

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G107174

JUDITH MELTON, Employee	CLAIMANT
CLARKSVILLE SCHOOL DISTRICT, Employer	RESPONDENT #1
ARKANSAS SCHOOL BOARDS ASSOC., Carrier/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JUNE 16, 2021

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

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

Respondent #1 represented by MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by CHRISTY KING, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 18, 2021, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on December 2, 2020, and an Amended Pre-hearing Order was filed on January 21, 2021. 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. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury on August 19, 2011 to her head, neck, back and left elbow.

4. The claimant is entitled to a weekly compensation rate of \$575.00 for temporary total disability benefits and \$431.00 for permanent partial disability benefits.

5. The prior Opinion is *res judicata* and the law of the case.

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

1. Extent of claimant's permanent impairment.
2. Extent of claimant's wage loss disability.
3. Additional medical treatment.
4. Maximum medical improvement date.
5. Respondents No. 1 and 2 raise the statute of limitations defense.
6. Whether claimant's attorney is entitled to an attorney's fee.

The claimant's contentions are as follows:

a. The claimant contends that she is entitled to permanent impairment as reflected by the impairment ratings assessed by her authorized treating physician, Dr. Rosenzweig.

b. The claimant contends that she is entitled to wage loss disability in addition to her permanent impairment.

c. The claimant contends that her attorney is entitled to an appropriate attorney's fee."

Respondent No. 1's contentions are as follows:

"Respondents contend that all appropriate benefits are being paid with regard to Claimant's compensable injuries sustained on 8/19/11. Claimant has been assigned the following ratings by Dr. Kenneth Rosenzweig: a 5% for her brain injury; an 8% for the cervical spine and a 9% for the lumbar spine; Respondents No. 1 assert that none of these ratings are attributable to the compensable injury sustained on August 19, 2011.

The 5% rating for the brain injury, according to Dr. Rosenzweig, is because of the MRI dated December 29, 2011. That MRI revealed nonspecific white matter change consistent with age, and Claimant has no evidence of a traumatic brain injury. Further, Dr. Tonya Phillips has opined that from the standpoint of Claimant's migraines and cognitive impairment, there are no limitations as far as her ability to work.

Claimant's cervical spine rating, an 8% according to Dr. Rosenzweig, is due to a pre-existing and underlying condition. Dr. Stephen Heim assigned a 10% rating to the body as a whole in 2003 for Claimant's neck and upper extremity condition. Claimant's MRI performed on December 29, 2011, revealed degenerative disc disease including spondylosis at C4-5 and C5-6. Dr. Zachary Mason opined that these findings were old, and no acute abnormalities were noted. She has not had surgery on her cervical spine.

Claimant's lumbar spine rating, a 9%, is also due to a pre-existing and underlying condition. Dr. Mason opined that she had a bulge at L4-5, but an MRI done approximately six years previously also showed a bulge at that level. She has not had surgery on her lumbar spine.

Claimant is not permanently and totally disabled associated with her compensable 8/19/11 injuries. No rating is applicable associated with those injuries, and no wage loss applies.

Respondents No. 1 are unaware of any medical treatment in dispute other than perhaps Claimant's entitlement to therapeutic massage. The same is not reasonable and necessary.

With regard to the statute of limitations, the last TTD check was issued to Claimant on 9/14/17. She did not assert that she was permanently and totally disabled until 11/15/19. Claimant's Form C filed on October 27, 2015 did not make a claim for permanent total disability benefits."

Respondent No. 2's contentions are as follows:

"The Death and Permanent Total Disability Trust Fund contends that the Statute of Limitations has run on this claim pursuant to A.C.A. §11-9-702(b), and *Kirk v. Cent. State Mfg.*, 2018 Ark. App. 78, 540 S.W.3d 714 (2018). Claimant filed an AR-C on October 27, 2015, which did not mark benefits for permanent and total disability. Claimant's first request for permanent and total disability benefits was made in the prehearing questionnaire filed on November 15, 2019.

The claimant in this matter is a 66-year-old female who suffered compensable injuries to her head, neck, back and left elbow on August 19, 2011. The claimant was employed by the respondent as a school teacher, and apparently slipped and fell while taking students to the school bus.

The claimant has been treated for her compensable injuries since 2011 and has extensive medical records regarding that treatment. The claimant has been treated by Dr. Kenneth Rosenzweig on many occasions. A letter dated June 28, 2020, which Dr. Rosenzweig authored, does a good job of

summarizing her treatment course. The body of that letter as found at Claimant's Exhibit 1, Pages 205-206 is as follows:

Judy Melton's original date of injury was in 2011. She has had subsequent injuries. I have been treating her since 2012 regarding her job related injury. She has undergone extensive treatment regarding her cervical spine, lumbar spine, and sacroiliac joint. She has also had extensive treatment for a post concussion syndrome with chronic recurring headaches as documented by Dr. Reginal Rutherford, who is now deceased, and Tonya Phillips, M.D., a neurologist in Ft. Smith. She has had extensive surgery to her knee with multiple revisions. The last surgery was performed by Dr. Chris Arnold in Fayetteville, She has persistent ankylosis and gait disturbance which continues to aggravate her low back pain. She has undergone a variety of interventions that include but are not restricted to radiofrequency, epidural steroids, SI joint injections and radiofrequency of the SI joint. Although Ms. Melton may be at MMI she may require ongoing treatment for her ongoing difficulties. I believe her back pain has been aggravated by her ongoing struggles regarding her knee injury, knee surgeries, and knee rehab. The pathology as presented on her initial diagnostics suggest a preexisting condition but was aggravated by her mechanism of injury. This is the main source of her indication for treatment. She continues to experience symptoms regarding her knee, neck, back, SI joint, and her headaches.

Using the *American Medical Association Guide to the Evaluation of Permanent Impairment, Fourth Edition*, using table 75, page 113, classification 2C, it is my opinion within a reasonable degree of medical certainty that Ms. Melton has sustained 5% impairment to the body as a whole regarding her brain injury. This was using Table 2 on Page 142.

Table 75, Page 113, section 2C allows 1% per level for multilevel involvement. Ms. Melton has a minimum of three levels involved in both the cervical spine and lumbar spine. Therefore, the +2 represents the multiple levels of both impairments at 6% and 7% for the cervical and lumbar spine respectively which would result in an 8% and 9% impairment respectively.

Her permanent restrictions include no overhead work, no away from body reaching or lifting, and no activities that require prolonged standing, repetitive bending, repetitive stooping, or walking on steps, inclines, or declines.

If there are any questions regarding the formulation of this report, please contact me at this office.

Respondent #1 introduced an impairment rating summary prepared by Stuart A. Jones, PT DPT and Charles Davidson, M.Ed., CEAS, CSDA, CFE of the Functional Testing Centers in Mountain Home, Arkansas. Following is a portion of that report found at Respondent 1’s Exhibit 1, Pages 115 – 116, that also summarizes treatment and identifies diagnostic testing the claimant has undergone:

Client Name: Ms. Judith “Judy” Melton **Date:** 09-01-2020
Physician: Dr. Christopher Arnold (Knee condition, MMI stated)
Dr. Kenneth Rosenzweig (MMI stated for head injury, neck injury, low back injury on 06-28-2020)
DOB: 01-03-1955
Employer: Clarksville Public Schools **Job Title:** School Teacher
Injured Area Addressed: Head, Neck and Low Back
Prior Medical History includes: Total knee arthroplasty on right knee with multiple, failed revision surgeries with the most recent being a right knee open polyethylene exchange, right knee open lysis adhesions, excision of fibrotic tissue, right knee open lateral release. 06-19-2017, Dr. Christopher Arnold. (Right knee previously rated, 20% Whole person, 50% lower extremity impairment, 11-05-2019).

Diagnostic Testing:

Cervical –

MRI of the cervical spine, 04-07-2004 indicated, “Disc ridge complex C5-6, midline to the right without apparent foraminal encroachment, Doug Kerin, MD.

MRI of the cervical spine, 12-29-2011 indicated, “Degenerative disc disease at C4-5 and C5-C6. Minimal central canal stenosis at C5-C6 with mild to moderate bilateral foraminal narrowing. No fracture. No cord edema. Rajech Sethi, MD. MRI of the cervical spine, 01-15-2013 indicated, “Mild multilevel spondylitic changes of the cervical spine manifested most prominently at C5-6 where there is mild bioforaminal narrowing and mild central stenosis. No posttraumatic sequela is demonstrated, Jason Beck, MD.

Treatment: Cervical collar, Physical Therapy, Medication Management

Lumbar –

MRI of the lumbar spine on 01-31-2012 indicated, “Bulging disc L4-5, Spinal canal diameter lower limits normal at L4-5, Doug Kerin, MD.

MRI of the lumbar spine on 12-31-2012 indicated, “Fairly unremarkable MRI lumbar spine. Very mild disc bulge at L4-5”. MRI of the lumbar spine on 08-09-2013 indicated, “Stable MRI lumbar spine. The vertebral body height and alignment are maintained. Soft tissue are unremarkable. No abnormal signal is seen within the spinal cord. There is no acute disc protrusion. There is a very minimal disc bulge at L4-5, not changed from reference study (12-31-2012). Thickening of the ligamentum also noted at L4-5. Mild facet degenerative changes at L4-5 and L5-S1. Ashley Burnham, MD.

MRI of the lumbar spine on 08-09-2019 indicated: Multilevel spondylitic changes most prominent at L4-5 where there is a mild bilateral inferior foraminal narrowing and mild lateral recess stenosis, Jason Beck, MD.

Treatment has included: Lumbar radiofrequency in 2014, SI joint radiofrequency in 2016, trigger point injections, medication management, Physical Therapy.

A review of medical reports/history was performed and included Physician reports:

Of note, Dr. Rosenzweig indicated on 05-09-2018, “SI joint pain from chronic gait disturbance status post revision total knee arthroplasty with prolonged course of rehabilitation for recovery”. Also documented, “Her gait disturbance is improved with still somewhat a light lurch, trunk shift up-down gait with a functionally short leg due to flexor contracture of the knee (right)”.

Dr. Rosenzweig also indicated on 08-01-2018, “SI joint pain from chronic gait disturbance. Page 3 of this same report indicated under header 5: “There is significant indication for procedures to get her back pain under control which in my opinion is sacroiliac in origin based on the vertical shear forces of her antalgic lurch gait.”

It should be noted that the claimant’s right knee difficulties are not associated with the compensable injuries in this case.

The claimant has asked the Commission to consider the extent of her permanent impairment. Dr. Rosenzweig found the claimant to have a 5% impairment to the body as a whole regarding her head/brain injury using *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*, using Table 2 on Page 142. However, Stuart Jones, PT/DPT of the Functional Testing Centers in Mountain Home, Arkansas did not rate the claimant’s head injury and instead stated, “No impairment was assigned for Ms. Melton’s head injury as this is outside the scope of this provider” in his September 1, 2020 impairment evaluation report. On September 16, 2020, Dr. Tonya Lynn Phillips with Baptist Health Neurosurgery Clinic wrote the following letter regarding the claimant’s head/brain difficulties found at Respondent 1’s Exhibit 1, Page 120:

Mrs. Melton is a patient that I have followed for a number of years for chronic intractable migraines. She had a long history of migraines which exacerbated after concussion. She has had some mild attention and concentration focusing issues which was felt to be related to the concussion

but also related to medication as well as her migraines. She has been stable as far as her migraines are concerned has had no worsening in her other symptoms. At this time from the standpoint of her migraines as well as cognitive impairment there are no limitations as far as her ability to work.

I find that the claimant's proper impairment rating for her head/brain injury to be 5% to the body as a whole as rated by Dr. Rosenzweig. I also find that as of the date of that rating and in agreement with Dr. Rosenzweig, that the claimant had reached maximum medical improvement for her head/brain injury on June 28, 2020.

The claimant was also assigned a permanent impairment rating for her lumbar and cervical spine in Dr. Rosenzweig's June 28, 2020 letter. Dr. Rosenzweig indicated that he used Table 75 at Page 113 and also Section 2C which allows 1% per level for multiple level involvement. Dr. Rosenzweig found that the claimant had a minimum of three levels involved in both the cervical spine and lumbar spine and states, "Therefore, the +2 represents the multiple levels of both impairments at 6% and 7% for the cervical and lumbar spine respectively which would result in an 8% and 9% impairment rating respectively." Stuart Jones, PT/DPT of the Functional Testing Centers in Mountain Home, Arkansas did issue ratings for both the claimant's cervical and lumbar spine as well. PT Jones found the claimant to have sustained a 4% whole person impairment regarding her cervical spine. Following is a portion of the impairment rating summary prepared by PT Jones and found at Respondent 1's Exhibit 1, Page 115:

As it relates to her cervical injury, Ms. Melton did have objective findings of muscle spasms present during physical examination this date with noted spasms in her left lower side cervical region. She presented with a normal cervical posture with no lateral deviation or curvature of the spine noted. There were no reports of radicular signs in either UE. She did exhibit mild active range of motion deficits but this is not ratable under Arkansas Statute. She has not had any surgical procedure on her cervical region.

A diagnosis based impairment is appropriate for her cervical spine under Table 75, II.C.: Unoperated on, with medically documented injury, and rigidity (pain not taken into account) associated with none to minimal degenerative changes on structural tests. This is a 4% Whole person impairment. She did have objective findings on her prior MRIs (notably at C5-6) and muscle spasms at the time of this evaluation, which also constitutes an objective finding.

PT Jones also assessed a 0% impairment rating regarding the claimant's lumbar spine. Following is a portion of the impairment rating summary as it considers the claimant's lumbar spine which is found at Respondent 1's Exhibit 1, Page 116:

As it relates to her lumbar spine, there is no objective findings to support impairment based on physical findings or based on Diagnosis based impairments. She has not had surgery on her lumbar spine. Ms. Melton exhibited mildly decreased lumbar motion that is not ratable under Arkansas workers' compensation statute. She did not have any altered lateral deviation of the spine and did not have muscle spasms present at the time of this examination this date. She had a normal lordotic curvature as well. She reports no radicular pain in either LE but has chronic pain in her right knee. It is noted that on numerous occasions, Dr. Rosenzweig related her chronic low back pain to a chronic gait disturbance (which Ms. Melton clearly has due to a prior right knee injury that has required multiple surgeries). In view of that statement, there is no available rating in the guides that would indicate impairment of her lumbar spine for gait derangement as this has already been addressed in her knee impairment.

It was also noted in PT Jones' impairment rating summary that on December 23, 2003, which is prior to this compensable injury, Dr. Stephen Heim assigned a 10% total body disability to "her neck and upper extremity or wrist." I note that that medical record is found at Respondent 1's Exhibit 1, Page 17, and apparently considers her neck range of motion and strength; however, it does not provide any reference to the *AMA Guides to the Evaluation of Permanent Impairment*.

After my consideration of both Dr. Rosenzweig's letter dated June 28, 2020 and the information provided in PT Jones' impairment evaluation summary dated September 1, 2020, along with the other medical records introduced in this matter, I find that the claimant sustained a 4% whole person rating to her cervical spine and that the claimant has failed to prove that she sustained any whole person impairment to her lumbar spine. It should also be noted that the claimant's MMI date for her lumbar and cervical spine injuries would be June 28, 2020, as per Dr. Rosenzweig's letter of that date.

The claimant has asked the Commission to determine her entitlement to wage loss disability as a result of her compensable injuries. Pursuant to A.C.A. §11-9-522(b)(1), when considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors including the percentage of impairment as well as the employee's age, education, work experience, and all other matters reasonable expected to affect her future earning capacity.

The claimant was employed as a teacher for many years, including roughly seven years after her compensable August 19, 2011 injuries. The claimant was never removed from work due to her compensable injuries from her August 19, 2011 fall. However, she underwent an FCE at Functional Testing Center in Mountain Home on November 5, 2019. The claimant gave a reliable effort “with 40 of 40 consistency measures within expected limits.” Stuart Jones, PT, in part administered the claimant's testing. He found the claimant to be able to perform at a sedentary physical demand level. That FCE clearly considered the claimant's right knee difficulties which are not associated with this case, but are in my opinion her most significant physical disability. It appears from the testimony as a whole that the claimant made a personal choice not to continue teaching. While I do believe that the claimant has symptoms and pain associated with her lumbar and cervical spine, they do not rise to a level that would prevent her from teaching. The claimant also gave much testimony about memory or mental focus deficits that she believes prevent her from working as a teacher. However, Dr. Phillips from Baptist Health Neurology Clinic who has followed the claimant for a number of years stated, “At this time from the standpoint of her migraines as well as cognitive impairment there are no limitations as far as her ability to work.” The claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss disability. While permanent total disability was not specifically made an issue in this matter as stated above, I do not believe that the injuries the claimant sustained in her August 19, 2011 fall would cause the claimant an inability to earn a meaningful wage as I believe that the claimant's injuries would have allowed her to remain in her employment as a teacher. The claimant simply chose not to do so, or

for health reasons not related to these compensable injuries, most likely her right knee which had been operated on on numerous occasions including a total replacement and several failed revisions. In Dr. Rosenzweig’s December 11, 2020 medical record regarding the claimant he states, “... Right knee is a failed total knee arthroplasty with persistent ankylosis, and the ongoing gait disturbance is a chronic strain to her back and her sacroiliac joints.”

The claimant has asked the Commission to determine if she is entitled to additional medical treatment; particularly, continued treatment with Dr. Rosenzweig . Following is a portion of a medical report from her February 4, 2021 visit with Dr. Rosenzweig found at Claimant’s Exhibit 1, Pages 221 – 222:

HISTORY OF PRESENT ILLNESS:

Ms. Melton is a 66-year-old worker’s compensation claimant from 2011. She is having ongoing issues regarding back pain and knee pain. She is going to seek another opinion regarding her total knee that has failed. She had been hospitalized for COVID infection and has now since recovered. She is still having quite a bit of discomfort in her back and knee. She would like to resume intervention for pain control. She is currently taking Cymbalta for her chronic pain and hydrocodone for breakthrough pain. She is having a chief complaint of back pain right greater than left. Previous trigger point injections have been helpful, but they are not giving her much duration. She was benefiting from therapeutic massages, physical therapy, and self directed exercise efforts, but this has all fallen by the wayside while recovering from her COVID infection. Apparently, she was very sick and received a remdesivir infusion which helped her recovery.

PLAN/RECOMMENDATION:

Radiofrequency repeated will be considered for ongoing back pain for continued management.

It is clear from many of Dr. Rosenzweig’s previous medical records that the claimant’s chronic back difficulties are related to problems associated with her gait disturbance which is chronically straining her back. The claimant’s right knee condition is not a part of the matter at hand. Treatment for her lumbar difficulties with Dr. Rosenzweig is not reasonable, necessary medical treatment for her current

difficulties which are not caused by her August 2011 compensable fall, but instead caused by her gait disturbance caused by an unrelated knee injury.

Respondents #1 and #2 have raised the issue of the statute of limitations. I found that the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss disability. As such, any statute of limitations consideration is moot. I have found that the claimant is entitled to permanent partial impairment in the form of anatomical impairment ratings of 5% to the body as a whole regarding her head/brain and 4% to the body as a whole regarding her cervical spine.

On October 27, 2015, the claimant filed an AR-C form for additional benefits. The claimant marked the box for “additional permanent partial” along with other boxes for various benefits. No motion to dismiss that request for benefits has been filed or granted since that time. As such, the claimant’s filing of the October 27, 2015 AR-C tolled the statute of limitations with regard to permanent partial disability. Respondents #1 and #2 have failed to prove that the statute of limitations has run on permanent partial disability.

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 witness and to observe her 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 December 2, 2020, and contained in an Amended Pre-hearing Order filed January 21, 2021, are hereby accepted as fact.

2. The claimant is entitled to permanent impairment in the form of permanent partial disability as she is entitled to an anatomical impairment rating of 5% to the body as a whole regarding her head/brain injury. The claimant has also proven by a preponderance of the evidence that she is entitled to

an anatomical impairment rating of 4% to the body as a whole regarding her cervical spine. The claimant has failed to prove that she sustained any impairment rating to her lumbar spine.

3. The claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss disability.

4. The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment by Dr. Rosenzweig regarding her lumbar spine.

5. The claimant reached maximum medical improvement regarding her lumbar and cervical spine and her head/brain injury on June 28, 2020.

6. Respondent #1 and Respondent #2 have failed to prove that the statute of limitations had run on permanent partial disability. The issue of whether or not the statute of limitations had run regarding wage loss disability is moot in that the claimant failed to prove by a preponderance of the evidence that she is entitled to wage loss disability.

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

ORDER

Respondent #1 shall pay the claimant for a 5% anatomical impairment rating to the body as a whole regarding her head/brain injury. Respondent #1 shall also pay the claimant an anatomical impairment rating of 4% to the body as a whole regarding her cervical spine.

Respondents 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 respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents 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.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**