

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **F604277**

ALEX T. GILLESPIE

CLAIMANT

HARP'S FOOD STORES, INC.

RESPONDENT

CANNON COCHRAN MANAGEMENT SERVICES
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED JUNE 20, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by KENNETH L. OSBORNE, Attorney, Fayetteville, Arkansas.

Respondent represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 24, 2007, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a Pre-Hearing Order was entered in the claim on January 29, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee-employer relationship existed between the parties on February 2, 2006.
3. The claimant was earning wages to entitle him to compensation at the weekly rate of \$227.00 for temporary total disability and \$170.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's right knee.
2. Related medical.

3. Temporary partial disability benefits from February 3, 2006 to March 12, 2006, and temporary total disability from March 13, 2006 to September 1, 2006.
4. Claimant's entitlement to an 18% impairment rating to his right knee.
5. Attorney's fee.

In regard to the foregoing issues, the claimant contend he was injured when he slipped in the store around the produce section on February 2, 2006. He injured his right knee which ultimately led to surgery. As a result of his injury, his hours were cut significantly and as a result he is entitled to temporary partial disability as well as permanent partial disability based upon his impairment rating. The claimant was given an impairment rating of 18% which has been denied.

In regard to the foregoing issues, the respondent contends the claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act. The respondent acknowledges that they originally accepted this claim and paid various medical expenses, but after doing a thorough investigation, the respondent takes the position that the claimant did not sustain a compensable injury.

The documentary evidence in this matter consists of the Commission's Prehearing Order, marked Commission's Exhibit No. 1. The claimant submitted documentary evidence, marked Claimant's Exhibit No. 1. The respondent submitted documentary evidence, marked Respondent's Exhibit No. 1, and the deposition of Billy Bean, which is marked Respondent's Exhibit No. 2. All of these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he began working for the respondent around the first week in January 2006. The claimant testified that he worked in the produce department, kept the produce looking fresh, stocked products, unloaded trucks, rotated the produce, and kept the department clean. The claimant testified that he was on his feet throughout the day and worked his shift from approximately 6:00 AM to 3:00 PM , but that this might vary. The claimant testified that on February 2, 2006, he was soaking lettuce in a sink. The claimant explained that there was a drain in the middle of the floor and when he picked up the lettuce, he stepped with his right foot, and his right knee sort of went in and out. The claimant stated that he thought something happened but then he sort of shook it and felt maybe it was okay, but then it started hurting pretty bad. After that, the claimant testified that he did not fall to the floor but caught himself. The claimant remembered that Billy Bean was coming out of the cooler which was about a foot away from where he was standing. The claimant testified that Mr. Bean asked him if he was okay and thought that Mr. Bean had seen it happen. The claimant testified that he continued working for a while but then his knee started hurting so he reported it to his department manager, Ron Bowman. The claimant testified that he told Mr. Bowman that he had hurt his knee and needed to go, at which time he went to a Medicare Clinic in Tontitown. The claimant testified that he contacted the respondent and they authorized the visit but told him that he would need to come in and fill out forms. The claimant testified that the respondent informed him after he had filled out the proper forms that he would need to go to the medical provider that they directed him to.

The claimant testified that he was seen at Quick Care and was treated for a strain. The claimant testified that he also was given pain medication and anti-inflammatories as well as placed on light duty. The claimant testified that eventually he was referred to Dr. Coker

because his knee was not getting any better. The claimant testified that Dr. Coker operated on his knee on April 14, 2006, to repair the ligaments. The claimant was asked if, before this operation, he had ever been diagnosed with a meniscus tear and the claimant responded, "No." The claimant testified that he had reviewed his medical records subsequent to the operation and realized that he had also been diagnosed with some type of arthritis which created some of his discomfort. The claimant testified that the operation has made his knee stronger, although it is not one hundred percent.

The claimant testified that when he began working for the respondent, he was working 40 hours per week but due to slow business, his hours had been reduced to 26 hours per week. The claimant testified that after his workers' compensation injury, his hours were cut down to eight, which is just too few hours for him to earn a living. The claimant testified that the week ending January 29, he worked over 40 hours. The next period, ending February 12, he worked 20 hours per week, and after that until he quit on March 13, 2006, he worked about eight hours per week. The claimant testified that Dr. Coker released him on September 1, 2006, but that he has been unable to find suitable employment since that date.

The claimant testified that he had a past right knee injury in 1994. The claimant testified that he was working, stepped in a hole, and his knee cap went over to the side. The claimant testified that he was treated by Dr. Sorrels and, in fact, underwent knee surgery performed by Dr. Sorrels. The claimant testified that following his surgery and follow-up with the doctor, his knee healed, and he has not had any problems subsequent to his initial surgery until he went to work for the respondent.

On cross-examination, the claimant testified that he has had approximately four prior workers' compensation claims, one to his left knee, two to his left ankle, and one to his back. The claimant testified that three of these claims were resolved by settlement. The claimant

was asked if he was given a knee brace following his right knee surgery and the claimant responded, "No." The claimant testified that he thinks he was given a knee brace following his left knee surgery some years ago but he does not recall. The claimant was asked by the respondent if he had retained or owned a knee brace and the claimant responded, "No." The claimant testified that from the date he quit working for the respondent he has worked one day for wages. The claimant explained that after he was released following his right knee surgery, he worked one day for Pinnacle Country Club but that his knee prevented him from continuing this work. The claimant testified that he has not drawn nor applied for unemployment benefits. The claimant agreed that the respondent did pay for some of the medical expenses for his right knee but has not paid any indemnity. The claimant testified that he was 6'3" and weighed about 300 pounds. The claimant testified that in the last two years, he has gain approximately 40 pounds. The claimant was asked if he ever wore a knee brace while working for the respondent before February 2, 2006, and the claimant responded, "Well, yes, I did, I'm sure." The claimant explained that this was for knee repair and that he was sure after his knee surgery that he got a knee brace. The claimant was again asked if, before his accident when he stepped in the drain on February 2, 2006, he had worn a knee brace on his right knee, the claimant responded, "I'm sure I did, yes."

On redirect examination, the claimant testified that following his February 2, 2006 injury, he had pain in his knee like a needle sticking into the side but was able to work. The claimant was reminded that the respondent's attorney had asked him if he had worn a knee brace on his right knee before the February 2, 2006 accident, and the claimant testified that he was sorry but that, no, he had not worn a knee brace. The claimant testified that he had worn a brace on his left knee but not his right. The claimant testified that after his February 2, accident, he was given a Velcro knee brace at Quick Care to wear at work.

On redirect examination, the claimant agreed that before he reported his work related accident, he went on his own to a medical clinic in Tontitown. The claimant agreed that he went to this medical clinic on his own and he did this before he reported his event.

Dennis Baker, testified on behalf of the respondent, stating that he had been an employee of the respondent employer for 20 years. Mr. Baker testified that currently, he is director of the produce operations for the respondent and has been in this position for the past five years. Mr. Baker testified that he sees all workers' compensation claims that are filed, after they have gone through Ken Bennett's office, who takes care of workers' compensation. Mr. Baker explained that he only sees the claims that arise out of his produce department. Mr. Baker testified that he was in the store where the claimant was employed when it opened in January 2006. This witness testified that he was working with the claimant every day during this period of time and became acquainted with him. Mr. Baker testified that in the middle of January, he was in the store buying groceries and checking out the produce department when he noticed that the claimant had on a knee brace. This witness testified that he asked the claimant if he had hurt himself and the claimant told him no that he was wearing a knee brace because of an old injury. Mr. Baker testified that he could not remember which knee the claimant was wearing the knee brace. This witness testified that the knee brace the claimant was wearing was black Velcro that went almost to the claimant's hip to just above his ankle.

On cross-examination by the claimant's attorney, Mr. Baker was asked if there was a video film of the claimant wearing a knee brace while working for the respondent. Mr. Baker testified that he had no idea if there was or not.

On rebuttal, the claimant was asked if he had ever worn a black knee brace which reached from just below his hip almost down to his ankle while working for the respondent in January 2006, and the claimant responded, "No, I did not." The claimant was

then asked if he owned such a brace and the claimant responded, "No." On rebuttal cross-examination, the claimant was asked if he ever wore a left knee brace from Dr. Tomlinson, and the claimant responded, "I don't remember."

Billy Bean testified, by way of deposition, on May 1, 2007. Mr. Bean was asked if he had witnessed an accident on February 2, 2006, from which a workers' compensation claim was generated by the claimant. Mr. Bean testified that he did not see the claimant hurt his leg because he was out putting up produce. Mr. Bean stated that when he walked back in, the claimant told him that he had hurt his leg and might have to go to court. Mr. Bean testified that when he came in, he did not ask the claimant anything, the claimant just told him he had hurt himself. Mr. Bean testified that approximately two weeks later, he overheard the claimant talking on his cell phone to someone, and he overheard the claimant say something about, "Well, you know, my old injury, or something like that." Mr. Bean testified that about three months prior to this deposition, the claimant called him and told him that he had a new injury to his leg, and the conversation he had overheard on the cell phone was about an old injury.

On cross-examination, Mr. Bean testified that he worked with the claimant approximately three or four weeks. When asked, Mr. Bean testified that he has seen the claimant wear a brace from his knee down to his ankle and believed he remembered it being on his left knee but was not positive. Mr. Bean testified that this brace might have been blue or grey and was worn on the outside of his clothes. Mr. Bean was asked if, prior to February 2, 2006, the claimant ever complained about his right knee hurting. Mr. Bean responded, "No, sir."

The medical records indicate that the claimant was seen by Dr. Cassat on February 3, 2006, for an injury to his right knee. Following examination, but no x-rays, the claimant was prescribed Vicodin and instructions were given that he should wear a straight leg brace

and keep his leg elevated when able. The claimant was seen at Quick Care Medical Clinic on February 6, 2006, for follow-up of a knee injury sustained on February 2, 2006, while working in the produce department. The nurse practitioner, writes in her notes that the claimant slipped four days ago and he took off Saturday and Sunday elevating and icing his leg. The nurse notes that there is pain with palpation in the right lateral aspect of the claimant's knee with mild swelling, noting a previous scar due to a patella problem. The claimant was diagnosed with a strain of his right knee with pain, medications were prescribed, and he was to be on limited duty with no standing. The claimant was seen again by the nurse practitioner, Vicki Moore, on February 10, 2006, where she reports that he has had episodes of his knee giving out when he is not using the supporter. The nurse notes that the claimant indicates that the pain in his knee has increased and that the Vicodin medication has helped him rest at night, but he continues to use Ibuprofen as well as the leg brace and crutches as recommended. No swelling is noted in the claimant's right knee but pain was still noted. Again, the claimant is diagnosed with a possible strain for which medications were continued and he was prescribed a soft Velcro brace to wear at home and under the immobilizer that he was given last week. The claimant's restrictions of no standing for one hour and to limit his weight bearing will continue. The claimant was seen by Dr. Coker on February 28, 2006 for evaluation of his right knee. The doctor writes that the claimant reports that he had a buckle injury to his knee and since then, he has had pain and occasional locking of his knee. After examination, Dr. Coker assessed the claimant with having right knee strain with a possible cartilage tear, for which he recommended an MRI. Dr. Rodger Dickinson writes on March 6, 2006, that he is going to inject the claimant's knee and also prescribe medication. Dr. Dickinson also had the claimant undergo x-rays which revealed AP and lateral right knee osteoarthritic changes involving the lateral compartment of the knee as well as the patellofemoral area consistent with osteoarthritis. The claimant

underwent an MRI of his right knee on March 27, 2006. Dr. Matthew Coker writes on March 30, 2006, that the claimant's MRI reveals medial and lateral meniscal tears that go to surface of the meniscus. Dr. Coker notes that it is difficult to see the ACL on the MRI and he is concerned about a possible partial tear or strain to the ACL. Dr. Coker recommended that the claimant undergo a knee scope to debride the meniscal tears and evaluate the ACL. The claimant underwent surgery on April 14, 2006, and underwent a right knee arthroscopy with partial lateral meniscectomies and micro fracture femoral condyle. On April 18, 2006, Dr. Coker took the claimant off work until his follow-up appointment on April 28, 2006. Dr. Coker writes on April 28, 2006, that the claimant had undergone debridement of his right knee and was also found to have some arthritis in the patellofemoral joint. Dr. Coker writes that the claimant reports that he is doing much better and that he is off his pain medications. The doctor notes that the claimant's wound is healing, there is very little swelling, and there is good motion in his knee. Dr. Coker recommended a five week return evaluation. When the claimant was seen by Dr. Coker on March 26, the doctor notes that the claimant still has a little pain laterally, but notes that he did have significant arthritis as discovered during the operation. Dr. Coker recommended that the claimant begin therapy for quad strengthening and prescribed Darvocet. On July 11, 2006, Dr. Coker writes that the claimant reports that he is having significant pain and has been doing his physical therapy faithfully. Dr. Coker notes that he and the claimant discussed the fact that he might be doing too much with his physical therapy. Dr. Coker notes that the claimant should lose a little weight and did not think the claimant was a good candidate for a total knee replacement at this time. The doctor recommended and gave the claimant a steroid injection and recommended that he continue with his own exercises and the doctor notes that he has not reached maximum medical improvement. On September 1, 2006, Dr. Coker briefly reviews the claimant's surgical procedure and discusses the claimant's preexisting arthritic condition and possible

treatment. Dr. Coker notes that this will be the final visit as to the claimant's meniscal tear and referred him for a rating. On October 5, 2006, the claimant was assessed with an 18% impairment rating to his right knee.

After a complete review of this entire matter, I find that the claimant has proven by a preponderance of the evidence that he sustained a right knee injury while working for the respondent on February 2, 2006. The claimant, who is a large man, has described a twisting injury to his right knee. The claimant reported this injury and began receiving medical treatment which the respondent authorized initially. There has been some question as to whether the claimant had been wearing a knee brace on his right knee prior to the February 2, 2006, injury. Mr. Bean, a fellow employee, testified that he did remember the claimant wearing a brace prior to February 2, 2006, but believes or remembers that it was on the claimant's left knee. The medical records clearly set forth that the claimant had a meniscuses tear which required repair by Dr. Coker. I do not find that the claimant is entitled to temporary total disability from the date he voluntarily quit his job on March 13, 2006 to September 1, 2006. I do find, however, that he is entitled to temporary total disability from the date of his surgery on April 14, 2006 until he was released by Dr. Coker on September 1, 2006. I also find that the claimant is entitled to temporary partial disability due to the reduced hours after his accident. The claimant has testified that for the week ending February 12, 2006, he worked 20 hours which would entitle him to a temporary partial disability rate of \$113.00 for that pay period. The claimant has testified that from February 12, until he quit on March 13, 2006, he worked only eight hours each week. Therefore, the claimant would be entitled to a temporary partial disability rate of \$182.00 per week for the remaining time that he worked for the respondent (See Ark. Code Ann. §11-9-520). Based on the AMA Guides, Fourth Edition, Table 64, for a partial lateral meniscectomy, the claimant would be entitled to a 2% impairment rating to the lower extremity.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 2, 2006, the relationship of employee-employer existed between the parties.
3. The claimant has proven by a preponderance of the evidence that he sustained a right knee injury while working for the respondent on February 2, 2006. (See Discussion above).
4. The respondent should pay for all reasonable and necessary medical treatment for this claimant's compensable injury.
5. The claimant is entitled to temporary total disability from April 14, 2006, the date of his knee surgery until he was released by Dr. Coker on September 1, 2006. (See Discussion above).
6. The claimant is entitled to temporary partial disability for the week ending February 12, 2006 in the amount of \$113.00, and the week subsequent to that, until he quit on March 13, 2006, he would be entitled to temporary partial disability in the amount of \$182.00 per week. (See Discussion above).
7. The claimant has proven by a preponderance of the evidence, and in accordance with the AMA Guides, Fourth Edition, Table 64, that he is entitled to a 2% impairment rating for his partial lateral meniscectomy for his lower extremity.
8. The respondent has controverted this claim in its entirety.
9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right knee on February 2, 2006. The respondent shall pay all reasonable and necessary medical treatment for this claimant's compensable right knee injury.

The respondent shall pay temporary total disability to this claimant from April 14, 2006 until September 1, 2006. The respondent shall pay temporary partial disability to this claimant for a one week period at the rate of \$113.00 per week, and from February 12, 2006 until March 13, 2006 at the rate of \$182.00 per week.

The claimant is entitled to a permanent partial impairment rating of 2% to the right lower extremity, which the respondent shall pay.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondent in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE