

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E615302 (11/06/96) & F505488 (5/19/05)

MICHAEL THROWER, EMPLOYEE

CLAIMANT

ROADWAY EXPRESS, EMPLOYER

RESPONDENT

OLD REPUBLIC INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED JANUARY 18, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on November 16, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represent by the HONORABLE ANDREW M. IVEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-referenced claims to determine the claimant's entitlement to workers' compensation benefits.

On September 13, 2005, a pre-hearing conference was conducted in these claims, from which a Pre-hearing Order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Michael Thrower, the claimant, Jerry Bishop, along with the November

9, 2005, deposition testimony of Dr. James C. Tucker, Jr., coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Michael Shawn Thrower, the claimant, with a date of birth of October 6, 1963, is a high school graduate with approximately six years of on-going vocational technical training in diesel mechanics. Claimant commenced his employment with respondent on August 26, 1996, as a mechanic.

On November 6, 1996, claimant suffered an injury to his left knee within the course and scope of his employment with respondents. The injury was accepted as compensable and appropriate corresponding workers' compensation benefits paid to and on behalf of the claimant. The testimony of the claimant reflects that he underwent five (5) surgeries relative to the November 6, 1996, left knee injury prior to May 2005. Claimant estimates that he underwent his last left knee surgery "a couple of years" prior to May 2005.

Claimant's testimony reflects that as of May 2005, he was still taking medication, Celebrex, which had been prescribed by Dr. Jimmy Tucker, relative to his November 6, 1996, left knee injury. Dr. Tucker has been the claimant's treating physician relative to the November 6, 1996, left knee injury since the initial surgery. The testimony of the claimant reflects that in November 2004, he had a MRI scan performed on the left knee. Claimant maintains that while he continued to take Celebrex following the MRI scan, from March 2005 until the May 2005, incident he did not require medical treatment relative to his left knee. Further, claimant denies that he had to be off from work due to the left knee during the afore period. Claimant describes the condition of his left knee during the period March through May 2005, as "all right". (T. 12).

Claimant asserts that on May 18, 2005, he suffered another work related accident resulting in injury to his left knee. In describing the mechanics of the accident, claimant testified:

I was working on a trailer door and it was a pretty new trailer and somebody had tightened up the bolts with an impact tool real tight and I had a long wrench on it and I was standing on a freight platform that you stand on and I was pulling on the wrench and the bolt broke loose and I lost my balance and I twisted and fell on some freight that was in the trailer. (T. 10).

Claimant asserts that within fifteen to twenty minutes of the accident he felt the left knee swell. Claimant maintains that he returned to his work area where he had some ice and applied it to the swollen left knee. Claimant noted that after the knee continued hurting he notified the dispatcher, Doug Walters, of the accident and the fact that he had hurt his left knee. While acknowledging that the November 6, 1996, left knee injury was the product of working on and trailer door, claimant denies that he is confusing the May 18, 2005, accident with the previous injury. Claimant noted that during a five-day period he usually work on six to seven trailer doors.

_____ Claimant's testimony reflects that after waiting for an hour or so the knee pain became more severe and he finally pulled up his pants and examined it. Claimant asserts that he observed swelling and a mark on the left knee. Claimant explained that in light of the past trouble he'd had with his knee he did not want to take a chance so he called the dispatcher again and told him he need to go see a doctor. Claimant added that he informed the dispatcher that he was going to see Dr. Tucker.

Claimant testified that he proceed to the office of Dr. Tucker for medical treatment of his left knee relative to the symptoms growing out of the May 18, 2005, accident. Claimant did not

call to make an appointment prior to going to Dr. Tucker's office:

No, I just went down there and told them that, at the desk, that I had fallen and hurt my knee and that Dr. Tucker was the doctor that had worked on me previous and that I needed to see Dr. Tucker and let him look at it. (T. 13).

Claimant denies that he hurt his knee performing any activity other than the manner he described as happening on May 18, 2005.

Claimant's testimony reflects that he was seen by Dr. Tucker on May 18, 2005, relative to his left knee complaint. Claimant underwent a MRI scan of his left knee on May 27, 2005, pursuant to the directions of Dr. Tucker. Claimant testified that he believed that he worked between May 18, 2005, and the May 27, 2005, MRI scan, as well as between May 27, 2005, and June 14, 2005. Claimant asserts the by June 14, 2005, visit to Dr. Tucker his left knee symptoms had gotten worse and he was directed to remain off work and furnished an off work slip to that effect.

Claimant testified that he reported to appropriate supervisory personnel of respondents that he was directed to remain off work by his treating physician. The testimony in the record reflects that the claimant is the only mechanic of respondent at the Little Rock terminal.

The testimony of the claimant reflects that Dr. Tucker originally scheduled him for arthroscopic surgery relative to the left knee on July 7, 2005, however it was not performed. Claimant testified that the surgery was rescheduled for August 8, 2005, but not performed. Claimant became aware prior to the scheduled surgery that it was not being approved.

Claimant's testimony reflects that someone from Dr. Tucker's office called him on August 10, 2005, and asked if he could be at the hospital at 9:30 a.m on August 11, 2005, for the

scheduled surgery. The testimony of the claimant reflects that the surgery was performed on August 11, 2005, by Dr. Tucker. Claimant asserts that he had relied on Dr. Tucker's office to find out about authorization for the surgery commencing with the July 7, 2005, scheduling. Claimant's testimony reflects that based on past experience with Dr. Tucker's office surgery would not have been performed without authorization based on past cancellations. Claimant proceeded with the August 11, 2005, surgery under the belief that it had been authorized by respondents. Claimant asserts that he did not learn until the morning of August 11, 2005, that the surgery was being charged to his union personal insurance.

Claimant asserts that following the August 11, 2005, surgery Dr. Tucker recommended physical therapy, however respondents would not approve it. As a consequence of the afore, claimant testified that he just had to do what he could do at home. Claimant's testimony reflects that he returned to work on October 31, 2005. Claimant asserts that he was directed to remain off work by Dr. Tucker the entire time from June 14, 2005, until October 30, 2005, relative to his left knee injury.

Claimant testified that he has not received any workers' compensation indemnity benefits relative to the time he was off work from June 14, 2005, through October 30, 2005. Claimant asserts that he was told to try and see what he could do in terms of being released to return to full duty work prior to October 31, 2005. Claimant denies that he was released to full duty work by Dr. Tucker in September 2005. Claimant maintains that because of the hardship of the time he was off work, Dr. Tucker told him he could try to go to work. (T. 34). Claimant testified that he is uncertain if he returned to Dr. Tucker and informed that he was unable to do the work he was assigned to do prior to October 30, 2005. The testimony of the claimant reflects that his wife has

undergone several hip replacement surgeries and is disabled. Claimant testified that the only income his family had during the period June 14, 2005, through October 30, 2005, was his wife's disability benefits.

The testimony of the claimant reflects that he was written up by supervisory personnel of respondent on September 19-23, 2005, and September 26, 2005, for being off work June 19, 2005 through June 26, 2005. Claimant testified that he had no idea why he was written up for being off from work three months after he had been off work. Claimant noted that he was in fact under the care of Dr. Tucker and instructed to remain off work during the period that the write-ups covered.

Regarding the symptoms experienced in his left knee attributable to the May 18, 2005, accident, claimant's testimony reflects:

Yes. After, I could feel it swelling and then like I say an hour or so I finally looked at it. And there was a big bulge on one side of it and that's when I went to Dr. Tucker, okay? Then after the swelling went down I don't remember exactly when, but it would lock up, that's all I can, that's the only way I can describe it. It would just, and when it locked up, I mean you couldn't put no weight on it or nothing. And it might be locked up for five minutes or it might be locked up all day. And when it was I would be on crutches. (T. 22).

Claimant was notified by his attorney in writing that respondents had scheduled an appointment for him to be seen by Dr. William Blankenship on August 23, 2005, for a second opinion evaluation.

Claimant acknowledged that the 1996 left knee injury was not his first injury to his left knee, nor was it the first time that he had surgery on the left knee. The testimony of the claimant reflects that the earlier surgery, 1993 or 1995, was not the product of an injury, but

rather the pain in the knee progressively worsened to the point surgery was performed by Dr. Hudson. Claimant asserts that the November 6, 1996, injury occurred when while repairing the door of a trailer, he slipped and fell off the ladder that he was standing on and struck his left knee. Claimant testified that when he reported his May 18, 2005, accident to the dispatcher, Doug Walters, he relayed that he had fallen inside the trailer.

The testimony of the claimant reflects that he is member of the Teamster's Union, and that his position as a mechanic is protected under that union contract. The testimony reflects that under the union rules respondent can only have one mechanic on staff at its Little Rock terminal. Claimant concedes that pursuant to the union rules and his contract his employment cannot be terminated at will.

Claimant acknowledged that he was having problems with attendance and tardiness prior to the May 2005, incident. Claimant had been reprimanded in writing for his habitual tardiness a day or two prior the May 18, 2005, incident. As a consequence of the afore claimant had agreed to a one day suspension. Claimant is scheduled to be at work at 6:00 a.m., and is required to call in two (2) hours before the start of his shift if he is sick to report if he is not coming to work.

Claimant acknowledged that he took FMLA leave for approximately six (6) months prior to the May 18, 2005, incident. Claimant explained that he was having some family problems and mental problems that necessitated the FMLA leave. The testimony of the claimant reflects that he was in a rehabilitation center due to addiction to pain medication.

Claimant acknowledge an incident at work prior to May 18, 2005, where he called on the intercom to the terminal office relaying that he had fallen, passed out, and could not get up. Further, claimant testified that he was found on the floor by his co-workers when they came to

check on him. The telephone/intercom used by the claimant to call the terminal office is mounted on the wall. Claimant's testimony reflects regarding his ability to use the wall mounted telephone to summon help, that while he was dizzy, he was able to get to that point.

Mr. Leslie Gerald Bishop, manager of several terminals in central Arkansas, to include the Little Rock terminal of respondents, testified that he has held the position for eighteen years. Mr. Bishop testified that he has had problems with tardiness regarding the claimant. The testimony of Mr. Bishop reflects regarding his dealings with the claimant:

You asked me if I had any personal problems with Mr. Thrower, and I answered no. I would say that personally, I would consider Shawn a friend, and have done many things with him away from work. Him helping me, etcetera. As far as at work, tardiness has always been a problem. It's been a consistent problem. We have, I have and my operations manger, Rick Moody, has worked, we've bent over backwards to try to accommodate Shawn to get him to work, even to the point of changing hours, telling him that if you can't make it at six, just get here. We needed the position. We needed the mechanic's position desperately. So, over the years, it has been pretty consistent. The issue with us, there would be times, let's say two or three months in a row that everything would be fine, then we would slip into a week or two or three of tardiness, absenteeism, missing work. (T. 42-43).

The testimony of Mr. Bishop reflects that when the claimant does not show up for work, pursuant to the union contract, he can hire temporary help, but not permanent help, to discharge the duties of mechanic. On those day when the claimant is not present to work respondents have to call in a vendor. Mr. Bishop explained:

Well, basically, the reason the mechanic comes in at 6:00, he comes in to repair or fix any equipment, tractors especially, or trailers that need to be dispatched for that day. So if he does not come in, if we know that in advance, then we have ample time to call the vendor to get them to fix things that need to be repaired before the tractor goes to the street, especially safety items. If we're in short notice, then we're sitting

there waiting for a vendor. And mechanical vendors are difficult. They have to meet certain insurance minimums in order to come on out yard and actually perform the work. So, you're limited in the number that are available. So, what happens is it just delays progress of the whole day. (T. 48).

Mr. Bishop added that the cost of the vendor to the respondents is two to three times more expensive than their own mechanic.

The testimony of Mr. Bishop reflects that on May 18, 2005, the claimant was in the progression of the reprimand process due to excessive absenteeism and tardiness. Mr. Bishop noted that the claimant had actually been issued a disciplinary letter for a three-day suspension, and that the claimant had acknowledged that there was a problem and had agreed to a one-day suspension. The testimony of Mr. Bishop reflects that the claimant was one level from discharge in the progression process.

While Mr. Bishop testified that he was not present at the time claimant reported that he had fallen on May 18, 2005, he did see him on the same day. Regarding his observations of the claimant on May 18, 2005, Mr. Bishop testified:

I come to work somewhere between 7:00 and 7:30 in the morning, usually. Normal procedure is to come in one entrance, and drive around the terminal observing. That morning, I observed Mr. Thrower walking from the dock to his work station.(T. 50).

Mr. Bishop noted that the observation was "after" the incident occurred. Mr. Bishop testified that there did not appear to be anything unusual regarding the claimant's movement or walking.

On cross-examination Mr. Bishop testified that as far as he knew the claimant had been honest with him. The testimony of Mr. Bishop reflects, regarding the morning of May 18, 2005:

I came into the job. I think there was something maybe an hour or so later that I wanted to talk to him about, went out and I looked out

and his vehicle was gone. So, I turned around and said, where's Shawn? And my dispatcher said he had to go to the doctor. I said what happened? Well, he said he hurt his knee. Said he stepped off of one of the freight stools, and twisted his knee, and he went out to put some ice on it, all of that, very factual. And that he's left now and gone to the doctor. So, do I have any reason to dispute that, no. (T. 54).

Mr. Bishop offered an explanation for a series of write-ups that the claimant received in September 2005, regarding infractions that occurred in June 2005:

Well, maybe I can explain it to you this way. I think you are trying possibly to create something that's really not significant. I think what you've got going on with those letters where they go back a certain period, is you've got a supervisor that's angry.

Yes. And he is trying to clear the record.

And he is wanting Shawn to understand, now look, this is serious. We need to get past what's going on, and I'm letting you know that I'm going to react to these incidents differently than we have reacted to them in the past. It's sort of a, let's say look, we've been very lenient. We can no longer be that way. Head's up. (64-65).

Mr. Bishop testified that he did receive an unrestricted release, authored by Dr. Tucker, for the claimant to return to work in September 2005:

Essentially, and I don't remember the time frame, but you guys are looking for something and I've got a copy of it if you want to see it. I've got a release from Dr. Tucker sometimes in September with no restrictions. Now then, Shawn reported to work right about that time for one day. I don't even thin he stayed maybe a couple of hours. By the time I got there at 7:00, 7:30, he was already gone. I've got my dates wrong. Now prior to this, he had called me on a Friday or a Thursday before that Monday, told me that he had the surgery. I didn't know that he had it because I knew that it was being disputed. Had the surgery; he'd recovered. He was ready to come back to work. I said fine. Make sure that you bring the release from your doctor Monday when you show up. He did show up that Monday. To my knowledge, he did not have a release from the doctor. He only stayed there an hour or two. He left. (T. 58).

The medical in the record reflects that in correspondence of May 13, 2004, Dr. James Tucker, a Little Rock orthopedic surgeon, opined that the claimant had reached maximum medical improvement relative to November 6, 1996, compensable left knee injury.(CX. #1, p. 10). In response to a March 30, 2005, inquiry from respondents, Dr. Tucker reported that additional medical treatment relative to the claimant's November 6, 1996, left knee injury would consist of "some physical therapy intermittently". (CX. #1, p. 15).

The medical records reflect that the claimant was seen by Dr. Tucker on May 18, 2005, with a complaint of having re-injured his left knee when he fell off of a stand at work and twisted it. The report of the office visit further reflects of the claimant's left knee, "he has had pain and swelling and ecchymosis posterolaterally". The physical exam of the claimant conducted by Dr. Tucker during the May 18, 2005, visit disclosed the presence of ecchymosis. The May 18, 2005, office note concluded:

PLAN:

However, I am concerned about a possible lateral collateral, postero-lateral corner injury and I am going to go ahead and get an MRI and I want to keep him off work until we get that back. We will get the MRI and see him back as soon as possible. (CX.#1, p. 16a).

On May 27, 2005, claimant underwent the MRI scan of his left knee. (CX. #1, p. 17). When seen in followup by Dr. Tucker on June 14, 2005, claimant relayed that he has having locking in the left knee. In addition to the locking, Dr. Tucker noted that the claimant continued to have some pain and ecchymosis laterally. Dr. Tucker's assessment of the claimant's complaints reflects:

It appears that in addition to the injury to the posterolateral side of the knee Shawn probably has a loose body or a torn meniscus that is flipping in and out of the compartment. We are going to go ahead and schedule him for an arthroscopy, and then we will see him back postoperatively. (CX. #1, p.18a).

Dr. Tucker authored a June 20, 2005, release from work document on behalf of the claimant. The document also reflects restrictions of no walking and no lifting. (CX. #1, p. 19). It is undisputed that Dr. Tucker scheduled the claimant for surgery relative to the left knee complaint on July 7, 2005. Respondents controverted the claimant's May 18, 2005, injury, thereby withholding authorization from Dr. Tucker to proceed with the surgery.

Claimant was again seen by Dr. Tucker on July 19, 2005. The assessment of the claimant's knee by Dr. Tucker during the afore visit reflects:

At this point in time, I think we are going to have to proceed with a diagnostic arthroscopy. He has signs and symptoms of a loose body and with the condition of the articular cartilage in his knee previously, this would not be unusual. So, we are going to go ahead and schedule him for a diagnostic arthroscopy and possible loose body removal. We will see him back postoperatively. (CX. #1, p. 21).

As noted above, the testimony of the claimant reflects that he underwent the surgery on his left knee under the care of Dr. Tucker on August 11, 2005. The August 23, 2005, office note reflects that Dr. Tucker performed arthroscopy and debrided the claimant's knee. The office note further reflects plans of Dr. Tucker to start the claimant on physical therapy and that he expected the claimant to return to work in two (2) weeks. (CX. #1, p. 23-25).

Contrary to the testimony of the claimant, the evidence in the record reflects a September 6, 2005, Physician's Status Report authored by Dr. Tucker which released the claimant to return to work without restrictions on September 12, 2005. (RX. #2). Claimant was seen in follow-up by Dr. Tucker on September 27, 2005. The office note relative to the afore visit reflects that the claimant had, "tried to go back to work but was having to lift heavy barrels and really had a lot of knee pain". The September 27, 2005, report further reflects:

I think that it is too early to expect him to resume heavy labor. His quadriceps mass is still deficient from his injury and this is going to take some time to come back since he is having to do a home therapy program. I am going to let him go back to work, but I really do not want him lifting anything over 25 pounds or pushing anything over 25 pounds. We will see him back in four weeks for a recheck. (CX. #1, p.26).

On October 25, 2005, claimant was seen by Dr. Tucker and released to return to work without restrictions. (CX. #1, p. 29).

On November 9, 2005, the parties obtained the deposition of Dr. James C. Tucker, which is included in the record of the claim as a Joint Exhibit. Dr. Tucker is a Little Rock orthopedic surgeon who has treated the claimant and performed multiple surgeries relative to the claimant's left knee. The testimony of Dr. Tucker reflects that he assessed the end of the claimant's healing period as April 4, 2000, relative to the left knee injury. Claimant was assessed with a permanent physical impairment at 13% to the left knee and restrictions/prohibitions against squatting and lifting over 100 pounds imposed.

On September 30, 2002, claimant underwent an additional procedure relative to the left knee under the care of Dr. Tucker in the form of a diagnostic arthroscopy with partial medial meniscectomy. An additional 2% impairment was assessed relative to the claimant's left knee by Dr. Tucker in February 2004. All of the claimant's treatment under the care of Dr. Tucker relative to his left knee prior to March 30, 2005, grew out of the compensable November 6, 1996, injury.

Dr. Tucker acknowledged that the claimant was seen by him on May 18, 2005, for complaints relative to his left and a history of having fallen and twisted the knee at work on the morning of the visit. Further the testimony of Dr. Tucker reflects that in addition to the physical

examination of the claimant's left knee during the May 18, 2005, visit, he also order a MRI scan of the left. The MRI scan of May 27, 2005, was compared by the radiologist to a prior MRI scan of November 15, 2004, who did not find any significant changes other than postoperative changes. Dr. Tucker testified that he nevertheless decided to schedule the claimant for arthroscopy based on findings of medial joint line tenderness, a positive medial McMurray test and the fact that the claimant was having locking in the left knee. (JX. #1, p. 13-14).

Dr. Tucker testified that the respondent-carrier advised that they would not approve/authorize the surgery to the claimant's left knee based upon similarities of the November 2004 and May 2005 MRIs. As a consequence of the afore, the scheduled July 2005, surgery was cancelled. In August 2005, the surgery was rescheduled and performed after the claimant's personal health insurer approved it. The testimony of Dr. Tucker reflects that he was unaware that the respondents had arranged for the claimant to be seen in a second opinion evaluation by Dr. William Blankenship.

During the August 2005, surgery, Dr. Tucker performed a debridement of the knee and removed a loose articular flap. Regarding his findings during the August 2005, surgery in relation to the May 18, 2005, accident, as opposed to the status of the knee prior to the accident, Dr. Tucker testified:

Well, I have - - the area where he had the injury at was different than any of the areas that were involved in his previous surgery or problems, so - - (JX. #1, p. 17).

Further the testimony of Dr. Tucker reflects that at the time he examined the claimant's left on May 18, 2005, there were signs of an acute injury to the knee. (JX. #1, p. 19).

Dr. Tucker's testimony reflects, with respect to the condition of a joint, an MRI scan is

not as accurate as a diagnostic arthroscopy. Further, the testimony of Dr. Tucker reflects that when he performed the surgical procedure, he found what he suspected, an articular cartilage tear, which was consistent with the symptoms exhibited by the claimant. Dr. Tucker testified that between November 2004, and May 18, 2005, he had no contact with the claimant.

The testimony of Dr. Tucker reflects that when he saw the claimant on October 25, 2005, he again released him to return to work. Further, Dr. Tucker testified that at the time he released the claimant to return to work claimant was not at maximum medical improvement and would not be as such until at least four weeks following his return to work. Dr. Tucker noted that the type of injury and surgical repair claimant underwent in August 2005, he would not anticipate a permanent impairment.

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, and application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 18, 2005, the relationship of employee-employer-carrier existed among the parties.
3. On May 18, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00/\$350.00, for temporary total/permanent partial disability.
4. On May 18, 2005, the claimant sustained an injury to his left knee arising out of and in the course of his employment.
5. The claimant was temporarily totally disable for the period beginning June 14,

2005, and continuing through October 30, 2005, as a result of the May 18, 2005, compensable left knee injury.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the May 18, 2005, left knee injury of the claimant.

7. The respondents have controverted this claim in its entirety.

CONCLUSIONS

On November 6, 1996, the claimant suffered an accidental injury to his left knee while discharging employment duties for respondents. The injury was accepted as compensable and respondents paid appropriate medical and indemnity workers' compensation benefits. On May 18, 2005, claimant asserts that he suffered another accidental injury to his left knee while discharging employment duties for respondents. Claimant seeks corresponding temporary total disability and medical benefits as a result of the May 18, 2005, accident along with controverted attorney fees. Respondents deny that the claimant suffered a compensable injury to his left knee on May 18, 2005, and have controverted this claim in its entirety.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provisions. In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16), establishing the injury; and that

the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A)(i). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant suffered a compensable injury to his left knee on November 6, 1996, and underwent several surgical procedures under the care of Dr. James C. Tucker, a Little Rock orthopedic surgeon. Claimant was last seen by Dr. Tucker relative to the November 6, 1996, injury on or about November 15, 2004.

Claimant performs duties as a mechanic for respondent-employer at its Little Rock terminal. The credible evidence in the record reflects that on May 18, 2005, while working on a trailer door and standing on a freight platform using a long wrench to un-tighten bolts, claimant lost his balance, fell and twisted his left knee in the process. While the accident was not witnessed by anyone else, claimant notified his supervisor, the dispatcher, that he had fallen, injured his knee and was applying ice to the area to obtain relief. When the pain in the left knee continued and claimant observed swelling as well, he again contacted the dispatcher and relayed that he would be seeking medical treatment for the injury.

Claimant was left the job site on May 18, 2005, and preceded to the office of Dr. James Tucker, his treating orthopedic surgeon relative to the prior November 6, 1996, left knee injury. Once at the office of Dr. Tucker claimant relayed a history of the May 18, 2005, accident. The medical records of Dr. Tucker reflect the objective findings relative to his physical examination of the claimant's left knee which included swelling and ecchymosis posterolaterally.

The evidence in the record reflects that the claimant received medical treatment under the care of Dr. Tucker following the May 18, 2005, visit, and continuing thereafter, to included diagnostic studies and ultimately surgery. Claimant did not discharge duties from June 14, 2005, until his release without restrictions on October 25, 2005, and resumption of duties on October 31, 2005. On or about September 12, 2005, claimant did return to the employment of respondents pursuant to an unrestricted release authored by Dr. Tucker, however was unable to discharge employment duties for any appreciable time. Claimant returned to Dr. Tucker following the afore effort and was again directed to remain off work.

The evidence preponderates that the claimant had objective finding of an injury to the left knee at the time of the May 18, 2005, physical examination by Dr. Tucker. Further, claimant displayed symptoms consistent with the August 2005, surgical findings of Dr. Tucker. The claimant has sustained his burden of proof by a preponderance of the he suffered an injury to his left knee on May 18, 2005, arising out of and in the course of his employment which caused internal and external harm to body requiring medical services and resulting in disability. Further there is medial evidence supported by objective findings establishing the injury and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Respondents have controverted this claim in its entirety.

Ark. Code Ann. §11-9-508 (a) mandates that the employer provide such medical services as may be reasonably necessary in connection with the employee's injury. Whether a medical procedure or device is reasonable and necessary is a question of fact. *Air Compressor Equipment v. Sword*, 69 Ark. 162, 11 S.W.3d 1 (2000).

In the instant claim respondents were notified by the claimant of the May 18, 2005, left

knee accidental injury following its occurrence. Further, claimant notified respondents the he was leaving work on May 18, 2005, and seeking medical treatment for his left knee under the care of Dr. James C. Tucker. Following several examinations and visits along with diagnostic studies Dr. Tucker recommended and scheduled surgery to address the claimant's left knee injury. Respondents refused to authorize/approve the surgery which was scheduled in July 2005, and, as a consequence, the surgery was cancelled.

Prior to a pending scheduled second opinion evaluation by another orthopedic surgeon, claimant was contacted by his treating physician and directed to report for surgery the following morning. Claimant reported as directed and underwent the surgery relative to his compensable left knee injury. Claimant later learned that the authorization/approval for the surgical procedure had been obtained from his personal health insurer and not respondents. Since respondents took the position that there were no changes in the claimant's left knee based on a comparison of the November 15, 2004, MRI scan to the May 27, 2005, MRI scan, and that the same served as the basis for controverting the claim, one is left to ponder what was expected to be gained from second opinion evaluation by Dr. Blankenship.

The evidence in place, which was in the possession of respondents, reflects that claimant had last been seen by Dr. Tucker relative to his left knee on November 15, 2004, that on the morning of May 18, 2005, claimant had reported an accident injury to his left to the dispatcher and later told the dispatcher that his left knee pain had not subsided and was now accompanied by swelling of the knee, that he was going to get medical treatment from Dr. Tucker for the left knee injury, and, in fact proceeded to Dr. Tucker's office as a walk-in to receive medical treatment for the injury. Further, the medical records of Dr. Tucker reflect with respect to the

May 18, 2005, visit of the claimant a history of the May 18, 2005, accident injury at work, along with objective findings of injury during the physical examination. The evidence preponderates that the medical treatment rendered to the claimant by Dr. Tucker on and after May 18, 2005, was reasonably necessary and related to the claimant's compensable left knee injury.

Respondents have controverted this claim in its entirety, to include all medical benefits.

The May 18, 2005, compensable left knee injury of the claimant is a scheduled injury pursuant to Ark. Code Ann. §11-9-521. Claimant was off work and within his healing period for period June 14, 2005, through October 30, 2005. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Respondents have controverted this claim in its entirety, to include the claimant's entitlement to temporary total disability benefits.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$466.00, for the period June 14, 2005, through October 30, 2005, as a result of his compensable left knee injury of May 18, 2005. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing and other apparatus expenses growing out of the claimant's compensable left knee injury of May 18, 2005, to include medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809 until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge