 2012) would foreclose him from receiving them for a given period. This provision reads:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

In *Cantrell v. Temple Inland, Inc.*, 2010 AR Work. Comp. LEXIS 194, Claim No. F904606 (Full Commission Opinion filed June 3, 2010), the Commission wrote:

An offer of suitable employment is a condition precedent to applying Ark. Code Ann. § 11-9-526. *Webb v. Webb*, Full Commission Opinion, June 29, 2000, (Claim No. E906155). Moreover, work must be available within the employee's physical restrictions. *McCullor v. Democrat Printing & Lithographic Co.*, Full Commission Opinion, April 28, 1998, (Claim No. E608050). The claimant must unjustifiably refuse employment which is suitable to his capacity. *Barnette v. Allen Canning Company*, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

The evidence establishes that shortly before the hearing, Quitman School District offered Claimant another (since his had been eliminated) bus driving job. But again, Truxler in his testimony admitted that Claimant's most recent work restrictions—which remain in place—would not allow him to drive a school bus. For that reason, Claimant's

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declining this job offer does not affect his entitlement to temporary total disability benefits because (1) the position was not suitable to his capacity; and (2) the refusal to accept the job was justifiable.

B. Attorney's Fee

Introduction. Claimant has asserted that he is entitled to a controverted attorney's fee in this matter.

Standard. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with *See 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).

Discussion. The evidence before me shows that Respondents have controverted Claimant's entitlement to additional temporary total disability benefits. Thus, the evidence preponderates that his counsel, the Hon. Steven McNeely, is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish 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

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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).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge