

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H208370

JASON HOUSE,
EMPLOYEE

CLAIMANT

PENSKE LOGISTICS, INC.,
EMPLOYER

RESPONDENT

OLD REPUBLIC INSURANCE COMPANY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED APRIL 9, 2024

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE MICHAEL L. ELLIG, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE JARROD S. PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed October 2, 2023. The administrative law judge found that the claimant failed to prove he was entitled to permanent partial disability benefits. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant proved he sustained a permanent anatomical impairment in the amount of 37% to the right lower extremity.

I. HISTORY

Jason Patrick House, now age 51, testified that he was previously involved in a motor vehicle accident in 1997. The claimant testified that he sustained injuries which included a right kneecap fracture. Dr. James W. Long noted on December 12, 2016:

This is the initial office visit in several years for this 44-year-old male complaining of pain in his left knee. This patient has a significant orthopaedic history. He was initially injured in 1997 and treated at University of Arkansas for Medical Sciences with a fracture of his right acetabulum, treated by open reduction and internal fixation and with plate and screws, plus an intramedullary rod of his right femur and an arthrotomy of his right knee with repair of the fractures extensor mechanism, including the patella. This occurred as the result of a motor vehicle accident in 1997. Open reduction and internal fixation procedure for the hip, including the acetabulum as well as the midthird of the femur with retained intramedullary rod and the fracture about the right patella and extensor mechanism. He developed no overt arthritic symptoms in his right hip, fortunately, and his knee is symptomatic, but not severely so....I have not seen him in several years and he reports that he did well enough with his hip replacement on the left and his reconstruction for acetabular and femoral fracture as well as the knee reconstruction for fracture to the point that he went back to work. He drives a truck that carries chicken entrails for Bozel. This requires him to work on a very slick floor as a result of spillage of this cargo.

On September 13, 2016, the patient slipped and fell on a concrete floor and injured his left knee as well as his left shoulder....

IMPRESSION:

1. Subacute fracture of the left patella at the proximal pole that is incomplete with avulsion of a small patellar fragment and possible quadriceps tear.
2. Posttraumatic arthrosis of the left shoulder with limitation of motion. No fracture or over structural change.
3. Old left total hip replacement with subacute trauma. No fractures or bony lesions, and no loosening.

4. Severe, old, posttraumatic arthrosis of the right hip with retained acetabular plate and screws.
5. Healed fracture of the right femur with retained intramedullary rod, antegrade.
6. Severe posttraumatic arthrosis of the right knee.

The patient has significant orthopaedic pathology in his right hip and knee secondary to trauma in 1997, with retained hardware as recorded above. He is in today because of the left knee from an apparent tear of the quadriceps tendon that occurred during a fall in September of 2016....

The posttraumatic arthrosis that is radiographically quite severe in the left knee and the right hip does not appear to be directly affected by the fall in September of 2016, in which he landed on his left knee, hip, and shoulder. The degeneration of the right hip and the right knee may eventually require replacement arthroplasty....

It was noted on May 11, 2022, "Knee bone on bone on the right; Lots of pain all the time; Pt is not helpful; walking is hard after 1/2 day; can go back out after sitting 2 yrs; Last injection was 7-10 yrs ago; 1 mo benefit."

The parties stipulated that the claimant "sustained a compensable injury to his right knee" on June 15, 2022. The claimant testified on direct examination:

Q. Would you briefly describe to the judge the accident that occurred on June 15, 2022.

A. I was pre-tripping my trailer....And I hooked up my truck and go to dolly the landing gear up and turned around and stepped in a hole that I didn't see....

Q. When you stepped in that hole, what happened?

A. I heard a pop and I twisted it a little bit there....My [right] knee swelled up.

Dr. Trent Johnson noted on July 15, 2022:

Mr. House is here for evaluation of his right knee. He reports a pain in his right knee. The patient has a history of stepping in a trailer rut, sustained twisting injury to his right knee. Since that time, he has had medial-sided knee pain. The patient reports aching and throbbing, worse with weightbearing and ambulating. This pain is mainly about the medial aspect of the knee. He has history of posttraumatic arthritis of the knee....

IMAGING: X-rays of the right knee show severe end-stage tricompartmental arthritis of his knee. There is joint space narrowing and varus deformity, osteophyte formation, and subchondral sclerosis. There is an intramedullary rod present in his femur. He has no acute fractures or dislocations.

IMPRESSION/DIAGNOSIS: 50-year-old gentleman with exacerbation of his arthritis in his right knee. Treatment options were discussed at this time and include a steroid injection.

Dr. Jonathan Creech reported on or about August 30, 2022:

50-year-old male past med history of hypertension and surgical history of a left total hip arthroplasty with right knee pain for years. He had a twisting injury at work on June 15 and has exacerbated his chronic knee pain. His right knee pain is moderate to severe, sometimes dull, sometimes sharp pain that is chronic, steady, improved with rest, and worse with activities. [Has] tried NSAIDs, Tylenol, and a corticosteroid injection the last was on July 15....

X-rays of the right knee demonstrate varus alignment with bone-on-bone arthritis the medial compartment. There is a previous antegrade femoral nail with a distal interlocking screw. There are osteophytes, subchondral sclerosis, and cysts....

This is a Worker's Compensation injury. His right knee osteoarthritis is a degenerative disease over multiple years. It is possible that he has now acute on chronic pain from a meniscal injury or other soft tissue injury on top of his arthritis.

Dr. Creech performed surgery on November 16, 2022: “Right Robotic Total Knee Arthroplasty.” The pre- and post-operative diagnosis was “Right Knee Osteoarthritis.”

The claimant testified that he benefitted from surgery performed by Dr. Creech.

Dr. Creech assessed and planned the following on or about February 16, 2023:

X-rays of the right knee demonstrate total knee arthroplasty with appropriate alignment and positioning. No complicating features.

50-year-old male with past medical history of hypertension now 3 months out status post right total knee arthroplasty doing well. His pain is controlled. He is happy with his results. He states he is having difficulty bending his knee to get into his truck.

Discussed returning to work for sedentary duty for 3 weeks and then returning to full duty. Physical therapy ordered to try to increase flexion. He would like to return to clinic in 6 weeks for a recheck....

An IMPAIRMENT EVALUATION SUMMARY – Lower Extremity was performed at Functional Testing Centers, Inc. on April 19, 2023. It was noted at that time, “Mr. House reports injury at work when he stepped in a hole while at work resulting in the onset of right knee pain.” An Occupational Therapist and a Certified Senior Disability Analyst concluded, “The guides recommend using the section that provides the greater impairment. In Mr. House’s case, the Diagnosis based estimate impairment is the greatest impairment and is the most appropriate, applicable

impairment for this patient. This results in a 15% Whole Person, 37% Lower Extremity impairment as a result of this work related injury.”

The parties stipulated that the claimant “has been assigned an impairment rating of 37% to his right lower extremity.”

A pre-hearing order was filed on June 28, 2023. According to the pre-hearing order, the claimant contended that he was “entitled to permanent partial disability benefits for his compensable injury and that his attorney is entitled to the statutory fees.”

The respondents contended that “all appropriate benefits have been paid. The claimant suffered a twisting injury to his right knee resulting in a meniscal tear. Prior to his injury, he had surgery on his right knee and had a prior diagnosis of osteoarthritis which was deemed to be bone on bone. Dr. Creech’s report of 8/30/22 indicated the claimant has had chronic right knee pain for years. Medical reports, including the surgical report, support the diagnosis of osteoarthritis being the sole need for the total knee replacement. In light of this, it is respondents’ position that the claimant’s work related meniscal injury is not the major cause of the need for the total knee replacement or the permanent rating that has been assigned. Thus, it is respondents’ position that they are not liable for that impairment rating.”

The parties agreed to litigate the following issues:

1. Claimant’s entitlement to permanent disability benefits in an amount equal to 37% to the lower extremity.

2. Attorney's fee.

After a hearing, an administrative law judge filed an opinion on October 2, 2023. The administrative law judge found that the claimant failed to prove he was entitled to permanent partial disability benefits. The claimant appeals to the Full Commission.

II. ADJUDICATION

Permanent impairment is any functional or anatomical loss remaining after the healing period has been reached. *Johnson v. Gen. Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). The Commission has adopted the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) to be used in assessing anatomical impairment. See *Commission Rule 34*; Ark. Code Ann. §11-9-521(g)(Repl. 2012). It is the Commission's duty, using the *Guides*, to determine whether the claimant has proved he is entitled to a permanent anatomical impairment. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(Repl. 2012). Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2012). Although it is true that the legislature has required medical evidence supported by objective findings to

establish a compensable injury, it does not follow that such evidence is required to establish each and every element of compensability. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). All that is required is that the medical evidence be supported by objective medical findings. *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006). Medical opinions addressing impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B)(Repl. 2012).

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(F)(ii)(a)(Repl. 2012). “Major cause” means “more than fifty percent (50%) of the cause,” and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14)(Repl. 2012). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat’l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003).

An administrative law judge found in the present matter, “2. Claimant has failed to meet his burden of proving by a preponderance of [the] evidence that he is entitled to permanent partial disability benefits in an amount equal to 37% to the lower extremity for his compensable injury.”

The Full Commission finds that the claimant proved he was entitled to a rating for permanent anatomical impairment in the amount of 37% to the right lower extremity.

The claimant sustained injuries which included a right kneecap fracture as the result of a motor vehicle accident occurring in 1997. Dr. Long noted in December 2016 that the claimant had undergone an arthroscopy of the right knee following the 1997 accident. Dr. Long's impression in 2016 included "6. Severe posttraumatic arthrosis of the right knee." It was noted in May 2022 that the claimant suffered from chronic pain in his right knee, "Knee bone on bone on the right."

The Full Commission therefore recognizes that the claimant suffered from a pre-existing arthritic condition in his right knee. However, the parties stipulated that the claimant "sustained a compensable injury to his right knee" while employed with the respondents on June 15, 2022. The claimant testified that the June 15, 2022 compensable injury occurred as the result of a twisting motion after he stepped into a hole. Dr. Johnson examined the claimant on July 15, 2022 and reported a "varus deformity" in the claimant's right knee. The Full Commission finds that the "varus deformity" reported by Dr. Johnson was a supporting objective medical finding. See *Singleton, supra*. Dr. Long had expressly noted in 2016 with regard to the claimant's right knee, "He does not have any angular

deformity.” The claimant was suffering from an objective varus deformity following the June 15, 2022 stipulated compensable injury to the right knee. Dr. Johnson’s impression on July 15, 2022 was “exacerbation of his arthritis in his right knee.”

Dr. Creech performed a “Right Robotic Total Knee Arthroplasty” on November 16, 2022. The claimant reported benefit from surgery performed by Dr. Creech, and post-surgical improvement is evidence demonstrating that surgical treatment was reasonably necessary in connection with the compensable injury. *Hill v. Baptist Med. Ctr.*, 74 Ark. App. 250, 48 S.W.3d 544 (2001).

As we have discussed, an IMPAIRMENT EVALUATION SUMMARY – Lower Extremity was performed at Functional Testing Centers, Inc. on April 19, 2023. Following the IMPAIRMENT EVALUATION SUMMARY, the claimant was assigned permanent anatomical impairment in the amount of “15% Whole Person, 37% Lower Extremity impairment as a result of this work related injury.” An Occupational Therapist and a Certified Senior Disability Analyst concluded in part that the claimant had sustained a “Flexion” impairment resulting from “PASSIVE Range of Motion” of the right knee. “Passive” range of motion performed by an examiner is not under the claimant’s voluntary control and can be interpreted as objective medical evidence establishing anatomical impairment. *See Hayes v. Wal-Mart*

Stores, 71 Ark. App. 207, 29 S.W.3d 751 (Ark. 2000). See also *Evans v. Firestone Bldg. Prods.*, 2020 Ark. App. 80, 594 S.W.3d 139. The Full Commission finds in the present matter that the 15% whole-person, 37% lower extremity impairment was supported by objective medical findings to include the post-compensable injury “varus deformity” reported by Dr. Johnson and the passive range of motion deficit observed by the evaluators at Functional Testing Centers, Inc.

The respondents argue on appeal that the major cause of the claimant’s permanent anatomical impairment was the preexisting arthritic condition in the claimant’s right knee. The respondents cite as authority *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008). In *Hickman*, the Arkansas Supreme Court affirmed the Commission’s decision that the claimant failed to prove his compensable injury was the major cause of knee-replacement surgery and a resulting anatomical impairment rating. The Supreme Court’s holding in *Hickman* is readily distinguishable from the evidence in the present matter. In *Hickman*, for instance, a treating physician had testified that pre-existing degenerative changes were the major cause of the claimant’s surgery and impairment. There was no such testimony in the present matter. In fact, there were no expert opinions of record contradicting the conclusion that the claimant had

sustained permanent anatomical impairment “as a result of this work related injury.”

The evidence in the present matter is similar to the evidence presented in *Ark. Forestry Comm. v. Lindsey*, 2021 Ark. App. 497, 638 S.W.3d 333, where the Court of Appeals distinguished the Court’s holding in *Hickman, supra*. The Court in *Lindsey* affirmed the Commission’s finding that the claimant had sustained a permanent anatomical impairment as a result of his compensable injury. The claimant in *Lindsey* proved he was entitled to a permanent anatomical impairment despite a pre-existing degenerative condition.

The Full Commission finds in the present matter that the claimant proved by a preponderance of the evidence that he sustained a 15% whole-person, 37% lower extremity impairment as a result of his compensable injury. The Full Commission finds that this rating was consistent with the 4th Edition of the *Guides* at Table 41, p. 3/78. The permanent rating was supported by objective and measurable physical findings, including a varus deformity and passive range of motion deficit. The claimant proved that the June 15, 2022 compensable injury was the major cause of his permanent anatomical impairment. The permanent impairment assessed by the evaluators at Functional Testing Centers, Inc. was not the result of a prior injury or pre-existing condition.

After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant proved he sustained permanent anatomical impairment in the amount of 37% to the right lower extremity as a result of the compensable injury sustained by the claimant on June 15, 2022. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's finding that the claimant proved he sustained a thirty-seven percent (37%) permanent anatomical impairment to his lower right extremity.

"Permanent impairment" has been defined as "any permanent functional or anatomical loss remaining after the healing period has ended." *Carrick v. Baptist Health*, 2022 Ark. App. 134, 643 S.W.3d 466 (2022).

Any determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c)(1)(B). "Objective findings" are those findings that cannot come under the voluntary control of the patient, and complaints of pain are not to be considered objective medical findings. Ark. Code Ann. §11-9-102(16)(A); *Reed v. First Step, Inc.*, 2019 Ark. App. 289, 577 S.W.3d 424 (2019).

The Commission is authorized to decide which portions of the medical evidence to credit and to translate this evidence into a finding of permanent impairment using the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993); thus, the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Carrick*, 2022 Ark. App. 134, 643 S.W.3d 466. "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." Ark. Code Ann.

§11-9-102(4)(F)(ii)(a); *Leach v. Cooper Tire & Rubber Co.*, 2011 Ark. App. 571 (2011).

In the present case, the claimant has failed to meet his burden of proving that his compensable injury was the major cause of his alleged permanent impairment. Prior to his work-related injury, the claimant was diagnosed with “severe posttraumatic arthrosis of the right knee from a fracture of the femur and injury around the patella that occurred in a motor vehicle accident in the 1990s.” (Reps. Ex. 1, P. 9).

On May 11, 2022, just prior to his on-the-job accident, Dr. Terri Lewelling classified the claimant’s condition as “[k]nee bone on the right; Lots of pain all the time; Pt is not helpful; walking his hard after 1/2 day.” (Resp. Ex. 1, P. 13).

After the claimant’s compensable injury, Dr. Trent Johnson noted in his report dated July 15, 2022, the claimant’s pre-existing degenerative condition, finding “[s]evere end-state tricompartmental arthritis of his right knee. There is joint space narrowing and varus deformity, osteophyte formation, and subchondral sclerosis.” (Resp. Ex. 1, P. 16). Post-accident x-rays of his right knee revealed “varus alignment with bone-on-bone arthritis of the medial compartment. There is a previous antegrade femoral nail with a distal interlocking screw. There are osteophytes, subchondral sclerosis, and cysts.” (Resp. Ex. 1, P. 28). Dr. Jonathan Creech’s pre-

operative findings state that the claimant's "right knee osteoarthritis is a degenerative disease over multiple years... with right knee pain for years."

Id.

Considering the medical records leading up to the claimant's injury and the claimant's complaints of debilitating pain just thirty-five (35) days prior to his work-related injury, it is clear that the major cause of the claimant's permanent partial impairment is his pre-existing arthrosis and osteoarthritis, and the claimant has failed in meeting his burden of proof in this matter.

Accordingly, for the reasons stated above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner