

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103814

ERIC PRATT

CLAIMANT

B & B DIRECTIONAL BORING, INC.

RESPONDENT

AMERICAN STATES INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 16, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on January 26, 2004, in Springdale, Arkansas. The deposition of Dr. Alice Martinson was taken on December 11, 2003. This deposition has been admitted as Respondent's Exhibit No. 3. The deposition of Dr. Anthony N. Hui was taken on January 12, 2004. The deposition of Dr. Hui has been admitted as Respondent's Exhibit No. 2. A previous hearing was held on this claim on March 4, 2003, and an Opinion was entered on May 27, 2003. Portions of the transcript of this prior hearing were again referenced in the present case.

A pre-hearing order was entered in this case on November 25, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the claimant announced that he was seeking continued temporary total disability benefits only through May 20, 2003. A copy of the pre-hearing order, with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations are offered by the parties and are hereby accepted:

1. The prior Opinion of May 27, 2003, has become final and is res judicata of all issues raised and addressed therein.

2. Temporary total disability benefits have been paid by the respondents through April 22, 2003.
3. The respondents have accepted liability for and have paid permanent partial disability benefits for a 23% permanent physical impairment to the leg.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to continued temporary total disability benefits from April 23, 2003 through May 20, 2003.
2. The claimant's entitlement to additional permanent partial disability benefits for additional permanent physical impairment in the amount of 14% to the leg.
3. The claimant's entitlement to the recommended (now provided) radiation therapy.
4. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that he was last paid TTD on April 22, 2003. However, Eric continued to remain disabled and based on a second opinion by Dr. Martinson on August 21, 2003, he was disabled through that date. In that second opinion Dr. Martinson gave Eric an additional 14% PPD. Based on Dr. Martinson's report the claimant contends that his correct diagnosis is chronic post traumatic synovitis with the need for ongoing medical treatment to remove loose bodies. Based on Dr. Martinson's report, the claimant contends he is now entitled to radiation and pain therapy treatments previously prescribed by Dr. Powell."

In regard to these issues, the respondents contend:

"Respondents contend that as of the date of last payment of temporary total disability benefits in April of 2003, the claimant was determined to have reached MMI and is not entitled to additional indemnity benefits."

The 14% rating does not meet the requirements of the Workers' Compensation Act and has not been accepted."

## DISCUSSION

### I. CLAIMANT'S ENTITLEMENT TO CONTINUING TEMPORARY TOTAL DISABILITY BENEFITS FROM APRIL 23, 2003 THROUGH MAY 20, 2003

\_\_\_\_\_A review of the prior Opinion (entered on May 27, 2003) reflects that the respondents stipulated that the claimant re-entered his healing period from the effects of his compensable scheduled injury and once again became entitled to temporary total disability benefits on October 7, 2002. The respondents voluntarily reinstated the payment of temporary total disability benefits on that date. However, the respondents unilaterally terminated those benefits on December 31, 2002. It was this action by the respondents that necessitated the prior hearing on March 4, 2003, and the Opinion that generated on May 27, 2003.

In the prior Opinion of May 27, 2003, it was expressly held that the claimant had proven that he continued within his second healing period from the effects of his compensable knee injury from January 1, 2003 through a date yet to be determined. This finding was based upon the reports and records of Dr. Mark Powell. Dr. Powell is a certified orthopaedic surgeon and the claimant's primary treating physician for his compensable injury. As noted in the prior Opinion, Dr. Powell released the claimant to return to limited or light duty employment on December 30, 2002. However, he also noted that the claimant had not achieved "maximum medical improvement" in his recovery from the surgery of October 7, 2002 and continued under the active medical treatment of Dr. Powell for both his compensable injury and his non compensable PVNS. It was noted in this opinion that the claimant had last been seen and treated by Dr. Powell on February 27, 2003. At that time, Dr. Powell did not release the claimant from continuing treatment and expressly directed the claimant to return for more follow up in three months from that

date. Thus, Dr. Powell clearly anticipated that the claimant's healing period from the effects of his compensable knee injury would not end until at least three months following the February 27, 2003 visit.

The previous Opinion of May 27, 2003, also found that the claimant had not "returned to work", as of the date of hearing on March 4, 2003. He had no anticipated offer of employment, at that time, and the date of his return to work was uncertain.

Based upon these facts and the rule of law announced by the Supreme Court in International Paper Company v. McGoogan, 255 Ark. 1025, 504 S.W. 2<sup>nd</sup> 739 (1974), the claimant was awarded continuing temporary total disability benefits from January 1, 2003 through a date yet to be determined. The Opinion of May 27, 2003, was not appealed and has become final. After the hearing and prior to the entry of the Opinion on May 27, 2003, the respondents made no attempt to present any additional evidence to show that (after the hearing on March 4, 2003), the claimant's healing period had ended or that he had returned to work, or that he was now barred from receiving continuing temporary total disability benefits for any other reason. After the entry of this Opinion on May 27, 2003, the respondents did not appeal or seek any order from this Commission clarifying or modifying the award of continuing temporary total disability benefits to a date yet to be determined. Instead, the respondents unilaterally chose to only pay temporary disability benefits through April 22, 2003. The respondents offer no reasonable explanation for their decision to only pay these benefits through April 22, 2003. At the most recent hearing (on March 4, 2003), the respondents have still offered no evidence to indicate that the claimant's healing period from the effects of his compensable knee injury had actually ended on April 22, 2003, that the claimant had returned to employment on that date, or that the claimant had somehow become barred by the provisions of the Act from being entitled to temporary total disability benefits after April 22, 2003.

The claimant's entitlement to continuing temporary total disability benefits for the period of April 23, 2003 through May 20, 2003, appears to be merely a request for the enforcement of the prior Opinion of May 27, 2003, rather than a claim for additional benefits, Carroll Electric Co-operative v. Pack, \_\_\_Ark. App. \_\_\_\_, \_\_\_\_, S.W. 3<sup>rd</sup>, \_\_\_ (Opinion March 4, 2004). The evidence presented at the prior hearing was at that time, and still remains sufficient to support an award of continuing temporary total disability benefits through May 20, 2003. I find that the claimant is entitled to such continuing temporary total disability benefits.

## II. ADDITIONAL PERMANENT PHYSICAL IMPAIRMENT

\_\_\_\_\_The claimant had previously been assessed a 23% permanent physical impairment to the leg by Dr. Mark Powell, an orthopaedic surgeon and his treating physician. The respondents have accepted and paid permanent partial disability benefits equivalent to this permanent impairment rating.

In August of 2003, the claimant underwent an independent medical examination, at the respondents request, by Dr. Alice Martinson (also an orthopaedic surgeon). Based upon her review of the claimant's records and her personal evaluation of the claimant, Dr. Martinson assessed a permanent physical impairment of 37% to the leg. The claimant now seeks additional permanent partial disability benefits for this increase in his prior rating. In order to be entitled to such benefits, the claimant must show that the impairment rating assessed by Dr. Martinson complies with the various standards for impairment ratings imposed by the Act.

After careful consideration of all the evidence presented, it is my opinion that the claimant has failed to meet this burden. Ark. Code Ann. §11-9-521(h)(1)(A) requires that assessments of anatomical impairment must conform with the official rating guide adopted by this Commission. At the present time, this official rating guide is the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. The

rating assessed by Dr. Martinson does not conform to this standard.

It is apparent from Dr. Martinson's report of August 21, 2003 and her deposition that her assessment of permanent physical impairment was not made in a manner espoused by the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition). Dr. Martinson states that upon her review of the "AMA Guidelines", she cannot find a method that would support the degree of permanent physical impairment which she believes has resulted from the claimant's current condition. As she had placed the same physical restrictions on the claimant that she would an individual who had undergone a total knee replacement, she opines that the claimant should be given the same degree of impairment accorded by the guides to an individual that had undergone a total knee replacement (i.e. 37% to the leg). While the claimant may well be as restricted as an individual that underwent a total knee replacement, the guides do not provide for such an extrapolation of ratings between such significantly different physical conditions.

As the rating of Dr. Martinson does not conform to any method for rating of permanent physical impairment recognized by the Commission's official rating guide, her rating does not satisfy the requirements of Ark. Code Ann. §11-9-521(h)(1)(A). Therefore, this assessment of permanent physical impairment cannot support an award of permanent partial disability benefits. The claimant's request for such benefits must be denied.

### III. PAYMENT OF EXPENSES INCURRED FOR RADIATION THERAPY PERFORMED ON THE CLAIMANT'S RIGHT KNEE

In order to be entitled to the payment of the expenses incurred for the claimant's receipt of radiation therapy to his right knee, the claimant must prove that this radiation therapy represents "reasonably necessary medical services" for his compensable injury. The medical services are "reasonably necessary" when they are necessitated by or related to the compensable injury. These services must also have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

The greater weight of the credible medical evidence presented shows the presence of two ongoing conditions involving the internal components of the claimant's right knee. One of these conditions takes the form of damage to the claimant's medial femoral condyle with chronic formation of osteochondral loose bodies. This chronic condition that has resulted from the claimant's compensable injury of January 4, 2001. The other condition is in the form of pigmented villinodular synovitis (PVNS). The greater weight of the credible medical evidence further shows that there is no relationship between this condition and the claimant's employment related accident and resulting injury of January 4, 2001. Although both of these conditions are obviously causing the claimant some discomfort and difficulties with his right knee, the medical evidence shows that these two conditions remain entirely separate and distinct, with one having no influence on the other.

The greater weight of the credible medical evidence also establishes that the radiation therapy provided the claimant by Dr. Powell was directed solely toward the treatment of his pigmented villinodular synovitis (PVNS). This treatment was in no way necessitated by or intended to, in any way, to affect the claimant's compensable injury to his medial femoral condyle and resulting chronic formation of chondral loose bodies. There is also no evidence to show that treatment of the claimant's PVNS, was, in any way, a necessary pre-requisite for resolution or stabilization of his compensable injury and its chronic sequelae. Thus, any treatment directed solely toward the claimant's non compensable PVNS could not constitute reasonably necessary medical services, within the meaning of Ark. Code Ann. §11-9-508, Artex Hydroponics, Inc. v. Pippin, 267 Ark. 1040, 593 S.W. 2<sup>nd</sup> 473 (Ct. App. 1980).

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On January 4, 2001, the relationship of employee-employer-carrier existed between the parties.
3. The appropriate weekly compensation rates are \$293.00 for total disability and \$220.00 for permanent partial disability.
4. On January 4, 2001, the claimant sustained a compensable injury to his right knee that resulted in physical damage to his medial femoral condyle with resulting chronic formation of chondral loose bodies.
5. The radiation therapy provided and/or recommended for the claimant's right knee does not constitute reasonably necessary medical services for his compensable injury, within the meaning of Ark. Code Ann. §11-9-508. Specifically, such medical services are in no way related to or necessitated by the claimant's compensable injury, but are solely necessitated by and related to the claimant's non compensable PVNS.
6. The claimant continues to remain entitled to all reasonably necessary medical services necessitated by or related to his compensable medial condyle damage and chronic chondral loose body formation.
7. The claimant continued to be entitled to temporary total disability benefits for the period of April 23, 2003 through May 20, 2003.
8. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to permanent partial disability benefits for any permanent physical impairment in excess of 23% to the leg. Specifically, he has failed to prove that any assessment of permanent physical impairment in excess of that amount was calculated in a method that conforms to the official rating guide adopted by this Commission, as required by Ark. Code Ann. §11-9-521(h)(1)(A).

9. The respondents have controverted the claimant's entitlement to any temporary total disability benefits accruing after December 30, 2002, his entitlement to permanent partial disability benefits for permanent physical impairment in excess of 23% to the leg, and his entitlement to the payment of expenses incurred as a result of radiation therapy rendered to his right knee.
10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the continuing controverted temporary total disability benefits herein awarded.

#### ORDER

The respondents shall pay continuing temporary total disability benefits to the claimant for the period of April 23, 2003 through May 20, 2003.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fees on the foregoing temporary total disability benefits herein awarded. One-half of this fee shall be the liability of the respondents in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondents from such benefits.

The respondents continue to remain liable for the expense of all reasonably necessary medical services required by the claimant for his compensable right knee injury.

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.

For the reasons heretofore set forth in this Opinion, the claimant's request for additional permanent partial disability benefits and his request for the payment of expenses incurred for radiation therapy to his right knee must be and hereby is denied and dismissed.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge