

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F203651

JACOB BOWMAN, Employee	CLAIMANT
HOLMES ERECTION, Employer	RESPONDENT
SPECIALTY RISK SERVICES, Carrier	RESPONDENT

OPINION FILED JUNE 9, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 24, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 29, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his left knee on July 13, 2001.
4. The respondent has paid permanent partial disability benefits based upon a 12% rating to the lower extremity at the rate of \$234.00 per week.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$480.00 which would entitle him to compensation at the rate of \$320.00 for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Additional temporary total disability benefits from June 28, 2002 through June 19, 2003 and from January 24, 2004 through a date yet to be determined.
2. Claimant's entitlement to payment for additional medical treatment including surgery performed by Dr. Jones in February 2003 and medication for depression.
3. Claimant's entitlement to permanent partial disability in an amount equal to 25% to the lower extremity.
4. Attorney fee.

Subsequent to the pre-hearing conference it was clarified that the first period for which claimant seeks temporary total disability benefits is March 28, 2002 through June 19, 2003.

The claimant's contentions are set forth in the pre-hearing questionnaire which is attached as Exhibit 1 to the pre-hearing order.

The respondent's contentions as set forth in its pre-hearing questionnaire are as follows: "The claimant sustained a compensable injury to his knee. It was accepted and a 12% rating was paid. The claimant had a substantial pre-existing knee problem. Any impairment in excess of the 12% is due to the pre-existing problem. The claimant has been working for another employer since he was released to return to work. No physician has taken him off of work for the time periods he is requesting. The claimant was not referred to Dr. James Tucker, he requested the services of Dr. Tucker and asked Dr. Jones for the referral."

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 witness and to observe his 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 pre-hearing conference conducted on March 29, 2004, and contained in a pre-hearing order filed that date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$480.00 which would entitle him to compensation at the rate of \$320.00 for total disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. This includes surgery performed by Dr. Jones in February 2003 as well as an evaluation by Dr. Tucker.

4. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury in the form of depression or that he is entitled to medical treatment for that condition.

5. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 28, 2002 and continuing through September 4, 2002. Respondent is entitled to a credit for any temporary total disability benefits or unemployment benefits paid during this period.

6. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to an additional period of temporary total disability benefits beginning January 28, 2003 and continuing through June 19, 2003. Respondent is entitled to a credit for any temporary total disability benefits or unemployment benefits paid during this period.

7. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits subsequent to January 24, 2004.

8. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional permanent partial disability benefits in an amount equal to 8% to the left lower extremity as a result of his compensable injury.

9. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

\_\_\_\_\_The claimant is a 26-year-old man with a history of left knee problems beginning in 1991. Claimant suffered an injury to his left knee while playing sports in 1991. As a result of that injury surgery was performed to repair claimant's anterior cruciate ligament. Claimant testified that he completely recovered from that injury and that no limitations were placed upon him by his treating physician. Claimant also testified that he was unaware of any impairment rating assigned to him as a result of that injury.

The claimant suffered a compensable injury while working for the respondent on July 13, 2001 when he tripped while going down a flight of stairs and injured his left knee. Claimant came under the care of Dr. Greg Jones who performed surgery in March 2002. Following that surgical procedure Dr. Jones assigned a 17% impairment rating of which 5% was pre-existing. This resulted in respondent paying claimant permanent partial disability benefits in an amount equal to 12% to the left lower extremity.

Claimant returned to work for other employers but sought additional medical treatment from Dr. Jones in January 2003. As a result of claimant's continued complaints of pain, Dr. Jones performed a second arthroscopic procedure in February 2003. In June 2003 Dr. Jones released claimant to return to work and claimant returned to work for another employer until he was laid off in January 2004. Also in January 2004 claimant returned to Dr. Jones for additional medical treatment. Dr. Jones has recommended that claimant see Dr. Tucker for an evaluation of a medial transplantation.

Respondent initially accepted this injury as compensable and paid some compensation benefits including the March 2002 surgery by Dr. Jones. However, respondent subsequently ceased paying benefits and has not paid for Dr. Jones' second

surgery in February 2003. As a result claimant has filed this claim contending that he is entitled to additional medical treatment as a result of his compensable injury. This includes surgery performed by Dr. Jones in February 2003 and treatment and medication for depression. Claimant also seeks payment of additional temporary total disability benefits and additional permanent partial disability benefits.

### ADJUDICATION

The initial issue for consideration involves claimant's contention that he is entitled to additional medical treatment for his compensable left knee injury.

A claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291). In this particular case, I find that claimant has met his burden of proof.

While claimant did have a preexisting injury to his left knee for which he underwent surgery in 1991, claimant testified that he completely recovered from that injury and did not have any additional problems until after his compensable injury in July 2001. With respect to this issue, I also note that no evidence was offered indicating that claimant sought any medical treatment for his left knee after 1991 until after his compensable injury in July 2001.

I also believe it is important to note that claimant testified that he continued to have problems with his left knee even after the first surgery was performed by Dr. Jones in March 2002.

Furthermore, I also note that Dr. Jones in his report of June 19, 2003 states that the claimant's July 2001 injury exacerbated and disrupted the claimant's prior anterior cruciate ligament reconstruction from 1991. Therefore, it was his opinion that claimant's most recent injury served to aggravate his prior preexisting condition.

Accordingly, based upon the lack of evidence indicating that claimant had additional problems with his left knee subsequent to 1991, the testimony of the claimant that he did not have any additional problems subsequent to 1991, and the opinion of Dr. Jones, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as a result of his compensable left knee injury. This includes the surgery which was performed by Dr. Jones in February 2003. Specifically, I find that that surgical procedure was the direct result of an aggravation of claimant's pre-existing condition.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment in the form of an evaluation by Dr. Tucker.

Following claimant's second surgical procedure by Dr. Jones in March 2003 claimant continued to seek medical treatment from Dr. Jones for his knee problems. In a report dated September 5, 2003, Dr. Jones noted these continued problems and stated that meniscal transplantation might be an option that claimant might have to pursue at some point in the future. However, at that time Dr. Jones stated that he believed that this was many years away and that claimant would have to learn to live with his knee condition. At the time of claimant's next visit with Dr. Jones on December 3, 2003, Dr. Jones again noted that claimant might have to pursue an additional surgical procedure. Dr. Jones stated in his note that he would attempt to determine whether a physician at the University of Arkansas Medical Center in Little Rock was experienced in that type of evaluation and consultation.

Apparently after that visit with Dr. Jones the claimant on his own found the name of Dr. James Tucker in Little Rock. Claimant apparently informed Dr. Jones of Dr. Tucker and as a result, Dr. Tucker in his medical report of January 23, 2004 indicates that Dr. Tucker performs meniscal transplantations. Dr. Jones goes on to note that he does not

have any expertise in this type of procedure and therefore would not be willing to perform it on the claimant for the first time. Dr. Jones went on to state that he believed an evaluation was medically necessary and related to claimant's work-related injury. As a result, Dr. Jones recommended that claimant be evaluated by Dr. Tucker.

While respondent has characterized this referral as one made at the claimant's request, I disagree. While claimant did give the name of Dr. Tucker to Dr. Jones, he did so only after Dr. Jones had already indicated that claimant might need an additional evaluation and procedure. Thus, this was not a situation wherein claimant simply went to Dr. Jones and requested a referral to another physician. Instead, this referral was precipitated by Dr. Jones' initial indication that further evaluation would be necessary once a physician was found. Once Dr. Jones learned of Dr. Tucker's expertise, he referred claimant to him for evaluation which he opined was medically necessary for treatment of claimant's compensable injury.

Based upon the foregoing, I find that claimant has met his burden of proving by a preponderance of the evidence that an evaluation from Dr. Tucker is reasonable and necessary and causally related to his compensable injury. Claimant's authorized treating physician, Dr. Jones, has recommended that claimant undergo a referral to Dr. Tucker to determine whether any additional procedure is needed for treatment of claimant's compensable knee injury.

The next issue for consideration involves claimant's contention that he is entitled to medical treatment for depression relating to his compensable left knee injury. In his medical report of June 19, 2003, Dr. Jones recommended that claimant receive treatment for depression. In addition, Dr. Jones prescribed claimant medication for depression.

The law regarding a mental injury or illness is codified at A.C.A. §11-9-113. Subsection (a)(2) of that statute states that no mental injury or illness will be compensable unless it is diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis

of the condition meets the criteria established in the most current issue of the *Diagnostic & Statistical Manual of Mental Disorders*.

In this particular case, claimant testified that following Dr. Jones' recommendation he was evaluated by a Dr. Timms. However, it is unclear whether Dr. Timms is a licensed psychiatrist or psychologist. Furthermore, even if one were to assume that Dr. Timms was a psychiatrist or a psychologist, there is no medical report from Dr. Timms diagnosing claimant with depression. While Dr. Jones has diagnosed claimant with depression, Dr. Jones is not a licensed psychiatrist or psychologist. Furthermore, there is no evidence that Dr. Jones' diagnosis meets the criteria established in the most current issue of the *Diagnostic & Statistical Manual of Mental Disorders* for depression. Accordingly, for these reasons, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to medical treatment or prescription medication for depression.

The next issue involves claimant's request for temporary total disability benefits beginning March 28, 2002 and continuing through June 19, 2003, and again from January 24, 2004 through a date yet to be determined.

A claimant who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

Initially, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 28, 2002 and continuing through September 4, 2002.

The evidence indicates that surgery was performed on the claimant's left knee by Dr. Jones in March 2002. Claimant was off work for that period of time until his release by Dr. Jones on September 4, 2002. In a report of that date Dr. Jones stated that claimant had a permanent physical impairment rating in an amount equal to 17% to the lower

extremity. Dr. Jones also released the claimant to return to work with a 50-pound lifting restriction. According to claimant's testimony, after his employment with respondent he worked for three separate employers including Absco Metal Fabrications, Specialty Fabrications of Arkansas, and R & R Pipeline Construction. Claimant testified that he worked as a welder on all of these jobs. I note that it is unclear from a review of the evidence presented the exact dates claimant worked for these employers. Nevertheless, claimant has the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits.

In this particular case, I find that claimant is entitled to temporary total disability benefits beginning March 28, 2002, the time of his surgery, and continuing through September 4, 2002, the date claimant was assigned a permanent physical impairment rating and released to return to work by Dr. Jones. According to claimant's testimony the respondent paid some temporary total disability benefits during this period of time. Respondent is obviously entitled to a credit for any temporary total disability benefits paid. In addition, claimant also testified that he filed for and received unemployment compensation benefits for various periods of time. To the extent that claimant received any unemployment compensation benefits from March 28, 2002 through September 4, 2002, respondent is also entitled to a credit for those benefits as well.

As previously noted, claimant testified that he continued to suffer from additional problems with his left knee following his release by Dr. Jones in September 2002. This resulted in claimant seeking additional medical treatment from Dr. Jones on January 28, 2003. At the time of that evaluation Dr. Jones recommended another arthroscopic procedure which was eventually performed in February 2003. It is this surgery which I have previously found to be reasonable, necessary, and causally related to claimant's July 2001 compensable injury. As a result of this additional treatment and surgery the claimant was again taken off work by Dr. Jones and re-entered another healing period. I find that

this condition existed from January 28, 2003 and continued until June 19, 2003. In a medical report dated June 19, 2003, Dr. Jones stated that claimant had sufficient healing for him to declare him as having reached maximum medical improvement. As a result, Dr. Jones assigned the claimant a permanent physical impairment rating and released the claimant to return to heavy work. Although claimant did not immediately return to work for another employer, according to Dr. Jones' medical report the claimant had reached maximum medical improvement as of June 19, 2003; therefore, he would not be entitled to temporary total disability benefits subsequent to that date.

Accordingly, I find that claimant is entitled to additional temporary total disability benefits beginning January 28, 2003, and continuing through June 19, 2003. Again, respondent is entitled to a credit for any temporary total disability benefits or unemployment benefits paid during this period.

Finally, claimant also contends that he is entitled to additional temporary total disability benefits beginning January 24, 2004 and continuing through a date yet to be determined. Claimant contends that he re-entered another healing period as of that date and that it continues indefinitely due to the respondent's failure to authorize medical treatment from Dr. Tucker. Although Dr. Jones has recommended that claimant undergo an evaluation by Dr. Tucker, I do not find that claimant is entitled to additional temporary total disability benefits subsequent to January 24, 2004. As previously noted, an employee who suffers a scheduled injury is entitled to receive temporary total disability benefits during their healing period or until they return to work, whichever occurs first. In this particular case, claimant's healing period had ended on June 19, 2003 and he returned to work for R & R Pipeline Construction as a welder until he was laid off by that company in January 2004. Although Dr. Jones had indicated that claimant should modify his activities, there is no indication that Dr. Jones was of the opinion that claimant could no longer work while awaiting the evaluation by Dr. Tucker. Furthermore, claimant was no

longer working for R & R Pipeline Construction because of his compensable knee injury, but rather because he was laid off by that company. Given these facts, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits subsequent to January 24, 2004.

The final issue for consideration involves claimant's contention that he is entitled to permanent partial disability benefits in an amount equal to 25% to the lower extremity. Following the first surgical procedure Dr. Jones in a report dated September 4, 2002 opined that claimant had a 17% impairment rating to the lower extremity based upon the AMA Guides. In a letter dated October 17, 2002, Dr. Jones stated that of that 17%, 5% would be attributable to the claimant's 1991 injury. Thus, 12% of the impairment rating was attributable to the claimant's compensable injury and respondent paid claimant benefits commensurate with that rating.

Following the second surgical procedure performed by Dr. Jones in February 2003, he opined in his report of June 19, 2003 that his previous impairment of 17% had been increased because of claimant's additional left knee problems. As a result, Dr. Jones opined that the claimant had a 25% lower extremity impairment. Although it might be argued that Dr. Jones intended to add 25% to the pre-existing 17% impairment rating, I find no merit to that argument. Instead, I interpret Dr. Jones' medical report as assigning the claimant an overall impairment rating to the lower extremity of 25%. Of that 25%, 5% pre-existed claimant's compensable injury and respondents have previously paid 12%. Therefore, I find that respondent is liable for payment of additional permanent partial disability benefits in an amount equal to 8% to the lower extremity.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the

claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable left knee injury. This includes surgery performed by Dr. Jones in February 2003 as well as an evaluation by Dr. Tucker. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for medical treatment or medication related to claimant's depression. Claimant is entitled to temporary total disability benefits from March 28, 2002 through September 4, 2002, and again from January 28, 2003 through June 19, 2003. Respondent is entitled to a credit for any temporary total disability benefits paid or unemployment compensation benefits received by claimant during these periods of time. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits subsequent to January 24, 2004. Finally, claimant is entitled to additional permanent partial disability benefits in an amount equal to 8% to the lower extremity as a result of his compensable injury. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award

shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE