

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. H108811**

**JULIE REVELS,  
EMPLOYEE**

**CLAIMANT**

**MAGNET COVE ELEMENTARY SCHOOL,  
EMPLOYER**

**RESPONDENT**

**ARKANSAS SCHOOL BOARDS ASS'N. WORKERS'  
COMPENSATION TRUST/ARKANSAS SCHOOL  
BDS. ASS'N, INS. CARRIER/TPA**

**RESPONDENT**

**OPINION FILED JULY 16, 2024**

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens on April 17, 2024, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Gary Davis, Davis Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Melissa Wood, Worley, Wood & Parrish, P.A., Little Rock, Pulaski County, Arkansas.

**INTRODUCTION**

In the prehearing order filed March 7, 2024, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including September 21, 2021, when the claimant sustained an admittedly compensable injury to her right shoulder, for which the respondents paid medical and indemnity benefits.
3. The claimant's average weekly wage (AWW) was \$1,128.44, which is sufficient to entitle her to weekly compensation rates of \$736.00 for temporary total disability (TTD), and \$552.00 for permanent partial disability (PPD) benefits.

4. The claimant's authorized treating physician assigned her a permanent anatomical impairment rating of 11% to the body-as-a-whole (BAW).
5. The respondents have accepted and paid, or are in the process of paying, a permanent anatomical impairment rating of five percent (5%) BAW.
6. The respondents controvert only the difference between the 11% BAW and five 5% BAW impairment ratings, which totals six percent (6%) BAW.
7. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Commission Exhibit 1 at 2; T. at 4-5). Pursuant to the party's mutual agreement the issues litigated at the hearing were:

1. Whether the claimant is entitled to PPD benefits commensurate with the eleven percent 11% BAW, *or* the five percent 5% BAW permanent anatomical impairment rating pursuant to the applicable *American Medical Association Guides to the Evaluation of Permanent Impairment* (AMA, 4<sup>th</sup> Edition 1993) (the *AMA Guides*).
2. Whether and to what extent the claimant's attorney is entitled to a controverted fee on these facts.
3. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Comms'n Ex. 1 at 2; T. 4-5).

The claimant contends she sustained admitted compensable injuries to her right shoulder. She contends her authorized, principal treating physician assigned her a permanent anatomical impairment rating of 11% BAW, and she is entitled to PPD benefits based on this 11% BAW rating. She contends the respondents have accepted and will pay only a 5% BAW permanent anatomical impairment rating. The claimant contends the respondents have controverted payment of PPD benefits commensurate with the difference between the 11% BAW rating and the 5% BAW rating, which is 6% BAW and, therefore, her attorney is entitled to a controverted fee based on this amount (6% BAW). Finally, the claimant's attorney respectfully requests the Commission order the

respondents to deduct any attorney's fees the claimant owes based on controverted benefits she may receive by award or otherwise, and to pay his attorney's fees by separate check payable directly to him. (Comms'n Ex. 1 at 3; T. 4-5; 102-104).

The respondents contend they have accepted and paid all appropriate benefits related to the claimant's September 21, 2021, compensable shoulder injury. The respondents contend they have accepted a 5% BAW permanent anatomical impairment rating, and that this 5% BAW rating is supported by the *AMA Guides*, while the 11% rating is *not* supported by the *AMA Guides*. The respondents reserve the right to supplement their contentions and to assert any and all other applicable defenses and arguments upon the completion of necessary investigation and discovery. The respondents reserve any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 3; T. 4-5; T. 104-106).

### **STATEMENT OF THE CASE**

The claimant, Ms. Julie Revels (the claimant), is 57 years old. She has worked as an elementary school teacher for some 34 years. She has worked for the Magnet Cove School District for 21 years, and was working there as a third (3<sup>rd</sup>) grade teacher at the time of her admittedly compensable September 21, 2021, right shoulder injury. On September 21, 2021, the claimant slipped on some water that had been spilled in her classroom, and fell sideways onto her right shoulder. (T. 10-15). The claimant was treated by Dr. Christopher Young, a Hot Springs, Arkansas orthopedic surgeon. Dr. Young ordered an MRI which revealed a torn rotator cuff in the claimant's right shoulder, and he performed surgery to repair the tear. The claimant was off work some six (6) weeks, and thereafter underwent about a year of physical therapy (PT). Dr. Young opined the claimant reached maximum medical improvement (MMI) as of November 8, 2022, and noted the she was to undergo a functional capacity evaluation (FCE), apparently in order to assist him in

determining her permanent anatomical impairment. (T. 10-23; Claimant's Exhibit 1 at 76; 1-76; Respondents' Exhibit 1 at 1-3).

On December 21, 2022, the claimant underwent the FCE at Functional Testing Centers, Inc. (Functional Testing Centers), of Mountain Home, Arkansas, which is owned and operated by Mr. Rick Byrd and Mr. Casey Garretson. The claimant's FCE results were deemed to be reliable, with the claimant performing the test demonstrating 50 out of 50 of the consistency measures. Based on the FCE results Mr. Garretson, an occupational therapist specializing in functional capacity testing, opined the claimant was capable of returning to full duty work, and assigned her a permanent anatomical impairment rating of 9% to the right upper extremity, and 5% BAW. This impairment rating report cites the Arkansas Court of Appeals' decision in *Hayes v. Wal-Mart Stores, Inc.*, 71 Ark. App. 207, 29 S.W.3d 751 (Ark. App. 2000), wherein the court held that passive range-of-motion (ROM) tests (where the doctor or examiner manipulates the claimant's arm) were not under the claimant's voluntary control and, therefore, were objective in nature; while active ROM tests (where the claimant was asked to raise her arm as high as she could, etc.) were in fact subjective in nature. As stipulated, the respondents accepted and paid the 5% BAW impairment rating. (RX1 at 4-29; 24; Stipulation No. 5, *supra.*).

On March 2, 2023, Dr. Young saw the claimant in follow-up of the FCE and, based on his reading of the FCE, the claimant's significant loss of use of her right arm in performing activities which required her to lift and use her right arm above her head, as well as his interpretation of *the AMA Guides*, Dr. Young assigned the claimant an 11% BAW impairment rating. (CX1 at 78-81; and T. 18-45).

Some six (6) months later Mr. Rick Byrd of Functional Testing Centers was asked and did write a letter to the respondents' adjuster entitled, "Impairment Rating Review" in which he

rendered an opinion that Dr. Young's 11% BAW impairment rating was not properly based on *the AMA Guides*. Mr. Byrd also reaffirmed his and Mr. Garretson's opinion that based on the reliable FCE results and *the AMA Guides*, the claimant was entitled to a permanent anatomical impairment rating of 5% BAW which, again, the respondents accepted and paid. (RX1 at 30). Both Mr. Garretson and Mr. Byrd testified at the hearing, explaining in some detail how they arrived at the 5% BAW rating; and they both disagreed with Dr. Young's 11% BAW impairment rating, affirming and standing by their 5% BAW impairment rating based on the reliable FCE results and their interpretation of *the AMA Guides*. (T. 46-99).

Finally, in a progress note report dated September 5, 2023, after having reviewed Mr. Byrd's "Impairment Rating Review", Dr. Young once again examined the claimant and concluded he had no reason to change his 11% BAW impairment rating; and he reaffirmed his 11% BAW impairment rating stating it was in fact based on *the AMA Guides*. (CX1 at 82-83). Neither party chose to depose Dr. Young and to introduce into evidence his evidentiary deposition.

## **DISCUSSION**

### **The Burden of Proof**

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2024 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). *Ark. Code Ann.* Section 11-9-704(c)(3) (2024 Lexis Repl.) states that the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899

(Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2023 Lexis Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

**The preponderance of the credible evidence of record demonstrates the claimant is entitled to the 11% permanent anatomical impairment rating Dr. Young assigned her which was based on the FCE results, his own physical examinations, and the applicable AMA Guides.**

**Permanent Anatomical Impairment, Generally**

The Arkansas Court of Appeals summarized the law as follows regarding compensable permanent impairment in *Wayne Smith Trucking, Inc. v. McWilliams*, 2011 Ark. App. 414, 384 S.W.3d 561:

"Permanent impairment" has been defined as "any permanent functional or anatomical loss remaining after the healing period has ended." *Main v. McGehee Metals*, 2010 Ark. App. 585, at 9, \_\_\_ S.W.3d \_\_\_, \_\_\_. Any determination of the existence or extent of physical impairment must be supported by objective and measurable findings. *Dillard's v. Johnson*, 2010 Ark. App. 138, \_\_\_ S.W.3d \_\_\_. "Objective findings" are those that cannot come under the voluntary control of the patient, and specifically exclude pain, straight-leg-raising test, and range-of-motion tests. Ark. Code Ann. § 11-9-102(16)(A) (Repl. 2002); *Vangilder v. Anchor Packaging, Inc.*, 2011 Ark. App. 240. In *Wal-Mart Assocs., Inc. v. Ealey*, 2009 Ark. App. 680, this court, in addressing an impairment rating, held that there was no requirement that medical testimony be based solely or expressly on objective findings, only that the medical evidence of the injury and impairment be supported by objective findings. Furthermore, 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(4)(F)(ii)(a) (Supp. 2009). "Major cause" means more than fifty percent of the cause. *Ark. Code Ann.* § 11-9-102(14)(A) (Supp. 2009).

An injured employee is entitled to compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Vangilder, supra*. The Commission is authorized to determine what portion of the medical and other relevant evidence to credit and to translate that evidence into a finding of permanent impairment using *The American Medical Association Guides to the Evaluation of Permanent Impairment* (American Medical Ass'n, 4<sup>th</sup> Ed., 1993) (*the AMA Guides*). The Commission may assess its own impairment rating rather than rely solely upon determination of the validity of ratings assigned by physicians. *Main v. McGehee Metals, supra*.

The sole question for determination in this case is whether the claimant is entitled to the 11% BAW impairment rating Dr. Young consistently maintained she was entitled to based upon his review of the FCE and subsequently issued reports, his own examinations of her, and the applicable *AMA Guides*. Of course, the respondents accepted and paid a 5% BAW impairment rating. Therefore, at issue is 6% BAW – *i.e.*, the difference between Dr. Young’s 11% BAW impairment rating and the 5% BAW rating the respondents accepted.

This was a well-litigated case on an interesting issue by two (2) excellent, highly experienced attorneys that turns on rather subtle evidentiary considerations. All three (3) of the witnesses who testified – the claimant, Mr. Garretson and Mr. Byrd – were all articulate and highly credible. Based on the applicable law and the totality of the evidence, I am compelled to find the claimant has in fact met her burden of proof in demonstrating she is entitled to a permanent anatomical impairment rating of 11% BAW – *i.e.*, she is entitled to additional PPD benefits based on an additional 6% BAW impairment rating, the difference between Dr. Young’s 11% BAW impairment rating and the 5% BAW impairment rating the respondents accepted, for the following reasons.

First, again, I found all three (3) witnesses to be articulate and highly credible. I found the claimant’s testimony concerning her demonstrable, objective physical limitations and restrictions resulting from her admittedly compensable right shoulder injury to be credible and reasonable, and not exaggerated, as apparently did Dr. Young. This is especially true when considered in light of the reliable FCE results, Dr. Young’s physical examinations, and the applicable *AMA Guides*.

Second, I find the record is devoid of sufficient evidence to demonstrate that Dr. Young’s opinion the claimant is entitled to an 11% BAW permanent anatomical impairment rating is not in fact based on objective factors. Clearly, as the claimant’s treating and operating orthopedic surgeon Dr. Young is a medical professional and is in the very best position to determine the true and



accurate extent of the claimant's permanent anatomical impairment. After having treated the claimant, operated on her; examined her on multiple occasions; reviewed the FCE results and subsequent related reports, and thereafter conducted his own physical examinations of her, Dr. Young opined the claimant is entitled to an 11% BAW impairment rating *based on the applicable AMA Guides*. The respondents apparently argue that Dr. Young based his 11% BAW impairment rating at least in part on subjective factors such as passive, rather than active, ROM tests, and/or the claimant's own subjective reports of what she can and cannot do/her physical limitations and/or restrictions. *See, Hayes v. Wal-Mart Stores, Inc., supra*. But, significantly, the record is devoid of sufficient evidence to support this argument. I did not notice in any of Dr. Young's relevant reports that he based his impairment rating or any part thereof on active ROM or on any other notable subjective factor(s). Therefore, when Dr. Young states he based his 11% impairment rating on *the AMA Guides*, without clear, demonstrable evidence to the contrary it would constitute sheer speculation and conjecture for me to state and find otherwise. As in any case, such speculation and conjecture would be unwarranted, and improper.

Therefore, for all the aforementioned reasons I hereby make the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations contained in the prehearing order filed March 7, 2024, which the parties affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has met her burden of proof in demonstrating she is entitled to an impairment rating of 11% BAW – *i.e.*, to additional PPD benefits based on the 6% BAW difference in the two (2) subject ratings.
3. The claimant's attorney is entitled to the maximum statutory attorney's fees based on the additional PPD benefits awarded for the additional 6% BAW permanent anatomical impairment rating determined herein.
4. The respondents shall deduct the claimant's portion of the attorney's fee from the benefits awarded and shall pay the claimant's attorney's entire fee via a separate check made out solely to the claimant's attorney.

**AWARD**

The respondents hereby are directed to pay benefits in accordance with the “Findings of Fact and Conclusions of Law” set forth above. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to *Ark. Code Ann.* Section 11-9-809, and *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett*, 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 1998); and *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004).

If they have not already done so, the respondents shall pay the court reporter’s fee within 20 days of their receipt of this opinion.

**IT IS SO ORDERED.**

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Mike Pickens  
Administrative Law Judge

MP/mp