

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F507177 & F600041

BOBBY PRITCHETT, EMPLOYEE

CLAIMANT

**HILL & HILL CONSTRUCTION COMPANY, INC.,
EMPLOYER**

RESPONDENT

**COMMERCE & INDUSTRY INSURANCE CO.
c/o AIG CLAIM SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED SEPTEMBER 12, 2007

Hearing before Administrative Law Judge Barbara Webb on June 14, 2007, in Helena, Phillips County, Arkansas.

The claimant was represented by Mr. Mike Etoch, Attorney at Law, Helena, Arkansas.

The respondents were represented by Mr. Jarrod Parrish, Attorney at Law, Worley, Wood and Parrish, P.A., Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on June 14, 2007, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on April 17, 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 April 17, 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 April 22, 2005, when claimant sustained a compensable left knee injury.
3. The claimant's earnings were sufficient to entitle him to a maximum compensation rate of \$450.00 for temporary total disability and \$338.00 for permanent partial disability benefits.
4. The claimant was involved in a work-related accident on April 22, 2005.
5. The claimant was assigned a 22% permanent partial impairment rating for his left knee injury, which was accepted and paid by respondents.

ISSUES

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

1. Compensability of claimant's right knee injury on April 22, 2005.
2. Claimant's entitlement to additional benefits associated with his right knee injury.
3. Claimant's entitlement to additional temporary total disability benefits related to his left leg.

The record consists of a one volume transcript of the June 14, 2007 hearing, consisting of the testimony of Emma Pritchett and Bobby Pritchett, 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); Respondents' Exhibit No. 2 (Employment Records); Respondent's Exhibit No. 3 (Letter dated 5/25/07); and Respondents' Exhibit No. 4 (Letter dated 5/14/07). The Claimant's letters dated June 22, 2007, and July 9, 2007 and post-hearing brief submitted on July 9, 2007, and Respondents' letter dated July 3, 2007, and post-hearing brief submitted on July 17, 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-two years of age (b. d. 3/5/55). He has worked for the respondents for 33 years performing mechanical work and operating heavy equipment, including a track hoe and dozer. He currently works in a supervisory capacity and explained that he is no longer able operate heavy equipment due to the injury that occurred in April of 2005. The claimant was injured on the job in 1993. At that time, he hurt his right leg and required surgery. Following his surgery, he returned to work performing the same type of work he had previously done, i.e. mechanic work. He also suffered a previous on-the-job injury in which his finger was cut off but it was sewed back on and he returned back to work after that accident as well. He described the accident on April 22, 2005, as follows:

A. I was – we was putting a track, me and Mr. Hill and – me and Larry was putting a track on a D8 dozer, and we put the track on, got that pry bar and chains hooked both sides and pried down. And I got up on some blocks so I could catch the bar and pull down, we had the bar inside the pipe. I was pulling down, and it flipped and I landed down on my – the pipe went on my legs, I went down on my knees and I hit it on the ground.

Q. Would you tell me a little bit of how – where did your legs land and – ?

A. My legs landed on the block, I hit my butt and my knees hit the ground.

He explained that his legs were underneath him when he landed and “burned like fire.” The accident was witnessed by a co-worker and Larry Hill. Pritchett began rolling on the ground and rubbing his legs and stretching his knees and finally got up and tried to walk it off. He testified that both of his knees were hurting. He told Larry Hill that both knees hurt so bad that he could hardly take it. He testified that this injury was different because both knees burned like fire and were swollen and hurt worse than ever before. He sought medical treatment the next week by Dr. Barr. Following his examination, he was scheduled for MRI’s and x-rays on both knees. Following a review of the MRI reports, it was determined that his right leg would be operated on first.

He continued to work at this time performing light duty work as a supervisor except for a short period of time in which he was off due to an unrelated workers’ comp claim involving a head injury for which he was paid. His surgery was delayed due to the head injury. His left leg proceeded to get worse and it was determined that his left leg would be operated on first instead.

Following the surgery on his left knee, he was examined by Dr. Braden. He recalled going to see Dr. Braden for approximately five or ten minutes. He explained that Dr. Braden picked up his legs and moved them up and down and made him bend them up and down and tried to move them sideways, which he couldn’t perform. He testified that Dr. Braden did not take any x-rays and did not review any x-rays or conduct any MRI tests to his knowledge.

He explained that he had a prior surgery on his right knee which pre-existed the April 2005 injury. He also had to have some shots in his right leg on occasion. He explained that prior to the accident in April 2005, his legs didn't hurt him as bad but after the accident he had a lot of trouble with his legs that he didn't have before. He testified that he still wanted to have surgery on his right leg and needed it but that the treatment had been denied by workers' comp. He testified that he was continuing to work in constant pain which was not present before the accident.

On cross-examination, the claimant testified that he could not recall whether he had at least five prior workers' comp claims but agreed that he had been hurt several times while at Hill & Hill over the years. He testified that he had not had any problems other than a little bit of arthritis since his 1996 right knee surgery. He recalled an incident in 2004 in which he re-injured his right knee prior to April 2005. At that time, he received a cortisone shot in the right knee. He acknowledged that he had received cortisone injections in his knees from Dr. Barr over the years. He admitted that prior to April of 2005, he had reported to Teresa and Raymond Hill that he had hurt his right knee prior to the injury but that the pain was different. At the time of the 2005 incident, he was on Vioxx and an anti-inflammatory. He has osteoarthritis and gout in his right leg but his gout is in his ankle and down in his foot. He explained that the gout flairs up when he eats the wrong food. He explained that his fingernails had grease under them because he touched the equipment and showed his workers what to do but that he was not able to perform the heavy work. He applied for Social Security but his case was continued and he

went back to work in January of 2007. He testified that he has been hunting and fishing since his injury in April of 2005 and hunted in the 2006 deer season.

The claimant testified that he was paid \$9.50 an hour and worked approximately 70 to 80 hours a week before the accident. Since the accident, he explained that he was only able to work 60 to 65 hours and sometimes got 70 hours. He stopped working on July 10, 2006, due to the head injury.

Emma Pritchett was called to testify for the claimant. She has been married to the claimant for 32 years. She recalled him having surgery on his right knee in 1996. After the surgery, he recovered and returned to work for Hill & Hill. He also had a series of four to five cortisone shots for pain in his knees over a period of 12 years. She recalled that he was injured in an accident on or about April 22, 2005, and that following that accident, his pain was "no more than usual." She testified that she took Pritchett to see Dr. Barr. She told the receptionist that her husband had fallen and hurt both knees. He returned for a follow-up examination with Dr. Barr and referred for an MRI on both legs. She testified that they scheduled him to have surgery but he continued working and hit his head and that postponed the scheduled knee surgery. The left knee was subsequently operated on and Pritchett was off work for a while and received workers' compensation during that time. She accompanied the claimant to the functional evaluation done by Dr. Braden in Jonesboro. She did not observe Dr. Braden taking any x-rays or MRI's. She explained that Dr. Braden examined the claimant's knees and looked at a chart that he had and evaluated him from that. She explained that Dr. Braden examined both

knees and both legs. She testified that the claimant could not read or write and that she had to do that for him and that she has had a memory problem since he has been hit on the head.

On cross-examination, Mrs. Pritchett testified that Dr. Braden may have had the MRI or other reports but that she did not see him with the records. She explained that the claimant had gone back to work after the accident in April of 2005 but continued to work in pain. She testified that the claimant has arthritis and would go to Dr. Barr to get cortisone. She explained that he had never had a lot of swelling in his knees prior to April of 2005 but that when he fell, his knees swelled. She explained that her husband was able to withstand pain and did not take pain pills. She agreed that a physician was in a better position regarding whether her husband's right knee problems were related to the fall in April of 2005 but that she knew her husband's condition was worse because she lived with him every day. She explained that the injury he suffered in April of 2005 "brought him down." She explained that after April of 2005, she observed the claimant's knees swelling so bad that he had to take Epsom salt baths and she put ice packs on his knees if he stood a lot or sits a lot. She testified that the swelling occurred on a weekly basis. She explained that Pritchett takes ibuprofen every day and has difficulty getting up and out of a chair or going up the steps to the house. She noted that that he has a popping in both knees since April of 2005 and that he was in more pain since the accident. She explained that prior to April of 2005, he had grinding in his knees but

since the accident when he stands up, it makes a loud pop. She noted the changes occurred immediately after the accident in April of 2005.

Medical records in the case reveal that the claimant underwent arthroscopy with chondroplasty of a chondral flap tear and chondral lesion of the medial femoral condyle of the right knee on April 24, 1996. On July 11, 1996, Dr. Wilson rated the claimant with a ten percent permanent impairment to the right lower extremity. On May 24, 1999, he returned to Dr. Wilson with bilateral knee pain and swelling in the right knee and received bilateral injections. On July 24, 2000, Pritchett was seen by Dr. Wilson after injuring his right knee when he fell off a spreader and had an effusion. His right knee was injected with Celestone and Xylocaine.

On February 10, 2004, Pritchett was examined by Dr. William Barr after reporting an injury to both knees which removing an oil cooler from a trackhoe. At that time, Pritchett reported that he had had prior knee problems but not in recent years. He reported losing weight from 288 pounds to 258 pounds. He was diagnosed with strain in both knees and pre-existing osteoarthritis in both knees with right greater than left. He was on Vioxx and was given an injection in the right knee. Dr. Barr noted that an x-ray report revealed moderate degenerative changes in both knees.

On February 17, 2004, he returned to Dr. Barr for with complaints of pain in both knees with noted improvement in the right knee after the injection. He received an injection in the left knee.

On March 26, 2005, clinic notes reflect that Pritchett sought medical treatment with complaints of injury to both knees. He reported that he was injured at work when he fell injuring both knees on the previous Friday. He was diagnosed with strain to both knees with traumatic exacerbation of osteoarthritis and probable gout in both knees. He was treated with injections in both knees. On May 3, 2005, he returned with complaints of bilateral knee pain. He was given knee braces and was referred for an MRI on both knees. The MRI on the left knee revealed a PHMM small free edge degenerative tear with small joint effusion and mild patellofemoral and medial knee compartment osteoarthritis. The MRI on the right knee revealed Mild medial compartment osteoarthritis with PHMM small tear and small joint effusion and mild patellofemoral osteoarthritis.

Dr. Barr's notes reflect that the claimant was evaluated again on November 28, 2005. It was noted that he had a history of a concussion and had not worked for two and one half months. He observed that the right knee was worse than the left and scheduled an arthroscopy of the right knee on January 6, 2006. On December 27, 2005, the claimant returned to Dr. Barr with complaints that his left knee had gotten so bad he wanted to have arthroscopy done on his left knee first. Dr. Barr noted that both knees were about the same and agreed to proceed on the left knee first. On January 7, 2006, the claimant underwent arthroscopy on his left knee. On February 17, 2006, the claimant was noted to have popping in his left and right knees. He was approved for Neovisc injections and received the first injection in his left knee on March 9, 2006, and the second on March 16, 2006. On March

23, 2006, he received his third injection in his left knee and was noted to be having a lot of trouble with his right knee. He was scheduled and received ten physical therapy visits. On June 15, 2006, it was noted that he was unable to work and still going to physical therapy. He reported that his left knee felt better but that his right knee was "killing him as well".

On July 13, 2006, the claimant underwent an independent medical examination by Dr. Terence Braden. Dr. Braden examined the claimant and medical records from Dr. Barr's office. In his report, he observed that the claimant's need for ongoing treatment is from the severe degenerative joint disease which preceded his injury. He further noted that "the right knee with its previous significant degenerative changes and operative intervention is a pre-existing problem". He submitted both of these opinions within a reasonable degree of medical certainty.

On July 31, 2006, the claimant was seen by Dr. Barr concerning his right knee. Dr. Barr noted that the claimant had finished his PT with his left knee and received an impairment rating from Dr. Braden. He noted that records reflected that the claimant had injured both knees and that the claimant needed to proceed with the right knee procedure as he had done with the left knee in light of the posterior horn medial meniscus tear in his right knee and tricompartmental osteoarthritis which pre-existed the injury.

DISCUSSION

_____The claimant contends that he sustained injuries to both knees on April 22, 2005, while working for respondent employer. The left knee was treated first and the

claimant was assigned a 22% permanent partial impairment rating for his left knee injury, which was accepted and paid by respondent carrier. The claimant contends that the right knee needs surgery and that damage to both knees has caused him to be permanently and totally disabled. The claimant contends he is entitled to temporary total disability benefits from July 21, 2006, the last date of payment of benefits, through January 15, 2007, the date he returned to work.

The respondents contend that all appropriate benefits have been paid with regard to claimant's left knee injury and that the claimant's current need for medical treatment is associated with pre-existing problems and not an acute work-related injury. As such, respondents have denied benefits as of July 21, 2006. The respondents contend that the medical documentation does not support entitlement to additional indemnity benefits beyond the permanent impairment rating associated with the claimant's compensable injury.

Additional Medical Treatment

The respondents have accepted the April 22, 2005, left knee injury as compensable and paid medical expenses and temporary total disability benefits until July 21, 2006. In support of their denial of treatment for the right knee, Respondents rely on the medical opinion of Dr. Braden and past medical reports of the claimant reflecting pre-existing problems and previous injuries to his right knee concluding that the claimant had chronic, ongoing degenerative/osteoarthritic problems in his right knee since 1996.

On the other hand, claimant contends that he suffered traumatic exacerbation of osteoarthritis in both knees at the time of the April, 2005 incident. The claimant further points out that the credible testimony of the claimant and his wife both establish that claimant had worked regularly in heavy work for 70-80 hours a week prior to the specific incident occurring on April 22, 2005, that he currently uses a cane and cannot perform any heavy work, and that he currently suffers from problems with his legs that he had never experienced before. Claimant relies on the medical records of Dr. Barr to support that the medical treatment recommended by Dr. Barr, including the arthroscopic surgery on his right knee, is reasonable and necessary medical treatment and related to the work-related injury in April of 2005.

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, there is no dispute that a specific incident occurred in which the claimant suffered a compensable injury. The evidence demonstrates that there is objective medical evidence which established the current need for surgery. 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 him and the proper determination is whether there is sufficient evidence to establish that a 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, Dr. Braden opined that the "need for his ongoing treatment is from the severe degenerative joint disease that preceded his injury" and "The right knee with its previous significant degenerative changes and operative intervention is a pre-existing problem." To the contrary, the medical records of Dr. Barr support the conclusion that the claimant's right knee condition was more than just a sprain and that the claimant had a tear in his knee which requires the requested surgery.

This medical evidence is further substantiated by the testimony of the claimant and his wife. The claimant and his wife testified that he had worked and 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 physician, I find that the medical treatment recommended by Dr. Barr, including the arthroscopic surgery of the right knee, to be reasonable and necessary and related to the compensable injury.

ADDITIONAL TEMPORARY TOTAL DISABILITY

Claimant is contending that he is entitled to additional temporary total disability benefits for his time off work due to his admittedly compensable injury to his left leg from November 23, 2005 until July 21, 2006, and was underpaid benefits by approximately \$3,600.00. Respondents contend that TTD benefits were owed from 01/07/06 until 07/13/06 and that claimant was in fact over paid benefits. 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). In the instant case, the evidence demonstrates that the claimant was able to continue to work until his surgery in January of 2007 and that any work missed was due to a concussion from another accident not at issue in this case.

Based on the preponderance of the evidence, I find that the claimant has failed to establish that he is entitled to additional temporary total disability related to his left leg. However, I would note that the claimant will be entitled to temporary total disability benefits for any work missed due to the injury and

subsequent treatment of his right knee. I further find that the evidence has failed to demonstrate that respondents are entitled to a credit for overpayment of benefits.

CONTROVERSION AND ATTORNEY'S FEES

Based on my review of the evidence in this case, I find that respondents have fully controverted compensability of a right knee injury, and payment of all additional medical and temporary total disability benefits 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 employer/employee/carrier relationship existed on April 22, 2005, when claimant sustained a compensable left knee injury.
3. The claimant's earnings were sufficient to entitle him to a maximum compensation rate of \$450.00 for temporary total disability and \$338.00 for permanent partial disability benefits.

4. The claimant was involved in a work-related accident on April 22, 2005 and suffered compensable injuries to both his left and right knee. .
5. The claimant was assigned a 22% permanent partial impairment rating for his left knee injury, which was accepted and paid by respondents.
6. The claimant has proven by a preponderance of the evidence that he is entitled to additional benefits associated with his right knee injury, specifically the recommended surgery by Dr. Barr.
7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits related to his left leg.
8. Claimant has proven by a preponderance of the evidence that his need for additional medical treatment from Dr. Barr, including the recommended surgery to the right knee, is reasonable and necessary and causally related to his compensable work-related injury in April of 2005.
9. Respondents have controverted claimant's entitlement to compensability and additional medical benefits and additional temporary total disability benefits 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.
