

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F201084**

<b>JACK HARRISON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>HAI SERVICES, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>VALLEY FORGE INS. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED AUGUST 19, 2004**

Hearing before Administrative Law Judge J. Mark White on July 15, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On July 15, 2004, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on May 24, 2004, and a Prehearing Order was entered that same day. A copy of the May 24, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including January 7, 2002; that on January 7, 2002, the claimant sustained a compensable injury to his left knee; that respondents accepted the January 7, 2002, injury as compensable and paid benefits; that the claimant earned sufficient wages to be entitled to a compensation rate of \$280 for total disability and \$210 for permanent partial disability; that as of February 10, 2004, the claimant's permanent impairment attributable to the compensable injury was 9% to the left lower extremity, as assigned by Dr. Charles Pearce; that the respondents have paid permanent benefits equivalent to a 10% impairment rating to the leg; and that after the claimant initially reached the end of his first healing period, the exact date of which is in dispute, the claimant entered a new healing period and the respondents voluntarily paid additional temporary total disability benefits from July 18, 2003, through February 12, 2004.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional temporary total disability benefits; whether additional medical treatment, specifically the total knee replacement recommended by Dr. Jeffrey DeHaan, is reasonably necessary in connection with the compensable injury; and controversion and attorney's fees.

The claimant contends that he is entitled to additional temporary total disability benefits from September 4, 2002 through October 30, 2002, from May 29,

2003, through July 17, 2003, and from February 12, 2004, through a date yet to be determined; that Dr. Barry Green prematurely assessed the claimant at maximum medical improvement as of September 4, 2002, and that Dr. Jeffrey DeHaan did not release the claimant until October 30, 2002; that the additional medical treatment being recommended by Dr. Jeffrey DeHaan, specifically the total knee replacement, is reasonable, necessary and related to the compensable injury; and that he should have his attorney's fees paid as permitted by law, and specifically the respondents should be ordered to pay attorney's fees for temporary total disability benefits which were accepted and paid by the respondents from July 18, 2003, through February 12, 2004.

Respondents contend that they have paid \$3,864 in permanent physical impairment benefits, the equivalent of a 10% rating; that the claimant reached maximum medical improvement no later than December 13, 2003; that the claimant is not entitled to an award of medical benefits for knee replacement surgery; and that they have overpaid the claimant's temporary total disability benefits and are entitled to a credit for benefits paid from July 22, 2002, until November 3, 2002.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he has not returned to work.
4. The claimant has proven by a preponderance of the evidence that he was still within his healing period from July 22, 2002, through October 30, 2002, and from May 29, 2003, through July 17, 2003.
5. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from July 22, 2002, through October 30, 2002, and from May 29, 2003, through July 17, 2003.
6. The claimant has proven by a preponderance of the evidence that he remains

within his healing period from February 12, 2004, through a date yet to be determined.

7. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 12, 2004, through a date yet to be determined.
8. The claimant has proven by a preponderance of the evidence that his compensable injury combined with or aggravated his pre-existing knee condition to bring about the need for a total knee replacement.
9. The claimant has proven by a preponderance of the evidence that additional medical treatment, specifically a total knee replacement, is reasonably necessary in connection with the compensable injury.
10. The claimant has proven by a preponderance of the evidence that the respondents controverted his entitlement to the temporary total disability benefits voluntarily paid from July 18, 2003, through February 12, 2004, and that he is entitled to attorney's fees on those benefits.
11. The respondents have controverted this claim in its entirety.

## DISCUSSION

### I. History

The claimant sustained a compensable injury to his left knee on January 7, 2002, when he bent over to pick up a piece of conduit and his knee “popped.” The respondents accepted the injury as compensable and paid benefits. After initial treatment in the ER, the claimant saw Dr. Frank Hamlin on February 11. Dr. Hamlin noted a “large effusion” of the knee, and an MRI performed February 14 revealed “a moderate sized joint effusion.” Dr. Hamlin saw him again on February 18; he noted “no major pathology” and diagnosed “Patellofemoral disease with effusion, left knee.” He aspirated the knee and then prescribed physical therapy.

On May 14, Dr. Hamlin performed arthroscopic surgery. His postoperative diagnosis was:

1. Grade I to II chondromalacia of the paramedial facet of the patella, the median ridge of the patella.
2. Grade III changes of the femoral notch and groove.
3. Grade II and III changes of a portion of the articular surface of the medial femoral condyle.

After the claimant completed additional physical therapy and work hardening, Dr. Hamlin released him on July 22 and opined him to be at maximum medical improvement. The claimant testified, however, that at the time Dr. Hamlin

released him, he was still having significant pain in his knee, as well as frequent “giving-way” episodes. The claimant asked the Commission for a change of physician to Dr. Jeffrey DeHaan, and the Commission granted the change on August 23. The record does not reflect when the claimant filed his request with the Commission.

Before the claimant could see Dr. DeHaan, though, the respondents sent him to Dr. Barry Green on September 4 for the assignment of an impairment rating. Dr. Green diagnosed “subluxation of the left patella and osteoarthritis of the left knee,” agreed the claimant had reached maximum medical improvement, and assigned an impairment rating of 7% to the left lower extremity.

The claimant saw Dr. DeHaan on September 18. Dr. DeHaan opined that the claimant had in fact not reached maximum medical improvement and that the assignment of an impairment rating was “premature.” He opined that a total knee replacement was “out because he can’t just have a total knee with a subluxing patella.” Instead, he recommended the claimant wear a different kind of knee brace, known as a Bledsoe brace, to give him “a little bit of medial lateral stability.” The claimant returned on October 30; Dr. DeHaan noted that the brace had not kept the claimant’s knee from giving way, but he concluded he had nothing else to offer the claimant by way of treatment. The respondents finally terminated the claimant’s

temporary total disability benefits as of November 3, and recharacterized the payments made from September 4 through November 6 as permanent partial disability benefits in payment of the impairment rating assigned by Dr. Green.

The claimant testified that on the morning of November 30, he woke up with severe pain and swelling in his knee and foot. He went to the emergency room that day, and on December 4 he returned to Dr. DeHaan. Dr. DeHaan again told him he had nothing to offer and instructed the claimant to wear his knee brace indefinitely. The claimant testified that he unsuccessfully looked for work within his restrictions over the next several months. At one point, he explored returning to school; he was unable to return to work at his old job, for the respondent-employer had filed for bankruptcy and gone out of business. The claimant received unemployment benefits from January 4, 2003, through May 27, 2003.

On April 21, 2003, the claimant returned to Dr. DeHaan because of his continuing left knee instability. Dr. DeHaan suggested a referral to a sports medicine doctor in Dallas or Little Rock, but the respondents denied the proposed referral. On May 28, Dr. DeHaan gave the claimant a work excuse for the next eight weeks, and on June 2 he put a cast on the claimant's leg to "get a little more stability." The cast was removed on June 30 and Dr. DeHaan prescribed more physical therapy. Dr. DeHaan authored a letter after that visit, in which he said:

[The claimant] has severe knee problems with patellar instability and falling episodes because of the knee buckling and giving-way on him. At this point I do not think he can return to the work force in any capacity. I think he does himself and possibly may put other people at undue risk for injury.

At this point I'd like to try rehab, but consideration of a VMO tightening is also going to be considered on his next visit if he's not doing well.

The physical therapy was of little benefit, and on August 13 Dr. DeHaan decided to seek a second opinion from Dr. Lowry Barnes. Dr. Barnes asked Dr. Charles Pearce to evaluate the claimant, and Dr. Pearce recommended an arthroscopic medial reefing. Dr. DeHaan agreed with the recommendation, writing on October 22: "They felt an arthroscopic medial reefing of the VMO would be of benefit to him and felt that he did have significant laxity in that knee and this is what I was thinking all along." Dr. Pearce performed the surgery on December 12, 2003. Afterwards, Dr. Pearce noted that the claimant was found "to have fairly significant chondrosis of the femoral trochlea as well as a chondral lesion of the medial femoral condyle, which was full thickness. This was treated with debridement and microfracture."

On February 10, 2004, Dr. Pearce released the claimant from care with no work restrictions and assigned a permanent impairment rating of 9% to the lower extremity. Dr. DeHaan saw the claimant the next day, however, and restricted him

to sedentary duty. The respondents terminated the claimant's temporary total disability benefits as of February 11.

Reviewing the photographs from the arthroscopy performed by Dr. Pearce, Dr. DeHaan commented that the claimant "has got much more arthritic changes to the medial femoral condyle and the intercondylar notch where the patella has probably damaged it with his prior dislocations." Because of his concern about the arthritic changes, Dr. DeHaan ordered a bone scan. Reviewing the results of the bone scan on March 3, Dr. DeHaan noted, "His bone scan lit up like a hot light on the left knee, both medial compartment, patellofemoral compartment and some in the lateral compartment. That, coupled with his intraoperative arthroscopy photographs, lead me to believe that this gentleman has post traumatic arthritic changes to his knee." Dr. DeHaan continued, "I think that there are only two options that he has: continuing with his pain medication and living with it so to speak, or surgically having a knee replacement."

On March 3 Dr. DeHaan removed the claimant from work entirely, and on March 22 he opined that the claimant had not yet reached MMI, given his continuing difficulties with arthritis in his knee. On March 31, Dr. DeHaan decided to proceed with the total knee replacement, but the respondents denied the proposed procedure. On June 15, Dr. Pearce wrote the claimant's attorney that he

would defer to Dr. DeHaan's opinion as to "the need for total knee replacement and his off-work status."

At the hearing, the claimant testified that he continues to have a constant "burning" pain in his knee, which he described as like having "a hot skillet or an iron sitting on my knee." He testified that his knee visibly swells if he is on it "for any length of time" and that he can reduce the swelling only by sitting or lying down and propping his leg up. He continues to take narcotic medication as prescribed by Dr. DeHaan.

## **II. Adjudication**

### **A. Temporary Total Disability Benefits**

An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work, whichever occurs first. ARK. CODE ANN. § 11-9-521 (a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period continues until the underlying condition has become stable, the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve his condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

Three different periods of disability are in question. The claimant contends that he is entitled to additional temporary total disability benefits from September 4, 2002, through October 30, 2002, since the respondents retroactively recharacterized the TTD payments made in that time as permanent partial disability benefits. The claimant also contends he is entitled to temporary total disability benefits from May 29, 2003, through July 17, 2003, and from February 12, 2004, through a date yet to be determined.

The claimant testified that he did not return to work after his injury and that his employer had gone out of business. There is no evidence in the record to contradict his testimony or otherwise show that he returned to work. I find that the claimant has proven by a preponderance of the evidence that he has not returned to work.

Therefore, the claimant's entitlement to temporary total disability benefits hinges on whether he was within his healing period during these three periods of time. The first period is from July 22, 2002, through October 30, 2002. The respondents paid benefits during this period, characterized as both temporary total and permanent partial disability benefits, but they now contend they are entitled to a credit for any payments made over and above the 9% rating, for they contend the claimant was not within his healing period. Indeed, Dr. Hamlin admittedly released

the claimant and declared him to be at MMI as of July 22, and Dr. Green later agreed that the claimant was at MMI.

The claimant's visit with Dr. Green was for the sole purpose of assigning an impairment rating, and there is no indication that Dr. Green did anything more than a cursory examination. This visit was the only time Dr. Green saw the claimant. Therefore, I find that Dr. Green's opinion is entitled to little weight in comparison to that of Dr. Hamlin and Dr. DeHaan.

Dr. Hamlin's MMI opinion was specifically contradicted by Dr. DeHaan. The claimant sought a change of physician to Dr. DeHaan because he disputed Dr. Hamlin's opinion that he had reached MMI. At the time, Dr. Hamlin's opinion might have appeared reasonable. But in hindsight, it is clear that the claimant had not reached the end of his healing period. He continued to have the same problems with his knee; Dr. DeHaan, Dr. Barnes and Dr. Pearce all eventually agreed that additional treatment was necessary; and there was no significant intervening cause or reason to think that a new healing period later arose. It is true that the treatment provided by Dr. DeHaan in 2002 and the first half of 2003 was relatively minor; but Dr. DeHaan's notes make clear that he hoped that time and the use of a different brace would resolve the claimant's injury. When these measures failed, he recommended referral to a sports medicine doctor, which referral the respondents

denied. Dr. DeHaan continued conservative treatment, and when the claimant was finally allowed to see Dr. Barnes and then Dr. Pearce, they agreed that more treatment was necessary.

In short, in hindsight it is clear that the claimant never left his healing period. Dr. Hamlin's MMI opinion is outweighed by the successive opinions of Drs. DeHaan, Barnes and Pearce that additional treatment was indicated. Dr. DeHaan had decided by April, 2003, that referral to another doctor was warranted, but the respondents refused to approve a referral until October. Their delay in restarting indemnity benefits and approving the referral does not change the fact that Dr. DeHaan had recommended a referral – e.g., additional treatment – in April, 2003.

In regards to when the claimant reached the end of his healing period in 2002, I give the opinion of Dr. DeHaan more weight than that of Dr. Hamlin, in light of the claimant's subsequent treatment and progress. I find that the claimant has proven by a preponderance of the evidence that he was within his healing period from July 22, 2002, through October 30, 2002. I therefore conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from July 22, 2002, through October 30, 2002.

Given the uncontradicted opinion of Dr. DeHaan that the claimant required additional treatment as early as April, 2003, and given the later corroborating

opinions of Drs. Barnes and Pearce that additional treatment was indicated, I find that the claimant has proven by a preponderance of the evidence that he was still within his healing period from May 29, 2003, through July 17, 2003. I therefore conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from May 29, 2003, through July 17, 2003.

The final period of time for which the claimant seeks benefits is from February 12, 2004, through a date yet to be determined. The respondents terminated indemnity benefits as of February 12, 2004, because Dr. Pearce released the claimant from care on February 10. However, Dr. DeHaan subsequently recommended a total knee replacement. Whether the claimant remains in his healing period depends on whether or not the total knee replacement is reasonably necessary. As discussed below, I find that it is; therefore, I must find that the claimant has proven by a preponderance of the evidence that he remains within his healing period from February 12, 2004, through a date yet to be determined. Therefore, the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 12, 2004, through a date yet to be determined.

## **B. Additional Medical Treatment**

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

Dr. DeHaan has recommended that the claimant undergo a total knee replacement. While Dr. Pearce had earlier declared the claimant to be at maximum medical improvement, he wrote on June 15, 2004, that he would defer to Dr. DeHaan's opinion as to the need for a total knee replacement. I also note that Dr. Pearce's MMI opinion was given before the claimant's bone scan, and it was the bone scan results which led Dr. DeHaan to finally recommend a total knee replacement. There is no medical opinion in the record contradicting Dr. DeHaan's recommendation.

It is true that Dr. DeHaan attributes the need for the total knee replacement to the claimant's arthritis, a condition that is often degenerative in nature. But throughout his notes, Dr. DeHaan repeatedly refers to the claimant's condition as "posttraumatic arthritis," tying it to the claimant's compensable injury. In his note of January 7, 2004, Dr. DeHaan suggests that the arthritic changes were the result

of the prior dislocations of the patella, which themselves were without question caused by the compensable injury. It should be remembered that arthritis is nothing more than “inflammation, degeneration, or metabolic derangement” of the joints. *Dorland’s Illustrated Medical Dictionary*, 26<sup>th</sup> Edition (1981). Dr. DeHaan’s implicit opinion – that the patella dislocations caused by the compensable injury resulted in damage to the joints of the knee – is plausible, and there is no medical opinion or evidence to the contrary. Indeed, the medical evidence confirms this opinion, particularly a comparison of the reports of the claimant’s two arthroscopic surgeries. When Dr. Hamlin performed surgery on May 14, 2002, he noted Grade II and III arthritic changes in the medial femoral condyle. But when Dr. Pearce performed surgery less than two years later, he noted Grade IV arthritic changes in the medial femoral condyle. This relatively rapid worsening of the arthritic condition of the claimant’s knee plausibly supports Dr. DeHaan’s description of the claimant’s arthritis as “posttraumatic.”

I also note that the claimant had preexisting left knee problems prior to his compensable injury. This matters not, for when an accidental injury aggravates a prior one, the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident. *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999). Even if it is demonstrated that a

pre-existing condition is also a causal factor, the claimant has met his burden of proof for additional medical treatment so long as he proves that the work injury combined with or aggravated the pre-existing condition to bring about the need for the treatment. *General Electric Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998). Given the medical evidence, the claimant's uncontradicted testimony as to when and how his symptoms began, and the seven-year gap between his prior knee problems and his compensable injury, I find that the claimant has proven by a preponderance of the evidence that his compensable injury combined with or aggravated his pre-existing knee condition to bring about the need for a total knee replacement.

Therefore, given Dr. DeHaan's uncontradicted recommendation, I find that the claimant has proven by a preponderance of the evidence that additional medical treatment, specifically a total knee replacement, is reasonably necessary in connection with the compensable injury.

### **C. Controversion**

Attorney's fees may be awarded "on the amount of compensation for indemnity benefits controverted and awarded." ARK. CODE ANN. § 11-9-715(a)(2)(B)(ii). The object of the attorney's fee statute is to place the burden and

expense of litigation upon the party which made it necessary. *Cleek v. Great S. Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). Whether or not a claim has been controverted is a question of fact. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998).

The evidence herein is similar to that of *Wal-Mart Stores v. Brown*, 73 Ark. App. 174, 40 S.W.3d 835 (2001). There, the Court of Appeals found that an award of attorney's fees was appropriate where the respondents initially controverted indemnity benefits, forcing the claimant to retain counsel in order to present and protect her claim for benefits, even though respondents later voluntarily agreed to pay the controverted benefits one month before a full hearing was to have been held. *Id.* I cannot find that the present matter is substantially different. The claimant testified that a hearing had been scheduled on his entitlement to temporary total disability benefits, but the day before the hearing the respondents voluntarily agreed to resume payment of the benefits. The benefits were reinstated as of July 18, 2003, and the hearing was cancelled.

Given the Full Commission's finding as affirmed by the Court of Appeals in *Wal-Mart Stores v. Brown, supra*, and the claimant's uncontradicted testimony, I find that the claimant has proven by a preponderance of the evidence that the respondents controverted his entitlement to the temporary total disability benefits

voluntarily paid from July 18, 2003, through February 12, 2004, and that he is entitled to attorney's fees on those benefits.

### **AWARD**

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment; and that he was entitled to temporary total disability benefits from July 22, 2002, through October 30, 2002, from May 29, 2003, through July 17, 2003, and from February 12, 2004, through a date yet to be determined. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Gregory R. Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

---

**HON. J. MARK WHITE**  
Administrative Law Judge