

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207379/F308089

BECKY MULDOON	CLAIMANT
TYSON POULTRY, INC.	RESPONDENT
TYNET CORPORATION INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 10, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by MELISSA LEE, Attorney, Springdale, Arkansas.

STATEMENT OF THE CASE

A hearing was held on December 11, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on October 7, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On January 11, 2002, and May 1, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her right knee on January 11, 2002, and May 1, 2003.

4. Medical expenses have been paid.

By agreement of the parties the issues to litigate are limited to the following:

1. Additional medical in the form of surgery for the claimant's right knee.

2. What is the appropriate compensation rate for this claimant?

3. Attorney's fees.

In regard to the foregoing issues the claimant contends that she is entitled to temporary total disability benefits regarding her May 1, 2003, injury from on or about May 9, 2003, until she returned to light duty work on or about August 7, 2003. The claimant contends that she is entitled to surgery by Dr. Martimbeau regarding her May 1, 2003, injury and that the respondents should be directed to pay for that surgery. The claimant contends that her attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that this claim has been accepted as compensable and all appropriate benefits paid. Respondents contend that the claimant was treated by Dr. Tackett and Dr. Russell Allison. Respondents contend that the claimant requested a change of physician to Dr. Claude Martimbeau which was approved on July 25, 2002. Respondents contend that the claimant reached maximum medical improvement on March 12, 2003. Respondents contend that the claimant was assessed a 7 percent impairment rating to the lower extremity on April 9, 2003, which is currently being paid biweekly. Respondents contend that \$4,657.50 has been paid in temporary total disability benefits

and \$1,884.00 has been paid in permanent partial disability benefits. Respondents contend that the claimant was examined by Dr. James Mulhollan on July 10, 2003, and determined not to be a surgical candidate for the partial knee replacement recommended by Dr. Martimbeau on June 24, 2003. Respondents reserve the right to amend the above contentions upon completion of pre-trial discovery.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1, a note from Dr. Martimbeau marked Claimant's Exhibit No. 2 and additional documentation marked Claimant's Exhibit No. 3. The respondents submitted pay sheets marked Respondents' Exhibit No. 1, two packets of documentary evidence marked Respondents Exhibit No. 2 and No. 3, the deposition of the claimant marked Respondents' Exhibit No. 4, medical information marked Respondents' Exhibit No. 5, additional documentary evidence marked Respondents' Exhibit No. 6 and the deposition of Dr. James Mulhollan marked Respondents' Exhibit No. 7. All these exhibits were admitted without objection.

The parties submitted letter briefs after the hearing and all of the evidence was admitted.

DISCUSSION

Randy Muldoon testified on behalf of his wife stating that they had been married twenty-four years. Mr. Muldoon testified that he recalled the claimant being injured in January 2002 and then again in May 2003. This witness agreed that the claimant had

surgery after her January 2002 injury and her condition improved to some extent after that surgery. Mr. Muldoon testified that after the May 2003 injury the claimant's condition got obviously worse and her activities lessened. Mr. Muldoon testified that the claimant was in a lot of pain and not able to do things that she was able to do up until the second injury. This witness testified that he has observed swelling as well as some discoloration at times in the claimant's right knee injury area. Mr. Muldoon testified that he had observed the claimant's knee just prior to coming into this hearing and he could see that the screws were poking out of the bone pointing to the right side of the knee. Mr. Muldoon testified that Dr. Martimbeau has shown them exactly where he put the template and screws in the claimant's right knee during the first operation and after the claimant's healing process that was not visible but now he can see the screws. Mr. Muldoon again testified that the discoloration and the visible screws are in the same location where his wife had her first surgery. Mr. Muldoon testified that as a result of the claimant's knee problems she cannot squat, bend or do any gardening and her activities are very limited. This witness agreed that the claimant had been off work for about one month prior to this hearing and that even with this time off work her condition continues to deteriorate. Mr. Muldoon testified that his wife has a noticeable limp more so when she is tired. This witness testified that following the surgery in 2002 the claimant had gotten back to the point where she was pretty active and was on almost back to normal.

On cross examination, Mr. Muldoon testified that after the October 2002 surgery, the claimant was able to work at her job for the respondent as a floor person. Mr. Muldoon stated that he recalls his wife using a large rubber band type thing to help exercise her knee as well as flexing her knee to get the muscles strengthened after the surgery. Mr. Muldoon testified that he has taken his wife deer hunting since May 2003 and from the pickup she would walk on flat ground to a stool.

The claimant testified that she was initially hurt in January 2002 when she slid on a grate and her right knee hit a stainless steel post with all of her weight. The claimant testified that after her surgery she was able to return to work and in May 2003 she was accidentally hit by another employee pulling a pallet which caused her to fall and in her fall she got her foot stuck under a trash bin causing her right knee to twist. The claimant testified that as a result of this second injury, she returned to Dr. Martimbeau and she has followed all of his recommendations at to conservative treatment. The claimant testified that it is her understanding that Dr. Martimbeau is now recommending a second surgery on her knee and although she does not want to go through it if it will help her improve she wants the surgery. The claimant testified that she has pain in her right knee and she has limited flexibility in her knee making it difficult for her to go up steps. The claimant testified that she was taking muscle relaxers, antidepressants, pain pills and that she cannot stand the pain. The claimant testified that she tried to return to work but since

they normally work a ten-hour day, by the end of the day her knee was so swollen that her husband would have to help her get out of her car and she would be crying. The claimant testified that her pain interferes with her daily activities and causes her to be unable to sleep at night. The claimant testified that she was taken off work on October 31, 2003, and that she was still off work as of the date of the hearing.

The claimant testified that Dr. Mulhollan has never treated her and that she has seen him one time and then she only saw him for four to five minutes. The claimant remembered that during that period of time he kept trying to walk out of the room and she would not let him. The claimant testified that she had her x-rays, MRI and CT scans with her and he did not examine or look at these films before he examined her. The claimant was asked why she did not want to rely on Dr. Mulhollan's opinion and the claimant responded, "Because he never touched my knee until I insisted that he examine my knee, and I also had to insist on him looking at the MRI and suggested that if he didn't like what I had to take film of his own." The claimant testified that Dr. Mulhollan did take film of his own but he took two views from the top where he could not see the screws.

The claimant testified that she has been employed with the respondent since 1996 as a full time employee working forty hours per week. The claimant explained that each week is not a complete forty hours because the hours are determined by the amount of product they have to run. The claimant testified that when product

is available in the plant it is expected that she work until the product is processed which would involve overtime sometimes. The claimant testified that as an employee she had no option to refuse to work overtime or to complete the run of product, if she would have she would have been given an occurrence. The claimant agreed that she had to stay and work for the respondent until they told her to leave. The claimant testified that she was earning from \$8.75 to \$8.95 and further agreed that there is a payroll record which shows that on the week she worked forty hours she received \$350.

On cross examination, the claimant testified that she worked four days a week and normally ten hour shifts but there was no guaranty of a forty-hour week. The claimant did agree that there is some overtime work. The claimant testified that she was forty-five years old and it was her understanding that Dr. Martimbeau has recommended a partial knee replacement. The claimant testified that Dr. Martimbeau has had her in physical therapy but he also has her doing home exercises to strengthen her knee. The claimant testified that Dr. Martimbeau has taken her off work and instructed her to take her medications and try not to injure her knee any further. The claimant testified that before she was taken off work she was working for the respondent sitting on a stool stamping labels. The claimant agreed that she still is able to drive but that her shopping is very limited to about thirty minutes before she has to get back into the car. The claimant testified that she cannot walk more than thirty minutes at a time. The claimant

agreed that Dr. Mulhollan had recommended conservative treatment of swimming and using a stationary bike. The claimant testified that she cannot swim and that the stationary bike and walking she cannot do.

Mary Koch testified that she was the complex nurse manager for the respondent and had been in that position for the past ten years. Ms. Koch testified that she was a licenced RN and had been for twenty-four years. This witness testified that she knew the claimant and was aware of her January 2001 injury as well as the event on May 1, 2003, involving the claimant's right knee. Ms. Koch testified that following the May 2003 event the claimant initially denied any problem at that time but then a few days later she came in having problems. This witness testified that the claimant returned to Dr. Martimbeau and his notes indicate that there was no new injury but that she had aggravated her pre-existing injury. Ms. Koch testified that following her January injury the claimant was put on restricted duty but more recently she has been making labels in the conference room. Ms. Koch testified that to her knowledge the claimant was still employed by the respondent and that Dr. Martimbeau had taken her off work as of October 29, 2003.

The respondents called Betty Killough who testified that she had been the complex human resource manager since 1998 but had been employed in personnel since 1989. Ms. Killough testified that it is her responsibility to oversee all the human resources functions and she made sure that all policies were followed. This witness

testified that she knew the claimant and had reviewed her personnel files prior to testifying. Ms. Killough testified that a full time employee for the respondent is someone that is scheduled for all the hours that the plant works that week. This witness testified that the claimant is considered a full time employee and has been so considered throughout her employment with the respondent. Ms. Killough testified that on January 11, 2002, the claimant was earning \$8.75 and her hourly rate as of May 1, 2003, was \$8.95 per hour. Ms. Killough testified that the claimant was in a production job and she is not guaranteed forty hours per week. Again it was explained that the number of hours worked by the production workers depends on the amount of product coming in that week which needed to be processed. This witness testified that normally a worker will work nine and a half hours per week but there is the possibility of overtime. Ms. Killough testified that she has observed the claimant performing her last job of stamping labels and this work is still available to the claimant. On cross examination, Ms. Killough testified that the respondent has implemented an incentive program with their four-day work week where if a team member works all of their scheduled hours which are the nine and a half for four days they will receive forty hours of pay. This witness testified that although the claimant was not guaranteed a forty-hour week it was expected of her to be available for the hours of work necessary to run the product that week. This witness testified that it was expected that the claimant show up at

the start of her shift each morning and to stay until the product is run.

The medical records document the claimant's initial right knee injury on January 11, 2002. Dr. Claude Martimbeau writes on April 9, 2003, that the claimant had surgery on her right knee on October 3, 2002, for a transfer of the patellar tendon with lateral release noting that the claimant has returned to work but still has pain, stiffness and swelling in her right knee. After examination, the doctor diagnosed the claimant with being status post chondritis of the patellofemoral joint with transfer of the patellar tendon. Dr. Martimbeau assessed the claimant with a 7 percent lower extremity impairment rating based on the AMA Guides noting that she may require some medication in the form of Ansaid and she should observe some restrictions at work regarding her right knee of no kneeling down, squatting down and to use the stairs the least amount possible. Dr. Martimbeau writes on May 13, 2003, that the claimant is complaining of right knee pain after having a new injury one week earlier when she was at work and was hit by a jack driver knocking her down and pinning her right foot between the trash can and a pallet causing her knee to twist. Upon examination, the doctor notes that there is severe crepitus with pain from the anterior compartment and flexation and extension. X-rays reveal that there is no new injury but it is noted that the attachment of the tuberosity may have a non-union since there is a radiolucent line between the two bony fragments or the tuberosity and the upper tibia. On June 10, 2003, Dr. Martimbeau writes that

the claimant was seen for her right knee pain and there is a question regarding the possible non-union of the previous osteotomy and an MRI was recommended to assess the healing status of the tibial tuberosity. Dr. Martimbeau writes on June 18 that the claimant had an MRI but it failed to show a non-union because of the metal. On June 24, 2003, Dr. Martimbeau writes that the claimant has had a CT scan that shows a non-union of the anterior tibial tuberosity and she is experiencing pain of the patellofemoral joint with severe crepitation. Upon examination, the doctor notes that the claimant's knee shows crepitation of the patellofemoral joint. X-rays of the claimant's right knee shows that the tibiofemoral joint appears normal. Dr. Martimbeau recommended a partial replacement of her knee by doing a patellofemoral joint replacement at the same time the tibial tuberosity will be repaired.

Dr. James Mulhollan saw the claimant on July 10, 2003, and he writes that, "Significant clinical observations include the following:" and then he goes ahead to describe the claimant as being very over weight with an obvious scar on her knee, mild subpatellar crepitation and full range of motion. Dr. Mulhollan writes that the radiographic examination reveals that the osteotomy of the tibial tubercle has healed by a fibrous mechanism and finds that there is no malalignment in either knee although there is very vague narrowing of the right knee. Dr. Mulhollan writes that he does not think that the claimant has a surgical problem and writes that her weight and strength deficit are her main problems for

which he recommends swimming and a stationary bike as well as walking. Dr. Mulhollan then goes on at length to describe his impression of the claimant's negative attitude toward his recommendations. Dr. Mulhollan notes that he applied an electric stimulator to the claimant's knee and she should return in one month for him to determine if she is properly using this mechanism. The doctor released the claimant to return to work on Monday, July 14, but she should limit her climbing, squatting and working on slick surfaces. Dr. Mulhollan writes, "Unfortunately, these limitations will probably continue rather indefinitely out in time."

In Dr. Mulhollan's deposition he stated that he did not know how much time he spent with the claimant during his evaluation of her, noting that it did not take especially long to evaluate her because of her obesity. The doctor noted that she also had a surgical scar, a little bit of tenderness, full motion as well as no effusion explaining that no effusion would indicate no fluid in the joint. Dr. Mulhollan was critical of Dr. Martimbeau's decision to operate on the claimant's knee the first time stating that he was at a loss about why she was subjected to such a big operation and indicated that even though the surgery was apparently a success the byproducts of this surgery weakened the patient significantly. Dr. Mulhollan continued by stating that the combination of the claimant's obesity and her weakness have set her up for a "fatal flaw." Dr. Mulhollan continued to testify that even though he did not see the film of the claimant's knee prior to her surgery, in

his opinion Dr. Martimbeau performed surgery that was unnecessary. Dr. Mulhollan discussed several of the tests which he reviewed for this claimant and stated at least twice that he disagreed with Dr. Martimbeau's diagnosis as well as his treatment approach. Dr. Mulhollan was asked if he agreed with Dr. Martimbeau's recommendation of a second surgery to do a partial knee replacement on the claimant and the doctor stated that if the claimant would lose weight and work on the strengthening of her knee he thinks her need for surgery would go away. The doctor further stated that if the claimant continues to remain obese and deconditioned, these two factors can sabotage the outcome of the surgery. Dr. Mulhollan testified that he agreed with Dr. Martimbeau's note of May 13, 2003, where it sets out that the claimant has no new injury that tore loose a boney union in her knee.

On cross examination, when Dr. Mulhollan was asked if in his opinion Dr. Martimbeau performed an unnecessary surgery, Dr. Mulhollan responded, "I don't think---I can't say that. He and I disagree with the indication for surgery in this particular case. And I would not have done it." Dr. Mulhollan agreed that he never saw the claimant's knee before she had surgery, that all he had access to was that he read Dr. Martimbeau's dictated reports. Dr. Mulhollan stated that he saw little prospect of the claimant improving independent of whatever care she might have. On redirect examination, Dr. Mulhollan stated that in his opinion the claimant has plenty of potential to improve but that he found it distressing to itemize a treatment plan that can be done to improve her

situation and for her to come up with reasons why she cannot do them.

After a review of this entire record, I find that the claimant re-injured her right knee while working for the respondent on May 1, 2003, when she was hit by a pallet jack and twisted her right knee. The testimony was quite clear that the claimant was working full time as required by the respondent and was doing her job on the floor with just minimal restrictions. The claimant had been released by her doctor on April 9, 2003, noting that she had reached maximum medical improvement on March 12, 2003, for her compensable knee injury. The claimant had not sought medical treatment for her right knee until she sustained the May 1, 2003, re-injury. Therefore, the claimant did sustain a new injury on May 1, 2003, as evidenced by the x-rays showing a non union in the injured area which had not been previously noted before the May 1 event. The respondents have stipulated that the claimant sustained a compensable injury to her right knee on May 1, 2003, and therefore, her benefits should be figured from this date forward. The claimant as well as the respondents have testified that she was not guaranteed a forty hour week, however, both the respondent and the claimant have testified that she was expected to report to the plant on the four days a week that she was assigned to work and was expected to work until the product which was received was processed. The respondents have also testified that they have an incentive program that if an employee works thirty-nine and a half hours, four days a week, they are paid for a forty hour week. Also

it has been testified by both parties that there is the possibility of overtime and that overtime is sometimes required in order to get the product out, therefore, this claimant's workers' compensation rate should be figured on a forty hour week times the \$8.95 which she was earning on May 1, 2003. This will give the claimant an average weekly wage of \$358.00 per week entitling her to a temporary total disability rate of \$241.00 and a permanent partial disability rate of \$181.00. Ark. Code Ann. §11-9-518(c) allows the Commission to determine the appropriate average weekly wage for a claimant in exceptional circumstances based on what the Commission determines to be just and fair to all parties concerned.

I further find, after reviewing the medical information as well as all the testimony, that the claimant is entitled to the treatment as recommended by her treating physician, Dr. Claude Martimbeau. Dr. Martimbeau initially treated this claimant's right knee injury and according to his records and the claimant's testimony the October 2002 surgery was successful until she was re-injured on May 1, 2003. It is certainly noted that Dr. Mulhollan who saw the claimant for a few minutes in his office has determined that based on her obesity and lack of enthusiasm for strengthening her right knee, any further surgery and even the surgery which she has undergone was unnecessary and not beneficial to her. Dr. Mulhollan, in his deposition, has clearly set forth that this is a medical disagreement which he has with Dr. Martimbeau's recommended plan of treatment and since Dr. Martimbeau has had more history with the claimant as well as the claimant's confidence in his

recommended treatment plan, I find that his recommendations should be followed.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On January 11, 2002, and May 1, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her right knee on January 11, 2002, and May 1, 2003.

4. Medical expenses have been paid.

5. The claimant should be paid at a compensation rate based on a forty hour week being paid \$8.95 which was her rate of pay on May 1, 2003, when she re-injured her right knee. See discussion above.

6. The claimant is entitled to additional medical treatment in the form of the surgery which is recommended by Dr. Martimbeau. See discussion above.

7. The respondents have controverted this claimant's compensation rate as well as her entitlement to additional medical.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that she is entitled to be compensated at a rate of \$241.00 for temporary total disability and \$181.00 for permanent partial disability for her May 1, 2003, right knee injury.

The claimant has proven by a preponderance of the evidence that she is entitled to the recommended surgical procedure and treatment by Dr. Martimbeau.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE