

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H003073

KENNETH BREWTON, Employee	CLAIMANT
MAY AVENUE PLUMBING, Employer	RESPONDENT
UNITED FIRE & CASUALTY CO., Carrier	RESPONDENT

OPINION FILED MARCH 20, 2025

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

Claimant represented by EDDIE H. WALKER, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 10, 2025, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 15, 2025, and a pre-hearing order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 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 prior Opinion of November 22, 2023, is final.
3. The respondent is paying claimant a 5% impairment rating to the body as a whole for his compensable low back injury based on the rating assigned by Dr. Bruffett.

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

1. Claimant's entitlement to a 13% rating to the body as a whole for his low back injury.
2. Controversion of the difference between the 5% rating and 13% rating.
3. Late payment penalty.

The claimant contends that his primary treating physician assessed a 13% impairment rating to the body as a whole regarding the claimant's back on September 5, 2024, and that information was sent to respondent's attorney on September 6, 2024. Respondents have controverted the difference between the 5% rating and 13% rating, and owe a late payment penalty.

The respondents contend that all appropriate benefits are being paid with regard to claimant's compensable injuries sustained on January 7, 2020. An independent medical evaluation has been conducted by Dr. Wayne Bruffett. Dr. Bruffett was asked whether or not permanency would apply, and he assigned a 5% rating to the body as a whole. Upon receipt of the IME report, the adjuster started timely payments associated with the applicable rating.

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 witnesses and to observe their 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 January 15, 2025, 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 that he has a 13% impairment rating to the body as a whole for his low back injury.

3. Respondent has controverted claimant's entitlement to payment of permanent partial disability benefits in an amount equal to 8% to the body as a whole.

4. Respondent is not liable for payment of a late payment penalty.

FACTUAL BACKGROUND

On January 7, 2020, while working for respondent, claimant was sitting at a stop light when he was struck from behind by another vehicle. Respondent accepted as compensable injuries to claimant's low back and left shoulder as a result of that accident. Respondent did not accept as compensable an injury to claimant's cervical spine. A hearing on compensability of claimant's cervical spine injury was conducted on November 13, 2023. Following that hearing, an Opinion was filed on November 22, 2023, finding that claimant had proven compensability of his cervical spine injury and awarding payment of medical benefits. That Opinion was not appealed and the parties have stipulated that it is final.

The current claim involves the compensable low back injury. For that injury claimant initially sought medical treatment from Dr. Edward Saer. Dr. Saer treated claimant conservatively and ordered an MRI scan which he interpreted as showing degenerative changes. In a report dated September 21, 2021, Dr. Saer stated that claimant had reached maximum medical improvement and that he had no permanent

impairment. In his report, Dr. Saer also noted that claimant had undergone a functional capacity evaluation which determined that claimant was functioning in the medium work category. Dr. Saer imposed permanent work restrictions on the claimant's ability to return to work.

Thereafter, claimant came under the care of Dr. Blankenship for his low back complaints. Dr. Blankenship also ordered an MRI scan and interpreted it as showing slight anterolisthesis at L4-5 with an annular fissure and neural foraminal narrowing; a disc bulge with facet arthropathy without significant impingement at L5-S1; and an upper lumbar facet arthropathy, less significant than at L4-5 and L5-S1.

Dr. Blankenship referred claimant to Dr. Cannon for pain management and his treatment has consisted of facet injections. According to Dr. Blankenship's report of July 15, 2024, claimant is receiving the facet injections every three months and it provides 75% relief which lasts 2-3 months. Dr. Blankenship also stated that as the injections are providing relief, surgery would not be indicated. However, it was his opinion that it is as likely as not that at some point the injections will not provide relief and surgery would need to be considered.

In a letter to Attorney Walker dated September 5, 2024, Dr. Blankenship stated:

The patient does qualify for an Impairment rating based on the 4th Edition AMA Guidelines. He does have a grade 1 anterolisthesis at the L4-5 level which would qualify under subheading 3A for 7% impairment to the body as a whole. The gentleman also has a posterior disc protrusion at the lumbosacrum which would qualify under 2C for an unoperated on disc protrusion for 7% to the body as a whole. These would be combined via the combined values table. His total impairment would be 13% to the body as a whole.

Following Dr. Blankenship's assignment of the 13% rating, respondent had

claimant undergo an evaluation by Dr. Wayne Bruffett on October 18, 2024. At the time of that visit, Dr. Bruffett did not have the actual MRI scan of June 3, 2024, available to him. After the MRI scan was provided to him, Dr. Bruffett in an addendum dated November 1, 2024, stated:

I was able to review the MRI scans. Honestly they look pretty good. He has some mild degenerative changes. On the more recent study he may have a small annular tear at L3-4. He apparently had a significant injury if he required shoulder surgery. So I would say with a reasonable degree of medical certainty that he did sustain injury to the lumbar spine as described above. However he was treated non operatively and I can not say that he has a specific herniated nucleus pulposis. And my opinion an impairment rating of 5% of the whole person based on the lumbar spine is reasonable.

Based on the opinion of Dr. Bruffett, respondent accepted and paid claimant permanent partial disability benefits based on the 5% impairment rating. Claimant contends that the 13% rating assigned by Dr. Blankenship is appropriate and requests payment of the difference in the ratings as well as an attorney's fee and penalty.

ADJUDICATION

The first issue for consideration is claimant's impairment rating. As previously noted, Dr. Blankenship assigned claimant a 13% rating to the body as a whole for his low back injury and Dr. Bruffett has opined that the proper rating is 5% to the body as a whole. Based upon the evidence presented, I find that Dr. Blankenship's opinion is credible and entitled to greater weight. First, Dr. Blankenship has been claimant's authorized treating physician and has evaluated claimant on a number of occasions. On the other hand, Dr. Bruffett has evaluated the claimant only once.

Furthermore, Dr. Blankenship specifically references the 4th Edition of the AMA

guides as a basis for his impairment rating. After my review of the citations in Dr. Blankenship's report with the AMA guides, I find that his rating is appropriate and in accordance with the applicable law. Therefore, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to payment of permanent partial disability benefits based upon the 13% impairment rating assigned by Dr. Blankenship.

I also find that respondent has controverted the difference in payment of the 13% impairment rating assigned by Dr. Blankenship and the previously accepted 5% rating.

The last issue for consideration involves claimant's request for a penalty. I find that under the circumstances the respondent is not liable for a late payment penalty.

This case was originally scheduled for a hearing on respondents Motion to Dismiss for September 9, 2024. On September 6, 2024, Attorney Walker sent a letter attaching the September 5, 2024, report from Dr. Blankenship assigning an impairment rating. Attorney Walker also indicated that claimant was filing a claim for permanent partial disability benefits and that the Motion to Dismiss was now moot. In an email response of September 6, 2024, Attorney Wood stated that respondent had no objection to removing the dismissal hearing from the docket. She also indicated that respondent was requesting an independent medical evaluation with respect to claimant's permanent impairment. Respondent also suggested that the file be returned to General Files stating that an evaluation might eliminate the need for litigation or resolve in a settlement. Attorney Walker stated that claimant did not object to returning the file to General Files. Dr. Bruffett subsequently wrote the report assigning claimant a 5% rating which respondent accepted. However, claimant contended that the 13%

impairment rating assigned by Dr. Blankenship was appropriate and this hearing was conducted.

I find that under the circumstances respondent was entitled to obtain an evaluation to determine whether claimant had any permanent impairment as a result of his compensable low back injury and the extent of that impairment rating. In fact, Dr. Bruffett did assign claimant an impairment rating which was accepted by respondent. Even though I have found that the impairment rating assigned by Dr. Blankenship is appropriate, respondent nevertheless was entitled to investigate claimant's claim for permanent impairment and obtain evidence with respect to that issue.

Accordingly, I find that respondent is not liable for the payment of a late payment penalty on the impairment rating.

AWARD

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 13% to the body as a whole based upon the permanent impairment rating assigned by Dr. Blankenship. Respondent has controverted claimant's entitlement to payment of permanent partial disability benefits in an amount equal to 8% to the body as a whole based upon the difference between the 13% impairment rating assigned by Dr. Blankenship and the previously accepted rating of 5% assigned by Dr. Bruffett. Respondent is not liable for payment of a late payment penalty.

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. This award shall bear interest at the maximum legal rate until paid.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$278.45.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE