

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105333

GUSTAVO SANDOVAL,  
EMPLOYEE

CLAIMANT

VAN HORN CONSTRUCTION INC.,  
EMPLOYER

RESPONDENT

AMERISURE INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED AUGUST 31, 2004**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Russellville, Pope County, Arkansas.

The claimant was represented by HONORABLE MARK EUGENE FORD, Attorney at Law, Ft. Smith, Arkansas.

The respondent was represented by HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on July 14, 2004 in Russellville, Arkansas. A prehearing order was entered in this case on April 30, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

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

1. The employee/employer/carrier relationship existed among the parties on April 27, 2001.

2. On April 27, 2001, the claimant sustained an injury to his right knee in the course and scope of his employment with Van Horn Construction, Inc. The injury was accepted as compensable.

3. The claimant's average weekly wage on April 27, 2001 was \$528.00. The claimant's TTD rate is \$352.00 per week. The claimant's PPD rate is \$264.00 per week.

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

1. Compensability (whether the claimant's present condition is either (a) causally related to the compensable accident and injury sustained on April 27, 2001 or in the alternative (b) whether the claimant sustained a new compensable knee injury when the claimant returned to work for the respondent Van Horn Construction, Inc. from September 3, 2001 until May 12, 2002.

2. Payment of medical expense benefits.

3. Payment of attorney's fee.

The record consists of the July 14, 2004 hearing transcript and the exhibits contained therein.

**DISCUSSION**

The claimant sustained an admittedly compensable right knee injury while working for Van Horn Construction, Inc. on April 27, 2001 and was taken off work essentially immediately. Dr. Jeffrey Evans performed an arthroscopic right knee lateral meniscus tear repair on May 25, 2001. Dr. Evans released the claimant to return to work on July 31, 2001, and the claimant returned to work for Van Horn Construction, Inc. on or about September 3, 2001.

The claimant continued to experience some degree of right knee pain, and Dr. Evans continued to treat the claimant for what Dr. Evans Diagnosed as a right iliotibial band syndrome. Dr. Evans continued to follow the claimant for the iliotibial band syndrome until June 3, 2002, when Dr. Evans signed the claimant a 2% permanent anatomical impairment rating and released the claimant from his care.

The claimant returned to Dr. Evans approximately five months later on November 13, 2002 with right knee problems, which a November 19, 2002 MRI identified as a right lateral meniscus tear.

The claimant had previously been laid off by Van Horn Construction on May 12, 2002, and the claimant drew unemployment benefits from May 27, 2002 until December 26,

2002. The claimant testified that he worked two weeks as a roofer during this period, but could not identify when between May of 2002 and December of 2002 that he worked as a roofer.

As discussed above, the claimant asserts that the right lateral meniscus tear confirmed by MRI on November 19, 2002 is either causally related to his admittedly compensable right lateral meniscus tear injury sustained on April 27, 2001, or was instead caused by his subsequent employment at Van Horn Construction between September 3, 2001 and May 12, 2002, and was not caused by any activity or employment after his May 12, 2002 layoff.

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury.

Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

To the extent that the claimant asserts in the alternative that his November 2002 right lateral meniscus tear was not a recurrence of the April 27, 2001 right lateral meniscus tear but was instead either an aggravation or new injury to the knee caused by his return to employment for Van Horn Construction between September 2001 and May of 2002, I note that the claimant does not assert that this alleged injury was caused by a specific incident and is identifiable by time and place of occurrence. Therefore, in order to prevail under this alternative legal theory, the claimant must establish that his knee injury falls within any one of the categories of compensable gradual onset injuries identified in Ark. Code Ann. § 11-9-102(4)(A)(ii)(Repl. 2002). Since this claim does not involve a back injury or hearing loss, in order to prove a compensable gradual onset injury under Ark. Code Ann. § 11-9-102(4)(A)(ii)(a), the claimant must show by a preponderance of the evidence that his gradual onset knee injury: (1) arose out of and in the course of employment; (2) caused internal or external physical harm to the body requiring medical services; (3) was caused by rapid

repetitive motion; and (4) was the major cause of his disability or need for treatment. High Capacity Prods. v. Moore, 91 Ark. App. 1, 962 S.W.2d 831 (1998). In addition, the injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4) (D).

**A. Recurrence**

To the extent that the claimant asserts that his second lateral meniscus tear was a natural and probable consequence of his first lateral meniscus tear, I note that Dr. Evans persuasively testified that just because a person has had one meniscus tear does not predispose that individual to have subsequent meniscal tear. (Respondents' Ex. 1, p. 22). Based on Dr. Evans' persuasive expert medical opinion, I find that the preponderance of the evidence in the record fails to establish that the claimant's right knee lateral meniscus tear identified in November of 2002 is in any way causally related to his admittedly compensable right lateral meniscus tear sustained on April 27, 2001.

**B. Aggravation/New Injury**

On this record, I also find that the claimant has failed to prove by a preponderance of the credible evidence that the right lateral meniscus tear identified in November of 2002 is causally related in any way to his work duties

for Van Horn Construction during the period between September of 2001 and May of 2002. In concluding that the claimant has failed to establish that his second right lateral meniscus tear is causally related to either his first lateral meniscus tear or to his period of subsequent work between September of 2001 and May of 2002, I recognize that the claimant experienced some degree of right knee pain even after Dr. Evans' May 2001 right lateral meniscus repair. However, Dr. Evans' deposition testimony persuasively indicates that Dr. Evans is capable of determining the difference between pain associated with a meniscal tear and pain associated with iliotibial band syndrome, and that in the claimant's case, Dr. Evans was able through clinical evaluation and testing to determine that the claimant's ongoing pain through June of 2002 was associated with the iliotibial band and not associated with the lateral joint line. [Respondents' Ex. 1, p. 18-19]. In fact, Dr. Evans' post surgical clinical reports through June 3, 2002 (i.e. after the claimant last worked for Van Horn Construction) indicate that Dr. Evans performed clinical examination and that Dr. Evans determined an absence of joint line tenderness. I am persuaded by Dr. Evans' post surgical clinical reports and Dr. Evans'

deposition testimony that the claimant was not yet experiencing symptoms of any new right lateral meniscus tear when Dr. Evans performed his clinical examination on June 3, 2002, several weeks after the claimant last worked at Van Horn Construction on May 12, 2002. Absent any credible evidence to persuade me that Dr. Evans' clinical testing through June of 2002 was inadequate and/or that Dr. Evans' expert testimony is inaccurate or otherwise based on some relevant mistake of fact, I find based on Dr. Evans' deposition testimony and his medical reports that a preponderance of the evidence establishes that the claimant's second right lateral meniscus tear at issue in this case occurred after Dr. Evans examined the claimant on June 3, 2002, and therefore after the claimant last worked for Van Horn Construction on May 12, 2002.

Because the claimant has failed to establish by a preponderance of the evidence that his right lateral meniscus tear identified in November of 2002 is in any way causally related to his admittedly compensable April 27, 2001 right lateral meniscus tear, or in any way causally related to his subsequent employment with Van Horn Construction between September of 2001 and May of 2002, I find that all remaining potential issues in this case are

moot, and that the claimant's claim for additional benefits must be denied.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee/employer/carrier relationship existed among the parties on April 27, 2001.

2. On April 27, 2001, the claimant sustained an injury to his right knee in the course and scope of his employment with Van Horn Construction, Inc. The injury was accepted as compensable.

3. The claimant's average weekly wage on April 27, 2001 was \$528.00. The claimant's TTD rate is \$352.00 per week. The claimant's PPD rate is \$264.00 per week.

4. The claimant has failed to prove by a preponderance of the evidence that his right lateral meniscus tear identified in November of 2002 is a natural and probable consequence of his admittedly compensable April 27, 2001 right knee injury.

5. The claimant has failed to prove by a preponderance of the evidence that his right lateral meniscus tear identified in November of 2002 is causally related in any way to his employment with Van Horn Construction between September of 2001 and May of 2002.

6. The claimant has therefore failed to prove by a

preponderance of the credible evidence that he is entitled to workers' compensation benefits from Van Horn Construction for his right lateral meniscus tear identified in November of 2002.

7. Because the claimant has failed to prove by a preponderance of the evidence that his right lateral meniscus tear identified in November of 2002 is either a recurrence of his admittedly compensable 2001 injury, or is in any way causally related to his subsequent employment with Van Horn Construction, I find that all other potential issues in this case are moot.

**ORDER**

For the reasons discussed herein, this claim for benefits must be, and hereby is, denied.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge