BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. G400712

ADOLPH SCOTT, EMPLOYEE	**CLAIMANT**
ARKANSAS SCHOOL FOR THE DEAF, EMPLOYER	**RESPONDENT NO. 1**
PUBLIC EMPLOYEE CLAIMS, CARRIER/TPA	**RESPONDENT NO. 1**
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	**RESPONDENT NO. 2**

OPINION FILED AUGUST 11, 2021

Hearing before Administrative Law Judge O. Milton Fine II on June 24, 2021, in Little Rock, Pulaski County, Arkansas.

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

Respondents No. 1 represented by Mr. Charles H. McLemore, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, represented by Ms. Christy L. King, Attorney at Law, Little Rock, Arkansas, excused from participation.

STATEMENT OF THE CASE

On June 24, 2021, the above-captioned claim was heard in Little Rock, Arkansas. A pre-hearing conference took place on April 26, 2021. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. They are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer/employee/carrier relationship existed on or about July 3, 2013, when Claimant sustained a compensable injury to his lower back.
3. Respondents No. 1 accepted the above injury and paid benefits pursuant thereto, including an impairment rating of twelve percent (12%) to the body as a whole that was assigned by Dr. Wayne Bruffett.
4. Claimant's average weekly wage of $431.66 entitles him to compensation rates of $288.00/$216.00.
5. Claimant reached maximum medical improvement and the end of his healing period on July 15, 2015.

Issues

The parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

1. Whether Claimant is permanently and totally disabled, or in the alternative, entitled to wage-loss disability benefits.
2. Whether Respondents No. 1 are entitled to an offset or credit against benefits paid to Claimant by the Arkansas Teacher Retirement System.
3. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that admitted compensable injuries were sustained on July 3, 2013.
2. The claimant is permanently impaired and permanently restricted.
3. Claimant contends he has been rendered permanently and totally disabled or, in the alternative, that he is entitled to a wage-loss disability determination.
4. The claim is controverted for purposes of attorney's fees.
5. Claimant reserves the right to pursue other benefits to which he may become entitled in the future.
6. Claimant's attorney respectfully requests that any attorney's fees owed by the claimant on controverted benefits paid by award or otherwise be deducted from the claimant's benefits and paid directly to the claimant's attorney by separate check, and that any Commission order direct the respondents to make payment of attorney's fees in this manner.

Respondents No. 1:

1. Respondents No. 1 contend that the claimant sustained an injury to the buttocks and low back on July 3, 2013, which was accepted as compensable by them. The claimant has been provided reasonable and necessary medical treatment for his compensable injury, including fusion surgery at L4-5 by Dr. Bruffett on January 22, 2015; and Respondents No.

1 contend that all authorized treatment reasonable and necessary for the compensable injury has been, and continues to be, provided to him.

2. The claimant performed reliably in the medium classification of work at a Functional Capacity Evaluation ("FCE") on July 8, 2015. On July 15, 2015, Dr. Bruffett found that he had reached maximum medical improvement and assigned him a twelve percent (12%) whole-body permanent anatomical impairment rating. This rating has been accepted and paid to the claimant by Respondents No. 1. The claimant last worked for Respondent employer on July 20, 2015. He retired and resigned his position effective May 10, 2015. The claimant subsequently moved to South Carolina with his special friend. On April 27, 2016, Dr. Bruffett again saw him; and after both an MRI and CT scan, Dr. Bruffett concluded there was no problem of surgical significance and no change in status. On October 18, 2017, Dr. Bruffett again saw the claimant for complaints of pain in the back that was not radicular; and after an MRI study, Bruffett again concluded there was no problem of surgical significance and suggested he see Dr. Kevin Collins for treatment if the pain was severe enough to warrant further work up. The claimant continues to be provided medical treatment, in the form of pain management where is now lives in South Carolina, by Respondents No. 1.

3. Respondents No. 1 contend that the claimant cannot establish that he is permanently and totally disabled, or that he is entitled to permanent

disability benefits in excess of his anatomical impairment rating. The claimant receives a retirement disability benefit provided by his employer, for which Respondents No. 1 contend they are entitled to an offset under Ark. Code Ann. § 11-9-411 (Repl. 2012), in the event he is awarded further disability benefits.

4. Respondents No. 1 reserve the right to raise additional contentions, or to modify those stated herein, pending the completion of discovery.

Respondent No. 2:

1. If Claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. § 11-9-502 (Repl. 2012). Therefore, the Trust Fund has not controverted his entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of Claimant and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The stipulations set forth above are reasonable and are hereby accepted.

3. Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled.

4. Claimant has proven by a preponderance of the evidence that he is entitled to wage loss disability of thirty percent (30%).

5. Respondents No. 1 have proven by a preponderance of the evidence that they are entitled to entitled to a dollar-for-dollar offset under Ark. Code Ann. § 11-9-411 (Repl. 2012) concerning disability benefits Claimant receives from the Arkansas Teacher Retirement System.

6. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation of his medical records, consisting of one (1) index page and thirty-three (33) numbered pages thereafter; Claimant's Exhibit 2, another compilation of his medical records, consisting of one (1) index page and forty-six (46) numbered pages thereafter; Claimant's Exhibit 3, non-medical records, consisting of one (1) index page and eleven (11) numbered pages thereafter; Respondents No. 1 Exhibit 1, another compilation of Claimant's medical records, consisting of one (1) index page and forty-six (46) numbered pages thereafter;

Respondents No.1 Exhibit 2, non-medical records, consisting of one index pages and twenty-eight (28) numbered pages thereafter; and Joint Exhibit 1, the transcript of the deposition[1] of Claimant taken October 10, 2019, consisting of sixty-one (61) numbered pages.

Adjudication

A. Permanent and Total Disability

Introduction. Claimant has contended that as a result of his compensable injury, he is permanently and totally disabled. In the alternative, he has asserted that he is entitled to wage loss disability benefits over and above his twelve percent (12%) whole-body impairment rating. Respondents No. 1 have argued otherwise.

Standard. As the parties stipulated and the record reflects, the accident of July 3, 2013, resulted in a compensable injury to Claimant's lower back. This injury is an unscheduled one. *Cf*. Ark. Code Ann. § 11-9-521 (Repl. 2012). The term "permanent total disability" is defined in the statute as "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." *Id*. § 11-9-519(e)(1) (Repl. 2012).

Claimant's entitlement to wage loss disability benefits is controlled by Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2012), which states:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the

[1]Per Commission policy, this separately-bound transcript has been retained in the Commission's file.

> employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

See Curry v. Franklin Elec., 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such "other matters" include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). As the Arkansas Court of Appeals noted in *Hixon v. Baptist Health*, 2010 Ark. App. 413, 375 S.W.3d 690, "there is no exact formula for determining wage loss . . . ." Under § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996).

To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The standard "preponderance of the evidence" means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415 (citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947)). The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering factors that may impact a claimant's future earning capacity, the Commission considers his motivation to return to work, because a lack of interest or a negative attitude impedes

the assessment of his loss of earning capacity. *Id*. The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Repl. 2012) provides:

> *(a)* Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
>
> *(b)* If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is more than fifty percent (50%) of the cause, and has to be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14) (Repl. 2012). "Disability" is the "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." *Id*. § 11-9-102(8).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id*. In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id*.

Evidence–Testimony. Claimant, who is sixty-four (64) years old, testified that he completed the eleventh (11th) grade and began the twelfth (12th), but did not graduate. He was in the United States Army for two and a half (2 1/2) years. His assignment in the military was to wire field telephones. Claimant has never had a driver's license.

His work history has been primarily as a custodian. He has never worked with computers or supervised anyone. While living in Oklahoma, Claimant was employed as a janitor for a hospital and for a dance club. He also earned money by detailing vehicles. Part of the time he was doing this, he as also working for the disco. According to Claimant, he was employed for eight (8) years as a custodian for the Arkansas School for the Deaf. His hours there were from 7:00 a.m. to 4:30 p.m. During that same period, from 5:00 p.m. to 9:00 p.m., he worked as a janitor in the Doctor's Building in Little Rock. The latter position required that he pick up trash in the parking lot and then collect the refuse in the building.

In describing his duties at the Arkansas School for the Deaf, he related:

> To clean up. I—they—he gave us our buildings to clean up. And we would go in and we would have to clean the bathrooms and clean the rooms and mop the floors. And I would keep my floors, you know, waxed every—every three months. You know, just mop wax. And in the summertime we would have to strip the floors, and that's how my injury happened.

Waxing and stripping floors there required use of a buffer. Claimant agreed that his job at the school required that he be able to lift, bend, stoop, push and pull. He was on his feet all day there. Stipulation No. 4, *supra*, notwithstanding, Claimant stated that he earned between $8.00 and $9.00 per hour there.

Asked to describe how he became injured on June 28, 2013[2], Claimant responded:

> Went in that morning, and the room that I stopped, in, I went in to get my buffer to get started on it, and the stripper, I had put the stripper down on the floor, you know, to get started. And when I got started, I was moving the buffer around. The cord hadn't been cleaned off, it had wax on it, and the cord had flipped over. And when I went around and I came back, and I went around again and came back, my cord had flipped over again. And when I came back, it had caught up under my buffer. And it started wrapping around the buffer, and I was trying to hold it because I say I know what's going to happen if I let go of this buffer. And when I let go of it, it went one way, and I went about this far (indicating) up in the air and came down on my back. And I heard a crack. And I laid there for a few minutes. I said, Lord, I done broke my back. And that's what happened.

After unsuccessfully treating with two practitioners, Claimant began seeing Drs. Kevin Collins and Wayne Bruffett. He underwent conservative treatment that included physical therapy. On January 22, 2015, Dr. Bruffett performed surgery on him. Bruffett released him on July 15, 2015. Thereafter, he continued to treat with Collins for a long time. Since moving to South Carolina, he has continued to undergo pain management. He attends monthly appointments at the pain management clinic, and is prescribed Flexeril, Tramadol and Lyrica. Claimant takes Flexeril on an as-needed basis; and he takes the other two daily. Later, however, he testified that he takes one regularly and

[2]While Stipulation No. 2 reflects that Claimant was injured "*on or about* July 3, 2013," he insisted that the accident took place on June 28, 2013. (Emphasis added) This is despite the fact that in the accident reporting form used by Respondent Public Employee Claims that is in evidence, he wrote that his injury happened on the latter date. Because of the italicized language above, I accept the stipulation in question. In any case, in *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001), the Arkansas Supreme Court held that to be "identifiable by time and place of occurrence," a claimant does not have to "identify the precise time and numerical date

the other two as needed. Questioned whether he suffers from any side effects from any of these three, he responded: "Well, they haven't bothered me so far." After the surgery, Claimant began wearing a back brace. He ceased using it for a time, but has since resumed wearing it because it helps him while walking.

His understanding from Dr. Collins was that he could no longer perform his old duties and would need something less strenuous such as a desk job. But when Claimant asked his supervisor at the Arkansas School for the Deaf about this, he was told that such work was not available. In fact, according to Claimant, Respondents never contacted him about returning to work at the school in any capacity. They never offered to help him find other employment, either. Asked why he applied for disability retirement benefits, Claimant answered: "Well, because my job where I was working at didn't have nothing for me to do, so that's the only choice that I had." As for his other job at Doctor's Hospital, Claimant testified that he "stopped because I couldn't do that work either."

As alluded to above, Claimant initially testified that he did not work at the Arkansas School for the Deaf following his injury. However, the following exchange took place on cross-examination:

> Q. Now, I've got your time records from your employer, and it looks like you were working until January 20th of 2015.
>
> A. Is that at the Doctor's Building?
>
> Q. Well, this is a state government time sheet—

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upon which an accidental injury occurred. Instead, the statute only requires that the claimant show that the occurrence of the injury is capable of being identified."

A. Okay.

Q. —so that would be from the school.

A. At—at the school, before I wrote that letter[3] [of resignation, which is in Respondents No. 1 Exhibit 2], I did—I was still working there for, I think, about a few weeks, and he told me they didn't have nothing else, so I couldn't do that work no more. So I had to retire from it.

Q. Because your back was hurting you?

A. Yes, sir.

While he maintained that he was no longer working at the school as of the time of his January 22, 2015, surgery, he acknowledged that his resignation letter is dated April 28, 2015.

Claimant related that he had no pre-existing problems with his back. He had never been in a motor vehicle accident, and he had never undergone chiropractic treatment. Before the July 2013 accident, he was able physically to do anything that he wanted. When he was younger, he played baseball and ran track. Other than his stipulated back injury, the only major health problem that he has suffered was a stomach condition that necessitated surgery approximately three years ago. He is a recovering alcoholic, having spent two years in rehabilitation prior to going to work for the Arkansas School for the Deaf.

[3]At another point in his testimony, in reference to this letter, Claimant appeared to disclaim authorship, stating: "I can't write that good . . . [i]t seemed like it's been wrote over." After reading the eloquent letter, and having had a chance to observe Claimant testify at length and to consider his educational background, I find that this correspondence was clearly ghostwritten.

As for his present condition, Claimant testified: "Well, I try to clean up at home and stuff, but, you know, I have to—I do a little bit, then I have to stop because my back, it go to hurting, and I can't hardly clean up the way that I want to." Despite this, he still helps take his fiancé to medical appointments. When doing so, he has to get her wheelchair in and out of the vehicle and push her while she is in the wheelchair. He suffers from pain, especially at night, in his legs and back. The leg pain is like an ache. He helps around the house, including vacuuming and cooking; but he does not mow the lawn. But he gets tired. The following exchange took place:

> Q. Do you have sleeping difficulties?
>
> A. Yes, sir.
>
> Q. Does that kind of cause you some issues during the day because you're having sleeping difficulties?
>
> A. Well, you know, not really issues, but when I take my medicine, you know, it kind of help.
>
> Q. Okay.
>
> A. It calms it down, and then when at night I take it, and I—it—it puts me to sleep.

Claimant helps with the grocery shopping. But at times, he leaves the store and returns to the vehicle and allows his fiancé to finish. The morning of the hearing, he was able to walk from his hotel in downtown Little Rock to the Commission.

Later, on cross-examination, the following exchange took place:

> Q. Now, I understand you still have some symptoms in your back, and you're getting this pain management. Has it gotten better or worse over time?

> A. Well—well, when I take my medicine, I can tell a difference in it. But it's like when I lay down at night, like I'm sitting here, I can feel my bones pushing up from like where your spine, you know, how it's connected, and from where it got the, I guess it's a bolt and a clamp, I could feel my bottom pushing up and that makes it hurt.

He rated his back pain as 3/10 while he was sitting on the witness stand. The only medicine he took prior to the hearing was his pain medication, Tramadol.

While he underwent physical therapy, he stated it was not very helpful. The exercise portion of the therapy did not alleviate his condition, but the packs that were applied to him were beneficial. On the other hand, Claimant testified that the surgery improved his pain.

Before Dr. Bruffett released him, Claimant underwent a functional capacity evaluation. He related that he gave his best effort during the testing, and that some of the lifting exercises bothered him. Claimant's testimony was that he informed Bruffett of this. He has seen Bruffett twice since being released by him. In 2016, the doctor had him undergo an MRI and a CT scan. When Claimant went back to him one last time in 2017, Bruffett has him undergo another MRI. No provider has recommended that he have another operation on his back.

As part of his normal routine, Claimant walks three times a day. He elaborated:

> I get up at 6:30 and get dressed, and I go take my walk for about an hour and a half, and then I come back and I rest for a while, and we eat breakfast, and then at noon, I take my other walk about the same time, and I come back. And then about 5:00, I go back for my other walk . . . I walk around through the park, and we got a big, big track that you can walk around. And I walk around that a couple of times, and then I sit down and rest, and I'll go back home.

Even if he is having a "bad day," when his back pain is 4/10, he is able to get around: "I, you know, I just make myself get up and walk out in the sunshine. You know, it helps."

At present, Claimant lives in South Carolina. He moved there so that he and his fiancé, who suffers from health problems, could be closer to her family. Claimant related that he takes care of her. He had to ride a bus for two days from Columbia, South Carolina to Little Rock in order to attend the hearing. This allowed him only brief periods to leave the bus and stretch. Asked how the ride made him feel, he replied: "[r]eal terrible . . . when I sit down for a long time, where I had my operation, I can feel my bone pushing up." This was his third or fourth trip back to Arkansas since moving to the East Coast. Discomfort while seated causes him to twist around in an effort to ease the pain, which can be as severe as 5/10.

With respect to his fiancé, Claimant stated that he has been hesitant to leave her due to her health problems because in one instance, the stove caught on fire while he was outside the house.

The following exchange occurred on cross-examination:

Q. I want to ask you, we've got the letter you wrote to the school, and I know you've been receiving the retirement, the disability retirement, from the Teacher Retirement System, since you wrote that letter, have you worked anywhere?

A. No, sir. I haven't worked for seven years.

Q. Okay. Have you looked for work anywhere?

A. No, sir. Because I wasn't—I couldn't work. Because if I worked, then I would get in trouble with the Workman Comp people, and

they would think [there] wasn't nothing really wrong with me, and it is something wrong with me. And it's like I told my lawyer right there, that I really wanted to keep my job that I had, but the incident, I couldn't keep it. And that was the reason why I wrote that letter.

Q. Well, I heard you testify that you wanted some kind of a desk job, but they didn't give you one.

A. Yeah. They—they—he told me that he didn't have nothing like that for me.

Q. Have you looked for a desk job anywhere else?

A. No, sir.

. . .

Q. But you're not trying to find a job somewhere else, are you?

A. No, sir, not since this incident, no, sir.

Q. Well, since you moved to South Carolina—

A. Well, if—see, if I find a job, I still have to tell the truth, and that's what I'm going to do anyway, tell, the truth, but what I'm trying to say is, I put it on my application that I have a back problem, ain't too many places going to hire you for that.

Q. All right. Is that why you're not looking?

A. No.

Q. Okay.

A. I'm just not looking because I was under Workman's Comp.

He later stated that he would like to find a job "if [he] could be able to work . . . ." Claimant added: "I haven't been looking for one [a job] for seven years in order because I was under doctor's care, and they told me that I wouldn't be able to work so

that's the reason why." He agreed that he needs to be around the house in order to help his fiancé.

Under questioning by the Commission, the following exchange occurred:

> Q. Now, are you not working because you feel somehow that's going to hurt your case? Or are you not working because you don't feel like you physically can work?
>
> A. Well, it's—it's in both. It's in both. I feel if I go to work while I'm up under Workman's Comp, I'm going to get in trouble for it. And plus, I'm up under doctor's care, and then if I go to work, it's a physical thing about me about hurting my back over again.

Claimant plans to apply for Social Security disability benefits. Currently, he is collecting disability retirement benefits from the Arkansas Teacher Retirement System ("ATRS"). This began on or around June 1, 2015. This was about the time that he moved to South Carolina.

Asked if he is currently physically capable of performing any of the jobs that he has held in his career, Claimant answered in the affirmative, referring to the custodial job he held at the dance club. He elaborated: "I really didn't have too much work there to do . . . vacuum and straighten up the chairs and clean the pool table and stuff off and sweep around the lot and take out the trash, and that was it." His testimony was that he would be able to show up every day for a job, but he hastened to add: "I don't know how my back would feel about it . . . ."

Evidence–Medical Records. Claimant's Exhibits 1 and 2 and Respondents No. 1 Exhibit 1 detail the treatment he has undergone in connection with his compensable lower back injury.

Claimant presented to Dr. Collins on January 15, 2014, with back pain that he related began when slipped and landed on his back and buttock area when an electrical cord became entangled with a floor buffer at work. At that time, he had only undergone physical therapy and had not missed work. X-rays that had been taken initially showed minimal anterolisthesis at L4-5 and degenerative findings in the lumbar spine. Claimant told Dr. Collins that he has a nighttime job that entails his lifting trash extensively, and that this task aggravates his spinal condition. The doctor ordered a lumbar MRI.

This test, which took place on January 22, 2014, was read by Dr. Angela Fanizza to show the following:

> L4-5 mild spondylolisthesis, hypertrophied neural arch and small shallow midline disc protrusion with tiny annular rent results in mild to moderate central and biforaminal stenosis
>
> L5-S1 tiny annular rent and right paracentral shallow disc protrusion barely abuts the right side of the dural sac without neural encroachment or substantive stenosis

Collins interpreted the MRI on February 12, 2014, to reflect "evidence of two-level herniated disc at L4-5 and L5-S1," along with pre-existing arthritis. He prescribed Hydrocodone and referred Claimant to Dr. Carlos Roman for evaluation/treatment, including injections if necessary. However, Respondents No. 1 denied the proposed treatment by Roman. Because Claimant was complaining of spasms, Dr. Collins prescribed Flexeril on April 9, 2014. Collins saw Claimant again on August 13, 2014, and wrote:

> Pt is here for follow up. The injections help but wear off. At this point, he is willing to go forth with surgery. Pt is frustrated and worried about losing his job, they have given him a[n] ultimatum to return to work by Monday.

> It[']s ok if he wants try but I suspect his back will not be able to tolerate the work load. I think he is full disabled at this point, maybe have surgery he may not be, but that will need to be determined.

Dr. Bruffett examined Claimant on September 17, 2014, and read his MRI to show stenosis and spondylolisthesis at L4-5. The doctor declined to change his work status, but started him on Neurontin. On December 29, 2014, Bruffett wrote:

> Mr. Scott got hurt at work in June of 2013. Prior to that, he really did not have any significant problems with his back. I would say with a reasonable degree of medical certainty that his work injury caused his motion segment at L4-5 to become symptomatic, resulting in symptomatic stenosis and spondylolisthesis at this level. He has had extensive nonoperative treatment now. He is at the point where he is desiring surgical care.
>
> . . .
>
> Mr. Scott's spondylolisthesis is very subtle on his MRI scan because this is a supine study. When he stands up, this becomes a dynamic process, and it is certainly obvious on his standing plain films with a listhesis of probably 5 to 6 mm. He is desiring surgical treatment for this instability, and I think that is reasonable. He would need a laminectomy for his stenosis at L4-5, and, because of the instability imparted by the spondylolisthesis, he would need a concomitant stabilization at L4-5 with instrumentation and bone grafting.

On January 22, 2015, Claimant underwent a bilateral laminectomy and decompression with a complete facetectomy on the left at L4-5, along with a posterior fusion with a transforaminal lumbar interbody fusion at the same level. The pre- and post-operative diagnoses were spondylolisthesis at L4-5 plus spinal stenosis with radiculopathy. Dr. Bruffett on February 9, 2015, released him "to work with light sedentary office work only, with no lifting greater than 10 pounds . . . ." The doctor, however, wrote on May 18, 2015, that he did not think that Claimant would be able to go

back to his job. He stated on June 29, 2015, that Claimant "has done very well with the physical therapy," that Claimant "says it [has] helped him dramatically." Bruffett added that Claimant was "off the walker . . . [and] off the narcotics." An FCE was recommended.

The FCE took place on July 8, 2015. The evaluation reflected that Claimant gave a reliable effort, with 55 out of 55 consistency measures within expected limits, and showed that he could perform work in the Medium category. On July 15, 2015, Dr. Bruffett went over these results with Claimant and assigned him an impairment rating of twelve percent (12%) to the body as a whole. He added that Claimant could return to see him as needed.

This happened on April 25, 2016, when Claimant came back and told the doctor that he was having ongoing bilateral leg numbness and lower back pain. Bruffett recommended a CAT scan, which took place the next day. It showed, inter alia, the fusion to be intact. The doctor on April 27, 2016, wrote:

> I have reassured Mr. Scott that I do not see a problem in his spine [of] further surgical significance. I am not going to change his status. I just tried to reassure him that although he may have some residual symptoms I will see him on his problem in his spine and is relieved to know this.

Dr. Collins on May 17, 2017, wrote a letter to Claimant's former co-counsel that reads in pertinent part:

> 1) Whether or not I agree that Mr. Scott is totally and permanently disabled. I do believe so. As far as whether or not it was due to his worker's compensation injury. I fell that it is. As far as if he can return to perform his duties at his previous job as a janitor. I do not feel that he can work his job and/or another as a result of his back surgery and decreased functional mobility as a result of that.

> Furthermore, he still has evidence of a torn disc at L5-S1 with a small right paracentral protrusion notable on MRI that was done back on 01/22/2014.
>
> 2) Please state whether Mr. Scott can perform any gainful employment as a result of his injury. I do not believe he can.
>
> 3) As far as my opinion as a future prognosis of Adolph Scott's condition. He has a fair to poor prognosis. The degeneration will persist over time. He has significant sequelae as a result of the surgery itself with deflection of good muscle away from the bone to allow for the surgery, now with atrophy. He also has ongoing neurologic deficits in that right lower extremity that will impact adversely on his gait over time, which will increase his back pain because of the way he has to ambulate as a result thereof.
>
> So, to recapitulate, he has permanent and total disability as a result of his worker's compensation injury because he is not able to engage in meaningful work to earn wages of the same as employment.

On October 18, 2017, Dr. Bruffett saw Claimant once again after he underwent another MRI that same day, and reported the following:

> [Claimant] has rather chronic pain in his back. This does not seem to be radicular in nature. On examination . . . [t]here is decreased ranged of motion of his lumbar spine. He does not appear [to have] any frank neurologic deficits. I reviewed x-rays and his MRI scan. He has postsurgical changes at L4[-]5 but really no evidence of high-grade stenosis above or below this. There is disc degeneration as well to some degree at multiple levels. I have reassured Mr. Scott that I do not see a problem [with] his spine [of] further surgical significance. If his pain is severe enough to warrant further workup and treatment I would recommend that he see Dr. Kevin Collins who he has seen in the past for further evaluation and nonoperative care.

The records of Claimant's South Carolina pain management treatment reflect that he has presented with back pain of 2/10 or higher, with it radiating to both of his extremities below the knees and including numbness and tingling. He has been prescribed at various times MS Contin, Cyclobenzaprine, Flexeril, Tramadol and Lyrica.

In addition, Dr. Collins has prescribed at various times Hydrocodone, Gabapentin and Methocarbamol.

Discussion. The evidence at bar shows that Claimant is 64 years old. He lacks a high school diploma, having failed to complete the twelfth (12th) grade. After leaving school, he entered the U.S. Army and served for over two (2) years, specializing in servicing field telephones. His work career thereafter has consisted primarily of serving as a custodian for various employers. In addition, he has detailed vehicles. He has never had a driver's license. Claimant played baseball and ran track when he was younger, and did not have pre-existing back problems.

His work-related incident at the Arkansas School for the Deaf in the summer of 2013 resulted in a stipulated compensable injury to his lower back. After conservative treatment failed to alleviate his symptoms, he underwent surgery on January 22, 2015. This consisted of a fusion, laminectomy, facetectomy and decompression at L4-5. Claimant testified that this operation helped his back; and his medical records in evidence corroborate that. Since being released by his surgeon, Dr. Bruffett, on July 15, 2015, Claimant has returned to him twice with back concerns; but after further radiological studies, including a CT scan and two MRIs, the doctor has not recommended any additional surgical intervention. The only treatment that Claimant is undergoing presently is pain management, which is comprised mostly of prescription medications including Flexeril, Tramadol and Lyrica. His pain ranges from 2/10 to 5/10 in severity. During the hearing, after he had been sitting for some time, Claimant assessed it as being 3/10.

Dr. Bruffett assigned Claimant a permanent partial impairment rating of twelve percent (12%) to the body as a whole. This occurred after Claimant underwent an FCE that reflected that he gave a reliable effort and demonstrated the ability to work in the Medium classification. Also, Bruffett wrote that Claimant would not be able to return to his old job at the Arkansas School for the Deaf. Dr. Collins went further, opining that Claimant is permanently and totally disabled and cannot perform any gainful employment.

The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Based on my review of the evidence, while I credit Bruffett's opinion, I cannot do the same for the one rendered by Collins. The reason for this is that the evidence shows that Claimant was not able to continue in his former employment. The Arkansas School for the Deaf could not accommodate Dr. Bruffett's recommendation that Claimant move to a desk job there. Thus, he took disability retirement. But the FCE results, coupled with Claimant's acknowledgment at the hearing that there is a job in his employment history that he is still capable of performing, among other things detailed herein, show that he is still capable of engaging in gainful employment.

Despite this, the fact remains that Claimant has not engaged in any efforts to return to the working world in any capacity. He admitted that while one of the reasons for this is his fear that his back will not enable him to do so, the other reasons are that he has feared getting in trouble for seeking employment (in light of the instant claim)

and his felt need to stay close to home to care for his fiancé. Despite that last factor, Claimant leaves the house three times a day to walk for extended periods of time. He wears a back brace while doing this. Furthermore, he helps his significant other by doing household chores, helping her shop for groceries, and taking her to medical appointments (which includes pushing her in her wheelchair). The evidence does not show, in light of the above, that Claimant is motivated to return to the work force.

In sum, after consideration of the foregoing, I find that he has not met his burden of proving that he is permanently and totally disabled. I do find, however, that the preponderance of the evidence establishes that Claimant has suffered wage loss disability of thirty percent (30%), and that his stipulated compensable lower back injury is the major cause of this.

B. Offset

Respondents No. 1 have argued that in the event Claimant is awarded permanent and total or wage loss disability benefits, there must be an offset under Ark. Code Ann. § 11-9-411(a) (Repl. 2012) for the benefits Claimant has drawn from ATRS. Claimant does not agree with this.

Section 11-9-411(a) provides:

> (a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

In *Henson v. Gen. Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2007), the Arkansas Court of Appeals stated: " We . . . hold that the Commission did not err in finding that Ark. Code Ann. § 11-9-411 applies to retirement-disability benefits, as the overriding purpose of § 411 is to prevent a double recovery by a claimant for the same period of disability."

The testimony of Claimant, which I credit, was that he began receiving disability retirement benefits from ATRS around June 1, 2015. The ATRS statement contained in Respondents No. 1 Exhibit 2 confirms this. According to Claimant, he was still collecting these benefits as of the date of the hearing. After consideration of the evidence, I find that Respondents No. 1 have proven that they are entitled to a dollar-for-dollar offset with respect to Claimant's disability retirement benefits under ATRS.

C. Controversion

Introduction. Claimant has asserted that he is entitled to a controverted attorney's fee in this matter.

Standard. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be twenty-five percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents No. 1 in accordance with *See* Ark. Code Ann. § 11-9-715 (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

Discussion. The evidence before me clearly shows that Respondents No. 1 have controverted Claimant's entitlement to additional indemnity benefits. Thus, the evidence preponderates that his counsel, the Hon. Gary Davis, is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents No. 1 are directed to furnish/pay benefits in accordance with the findings of fact and conclusions of law 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 (Repl. 2012). *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 No. 1 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

_____
Hon. O. Milton Fine II
Chief Administrative Law Judge