

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. G900272**

GLENN D. DAVIS, EMPLOYEE	CLAIMANT
WEYERHAUSER NR CO., SELF-INURED EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MGMT. SVCS., INC., THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED MARCH 5, 2024

Hearing before Administrative Law Judge O. Milton Fine II on December 6, 2023, in El Dorado, Union County, Arkansas.

Claimant represented by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 6, 2023, the above-captioned claim was heard in El Dorado, Arkansas. A pre-hearing conference took place on September 26, 2023. The 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, as amended, were properly set forth in the order.

Stipulations

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

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/self-insured employer/third party administrator relationship existed at all relevant times, including on or about December 17, 2018, when Claimant sustained a compensable injury to his back.
3. Claimant was assigned an impairment rating of twelve percent (12%) to the body as a whole in connection with his compensable back injury. Respondents accepted and paid this rating, along with an attorney's fee thereon.
4. Claimant's average weekly wage of \$1,010.00 entitles him to compensation rates of \$673.00/\$505.00.
5. Respondents have controverted this claim for additional benefits.

Issues

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

1. Whether Claimant is entitled to penalties and interest concerning the circumstances surrounding the payment of permanent partial disability benefits in connection with the twelve percent (12%) impairment rating to the body as a whole that he was assigned for his stipulated compensable back injury.
2. Whether Claimant is permanently and totally disabled or, in the alternative, entitled to wage loss disability benefits.

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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 on December 17, 2018, he fell from a ladder in the course and scope of his employment, injuring his back. Respondents accepted the claim as compensable. On November 25, 2019, he underwent a lumbar fusion surgery at L5-S1. Claimant received conservative treatment following surgery; but eventually, Dr. Scott Schlesinger recommended a left L3-4 decompression and fusion procedure. Respondents authorized the decompression but not the fusion. Schlesinger opined that he was concerned that Claimant would develop progressive collapse of the left L3-4 neural foramen without a simultaneous lumbar fusion. Respondents sent Claimant to Dr. Wayne Bruffett for an independent medical evaluation. He opined that Claimant did not need another surgery and released him at maximum medical improvement with a twelve percent (12%) impairment rating to the body as a whole on August 9, 2021. Bruffett also found that Claimant could not work an eight-hour day, and recommended that he apply for Social Security Disability benefits. At that point, Respondents cut off all treatment and ceased payment of indemnity benefits.

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2. Claimant requested a change of physician for ongoing pain management.
3. Claimant is 56 years old and had been employed by Respondent employer for 23 years at the time the accident in question took place. Claimant was terminated by his employer following this accident..
4. Claimant further contends that he is entitled to payment of permanent partial disability benefits in connection with his twelve percent (12%) impairment rating, along with interest and penalties.
5. Claimant also contends that he is permanently and totally disabled or, in the alternative, entitled to wage loss disability benefits, and that his attorney is entitled to controverted fee.
6. Claimant reserves all issues not raised herein.

Respondents:

1. Respondents contend that Claimant is not permanently and totally disabled or entitled to any wage loss disability 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 proven by a preponderance of the evidence that he is entitled to the payment under Ark. Code Ann. § 11-9-802(b) (Repl. 2012) of an additional eighteen (18%) percent of the value of his twelve percent (12%) impairment rating to the body as a result of Respondents' failure to initiate payment of permanent partial disability benefits in a timely manner under this provision.
4. Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled.
5. Claimant has proven by a preponderance of the evidence that he has sustained wage loss disability of thirty-five percent (35%), and is entitled to additional permanent partial disability benefits pursuant thereto.
6. Claimant has proven by a preponderance of the evidence that his attorney, the Hon. Laura Beth York, is entitled to a controverted fee under Ark. Code Ann. § 11-9-715 (Repl. 2012) on the indemnity benefits awarded herein in Findings/Conclusions Nos. 3 and 5 *supra*.

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness. He testified at the hearing and via deposition (see *infra*).

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,

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consisting of five abstract/index pages and 120 numbered pages thereafter; Respondents' Exhibit 1, the transcript of the deposition¹ of Claimant taken October 14, 2022, consisting of 68 numbered pages; and Joint Exhibit 1, documentation concerning the payment of permanent partial disability benefits pursuant to the impairment rating and the controverted attorney's fee thereon, consisting of three pages.

Adjudication

A. Penalties and Interest

Introduction. As alluded to above, Claimant suffered a stipulated compensable back injury. He has argued that while, as stipulated, Respondents accepted and paid this rating, they did not do so in a timely fashion. For that reason, they are liable for interest and penalties. Respondents deny this.

Standards. Under Ark. Code Ann. § 11-9-802 (Repl. 2012):

(a) The first installment of compensation shall become due on the fifteenth day after the employer has notice of the injury or death, as provided in § 11-9-701, on which date all compensation then accrued shall be paid. Thereafter, compensation shall be paid every two (2) weeks except where the Workers' Compensation Commission directs that installment payments be made at other periods.

(b) If any installment of compensation payable without an award is not paid within fifteen (15) days after it becomes due, as provided in subsection (a) of this section, there shall be added to the unpaid installment an amount equal to eighteen percent (18%) thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of controversion is filed or an extension is granted the employer under § 11-9-803 or unless such nonpayment is excused by the commission after a showing by the employer that, owing to conditions over

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

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which he or she had no control, the installment could not be paid within the period prescribed.

...

(e) In the event that the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant.

As the party seeking relief under this provision, Claimant under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012) must prove his entitlement thereto by a preponderance of the evidence. This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

Discussion. Respondents sent Claimant to an independent medical evaluation by Dr. Wayne Bruffett on August 9, 2021. Dr. Bruffett on that date assigned Claimant an impairment rating of twelve percent (12%) to the body as a whole. Based on Claimant's stipulated compensation rate, he should have received permanent partial disability benefits totaling \$27,270.00, payable over the course of 54 weeks in accordance with § 11-9-802(a)-(b). But instead of initiating payment of installments within 15 days, as provided by the law, Respondents did not pay him anything thereon until September 22, 2022. On that date, as shown by Joint Exhibit 1, they sent Claimant a lump-sum check in the amount of \$23,861.25—which consists of \$27,270.00 minus Claimant's portion of the controverted attorney's fee under § 11-9-715, or \$3,408.75.

At the hearing, Claimant argued that the lengthy delay in payment—almost 13 months—is “*res ipsa loquitor*.”² Respondents countered that the reason for the delay was that the parties had been working toward an amicable resolution of the claim, but ultimately just paid the value of the rating in a lump sum. Once that occurred, a pending earlier hearing on this claim was taken off the docket.

My review of the evidence shows that Respondents clearly did not comply with the 15-day deadline for initiating payments under Subsection (b). However, the circumstances do not warrant a finding that the failure to pay in a timely manner was “willful and intentional” under Subsection (e). Consequently, Claimant has proven by a preponderance of the evidence that he is entitled to payment of an additional eighteen (18%) percent under § 11-9-802(b).

B. 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 have argued otherwise.

Standard. The accident of December 17, 2018, resulted in a compensable injury to Claimant’s 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,

²This is a Latin term meaning, “The thing speaks for itself.” BLACK’S LAW DICTIONARY 678 (abridged 5th ed. 1983).

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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 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 wage loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood.

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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

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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 58 years old and a high school graduate, attended Southern Arkansas University, where he played football. He left college for a year; and during that period, he worked in shipping and pulpwood hauling. While he returned to SAU thereafter, he failed to complete his studies there, accumulating approximately 100 credit hours toward a physical education degree. Thereafter, in 1989, he joined the United States Army. There, he worked in the burgeoning word processing area, performing MS-DOS and JS2 commanding. This work required that he have Top Secret Clearance.

After four years in the Service, he received an Honorable Discharge. Upon his return to civilian life, he worked as a traffic agent for a chemical manufacturer for five to six months. In this job, he used a computer to dispatch trucks and coordinated the bills of lading. He left for a more lucrative position at International Paper, where he worked inside the mill. Claimant testified that this was a physical job, and lasted for four years. Thereafter, for approximately one year, he worked for a steel mill. There, he strapped the ends of T-posts that had been manufactured there. This, too, was highly physical.

Claimant's next place of employment was at Respondent Weyerhaeuser. At first, he was a utility worker, filling in at various assignments. He became the driver of a piece of heavy equipment that loaded logs. After eight or nine years in this position, Claimant became a boiler helper at Weyerhaeuser. He described this job as follows:

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It's your responsibility to make sure the boiler has enough fuel and everything is running right. It consists of climbing a whole lot of stairs, turning valves and all that kind of stuff and making sure you've got enough fuel in the boiler.

This job entailed use of a computer.

On the stipulated date of injury, December 17, 2018, the following happened:

What I did I came in to work at 7:00 that evening, and so we have to do maintenance on the machines before we can operate them, so I took the machine up to the grease rack, and I started doing maintenance and checking everything to make sure it was serviceable, so then on my way back, I was coming back to the boiler, and I noticed that the dry waste bin where they send the chips off of the plywood, it was running over, so I had to get off the Cat to go over there to stop it, so when I was getting off the Cat, I don't know if I just lost my balance or slipped or glove or grease or whatever, and I was holding and I fell back.

As a result of this incident, Claimant hurt his lower back. Respondents accepted the injury as compensable and have paid benefits to him as a result. He was able to finish his shift at the time of his injury; and he continued working until January 9, 2019.

In recounting the treatment he has undergone, Claimant testified that he underwent six to eight weeks of physical therapy. Because this did not help, Respondents sent him to Dr. Schlesinger. Initially, his treatment by Schlesinger consisted of injections. These, however, did not provide lasting relief. Eventually, on November 25, 2019, he underwent a transforaminal decompression and fusion at L5-S1. Asked how he fared as a result of these procedures, Claimant responded: "I had some difficulties and then, after that, I suffer from a whole lot of numbness and pain in my back. He told me to come back, so I went back, and I went on another round of injections in my back." Asked whether the injections helped, Claimant's response was

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terse: “No.” Claimant related that the surgery did not help, either. In February of 2021, Dr. Schlesinger recommended another operation: an L3-4 fusion. But Respondents refused to cover it, and instead sent Claimant to Dr. Bruffett for an independent medical evaluation. Although it was Claimant’s testimony that Bruffett never laid his hands upon him to examine him during their ten-minute visit, he later acknowledged that the doctor observed his gait and asked him to stand and to bend over. Dr. Bruffett, as a result of that appointment, found Claimant to be at maximum medical improvement and assigned him an impairment rating of twelve percent (12%) to the body as a whole. In describing how he was doing at the time of this release, Claimant stated: “About the same as when I went. I was still having a lot of pain in my lower back and down my hip and down my left leg.” Per Claimant, Dr. Schlesinger did not refer him elsewhere; and he did not return to Schlesinger for additional treatment after going to Bruffett.

Claimant requested and received a change of physician to Dr. Krishnappa Prasad. There, Claimant underwent pain management in the form of injections. He underwent two injections before being informed that Respondents would no longer cover them. Asked whether the injections helped, Claimant’s reply was “[n]ot really, no.” Since then, Claimant has been treating at the Veteran’s Administration. This treatment has been comprised of prescriptions of Gabapentin, Diclofenac, and Cyclobenzaprine. These are taken three times a day. An additional medication that Claimant takes to address what he termed “severe pain” that occurs perhaps twice a week is Hydrocodone, which is prescribed by his primary care physician. His medications make him drowsy. Regardless, he rates his daily pain as 7/10.

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While Claimant was still treating for his lower back injury, in 2020, Respondent Weyerhauser terminated him. He had to apply for leave under the Family Medical Leave Act; and when that had been exhausted, he was terminated. Later, on cross-examination, Claimant added that he took early retirement, at age 55, from Weyerhauser in May 2022. He stated that at the time Dr. Bruffett released him from treatment, he was still unable to perform his old job at Weyerhauser.

His testimony on direct examination was that he has not performed any work since December 2018. On cross-examination, however, he agreed that the correct date is January 9, 2019. Claimant successfully applied for Social Security Disability benefits. He draws a pension from Respondent Weyerhauser. Claimant has not been offered vocational rehabilitation. While his job in the Army involved computers, his stint in the military was long, long ago, and the work primarily entailed printing and delivering documents. He has not kept up with advances in technology. Claimant did not use computers at Weyerhauser other than such tasks as entering his time. His personal computer is not operational. He rarely has used email. But he is able use a laptop for, inter alia, performing internet searches and using social media. Claimant does not think that there is any type of employment that he would be able to do. He added that if such a job exists, he is “going to be in pain doing it.” He admitted that he has not looked for work anywhere since leaving Weyerhauser.

Notwithstanding his assignment of a five-pound lifting restriction by Dr. Schlesinger, it is Claimant’s belief that he is able to lift up to 30 to 40 pounds. Although recently, by necessity, he had to lift a car battery in order to place it in the engine

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compartment of his vehicle, it is not a task that he could do on a daily basis. Claimant can stand for four to five minutes. After that point, the pain in his hip and leg becomes “unbearable.” He is able to walk a quarter of mile before burning in his legs and hip prompt him to sit. Sitting is tolerable for approximately 30 minutes. Use of a recliner at home helps with this, since it allows him to switch positions, such as leaning to the side and stretching his hip. When he attended the church funeral of his sister, the uncomfortable nature of the wooden pews rendered him physically unable to attend the graveside service thereafter. The furthest he has driven since the accident is from South Arkansas to Little Rock. When making a journey of this length, he has to stop twice in order to stretch because of back pain. In order to ensure that he is lucid enough to make this road trip, he has to cease his medications the day prior. Once he has returned home, however, he has to take Hydrocodone along with his three other medications in order to get his pain back under control. His treatment with the VA includes addressing his hypertension. However, neither this condition nor his previous knee surgery and surgical treatment for prostate cancer forms the basis for his inability to return to work; instead, that cause is his back injury.

Turning to the subject of hobbies, Claimant related that he likes gardening and taking care of his yard. Unfortunately, due to his condition, this has been impaired. He is unable to garden. Mowing his half-acre-sized lot on his riding lawn mower takes one and one-half to two hours because he has to take multiple breaks. Even with breaks, he is “laid up” for a day or two thereafter. While he still fishes, he does so less

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frequently than before his back was injured. Questioned why this is the case, Claimant replied:

Because it's too much pain and too much trouble to get . . . [u]sually, I have to try to find somewhere where I can sit down or something like that, you know, or a place where I can just back my truck up to and sit on the tailgate of my truck or something, and whatever you do, you're not going to do it for long, anyway. Maybe I might be able to do it for maybe an hour or so, not long.

In describing his daily activities, he stated: "Really, I've been kind of reduced to almost doing nothing. I piddle around the house. I hardly ever go anywhere. I hardly ever do anything now." He walks for exercise. Claimant is still able to cook, wash dishes, and do his laundry.

In order to have the boiler helper position at Weyerhaeuser, Claimant had to possess a boiler operator's license. His license has since lapsed. Asked if he is physically capable of going back to that line of work, he responded:

No . . . [b]ecause the boiler helper job is to keep—you have to keep what they call a fire box, that's where you're burning all of your fuel and stuff, you, also, have to keep that cleaned out. When you burn that fuel in there, it'll build up a big slag on the floor and you have to get this rake that weighs about a hundred pounds and put it in that boiler and you have to break—[y]ou've got to put a fire suit on . . . [a]nd you have to break, physically break that stuff up and sometimes if it gets real bad, it could take you like maybe an hour or so to get it out . . . [w]hen you monitor them monitors, you still have to run up and down the stairs and go make adjustments on those valves and stuff like that, also.

Evidence—Medical Records. Claimant's Exhibit 1 details the treatment he has undergone in connection with his compensable injury.

As Claimant outlined in his testimony, he did not first seek treatment for his back until approximately three weeks after the accident, on January 9, 2019. His initial

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treatment was conservative in nature: medication and physical therapy. A lumbar MRI on March 22, 2019, revealed, per Dr. Elizabeth Sullivan:

Severe central canal stenosis at the L3-4 from combination of advanced degenerative disc disease with osteophyte as well as epidural lipomatosis. There is swelling of the cauda equina proximal to this. Advanced degenerative disc disease with osteophyte at L5-S1 with bilateral foraminal stenosis. Moderate diffuse disc bulge with acquired central canal stenosis and epidural lipomatosis at L4-5. Marrow signal change at the L3 and L4 presumed to be reactive from degenerative disc disease.

Sullivan on April 17, 2019, recommended epidural steroid injections along with a prescription of Gabapentin.

When the injections did not afford Claimant relief, he was seen by Dr. Schlesinger, Dr. Sullivan's colleague, on June 25, 2019. Schlesinger's report reads in pertinent part:

MRI

A[n] MRI of the Lumbar Spine has been obtained prior to this visit. The study was performed on 03/22/2019[.]

A decision was made to personally read and interpret the multiple images of the studies. This reading was from the perspective of a Neurosurgeon and not a Radiologist. My personal reading of the multiple individual images was very thorough and detailed and was carried out with the clinical knowledge of the patient and comparing to the imaging data. I personally read and interpreted the study as abnormal with the finding of:

Severe degenerative changes at L3-S1 there is lumbar epidural lipomatosis which is severe at L4-5 and L3-4. There is significant clumping of the lumbar nerve roots. There is significant disc protrusions at L3-S1. There is significant stenosis at L3-4 L4-5 and moderate at L5-S1 there is severe neural foramen stenosis at L5-S1 bilaterally moderate neuroforaminal stenosis at L4-5 bilaterally and moderate least severe at L3-4 bilaterally. Most significant findings that seem to correlate with the patient's pain distribution include the L3-4 level plus or minus L4-5 including the potential contribution of the L3-4 neural foramen stenosis

bilaterally but obvious that I am still concerned about the L5-S1 neuroforaminal stenosis bilaterally.

...

Diagnosis:

I believe the patient's diagnosis is:

1. Low Back Pain (M54.5)
2. Obesity (E66.9)
3. Pain in leg (M79.606)
4. Osseous and subluxation stenosis of intervertebral foramina of lumbar region (M99.63)
5. Spinal stenosis (M48.00)
6. Intervertebral disc degeneration, lumbar region (M51.36)
7. Lipomatosis (E88)

Plan:

A decision was made to proceed with Lumbar facet injections—blocks at L3-4, 4-5, and 5-1 on the left.

A decision was made to discuss the importance of obesity in their spinal condition as well as their overall health and well-being. I feel that the patient's obesity, BMI and body habitus are major contributing factors to their spinal condition. I strongly recommend that the patient undergo an aggressive weight loss program and have advised the patient of this plan.

Although the accident or injury may or may not have caused any radiological changes, I do feel that if the patient history is accurate and the symptoms all started with the accident then there is a greater than 51% chance that the accident did in fact cause the symptoms a[nd] was therefore the cause of the recommended treatment.

We will have the patient remain off work if there is no light duty available until after treatment is completed.

Summary:

This 54-year-old male presents with lower back pain is the main complaint. He does have sciatica involving his L4 nerve root bilaterally left worse than right but the back pain bothers him worse. He has multiple abnormalities on MRI. I doubt any of these were directly caused by the work injury but based on his history the symptoms started so this is very likely an aggravation of an underlying lumbar degenerative process.

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This is back pain is the main problem we will proceed with lumbar facet protocol. If this fails we will repeat the MRI of the lumbar spine and begin serial selective nerve root block testing on the left starting at the L5-S1 neuroforamen but then proceeding to the L3-4 neuroforamen and then possibly the L4-5 right certainly his case is extremely complicated. If possible would like to avoid surgery.

Claimant returned to Dr. Sullivan on August 20, 2019, and told her that neither the facet injections nor the Gabapentin helped. A neuroforaminal block at L5-S1, along with Tizanidine and continued Gabapentin, were ordered. The block, per Claimant on October 29, 2019, helped for two days; but it pinpointed L5-S1 as the origin of his problems. Dr. Schlesinger recommended an LSO brace and surgery in the forms of a decompression and fusion at L5-S1.

A laminectomy, decompression, and fusion at this site took place on November 25, 2019. The pre and post-operative diagnoses assigned by Dr. Schlesinger were:

1. L5/S1 neuroforaminal stenosis, bilaterally, and spinal cord stenosis L5 and S1
2. Segmental instability L5/S1

Claimant told Schlesinger on December 19, 2019, that while he had experienced moderate relief from the surgery, he still was having constant lower back pain and left foot numbness. An epidural steroid injection at L4-5 was recommended. He underwent another MRI on February 17, 2020, which showed:

1. Interval surgical intervention at the L5-S1 level with left-sided hemilaminectomy/facetectomy defect and interbody fusion. There is retrolisthesis, a broad-based disc displacement, which is mixed in the biforaminal positions and moderate to severe facet hypertrophy contributing to the abutment of bilateral exiting L5 nerves with possible compression bilaterally.

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2. Retrolisthesis, a broad-based disc displacement and moderate facet hypertrophy at the L4-5 level contributing to the abutment of bilateral descending L5 nerves.
3. Disc height loss, a broad-based disc displacement with central and right foraminal predominance and mixed left foraminal protrusion, moderate facet hypertrophy and epidural lipomatosis at the L3-4 level contributing to moderate canal stenosis with abutment of bilateral exiting L3 nerves and abutment of bilateral descending L4 nerves.

Dr. Schlesinger saw Claimant again on February 25, 2020, and wrote that they would proceed with lumbar medial branch blocks at L3-4 and L4-5 on the left, and then a rhizotomy. An EMG was ordered as well to determine the source of lower extremity numbness. While the nerve conduction study was abnormal, the doctor attributed it to metabolic causes. The report of June 17, 2020, reads in pertinent part:

Due to the deterioration of his left leg pain that is consistent with L3-4 distribution, we will obtain a new MRI of the lumbar spine. On the prior study, he had moderately severe left sided neuroforaminal stenosis. We will formulate a plan of action after reviewing the new MRI. If the patient is not a surgical candidate, he may ultimately need to meet with pain management.

The MRI took place on July 14, 2020. It was of poor quality, but reflected unremarkable changes at L5-S1, moderately severe stenosis at that level and at L3-4, and moderate stenosis at L4-5. Because of the COVID-19 pandemic, the facet protocol never occurred. But Dr. Schlesinger opined that Claimant's increased left leg pain was due to abnormalities at L3-4. On August 4, 2020, the doctor wrote:

The patient states that he has been terminated from work. If light duty were available then he could obtain a new job that he could attempt to do. I have no way of giving a maximum medical improvement date until we see what is the underlying treatment plan.

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Schlesinger ordered root blocks at L3-4 and L4-5. The L4-5 block took place on September 3, 2020. He reported a twenty percent (20%) decrease in pain thereafter—not enough, in his opinion, to warrant surgery. The L3-4 block took place on October 8, 2020. Claimant reported to Schlesinger on October 15, 2020, that he received no relief from the injection. The doctor wrote:

When he underwent a left L4-5 SNRB [selective nerve root block] on 9/3/20, he did feel a reproduction of his typical leg pain but unfortunately only had about 20% relief. It is possible that not enough local anesthetic was used and we will repeat this SNRB at L4-5 with a higher amount of bupivacaine. If the SNRB testing indicates that the left L4 nerve root is significantly the problem then we can proceed with decompression of L3-L4 on the left hopefully without a fusion.

The revision nerve root block of L4-5 happened on November 12, 2020. In this instance, Claimant reported having seventy percent (70%) relief following the injection—enough, in his opinion, to justify surgery. Another lumbar MRI on January 14, 2021. After reviewing everything and visiting with Claimant on February 10, 2021, Dr. Schlesinger recommended that he undergo a left L3-4 decompression. However, following another appointment on February 24, 2021, the doctor also recommended a Wenzel fusion at that level.

As recounted in the testimony above, this surgery never took place. Instead, Claimant was sent to Dr. Bruffett on August 9, 2021, for an independent medical evaluation. Bruffett's report reads in pertinent part:

I would like to answer the questions posed for this IME[. T]he diagnosis is post laminectomy syndrome status post fusion[. H]e has multiple degenerative changes and epidural lipomatosis as described above. I believe as a consequence of his work injury there was an exacerbation of these degenerative changes. I would say that his work injury and

subsequent surgery accounted for greater than 51% of his ongoing problems and pain and so forth. Disability is a different question. That has to do with one's ability to work in my opinion and there are many complex components of this including job satisfaction, and so forth. I do believe he is at maximum medical improvement. **I do not feel that further treatment is indicated. He does not need further surgery[.] [B]ased on the American Medical Association [G]uides to the [E]valuation of [P]ermanent [I]mpairment [F]ourth [A]ddition[,] I would assign him an impairment rating of 12% of the whole person. I would not place any restrictions upon him. However, I am sure that he has some limitations. He has not worked in several years. The medical literature would say that his likelihood of returning to gainful employment now is slim to none. We could obtain a functional capacity evaluation to define his capabilities, but I do not think that we will change his long term working status. He does not feel like he is capable of working an 8-hour day in any capacity and he has not worked in years so I doubt that he returns to the workforce.** He may just want to talk to his attorney about whether he qualifies for [Social S]ecurity disability or not.

(Emphasis added)

On May 16, 2022, Claimant began seeing Dr. Prasad for pain management. He was prescribed Norco and Gabapentin, and recommended for an epidural steroid injection at L4-5. The doctor administered trigger point injections at three sites during the appointment.

Discussion. The evidence at bar shows that Claimant is 58 years old. He has a high school diploma, and completed approximately 100 credit hours toward a college degree. Between stints at Southern Arkansas University, he had jobs in shipping and pulpwood hauling. After leaving school for good, he entered the U.S. Army and served in the word processing area. He had Top Secret Clearance in order to work in this area. Following an Honorable Discharge, Claimant was a traffic agent for a chemical plant. In this capacity, he utilized a computer to coordinate bills of lading and to dispatch trucks.

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Thereafter, he worked in various capacities in a paper mill. Later, he was employed in a steel mill, performing a heavily physical job. After leaving this position, he joined Respondent Weyerhaeuser. He rotated through various positions before becoming the operator of a piece of heavy equipment that loaded logs. Eventually, he became a boiler helper. Not only did this area of work require that he have a boiler's license, but it required physical activities such as raking out a firebox and going up and down steps throughout the shift.

It was in this last job that he sustained a stipulated compensable injury to his back on December 17, 2018. For the next 11 months, Claimant underwent various conservative measures to address his symptoms, from physical therapy to injections. Ultimately, he had to undergo surgery in the forms of a laminectomy, decompression and fusion at L5-S1. Unfortunately, these procedures were only moderately successful. Thereafter, he continued to suffer from, inter alia, back pain and numbness in his left foot. After administering additional injections and having Claimant undergo other diagnostic procedures, his surgeon, Dr. Schlesinger, recommended a decompression and fusion at another level: L3-4. However, Respondents refused to cover this and sent Claimant to Dr. Bruffett for an independent medical evaluation. Bruffett assigned him an impairment rating of twelve percent (12%) to the body as a whole.

While the doctor did not give Claimant any permanent restrictions, he nonetheless expressed misgivings about whether he could or at least would return to the workforce. Based on the extended length of time that Claimant had been absent from the working world, Bruffett candidly stated that per "the medical literature

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. . . his likelihood of returning to gainful employment now is slim to none.” He added that because of this, a functional capacity evaluation would not be useful, and recommended that Claimant might wish to pursue Social Security Disability benefits. Dr. Schlesinger, on the other hand, was more optimistic regarding Claimant's prospects. He wrote in multiple reports that “[i]f light duty were available then he could obtain a new job that he could attempt to do.” Of course, this possibility was foreclosed at Weyerhauser when he was terminated from there. Regardless of this, Claimant opted for early retirement from there. He acknowledged that he is able to lift up to 30 to 40 pounds, and has demonstrated this by replacing a car battery by himself.

Claimant's back condition would keep him from having another job that entailed physical work on a par with what he was performing at Weyerhauser or any similar positions in his employment history. He is currently undergoing pain management. His regimen includes medications that make him drowsy. Despite this protocol, he still has pain. Claimant's condition requires him to alternate positions of standing and sitting in order to have some level of comfort or tolerance. He is able to walk some and fish for recreation; and he continues to handle household tasks. Claimant still operates a riding lawn mower; but his condition necessitates more frequent breaks. Claimant's less physical jobs have involved the use of a computer. He is able to operate a laptop.

I find, after consideration of Claimant's testimony, that he is not motivated to return to the workforce. While he has not met his burden of proving that he is permanently and totally disabled, the preponderance of the evidence does establish that

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he has suffered wage loss disability of thirty-five percent (35%). Moreover, his stipulated compensable back injury is the major cause of this disability.

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 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 have controverted Claimant's entitlement to additional indemnity benefits—including the eighteen percent (18%) amount awarded above due to their failure to pay permanent partial disability benefits in a timely manner. Thus, the evidence preponderates that his counsel, the Hon. Laura Beth York, is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents 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,

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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 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge