

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409848

SHARON COX, EMPLOYEE

CLAIMANT

THE HICKORY HOUSE, EMPLOYER

RESPONDENT

FIRSTCOMP INSURANCE COMPANY, CARRIER

RESPONDENT

OPINION FILED AUGUST 2, 2006

Hearing before Administrative Law Judge J. Mark White on April 6, 2006, in Hope, Hempstead County, Arkansas.

Claimant represented by Mr. Jim Bob Steel, Attorney at Law, Nashville, Arkansas.

Respondents represented by Mr. William Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 6, 2006, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on December 19, 2005, and a Prehearing Order was entered that same day. A copy of the December 19, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including March 22, 2004; and that respondents have controverted this claim in its entirety.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary total disability benefits and medical treatment; determination of the claimant's average weekly wage and corresponding compensation rate; and attorney's fees. At the hearing, the parties agreed to add the issue of whether the claimant is entitled to permanent partial disability benefits.

The claimant contends that she sustained an on-the-job injury while working as a waitress with the respondent-employer on March 22, 2004; that at the time of her injury, she was earning approximately \$700 weekly; that she has not reached the end of her healing period; and that she is entitled to temporary total disability benefits and permanent partial disability benefits.

Respondents contend that claimant did not report an on-the-job injury; that the claimant indicated that she was quitting due to her boyfriend being injured in Iraq; that the claimant was denied unemployment benefits for abandoning her job; that any knee condition that the claimant has is preexisting and not work related; and that the claimant earned an average weekly wage of \$251.91, entitling her to a compensation rate of \$168 for total disability benefits.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 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 has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment; and that her injury was caused by a specific incident identifiable by time and place of occurrence.
4. The claimant has proven by a preponderance of the evidence that her injury required medical services and caused internal physical harm to the body, specifically the right knee; and that the existence and extent of her right knee injury is established by medical evidence supported by objective findings.
5. The claimant has therefore proven by a preponderance of the evidence that

she sustained a compensable injury to her right knee.

6. The claimant has proven by a preponderance of the evidence that the medical treatment rendered for her right knee between April 5, 2004, and August 17, 2004, was reasonably necessary in connection with her compensable injury.
7. The claimant has failed to prove by a preponderance of the evidence that the medical treatment rendered after August 17, 2004, was reasonably necessary in connection with her compensable injury.
8. The claimant has proven by a preponderance of the evidence that she was within her healing period and had not returned to work from May 22, 2004, through August 17, 2004.
9. The claimant has therefore proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from May 22, 2004, through August 17, 2004.
10. The claimant has proven by a preponderance of the evidence that she earned an average weekly wage of \$253.23.
11. The claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits.
12. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a waitress. In mid-March 2004, while taking a drink to a customer, she tripped and fell. She testified that she landed on both knee. One of the customers present that day testified and agreed she landed on both knees; another customer testified he thought she landed on only one knee, but he acknowledged that he was on the other side of the table and could not directly see how she landed. Both the customers and the claimant's supervisor noticed her limping for some time after this fall.

The claimant testified she thought the pain in her knee would go away, so she did not initially seek medical treatment. The claimant testified the respondent-employer did not offer her medical treatment, but she acknowledged she never asked for any. She went to the hospital on April 5 with the following history: "54 y/o c/o fall @ work approx 3 wks ago, c/o R knee pain doesn't appear to be getting any better. States unable to bear wt. Denies swelling." X-rays revealed nothing but "demineralization" – a loss of calcium in the bone attributable to the claimant's age and sex. She was diagnosed with a right knee contusion and advised to see an orthopedist for follow-up. Instead, she saw her family doctor, Dr. Max Odom, on April 12. Though the hospital records quoted the claimant as denying having any

swelling, Dr. Odom's records quote the claimant as saying she had "significant swelling." Dr. Odom noted increased crepitus in the knee and diagnosed the claimant with post-traumatic subpatellar bursitis. As explained by Dr. Odom in his deposition, subpatellar bursitis is an inflammation of the bursa under the kneecap.

Dr. Odom prescribed medication and provided a work excuse. Nonetheless, the claimant continued to work. Dr. Odom continued to treat her, and on May 21 he provided a knee injection. The following day, the claimant flew to Houston to care for her boyfriend, a soldier who had been injured in Iraq. It is not clear from the record precisely when the claimant returned from Houston, but she next saw Dr. Odom on June 24. His treatment note of this visit omits any diagnosis of bursitis and replaces it with a diagnosis of post-traumatic arthritis with a component of pre-existing osteoarthritis of the knee exacerbated by the work injury. The claimant returned again to Dr. Odom on August 17. The condition of her right knee was mostly unchanged, but Dr. Odom for the first time noted crepitus in the left knee. He advised the claimant to return in four to six weeks, but she never returned. She testified she lost her health insurance and could not afford to return to Dr. Odom.

Whether the claimant properly notified the respondent-employer of her intent to leave her job and fly to Houston is disputed by the claimant and her supervisor. Whatever notice was given, when the claimant returned from Houston

she was advised by her supervisor there was no position available for her. The claimant then filed for unemployment benefits. She testified that had a position been available, she would have resumed working for the respondent-employer in spite of the condition of her knee.

The claimant did not seek treatment again until a year later, when Arkansas Rehabilitation Services agreed to pay for additional medical treatment. She went to the hospital on May 30, 2005, and from there she was referred to an orthopedist, Dr. Jeffrey DeHaan. Dr. DeHaan first saw her on June 24 and diagnosed her with "bilateral internal derangement of the knees." An MRI scan revealed a complex tear of the meniscus of the right knee, and Dr. DeHaan performed surgery to repair the tear on September 30. The claimant testified she received only temporary relief from the surgery, and that her right knee was back to its prior condition within weeks. Her left knee worsened as well, and an MRI scan of that knee also revealed a meniscal tear. Dr. DeHaan wrote in his note of November 7:

Sharon is here F/U right knee arthroscopic meniscectomy. Her left knee is bothering her quite a bit as well, and she's here F/U MRI scan of that knee. She has a medial meniscal tear of the knee as far as the intra articular pathology is concerned. She also has the same avascular changes to the intra medular area of her bone. These are both quite interesting in that both knees have primarily the same happenings to them.

After a bone scan was performed, Dr. DeHaan speculated the claimant had

“articular microfractures” in both knees as a result of avascular necrosis of the knees. Dr. DeHaan has treated the left knee conservatively, but he performed a total knee replacement on the right knee on December 1. It is not known at this time whether the claimant will also require a total replacement of the left knee.

II. Adjudication

A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be

denied. *Id.*

The claimant testified that she experienced an onset of pain in her right knee in mid-March 2004 when she fell while on the job. Her description of the fall was corroborated by two witnesses, and her supervisor acknowledged she reported a fall. I find that the claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment; and that her injury was caused by a specific incident identifiable by time and place of occurrence.

The claimant credibly testified to an onset of pain in the right knee beginning with this fall. Dr. Odom diagnosed her with a traumatic injury to the right knee, and his diagnosis was supported by objective findings, including his observation of crepitus in the right knee. Though the claimant now has problems in both knees, nothing in the record documents any complaint of pain in the left knee, nor any objective finding of injury, until months after the fall at work. On balance, there is insufficient evidence in the record to connect the claimant's left-knee problems (and accompanying objective findings) with her fall at work.

I find that the claimant has proven by a preponderance of the evidence that her injury required medical services and caused internal physical harm to the body, specifically her right knee; and that the existence and extent of her right knee injury is established by medical evidence supported by objective findings. The claimant has

proven every element of a compensable injury; I therefore find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right knee.

B. Medical Treatment

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. Ark. Code Ann. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). Even if a preexisting condition is also a causal factor, the claimant need show only that the work injury combined with or aggravated the preexisting condition to bring about the need for the treatment. *General Elec. Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

The claimant has essentially had two separate rounds of treatment: treatment by Dr. Odom for a subpatellar bursitis in the right knee, and treatment by Dr. DeHaan for meniscal tears and avascular necrosis of both knees. Nothing in the record indicates the claimant had any form of subpatellar bursitis prior to her work injury, though she had been treated in 2000 for bursitis in a different area of the knee. Dr. Odom testified in his deposition that the subpatellar bursitis he diagnosed

was related to the work injury of March 2004. I find that the claimant has proven by a preponderance of the evidence that the medical treatment rendered for her right knee between April 5, 2004, and August 17, 2004 – the end of her treatment with Dr. Odom – was reasonably necessary in connection with her compensable injury.

In his treatment the following year, Dr. DeHaan diagnosed the claimant with meniscal tears and avascular necrosis in both knees. In his deposition testimony he agreed that these conditions “could reasonably flow” from the injury of March 2004. But when pressed for details as to the two specific injuries, Dr. DeHaan appeared far less certain. As to the meniscal tears, it is notable that while the claimant has had significant tears in both knees, her pain was limited to the right knee for many months after the work injury. Dr. DeHaan testified that had the work injury caused the tears, he would have expected the claimant to develop catching and giving way episodes “fairly soon” after the injury, yet the testimony and medical records indicate these symptoms did not arise until many months after the work injury.

As for the avascular necrosis, it is likewise notable that while the claimant has necrosis in both knees, she had no left knee symptoms for many months after the work injury. Dr. DeHaan again testified he would have expected symptoms to develop in both knees had the fall contributed to the necrosis, rather than in the right knee alone.

It must also be noted there is nothing in the record to establish what the claimant's symptoms were, or how those symptoms changed, in the ten months between her treatment with Dr. Odom and her treatment with Dr. DeHaan. Finally, though I find Dr. Odom's treatment of subpatellar bursitis in 2004 to be causally connected, there is nothing in the record to explain what, if any, connection this subpatellar bursitis has to the arthritis, meniscal tears, and avascular necrosis treated by Dr. DeHaan.

Given the record before me, I am not persuaded that the claimant's 2004 fall caused the internal knee problems treated surgically by Dr. DeHaan in 2005, nor am I persuaded that the fall aggravated a pre-existing condition to bring about this need for treatment and surgery. I find that the claimant has failed to prove by a preponderance of the evidence that the medical treatment rendered after August 17, 2004, was reasonably necessary in connection with her compensable injury.

C. Temporary Total Disability Benefits

An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during her healing period or until she returns to work, whichever occurs first. Ark. Code Ann. § 11-9-521 (a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period

continues until the underlying condition has become stable, the employee is as far restored as the permanent character of her injury will permit, and there is nothing further in the way of treatment that will improve her condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

As discussed above, I find that medical treatment was reasonably necessary only through August 17, 2004. The claimant received no treatment for some ten months thereafter, and there is nothing to suggest her condition in this time was anything but stable. I therefore find that the claimant reached the end of her healing period on August 17, 2004.

The claimant worked from the time of her injury until mid-May. She left for Houston on May 22 and did not return until mid-June. The date of her return is unknown, but she did see Dr. Odom on June 24. Though the claimant worked in the months following her injury, Dr. Odom testified she should not have been working at any point during his treatment of her.

In many respects this claim resembles that of *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Like the present claimant, Biles sustained a scheduled injury yet continued to work. Biles worked until he was terminated for reasons unrelated to his injury, just as the present claimant worked until she voluntarily left her employment for reasons unrelated to her injury. Yet the Court

of Appeals found Biles to be entitled to temporary total disability benefits while off work, even though he initially continued to work until he was terminated.

Given the above discussion and the precedent of *Biles*, I find that the claimant has proven by a preponderance of the evidence that she was within her healing period and had not returned to work from May 22, 2004, the date she left for Houston, through August 17, 2004, the end of her healing period. I therefore conclude that the claimant has proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from May 22, 2004, through August 17, 2004.

D. Average Weekly Wage

Compensation is payable at a rate computed from the claimant's average weekly wage under the contract of hire in force at the time of the accident. Ark. Code Ann. § 11-9-518(a)(1). The Commission is empowered in exceptional circumstances to determine the average weekly wage by a method that is just and fair to the parties. Ark. Code Ann. § 11-9-518(c).

The claimant's wage records were introduced into the record by the respondents. The claimant asserted that she received additional tip income not reflected neither on the wage records nor on her W-2. The claimant guessed that she

earned a total of \$600 per week including all her tip income. The claimant introduced no records to corroborate or support this assertion.

On balance, I find documentary evidence to be more persuasive on this question than a mere guess by the claimant. The wage records reflect that for the ten pay periods preceding the date of injury (March 17), the claimant was paid a total of \$2,532.26, or an average of \$253.23. I find that the claimant has proven by a preponderance of the evidence that she earned an average weekly wage of \$253.23.

E. Permanent Partial Disability Benefits

The parties agreed at the hearing to add the issue of permanent partial disability benefits. Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969).

The record before me contains no permanent impairment rating assigned by any physician. Without submitting into evidence a physician’s report assigning a permanent impairment rating, a claimant is not entitled to permanent disability benefits or wage-loss benefits. *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 116 S.W.3d 461 (2003); *but see Johnson v. General Dynamics*, 46 Ark. App. 188, 878

S.W.2d 411 (1994). Therefore, I conclude that the claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits.

F. Introduction of New Evidence

Ordinarily, all evidence is to be presented to the Commission at the hearing, and evidence may be admitted after the hearing only at the discretion of the Commission. Ark. Code Ann. § 11-9-705 (c)(1). At the hearing, the parties were given permission to depose Dr. DeHaan after the hearing, and the transcript of Dr. DeHaan's deposition is therefore admitted into evidence as Joint Exhibit No. 2, to be retained separately in the Commission's file.

On July 19, the claimant's attorney moved to introduce 165 pages of new medical evidence into the record. These records were utilized by Dr. DeHaan in his deposition, and the claimant's attorney and respondents' attorney have agreed to jointly submit these new records. The respondents have offered no objection. Therefore, the newly submitted medical documentation will be admitted into the record herein as Joint Exhibit No. 3, to be blue-backed and retained separately in the Commission's file.

AWARD

The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right knee; that the medical treatment rendered for her right knee between April 5, 2004, and August 17, 2004, was reasonably necessary in connection with her compensable injury; and that she was entitled to temporary total disability benefits from May 22, 2004, through August 17, 2004. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Jim Bob Steel, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge