

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G900188

CLAYTON McWILLIAMS, EMPLOYEE	CLAIMANT
ARKANSAS STATE POLICE, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED APRIL 4, 2024

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents No. 1 represented by the HONORABLE CHARLES H. McLEMORE, JR., Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's opinion filed July 5, 2023. The administrative law judge found that the claimant proved he was permanently totally disabled. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant proved he was permanently totally disabled. The Full Commission finds that the claimant proved he sustained wage-loss

disability in the amount of 40% in excess of his 49% permanent anatomical impairment.

I. HISTORY

Clayton Hendrix McWilliams, now age 37, testified that he had earned an undergraduate degree in criminal justice. Mr. McWilliams testified that he had volunteered in the area of diesel mechanics while he attended college. The claimant subsequently became employed with the respondents, Arkansas State Police.

The parties stipulated that the employment relationship existed at all pertinent times, including January 2, 2019. The claimant testified on direct examination:

Q. So let's go to the date of your accident, January the 3<sup>rd</sup> of 2019, and take us to that day. As best you can recall, what were the events that led to your accident?

A. Okay. Sure. So it was raining terribly that day and I left the house, the trailer house....They called me on my cell phone and said they had been trying to get ahold of me, and told me about the wreck....There was [an] overturned log truck that they didn't have a trooper to work and so I started heading that way....I actually turned the entire vehicle sideways....and I went into the only tree in somebody's yard....

Q. You ended up getting off the highway and struck a tree?

A. Yes, sir....the last thing I remember is bracing for impact.

The parties stipulated that the claimant "sustained compensable injuries to, among others, his head/brain, pelvis, right femur, right ankle, [and] left leg."

The record indicates that the claimant received inpatient physical therapy at NeuroRestorative Timber Ridge beginning April 11, 2019.

The Social Security Administration informed the claimant on June 16, 2020, “You are entitled to monthly disability benefits beginning July 2019.”

Dr. Robert L. Garrison noted on July 24, 2020:

Clayton returns today for followup. He is now little over a year and a half out from pelvic ring injury that underwent repair and a left segmental femur fracture that underwent open reduction with intramedullary fixation. He also sustained a right tibia fracture that underwent intramedullary nailing, which has gone on to heal.

Clayton reports he is starting to jog a little bit and would like to start doing more activities such as weightlifting, things that he was involved with before this accident....

ASSESSMENT:

1. Status post open reduction and internal fixation of pelvic ring injury, clinically and radiographically healed.
2. Open reduction with intramedullary fixation of left segmental femur fracture, clinically and radiographically healed.
3. Radiographically and clinically healed right tibia fracture after intramedullary nailing.

PLAN: I told Clayton and his mom today I think he has met maximum medical improvement from my standpoint. From my standpoint, impairment rating will need to be done by physician dealing with impairment ratings. I would defer to them at this time. He will follow up from my standpoint as needed. I feel from an orthopaedic standpoint when he can tolerate as far as activities, he can proceed doing. In regard to his closed head injury, I will defer that for further evaluation as far as impairment rating is concerned. Again, we will see him back as needed.

The claimant participated in a Functional Capacity Evaluation at Functional Testing Centers, Inc. on August 28, 2020: “The results of this

evaluation indicate that a reliable effort was put forth, with 52 of 52 consistency measures within expected limits....Mr. McWilliams completed functional testing on this date with **reliable** results. Overall, Mr. McWilliams demonstrated the ability to perform work in the **LIGHT** classification of work[.]” The claimant was also assigned a 19% whole-person impairment rating on August 28, 2020.

Dr. Barry D. Baskin provided an INDEPENDENT MEDICAL EVALUATION on October 7, 2020:

Mr. McWilliams is a 34-year-old gentleman from Magnolia, Arkansas. He worked as an Arkansas state police officer. He was involved in a single car accident 1/3/2019. He was on a call, it was raining heavily, and he hydroplaned and his police cruiser hit a tree. He had extensive pelvic trauma with sacral fractures, pelvic fractures, comminuted fracture of the left femur, right tibia, left hip, and ring fractures of the pelvis. He underwent ORIF of the pelvis, right SI joint screw. He had a traumatic brain injury with subarachnoid hemorrhage and subdural hematoma. He was stabilized at St. Michael’s Medical Center in Texarkana which was near the accident and then he was transferred to UAMS where he was on a ventilator x 2 weeks. He spent 3 weeks at UAMS and then went to Texas Institute of Rehabilitation and Research (TIRR) for 2-1/2 months. He then went to Timber Ridge NeuroRestorative Center in Benton. He had complications of DVT in the left leg. He is still being treated at Timber Ridge as an inpatient. He is now going 3 days a week and home for 4 days a week with a long weekend every other weekend. He was on Eliquis for a few months and now is off. He has had neuropsych evaluation by Dr. Zolten. He has had a functional capacity evaluation ordered by Dr. Robert Garrison, his trauma orthopaedic surgeon at UAMS. This was done on 8/28/2020, and I have that study. He is now referred to me for ongoing management....

Review of the medical records includes a functional capacity evaluation by Functional Testing Centers from 8/28/2020. He gave good effort. He was given a [rating] on his orthopaedic injuries. He was not rated on his traumatic brain injury. His orthopaedic injuries were rated on referral from Dr. Garrison at 19% whole person impairment using the combined values chart on page 322. I am not asked to see him for his orthopaedic injuries, but instead for his closed head injury.... Records from Timber Ridge are reviewed. Those records indicate that Mr. McWilliams was diagnosed with a closed head injury with subdural and subarachnoid hemorrhage, hemorrhagic contusion of the left temporal lobe, closed pelvic ring fracture, open displaced left femoral shaft fracture, open right tibia and fibula fractures, closed nondisplaced anterior process of the right calcaneus fracture, left chin laceration. He was treated primarily at UAMS with Dr. Robert Garrison....MRI of the brain revealed extensive shear injury throughout the brain most pronounced at the corpus callosum. He had atrophy at the right cerebral peduncle, encephalomalacia was noted within the left side greater than right frontal lobes and right medial temporal lobe was noted. Interval development of diffuse cerebral volume loss was also noted....

**IMPRESSION:** Mr. McWilliams is a nice gentleman referred to me by Heather Montgomery, RN, Case Manager with Systemedic. He is a former state trooper involved in a severe motor vehicle accident when he hydroplaned on a rainy night 1/3/2019 and sustained multiple orthopaedic trauma and a closed head injury. He had complications of a DVT. He has had extensive rehabilitation at TIRR and subsequently at Timber Ridge. He is still at Timber Ridge and they are weaning him back to an outpatient program. He has had neuropsych evaluation by Dr. Zolten which I do not have....I would like to get Dr. Zolten's records. This evaluation is an IME to get to know Mr. McWilliams with plans of me following him long term for ongoing traumatic brain injury rehabilitation efforts....He has been disabled from his job as an Arkansas State Trooper. I will see him back in follow up in about a month.

An occupational therapist noted in part on February 4, 2021, “Mr. McWilliams is recommended for approval by physician to resume driving independently.” The claimant testified that he was physically able to operate a motor vehicle, at least for shorter distances.

Dr. Baskin gave the following impression on March 9, 2021: “Mr. McWilliams is making good progress after a severe traumatic brain injury 1/3/2019. He is now two years post injury....We are going to get a vocational rehab evaluation to see what type of work he can do. He is not going to be able to go back to work as a state police officer....I am recommending a functional capacity evaluation to find out what Mr. McWilliams can do with regards to return to work.”

The claimant was discharged from Timber Ridge on or about March 29, 2021.

The claimant participated in another Functional Capacity Evaluation on May 6, 2021: “The results of this evaluation indicate that a reliable effort was put forth, with 50 of 50 consistency measures within expected limits....Mr. McWilliams completed functional testing on this date with **reliable** results. Overall, Mr. McWilliams demonstrated the ability to perform work in the **LIGHT** classification of work[.]”

The parties stipulated that the claimant reached maximum medical improvement on May 6, 2021.

Heather Taylor, a Vocational Rehabilitation Consultant, provided a VOCATIONAL REHABILITATION INITIAL EVALUATION on May 24, 2021. Heather Taylor reported in part, “before beginning the job search process with Mr. McWilliams, it is my recommendation and opinion that he could benefit from working as a volunteer on a transitional basis as a simulation of work and as a gauge of whether or not he would eventually be capable of returning to competitive employment. Therefore, I will research the non-profit agencies in his local area that accept volunteers and identify one that would be appropriate for him to participate in.”

Heather Taylor opined on June 21, 2021, “Because of his brain injury deficits, he will be unable to return to his previous skilled occupation and, in my opinion, will not be able to return to any other skilled occupation. If, or when, he is able to return to competitive employment, because of his brain injury deficits, he will likely only be able to return to an unskilled or semi-skilled occupation.”

Dr. Baskin provided an IMPAIRMENT RATING on June 21, 2021:

Mr. McWilliams is back in for follow up for his traumatic brain injury. Overall he is doing fairly well. He has had a functional capacity evaluation with good reliability. He still has left spasticity and hemiparesis. He still has difficulty with spasm in his left side. He had multiple fractures. He has had neuropsych evaluation with Dr. Zolten that revealed extensive [shearing] injury throughout his brain. He has had significant gross and fine motor defects primarily on the left side. He has had cognitive deficits. He has had some impairment of visual perceptual skills....He has made significant

improvement....His recent FCE revealed reliable effort with 50/50 [consistency] measures with the expected limits. He was able to work in a light physical demand category. He is medically retired from the Arkansas State Police Department as a trooper. His functional capacity evaluation was noted to be able to stand better on the right side than the left.... Using the AMA Guides to the Evaluation of Permanent Impairment Mr. McWilliams has an impairment due to mental status changes and cognitive impairment of 25% to the whole person using table 2 on page 142. Due to his sacroiliac fractures and diastasis requiring screw fixation turning to table 64 on page 85 he has a 3% whole person impairment. Due to his pelvic diastasis and bilateral pubic rami fracture and fixation turning to section 3.4 on page 131 he has a 5% whole person impairment. Due to his spastic hemiparesis and gait abnormality using the station and gait eval [table] 13 on page 148 he has a 9% whole person impairment. Due to [his] multiple comminuted femur and hip fracture on the left with decreased external rotation at only 30% he has a 2% whole person impairment using table 40 on page 78. Due to the lost range of motion in the right ankle associated with his foot and calcaneous fractures using table 42 on page 78 he has a 4% whole person impairment rating. Due to the lumbar disc protrusions x 2 using table 75 on page 113 he has a 10% whole person impairment rating....Using table 2 on page 280 he has a 3% whole person impairment rating. Turning to the combined values chart of the 4<sup>th</sup> Edition AMA Guides on page 322 Mr. McWilliams's impairment ratings as outlined above are combined to equal a 47% whole person impairment. He was previously rated by Functional Testing Centers and not all the ratings that he actually has were included. Three hours was spent on this evaluation looking through his medical records and applying them appropriately to the AMA Guides 4<sup>th</sup> Edition in determining his whole person impairment rating as a result of his injuries. Mr. McWilliams is effectively, totally and permanently disabled as a result of his motor vehicle accident. Again, his impairment rating of the whole person is calculated at 47%....

Dr. Baskin informed a case manager on July 14, 2021, "There is one item that needs to be added to my rating that I overlooked. I did not rate



Mr. McWilliams on the calcaneal fracture. He had lost some range of motion in the right ankle in plantar flexion and equal to 3% whole person impairment and he lost some range of motion in inversion of the right ankle equal to 1% whole person....This 4% impairment rating would then be combined with the 47% rating that I calculated to yield a permanent partial impairment rating of 49% to the whole person....I believe the 49% rating is the whole package at this point.”

The parties stipulated that Respondent No. 1 paid a 49% permanent anatomical impairment rating “which includes/takes into consideration all of the claimant’s compensable injuries.”

Heather Taylor provided a VOCATIONAL REHABILITATION

CLOSURE REPORT on November 3, 2021:

Mr. Clayton McWilliams began his volunteer work program on 06/08/21. As of this date, his volunteer schedule has remained as follows: Tuesday and Thursday evenings from 7:00 p.m. to 9:00 p.m. at Southern Arkansas University (SAU) campus police department and on Wednesdays from 11:00 a.m. to 1:00 p.m. at the local animal shelter, Columbia County Animal Protection Society (CCAPS)....

My vocational recommendation at this time is for Mr. McWilliams to continue to participate in his volunteer work program for an indefinite period of time. Both places have stated he can continue to volunteer there for as long as he wants and, in my opinion, this will be very good for him and may increase his overall independence.

After working with Mr. McWilliams, communicating with both volunteer places, and observing Mr. McWilliams doing his volunteer work, it is my professional opinion that he is not able to return to competitive employment at this time....If his independence increases overtime, he may eventually be able

to return to competitive employment, but in my opinion, it would only be to an unskilled occupation. I have communicated my final opinion and my most recent onsite observation to Public Employee Claims Division. At this time, vocational rehabilitation file closure is recommended. I have also communicated with Mr. McWilliams that I am closing his vocational rehabilitation file. Thank you for this referral. It was a pleasure working with Mr. McWilliams.

On January 11, 2022, the claimant was re-admitted to NeuroRestorative Timber Ridge “for further evaluation and treatment.” The claimant’s admission was described as an annual “tune up,” and he was discharged on January 31, 2022.

A pre-hearing order was filed on February 16, 2022. According to the text of the pre-hearing order, the parties contended the following: “The claimant contends he is permanently and totally disabled (PTD) as a result of his multiple injuries or, alternatively, is entitled to substantial wage loss disability benefits. The claimant contends further the claimant contends (sic) the Commission should order Respondent No. 1 to pay a controverted attorney’s fee on any and all additional PPD benefits he may be awarded.

First, Respondent No. 1 contends the claimant sustained compensable injuries on January 3, 2019, in a motor vehicle accident (MVA), which they accepted as compensable and that they have paid and continue to pay all appropriate medical and indemnity benefits to date to which the claimant is entitled. Respondent No. 1 states they have paid for,

among other treatment and medications, etc., the claimant's pelvic surgery performed by Dr. Richard Garrison, for physical therapy (PT), in-patient treatment, and for treatment with Dr. Barry Baskin for the claimant's traumatic head/brain injury.

Second, Respondent No. 2 contends the claimant performed reliably in the Light classification of employment on a Functional Capacity Evaluation (FCE) on May 6, 2021, and also on August 28, 2020. Respondent No. 1 continues to provide vocational rehabilitation for the claimant, who performs volunteer work, and collects Social Security disability (SSD) benefits, as well as a separate disability benefit from his employer due to his disability. Dr. Garrison, who had treated the claimant's pelvic injury, released the claimant at maximum medical improvement (MMI) on July 24, 2020. In addition, Dr. Barry Baskin, who treated the claimant for his head/traumatic brain injury, determined the claimant reached MMI for his traumatic brain injury injury/mental condition on March 29, 2021. Again, Respondent No. 1 notes Dr. Baskin assigned the claimant at 49% BAW permanent anatomical impairment rating, which they accepted in full which they began paying on or about May 7, 2021, and which they continue to pay.

Third, Respondent No. 1 contends the claimant has the burden of proving he is in fact PTD or, alternatively, that he is entitled to PPD benefits

in excess of his 49% impairment rating. Further, Respondent No. 1 contends they are entitled to a dollar-for-dollar offset pursuant to **Ark. Code Ann.** §11-9-411 (2022 Lexis Replacement) for any and all disability benefits the claimant has received or is receiving from any and all third-party payors. Finally, Respondent No. 1 reserves the right to raise additional contentions, or to modify those stated herein, pending the completion of discovery, and reserves any and all issues not addressed therein for future determination and/or litigation.

Respondent No. 2 defers to the outcome of the litigation on the issues of whether the claimant is PTD or, alternatively, is entitled to wage loss disability benefits in excess of his 49% BAW impairment rating. Furthermore, Respondent No. 2 points out and reiterates it has not controverted any benefits in this claim and, therefore, may not be deemed liable for the payment of any of the claimant's attorney's fees. Respondent No. 2 waives its appearance at the aforementioned subject hearing. Finally, Respondent No. 2 specifically reserves any and all other issues for future determination and/or litigation."

The parties agreed to litigate the following issues:

1. Whether the claimant is permanently and totally disabled (PTD) as a result of the January 3, 2019 compensable injuries; or alternatively, whether he is entitled to wage loss disability benefits in excess of his forty-nine (49%) body-as-a-whole (BAW) impairment rating.

2. Whether the claimant's attorney is entitled to a controverted fee on these facts.
3. The parties specifically reserve any and all other issues for future litigation and/or determination.

Heather Taylor reported in part on March 21, 2022:

My vocational rehabilitation file was closed on 11/03/21, with my overall vocational opinion being that Mr. Clayton McWilliams still needed frequent to constant supervision even for his volunteer work situation. But with additional time, if his independence increased overtime, he may eventually be able to return to competitive employment in an unskilled/semi-skilled job.

On 02/23/22, Mr. McWilliams' attorney requested a re-assessment of Mr. McWilliams' vocational/return-to-work options. Therefore, Verlene Williams with Public Employee Claims Division authorized me to re-open this case for a further review/assessment of his employability.

For purposes of vocational re-assessment, I met with Mr. McWilliams again on 03/16/22, talked with his former volunteer supervisor at Southern Arkansas University (SAU) where he was doing volunteer work, talked with his mother, and reviewed all Timber Ridge reports from his recent twenty-day stay for therapies in January 2022. Timber Ridge noted continued cognitive deficits and ongoing issues. I discovered that Mr. McWilliams abruptly stopped doing his volunteer work at SAU at the beginning of November 2021, with no timely notice to his direct supervisor and has not been doing any volunteer work since that date....

This information has been conveyed to Public Employee Claims Division and they have since requested I keep this case open for a while longer to assist Mr. McWilliams in re-establishing a volunteer work situation....

Heather Taylor reported on April 25, 2022, "In late March 2022, he began volunteering at the Magnolia Senior Center two days per week....My main recommendation at this time is to continue to monitor him participating in this newly re-established volunteer work program for a few months and

then, once again, re-assess his progress and level of independence in a volunteer situation and make an assessment/determination if he is ready to try and return to the workforce. I have notified Mr. McWilliams and Rene, the senior center director, of my leaving Systemedic and Public Employee Claims Division has also been notified. In the coming weeks this case will be transitioned to a new vocational rehabilitation staff member at Systemedic to continue to provide him with vocational rehabilitation services.”

The claimant began meeting with another Vocational Rehabilitation Consultant, Keondra Hampton, on or about May 31, 2022. Ms. Hampton recommended, “Overall, Mr. McWilliams is doing very well in his volunteer experience. In my professional opinion, I am not ruling out the possibility of competitive employment in an unskilled/semiskilled job. My recommendation at this time is to continue to monitor his participation in his volunteering experience with Magnolia Senior Center.”

Keondra Hampton corresponded with the claimant on July 25, 2022:

Per our telephone conversation, I have scheduled a meeting with representatives from TEEM Academy and your attorney, Greg Giles, to discuss the details of the supported employment program with TEEM. Public Employment Claims Division has approved your participation to move forward with supported employment services. I reserved a meeting space at the Columbia County Library at 2057 N. Jackson, Magnolia, Arkansas. Our meeting is scheduled for **Thursday, August 4, 2022, at 1:00 p.m.**

Your attorney and the TEEM Academy Program Director, Robert Pierce, will attend the meeting virtually via zoom conference. Please feel free to invite your parents to attend this meeting as well. If all parties agree to your participation, we will proceed with completing your referral forms for TEEM Academy....

The record includes a Narrative Report from TEEM Academy dated August 18, 2022:

Clayton is able to perform everything on his own inside the home and doesn't need any assistance. He is able to cook, clean and take care of himself. He does walk with a cane and is considered a fall risk. He has balance issues.

If sitting he would need cushion and good back support. He would prefer not to have a desk job. He is able to walk without the cane but prefers not to work in places that might require quick reactions....

Clayton drives himself. He would prefer to work in Magnolia, El Dorado, Camden or in Stamps and Lewisville. (Lafayette County)....

Clayton is most comfortable with medium paced jobs. He relies on a lot [of] post it notes and reminders. Routine, predictable activities are best....

He is interested in looking into surveillance type work at Walmart or perhaps a door greeter. Possibly working with the police department like filing, looking over reports, etc.

Something that is not too strenuous....

Clayton gets up and eats breakfast around 6, then goes to the gym every morning for about 30 minutes or so. Then he goes back home and checks the mailbox. He enjoys driving but does not want to be a truck driver. He also [likes] to travel with his family.

**Summary and Recommendations:**

Clayton Williams has lots of transferrable skills and some positive employable characteristics, such as willingness to try new things, friendliness, punctuality, and strong motivation to work. Clayton has a clean criminal record and has reliable transportation. He has a preference to part-time work and is open to several positions but is particularly interested in working within the police force in a low stress capacity or as a

greeter at a store. Clayton would excel in a low stress environment where he can work with [any amount of] people, but not super loud people where he can be easily startled. Clayton is capable of working independently once he is taught how to do each task. TEEM recommends a position with any amount of interaction with others....

TEEM is pleased to share that we will enroll Clayton McWilliams into our on-line integrated employment service that will expedite job leads and job searching utilizing a comprehensive infrastructure. This system includes: Indeed.com, Zip Recruiter.com, and the LWC workforce job board. These tools will increase the speed of finding, applying, and interviewing for appropriate positions.

The Narrative Report indicated that TEEM would investigate the positions “1. Arkansas State Police – filing, records” and “2. Walmart – Greeter.”

The claimant also continued to meet with Keondra Hampton, the Vocational Rehabilitation Consultant. Ms. Hampton reported that the claimant had applied for several employment positions but had not been hired.

A hearing was held on April 6, 2023. The claimant testified on direct examination:

Q. Have you been able to return to work?

A. No, sir, I have not. I've wanted to but I have not....I've went and interviewed at several places and the volunteer jobs have really stuck out. Like, I first started out at SAU Police Department, which is just like a quarter mile from my parents' house where I was living, and helped those guys twice a week, basically just turning off lights around that campus....Where I'm currently at now, I volunteer as well.

Q. And where is that?

A. That's at the Magnolia Senior Center....



Q. Did you submit job applications and try and locate jobs?

A. Yes, sir, I did....

Q. And were you successful in getting some job interviews?

A. I was successful in getting interviews. Yes, sir.

Q. How many interviews would you say that you had?

A. I would say two.

Q. And were you successful in gaining any offers of employment?

A. Well, I kinda felt like – I don't know about gaining any offers. No, sir, I was not....

Q. At this point, as you sit here today, have you had a job offer?

A. No, sir....

Q. After doing the volunteer work, and seeing where you are, and being out there in the volunteer world, what are your thoughts at this point in truly being able to return to work on an eight-hour-a-day, five-day-a-week basis within a structured work day?

A. For that – to have that capability, that's – no, sir, there's no way.

Q. Why do you say that?

A. Because I don't think I could come and stay coherent for the full eight hours.

Q. When you say coherent, what do you mean?

A. As far as doing tasks, and I'd have to walk around with a pad in my hand and make out a task of everything I need to do, or a list of tasks and put a check beside each one as I get 'em done....

Q. If you were given the opportunity to do those volunteer jobs eight hours a day, five days a week, do you think that you could do that?

A. No, sir, I don't.

The respondents' attorney cross-examined the claimant:

Q. So you think part-time you could do some work or you don't think you're able to do any work?

A. I don't think I'm able to do any work.

Keondra Hampton reported on June 5, 2023:

Mr. Clayton McWilliams remains within the first milestone of his supportive employment plan with TEEM Academy. During this reporting period, Mr. McWilliams was assigned a new job coach to assist with job development and placement, however, his newly assigned job coach was terminated from TEEM Academy within this reporting period. Mr. McWilliams remains working at his volunteer experience with Magnolia Senior Center, three days a week. Mr. McWilliams remained cooperative with me throughout this reporting period and is eager for job placement....

My recommendation for Mr. McWilliams is to continue with each milestone within the supported employment program for on-the-job supports with Mr. Pierce until a new job coach is assigned....

Robert Pierce, TEEM Academy's Director of Employment Services,

corresponded with Public Employee Claims Division on June 21, 2023:

This letter contains Mr. McWilliams' request to pause his employment search.

"Hey Robert, can you take a break from my job hunt sir? Because it's going to be 3-6 months before the judge who heard my case will make a decision and people are calling me about applications that have been put in, honestly, I can't have a paying job right now or it will mess up my case brother."

Please contact me if you have any questions.

Keondra Hampton corresponded with the claimant's attorney on July 3, 2023:

I contacted Mr. Clayton McWilliams on 06/30/23, and he stated he is no longer interested in receiving vocational rehabilitation at this time and has requested to close his vocational rehabilitation file with Systemedic. Public Employee Claims Division has been notified of Mr. McWilliams' request and has agreed to close the vocational rehabilitation file if continuation of services is not requested by you.

Currently Mr. McWilliams' file remains open. However, if vocational rehabilitation services are no longer needed and a request for continued services is not received by 07/24/23, I will proceed to close the file.

Meanwhile, an administrative law judge filed an opinion on July 5, 2023. The administrative law judge found, among other things, "2. The claimant has met his burden of proof in demonstrating he is PTD within the meaning of the Act and applicable case law." Respondent No. 1 filed a timely notice of appeal.

Keondra Hampton reported on July 25, 2023:

At the request of Public Employee Claims Division, vocational rehabilitation services were discontinued for Mr. Clayton McWilliams on 07/25/23. On 06/21/23, I received notification from Robert Pierce, Director of Employment Services with TEEM Academy regarding Mr. McWilliams' request to pause his employment search. I contacted Mr. McWilliams on 06/30/23, and he stated he is no longer interested in receiving vocational rehabilitation and requested to close his vocational rehabilitation file with Systemedic....

A letter of notification for the request of case closure was sent to Mr. McWilliams' attorney, Greg Giles, on 07/03/23. The letter indicated a request of continuation of vocational rehabilitation services was due by 07/24/23, in order to keep the vocational rehabilitation file open. Due to not receiving a request from Mr. Giles or Mr. McWilliams to keep the vocational rehabilitation file open, my file is now closed. Mr. McWilliams has been notified by letter of vocational rehabilitation file closure.

It was a pleasure working with Mr. McWilliams. Thank you for this referral.

On August 3, 2023, Respondent No. 1 filed a **MOTION TO INTRODUCE NEWLY DISCOVERED EVIDENCE**. The moving party

stated, among other things, “f) That the Respondent No. 1 has, subsequent to the hearing, received additional reports from Ms. Keondra Hampton and the claimant’s job coach at TEEM Academy regarding the claimant’s efforts to return to work, including June 5, 2023 progress report, June 21, 2023 letter, and July 25, 2023 closure[.]...Respondent prays that the aforementioned newly discovered evidence be introduced into the record on this claim or that further hearing for the purpose of introducing additional evidence be granted pursuant to Ark. Code Ann. §11-9-705(c)(1)(C).” The Full Commission unanimously granted the respondents’ motion in an opinion filed September 20, 2023. The Full Commission entered into the record the aforementioned documents authored June 5, 2023, June 21, 2023, July 3, 2023, and July 25, 2023.

## II. ADJUDICATION

The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Cross v. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In considering claims for permanent partial disability benefits exceeding the employee’s percentage of permanent physical impairment, the 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 future earning capacity. Ark. Code Ann. §11-9-522(b)(1)(Repl. 2012).

Ark. Code Ann. §11-9-519(Repl. 2012) provides, in pertinent part:

(e)(1) “Permanent total disability” means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

An administrative law judge found in the present matter, “2. The claimant has met his burden of proof in demonstrating he is PTD within the meaning of the Act and applicable case law.” The Full Commission does not affirm the administrative law judge’s finding that the claimant proved he was permanently totally disabled. The claimant is only age 37 and is a college graduate. The claimant sustained a traumatic compensable injury while employed with the respondents, Arkansas State Police, on or about January 3, 2019. The parties stipulated that as a result of his compensable accident the claimant sustained a traumatic brain injury as well as injuries to his pelvis, right femur, and left leg. However, Dr. Garrison noted in July 2020 that the claimant was physically active. Dr. Garrison noted that the claimant was able to participate in activities such as running and weightlifting. A Functional Capacity Evaluation in August 2020 indicated that the claimant was able to perform at least light-duty work.

Dr. Baskin began evaluating the claimant in October 2020. Dr. Baskin opined that the claimant was physically unable to return to his previous occupation of Arkansas State Trooper. However, an occupational therapist reported in February 2021 that the claimant was able to drive a motor vehicle. The claimant's mother, Kay McWilliams, testified that the claimant was physically able to operate a motor vehicle and travel relatively long distances. It was concluded following another Functional Capacity Evaluation on May 6, 2021 that the claimant could perform at least light work. The parties stipulated that the claimant reached maximum medical improvement on May 6, 2021.

Heather Taylor provided Vocational Rehabilitation services to the claimant beginning May 24, 2021. On July 24, 2021, Dr. Baskin concluded that the claimant had sustained permanent anatomical impairment in the amount of 49%. The parties stipulated that the respondents accepted and paid the 49% rating. The record indicates that the claimant was physically able to perform part-time volunteer services in venues such as Southern Arkansas University and the Magnolia Senior Center. Keondra Hampton, a Vocational Rehabilitation Consultant, stated on May 31, 2022, "In my professional opinion, *I am not ruling out the possibility of competitive employment in an unskilled/semiskilled job* [emphasis supplied]." Ms. Hampton arranged for the claimant to consult with a Vocational Placement

service, TEEM Academy, beginning August 4, 2022. It was noted at TEEM Academy on August 18, 2022 that the claimant was struggling with some physical limitations. However, the claimant was able to perform activities such as cooking and cleaning and was able to perform “medium paced jobs.” The evaluator at TEEM Academy reported that employment positions could be available such as record-keeping with the Arkansas State Police or retail employment with Walmart. The claimant testified at a hearing held April 6, 2023 that he believed himself unable to return to any type of work.

Following the hearing held April 6, 2023, the respondents introduced into the record the report of a letter to the claimant from Robert Pierce, Director of Employment Services at TEEM Academy. The claimant queried Mr. Pierce, “Hey Robert can you take a break from my job hunt sir? Because it’s going to be 3-6 months before the judge who heard my case will make a decision and *people are calling me about applications that have been put in, honestly, I can’t have a paying job right now or it will mess up my case brother* [emphasis supplied].” In addition, Keondra Hampton reported on July 25, 2023, “I contacted Mr. McWilliams on 06/30/23, and he stated *he is no longer interested in receiving vocational rehabilitation* [emphasis supplied].”

In workers' compensation cases, the Commission functions as the trier of fact. *Blevins v. Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). 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 it deems worthy of belief. *Farmers Co-op v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). The Full Commission has the duty to adjudicate the case *de novo* and we are not bound by the characterization of evidence adopted by an administrative law judge. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

In the present matter, the respondents do not contend that the claimant is disqualified from receiving additional compensation in accordance with Ark. Code Ann. §11-9-505(b)(3)(Repl. 2012). Nevertheless, the claimant's demonstrated lack of interest in returning to gainful employment within his permanent physical restrictions impedes an assessment of his loss of earning capacity and casts doubt on the claimant's contention that he is permanently and totally disabled. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). *See also Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). With regard to the claimant's contention that he is physically unable to return to any gainful employment within his permanent physical restrictions,



the claimant has not been an entirely credible witness. The claimant's communication with Robert Pierce of TEEM Academy and Keondra Hampton, the vocational rehabilitation consultant, demonstrate a marked lack of motivation to return to appropriate gainful employment.

The Full Commission therefore finds that the claimant did not prove he was permanently and totally disabled. The Full Commission finds that the claimant sustained wage-loss disability in the amount of 40% in excess of the 49% permanent anatomical impairment accepted and paid by the respondents. The claimant is only 37 years old and is a college graduate. The claimant sustained a traumatic compensable injury on or about January 3, 2019 which resulted in 49% permanent anatomical impairment. The claimant is physically unable to return to his previous occupation of Arkansas State Trooper. Nevertheless, the evidence demonstrates that there are gainful employment opportunities available for the claimant within his permanent physical restrictions. Expert and credible vocational rehabilitation consulting has been provided to the claimant by Heather Taylor and Keondra Hampton, and additional assistance was provided through TEEM Academy. However, again, the evidence demonstrates that the claimant is not motivated to return to work. As the Full Commission has stated *supra*, the claimant's lack of interest in returning to appropriate

gainful employment impedes an assessment of his loss of earning capacity.

*Gaston, supra.*

After reviewing the entire record *de novo*, therefore, the Full Commission finds that the claimant did not prove he was permanently and totally disabled. The Full Commission finds that the claimant sustained wage-loss disability in the amount of 40% in excess of the 49% permanent anatomical impairment accepted and paid by the respondents. The claimant proved that the compensable injury was the major cause of his 49% permanent anatomical impairment and 40% wage-loss disability. The respondents are entitled to an appropriate offset in accordance with Ark. Code Ann. §11-9-411(Repl. 2012). The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing in part on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's finding that the claimant proved he is entitled to forty percent (40%) wage-loss disability in excess of his forty-nine percent (49%) permanent anatomical impairment.

The claimant is not entitled to wage-loss disability under our Rules due to his wholesale refusal to engage in vocational rehabilitation without reasonable cause. Prior to his hearing with the administrative law judge on April 6, 2023, the claimant contacted his career counselor through TEEM Academy asking to discontinue his job search for the explicit purpose of bolstering his permanent and total disability claim.

Our rules are clear that:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

Ark. Code Ann. § 11-9-505(b)(3).

An employer relying on this defense must show that the claimant refused to participate in a program of vocational rehabilitation or job-

placement assistance or, through some other affirmative action, indicated an unwillingness to cooperate in those endeavors and that such refusal to cooperate was without any reasonable cause. *Tillery v. Alma Sch. Dist.*, 2022 Ark. App. 425 (2022).

Further, in considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission may also consider other permanent disability factors such as the claimant's age, education, work experience, medical evidence and other matters reasonably expected to affect the worker's future earning power. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). These factors are considered in *Beal v. Fairfield Bay Cnty. Club, Inc.*, 2011 Ark. App. 136 (2011) where the Court of Appeals stated:

Beal further testified that he had worked all of his life but that he has not returned to work because "they are not going to let him back out there, as no doctor is going to pass him on a physical and drug test and stuff." Beal is blind in his left eye, but admitted to having glaucoma before his injury. According to Beal he does not feel that there are any jobs he can perform and is now retired.

The Commission disagreed and concluded that "the evidence shows that [Beal] is clearly not motivated to return to any form of gainful employment" and noted that Beal's lack of motivation is a valid consideration in its denial of Beal's wage-loss disability claim. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

In a 2010 case considering wage-loss, the Court of Appeals affirmed the Commission's decision to deny wage-loss to a claimant who was 25-years-old and had not looked for any work outside of her previous job as a cake decorator or work within her restrictions. *Morrison v. Confectionately Yours, Inc.*, 2010 Ark. App. 687 (2010). This claimant received a seven percent (7%) disability rating, but the Court noted that this claimant had not attempted to look for work within her restrictions and had low motivation to return to any work other than her previous job. *Id.* The Commission found that the claimant developed skills as a cake decorator that would serve her well in other lines of work. *Id.*

It is undisputed that the claimant underwent vocational rehabilitation with Ms. Keondra Hampton of Systemedic throughout 2022 and 2023 who believed that the claimant was an excellent candidate to transition into employment with supports in place. (Resp. Ex. 2, P. 29). Since his injury, the claimant has written two books and has published and sold them

through Amazon. (Hrng. Tr., Pp. 58-60). He attends speaking engagements where he presents the story of his accident and recovery. (Hrng. Tr., Pp. 160-162, 164). The claimant attends the gym and uses the treadmill there regularly, walking backwards, forwards, and on an incline. (Hrng. Tr., Pp. 72-73). He cares for his two children, ages four (4) and eight (8) monthly and takes them on various outings alone and is able to drive himself alone for up to three hours, and shops at the grocery store, where he pushes a loaded cart without assistance. (Hrng. Tr., Pp. 39-40, 52-53, 88-89). He is currently drawing retirement from his employer and Social Security disability benefits. (Resp. Ex. 2, Pp. 7-11, 22-27).

The claimant currently volunteers for Magnolia Senior Center where his duties and tasks include “1) assisting with preparing meals for the seniors by pressing the seal on the lunch trays, 2) placing labels on the meal trays, and 3) sorting meals to prepare for delivery.” (Resp. Ex. 2, P. 16). During these volunteer shifts, the claimant “mingled with the seniors and recited the blessing for the meal,” and supervisors reported that the claimant arrives on time and works well with staff and residents. *Id.* As the claimant’s time with Magnolia Senior Center progressed, his duties did as well and he ultimately assisted the kitchen manager with tasks such as inventory, organizing lunch deliveries, and labeling and storing canned items. (Resp. Ex. 2, Pp. 28, 31). The claimant’s volunteer hours were

extended by an additional day in August of 2022 and Systemedic began looking for light duty part-time employment for the claimant through Teem Academy. (Resp. Ex. 2, Pp. 31-32).

The claimant first met with Teem Academy on August 18, 2022, and reported that he “is able to perform everything on his own inside the home and doesn’t need assistance. He is able to cook, clean and take care of himself.” (Resp. Ex. 2, P. 34). The claimant “loves reading in depth books as opposed to magazines or short stories. He can learn by reading instructions.” (Resp. Ex. 2, P. 35). He has no trouble communicating his needs or asking for help when needed. *Id.* Teem Academy found that the claimant “has lots of transferrable skills and some positive employable characteristics, such as willingness to try new things, friendliness, punctuality, and strong motivation to work” and is capable of working independently. (Resp. Ex. 2, P. 37).

The ALJ opined the claimant is highly motivated and continues to make every effort to find and return to some kind of gainful employment if at all possible and is “in this ALJ’s humble opinion, a courageous young man who, despite his occasional bouts with situational depression, is eager and highly motivated to attempt to beat the odds and find gainful employment.” (Op., P. 12). However, despite the assistance with preparing his resume, completing applications, and preparing for interviews, the evidence

indicates that the claimant has no interest in returning to the workforce.

Through his vocational rehabilitation program, the claimant was assigned a career counselor through TEEM Academy to assist with his job search. On June 21, 2023, the respondent carrier was notified that the claimant voluntarily discontinued his employment search through TEEM Academy stating:

Hey Robert, can you take a break from my job hunt sir? Because it's going to be 3-6 months before the judge who heard my case will make a decision and people are calling me about applications that have been put in, honestly, I can't have a paying job right now or it will mess up my case brother. (See attachment to Respondent No. 1's Motion to Introduce Newly Discovered Evidence).

On June 30, 2023, Ms. Keondra Hampton contacted the claimant who "stated he is no longer interested in receiving vocational rehabilitation at this time and has requested to close his vocational rehabilitation file." *Id.* The claimant's vocational rehabilitation file was closed on July 25, 2023. *Id.*

Not only has the claimant refused to continue vocational rehabilitation, he has done so for the explicit purpose of benefiting his workers' compensation claim. This alone renders the claimant ineligible for any disability beyond his impairment rating. The claimant's lack of motivation and unwillingness to continue with vocational rehabilitation and



job placement impedes the Commission's ability to assess the full extent of the claimant's wage-earning capacity.

The claimant should not receive any wage loss disability when he instructed his career counselor to take a break from his job hunt because in his own words, "I can't have a paying job right now or it will mess up my case, brother." To rule otherwise allows claimants to waive rehabilitation or refuse to participate in or cooperate with an offered program of rehabilitation or job placement without reasonable cause and still receive wage loss disability which is in direct conflict with Ark. Code Ann. § 11-9-505(b)(3).

Accordingly, for the reasons stated above, I respectfully dissent.

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MICHAEL R. MAYTON, Commissioner