

**BEFORE THE ARKANSAS WORKERS' COMPENSATION  
COMMISSION**

**CLAIM NO. F214247**

**TONYA L. APPLING, EMPLOYEE** **CLAIMANT**

**LITTLE ROCK CANCER CENTER,  
EMPLOYER** **RESPONDENT**

**ST. PAUL FIRE & MARINE INSURANCE  
COMPANY, INSURANCE CARRIER** **RESPONDENT**

**OPINION FILED MARCH 2, 2005**

Hearing before Administrative Law Judge Cynthia Estes Rogers on December 2, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Joseph E. Kilpatrick, Attorney at Law, Little Rock, Arkansas.

A hearing was held on December 2, 2004, to determine claimant's entitlement to additional temporary total disability indemnity benefits, as well as controverted attorney's fees.

The parties stipulated to the existence of the employee-employer relationship on June 1, 2001, when claimant sustained an admittedly compensable injury. The parties further stipulated that at the time of injury, claimant was earning a sufficient weekly wage to entitle her to weekly indemnity benefits of \$307.00 for temporary total disability and \$230.00 for permanent partial disability benefits.

The parties stipulated that claimant's injury is a scheduled injury and that the respondents accepted the claim as compensable and paid appropriate medical benefits and some indemnity benefits, as well as a 2 percent impairment rating to each lower extremity. It was further stipulated that respondents paid for the additional medical benefit of knee replacement surgery for one knee and indemnity benefits from and after the date of that surgery; as well, the respondents have agreed to pay the same for the other knee, which, at the time of the hearing, was scheduled for December 13, 2004.

Claimant contends that she is entitled to additional temporary total disability indemnity benefits from August 30, 2001, when claimant last worked, through June 28, 2004, the date of her first knee replacement surgery. Claimant admits that she was paid permanent partial disability benefits for the 2 percent impairments on each side during this period. Claimant contends that she is entitled to the additional period of temporary total disability indemnity benefits because she could not have reached maximum medical recovery without the advent of the knee replacement surgeries; and, because this is a scheduled injury case, she is entitled to temporary disability benefits during that period of time.

Respondents contend that they accepted the claim as compensable and have paid, or are paying, all appropriate benefits to which claimant is entitled. Respondents maintain that they ceased paying temporary total disability benefits on

January 9, 2003, because claimant's doctor found that claimant has reached maximum medical improvement and issued the impairment ratings on that date. Respondents contend, and claimant agrees, that respondents then began paying the permanent disability benefits. Respondents assert that after the doctor has said claimant has reached maximum improvement and impairment ratings have been issued, claimant cannot then remain "temporarily disabled" during an indefinite period until she elects to have surgery.

### **STATEMENT OF THE CASE**

Claimant, who is now in her early 40s, sustained admittedly compensable injuries to both her knees while employed with respondent-employer. Claimant first sustained a meniscal tear to her left knee on June 1, 2001, and underwent arthroscopy. Post-operatively, and after she had returned to work on light duty, claimant then injured her right knee when her left knee buckled; she had a partial meniscectomy. She was then diagnosed as having stage III to IV osteoarthritis, and was labeled as "morbidly obese."

Claimant testified, and the medical records reflect, that she remained in constant pain. Over the course of treatment, she has had cortisone injections that lasted a few weeks, and eventually had hyalgan injections that lasted a few weeks. None of this treatment seemed to be effective enough for claimant to live with the pain.

Medical records, including Dr. Ralph Cash's deposition of February 25, 2004, reflect that her treating physicians initially did not believe claimant to be a candidate for knee replacement surgery because of her young age, in addition to her weight. However, after the conservative treatment seemed to bring claimant no relief, both Dr. Cash, as well as Dr. Lorio – who was asked by Dr. Cash for a second opinion on January 2, 2003 – opined that total knee arthroplasty would be the “next logical step” if claimant's pain was to the point where she could no longer stand it.

According to the parties' contentions, as well as Dr. Cash's deposition, Dr. Cash apparently issued a report on January 9, 2003, wherein he issued 2 percent impairment ratings to claimant for each side. Notably, this report was neither introduced into evidence, nor was it proffered by either party. According to the stipulations noted above, these ratings were accepted by respondents and began being paid after that date rather than temporary total disability (TTD) indemnity benefits, which were ceased when the ratings were issued.

It is respondents' position that Dr. Cash found claimant had reached “maximum medical improvement” (MMI) on the date that he issued those ratings and, therefore, respondents were correct in ceasing the TTD benefits. Dr. Cash testified in his deposition of February 25, 2004, that he did feel on January 9, 2003, that claimant had reached MMI, but he also testified that it was his opinion that she was

*at no time* able to work even a sit-down job, with “this kind of knee.” He, in fact, testified that in his opinion, she is “disabled.” He testified:

Q. Let me ask you before this time, before this time, we know that you had given her back in August of 2001 restricted duty release. You mentioned a few minutes ago that you were encouraging this lady to try to do something?

A. That’s right.

Q. Do you think that she should have been working during this time?

A. No, she couldn’t.

Q. And she couldn’t objectively?

A. That’s correct. I think that, of course part of this is a judgment, watching her walk, she was very consistent. In fact I thought she was a fairly stoic lady, you know. I mean, she wasn’t a crybaby. And the knees kind of became progressively worse at a fairly rapid fashion and so this was a kind of ongoing thing that the knees deteriorated.

He testified that he initially did not encourage claimant to have total knee arthroplasty, primarily due to her young age and the high risk of the surgery, but that because her condition never improved, he believed knee replacement was the best option for her. Dr. James Mulhollan, whom claimant saw on May 13, 2004, at respondents’ request, agreed with Dr. Cash that claimant needed the joint replacement surgeries, and that her injuries were the “main factors” of her problems, although her weight certainly aggravated her injuries. Dr. Mulhollan opined, “[T]here is no ready remedy for the patient’s predicament besides joint replacement,” noting that the

surgery would be undertaken with significant “extra risk” due to the claimant’s age and weight.

Claimant had left total knee replacement surgery on June 28, 2004; and, at the date of full hearing in this matter, claimant was scheduled for right total knee replacement surgery on December 13, 2004. As noted in the stipulations above, respondents paid for claimant’s first (left) knee replacement surgery and indemnity benefits following the surgery; further, respondents agreed to pay the same medical and indemnity benefits for the second (right) knee replacement surgery.

#### **FINDINGS OF FACT**

1. Claimant’s injury was a scheduled injury;
2. Respondents accepted claimant’s knee injuries as compensable and paid medical benefits, as well as certain periods of indemnity benefits and a 2 percent permanent impairment rating for each lower extremity;
3. All further stipulations agreed to herein by the parties are accepted as fact;
4. Claimant has not returned to work since August 30, 2001, the date of the second knee injury;
5. Objective findings exist that claimant was unable to return to work at any time after the injury of the second (right) knee, despite impairment ratings being issued by Dr. Cash on January 9, 2003;

6. Claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability indemnity benefits commencing August 30, 2001, and continuing through June 28, 2004, as well as attorney's fees.

7. Respondents have controverted claimant's entitlement to additional temporary total disability indemnity benefits and attorney's fees;

8. Respondents are entitled to credit for any permanent partial disability benefits paid during periods in which temporary total disability indemnity benefits should have been paid pursuant to this opinion.

### **DISCUSSION**

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The Court of Appeals has held that the determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.* These are matters of weight and

credibility, and thus lie within the exclusive province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Mgmt*, 343 Ark. 276, 33 S.W.3d 167 (2000).

In this case, there is no question that claimant has not worked since August 30, 2001. There is, likewise, no question that Dr. Cash issued some sort of report on January 9, 2003, to include impairment ratings that have been accepted by respondents, which respondents immediately began paying, rather than continuing TTD benefits. What is questionable is the extent of the full meaning and effect of the January 9, 2003, report by Dr. Cash. As that report was neither introduced into evidence nor proffered, this examiner is without the benefit of weighing the report without speculation.

Dr. Cash did testify about the report in his February 25, 2004, deposition, which is in evidence; however, his testimony regarding his opinion of that date was that he thought “at that time” that claimant had reached MMI but that he was never of the opinion that she could return to work – not even in a sit-down job. When

taking his entire testimony into account, in addition to the medical records in evidence, it is this examiner's opinion that despite Dr. Cash's issuance of impairment ratings following the more conservative treatments he had attempted with claimant, he was never of the opinion that she would be able to actually return to work without the knee replacement surgeries if her pain continued, which it did. His testimony seems to indicate that his January 9, 2003, opinion was actually that, without knee replacement, claimant's condition was as improved as it would get.

The medical records are clear that claimant continued to see Dr. Cash after January 9, 2003, complaining of persistent pain and receiving injections for same. Dr. Cash continued to discourage arthroplasty until February 4, 2004. It was not until after Dr. Mulhollan issued his opinion on May 13, 2004, agreeing with Dr. Cash, that respondents agreed to pay for the knee replacement surgeries. Claimant had the first knee replacement on June 28, 2004. Therefore, it is my opinion that claimant was not putting off the surgery, but simply waiting to be recommended for the surgery by her physician, Dr. Cash, and then waiting to know if it would be covered by respondents.

It is, therefore, this examiner's opinion that claimant remained in her healing period and unable to work and is entitled to additional TTD benefits from August 30, 2001, the last date she worked, through June 28, 2004, the date of her first knee replacement surgery. Claimant has proven by a preponderance of the evidence that she is entitled to this additional period of temporary total disability indemnity benefits.

**AWARD**

Respondents are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents are entitled to credit for any permanent partial disability benefits paid during periods in which temporary total disability indemnity benefits should have been paid pursuant to this opinion.

Respondents are directed to pay the claimant's attorney, Mr. Gary Davis, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

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CYNTHIA ESTES ROGERS  
Administrative Law Judge