

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102835

HARLAN PENNINGTON, EMPLOYEE	CLAIMANT
SERVICE EXPERTS OF ARK., LLC, EMPLOYER	RESPONDENT NO. 2
AMERICAN MOTORIST INS. CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED JUNE 22, 2009

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

Claimant appears Pro Se.

Respondent No. 1 represented by the HONORABLE BETTY J.  
DEMORY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID SIMMONS,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE CHRISTY KING,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's  
opinion filed September 10, 2008. The administrative law  
judge found that nursing and attendant care services

rendered by a home health aide were reasonably necessary. The administrative law judge found that the claimant was permanently and totally disabled. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved home health care was reasonably necessary. We find that the claimant proved he was entitled to wage-loss disability in the amount of 16%.

I. HISTORY

Harlan Oliver Pennington, age 63, testified that he completed the seventh grade. Mr. Pennington testified that he is able to read, write, and do simple math. The claimant began working for the respondent-employer, Service Experts, in about July 1993. The claimant testified that he was the respondents' Master Plumber over the commercial plumbing division. Dr. James S. Mulhollan performed surgery on the claimant's left knee in May 2000. Dr. Mulhollan informed the respondents on June 1, 2000, "By Monday, June 5, I think he will be able to resume his work as a plumber."

The parties stipulated that the claimant sustained compensable injuries to his right wrist, left shoulder, and

knee on February 28, 2001. The claimant testified that he tripped over a piece of wire and fell, "and I did a nose dive and broke my arm and jammed my shoulder and busted my knee."

Although the parties stipulated that an injury occurred on February 28, 2001, Dr. William F. Hefley, Jr. actually examined the claimant on February 27, 2001: "Harlan is a 55 year old left hand dominant gentleman, who works as a plumber. He was at work this morning when he tripped over a cord and fell on an outstretched right upper extremity....X-RAYS: He has a comminuted displaced right distal radius Colles fracture." Dr. Hefley's impression was "1. Comminuted right displaced right Colles fracture....The wrist was gently reduced in the emergency room. A Sugar Tong splint was applied."

Dr. Hefley noted on March 1, 2001, "I took Harlan Pennington to the operating room today for reduction and external fixation of the right Colles fracture. He tolerated surgery nicely." Kenneth Weaver, PA-C, examined the claimant on March 9, 2001 and noted, "Films of right wrist reveal the hardware to be well fixed in good position and the fracture to be well aligned with some callus

formation beginning within the fracture. Films of the left shoulder reveal the humeral head to be slightly elevated, AC DJD, downsloping acromion and some arthritis of the glenohumeral joint." Mr. Weaver's impression included "2. Impingement syndrome left shoulder."

The claimant followed up with Dr. Hefley on April 13, 2001:

He is 6 weeks post right Colles ex/fix. The wrist is feeling well. He has a new problem today of left knee problems. He originally fell and fractured his patella in 1978. He was treated in Hot Springs with ORIF. About six months later he had the hardware removed then one year ago he was having problems with the knee and Jim Mulhollan did an arthroscopy on him. The knee has been doing well until six weeks ago when he was injured at work. He tells me he was walking at work and tripped and fell. That was when he fractured the right wrist. He didn't realize the knee had been injured as well because the wrist was hurting so much but he has had giving way episodes in the left knee since then and wanted to have it checked. He is not having pain.... On exam he has a small effusion in the left knee....

X-RAYS: Left knee films reveal significant patellofemoral and moderate varus osteoarthritis. The patella fracture is healed. He has some patella BAJA. Right wrist fracture is healing well.

Dr. Hefley's impression was "1. 6 weeks post right Colles ex/fix, doing well. 2. Left knee status post patellar fracture now with patella BAJA and posttraumatic

varus patellofemoral DJD. I don't see any new injury that occurred six weeks ago." Dr. Hefley treated the claimant's left knee conservatively.

Dr. Hefley noted on April 17, 2001, "I took Harlan Pennington to the operating room today and removed the external fixator from the right wrist today. He tolerated surgery nicely." Dr. Hefley pronounced maximum medical improvement for the claimant's right wrist on June 22, 2001.

Dr. Hefley noted on September 12, 2001, "We are going to proceed with a left knee arthroscopy." Dr. Hefley performed an "arthroscopy, a revision medial meniscectomy and tri-compartmental chondroplasty" on September 21, 2001. The claimant testified that he returned to work in November 2001. Dr. Hefley noted on February 4, 2002, "He is not improving and would like to proceed with knee replacement surgery." The claimant testified that Service Masters terminated his employment on or about October 3, 2003.

Dr. Hefley performed a left total knee replacement arthroplasty on February 20, 2004. The claimant testified that, while at home recovering from surgery, he retained the in-home nursing care of Elizabeth Mazingo. The claimant described Ms. Mazingo's services: "Everything around the

house and taking care of me, changing bandages, lifting that big old heavy machine that I had to have in the bed for exercising my leg, cooking, everything that needed to be done, you know, for me to get out of the hospital instead of being in rehab at the hospital....She stayed with me 24 hours a day there at the house basically."

Dr. Hefley performed a left shoulder arthroscopy on August 13, 2004. A Baptist Health General Adult Admission Profile on that date listed JoAnn Mazingo as the claimant's Primary Caregiver. Ms. Mazingo's Relationship to the claimant was listed as "Friend."

Dr. Hefley noted in part on October 13, 2004, "2. We'll let him begin to lift objects up to 10 pounds but no higher than chest level. 3. He could technically go back to limited/light duty at this point given those restrictions. He can do overhead reaching and overhead work as long as it does not involve any lifting."

A hearing was held on November 16, 2004. The claimant testified that he had not returned to work. Dr. Hefley reported on November 17, 2004: "1. We are going to release him at this point with regard to his shoulder. He can do overhead work and reaching, however, I do want to limit his

lifting in the left hand to no more than 25 pounds. In about three more months he should be fine to do unrestricted work and lifting with the left arm."

An administrative law judge filed an opinion on January 20, 2005. The administrative law judge found, among other things, that the claimant "was temporarily totally disabled for the period commencing October 3, 2003, and continuing until such time as he reaches the end of his healing period or is released to return to appropriated (sic) work, a date to be determined, in addition to prior periods of total incapacitation growing out of the February 27, 2001, compensable injuries." The administrative law judge found that Dr. Hefley's treatment was reasonably necessary. (The Full Commission affirmed and adopted the administrative law judge's decision in an opinion filed July 18, 2005).

The claimant followed up with Dr. Hefley on February 9, 2005:

Mr. Pennington is now 1 year out from left TKR. He is 5-1/2 months out from left shoulder arthroscopy. With respect to the left knee, it is doing rather well. He has some morning stiffness and tightness on most days but once he is up and around and he stretches the knee it does loosen up and it will feel better for the rest of the day. It does not interfere with his sleep. He gets around well on it.

With regard to the left shoulder it is feeling well much of the time. It does get a bit sore and achy if he overuses it. He can do some overhead reaching and even some lifting up to 15 to 20 pounds to shoulder level but he has been avoiding doing any lifting or heavy work overhead....

Today he demonstrates a normal gait without limp. Exam of the left knee does not reveal any effusion, erythema or warmth. His surgical scars are all well healed. He has excellent range of motion from 0 to 135 degrees. The knee is stable on exam.

With regard to the left shoulder, he has good active and passive ROM. He has 170 degrees forward elevation, 170 degrees abduction, 50 degrees external rotation and internal rotation to T12 on both active and passive range of motion. He has good strength on manually resisted internal and external rotation....

**PLAN:**

1. Unless he has any problems with the knee or shoulder we'll see him back in about three years and make x-rays of the knee at that time.
2. Mr. Pennington has raised concerns about him ever being able to go back to work as a master plumber. These are impairment and disability issues which apparently are still open for final comment before the Industrial Commission. I will not make any impairment determinations today. These are questions which may be forthcoming to use either from the work comp carrier or the Industrial Commission directly and when should they come before us we can address them at that time. It may very well be that he might be sent out to an independent medical examiner for final impairment rating.

Dr. Hefley assigned the claimant a Permanent Impairment Rating on November 1, 2005. Dr. Hefley stated that the

claimant's left knee impairment was 37% lower extremity, 15% whole person. Dr. Hefley stated that the claimant had reached maximum medical improvement on February 9, 2005. Dr. Hefley noted, "The patient will require periodic observation and surveillance regarding his total knee replacement, with the next routine follow-up recommended in February of 2008."

The claimant followed up with Dr. Hefley on March 14, 2006:

Harlan is here today so we can evaluate his left shoulder. Apparently the work comp carrier wants to settle with him and is covering his left shoulder injury as an industrial injury. They would like us to provide an impairment rating.

The left shoulder only bothers him with overhead movements. He tried throwing a ball with his grandchildren a while back, and this was a bit difficult for him. If he reaches over head to change a light bulb or do a bit of overhead work, this will also bother him. For the most part, he is reasonably happy with how the shoulder is doing.

The knee hurts once in a while, but overall that is doing reasonably well also....

Exam was limited to the left shoulder today. There is no deformity or swelling noted. Passive forward flexion is to 160 degrees, abduction to 160 degrees, external rotation is 80 degrees, and internal rotation is 70 degrees. Actively, he will only forward flexion to about 135 degrees and abduct to 120 degrees. He has

good strength on manually-resisted internal and external rotation as well as in the supraspinatus position. I would grade these at 5/5. Distal neurovascular status is intact in the left upper extremity. He does not have any impingement signs today. There is no crepitation of shoulder motion....

Dr. Hefley gave the following impression: "He is 19 months (8-13-2004) post left shoulder arthroscopic superior labrum anterior posterior repair, subacromial decompression, and distal clavicle resection, doing well....We will go ahead and calculate a permanent impairment rating for the left shoulder."

The parties have stipulated that the claimant reached the end of his healing period for his left shoulder "no earlier than March 14, 2006."

Dr. Hefley calculated a Permanent Impairment Rating for the claimant's left shoulder on March 24, 2006. Dr. Hefley assigned 13% to the claimant's upper extremity and 8% to the whole person.

The parties stipulated that the claimant "has been assigned a 37% anatomical impairment rating to the left lower extremity; a 10% anatomical impairment to the right upper extremity, and an 8% anatomical impairment rating to the body as a whole for his left shoulder."

The claimant followed up with Dr. Hefley on January 2, 2008: "He is 3.9 years out from his left total knee replacement. He lets me know that he is able to get around on it fairly well; however, he does notice some popping with ambulation that concerns him a lot....On exam, he demonstrates a normal gait. His knee alignment is neutral. The collateral ligaments are intact. There is no effusion and no erythema. He has good strength in flexion and extension. His range of motion is 0 to 130 degrees....AP and lateral views of the left knee show the implants to be well seated, fixed and in good position. There are no lytic processes noted....I explained to him that the popping in his knee is the metal parts colliding with the plastic parts within his implant and he understands this."

The record indicates that Dr. Hefley's assistant signed a Work Status Report on January 2, 2008 with the following restrictions: "Class IV Moderate limitation of functional capacity - patient is capable of clerical, sedentary type activities. NO lifting greater than 10 lbs. NO bending, stooping and twisting."

On or about March 24, 2008, the Commission received a letter to the administrative law judge from Elizabeth Mazingo:

This concerns Mr. Harlan Pennington, WCC File No: F102835 I was an In Home Health Aid for Mr. Penningtons late wife for two years. I am now retired.

When Dr. Hefley talked to Mr. Pennington about his knee surgery he was told he would be in the hospital for about a week, then in rehab. for a few days because he didn't have anyone in the home to care for him.

When I agreed to live with Mr. Pennington Dr. Hefley released him from the hospital on Sunday after surgery on Friday.

I lived with him for six weeks after the knee replacement. I used my car to transport him to and from Doctors apointments and therapy (sic) apointments.

When he had his shoulder surgery. I went every day to see after him. Again, I used my car to transport him to Dr. and therapy.

He has ask me to send you copies of my qualifications. Any other Questions about my qualifications can be checked through The State Of Arkansas Department of Human Services, Office of Long Term Care.

Hopefully this will clear up any questions the insurance company might have.

A pre-hearing order was filed on May 13, 2008. The claimant wrote on his pre-hearing questionnaire, "I had a lady who stayed with me after surgrey (sic) - Drove me to Dr

Apts and therapy (sic). I paid her out of my pocket. I was never paid for that. The insurance lady ask (sic) for a signed statement from her but, they never paid me back."

Respondent No. 1 contended that it had paid all appropriate benefits to which the claimant was entitled.

The administrative law judge scheduled a hearing on the issues of "nursing/attendant care services; wage loss/permanent total disability; Second Injury Fund liability; and controverted attorney fees."

A hearing was held on June 19, 2008. The claimant testified that he had not worked for any employer since his termination in October 2003. The claimant testified that he was receiving social security benefits for retirement. The claimant testified regarding his physical condition, "Well, as long as I don't try to do too much I make it pretty good. The pain has subsided from what it was."

An administrative law judge filed an opinion on September 10, 2008. The administrative law judge found, among other things, that the nursing care services rendered by Ms. Mazingo were reasonably necessary. The administrative law judge found that the claimant was permanently and totally disabled. The administrative law

judge found that Respondent No. 2, Second Injury Fund, was not liable; Respondent No. 1 does not appeal this finding. Respondent No. 1 appeals to the Full Commission the findings regarding nursing services and permanent total disability.

## II. ADJUDICATION

### A. Wage-Loss Disability

The claimant sustained compensable scheduled injuries to his right wrist and left knee. A claimant who sustains a scheduled injury is limited to the applicable allowances set forth in Ark. Code Ann. §11-9-521, and such benefits cannot be increased by considering wage-loss factors absent a finding of permanent total disability. *Federal Compress & Whse. v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996). "Permanent total disability" means 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) (Repl. 1996). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519(e)(2) (Repl. 1996).

The instant claimant did not prove by a preponderance of the evidence that he was permanently and totally disabled

as a result of the compensable injuries to his right wrist and left knee. The claimant sustained compensable injuries on February 28, 2001 and subsequently underwent right-wrist surgery. The treating surgeon, Dr. Hefley, pronounced maximum medical improvement for the claimant's right wrist on June 22, 2001. The claimant then underwent left-knee surgery and a subsequent left-knee replacement. Dr. Hefley opined that the claimant had reached maximum medical improvement for his left knee on February 9, 2005. Dr. Hefley stated in March 2006 that the claimant's knee caused occasional pain but that the claimant was "doing reasonably well." Dr. Hefley examined the claimant's knee in January 2008 and noted that the claimant walked with a normal gait. Dr. Hefley reported that the claimant's knee alignment was neutral, that the ligaments were intact, and that there was no effusion or erythema. Dr. Hefley did not opine that the claimant was permanently and totally disabled with regard to the right wrist or left knee. The Full Commission finds that the claimant did not prove he was entitled to permanent benefits in excess of the anatomical impairment ratings accepted and paid by the respondents for the claimant's compensable scheduled injuries.

The claimant sustained an unscheduled compensable injury to his left shoulder. In considering claims for permanent partial disability benefits in excess of 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 earning capacity. Ark. Code Ann. §11-9-522(b) (1) (Repl. 1996).

In the present matter, the claimant is age 63 with only a seventh grade education. However, the claimant testified he is able to read, write, and perform simple mathematics. The claimant began working for the respondent-employer in July 1993. The claimant worked as a Master Plumber and performed supervisory responsibilities. It was stipulated that the claimant sustained compensable scheduled injuries to his right wrist and left knee on February 28, 2001. The claimant also sustained a compensable injury to his left shoulder on that date. The claimant initially returned to work for the respondents in November 2001 but his employment was terminated on or about October 3, 2003. Dr. Hefley operated on the claimant's left shoulder in August 2004.

Dr. Hefley opined by October 2004 that the claimant could return to work with restrictions, but the claimant did not attempt to return to work for any employer. Dr. Hefley noted on November 17, 2004, "1. We are going to release him at this point with regard to his shoulder. He can do overhead work and reaching, however, I do want to limit his lifting in the left hand to no more than 25 pounds. In about three more months he should be fine to do unrestricted work and lifting with the left arm."

Dr. Hefley reported on February 9, 2005, "With regard to the left shoulder it is feeling well much of the time. It does get a bit sore and achy if he overuses it. He can do some overhead reaching and even some lifting up to 15 to 20 pounds to shoulder level but he has been avoiding doing any lifting or heavy work overhead." Although noting that the claimant had concerns about attempting to return to work as a Master Plumber, Dr. Hefley did not opine that the claimant was permanently and totally disabled. Dr. Hefley noted in March 2006 that overhead movements such as throwing a ball or reaching overhead bothered the claimant, but that overall the claimant was "reasonably happy with how the

shoulder is doing." Dr. Hefley assigned the claimant an 8% whole-body impairment rating on March 24, 2006.

The claimant has not worked for the respondents or any other employer since October 2003. The Full Commission recognizes that the claimant may not be able to return to full-time, unrestricted work as a Master Plumber. The record demonstrates, however, that the claimant is not motivated to perform any gainful employment, even work within the claimant's physical restrictions. A report on January 2, 2008 indicated that the claimant had only moderate limitation of his functional capacity and was capable of clerical, sedentary activities. We again note that the claimant is able to read, write, and perform math. The claimant's lack of motivation is an impediment to a full assessment of his ability to return to appropriate work. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). In the present matter, the Full Commission does not affirm the administrative law judge's finding that the claimant is permanently and totally disabled. Instead, we find that the claimant proved he was entitled to wage-loss disability in the amount of 16% in excess of the 8%

anatomical impairment accepted by the respondents for the compensable shoulder injury.

B. Nursing Services

The employer shall promptly provide for an injured employee such medical treatment and nursing services as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The Arkansas Supreme Court has said that the services contemplated under "nursing services" are those rendered in tending or ministering to another in sickness or infirmity. *Little Rock Convention & Visitors Bur. v. Pack*, 60 Ark. App. 82, 959 S.W.2d 415 (1997), citing *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979). Nursing services do not include assistance with household and personal tasks which the claimant is unable to perform. *Pine Bluff Parks & Recreation Co. v. Porter*, 6 Ark. App. 154, 639 S.W.2d 363(1982).

An administrative law judge found in the present matter, "5. Nursing and attendant care services rendered to and on behalf of the claimant by Ms. Elizabeth Mazingo, was reasonably necessary and causally related to the treatment of the claimant's compensable injury of February 27, 2001."

The Full Commission affirms this finding. The claimant sustained compensable injuries to his right wrist, left shoulder, and left knee on or about February 27, 2001. The claimant testified that Ms. Mazingo began performing in-home nursing care in about February 2004 while the claimant was recovering from surgery. The claimant testified that Ms. Mazingo's personal assistance including changing bandages and physical rehabilitation. Elizabeth Mazingo testified that she had worked as a licensed home health aide since 1993. Ms. Mazingo described her work for the claimant: "That included everything, the bandages, the bed, gave him his medication. I changed his clothes I wiped him when he was dirty. Carried the bedpan and urinal. Cleaned house for him. Took him to his doctor's appointments, transfer him from the bed to a wheelchair, and just anything. I did housekeeping, cooking. Basically just about everything for him because he wasn't able."

We note that Elizabeth Mazingo did assist the claimant with assistance in some household and personal tasks which were not directly nursing services. Nevertheless, the record shows that the majority of Ms. Mazingo's work for the claimant was related to home health care and rehabilitation

after surgery for his compensable injuries. The claimant testified that he paid Ms. Mazingo approximately \$4,800.00 for her services. The administrative law judge determined that Ms. Mazingo was entitled to a weekly rate of \$480.00 for the claimant's six-week recovery period following knee replacement surgery. The administrative law judge calculated a weekly rate of \$280.00 for the claimant's four-week recovery period following shoulder surgery. A total of these two rates calculates to \$4000. However, the administrative law judge ordered Respondent No. 1 to reimburse the claimant "for nursing services totaling \$3,840.00." Because Elizabeth Mazingo was providing home-based services to the claimant involving driving, housekeeping, and shopping, and not exclusively nursing care services, we find that the claimant is entitled to the sum of \$1,920.00 to reimburse Ms. Mazingo for nursing care services.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved Ms. Mazingo's home health care services were reasonably necessary in connection with the compensable injury. We direct the respondents to reimburse the claimant for these services in

the amount of \$1,920.00. The Full Commission finds that the claimant proved he was entitled to 16% wage-loss disability in excess of the 8% anatomical impairment for his compensable left shoulder injury. The record demonstrates that the compensable injury was the major cause of the claimant's wage-loss disability. The claimant did not prove he was permanently and totally disabled for the scheduled injuries to his right wrist or left knee. The Full Commission therefore affirms the administrative law judge's opinion as modified.

IT IS SO ORDERED.

---

A. WATSON BELL, Chairman

---

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After a de novo review of the record, I concur in part and respectfully dissent in part from the majority opinion. I concur that the home health care he received was reasonably necessary. However, I dissent from the majority opinion and find that the claimant proved by a preponderance

of the evidence that he is permanently and totally disabled and that he is entitled to reimbursement of eighty percent of his expenses for those home health care.

PERMANENT DISABILITY BENEFITS

Arkansas Workers' Compensation law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998). If the employee is totally incapacitated from earning a livelihood at that

time, he is entitled to compensation for permanent and total disability. See Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

For an award of permanent benefits, the compensable injury must be the major cause of the disability or impairment. If the injury combines with a pre-existing disease or condition, or the aging process, to cause or prolong the disability, permanent benefits are available only if the compensable injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. Sec. 11-9-102(4)(F)(ii). Major cause is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. Sec. 11-9-102(14).

I find that the claimant proved by a preponderance of the evidence that he was permanently and totally disabled. He suffered a compensable injury to his right wrist, left shoulder and left knee. The wrist and knee injuries were scheduled, while the shoulder injury was to the body as a whole.

The claimant was sixty-two years old at the time of hearing, with a seventh grade education. He could read, but he did not do much writing. He could do simple math. While employed with respondent employer he was demoted out of a supervisory role because he did not have computer and office skills. He had a master plumber license but was

unable to take on apprentices, because he could not monitor their work. He was unable to work as a plumber, because of his knee and shoulder.

The claimant credibly testified that he was physically unable to work since October 2003. He stated that on a typical day, he would walk "a little bit" in his yard and sit on his back porch or in the yard: "That's where I stay." His girlfriend drove for him, but he "really" only got out to go to the doctor.

The claimant did not feel that he could work, because his knee was very stiff when he got up in the morning. To loosen it, he would "put it up" and then walk. He exercised it every morning. The claimant testified that his knee was the biggest impediment to his return to work: "[i]f I'm up on it too much it just tightens up and don't want to work and goes to hurting and I go sit down. You can't do that out there, I can't climb in and out of ditches and walk through mud and go up on roofs and ladders and that kind of stuff that would be required to be a working plumber out in the field."

After October 2003, he did not work anywhere or look for a job, because he was physically unable "to get out

and do the work." He explained that he knew he could not work, based upon "[j]ust what little bit of walking I do around the house and having to stop and rest my leg and stuff like that." He did not apply for unemployment, because he could not attest that he was physically able to go to work.

The claimant testified that his shoulder did not bother him, unless he picked up something heavy or used it too much, and then he would feel it the next day. He stated, "I don't use it much really, for nothing. Cause I know I can't." He was left handed, but learned to use his right hand due to the limitations in his left arm: "I have to. That's my main hand now." However, his right wrist was still numb, and it felt "broke or bruised."

The claimant lived on sixty-eight acres. In response to the question, "do you walk over the 68 acres," he said "No. Lord no." He had a four-wheeler in which he had installed hand shift, so that he could shift with his right hand. He had a current hunting and fishing license, but had not fished the year of the hearing. The year prior he had taken his grandchildren to a stock pond. He hunted

in the 2007 deer season, in his back yard where he sat and watched for game.

Elizabeth Mazingo testified that she provided home health care for the claimant after both his knee and shoulder surgeries. She had known the claimant before the accident, and she stated that he had no physical limitations before it. He could do "heavy type stuff and plumbers work," on the job and at home, but after the injury he was not able to do anything like what he did before, "not at all." The claimant did not assist her with her activities and businesses. They went fishing a couple of times the year prior to the hearing, but not since that time. She hunted, riding the four-wheeler to the deer stand. He hunted, but from the back yard from a lawn chair. They did not have any hunting success in the year before the hearing.

Dr. Hefley issued a permanent anatomical impairment rating for his February 28, 2002 injury to his left knee in the amount of 37% to the lower extremity or 15% to the whole person, and for his February 28, 2002 injury to his left shoulder in the amount of 13% to the upper extremity or 8% whole person.

On November 17, 2004, Dr. Hefley released the claimant with regard to his shoulder. He could do overhead work and reaching, but lifting with his left hand was limited to no more than 25 pounds. On February 9, 2005, Dr. Hefley noted his left shoulder became sore and achy if he overused it. He could do some overhead reaching and even some lifting up to 15 or 20 pounds to shoulder level, but he was avoiding doing any lifting or heavy work overhead. The doctor noted both shoulder and knee were "doing well." Dr. Hefley noted the claimant's concern that he would not be able to return to work as a master plumber. On March 14, 2006, Dr. Hefley noted that the claimant's left shoulder only bothered him with overhead movements. Throwing a ball with his grandchildren was difficult. Overhead work, even changing a light bulb, bothered him.

On March 14, 2006, Dr. Hefley noted that the claimant's knee also hurt once in a while. On January 2, 2008, Dr. Hefley stated that for his left knee, the claimant's work status was "Class IV" which was a moderate limitation of functional capacity. He was capable of clerical, sedentary type activities, with no lifting greater than 10 lbs, and no bending, stooping or twisting.

In light of the claimant's advancing age, limited education, heavy labor work history, lack of computer or office skills, and his physical limitations, I find that he was permanently and totally disabled. His shoulder injury prevented him from returning to work as a master plumber. His knee injury limited him to clerical, sedentary type activities, with no lifting greater than 10 lbs, and no bending, stooping or twisting. The claimant was demoted from a position which required computer work in addition to his master plumber and foreman work, because he could not do that work. There is no evidence that any job existed which a sixty-two year old man with a seventh grade education and the severe physical limitations he had could obtain or perform. Furthermore, his cooperation with the doctor's plan of therapy, both clinical and at home, and his return to work between his injury and his layoff in October 2003, all indicate that he was committed to recovery. His refusal to draw unemployment, because he could not honestly say he was able to return to work, also weighs in favor of the claimant's true permanent and total disability status. I find that the claimant proved by a preponderance of the

evidence that he was permanently and totally disabled due to the February 2002 compensable injury.

The majority also found that the claimant was entitled to reimbursement for nursing services provided by Ms. Mazingo and paid for by the claimant, a finding with which I concur. However, the majority limited the award of reimbursement, because Mazingo was paid to do services which were nursing services and also those which were not nursing services under Ark. Code Ann. Sec. 11-9-508(a). I concur that all the services provided by Mazingo may not fall within the definition of "nursing services" according to the Act, however, I disagree with the majority's reduction of the award of reimbursement by one-half. The only services which Mazingo and the claimant identified which appear to be outside the definition were housekeeping and cooking, activities which accounted for much less than one-half of her total activities for the claimant. The majority even states that "the record shows that the majority of Ms. Mazingo's work for the claimant was related to home health care and rehabilitation after surgery for his compensable injuries." (Emphasis added.) If the majority of the work was nursing service, then the claimant is entitled to be

reimbursed for more than fifty percent of the cost of Mazingo's services. Given that cooking and housekeeping were not her primary activities, I would increase the award of reimbursement to eighty percent of the total amount of his expenses for her services.

Based upon my de novo review of the record, I must dissent from the majority opinion finding that the claimant failed to prove by a preponderance of the evidence that he was permanently and totally disabled. I find that he was permanently and totally disabled due to his compensable injury. I concur with the majority opinion that the claimant is entitled to reimbursement for his expenses related to nursing services and that all the services provided by the home health care nurse may not have been nursing services under the statute. However, I dissent from the reduction of the award by fifty-percent, and I would award him reimbursement of eighty percent of his expenses. For the aforementioned reasons, I must concur and respectfully dissent from the majority opinion.

---

PHILIP A. HOOD, Commissioner