

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H000250

DARRYL PAYNE, EMPLOYEE	CLAIMANT
PHILLIPS COMMUNITY COLLEGE, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 22, 2021

A hearing was held before ADMINISTRATIVE LAW JUDGE KATIE ANDERSON, in Helena, Phillips County, Arkansas.

Claimant was represented by Mr. Mark Alan Peoples, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Mr. Robert Montgomery, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-captioned claim on March 30, 2022, in Helena, Arkansas.

A Prehearing Order was previously entered in this case on January 26, 2022. The Prehearing Order has been marked as Commission's Exhibit #1 and was made a part of the record without any objection from the parties.

Stipulations:

During the prehearing telephone conference, the parties agreed to the following stipulations, which were also modified at the hearing:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer-employee relationship existed on January 7, 2020, when Claimant sustained a compensable work-related injury to his left leg.
3. Respondents have paid some medical and indemnity benefits owed to Claimant.

4. At the time of the injury, Claimant was earning an average weekly wage of \$339.77, entitling him to temporary total disability (TTD)/permanent partial disability (PPD) compensation rates of \$227.00/\$170.00.
5. Claimant reached maximum medical improvement (MMI) on or about July 13, 2021.
6. In November 2020, Claimant was assigned a twelve percent (12%) impairment rating to the left leg, which was accepted and is currently being paid by Respondents.
7. In October 2021, Claimant was assigned an additional ten percent (10%) to the lower left extremity, which is also currently being paid by Respondents.
8. In September 2021, Claimant was assigned a twenty percent (20%) whole body impairment rating, which was not paid by Respondents.
9. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Issues:

The parties agreed to litigate the following issues, which were modified at the hearing:

1. Permanent total disability, or in the alternative, wage loss.¹
2. PPD based on twenty percent (20%) whole body impairment.
3. Attorney's fees.
4. All other issues are reserved.

Contentions:

The following contentions were submitted by the parties:

The Claimant contends he is permanently and totally disabled as a result of his work injuries; that he is entitled to additional PPD based on the twenty percent (20%) whole body impairment; and that the benefits set forth above have been controverted and thus undersigned counsel is entitled to maximum statutory attorney's fees.

¹ At the hearing, the parties agreed to add the issue of wage loss as an alternative.

Respondents contend that the Claimant has received all reasonable and necessary medical treatment for compensable left knee injury. After the January 7, 2020, incident the Claimant came under the care of Dr. Philip Smith. The Claimant underwent a left quadricep tendon repair on February 13, 2020. He underwent an exploration of his quadricep tendon on February 24, 2021, and was found to be at maximum medical improvement (MMI) on July 13, 2021. The Claimant was assigned impairment ratings of twelve percent (12%) to the lower extremity on November 29, 2020, and an additional ten percent (10%) to the lower extremity on October 15, 2021. The Claimant is currently receiving permanent partial disability benefit payments for the assigned impairment ratings.

Respondents further contend that the Claimant sustained a compensable injury to his left lower extremity. As the Claimant contends he sustained injuries to his lower extremities, the limitations expressed in Ark. Code Ann. § 11-9-521(g) are applicable. The Respondents contend that the Claimant is not permanently and totally disabled. The Claimant underwent a functional capacity evaluation which placed him in the MEDIUM work classification as defined by the U.S. Department of Labor. None of the Claimant's physicians have indicated that the Claimant is permanently and totally disabled. The Claimant has also been evaluated for vocational rehabilitation possibilities by Heather Taylor, MRC, CRC.

The Respondents contend that the Claimant is not permanently and totally disabled and that he is receiving and has received all appropriate indemnity benefits relative to his compensable scheduled lower extremity injury.

Summary of Evidence:

The record consists of the hearing transcript of March 30, 2022, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's

Exhibit #1 included the Prehearing Order entered on January 26, 2022; Claimant's Exhibit #1 was sixteen (16) pages in length and consisted of medical records; Respondents' Exhibit #1 was twelve (12) pages and consisted of medical records; and Respondents' Exhibit #2 was forty-six (46) pages and consisted of vocational rehabilitation letters, forms, and reports.

Witness:

During the hearing, Darryl Payne (Claimant, used interchangeably herein), was the only witness to testify.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and other matters properly before the Commission, and after having had an opportunity to hear the Claimant's testimony and observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The stipulations set forth above are hereby accepted.
3. Claimant failed to prove by a preponderance of the evidence that he has been rendered permanently and totally disabled as a result of his compensable left lower extremity injury. Alternatively, Claimant has failed to prove that he is entitled to wage loss for his scheduled injury to the left lower extremity.
4. Claimant failed to prove by a preponderance of the evidence that he is entitled to a twenty percent (20%) permanent impairment rating to the body as a whole.
5. The issue of an attorney's fee has been rendered moot pursuant to the foregoing findings. As a result, the issue has not been discussed in this Opinion.
6. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

CASE IN CHIEF

Hearing Testimony:

Claimant was fifty-three (53) years old at the time of the hearing. He completed high school in 1987. He did not attend college or vocational training. However, he had experience in janitorial service work, and he and his sister co-owned A & D Cleaning Company, a janitorial service. He also previously worked in the landscaping business. He went to work for Respondent-Employer in January of 2019, where he was responsible for cleaning three (3) buildings (upstairs and downstairs), including buffing floors, cleaning restrooms, cleaning the gymnasium, and otherwise sanitizing the school campus.

Prior to January 7, 2020, he did not have any physical limitations as far as his ability to do the job for Respondent-Employer. On January 7, 2020, he was injured when he fell down the stairs while carrying computer monitors. Claimant described the January 7, 2020, event as follows:

They was pretty much in the way of the doorway of the students going in; so it was probably maybe a hundred monitors. We were pretty much going to and from the gater loaded them into boxes and apparently, I came down the steps with the box in front of me and that's where the accident happened.

Claimant was transported by ambulance to the hospital. Claimant had a left quadriceps tendon rupture.

At that point in Claimant's testimony, he moved from the witness stand to the center of the hearing room and positioned himself so that he could demonstrate the issues he was having with his left leg. Claimant removed a compression-type brace from his left knee and pointed to the area right below the kneecap on his left leg. He stated that "they had stated that my patella was something defect in my records, and I asked the doctor about it and he - - that's when the second surgery was advised to me, but on this leg, you can see the difference." (Pulled up pants leg to compare both knees.) Claimant noted the swelling on the left knee as compared to the right.

Claimant noted that he had to use his right leg to support his left leg after the January 7, 2020, event at work.

During his testimony, the Claimant acknowledged that Respondents accepted the injury as compensable and provided medical treatment, primarily by Dr. Smith. Approximately five weeks after the compensable work injury on January 7, 2020, Claimant underwent surgery on his left leg. Claimant stated that he improved after the surgery and had increased use of his leg afterward. According to the Claimant, he also had a second surgery to his left knee. As it relates to the second surgery, Claimant stated that the doctor noted “that the pain and the swelling due to my patella, it’s something about my patella that he had brought to my attention and that brought forth the second surgery . . .”

Claimant testified that he had not worked at Respondent-Employer since the day he sustained a compensable injury to his left extremity on January 7, 2020, because Respondent-Employer did not have work for him within his restrictions. Claimant explained that Respondents offered him the assistance of Heather Taylor, a vocational rehabilitation counselor, to seek out other work.

Claimant stated that even though he asserts that he is permanently and totally disabled, he is seeking out other work because he has no income. According to the Claimant, he has gone through exhaustive efforts with Ms. Taylor.

As for an accident Claimant had in October of 2021 while at home, he stated that his knee buckled, causing him to fall and sprain his ankle. Claimant stated that he had a laceration and hematoma on the back of his head from the fall.² Claimant stated that from that day forward, he did not seek additional work because he lost interest after the fall. Although he lost interest, he

² At the hearing, there was a visible laceration that had healed on the back of Claimant’s head, as well as what appeared to be a knot.

stated that he continued to work with Heather Taylor, and that he had followed up on several job opportunities. Claimant stated that he had followed up on twenty (20) to thirty (30) job leads, but had not gotten a call back on any of them. Ms. Taylor also submitted his resume on his behalf, but to no avail. By way of example, Claimant stated that he applied for a job at the casino, AutoZone, Napa, New Delta Transportation Safety, and a bail bondsman position. Claimant wanted to work if he was physically able, but stated that he was not able at that time. He noted that he was on seven (7) medications, and they impacted his ability to drive and perform job duties.

Claimant also testified that he submitted to a Functional Capacity Evaluation (FCE) in August of 2021, which lasted several hours. According to the Claimant, he gave full effort, and he was in significant pain afterward. He stated that if the activities in the FCE were similar to his job duties, he would not be able to perform them. He explained that he could not do the squatting and that his left side was weaker than his right side. He stated that he had swelling, throbbing, weakness, and balance issues.

When asked if he had any job prospects at the time of the hearing, Claimant stated, “Not at this moment.” As for the foreseeable future, Claimant stated, “Yes, I mean, just try to get back into the family business of A&D Cleaning Company.” However, Claimant followed up by testifying that at the time of the hearing he was not actually able to do that sort of work.

As for his daily activities, Claimant stated that he visited his disabled brother and helped “take care of him.” While his brother had home health aides, he would spend a lot of time with him. He also spent a lot of time at church. He could go to the grocery store sometimes, and do laundry. He could carry a gallon of milk across the room, but he was not currently able to work.

On cross-examination, Claimant stated that he could read and write, use a computer, and send e-mails. Claimant stated that he had some work history including fast food work, landscaping

work, and janitorial work, including owning his own janitorial service. When asked about the history of the family janitorial business, Claimant stated that the business was his sister's idea, and he sought out the contract work. Claimant stated that A&D Cleaning Company was still in business at the time of the hearing, and Claimant stated that he and his sister were co-owners of the company. His involvement included seeking out contracts "that [he could] submit out to subcontractor workers." His sister would help with the contracts. When asked how Claimant seeks out contracts for A&D Cleaning Company, he replied, "Just call in. Submit my credentials to them and let them know my job status, my job capabilities." When asked if he received an income from A&D Cleaning Company as one of the owners, Claimant said that he did until the business shut down in 2017 or 2018.

Regarding his injury, Claimant reiterated that he fell on his left side in January of 2020, while working for Respondent-Employer and injured his left knee. He was treated by Dr. Smith who did two surgeries on Claimant's left leg. Claimant also stated that he had a defect to his patella. At the hearing, he used a cane to ambulate. He stated that he was using a cane more than he was when he testified at his deposition in January of 2022. Claimant also clarified that he was wearing a compression sleeve on his knee at time of the deposition and at the time of the hearing. However, Claimant also had a knee brace that he did not wear all the time.

As for Claimant's second surgery, Claimant testified that it did not provide him much relief. He also noted that he was unable to complete the physical therapy due to other complications. However, Claimant admitted that his deposition testimony was that the six (6) weeks of physical therapy, including the stationary bike, step exercising, and squats, after the second surgery seem to help his leg. He stated that he was still performing those exercises as of the day of the hearing.

On cross-examination, Claimant was asked about the number of jobs he had applied for since he was unable to return to work for Respondent-Employer. Including the jobs that Ms. Taylor had helped him locate, as well as the jobs that he had applied for on his own, Claimant stated that he had applied for twelve (12) jobs as of the date of his deposition in January of 2022. However, at the hearing, when asked if that was an accurate statement, the Claimant testified that he had applied for twenty (20) to thirty (30) jobs. Claimant was also asked about his statement in his deposition that he had not applied for any of the jobs in the last six months that were on the list of current jobs from Ms. Taylor. He testified that he had applied for two (2) or three (3) jobs in the past month and maybe ten (10) or twelve (12) since his FCE approximately seven months prior to the hearing.

Claimant confirmed that he currently lived in Helena; that he graduated from high school in Helena; that he attended church in Helena; and that although he did not drive to the hearing that day, he could drive the Silverado pick-up truck that he owned. He testified that he spent most days sitting with his disabled brother and watching television. He testified at his deposition that he could cook; that he could do some laundry; and stated that he could “maneuver pretty good.” However, at the hearing, Claimant testified that he did not remember making that statement at the deposition. He testified that his family and church friends assist him with chores around the house.

Claimant was asked about his FCE from August of 2021, and he understood that based on the results of the evaluation that he was placed in the medium classification of work. He also stated that even though the last report from Ms. Taylor was in December of 2021, he met with her “every time she comes.” Nevertheless, at the time of the hearing, he did not have another appointment scheduled with her. Claimant agreed with the statement in Ms. Taylor’s December

of 2021, report that Claimant needed to “step up his efforts in the job search process,” and admitted that Ms. Taylor made that suggestion to him.

Respondents’ counsel asked Claimant at his deposition if he had considered additional education, and Claimant stated that he had considered pursuing training in heating and air (HVAC). At the hearing, however, Claimant stated that he had only “been googling it.”

Claimant also testified on cross-examination that he had fallen in November of 2021, and sprained his ankle and cut his head. He was taken to Helena Regional Hospital after the fall where they did CT scans of his left side and his head. Claimant stated that the laceration on his head was still bothering him at the time of the hearing, in that it had impacted his vision, his nervous system, and caused swelling and headaches. However, when asked if he was told by medical professionals at the hospital that there was no acute intracranial hemorrhage or infarction to his head, Claimant replied, “Yeah. Yes.” Respondents’ counsel also asked Claimant if he was aware of the statement in the medical record that “The posterior scalp, back of your head hematoma has essentially resolved.” Claimant said that he did not remember the doctors noting that the hematoma had resolved. Claimant testified that he had returned to the doctor regarding his ankle, hip and scalp after his fall in 2021. Claimant testified that his treating physicians had opined that he was unable to work after his January of 2020, compensable injury.

As for his sources of income, Claimant testified that he received money from Mid-Delta, which was a state assistance program that pays electric, gas, and water bills; he received assistance from his church; and he received assistance from his family. He stated that his workers’ compensation benefits of \$680.00 per month stopped in February of 2021. Claimant stated that it was his desire to ultimately return to work. Specifically, he stated, “I’m going to have to do something with my life.”

On redirect examination, Claimant stated that while he wanted to return to work, he was not physically able to do that at the time of the hearing. He also stated that after his ankle injury in November of 2021, when he fell at home, there was a period of time that he did not look for work. Additionally, the note on Ms. Taylor's report dated December 2021, was also immediately after his November 2021 fall at home. The Claimant stated that he had "tried to" step it up since that time. Claimant also clarified that when he testified that he had only applied for twelve (12) jobs, that was only going back to the six (6) months prior to January of 2022.

Claimant stated that overall, he had good days and bad days. He was able to drive, but had days when he did not feel like driving and he did not always have enough money for gasoline. He stated that the shuttle bus would pick him up for church, and Mid-Delta would take him to a job if he had one. In his opinion, he was not able to do medium work though, unless he could stand, drive and take breaks. According to the Claimant, he was not able to do HVAC work at the time of the hearing, but it was something he was interested in learning more about.

On recross-examination, Claimant was asked about A&D Cleaning Company. Claimant testified that he was a co-owner of the company with his sister and they were in business together for twelve (12) to fourteen (14) years. As an owner of the business, he was familiar with how to hire and fire employees. His sister reported income and paid the taxes for the small business. However, Claimant was familiar with soliciting business for the company, had experience dealing with the public, experience with supervising employees, and experience with bidding on a job and getting it completed in a timely manner.

Medical Exhibits:

Claimant's medical records showed that he saw Dr. Smith at OrthoArkansas on November 10, 2020. Dr. Smith's clinic notes indicated that Claimant was nine (9) months post-surgery and

had continued complaints of pain. He noted that Claimant was making progress in physical therapy and participated in a Functional Capacity Evaluation. Dr. Smith noted that Claimant was walking with a limp, but there was no instability with Claimant's left knee. Dr. Smith recommended quad strengthening, low impact exercise, and weight loss. He assessed Claimant with strain of left quadriceps muscles, fascia and tendon. He opined that Claimant was at Maximum Medical Improvement (MMI) and could return to work on November 11, 2020, in the medium classification.

A follow-up note from Dr. Smith on November 29, 2020, indicates that after Claimant's February 13, 2020, surgery, he continued to complain of pain in the left lower extremity and was slow to progress in physical therapy, but a subsequent MRI and ultrasound showed no evidence of re-tear. He underwent an FCE which placed him on permanent restrictions. Dr. Smith opined that based on the evaluation of permanent impairment, 4th edition, Claimant had a five percent (5%) whole body rating or a twelve percent (12%) lower impairment rating based on grade four (4) muscle weakness to the left knee.

On February 24, 2021, Dr. Smith's operative note indicated that Claimant underwent a second surgery in the form of an open exploration and evaluation of the left quad tendon.

An undated note from Dr. Smith indicated that Claimant was still having pain and weakness in the left lower extremity and multiple systemic issues. Dr. Smith recommended a Functional Capacity Evaluation; recommended that Claimant stay at his current work restrictions; and stated that Claimant had reached Maximum Medical Improvement (MMI).

On July 13, 2021, Dr. Philip Smith opined that Claimant could return to work on July 14, 2021, "with the restrictions of no prolonged standing more than 20-30 minutes at a time. Desk work/ sit down duty. Use one crutch as needed and no repetitive bending or squatting."

A Functional Capacity Evaluation Report dated August 13, 2021, revealed that Claimant gave reliable effort during the evaluation and that he demonstrated the ability to perform work in the medium classification. The report showed that Claimant demonstrated functional limitations with crouching, kneeling, and climbing stairs, as he performed these activities only at the occasional level when taking into account a normal workday; that Claimant exhibited mild difficulty with prolonged walking as he performed these activities at the frequent level when taking into account a normal workday; and that Claimant performed all other activities at a level consistent with that of an average worker.

On September 5, 2021, Dr. Philip Smith's clinic note indicated that after Claimant's left quadriceps tendon rupture in January of 2020, he underwent repair on February 13, 2020. Due to continued pain over the following year, despite extensive physical therapy, he underwent a second exploratory surgery on February 24, 2001, which showed complete healing. He returned to physical therapy but continued to complain of pain and weakness. He opined that Claimant reached Maximum Medical Improvement (MMI) on July 13, 2021, and noted that Claimant's FCE was reliable and placed him in the medium classification. Based on the guides to the evaluation of permanent impairment, 4th edition, Dr. Smith opined that Claimant sustained a twenty percent (20%) whole person impairment due to his routine use of a cane for ambulation.

On October 15, 2021, Dr. Philip Smith's clinic note summarized Claimant's medical history related to his compensable injury of January of 2020. He noted Claimant had difficulty after surgery and was slow to recover. He opined that Claimant reached Maximum Medical Improvement (MMII) on July 13, 2021, and that Claimant underwent a Functional Capacity Evaluation placing him in the medium work classification. Based on Claimant's range of motion,

he had a four percent (4%) whole person impairment or a ten percent (10%) lower extremity impairment.

On October 28, 2021, Claimant presented to Helena Regional Medical Center, with complaints of a severe headache, pain in the left ankle, left hip, and lower left back. Claimant reported that he fell at home while outside. He stated that his left leg “gave out” and he fell back hitting the back of his head on the concrete. Hospital records noted a large hematoma to the back of the head, bleeding controlled with dressing, previous surgery on the left leg but no obvious deformity. An x-ray of Claimant’s left ankle and left hip showed no acute findings. An x-ray of Claimant’s lumbar spine showed mild-to-moderate degenerative arthritis in the lower lumbar region. A CT scan of Claimant’s head showed no acute intracranial hemorrhage or infarction. Claimant was diagnosed with a laceration on the scalp, acute post-traumatic headache, sprain of the ankle, and contusion of the left hip. He was instructed to keep his ankle elevated and have his staples removed in approximately seven (7) days.

A comparative CT of Claimant’s head taken on December 7, 2021, as compared to the October 28, 2021, CT scan, showed no acute intracranial hemorrhage or infarction and noted that the posterior scalp hematoma had “essentially resolved.” The imaging report further noted that, “Otherwise, no appreciable change.”

Documentary Exhibits:

On January 15, 2021, Claimant underwent a vocational rehabilitation initial evaluation by Ms. Heather Taylor, a vocational rehabilitation counselor. On the evaluation report, it is noted that Claimant did not use an assistive aide to ambulate, but did tell Ms. Taylor that he had a knee brace that wore only occasionally when he is going to be on his feet for long periods during the day. Claimant told Ms. Taylor that he spends most days with his disabled brother visiting and

watching television. Other daily activities included running errands and performing household chores such as cooking, cleaning the house, and laundry. Claimant stated that he was unable mow his yard last year, but that he got help from a church member. Ms. Taylor noted that Claimant reported being very active in his church and even played Santa Clause for the kids during Christmas. Claimant also reported owning a professional camera and his enjoyment of photography. Lastly, Claimant reported having a valid Arkansas driver's license and that he could drive without difficulty.

Ms. Taylor's report also noted that Dr. Smith had released Claimant to return to work at his last visit on January 9, 2021, within the medium classification based on his FCE. Claimant reported the following issues: difficulty with flexing his leg outward or inward; regular pain in his quad area; and when sitting, it was easier to sit with his leg stretched out rather than bent. Claimant reported that he did not take any prescription medication for his injury at the time and took over-the-counter medication as needed for pain symptoms.

Ms. Taylor authored a report summary on March 9, 2021, wherein she noted that the job search for Claimant was on hold until he had recovered from his surgery in February of 2021.

On May 11, 2021, Ms. Taylor's report summary indicated that Claimant's job search was still on hold as he was in physical therapy and still dealing with lingering pain in his knee.

On July 16, 2021, Ms. Taylor's report summary indicated that Claimant was recovering from a second surgery. He had been released at maximum Medical Improvement (MMI) at his last doctor appointment, and he would be participating in an FCE in the next couple of weeks. She noted that Claimant was ready to begin the vocational rehabilitation/return-to-work process.

An August 9, 2021, report summary by Ms. Taylor stated that Claimant was released by his physician and placed at MMI on July 13, 2021, and he would complete his FCE on August 13,

2021. Ms. Taylor indicated that if Claimant was agreeable, they would begin the vocational rehabilitation process when they met on August 18, 2021.

Claimant's first vocational rehabilitation report, dated September 20, 2021, stated that Claimant and Ms. Taylor met in August of 2021; that they reviewed interview skills training; and that they reviewed and uploaded his resume. Ms. Taylor provided approximately twenty-three (23) current job openings that were suitable for Claimant's education, work history, skills, and his FCE limitations. Ms. Taylor noted that the goal was to return Claimant to the workforce; that he was a good candidate for returning to the workforce; and that he had skills from prior occupations that he could utilize in returning to a new or similar position that was more consistent with his FCE. Claimant was agreeable to working with Ms. Taylor in the rehabilitation/job search process, and Ms. Taylor would assist Claimant so that he would be as prepared as he could be.

In an October 18, 2021, report by Ms. Taylor, she noted that Claimant has experienced some depression and was not as motivated to apply for jobs, but that situation had improved, and he was putting forth effort in job placement. When they met, they applied for thirteen (13) jobs. She informed Claimant of approximately forty (40) jobs that were suitable for Claimant. In sum, Ms. Taylor recommended that they continue with job market research to identify job openings.

In her November 15, 2021, report, Ms. Taylor listed approximately twenty-four (24) jobs that were currently open that were suitable for the Claimant. Since the last report, Ms. Taylor noted that Claimant had fallen and was seeking treatment for his injuries. He had paused his job search efforts, but told her that he would resume those efforts soon. She also noted that Claimant appears to still be suffering from some depression over the loss of a relationship, but hoped that the need for household income would motivate him.

On December 17, 2021, Ms. Taylor's report showed that Claimant had not applied for a job on his own in over a month. She noted that he had fallen in late 2021; however, she noted that she had encouraged him to continue with the job search efforts. She noted that he was less motivated to apply for jobs that he was when they first began the process. She listed approximately thirty-one (31) jobs that were currently open and suitable for Claimant. However, she also noted that when she met with him to assist him by applying for jobs on her computer, Claimant indicated to her that he was not focused on getting a job, but was more focused on getting medical treatment for his ankle and head injury from his fall in November of 2021 and going to Mid-Delta to get financial assistance for the day. She noted that his long-term girlfriend (who provided household income for him) had since left him and moved out of state. She stated in the report that she would continue to provide Claimant vocational support, but the Claimant needed to "step up his efforts in the job search process." Ms. Taylor recommended providing him with job search assistance for one more month (throughout the end of January of 2022), and if Claimant was still not making a more concerted effort, then she would recommend at that time that the file be closed.

In her report of January 31, 2022, Ms. Taylor stated that Claimant had been more cooperative in the last month than in the previous month. She listed approximately twenty (20) jobs that were currently available and suitable for Claimant. Claimant asked Ms. Taylor to assist him with online job applications, and due to his increased effort, Ms. Taylor agreed to continue to assist Claimant.

Ms. Taylor's last report of February 28, 2022, indicated that she met with the Claimant and that he was more cooperative and focused on the job search process than he had been in their previous meeting. She planned to keep working with Claimant on job search assistance and support.

ADJUDICATION

A. Permanent and Total Disability of the Left Lower Extremity Injury, or in the Alternative, Wage Loss:

Claimant contends that he has been rendered permanently and totally disabled as a result of his compensable left lower extremity injury of January 7, 2020.

Ark. Code Ann. § 11-9-519(e) provides:

(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wages in the same or other employment.

Claimant is fifty-three (53) years old and has a high school education. The evidence shows that Claimant has worked primarily in the janitorial field, and even owned his own janitorial company along with a family member. Claimant began working for Respondent-Employer in January of 2019, where he worked until he fell and injured his left leg at work on January 7, 2020.

Claimant received treatment for his left quadricep tendon rupture, including physical therapy, and ultimately underwent a left quadricep tendon repair surgery on February 13, 2020, by orthopedist Dr. Philip Smith. Approximately one year later, based on continued complaints of pain in the left quadricep, Claimant underwent exploratory surgery on the left quadricep tendon on February 24, 2021, which showed complete healing from the work-related injury of January 7, 2020.

The parties stipulated that Claimant reached Maximum Medical Improvement (MMI) on July 13, 2021, as determined by Dr. Smith, Claimant's treating specialist and that Dr. Smith assigned a twelve percent (12%) impairment rating to the left lower extremity and an additional ten percent (10%) impairment to the lower left extremity, which Respondents have paid.

Furthermore, Claimant's Functional Capacity Evaluation on August 13, 2021, showed that he gave reliable effort and that he was in the medium classification of work with restrictions of occasional crouching, kneeling, and climbing stairs, and frequent standing, sitting, walking, stooping, and pulling/pushing.

During the hearing, Claimant's testified that his daily activities were significantly limited due to his injuries and that his current medications also impacted his ability to work. However, Claimant reported to Ms. Taylor that he was able to do some household chores, including laundry, cleaning, and cooking and that he spent most of his day as a companion for his disabled brother. He also testified that he was very active in church. He stated that he could drive his Silverado pick-up truck without difficulty.

Nevertheless, as for returning to work, Claimant has shown little motivation to pursue any gainful employment since his compensable injury. The evidence shows Claimant is able to perform medium work with restrictions (listed above). Ms. Taylor stated that from a vocational rehabilitation standpoint, the Claimant was a good candidate for returning to the work force, and he had skills from prior occupations that he could utilize in returning to a new or similar position that was more consistent with his FCE. Claimant admitted during cross-examination that as a result of owning his own business with his sister, he had experience in the following areas: hiring and firing employees; soliciting business for the company; dealing with the public; supervising employees; and bidding on a job and getting it completed in a timely manner.

Ms. Taylor met with and/or communicated with the Claimant regarding vocational rehabilitation for more than one (1) year (between January of 2021 and February of 2022). However, based on her records, there were occasions when her notes reflected that the Claimant

was not motivated to find work due to a fall at home in October of 2021³ and then again when he was suffering from depression after the loss of a long-term relationship. Her records also demonstrate that she felt that Claimant needed to “step up his efforts in the job search process.” Ms. Taylor’s reports indicated that when she and Claimant were meeting, she was providing Claimant approximately 12 to 40 job opportunities per month that were suitable for him. However, Claimant’s testimony was very inconsistent as to how many jobs he had pursued both on his own and as a result of the assistance from Ms. Taylor. Hence, it is apparent that Claimant has had opportunities that he could pursue to return to work within his ability, but for reasons unrelated to his compensable work injury of January 7, 2020, he has simply not been motivated to do so.

I note that none of Claimant’s treating physicians have opined that Claimant is permanently and totally disabled, and there is no probative evidence of record demonstrating the same.

While I sympathize with the Claimant’s injury to his left lower extremity, based on the foregoing, I do not find his testimony that he is unable to return to any type of work due to his left lower extremity injury on January 7, 2020, to be corroborated by the evidence of record.

Therefore, after considering all the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that Claimant failed to prove by a preponderance of the credible evidence that because of his compensable injury of January 7, 2020, he has the inability to earn meaningful wages.

In the alternative, Claimant asserted at the hearing that he is entitled to wage loss as the result of his compensable lower left leg injury of January 7, 2020. However, in the instant matter, Claimant’s injury to his left lower extremity is a scheduled injury. It has been long-established that for a scheduled injury, absent a finding of permanent total disability, the award of benefits is

³ I note that medical records showed that the injuries to Claimant’s head, left ankle, left hip, and low back from his October 2021 fall at home had resolved.

limited to the benefits provided for that scheduled injury. Rash v. Goodyear Tire & Rubber, 18 Ark. App. 248, 715 S.W.2d 449 (1986); see, also, Federal Compress & Warehouse Co. v. Risper, 55 Ark. App. 300, 935 S.W.2d 279 (1996)(stating that a claimant who sustains a scheduled injury is limited to the applicable allowances set forth in Ark. Code Ann. § 11-9-521, and such benefits cannot be increased by considering wage-loss factors absent a finding of total disability).

Therefore, as Claimant’s left extremity injury (specifically to the rupture of his quadricep tendon) is a scheduled injury, he is not entitled to wage loss disability.

B. Additional Permanent Anatomical Impairment/PPD for Claimant’s Left Lower Extremity:

The Claimant asserts that he is entitled to additional PPD based on a twenty percent (20%) whole body impairment rating from Dr. Smith. On the other hand, Respondents contend that the Claimant was assigned impairment ratings of twelve percent (12%) to the lower extremity on November 29, 2020, and an additional ten percent (10%) to the lower extremity on October 15, 2021, for which Claimant was receiving permanent partial disability benefits as payment of the assigned impairment ratings.

Permanent impairment, generally a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). Pursuant to Ark. Code Ann. § 11-9-522(g) (Repl. 2012), the Commission adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) as an impairment rating guide. See AWCC R. 099.34. Any determination of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c)(1). “Objective findings” are defined as those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Permanent benefits are to

be awarded only following a determination that the compensable injury is the major cause of the disability or impairment. Id. § 11-9-102(F)(ii).

In the present matter, it is undisputed that Claimant sustained an admittedly compensable injury to his left lower extremity on January 7, 2020, when he fell down some stairs while carrying boxes as part of his job duties for Respondent-Employer. Respondents have paid the ratings of twelve percent (12%) and an additional ten percent (10%) for Claimant's lower left leg. However, on September 5, 2021, Dr. Smith assigned Claimant another rating of twenty percent (20%) to the body as a whole based on Claimant's use of a cane for ambulation. The medical records demonstrate that Claimant's left quadricep tendon rupture had completely healed. The Claimant's second surgery and suggested physical therapy appear to be based on Claimant's subjective complaints of pain, rather than any objective medical findings. Furthermore, the medical records do not indicate that a cane was prescribed by a treating physician as a result of the Claimant's compensable injury on January 7, 2020. I assign minimal weight to Dr. Smith's opinion that Claimant is entitled to a twenty percent (20%) impairment rating to the body as a whole based on his use of a cane for ambulation since he did not list an objective medical finding to support said impairment. Use of a cane is subjective and does not qualify as an objective finding.

Based on the evidence before me, I find that the Claimant has failed to meet his burden of providing objective and measurable findings to support an assessment of twenty percent (20%) permanent impairment rating to the body as a whole.

C. Attorney's fee:

For the reasons discussed herein, this claim for permanent and total disability benefits, and in the alternative, wage loss, as well as additional permanent anatomical impairment/PPD for

Claimant's left lower extremity must be, and hereby is, respectfully denied. In light of the foregoing, the issue of an attorney's fee is rendered moot.

ORDER

For the reasons discussed herein, this claim for permanent and total disability benefits, and in the alternative, wage loss, as well as additional permanent anatomical impairment/PPD for Claimant's left lower extremity must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

KATIE ANDERSON
ADMINISTRATIVE LAW JUDGE