

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. F202307**

PAMELA McWILLIAMS, EMPLOYEE

CLAIMANT

VS.

BUZZ BUY CONVENIENCE STORE, EMPLOYER

RESPONDENT

FEDERATED MUTUAL INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 29, 2003

Hearing held August 28, 2003, in El Dorado, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Mr. F. Mattison Thomas, III, Attorney at Law, 423 North Washington, El Dorado, Arkansas 71730-5615.

Respondents are represented by Mr. Nelson V. Shaw, Attorney at Law, 5505 Plaza Drive, Texarkana AR 75503.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in El Dorado, Arkansas, on August 28, 2003. A prehearing telephone conference was held on this claim on June 16, 2003, with a Prehearing Conference Order filed on that same date. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, the parties agreed upon the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
2. The employee-employer-carrier relationship existed between the parties on December 26, 2001;
3. Claimant underwent arthroscopic surgery on her right knee by Dr. Gati on April 11, 2002;

4. Claimant earned an hourly rate of \$5.65 on the date of her injury;
5. Claimant received temporary total disability in the amount of \$130.00 per week while she was off work for her right knee surgery;
6. Claimant was released to return to work with restrictions by Dr. Gati on June 11, 2002;
7. Claimant was fully released by Dr. Gati on July 12, 2002;
8. Claimant received an anatomical impairment rating of 7% to the right lower extremity.

During the prehearing telephone conference the parties agreed to limit the issues to:

1. Whether claimant is entitled to temporary total disability benefits from June 12, 2002, through a date yet to be determined due to respondents' failure to return claimant to work with restrictions;
2. Whether claimant sustained a back injury as a compensable consequence of her compensable right knee injury for which she is entitled to temporary total disability and medical benefits;
3. Whether claimant is entitled to additional temporary total disability benefits based upon the correct temporary total disability rate of \$151.00 per week;
4. Whether claimant is entitled to permanent partial disability benefits for the 7% anatomical impairment rating to the right lower extremity;
5. Controversion and attorney's fees.

At the beginning of the hearing, claimant withdrew the issue regarding permanency and permanent partial disability as these issues are premature at this time. Claimant contends that she is still within her healing period as a result of a compensable consequence injury to her back. Claimant contends that she is entitled to additional temporary total disability for her compensable right knee injury at the proper disability rate. Claimant further contends that she is entitled to additional temporary total disability for her right knee injury from the date she was released to return to work and was refused work within her restrictions by respondents. Finally, claimant contends that she sustained a compensable injury to her back as a consequence of her compensable right knee injury for which she is entitled to temporary total disability and medical benefits. Respondents contend that the claimant has received all temporary total disability benefits to which she is entitled.

From a review of the record as a whole, to include the medical reports, documents, and all other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. § 11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on June 16, 2003, and contained in the Prehearing Order filed on that same date are hereby accepted as fact.

2. Claimant received temporary total disability benefits at the rate of \$130 per week.

3. Claimant earned an average weekly wage of \$226.00 which computes to a temporary total disability rate of \$151.00 per week.

4. Claimant has proven entitlement to additional temporary total disability benefits for the difference between benefits paid at \$130.00 per week and the correct compensation rate of \$151.00.

5. Claimant's healing period for the compensable right knee injury ended on June 11, 2002;

6. Claimant has failed to prove by a preponderance of the evidence that she remained within her healing period after June 11, 2003, therefore, claimant has failed to prove entitlement to additional temporary total disability for her right knee injury subsequent to this date.

7. Claimant has proven by a preponderance of the evidence that she sustained a compensable consequence injury to her back on or about June 23, 2003, when she fell as result of her compensable knee injury, incurring her back.

8. Claimant remains in her healing period and totally incapacitated from earning wages as a result of her compensable back injury.

9. Claimant has proven by a preponderance of the evidence entitlement to additional temporary total disability benefits from June 24, 2003, through a date yet to be determined.

10. Respondents have controverted claimant's entitlement to the benefits awarded.

CONCLUSION

Claimant was employed as the assistant closer for respondent-employer on December 26, 2001, when she sustained a compensable injury to her right knee. At the time of her injury, claimant earned \$5.65 per hour on a 40 hour work week. Claimant described the injury as occurring when she slipped in some water on the floor and twisted her knee. As a result of this injury, claimant was diagnosed with patellar subluxation and eventually underwent surgery to alleviate the pain in the patellofemoral joint. As this injury and the treatment thereof were accepted as compensable, the record does not contain detailed operative reports concerning this procedure. After undergoing surgery in the spring of 2002, claimant was released to return to work by Dr. Gati on June 11, 2002. In his report from the examination on June 11, 2002, Dr. Gati stated:

Ms. Hartsfield comes today to clinic for follow-up for her knee. She reports the pain that she was having last week is gone. She still thinks that her knee is not 100% like it was before her injury. She reports that she has a limp, although no limp is noted today on her gait.

PHYSICAL EXAMINATION: She has full range of motion of her right knee. There is no warmth or erythema and no swelling. She has no significant tenderness. There is no crepitus.

PLAN: At this point, we will have her just continue with her home exercise program. I will have her resume wearing her knee sleeve and we are going to release

her back to full duties at work. We will see her in a month for a final evaluation.

The record reveals that the claimant attempted to return to work, but was advised that the only position available was a part-time position. Claimant refused the part-time position since she “needed” a full time position.

Subsequent to this release, claimant’s knee gave way while she was at home, causing her to fall and injury her back. A hand-written x-ray report dated June 24, 2002, states that there are no fractures, and that there is normal alignment and vertebral height and disc space, but that the claimant has moderate degenerative disc disease. Dr. Patrick Antoon examined the claimant on June 24, 2002, and noted the presence of lumbar spine muscle spasm. An MRI of the lumbar spine performed on June 28, 2002, revealed “Omnidirectional disc bulging at L4-5 indenting the thecal sac with bilateral foraminal stenosis as well.”

Claimant returned to Dr. Gati on July 9, 2002. In his report of this date, Dr. Gati stated:

Ms. Hartsfield comes today to clinic for follow-up of her knee. The patient is not having any significant pain. She still has giving away symptoms occasionally in her knee. The last time was approximately two weeks ago and when she did that, she reports injuring her back. The patient is not working at this point secondary to loss of her job.

PHYSICAL EXAMINATION: The patient has full range of motion of her knee. There is no warmth or erythema and no swelling. She has no significant tenderness. There is no crepitus with knee motion. Her patella tracks well.

PLAN: At this point, I am just going to recommend that she continue with her quadriceps home program. We will have her wear the knee sleeve as needed. If she cannot take anti-inflammatories, we will just have her continue with her glucosamine. If her knee flares-up again and she has problems, she might need a steroid injection in the future. She also has some chondromalacia with the trochlear groove and on the underside of the patella that may also cause problems in the future and if the steroid injection does not help, she may also benefit from Synvisc injections. We will just see her back as needed. If she has any problems in the future, we will be happy to see her back.

In a letter dated October 15, 2002, Dr. Antoon specifically related claimant's lumbar back strain and sprain injury to claimant's compensable right knee injury.

In this regard, Dr. Antoon stated:

It is my medical opinion to a reasonable degree of medical certainty that the fall injury resulting in a lumbar back strain and sprain injury is due to the patient's laxity and discomfort of her knee injury. I feel like if the patient had not fallen due to the weakness in her knee that the lumbar back strain could have avoided. I think that Workman's (sic) Compensation should make all efforts to consider her lumbar back pain was directly related injury to haven fallen and this fall was due to a weakness in her knee. Hopefully, Workman's (sic) Comp will see this as a variant of her knee injury and will consider compensation and treatment for her lumbar back pain under her Work Comp case.

In a letter dated October 4, 2002, Dr. Gait stated that "it was felt that [the claimant] had reached MMI" when she "was last seen by me in July." Dr. Gati assigned the claimant a 7% impairment to the right lower extremity.

Prior to her compensable injury, claimant has suffered multiple injuries to her right knee. In 1995, claimant injured the medial meniscus in her right knee which required a surgical repair. In 1996, claimant injured the anterior cruciate ligament in her right knee which required a surgical repair. In October of 2001, claimant fell off the steps at her home and again injured the medial meniscus of her right knee. This injury did not require surgery, but did keep the claimant off work for one week. Claimant testified that she was completely recovered from this October 2001, injury by the time she sustained her compensable injury in December of 2001.

Since claimant's injury is a scheduled injury, temporary total disability benefits are only appropriate when claimant is still within her healing period and while she has not returned to work. See, Ark. Code Ann. § 11-9-521(a) (Supp. 1999); Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is defined as that period for healing of the injury resulting from the accident which continues until the employee is as far restored as the permanent character of the injury will permit. J.A. Riggs Tractor Co. v. Etkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. Id. Whether an employee's healing period has ended is a factual determination for the Commission to decide. Ketcher Roofing Co. v. Johnson, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

I find that the claimant's healing was as far restored as the permanent character of her injury would permit as of June 11, 2002, when Dr. Gati released the claimant to return to work without restrictions. Although the parties stipulated that Dr. Gati released claimant to return to work with restrictions on June 11, 2002, the medical records and claimant's testimony indicate that the only restriction was to wear a knee brace. Dr. Gati's physical examination of the claimant on June 11, 2002, is identical to Dr. Gati's findings upon physical examination on July 9, 2002. When Dr. Gati released claimant on July 9th, he again advised the claimant to wear her knee brace as needed. Dr. Gati stated in his October 4, 2002, correspondence that the claimant had reached maximum medical improvement when he last examined the claimant, but this date is not exclusive of any date prior to the last visit. Claimant was released to return to work on June 11, 2002. Although the claimant complained that her knee was not 100% like it was prior to her injury on June 11, 2002, Dr. Gati's July 9th report likewise reveals that the claimant will continue to have problems with this knee. The 7% impairment rating confirms this statement by the claimant. Merely because the claimant's knee is not back to its condition prior to her injury, this does not mean that the claimant remains within her healing period. On the contrary, the healing period ends when the healing has plateaued, not when the condition has returned to a pre-injury status. The medical records do not reveal an improvement in claimant's healing process between the June and July doctor's visits. Accordingly, I find that the claimant's healing period

ended on or before June 11, 2002, when Dr. Gati released the claimant to return to work.

Since claimant's healing period ended by June 11, 2002, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits.

Claimant contends that her back was injured as a consequence of her compensable knee injury, when her knee gave way, causing claimant to fall and injury her back. Thus, claimant contends that her back injury is a compensable consequence and should be paid for in workers' compensation benefits.

For an injury to be compensable, there must be objective findings to support its existence. A.C.A. § 11-9-102(4)(D) and (16). In his June 24, 2002, medical report, Dr. Antoon noted the presence of muscle spasm in claimant's lumbar spine when she sought treatment for this injury. Muscle spasms, while objective medical findings, will not support a claim of compensability unless there is evidence linking the spasms to work-related event. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). There is no evidence that the claimant suffered from muscle spasm in her lumbar spine prior to fall in late June of 2002. Moreover, the MRI performed on June 28, 2002, revealed the presence of a bulging disc indenting the thecal sac at L4-5. Again, there is no evidence of back pain, muscle spasms or of a bulging disc prior to claimant's fall in June of 2002. Accordingly, I find that the claimant has established by a preponderance of the evidence that these

objective findings are directly related to her fall. Therefore, I find that the claimant sustained a compensable back injury as a consequence of her compensable right knee injury.

In reaching this finding, I have placed great weight upon the medical opinion of Dr. Antoon, that claimant's back injury is a result of claimant fall which resulted from the laxity and discomfort in claimant's right knee. Dr. Antoon's opinion does not address the claimant's previous knee injuries, however, there is no evidence in the record that claimant's 1995 medial meniscus injury and her 1996 anterior cruciate ligament injury, or even her minor medial meniscus injury in October of 2001, resulted in the laxity and discomfort the claimant now experiences as a result of her admittedly compensable patella subluxation injury. Dr. Gati outlined a possible course of treatment for the claimant following his last medical examination of the claimant, which acknowledged the fact that the claimant will continue to have difficulty with her right knee following this compensable injury. There is no evidence in the record which would indicate that the claimant experienced her knee giving way or continued pain in her knee as a result of her previous injuries. While it is possible that the previous injuries may have contributed to the claimant's fall in June of 2002, to reach such a finding upon this record would require speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena

Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Accordingly, I find that the claimant sustained a compensable consequence injury to her back on June 23, 2002, for which she is entitled to medical and indemnity benefits. I further find that the claimant was within her healing period and totally incapacitated from earning wages from June 24, 2002, through a date yet to be determined, as a result of this compensable consequence for which she is entitled to temporary total disability benefits. In reaching this finding, I acknowledge that the claimant owns a candle making business. However, the evidence indicates that this business does not generate much profit, if any, and is more of a therapeutic outlet for the claimant.

AWARD

Claimant has failed to prove that she remains within her healing period for her compensable right knee injury. Claimant has proven by a preponderance of the evidence that she sustained a compensable consequence injury to her back on June 23, 2002, and that she is entitled to reasonably necessary medical benefits related to this injury as well as temporary total disability from June 24, 2002, through a date yet to be determined. Respondents have controverted the claimant's entitlement to the benefits awarded herein. Claimant's attorney is entitled to the maximum statutory fee on the benefits awarded, one-half (½) to be paid by the claimant and one-half (½) to be paid by respondents. Respondents are ordered

to withhold claimant's portion of the attorney's fees from the claimant's award and to pay the attorney's fees directly to claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall draw interest at the maximum legal rate until paid.

IT IS SO ORDERED.

HON. KAREN McKINNEY
Administrative Law Judge