

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F410668**

**JIMMY L. PERREN, EMPLOYEE**

**CLAIMANT**

**PILGRIM'S PRIDE CORPORATION, EMPLOYER;  
GALLAGHER BASSETT SERVICES/TPA**

**RESPONDENT #1**

**DEATH & PERMANENT TOTAL DISABILITY  
TRUST FUND**

**RESPONDENT #2**

**OPINION FILED DECEMBER 29, 2006**

A hearing in this case was conducted on October 9, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Phillip Wells, Attorney at Law, Jonesboro, Arkansas.

Respondent #1 was represented by Michael R. Mayton, Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by Judy W. Rudd, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held on this claim on August 8, 2006. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to seven stipulations. Six of these stipulations are contained in the Prehearing Order and were confirmed by the parties at the hearing; the parties agreed to the seventh stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on October 3, 2003 and at all other relevant times.
2. Claimant sustained a compensable injury to his right shoulder and left wrist on

October 3, 2003.

3. Claimant's healing period ended on June 21, 2004.

4. Claimant's permanent partial disability rate is \$320.00.

5. Respondent #1 accepted and made payments toward a 10% permanent impairment rating to Claimant's right shoulder.

6. Claimant could not have been permanently and totally disabled before January 9, 2005.

7. Respondent #1 controverts any additional benefits over those benefits due for Claimant's 10% permanent impairment rating.

At the October 9, 2006 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties withdrew the third and fourth issues listed in the Prehearing Order. The parties then confirmed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is permanently totally disabled.

2. In the alternative, whether Claimant is entitled to wage-loss disability benefits.

3. Whether Claimant is entitled to an attorney's fee.

### **DISCUSSION**

At the time of the hearing Claimant was 61 years of age. He completed ten years of education; he has not received his GED. While serving in the Navy he did attend diesel school and equipment operator school. In 1975 or 1976, he attended Black River Vo-Tech and became a certified welder.

Claimant's work history consists mostly of jobs involving manual or skilled labor, although he has some supervisory or administrative experience. After leaving high school

he worked on a farm and as a carpenter. He then worked in a factory until he entered the Navy and became a construction mechanic in the Seabees; he was in the service from 1965 until 1971. After his military service he returned to the factory until he got a job in construction; he kept that job until he began working for the Clay County Road Department in 1979. He was a foreman in the Clay County Road Department until 1990, when he left to work for the Respondent employer in 1991.

Claimant's supervisory or administrative experience came in the course of his employment with the Clay County Road Department. He explained his duties as foreman: "I took care of the bridges, the gravel hauling, over all the crews; and then the truck shop, I did the maintenance myself, the mechanic work myself in the truck shop." He supervised a crew of approximately thirty-six workers, tending to matters such as work schedules, payroll, and leave; he had the authority to hire and fire crew members. He denied having any kind of computer or typing skills.

When Claimant began working for the Respondent employer, he started as a mechanic working at its truck shop and in its feed mill. His activities involved manual labor. About a year before his compensable injury, while at work, Claimant fell eight or nine feet and landed on his shoulder. He was told by a doctor that he "had a real bad bruise" but he did not miss any time from work.

Claimant described the injury he sustained on October 3, 2003.

I was working on the fuel pumps, and I just got them fixed. I come back down to let my boss know I got them fixed. And he told me, he said, "Well," he said, "catch that truck coming in," fixing to come in on the scales.

And so I -- it wasn't a run or a walk; it was just kind of in between. And just before I got to the truck, I stepped on a rock and turned my ankle. And when I did, I spun around, and I actually hit the side of the running board with my

shoulder and everything on the ground. And I also hit my head, but I had my hard hat on, so -- and when I got up, my shoulder, I couldn't move it then. It was just limp.

Claimant reported his injury to his supervisor, presented to the company nurse, and then went to the company doctor.

Claimant presented to Dr. Ron Bates on October 3, 2003. Claimant reported "having difficulty moving the right shoulder." Upon examination, the doctor recorded the following: "The patient declines to move the right upper shoulder stating that it is very difficult to do so. He has full passive range of motion however." The doctor assessed a right shoulder strain and placed Claimant on restricted work status. Claimant was unable to actively move his right upper extremity at an October 9, 2003 follow-up visit. Dr. Bates assessed a "[r]ight shoulder injury, most consistent with a rotator cuff tear." An MRI study of Claimant's right shoulder performed October 14, 2003 revealed a chronic tear of the rotator cuff tendon, moderate-sized joint effusion, a tear of the anterior glenoid labrum, and a tear of the subscapularis tendon. Dr. Bates noted on October 16, 2003 that Claimant needed "an orthopedic referral for a tear of the rotator cuff."

Claimant then came under the care of Dr. Jeff Angel, an orthopedic surgeon. On November 11, 2003, Claimant underwent an open repair of the torn rotator cuff, acromioplasty, and distal clavicle resection. Shortly after discharge Claimant began having some drainage from his right shoulder. Therefore, on November 18, 2003 he underwent an incision, debridement, and draining of a seroma in his right shoulder. This procedure was successful.

After a course of physical therapy, Claimant returned to Dr. Angel on February 16, 2004. Claimant reported "that his shoulder is improving but he is stuck on ... how much

lifting he can do and thinks he is plateauing with physical therapy.” Upon examination, Dr. Angel opined that Claimant should undergo manipulation of his right shoulder. This procedure occurred on February 24, 2004; Claimant’s contractures were relieved and he “had good full range of motion, 180 degrees of active range of motion and forward flexion and good 45 degrees external rotation, internal rotation.” He continued to follow up with Dr. Angel after this procedure.

At Claimant’s examination on June 21, 2004, Dr. Angel recorded the following:

He is using his shoulder. He still lacks flexion above 90 degrees. Abduction above 80 degrees. He is neurovascularly intact. He does not have much pain. There is some pop at the very top. Once activated, he can keep it up there.

The doctor assessed a healing right shoulder with some residual disability and rated Claimant with a 10% permanent impairment rating to the body as a whole. On a Form AR-3 signed on the same date, Dr. Angel released Claimant with a good prognosis. He allowed Claimant to return to work with a restriction of “No overhead lifting permanent.”

After his November 2003 procedures, Claimant returned to work at his same job. For approximately six months he underwent physical therapy and worked solely with his left hand. Following his June 21, 2004 examination by Dr. Angel, Claimant worked four more days and was then laid off. The feed mill manager, Jason McDougald, testified that the Respondent employer had planned to eliminate Claimant’s job before he was injured. McDougald testified that Claimant was a “good worker” that he hated to see go.

The Respondent employer made an attempt to keep Claimant: he was offered a job driving a truck to haul feed out to farms. Claimant was familiar with the type of truck involved; he had worked on these trucks as a mechanic, and had driven them on site and

off. McDougald testified that Claimant could perform all the operations required by this job with one hand. Claimant disagreed.

Q. Now, besides driving the truck itself, the operations of a truck driver on the grain truck that you were offered the job, is that a job that you physically could have performed?

A. No, sir.

Q. And describe to the Judge what about that job was something you could not physically do.

A. Well, as far as driving, I would have had to have drove one-handed, and I couldn't shift the truck with my right hand. And it would have been dangerous to even try to do something like that, you know, to do it all the time.

As far as opening the bins, I would have had to have used my left hand all the time to open the bins, and it just -- there was just no way I could do it.

Q. Now, when you say you had to drive the truck and shift, was it a truck that required shifting?

A. Yes.

Q. When you drove this truck down to Jacksonville, or wherever, did you have to actually drive it after your shoulder had problems?

A. Yes.

Q. Tell the Judge what type of problems you had driving the truck.

A. I had to shift it with my left hand. (Indicating) I would put this hand on the steering wheel, and stick this hand over here and shift it as I was going down the road, and then I would come back to driving like this.

Q. Did you feel that was something you could perform safely and properly?

A. No. No, sir, I could not.

Q. Did you tell the people that offered you the job as a truck driver there that that's something you could not physically perform?

A. Yes, sir.

Claimant testified that no other jobs were offered to him. Further, he did not believe that he could return to work as a mechanic: “At the feed mills, you have to do a lot of climbing and greasing. And there’s a lot of strenuous work with your arms, like pulling wrenches. We’d replace augers, bearings. And degrees, you have to climb degrees. And there’s no way I could just climb, you know, with one hand.” Even with the accommodations offered by the Respondent employer, Claimant did not believe he could perform a full day’s work as a mechanic.

On direct examination, McDougald testified that he knew about Claimant’s medical work restriction and that he could have worked Claimant around that restriction. However, on cross-examination, he admitted that it was not feasible for the long term for Claimant to continue working as a mechanic. He testified that the truck driving job could have been performed by Claimant with one hand and without any overhead lifting. He recalled that Claimant “said he just didn’t believe he could do it.” On cross-examination, McDougald seemed to agree.

Q. Now, as the manager of the feed mill and in charge of the operation involving the trucks, you would admit that it’s important to have truck drivers that can do that job safely?

A. Yes, sir.

Q. All of the nine trucks that you had in operation, were they standard shifts?

A. Yes, sir.

Q. And you’ve heard Mr. Perren testify that he could not shift with his right hand?

A. Yes, sir.

Q. Do you have any reason to dispute that?

A. No, sir.

Q. And in terms of whether that was a medical restriction, Mr. Perren, you heard him testify today as to his physical limitations?

A. Yes, sir.

Q. And do you have any dispute as to what his physical limitations are?

A. No, sir.

Q. And he testified that he felt it was not safe for him to be able to try to shift with his left hand while driving with his left hand. Would you agree with that statement?

A. Yes, sir.

After being laid off, Claimant applied for and received unemployment compensation.

These benefits were last paid on January 9, 2005; he continued to look for work during that time.

Q. And describe for the Judge what type of jobs you were looking for.

A. I was looking for jobs like -- something that I could do, you know, that wouldn't take a whole lot of strenuous work with my right hand, and I could do most of it with my left hand. I went -- I checked like auto parts stores. I checked at Sunrise Honda; they had a job open like delivering motorcycles to different places. B & R Marine. I checked Wholesale Tire. Just all kinds of places I went to and checked to try to find jobs. I checked with the County to see if they might have something, you know, that I could do. White Farms down the road from me there, I checked with them to see if they had anything I might be able to do on the farm. Numerous places I've checked.

Q. Now, Mr. Perren, other than doing mechanic work, and based on your past work experience, is there any kind of administrative or supervisory jobs that you can do or have skills to do?

A. I could probably do a supervisor job on some things, you know, that I knew about, but -- like I was supervisor on the County road department, you know, like bridges and roads and stuff like that.

Although he continued to look for a job up until the time of the hearing, Claimant has been

unable to find work. He applied for and is receiving social security disability benefits. He denied that this caused him to moderate his efforts to find a job.

Claimant testified, and the medical records corroborate, that he needed additional medical treatment after his release by Dr. Angel. He returned to Dr. Angel on January 19, 2005; on his note of that date, the doctor wrote: "I think he cannot do manual labor /construction." Claimant was subsequently referred to Dr. Bruce Safman, a pain management specialist. Claimant first presented to Dr. Safman on March 4, 2005; the doctor did trigger point injections then and upon follow-up presentations. On March 18, 2005, the Dr. Safman recorded that Claimant "has done very well with the trigger point injections."

Claimant described his current condition: "If I use [my shoulder] a whole lot, I'll pay for it the next day. And it gets stiff where I can't hardly move it, you know, if it's pretty active." Claimant is right-handed. His activities include mowing his yard with a riding mower, using a weed eater left-handed, and "keep[ing] the maintenance and everything done around the house, you know, normal stuff." He can't shoot a gun to hunt due to his shoulder condition; it is difficult for him to cast a rod to fish; he is unable to ride horses as he did before his injury. He is taking prescription and non-prescription medications.

Respondents' Exhibit #1 contains records of the Arkansas Employment Security Department related to Claimant's request for benefits. On page 11 of the exhibit, on a form he signed on July 2, 2004, Claimant checked "Yes" when asked: "Are you able and available for work?" On that same page he noted: "I can only raise my arm so far due to a shoulder injury that occurred at work. I can do maintenance, welding and construction." On page 14, he explained why he declined the truck driving jog: "Not a truck driver, & could

not function because of shoulder injury[.]” On page 16, he indicated that he could begin full time work immediately; he also noted that he has disabilities that limit his ability to work.

Claimant’s wife testified at the hearing. She described him as “a very independent person” who was “very active” prior to his injury. After his injury, Claimant is “not able to use his right arm to lift it, and it constricts his things to do -- I mean he can’t hardly use it.” She explained that if Claimant did use his arm extensively, “he’s in the recliner for a couple of days after that from the pain in the -- going up his neck, can cause headaches.” His problems are caused when he tries to perform activities around the house. Even with his medication, “if he is very active, it still takes him a couple of days to get where he’s back to where he can do anything without pain.” On cross-examination Claimant’s wife acknowledged that Claimant is still able to ride his motorcycles, but can only do so with the cruise control on “if he’s going very far at all.”

#### **A. Permanent Total Disability**

“Permanent total disability” means inability, because of compensable injury, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). Claimant has the burden of proving his inability to earn any meaningful wage in the same or other employment; he must sustain this burden by a preponderance of the evidence. Ark. Code Ann. §§ 11-9-519(e)(2) and 11-9-704(c)(2). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

Claimant’s shoulder injury is not scheduled under the Act; therefore, his entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Pursuant to this

statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant permanently and totally disabled based upon wage-loss factors. Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 405, 141 S.W.3d 916, \_\_\_ (2004).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity.

Lee v. Alcoa Extrusion, Inc., 89 Ark. App. 228, 233, \_\_\_ S.W.3d \_\_\_, \_\_\_ (2005) (citations omitted). In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) provides that permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A).

I find that Claimant has not sustained his burden of proving by a preponderance of the evidence that he is permanently totally disabled. In the course of securing unemployment compensation benefits, Claimant represented that he is able and available for work, although he is disabled. Dr. Angel discounts Claimant's ability to perform manual labor; however, Claimant does have some supervisory or administrative experience. There is no indication that he cannot perform work at the sedentary level, at least. The evidence will not sustain a finding that Claimant is permanently totally disabled.

#### **B. Wage-loss Disability Benefits**

In the alternative, Claimant seeks wage-loss disability benefits. He has been

assessed with a 10% permanent impairment rating due to his right shoulder injury. Therefore, the Commission may consider his claim for wage-loss disability benefits in excess of his permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Logan County v. McDonald, 90 Ark. App. 409, 416-17, \_\_\_ S.W.3d \_\_\_, \_\_\_ (2005).

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

McKinney v. Plastics Research & Dev., Full Workers' Compensation Commission Opinion filed November 10, 2004 (E901881)(citations omitted); see Ark. Code Ann. § 11-9-522(b)(1); Logan County, 90 Ark. App. at 416-17, \_\_\_ S.W.3d at \_\_\_\_\_. In addition, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a); see McKinney, supra. "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A). Claimant has the burden of proving his entitlement to wage-loss disability benefits by a preponderance of the evidence. See Ark. Code Ann. § 11-9-704(c)(2).

A claimant is not entitled to permanent partial disability benefits in excess of his permanent physical impairment if, subsequent to his injury, he has a bona fide and reasonably obtainable offer to be employed at wages at least equal to his average weekly

wage at the time of the accident. Ark. Code Ann. § 11-9-522(b)(2). Either the employer or the insurance carrier has the burden of proving the claimant's receipt of a bona fide offer to be employed. Ark. Code Ann. § 11-9-522(c)(1). If a claimant's physical condition precludes his return to work in an offered position, then that offer is not "reasonably obtainable." See Black v. George Kell Motors, Full Workers' Compensation Commission Opinion filed May 12, 1995 (E119672).

I first find that Claimant is motivated to seek further employment and has a positive attitude in looking for work. Claimant credibly testified about his continuing efforts to find work and that he would like to return to work despite receiving social security disability benefits. His former boss, McDougald, considered Claimant a "good worker" and tried to retain his services. Clearly, Claimant is motivated and interested in employment, and has the right attitude in seeking further work.

At the time of the hearing, Claimant was 61 years of age; he completed ten years of education but has not received his GED. He is a certified welder and has specialized training in diesel and equipment operation. Much of his employment history consists of jobs that require manual or physical labor, but he does have supervisory or administrative experience as a result of his job with the Clay County Road Department. He is right-handed, but his use of this hand is limited due to the condition of his right shoulder; he is permanently impaired in his right upper extremity and has a permanent work restriction due to this impairment. Dr. Angel does not believe he will return to work involving manual labor. He has qualified for social security disability benefits. Thus, there is some degree of wage-loss following his compensable injury.

Respondents contend that the truck driving job offered to Claimant constituted a bona fide and reasonably obtainable offer of employment, so that Claimant is not entitled to permanent partial disability benefits in excess of his permanent physical impairment. Claimant argues that the truck driving job was not a bona fide reasonably obtainable offer given his physical condition. I find that Respondent #1 did not sustain its burden on this point. While the permanent impairment assigned by Dr. Angel does not appear to prohibit truck driving, Claimant testified that he physically cannot drive a standard-shift truck safely, due to his right shoulder condition. McDougald, who believes Claimant is a good employee worthy of retaining, did not dispute Claimant's view of his physical limitations and agreed that it would not be safe for Claimant to shift with his left hand while driving with his left hand. McDougald's testimony that Claimant could operate the feed truck's other mechanisms with one hand is a tacit admission that Claimant is, indeed, limited to the use of one hand. Claimant is certainly credible on this point: given his work ethic, it is difficult to believe he rejected a truck driving job that he could have performed.

After considering all relevant wage-loss factors, I find that Claimant established a decrease in his wage-earning capacity equal to 40% to the body as a whole. He is entitled to benefits for this decrease. Further, I find that Claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. He could perform his job prior to his compensable injury; since then, the medical evidence and McDougald's testimony corroborate his testimony that he cannot perform the manual labor that he could beforehand. Claimant's compensable injury is the sole, and thus the major, cause for his decrease in earning capacity.

### **C. Attorney's Fee**

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). Respondent #1 stipulated that it controverts any additional benefits over those benefits due for Claimant's 10% permanent impairment rating. Further, Claimant is awarded wage-loss disability benefits in this opinion. Therefore, pursuant to the statute, Claimant is entitled to an award of an attorney's fee on the amount of wage-loss disability benefits awarded herein.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on October 3, 2003 and at all other relevant times.
3. Claimant sustained a compensable injury to his right shoulder and left wrist on October 3, 2003.
4. Claimant's healing period ended on June 21, 2004.
5. Claimant's permanent partial disability rate is \$320.00.
6. Respondent #1 accepted and made payments toward a 10% permanent impairment rating to Claimant's right shoulder.
7. Claimant could not have been permanently and totally disabled before January 9, 2005.
8. Respondent #1 controverts any additional benefits over those benefits due for Claimant's 10% permanent impairment rating.

9. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to permanent total disability benefits. In the course of securing unemployment compensation benefits, he represented that he is able and available for work, although he is disabled. There is no indication in the record that Claimant cannot perform work at least at the sedentary level.

10. Claimant is motivated to seek further employment and has a positive attitude in looking for work. Claimant credibly testified about his continuing efforts to find work; his former boss considers Claimant a “good worker” worthy of retention.

11. Respondent #1 did not sustain its burden of proving that Claimant received a bona fide and reasonably obtainable offer of employment. Claimant credibly testified that he physically could not drive a standard-shift truck safely, due to his right shoulder condition. Claimant’s boss did not dispute the Claimant’s view of his physical limitations and agreed that it would not be safe for Claimant to shift with his left hand while driving with his left hand. Given Claimant’s work ethic, it is difficult to believe that he rejected a truck driving job that he could have performed.

12. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in his wage earning capacity equal to forty per cent (40%) to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. He could perform his job prior to his compensable injury; since then, the medical evidence, Claimant’s testimony, and McDougald’s testimony all prove that Claimant cannot perform the extent of physical labor

that he could beforehand.

13. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715, to be paid by Respondent #1.

**AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein. Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondent #1 in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III  
Administrative Law Judge

DFA/ml