

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F412966

TIMOTHY L. RITCHIE, EMPLOYEE

CLAIMANT

**WAL-MART STORES, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

OPINION FILED NOVEMBER 17, 2006

A hearing in this case was conducted on June 19, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Searcy, White County, Arkansas.

Claimant was represented by James W. Stanley, Attorney at Law, North Little Rock, Arkansas.

Respondent was represented by Kathryn Hall, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held in this claim on February 28, 2006. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to four stipulations. Three of these stipulations are contained in the Prehearing Order and were confirmed by the parties at the hearing; the parties agreed to the fourth stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on July 10, 2003 and at all other relevant times.
2. Claimant sustained a compensable injury to his right knee on or about July 10, 2003.

3. Claimant's average weekly wage was \$520.42; his temporary total disability rate is \$347.00 and his permanent partial disability rate is \$260.00.

4. Respondent controverts additional temporary total disability benefits and medical expenses after April 13, 2005.

At the June 19, 2006 hearing, the parties discussed the issues set forth in the Prehearing Order. After agreeing to amend the second issue, the parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is entitled to additional medical treatment and benefits.
2. Whether Claimant is entitled to additional temporary total disability benefits from April 13, 2005 to September 26, 2005.
3. Whether Claimant is entitled to attorney's fees.

POST-HEARING BRIEFS

As permitted by the Prehearing Order, both parties filed post-hearing briefs in this claim. In order to complete the record, these briefs will be blue-backed and made a part of the record herein:

1. Respondent's Post-Hearing Brief received June 28, 2006; and
2. Claimant's Post-Hearing Brief received July 7, 2006.

DISCUSSION

By the time of the hearing Claimant had worked for Respondent seven years. He has held several different positions, including order filling, detail/clean-up, and double jacking; Claimant has been in this last position for the last three years. He was still employed by the Respondent at the time of the hearing.

Claimant sustained a right knee injury on March 16, 2002. He sought medical treatment and underwent a course of physical therapy. His symptoms resolved without surgery, so he returned to full time employment after a number of weeks off work. Claimant recalled that he did not have any further problems with his right knee until his compensable injury in July of 2003.

The medical records in evidence indicate that Claimant presented to Dr. James McCoy on March 19, 2002, complaining of an injury to his right knee on March 16, 2002. Upon examination, Dr. McCoy assessed “an internal derangement in his right knee” and scheduled an MRI, which Claimant underwent on March 22, 2002. This study produced the following impression: “Low grade meniscal injury to the posteromedial meniscus. Otherwise normal MRI of the right knee.” On March 29, 2002, Dr. McCoy opined that the MRI finding “represents probably a degenerative condition in the knee which was aggravated by walking on it while at work one day.” Claimant then began a course of physical therapy. On May 1, 2002 Dr. McCoy opined that Claimant’s knee was “markedly improved” and released him to return to work on May 14, 2002.

Claimant described how he sustained a compensable injury to his right knee on July 10, 2003.

I was on my double-jack. It had some problems on it, and I’d had it to the maintenance shop three or four times that night. When I’d go to take off, the handle - you stand in front of it, and the handle would swing whichever way - if you had it turned just little bit, it would just sling you off.

That’s what it did; it slung me off of it. When I landed, I landed at a twist. I felt something then kinda like a knuckle snapping or something like that [in the right knee].

....

Then maybe 20 minutes later, it began to swell and I couldn’t hardly walk on

it at all. So I went to my manager, Billy Hanson, and told him what had happened and how many times I'd had the jack over to the shop.

Respondent sent Claimant to a physician, thus beginning a course of treatment to address this right knee injury.

On July 10, 2003, Dr. Joe Dugger reported that Claimant presented "complaining of right knee pain since riding on his doublejack and having a fairly violent jerk motion which caused immediate right knee pain and swelling. He did not strike it on anything but he believes this is a reagravation of a knee injury which occurred on a job last year." Following an examination, Dr. Dugger assessed a right knee sprain, took Claimant off work, and prescribed medications. On July 15, 2003, Dr. Dugger observed swelling around Claimant's right knee.

Claimant then came under the care of Dr. James Mulhollan. He first presented to Dr. Mulhollan on July 17, 2003; the doctor found a medial meniscus tear. On July 23, 2003, Claimant underwent a diagnostic arthroscopy, and a partial medial meniscectomy via arthroscopy, to address his symptoms. In a letter of that same date, Dr. Mulhollan reported: "I found the anticipated the medial meniscus tear, which was removed. The remainder of the patient's knee was quite healthy. I expect this to effect a complete recovery."

Despite this prediction, Claimant continued to experience problems with his knee. His knee was aspirated and injected on August 26, 2003 and again on September 25, 2003. Other notes in this time period report irritation and swelling in Claimant's right knee. On December 22, 2003, Claimant presented to Mulhollan complaining of difficulty negotiating steps and having fallen on three occasions because his knee tended "to give

out.” Studies demonstrated the presence of “significant right knee region osteopenia, indicative of favoring, which, in turn, is related to weakness.” Although the doctor also noted Claimant’s “moderate weight excess,” he recommended that Claimant use a stationary bicycle to address his weakness: “I think exercising on the bicycle, pedaling with one leg, is his best option for improving strength.” Claimant reported to Dr. Mulhollan on February 12, 2004 that he attempted to use the bicycle but could not manage pedaling with one leg. At this visit, studies revealed the continuing presence of “significant osteopenia.” Noting Claimant’s weight, the doctor remarked that “[i]n all likelihood, the patient will continue to have pain as long as he weighs this much and continues to have a strength deficit at this level.”

Claimant underwent an MRI of his right knee on March 23, 2004. This study produced the following impression:

1. Postsurgical changes of the medial meniscus. No recurrent tear is demonstrated in the remnant. No acute intra-articular injury is evident.
2. Findings in the medial compartment raise concern for early osteoarthritis. There is no acute bone trauma or osteochondral lesion.
3. Small effusion. Thin Baker’s cyst.

On March 25, 2004, Dr. Mulhollan interpreted this MRI as “normal” and authorized Claimant to continue with his regular job. Then, on October 28, 2004, Dr. Mulhollan examined Claimant for the last time. Studies demonstrated the absence of “significant compartment failure” and the presence of “very vague osteopenia.” Dr. Mulhollan assessed Claimant’s permanent impairment at 3% and released Claimant from his care.

Claimant presented to Dr. Kenneth Martin on April 13, 2005, reporting that “his knee has not gotten any better since the surgery. He has pain every day.” Upon examination,

Dr. Martin found “a small effusion” as well as pain and tenderness. Dr. Martin ordered a bone scan.

Claimant underwent two studies on May 24, 2005. The first study produced an impression of “[e]ssentially negative right knee and patellar margin.” The second study, a limited nuclear medicine bone scan of Claimant’s right knee, produced the following impression:

Increased activity in the region of the medial tibial plateau of the right knee. Some increased activity of both patellae of questionable significance. This could either represent trauma in the region of the medial tibial plateau or arthritis.

On August 1, 2005, Dr. Martin examined Claimant, assessed “[c]hondromalacia of the right knee,” and planned an arthroscopy of Claimant’s right knee.

On August 11, 2005, Claimant underwent an arthroscopy, arthroscopic partial medial meniscectomy, partial synovectomy, and lateral retinacular release. Claimant’s postoperative diagnosis included a torn medial meniscus remnant, chondromalacia, and synovitis. The operative report notes that “[t]here was a flap tear in the meniscus that appeared to be in the remaining remnant of meniscus.” Otherwise, no meniscal tear was identified.

Claimant again presented to Dr. Martin on September 15, 2005, reporting continuing pain; upon examination, Claimant did still have some swelling. Dr. Martin directed Claimant to continue his physical therapy and planned on returning him to work on September 26, 2005. Claimant again presented to Dr. Martin on December 7, 2005. Although Claimant reported having been back at “full work,” he also reported “having a considerable amount of difficulty with his right knee.” The doctor found 1+ effusion upon

examination as well as full range of motion. He continued Claimant at full work, ordered a trial of Synvisc injections, and planned on doing “an MMI on him.”

At the hearing, Claimant addressed his work status following the compensable injury. After July 10, 2003, Respondent placed Claimant on light duty until his July 23, 2003 surgery. Claimant recalled that he was off work for six weeks following this surgery; Dr. Mulhollan then released him to return to light duty. After his last visit with Dr. Mulhollan on October 28, 2004, Claimant worked until he had his second surgery on August 11, 2005. Claimant denied any new injuries after he left Dr. Mulhollan’s care. Claimant returned to work for Respondent after September 26, 2005.

Claimant reported at the hearing that he still experienced pain and swelling in his right knee. His electronic knee brace is somewhat helpful: “It helps with the pain some, but it’s not something that you wear around everywhere.” Claimant is not receiving any medication for his pain. He is still under Dr. Martin’s care, and does receive injections in his knee. He is performing his full range of duties for Respondent. As to the payment of his medical bills, Claimant explained that his insurance company, Blue Cross/Blue Shield, has partially paid his bills for Dr. Martin’s care, his surgery and hospital care, and his physical therapy. At the hearing, Respondent requested any credit to which it might be due under Ark. Code Ann. § 11-9-411.

Dr. Martin’s May 8, 2006 deposition is in the record. He did not recall being informed by Claimant of his 2002 knee injury. However, once Claimant informed the doctor of his 2003 injury and surgery, the doctor conceded: “I probably went on that and went forward. I might not have delved in great detail into that.” He agreed that Claimant would continue to have pain as long as he maintained a sedentary and obese lifestyle.

As to the August 11, 2005 surgery, Dr. Martin acknowledged the presence of a flap tear in Claimant's meniscus, that was not documented by the March 23, 2004 MRI. He explained:

Q. So therefore would you agree that the tear mentioned in your August 2005 operative report appears to be a new finding?

A. No. My opinion is that that can't be seen very well on a patient that's postsurgical. Sometimes it's just difficult to visualize the remnant and any tear there. That's why I ended up arthroscoping Mr. Ritchie's knee, is because that MRI is not always accurate on a postsurgical knee.

Dr. Martin also addressed the relationship between Claimant's compensable injury and his August 11, 2005 surgery.

Q. ... Dr. Martin, based on your chart notes and x-rays, as well as the chart notes and x-rays of Dr. Mulhollan and Dr. McCoy, who both previously treated Mr. Ritchie for right knee problems, is there any way that you can state with a reasonable degree of medical certainty exactly what caused the claimant's right knee chondromalacia and the meniscal tear and the need for his August 11, 2005 arthroscopic surgery?

A. Trying to put me on the spot, aren't you? Dr. McCoy diagnosed a meniscal tear in '02. Dr. McCoy in Searcy diagnosed that in 2002, and the patient recovered. What can happen is that some of us live with small meniscal tears and do fine, and another injury then enlarges the tear, and it gets to be symptomatic. So he can't live with it any longer. And it can be something minor, just a mild twist or something, or it can be something as simple as getting out of a car. So I think he had -- he did have the preexisting tear, but I think he had to have some sort of injury that made him symptomatic. Then he had the surgery by Dr. Mulhollan. So I think the injury at work had something to do with it.

Now, his continued pain now is a more difficult problem. He continues to have discomfort in the knee. And the chondromalacia I described was some breakdown of the cartilage surface. Now, how much of that came from his initial injury, how much is from obesity, I can't say for sure how much is. But I do think and my opinion is, within a reasonable degree of medical certainty, that the operation that Dr. Mulhollan did was caused by the injury at work, that tear, that symptomatic tear.

So -- but going forward now, what's causing all this pain now, whether it's all

-- whether there's some degeneration involved with his weight, or from the old injury, I can't say for sure what causes that. But I believe that what Dr. Mulhollan treated him for and that flap that we saw more likely than not was from a work-related injury from what Mr. Ritchie described from his history.

Respondent's counsel later attempted to ask the question in another fashion.

Q. Okay. I'm going to ask you this a little bit different way. Since it did not happen in this case and considering the following factors: Including the claimant's prior 2002 injury, which you were before today unaware; evidence of osteoarthritis in his knees; significant gaps in treatment during the year before you treated him; his normal MRI on March 23rd -- I'm sorry, March 24th, 2004 in which you did not find any tears; the tear that was found during his August 2005 surgery; his age; his smoking habits; and certainly his obesity; can you state with any degree of certainty, or whether would your opinion be based at least in part on speculation, as to what caused the new chondromalacia, the new meniscal tear, and the need for his August 11, 2005 knee surgery?

A. Let me see if I have this question right. What we found at surgery in August of 2005 was a retained fragment of meniscus. I was hoping that that would be symptomatic and that would be the cause of most of his pain. I can't say for sure that all of his problems right now are strictly degenerative. Certainly the meniscus has some function. It acts as extra cushion in the knee. It acts as lubricant for the knee. So when the meniscus is removed, there is some degeneration that occurs secondary to that. I agree this is a little fast for that to occur, so I'm sorry I can't help you much more to say I don't really know for sure whether -- whether what he has now is all from this injury, or it's all degenerative. I think it's a little of both, and I can't quantitate how much is from each.

Upon examination by Claimant's counsel, Dr. Martin confirmed his expectation that at least some of the diagnoses resulting from the August 11, 2005 surgery would be as a result of the postoperative effects of the first surgery. He pointed to the fact that Claimant was never pain free following the first surgery, and that he was "still dealing with the same thing" two years later, as evidence that the second surgery was related to the first surgery.

Dr. Martin believes that Claimant has had a fair result from his second surgery. He acknowledged the continuing presence of pain and swelling. He reviewed the limitations

Claimant operates under and the prospect for future treatment. His records did not reflect that Claimant suffered any reinjury following his 2003 compensable injury, but he conceded that his records would be based on Claimant's history. He concluded:

Q. Also [Claimant's counsel] asked you -- you stated that the meniscal tear in 2005 could be a result, partially or whatever, of the 2003 surgery. Given all the other factors, can you state that without resorting at all to speculation?

A. I think more likely than not it was related to that surgery.

A. Medical Benefits

An employer shall 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). Reasonably necessary medical services "may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury." Greer v. Phillip Mitchell Construction, Full Workers' Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee need not establish that the compensable injury is the major cause for the need for medical treatment; rather, it is sufficient if the compensable injury is a factor in the resulting need for medical treatment. See Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Ballance v. K.C. Contracting, Full Workers' Compensation Commission Opinion filed August 30, 2004 (F204392).

The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, 90 Ark. App. 248, ___ S.W.3d ___ (2005). "Preponderance of the evidence" means evidence of

greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment and benefits in connection with his July 10, 2003 compensable right knee injury. Certainly, the record reflects that additional medical treatment is reasonably necessary to reduce or alleviate Claimant's symptoms, maintain the level of healing achieved, and prevent further deterioration in his right knee. Claimant testified to, and Dr. Martin corroborated the existence of, pain and swelling in his right knee; he continues to receive injections to address his condition. Thus, additional medical treatment is reasonably necessary to treat Claimant's right knee.

Further, Claimant's compensable injury is at least a factor in his resulting need for medical treatment to his right knee. Respondent argues that matters such as Claimant's failure to lose weight, failure to exercise, osteoarthritis, and gaps in treatment, all call into question any connection between Claimant's current condition and his 2003 compensable injury. However, the rule announced in Williams v. L & W Janitorial, Inc. is that the compensable injury need not be the major cause of Claimant's current need for treatment; it is sufficient if the compensable injury is a factor in his resulting need for medical treatment. Claimant testified that he did not reinjure himself following his compensable injury; his testimony, supported by the medical records, together indicate that his pain and need for treatment have been constant since the injury. Dr. Martin's deposition testimony also indicates that Claimant's compensable right knee injury is at least a factor in Claimant's current need for medical treatment. Therefore, Claimant established a

connection between his need for treatment and his compensable injury.

B. Temporary Total Disability Benefits

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Fred's, Inc. v. Jefferson, 361 Ark. 258, ___ S.W.3d ___ (2005). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The "healing period" is that period for healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(12). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 228, 79 S.W.3d 414, ___ (2002). The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant did not sustain his burden of proving an entitlement to temporary total disability benefits from April 13, 2005 until August 10, 2005. Claimant testified that from the time of his last visit with Dr. Mulhollan, which occurred on October 28, 2004, Claimant worked until the time of his second surgery, which was on August 11, 2005. Thus, for this period, Claimant did not suffer a total incapacity to earn wages.

I find that Claimant did sustain his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 11, 2005 until September 26, 2005. Claimant testified that Dr. Martin kept him off work following the second surgery until he was released to return to work on September 26, 2005. Dr.

Martin's September 15, 2005 note corroborates Claimant's testimony. On September 26, 2005, Claimant returned to work for Respondent. Thus, Claimant remained within his healing period, and suffered from a total incapacity to earn wages, from August 11, 2005 until September 26, 2005.

C. Credit under Ark. Code Ann. § 11-9-411

Ark. Code Ann. § 11-9-411(a) provides that “[a]ny benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services ... whether those benefits were paid under a group health care service plan of whatever form or nature, ... a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.” This section evidences the legislature’s intent for the amount of workers’ compensation benefits payable to an injured worker to be reduced “dollar-for-dollar” by the amount of benefits that the worker previously received for the same medical services under any of the listed group plans. Dooley v. Automated Conveyor Sys., Inc., 84 Ark. App. 412, 416-17, 143 S.W.3d 585, ___ (2004). A respondent is not required to affirmatively plead the offset provisions of Ark. Code Ann. § 11-9-411; this statute applies summarily. Brister v. Little Rock Waste Water Utilities, Full Workers’ Compensation Commission Opinion filed September 19, 2005 (E607106).

Respondent is entitled to a credit under Ark. Code Ann. § 11-9-411(a) to the extent that Claimant’s medical bills were paid by one of the policies or plans listed in the statute. Claimant referred to Blue Cross/Blue Shield as “[m]y insurance company,” without specifying whether this was a group policy or not. Again, if Claimant’s insurance plan

qualifies as a “group health care service plan of whatever form or nature” or another listed plan, Respondent is entitled to the credit or off-set allowed by the statute. To the extent that a credit or off-set applies, Respondent is required to hold the amount of this off-set in reserve for a period of five years, subject to a claim being made by the health insurance carrier; if no claim is made during that time period, Respondent shall pay the amount of the off-set to the Death and Permanent Total Disability Trust Fund. Ark. Code Ann. § 11-9-411; see Conner v. Texarkana School District, Full Workers’ Compensation Commission Opinion filed August 15, 2006 (F410155).

D. Attorney’s Fee

Attorney’s fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). Respondents controvert additional temporary total disability benefits after April 13, 2005; Claimant is awarded temporary total disability benefits after that date, for the period specified above. Therefore, pursuant to the statute, Claimant is entitled to an award of an attorney’s fee on the amount of temporary total disability benefits awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- _____ 1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on July 10, 2003 and at all other relevant times.
3. Claimant sustained a compensable injury to his right knee on or about July 10, 2003.
4. Claimant’s average weekly wage was \$520.42; his temporary total disability rate

is \$347.00 and his permanent partial disability rate is \$260.00.

5. Respondent controverts additional temporary total disability benefits and medical expenses after April 13, 2005.

6. Claimant sustained his burden of proving that he is entitled to additional reasonably necessary medical treatment and benefits in connection with his July 10, 2003 compensable injury. The record demonstrates that such treatment is reasonably necessary to reduce or alleviate his symptoms, maintain the level of healing achieved, and prevent further deterioration in his right knee. Further, Claimant's compensable injury is at least a factor in his resulting need for medical treatment: the medical records corroborate his testimony concerning his continuing symptoms in his right knee following the injury. Dr. Martin's deposition testimony further demonstrates that the compensable right knee injury is at least a factor in Claimant's current need for medical treatment.

7. Claimant sustained his burden of proving that he is entitled to temporary total disability benefits from August 11, 2005 until September 26, 2005. Claimant underwent surgery on August 11, 2005; then, until September 26, 2005, he was off work under doctor's orders recovering from his surgery. Thus, he remained in his healing period until September 26, 2005, and was incapacitated from earning wages during this period.

8. Respondent is entitled to a credit under Ark. Code Ann. § 11-9-411, to the extent that Claimant's medical bills were paid by one of the policies or plans listed in the statute. To the extent that a credit or off-set applies, Respondent is required to hold the amount of this off-set in reserve for a period of five years, subject to a claim being made by the health insurance carrier; if no claim is made during that time period, Respondent shall pay the amount of the off-set to the Death and Permanent Total Disability Trust Fund.

9. Claimant is entitled to an award of an attorney's fee on the amount of temporary total disability benefits awarded herein. Respondent controverted additional benefits after April 13, 2005; benefits are awarded herein after that date.

AWARD

Respondent is directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondent 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.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml