

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408549

DENNIS ADDIE, EMPLOYEE	CLAIMANT
GE RAILCAR REPAIR, SELF-INSURED EMPLOYER	RESPONDENT NO. 1
SEDGWICK CLAIMS MANAGEMENT SERVICES, TPA,	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 25, 2006

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on June 28, 2006 at Texarkana, Miller County, Arkansas.

Claimant was represented by HON. GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents No. 1 represented by HON. CHARLES D. BARNETT, Attorney at Law, Texarkana, Arkansas.

Respondent No 2, represented by HON. TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 28, 2006, the above-captioned case came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on May 31, 2006, and a Prehearing Order was entered on June 1, 2006. A copy of the June 1, 2006, Prehearing Order was marked as Commission Exhibit "1" and made a part of the record herein without objection.

At the full hearing of June 28, 2006, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including June 29, 2004.
- 3) The claimant sustained a compensable injury to his right knee on June 29, 2004, and he reached maximum medical improvement from his injury on November 7, 2005.
- 4) The parties stipulated the vocational evaluation prepared by Terry Finley would be admitted into evidence without the necessity of Mr. Finley's appearance at the full hearing.
- 5) The parties stipulated that claimant raised compensation rates as an issue on March 16, 2006; and, that the previous ALJ's opinion which addressed compensation rates, was entered on February 10, 2006. (T. pg. 6, lines 6-12)
- 6) That the claimant was earning \$14.35 per hour at the time of his compensable injury.

At the hearing, the parties agreed the following issues would be litigated.

- 1) Whether the claimant's compensation rates were erroneously stipulated to at the prior hearing held in this matter on November 15, 2005.

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2) If the stipulated compensation rates were erroneous at the November 15, 2005, full hearing, should they now be modified pursuant to A.C.A. 11-9-713; and, should said modification be applied retroactively.

3) Res Judicata defense raised by the Respondent No. "1" regarding the issue of wage rate modification.

4) Determination of claimant's entitlement to permanent partial disability benefits and attorney's fees.

5) Whether claimant is entitled to additional medical treatment from Dr. Knight.

6) Whether Respondents No. 1 should be responsible for the cost of the impairment rating report prepared by Dr. Knight.

7) All issues not addressed herein are reserved.

At the full hearing the claimant contended, in summary, the following:

1) The compensation rate stipulated to by the parties at the hearing held November 15, 2005, and ordered in the Commission Opinion of February 10, 2006, was erroneous and should be modified pursuant to A.C.A. 11-9-713.

2) That the Commission should modify the compensation rates, and the claimant should be awarded any unpaid underpayment of benefits due to the incorrect compensation rates stipulated to at the November 15, 2005, full hearing.

3) Claimant states he has sustained a permanent impairment rating to the right lower extremity of 50% based on the letter opinion and report of Dr. Norris Knight dated March 27, 2006, and is entitled to attorney's fees.

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4) That claimant is entitled to additional medical treatment; specifically, continued medication management from Dr. Knight.

5) That respondents should be responsible for the cost of the impairment rating report prepared by Dr. Knight.

At the full hearing Respondents No. 1 contended, in summary, the following:

1) That claimant's final healing period ended on November 7, 2005, in accordance with an office note of Dr. Knight dated the same date. In a report dated March 18, 2005, Dr. Knight made the following finding. "While it is somewhat subjective, it is thought that approximately 80% of his pathology is pre-existing and 20% represents an exacerbation from the recent industrial injury. All of the traumatic arthritis in the patella, femoral and lateral compartment is pre-existing and the only exacerbation would be the medial compartment. Overall, 20% exacerbation, 80% pre-existing." Therefore, Respondents No. 1 maintain that they owe no permanent disability benefits as the claimant would be unable to prove major cause.

2) Respondent No. 1 contended any alleged issues regarding wage rate, average weekly wage, or compensation rates are now "res judicata" by virtue of the prior hearing with stipulations contained therein and the decision issued therein was not appealed and thus final. That, based upon the stipulations from the November 15, 2005 hearing and the subsequent ALJ opinion filed February 10, 2006, the claimant's PPD rate should be \$216.00 per week.

3) Respondents No. 1 contended the claimant is not entitled to any additional medical benefits or the cost of Dr. Knight's rating report.

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Respondent No. 2 contended at the full hearing, in summary, the following:

- 1) The claimant cannot demonstrate that he is entitled to permanent total disability benefits, and
- 2) That the major cause of his disability is not the compensable knee injury.
- 3) That if there is an anatomical impairment rating that is found to be valid and owed, that it would be the responsibility of the carrier and not the Second Injury Fund. That wage-loss disability is not an issue at this time.

DISCUSSION

1. History

The parties stipulated that the claimant sustained a compensable right knee injury on June 29, 2004. On that date, the claimant stepped off a ladder onto a bolt and twisted his right knee. After the June 29, 2004 injury, the claimant treated primarily with Dr. Norris Knight. The claimant was treated with a series of injections, with no benefit, and arthroscopic surgery to treat his tear of the medial meniscus on November 12, 2004. Dr. Knight noted the arthroscopy and debridement of claimant's complex tear of the medial meniscus was only partial successful, and recommended a total right knee replacement on March 18, 2005. The claimant received the total knee replacement on June 15, 2005.

Respondents No. 1 and the claimant disagreed about various dates of TTD the claimant was entitled to, and as a result, the parties had a full hearing before the

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Commission and this Administrative Law Judge on November 15, 2005. At the November 15, 2005 hearing, the claimant, pro se, stipulated to a TTD rate of \$289.00 per week. On February 10, 2006, this Administrative Law Judge entered an opinion and order which awarded the claimant certain TTD benefits and accepted the parties stipulations as fact. Subsequent to the November 15, 2005 hearing, the claimant retained attorney Gregory Giles. On March 16, 2006, Mr. Giles sent a letter to the Commission requesting a hearing and listed compensation rates as an issue. (JX-3)

The claimant acknowledged at the June 28, 2006 hearing, that he had previous problems with his right knee. The claimant testified that they began around 1996 or 1997. The claimant testified that in 1996 he was having right knee pain and required a scope on his right knee. The claimant testified that at that time Dr. Webb advised him he had arthritis in the right knee. (T. pg. 43, lines 7-20) The claimant testified that after his right knee scope in the mid to late '90's that he had fluid drained off the knee once in 1998, but that after that he never really had any problems with his right knee until his compensable injury in 2004. The claimant testified that when Dr. Webb was treating his right knee between 1996 & 1998, there was no mention of the need for a total knee replacement.

After the claimant's total knee replacement in June of 2005, the claimant testified he continued to receive treatment from Dr. Knight until he was released by Dr. Knight and found to be at MMI on November 7, 2005. On March 27, 2006, Dr. Knight found the claimant to have a 50% permanent impairment to his lower extremity, based on the Guides to the Evaluation of Permanent Impairment, American Medical Association

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4th Edition. (CIX-2, pg. 31 & 32) Dr. Knight then elaborated on his impairment rating in an April 25, 2006 letter. (CX-2, pg. 34) In Dr. Knight's April 25, 2006 letter, Dr. Knight opined that 80 % of the claimant's impairment was due to pre-existing conditions and 20% was exacerbation from the June 2004 compensable injury.

The claimant testified that since his release from Dr. Knight on November 7, 2005, he has continued to have pain in his right knee, and requested continued pain/medication management from Dr. Knight.

II. Adjudication

A. Wage Rate Determination,

Modification pursuant to A.C.A. 11-9-713, and Res Judicata Defense

The claimant has alleged he stipulated to an erroneous wage rate at the full hearing conducted on November 15, 2005. The parties all agree that at the November 15, 2005 full hearing, the claimant stipulated to a temporary total disability rate of \$289.00 per week. Pursuant to that stipulation, the claimant would be entitled to a PPD rate of \$216.00 per week. This ALJ entered an opinion and order on February 10, 2006, which accepted the parties stipulations and awarded the claimant TTD benefits for the period of March 18, 2005, through June 14, 2005.

The claimant requestes a modification of previously stipulated compensation rate on the grounds of erroneous wage rate pursuant to A.C.A. 11-9-713, which states in part:

- "(a)(1) Except where a joint petition settlement has been approved, the Workers' Compensation Commission may review any compensation order, award or decision.
- (2) This may be done at any time within six (6) months of

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termination of the compensation period fixed in the original order or award, upon the commission's own motion or upon the application of any party in interest, on the ground of a change in physical condition or upon proof of erroneous wage rate."

Strict construction of A.C.A. 11-9-713 raises a seemingly unfair result. I find that when I accepted the parties stipulation of the claimant's TTD rate and accepted such as fact, my subsequent opinion filed February 10, 2006, amounted to an award or order that would be reviewable under A.C.A. 11-9-713. My February 10, 2006, opinion specifically awarded the claimant TTD for the period of March 18, 2005 through June 14, 2005 at the stipulated TTD rate of \$289.00 per week.

The claimant's attorney requested a review of the compensation rates on March 16, 2006, (JX-3), which was well within six months from the date of my February 10, 2006, award. The claimant argues that since he requested a review within six months of the February 10, 2006 order and even within six months of the actual stipulation, that review is proper. Claimant's argument seems logical as it appears 11-9-713 was intended to correct a situation just as is presented here. However, A.C.A. 11-9-713 specifically states "This may be done at any time within six (6) months of termination of the compensation period fixed in the original compensation order or award." (emphasis added) The fixed compensation period awarded in my February 10, 2006 order terminated on June 14, 2005; therefore, the time for review ended six months after June 14, 2005. As stated earlier, the strict construction of 11-9-713 seems to go against the intent of the Statute due to the fact that the claimant obviously didn't actually receive the TTD benefits

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I awarded until after my February 10, 2006 order. The claimant argues that he had six months from the date of the February 10, 2006 opinion. I agree that interpretation would seem logical; however, I must strictly construe the statute and in that instance this fixed period of compensation terminated on 6/14/05. I recognize that where there are multiple periods of limitations, the longer period is binding; however, I know of no period longer than six months when it comes to erroneous wage rates.

Therefore, I find the claimant's PPD rate is \$216.00 per week based on his stipulations contained in the record of November 15, 2006, (JX-1), and subsequent award dated 2/10/06. (JX-2) The issue of wage rates determination and res judicata become moot.

B. Permanent Partial Disability Benefits.

This claim is very similar to the facts in Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167.72 S.W. 3d 889 (2002). In Westbrook, the claimant was assigned a 30% whole body impairment, but the claimant's physician opined 90% of the impairment was due to the pre-existing conditions and 10% of the impairment was due to the Compensable injury. Therefore, in Westbrook, the Commission found that the claimant was entitled to PPD for a 3% whole body impairment

In the present claim, Dr. Knight has rated the claimant with a 50% permanent impairment to the lower extremity. (CX-2, pg. 31 & 32). Dr. Knight also expands his opinion to state that 80% of the impairment is due to pre-existing conditions and 20% is due to the claimant's compensable June 2004 injury. (CX-2, pg. 34) It is clear to this

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examiner that 20% of the claimant's lower extremity impairment was directly caused by the admitted compensable injury.

Permanent partial disability benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. If any compensable injury combines with a pre-existing disease or condition or the natural process of aging to cause or prolong disability or the need for treatment, permanent benefits shall be payable for the resulting condition only if the compensable disability is the major cause of the permanent disability or need for treatment.

Major cause is defined by A.C.A. 11-9-102(14) to mean "more than 50% of the cause." A finding of major cause shall be established according to the preponderance of the evidence. A preponderance of the evidence shows that the compensable injury was the major cause of 20% of the claimant's permanent impairment to his lower extremity. Therefore, I find Respondents No. 1 are obligated to compensate the claimant for a 10% permanent impairment to his lower extremity. (20% x 50% =10%)

C. Additional Medical Benefits

The claimant has requested continued treatment from Dr. Norris Knight as well as reimbursement for the cost of Dr. Knight's impairment rating. An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. (A.C.A. 11-9-508(a)). What constitutes reasonable necessary medical treatment is a question of fact.

Clearly, as stated above, I have awarded the claimant permanent partial

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disability benefits and, therefore, find that the rating report prepared by Dr. Knight was reasonable, necessary and related to the claimant's admitted compensable injury. The respondents controverted the cost of the visit and report from Dr. Knight for the rating, causing the claimant to bear the cost himself. Therefore, Respondents No. 1 are directed to reimburse the claimant \$450.00 for the cost of the impairment rating.

The claimant has requested continued medical management from Dr. Knight; however, the facts contained in the record do not lead this examiner to find that such continued care is reasonably necessary and related to the claimant's compensable injury. Claimant testified he had right leg pain years before the compensable event. Additionally, Dr. Knight released the claimant on November 7, 2005, at MMI, and there are no reports contained in the record that recommend additional treatment. Based on the evidence presented, I find the claimant has failed to prove by a preponderance of the evidence that future medication management is reasonably necessary in connection with his compensable injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704.

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

- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant's allegations of erroneous wage rate cannot be addressed because said request was not done "within six (6) months" of termination of the compensation period fixed in the February 10, 2006, ALJ opinion and order. Therefore, the other issue related to wage-rate determination and res judicata are now moot.
- 4) Based on the previous stipulations contained herein at JX-2, the claimant's PPD rate is \$216.00 per week.
- 5) The claimant has proven by a preponderance of the evidence that he sustained a permanent physical impairment to the lower extremity in the amount of 10% as a result of the June 29, 2004 compensable injury. Respondents No. 1 are responsible for the 10% lower extremity impairment plus the maximum statutory attorney's fee.
- 6) The claimant has proven by a preponderance of the evidence that he is entitled to a \$450.00 reimbursement for the cost of his impairment rating prepared by Dr.

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Knight. Said report was controverted by Respondents No. 1, and the claimant had to personally pay for the cost of the report.

- 7) The claimant has failed to prove by a preponderance of the evidence entitlement to future medical treatment from Dr. Knight.
- 8) Second Injury Fund has no liability for benefits awarded herein.

AWARD

Respondent No. 1 is hereby ordered and directed to pay the claimant for his 10% lower extremity permanent impairment. Further, Respondents No. 1 are ordered to reimburse the claimant for the cost of Dr. Knight's impairment rating report pursuant to the findings of fact and conclusions of law recited herein.

Maximum attorney's fees are herein awarded to claimant's attorney, the Honorable Gregory R. Giles, pursuant to A. C. A. 11-9-715.

Said award shall be paid in lump sum without discount. This award shall bear interest at the legal rate pursuant to A.C.A. 11-9-809 until paid.

S. DALE DOUTHIT
Administrative Law Judge

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