

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-571

L&W JANITORIAL, INC., and
CINCINNATI INSURANCE
COMPANY

APPELLANTS

V.

PEARLINE WILLIAMS

APPELLEE

Opinion Delivered FEBRUARY 11, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION

[NOS. E613264, F101926]

AFFIRMED

RITA W. GRUBER, Judge

This workers' compensation case is a second appeal regarding appellee Pearlline Williams's compensable right-knee injury of November 15, 2000, which occurred in a work-related fall. Previous injuries to the same knee included a 1996 compensable injury. In *Williams v. L&W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004), we reversed and remanded the Commission's denial of Williams's claim for knee-replacement surgery that was medically recommended after she had undergone a different knee surgery that had been accepted as related to the 2000 injury. We observed that an employer is required to take an employee as it finds her and that Williams's 2000 injury was a factor in her need for the second surgery. The Workers' Compensation Commission remanded the case to the law judge. Williams underwent the recommended knee-replacement surgery on December 3, 2004, after the law judge found that it was reasonable and necessary medical treatment related

to her 2000 compensable injury.

Controversy then arose over additional claims related to the 2000 compensable injury. In an opinion of March 14, 2008, the Commission awarded Williams a thirty-seven percent anatomical impairment rating and permanent total disability, finding that the 2000 injury was the major cause of each. The Commission also found that the Second Injury Fund had no liability in the case, making L&W Janitorial, Inc., solely responsible for the permanent total disability. L&W appeals the Commission's 2008 decision, contending that these findings are not supported by substantial evidence or by law. We affirm the decision of the Commission.

Sufficiency of the Evidence

In its first point on appeal, L&W challenges the sufficiency of the evidence to support the Commission's findings that Williams sustained a thirty-seven percent anatomical impairment as a result of her 2000 compensable injury, that she was permanently totally disabled, and that her 2000 injury was the major cause of her anatomical impairment and permanent disability. L&W's arguments focus on the issue of major cause.

Permanent impairment is any permanent functional or anatomical loss remaining after the claimant's healing period has ended. *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003). Arkansas Code Annotated section 11-9-102(4)(F)(ii) (Supp. 2007) 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 need for treatment.

A finding of major cause, which means more than fifty percent, shall be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14). The statute requires that medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B).

Evidence before the Commission included medical records, Williams's testimony, and the testimony of orthopedic surgeons Drs. James S. Mulhollan, Kenneth Martin, and Thomas F. Rooney. In finding that Williams had proven her 2000 compensable injury to be the major cause of her resulting anatomical impairment, the Commission assigned significant weight to the testimony of Dr. Rooney and accepted his assignment of thirty-seven-percent impairment to the lower leg resulting from the total knee replacement. The Commission summarized his February 27, 2006 deposition testimony as follows:

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."

The Commission noted that Williams, whom it found to be a credible witness, presented the following proof of permanent total disability. She was sixty-one years old with only a high school education, she testified that she was no longer able to perform physical custodial work to earn a living, Dr. Rooney assigned her a permanent anatomical impairment and permanent sedentary work status, and she had not been offered any vocational assistance.

The Commission distinguished Williams’s case from *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, ___ S.W.3d ____ (2008), which upheld the Commission’s finding that the claimant failed to prove that his compensable injury was the major cause of compensable knee-replacement surgery and subsequent impairment rating to the lower extremity. Hickman’s medical history included preexisting degenerative knee condition and surgeries. The *Hickman* court noted evidence of earlier knee problems and an absence of evidence “that the need for Hickman’s knee-replacement surgery and the resulting impairment would not have occurred but for the work-related injury.” 372 Ark. at 509, ___ S.W.3d at _____. The Commission in the present case, giving great weight to Dr. Rooney’s opinion, specifically found that the major cause of Williams’s impairment and surgery was the compensable injury rather than her earlier injury and preexisting arthritis.

L&W challenges the Commission’s finding that Williams’s 2000 compensable incident was the major cause of her permanent physical impairment and disability, arguing that any permanent impairment resulted instead from her preexisting arthritis. L&W asserts that the Commission’s opinion is “wholly inconsistent” with the findings and reasoning of the first Commission’s opinion in this case, and it complains that the “flip-flop” of the one commissioner who participated in the two opinions is “mind-boggling.” It also maintains that the Commission mischaracterized the testimony of Dr. Rooney.

Our standard of review is well settled. Where the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the findings of the Commission and will affirm if those findings are supported by substantial evidence.

Murphy v. Forsgren, Inc., 99 Ark. App. 223, 258 S.W.3d 794 (2007). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* We defer to the Commission's findings on what testimony it deems to be credible, and the resolution of conflicting evidence is a question of fact for the Commission. *Hargis Transp. v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004).

The question on appeal is not whether we would have reached the same conclusion as the Commission did had we been charged with the duty of finding the facts. *Maupin v. Pulaski County Sheriff's Office*, 90 Ark. App. 1, 203 S.W.3d 668 (2005). There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Id.* We will reverse the Commission's decision only if we are convinced that fair-minded persons with the same facts before them could not have reached the findings arrived at by the Commission. *Id.*

Here, Dr. Rooney agreed in his 2006 testimony with the earlier opinions of Drs. Mulhollan and Martin that Williams had traumatic arthritis in her right knee, but he disagreed that she most likely would have been a candidate for the total-knee replacement before her 2000 compensable injury. Reviewing the medical records and history from 1996 forward, Dr. Rooney noted that her knee "became suddenly worse" when she hurt it again in 2000. He stated, "I think had she not had the injury she probably wouldn't have come to the total [knee-replacement surgery] that I did, from the review of her records. So I think it was more due to the injuries than not."

When asked if the compensable 2000 injury was the major cause of Williams's knee-replacement surgery and impairment rating, Dr. Rooney stated: "[A]ccording to her history of the increase in severity of her pain, I think it contributed to it greatly." Dr. Rooney said that the purpose of the surgery had been to correct Williams's arthritis. When asked if the major cause of the arthritis preexisted the 2000 injury, he stated that "the arthritis pre-existed the injury by a long time. But her disability didn't—according to my history." His understanding was that Williams "was getting along even though she had symptoms, which she told me about, until she had the [2000] injury, and then she couldn't tolerate it any longer." He reiterated that she did not need surgery until the 2000 incident changed the symptoms of her arthritis. Based on Williams's becoming symptomatic enough to have surgery, Dr. Rooney stated his disagreement with the opinions of Drs. Martin and Mulhollan that "more than fifty percent of this was due to her pre-existing arthritis."

L&W's arguments on appeal go to the weight of the evidence and credibility of the testimony, matters for the Commission rather than this court to decide. The Commission found that the evidence in the present case, particularly Williams's testimony and the 2006 testimony of Dr. Rooney, showed her 2000 injury to be the major cause of her impairment and of her related permanent total disability. That evidence, summarized in the previous paragraphs of this opinion, constitutes substantial evidence to support those findings.

Second Injury Fund

In *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 5, 746 S.W.2d 539, 541 (1988), the supreme court set forth the three elements that must be shown for the Second

Injury Fund to have liability: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury the employee must have had a permanent partial disability or impairment; and (3) the disability or impairment must have combined with the recent compensable injury to produce the current disability status. The determination of whether an employee suffered a preexisting impairment in addition to any disability that resulted from a work-related injury is a factual one to be made by the Commission. *Chamberlain Group v. Rios*, 45 Ark. App. 144, 147, 871 S.W.2d 595, 596 (1994).

In the present case, the Commission found that only the first of *Mid-State's* three requirements existed. Although recognizing Williams's preexisting arthritis and earlier injury, the Commission found that the second hurdle was not met because the record did not demonstrate a permanent partial disability or impairment prior to the 2000 compensable injury. Addressing the third requirement, the Commission noted Dr. Rooney's testimony that in 2004 Williams complained about her knee only in relation to her 2000 injury and noted Williams's testimony that she would still be performing gainful employment but for the 2000 injury, which she said was the only reason she could no longer work. The Commission concluded that, even if there was a prior disability or impairment, there had been no combination with the recent compensable injury to produce her current disability.

The testimony of Williams and Dr. Rooney constitutes substantial evidence to support the findings of the Commission that there was no permanent partial disability or impairment prior to the 2000 compensable injury. Thus, the second factor of *Mid-State* was not met, and

it is unnecessary for us to consider the third factor. We affirm the Commission's decision that the Second Injury Fund is not liable for payment of benefits.

Affirmed.

VAUGHT, C.J., and ROBBINS, J., agree.