

ARKANSAS WORKERS' COMPENSATION

I. JURISDICTION

A. Act will apply where:

1. The injury occurred in the state of Arkansas.
2. The contract of employment is entered into in Arkansas between an Arkansas resident and an employer who is a resident or who maintains an office in Arkansas exercising general control over the employee, even if the injury occurred in a different state in which both parties contemplated the employment would be performed.
3. Claimant is entitled to a presumption of jurisdiction, but such presumption is rebuttable. Multiple factors are considered for jurisdiction determinations.

II. ACCIDENTS

A. Compensable Injury Ark. Code Ann. § 11-9-102(4)(A)

1. Specific Incident – Claimant must prove each element by a preponderance of the evidence:
 - a. An injury arising out of and in the course of employment;
 - i. “Arising out of” refers to the cause of the accident. An injury arises out of employment if the employee is carrying out the employer’s purpose or advancing the employer’s interests.
 - ii. “In the course of” refers to the time, place and circumstances of the accident. The accident must occur within the time and space boundaries of the employment
 - b. That the injury caused internal or external harm to the body which required medical services or resulted in disability or death;
 - i. An aggravation of a pre-existing condition can be compensable if all of these elements are met for the aggravating incident
 - c. Medical evidence supported by objective findings, as defined in Ark. Code. Ann. 11-9-102(16);
 - d. That the injury was caused by a specific incident identifiable by time and place of occurrence.
2. Gradual Onset/Repetitive Motion: Injuries caused by rapid repetitive motion (carpal tunnel specifically included) or gradual onset injuries to the back or hearing loss require proof of the following elements:
 - a. An injury arising out of and in the course of employment;
 - b. That the injury caused internal or external harm to the body which required medical services or resulted in disability or death;
 - c. The injury was the major cause of the disability or need for treatment;
 - d. Medical evidence supported by objective findings.
3. Mental illness Ark. Code Ann. § 11-9-113

- a. For mental illness to be a compensable injury it must be caused by physical injury to the employee's body, demonstrated by a preponderance of the evidence, and diagnosed by a licensed psychiatrist or psychologist.
- b. Exception: victims of crimes of violence.
- c. Maximum compensation is 26 weeks.
4. Heart or cardiovascular injury, accident, or disease Ark. Code Ann. § 11-9-114
 - a. Compensable only if an accident is the major cause of the physical harm.
 - b. The employee must show that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work or that an unusual and unpredicted incident occurred which was the major cause of the physical harm and stress must not be considered.
5. Hernia Ark. Code Ann. § 11-9-523
 - a. Employee must show that the hernia occurred immediately following and as a result of sudden effort, severe strain, or the application of force directly to the abdominal wall; that there was severe pain in the hernia region that caused the employee to immediately cease work; that the employee gave the employer notice within 48 hours afterward and that medical attention was required within 72 hours.

B. Occupational Disease Ark. Code Ann. § 11-9-601

1. Occupational Disease is defined as any disease that results in disability or death and arises out of and in the course of the occupation or employment or naturally follows or results from a compensable injury.
2. There must be a causal connection between the occupation and the disease established by a preponderance of the evidence.
3. An occupational disease is characteristic of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the disease in question.
4. The test of compensability is whether the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments.
5. The amount of compensation will be based on the average weekly wage of the employee when last exposed to the occupational disease.

III. NOTICE Ark. Code Ann. § 11-9-701

- A. Notice of the accident should be given immediately after it occurs and must be reported on the appropriate form prescribed or approved by the Commission (Form N).
- B. Failure to give notice will not bar a claim if:
 1. The employer had knowledge of the injury; or
 2. If the employee had no knowledge that the condition or disease arose out of and in the course of employment; or

3. If the Commission excuses the failure due to a satisfactory reason that the notice could not be given.

IV. REPORT OF INJURY Ark. Code Ann. § 11-9-529

- A. Employers must file a report of injury (Form 1) with the Arkansas Workers' Compensation Commission within 10 days of receiving notice or knowledge of the injury.
- B. The report filed with the Commission must include:
 1. Name, address, business of the employer;
 2. Name, address, occupation of employee;
 3. Cause and nature of the injury; and
 4. Date, time and location of the injury.
- C. Failure to file a report could result in a \$500 fine.

V. CLAIM FOR COMPENSATION

- A. A claim for an injury other than an occupational disease must be filed within 2 years from the date of the injury unless compensation has been paid, in which case a claim for additional compensation must be filed within 1 year from the date of the last payment of compensation or 2 years from the date of the injury, whichever is greater.
 1. The date of the injury is defined as the date of the occurrence of the accident from which a compensable injury results.
- B. Claims based on occupational diseases must be filed within 2 years from the date of the last injurious exposure to the hazards of the disease. The statute of limitations does not begin to run until the employee knows or should be reasonably expected to be aware of the extent or nature of the injury.
- C. If the employee has not made a request for a hearing within six months of filing a claim for compensation the employer may move to dismiss the claim without prejudice.
- D. Failure to file a claim within the statutory time limits is not a bar to the right to file a claim unless the employer objects at the first hearing on the claim.
- E. Benefits not claimed on the Form C are barred by the SOL, if later claimed, but more than 1 year from last payment of compensation. *Flores v. Wal-Mart Dist. and Claims Mgmt. Inc.*, 2012 Ark. App. 201.

VI. INTENT TO ACCEPT OR CONTROVERT CLAIM Ark. Code Ann. § 11-9-803

- A. Employer must file a statement of its intent to accept or controvert a claim (Form 2) within fifteen days of the date upon which it receives notice of the alleged injury.
- B. Employer may request a time extension if it has made a good faith effort to obtain medical records, but has been unable to do so and is therefore unable to determine the validity of the employee's claim.
- C. Note that this step must be done within fifteen days of the injury, **not** within fifteen days of the claim for compensation, so that this step will typically be required before the employee has even filed a claim for compensation.

VII. MEDICAL TREATMENT Ark. Code Ann. § 11-9-508

- A. Employer has the right to select the initial treating physician. If the employer has contracted with a certified managed care organization, then the employer has the right to select the initial primary care physician from among those in the organization.
- B. However, the employee may request a one-time change of physician from the employer or carrier.
 - 1. If the employee's request for a change of physician is denied, the employee can petition the Commission and if the Commission agrees, they may select the physician if they do not agree with the employee's choice.
 - 2. When the employee petitions for a change of physician, the new physician must be either:
 - a. Associated with the managed care entity chosen by the employer, or
 - b. The regular treating physician of the employee provided the following factors are met:
 - i. the physician maintains the employee's medical records;
 - ii. the employee has a bona fide doctor-patient relationship with they physician;
 - iii. there is a history of regular treatment prior to the onset of the compensable injury;
 - iv. the primary care physician agrees to refer the employee to the managed care entity for specialized treatment; and
 - v. the primary care physician agrees to comply with the rules, terms, and conditions regarding services performed by the managed care entity chosen by the employer.
- C. Treatment furnished by any physician other than the ones selected according to these methods, except emergency treatment, will be at the employee's expense.
 - 1. Exception: If the employer does not deliver to the employee, either in person or by certified mail, a copy of a notice which explains the employee's rights and responsibilities concerning a change of physician, then the changes of

physician rules do not apply and the employer will be responsible for the unauthorized treatment.

- D. If the employer fails to provide prompt medical services within a reasonable time, the Commission may direct that the injured employee obtain the medical service at the expense of the employer.

VIII. VOCATIONAL REHABILITATION Ark. Code Ann. § 11-9-505

- A. Upon a finding by the commission that a vocational rehabilitation program is reasonable, an employer will be liable to an employee for vocational rehabilitation costs if the employee:
 - 1. Is entitled to receive compensation benefits for permanent disability; and
 - 2. Has not been offered an opportunity to return to work or reemployment assistance.
- B. Employer's responsibility for payments for the program will not exceed 72 weeks.
- C. Employee will not be required to enter a program against his or her consent.
 - 1. If employee waives rehabilitation or refuses to participate in an offered program, the employee will not be entitled to benefits beyond the established percentage of permanent physical impairment.
- D. Employee must request the program by filing a request with the Commission prior to a determination of the amount of permanent disability benefits payable to the employee.

IX. AVERAGE WEEKLY WAGE Ark. Code Ann. § 11-9-518

- A. Computed based on the contract of hire in force at the time of the accident, considering the fifty-two weeks prior to the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer as well as tips and commissions.
- B. Piece-basis employees: divide the earnings by the number of hours required to earn those wages during the fifty-two weeks preceding the week in which the accident occurred, then multiply this hourly wage by the number of hours in a full-time workweek.
- C. Overtime: add to the regular weekly wages, compute by dividing the overtime earnings by the number of weeks worked by the employee.

X. DISABILITY BENEFITS

- A. Temporary Total Disability (TTD) Ark. Code Ann. §§ 11-9-501(b), 11-9-519

1. Compensation rate is two-thirds of average weekly wage (AWW) up to statutory maximum.
2. If an injured employer refuses suitable employment he loses any entitlement to compensation unless the Commission determines the refusal is justifiable.
3. Waiting period:
 - a. For the first seven calendar days, no TTD is due.
 - b. For more than seven, but less than fourteen days, only the second week is due.
 - c. For more than fourteen days of disability, go back to the first day of disability.
 - d. The waiting period does not include the date of injury.
4. TTD is calculated using the calendar week with each day being one-seventh of the week.
5. Failure to pay TTD without an award within fifteen days after it becomes due is an eighteen percent penalty which must be paid at the same time as the installment unless notice of controversion is filed or an extension is granted.
6. If a TTD installment payable under an award is not paid within fifteen days after it becomes due, there is a twenty percent penalty.
7. Willful failure to pay a benefit results in a penalty up to thirty-six percent.

B. Temporary Partial Disability (TPD) Ark. Code Ann. § 11-9-520

1. Compensation rate is 2/3 of the difference between the employee's average weekly wage prior to the accident and his wage-earning capacity after the injury.

C. Permanent Partial Disability (PPD) Ark. Code Ann. §§ 11-9-501(d)(1), 11-9-521

1. Compensable injury must be the major cause (more than 50%) of the injury for Claimant to receive permanent benefits.
2. Compensation rate is 75% of TTD rate up to the statutory maximum if the TTD rate is \$205.35 or greater. If TTD rate is below \$205.35, PPD rate is 2/3 of average weekly wage.
3. Permanent partial disabilities not listed in the statutory schedule will be apportioned to the body as a whole with a value of four hundred fifty weeks.
4. In claims for disability in excess of permanent partial impairment for unscheduled injuries (wage loss claims), the Commission may take into account the employee's age, education, work experience, and other matters that may affect his future earning capacity.
5. Compensation is allowed after twelve months after the injury, for serious and permanent facial or head disfigurement for not more than \$3,500.
6. The clinical impairment rating must be pursuant to the AMA Guides to the Evaluation of Permanent Impairment (4th Edition).
 - a. If the employee is back to work, only the clinical rating is due.
 - b. If the employee is unable to return to work, the rating is negotiable and can be awarded by the ALJ.

7. PPD payments should start from the date the rating is given and notification in writing should be given to the injured employee.

D. Permanent Total Disability (PTD)

1. Permanent total disability means the inability because of compensable injury or occupational disease to earn any meaningful wages in the same or other employment.
2. Compensation rate is 2/3 of the average weekly wage.
3. The employer or carrier may, annually, require the injured worker receiving permanent total disability benefits to certify that he is permanently and totally disabled and not gainfully employed.
4. As of January 1, 2008 the cap for PTD is 325 times the maximum total disability rate established at the date of injury.

E. Death

1. For deaths occurring as the result of an injury that occurred on or after July 1, 1993, the employer is responsible for funeral expenses of \$6,000 or less.
2. There is a rebuttable presumption that death did not result from the injury if:
 - a. death does not occur within one year from the date of the accident; or
 - b. within the first three years of the period for compensation benefits.
3. Compensation for death of an employee is payable to the dependents in the following percentages of the average weekly wage and in the following order of preference:
 - a. Widow/Widower with no children: 35% paid until his/her death or remarriage;
 - b. Widow/Widower with children: 35% paid until his/her death or remarriage and 15% for each child;
 - c. One child with no widow/widower: 50%;
 - d. More than one child with no widow/widower: 15% for each child and 35% to the children as a class to be divided equally among them;
 - e. Parents: 25% each;
 - f. Siblings, grandchildren, grandparents: 15% each.
4. If a spouse remarries before complete payment of benefits, he/she must be paid a lump sum equal to compensation for 104 weeks.
5. Benefits to children will terminate at age eighteen unless the child is a full-time student under the age of twenty-five.
6. Incapacitated dependants are entitled to compensation regardless of age or marital status.

F. Illegally Employed Minor

1. Minors employed in violation of federal or state statutes pertaining to minimum ages for employment of minors are entitled to double the statutory amounts of compensation or death benefits.

2. This provision applies unless the minor misrepresented his or her age, in writing, to the employer.

G. Attorney's Fees Ark. Code Ann. 11-9-715

1. Capped at 25% of compensation for indemnity benefits.
2. Attorney's fees are not payable on medical benefits.
3. Where the Commission determines that a claim has been controverted, in whole or part, attorney's fees are paid $\frac{1}{2}$ by employer in addition to compensation awarded and $\frac{1}{2}$ by the claimant out of compensation payable to them.

XI. PROCEDURE

A. Pre-Injury Posting (Form P)

1. Employers should have Form P displayed in a conspicuous place to instruct employees in how to deal with an injury.

B. Employee's Notice of Injury (Form N)

1. Employee is required to fill out Form N and provide notice of his injury to the person and place specified by the employer.
2. Employer is not responsible for any benefits to the employee incurred prior to notification of the injury, except for emergency treatment that occurs outside the normal business hours of the employer, so long as a report of injury is made the next day.
3. Employee can be excused for failure to file Form N if:
 - a. the injury renders the employee incapable of informing the employer of it;
 - b. the employee did not know a condition arose out of employment; or
 - c. the employer had actual knowledge of the injury.

C. Employer's Report of Injury (Form 1)

1. Employer must report an employee's injury to the workers' compensation commission within ten days from receipt of notice of actual knowledge using Form 1.
2. Failure to do so may result in a fine up to \$500.

D. Claim for Compensation (Form C)

1. Employee must file a claim for compensation using Form C within the limitations period, which is 2 years from the date of injury or 1 year from the last payment of compensation.
2. The claim will be assigned to one of six geographic districts throughout the state, based on the county in which the injury occurred or the district in which the respondent's place of business is located if the injury occurred outside the state.

3. Ark. Code Ann. § 11-9-704. The Commission must notify the employer and any interested parties that an employee has filed a Claim for Compensation within ten days of such a filing.
4. Ark. Code Ann. § 11-9-702. If the employee fails to request a hearing within six months of filing his or her claim the claim may, upon motion and hearing, be dismissed without prejudice, allowing the employee to refile his claim within the two-year statute of limitations.

E. Employer's Response (Form 2)

1. Employer must file a statement of its intent to accept or controvert a claim (Form 2) within fifteen days of the date upon which it received notice of the alleged injury.
2. Form 2 may be required well before the employee files a Form C.
3. Employer may request a time extension if a good faith, but unsuccessful effort has been made to obtain medical records rendering the employer unable to determine the validity of an employee's claim.

F. Payment of Benefits

1. The first installment of compensation must be paid on the fifteenth day after the employer received notice of the injury, with payments to continue every two weeks thereafter.

G. Disputed Claims

1. Preliminary Conference
 - a. Mediation Conferences will be held in all cases in which the amount in dispute is less than \$2,500.
 - b. For cases in which the amount in dispute is more than \$2,500 the parties may request a voluntary mediation if all parties agree.
 - c. The conference will be informal, nonbinding, and confidential, by telephone or in person.
 - d. Attendance by the parties or a representative is required and the mediator is authorized to compel attendance, however the mediator is not authorized to compel settlement.
 - e. Following the conference, the Report of Mediation Conference (Form R) is placed in the file and copies are sent to all the parties.
2. Depositions
 - a. Any party may conduct depositions after the claim has been controverted by the filing of Form 2, however prior to the time a case has been controverted, the Commission may order depositions for good cause shown and upon application of either party.
3. Settlement
 - a. If both parties agree to a settlement a joint petition must be filed with the Commission.
 - b. The Commission will hear the petition, take testimony, and make investigations to determine whether to allow the final settlement.

- c. Neither party may appeal an order or award denying a joint petition, however the denial is made without prejudice to either party.
- 4. Hearing
 - a. Either party may file an application for a hearing that clearly identifies the specific issues of fact or law in controversy and the applying party's contentions.
 - b. If ordered, the Commission must give interested parties ten days notice of the hearing.
 - c. The hearing will be held in the county where the accident occurred, or the county of the employer's residence or place of business if the injury occurred outside the state.
 - d. Evidence may include verified medical reports provided the party using the reports has given opposing counsel notice and copies of all records and reports within seven days of the hearing.
 - e. Expert testimony is only permissible if such testimony complies with the requirements of Daubert and Kumho.
- 5. Award
 - a. The order denying the claim or making the award will be filed in the office of the Commission and a copy will be sent to each party.
- 6. Appellate Process
 - a. Full Workers' Compensation Commission
 - i. 30 days from the date of receipt of the order or award to file application for review
 - ii. Will review the evidence, or hear the parties, their representatives, and witnesses.
 - b. Court of Appeals
 - i. 30 days from the date of receipt of the order or award to file notice of appeal
 - ii. Notice filed in office of commission
 - iii. Court will review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award upon any of the following grounds, but no others:
 - (a.) The commission acted without or in excess of its powers
 - (b.) The order or award was procured by fraud
 - (c.) The facts found by the commission do not support the order or award
 - (d.) The order or award was not supported by substantial evidence of record

XII. DEFENSES

A. Assault

- 1. Employee's claim will be barred if it occurred as a result of an assault absent a showing by a preponderance of the evidence that the incident arose out of a

work related animus or hostility between the claimant and the co-worker who caused the assault.

B. Horseplay

1. An injury that occurs as a result of horseplay will not be compensable except as to innocent victims of the playing.
2. Arkansas statutes and cases do not define horseplay, but find it synonymous with the terms “skylarking,” or “rough or boisterous play.” *Morales v. Martinez*, 88 Ark. App. 274.

C. Going and Coming Rule

1. Precludes recovery for an injury sustained while the employee is going to or returning from his place of employment.
2. Premises exception no longer exists in Arkansas. The 1993 Act excludes from compensation injuries that occur “at time when employment services were not being performed.”
 - a. Merely walking through an employer’s parking lot will not qualify as performing “employment services” and therefore a claim for injury arising out of that activity will likely be precluded. See *Hightower v. Newark Public School System*, 57 Ark. App. 159.
3. The rule does not preclude benefits where the journey itself is part of employment services, such as in the case of delivery drivers.
4. Dual Purpose Exception
 - a. An injury occurring during a trip that serves both a business and personal purpose is within the course of employment.
 - i. A trip that involves the performance of services for the employer which would have caused the trip to be taken by someone else falls under this exception
 - b. Applies to out of town trips, trips to and from work, and miscellaneous errands such as visits to bars and restaurants if motivated in part by the intention to transact business there.
 - c. Exception will not apply to identifiable deviations from the business trip for personal reasons until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial.

D. Recreational or social activities

1. An employee injured while engaging in or performing or as a result of engaging in or performing any recreational or social activities for the employee’s personal pleasure is precluded from receiving compensation benefits.

E. Employment services were not being performed, employee had not yet been hired or employment relationship had terminated.

F. Intoxication Ark. Code Ann. § 11-9-102(4)(B)(iv)

1. An injury “substantially occasioned” by the use of alcohol or drugs is not compensable.

2. The mere presence of alcohol or drugs creates a rebuttable presumption that the accident was substantially occasioned by the use of the drugs or alcohol.
3. By performing services for the employer, the employee has impliedly consented to reasonable drug and alcohol testing for the presence of these substances in the employee's body at the time of the accident and refusal to test precludes the employee from receiving benefits unless he proves it did not substantially cause the injury.
4. The employee must prove by a preponderance of the evidence that the alcohol or drugs did not substantially occasion the accident.
5. If a reasonable suspicion of alcohol exists at the time of the accident testing must be done within eight hours.
6. If a reasonable suspicion of drugs exists at the time of the accident testing must be done within thirty-two hours.

G. "Shippers Defense" from *Shippers' Transport of Georgia v. Stepp*, 265 Ark. 365.

1. A false statement in an employment application will bar workers' compensation benefits if the following conditions are shown:
 - a. The employee knowingly and willfully made a false representation as to his or her physical condition;
 - b. The employer relied upon the false representation;
 - c. The reliance upon the false misrepresentation was a substantial factor in hiring the employee; and
 - d. There is a causal connection between the false representation and the injury.
2. For the defense to apply, the questions asked on the employment application must request factual information, not an opinion.

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RECENTLY ASKED QUESTIONS IN ARKANSAS FROM ISSUES ADDRESSED IN RECENT ARKANSAS CASES

SUPREME COURT OF ARKANSAS

Q. Is a negligent supervision, retention, and hiring action stemming from purported sexual assault of employee by her supervisor within the exclusive jurisdiction of the Workers' Compensation Act of Arkansas?

A. Yes. In *Truman Arnold Companies v. Miller*, an employee brought an action against her employer in civil court alleging negligent supervision, retention, and hiring stemming from purported sexual assault of employee by her supervisor. Employer sought a writ of prohibition following the entry of an order by the Miller County Circuit Court, and asserted that the Workers' Compensation Commission has exclusive jurisdiction. The Arkansas Supreme Court held that the Commission has been granted exclusive, original jurisdiction to determine the applicability of the Workers' Compensation Act. *VanWagoner v. Beverly Enterprises*, 334 Ark. 12, 16, 970 S.W.2d 810, 812 (1998). Factual questions or mixed questions of fact and law lie exclusively with the Commission because they are not so one-sided that the issue can be determined as a matter of law. The Court held that whether the Workers' Compensation Act is intended to apply to negligence resulting in a sexual assault such as this case, must initially be determined by the Commission.

Truman Arnold Companies v. Miller Cty. Circuit Court, 2017 Ark. 94, 4, 513 S.W.3d 838, 840 (2017)

Q. Is a wrongful-death and survivor civil action brought by an employee's survivor against a former employer to recover for the death from a mesothelioma diagnosis more than three years after last exposure to asbestos at work barred by the exclusive remedy provision of the Workers' Compensation Act?

A. Yes. In *Hendrix*, a former employee's survivor brought a wrongful-death and survival action against the former employer to recover for a death resulting from mesothelioma exposure, which was diagnosed three years after the employee's last exposure to asbestos at work. The survivor asserted that exclusive-remedy provision of the Arkansas Workers' Compensation Act did not bar a common-law tort action against the decedent's employer as the Act provided no remedy for the disease that caused the decedent's death. The Court held that as a matter of first impression the exclusive remedy provision barred the suit since employee had a remedy under the Arkansas Workers' Compensation Act. The Court has said that Workers' Compensation Act clearly indicates that any claim for injury or death against an employer may only be brought under the Act, thus eliminating an employer's tort liability. *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 42 S.W.3d 443 (2001). Despite the Court acknowledging that the remedy of the Act "rings hollow" with this case, as the statute of limitations barred a workers' compensation claim, the Court nevertheless found that the exclusive-remedy

provision barred survivor from successfully bringing a common law tort action against the employer.

Hendrix v. Alcoa, Inc., 2016 Ark. 453, 4, 506 S.W.3d 230, 233 (2016).

COURT OF APPEALS OF ARKANSAS

Q. Is a mental injury compensable when the diagnosis does not meet the established criteria for depression in the most current DSM ?

A. No. In *Lincoln Public Schools v. Secrist*, Employer appealed the Commission's decision that Secrist had successfully proven that she suffered from a mental injury in the form of depression as a result of her compensable back injury. The Arkansas Court of Appeals reversed the Commission's ruling on the grounds that Secrist's diagnosis did not establish the necessary criteria for depression in the most current DSM. Arkansas Code Annotated section 11-9-113 requires the diagnosis of a mental injury or illness, in this case major depressive disorder, must meet the criteria established in the DSM in order to be compensable. Here, the Commission found Claimant had established five of the nine symptoms listed in the DSM for major depressive disorder and had proved a compensable mental injury. However, the Court found that Dr. Childers's medical evidence established, at best, only four of the five symptoms found by the Commission. Because the supporting medical evidence did not meet the established criteria for depression in accordance with the DSM-5, Claimant was found to not have met the burden of proving a compensable mental injury under the workers' compensation statutes.

Lincoln Pub. Sch. v. Secrist, 2016 Ark. App. 315, 3, 496 S.W.3d 396, 398 (2016).

Q. Does a 40% wage-loss disability entitle a Claimant to permanent partial disability benefits?

A. Yes. In *Arkansas Highway & Transportation Dep't. v. Wiggins*, Employer appealed the opinion of the Commission that affirmed the Administrative Law Judge's opinion awarding Wiggins a 40% wage-loss disability. Wiggins was assessed a 7% impairment rating on her cervical spine, 10% on her lumbar spine, totaling a 17% whole-person impairment. Employer accepted these anatomical impairment ratings but denied that Wiggins was entitled to wage-loss disability benefits. The Court found that Wiggins was entitled to wage-loss disability benefits and affirmed the ALJ and the Commission. In reaching its determination, the Court found that the wage-loss factor is the extent to which a compensable injury has affected Wiggins's ability to earn a livelihood. *Wal-Mart Assoc., Inc. v. Keys*, 2012 Ark. App. 559, 423 S.W.3d 683. When a claimant has an impairment rating to the body as a whole, the Commission has the authority to increase the disability rating based on wage-loss factors. *Id.* The Commission is charged with the duty of determining disability based on consideration of medical evidence and other

factors affecting wage loss, such as the claimant's age, education, work experience, motivation, post-injury income, demeanor, and credibility.

Arkansas Highway & Transportation Dep't v. Wiggins, 2016 Ark. App. 364, 4, 499 S.W.3d 229, 232 (2016).

Q. *Is an injury that is sustained by a laundry aide worker, who is on his/her way to the hospital cafeteria to a mid-morning snack during a break from her duties part of her employment services?*

A. No. In *Fulbright*, the employee, a laundry aide for St. Bernard's Medical Center, tripped and fell on her way to the cafeteria to get a snack during a break. The employee testified that although she was not directly benefiting her employer during her break, she was indirectly benefiting her employer by getting something to eat so that she could have energy to perform the physical labor associated with her work. The Court found that there was no evidence or indication that Claimant was performing a job-related duty during the break. A compensable injury does not include an injury that was inflicted on the employee at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii). It was determined that Claimant's employment was not physically demanding and that a snack would not be necessary to continue working until lunch. Claimant was performing a personal errand that was not related to her employment when she was injured, and thus, the injury was found to not be compensable.

Fulbright v. St. Bernard's Med. Ctr., 2016 Ark. App. 417, 6, 502 S.W.3d 540, 544 (2016)

Q. *Is a burn injury suffered while getting ready in the morning to begin a training exercise compensable if the employee had not yet logged any on-duty time prior to the injury.*

A. Yes. In *USA Trucks, Inc. v. Jarrell*, the employee, a truck driver in training, was instructed to sleep on the top bunk in the cabin of the truck by his instructor. The following morning, the trainer woke the employee and instructed him to immediately conduct a pre-trip inspection of the truck. Employee climbed down from the top bunk and inadvertently stepped into a crock pot full of hot water. The Court articulated that the Workers' Compensation Act does not define the phrase "in the course of employment" or the term "employment services." *Wallace v. W. Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006). The Court found that the employee was following the trainer's instructions at the time of the injury. Employee had been instructed by the trainer to sleep on the top bunk of the trunk and was injured while getting down from the top bunk to begin the pre-trip inspection. The fact that the injury occurred while stepping out of bed did not automatically mean that Claimant was "performing personal grooming and related tasks." The Court held that the injury was compensable as sleeping and

climbing down from the top bunk was in the course and scope of the employee's employment as the trainer had instructed him to do so.

USA Trucks, Inc. v. Jarrell, 2016 Ark. App. 484, 5, 503 S.W.3d 870, 874 (2016).

Q. Can the failure of a claimant to seek other employment since their work injury preclude them from being found permanently and totally disabled?

- A. Yes. In *Schall*, the Court affirmed the Commission's decision holding that the evidence employee presented failed to carry the burden of the employee to prove an inability to earn any meaningful wage. On appeal, employee asserts that the Commission based its opinion on the fact that she had not attempted to find other employment since her work injury. Arkansas Code Annotated section 11-9-519(e)(1) (Repl. 2012) provides that "Permanent total disability" means the inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. The Court articulated that the burden of proof shall be on the employee to prove the inability to earn any meaningful wage in the same or other employment. The employee's motivation to return to work or lack thereof, is a factor that can be considered when determining an employee's future earning capacity. *SSI, Inc. v. Lohman*, 98 Ark. App. 294, 297, 254 S.W.3d 804, 808 (2007). The Commission found that employee's testimony regarding her confinement to her bedroom as a result of the compensable injury was not credible. The Court affirmed the Commission's determination that employee's decision to not seek other employment was sufficient evidence to show that she had not met her burden of proof, and thus, was not found to be permanently and totally disabled.

Schall v. Univ. of Arkansas for Med. Scis., 2017 Ark. App. 50, 3, 510 S.W.3d 302, 303 (2017).

Q. Is an undocumented immigrant entitled to workers' compensation benefits?

- A. Yes. In *Packers Sanitation Servs., Inc. v. Quintanilla*, Quintanilla, an undocumented immigrant from El Salvador, injured herself while using a pressure hose and chemicals to clean a production line. Quintanilla had lived in the United States for over ten years and began working for the employer utilizing a fake identity. Arkansas Code Annotated section 11-9-102(9)(A) defines an "employee" as "any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire." As such, the Court found that an undocumented employee, who in providing services to the employer sustained a compensable injury, is entitled to temporary total disability benefits during the duration of the disability.

Packers Sanitation Servs., Inc. v. Quintanilla, 2017 Ark. App. 213, 6 (2017).

Q. Are the children following the death of their parent, who was receiving permanent and total disability payments due to his injury that rendered him a quadriplegic, eligible for survivor benefits when parental rights have been terminated?

A. Yes. In *J.M.E.*, two minor children of a deceased injured employee brought an action asserting eligibility for workers' compensation benefits. Six years after the children's father, employee, sustained a catastrophic injury that rendered him permanently and totally disabled, his parental rights were terminated by the adoption of the two children. Eight months after the adoption, the two children filed for statutory survivor benefits. In a typical dependent-survivor case, the minor children of an injured employee who is receiving permanent total disability payments are entitled to workers' compensation survivor benefits upon the death of the employee. The children were living with and being supported by their father, Claimant, at the time the compensable injury occurred in 2007. Thus, the Court found that even though the children's dependency status had been terminated at the time of their adoption, they nonetheless were entitled to survivor benefits as they were dependents of Claimant/father at the time of his compensable injury.

J.M.E. v. Valley View Agri Sys., Inc., 2016 Ark. App. 531, 2, 505 S.W.3d 211, 212 (2016), reh'g denied (Nov. 30, 2016).

Q. Is a death resulting from a traffic accident while carpooling home from work a compensable injury?

A. No. In *Wayne Holden & Co., Inc. v. Waggoner*, Waggoner, the employee, died in a motor-vehicle collision while carpooling home from work. The employer appealed the Commission's decision that Waggoner had sustained a compensable injury. On the day of the accident, Waggoner and his crew returned to the company office and clocked out around 11:00 a.m. After clocking out, Waggoner left the office with two co-workers in a vehicle driven by one of the co-workers. The Court articulated that a compensable injury is one that arises out of, and in the course of, employment, and does not include one that is inflicted on an employee when employment services are not being performed. *Razorback Concrete v. Perkins*, 2015 Ark. App. 368, at 2, 465 S.W.3d 15, 16. As a general rule, an employee traveling to and from the workplace is not within the course of his or her employment. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). The Court found that Waggoner was not performing a special work-related task when the accident occurred, and thus, his death did not result in a compensable injury.

Wayne Holden & Co., Inc. v. Waggoner, 2016 Ark. App. 309, 9, 497 S.W.3d 210, 218 (2016).

Q. Is an employee permanently and totally disabled if they have the ability to make 7-hour drives and play slot machines for an hour?

A. No. In *Cooper*, employee injured his back while transferring a patient from the operating table to a stretcher. He was subsequently released to return to work with an 11% impairment rating. At the final hearing, employee testified that his pain was a 9 out of 10, and he was on a number of medications that made him drowsy, affected his ability to concentrate, and affected his memory. He did admit that he had been able to take a seven-hour round trip drive and played slot machines for about an hour. He appealed the Commission's finding that he was not permanently and totally disabled. The Court affirmed the Commission's decision and articulated that the Commission is charged with the duty of determining disability based on a consideration of medical evidence and other factors affecting wage loss, such as the claimant's age, education, and work experience, and a reasonable mind could come to the conclusion that employee was not permanently and totally disabled based on the fact that he could play slots for an hour and make seven-hour drives.

Cooper v. Univ. of Arkansas for Med. Scis., 2017 Ark. App. 58, 7, 510 S.W.3d 304, 309 (2017).

Q. Is an employer entitled to offset benefits a claimant receives from the Arkansas Local Police and Fire Retirement System (LOPFI)?

A. Yes. In *Bowmaster*, Employee asserted on appeal that his dysphasia was a compensable injury, and the City of Jacksonville asserted they were entitled to an offset for the benefits paid to the employee through the Local Police and Fire Retirement System (LOPFI). The Arkansas Code Annotated section 11-9-411(a)(1) provides 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 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. Moreover, the Court had previously found that benefits payable to an employee through LOPFI are subject to the offset provisions of the statute. *Brigman v. City of W. Memphis*, 2013 Ark. App. 66. The Court found that the City of Jacksonville was entitled to a credit from the benefits the employee received from the Local Police and Fire Retirement System.

Bowmaster v. City of Jacksonville, 2016 Ark. App. 572, 7, 507 S.W.3d 526, 530 (2016).

Q. Is a mental injury compensable if it was caused as a result of a racist work place, where the aggrieved party did not sustain any accompanying physical injury or crime of violence?

- A. No. In *Gaither*, employee brought a workers' compensation claim alleging she had developed chronic headaches, anxiety, and depression as a result of a racist work environment while working for her employer. In her testimony, employee admitted that she had not suffered any physical injury, nor was she the victim of a crime of violence in the workplace. The Court analyzed Arkansas Code Annotated section 11-9-113(a)(1), which provides that a mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence. The Court found that the employee had not suffered a compensable injury based upon its interpretation of §11-9-113(a)(1).

Gaither v. Arkansas Found. for Med. Care, 2017 Ark. App. 180, 2 (2017) .

Q. Is there a compensable claim for injuries sustained as a result from an altercation between two employees in the employer's parking lot prior to work beginning?

- A. Yes, In *Dorn*, an employee brought a workers' compensation claim stemming from an altercation on May 5, 2016, between employee, a maintenance worker for Housing Authority of Pine Bluff, and his coworker, Bruce Spicer. The altercation occurred in their employer's parking lot in front of the maintenance building on the morning of a supervisor-called meeting with employee and Spicer regarding an incident between the two the previous day. The Court found that Claimant was well within the time and space boundaries of his employment: he arrived on time to clock in for a meeting inside the security gate of his employer's campus, and he was required to attend a meeting the same morning to resolve the conflict with Spicer. The Court thus, found that the employee had suffered a compensable injury.

Dorn v. Hous. Auth. City of Pine Bluff, 2017 Ark. App. 309, 1 (2017)

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