

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206114

DOLORES BURTON

CLAIMANT

UNIVERSITY OF ARKANSAS

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 19, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by RICHARD SMITH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 23, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on April 17, 2003. This pre-hearing order purported to set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, certain clarifications were made in regard to the pre-hearing order. Stipulations #5 was changed to reflect that there was no dispute over the payment of temporary total disability benefits accruing through June 12, 2002, and that all such benefits have been paid. The second clarification involves stipulation #6, which was changed to reflect that the respondents had accepted liability for and have paid permanent partial disability benefits attributable to a 4% permanent physical impairment to the leg. The first issue was clarified to reflect that the claimant was seeking additional temporary total disability benefits from June 13, 2002 though a date yet to be determined. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On February 28, 2002, the relationship of employee-self insured employer-

third party carrier existed between the parties.

2. The appropriate weekly compensation rates are \$211.00 for total disability and \$158.00 for permanent partial disability.
3. On February 28, 2002, the claimant sustained a compensable injury to her left knee.
4. There is no dispute, at present, over the payment of medical expenses and all such benefits have been or will be paid.
5. There is no dispute over the payment of temporary disability benefits accruing through June 12, 2002 and all such benefits have been paid.
6. The respondents have paid permanent benefits for a 4% permanent physical impairment to the leg.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional temporary total disability benefits from June 13, 2002 through a date yet to be determined.
2. The claimant's entitlement to permanent benefits for both permanent physical impairment and possible permanent total disability.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"Claimant was injured on February 28, 2002, when she was washing showers-she twisted and injured her knee.

The respondents has paid the anatomical rating but the problem is that this woman is sixty-one years of age and has less than a ninth grade education and simply cannot return to her work as a custodian and cannot be retrained because of her lack of education. She requests permanent and total disability. In addition, the claimant requests fifty-two weeks of benefits, because the respondent made no effort whatsoever to attempt to find this woman work.

We weren't asking for her to be a law professor but seventeen years as a housekeeper at the university required more of the university and for any employer other than to just throw her on the industrial junk heap. The statute provides that even if she doesn't get permanent and total and they fail to return her to work or failure to even make an effort at returning her to work (perhaps she could have coached football) then she is entitled to receive up to fifty-two weeks of benefits. We also maintain that these benefits are in addition to the permanent and total disability benefits."

In regard to these issues, the respondents contend:

"Respondents contend that claimant is not PTD. She has no permanent restrictions from her physician. Furthermore, she has a scheduled injury and respondents have paid the 4% rating."

## DISCUSSION

### I. ADDITIONAL TEMPORARY TOTAL DISABILITY

The first issue to be addressed concerns the claimant's entitlement to additional temporary total disability benefits from June 13, 2002 through a date yet to be determined. The burden rests upon the claimant to prove her entitlement to these benefits. The injury sustained by the claimant was to a portion of her body that is "scheduled" under Ark. Code Ann. §11-9-521. Her entitlement to additional temporary total disability benefits is controlled by subdivision (a) of this subsection. In order to be entitled to additional temporary total disability benefits under this subsection, the claimant must prove that during the period she now seeks additional temporary total disability benefits, she has continued within her healing period from the effects of her compensable scheduled injury and had not "returned to work".

The duration of the healing period is a medical question, and must be resolved upon the basis of the greater weight of the medical evidence presented. However, this does not mean that this issue requires expert medical opinion. The healing period continues until the claimant achieves the maximum benefit of time and medical treatment in regard to the

healing or resolution of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing further in the way of medical treatment offers a reasonable expectation of further improvement, then the healing period has ended. Once this has occurred, the mere continuation of chronic symptoms is not sufficient, in and of itself, to extend the healing period.

On June 12, 2002, the claimant was released from active treatment by Dr. Tom Patrick Coker, an orthopaedic surgeon and the claimant's primary treating physician. At that time, Dr. Coker noted that the claimant was "doing very well" and was "very happy" (apparently with the results of her surgery). On October 21, 2002, Dr. Coker assessed a permanent physical impairment of 4% to the leg, as a result of the permanent damage caused by the compensable injury. The record is silent in regard to the delay between the claimant's release from active treatment and the rendering of a permanent impairment rating.

There is no evidence that the claimant sought or received any further active treatment from Dr. Coker. In fact, there is no evidence that the claimant sought or received any further medical services of any kind to her compensable knee injury, until she consulted Dr. Christopher A. Arnold, on April 22, 2003.

On April 22, 2003, Dr. Arnold, who is also an orthopaedic surgeon, apparently performed an orthopaedic evaluation on the claimant. Based upon this evaluation, Dr. Arnold authored a report to the claimant's attorney, which set out his opinion concerning the nature of the claimant's continuing symptoms, his recommendations various restrictions on the claimant's potential employment activities, and his recommendations concerning her continued medical care. However, it does not appear that the claimant has actually sought any further medical services from either Dr. Arnold or Dr. Coker, since Dr. Arnold's initial evaluation.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that her healing period for the actual physical damage caused by her compensable injury has continued beyond June 12, 2002. Since that date, she has neither sought nor received any medical treatment directed toward improving the actual physical damage caused by this compensable injury. The medical evidence fails to show that any such additional medical treatment is recommended, at the present time. In fact, all of the medical evidence indicates that the remaining physical damage is permanent in nature. I would note that the medical services recommended by Dr. Arnold, at this time, are directed toward attempting to provide the claimant with more relief from her chronic symptoms and possibly to some degree toward maintaining the current stable state of the actual physical damage she has experienced. While these medical services may well constitute “reasonably necessary medical services” for the claimant’s compensable injury, they do not constitute active treatment (i.e. treatment to reduce the physical damage caused by the compensable injury). Thus, these services cannot act to extend the healing period.

As the claimant has failed to prove that she continued within her healing period from the effects of her compensable injury after June 12, 2002, she would not be entitled to any additional temporary disability benefits after that date. Her request for additional temporary total disability benefits after June 12, 2002, must be denied.

## II. PERMANENT PHYSICAL IMPAIRMENT

The next issue concerns the extent of permanent physical impairment produced by the claimant’s compensable injury. The respondents contend that the claimant’s permanent physical impairment is in the amount of 4% to the leg, as assessed by Dr. Coker. The claimant contends that her permanent physical impairment exceeds this amount. The burden rests upon the claimant to prove the existence of any permanent physical impairment in excess of 4% to the leg.

The Act imposes upon this Commission the duty or obligation to calculate the specific percentage or degree of permanent physical impairment, caused by a compensable injury in a manner that conforms to the various requirements set out in the Act. Clearly, this Commission may adopt the percentage or degree of permanent physical impairment calculated by a medical expert, if it finds that these calculations were formed in a manner that conforms to all the requirements of the Act. However, it is ultimately the duty or obligation of this Commission to calculate the appropriate degree or percentage of permanent physical impairment and not any medical expert.

In order to conform to the Act, the percentage or degree of permanent physical impairment assessed must be “supported by objective and measurable physical or mental findings”, without any consideration to “complaints of pain”. The rating must further conform to the official impairment rating guide (at the present time, the American Medical Association’s Guides to the Evaluation of Permanent Impairment, (fourth edition). Finally, the compensable injury must be the “major cause” of the degree or percentage of permanent impairment assessed.

In his report of October 21, 2002, Dr. Coker states that he is assessing a permanent physical impairment “due to partial meniscectomy, crepitus, and loss of joint space due to articular cartilage injury”. Clearly, all of these factors would represent “objective and measurable physical findings”, as required by Ark. Code Ann. §11-9-704(c)(1)(B). None of these factors would afford any consideration to pain, as prohibited by Ark. Code Ann. §11-9-102(16)(A)(ii). The medical evidence also shows that the compensable injury was the sole cause of the damage producing these factors. Thus, the compensable injury would be the “major cause” of any permanent physical impairment attributable to these factors, as required by Ark. Code Ann. §11-9-102(4)(F)(ii)(a),

The real problem with Dr. Coker’s assessment of a 4% permanent physical impairment to the leg arises upon review of the American Medical Association’s Guides to

the Evaluation of Permanent Impairment (fourth edition). Given the factors indicated by Dr. Coker as the basis for his assessment, there is no method of calculation adopted by the guide that would yield this particular degree of permanent physical impairment.

Under table 64, on page 85 of the guide the first factor to be considered ( a partial meniscectomy) would carry a 2% permanent physical impairment. Page 83, table 62 provides for an additional 5% permanent physical impairment to the leg for the second factor (crepitation). In regard to the third factor (loss of joint space due to cartilage damage), table 62 provides a range of ratings that run from 7% to the leg to 50% to the leg for cartilage loss of the knee joint and 10% to 20% to the leg for cartilage lost to the patellofemoral joint. Dr. Coker's operative note indicates a cartilage damage loss involving both the patellofemoral joint and the area of the medial femoral chondyle.

The various ratings given by table 62 on page 83 of the guides for articular cartilage damage or loss are based upon measurement of the loss as shown on radiographic studies. As previously noted, this loss varies for the knee from a 7% to the leg for a 1 mm. loss to a 50% rating for a total or 4 mm. loss, and for the patellofemoral joint from a 10% rating for a 2 mm. loss to a 20% rating for a 4 mm. or total loss. In his operative report, Dr. Coker indicates a total cartilage loss to a portion of the patellofemoral joint and to a portion of the knee joint in the area of the femoral chondyle, as a result of the claimant's compensable injury. However, I am not certain that the partial total loss noted in the operative report would be the same as the loss described in the guide. Although Dr. Coker indicated that he was considering joint space narrowing and articular cartilage loss in assessing his impairment, there is no indication that he considered it in the same manner recommended by the guides and as set out in table 62.

I recognize that it could be argued that any arthritic impairment or cartilage loss with resulting joint space narrowing could be attributable to the claimant's advancing age, rather than the compensable injury. However, I would note that the evidence does not support

this argument. Obviously, both Dr. Coker and Dr. Arnold attribute this loss to the claimant's compensable injury. I would also note that the initial x-rays performed on the claimant on March 8, 2002, were not interpreted by either the radiologist or Dr. Coker as showing any significant pre-existing arthritic changes, except for some bone spurs on the patella.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that her compensable injury has produced permanent physical impairment in excess of the 4% impairment assessed by Dr. Coker. Based upon the medical evidence presented she would clearly be entitled, under the Act, to a permanent physical impairment of at least 7% to the leg below the hip. This degree of impairment would be based only on her compensable meniscal injury with the resulting partial meniscectomy and the resulting crepitus. It would further appear, that, under the Act, she would be entitled to additional permanent physical impairment for her compensable articular cartilage injury with resulting loss of cartilage interval and joint space narrowing involving her knee joint and/or her patellofemoral joint. However, due to no fault of the claimant, the radiographic information necessary to calculate the exact degree of this impairment attributable to this loss has not yet been made available.

Therefore, I find that the claimant is entitled to permanent benefits for a permanent physical impairment of at least 7% to the leg below the hip. She is further entitled to return at the respondents expense, to Dr. Coker for the purpose of conducting the radiographic studies necessary to determine the exact extent of permanent physical impairment to which she would be entitled as a result of her compensable articular cartilage injury with resulting loss of cartilage interval and joint space narrowing, in the manner set out in table 62, page 83 of the American Medical Association Guides to the Evaluation of Permanent Impairment (fourth edition). If these radiographic studies have already been made then Dr. Coker or any competent radiologist is to make the necessary measurements required by the guides.

### III. PERMANENT TOTAL DISABILITY

As previously noted, the claimant's compensable injury was to a portion of her anatomy that is scheduled under the provisions of Ark. Code Ann. §11-9-521. Pursuant to the provisions of this subsection, the claimant is entitled to permanent benefits only for the permanent physical impairment attributable to her compensable injury, unless she proves permanent total disability.

In order to establish permanent total disability, the claimant must prove by the greater weight of the credible evidence that her compensable injury was the "major cause" of an inability to pursue any type of regular gainful employment for which she is otherwise qualified. In making this determination, this Commission is to consider all relevant factors, such as the degree of permanent impairment, the physical restrictions and limitations imposed as a result of the effects of the compensable injury, the claimant's age, the extent of her education/vocational training, and her previous work experience.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that her compensable knee injury of February 28, 2002, has rendered her permanently totally disabled. This determination is complicated by the fact that the claimant has made no attempt to seek employment within the physical restrictions and limitations imposed by her compensable injury, either with the respondent or any other employer. Instead, she has elected to file for and is currently receiving social security disability benefits. Although the claimant has a limited education (leaving school in the ninth grade), she appears of average intelligence and possesses sufficient mental faculties to perform some types of clerical and sales work. Although the claimant's primary occupation appears to be in housekeeping positions (including over sixteen years with the respondent), she does have some experience in assembly line or factory type work.

Although the physical restrictions imposed on the claimant's potential employments, as the result of her compensable injury would prevent her from returning to the

employment position she held at the time of her injury or any other “housekeeping” type position, these restrictions would not prevent her from performing some assembly line positions and certain clerical or light sales positions. These types of positions, which remain within her physical limitations and restrictions, exist in sufficient number in the area of her residence to present her with a reasonable expectation of obtaining regular gainful employment.

There is no doubt that the claimant has sustained a substantial reduction in the number of employments available to her, as a result of her compensable injury, and has suffered a loss of wage earning capacity that is significantly more than that “built in” to Ark. Code Ann. §11-9-521. However, I find this loss to be less than total.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On February 28, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On February 28, 2002, the claimant earned wages sufficient to entitle her to weekly compensation rates of \$211.00 for total disability and \$158.00 for permanent partial disability.
4. On February 28, 2002, the claimant sustained a compensable injury to her left knee.
5. There is no dispute, at the present time, over the payment of expenses incurred for reasonably necessary medical services for the compensable injury, and all such expenses have or will be paid by the respondent.
6. There is no dispute over the payment of temporary disability benefits accruing through June 12, 2002, and all such benefits have been paid.
7. The claimant has failed to prove by the greater weight of the credible

evidence that she is entitled to additional temporary total disability benefits after June 12, 2002. Specifically, she has failed to prove that she continued within her healing period from the effects of her compensable injury after that date.

8. The claimant has proven by the greater weight of the credible evidence that her compensable left knee injury was the major cause of at least a 7% permanent physical impairment to the leg below the hip. However, a final determination of the total extent of her permanent physical impairment is reserved for a decision following the completion of the testing and measurement necessary to calculate the exact degree or percentage of permanent physical impairment resulting from the articular cartilage damage and joint space narrowing produced by her compensable injury, as heretofore described in this Opinion.
9. The claimant has failed to prove by the greater weight of the credible evidence that her compensable injury has rendered her permanently totally disabled.
10. The respondents have controverted the claimant's entitlement to any additional temporary total disability benefits accruing after June 13, 2002, her entitlement to permanent benefits for permanent physical impairment in excess of 4% to the leg below the hip, and her entitlement to permanent total disability benefits.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all permanent benefits for permanent physical impairment herein and hereinafter awarded, which are in excess of 4% to the leg below the hip.

## ORDER

The respondents shall pay to the claimant a preliminary award of permanent benefits for a permanent physical impairment of 7% to the leg below the hip and shall be entitled to credit for the permanent partial disability benefits previously paid (i.e. 4% to the leg below the hip).

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on all permanent partial disability benefits herein and hereinafter awarded, which are in excess of 4% to the leg below the hip. One-half of this fee shall be the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

The claimant is hereby directed to return to Dr. Tom Patrick Coker for the purpose of performing the radiographic studies and measurements necessary to calculate the exact degree or percentage of impairment resulting from the articular cartilage damage and joint space narrowing produced by her compensable injury in accord with the method set out in table 62, page 83 of the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition). This testing and evaluation is to be at the expense of the respondents. Upon receipt of the necessary information, a final determination will be made in regard to the extent of any permanent physical impairment attributable to such permanent damage.

For the reasons heretofore set forth in this Opinion, the claimant's request for additional temporary total disability benefits should be and hereby is denied.

For the reasons heretofore set forth in this Opinion, the claimant's request for permanent total disability benefits should be and hereby is denied.

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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MICHAEL L. ELLIG  
Administrative Law Judge