

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502152

SALLY CLEVELAND	CLAIMANT
FOOD PLUS V	RESPONDENT
STATE FARM & CASUALTY COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 30, 2006

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

Claimant represented by MARK FORD, Attorney, Fort Smith, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 13, 2006, 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 January 18, 2006. 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 December 9, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to her left knee and left low back on December 9, 2003.

4. Medical expenses have been paid to date for the claimant's left knee and low back injuries.

5. The claimant is entitled to a compensation rate of \$90.00 for temporary total disability and permanent partial disability.

By agreement of the parties the issues to be litigated are limited to the following:

1. Compensability of the claimant's right knee injury.
2. Additional medical and medical for the claimant's right knee.
3. Temporary total disability from December 10, 2003, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that on or about December 9, 2003, she sustained a compensable injury to her low back and left knee as a result of an accident, which occurred in the course and scope of her employment for the respondent, Food Plus. The accident occurred as follows: while claimant was working doing food prep, she slipped on a greasy substance on the floor near the deep-fryer and fell down, twisting her low back and landing on her left hip and left knee. As a result of this compensable accident and injury, the claimant contends: (a) that she is entitled to medical expense benefits for the reasonable and necessary treatment of her injury; (b) that she is entitled to temporary total disability benefits from December 9, 2003, to a date to be determined; (c) that she is still within her healing period, and the issue of permanent disability should be held in abeyance; and (d) that she is entitled to an award of attorney's fees.

In regard to the foregoing issues the respondents contend that all appropriate benefits are being paid with regard to this claim. Medical benefits have not been denied to the claimant. The medical documentation does not support entitlement to any indemnity benefits. At the time of the hearing, the respondents restated their contentions as set forth in the transcript.

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. The respondents submitted medical documentation marked Respondent's Exhibit No. 1 and non medical documentation marked Respondent's Exhibit No. 2. All of these exhibits were admitted without objection.

#### DISCUSSION

\_\_\_\_\_The parties have stipulated and the claimant testified that on December 9, 2003, while working for the respondent she slipped and fell and injured her left knee. The claimant testified that she wasn't knocked out but she was on the verge. The claimant testified that beside hitting her knee she also hit her shoulder and her elbow stating that just everything went down. The claimant agreed that she was first seen by Dr. Rodgers at the Cooper Clinic Pro-Med. The claimant testified that Dr. Rodgers prescribed Vioxx and sent her to physical therapy for treatment of her back and knee. The claimant testified that she went through approximately three months of physical therapy but did not notice any improvement. The claimant agreed that during her treatment with Dr.

Rodgers, she also noted swelling with her right knee because she was transferring all of her weight from her injured knee over to her right knee. The claimant testified that for at least a year prior to her December 9, 2003 fall, she had not been having problems with her low back or either one of her knees nor had she received any treatment for any of these areas during the past year.

The claimant testified that in 1969, she had surgery on her right knee to remove a meniscus. The claimant testified that since her surgery she has not had any significant problems with her right knee. The claimant testified that she was transferring her weight to her right knee to compensate for her injured left knee and she discussed this problem with Dr. Rodgers. The claimant testified that Dr. Rodgers injected both of her knees and that this treatment was "horrible." The claimant testified that she was referred to Dr. Wolfe, an orthopaedic doctor, and that he injected both her knees. The claimant remembered that Dr. Wolfe gave her knee supports for both of her knees which she wore to work. The claimant testified that Dr. Rodgers took her off work for one week following her compensable fall. The claimant testified that she returned to work and continued to work for the respondent until about March of 2004. The claimant remembers that the respondent's business closed approximately one month after she was laid off. The claimant testified that after she left work with the respondent she applied for several jobs but because of her limitations she was unable to find work within her limited duty capacity. The claimant testified that if she had not lost her job with the respondent and

if they had not closed down she would have continued to work for them on light duty. The claimant testified that she did work for a new restaurant in Fort Smith, Bailey's, at one point in 2005. The claimant testified that due to the pain in her knees she had problems with her concentration and then a deep fryer exploded which brought back memories of her fall at the respondent's business, so she quit.

The claimant testified that currently her knees do not support her and that her left knee snaps and pops. The claimant stated that her right knee is swollen all of the time and that she can feel a difference in both of her knees into her hips. The claimant testified that all of this throws her back to where it will spasm which occurs at least once a week. The claimant testified that it was her right knee that it is the basis of the pain that she is suffering right now and also her back pain is excruciating.

The claimant testified that on February 16, 2004, she was working for the respondent and again slipped in the deli area, but this time caught herself as she was going down. The claimant testified that even though she caught herself she was in a squatting position on her left side and it forced her right side to take an unnatural turn. The claimant testified that it twisted her back and her right and left knee. The claimant testified that no formal report was filled out since they did not have reporting sheets but she did report this incident to her doctor.

The claimant testified that in February of 2005, when she saw Dr. Wolfe, he recommended that she undergo lumbar epidural steroid

injections but she turned these down because she was afraid of them. The claimant testified that after her visit with Dr. Wolfe in February of 2005, she left the state of Arkansas and went to visit her sister in Indiana. The claimant testified that she intended to stay about one month but ended up staying until the fourth of July weekend. The claimant testified that ever since her slip and fall accident on December 9, 2003, she has continued to have problems with her knees and back and this was part of the reason she stayed in Indiana so long. The claimant explained that she couldn't make the twelve-hour drive back home because her knees were bothering her and the pain was so bad.

The claimant testified that when she returned to Arkansas she returned to see Dr. Wolfe and he in turn referred her to Dr. Jeffrey Evans for evaluation of her knees. The claimant testified that she also was referred to another physician to have an evaluation for her back but has been unable to see anyone. The claimant testified that Dr. Wolfe has kind of washed his hands of her. The claimant testified that Dr. Evans after examination has recommended that she go to Little Rock for treatment of her knees as well as for pain management. The claimant testified that to date she has not been able to return to work anywhere because of her condition and that she is asking to be allowed to go to UAMS based on Dr. Evans' referral. The claimant testified that she understands that Dr. Evans is recommending a right knee replacement and that she willing to undergo this procedure.

On cross examination, the claimant agreed that she has done some personal care work for \$10.00 an hour sporadically. The claimant explained that this job entails her sitting with elderly people in a hospice type situation. The claimant also agreed that Dr. Wolfe returned her to full duty work capacity in January of 2004, but indicated that this full duty should be as tolerated and she should observe a lifting restriction of no more than 15 pounds. The claimant continued to be treated by Dr. Wolfe and encouraged to observe his stated limitations through January 31, 2005. The claimant agreed that from February 2005 through October of 2005, she received no medical treatment which is the time she was in Indiana. The claimant agreed that she contacted the insurance company about getting medical treatment while she was in Indiana but she could not find a doctor to see her. The claimant testified that when she returned to Arkansas she again followed up with Dr. Wolfe. The claimant agreed that she has never had an orthopaedic evaluation of her back as recommended by Dr. Wolfe. The claimant agreed that she requested that she be referred to Dr. Standefer but Dr. Standefer declined to see her.

The medical records set forth that the claimant was seen at the Cooper Clinic on December 10, 2003, due to a slip and fall resulting in a bruise to her left upper arm, strain of her right lower wrist area, strain of the low back, and a bruise to the left knee. Dr. Edward Gill writes that the claimant is on Ziac for her blood pressure and also on an arthritis study which is double-blinded. The doctor writes that the claimant is not sure whether

she is on aspirin or another anti-inflammatory medication and that they will need to speak to her rheumatologist to make sure any medications will not interfere with their study. Upon examination, Dr. Gills notes that there is an obvious left knee contusion and bruise, deep bruise to her left upper arm, some mild soft tissue swelling of the right lower forearm, and she has subjective complaints of low back discomfort. The doctor notes that she has multiple contusions and bruises without any bony injuries. Dr. Gills removed the claimant from work for one week and prescribed medications that would be approved by her rheumatologist. The claimant was seen by Dr. Brian Rodgers on December 17, 2003, for follow up of her multiple contusions. Dr. Rodgers writes that the claimant reports that her left arm and left leg are still bruised and that she has a little numbness around the heel of her left foot. Dr. Rodgers notes that the claimant has low back pain which she feels is really not improving. After examination, Dr. Rodgers assessed the claimant with lumbar pain and multiple contusions which are resolving for which he prescribed medications, physical therapy, and released her to work on limited duty. On January 2, 2004, Dr. Rodgers writes that the claimant reports that she is not doing any better, that her heel is still numb, but that her back is a little better. Dr. Rodgers notes that the claimant is now complaining of right leg and right hip pain noting that the claimant stated that this started to occur when she was transferring more weight onto her right side. Dr. Rodgers notes that the claimant has had previous surgery to her right knee. Dr.

Rodgers prescribed medications and physical therapy and that she is to continue on limited work duty. On January 12, 2004, Dr. Rodgers saw the claimant and notes that she is still complaining of lower back pain and other problems which she opines the physical therapy is not helping. Dr. Rodgers continued the claimant's medications and physical therapy and notes in an addendum that the claimant feels that her transfer of weight from one side to the other has aggravated her arthritis. On January 27, 2004, the claimant underwent radiographic studies of her right hip which showed marked osteoarthritis changes of the right hip, asymmetric when compared with her left, and of her right knee which showed moderate arthritic changes of the right knee with evidence of chondrocalcinosis, possibly representing calcium pyrophosphate disease. Physicians statements dated January 2, 12, and 27<sup>th</sup> indicated that the claimant was continued on limited duty work with a lifting restriction of not over 10 pounds. On January 29, 2004, the claimant underwent radiographic studies of her lumbar spine which revealed degenerative changes to her thoracic region and scattered through the lumbar area with some moderate sized spurs in the lower thoracic spine and small spurs in the mid to lower lumbar region. There is also noted a defect posterior element at L5 on the left side which could be congenital or it might possibly be related to a prior surgery. There were also tests made of the claimant's knees which revealed degenerative changes in both knees, the right worse than the left. On February the 12<sup>th</sup>, the claimant underwent an MRI of her left knee which revealed a tear of the

posterior horn medial meniscus with a small joint effusion. The physical therapist writes on February 17, 2004, that the claimant reports that she has fallen again the same food prep area as she had her previous injury. The therapist writes that the claimant reports that she heard a click or pop in her right knee, reported this event but no paper work was filled out. The therapist also notes that the claimant states that she has had an increase of pain in the lumbar region. The claimant underwent radiographic studies of her knees on February 26, 2004, which revealed severe medial compartment joint space narrowing in the right knee and minimal lateral compartment narrowing on the left. This report sets forth that there is spurring and sclerosis in the medial compartment of the knee joint space on the right as well as mild narrowing at the patellofemoral joint on the right as well as spurs. It is noted that there is probable some knee effusion.

Dr. Michael Wolfe writes on January 29, 2004, after examination and review of the claimant's radiographic reports that the claimant probably has a degenerative meniscal tear superimposed over degenerative changes in her left knee, lumbar syndrome superimposed over degenerative changes and degenerative joint disease of the right hip. Dr. Wolfe administered an injection to the claimant's knee, gave her a knee support and recommended physical therapy for her back and knee. The doctor also continued the claimant on Vioxx and to limit her lifting to less than 15 pounds. On February 26, 2004, Dr. Wolfe writes that the claimant's left knee is a little better and that the MRI of the claimant's

right knee showed a probable tear of the posterior horn of the medial meniscus noting that the right knee is actually bothering her worse. Dr. Wolfe notes that the claimant reports that she had another slip just a few days ago and that although she did not strike her knee, she twisted it. Dr. Wolfe notes that the claimant had a meniscectomy of the right knee in 1968. After examination, Dr. Wolfe reviewed the claimant's studies of her right knee which showed near complete loss of medial joint space. Dr. Wolfe writes that the claimant still has a lot of pain related to her back and left knee but that her right knee is probably related mainly to the degenerative changes in the knee but was aggravated by this secondary injury. Dr. Wolfe injected the claimant's right knee and gave her a knee brace as well as kept her on her present light duty limitations. On April 1, 2004, Dr. Wolfe writes that the claimant reports that the injections did not help her knee and that she continues to have ongoing discomfort in both knees. Dr. Wolfe writes the claimant's left knee is not bothering her bad enough to warrant surgical intervention and recommended that she continue with regular duty as tolerated. Dr. Wolfe writes on June 3, 2004, that the claimant's left knee is better but that her right knee is still painful and she has difficulty getting around. The doctor notes that the claimant reports continuing numbness in her left heel and that she does have some symptomatic numbness along the posterior aspect of her left foot. Dr. Wolfe recommended that she have an MRI of her lumbar spine as well as EMG and NCV studies. It was recommended that she continue on regular duty as tolerated and

Bextra was prescribed. Dr. Wolfe did not see the claimant until January 31, 2005, when she reported that she was still having low back and left knee pain as well as numbness that radiated to her left heel. After examination, Dr. Wolfe writes that the claimant has ongoing cartilage changes in her left knee and notes that the numbness and radiation of pain causes him to be concerned that there may be a disc problem. Dr. Wolfe again recommended an MRI as well as EMG and NCV studies of the lower extremities. The doctor recommended that the claimant not do any repetitive bending, stooping, or lifting more than 15 pounds. On February 28, 2005, Dr. Wolfe writes that the claimant still has some numbness extending into her left heel. Dr. Wolfe writes that the claimant's EMG and NCV studies showed absent H reflexes. It is noted that there was no evidence of denervation on her EMG and the doctor writes that this could be an S1 nerve root lesion. Dr. Wolfe writes that the claimant's MRI did show some posterior lateral disc bulges at 3-4 and 4-5. The doctor notes that due to her continued complaints of knee pain, he would like to try an LESI. Dr. Wolfe continued the claimant on her previous restrictions. On October 18, 2005, the claimant was seen by Dr. Wolfe where she reports that she is still having severe back and knee pain, right worse than left. The claimant reported that she had been working at Bailey's restaurant but due to the pain she could not tolerate the work noting that activity worsens her discomfort. Dr. Wolfe writes that the claimant reports that her worse pain is her back pain with some radiation down her leg. Examination revealed that both her knees

had significant crepitus with McMurray's and both showed significant medial joint line pain. The claimant was assessed with lumbar syndrome possibly radicular component to her pain, degenerative joint disease of her right knee and meniscal tear of her left knee. Dr. Wolfe writes that the claimant would like to consider surgical intervention for these problems and would like to see Dr. Standefer for her back and Dr. Evans for her knees.

Dr. Jeffrey Evans writes on January 26, 2006, that he has seen the claimant for her complaints of bilateral knee pain. Dr. Evans notes that her right knee hurts worse than her left and that this keeps her awake at night. The claimant reports some swelling bilaterally and that both knees buckle. Upon examination, Dr. Evans notes that she has a well healed medial joint scar on the right and that she has valgus deformity of the right knee. Dr. Evans notes that the claimant has normal alignment of her left knee and there is crepitus noted with range of motion of the bilateral knees. X-rays of the claimant's right knee showed degenerative joint disease primarily in the medial and patellofemoral compartments with bone on bone articulation medially. X-rays of the claimant's left knee showed mild degenerative joint disease with mild degenerative joint disease with mild medial joint space narrowing and retropatellar spurs. The claimant was assessed with bilateral knee degenerative joint disease right greater than left. Dr. Evans writes that this is a very complex situation and that her right knee is much worse than her left. He noted that she also has chronic low back and hip pain. Dr. Evans recommended that the

claimant be referred to UAMS for consideration of right total knee replacement with evaluation by neurosurgery and also a referral to a pain control service. Dr. Evans opined that the claimant needs a team approach to her various problems in order to have success with her treatment. Dr. Evans writes to the respondent's carrier on March 3, 2006, in response to their letter regarding the claimant. Dr. Evans again states that he feels that the claimant needs a team approach to address her various medical problems, writing that he does not feel that the claimant's pain and symptoms will be adequately treated by one simple surgery. Dr. Evans writes that the claimant will need a comprehensive team approach in order to work out all of the issues that relate to her pain and symptoms. Dr. Evans notes that it is his opinion that her degenerative joint disease of both knees predated the workers' compensation accident of December 9, 2003. However, he thinks that her degenerative disease was not symptomatic prior to that date, yet became symptomatic after her injury. In answer to another one of the carrier's questions, Dr. Evans writes that the claimant has a history of right knee arthrotomy and total medial meniscectomy in 1969. Dr. Evans writes that many patients are seen every year who have had a history of these types of problems and over a 20 year period of time have developed significant arthritis in the knee, particular in the medial joint compartment where the meniscus was removed. Dr. Evans writes that the claimant related the problems with her bilateral knees to her falling on a greasy floor at work on December 9, 2003. Dr. Evans writes that with all the

information that he has it is his medical opinion that while her previous surgical treatment did contribute to the severe arthritis of the right knee certainly the accident of December 9, 2003 left both of the knees symptomatic. In answer to another one of the carrier's questions, Dr. Evans writes that the claimant was asymptomatic prior to the fall of December 9, 2003, and that he thinks that the number would be less than 50% because the fall brought on the symptoms that she now has and should be considered the majority of the causative effect.

After a review of all of the evidence, I find that the claimant has proven by a preponderance of the evidence that she has exacerbated her pre-existing right knee arthritis due to overuse following her compensable left knee injury. The claimant therefore is entitled to treatment for her right knee as well as ongoing treatment for her left knee and back. The medical records set forth that the claimant was being treated for arthritis prior to her compensable injury and Dr. Evans has noted that in his opinion her degenerative joint disease pre-dated her workers' compensable accident. Dr. Evans also writes that it is his medical opinion that while the claimant's previous surgical treatment did contribute to her severe arthritis of the right knee certainly the accident of December 9, 2003, left both of the knees symptomatic. Dr. Evans further writes that he thinks that the claimant's compensable fall is the major cause or need for her medical treatment. The claimant has failed however to prove by a preponderance of the evidence that she is entitled to temporary

total disability from December 10, 2003 to a date to be determined. The claimant's own testimony has indicated that she continued to work for the respondent on limited duty up to March 4, 2004, at which time she was laid off. The claimant has testified and the records set forth that she worked for a restaurant named Bailey's from approximately September 7, 2005 through September 20, 2005, and that she also has worked sporadically as a temporary earning \$10.00 an hour sitting with elderly patients. The frequency and length of time which the claimant may have worked for this temporary agency is impossible to determine since there is no testimony or documentation to verify except for the claimant testifying that she earned \$10.00 an hour. Based on Arkansas law, as set forth in Wheeler Construction Company v. Armstrong, 73 Ark. App. 146, 41 S.W. 3<sup>rd</sup> 822 (2001), the claimant is entitled to temporary total disability for her scheduled injuries beginning on March 4, 2004, to a date to be determined except for the period of time from September 7, 2005 through September 20, 2005, when she was working for Bailey's restaurant. The Court of Appeals in the Armstrong case set forth that Ark. Code Ann. §11-9-521(a) expressly provides that for a scheduled permanent injury the injured employee is to receive compensation for temporary total or temporary partial during the healing period or until the employee returns to work whichever occurs first. The Court wrote that conspicuously absent from this statute is any indication that the injured employee show an incapacity to earn wages as a requirement to receiving temporary benefits. The Court held that the only issue in the Armstrong case

in dispute was whether Armstrong remained within his healing period. In the case involving the claimant herein, the claimant is under ongoing treatment for her knees and there has been no indication that she has reached the end of her healing period.

FINDINGS & CONCLUSIONS

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

2. On December 9, 2003, the relationship of employee-employer existed between the parties.

3. The claimant sustained compensable injuries to her left knee and left low back on December 9, 2003.

4. Medical expenses have been paid to date for the claimant's left knee and low back injuries.

5. The claimant is entitled to a compensation rate of \$90.00 for temporary total disability benefits and permanent partial disability.

6. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right knee resulting from overuse due to her compensable left knee injury.

7. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injuries to her left knee and back as well as her right knee at the respondents' expense.

8. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from March 4, 2004 to a date to be determined except for a period of time from

September 7, 2005 through September 20, 2005. See Discussion above. Also see Wheeler Construction Company v. Armstrong, 73 Ark. App. 146, 41 S.W. 3<sup>rd</sup> 822 (2001). Also see Ark. Code Ann. §11-9-521(a).

9. 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 sustained a compensable injury to her right knee due to overuse resulting from her compensable left knee injury. The respondents shall pay for continuing medical treatment for the claimant's compensable left knee, back, and right knee injuries.

The respondents shall pay temporary total disability to this claimant from March 4, 2004 to a date yet to be determined with the exception of a two week period of time from September 7, 2005 through September 20, 2005.

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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE