

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F306687 and F601983**

<b>SALLY PICKENS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>HEALTH RESOURCES OF ARKANSAS, INC., EMPLOYER</b>	<b>RESPONDENT NO. 1</b>
<b>COMMERCE &amp; INDUSTRY INS. CO., CARRIER/TPA</b>	<b>RESPONDENT NO. 1</b>
<b>NORTH ARKANSAS HUMAN SERVICES, EMPLOYER</b>	<b>RESPONDENT NO. 2</b>
<b>WESTPORT INSURANCE CORPORATION, CARRIER/TPA</b>	<b>RESPONDENT NO. 2</b>

**OPINION FILED JANUARY 3, 2007**

Hearing before Administrative Law Judge O. Milton Fine II on November 20, 2006, in Batesville, Independence County, Arkansas.

Claimant represented by Mr. Thomas W. Mickel, Attorney at Law, Conway, Arkansas.

Respondents No. 1 represented by Mr. Jarrod Parrish, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

In sum, this matter consists of two alleged injuries--an admittedly compensable knee injury in 2003 (Claim No. F306687)--and an alleged injury to the same knee in 2006 (Claim No. F601983). Because of the issue as to whether the second injury was an aggravation or a recurrence of the first, the respondents in the first claim were added to the second, and the claims were heard together on November 20, 2006 in Batesville, Independence County. See *Bankston v. Bionetics Corporation*, 2006 AWCC 120, Claim No. F406876

(Jul. 11, 2006)(in issues involving recurrence versus aggravation, the carrier from the prior injury is a necessary party to the claim involving the latter injury). Other questions also surround these claims.

### Stipulations

Prehearing conferences regarding both claims took place on September 11, 2006 and September 18, 2006. A September 28, 2006 Prehearing Order was admitted without objection as Commission Exhibit 1. Per that order, the following stipulations are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The Claimant sustained a compensable knee injury while employed by North Arkansas Human Services on May 20, 2003.
3. The Claimant's average weekly wage on May 20, 2003 is sufficient to entitle her to compensation rates of \$232/\$174.
4. The employer/employee relationship existed between the Claimant and Health Resources of Arkansas, Inc. on February 12, 2006.

### Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Claimant withdrew the issue concerning her average weekly wage and compensation rate on February 12, 2006, leaving the following to be litigated:

1. Additional medical treatment in the form of additional right knee surgery following an incident at work on February 12, 2006.
2. Aggravation versus recurrence on February 12, 2006.

3. Carrier liability.
4. Controversion.
5. Attorney's fees.

Exhibit 1 incorporates by reference issues identified in a June 27, 2005 Prehearing Order, which came after a June 23, 2005 telephone conference and which concerns only Claim No. F306687. That order, which was admitted without objection as Commission Exhibit 2, identifies four additional issues. Claimant withdrew the one concerning temporary total disability, leaving the following to be litigated:

6. Additional medical treatment on and after December 14, 2004.
7. Controversion.
8. Attorney's fees.

#### Contentions

Claimant. With regard to Claim No. F306687, Claimant contends the following: that she sustained a compensable injury to her right knee when she fell down some stairs at work on May 20, 2003; that an MRI that was performed a couple of weeks after the injury disclosed contusions to the lateral femoral condyle and posterior tibial plateau, an ACL tear, and a tear of the posterior horn of the medial meniscus; that Dr. J.D. Allen, her treating orthopedist, performed surgery on July 7, 2003 to remove the torn meniscus and to repair the torn ACL; that since that time, Claimant has continued having problems with her knee despite being able to work light duty; that on September 18, 2003, Dr. Allen took her off work secondary to her report that her employer was requiring her to work beyond her restrictions; that Claimant's symptoms continued and she had additional knee surgery.

As for Claim No. F601983, Claimant contends that On February 12, 2006, she felt a pop in her right knee while pulling laundry out of a dryer; that she has since learned that she requires additional knee surgery; that the major cause of her need for treatment is either a new compensable injury, or it is a recurrence of the May 2003 injury; that either or both Respondent carriers are liable for benefits in this matter; that the Respondent carriers should be directed to equally share liability for benefits due to Claimant while the Commission determines the ultimate issue of carrier liability; that Claimant takes no position as to which carrier, or whether both of them, are liable for benefits; that all Respondents have controverted this claim in its entirety; and that she is entitled to maximum attorney's fees on all benefits awarded.

Respondents No. 1. These respondents, who are party only to Claim No. F601983, which arose out of Claimant's alleged 2006 knee injury, contend that Claimant did not suffer a compensable injury on or about February 12, 2006; that Claimant's current problems are related to an injury she incurred on June 5, 2003, which was a work-related injury; and that the prior employer and workers' compensation carrier should be brought in as a party respondent to account for benefits associated with Claimant's current request for medical treatment—which, as noted above, has taken place.

Respondents No. 2. These respondents, which were added to Claim No. F601983, are the sole respondents in Claim No. F306687, which concerns Claimant's May 2003 knee injury. They contend that they have paid all appropriate benefits due to Claimant; that Claimant was released in February 2004 and did not have further medical treatment until August 10, 2004, at which time her family physician referred her back to Dr. Allen; and that Claimant's 2006 knee injury amounts to an aggravation or new injury for which they

are consequently not liable. In the alternative, these respondents contend that Claimant's current condition and need for treatment is not causally related to her employment in that her problem, according to Dr. Allen, could be related to her weight. Finally, while Respondents No. 2 initially contended that Dr. Allen opined that he was unsure as to whether the Claimant has a tear of her meniscus; that the diagnostic studies taken to date show no tear; and that Dr. Allen opined that he feels that the Claimant's problem is a patellofemoral as opposed to a meniscal one, they orally amended their contentions at the November 20, 2006 hearing to assert that Claimant incurred a newly torn meniscus as the result of a December 14, 2004 stumble at her home, absolving these respondents of responsibility after that time.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission; and having had an opportunity to hear the testimony of the Claimant/witness and to observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant's December 14, 2004 fall was an independent intervening cause, absolving Respondents No. 2 from responsibility for Claimant's medical treatment after that date for Claimant's admittedly compensable May 20, 2003 injury

4. Claimant has not proven by a preponderance of the evidence that her February 12, 2006 symptoms were due to a new compensable injury or due to a recurrence of her May 20, 2003 injury.
5. Instead, a preponderance of the evidence establishes that Claimant's symptoms at issue on February 12, 2006 were a recurrence of the injuries sustained in her non-compensable December 14, 2004 fall.

### **DISCUSSION**

Claimant is fifty (50) years old, attended two (2) years of college, and has 160 advanced academic hours from the University of Texas. At all relevant times herein, Claimant was an employee of North Arkansas Human Services—which at a certain point underwent a name change to Health Resources of Arkansas. Claimant testified that on May 20, 2003, she was going up the back stairs to the kitchen at the Respondent-employer when she slipped. The stairs had been greasy, and her foot was wet. She fell off the loading dock onto her leg and injured her right knee.

The medical records reflect that on June 5, 2003 an MRI performed on Claimant revealed a bone contusion involving the lateral femoral condyle as well as the posterior aspect of the tibial plateau; a tear in the ACL; and a large tear in the posterior horn of the lateral meniscus. On July 7, 2003, Dr. James Allen performed surgery on the knee, finding a torn ACL and lateral meniscus. Dr. Allen debrided the meniscal fragment because it was not reparable, and performed an ACL substitution, using Claimant's own tissue. Respondents No. 2 accepted the knee injury as compensable and paid for treatment up to and including the aforementioned surgery, along with temporary total disability benefits.

Claimant testified that upon returning to work in late August or early September of 2003, while her knee was better than before the surgery, she was having problems with it. She testified that she has “good days” and “bad days” with it; “[o]n a bad day, it feels like somebody is trying to drive a nail through my kneecap, and it swells and sticks.”

The medical records and deposition testimony of Dr. Allen reflect that on August 19, 2003, her knee looked good and had no effusion. Her ACL graft appeared stable as well. On September 18, 2003, Claimant returned to see Dr. Allen and presented with mild effusion. Based on Claimant’s size, injury and surgery, Dr. Allen thought that Claimant was involved in activities she was not yet ready for; and as a result, he took her off the workforce, placed her back on crutches along with restrictions on lifting and movement. He also had a therapist work with her to get the strength back in her legs. On October 16, 2003, Claimant returned to Dr. Allen and presented with patellofemoral pain, which he testified is fairly common after bone-tendon-bond grafting. Quad exercises and strengthening, he felt, would address this problem. He kept her on movement and lifting restrictions. Claimant testified that her weight loss helped her knee. She returned to Dr. Allen on November 20, 2003. While she presented with knee discomfort, it had and continued to improve. Her motion, according to Dr. Allen, was excellent, and she was walking without assistance. She next saw Dr. Allen on December 16, 2003, and presented with medial joint pain, which was away from the meniscal tear that was surgically repaired—a new symptom. The knee did not show effusion, and Claimant had a good range of motion. Dr. Allen set her back up with a therapist to work on her hamstrings and quads. Because of her symptoms, Dr. Allen on

January 11, 2004, was considering that, if Claimant's problems were not due to an extension of her earlier meniscal tear, which indications were not pointing to, whether this was a new problem she developed as a result of her activity level and weight. Dr. Allen next saw her on February 17, 2004 and determined that she had reached maximum medical improvement. He listed permanent restrictions for her and discontinued the follow-up visits.

Dr. Allen did not see Claimant again until August 10, 2004. She again presented with knee pain, primarily in the patellofemoral mechanism—which is behind her kneecap. The examination showed mild effusion and no instability. There was some patellofemoral crepitus, but good maintenance of joint space. Dr. Allen testified that is a side-effect of bone-tendon-bone grafts, and was complicated by Claimant's weight problem. He found no problems with her ACL or meniscus, which he had surgically repaired. He opined that her problems were due to her efforts to lose weight; that she had probably overdone efforts despite the plus of having lost sixty (60) pounds. He again removed her from the workforce, and placed her on an outpatient therapy program of supervised quad and hamstring strengthening, keeping the right knee away from certain activities involving bending and resistance.

Dr. Allen conducted an MRI on September 20, 2004. Claimant presented with knee catching, swelling, pain in the joint and under the kneecap, bruising, and snapping, popping and crackling in the knee. Dr. Allen testified that if she had presented with these symptoms in February 2004, he would probably not have released her. The MRI was conducted to find out whether the graft—the ACL repair, was still good, and whether another injury had occurred to Claimant's knee. Dr. Allen did not

find an abnormal accumulation of fluid in the joint. According to the MRI, the ACL was in good shape, and there was no evidence of a meniscal tear. Based on these findings, Dr. Allen recommended further physical therapy.

Claimant testified that on December 14, 2004, she was going to get something in her house when her knee locked. Claimant grabbed her Christmas tree to stop from falling, but the tree broke in two and she fell. She testified that this fall did not injure her knee, but that the knee was the cause of the fall. The knee continued to lock up after the fall as well. In March of 2005, she needed additional surgery on the knee. Respondent No. 2 carrier refused to pay for the surgery, but Claimant underwent the procedure anyway. She testified that she was able to come back to work after the surgery, and that she was better: the constant pain was gone, the swelling had improved, and her knee was not catching. According to her, this remained the case until the February 12, 2006 incident.

According to the medical records, when Claimant presented herself for treatment after the December 2004 fall, she stated that "she is not sure whether she got up and started to stumble, or whether she stumbled and made this thing [presumably, her knee] worse." She presented with a catching sensation along the lateral aspect of the knee, which Dr. Allen testified was a new finding. Dr. Allen performed arthroscopic surgery on May 18, 2005. He found the previous ACL repair to be fine. There was a small tear in the meniscus, which he felt was a degenerative tear, which went into the bed of her former meniscal injury and extended toward the back of the knee. Some of the newer tear affected areas not touched by the former tear. Dr. Allen testified that the injury could have been related to some type of trauma, or her weight and activity level.

In the surgery, Dr. Allen also debrided a band of scar tissue, which he stated is not uncommon, across the inside front of Claimant's knee. On July 5, 2005, he discharged Claimant from follow-up.

Back at work for Respondent-employer, which had undergone a name change, Claimant testified that on February 12, 2006 she was reaching into a standard-size front-loading clothes dryer to retrieve a dish cloth when she "heard and felt a snap. It wasn't a pop; it was a snap." She bent the knee in order to reach, but did not twist it, and the snap occurred when she straightened the knee. She admitted in her testimony that this movement was outside the restrictions Dr. Allen had prescribed. The injury was again to her right knee, and it started to swell. While she testified that she was still able to continue working for Respondent-employer, she quit her job because she was afraid she would not be able to perform at 100 percent and see to the safety of the children in her care.

Claimant has not had a third knee surgery, and at present only injections are being discussed. She testified that it "feels like somebody is trying to drive a nail through [her] kneecap." She also testified that she feels pain underneath. She also feels a spasm sensation in her lower quadriceps, which she testified was the same thing she felt after her two previous injuries. After her May 2005 surgeries, her knee did not grind, pop, or give way. But after the February 2006 incident, all three would occur.

The medical records reflect that Claimant underwent an MRI on February 23, 2006. But with the exceptions of the postoperative changes and a small amount of a joint effusion, nothing remarkable was noted. No medical tear was seen. Dr. Allen again placed Claimant on restrictions regarding movement such as stooping and

bending, and prescribed therapy. On March 28, 2006, she presented with pain in the knee. There was mild effusion, and tenderness over the medial joint space. Dr. Allen wondered whether chondromalacia or a loose body, or perhaps damage to the meniscus that the MRI missed, was involved. She was given a nonsteroidal.

Dr. Allen was equivocal when testifying regarding what role, if any, that her May 2003 injury had in her February 12, 2006 symptoms:

In [Claimant's] case, when I saw her in February [2006], she had a change in her physical findings, because her tenderness along her medial joint line, which was new, and my concern was that just with this recurrent injury, whether it was related to—you know, you could make the argument, and some people would make the argument, that just because of her old injury and the fact that the knee had had ACL surgery and she had a meniscal injury on the lateral side or outside part of the knee, that she was a setup to have further injury. I don't know how to answer that other than to say that, you know, she had gone pretty much symptom free until this injury in February, and I'm sure that probably her old injury did feed into that some, because I don't think her leg—I don't think that she got her leg as strong as it would have been before she had injured it originally.

...

Q The fact that she has all these factors playing against her, her weight, as Mr. Frye discussed, altered gait, possibly from one leg being shorter than the other, a high level of activity on her job, you don't dispute that all of those things contribute to the problems that she showed up with in February of '06, do you?

A No, I can't.

Dr. Allen attributed her kneecap pain to weakness in her quadriceps. While he initially intended to operate on the knee, Dr. Allen testified that Claimant's problems went from being mechanical in nature to simply pain. So he instead looked to Synvisc injections to treat her. Those have not yet occurred. While Claimant testified that she felt like her problems were attributable at least in part to the build-up of scar tissue in the knee from the surgery, Dr. Allen testified that he disagreed and believed that the progression of

Claimant's life and her activity on the knee would be as likely to induce scarring. And he was of the opinion that her current symptoms pointed more toward degenerative changes than an acute injury in February 2006. In Dr. Allen's opinion, if an acute injury had occurred in February 2006, the MRI would have shown it. The sensation Claimant experienced in February, according to Dr. Allen, was possibly due to her knee trying to dislocate, which is known as subluxation. And the treatment for this condition would be quadricep exercises and time.

### **ADJUDICATION**

#### A. Issue No. 6: Additional Medical Treatment

Because of the order in which the events unfolded under these claims, it makes sense to address the issues under Claim No. 306687 first. Claimant contends that Respondents No. 2 should be liable for her additional medical treatment—namely, her May 18, 2005 surgery. Respondents No. 2 argue that the Claimant's December 14, 2004, fall in her home is an independent intervening cause, absolving them from responsibility for the second surgery.

The pertinent section of the Arkansas Workers' Compensation Act provides:

Under this subdivision (4)(F), benefits shall not be payable for a condition which results for a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

Ark. Code Ann. § 11-9-102(f)(F)(iii) (Repl. 2002). This provision did not repeal, but instead codified, preexisting case law. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 757-58, 20 S.W.3d 326 (2000). The operative test remains the one set forth in *Guidry v. J&R Eads Const. Co.*, 11 Ark. App. 219, 223, 669 S.W.2d 483 (1984): the

question is whether a causal connection between the primary injury and the subsequent disability exists, and provided such a connection is established, there is no independent intervening cause unless the subsequent disability is triggered by activity by the claimant that is unreasonable under the circumstances.

There is no need to examine the reasonableness of Claimant's conduct on December 14, 2004, because no causal connection has been shown. As reflected above, the evidence reflects that Claimant's healing period ended on February 17, 2004, just shy of ten (10) months before the fall. In August 2004, Dr. Allen in examining Claimant found no problems with her ACL or meniscus. He found some patellofemoral crepitus, which can be a side-effect of an ACL repair, especially when complicated by Claimant's weight problem. He opined that her problems were due to her efforts to lose weight, and placed her on outpatient therapy. A September 2004 MRI conducted on Claimant did not reveal any problem with her ACL or meniscus. While Dr. Allen testified that it is hard in reading an MRI to determine whether a torn meniscus is chronic or acute, and while the more recent tear went into the bed of the old tear, he also stated that the tear affected areas not touched by the former tear. Moreover, he testified that the injury could have been related to some type of trauma. Moreover, only after the fall in her home in December 2004, through the subsequent surgery, was the torn meniscus revealed.

The evidence does not support a finding, however, that the December 2004 fall was caused by her May 20, 2003 compensable injury. Dr. Allen's testimony does not support this. Indeed, despite Claimant's testimony at the November 20, 2006 hearing that her knee problems caused the fall, her contemporaneous statement when she

presented for treatment in 2004 showed that she herself was unsure as to the cause. In sum, the December 14, 2004 fall was an independent intervening cause that relieves Respondents No. 2 of responsibility for Claimant's treatment after that date, including the May 2005 surgery. Simply put, Claimant has not met her burden of proof. This claim is thus denied and dismissed.

B. Balance of Issues Under This Claim

Because of the above finding, the balance of the issues under Claim No. F306687—controversion and attorney's fees—are moot and will not be addressed.

C. Issue Nos. 2 and 3: Aggravation Versus Recurrence and Carrier Liability

That leaves Claim No. F601983, which surrounds the February 12, 2006 incident involving the dryer. Claimant contends that she is entitled to additional treatment for this injury, in the form of additional surgery, from either or both Respondents Nos. 1 and 2. A corresponding issue is whether this injury is an aggravation or a recurrence.

The threshold question is whether the February 12, 2006 injury is a compensable one. Respondents have contended that this injury is not compensable. To establish a compensable injury pursuant to Act 796 of 1993, Claimant must prove, by a preponderance of the evidence, that she sustained an accidental injury causing physical harm. She must show that this injury arose out of and in the course of her employment, and that the injury required medical services or resulted in disability or death. Moreover, the injury must be established by medical evidence, supported by objective findings. Ark. Code Ann. § 11-9-102 (Repl. 2002).

I find that Claimant has not met her burden of proving a compensable aggravation or new injury as a result of the February 12, 2006 dryer incident. Dr. Allen

testified that Claimant's post-February 2006 symptoms pointed more toward degenerative changes than an acute injury. He stated that if an acute injury had occurred in February 2006, the MRI would have shown it. This testimony, along with the objective medical evidence adduced at the hearing, casts a great deal of doubt on whether an accidental injury occurred on that date.

I also find that a preponderance of the evidence also indicates that the symptoms following the February 2006 dryer incident were not an aggravation, nor were they a recurrence of Claimant's May 2003 injury. The test for determining if a subsequent episode is an aggravation or a recurrence is whether the subsequent episode was precipitated by an independent intervening cause, or was a natural and probable result of the first injury. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 167-68, 969 S.W.2d 677 (1998).

First, as noted above, Dr. Allen testified that Claimant's symptoms after the February 12, 2006 incident involving the dryer was more indicative of degenerative changes as opposed to an acute injury. According to him, if an acute injury had occurred as a result of the dryer incident, the February 23, 2006 MRI would have shown it. While Claimant testified that she felt a "snap" when reaching into the dryer, Dr. Allen stated that this was due to subluxation. Based on this and the objective medical evidence, I do find that the February 2006 incident constituted a recurrence and not an aggravation.

As discussed previously, however, the December 2004 fall was an independent, intervening cause, breaking the chain of causation going back to the original, compensable injury in May 2003. The symptoms on February 12, 2006 were actually of

the December 2004 non-compensable injury, and not a recurrence of the May 2003 injury. Claimant is therefore not entitled to relief from either carrier. This claim is thus denied and dismissed.

D. Balance of Issues Under This Claim

Because of the above finding, the balance of the issues under Claim No. F601983—additional medical treatment, controversion and attorney's fees—are moot and will not be addressed.

**CONCLUSION**

With regard to Claim No. F306687, Claimant's December 14, 2004 fall was an independent intervening cause, absolving Respondents No. 2 from responsibility for Claimant's medical treatment after that date for Claimant's admittedly compensable May 20, 2003 injury. As for Claim No. F601983, Claimant has not proven by a preponderance of the evidence that her February 12, 2006 symptoms were due to a new compensable injury or due to a recurrence of her May 20, 2003 injury. Instead, a preponderance of the evidence establishes that Claimant's symptoms at issue on February 12, 2006 were a recurrence of the injuries sustained in her non-compensable December 14, 2004 fall. Therefore, the claims for benefits must be, and hereby are, denied and dismissed.

**IT IS SO ORDERED.**

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Hon. O. Milton Fine II  
Administrative Law Judge