

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G905274

FRANKLIN M. BLOWERS, Employee	CLAIMANT
GERDAU MACSTEEL, Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, Carrier/TPA	RESPONDENT

OPINION FILED MAY 4, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by WHITNEY B. JAMES, Attorney, Little Rock, Arkansas.

Respondent represented by LEE J. MULDROW, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 12, 2021, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on December 16, 2020 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on July 7, 2019.
3. The claimant sustained a compensable injury to his left leg on July 7, 2019.
4. The claimant was earning sufficient wages to entitle him to compensation at

the maximum rates.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Additional temporary total disability benefits from August 2019 through June 26, 2020.
2. Permanent partial disability based on an 11% impairment rating.
3. Attorney's fee.

At the time of the hearing claimant chose to reserve the issue of his entitlement to temporary total disability benefits. Thus, the only issues are his entitlement to an 11% impairment rating and an attorney fee.

The claimant contends he is entitled to permanent partial disability based on an 11% impairment rating and a controverted attorney's fee.

The respondent contends the claimant is not entitled to an impairment rating of 11% to the body as a whole.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on December 16, 2020 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence

that he is entitled to payment of permanent partial disability benefits in an amount equal to 11% to the body as a whole for permanent impairment resulting from his compensable injury.

3. Respondent has controverted claimant's entitlement to permanent partial disability benefits.

FACTUAL BACKGROUND

Claimant is a 41-year-old man who worked for respondent in plant utility. Claimant's job duties varied, but included preventative maintenance of all equipment. Claimant suffered an admittedly compensable injury to his left leg on July 7, 2019, when his leg popped while he was moving quickly to get to a computer to turn off a scale.

Within two hours of this incident claimant was taken to the Mercy Emergency Outpatient Clinic. After his initial medical treatment claimant came under the care of Dr. Holder. Claimant was diagnosed with deep vein thrombosis and he also developed a pulmonary embolism as a result of his leg injury. Respondent accepted liability for both claimant's left leg injury and the pulmonary embolism. Claimant's medical treatment has included medication as well as the use of crutches.

Claimant has undergone pulmonary testing and was assigned an 11% impairment rating for his pulmonary condition. Respondent has denied liability for the rating and as a result claimant has filed this claim.

ADJUDICATION

Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has ended. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.

2d 216 (1969). Pursuant to A.C.A. §11-9-522(g), the Commission adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993) as an impairment rating guide. See Commission Rule 099.34. A determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings. A.C.A. §11-9-704(c)(1)(B).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a permanent impairment of 11% to the body as a whole as a result of his pulmonary embolism.

In response to the 11% impairment rating assigned by Dr. Terry Clark on June 26, 2020, respondent sent claimant's medical records and pulmonary test results to Dr. Christopher John of Southwest Pulmonary Associates for review. In a report dated February 22, 2021, Dr. John indicated that claimant had the following pulmonary function test findings:

- FVC was 79% of predicted
- FEV1 was 81% of predicted
- FEV1/FVC ration was 82% of predicted
- DLVA was 96% of predicted.

Based upon the pulmonary function test findings, Dr. John stated that according to the Sixth Edition of the AMA Guides, claimant would qualify for a 0% impairment rating. As previously noted, the Commission adopted the Fourth Edition of the AMA Guides as an impairment rating guide, not the Sixth.

On June 26, 2020, claimant underwent an impairment rating evaluation which was performed by Dr. Terry Clark. Dr. Clark stated in his report that pursuant to Table 5:

Classes of Air Passage Defects, claimant would have an 11% impairment rating for his pulmonary condition. He also indicated that the rating was based on the Fourth Edition of the AMA Guides.

My review of the Fourth Edition of the AMA Guides indicates that the respiratory system is addressed in Chapter 5. The table specifically addressing Classes of Respiratory Impairment is Table 8. The relevant portions of that table are Class 1 and Class 2. Class 1 of Table 8 indicates that a person has 0% impairment if the following criteria are met:

FVC \geq 80% of predicted; and FEV \geq 80% of predicted;
and FEV/FVC \geq 70%; and D_{co} \geq 70% of predicted.

Significantly, the rating requirement's use of the word "and" indicates that each of the test results must be present for a 0% impairment rating. This is in contrast to the language of Class 2 which does not require all test results to be present, but instead uses "or" between the various test results:

FVC between 60% and 79% of predicted; *or* FEV,
between 60% and 79% of predicted; *or* D_{co} between
60% and 69% of predicted.

In this particular case, even though Dr. John relied on the Sixth Edition of the AMA Guides, he did enumerate the specific pulmonary test results. The first test result noted by Dr. John is "FVC was 79% of predicted." Clearly, under the criteria listed in Class 1, claimant does not qualify for a 0% impairment rating because the first requirement is that the FVC be equal to or greater than 80% in addition to meeting all other criteria.

However, the FVC of 79% does meet the criteria for a Class 2 impairment of 10 - 25% to the body as a whole. Pursuant to the *Fourth Edition of the AMA Guides*, this

finding alone is sufficient to qualify for a Class 2 impairment rating of 10 – 25%. In addition, I note that there are objective findings supporting the impairment rating. This includes the pulmonary function test as well as the findings noted by Dr. Clark in his report.

In summary, claimant has the burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits based on an 11% impairment rating. Based upon the pulmonary testing that claimant's FVC equaled 79% of predicted, I find based upon Table 8 of Chapter 5 of the AMA Guides that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a permanent impairment in an amount equal to 11% to the body as a whole as assigned by Dr. Clark.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 11% to the body as a whole based upon a permanent physical impairment rating. Respondent has controverted claimant's entitlement to payment of this impairment rating.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

All sums herein accrued are payable in a lump sum and without discount.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$314.65.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE