

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G501910**

MICHAEL GUNNETT, EMPLOYEE

CLAIMANT

VS.

ARKANSAS STATE POLICE, EMPLOYER

RESPONDENT

**PUBLIC EMPLOYEE CLAIMS DIVISION
ARKANSAS INSURANCE DEPARTMENT**

RESPONDENT

OPINION FILED APRIL 26, 2022

Hearing before Administrative Law Judge, James D. Kennedy, on the 22nd day of March, 2022, in Little Rock, Arkansas.

Claimant is represented by Mr. Gary Davis, Attorney-at-Law, Little Rock, Arkansas.

Respondents are represented by Mr. Charles H. McLemore, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 22nd day of March, 2022, and at the time of the hearing, the sole issue before the Commission was the extent of the permanent impairment. A copy of the Prehearing Order was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the within claim and an employer/employee relationship existed on October 14, 2014, when the claimant sustained a compensable work-related injury to his right shoulder. At the time of the injury, the claimant was earning an average weekly wage of \$1,129.34, entitling him to temporary total disability and permanent partial disability rates of \$617.00/\$463.00, respectively.

Respondents contend that they accepted the claim to the right shoulder, which was reported on October 14, 2014, and have paid the appropriate benefits which included

two surgeries by Doctor Samuel Moore on March 11, 2015, and August 24, 2016. After the surgeries, claimant complained of breathing difficulties and sought additional treatment, which was initially provided by Doctor Ladly Abraham, and later by Doctor David Greenwood, where the claimant obtained a diagnosis of a paralyzed right hemidiaphragm. Doctor Moore released the claimant at maximum medical improvement on July 7, 2017, and provided no permanent impairment or work restrictions due to his right shoulder at that time, but referred the claimant to Doctor Greenwood, in regard to the claimant's breathing. The claimant was later assigned an impairment rating of fifty percent (50%) permanent partial disability (PPD) rating to the body as a whole, by Doctor Greenwood. His reports were forwarded to Rick Byrd, a Certified Senior Disability Analyst who opined that the claimant's injuries would relate to a twenty-seven percent (27%) permanent partial disability (PPD) impairment rating. The reports were also forwarded to Doctor Barry Baskin who also opined that the claimant's permanent partial disability (PPD) rating would equate to a twenty-seven percent (27%) impairment rating to the body as a whole. The twenty-seven percent (27%) permanent partial disability (PPD) rating was accepted by respondents and they are paying permanent partial disability benefits at that rate to the claimant. The claimant has returned to work and has been working without restrictions since 2017 and has now been promoted to a higher paying position.

The claimant contends that due to the admitted compensable injuries sustained on October 14, 2014, he is entitled to a permanent partial disability impairment rating of fifty percent (50%) to the body as a whole, as opposed to the twenty-seven percent (27%) impairment rating accepted by the respondents, that the difference between the ratings had been controverted, and consequently he is entitled to attorney fees for any amount

ordered over the twenty-seven percent (27%) permanent partial disability (PPD) rating that was accepted by the respondents.

The claimant's and respondent's contentions are all set out in their respective responses to the Prehearing Questionnaire and made a part of the record without objection. The sole witness was the claimant, Michael Gunnett. From a review of the record as a whole, to include medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witness, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on October 14, 2014, when the claimant sustained a compensable work-related injury to his right shoulder.
3. That at the time of the injury, the claimant was earning an average weekly wage of \$1,129.94, entitling him to temporary total disability and permanent partial disability rates of \$617.00/\$463.00, respectively.
4. The respondents accepted the claim, paid medical, and accepted a twenty-seven percent (27%) permanent partial disability (PPD) impairment rating to the body as a whole.
5. The claimant was found, by Dr. David Moore, to be at maximum medical improvement (MMI) on July 7, 2017.
6. That page 18 of the medical records submitted by the respondents and specifically the report provided by Rick Byrd, a Certified Senior Disability Analyst, was found to be admissible.
7. That the claimant has satisfied the required burden of proof, by a preponderance of the evidence, for a permanent partial disability (PPD) impairment rating of fifty percent (50%) to the body as a whole.

8. That the claimant and his attorney are entitled to the appropriate attorney fees pursuant to Ark. Code Ann. §11-9-715, based on the difference between the twenty-seven percent (27%) PPD rating that was accepted by the respondents and the fifty percent (50%) PPD rating that was awarded.
9. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The Prehearing Order, along with the Prehearing Questionnaires of the parties were admitted into the record without objection. The claimant submitted an exhibit that consisted of forty-eight (48) pages of medical records that were admitted without objection. The respondents submitted twenty-two (22) pages of medical records and an objection was specifically made in regard to the admissibility of page 18 of the exhibit, the report of Rick Byrd. At the time of the hearing the admissibility of this report was taken under advisement with the remaining pages of the exhibit without objection. In addition, the respondents submitted a second exhibit which consisted of forty-eight (48) pages of WCC forms and correspondence which was also admitted without objection.

The claimant testified that he was born on July 25, 1967, and obtained a high school diploma with a “little bit of college” and also obtained a Master Electrician’s license. Currently, he works for the Arkansas State Police as a State Trooper. He stated that he went to troop school in August of 1998. Prior to that, he was in the Army and worked as an electrician.

His problems began when he fell during training and injured his right shoulder, which resulted in a couple of surgeries performed by Doctor Moore. He received disability workers’ compensation benefits during his recovery periods, and then returned to work. After the second surgery, he suffered a hemidiaphragm paralysis. (Tr. 7, 8) He was later

treated by Doctor Greenwood. The claimant first noticed he was having problems while he was going to physical therapy and thought he was just out of shape, due to the time spent sitting in a chair during recovery. He later returned to work and was required to take a physical, due to the fact he was getting prepared for his annual physical fitness assessment, which required a doctor's note. (Tr. 9) During this process, he commented, "I feel like I have one lung and I don't know what's going on but I'm running out of air all the time." He was then placed on a breathing machine and later referred to Doctor Abraham. He was then referred to Doctor Greenwood in 2017 for treatment and has been under his care since then. (Tr.10) He last saw Doctor Greenwood about three (3) months prior to the hearing. He has been placed on a couple of medications and has blown into a breathing apparatus two (2) or three (3) times a day, in an attempt to improve his lung function. (Tr.11) He testified there had been zero improvement in his breathing. In regard to his job, his employer reassigned his job duties and functions to reduce his public exposure due to his current health condition. Doctor Greenwood has been his treating physician and he is still receiving treatment from him. (Tr.12) The claimant additionally testified he had never seen Doctor Baskin and had "Never even heard of him." (Tr.13)

Under cross-examination, the claimant admitted he suffered injuries while in the Army and was being treated for them at the VA. He denied being treated for an issue with his lungs and stated that he ran 15 to 20 miles a week at the time. (Tr.15) He admitted that he talked to Doctor Abraham or Doctor Greenwood about burn pits in Iraq. Although Doctor Abraham never examined him, he thought that he came to the conclusion he had COPD due to his time in theater. The claimant went on to testify that he disagreed with him and requested a change of physician and he then saw Doctor

Greenwood. He admitted receiving a sleep machine from the VA. (Tr.16) He also admitted to being diagnosed with sleep apnea prior to the shoulder injury, but denied using the breathing apparatus on a regular basis. He also admitted to tearing his right shoulder when he fell on it, during a training session. (Tr.17) He also admitted he did not initially receive any treatment in regard to the injury. (Tr.18) He agreed that the first treatment for his shoulder was in January of 2015. His shoulder had improved, and his current issue was with his lungs. In regard to Doctor Abraham, he thought that he only saw him once. (Tr.20)

In regard to breathing, the claimant stated, “I don’t think that it improved over time. I think it fluctuated then very small amounts.” “My breathing from me personally has not got any better, it stayed the same. I still continue to have problems. I run out of air even in here talking.” (Tr.21)

In regard to the tests provided by Doctor Greenwood, the claimant testified a nurse or a medical person would actually perform the tests. (Tr.25) The claimant also admitted he had returned to work after he was cleared for his shoulder. (Tr.26) He also admitted he was promoted while still in bed, prior to returning to work. Prior to the accident, his rank was Corporal, while his current rank is now Sergeant, which came with an increase in pay. (Tr.27) He currently works in the Training Division. The claimant also admitted he drove to the hearing and made a trip to South Dakota with his son, last year. (Tr.28) While there, he went pheasant hunting, but stated he had trouble walking. (Tr.29) The claimant admitted he still carried a gun, and that he had to pass a test for that. He also stated that although there was a driver’s test during recruit school, there were no driver’s tests after they were out of school. (Tr.30)

Under redirect-examination, the claimant testified his current position allows him to work in such a way as to not put excessive stress on his lungs. (Tr.31) Since the injury, they have had to re-design his duties. (Tr.32)

On recross-examination, the claimant testified it would be a problem if he had to fight for his or your life. (Tr.33)

The claimant submitted forty-eight (48) pages of medical records without objection. The claimant initially presented to Doctor Moore for an acromioclavicular arthrosis, impingement, and a possible rotator cuff tear of the right shoulder on January 5, 2015. (Cl.Ex.1, pp.1-3) On February 18, 2015, the claimant received a right shoulder MRI, which provided he suffered from a partial thickness insertional infraspinatus tendon tear, mild supraspinatus tendinosis, posterior and inferior labral tear, and also suffered from acromioclavicular osteoarthritis. (Cl.Ex.1, p.4) The claimant returned to Doctor Moore on February 19, 2015, for his first right shoulder surgery, at the Arkansas Surgery Hospital on March 11, 2015. (Cl.Ex.1, pp.5-8) The claimant returned to Doctor Moore on July 6, 2015, for a post-surgery evaluation which provided that he was doing well, three months post-surgery. (Cl.Ex.1, p.9)

A right shoulder arthrogram and an MRI was performed on January 11, 2016, and they suggested a full-thickness defect of the right rotator cuff. (Cl.Ex.1, pp.10-11) The claimant returned to Doctor Moore on January 25, 2016, and the report provided that due to his persistent pain and the painful partial-thickness rotator cuff tear, a repeat arthroscopy along with a possible rotator cuff repair was discussed. The report also provided that the claimant's work restrictions were lifted. (Cl.Ex.1, p.12) The claimant returned to Doctor Moore on August 1, 2016, and the report provided the claimant

suffered from a painful partial-thickness rotator cuff repair of the right shoulder along with degenerative labral tearing of the right shoulder. A second right shoulder arthroscopy and a rotator cuff repair was recommended. (Cl.Ex.1, p.13) The second right shoulder arthroscopy was performed by Doctor Moore on August 24, 2016. (Cl.Ex.1, pp.14-16) The claimant returned to Doctor Moore on February 20, 2017, and the report provided the claimant's right shoulder was healing well. The report also provided Doctor Moore would refer the claimant to pulmonology in regard to treatment for his pulmonary condition. (Cl.Ex.1, p.17)

The claimant initially presented to Doctor Abraham for a pulmonary evaluation, in regard to his shortness of breath, on February 21, 2017. He was assessed with dyspnea and disorders of the diaphragm. The claimant then returned to Doctor Abraham on March 15, 2017, and the report provided for dyspnea, centrilobular emphysema, disorders of the diaphragm, and obstructive sleep apnea. (Cl.Ex.1, pp.18-21) On March 24, 2017, the claimant presented for a fluoroscopy which provided that he suffered from a paralysis of the right diaphragm. (Cl.Ex.1, p.22) The claimant then returned to Doctor Moore on April 3, 2017, and the report provided that the claimant's main problem was currently the paralysis of his right hemidiaphragm, since the date of the surgery on August 24, 2016. The report also provided that the claimant was referred for a second opinion in regard to his pulmonary issues. (Cl.Ex.1, p.23) A report from the nurse case manager and Doctor Abraham dated April 12, 2017, provided that the paralysis of the hemidiaphragm was most likely due to his surgery for his October 14, 2014 work injury. (Cl.Ex.1, p.24)

The claimant later presented to Doctor Greenwood on May 11, 2017, who opined that with a reasonable degree of medical certainty, the claimant's diagnosis of a paralyzed

right hemidiaphragm is fifty-one percent (51%) or greater related to his injury on October 14, 2014, and not his sleep apnea. A chart note signed by Doctor Moore provided he would defer treatment to Doctor Greenwood relating to the right hemidiaphragm paralysis. (Cl.Ex.1, pp. 25-27) On July 7, 2017, Doctor Moore released the claimant in regard to his right shoulder injury at MMI and further opined that any permanent impairment issued by Doctor Greenwood was related to the right shoulder injury and subsequent surgeries. (greater than fifty percent [50%]). This opinion was stated within a reasonable degree of medical certainty. (Cl.Ex.1, p.28)

The claimant returned to Doctor Greenwood on September 7, 2017, and later on March 27, 2018, and the March report provided that the claimant's disorders of the diaphragm were slightly better over the last six (6) months, based on a pulmonary function test. (Cl.Ex.1, pp.29-31) On May 21, 2018, the claimant returned to Doctor Moore, and the report provided that the claimant's lung function was permanently damaged. (Cl.Ex.1, p.32)

The claimant later returned to Doctor Greenwood on October 4, 2018, and the report provided the claimant was doing OK, but that he had concerns about PT in the spring. (Cl.Ex.1, pp.33–34) In response to a letter from the Arkansas Insurance Department, Doctor Greenwood issued a handwritten note dated October 16, 2018, which provided, "As previously attested to I believe (50% or better chance) that his paralyzed diaphragm is a result of either the injury or subsequent surgery for the injury." (Cl.Ex.1, pp.35-36) Doctor Greenwood issued a report on January 7, 2019, which provided that this was a follow-up for a probable war wound and a paralyzed right hemidiaphragm. The report provided the claimant was improving. (Cl.Ex.1, pp. 37-38)

Another Pulmonary Function Report was provided to the claimant on August 16, 2019. The claimant also presented to Doctor Greenwood on the above-date and the report provided that the claimant was doing OK, but not able to do what he used to do. (Cl.Ex.1, pp.39-41) The claimant returned to Doctor Greenwood for another follow-up on February 4, 2020, and another Pulmonary Function Report. The report provided that the claimant was OK, but could not do his job in the field, nor exert himself to stay in shape. Doctor Greenwood further opined the claimant was stable with a severely decreased exertional capacity. (Cl.Ex.1, pp.42-44)

On March 9, 2021, Doctor Greenwood opined that, “Within a reasonable degree of medical certainty, the percentage of permanent impairment related to the above-referenced injury which satisfies both requirements stated above is 50% to the body as a whole” referring to the injury of October 14, 2014, and a FEV of fifty-eight (58%), and to the American Medical Association’s Guide for the Evaluation of Permanent Impairment, 4th Edition. (Cl.Ex.1, p.45) The Arkansas Insurance Department mailed a form to Doctor Greenwood on April 8, 2021, asking if the claimant had reached MMI and also asking for a clarification of the attached “Physician’s Statement.” Doctor Greenwood responded that the claimant had reached MMI on February 8, 2021. He also opined that the claimant had a permanent partial impairment rating of twenty-six percent (26%) to fifty percent (50%) to the whole person, referring to page 162 and table 8 of the Fourth Edition of the AMA Guidelines. (Cl.Ex.1, p.46) The final document from Doctor Greenwood again provided that the claimant had a fifty percent (50%) impairment rating to the body as a whole based upon, “FEV, 58%, too short of breath to perform his duties as he did prior to injury.” (Cl.Ex.1, pp. 47-48)

The respondent submitted twenty-two (22) pages of medical records with an objection by the claimant in regard to the admissibility of the Impairment Rating Review by Rick Byrd on page 18 of the exhibit. The claimant presented to Doctor James Tilley on July 15, 2014, and the report provided the claimant suffered from obstructive sleep apnea and unspecified insomnia. (Resp.Ex.1, pp.1-3) On October 6, 2016, progress notes provided the claimant had a chief complaint of not being able to sleep and had an objective of obtaining a new mask for his CPAP machine. (Resp.Ex.1, pp. 4-8) A formal request for a replacement sleep apnea mask was made on October 6, 2016. (Resp.Ex. 1, pp.9-10)

On January 27, 2017, the claimant presented to Vilonia Therapy Services and the report provided the claimant was showing increased tolerance to the Advanced Throwers 10 exercise program, shown by decreased rest breaks during the exercise series. (Resp. Ex.1, p.11) On April 14, 2017, Doctor Moore issued a letter requesting a second opinion from another pulmonologist regarding the paralysis of the claimant's right hemidiaphragm. (Resp.Ex.1, p.12) A report from Doctor Greenwood dated February 8, 2021, provided the claimant was doing OK with his paralyzed right hemidiaphragm and his probable war lung. (Resp.Ex.1, pp.14-15)

An objection was made to the admissibility of the Impairment Rating Review by Rick Byrd, Senior Disability Analyst. As discussed below, the document was admitted after the issue was taken under advisement at the time of the hearing. The report refers to Doctor Greenwood's finding of a Forced Expiratory Volume (FEV) of fifty-eight percent (58%) with a persistent shortness of breath. This report went on to provide that the claimant falls within the Class 3 Category, using Table 8, which listed the Forced

Expiratory Volume requirements to be between forty-one percent (41%) and fifty-nine percent (59%). The guide at this level has an impairment range of twenty-six percent (26%) to fifty percent (50%), and one would assign patients with a forty-one percent (41%) Forced Expiratory Volume (FEV), a fifty percent (50%) percent whole person impairment rating, and one with a fifty-nine percent (59%) Forced Expiratory Volume (FEV), a twenty-six percent (26%) whole person impairment rating. Since the claimant's Forced Expiratory Volume (FEV) is documented at fifty-eight percent (58%), the report provided he would recommend an assigned rating of a twenty-seven percent (27%) whole person impairment rating. The report referred to the American Medical Association's Guide for the Evaluation of Permanent Impairment, 4th Edition, page 162 and table 8. (Resp.Ex.1, p.18)

Doctor Barry Baskin also issued an impairment rating on May 22, 2021, after reviewing the medical records that were provided to him by the case manager. His report provided the claimant was seen by Doctor Greenwood, a pulmonologist, who gave the claimant a fifty percent (50%) impairment rating to the whole person. Doctor Baskin also referred to the report by the Functional Testing Centers and the impairment rating of twenty-seven percent (27%) to the whole person. The report went on to provide that, "The rating of 50% would be on the high end for this range of FEV 1 restriction." The AMA Guides, 4th Edition, were also used for the report and after reviewing the claimant's medical records, Doctor Baskin opined that the claimant had a twenty-seven percent (27%) whole person impairment. The report also provided the claimant's impairment rating was reviewed a second time. (Resp.Ex.1, pp.19-20)

The respondents also submitted forty-eight (48) pages of WCC Forms and correspondence into the record, without objection. The Arkansas N Form provided that the claimant lost his footing while at the shooting range and fell on his shoulder on October 14, 2014. (Resp.Ex.2, pp.3-5) A letter from the Arkansas Insurance Department provided that Doctor Greenwood had provided that the claimant had a 26–50% permanent partial impairment rating which would have to be clarified. (Resp.Ex. 2, p.19) A letter from the Arkansas Insurance Department provided they had reviewed the permanent partial disability ratings assigned to the claimant’s claim and that he would receive a twenty-seven percent (27%) permanent partial rating based upon the AMA Guidelines, 4th Edition. (Resp.Ex.2, p. 29). In addition, a letter from the claimant’s attorney was made part of the record, where a request to Doctor Greenwood was made in order to clarify his permanent partial impairment rating of twenty-six percent 26% to fifty percent (50%). (Resp.Ex.2, p.30)

DISCUSSION AND ADJUDICATION OF ISSUES

The claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to compensation benefits under the Arkansas Workers’ Compensation Law. In determining whether the claimant has sustained the burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann 11-9-704. *Wade v. Mr. Cavananugh’s*, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. *Weldon v. Pierce Brothers Construction Co.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). This includes the Commission’s province to reconcile conflicting medical evidence. *Arkansas Health Ctr. v. Burnett*, 2018 Ark. App. 427, 558 S.W. 3d 408.

There appears to be no dispute that the claimant sustained a compensable work-related injury to his right shoulder, that he suffered through two (2) surgeries that were covered by the respondents in an attempt to repair his right shoulder, and that he reached MMI on July 7, 2017. The respondents accepted and started paying the claimant a twenty-seven percent (27%) permanent partial disability (PPD) rating to the body as a whole, based upon a report issued by Doctor Baskin, a non-treating physician, and also a twenty-seven percent (27%) permanent partial disability (PPD) rating issued by Rick Byrd, a Senior Disability Analyst. The claimant contends that he is entitled to a fifty percent (50%) permanent partial disability (PPD) rating to the body as a whole, based upon the findings of his treating physician, Doctor Greenwood, plus attorney fees for the difference between any finding of disability between the twenty-seven percent (27%) and the fifty percent (50%) permanent partial disability rating.

The initial issue that must be reached is the admissibility of page 18 of “Respondent’s Exhibit One,” the report issued by Rick Byrd. The Workers’ Compensation Commission has broad discretion with reference to admission of the evidence, and its decision will not be reversed absence a showing of abuse of discretion. *Brown v. Alabama Electric Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998). The Commission is given a great deal of latitude in evidentiary matters; specifically, Ark. Code Ann. §11-9-705(a) states that the Commission “shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure.” *Stoker v. Thomas Randall Fowler Inc.*, 2017 Ark. App. 594, 533 S.W.3d 596 (2017). That based upon the above, page 18 of the “Respondent’s Exhibit One” is found to be admissible.

The parties agreed that the sole issue to be litigated is the permanent impairment rating. Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has been reached. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-9704 (c) (1) (Repl. 2012) Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9102(16)(A)(i). Although it is true that the legislature has required medical evidence to establish a compensable injury, it does not follow that such evidence is required to establish each and every element of compensability. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). Medical opinions addressing impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9102(16)(B). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(f)(ii)a. “Major cause” means more than fifty percent (50%) if the cause. Ark. Code Ann. §11-9-102(14).

In the present matter, Doctor Abraham and his case manager opined on April 12, 2017, that the paralysis of the hemidiaphragm was most likely due to the claimant’s surgery for his October 14, 2014, work injury. Later, the claimant presented to Doctor Greenwood, a pulmonologist, who continued to treat the claimant and last saw him approximately three (3) months prior to the hearing, and who also diagnosed the claimant with a paralyzed right hemidiaphragm and opined that it is fifty-one percent (51%) or greater related to his injury on October 14, 2014, and not his sleep apnea. On July 7, 2017, Doctor Moore, the surgeon who performed the claimant’s two (2) shoulder

surgeries, stated he would defer treatment to Doctor Greenwood, in regard to the right hemidiaphragm paralysis. Later on October 16, 2018, Doctor Greenwood issued a handwritten note in a reply to a request from the Arkansas Insurance Department which stated as follows: “As previously attested to I believe (50% or better chance) that his paralyzed diaphragm is a result of either the injury or subsequent surgery for the injury.” Here it is clear that the injury to the right hemidiaphragm is a result of either the work-related injury or the subsequent surgery for the work-related injury.

Consequently, a review of the permanent partial disability ratings must occur. Doctor Greenwood, the treating pulmonologist, opined in a report on March 9, 2021, that “Within a reasonable degree of medical certainty, the percentage of permanent impairment related to the above referenced injury which satisfies both requirements stated above is 50% of the body as a whole” referring to the injury of October 14, 2014, and a FEV of fifty-eight percent (58%), referring to the American Medical Association’s Guide for the Evaluation of Permanent Impairment, 4th Edition. Later in responding to a request by the Arkansas Insurance Department on April 8, 2021, Doctor Greenwood responded that the claimant had reached MMI on February 8, 2021, and opined that the claimant had a permanent partial impairment rating of twenty-six percent (26%) to fifty percent (50%) to the whole person, referring to page 162 and table 8 of the Fourth Edition of the AMA Guidelines. (Cl.Ex.1, p.46) Later on September 13, 2021, Doctor Greenwood signed a physician’s statement, again referring to the American Medical Association’s Guide for the Evaluation of Permanent Impairment, 4th Edition, and he provided that within a reasonable degree of medical certainty, the percentage of permanent impairment related to the above referenced injury which satisfies both requirements (a reasonable

degree of medical certainty and the injury was the major cause) is a fifty percent (50%) impairment rating to the body as a whole. He also stated that the FEV of fifty-eight percent (58%) caused the claimant to be too short of breath to perform his duties as he did prior to the injury.

The respondents referred the medical information to Rick Byrd, a Certified Senior Disability Analyst, at Functional Testing Centers, Inc. of Mountain Home, Arkansas, who also referred to page 162, table 8, of the American Medical Association's Guide for the Evaluation of Permanent Impairment, 4th Edition, and opined that since the claimant's FEV is documented at fifty eight percent (58%), he would recommend an assigned rating of a twenty-seven percent (27%) permanent partial disability (PPD) rating to the body as a whole.

The respondents also forwarded the medical information to Doctor Barry Baskin for an additional opinion. On May 22, 2021, and also referring to the American Medical Association's Guide for the Evaluation of Permanent Impairment, 4th Edition, and page 162, table 8, Doctor Baskin opined that the claimant had a permanent partial disability (PPD) rating of twenty-seven percent (27%) to the body as a whole and explained how he reached his determination. He went on to state that "The rating of 50% would be on the high end for this range of FEV 1 restriction."

The treating physician, as well as the disability analyst, and the physician who issued a second opinion, all referred to page 162, table 8, of the American Medical Association's Guide for the Evaluation of Permanent Impairment, 4th Edition, in regard to their opinion. The table provides under class three that a FEV between forty-one percent (41%) and fifty-nine percent (59%) results in a moderate impairment rating of twenty-six

percent (26%) to fifty percent 50%. It is well settled that the Commission has the duty of weighing medical evidence and the authority to determine its medical soundness and probative force. *Williams v. Ark. Dept. of Cmty. Corr.*, 2016 Ark. App. 427, 502 S.W. 3d 534 (2016). Although Doctor Baskin and the Senior Certified Disability Analyst both issued a permanent partial disability (PPD) rating to the body as whole of twenty-seven percent (27%) after reviewing the medical records, the opinion issued by Doctor Greenwood of a permanent partial disability (PPD) rating to the body as a whole of fifty percent (50%) is found to be entitled to a more significant evidentiary weight than the others, due to Doctor Greenwood's numerous personal examinations of the claimant over a period of time and of also issuing a report that also falls within the guidelines as spelled out at page 162, table 8, of the American Medical Association's Guide for the Evaluation of Permanent Impairment, 4th Edition. It is also noted that Doctor Baskin even commented that a rating of fifty percent (50%) was within the range of disability, but on the high end. Since neither Doctor Baskin and the Senior Certified Disability Analyst had the opportunity to examine the claimant or apparently even talk with him, the opinion by Doctor Greenwood that the claimant has a fifty percent (50%) permanent partial disability (PPD) rating to the body as a whole is found to be controlling.

The claimant and his attorney are entitled to the appropriate legal fees as spelled out in Ann. Code Ann. §11-9-715, based upon the difference between the fifty percent (50%) permanent partial disability (PPD) rating to the body as a whole and the rating of twenty-seven percent (27%) permanent partial disability (PPD) rating to the body as a whole, accepted by the respondents.

CONCLUSION

Based upon the available evidence, and after weighing it impartially without giving the benefit of the doubt to either party, it is found that the claimant has satisfied the required burden of proof, by a preponderance of the credible evidence, that he has a fifty percent (50%) permanent partial disability rating (PPD) due to the paralysis of the right hemidiaphragm, which was the result of his work-related injury and the resulting surgeries. Additionally, due to the fact the respondents accepted the permanent partial disability (PPD) rating of twenty-seven percent (27%) to the body as a whole, the claimant and his attorney are also entitled to attorney fees based upon the difference between the accepted twenty-seven percent (27%) permanent partial disability (PPD) rating and the fifty percent (50%) permanent partial disability (PPD) rating which was awarded. This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

IT IS SO ORDERED.

JAMES D. KENNEDY
Administrative Law Judge