

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F208156/F305012

WENDELL RUSSELL		CLAIMANT
FORT SMITH EMERGENCY MEDICAL		RESPONDENT
TRAVELERS INSURANCE COMPANY INSURANCE CARRIER	No. 1	RESPONDENT
COMMERCE & INDUSTRY	No. 2	RESPONDENT

OPINION FILED NOVEMBER 17, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

Respondents No. 2 represented by SCOTT MORGAN, Attorney, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claims on October 14, 2003, in Fort Smith, Arkansas. The deposition of Dr. Frankie M. Griffin was taken on August 28, 2003, and has been introduced as Respondent's Joint Exhibit No. 1.

A pre-hearing order was entered in this case on July 30, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, certain clarifications were made in regard to the issues. A copy of the pre-hearing order with these clarifications noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On July 17, 2002, the relationship of employee-employer-carrier existed between the claimant, Ft. Smith Emergency Medical and Travelers Insurance.
2. On January 17, 2003, the relationship of employee-employer carrier existed between the claimant, Ft. Smith Emergency Medical and Commerce and

Industry Insurance Company (AIG Services TPA).

3. On July 17, 2002, the appropriate weekly compensation rates were \$215.00 for total disability and \$161.00 for permanent partial disability.
4. On January 17, 2003, the appropriate weekly compensation rates were \$215.00 for total disability and \$161.00 for permanent partial disability.
5. On July 17, 2002, the claimant sustained a compensable injury to his right knee.
6. The respondent Travelers has paid or will pay all medical expenses incurred prior to January 17, 2003.
7. The respondent, Travelers has paid all temporary disability benefits accruing prior to January 17, 2003.
8. The respondent, Travelers denies liability for any benefits accruing on and after January 17, 2003.
9. Respondent Commerce & Industry denies any liability for benefits.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the respondent Travelers is liable for any benefits or portion thereof for the claimant's right knee difficulties on and after January 17, 2003 (i.e. whether these difficulties represent a continuation reoccurrence, or complication of the compensable injury of July 17, 2002)..
2. Whether the respondent Commerce & Industry is liable for any benefits or portion thereof for the clamant's right knee difficulties on and after January 17, 2003 (i.e. (i.e. whether these difficulties are the result of a new compensable injury sustained on January 17, 2003).
3. The claimant's entitlement to the payment of medical expenses incurred after January 17, 2003 and temporary total disability benefits from January 17,

2003.

4. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"The claimant suffered a compensable right knee injury on July 17, 2002. On January 17, 2003, the claimant suffered either a recurrence or re-injury of the right knee; or, in the alternative, suffered an aggravation or new injury to the right knee in the course of his employment for which he is entitled to the award of reasonable and necessary medical services; temporary total disability, and attorney's fees."

In regard to these issues, the respondent carrier #1, Travelers Insurance Company contends:

"Respondents paid the claimant appropriate benefits for a compensable injury, and the claimant was released to return to very heavy work based upon his FCE and treating physician's assessment. The claimant suffered a new injury or aggravation of a pre-existing condition after a new carrier assumed workers' compensation coverage."

In regard to these issues, the respondent carrier #2, Commerce & Industry Insurance Company contends:

"Respondent No. 2 contends that the alleged injury of January 17, 2003, is not compensable due to it being a recurrence of a previous injury for which it is not responsible. In the alternative, respondent #2 would further contend that the claimant was not performing employment services at the time of his alleged injury on January 17, 2003."

### DISCUSSION

\_\_\_\_\_The central issue in this case concerns the claimant's entitlement to benefits under the Arkansas Workers' Compensation Act (specifically, in the form of the payment of medical expenses and temporary total disability benefits) for difficulties he has experienced with his right knee on and after January 17, 2003. This issue also involves the matter of liability for any such benefits, as between the two carriers for the respondent employer, the Travelers Insurance Company and Commerce & Industry Insurance Company.

If the claimant's difficulties with his right knee, on and after January 17, 2003, represent a continuation or reoccurrence of his admittedly compensable right knee injury of July 17, 2002, then Travelers Insurance Company is liable for any appropriate benefits. If the claimant's difficulties with his right knee, on and after January 17, 2003, are the result of a new compensable injury occurring on that date, then Commerce & Industry Insurance Company is liable for appropriate benefits. If the claimant's difficulties with his right knee, on and after January 17, 2003, is the result of both the prior admittedly compensable injury of July 17, 2002 and a subsequent employment related aggravation of this injury on January 17, 2003, then the doctrine of apportionment would likely be appropriate and liability for any benefits would be apportioned between the two carriers. If the claimant's difficulty with his right knee, on and after January 17, 2003, is not causally related to either admittedly compensable injury of July 17, 2002, or a new compensable injury on January 17, 2003, then the claimant's subsequent right knee difficulties would not be "compensable" and neither respondent would be liable for any benefits under the Act.

The record reveals that the claimant sustained an admittedly compensable injury to his right knee on July 17, 2002. This injury produced a tear of his medial meniscus and possible damage to the underlying articular cartilage. The compensable injury produced sufficient physical damage to the claimant's right knee that required corrective surgery.

There is no evidence, whatsoever, that the claimant had experienced any difficulties with his right knee, prior to the compensable injury of July 17, 2002. Although the claimant did obtain substantial relief from the symptoms produced by this compensable injury with the corrective surgery, the evidence falls short of establishing that this injury entirely resolved. On October 9, 2002, a functional capacity evaluation or FCE was performed on the claimant. This evaluation noted that the claimant gave maximal consistent effort on all tests and that the testing demonstrated no restrictions in the use of his right knee. However, the examiner, who administered these tests, did note objective evidence of the

continued presence of some degree of injury in the form of observable residual swelling about the knee joint.

Following the FCE, the claimant was discharged from further active treatment and released to return to work without restrictions by Dr. Frankie Griffin, the treating orthopaedic surgeon. However, Dr. Griffin obviously had some concern about the actual total resolution of the compensable injury, as he directed the claimant to return for a follow up examination in six months (or sooner, if needed). The claimant's current right knee difficulties appeared well within this six months.

Following the onset of increased difficulties with the claimant's right knee, on January 17, 2003, the claimant returned to Dr. Griffin. An MRI of the claimant's right knee was performed at Dr. Griffin's direction on January 22, 2003. This MRI demonstrated objective defects indicative of the presence of both postsurgical changes or scarring and a small tear of another ligament (i.e. the lateral meniscus, rather than the medial meniscus). However, in his deposition, Dr. Griffin clearly states that in his expert medical opinion, the only way to determine (within a reasonable degree of medical certainty) whether the claimant's current difficulties are the result of his prior compensable injury or some new and distinct injury is to perform a diagnostic arthroscopy of the claimant's right knee.

Neither of the respondent carriers have agreed to voluntarily authorize this diagnostic procedure. The evidence indicates that the claimant does not have the funds or any other means to pay for such a procedure. Thus, this diagnostic visual evaluation has not been performed.

Clearly, the medical evidence shows that the diagnostic procedure recommended by Dr. Griffin is crucial to the issue currently before this Commission. Without this recommended diagnostic procedure, it would be impossible to ascertain with any degree of accuracy or certainty whether the claimant's current difficulties with his right knee are

solely the result of his admittedly compensable injury of July 17, 2002, or are the result of a new injury (compensable or otherwise) on January 17, 2003, or are the result of both the admittedly compensable injury and a subsequent aggravation on January 17, 2003, or are totally unrelated to any of the above. To attempt to decide these issues without the results of this diagnostic procedure would violate the mandate of Ark. Code Ann. §11-9-811, which requires this Commission to take appropriate action to properly protect the rights of all parties concerned, including the ordering of necessary medical examinations or evaluations.

However, this raises the question of liability for the expense of this diagnostic procedure. Clearly, applicable case law provides that diagnostic procedures and testing, which are medically appropriate to accurately diagnose the nature and extent of a compensable injury, constitute “reasonably necessary medical services” for such a compensable injury, under Ark. Code Ann. §11-9-508. In the present case, the claimant sustained an admittedly compensable injury to his right knee on July 17, 2002, while Travelers Insurance Company provided workers’ compensation insurance coverage. After consideration of the evidence presented, it is my opinion that the greater weight of this evidence establishes that the diagnostic arthroscopy recommended by Dr. Griffin is medically appropriate to accurately diagnose the nature and extent this admittedly compensable injury. Thus, the expense of this diagnostic procedure would be the liability of the Travelers Insurance Company, subject to the Commission’s medical fee schedule.

Following this diagnostic procedure, sufficient information should be available to allow a decision on the claimant’s entitlement to benefits, under the Act, for his current right knee difficulties and on the appropriate carrier or carriers liable for any such benefits that would adequately protect the rights and interests of all parties concerned. Thus, any decision on these issues is reserved for future determination, pending the outcome of this diagnostic procedure. All parties will be allowed the opportunity to present any additional

evidence relevant to these issues they deem appropriate, once this diagnostic procedure has been completed.

It must be noted that, at this time, the respondent, Travelers Insurance Company, is only liable for the expense of a diagnostic arthroscopy (subject to the medical fee schedule established by this Commission). Liability for any additional expense that might be incurred, should any corrective measures also be performed during this arthroscopy, is reserved for future determination, in the manner heretofore discussed.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 17, 2002, the relationship of employee-employer-carrier existed between the claimant, Fort Smith Emergency Medical, and Travelers Insurance Company.
3. On July 17, 2002, the appropriate weekly compensation rates were \$215.00 for total disability and \$161.00 for permanent partial disability.
4. On July 17, 2002, the claimant sustained a compensable injury to his right knee.
5. The respondent, Travelers Insurance Company, has paid all temporary total disability benefits accruing prior to January 17, 2003.
6. The respondent, Travelers Insurance Company, has paid or will pay all medical expenses incurred for services rendered to the claimant for his right knee difficulties prior to January 17, 2003.
7. The diagnostic arthroscopy on the claimant's right knee, which has been recommended by Dr. Frankie Griffin subsequent to January 17, 2003, constitutes "reasonably necessary medical services" for the claimant's compensable injury of July 17, 2002. Pursuant to Ark. Code Ann. §11-9-508,

the respondent, Travelers Insurance Company, is liable for the expense for this diagnostic arthroscopy (subject to the medical fee schedule established by this Commission).

8. On January 17, 2003, the relationship of employee-employer-carrier existed between the claimant, Fort Smith Emergency Medical, and Commerce & Industry Insurance Company.
9. On January 17, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$215.00 for total disability and \$161.00 for permanent partial disability.
10. The respondent, Travelers Insurance Company, controverts the claimant's entitlement to any additional benefits accruing on and after January 17, 2003. The respondent, Commerce & Industry Insurance Company, denies the occurrence of any compensable injury on January 17, 2003, and controverts the claimant's entitlement to any all benefits attributable thereto.
11. Until such time as the recommended diagnostic arthroscopy is performed on the claimant's right knee, there is not sufficient medical evidence available to allow a decision on the issues set out in the pre-hearing order that would meet the mandate imposed upon this Commission by Ark. Code Ann. §11-9-811. Thus, these issues are reserved for future determination pending completion of the diagnostic arthroscopy and further development of the record by the various parties concerned.

#### ORDER

The claimant is hereby ordered to undergo at the earliest opportunity the diagnostic arthroscopy recommended by Dr. Frankie Griffin. The expense of this diagnostic arthroscopy is the liability of the Travelers Insurance Company, subject to the medical fee schedule established by this Commission.

All issues raised in the pre-hearing order of July 30, 2003 are reserved for future determination upon pending completion of this diagnostic arthroscopy and after allowing all parties concerned the opportunity to present all relevant additional evidence they desire, which may be developed as a result of this diagnostic procedure.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge