BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F200619

RICHARD COSNER, Employee	CLAIMANT
C&J FORMS & LABELS CO., Employer	RESPONDENT NO. 1
LIBERTY MUTUAL GROUP, Carrier	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED OCTOBER 18, 2022

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

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

Respondents No. 1 represented by GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 26, 2022, a Pre-hearing Order was filed in the above captioned claim. A pre-hearing conference was conducted on June 22, 2022. It should be noted that this matter was remanded from the Court of Appeals to the Full Commission on November 17, 2021. The Full Commission, thereafter, remanded this mater to this Administrative Law Judge on May 23, 2022, for further proceedings. 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 this claim.

2. The relationship of employee-employer-carrier existed between the parties on December 19, 2001.

3. The claimant sustained a compensable injury on December 19, 2001, to his right knee and to the bilateral shoulders as a compensable consequence of his compensable right knee injury.

4. The claimant is entitled to a weekly compensation rate of $410.00 for temporary total disability and $308.00 for permanent partial disability.

5. All prior opinions are final and res judicata.

By agreement of the parties the issues to litigate are limited to the following:

1. Extent of permanent impairment regarding the claimant's right knee.

2. Extent of permanent impairment regarding the claimant's bilateral shoulders.

3. Whether Claimant's attorney is entitled to an attorney's fee.

Claimant's contentions are:

> "Claimant contends that the impairment ratings assessed by Dr. Holder in October of 2019 are the appropriate impairment ratings regarding Mr. Cosner's shoulders instead of the impairment ratings that were assessed by Dr. Ahmadi in March of 2019.
> Dr. Holder's assessment specifically mentions utilizing passive range of motion.
> Additionally, the Claimant contends that the impairment rating assessed by Dr. Buie in October of 2019 regarding the Claimant's right knee is the appropriate rating for his knee since prior to that date Dr. Barnes described the claimant's knee condition as a failed total knee replacement.
> Claimant contends that neither Dr. Ahmadi's or Dr. Holder's impairment ratings regarding the shoulders have been accepted or paid."

Respondents No. 1's contentions are:

> "Respondents No. 1 contend that the shoulder impairment does not meet the requirements of the Workers' Compensation Act. The claimant was referred to Dr. Holder for one visit by claimant's attorney since Dr. Holder had never seen, treated or evaluated the claimant and there is no indication that he has ever reviewed any of the claimant's prior treatment or records. In addition, Dr. Holder does not set out if his "impairment" determination is to the extremity or the body. Despite this, Dr. Holder's rating determination is more than the rating from claimant's actual treating physician, Dr. Ahmadi, which was accepted and paid.
> Respondents No. 1 contend that the claimant's increased PPD rating to the knee also is improper and should not be given any weight. Dr. Buie has not seen or treated the claimant now for over 11 years. Dr. Buie is the physician that referred the claimant to Dr. Barnes, claimant's actual treating physician. Dr. Buie was not provided any treatment or reviewed any records and there is no indication that Dr. Buie had any knowledge of the treatment or consideration of Dr. Barnes and any prior impairment determination. In addition, Dr. Buie's rating does not meet the statutory requirements since it also specifically takes into consideration the claimant's 'pain'.
>
> Respondents No. 1 contend both increased ratings are improper and should be given no weight or consideration."

The claimant in this matter is a 75-year-old male who sustained a compensable right knee injury on December 19, 2001. The claimant also sustained bilateral shoulder injuries as a compensable consequence of his compensable right knee injury. On December 15, 2019, this Administrative Law Judge conducted a hearing and issued an opinion filed March 16, 2020, with the following issues in question:

> 1. Extent of permanent impairment regarding the claimant's right knee.
>
> 2. Extent of permanent impairment regarding the claimant's bilateral shoulders.
>
> 3. Respondent No. 1 raises the statute of limitations defense.

> 4. Whether Claimant's attorney is entitled to an attorney's fee.

This Administrative Law Judge made the following Findings of Fact and Conclusions of Law in that March 16, 2020, opinion:

> 1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 4, 2019 and contained in a Pre-hearing Order filed on that same date, are hereby accepted as fact.
>
> 2. Respondent No. 1 has proven that the statute of limitations has run with respect to the claimant's claim for additional permanent partial disability benefits in relation to his knee and/or his shoulders. Having found that the statute of limitations has run, the issue of the claimant's entitlement to permanent impairment for his right knee and bilateral shoulders is moot.

The March 16, 2020, Administrative Law Judge opinion was appealed to the Arkansas Workers' Compensation Full Commission and an opinion filed on January 5, 2021, by the Arkansas Workers' Compensation Full Commission, affirmed and adopted the March 16, 2020, Administrative Law Judge opinion. The case was then appealed to the Arkansas Court of Appeals which issued an opinion on November 17, 2021, which reversed and remanded the case for a determination of benefits. The Full Commission, thereafter, remanded this matter back the Administrative Law Judge on May 23, 2022, for further proceedings in order to make a determination of benefits.

The parties chose not to request the Commission to consider additional evidence or testimony. As such, this matter will be decided on the existing record. The issues to be considered are the extent of the permanent impairment regarding the claimant's compensable right knee injury and the extent of the permanent impairment regarding the claimant's bilateral shoulder injuries, that are compensable consequences of his compensable right knee injury.

There will also be a determination as to the claimant's attorney's entitlement to an attorney's fee in this matter.

I will first consider permanent impairment associated with the claimant's right knee. On May 9, 2018, the claimant was examined by Dr. Charles Barnes at UAMS. Following are portions of that medical report:

> Assessment:
> Failed right total knee arthroplasty with chronic pain.
>
> Plan:
> Patient will call us if pain becomes severe and patient would like to proceed with revision right total knee arthroplasty. Patient has a history of DVT and PE. Patient would like to continue as is right now while he finishes recovering from shoulder surgery. Patient will return to office in 1 year if he does not call us back sooner.

On October 30, 2019, the claimant was seen by Dr. James Buie regarding his right knee. Following is a portion of that clinic note:

> HISTORY OF PRESENT ILLNESS: Richard is a 72 year old male that I have known for many years, originally evaluated here for an injury to his knee in 2001. He had had an accident at this time. Since that time he has had several arthroscopic evaluations, debridement. He has had some scar revisions, had manipulation of his knee with limited motion. He has had his foot to turn white.
> ***
> As we have noted at this time he continues to have significant pain and discomfort. He also has significant pain and discomfort at night. He says it is hard for him to sleep on occasion. He, however, has continued to work and use his crutches working for Calvert McBride Company in Fort Smith. Today he is in and has primary complaints of knee pain hurting over the anterior area of the knee, on the proximal tibia and the distal femur. He has some discomfort involving the tibia down to the middle third at the end of his femoral stem. He has had no recent swelling. No erythema. No induration, but he has virtually no motion. He has just about 20 degrees of flexion and he

> ambulates with a flexed knee and he really doesn't have significant improvement of that on attempting to extend the knee. He has had, I think, good alignment and he has no collateral ligament laxity or anterior or posterior laxity. No popliteal fullness. He has multiple scars involving the knee and on testing at this time Wartenberg wheel he has some loss of sensation of the right lower extremity and thigh. He has with the Doppler system found to have a poor posterior tibial pulse and nothing on the anterior tibial pulse. Today he is in primarily for an evaluation for impairment. On the rating of total knee replacement under pain he has continual moderate to severe pain. I am going to list that as five points. His range of motion. He has a 20 degree flexion contracture and virtually motion at zero. His stability was excellent, anterior, posterior, medial and lateral. No points. Flexion contracture of 16 to 20 degrees are ten points. Extension lag to ten to 20, ten points, and alignment is excellent. In combination this would tend to point to about 25 to 30 degrees as points. Using the table 64 for an estimate of lower extremity impairments total knees for results are less than 50 points.
>
> ASSESSMENT AND PLAN:
> I think that under the circumstances this patient has at this time a total knee that there appears to be some loosening and I understand Dr. Barnes has declared that it is a failed total knee. As a matter of fact, I understand that there was discussion about replacement. However, the patient has not decided. At this point I think he has a total knee that does indicate an impairment of approximately 75% at least.

After careful review of the medical records, testimony and in consideration of the *AMA Guides to the Evaluation of Permanent Impairment, 4th Edition*, specifically considering Page 3/88 Table 66 and Page 3/85 Table 64, I find that the claimant is entitled to 75% to the lower right extremity due to the clearly poor result from his total knee replacement. The claimant, here, is entitled to a 75% to his lower right extremity, which would include a 50% rating to his lower right extremity for a fair result of a total right knee replacement he was assigned in October 2009.

I will now consider the permanent impairment associated with the claimant's compensable consequence bilateral shoulder injuries. On March 27, 2019, the claimant was seen by Dr. Shahryar Ahmadi. Following is a portion of the orthopaedic clinic note from that visit, at which time Dr. Ahmadi examines and rates the claimant's bilateral shoulders:

> Chief Complaint:
> Status post right shoulder arthroscopy and rotator cuff repair, and followup of the left shoulder pain.
>
> History of Present Illness:
> Richard Cosner III is a 71 y.o.
> Who underwent right shoulder arthroscopy and rotator cuff repair on December 4, 2017. The operation was not successful and patient had re-tear of the repair and continued to have pain in both shoulders. The patient has a history of DVT and family history of PE and death in the family due to the PE and for that reason, he has decided not to proceed with the surgical intervention anymore. He is still complaining of significant pain in his both shoulders. He is also complaining of significant night pain.
> ***
> Impression/Plan:
> In summary, this is a 71-year-old gentleman with bilateral shoulder pain due to rotator cuff pathology. The rotator cuff repair that was done in December 2017 was not successful. The patient has a very strong family history of DVT and PE and death in the family due to that reason, and he does not want to proceed with the surgery because of that. Basically, patient is very high risk for having a DVT and PE after the operation and for that reason, he does not want to proceed with any surgical intervention. We performed the impairment rating in the office today. The patient will continue with activity as tolerated without any restrictions, although the pain will not let him do any heavy work. We are going to follow the patient on an as-needed basis. Also, patient wants to have a steroid injection. So, I talked to patient regarding pros and cons of a steroid injection, also potential complications of that, and we injected 40 mg of Depo-Medrol mixed with 3 mL of 1% lidocaine without epinephrine from posterolateral part of the right shoulder under sterile conditions in subacromial space. The patient

> tolerated that very well and it was without any complication.
>
> Impairment Rating Report:
>
> Left Shoulder Impairments
> Flexion to 50° = 9% left upper extremity
> Extension to 20° = 2% left upper extremity
> Abduction to 45° = 6% left upper extremity
> Adduction to 20° = 1% left upper extremity
> Internal rotation to 10° = 5% left upper extremity
> External rotation to 30° = 1% left upper extremity
> ROM Summary 9+2+6+1+5+1=24% left upper extremity
>
> Right Shoulder Impairments
> Flexion to 50° = 9% right upper extremity
> Extension to 25° = 2% right upper extremity
> Abduction to 60° = 6% right upper extremity
> Adduction to 20° = 1% right upper extremity
> Internal rotation to 20° = 4% right upper extremity
> External rotation to 35° = 1% right upper extremity
> ROM Summary: 9+2+6+1+4+1=23% right upper extremity
>
> Final Summary
> Right upper extremity: 23% = 14% WP
> Left upper extremity: 24% = 14% WP
> Whole person: 14 C 14 = 26%
> Permanent impairment of whole person: 26%

On October 8, 2019, the claimant was seen by Dr. Keith Holder at Mercy Clinic Occupational Medicine in Fort Smith, at which time Dr. Holder examines and rates the claimant's bilateral shoulder injuries. Following is a portion of that medical record:

> CHIEF COMPLAINT
> Knee Replacement, Right and Left shoulder pain.
>
> PATIENT DESCRIPTION OF ACCIDENT
> Richard had a vehicle accident in 2001 slamming into concrete wall smashing right knee into dash. He has been using Canadian crutches ever since and now has pain in both shoulders.
>
> HISTORY OF PRESENT ILLNESS

Richard's primary problem is pain located in the right knee. He describes it as throbbing, stabbing, sharp, aching. The problem began on 12/19/2001. Richard says that it seems to be worst in the morning, constant. He has noticed that it is made worse by weightbearing. His pain level is 7. Additional History: He has had numerous procedures on the right knee. No range of motion testing is performed for the right knee since this has been performed by Dr. Barnes who performed the surgery.

Richard's secondary problem is pain located in the right shoulder. He describes it as awful. Richard says that it seems to be constant. He has noticed that it is made worse by moving it. His pain level is 7. Additional History: He has been told that he has deterioration in his shoulders due to use of crutches for so many years. He has had one surgery on right shoulder. His right arm falls asleep every night when he sleeps. He has decreased range of motion. He was rated by the surgeon in Little Rock using active range of motion. He needs passive range of motion testing for both shoulders to complete the rating process.

Richard's tertiary problem is pain located in the left shoulder. He describes it as awful. The problem began on 12/19/2011. Richard says that it seems to be constant. He has noticed that it is made worse by moving it. His pain level is 7. Additional History: He has been told that he has deterioration in his shoulders due to use of crutches for so many years. He is requesting passive range of motion testing for both shoulders. The exam is limited to the passive range of motion measurements.

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COMPARISONS

Test	Measurement	Right	Left
Shoulder Passive ROM	Abduction	35	12
Shoulder Passive ROM	Adduction	10	16
Shoulder Passive ROM	Flexion	11	12
Shoulder Passive ROM	Extension	8	18
Shoulder Passive ROM	Internal Rotation	15	18
Shoulder Passive ROM	External Rotation	5	12

DIAGNOSIS

1. Impingement syndrome of right shoulder (M75.41)
2. Impingement syndrome of left shoulder (M75.42).

DISCUSSION

> This visit was for the measurement of range of motion for the right and left shoulders. He is rated using the passive range of motion for each shoulder separately. There was guarding of both shoulders in all planes. He was rated using the 4th ed of the Guides to the Evaluation of Permanent Impairment. Using the measured angles and adding the impairment percents using the Figure 1 worksheet page 3/17 the rating for the right shoulder was 28% and for the left shoulder 36%.

Both Dr. Ahmadi and Dr. Holder use the same methodology and the *AMA Guides for the Evaluation of Permanent Impairment, 4th Edition*, in assigning permanent impairment ratings for the claimant's bilateral shoulders. Dr. Ahmadi assigns an upper left extremity rating of 24% and an upper right extremity rating of 23%. Dr. Holder assigns an upper left extremity rating 36% and an upper right extremity rating of 28%. Upon review of both medical records, the difference in the two ratings using the same methodology and *AMA Guides to the Evaluation of Permanent Impairment, 4th Edition*, can be found in the measurements taken by each physician during examination. I find the most reliable measurements for determining permanent impairment would be by consideration of the most recent measurements of Dr. Holder, which were roughly taken six months after Dr. Ahmadi's measurements. Dr. Holder also stated in his October 8, 2019, record that he employed "passive range of motion for each shoulder separately" when rating the claimant, which is consistent with the Arkansas Workers' Compensation Act.

I find that Dr. Holder's October 8, 2019, examination and measurements are the best evidence to determine the permanent impairment rating for the claimant's bilateral shoulders. Taking the 28% right upper extremity rating and the 36% left upper extremity rating to Page 3/20 Table 3 of the *AMA Guides to the Evaluation of Permanent Impairment, 4th Edition*, I find that the right upper extremity rating of 28% converts to a whole person rating of 17%. And the left upper extremity rating of 36% converts to a whole person rating of 22%.

As indicated on Page 3/17 of the *AMA Guides to Evaluation of Permanent Impairment, 4th Edition*, at the bottom of Figure 1, it states "If both limbs are involved, calculate the whole-person impairment for each on a separate chart and combine the percents (combined values chart)." The combined values chart is found on Pages 3/22 and 3/23 of the *AMA Guides to the Evaluation of Permanent Impairment, 4th Edition*, which gives a combined whole person rating of 35% for the claimant's bilateral shoulder injuries, and I find as such.

The claimant's attorney in this matter is entitled to an attorney's fee commensurate with the Arkansas Workers' Compensation Act and the benefits awarded herein.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, 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 June 22, 2022, and contained in a Pre-hearing Order filed July 26, 2022, are hereby accepted as fact.

2. The claimant is entitled to a permanent impairment rating in the form of an anatomical impairment rating for his right knee of 75% to his lower right extremity. This includes the previous impairment rating of 50% to his lower right extremity assigned in October 2009.

3. The claimant is entitled to permanent impairment in the form of an anatomical impairment rating for his bilateral shoulder injuries of 35% to the body as a whole.

4. The claimant has proven by a preponderance of the evidence that his attorney is entitled to an attorney's fee in this matter.

ORDER

The respondents shall pay the claimant the difference between a 75% rating to his lower right extremity and the previous impairment rating of 50% to his lower right extremity assigned in October 2009. The respondents shall pay the claimant a whole person rating of 35% regarding his bilateral shoulder injuries. The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the benefits awarded herein, with one half of said attorney's fee to be paid by the respondent in addition to such benefits and one half of said attorney's fee to be withheld by the respondent from such benefits pursuant to Ark. Code Ann. §11-9-715.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE