

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112435

JAMES A. BANEY, SR., EMPLOYEE	CLAIMANT
POINSETT COUNTY JUDGE, EMPLOYER	RESPONDENT
AAC RISK MANAGEMENT SERVICES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 26, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on March 12, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Kristofer E. Richardson, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. J. Matthew Mauldin, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted March 12, 2004, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on January 14, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant times, including October 18, 2001; that the claimant sustained a compensable

injury to his right knee on said date; that he earned sufficient wages to entitle him to compensation rates of \$244.00 per week for temporary total disability and \$183.00 per week for permanent partial disability; that respondents paid temporary total disability until the claimant returned to work on January 7, 2002, as well as various medical and related expenses; and that the respondents controverted responsibility for claimant's total knee replacement performed on December 2, 2003.

By agreement of the parties, the primary issue presented for determination was whether the claimant's subsequent course of medical treatment, including a total knee replacement on December 2, 2003, remained the responsibility of the respondents. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that all of his additional medical treatment for the right knee was directly and casually related to the October 18, 2001, admitted injury, as well as an aggravation of his pre-existing condition; that the respondents inappropriately suspended additional medical care; that claimant's total knee replacement on December 2, 2003, was both reasonable and necessary, as well as related; that he was entitled to temporary benefits beginning December 2, 2003, and continuing through the present and until such time as his healing period has been determined to have ended; and that a controverted attorney's fee should attach to any additional benefits

awarded.

The respondents contended that claimant's knee surgery was not causally related to the compensable injury, but, rather to the claimant's pre-existing condition. Alternatively, if compensability was overcome, respondents claimed a credit or offset for any benefits paid by another provider pursuant to A.C.A. §11-9-411. At the hearing, respondents amended its contentions, maintaining that the additional medical treatment sought, the total knee replacement, was not reasonably necessary in connection with the compensable sprain injury.

In addition to the claimant, his wife, Norma Jean Baney, was called as a corroborating witness. The record in this claim is composed solely of the transcript of the March 12, 2004, hearing, together with the evidentiary deposition of Dr. John Ball, introduced as "Joint Exhibit A" and retained in the Commission file in bound form. Attached to the deposition, was a twenty-four (24) page medical exhibit.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that his total knee replacement performed on December 2, 2003, was reasonably necessary, as well as causally related to the October 18, 2001, admitted injury and remains the responsibility of the respondents.
4. The claimant is entitled to additional temporary total disability for the period beginning December 2, 2003, and continuing through the present and until such date as claimant's healing period is determined to have ended.
5. The claimant's healing period had not ended as of the date of the within hearing.
6. Respondents are entitled to a dollar-for-dollar offset for any benefits the claimant's has previously received pursuant to A.C.A. §11-9-411(a) (Repl. 2002).
7. Respondents have controverted all benefits beyond those previously paid.

DISCUSSION

_____The claimant, James A. Baney, Sr., is sixty-one (61) years old. The

claimant was employed as a road mechanic for Poinsett County for more than twenty (20) years. The claimant sustained an admitted injury to his right knee on October 18, 2001. As reflected by the stipulations, respondents paid temporary total disability until the claimant returned to work for the employer herein on January 7, 2002. In addition, respondents paid various medical and related expenses for conservative treatment to the right knee until the claimant was required to undergo a total knee replacement, at which point respondents controverted the surgical procedure. Claimant's description of the injury, the report of the injury, as well as claimant's course of medical treatment follows:

Q All right. You know we are here over a knee replacement that you had?

A Yes, sir.

Q And we're claiming that that stemmed from an October 18, 2001 incident. Go ahead and tell the Judge what happened on October 18, 2001.

A All right. I was out working on a John Deere motor grader. You know what that is?

JUDGE GREENBAUM: Yes, sir, I'd like to have one.

THE CLAIMANT: Okay. On the tam, I was standing on the tam fixing a fuel leak on top of the engine. You know, there's a little step right between the wheels that you step down on to get off the grader.

JUDGE GREENBAUM: Yes, sir.

THE CLAIMANT: All right. When I got through with it, I started to step back to get on the step, and my foot slipped and fell down between the tam and the knee hung on that little old step, and I just went on to the ground. That's what happened, right there.

BY MR. RICHARDSON:

Q And when you say your knee hung, are we basically talking about it slammed and grazed against it or –

A Well, I really thought it was just my kneecap at first just hung there and jerked it up, but I couldn't walk hardly. I finally did get in the truck and get back to the shop, though.

Q What did you do from there?

A I reported to Terry Grisham.

Q Did you go see a doctor?

A Yes, sir.

Q Who did you go see?

A Dr. Jacobs in Wynne.

Q Dr. Jacobs, is that your family doctor?

A That's my family doctor.

Q What did he do for you?

A He recommended I see Dr. Ball.

Q Okay. And did you go see Dr. Ball?

A I went to see Dr. Ball.

Q What did Dr. Ball do for you?

A Dr. Ball looked at the x-rays and everything and he said – (Tr.7-8)

Dr. John F. Ball, an orthopedic surgeon in Jonesboro, Arkansas, has remained the claimant's primary treating physician. He initially evaluated the

claimant on October 30, 2001, at which time claimant was diagnosed as having sustained a sprain while pointing out that the claimant had some pre-existing osteoarthritis of the knee which would cause difficulty in the claimant's recovery. The claimant was treated conservatively by an interarticular steroid injection. Dr. Ball's chart notes reflect that the claimant continued to receive conservative treatment, as well as periodic injections in the right knee every two (2) or three (3) months until the claimant ultimately underwent a total knee replacement on December 2, 2003. (Jt. Ex. A., Resp. Ex. 1, pp.9-21)

I found the claimant to be an extremely credible witness. The claimant testified that at the time of his injury, he was approaching retirement age, and that rather than undergo surgery for a total knee replacement, he elected to receive periodic injections while continuing to work. He stated that Dr. Ball left any decision concerning when to undergo a knee replacement up to him. He maintained that his physical condition grew progressively worse through on or about October, 2003, at which point his knee was so bad that he could hardly walk. The claimant then elected to undergo surgery which had been delayed in order that he could continue working. The claimant credible testimony concerning his decision to delay the surgery was corroborated by Dr. Ball.

On cross-examination, claimant acknowledged having other physical problems, as well as prior injuries. He recalled having sustained a prior work-related injury to his left knee which required arthroscopic surgery, but was

uncertain as to the date of the prior injury. The claimant did not dispute that in his discovery deposition, he stated that the left knee injury occurred in approximately 1990 or '91, but that it may have actually occurred in 1999. The claimant denied having sustained any prior injuries or making any complaints concerning his right knee prior to October 18, 2001, despite a reference by Dr. Jacobs of right knee complaints on July 2, 1999. (Tr.18-19)

The claimant's wife, Norma Jean Baney, was called as a corroborating witness. She could not recall the claimant experiencing any problems involving his right knee before October 18, 2001. She stated that following his admitted injury, the claimant had continuing problems involving the right knee until undergoing the knee replacement surgery which improved his overall condition.

Under our workers' compensation law, an employer takes an employee as he finds him, and a pre-existing disease or infirmity does not qualify a claim if the employment circumstances aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Jim Walter Homes vs. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2002). An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Heritage Baptist Temple vs. Robison*, 82 Ark. App. 640, 120 S.W.3d 150 (2003).

Compensability of this claim is undisputed. Further, the claimant's need for a total knee replacement which was ultimately performed on December 2, 2003, is not in question. In *Farmland Insurance Co. vs. Dubois*, 54 Ark. App. 141, 145, 923 S.W.2d 883, 885 (1996), the Court of Appeals clarified that while major cause is relevant to a determination of permanent disability, it is not necessary when a compensable injury combines with a pre-existing condition to warrant the need for additional medical treatment when it stated:

Ark. Code Ann. §§11-9-102(5)(F)(i) & (ii) provide that when an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter. It goes on to specifically provide that if any compensable injury combines with a preexisting condition, *permanent benefits* shall be payable only if the compensable injury is the major cause of the *permanent disability or need for treatment*. Therefore, when a claimant who has sustained a compensable injury is seeking *permanent disability benefits* there is a requirement to prove that the compensable injury is the *major cause of the permanent disability*. *In this case, appellee was only seeking medical benefits and temporary total disability. Therefore, appellant's argument is misplaced.* (Emphasis supplied)

This claim is strikingly similar to a recent Court of Appeals decision in which it was determined that a compensable aggravation of a pre-existing condition requiring a total knee replacement was compensable. It must be noted that this decision was issued subsequent to the January 14, 2004, prehearing conference conducted in this claim which may explain, in part, respondents' controversion of the recommended surgical procedure. See, *Pearline Williams vs. L & W Janitorial, Inc., and Cincinnati Insurance Company*, CA 03-681 (Opinion filed February 4, 2004).

Rather than conduct an exhaustive analysis of Dr. Ball's deposition, suffice it to say that he found a direct, causal connection between the claimant's October 18, 2001, admitted injury and the subsequent, total knee replacement.

I recognize that the claimant denied experiencing any problems with his right knee before October 18, 2001, and, there is medical evidence reflecting a diagnosis by Dr. James R. Jacobs, his family physician, relating a right knee complaint on July 9, 1999, which the claimant could not recall. I feel compelled to point out that there is medical evidence that the claimant experienced significant problems involving his left knee in 1999, and, in fact, underwent arthroscopic surgery by Dr. Owen for the left knee on March 30, 1999, which may explain this inconsistency. Nevertheless, assuming for the sake of argument that the claimant experienced a problem involving the right knee on July 2, 1999, which is not conceded herein, there is no evidence of any on-going difficulties involving either of the claimant's knees between July 2, 1999, and the October 18, 2001, admitted injury.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for

the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). The employee has the burden, by a preponderance of the evidence that the medical treatment is reasonably necessary. *Wal-Mart Stores, Inc., vs. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in his favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met his burden of proof be weighed impartially, without giving the benefit of the doubt to either party. *Arkansas Code Annotated §11-9-704(c)(4)*; *Wade vs. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App.

196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven, by a preponderance of the credible evidence, that his need for treatment, including surgery on December 2, 2003, was the result of the October 18, 2001, admitted injury. Accordingly, I hereby make the following:

AWARD

Respondent, Associated of Arkansas Counties, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$244.00 per week beginning December 2, 2003, and continuing through a date yet to be determined.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are entitled to a dollar-for-dollar offset for any benefits, whether short-term disability or medical treatment provided by other providers under A.C.A. §11-9-411; however, respondents are encouraged to reimburse the appropriate providers since the medical treatment is related to claimant's compensable injury.

Additionally, claimant's attorney, Mr. Kristofer E. Richardson, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge