

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504388

LAURIE KOLBEK,
EMPLOYEE

CLAIMANT

I C CORPORATION,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED MAY 26, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Conway, Faulkner County, Arkansas.

The claimant was represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

The respondent was represented by HONORABLE J. MATTHEW MAULDIN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 15, 2006 in Conway, Arkansas. A prehearing order was entered in this case on November 1, 2005. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. This prehearing order was supplemented by a letter dated February 6, 2006. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record, and the February 6, 2006 letter was made Commission's Exhibit No. 2 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order or in the February 6, 2006 supplemental letter and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer-employee-carrier relationship existed on or about November 22, 2004.
3. The claimant sustained a compensable injury on November 22, 2004.

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

Claimant:

1. Claimant's entitlement to additional benefits on and after March 12, 2005, including payment of medical expense and TTD from March 12, 2005, to at least June 20, 2005.
2. Whether claimant sustained a new, non-work-related injury on March 12, 2005, such that the incident on said date is an independent, intervening cause.
3. Controversion.
4. Attorneys' fees.

Respondent:

1. Whether claimant sustained an independent intervening injury on March 12, 2005.
2. Whether the claimant is entitled to benefits in connection with her alleged March 12, 2005 injury.

The record consists of the March 15, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

1. Independent Intervening Cause

The Arkansas Court of Appeals has described the following test for an independent intervening cause determination:

The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984).

Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 167, 969 S.W.2d 677 (1998).

As noted by the Court of Appeals in Davis v. Old Dominion Freight Line Inc., 69 Ark. App. 74, 77, 13 S.W.3d 171 (2000), affirmed 341 Ark. 751:

the overriding issue in cases involving subsequent injury or disability is 'whether there is a causal connection between the primary injury and the subsequent disability,' and only if such a connection exists does the question of the claimant's conduct need to be addressed.

More recently the Arkansas Court of Appeals summarized this area of law again as follows in *GNB Technologies v. Bryant*, ___ Ark. App. ___, ___, S.W.3d ___ (CA03-549, November 19, 2003):

We have held that, where the second complication is found to be a natural and probable result of the first injury, the employer remains liable; only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). The basic test is whether there is a causal connection between the two episodes. *Id.*

In the present case, the claimant sustained an admittedly compensable fracture of the patella in her left knee on November 22, 2004. According to the medical reports, the claimant was immediately put in a knee immobilizer, and the claimant did not come out of the knee immobilizer until a couple of weeks before she returned to light duty work for the respondents in February of 2005. On

March 12, 2005, the claimant was involved in an incident away from work in which she sustained what Dr. James Mulhollan, an orthopedic knee surgeon, has ultimately diagnosed as a lateral tibial plateau fracture in the left leg.

As I understand Dr. Mulhollan's relevant reports, Dr. Mulhollan has essentially concluded that the lateral tibial plateau fracture is a natural and probable consequence of the earlier patellar fracture because (1) when Dr. Mulhollan performed x-rays of each leg on March 17, 2006, the left leg had "profound left knee region osteopenia", (2) the claimant did not sustain sufficient trauma in the incident on March 12, 2005 to, in Dr. Mulhollan's opinion, have sustained a lateral tibial plateau fracture as a result solely of the trauma on March 12, 2005, and (3) Dr. Mulhollan attributes the osteopenia that he observed in the left knee region to the claimant having worn an immobilizer for the period that she wore it for her admittedly compensable November 22, 2004 injury. Dr. Mulhollan concluded in part in a March 17, 2005 letter to the respondents' company doctor:

I do think the fracture injury is directly related to the patellar fracture. This extremity is decidedly osteoporotic. The trauma that caused the fracture was quite minor, even though it seemed to be associated with a historically significant

mechanism. At the patient's age, the tibia should not fracture with such minor trauma.

In a March 24, 2005 letter, Dr. Mulhollan explained further:

The traumatic incident that this patient describes, that is, a 2-3-mile-an-hour injury, quite minor, is not enough to fracture the tibial plateau in a 47-year-old female. Such a tibial plateau fracture is highly unusual except in an elderly patient. A 47-year-old factory worker with a normal weight does not qualify as that. If I listed the etiologic causes of her injury, I would say first that the presence of osteoporosis that is a direct outcome of the patellar fracture and immobilization is greater than 50 percent. The second cause is the trauma that was sustained, which constitutes less than half of the cause of her having this injury. Therefore, it is my hope that the decision about responsibility in this case will be reconsidered.

At the request of the respondents, the claimant was also evaluated by Dr. Charles Pearce, an orthopedic specialist. Dr. Pearce in his May 26, 2005 letter included the following discussion regarding Dr. Mulhollan's conclusion that Ms. Kolbek experienced profound osteopenia of her leg secondary to her initial on the job injury which set her up for her second injury:

Although osteopenia could have played a role in a fracture such as this, in this particular case, the pathoanatomy was never nonweightbearing on the involved extremity (She used one crutch and was, at the very least, partial weightbearing) and it would be very unusual for her to develop "profound osteopenia" without other metabolic processes

being present. Also, it is well known among orthopaedists that plain radiographs are a poor quantitative evaluation of bone quality. Lastly, I would judge that, despite the reported speed of the trike (approximately 3 mph) when the injury occurred, the weight of such a heavy vehicle on an incline could produce significant force and easily produce what amounts to minimally displaced fractures in the tibial plateau (which is a region of the bone known as the "metaphysis" and is susceptible to these types of injuries, even with normal bone quality).

In response, Dr. Mulhollan wrote in part on June 14, 2005:

My office routinely x-rays both lower extremities on the same cassette. Side-to-side comparisons of bone quality provide a ready understanding of extremity strength, the use pattern of the extremity and even the level of symptoms. I would not be able to practice if I made single-extremity x-rays since so much information is overlooked without a side-to-side comparison.

After comparing the conflicting opinions of Dr. Mulhollan and Dr. Pearce, I am persuaded from Dr. Mulhollan's reports that Dr. Mulhollan obtained side-to-side comparative x-rays of sufficient quality from which Dr. Mulhollan could determine whether, and to what extent, Ms. Kolbek was experiencing osteopenia in the left knee area as compared to the right knee area. The claimant has therefore established by a preponderance of the credible evidence that she had profound osteopenia in the left knee when Dr. Mulhollan first treated her days after the March 12, 2005

alleged independent intervening cause of her current knee/leg problems. Because the preponderance of the evidence establishes that the osteopenia in the left knee area was profound as compared to her right knee area, and since Dr. Pearce has failed to identify what "metabolic processes", other than the process identified by Dr. Mulhollan, might be responsible for such profound osteopenia in the left leg as compared to the right leg, I also accord great weight to Dr. Mulhollan's conclusion that the left knee osteopenia was caused by the original compensable knee injury and subsequent knee immobilization prescribed as treatment for that injury. Therefore, I find that the claimant's left knee profound osteopenia at the time of the March 12, 2005 trauma was a natural and probable result of her admittedly compensable November 22, 2004 left knee injury. I also find based on Dr. Mulhollan's expert medical opinions, the claimant has established by a preponderance of the evidence that the profound osteopenia in her left knee area on March 12, 2005 put her at increased risk for the left tibial plateau fracture which she sustained on that date, and based on Dr. Mulhollan's expert medical opinions, I find that the osteopenia was more than 50 percent of the cause of the left tibial plateau fracture which she

sustained on that date. Under these circumstances, I find that the left tibial plateau fracture sustained on March 12, 2005 was a natural and probable result of her compensable November 22, 2004 knee injury and knee immobilization prescribed to treat that injury. Accord Oak Grove Lumber Co. v. Highfill, 62 Ark. App. 42, 968 S.W.2d 637 (1998) [Where claimant experienced a weakening of the bone from a first fracture, and the first fracture increased the probability of a displaced fracture, the Commission found the second fracture a compensable consequence of the first fracture].

There is also no evidence in the record that I can find indicating that any physician had prohibited in any way Ms. Kolbek's riding a motorcycle on March 12, 2005. Because I find that a causal connection exists between the injury sustained on March 12, 2005 and the admittedly compensable injury sustained on November 22, 2004, and since a preponderance of the evidence indicates that Ms. Kolbek's activity in riding the motorcycle on March 12, 2005 was not unreasonable under the circumstances, I find that Ms. Kolbek's displaced lateral tibial plateau fracture sustained on March 12, 2005 is a compensable consequence of her admittedly compensable November 22, 2004 knee injury.

2. Temporary Total Disability Compensation and Medical Expenses

The claimant's work related injury at issue is a right knee/leg injury, therefore the claimant's injury is considered a scheduled injury. See Ark. Code Ann. §11-9-521(a). For a scheduled injury, a claimant is entitled to temporary total disability benefits until her healing period ends or until she returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002). The healing period continues until the injured employee is as far restored as the permanent character of the injury will permit. The healing period ends once the underlying condition has become stable and when nothing further in the way of medical treatment will improve the permanent character of the injury. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The persistence of pain is not sufficient, by itself, to extend the healing period provided that the underlying condition has stabilized. Id.

In the present case, Dr. Mulhollan, who became the claimant's authorized treating physician following the March 12, 2005 injury indicated in a June 14, 2005 report that Ms. Kolbek should call his office in two to three months to

determine whether or not she has recovered from her injury, and Dr. Mulhollan did not release the claimant to return to work until June 20, 2005. Therefore, the claimant has established by a preponderance of the evidence that she is entitled to additional temporary total disability compensation for the period from March 12, 2005 until June 20, 2005.

At the hearing, it was also determined the respondents have no dispute that the treatment which Dr. Mulhollan has provided the claimant is appropriate for the injury which she sustained on March 12, 2005. Therefore, I find that the respondents are liable for the medical treatment documented in the March 15, 2006 hearing record.

I note, however, that group health insurance may have paid a portion of the claimant's medical bills, and I note that the claimant has received a period of short-term disability provided through her employer at work. The medical benefits and temporary disability payable by the respondents shall be reduced in an amount equal to dollar-for-dollar, the amount previously paid for the claimant's medical treatment and disability pursuant to any insurance coverage identified in Ark. Code Ann. § 11-9-411. Respondent is also directed to hold in reserve for a period

of five years a sum equal to the potential subrogation claims of such payors. See generally Calvin D. Dooley v. Automated Conveyor Systems, Inc., Full Workers' Compensation Commission, Opinion Filed January 8, 2003 (F100282).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The employer-employee-carrier relationship existed on or about November 22, 2004.

3. The claimant sustained a compensable injury on November 22, 2004.

4. The claimant proved by a preponderance of the evidence that the lateral tibial plateau fracture which she sustained on March 12, 2005 is a compensable consequence of her admittedly compensable November 22, 2004 left knee injury.

5. The claimant has experienced a period of additional temporary total disability from March 12, 2005 to June 20, 2005.

6. The additional medical treatment identified in the hearing transcript was reasonably necessary for and causally related to treatment of the claimant's compensable lateral

tibial plateau fracture in the left leg sustained on March 12, 2005.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge