

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM № G702350

NANCY HEITMAN (FORMERLY COONEY), EMPLOYEE

CLAIMANT

vs.

**ARKANSAS DEPARTMENT OF CORRECTION
(McPHERSON UNIT), EMPLOYER**

RESPONDENT № 1

PUBLIC EMPLOYEE CLAIMS DIVISION, TPA

RESPONDENT № 1

**DEATH & PERMANENT TOTAL DISABILTY
TRUST FUND**

RESPONDENT № 2

OPINION & ORDER FILED 11 MARCH 2025

This claim was heard before Arkansas Workers' Compensation Commission (the "Commission") Administrative Law Judge JayO. Howe on 11 December 2024 in Little Rock, Arkansas.

The claimant was represented by the Caldwell Law Firm, Mr. Andy L. Caldwell.

Respondent № 1 was represented by the Public Employee Claims Division, Mr. Charles McLemore.

Respondent № 2 was excused from participating in the proceeding.

STATEMENT OF THE CASE

The claimant and Respondent № 1 participated in a prehearing conference on 30 July 2024. A Prehearing Order was entered the same day. That Order was entered into the hearing record without objection as Commission's Exhibit № 1. As outlined in the Prehearing Order, the parties agreed to the following:

STIPULATIONS

1. The Commission has jurisdiction over this claim.

2. The employee/employer/TPA relationship existed on or about 3 April 2017, when the claimant sustained an accepted injury to her left knee.
3. At the time relevant to this matter, the claimant was earning an average weekly wage of \$539.06 per week, which would entitle her to compensation rates of \$359 and \$269 per week for Temporary Total Disability (TTD) and Permanent Partial Disability (PPD), respectively.
4. This claim was previously heard before the Commission on 9 September 2020. An ALJ's Opinion on the issues litigated at that hearing was entered on 8 December 2020. The Law of the Case Doctrine applies to that Opinion.

ISSUES

1. Whether the claimant is entitled to PPD benefits.
2. Whether the claimant is entitled to the costs associated with a Functional Capacity Evaluation, as she contends that it was reasonable and necessary medical treatment.¹
3. Whether the claimant is entitled to an attorney's fee.

All other issues are reserved.²

CONTENTIONS

According to their prehearing filings:

The claimant contends that she suffered compensable injuries to her left knee in the course and scope of her employment which resulted in the need for treatment beginning on or about April 3, 2017. Claimant had a total ACL reconstruction and debridement of cyclops lesion of posterior capsular release. Dr. Philip Allan Smith released the claimant with no impairment despite the two surgical procedures.

Claimant is entitled to anatomical impairment in accordance with the *American*

¹ This issue was not included in the Prehearing Order, but it is consistent with the claimant's amended prehearing information entered into the record without objection as Commission's Exhibit No 3. The respondents did not object to the issue being presented at the hearing. [TR at 10.]

² The Prehearing Order indicated an additional issue of whether the claimant was entitled to benefits under ACA § 11-9-505(a)(1). The parties agreed at the beginning of the hearing that that issue would not be presented for litigation. [TR at 9-10.]

Medical Association's Guides to the Evaluation of Permanent Impairment, 4th Edition. Functional Testing Centers, Inc. (FTC) has assigned an 8% rating to the claimant's lower extremity. The claimant is entitled to 8% impairment for her lower extremity or impairment as determined by the Commission in accordance with the Act and the *Guides to the Evaluation of Permanent Impairment, 4th Edition.* Claimant further contends that the evaluation by FTC was reasonable and necessary medical treatment under the Act for which the respondents should be responsible and for which the respondent should reimburse the claimant's cost. The respondents have controverted the claimant's entitlement to additional benefits, and Claimant is entitled to attorney's fees on all controverted benefits.

Respondents No. 1 contend that the claimant did sustain a compensable injury to her left knee on April 3, 2017, that this claim has been accepted, and that appropriate benefits have been or are being paid by Respondent No. 1. The claimant has been provided medical treatment reasonable and necessary for her injury, including left anterior cruciate ligament reconstruction with quad tendon autograft surgery performed by Dr. Smith on May 3, 2017, and a left anterior cruciate ligament cyclops debridement and posterior capsular release performed by Dr. Smith on August 23, 2017. The claimant was released at MMI by Dr. Smith on November 7, 2017, with zero percent (0%) permanent impairment and no permanent restrictions, Dr. Smith noted in his report that the Claimant had full extension and good flexion, good strength, was not having any pain at this time, had regained all of her motion, and was ready to go back to work.

The claimant was paid TTD benefits during her healing period, from April 4, 2017, to November 7, 2017. The TTD benefits were suspended on October 6, 2017,

when the claimant did not appear at a scheduled appointment, and her attorney was notified of this by the adjuster. Subsequently, when it was determined that the claimant had missed the appointment but called to reschedule, TTD benefits were reinstated, from October 6; and her attorney was notified of this by the adjuster.

The claimant made a demand for benefits³ under 11-9-505 on November 22, 2017. Claimant has since returned to work for her employer at greater wages than at the time of her injury. The claimant, who was hired on March 26, 2017, was not yet eligible for FMLA protection at the time of her April 3, 2017 injury, and had been terminated after being off work with no leave time; but she was rehired and began work on November 27, 2017, at a position with greater pay than what she earned at the time of her injury.

Respondent No. 1 contends that no additional TTD benefits are owed as the claimant has already been paid TTD for all of the days during her healing period. Respondent No. 1 contends that no PPD benefits are owed because the claimant was released at MMI by her treating physician with a finding that she had no permanent impairment as well as finding she had full extension and good flexion, good strength, was not having any pain at this time, had regained all of her motion, and was ready to go back to work. Respondent No.1 contends that the claimant has returned to work for her employer at greater wages than she made at the time of injury. Respondent No. 1 contends that the claimant is not owed benefits under either section of 11-9-505. Respondent No. 1 contends that all appropriate benefits have been paid to this Claimant.

³ See FN2.

At the time of the prehearing conference on December 5, 2017, the claimant requested a Change of Physician; but subsequently, the claimant withdrew her request for a change of physician and requested to see Dr. Smith again. Respondent provided the claimant with another visit with Dr. Smith on February 1, 2018, and again on October 2, 2018, at the claimant's request. Claimant demanded an Independent Medical Evaluation (IME) with a different doctor for the sole purpose of obtaining to Claimant's Motion for an Independent Medical Examination and contends that the claimant's treating physician has already stated his opinion regarding permanent anatomical impairment related to compensable injury. A hearing was held on the claimant's demand, with an Opinion and Order filed December 8, 2020, denying the claimant's demand for an IME, no appeal was filed, and this decision was final, res judicata, and the law of the case.

There has been no activity on the claim since that final December 8, 2020, decision; so Respondent No. 1 filed its Motion to Dismiss for Want of Prosecution on June 3, 2024, which Claimant has now objected to and demanded a hearing.

Respondent No. 1 contends that the claimant cannot establish her entitlement to an impairment rating for her 2017 injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole, including the evidence summarized below, and having heard testimony from the witness, observing her demeanor, I make the following findings of fact and conclusions of law under ACA § 11-9-704:

1. The AWCC has jurisdiction over this claim.
2. The stipulations as set forth above are accepted.
3. The claimant failed to prove by a preponderance of the evidence that she is entitled to PPD benefits.

4. The claimant failed to prove by a preponderance of the evidence that she is entitled to the costs associated with the impairment evaluation.
5. The claimant failed to prove by a preponderance of the evidence that she is entitled to an attorney's fee.

SUMMARY OF THE EVIDENCE

The claimant was the only witness. The record consists of the hearing transcript and the following exhibits: Commission's Exhibit No 1 (the Prehearing Order); Commission's Exhibit No 2 (the respondent's prehearing information); Commission's Exhibit No 3 (the claimant's amended prehearing information); Claimant's Exhibit No 1 (an index page and 46 pages of medical records); Claimant's Exhibit No 2 (one index page and a one-page bill for FTC's services); Respondents No 1 Exhibit No 1 (correspondence dated 1 October 2024 that accompanied their submission of exhibits before the hearing); and Respondents No 1 Exhibit No 2 (one index page and 14 pages of non-medical records). A previous hearing on whether the claimant was entitled to an IME was held on 8 December 2020. The transcript from that proceeding was incorporated by reference.

TESTIMONY

Claimant Nancy Heitman (formerly Cooney)

The claimant is a forty-three-year-old female who injured her left knee doing jumping jacks at the respondent-employer's training academy on 3 April 2017. She was diagnosed with a torn ACL and ultimately underwent surgical repair with Dr. Smith on 3 May 2017. A follow-up surgery was performed on 23 August 2017 for a debridement of some scar tissue.

The claimant testified that after some post-operative physical therapy, she was released by Dr. Smith in November of 2017 despite some continuing difficulties with her left knee. She described experiencing some weakness and decreased muscle volume in her

thigh, along with “pain, swelling, [and] popping.” She also described her gait as altered at the time of her release.

Dr. Smith’s clinic note from the date of her release indicated that the claimant had “full extension and good flexion” at the time; but she disagreed with that assessment. She credited his opinion, however, that she needed to “continue working on quad and hamstring strengthening.” According to her testimony, her left thigh and calf muscles were both smaller at the time of her release than they had been prior to her injury.

The claimant testified that she continues having pain, swelling, clicking, and popping in her left knee. She believes that her knee has not been the same since her injury and subsequent treatment. She described her condition as currently worse than at the time of her release and stated that she continues to experience weakness and difficulty straightening her leg.

On cross-examination the claimant confirmed that her testimony about the reduced size of her thigh muscle related to the time of her release, but that the difference in muscle size was not present at the time of the hearing. She recalled an appointment with Dr. Smith after her release where he noted left knee pain after prolonged running. According to the claimant, she stopped seeing Dr. Smith at that time because he would not listen to her.

The claimant stated that she began seeing an orthopedic physician at NEA Baptist around the time that she started working in security for the facility, sometime around September of 2022. In that security role, she said that she avoids taking the stairs, opting for elevators instead, when moving about the facility. The claimant then confirmed that she was not actually examined by the occupational therapist who authored an impairment evaluation letter she entered into evidence. She is not currently treating with any provider for her left knee.

Medical and Documentary Evidence

The claimant first presented to Central Arkansas Urgent Care with a chief complaint of left knee pain on 5 April 2017. She was preliminarily diagnosed with a sprain and referred to OrthoArkansas. She was soon diagnosed with an ACL tear and scheduled for surgical repair on 3 May 2017. About three months after surgery, Dr. Smith suspected that a cyclops lesion was hindering her recovery and impinging her range of motion. An arthroscopic debridement procedure was then scheduled after an MRI confirmed the cyclops lesion.

The claimant underwent the debridement procedure on 23 August 2017. She followed up in clinic on 1 September 2017, when Dr. Smith noted that he wanted her to continue working on range-of-motion exercises and quad strengthening. A physical therapy note from that same day provided:

Ms. Cooney has been seen in clinic for 3 visits following debridement of L knee after ACL [surgery]. Pt has been independent with ambulation since re-eval. Pt reports more soreness in knee than pain. AROM L knee 2-110 deg. PROM 0-115 deg. We have continued to progress strength but have really emphasized knee flexion and extension ROM. [sic]

[Cl. Ex. No 1 at 42.]

The claimant later returned to Dr. Smith's clinic and was released on 7 November 2017. At that visit, he noted:

HPI: Status post left ACL reconstruction. She also had a debridement of a cyclops lesion of posterior capsular release for stiffness. She has done very well following her second surgery. She is not having any pain at this time. She has regained all of her motion. She is ready to go back to work.

EXAMINATION: Left knee shows healed incisions. She has full extension and good flexion. She is a firm Lachman. She has good strength.

...

PLAN: She may resume all activities as tolerated. She needs to continue working on quad strengthening and hamstring strengthening. I will see her

back as needed. She has reached MMI. She will have a 0% permanent impairment rating.

[Cl. Ex. № 1 at 44.]

The claimant also introduced a report titled, Impairment Evaluation from Records-Lower Extremity, authored by Occupational Therapist Casey Garretson of Functional Testing Centers, Inc., on 14 November 2024. According to that opinion letter:

According to the medical record, Dr. [Smith] declared this patient at MMI on 11-07-2017 and indicated in that note, “She needs to continue working on quad and hamstring strengthening.” With this information as well as other notes from Dr. Smith reporting that she needs to continue working on quad strengthening, it would be reasonable in my professional opinion that had a moderate girth deficit due to her noted weakness in her thigh at the time of MMI. Using **Section 3.2c, Table 37 on page 77 of the Guides, Muscle Atrophy, this would result in an 8% Lower Extremity, 3 % Whole Person Impairment in this case.** There seemed to be a failure to note any measured atrophy in the medical records. [Emphasis in original.]

Also, according to the medical record, it is noted at the time of MMI, Dr. Smith stated, “She has full extension and good flexion.” Therefore, she did not qualify for impairment based on loss of motion at the time of MMI. However, in Dr. Smith’s note from 10-02-2018, he stated, “She lacks a few degrees of full extension compared to the opposite side.” Based on the notes from Dr. Smith, it is unclear the exact amount of degrees of extension that Ms. Cooney is lacking.

...

Summary Statement:

Although Ms. Cooney’s girth was not measured or documented in the medical records, it is highly likely that she indeed had a muscle atrophy impairment, as Dr. Smith made several reports of left quad and/or left hamstring weakness.

Based on the muscle atrophy impairment, she would be entitled to a 3% whole person impairment, or 8% lower extremity impairment.

[Cl. Ex. № 1 at 45-46.]

The claimant submitted into evidence a bill for the impairment report. [Cl. Ex. № 2 at 1.] She argues that the evaluation and report were reasonable and necessary medical services for which the respondents should be liable.

ADJUDICATION

The stipulated facts are outlined above and accepted. It is settled that the Commission, with the benefit of being in the presence of a witness and observing their demeanor, determines a witness' credibility and the appropriate weight to accord their statements. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999). A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). 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.*

A. The Claimant Failed to Prove by a Preponderance of the Evidence That She is Entitled to Permanent Partial Disability Benefits.

Permanent impairment is any permanent functional or anatomical loss remaining after the end of the healing period has been reached. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-9704(c)(1). Objective findings are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16)(A)(i). Medical opinions addressing impairment must be stated within a reasonable degree of medical certainty. *Id.* § 11-9102(16)(B). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. *Id.* § 11-9-

102(f)(ii)(a). "Major cause" means more than fifty percent (50%) of the cause. *Id.* § 11-9-102(14).

The crux of this claim lies between competing opinions on whether the claimant is entitled to an impairment rating and the commensurate PPD benefits. On the one hand there is the opinion from her treating surgeon who supervised her care through two surgical procedures and rehabilitative periods. On the other hand is the opinion of a qualified occupational therapist who reviewed the surgeon's records and then offered his own contradictory opinion. Given the record evidence, the claimant has failed to prove by a preponderance of the evidence that she is entitled to PPD benefits.

The evidence shows that Dr. Smith was responsible for managing the claimant's initial post-surgical care and recovery. After she was not progressing as expected, he sought further surgical intervention, by way of the debridement procedure, to promote her return to function. He monitored and evaluated her gains as she participated in physical therapy. When he saw the claimant on 1 September 2017, he noted that she had some bruising and lacked full extension. He also noted that he wanted her to "continue working on range of motion and quad strengthening."

Dr. Smith then saw the claimant again on 7 November 2017 and noted what appears to be excellent progress. "She is not having any pain at this time. She has regained all of her motion. She is ready to go back to work." He further indicated that she had "full extension and good flexion." Good strength was also noted. He released her at MMI that day and found her to have no permanent impairment (0% permanent impairment rating). The record from a previous hearing in this claim shows that the respondents, when reviewing the claimant's status with her attorney, had obtained hand-written confirmation from Dr. Smith that she had "Full ROM. No Ligamentous laxity. 0% according to AMA 4th edition." See 9 September 2020 TR, Resp. Ex. No 3 at 3-4. An email relaying the same

communication and information was introduced into the record for this hearing. [Resp. Ex. No 2 at 7.]

I find Dr. Smith's opinion on the claimant's condition and his assignment of a zero percent (0%) impairment rating at the time of her 7 November 2017 release at MMI to be credible. 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). In the absence of contemporaneous objective, measurable findings conflicting with Dr. Smith's assessment, I credit his opinion as it was initially relayed in the clinic notes and then again confirmed through subsequent communication with the respondents.

Just over seven years later, on 14 November 2024, the claimant obtained a contrary opinion from Dr. Garretson as to her condition in 2017. That opinion was appropriately presented as an evaluation based only on the records that were provided to the reviewer. Dr. Garretson agrees that because the claimant's records show that "she has no cruciate laxity and she has good stability in her knee, therefore she does not qualify for a diagnosis-based impairment." He supposes, however, that because Dr. Smith encouraged continued quad and hamstring strengthening, the claimant likely experienced muscle atrophy that would have entitled her to an eight percent (8%) impairment rating to her lower extremity. That is notwithstanding his acknowledgement that the record does not contain any comparative muscle girth measurements to support that determination. I find this opinion to be speculative and do not assign it greater weight than Dr. Smith's contemporaneous opinion on the claimant's condition at the time of her release from care.

The claimant, for her part, testified that she recalled having a noticeable muscle girth deficit at the time of her release. She provided no contemporaneous documentary evidence, however, to support that recollection. I find her recollection of her own lay

assessment of her condition in 2017, which stands apart from the documented medical observations at the time, to be of minimal evidentiary weight.

Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to PPD benefits associated with her compensable left knee injury.

B. THE CLAIMANT IS NOT ENTITLED TO THE COST OF THE IMPAIRMENT EVALUATION LETTER.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant bears the burden of proving that she is entitled to additional medical treatment. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Here, the claimant sought an opinion from an unauthorized provider after already receiving an impairment rating from Dr. Smith, her authorized provider with whom she had maintained a relationship throughout the course of her treatment. The impairment opinion provided by FTC in this claim was not based on any actual, in-person evaluation of the claimant. The claimant has failed to prove by a preponderance of the evidence that the evaluation services and the associated costs are reasonable or necessary in relation to the claimant's condition or treatment. Her request for the respondents to be held liable for the costs associated with that report is denied, accordingly.

C. THE CLAIMANT IS NOT ENTITLED TO AN ATTORNEY'S FEE.

Because the claimant failed to meet her burden on the claims above that might provide for an attorney's fee, her claim for a fee must also fail.

CONCLUSION

Because the claimant failed to meet her burden of proof on any of the issues presented in this matter, this claim for additional benefits is DENIED AND DISMISSED.

IT IS SO ORDERED.

JayO. Howe
Administrative Law Judge