

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC FILE No G907485

KENNETH EVANS, EMPLOYEE

CLAIMANT

FOREST HEIGHTS STEM ACADEMY, EMPLOYER

RESPONDENT

**ARKANSAS SCHOOL BOARDS ASSOCIATION,
CARRIER/TPA**

RESPONDENT

OPINION FILED 7 AUGUST 2023

On hearing before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe, 8 February 2023, Little Rock, Pulaski County, Arkansas.

Ms. Laura Beth York, Attorney-at-Law of Little Rock, Arkansas, appeared for the claimant.

Ms. Melissa Wood, Attorney-at-Law of Little Rock, Arkansas, appeared for the respondents.

I. STATEMENT OF THE CASE

The above-captioned case was heard on 8 February 2023 in Little Rock, Arkansas, after the parties participated in a prehearing telephone conference on 29 November 2022. A Prehearing Order, admitted to the record without objection as "Commission's Exhibit No 1," was entered on that same day. The Order stated the following ISSUES TO BE LITIGATED:

1. Whether the claimant is permanently and totally disabled or, in the alternative, entitled to wage loss disability benefits.
2. Whether the claimant is entitled to a controverted attorney's fee.

All other issues were reserved.

That Order also set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.

2. An employee/employer/carrier relationship existed on 9 October 2019 and at all other times relevant to this claim.
3. The respondents accepted this claim as compensable and paid medical and indemnity benefits, including permanent partial disability benefits pursuant to an impairment rating of twenty percent (20%) to the body as a whole, as assigned by Dr. Shahryar Ahmadi.
4. The parties will stipulate to the claimant's average weekly wage.

Two (2) WITNESSES provided sworn testimony—the claimant spoke on his own behalf and the respondents called Mr. Ronald Self, an employee for the Little Rock School District.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under Ark. Code Ann. § 11-9-704:

1. The AWCC has jurisdiction over this claim.
2. The previously noted stipulations are accepted as fact.
3. The claimant failed to prove, by a preponderance of evidence, that he is entitled to any additional benefits.
4. Consistent with the above, the claimant's attorney is not entitled to a fee.

III. HEARING TESTIMONY and MEDICAL EVIDENCE

A. Claimant on Direct-Examination by Ms. York:

Claimant, Kenneth Evans, is a 68-year-old male who graduated high school in 1972 and first worked a job hanging steel. He left that industry for retail work for about five (5) years, eventually becoming an assistant store manager for K-Mart. Mr. Evans then sold insurance for Prudential for a time. He performed other jobs over time, before beginning a job at Lowe's Home Improvement, where he moved up the ranks over his thirteen (13) years

of employment, eventually becoming an assistant store manager. [TR at 11-15] After suffering a back injury that brought some work restrictions, the claimant's responsibilities changed and he ultimately left employment at Lowe's. [TR at 16]

The claimant then worked as a substitute teacher at Watson Chapel School. He applied for and was approved for Social Security Disability related to the back injury, but was still able to work. Mr. Evans completed his degree around that time, earning a bachelor's degree in industrial technology from the University of Arkansas at Pine Bluff in 2009. [TR at 17] He then began working as a paraprofessional for the Pine Bluff School District. [TR at 19] His work responsibilities changed over time from assisting teachers with general classroom work to helping particular students, one-on-one. Mr. Evans worked as a paraprofessional with special needs children for about fifteen (15) years. [TR at 20] He also operated an ice cream truck on the side at some point during this time. [TR at 21]

Mr. Evans eventually moved to Little Rock and sought work with the Little Rock School District, where he was hired as a paraprofessional at Don Roberts Elementary School. He was tasked with providing one-on-one assistance to a particular student. [TR at 22] As that student progressed through school, the claimant moved along also, following him to Forest Heights STEM Academy.

On 9 October 2019, the claimant was assisting other staff in preparing for the end-of-day student pickups. [TR at 24.] He described how they put out traffic cones and directed vehicles in an orderly manner. Mr. Evans noticed that one vehicle was, essentially, not minding the traffic control rules. He attempted to get the vehicle to stop, when it ran over a traffic cone and a side mirror struck Mr. Evans' shoulder. [TR at 24] Evans managed to keep his feet, and the vehicle moved on down the line. [TR at 25]

According to the claimant, he was on his way to report the incident to an assistant principal when the driver "got out of his truck, straightened his mirror up, and then, walked

over to me and said, ‘Don’t you ever hit my truck again,’ and swung at me, which I moved back and didn’t allow him to hit me.” [TR at 25] Security apparently arrived and separated the two (2) before any further scuffling went on, and Mr. Evans reported to the school nurse that he thought he would be okay. [TR at 26] The claimant was in increasing pain after getting home and eventually presented to the emergency department.

Mr. Evans stated that his injury was initially accepted as compensable by the respondents. *Id.* After an MRI in early November, he was scheduled for surgery with Dr. Schock on 14 November 2019. According to Mr. Evans, the procedure with Dr. Schock did not provide relief. [TR at 27] He disputed the accuracy of Dr. Schock’s release with a zero percent (0%) impairment rating on 2 April 2020. After a change of physician request, the claimant saw Dr. Ahmadi at UAMS, who ordered another MRI. *Id.*

The claimant testified that the MRI revealed that the earlier surgery failed. Dr. Ahmadi recommended a reverse arthroplasty, and that procedure was performed in August 2020. [TR at 28] Mr. Evans explained that Dr. Ahmadi’s notes first reflected his report of a shoulder dislocation on 27 October 2020. The first dislocation occurred, according to the claimant, when he was sweeping the floor in his home. Sweeping was not outside of any physician-ordered activity restrictions. *Id.* He was able to move the shoulder back into socket on his own. [TR at 29]

Dr. Ahmadi eventually found the claimant to be at maximum medical improvement (MMI) on 8 December 2020. He assigned a twenty percent (20%) impairment rating to the body as a whole and a permanent restriction of no lifting over twenty-five (25) pounds. *Id.* The claimant continued to treat subsequent to additional dislocations.

Dr. Ahmadi left UAMS at some point and the claimant underwent a revision surgery performed by Dr. Rabinowitz on 29 November 2021. [TR at 30] Mr. Evans said that he did not recall Dr. Rabinowitz releasing him without restrictions on 12 July 2022, *see* Resp. Exh.

№ 1 at 10, but agreed that the doctor ordered a functional capacity evaluation (FCE). *Id.* He went on to state that the carrier did not approve the FCE and that Dr. Rabinowitz gave a permanent thirty (30) pound lifting restriction. [TR at 31]

Mr. Evans testified that between 9 October 2019, the date of the vehicle incident, and July of 2022, he was not offered any light-duty work. *Id.* Nor did he perform any work for the respondent during that time. He explained that he had provided notice of his intent to retire and that his retirement would have gone into effect in the summer of 2020. [TR at 32]

He stated that the vehicle incident and subsequent shoulder issues interrupted his plans. He further explained that he intended to build a business in retirement performing handyman work. According to the testimony, Mr. Evans has experience with electrical, plumbing, and woodworking. “I do all of that and those items that are not – that did not have to be checked by local, city, to be inspected.” [TR at 33.] Installing a dishwasher or garbage disposal were offered as examples of the general work he could handle. He intended to pursue this work full-time in his retirement from the school district.

Mr. Evans testified that he did not perform any handyman work while he was being treated for his shoulder injury. [TR at 34] Instead, he said, he did not start performing his handyman work until his July 2022 release. According to the testimony, he is unable to perform all of the work he might have been able to perform before the shoulder injury. He said that he has had to enlist the help of others to assist in performing certain jobs because of his shoulder issues.

When asked whether he could pick up a gallon of milk out of the refrigerator, he responded, “I definitely cannot do that.” [TR at 35] Regarding how his shoulder feels on any given day, Mr. Evans stated, “I still get some pain, just a sudden or sharp pain occasionally. It doesn’t hurt consistently, but I have pain, I have some soreness, if I just do some things. It does get sore. Basically, that’s it, because I try just pick things up, immediately. I just know

not to do a lot of things; so I won't try." *Id.* He went on to restate that some work now requires hiring additional help when he could have handled the work on his own in the past. [TR at 36]

Mr. Evans then stated again that he was not offered any light-duty work during the 2019-2020 school year. [TR at 37] He further stated that he had no communication from the school district after filing, through counsel, his Prehearing Questionnaire. [TR at 38] He did, however, eventually receive a letter from the school district, dated 7 December 2022, offering him light-duty work. [TR at 39] The claimant said that he thought it was odd to be offered work after his retirement date. He did not respond to the letter.

B. Claimant on Cross-Examination by Ms. Wood:

Mr. Evans discussed his previous back injury with respondents' counsel, saying that he started receiving social security disability payments sometime in the early '90s. [TR at 40] He treated for that injury three (3) to four (4) years and received a permanent lifting restriction of fifty (50) to sixty (60) pounds. [TR at 41] He confirmed that while his previous work running an ice cream truck was conducted as a formal business registered with the Secretary of State's office, his handyman work was not.

He clarified that he had actually taken on some work since his shoulder injury, taking a two-week painting job and occasionally fixing someone's faucet or "things like that." [TR at 42]

After his surgery in 2021, no additional therapies were ordered, though Mr. Evans has exercise bands at his home and continues to use them. He maintains no additional prescriptions since the procedure. [TR at 43]

Regarding work at the school, Mr. Evans explained that he "actually, did go back to work in the spring semester of '20, but COVID hit... we did have to go back to the school, but there were no students; so we were considered working." [TR at 44]

The claimant offered that he could still work for the school district, just not in his previous one-on-one roll. [TR at 46] But he said that he had not spoken with anyone at the school district about continuing work in any capacity. When asked “what’s keeping you from working now, and you said, because of my prior plans meaning you meant to retire and do more home repair, is that correct?” he answered, “yes.” *Id.* He confirmed that he thought about getting a contractor’s license and that he thought about selling cars. He also thought about pursuing computer-aided drafting.

Mr. Evans stated that he spends most of his days filled with leisurely activities, such as golf or fishing, chores around the house, and spending time with family. [TR at 47]

C. Respondent Witness Ronald Self:

Mr. Ronald Self took the stand for the respondents. He explained that he is the Little Rock School District’s director for safety, security, and risk management. [TR at 49] Overseeing workers’ compensation matters falls within his office’s responsibility. He stated that he was aware of Mr. Evans’ case. Mr. Self confirmed that the respondents had not heard any response from the claimant since a letter was sent offering him a return to work. [TR at 50] He explained that work within the claimant’s restrictions would be available and that he could continue working as a paraprofessional, although the one-on-one role would be outside the scope of his restrictions. He went on to say that the work would pay the same as before Mr. Evans’ injury and that positions were open at the time of the hearing. [TR at 51]

D. Examination by the Commission:

A brief explanation was offered to clarify some dates relating to Respondent’s Exhibit No 2:

Ms. York: Your Honor, there is a little bit of confusion with regard to the dates. We understand that the dates. We understand that the Respondent document, Exhibit 2, page 2,

and it has a date up here that says August 26, 2020, but it does show that his last date of work would be June 30th, 2020. It is Mr. Evans testimony that he, actually, submitted this paperwork to the Little Rock School District in August of 2019, before the October 2019 injury. He was giving them notice that he would work through the school year, and then, that would be the end and he would retire.

Ms. Wood: Judge, I don't disagree with when it was first applied for. I think this document, though, shows when it was approved.

So that would have been for August of '20. [TR at 52]

With that, the testimony concluded, and the case was submitted.

V. ADJUDICATION

The stipulated facts, as agreed during the prehearing conference, are outlined above.

A. The Claimant Failed to Prove, by a Preponderance of the Evidence, that he Is Entitled to Additional Benefits

There is no question in this matter as to whether the claimant suffered a compensable injury. He was injured, treated, assigned an impairment rating, paid benefits consistent with that rating, and eventually given a full duty release. He claims, however, entitlement to additional permanent benefits and/or wage loss benefits; but the evidence presented does not support that finding.

Permanent total disability is defined as the inability, because of a compensable injury, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). The employee must prove an inability to earn any meaningful wage. Ark. Code Ann. § 11-9-519(e)(2).

Mr. Evans was injured in the fall term of 2019 and retired at the end of the spring term in 2020. He failed to present any testimony as to a physician's finding that he was unable to earn any wages because of his injury. He was, in fact, released to full duty without restrictions in February of 2022 before later being assigned maximum medical improvement and a thirty-pound, overhead lifting restriction in June of 2022.

Evans did not controvert the respondents' testimony that full-time work within his restrictions was available to him through the school district at the same rate of pay as he received before his injury and chosen retirement date. Nor did he provide any proof of an inability to earn *any* wages after his retirement from the school district or through any other route of employment. He essentially stated that he had not moved forward with his post-retirement thoughts or plans for starting a handyman and repairs business because lifting restrictions could require hiring additional personnel. On this record I find that he failed to meet his burden for additional permanent disability benefits. The record is similarly short on evidence supporting an entitlement to any wage loss benefits.

B. Attorney's Fee

In accordance with the above, the claimant is not entitled to an attorney's fee.

VI. ORDER

Consistent with the findings of fact and conclusions of law set forth above, this claim is denied and dismissed.

SO ORDERED.

JAYO. HOWE
ADMINISTRATIVE LAW JUDGE