

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E613264 & F101926

PEARLINE WILLIAMS, EMPLOYEE	CLAIMANT
L & W JANITORIAL SERVICE, EMPLOYER	RESPONDENT NO. 1
CINCINNATI INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MARCH 14, 2008

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

Claimant represented by the HONORABLE GEORGE PIKE, Attorney
at Law, North Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE TERRY PENCE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD,
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 January 9, 2007. The administrative law judge
found that the claim was barred by the statute of

limitations and that the claimant did not prove she was entitled to additional benefits. Following our *de novo* review of the entire record, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant proved she sustained a 37% anatomical impairment as a result of her compensable scheduled injury, and that the claimant proved she was permanently totally disabled. The claimant proved that the November 15, 2000 injury was the major cause of her anatomical impairment and permanent total disability. We find that Respondent No. 1 is solely responsible for the claimant's permanent total disability.

I. HISTORY

Pearline Williams, age 61, testified that she was not educated beyond high school. Ms. Williams testified that she worked at Timex after graduating from high school and also began working for the respondent-employer, L&W Janitorial Service. The claimant testified regarding her work with the respondent-employer, "We did office buildings. We had to clean the desks, wipe the desks down, empty the trash, vacuum the floors....Then we'd head toward like cleaning the rest rooms, cleaning the commodes, and areas like that. We had to dust mop, mop floors, empty trash, and

then take the trash out. That was the daily routine, the work that we would do every day."

The parties stipulated that the claimant injured her right knee on July 8, 1996 and that benefits were paid. The claimant testified that she slipped and fell at work. A radiological examination was taken on July 9, 1996: "No significant degenerative changes are identified.

IMPRESSION: Negative right knee series with no interval change since 1988." Dr. Frank H. Ma saw the claimant on July 9, 1996 and diagnosed "Contusion of the right knee secondary to fall." The claimant also began treating with Dr. William F. Blankenship in July 1996.

Dr. W. Scott Bowen reported on December 17, 1996, "The x-rays today show mild patellofemoral spurring, no subluxation. There is evidence of osteoporosis of the right patella. At this time, I think she does have a post patellar contusion syndrome with a post traumatic chondromalacia."

Dr. Bowen reported on January 16, 1997, "Ms. Williams is doing better with her knee. She is still having some mild effusions but the therapy seems to help. Range of motion is full. There is some slight parapatellar tenderness. I would like her to return to work by Monday,

January 20th. I will have her continue outpatient therapy for another two weeks to complete the program and will release her."

A physical therapist informed Dr. Bowen on January 31, 1997, "Ms. Williams has now attended 6 of 6 scheduled appointments re-referred on 1/16/97. She is continuing to report improvement in her symptoms of her right knee....Ms. Williams at this time is an appropriate candidate for progression to an independent strengthening program. I did advise her to ice her knee on an as needed basis."

The claimant testified that she was eventually able to return to work following the 1996 injury. The claimant testified that she did not have physical restrictions following the injury in 1996. The record contains a Form AR-4, Report Of Compensation Paid/Suspension Of Payments, signed by a claims specialist with Respondent No. 1 on February 26, 1997. The Report indicated that Respondent No. 1 paid medical expenses, and that Respondent No. 1 paid temporary total disability benefits for seven weeks and two days.

The parties stipulated that the claimant sustained a compensable injury to her right knee on November 15, 2000. The claimant testified, "I was at work and I was coming up

the steps and I slipped and hit my knee on the step that was wet." Dr. Kenneth A. Martin examined the claimant on December 5, 2000: "She was at work going up stairs on 11-15-00 when she twisted the right knee....She injured her knee 2 ½ years ago and was seen at the SVI ER. She says that she does not recall any significant problems at that time and has been doing well since that time....X-RAYS: Show moderate arthritis primarily in the lateral compartment with osteophytes laterally and around the patella." Dr. Martin assessed, "Osteoarthritis with acute exacerbation secondary to the twisting injury....I don't think that she is a surgical candidate at this point. She may continue working....At this point I don't think that she has any permanent partial impairment as a result of this injury."

An MR scan of the claimant's right knee was taken on January 12, 2001, with the following impression: "Osteoarthritis involving the lateral compartment with evidence for subchondral bony necrosis of the tibia. There is also evidence for a possible sprain of the lateral collateral ligament. There is evidence for a tear involving the anterior horn and body of the lateral meniscus. There is also evidence for some mild edematous change within the fat within the retropatellar space."

Dr. Martin performed an arthroscopy and lateral meniscectomy, right knee on January 31, 2001. The pre- and post-operative diagnosis was "Torn lacteal meniscus, posttraumatic arthritis, right knee." Dr. Martin reported on January 31, 2001, "Ms. Williams underwent arthroscopy of her right knee today. She had a tear of the lateral meniscus as well as significant changes in the articular surface with exposed subchondral bone present over the lateral compartment. The procedure should improve her pain but will not eliminate all the pain because of the significant arthritic changes seen."

The parties stipulated that temporary total disability compensation was paid beginning January 31, 2001. The claimant testified that her physical condition did not improve following the 2001 surgery. Dr. Martin noted on March 15, 2001, "There is the possibility with the amount of arthritis that she may not be able to return to her previous occupation." The claimant followed up with Dr. Martin on April 5, 2001: "She is now 8 weeks post op arthroscopy and meniscectomy. She did have Grade IV changes on the lateral compartment....Most of the pain is coming from the Grade IV changes in the lateral compartment with complete loss of the articular cartilage surfaces." Dr. Martin assessed the

following on May 8, 2001: "Grade IV changes of the lateral compartment of the right knee....Because of her continued pain, Ms. Williams is a candidate for a unicompartmental arthroplasty involving the lateral compartment. I think she could return to work after that procedure."

The claimant followed up with Dr. Martin on May 15, 2001: "With the exposed subchondral bone over the lateral compartment, I think that her only option at this point is a lateral unicompartmental arthroplasty....More than likely she will have to seek a less strenuous job which does not require a lot of stooping, squatting, bending, etc." Dr. Martin assessed "Grade IV changes of the lateral compartment of the right knee."

Dr. James S. Mulhollan stated on June 12, 2001, "She tells me that she fell in November, 2000, and hit her knee on a step. Dr. Ken Martin performed (sic) an arthroscopic lateral meniscectomy on January 31. She has not improved....It is apparent that the patient injured an already very arthritic knee....This pattern of degeneration cannot be treated with osteotomy. In view of that, the only surgical remedy is joint replacement."

The parties stipulated that temporary total disability was paid until June 19, 2001 and that medical expenses were

paid until July 1, 2001. A pre-hearing order was filed on September 19, 2001. The claimant contended, among other things, that she required a total knee replacement as a result of the November 15, 2000 compensable injury. The respondents contended, among other things, that additional treatment was "recommended to address the claimant's arthritic changes which preexisted the injury at work."

Dr. Martin informed a representative of Systemedic on October 31, 2001, "I think the patient's knee was certainly severely degenerative at the time of her injury in November. I think she will be helped by total knee replacement, but I do not think the worker's compensation carrier should be responsible for that in any way since Arkansas has the 50-percent cause rule. Most of the cause for her knee replacement preexisted her job injury."

The parties deposed Dr. Mulhollan on October 31, 2001. Dr. Mulhollan testified that there was a "chronic longstanding degenerative arthritic process involving the outer compartment" of the claimant's right knee. Dr. Mulhollan testified, "the process that was going on in her knee could lead to a total knee replacement." Dr. Mulhollan opined that the "major cause" of a total knee replacement was not the November 15, 2000 injury but instead was "the

underlying degenerative arthritic process. My answer is predicated on the knowledge of Arkansas' 50 percent law as it applies to workers' comp."

The parties deposed Dr. Martin on November 29, 2001. Dr. Martin testified that he began treating the claimant on December 5, 2000, and that "x-rays showed arthritis, a lot of arthritis primarily over the lateral compartment, and I described osteophytes, which are bone spurs, laterally and around the kneecap." Dr. Martin described what he found during surgery he performed on January 31, 2001: "She had some mild degenerative changes around the kneecap, but most of the findings were in the lateral compartment where she had the arthritis. There was a tear in the lateral meniscus, and I resected the lateral meniscus, and she had what I described as grade four changes. And grade four change of the cartilage is where the cartilage is worn all the way down to the bone. So, there was exposed bone on the tibia, which is the bone in the lower part of the top of the shin, and the femur, which is the thigh bone." Dr. Martin testified that he eventually recommended "unicompartmental arthroplasty." Upon questioning by the respondents' attorney, Dr. Martin opined that the surgery he was recommending was "related to the arthritis."

A hearing was held on February 8, 2002. The claimant testified that she still had pain in her knee and that she remained off work. The claimant testified that she had trouble walking and that she was unable to perform her janitorial work. The claimant testified on direct examination:

Q. Were you able to continue your work all the way up until you had this second injury?

A. Yes, I was still working.

Q. And were you able to do your work as - as well as you could do it?

A. Well, not as good as I used to do it, but I was still in there trying to do it.

Q. And had you not had this injury in November - on November 15th, of 2000, would you still be doing what you was doing, had you not -

A. Oh, yes, I'd still be working.

Q. Is there any other reason why you're not working, other than this November 15 of 2000 injury?

A. That's the only reason.

The claimant agreed on cross-examination that she had experienced chronic pain and swelling in her knee and dragging of her leg since the 1996 compensable injury.

An administrative law judge (ALJ) filed an opinion on May 3, 2002. The ALJ found, among other things, that the

claimant "failed to prove a causal connection between her compensable injury and her need for total knee replacement surgery....Further medical treatment at the respondents' expense is unreasonable, unnecessary and unrelated to the compensable injury. This claim for additional medical expenses and temporary total disability benefits is respectfully denied and dismissed." The Full Commission affirmed and adopted the administrative law judge's decision.

The Arkansas Court of Appeals reversed and remanded for an award of benefits. See, *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). The Court of Appeals disagreed with the Commission's finding that knee replacement surgery was not reasonably necessary in connection with the claimant's compensable injury. The Court determined that the claimant's November 15, 2000 injury "was a factor in her need for the additional surgery." The Full Commission subsequently remanded the case to the administrative law judge "for additional findings consistent with the February 4, 2004, opinion of the Arkansas Court of Appeals."

Meanwhile, Dr. Thomas P. Rooney corresponded with the claimant's attorney on April 28, 2004:

Pearline is a fifty-seven year old lady complaining of constant pain and swelling in the right knee as a result of a fall on some steps while doing janitorial work for her husband on 11-15-00.

She gives a history of having injured the same knee at the same job in 1996 and was treated by Dr. Fred Blankenship with shots and pills for swelling and pain. She says she was off work off and on during that time and was still symptomatic up to the time of this more recent injury. She had been taking Tylenol....

X-rays taken today weightbearing and lateral of the right knee shows severe degenerative changes with minimal cartilage in the lateral compartment and about a 5° valgus deformity on the right side. There are severe patellofemoral changes also. The left side appears normal on the AP view.

I agree that she does need a total knee replacement. She is not a candidate for the Unispacer arthroplasty and I think a total arthroplasty would be indicated over a unicompartmental arthroplasty.

In an opinion filed May 5, 2004, the administrative law judge found that the claimant sustained a compensable injury on November 15, 2000. The ALJ found, among other things, that medical expenses had been paid until July 1, 2001. The ALJ found that the claimant proved "additional medical treatment (total knee replacement) is reasonable, necessary and related to the compensable injury. Respondents are directed to pay medical expenses within thirty days of receipt pursuant to Rule 30."

Dr. Rooney performed a right knee total arthroplasty on December 3, 2004. The pre- and post-operative diagnosis was "Degenerative arthritis of right knee." Dr. Rooney informed a case manager on August 15, 2005, "I expect that Ms. Williams will reach her maximum medical improvement at one year post-op, which will be December 2005. I think she is able to perform sedentary type activities. I think she will be restricted in her ability to walk or stand all day, climb, squat and lift and carry more than 25 pounds. These restrictions will most likely be permanent."

The claimant testified that she was no longer able to perform her work with L&W Janitorial Service. The claimant testified that she was not able to walk or climb stairs for an entire day. The claimant testified that she was physically unable to squat or kneel down to scrub.

On November 30, 2005, Dr. Rooney answered a query from Rehabilitation Management, Inc. Dr. Rooney wrote that the claimant had sustained a 37% impairment to the leg, 15% whole body. Dr. Rooney indicated that the claimant's work status was "Sedentary" and that the claimant's restrictions were permanent. The parties stipulated that the healing period ended December 1, 2005 and that the claimant had not worked since her surgery.

The parties deposed Dr. Rooney on February 27, 2006.

The claimant's attorney questioned Dr. Rooney:

Q. The question I have for you is - and what the Court must hear from you - is whether or not - had it not been for these two injuries at work which caused the traumatic arthritis to develop to the point when you saw her, was the major cause of her disability these two injuries at work?

A. Well, in reviewing her records and what I have, the testimony of Martin and Dr. Mulhollan, they were both in agreement that her arthritis was traumatic in origin from her injuries. And even Dr. Martin had mentioned at one time that she needed an arthroplasty, although he mentioned a unicompartmental, which meant just one side, and she ended up with a total knee arthroplasty. I think it's basically the same thing. And I think - I think had she not had the injury she probably wouldn't have come to the total arthroplasty that I did, from the review of her records. So I think it was more due to the injuries than not.

The attorney for Respondent No. 1 questioned Dr. Rooney:

Q. When you opened up Miss Williams' knee, kind of tell me what kind of changes you found in the knee.

A. She had some spurs on the inner aspect of her knee, some chondromalacia of the patella, which is the right knee. Her ligaments were intact. She had severe degenerative changes in the lateral compartment, where there was complete absence of cartilage and bone on bone, and also mild valgus deformity, which is a knock-kneed (sic) type deformity....

Q. Now, so that I'm clear in understanding, I don't know if you're aware of this - we're not here on the 1996 claim. All I do - all I'm

representing her employer on is a 2000 knee injury. Are you with me so far on that?

A. Mm-hmm. Yes....

Q. Your rating that you were giving, 37 percent, was due to the total knee replacement due to the arthritis, is that correct?

A. That's correct.

Q. Now, you mentioned the '96 injury. And I want to take that out of the equation. Solely based on the November 15th, 2000 injury, can you say that that injury is and of itself was the major cause of the knee - for the surgery and your impairment?

A. The injury of 2000?

Q. November of 2000. November 15, 2000.

A. Well, according to her history of the increase in severity of her pain, I think it contributed to it greatly.

Q. Well, now, your surgery, was it not, to correct the arthritis?

A. Yes.

Q. Okay. And can you agree with me that the major cause of the arthritis pre-existed the injury?

A. Well, I think the arthritis pre-existed the injury by a long time. But her disability didn't - according to my history -didn't pre-exist that....

Q. I guess the bottom line, Dr. Rooney, are you saying you disagree with Dr. Martin and Mulhollan about the major cause of the injury -

A. No. I think even Dr. Martin says, when they asked him the 50 percent thing, he said he didn't

know. I don't think I'm disagreeing with either one of them, -

Q. Well, if I tell you -

A. - basically.

Q. - that Mulhollan and Martin both said that they thought more than 50 percent of this was due to her pre-existing arthritis -

A. Well, I don't know that.

Q. Okay. I'm asking you to assume that's correct. Are you saying you disagree with that?

A. Yes, I do.

Q. And what - again, what's the basis of that?

A. Well, because I'm basing it on the fact that she became symptomatic enough to have surgery.

Q. Which are subjective, correct?

A. Yes....

Q. If you remove the symptoms and just look at what you repaired objectively - are you with me so far -

A. Yes.

Q. - can you say that more than 50 percent of what you repaired was caused by the November 15th, 2000 injury?

A. No.

A pre-hearing order was filed on August 23, 2006. The claimant's contentions were as follows: "The claimant seeks payment of the 37% impairment rating. She contends she is

permanently and totally disabled as a result of both of the compensable injuries which ultimately required a total knee replacement. Although the claimant is willing to undergo a vocational rehabilitation evaluation at the respondents' expense, she feels she is not a good candidate for rehabilitation due to her age, 60 (D.O.B. June 25, 1946), lack of transferable skills (the claimant has performed manual labor for the past thirty years) and sedentary work restrictions. The claimant further contends claim #E613264 is not barred by the Statute of Limitations as the claimant's arthritis was a latent condition."

Respondent No. 1, Cincinnati Insurance Company, contended that claim no. E613264 was barred by the statute of limitations "which ran on July 31, 1998. Furthermore, Respondent No. 1 contends all appropriate benefits have been paid on claim #F101926 and the claimant is not permanently and totally disabled nor is her injury the major cause of her disability. In the alternative, the Second Injury Fund and the Death & Permanent Total Disability Bank Fund would be responsible for further indemnity benefits."

Respondent No. 2, Second Injury Fund, contended that the claimant sustained a scheduled injury and was "not entitled to wage loss disability benefits. The Fund further

contends the claimant is not permanently and totally disabled. Alternatively, in the event of an award the claimant's benefits are limited by Ark. Code Ann. §11-9-522(f), limiting benefits to age 65."

The parties agreed to litigate the following issues: "Anatomical impairment; rehabilitation; wage loss; statute of limitations; major cause; Fund liability; controversion and attorney's fees. All other issues are reserved."

A hearing was held on October 12, 2006. The claimant testified on direct:

Q. And do you know of any job that you could successfully compete with others for at your age and with this kind of background?

A. No.

Q. Has the insurance company suggested that you go to any particular employer and find you a job?

A. No.

Q. Have they offered you any special training of any kind?

A. No.

The claimant testified that the second surgery "has helped some. It helped the leg be a little straighter than what it once was. My leg had a little drag in it, so it straightened it up a lot better, but I still have pain and it's still swollen."

The administrative law judge filed an opinion on January 9, 2007 and found:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on July 8, 1996 and November 15, 2000 at which time the claimant sustained compensable right knee injuries.
2. The claim for the July 8, 1996 injury is barred by the statute of limitations.
3. The claimant developed traumatic arthritis as a result of the 1996 injury which was the major cause of total knee replacement in 2004. The claimant was assessed a 37% rating and work restrictions which have prevented her from returning to the workforce.
4. In 2000 the claimant sustained a torn meniscus. Respondent No. 1, Cincinnati Insurance, has paid all appropriate benefits.
5. Neither the Second Injury Fund or the Death & Permanent Total Disability Trust Fund has any liability in this case.

The administrative law judge denied and dismissed the claim. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Statute of limitations

Ark. Code Ann. §11-9-702(b) (1996) provides:

- (1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater....
- (g)(1) A latent injury or condition shall not delay or toll the limitation periods specified in this section.

The administrative law judge found in the present matter, "The claim for the July 8, 1996 injury is barred by the statute of limitations." The Full Commission affirms this finding. The parties stipulated that the claimant injured her right knee on July 8, 1996 and that benefits were paid. A Form AR-4 submitted of record indicated that Respondent No. 1 did not pay any benefits after February 26, 1997. Pursuant to Ark. Code Ann. §11-9-702(b)(1), one (1) year from the date of last payment of compensation would be February 26, 1998 and two (2) years from the date of injury would be July 8, 1998. Respondent No. 1 contended that the statute of limitations "ran on July 31, 1998."

In the present matter, the statute of limitations did in fact run with regard to the 1996 injury as the administrative law judge found. The parties stipulated that the claimant sustained another compensable injury on November 15, 2000. The claimant claimed that she was entitled to additional benefits for the November 15, 2000 injury. All of the issues for adjudication were related to the November 15, 2000 right knee injury, not the 1996 injury. Counsel for Respondent No. 1 even informed Dr. Rooney at the February 27, 2006 deposition, "I don't know if you're aware of this - we're not here on the 1996 claim."

All I do - all I'm representing her employer on is a 2000 knee injury." The respondents do not contend that the statute of limitations bars the claim for benefits for the 2000 injury. Nor does the record support a theory that the statute of limitations bars the claim under an assertion that the claimant is suffering from arthritis as a result of the July 8, 1996 injury.

The Full Commission finds that the statute of limitations does bar any claim regarding the 1996 injury.

B. Anatomical Impairment

Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached.

Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). Ark. Code Ann. §11-9-102(F)(ii) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or impairment.

"Major cause" means more than fifty percent (50%) of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14).

In the present matter, the parties stipulated that the claimant sustained a compensable injury to her right knee on November 15, 2000. The claimant underwent an arthroscopy and lateral meniscectomy on January 31, 2001. Following this operative treatment, Dr. Martin and Dr. Mulhollan recommended additional surgery for the claimant. The respondents controverted this treatment, but the Arkansas Court of Appeals reversed the Commission's finding that the recommended surgery was not reasonably necessary in connection with the compensable injury. Dr. Rooney subsequently opined that the claimant needed a total knee replacement. In an opinion filed May 5, 2004, the administrative law judge found that a total knee replacement was reasonably necessary in connection with the compensable injury. This finding was not appealed. Dr. Rooney performed a right knee total arthroplasty on December 3, 2004.

Dr. Rooney was deposed on February 27, 2006. Dr. Rooney opined that, but for the compensable injury, the

claimant would not have needed a right knee total arthroplasty. Dr. Rooney disagreed with the prior opinions of Dr. Mulhollan and Dr. Martin, that is, that pre-existing arthritis was "more than 50 percent" the "major cause of the injury." Dr. Rooney opined that the claimant's condition was "more due to the injuries than not." It is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Full Commission finds that Dr. Rooney's opinion in the present matter is entitled to significant weight. We also find that the claimant proved that the November 15, 2000 compensable injury was the major cause of her resulting anatomical impairment.

The Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) to be used in the assessment of anatomical impairment. See, Commission Rule 099.34; Ark. Code Ann. §11-9-521(h) (Repl. 1996). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c) (1) (B) (Repl. 1996). It is the Commission's duty to translate the evidence on all issues before it into findings

of fact. *Johnson, supra*, citing *Gencorp Polymer Products v. Lander*, 36 Ark. App. 190, 820 S.W.2d 475 (1991).

In the present matter, Dr. Rooney opined that the claimant had sustained a 37% impairment to the leg and a corresponding 15% whole-body impairment. The Guides, at Table 64, page 3/85, assign a 15% whole-person impairment rating, which translates to a 37% impairment to the lower extremity, for a total knee replacement. The Full Commission finds that the impairment rating assigned by Dr. Rooney was proper pursuant to the Guides and was based on objective medical findings, including the objective findings observed by Dr. Rooney during surgery. We also reiterate that the November 15, 2000 compensable injury was the major cause of the claimant's anatomical impairment.

Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment except as otherwise provided in Ark. Code Ann. §11-9-519(b). An employee who has suffered a scheduled injury may claim entitlement to permanent total disability pursuant to Ark. Code Ann. §11-9-519. See, *McDonald v. Batesville Poultry Equip.*, 90 Ark. App. 435, 206 S.W.2d 908 (2005).

The Full Commission finds that the instant claimant proved she was permanently totally disabled. The claimant is age 61 and was a credible witness. The claimant has only a high school education with no further training and has performed mainly physical custodial work to earn a living. The claimant's work with the respondent-employer required lifting, stooping, walking, and bending. The claimant sustained a compensable injury in 2000 and underwent knee surgery in 2001. Dr. Martin stated in May 2001, "More than likely she will have to seek a less strenuous job which does not require a lot of stooping, squatting, bending, etc." Dr. Rooney performed a right knee total arthroplasty in 2004 and stated several months later, "I think she will be restricted in her ability to walk or stand all day, climb, squat and lift and carry more than 25 pounds. These restrictions will most likely be permanent." In November 2005, Dr. Rooney assigned the claimant a permanent sedentary work status.

The record demonstrates that, as a result of the November 15, 2000 injury and reasonably necessary surgeries performed by Dr. Martin and Dr. Rooney, the claimant is no longer able to perform her physical work with the respondent-employer. Dr. Rooney assigned the claimant a

permanent anatomical impairment. The claimant credibly testified that she was no longer able to work and that the respondent-carrier had not offered any vocational assistance. The claimant proved by a preponderance of the evidence that she was permanently and totally disabled. While we are aware of the Court's recent ruling in *Hickman v. Kellogg, Brown & Root, et al.*, ___, Ark. ___, ___ S.W.2d ___, we do not think this changes the result in the instant case. In both cases, the claimants had pre-existing degenerative knee conditions. The Court in *Hickman, supra*, stated that when the preexisting condition and a compensable injury combine and treatment results, impairment benefits are payable by a respondent only if the injury is the major cause of the permanent disability, citing ACA § 11-9-102(4)(F)(ii)(b) Supp. 2007. Here the evidence shows that the injury is the major cause for the impairment while in *Hickman*, the Court agreed with the Commission's finding that the degenerative condition was the major cause. The evidence demonstrates that the November 15, 2000 injury was the major cause of the claimant's permanent total disability.

C. Second Injury Fund

Finally, liability of the Second Injury Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at her present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. See, *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

In the present matter, the employee did suffer a compensable injury at her present place of employment. The compensable injury at issue occurred on November 15, 2000. The record does not demonstrate, though, that the claimant had a permanent partial disability or impairment prior to the November 15, 2000 compensable injury. The Full Commission recognizes that the claimant sustained a prior compensable injury in 1996 and that subsequent diagnostic testing suggested pre-existing degenerative changes. However, the claimant did not undergo surgery as a result of the 1996 compensable injury and she was able to return to full work duty afterward. Yet even if the claimant did have a prior disability or impairment, which the record does not

show, we find that there was no "combination" with the recent compensable injury to produce the claimant's current disability status. The claimant testified in 2002 that, but for the November 15, 2000 compensable injury, she would still be performing full gainful employment. The claimant did not attribute her symptoms to the 1996 injury. The claimant credibly testified that the 2000 injury was "the only reason" she was no longer able to work. Further, Dr. Rooney noted in 2004 that the claimant complained of pain and swelling in her knee as a result of the 2000 injury, not as a result of the 1996 injury or a combination of the two injuries.

The preponderance of evidence in the present matter does not show that the Second Injury Fund is liable. The Full Commission finds that Respondent No. 1 is solely liable for the claimant's permanent total disability.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the 1996 injury was barred by the statute of limitations. The Full Commission finds that the claimant proved she sustained a 37% anatomical impairment as a result of her 2000 compensable scheduled injury, and that the claimant proved she was permanently totally disabled. The

claimant proved that the November 15, 2000 injury was the major cause of her anatomical impairment and permanent total disability. Respondent No. 1 is solely responsible for the claimant's anatomical impairment and permanent total disability. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715 (Repl. 1996). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant's November 15, 2000, compensable injury was the major cause of her resulting anatomical impairment rating. Based upon my de novo review of the entire record, without giving the benefit

of the doubt to either party, I find that the preponderance of the evidence fails to support this finding.

This claim has a long history. In a previous round of litigation, the Arkansas Court of Appeals reversed the Full Commission's finding that the claimant's need for total knee replacement was not causally related to her November 15, 2000, injury. Williams v. L & W. Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). In reversing the Full Commission, the Court stated: "Both doctors can fairly said to have testified that appellant's fall at work was not the major cause, but that it was, at least, a factor in her resulting inability to work and need for knee replacement surgery." The Court went on to hold that the claimant's compensable injury was a factor in her need for additional surgery and therefore, reversed and remanded the claim for an award of benefits. The record reflects that the claimant underwent a total knee replacement on December 3, 2004. The issue presently before the Commission is whether the claimant's November 15, 2000 compensable injury is the major cause of her 37% permanent anatomical impairment rating resulting

from her total knee replacement, and if so, whether the claimant is permanently and totally disabled. After reviewing the medical evidence, fair-minded persons cannot find that the claimant's compensable injury is the major cause for her impairment rating.

First, as noted by the Court of Appeals when this claim was first before it, both Dr. Martin and Dr. Mulhollan testified that the claimant's November 15, 2000, fall was not the major cause of her need for knee replacement surgery. The Court held that for a finding of reasonable and necessary medical treatment, a major cause analysis is not applicable. The adverse is likewise true. Whether or not medical treatment is reasonable and necessary is not germane to whether a compensable injury is the major cause of an anatomical impairment rating resulting for such treatment.

Ark. Code Ann. § 11-9-102(4) (F) (Supp. 2005) provides:

(i) When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter.

(ii) (a) Permanent benefits shall be awarded only upon a determination that

the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or the need for treatment, permanent benefits shall only be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

Ark. Code Ann. §11-9-102(4)(F)(ii)(a)(Supp. 2005) provides that permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. "Major cause" is defined as more than fifty percent (50%) of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14)(A) (Supp. 2005); see, Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

In my opinion this case is squarely on point with the recent Supreme Court decision in Hickman v. Kellogg, Brown & Root, et al., ___ Ark. ___, ___ S.W.3d ___ (2008). In Hickman, the Arkansas Supreme Court held that in order to be entitled to permanent benefits a claimant must show:

"(1) that he suffered an injury arising out of, and in the course of his employment; (2) that the injury was caused by a specific incident; (3) that the injury caused internal or external physical harm to his body; (4) that the injury is supported by objective findings; (5) that the injury was the major cause of the disability or need for medical treatment."

In affirming the Commission's denial of permanent benefits, the Supreme Court relied upon the treating physician's opinion that the claimant's severe pre-existing degenerative changes of the knee were the major cause of the need for a total knee replacement and resulting impairment rating. Likewise, in the present claim, the claimant's treating physician at the time of his injury, Dr. Martin, testified as was found by the Court of Appeals, when it awarded medical treatment, that the major cause of the claimant's need for surgery was the claimant's severe pre-existing degenerative changes. As noted by the Supreme Court in its footnote, the finding that a knee injury or total knee replacement surgery may be compensable does not resolve the issue of permanent benefits. In my opinion, the overwhelming weight of evidence does not support the finding of the majority. Dr. Martin, Dr. Mulhollan and Dr. Rooney all

agree that the major cause of the claimant's need for knee replacement surgery and the resultant impairment rating was the claimant's pre-existing degenerative condition. The exacting testimony of Drs. Martin and Mulhollan demonstrates that the compensable injury was but a small factor in the need for surgery, while the claimant's pre-existing degenerative arthritis was more than 50% of the need. Moreover, like the claimant in Hickman, there is evidence in the present claim that the claimant's degenerative arthritis was not asymptomatic.

In reaching its finding that the claimant's compensable injury is the major cause for her anatomical impairment rating, the majority did not consider the deposition testimony of either Dr. Martin or Dr. Mulhollan. Rather, the majority relied solely upon the deposition testimony of Dr. Thomas Rooney who performed the claimant's total knee replacement surgery. In this regard, the majority states that Dr. Rooney opined that the claimant's condition was "more due to the injuries than not" and that he disagreed with the opinions of Dr. Martin and Dr. Mulhollan that the claimant's preexisting arthritis was "more than 50 percent" the "major cause of the injury." First, it is clearly evident from reading

Dr. Rooney's deposition that he considered both of the claimant's injuries when reaching his finding as to major cause. In this regard, Dr. Rooney was specifically asked about the claimant's two injuries, the one from 1996 and the 2000 injury when he testified as noted by the majority that her condition was "more due to the injuries than not." Contrary to the majorities characterization of Dr. Rooney's deposition testimony, Dr. Rooney agreed with Dr. Martin that the recommendation for the claimant's total knee replacement surgery was related to the preexisting arthritis. Dr. Rooney assigned the claimant a 37% anatomical impairment rating as a result of the total knee replacement which was due to the claimant's preexisting arthritis. In fact, Dr. Rooney answered affirmatively when asked, "But the major cause of the traumatic arthritis would have been before November of 2000." Thus, while Dr. Rooney testified that he operated on the claimant because she had symptoms, he unequivocally testified that the claimant's compensable injury was not more than 50 percent of what he repaired. Stated another way, the claimant's November 15, 2000, compensable injury was not the major cause of her anatomical impairment.

Accordingly, after reviewing the depositions of Dr. Martin, Dr. Mulhollan, and Dr. Rooney, I find that the claimant has failed to prove by a preponderance of the evidence that her November 15, 2000, compensable injury was the major cause of the anatomical impairment rating assigned by Dr. Rooney. Her compensable injury may have been a factor in her need for a total knee replacement, but it did not arise to the level of more than 50% of the cause. The claimant's preexisting arthritis which may have resulted from her 1996 injury is, unquestionably, more than 50% of the cause or need for the total knee replacement and resulting impairment. As found by the Administrative Law Judge and affirmed by the majority, the statute of limitations bars any claim for benefits arising out of the 1996 injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner