

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603467

BRADLEY CLEVINGER,
EMPLOYEE

CLAIMANT

CITY OF JONESBORO,
EMPLOYER

RESPONDENT

MUNICIPAL LEAGUE WCT,
TPA

RESPONDENT

OPINION FILED MARCH 1, 2011

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

Claimant represented by the HONORABLE PHILLIP WELLS,
Attorney at Law, Jonesboro, Arkansas.

Respondent represented by the HONORABLE J. CHRIS BRADLEY,
Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part;
reversed in part.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed September 30, 2010. The administrative law
judge found that the claimant sustained wage-loss disability
in the amount of 35%. The administrative law judge found
that the respondents were "not entitled to an offset against
the claimant's retirement disability benefits, in that
pursuant to Ark. Code Ann. §11-9-411(a)(2), the claimant

paid for his retirement disability benefits." After reviewing the entire record *de novo*, the Full Commission affirms in part and reverses in part the administrative law judge's opinion. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 35%. We find that the respondents are entitled to an offset in accordance with Ark. Code Ann. §11-9-411(a) (Repl. 2002).

I. HISTORY

Bradley D. Clevenger, age 46, testified that he had graduated from high school and had no additional formal education. Mr. Clevenger testified that he was a United States Marine for four years, where he served in an artillery unit. The claimant testified that he served in the National Guard as an engineer for two years after being discharged from the Marines.

The claimant's testimony indicated that he became employed as a firefighter for the respondent-employer in about 1988. The parties stipulated that the claimant sustained a compensable injury on March 22, 2006. The claimant testified that while performing a ladder drill, "I felt a twinge through my neck area and shot down through my

back. And after I went ahead and made the rescue, I come down, and within, say three to five minutes, everything went numb on my left side in my shoulder all the way down my arm."

Dr. Gregory F. Ricca began treating the claimant on March 31, 2006 and noted, "Mr. Clevenger is a 41 yo fireman who injured his upper thoracic back Wed, 3/22 while climbing a ladder multiple times for training at the Fire Academy." Dr. Ricca's assessment included "1) Marked posterior left shoulder and scapular region pain with numbness and tingling as well as some pain in the lateral left arm."

Dr. Ricca performed surgery on May 16, 2006: "1. Complete anterior discectomy C4-5 for neural compression. 2. Anterior interbody fusion C4-5 with a tricortical allograft strut. 3. Anterior instrumentation C4-5 with C-TEK. 4. Anterior key-hole decompression and foraminotomy C5-6 left."

Dr. Ricca noted on August 30, 2006, "As far as work goes, I do not think Mr. Clevenger should return to work as a fireman. He cannot engage in work that would require straining of his neck or upper body, including wearing an air pack and working over his head." The claimant testified

that he was physically unable to return to his job as a firefighter for the respondents.

Dr. Ricca assigned the claimant a "14% partial impairment of the whole person" on October 5, 2006. The parties stipulated that the claimant sustained a 14% anatomical impairment as a result of the compensable injury. The claimant testified that he was paid the 14% rating.

The claimant testified that he became employed part-time with the Arkansas Game and Fish Commission in May 2007: "I teach hunter's education to the kids and adults. I teach boater's education. I do wildlife programs at the nursing homes, schools, churches. I am actually - my title is Nighttime Event Co-Ordinator. Anything that we have out there at night, conservation meetings, I'm there to make sure that the place is open, first of all, and then to make sure the computer system, power point presentations, I explain how that's set up and how our A/V room works. That's mainly my jobs there....I also work at the front desk of the Nature Center." The claimant testified that his job with the Game and Fish Commission did not have any physical requirements, "because I mainly teach. I don't lift anything, you know."

Heather Taylor, a vocational rehabilitation consultant, provided a Vocational Rehabilitation Assessment on August 6, 2009 and reported in part:

Based on his work history, skills acquired, and training, Mr. Clevenger appears to have sufficient transferable skills to return to the workforce on a full-time basis. He returned to the workforce after his injury and has been employed successfully for the Arkansas Game & Fish Commission since 4/07. Although he is only working part-time, it is my opinion that he could work on a full-time basis at a number of jobs, as identified or other jobs with on-the-job training as long as he stays within his restrictions of *light to medium* work.

Mr. Clevenger would like to work full-time at the Arkansas Game & Fish Commission, but has been told that currently funds are not available to make his position full-time status. He said with his pension and part-time income, he sometimes has difficulty making ends meet monthly. He said he has no plans to quit his job at the Arkansas Game & Fish Commission. Therefore, I suggested that he look for another part-time job so that his part-time jobs combined would result in full-time income. He indicated he would consider this. Or, as another option, he could look for a full-time job utilizing his skills to transfer into a new occupation.

At this time, I have no specific vocational recommendations as this one-time vocational assessment is all that has been requested at this time by the Arkansas Municipal League. If vocational services are requested beyond this assessment, they could include things such as resume development, interview skills training and job search assistance through labor market research. However, in my opinion, Mr. Clevenger may not require extensive job search assistance as

he appears to already possess adequate job seeking skills as evidenced by the fact that he successfully completed a job search, successfully interviewed for a job and secured that new job in 4/07.

A pre-hearing order was filed on May 10, 2010. The claimant contended that he was entitled to wage-loss disability benefits because he was "unable to return to work in his prior employment. He has been required to take part-time employment with the Arkansas Game and Fish Commission." The parties agreed to litigate the issues of wage-loss disability and fees for legal services.

A hearing was held on August 6, 2010. The claimant testified that he was limited in the amount of weight he could lift and that he suffered from chronic pain in his middle back and left shoulder as a result of the compensable injury. The claimant testified that his physical limitations prevented him from returning to work as a firefighter.

An administrative law judge filed an opinion on September 30, 2010. The administrative law judge found, among other things, that the claimant had sustained wage-loss disability in the amount of 35%. The administrative law judge found that the respondents were not entitled to an

offset, in accordance with Ark. Code Ann. §11-9-411(a)(2). The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Wage-Loss

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Eckhardt v. Willis Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). 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 future earning capacity. Ark. Code Ann. §11-9-522(b)(1) (Repl. 2002).

In the present matter, an administrative law judge found that the claimant proved he sustained wage-loss disability in the amount of 35%. The Full Commission affirms this finding. The claimant is young, only age 46, but has only a high school diploma with no college education. The record indicates that the claimant's

employment history consists entirely of six years of military service, then employment as a firefighter for the respondents beginning in 1988. The parties stipulated that the claimant sustained a compensable injury on March 22, 2006. The claimant testified that he felt "a twinge" in his neck and back while performing a ladder drill, and that he shortly afterward began feeling numbness in his left shoulder. Dr. Ricca performed surgery on the claimant's cervical spine on May 16, 2006. Dr. Ricca subsequently assigned a 14% whole-person impairment, and the parties stipulated that the claimant sustained a 14% anatomical impairment as a result of the compensable injury.

Dr. Ricca stated on August 30, 2006 that he did not think the claimant should return to work as a firefighter. Dr. Ricca opined that the claimant could not take part in work activities which would require straining of the claimant's neck or upper body. Dr. Ricca also stated that the claimant could not wear an air pack or perform overhead work. The claimant did not return to work for the respondents. The claimant did find a job with the Arkansas Game and Fish Commission beginning in May 2007. However, the claimant's work with the Game and Fish Commission does

not violate the claimant's permanent physical restrictions. Further, the claimant's work with Game and Fish is only part-time. The claimant now earns \$12.75 hourly and has suffered a substantial loss of income as a result of the compensable injury and his permanent physical restrictions. We do not think the vocational consultant's opinion that the claimant should seek full-time work or another part-time job precludes the claimant from receiving wage-loss disability. When we consider this 46-year-old claimant's lack of an education beyond high school, his limited work experience, and his physical inability to resume a career as a firefighter, the Full Commission affirms the administrative law judge's award of 35% wage-loss disability.

B. Effect of payment by other insurers

Ark. Code Ann. §11-9-411(a) (Supp. 2009) provides:

(1) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

(2) The reduction specified in subdivision (a) (1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy.

An administrative law judge found in the present matter, "5. The respondent is not entitled to an offset against the claimant's retirement benefits, in that pursuant to Ark. Code Ann. §11-9-411(a) (2), the claimant paid for his retirement disability benefits." The Full Commission reverses this finding. The Full Commission finds that the respondents are entitled to an offset of the retirement-disability benefits the claimant has received through the Arkansas Local Police and Retirement System (LOPFI). The claimant contributed a percentage of his paycheck to LOPFI during the entirety of his employment with the respondents beginning in 1988, and the claimant is now receiving a monthly retirement check through LOPFI. The claimant argues that the "offset" provision of Ark. Code Ann. §11-9-411(a) (1) does not apply to the claimant's retirement benefits, because the claimant "paid" for the policy as provided in Ark. Code Ann. §11-9-411(a) (2).

Nevertheless, the parties stipulated that the claimant sustained a compensable injury on March 22, 2006. The legislature amended Ark. Code Ann. §11-9-411 by adding §11-

9-411(a)(2) in 2009. It is well-settled that changes in statutes relating only to remedies or procedural matters are generally held to be immediately applicable to existing causes of action and not just to those which may accrue in the future unless a contrary intent is expressed in the statute. *Arkansas State Police v. Welch*, 28 Ark. App. 234, 772 S.W.2d 620 (1989), citing *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987). However, any changes in statutes relating to vested rights are characterized as substantive and require application of the law as it existed at the time the claimant sustained a compensable injury. See *id.* A vested right exists when the law declares that one has a claim, or that one may resist enforcement of a claim. *Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981).

In the present matter, the Full Commission finds that Ark. Code Ann. §11-9-411(a) gave the respondents a vested right to reduce the claimant's benefits in an amount equal to, dollar-for-dollar, the amount of benefits the claimant had received for the same period of disability. See *Dooley v. Automated Conveyor Sys., Inc.*, 84 Ark. App. 412, 143 S.W.3d 585 (2004). The respondents were entitled to reduce

the claimant's benefits in an amount equal to the claimant's retirement-disability benefits. See *Henson v. General Electric*, 99 Ark. App. 129, 257 S.W.3d 908 (2007). The Full Commission finds that the 2009 amendment to Ark. Code Ann. §11-9-411 was a substantive change and requires application of the law as it existed at the time of the compensable injury. Therefore, the respondents are entitled to an offset for the claimant's retirement-disability benefits in accordance with Ark. Code Ann. §11-9-411(a) (Repl. 2002).

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 35%. The claimant proved that the March 22, 2006 compensable injury was the major cause of his 35% wage-loss disability. We find that the respondents are entitled to an offset for the claimant's retirement-disability benefits in accordance with Ark. Code Ann. §11-9-411(a) (Repl. 2002). We find that the legislature's 2009 amendment was a substantive change and requires application of the statute as existing at the time of the 2006 compensable injury. The Full Commission therefore affirms in part and reverses in part the administrative law judge's opinion.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2002). 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. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

Commissioner McKinney concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part. Specifically, I concur in the finding that the respondents are entitled to an offset for the claimant's retirement disability benefits pursuant to Ark. Code. Ann. § 11-9-411(a). However, I must respectfully dissent from the majority's award of a 35% loss in wage earning capacity. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that the claimant currently works for the Game and Fish Commission earning \$12.75 per hour, working 32 hours per week for two months

and 76 hours total during the third month. The claimant enjoys the work and admits that it does not financially support him.

Ms. Heather Taylor did a vocational rehabilitation survey for the claimant. Ms. Taylor's survey concluded that the claimant was capable of performing light to medium physical work.

In my opinion, the claimant has the transferrable skills along with the ability to do other jobs. He has simply chosen to work part-time for the Game and Fish Commission, although it is financially detrimental to him. He has chosen not to get another part-time job or look for other full-time work. In my opinion, this shows that the claimant lacks motivation which is a relevant factor when considering wage loss disability. Therefore, I find that the claimant is not entitled to any wage loss disability benefits in addition to his permanent anatomical impairment rating. Accordingly, I must dissent from the majority's award.

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. Specifically, I concur in the majority's finding that the claimant is entitled to an award of 35% wage-loss disability. However, I must respectfully dissent from the finding that respondents are entitled to an offset for the claimant's retirement disability benefits pursuant to Ark. Code Ann. §11-9-411(a). I find that, under strict construction, the respondent is not entitled to an offset.

Prior to the 2009 amendment, Ark. Code Ann. §11-9-411(a) provided that:

Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same...period of disability [from]...a group disability policy... .

The 2009 amendment added the following section to Ark. Code Ann. §11-9-411(a) (1):

The reduction specified in subsection (a) (1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy.

It is undisputed that the claimant paid for a portion of his retirement disability benefits. Ark. Code Ann. §11-9-704(c) (Repl. 2002) requires strict construction of workers' compensation statutes. Strict construction requires that nothing be taken as intended that is not clearly expressed, and its doctrine is to use the plain meaning of the language employed. American Standard Travelers Indemnity Co. v. Post, 78 Ark. App. 79, 77 S.W.3d 554 (2002). Under strict construction, the respondent is not entitled to any offset. Here, the claimant has paid for the policy. There is nothing in the statute allowing the respondent to take credit for half-paid policies. Any amount paid by the claimant means the claimant has "paid for the policy" according to Ark. Code Ann. §11-9-411(a) (2).

The majority grants an offset under the theory that the respondent somehow had a vested right to an offset which arose on the 2006 date of injury, before the 2009 amendment. This theory is simply wrong. A vested right to an offset of wage-loss disability benefits cannot arise until the benefits in question arise. Here, the claimant was not awarded wage-loss disability benefits until

September 30, 2010, well after the 2009 amendment. The application of the 2009 amendment does not strip the respondent of any vested interest that arose in 2006. For the majority to find that the respondent has a vested offset interest in a benefit that didn't arise until 2010 simply makes no sense.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner