BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H108549

JOSE BETANCOURT DEL RIO, Employee	CLAIMANT
BHI ENERGY, INC., Employer	RESPONDENT
STARR INDEMNITY & LIABILITY CO., Carrier	RESPONDENT

OPINION FILED JULY 7, 2025

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 16, 2025, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on April 23, 2025, and a pre-hearing order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed among the parties on September 14, 2021.

3. The claimant sustained a compensable injury to his back on September 14, 2021.

4. Prior Opinion of October 21, 2024, is final.

The issues to be litigated at the forthcoming hearing are as follows:

1. Temporary total disability benefits from January 20, 2025, to a date yet to be determined.

2. Respondents' entitlement to a credit against any temporary total disability benefits owed to claimant.

3. Payment of November 30, 2024, emergency room visit and December 4, 2024, visit to Siloam Springs Community Clinic.

4. Attorney fee.

At the hearing the parties agreed to stipulate that respondent has accepted liability for payment of the November 30, 2024, emergency room visit and the December 4, 2024, visit to Siloam Springs Community Clinic. The parties have also agreed to stipulate that claimant is entitled to temporary total disability benefits beginning January 28, 2025, and continuing through a date yet to be determined. Based upon the additional stipulations, the only issues remaining to be litigated are respondent's entitlement to apply its credit against any temporary total disability benefits owed to claimant and an attorney fee.

The claimant contends:

> "The Claimant contends that the respondents do not have the right to recoup an overpayment regarding a permanent impairment rating by withholding payments to the claimant that arise out of temporary total disability. The claimant contends that the respondents can only take a credit for an

> overpayment against the same type of benefits that created the overpayment.
>
> The claimant contends that his attorney is entitled to an attorney's fee in regard to temporary total disability benefits arising out of the January 28, 2025 surgery."

The respondents contend "a previous decision awarded compensability but no TTD. A credit was allowed for 6% to the body due to an overpaid PPD rating. No appeal was filed by either party. The respondents authorized the surgery that was done on 1-28-25. The 6% credit is equivalent to 20.28 weeks of benefits at the TTD rate. The credit will not be used up until 6-11-25. The ALJ decision states that the credit is for 'any benefits' paid in excess of the 2% appropriate rating. TTD has not been controverted. No attorney fees are due. The rating for a third surgery at the same level is 1%. It is impossible to take a 6% credit for a 1% PPD rating."

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 23, 2025, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that respondent has accepted liability for payment of the November 30, 2024, emergency room visit and the December 4, 2024, visit to Siloam Springs Community Clinic is also hereby accepted as fact.

3. The parties' stipulation that claimant is entitled to temporary total disability benefits beginning January 28, 2025, and continuing through a date yet to be determined is also hereby accepted as fact.

4. Respondent is entitled to apply the overpayment credit awarded in the prior opinion filed October 12, 2024, against payments due claimant for temporary total disability benefits beginning January 28, 2025.

5. Respondent has controverted claimant's entitlement to temporary total disability benefits arising from his surgery by Dr. Seale.

FACTUAL BACKGROUND

Claimant performed construction work for the respondent and has a history of a non-work-related back problem that resulted in surgery at L5-S1 in 2014. Claimant previously testified that after approximately a year's recovery he returned to work performing his regular activities which included heavy lifting. The parties have previously stipulated that claimant suffered a compensable injury to his low back while working for respondent on September 14, 2021. After some conservative treatment, claimant underwent a "revision left L5-S1 micro decompression" by Dr. Gannon Randolph in April 2022.

After the surgery by Dr. Randolph, claimant was released to return to work without restrictions on July 19, 2022, and at some point thereafter respondent paid claimant permanent partial disability benefits based on an 8% rating to the body as a whole.

Claimant previously testified that although he returned to work for respondent, he continued to have low back pain and changed jobs to work as an electrician which did not require heavy lifting. Claimant was also referred by respondent to Dr. Jared Seale who recommended a fusion procedure for a recurrent disc protrusion at L5-S1. Claimant was also evaluated by Dr. Randolph who agreed that claimant was in need of the proposed fusion procedure.

Respondent did not accept liability for the proposed procedure and as a result claimant filed a claim contending that he was entitled to the surgery. Claimant also requested payment of temporary total disability benefits and respondent raised as an issue the claimant's correct impairment rating as a result of the September 14, 2021, injury. A hearing on those issues was conducted on October 2, 2024, and an opinion was filed on October 21, 2024, finding that claimant had met his burden of proving by a preponderance of the evidence that he was entitled to the recommended surgery and that at that time claimant was not entitled to payment of additional temporary total disability benefits. As to the correct impairment rating, the following finding was made:

> 4. Claimant's impairment rating attributable to his compensable injury equals 2% to the body as a whole. Respondent is entitled to a credit for permanent partial disability benefits paid in excess of that 2% rating.

The award portion of the opinion contains the following:

> Claimant's permanent physical impairment rating as a result of his compensable injury on September 14, 2021, is 2% pursuant to the *AMA Guides*. Respondent is entitled to a credit for any benefits paid in excess of this amount.

The parties have stipulated that the October 21, 2024, opinion is final. Since the time of the last hearing, claimant underwent the recommended surgical procedure by Dr. Seale on January 28, 2025, and the parties have stipulated that claimant is entitled to temporary total disability benefits beginning on that date. The issue to be litigated is respondent's entitlement to apply its credit against the temporary total disability benefits payable to claimant.

ADJUDICATION

At the prior hearing, the parties stipulated that respondent had paid claimant permanent partial disability benefits based on an 8% rating to the body as a whole. Respondent introduced into evidence an impairment evaluation summary dated June 24, 2024, from Functional Testing Centers, Inc. which assigned claimant an 8% impairment rating to the body as whole for a surgically treated disc lesion without residual signs or symptoms pursuant to Table 75 of the *AMA Guides, 4th Edition*. However, as the prior opinion noted, the claimant's surgery in April 2022 was the second surgical procedure on his lumbar spine, not the first. Therefore, the claimant's first surgical procedure in 2014 for a non-work-related condition would have resulted in an 8% rating with the second procedure in 2022 resulting in an additional 2% impairment pursuant to the *AMA Guides*. Based upon this evidence, this administrative law judge found that respondent was entitled to a credit for permanent partial disability benefits paid in excess of 2%. As previously noted, the parties have agreed that the prior opinion is final.

Although respondent acknowledges that claimant is entitled to temporary total disability benefits beginning on January 28, 2025, following another surgical procedure, respondent contends that it is entitled to apply the previously awarded credit against those benefits until the credit is exhausted. Claimant contends that since the credit was for overpayment of permanent partial disability benefits, not temporary total disability benefits, respondent is not entitled to apply the credit.

I find that respondent is entitled to apply the previously awarded credit against payment of temporary total disability benefits until the credit is exhausted. Claimant has cited no authority supporting the contention that a credit for overpayment can only be applied against the same type of indemnity benefits for which the credit was awarded.

Claimant argues that allowing respondent to take a credit under these circumstances would permit a respondent to take a credit against payment of medical benefits. However, these are not the same type of benefits. Medical benefits are paid to a third party, while temporary total disability and permanent partial disability are indemnity benefits payable directly to a claimant. Furthermore, respondent is not requesting a credit against medical benefits payable in this claim. Instead, it is only requesting application of the credit against additional indemnity benefits payable to claimant.

Per the prior opinion, claimant has received indemnity benefits over and above that to which he was entitled under the Arkansas Workers' Compensation law. As a result, respondent was awarded a credit for that overpayment. Although the overpayment was for permanent partial disability benefits, a finding that respondent is not entitled to apply the credit against payment of temporary total disability benefits would continue to allow claimant to receive indemnity benefits in excess of those to which he is entitled under the law.

Accordingly, I find that respondent is entitled to apply its credit against temporary total disability benefits owed to claimant beginning on January 28, 2025, and continuing until the credit is exhausted or until claimant's entitlement to temporary total disability benefits ends, whichever occurs first.

Having found that respondent is entitled to apply its credit against temporary total disability benefits owed to claimant, it is not necessary to discuss whether the payment of permanent partial disability was an advance payment of compensation. Respondent has already proven that it's entitled to the credit which was awarded in the opinion filed October 21, 2024.

Finally, by controverting claimant's entitlement to the additional medical treatment in the form of surgery at the prior hearing, respondent has controverted claimant's entitlement to temporary total disability benefits arising out of that surgery beginning on January 28, 2025. Therefore, claimant's attorney is entitled a fee on temporary total disability benefits as of January 28, 2025.

AWARD/ORDER

Respondent is entitled to apply its credit against temporary total disability benefits owed to claimant beginning January 28, 2025. By controverting claimant's entitlement to the surgery, respondent has controverted payment of temporary total disability benefits attributable to that surgery.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum and without discount. This award shall bear interest at the maximum legal rate until paid.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of $263.00

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE