

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F110103

JUDITH L. MANNS, EMPLOYEE	CLAIMANT
EDWARDS GROCERY, EMPLOYER	RESPONDENT
UNION STANDARD INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED AUGUST 20, 2004

The hearing was conducted on May 19, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY III, in Mountain Home, Baxter County, Arkansas.

Claimant was represented by Frederick S. Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents were represented by William C. Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 19, 2004, the above-captioned claim came on for a hearing at Mountain Home, Arkansas. A prehearing conference was held on January 20, 2004, and a Prehearing Order was filed on January 26, 2004. A copy of the Prehearing Order will be made a part of the record at the time of the filing of this Opinion.

The parties agreed to three stipulations; the first two stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing, while the third stipulation was agreed to at the hearing. The stipulations that follow are hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant

times.

2. On August 17, 2001, Claimant sustained a compensable injury to her left knee.

3. Claimant's right knee injury has been controverted by Respondents.

At the May 19, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. As modified at the start of the hearing, and as agreed upon by the parties, the issues to be litigated and resolved are limited to the following:

1. Whether Claimant's right knee injury is a compensable consequence of her earlier compensable left knee injury.

2. Whether Claimant is entitled to reasonably necessary medical benefits in connection with her right knee injury.

3. Whether Claimant is entitled to temporary total disability benefits from October 16, 2003 to a date yet to be determined.

4. Whether Claimant is entitled to have Respondents pay certain medical bills related to her compensable left knee injury.

5. Whether Claimant is entitled to an attorney's fee.

The Claimant contends that her right knee injury is a compensable consequence of her admittedly compensable left knee injury sustained August 17, 2001. As such, Claimant contends that she is entitled to medical benefits and temporary total disability benefits in connection with her right knee injury. Claimant seeks to have Respondents pay certain bills related to her admittedly compensable left knee injury. Claimant also seeks an attorney's fee, in connection with her claim for benefits related to her right knee injury and in connection with an alleged underpayment

of temporary total disability benefits for her left knee injury.

Respondents argue that there is no causal connection between Claimant's compensable left knee injury and her subsequent right knee injury. Thus, Respondents contend that Claimant is not entitled to medical benefits and temporary total disability benefits for her right knee. Respondents deny that Claimant is entitled to an attorney's fee based upon underpayment of temporary total disability benefits related to Claimant's compensable left knee injury.

DISCUSSION

A. RIGHT KNEE INJURY AS A COMPENSABLE CONSEQUENCE

Claimant sustained a compensable injury to her left knee on August 17, 2001, when she tripped over a box of bread products in Respondent/employer's freezer. Dr. Ken Collins initially treated Claimant, but one week after her injury he referred her to Dr. Don Vowell. After other treatment did not relieve Claimant's pain, on October 15, 2001, Dr. Vowell recommended that Claimant undergo an arthroscopy on her left knee. Claimant consented, and on November 6, 2001, she underwent chondroplasty of medial femoral condyle of her left knee.

Claimant did not experience long-term relief from Dr. Vowell's treatment, so she obtained a change of physician order to consult with Dr. Chris Arnold. A clinic note dated October 15, 2002, indicates that Dr. Arnold and Claimant discussed her treatment options, including a total knee arthroplasty. Claimant elected to undergo this procedure, and on February 12, 2003, she underwent a left total knee arthroplasty. Dr. Arnold's post-operative diagnosis was "Left knee degenerative joint disease."

Dr. Arnold's treatment of Claimant's left knee provided her with relief. A clinic note dated March 5, 2003, notes that Claimant "is doing well and has no complaints." A clinic note dated April 15, 2003, states that "[o]verall she is doing well and has no signs of an infection.... She is happy." Claimant testified at the hearing that she believed progress was being made and things were going fine.

From August 17, 2001, the date of Claimant's compensable left knee injury, through April 15, 2003, the date of Dr. Arnold's clinic note quoted above, Claimant did not complain of pain in her right knee. The medical records from this time period are silent concerning Claimant's right knee. Claimant confirmed that she expressly told Dr. Arnold and Dr. James Mulhollan that she had never had any right knee problems. She also confirmed that from August 17, 2001, until either June or July of 2003, she did not experience any problems with her right knee. Indeed, she testified that as she recovered from the February, 2003 procedure, she was comfortable walking with both knees and that she was walking probably half a mile a day.

At this point Claimant developed a problem with her right knee.

In July, I think it was July, I was walking across my floor at the house, my right knee buckles and I almost go down to the floor, terrible, terrible pain. I didn't know what happened and I started gently trying to put weight on it, made it to the living room and it did it again. Twice. Within a 30-minute period of time my right knee buckled.

Claimant immediately contacted Dr. Arnold for a consultation.

Dr. Arnold's clinic note dated June 10, 2003, states that "[a]s she has been compensating for her left knee, [Claimant] has developed some right knee pain." Upon examination, Dr. Arnold found effusion in Claimant's right knee; he also noted tenderness, extension with pain, and flexion with pain. He recorded an impression of

“[r]ight knee pain most likely secondary to a meniscus tear.” The clinic note states:

Indirectly I think this is directly related to her work-related injury. She had a work injury on the left knee where she was quite debilitated and over used the right knee for approximately one year. After recent surgery, she has been obviously over compensating and was using the right knee more and now this has caused more symptomatology. I think she has an underlying meniscus tear.

Dr. Arnold’s clinic notes for July 15, 2003, August 5, 2003, and October 16, 2003, reflect continuing and increasing problems with Claimant’s right knee. On July 15, 2003, Dr. Arnold stated that Claimant “had no right knee pain until the development of treatment of her left knee. This is felt secondary to compensating for her painful left knee.” He noted effusion in Claimant’s right knee; he again noted effusion on August 5, 2003, and October 16, 2003.

In a clinic note dated December 18, 2003, Dr. Arnold further discussed his observations concerning Claimant’s right knee. Upon examination he again found effusion and tenderness. He recorded Claimant’s worry that “she is going to fall and break something.” Dr. Arnold wrote:

I think was this [sic] indirectly related to her work injury where she injured the left knee and was recovering from the left knee surgery when she developed symptoms on the right. She had no pain in the right knee prior to this.

On December 29, 2003, Dr. Arnold signed the following note concerning Claimant:

This lady is patient of mine. It is my belief, that within a reasonable degree of medical certainty, that her altered stance and walking as a result of the injury to her left knee has caused medical problems with her right knee and arthroscopic surgery for the right knee is needed at this time to correct her problems.

Dr. Mulhollan evaluated Claimant in his office on May 28, 2002,

apparently at the request of Respondents. On July 24, 2003, shortly after Claimant began experiencing a problem with her right knee, Dr. Mulhollan responded in writing to a series of questions; unfortunately, these questions are not in the record. Referencing Claimant's "job injury" Dr. Mulhollan wrote: "I do not think it can be stated with any certainty that the right knee problem is a direct result of that injury." He opined that Claimant should have an MRI. In response to another unprovided question, Dr. Mulhollan wrote:

I do not think anything about her right knee can be stated with any medical certainty, but there was no mention of the right knee for a very long interval after her job injury was sustained. I think it is more likely that the job injury increased the load on the knee and was a contributing factor but not the primary factor.

The parties deposed Dr. Arnold on March 23, 2004. He confirmed his diagnosis of Claimant's right knee problem as a "probable medial meniscus tear." He noted that the first time he saw Claimant for her right knee was on June 10, 2003, almost two years after her compensable left knee injury. When asked what would indicate that Claimant's right knee problem is related to her compensable left knee injury, Dr. Arnold stated: "Well, I think it would be the left knee surgery and recovering from that, also the left knee injury and recovering from that, compensating for that." He explained:

[T]his is somebody that was not putting - was not putting all of her weight - I would say was not putting an equal amount of weight on both knees for the past two years. She was putting more on the right knee and less on the left knee, and she was overcompensating for it. I think that was the - in my thought process, that was the culprit.

In Dr. Arnold's experience, "that happens fairly commonly."

Dr. Arnold was asked to comment on Dr. Mulhollan's July 24, 2003

statements. Dr. Arnold agreed with Dr. Mulhollan “that the job injury increased the load on the knee. I also agree that the surgery increased the load on that contralateral knee, and I think it was contributing factor.” Dr. Arnold confirmed that he could not identify the primary factor in Claimant’s right knee problem; that he does not know the extent of degenerative changes, if any, in Claimant’s right knee; and that he has no history of trauma between March and June, 2003.

Upon cross-examination by Claimant’s attorney, Dr. Arnold affirmed that his statement of December 29, 2003, is still his opinion. He agreed that it is natural and foreseeable that persons with a knee replacement will start having problems with their other knee. Based upon his prior experience, Dr. Arnold thought the problems Claimant had with her left knee were the major cause of the symptomatology in her right knee. While conceding to Respondents’ attorney that every patient is different, Dr. Arnold emphasized:

The thing that I’m saying with this is that she had - she was in a compromised position from the time of her injury to the time of her surgery until now, where she was favoring this knee, at which time this tear happened, and that’s why I think it’s a major contributing factor.

It should be noted that Claimant had previously reported a problem with her right knee. Upon cross-examination at the hearing, Claimant confirmed that her current right knee problem includes a cramping sensation. The medical records reflect that on March 4, 1994, Claimant reported to the emergency room of the North Arkansas Medical Center that she “had cramping sensation in [right] knee - painful all night and soreness today.” However, a radiology report of that same date notes that Claimant’s “right knee is intact showing no fracture, dislocation, arthritis or other abnormality.” The

radiology report records an impression of “[n]ormal right knee.”

Claimant argues that her right knee injury is a compensable consequence of her earlier compensable left knee injury. Claimant must prove two things: (1) that there is a causal connection between the compensable injury and the alleged consequential episode; and (2) that there are objective findings of a compensable consequence. See Lowe v. University of Arkansas at Pine Bluff, Full Workers’ Compensation Commission Opinion filed January 14, 2004 (E511115); Long v. L & J Mechanical, Full Workers’ Compensation Commission Opinion filed September 30, 2003 (F008439).

Regarding the causal connection requirement, the Commission has summarized the applicable test as follows:

When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury; the basic test is whether there is a causal connection between the two episodes.

Atchison v. John P. Marinoni Construction Co., Full Workers’ Compensation Commission Opinion filed September 19, 2001 (E616344). Claimant must prove this causal connection by a preponderance of the evidence. Bezzard v. American Greetings, Full Workers’ Compensation Commission Opinion filed January 22, 1999 (E616529). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant has sustained her burden of proving by a

preponderance of the evidence that a causal connection exists between her August 17, 2001 compensable left knee injury and her subsequent right knee problem. Dr. Arnold repeatedly identified a causal connection between the compensable left knee injury and subsequent right knee problem. His clinic notes, December 29, 2003 statement, and deposition testimony are consistent in this regard. As he testified at his deposition, Claimant “was in a compromised position from the time of her injury to the time of her surgery until now, where she was favoring this knee, at which time this tear happened, and that’s why I think it is a major contributing factor.”

Dr. Mulhollan’s July 24, 2003 letter supports Dr. Arnold’s opinion. Dr. Mulhollan’s letter must be used with care, because the record does not disclose the questions to which he responds. Nonetheless, while questioning whether anything concerning the right knee can be stated with medical certainty, he states: “I think it is more likely that the job injury increased the load on the knee and was a contributing factor, but not the primary factor.” Of course, the Commission opinions cited above do not require that the compensable injury be the “primary factor” in the consequential disability; the test is whether there is a causal connection. Dr. Mulhollan’s statement acknowledges some degree of causal connection.

Claimant’s failure to recall her March 4, 1994 right knee complaint should be noted. After observing Claimant testify, I find that she is a credible witness, and her failure to recall this one incident does not affect her credibility. Further, a radiology report of that same date provided an impression of “[n]ormal right knee.”

Claimant must also establish the compensability of her right knee injury by medical evidence supported by objective findings. As noted by the Commission in

Atchison, supra, “we interpret Ark. Code Ann. § 11-9-102(4)(D) as requiring objective medical findings to establish the full extent of a compensable injury (including alleged compensable consequences)...” “Objective findings” are those which cannot come under the voluntary control of the claimant. Ark. Code. Ann. § 11-9-102(16)(A)(i). A medical opinion addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B).

The record contains the required medical evidence supported by objective findings. Dr. Arnold’s December 29, 2003 written statement asserts his “belief, that within a reasonable degree of medical certainty, that [Claimant’s] altered stance and walking as a result of the injury to her left knee has caused medical problems with her right knee....” Dr. Arnold confirmed this opinion during his March 23, 2004 deposition. And, there are objective medical findings establishing an injury to Claimant’s right knee. Upon examination Dr. Arnold found effusion in Claimant’s right knee as evidenced by clinic notes dated June 10, 2003, July 15, 2003, August 5, 2003, October 16, 2003, and December 18, 2003. Effusion in the knee is an objective finding. Long, supra.

On the question of medical certainty, I find that Dr. Arnold’s opinion is entitled to greater weight than Dr. Mulhollan’s July 24, 2003 statements. Dr. Arnold is Claimant’s treating physician; Dr. Mulhollan is not. Further, the responses contained in Dr. Mulhollan’s July 24, 2003 letter are of uncertain value, since the record does not disclose the questions to which he was responding.

To summarize, Claimant has proven by a preponderance of the evidence that her right knee injury is a compensable consequence of her compensable left knee injury. Dr. Arnold’s testimony establishes a causal connection between the original

injury and the compensable consequence. Dr. Arnold offered his opinion within a reasonable degree of medical certainty. Repeated identification of effusion in Claimant's right knee constitutes the required objective findings in support of the medical evidence.

B. ENTITLEMENT TO MEDICAL BENEFITS

Claimant testified to continuing pain in her right knee. She described it as "24 hours a day seven days a week" ranging in intensity all the way to "excruciating[,] just unbearable." No medication has been able to alleviate her pain.

Dr. Arnold believes Claimant needs additional medical treatment. After a program of conservative treatment failed, Dr. Arnold wrote in his December 18, 2003 clinic note that "the next step is an arthroscopy or [an] MRI." His December 29, 2003 statement opines that "arthroscopic surgery for the right knee is needed at this time to correct her problems." On July 24, 2003, Dr. Mullhollan wrote: "I think the patient should have an MRI and then, based on the findings, consider having arthroscopy."

I find that Claimant has sustained her burden of proving by a preponderance of the evidence that she is entitled to medical benefits in connection with her right knee injury. An employer shall promptly provide for an injured employee such medical services or apparatus as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Dr. Arnold has already provided some treatment that he believed to be necessary regarding Claimant's right knee injury; both he and Dr. Mulhollan recommend an MRI, and foresee the possibility of additional procedures. Thus, Claimant has sustained her burden of proving that medical treatment is reasonably necessary in connection with her

compensable right knee injury.

C. ENTITLEMENT TO TEMPORARY TOTAL DISABILITY BENEFITS

Claimant testified that she is not working and that she cannot return to work due to her right knee injury. Dr. Arnold's October 16, 2003 clinic note states that Claimant "has reached her maximum medical improvement" for her compensable left knee injury. A "Certificate of Release for Return to Work or School" from Dr. Arnold's office, dated October 16, 2003, notes that Claimant is released to return to work with the limitation "sit down job only." Claimant testified that such work is not available.

As noted above, Dr. Arnold believes that Claimant needs additional medical treatment for her right knee. His December 18, 2003 clinic note reflects his belief that "the next step is an arthroscopy or [an] MRI"; Dr. Arnold told Claimant "to be as careful as she could possibly be until we get all of this ironed out." Dr. Arnold's December 29, 2003 statement opines that "arthroscopic surgery for the right knee is needed at this time to correct [Claimant's] problems." At his March 23, 2004 deposition, Dr. Arnold affirmed his expectation that Claimant's ability to work would improve if he were able to repair her right knee.

The applicable analysis is as follows:

Because the claimant's admittedly compensable knee injury is to a scheduled portion of the body, the claimant's claim for temporary benefits is subject to Ark. Code Ann. § 11-9-521(a), which provides that an employee is entitled to temporary benefits during the healing period or until the employee returns to work. ... The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended.

Atchison v. John P. Marinoni Construction Co., Full Workers' Compensation

Commission Opinion filed September 19, 2001 (E616344) (citations omitted).

I find that Claimant has sustained her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from October 16, 2003 to a date yet to be determined. She has not returned to work. She testified to continuing pain in her right knee; Dr. Arnold's testimony demonstrates that she is still within her healing period. Indeed, he believes that further treatment will improve her ability to work. Thus, Claimant is entitled to temporary total disability benefits.

An award of these benefits requires a determination of Claimant's average weekly wage; the parties were not able to stipulate to this. Claimant's counsel contends, and Claimant testified, that her average weekly wage is \$314.00. Respondent's counsel stated: "I calculated \$313.01 and I wouldn't have come up to Mountain Home if that was the only issue." Claimant's Exhibit Number 2 provides some information concerning her regular and overtime pay; I was unable to reach a figure of \$314.00 per week using this exhibit. Therefore, I find that Claimant's average weekly wage is \$313.00, the figure to which Respondents were prepared to stipulate.

D. OUTSTANDING LEFT KNEE MEDICAL BILLS

Without objection, Claimant introduced into evidence Claimant's Exhibit Number 3, purporting to be two unpaid medical statements. Claimant testified that, as of the date of the hearing, these statements remained unpaid. Both statements are payable to North Arkansas Regional Medical Center; one totals \$1,130.00, and the other totals \$33.00. Claimant testified that both bills relate to her compensable left

knee injury. I find that Claimant has proven by a preponderance of the evidence that Respondents should pay these two statements, as reasonably necessary medical treatment in connection with her compensable left knee injury. Respondents are liable for these statement under Ark. Code Ann. § 11-9-508(a).

E. ENTITLEMENT TO AN ATTORNEY'S FEE

1. Controverted Right Knee Injury

Claimant seeks an award of attorney's fees based upon her right knee injury. This Opinion finds that the right knee injury is a compensable consequence of Claimant's compensable left knee injury. Further, Respondents stipulated that they have controverted Claimant's right knee injury claim. Thus, under Ark. Code Ann. § 11-9-715(a)(2)(B)(ii), I find that Claimant should be, and hereby is, awarded an attorney's fee on the amount of compensation for indemnity benefits controverted and awarded in connection with Claimant's right knee injury.

2. Alleged Underpayment

Claimant also seeks an attorney's fee based upon an alleged underpayment of temporary total disability benefits in connection with her compensable left knee injury. Claimant testified that Respondents underpaid her benefits until she sought the assistance of counsel; then, after counsel became involved and notified Respondents of the underpayment, Claimant began to receive those benefits previously due but not paid. Respondents' counsel stated at the start of the hearing that "in going through those payment records, we indeed have apparently underpaid some of the benefits; we went back and caught those up."

Under Ark. Code Ann. § 11-9-715(a)(2)(B)(ii), I find that Claimant should be, and hereby is, awarded an attorney's fee on the difference between (a) temporary total disability benefits Claimant should have been paid based upon an average weekly wage of \$313.00 for her compensable left knee injury; and (b) temporary total disability benefits actually paid to Claimant prior to Respondents correcting the underpayment. As the Commission has noted, "assuming a position which requires the claimant to retain the services of an attorney to take the actions necessary to assure that the employee's rights are protected may constitute controversy." Icenhower v. DeQueen School District, Full Workers' Compensation Commission Opinion filed June 14, 2004 (F002583). Here, Claimant would have been underpaid benefits but for the services of her attorney; if Respondents had paid the proper amount of benefits, those services would not have been necessary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed at all relevant times.
3. On August 17, 2001, Claimant sustained a compensable injury to her left knee.
4. Claimant's right knee injury has been controverted by Respondents.
5. Claimant's right knee injury is a compensable consequence of her compensable left knee injury. Dr. Arnold's testimony establishes a causal connection

between the original left knee injury and the compensable consequence, the right knee injury. Repeated identification of effusion in Claimant's right knee constitutes the required objective findings in support of the medical evidence.

6. Claimant is entitled to reasonably necessary medical treatment in connection with her right knee injury. She continues to experience difficulty with this knee; Dr. Arnold testified to her need for medical treatment to repair this knee.

7. Claimant is entitled to temporary total disability benefits from October 16, 2003, to a date yet to be determined, due to the injury to her right knee, a scheduled portion of the body. These benefits shall be based on an average weekly wage of \$313.00. Claimant is not working; Dr. Arnold's testimony and the medical records demonstrate that she remains within her healing period.

_____8. Respondents are liable for two unpaid medical statements to North Arkansas Regional Medical Center; one is in the amount of \$1,130.00 and the other is in the amount of \$33.00. These statements stem from reasonably necessary medical treatment in connection with Claimant's compensable left knee injury.

9. Claimant's attorney is entitled to the statutorily prescribed attorney's fee allowed by Ark. Code Ann. § 11-9-715 on (a) indemnity benefits controverted and awarded in connection with Claimant's right knee injury; and (b) the difference in temporary total disability benefits due based upon an average weekly wage of \$313.00 for Claimant's left knee injury, and those temporary total disability benefits actually paid by Respondents prior to their correction of the underpayment. Respondents stipulated to controverting Claimant's right knee injury; they controverted the underpayment of temporary total disability payments for her left knee injury to the time they corrected the

underpayment.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

The Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee on any indemnity benefits due or to become due, as specified in the Findings of Fact and Conclusions of Law, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml