

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F606947

CYNTHIA PERRY, EMPLOYEE

CLAIMANT

I H SERVICES, INC., EMPLOYER

RESPONDENT

**LIBERTY MUTUAL FIRE INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 18, 2007

Hearing before Administrative Law Judge Barbara Webb on April 19, 2007, in Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Mr. Michael A. LeBoeuf, Attorney at Law, Law Offices of Gary Green, Little Rock, Arkansas.

The respondents were represented by Mr. Guy Alton Wade, Attorney at Law, Friday, Eldredge & Clark, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on April 19, 2007, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on January 31, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the January 31, 2007 Pre-hearing Order is made a part of the hearing record.

By agreement of the parties, the stipulations as submitted by the parties in the Pre-hearing Order as amended on the record are hereby accepted:

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

2. The employer/employee/carrier relationship existed on or about June 12, 2006, when claimant sustained an injury to her right knee.
3. The claimant's average weekly wage was \$313.67, which would entitle her to a temporary total disability rate of \$209.00.
4. Respondents initially accepted the claimant's claim as compensable and paid temporary total disability benefits and medical benefits through on or about July 26, 2006, when the claimant was released by Dr. Charles Pearce.
5. Claimant was granted a change of physician on August 29, 2006, to Dr. Harold Chakales.
6. Respondents paid for the claimant's initial visit with Dr. Chakales as ordered by the Commission and that said visit was not controverted.

ISSUES

By agreement of the parties, the issues presented at the hearing were as follows:

1. Claimant's entitlement to additional temporary total disability and permanent partial disability benefits.
2. Claimant's entitlement to additional medical treatment.
3. Controversion and attorney's fees.

CONTENTIONS

The claimant contends she sustained an injury to her right knee on June 12, 2006, while performing employment services for respondent employer. The

claimant contends she was treated by Dr. Charles Pearce until he released her on July 26, 2006, despite her continued complaints of pain. The claimant requested a change of physician which was granted on August 29, 2006, to Dr. Harold Chakales. Dr. Chakales performed additional tests and determined that claimant should undergo surgery. Surgery was performed on December 14, 2006, and the claimant is still in her healing period. Respondents paid for the initial visit to Dr. Chakales but have controverted any additional treatment.

The respondents contend that they have paid all benefits to which the claimant is entitled. The respondents contend that the claimant's current complaints are related to a pre-existing condition and any additional treatment is not related, reasonable or necessary.

The record consists of a one volume transcript of the April 19, 2007 hearing, consisting of the testimony of Cynthia Perry, the claimant, and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (Medical Reports); Respondents' Exhibit No. 1 (Medical Reports). The Claimant's post-hearing brief submitted on April 30, 2007, and Respondents' post-hearing brief submitted on April 30, 2007, have been blue-backed and are fully incorporated by reference and made a part of the record of this proceeding.

FACTUAL BACKGROUND

The claimant is fifty-one years of age (b.d. 12-16-55). She completed high school and pursued additional training as a certified nursing assistant. She previously worked as a clerk and cashier at a cleaners. She worked in numerous

nursing homes as a nursing assistant. On June 12, 2006, she was working for IH Services performing janitorial services at the Kohler Plastics plant and Kohler faucet plant in Sheridan, Arkansas. Her duties included checking the bathrooms in the faucet plant for toilet paper, then going to the plastics plant across the street to clean the break room, bathroom, and office building, and returning to the faucet plant to perform similar duties. She described the accident on June 12, 2006, at the Kohler plastics plant, as follows:

I went in to clean the men's bathroom, and when I walked in, the bathroom was flooded. When you walk in there's a wall – here's the door, there's a wall, and you've got to go around this way (Demonstrating). And the "Wet Floor" sign was in the bathroom. It wasn't outside the bathroom, it was in the bathroom, so I had no idea that the bathroom was flooded 'til I walked in there. And I almost fell, and I grabbed a hold of the wall to keep from falling and twisted my right knee.

Perry explained that she felt immediate pain in her knee and heard and felt it "pop" and observed immediate swelling. She reported the incident to the manager and to her supervisor at IH Services. Her supervisor arranged an appointment and took her to Dr. Saddiqui at the Winston Clinic in Sheridan that morning. Dr. Saddiqui examined her knee, performed x-rays, prescribed pain pills, and took her off work. She returned two days later for a follow-up examination and was referred to Dr. Johnson at OrthoArkansas. She was then referred to Dr. Pearce. An MRI was performed and she was released from Dr. Pearce's care. She left Dr. Pearce's office and went directly to the Commission and sought an immediate change of physician requesting Dr. Chakales. She was seen by Dr. Chakales who ultimately performed surgery on her right knee. Perry testified that she returned to work for

four days after she was released by Dr. Pearce but was unable to work due to the pain. Perry testified that her knee had improved since the surgery, but that she was still in pain and her knee was still not stable. On cross-examination, Perry acknowledged that she had two prior work-related injuries prior to her employment with respondents, including a staph infection to her index finger and an injury to her left knee when she hit an elk in a car accident. Perry was diagnosed with diabetes in 2002 and began receiving social security benefits due to a head injury in 1999. She explained that Medicare had paid for her medical treatment with Dr. Chakales, including the arthroscopy of her right knee.

DISCUSSION

Additional Medical Treatment

The respondents have accepted the June 12, 2006, right knee injury as compensable and paid medical expenses and temporary total disability benefits from June 22, 2006 until July 26, 2006, and the initial visit of October 4, 2006, with Dr. Chakales. Respondents rely on the medical records of Dr. Pearce and an MRI report which conclude that Perry suffered a right knee strain in June of 2006 for which she was treated conservatively with physical therapy and pain medications. Dr. Pearce concluded there were no objective findings and no indication for arthroscopy despite the claimant's continued complaints of right knee pain. From his evaluation and review of the MRI taken on 6/21/06, Dr. Pearce opined that the claimant showed only mild chondromalacia of the tibia femoral joint and sustained 0% permanent partial impairment according to the fourth edition of the AMA Guides

to the Evaluation of Permanent Impairment. In addition, respondents rely on a second MRI report performed on November 29, 2006, which they contend was consistent with the earlier report showing “no definitive tear”. Respondents contend that claimant’s subsequent treatment by Dr. Chakales was for her pre-existing degenerative condition and not any traumatically induced incident or injury.

On the other hand, claimant contends that she continued to be symptomatic and could not perform her job duties after the June 12, 2006 injury. She points out that after she was released to go back to work by Dr. Pearce, she continued to experience knee pain and sought treatment with Dr. Chakales. Based on his suspicion that claimant had a torn meniscus from his review of the November 29, 2006 MRI, Dr. Chakales performed a diagnostic surgical procedure which revealed that there was a “large bucket-handle tear type of the lateral meniscus with flapping, and the anterior horn of the lateral meniscus had to be removed”. Claimant relies on the medical records of Dr. Chakales to support that the medical treatment received after October 4, 2006, including the arthroscopic surgery on December 14, 2006, was reasonable and necessary medical treatment and related to the work-related injury in June of 2006.

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13

S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonable and necessary. Winslow v. D & B Mech. Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Id.* Here, as in Williams, there is no dispute that the claimant's injury was compensable. The evidence demonstrates that there is objective medical evidence which established the current need for surgery. Rather, what is disputed is whether the surgery is reasonable and necessary in relation to the compensable injury given the fact that she also suffers from degenerative conditions in her right knee. This is not a case where the claimant must establish that the compensable injury was the "major cause" of the need for the surgery since the claimant thus far is only seeking medical benefits and temporary total disability. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 145, 923 S.W.2d 883, 885(1996). Instead, the respondents must take the claimant as they found her and the proper determination is whether there is sufficient evidence to

establish that the compensable injury was a factor in the need for the surgery.

Williams v. L& W Janitorial, Inc., 85 Ark. App. 1 , 145 S.W.3d 183 (2004).

In Davis v. Helena Chemical Co., claimant suffered from a pre-existing lumbar degenerative condition before sustaining a compensable injury. Full Commission Opinion, filed August 3, 1999 (D406121). The Full Commission affirmed an administrative law judge's finding that claimant was entitled to additional medical treatment, stating:

The respondents' and the dissent's central argument in this case is that the treatment the claimant is presently receiving is because of an ongoing degenerative condition which would be occurring whether or not the claimant suffered an injury in 1984. However, this argument overlooks the fact that the claimant's previously asymptomatic degenerative process physically progressed and became symptomatic because of his 1984 compensable injury . . . the compensable injury, not some speculative event, is what resulted in the claimant's present condition.

Id.

The Full Commission later upheld a finding of compensability where symptoms of claimant's pre-existing condition were asymptomatic for five years prior to the compensable event. Jerry Hamblton v. Guy King & Sons, Inc. & Bituminous Casualty Corp., Full Commission Opinion, filed February 22, 2001 (E904812). The Commission held that a preponderance of the evidence showed that claimant's symptoms were the result of his compensable injury, despite the fact that claimant had a pre-existing ongoing degenerative process. Id. at 19.

In the instant case, there had been no medical testimony or opinions offered into evidence as to whether the need for surgery was related to the claimant's work-

related injury. However, the medical records of Dr. Chakales support the conclusion that the claimant's right knee condition was more than just a sprain and that the claimant, as suspected by Dr. Chakales, had a tear in her knee which required the surgery performed on December 14, 2006. This medical evidence is further substantiated by the testimony of the claimant. The claimant testified that she had no prior problems with her right knee and that her condition had improved following the surgery in 2006. While admittedly the MRI reports both failed to reveal the tear, I find that the claimant's continuing complaints of pain and swelling after completion of conservative treatment and the subsequent discovery of the meniscus tear during the diagnostic procedure are compelling evidence of the claimant's need for additional medical treatment. Based on the clear weight of the medical evidence in this case from claimant's treating physicians, I find that the medical treatment provided by Dr. Chakales, beginning on October 30, 2006, and continuing through the date of the hearing, including the arthroscopic surgery of December 14, 2006, was reasonable and necessary and related to the compensable injury.

ADDITIONAL TEMPORARY TOTAL DISABILITY

Claimant is contending that she is entitled to additional temporary total disability benefits from July 26, 2006, to a date yet to be determined. The claimant is entitled to temporary total benefits if he can satisfy a two-prong test: (1) claimant must be within his healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which

continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). Although claimant was released by Dr. Pearce to return to work in July of 2006, the evidence demonstrates that the claimant was not able to return to work due to continuing symptoms. The evidence demonstrates that the claimant unsuccessfully attempted to return to work after July 26, 2006, underwent arthroscopic surgery on December 12, 2006, and has remained off work as of the date of the hearing.

Based on the preponderance of the evidence, I find that the claimant is entitled to additional temporary total disability for the time period from July 26, 2006, through a date yet to be determined.

CONTROVERSION AND ATTORNEY'S FEES

Based on my review of the evidence in this case, I find that respondents have fully controverted payment of all additional medical and temporary total disability benefits from July 26, 2006, to a date yet to be determined. I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on or about June 12, 2006, when claimant sustained an injury to her right knee.
3. The claimant's average weekly wage was \$313.67, which would entitle her to a temporary total disability rate of \$209.00.
4. Respondents initially accepted the claimant's claim as compensable and paid temporary total disability benefits and medical benefits through on or about July 26, 2006, when the claimant was released by Dr. Charles Pearce.
5. Claimant was granted a change of physician on August 29, 2006, to Dr. Harold Chakales.
6. Respondents paid for the claimant's initial visit with Dr. Chakales as ordered by the Commission and that said visit was not controverted.
7. Claimant has proven by a preponderance of the evidence that her need for additional medical treatment from Dr. Chakales, including the surgery in December of 2006, is reasonable and necessary and causally related to her compensable work-related injury in June of 2006.

8. Claimant has proven by a preponderance of the evidence that she is entitled to continued temporary total disability benefits from date of injury until a date yet to be determined.
9. Respondents have controverted claimant's entitlement to additional medical benefits and additional temporary total disability benefits from July 26, 2006, to a date yet to be determined.
10. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

AWARD

The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law 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 Ark. Code Ann. § 11-9-809. See, Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge