BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H105195**

TAYLOR C. BRUNING, EMPLOYEE — CLAIMANT

CITY OF DECATUR, EMPLOYER — RESPONDENT

ARKANSAS MUNICIPAL LEAGUE, CARRIER — RESPONDENT

OPINION FILED **OCTOBER 31, 2024**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney, Springdale, Arkansas.

Respondents represented by MARY K. EDWARDS, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 8, 2024, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 14, 2024, 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 this claim.
2. The employee/employer/carrier relationship existed on June 23, 2021.
3. Claimant sustained a compensable injury on June 23, 2021.
4. The compensation rates are $440.00 for temporary total disability, and $330.00 for permanent partial disability.

By agreement of the parties, the issues to be litigated and resolved at the forthcoming hearing

were limited to the following:

1. Whether claimant is entitled to the impairment rating assessed on November 8, 2023, by Dr. Steven Cherney.
2. Whether claimant is entitled to permanent and total disability.
3. Whether claimant is entitled to wage loss disability.
4. Whether claimant is entitled to benefits under Ark. Code Ann. §11-9-505.
5. Attorney's fees.

All other issues are reserved by the parties.

The claimant contends that "He sustained a compensable injury while working for respondent on or about June 23, 2021. At that time, claimant was in the course and scope of his employment with respondent when he was involved in a motor vehicle accident and sustained injuries to his left hip, left lower extremity, left ankle, left foot, right lower extremity, left and right upper extremities, facial lacerations, and stomach lacerations. Claimant was first airlifted to Joplin, Missouri for medical treatment and then transferred to Springfield, Missouri for further medical treatment. Claimant had compound fractures in his left lower extremity and had to have multiple surgeries, including skin grafts for his injuries. Claimant stayed in the hospital for several months and was released for outpatient care. On August 16, 2023, claimant underwent a functional capacity evaluation. On November 8, 2023, Dr. Steven Cherney issued impairment ratings for claimant's left thigh and knee, for a combined impairment rating of 40% to claimant's lower extremity and 16% whole-body impairment. Dr. Cherney also considered claimant's gait derangement and issued a 15% whole-body impairment, for a combined 29% impairment rating to the whole body. Respondents dispute that claimant is entitled to a whole-body impairment rating and have controverted claimant's right to wage loss disability benefits."

The respondents contend that "Claimant is not entitled to a whole-person impairment rating. Claimant received an impairment rating from Dr. Steven Cherney for his left lower leg on November 8, 2023. See Exhibit "A." Respondents had the rating reviewed by Rick Byrd of Functional Testing Centers. Rick Byrd authored a report on the rating using the *Guides* and Dr. Cherney's measurements concluding that claimant was entitled to 16% to the left lower extremity. *See* Exhibit "B." Respondents contend that Dr. Cherney's rating was not assigned correctly pursuant to the *Guides*. Specifically, claimant is not entitled to a whole-person impairment rating for his left lower extremity. This is a scheduled injury, and scheduled injuries do not allow for wage-loss disability. Respondents reserve the right to file an Amended Response to the Prehearing Questionnaire or other appropriate pleading and to allege any further affirmative defense(s) that might be available upon further discovery."

From a review of the entire record including 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 March 14, 2024, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled.

3. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee under Ark. Code Ann. § 11-9-715 on the permanent and total disability benefits awarded herein.

FACTUAL BACKGROUND

Prior to the hearing of this matter on the merits, claimant filed a motion to exclude the results of a functional capacity evaluation (FCE) that was conducted by Mr. Rick Byrd of Functional Testing Centers. His motion was based on §11-9-705(d), which provides:

> Expert testimony shall not be allowed unless it satisfies the requirements of Federal Rule of Evidence 702 with annotations and amendments, that is, *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumbo Tire Co. v. Carmichael*, 526 U.S.137 (1999).

Claimant alleged several reasons why Mr. Byrd should not be permitted to testify as an expert witness in this matter, including but not limited to, his lack of educational credentials and state certifications, his methodology of conducting the FCE in this case, his bias in favor of the entity that retains him, and his improper use of another person's medical provider number in billing for his work.

In response to the motion to exclude, respondents denied Mr. Byrd was being offered as an expert in this matter and confirmed that the FCE report was neither testimony nor a document prepared under oath. Respondents urged that since Mr. Byrd conducted FCEs as a regular part of his business and that his work had previously been accepted by the Workers' Compensation Commission, I should err on the side of admitting the evidence opposed by claimant.

I denied claimant's challenge to the introduction of the evidence because §11-9-705(d) applies only to expert testimony, and respondents conceded that Mr. Byrd was not to be considered an expert in this matter.[1]

Prior to taking testimony at the hearing, we first took up claimant's objection to the portion

[1] In his post-trial brief, claimant urged me to reconsider this ruling, asserting that §11-9-705(d) applies not to specific witnesses, but rather "opinions from witnesses which were offered to provide expert scientific or technical information to the triers of fact," and that the *Daubert* rule is intended to "exclude unreliable expert testimony…" (Claimant's Trial Brief, page 6). I decline to revisit that decision for two reasons. First, the parties submitted simultaneous briefs, and respondent did not know that motion was going to be raised again. Second, expert testimony can only be provided by an expert, and I did not rely on Mr. Byrd's testimony or report as anything other than that of a lay witness.

of the medical records exhibit offered by respondents that included the aforementioned FCE (R.X. 67-84 and 87-88). This objection had three parts: (1) that it was irrelevant because respondent conceded it was not the report of an expert, (2) that it was hearsay and (3) that it was more prejudicial than probative, citing Arkansas Rules of Evidence 403 as persuasive authority. I overruled the objections, because (1) the FCE report involved the injuries that were the subject of this litigation and thus was relevant to whatever extent it was worth as a lay opinion, (2) Mr. Byrd had been deposed and any matters in his report that involved hearsay could have been explored at that time and (3) while Rule 403 can be applied to non-jury trials, an administrative law judge is competent and comfortable in evaluating these tests and giving such the appropriate weight in reaching its decisions.

HEARING TESTIMONY

Claimant's first witness was his wife, Emily Bruning. She testified that they had been married for six years and had four children. They had known each other since high school, and she said claimant had a dream to be a detective. To that end, he worked as a reserve officer in the City of Decatur before becoming a police officer. Claimant said she was employed as a CNA and in that capacity, she and claimant's mother provided home health care for claimant after his accident. She said claimant was in a coma for nine days after the accident and was bedridden for two years. He sometimes uses a wheelchair now and always uses a cane. Claimant has not driven a vehicle since the accident because he is afraid to do so; just sitting behind the wheel of the car caused him to throw up and have a panic attack. She testified that her husband has trouble getting in a vehicle and cannot do so without taking medication for nausea.

Mrs. Bruning testified that claimant takes Tramadol for his pain. He cuts them in half and takes three half pills, morning, noon, and night. If he engages in any activity outside of his home, he requires the fourth half pill for that day. Claimant attended two or three tee-ball games for one of his

children but on a normal day, he sits with his leg elevated for the majority of the day.

Mrs. Bruning said that claimant's medication makes him "dizzy, foggy, tired." He is not to operate machinery or drive while taking the Tramadol. Even elevated, claimant's foot swells to two or three times its normal size. Attending a ball game or going to a doctor's visit causes it to be even worse.

Mrs. Bruning discussed the photographs that were introduced to show claimant's injury, some of which she took and others she was present when they were taken. These photographs demonstrate the extent of claimant's surgeries, which included having screws in his hip as well as a rod that goes into his thigh. There are also photographs of the screws that were placed in claimant's knee. (Cl. X. #3). Additionally, she took photographs of x-rays of claimant's foot.

Mrs. Bruning said that claimant had worked with a vocational expert to apply for jobs. She helps him focus and remember certain dates. As of the date of the hearing, the vocational expert had worked with claimant for a few months, but he has found no employment. Were he to find a job, Mrs. Bruning said someone would have to provide transportation for him and that he would have to be able to sit or lie down every thirty to forty-five minutes. The City of Decatur did not make him an offer to do any kind of work for the police department.

Mrs. Bruning said that claimant has difficulty sleeping, because if his knees or ankles happen to touch while sleeping, it is very painful for him. Most nights, he cannot sleep through the night, and goes either to his recliner or to a hospital bed they have in their home.

Mrs. Bruning was present with claimant during the functional capacity evaluation. She did not remember Mr. Byrd typing anything while claimant was being examined. She said her husband did not walk around the room in multiple repetitions, and did not use both hands when he lifted because he had a cane in his right hand, thus disputing portions of Mr. Byrd's report.

On cross-examination, Mrs. Bruning says that the injury to husband has been very hard on her, because she is bearing the bulk of the financial load. She agreed things would be easier for her if claimant was able to work. She did not believe her husband could return to being a police officer. Mrs. Bruning was aware that nothing in the medical records said that claimant could not drive. She was unaware that Dr. Roman encouraged claimant to ease back into driving.

Claimant next called his mother, Malissa Brown, to testify. She stated that she has to coordinate with Emily Bruning's schedule to help get the children to school. Emily works one job with twelve-hour shifts three days a week and then a second job for twelve hours for another three days during the week. Ms. Brown said she takes the children to ball practice. She observed her son in a vehicle and noticed that he is nauseous when he does so.

On cross-examination, Ms. Brown testified that before the accident, she did help take care of the children but not nearly as often as she does now. She believes that if Emily were only working one job that she would not have to take care of the children as often.

Claimant then testified on his own behalf. Claimant related the steps he took to become a police officer, including working as an unpaid reserve officer and working part-time until he was certified to be an officer. On his last day of field training, he was going on a call to assist Gravette with a warrant when he was in an automobile collision. His description of the accident was as follows:

> "I was still in my driver's seat. My seatbelt had ripped all of my stuff off my external vest, including my tourniquet. And when I looked over to the driver's side door, I saw ~ well, actually, technically, I reached over and I felt a third and I was thinking to myself that's not a door handle, and I looked over and it was my boot and my leg was - it looked like I was kneeling the opposite direction backwards by my head, and I couldn't see out the window because there was blood. I didn't hit my head hard, but the glass had cut my face and my forehead a lot. And then my elbow, my belly, and my right leg were also cut open and bleeding. I just remember thinking to myself I'm about to bleed out because there was so much blood just profusely leaking out of my body at that point." (TR.82)

Claimant was airlifted to Freeman Health hospital in Joplin, Missouri for emergency treatment before being transferred to Cox Health in Springfield, Missouri. He was hospitalized for about six weeks.

Claimant wore shorts to the hearing so his leg would be visible, but also because wearing long pants causes his leg pain. Since it was stipulated that he had an injury, the extreme nature of the accident was relevant to his reluctance to drive or even ride in a vehicle. At this time, he can be in the pilot seat in the middle of the car and is working his way to ride in the passenger front seat, but he still has difficulties getting in the car and if he does not have to do it, he probably will not.

Claimant said that he begins the day with a constant dull, throbbing pain and then as the day goes on, it becomes more of a searing issue. As his foot swells, it becomes almost unbearable. He takes Tramadol for the pain three or four times a day, the fourth being necessary if he engages in family activities or does anything where he is not able to elevate his leg much. He said he leaves the house once or twice a week at the most and must use his cane whenever he walks. Claimant testified that if he were working, he would need to elevate his left leg easily over half of the day, and perhaps as much as six hours. He says that if he is not using the cane, he is in his wheelchair. He estimated that his day was about sixty percent using the cane and forty percent in the wheelchair.

Claimant said that he struggled in applying for jobs without his wife's assistance, because he has trouble remembering dates and focusing, which makes him upset. Despite his applications, he has not received a single job offer since the accident. Each Wednesday around one p.m., he consulted with the vocational expert and had taken all her recommendations the best he can. He has kept the vocational expert informed as to what jobs he has applied for, what qualifications he might need for a particular job, and how telephone interviews have gone.

On cross-examination, claimant admitted that he did not believe that he could be a police

officer in his current condition. He testified that he was a high-school graduate but did not attend college. His work history before serving as a police officer was mostly retail and food service. He did use computers in some of the jobs but said it was very simple operations.

Claimant understands that he had been cleared to sedentary duty and applied for every job that the vocational expert had laid out for him as long as it had not been redacted by the time he applied. He said his computer skills were such that he could use Google, look up videos, type on Microsoft Word and perhaps prepare a PowerPoint. He agreed he was both capable and willing to be taught new technology, and he was still actively applying for jobs. He did not know that he could work at a sedentary job but was willing to try. He wants to help his wife out financially. He was aware that his doctors wanted him to get back to normal, including driving.

On redirect examination, claimant said that despite his best efforts, as well as his wife and the vocational expert, no employer had been willing to give him a shot at any occupation, be it part-time or full-time.

Even taking into consideration the natural bias that I would expect a spouse and a parent to have for claimant, I found claimant's wife and mother to be credible witnesses. Claimant's testimony was likewise consistent with the medical records; having had the benefit of watching him throughout the hearing, I found nothing to suggest that he was being deceptive or exaggerating his physical condition.

REVIEW OF THE EXHIBITS

The parties submitted what I estimate to be over 700 pages of exhibits. Some of these were prehearing exhibits regarding claimant's *Daubert* motion; these were incorporated into the record of this hearing. At the hearing, there were additional documents, the most pertinent of which were the medical records. Rather than try to summarize all of them in this portion of this opinion, I will simply

list what was submitted and then refer to the portions of these exhibits that I relied upon in making my decision:

Claimant's Prehearing #1: Motion to Exclude Testimony and Report of Rick Byrd, which included Byrd's deposition and a separate binder of the exhibits to that deposition (mistakenly identified by the court reporter as a second Claimant's Exhibit #2)

Claimant's Prehearing #2: Respondents' Response to the Motion to Exclude.

Claimant's Prehearing #3: Claimant's Reply to Respondent's Response.

Claimant's Prehearing #4 Order denying the Motion to Exclude

Claimant's Hearing Exhibit #1 Claimant's medical records.

Claimant's Hearing Exhibit #2 Claimant's Prescriptions

Claimant's Hearing Exhibit #3 Claimant's Photographs

Claimant's Hearing Exhibit #4 Claimant's Job Search Index

Respondents' Hearing Exhibit #1 Additional medical records

Respondents' Hearing Exhibit #2 Claimant's non-medical records, which include a vocational analysis conducted by Melissa Jones Wilkins, the indemnity payment log, and the AMA Guides to the Evaluation of Permanent Impairment.

Additionally, the Commission's Prehearing Order was made an exhibit to the hearing. I am blue backing the post-hearing briefs submitted by the parties. These briefs were quite helpful and very much appreciated.

ADJUDICATION

As enumerated above, there are five issues in this matter. However, I do not need to decide the third and fourth issue, as I am convinced the evidence in this matter supports claimant's position that he is permanently and totally disabled as a result of his compensable injury.

The parties spent considerable time arguing whether the impairment rating of Rick Byrd should be admitted into evidence, and after I ruled that it was admissible, whether his rating or that

Dr. Steven Cherney should be given more weight. Having reviewed both, I find Dr. Cherney's ratings are more credible than that of Mr. Byrd on the 12% to the grade 4 muscle weakness of flexion. Mr. Byrd rejected that rating as a subjective test. However, there is no requirement that medical testimony be based solely on objective findings, only that the record contains supporting objective findings, *Ark. Dep't. of Corr. v. Washington*, 2024 Ark. App. 181, 685 S.W. 3d 347; *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W. 3d 709 (2006)—of which there are ample. I also agree with Dr. Cherney that a 15% impairment whole person impairment rating due to claimant's gait derangement is appropriate under the *Guides*. The more specific methods of establishing impairments do not adequately address all the issues with claimant's left leg, such as the shortened stance phase and the arthritic changes. However, I do agree with respondent that the 10% left lower extremity impairment for range of motion is not supported by Table 40, page 78 of the *Guides,* because claimant did not have less than 110 degrees of flexion. Therefore, I find the rating on the left leg to be 29% and for the whole person to be 12%. According to the Combined Value Chart on page 322 of the *Guides,* I find the total whole-body impairment to be 25%.

However, it mattered little if I agreed, in whole or in part, with the ratings by Dr. Cherney or Mr. Byrd. As claimant pointed out in his brief, Mr. Byrd's observations as a lay witness support the testimony of the witnesses at the hearing. Claimant used a cane during the examination; nothing was said that indicated that he did not consistently need it. When he was on his feet for a brief period of time, his left foot began to swell, eventually to the point that claimant had to loosen his shoelaces. Mr. Byrd found claimant put forth a reliable effort on 46 of 46 consistency measures. Nothing in the FCE indicates that claimant was malingering or otherwise exaggerating his condition for the purposes of the examination.

In considering claims for permanent disability in excess of the percentage of permanent

physical impairment, the Commission may consider other factors such as the employee's age, education, work experience, and all other matters reasonably expected to affect his future earning capacity. In this case, claimant is a relatively young person—29 years old at the time of the hearing. He completed high school and had no college or vocational training. Taken alone, those factors would indicate he could find or be trained for sedentary work. However, everything else mitigates against this claimant ever finding meaningful employment. His prior work experience was outlined in the vocational analysis report prepared by Melissa Jones Wilkins (R. X 1, pages 2-21). None of the jobs he previously performed appear to be within his current physical limitations, as I am convinced claimant would need to be able to sit, stand and even lie down at will during the course of the day. He is taking Tramadol, an opioid pain medication, to cope with the pain in his left foot, which would also affect his ability first travel to work and then to function in any type of employment that would require him to use any sort of cognition.[2]

Perhaps the biggest factor in my decision is claimant's motivation to work, as I believe he is highly motivated. He is married with four children. Because of his decreased income, claimant's wife is working 72 hours a week. I believe if there were any jobs he could do, he would have already been working to support his family. This accident was almost three and a half years ago; I see nothing in the record that causes me to believe claimant will recover sufficiently to perform even limited sedentary work. Thus, after considering all the relevant wage loss factors in this case, I find that claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as he is unable to earn any meaningful wages in the same employment he previously performed or any other employment.

[2] While there was testimony regarding claimant's mental state, such as his fear of riding in a car, and mention of situational depression in the medical records, claimant did not pursue a claim for a compensable mental injury in this hearing, and as such, that issue is reserved.

Because I have found claimant to be permanently and totally disabled based on the evidence before me, it is unnecessary for me to determine wage loss disability and/or benefits pursuant to A.C.A.§11-9-505.[3]

Since Claimant has proven herein his entitlement to permanent and total disability benefits, and because Respondents have controverted this matter above the 10% whole body impairment it accepted and paid, he has shown that his attorney should be awarded a controverted fee at their expense under Ark. Code Ann. § 11-9-715 on the indemnity benefits awarded herein.

ORDER

Respondents are directed to pay/furnish benefits in accordance with the findings of fact set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715.

Respondents are responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of $1,557.00.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE

[3] While the latter was listed in the prehearing order as an issue to be decided, the parties subsequently agreed to have claimant seen by a vocational analysis before the hearing. Based on this opinion, any further such efforts would be useless.