

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200619

RICHARD COSNER	CLAIMANT
C & J FORMS & LABELS CO.	RESPONDENT
SAFECO PROPERTY & CASUALTY INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 2, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 10, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on October 22, 2002. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On December 19, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$410.00 for temporary total disability and \$308.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injuries to his neck, back and right knee.

2. Related medical.

3. Claimant's entitlement to temporary total disability from February 21, 2003, through April 8, 2003.

4. The claimant's entitlement to temporary partial disability from April 9, 2003, to a date to be determined.

5. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained injury to his neck, knees, and back in a job related motor vehicle accident on December 19, 2001. The claimant contends that he is entitled to temporary total disability benefits for various periods associated with recovery from surgeries that he had undergone and regarding the medical treatment that he has undergone as a result of his compensable injuries. The claimant contends that this claim has been controverted and that his attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury in the course and scope of his employment as defined by the Act. Claimant's complaints are related to a pre-existing condition and not claimant's employment.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and a medical report marked Claimant's Exhibit No. 2. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1. The parties submitted the deposition of Dr. Buie which is marked Joint Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he had been working for the respondent since 1985 and on December 19, 2001, he was delivering Christmas presents for the respondent to OK Foods. The claimant testified that while pulling out of OK's parking lot some of the Christmas presents began to fall off the seat, he tried to catch them and as a result ran into a concrete culvert. The claimant explained that the culvert caught the frame of his truck and completely totaled his vehicle. The claimant testified that the air bag went off and peeled all the hid off of his face, blackened both of his eyes, snapped his neck back and it also injured his right knee. The claimant testified that he was kind of jammed up against the dash, locked in his truck by the air bag. The claimant testified that the first thing that he remembers is a gentleman knocking on his window asking him if he is all right. The claimant testified that he had difficulty getting out of his truck but once he got out, he took one step and collapsed. The claimant testified that although an ambulance was called he road with the wrecker to Randall Ford who was hauling his truck. The claimant testified

that once he got to Randall Ford his bosses were there, took a look at him and told him to get to the hospital.

The claimant testified that he was in pain especially in the right knee area and of course the air bag had almost completely skinned him from the waist up, noting that his eyes were black, his lips were swollen and his face looked like something had blown up in it. The claimant testified that after his emergency room visit on December 19, 2001, he was seen by Dr. Buie whom he had seen for many years for treatment of his knees.

The claimant testified that he first began seeing Dr. Buie for his knee problems in 1978. The claimant testified that his knee problems began in 1969 while he was in the service in Vietnam when his helicopter was hit by enemy fire and he had to jump out injuring his knees. The claimant agreed that he has been under Dr. Buie's treatment periodically over the past twenty years. The claimant testified that before this December 2001 accident he had never missed a day of work with the respondent due to any knee related problems and that before December 19, 2001, there had not been any determination made that he was going to have to have a knee replacement. The claimant did agree that he and Dr. Buie had discussed the possibility that at some time in the future he might need to undergo knee replacement but no time table had been established. The claimant testified it had not been determined that he would, in fact, need a knee replacement for sure.

The claimant testified that after his December 19, 2001, accident the condition of his knee changed and where before he had

been able to work out at least three times a week and do anything he wanted to do physically, after this accident his knee did not work properly, it would lock up and he would fall. The claimant stated that his right knee was very unstable. The claimant agreed that although he had pain and discomfort and needed treatment from time to time with his right knee before his December accident, he was still able to function however he wanted to function. The claimant testified that after his accident his knee continually got worse and although he worked with Dr. Buie trying many different things, these efforts did not improve his knee. The claimant testified that where his knee hit the dash a neuroma developed which was removed on February 20, 2002, and he also has undergone injections for his knee. The claimant testified that he tried everything Dr. Buie recommended to try to keep from doing the knee replacement but none of these treatments were successful.

The claimant testified that he underwent knee replacement surgery on February 21, 2003, and he has been off work as a result of this surgery until April 9, 2003. The claimant testified that the doctor released him to go back to work for four hours a day and he was still on crutches as a result of this surgery.

On cross examination, the claimant testified that he first began being seen by Dr. Buie following an accident while working with some cattle which required surgery to repair the meniscus in his right knee. The claimant agreed that Dr. Buie has been discussing with the Veteran's Administration the possibility of undergoing a total knee replacement before he had his December 2001

accident. The claimant testified that in 1988 one of Dr. Buie's associates, Dr. Mumme, operated on his left knee to remove a ganglion cyst. The claimant testified that from 1999 up until his injury his knee had begun to bother him and Dr. Buie had injected his knee with cortisone. The claimant agreed that in the fall he had a small tear in his medical meniscus and he underwent an MRI of his right knee which indicated that some cartilage had diminished. The claimant agreed that he and Dr. Buie had had some discussion about different procedures which he might consider but any decision was going to be put off until after December because of a volunteer project which the claimant was involved in over the Christmas holiday. The claimant also agreed that Dr. Buie wrote a letter to the Veteran's Administration on September 7, 2001, where he describes the chronic problems the claimant is having with his knees as well as his back and in that letter Dr. Buie specifically says that the claimant might require total knee arthroplasty of the right knee. The claimant agreed that at the emergency room on December 19, 2001, he indicated to the personnel that he had a cervical strain, a mild cerebral concussion and multiple contusions and abrasions including both of his knees. The claimant testified that he though that he also complained of his low back but was still sort of out of it and does not have a clear memory of it. The claimant testified that his group health insurance has paid most of his medical bills since the workers' compensation denied his claim. The claimant also testified that he continued to work for the respondent up until his knee surgery in February 2003 and

has just returned to work for the respondent the day before this hearing.

The claimant called Mr. J. C. Calvert to testify. Mr. Calvert stated that he owns the respondent's business and he has known the claimant for the past twenty-five years or longer. Mr. Calvert agreed that he was around the claimant on a regular basis before December 19, 2001, and that the claimant did not appear to be limited in regard to his ability to do his work in any way before December 19, 2001. Mr. Calvert also stated that, in his opinion, the claimant is trust worthy and he was a good worker.

The medical records set forth that the claimant was seen by Dr. Buie and underwent surgery on his right knee to repair a torn meniscus on February 21, 1978. Dr. Buie again writes on June 24, 1999, that he has again seen the claimant for his knee problems and x-rays that day show that the right knee has early narrowing of the medical joint with irregularity and the left knee is essentially normal. Dr. Buie writes on March 16, 2000, at length concerning the claimant's initial knee injuries in 1969 while serving in the military in Vietnam. Dr. Buie also writes concerning the treatment which he has administered to the claimant for his knees and writes that, in his opinion, the symptoms which the claimant is experiencing in regard to his knees are connected to the injuries he sustained while in the service. Dr. Buie writes that in the future the claimant may require further surgery and there is a possibility that he even might require arthroplasty of the knees in the future. On August 17, 2001, Dr. Buie writes that the claimant

has continuing symptoms involving his knees and back pain, low back pain, which has gotten worse over the years. Dr. Buie writes that x-rays taken that day primarily of the lumbar sacral spine show no evidence of particular osteoporosis, normal hips and no scoliosis, no significant disc disease, spondylolisthesis or spondylolysis. Dr. Mumme recommended that they get an MRI of the claimant's right knee. Dr. Buie writes on August 24, 2001, after reviewing the claimant's MRI of his right knee that this test shows evidence of changes involving the right meniscus. The doctor notes that there is also an effusion with narrowing of the medial joint space indicative of arthritis. Dr. Buie notes that the claimant has a bone island in the proximal tibial epiphysis. The doctor writes that the changes involving the claimant's medial meniscus may be from the result of surgical changes. On August 31, 2001, Dr. Buie writes that he has seen the claimant for his bilateral knee pain and recommended that they start the claimant on a rehabilitation program. Dr. Buie notes that the claimant's right knee has findings suggestive of internal derangement and is still symptomatic, particularly on the medial joint line and medial collateral ligament. Dr. Buie administered steroid injections. On September 7, 2001, in a letter written by Dr. Buie to probably the Veteran's Administration, Dr. Buie, after discussing the claimant's various physical problems associated with his Vietnam tour, writes that the problems associated with the claimant's right and left knee may indeed require further non-operative as well as operative treatment in the future and he may at sometime in the future

require total knee arthroplasty on the right knee. Dr. Buie notes that the claimant's symptoms as they related to his back will probably just require anti-inflammatory agents and/or rehabilitative physical therapy but he sees no indication for surgery. On September 20, 2001, the claimant was seen by Dr. Buie for follow up of his right as well as left knee. The claimant, it is noted, has some continued symptomology, giving way with the right knee on going up stairs, noting that he has findings of patella femoral crepitation. Different treatment plans were discussed and it was recommended that the claimant continue his exercises and to return after the first of the year.

The claimant was seen at the emergency room at St. Edward's Mercy Medical Center on December 19, 2001, as a result of a motor vehicle accident. It is noted that the claimant has chest pain and right knee pain. The emergency room report notes that the claimant hit a concrete embankment going approximately ten miles per hour which deployed the air bag. The ER report sets forth that when the air bag deployed it hit the claimant in the face, in the chin area and in the right side of the face as well as hit the claimant in the chest wall area. The claimant's knee hit the dashboard but there was no loss of consciousness. Dr. Buie saw the claimant on January 10, 2001, noting that he had been involved in a motor vehicle accident and sustained an injury to his right knee. The claimant reports that he had x-rays on his knees, facial bones, chest, spine and cervical spine. The doctor notes that the claimant states that he has aggravated the symptoms involving his

right knee and a diagnostic arthroscopy of the claimant's right knee was scheduled. On January 14, 2002, Dr. Buie performed a diagnostic arthroscopy and during this procedure he found very little arthritis except early changes 1-2, Grade I-II of medial femoral plateau and the later tibial plateau, some stippling. The doctor notes that there was a flap of the medial femoral condyle of the intracondylar area and that was removed and abraded by chondroplasty. The claimant was released on crutches and was to begin physical therapy the following day. On follow up, Dr. Buie writes on February 8, 2002, that the claimant continues to complain of discomfort with popping superolateral border of the patella on full extension and he is having some giving away. It was recommended that the claimant continue using his crutches as well as attending physical therapy. Due to continued complaints of pain and weakness, the claimant underwent a second operative procedure on February 25, 2002, with Dr. Buie. The post operative diagnosis sets forth that there were findings of a very large, thick band, lateral retinaculum and superior pole of patella with irregularity and chondral changes of the later superior pole of the patella and arthrofibrosis associated with the supra patellar pouch and what appears to be a significantly large plica superior and medial in the synovial area of the right knee. The medical records set forth that Dr. Buie continued to follow the claimant after this second surgery and on March 27, 2002, the doctor notes that the claimant is still unable to actively use his knee, flexation and extension and has marked discomfort. Dr. Buie injected the claimant and

recommended that he remain in his knee immobilizer. Dr. Buie writes that the claimant has an apparent reactive synovitis. Dr. Buie continued to see the claimant for his ongoing problems following his second arthroscopy and writes that the claimant had an injury which workers' compensation has turned down. The doctor notes that he disagrees with this assessment in a sense that some of the findings at arthroscopy were related directly to acute trauma. On April 11, 2002, the claimant underwent a closed manipulation under anesthesia for his right knee performed by Dr. Buie.

The claimant underwent an evaluation by Dr. Marvin Mumme for a second opinion as to his right knee problems. After taking a complete history, reviewing the claimant's past medical records and examining the claimant, Dr. Mumme assessed the claimant with having degenerative arthritis, right knee with findings of cartilaginous flap tear, articular surface, medial femoral condyle and spurring noted of the medial tibial plateau, and arthrofibrosis, right knee, with previous resection of superior patella scar and lateral retinacular release, and systematic neuroma, infrapatella branch of the saphenous nerve, right knee, and restricted motion, right knee, and history of ganglion excision, left knee and possible unstable medial meniscus, left knee. Dr. Mumme injected the neuroma on the claimant's right knee and recommended that they try a synvisc injection of the right knee. On May 20, 2002, Dr. Buie removed the neuroma, infrapatella branch of saphenous nerve of the claimant's right knee. The medical records set forth that the claimant

continued to be seen by Dr. Buie for his continued complaints of pain and limited range of motion. The claimant was diagnosed with a painful right knee and arthrofibrosis and an MRI was recommended. On February 21, 2003, Dr. Buie operated on the claimant for a total right knee arthroplasty.

Dr. James Buie, in his deposition taken on March 13, 2003, was asked if the claimant's motor vehicle accident which resulted in his hitting his knee up against the dash board of his truck was the trauma that he saw when he did the arthroscopic procedure. Dr. Buie responded, "I think that contributed primarily to it." Dr. Buie went on to indicate that, in his opinion, the accident accelerated the claimant's symptoms and a combination of the claimant's pre-existing knee problems and the trauma experienced in the motor vehicle accident produced enough problems to cause the findings he made during the arthroscopy. Dr. Buie also stated, "I think he (the claimant) aggravated a pre-existing condition that made it intolerable to continue without the arthroscopy evaluation. On cross examination by the respondents' attorney, Dr. Buie was asked about his earlier statement concerning the evidence he found of trauma at the time of the claimant's arthroscopic surgery done on January 14, 2002. Dr. Buie indicated that the specific evidence he was referring to was that on the medial femoral condyle there was actually a flap of cartilage that was torn that is usually associated with trauma. Dr. Buie was asked if the claimant's pre-existing knee condition was the overriding cause or effect for his knee for continuing medical treatment and Dr. Buie responded that

he felt that the claimant had trauma, realizing that the claimant did have some degenerative arthritis but following his accident his pain and symptoms increased and the claimant did not respond to the normal types of treatment that had helped him in the past which caused him to come to the conclusion that the trauma significantly affected the claimant's condition. Dr. Buie stated, "trauma I think is the thing that began to accelerate this." Dr. Buie stated, "I think it's a combination of things. I think that we have a situation of where he (the claimant) had a condition that was affected by an apparent injury. You know, he has gone along for several years with findings of some medial joint narrowing, findings suggestive of arthritis and he was having a few progressive changes, but up until this particular incident, he had not rapidly gone down hill like this." Dr. Buie stated that he had discussed with the claimant a series of things that they could do such as non-operative steroid injections, rehabilitation, strengthening and if these things did not work then Synvisc to see if that would help, arthroscopy and if none of these helped and he progressed, then eventually a total knee replacement. Dr. Buie stated that, "I would have anticipated that, but not for years down the pike."

After a complete review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he sustained compensable injuries while working for the respondent on December 19, 2001. The claimant has testified to being involved in a motor vehicle accident that day while working and the medical

records corroborate this testimony. The medical records as well as the claimant's testimony indicate that when the air bag released, it jammed his knee into the dash of the car. It is not questioned that this claimant has had prior knee problems for which he has had extensive treatment in the past. However, the claimant's testimony as well as that of Dr. Buie's both indicate that the claimant's problems with his right knee accelerated and his need for medical treatment became much more acute as a result of his December 19, 2001, motor vehicle accident. Although the medical records have set forth that a total knee replacement has been discussed with the claimant prior to December 2001, it was mentioned as a possibility not as a for certain need which this claimant might have for his right knee. Therefore, I find that the claimant's injury of December 19, 2001, aggravated his pre-existing right knee condition to the point which required him to undergo medical treatment resulting in a total knee replacement in February 2003. The respondents, therefore, should pay for the cost of all the medical treatment for this claimant's right knee injury subsequent to December 19, 2001, as well as temporary total disability from the date of the claimant's surgery on February 25, 2003, to April 9, 2003. The claimant has testified that since his return to work he had only been able to work four hours a day or half a day, therefore, the claimant will be entitled to temporary partial disability from April 9, 2003, to a date to be determined.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On December 19, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$410.00 for temporary total disability and \$308.00 for permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent on December 19, 2001. See discussion above.

5. The claimant is entitled to temporary total disability from the date of his surgery on February 25, 2003, to April 9, 2003.

6. The claimant is entitled to temporary partial disability since he is only able to work four hours per day from April 9, 2003, to a date to be determined.

7. The respondents should pay for all reasonable and necessary medical care for this claimant's compensable injuries.

8. The respondents have controverted this claim in its entirety.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injuries on December 19, 2001.

The respondents should pay for all reasonable and necessary medical treatment for the treatment of this claimant's compensable injuries.

The claimant is entitled to temporary total disability from February 25, 2003, to April 9, 2003, and then temporary partial disability for the four hours that this claimant is able to work from April 9, 2003, to a date to be determined.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE