

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509551

CARLA A. KEY,
EMPLOYEE

CLAIMANT

PULASKI COUNTY SPECIAL
SCHOOL DISTRICT,
EMPLOYER

RESPONDENT NO. 1

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND

RESPONDENT NO. 2

OPINION FILED AUGUST 8, 2011

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

Claimant represented by the HONORABLE GARY DAVIS,
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE GUY ALTON
WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY L.
KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed March 23, 2011. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the evidence, that she is permanently and totally disabled. Because the claimant sustained scheduled permanent injuries as defined by Ark. Code Ann. §11-9-521, and has failed to prove permanent total disability as defined by A.C.A. §11-9-519, she is not entitled to permanent partial disability benefits in excess of the percentage of permanent impairment accepted and paid by respondents #1.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the March 23, 2011 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I would award the claimant permanent and total disability benefits.

HISTORY

The claimant was employed as a maintenance custodian for the Pulaski County Special School District for 17 years. She sustained an admittedly compensable right knee injury on August 9, 2004, requiring total knee replacement. The claimant also experienced an admittedly compensable consequence injury to the left knee, likewise requiring a total knee replacement.

Due to inactivity associated with the condition of her knees, claimant testified that she has been unable to lose weight and has, in fact, gained

weight since her initial injury. In December 2009, the claimant's treating physician, Dr. Scott Bowen, testified that the claimant could definitely not return to work as a custodian without significant weight loss, and would have difficulty returning to any type of work without significant weight loss. He also testified that, at an ideal body weight, with bilateral knee replacement, a return to custodial work would be challenging, but not impossible. Dr. Bowen recommended lap band surgery for weight loss, but the claimant's claim for that medical treatment was denied.

The claimant testified on February 14, 2011, that she had lost approximately thirty-five pounds since the last hearing on January 25, 2010, using Weight Watchers. She stated that the process was slow. She had hoped to lose significant weight in order to try to return to her old job.

Prior to the August 9, 2004 right knee injury and subsequent compensable consequence to the left knee, she was extremely active. She was on her feet six to eight hours a day, moving equipment, going up and down stairs, squatting, kneeling, and lunging.

The claimant was forty-nine years old at the time of the hearing on permanent disability. She had a high school diploma. During high school, she took a vocational word processing course over two years. This was on an IBM typewriter, not a personal computer. After graduation, she worked as a secretary and as an office manager at a recycling company, cashier, and bookkeeper. These offices did not have computers. She started working for the school district in a part-time position, supervising students in the lunch room. She also worked summers as a carpet crew supervisor. Later, she worked for the district in the cafeteria, cooking, cashiering, and cleaning. She was employed as a school custodian for seventeen years. In her last position, she was head of maintenance over Oakbrook Elementary. She maintained the heat and air systems. She climbed ladders, stripped and waxed floors, and moved tables, desks, and other items. She cleaned everything. All of her positions in her work history had the same physical demands. She had to be able to stand, walk, do heavy lifting, and be on her feet all day. She used heavy machines to strip and buff the floors and clean carpets. She worked eight hours a day, five days a week.

The claimant testified that her rate of pay was eight hundred sixteen dollars and forty cents (\$816.40) before taxes and six hundred sixty-two dollars and ninety-five cents (\$662.95) after taxes. She carried insurance policies for accidents, cancer, and life, which she lost when she could no longer work.

At the time of the hearing, the claimant could not perform the job of custodian. She could not clean her house properly. If she was able to hold on to something, such as a grocery cart, she could be on her feet for about thirty to forty five minutes. After that much time, her pain would get unbearable. She could not walk around or be on her feet for an hour. She could walk about three or four minutes before she had to stop. She could not squat at all. To pick something up off the floor, she had to hold onto something. Her balance was very poor. She could not mop, vacuum, scrub showers or tubs, or climb ladders to dust. She was able to dust items that did not require a ladder. Some days, she was able to load the dishwasher. She could not lift the laundry. Some days, she was able to cook. Before her injuries, she did all of those household chores. She had a large yard, which she maintained with her husband

before her injuries. Since then, she has been unable to do yardwork. She could not maintain the pool they installed for her knee.

The claimant also explained that, while she could use a computer to do a few things, she could not sit long enough to be able to become proficient with it or to be employed using one. She did not know how to do word processing on a computer.

The claimant's pre-injury hobbies included going to flea markets, the lake, stockcar races, and the Toad Suck Festival, but she could no longer do these things because she could not walk.

The claimant could use the three steps up to her house, with the handrails. She could not handle concrete stairs. She tried to use her stationary bike, but she could not use it like she could before her injuries.

The claimant had muscle spasms in her legs below her knees, every other day, and sometimes daily. Her left leg was worse than the right. She had excruciating pain in her knees. The spasms drew her toes up and went into the back of her knees as well. This occurred most of the time, at least four times a

week, from one to three times in a day. She used her medications, which helped but did not eliminate her pain. When she had a spasm, she had to lay down and prop up her legs, to straighten them out. This was very painful.

The claimant saw Dr. Bowen in 2010. She made appointments with him as necessary. The claimant took medication for diabetes and cholesterol, as well as a muscle relaxer for the muscle spasms and a topical solution for her knees. The muscle relaxer and topical medication were prescribed in December.

Before the claimant was told the respondent-employer had no employment to offer her, they offered her a position as a teacher's aide in a four-year old classroom. She could not do that job. She would have had to be on her feet, moving around, chasing 20 four-year old children. No other position was offered. In March 2008, the claimant discussed rehabilitation with Ms. Taylor, a vocational rehabilitation consultant, who wanted the claimant to take some computer courses. She did not meet with the consultant to pursue work after the first two visits, because she was having problems, there were changes with the workers' compensation

insurance carrier, and she did not hear from the consultant again until they met in December 2010. At that time, she was again advised to take a computer class. In January, she spoke to the center offering the class. She did not take the class, because she could not sit long enough to make it through the class. She explained to the consultant that she could not sit or walk that much. She was also concerned about being out in the ice and snow. She could not be a dependable employee, so there was no point in taking the classes.

The claimant had not looked for work since her left knee replacement. She stated that she could not promise a prospective employer that she could be at work every day. She never knew how her pain level and ability to function would be. She did not expect to be able to return to her old job. She would love to return to work, if she could be dependable, and if her pain level decreased to allow her to work every day. She stated that "This has ruined my life."

On a good day, the claimant might try to go to the store. Sometimes she used a scooter in the store and sometimes she relied upon her cane. She had a lot of bad days, when she could not get out of bed. On

those days, she was so stiff, she could not walk. Her balance was off, due to the damage to her joints. She had spasms too.

In order to get to the hearing in the Workers' Compensation Commission building from North Little Rock at nine o'clock in the morning, she awakened at four-thirty in the morning. That gave her enough time to shower, have breakfast and get dressed. She required a lot of time to do these things, due to her knees and the stiffness in her legs. Her husband had to help her out of bed. This was not unusual for her to awaken so early for a nine o'clock appointment.

If her knees were as healthy as they were before her injury, she would still be working. She would not have diabetes, which was diagnosed in 2010, because she would not have gained so much weight. Her knees prevented her from working.

At the hearing, she had a spasm.

The claimant was awarded Social Security Disability benefits in the amount of six hundred forty-three dollars and fifty cents (\$643.50) a month.

Heather Taylor testified that she was a vocational rehabilitation counselor who was hired to

provide the claimant return-to-work assistance or vocational rehabilitation assistance. She understood that Dr. Bowen recommended a sedentary position; so, in March 2008, she recommended that the claimant enter a clerical training program, which covered most current office and computer skills. Participants progressed and worked at their own pace in the program. Daily attendance meant finishing the program in eight months. The program included an internship and job placement assistance. The claimant did not participate. Taylor was directed to discontinue her services to the claimant in September 2008. She was asked to begin her services again in November 2010. The claimant stated at that time that she would check into the program, but was unsure that she could do it. The claimant did call the program.

Taylor explained that any work history over twenty years old was not considered within the claimant's transferable skill set. Her skills were limited to those developed as a custodian. She was also limited to sedentary work, which is the lowest category of work in terms of physical demand. Essentially, the claimant would have to build her skill set for sedentary

work from scratch. The recommended program would allow her to get a full-time clerical or customer service position. The goal was to get her into a position she could sustain. The wages for such jobs would start at \$7.25 up to about \$10.50 per hour. This would be less than the \$13-14 per hour she was making as a custodian. It would be impossible for her to earn her pre-injury wages at the time of the hearing, and it would take a long time for her to potentially begin earning her pre-injury wages.

The claimant was considered mildly obese in 1995. In 2003, she was morbidly obese, at 278 pounds, 163 pounds overweight. In January 2007, she weighed 260. In October 2007, the claimant needed to lose 75-100 pounds. In November 2007, the claimant had lost 21 pounds in six weeks.

On January 12, 2006, Dr. Hudson determined that the claimant was at maximum medical improvement for her right knee arthroscopy, lateral release, microfracture of the lateral femoral condyle and partial medial meniscectomy. He stated she would continue to have problems, off and on, in the future. He issued a 10% impairment to her right lower extremity.

On January 3, 2007, Dr. Bowen evaluated the claimant's right knee due to pain and inability to work. He diagnosed post meniscectomy arthritis of the right knee, and he stated that work modification to limit her standing might help, but that she might not be able to work at all. He noted the need for a knee replacement, soon, due to her limited treatment options.

The claimant was admitted to a rehabilitation hospital on July 14, 2007, after left knee total arthroplasty.

Dr. Bowen saw the claimant on October 5, 2007. Therapy caused her to have a flare of pain in her knees. After the completion of therapy, he wanted her to return to restricted activity at work, although he noted that as a school custodian: "It is unlikely with bilateral total knees that she could carry out that type of activity long term." He wanted a functional capacity evaluation and for her to lose seventy-five to one hundred pounds. He stated this weight loss was "critical" and very important for her in the "long term."

On November 5, 2007, the claimant saw Dr. Bowen with resolving synovitis and improved strength in

the left knee. He noted that a diuretic, through her family doctor, might be necessary for her leg weakness and edema. He stated that the claimant "very much" wants to return to her custodial position. He felt that continued therapy would help. In December, Dr. Bowen stated that she was working on weight reduction and looking into a hospital program. He stated that she was "not quite sufficient to stand and work all day long in my opinion." He wanted her to have six more weeks of therapy. On January 15, 2008, Dr. Bowen stated that she had reached maximum medical improvement for her left knee replacement. He released her for a trial period of work, four hours a day, three days a week, every other day for one month. If she was able to maintain that schedule, then it would be increased, but "if not, we may have to look at a permanent job change or retirement." On March 17, 2008, Dr. Bowen issued a permanent impairment rating for her right knee of 37% to the lower extremity or 15% to the whole person. For the left knee, the rating was 37% to the lower extremity or 15% to the whole person. Combined, the ratings equal a 28% rating to the whole person, pursuant to the AMA

Guides to the Evaluation of Permanent Impairment, 4th Edition.

A report dated March 28, 2008, from Heather Taylor, vocational rehabilitation specialist, recommended that the employer be contacted concerning return-to-work opportunities, that the claimant complete a clerical and computer training program to enhance her skills and employability in a sedentary occupation, and that the claimant be provided job-search assistance.

On April 28, 2008, Taylor noted that the employer had no opportunities for the claimant, although she would be considered for any openings. Her recommendations remained the same. After that time, the claimant and Taylor were unable to meet. Taylor placed the file on hold, and then closed her file in September 2008 after speaking with the employer. The claimant's file was re-opened in November 2010, at which time Taylor contacted the claimant's attorney. Taylor and the claimant met in December, at which time the claimant reported concerns about her mobility and the amount of time it took her to get ready to go anywhere. Taylor recommended the clerical training program again. In January, the claimant reported that the weather had

interfered with her ability to participate in the program, and Taylor continued to recommend it.

DISCUSSION

Arkansas Workers' Compensation law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In order to be entitled to any wage-loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled

to compensation for permanent and total disability. See Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage-loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

To paraphrase the Court in Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 406, 141 S.W.3d 916 (2004), if one considers the claimant's limited education (a high school diploma with outdated technical training), heavy labor employment skills (custodial work), constant and regularly severe pain in her lower extremities, daily need for muscle relaxers due to muscle spasms, in addition to her age, forty-nine years at the time of the hearing, and the opinions of Dr. Bowen, the claimant is clearly permanently and totally incapacitated from earning wages.

For an award of permanent benefits, the compensable injury must be the major cause of the disability or impairment. If the injury combines with a pre-existing disease or condition, or the aging process, to cause or prolong the disability, permanent benefits are available only if the compensable injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. Sec. 11-9-102(4)(F)(ii). Major cause is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. Sec. 11-9-102(14). The claimant was able to perform her job duties without difficulty, despite her weight, until her compensable

injury. There is no other cause for her inability to work other than her compensable injury. Her weight limits her abilities now, but that is a direct result of her compensable injury and the resulting limitations upon her formerly active lifestyle.

In Cleary v. Cloudy's Trucking, Full Commission Opinion filed _____ 2005 (WCC No. F008725), the Commission awarded benefits based upon factors including the claimant's age, limited education, work experience requiring physical capability beyond his current abilities, extensive limitations due to his physical condition including a 53% impairment to his left leg, almost constant use of a cane, inability to lift, inability to sit more than one hour or walk more than a short distance, work restrictions of sedentary work limited to no more than five hours a day for no more than five days a week, a doctor's opinion that Claimant is unable to engage in full-time work and unable to return to his previous employment, and lack of transferable job skills and prior work in a sedentary position. Again, this is similar to the claimant's situation. She has a 37% permanent anatomical impairment to each lower extremity. Her ability to

walk, sit, stand, kneel, and lift are limited significantly. She required three to four hours from awakening until she was able to be ready at an appointment. She had outdated sedentary skills and twenty years experience in heavy manual labor, providing her no transferable skills. The claimant also had balance issues which affected her ability to walk, use stairs, and to function. This is a valid consideration, as noted in Hatfield v. First Baptist Church of Fort Smith, Full Commission Opinion filed May 11, 1999 (WCC No. E320142).

The claimant's injuries prevent her from successfully re-entering the workforce due to physical limitations, decreased conditions, continued pain and need for medications, a history of manual labor, no transferable skills, inability to obtain skills due to inability to sit long enough to complete classes, inability to implement skills in a sedentary position due to need to sit, stand, and walk as needed, and limitation upon the time she could do anything. Also, should the claimant return to work in a sedentary position, she would earn approximately fifty percent of her pre-injury earnings. It would take an extended

period of employment for the claimant to increase her earnings, if possible, to her pre-injury wages, according to the vocational rehabilitation specialist.

I would award the very credible claimant permanent and total disability benefits.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner