

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604990

LINDA S. WARD, EMPLOYEE	CLAIMANT
SO. ARK. DEVELOPMENTAL CENTER, EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, CARRIER	RESPONDENT

**OPINION FILED JUNE 4, 2007**

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on March 8, 2007 at Fordyce, Dallas County, Arkansas.

Claimant represented by HON. KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by HON. CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on March 8, 2007, in Fordyce, Arkansas. A prehearing conference was conducted in this case on January 24, 2007, and a Prehearing Order was filed on January 25, 2007. At the hearing the parties announced the stipulations, issues and their respective contentions were properly set out in the Prehearing Order, subject to any additional stipulations, contentions and issues agreed to at the hearing. A copy of the Prehearing Order was introduced into evidence as Commission Exhibit "1", and made a part of the record without objection.

At the full hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including March 16, 2006.
- 3) The claimant's compensation rates are \$275.00 per week for temporary total disability and \$206.00 per week for permanent partial disability.
- 4) The claimant sustained a compensable right leg injury on March 16, 2006, for which she sustained a 10% permanent impairment to her right lower extremity, which is being paid by the respondents.
- 5) Claimant received a change of physician to Dr. Jay Lipke.

By agreement of the parties, the issues to be litigated and resolved at the full hearing were limited to the following:

- 1) Whether claimant is entitled to additional temporary total disability benefits from August 23, 2006, through November 1, 2006.
- 2) Whether claimant is entitled to the additional medical treatment now recommended by Dr. Jay Lipke.

- 3) Whether respondents controverted the 10% impairment rating from Dr. Gati for which attorney's fees would apply.
- 4) Whether claimant is entitled to TTD payments for which respondent stopped payment prior to November 1, 2006.

The claimant contended, in summary, that her healing period did not end until November 2, 2006. The claimant contended entitlement to additional TTD benefits from August 23, 2006 through November 1, 2006. Claimant contended respondents controverted her impairment rating of 10% to the lower right extremity for which attorney's fees should apply. Claimant contended entitlement to the additional medical treatment recommended by Dr. Lipke.

Respondents contended, in summary, that all appropriate benefits have been paid or are continuing to be paid with regard to this claim. Respondents contended claimant reached maximum medical impairment on August 23, 2006, or in the alternative, on November 1, 2006. Respondents contended that any need for medical treatment by the claimant is due to pre-existing conditions and not any acute injury. Respondents contended they did not controvert any PPD benefits.

**DISCUSSION**

The claimant sustained a stipulated compensable right knee injury while working for the respondents on March 16, 2006. The claimant testified that on that date she tripped over some wires on the floor and fell and hurt her knee. (T. pg. 15, lines 23-24) The claimant testified that she first treated with Dr. Hatley after the March 16, 2006 incident and then with Dr. Gati. Dr. Gati performed surgery on claimant's right knee in May of 2006. After the knee surgery, the claimant continued seeing Dr. Gati until approximately August 23, 2006. Thereafter claimant treated with Dr. Lipke.

Dr. Gati issued a report finding the claimant at maximum medical improvement on August 23, 2006. The claimant then received a change of physician to Dr. Lipke, and ultimately returned to work with the respondents on November 2, 2006.

The claimant testified that she had problems with her knee dating back to the year 2000. (T. pg. 30, lines 12-19) The medical records show that the claimant was diagnosed with chondromalacia in both knees in August of 2002, and that she received injections in her right knee at that time. (RX-2, pg. 25)

This is primarily a claim for additional benefits. The claimant requests additional TTD, medical treatment and a controverted attorney's fee on her permanent impairment rating.

**ADJUDICATION**

**A. ADDITIONAL TEMPORARY TOTAL DISABILITY**

An employee who has sustained a scheduled injury is to receive temporary total disability compensation during her healing period or until she returns to work, whichever occurs first. Ark. Code Ann. §11-9-521(a); Wheeler Construction Co. v. Armstrong, 72 Ark. App. 146, 41 S. W. 3d 822 (2001). "Healing period" means "that period for healing of an injury resulting from an accident." A.C.A. §11-9-102(12) Whether an employee's healing period has ended is a question of fact for the Commission. Armstrong, Supra.

In this case, Dr. Gati undoubtedly found the claimant's healing period from her March 16, 2006 injury to have ended on August 23, 2006. (RX-2, pg. 71) The claimant's primary diagnosis prior to her May 11, 2006 surgery was right knee meniscal tear, right knee lateral meniscal tear, and right knee chondromalacia. The medical records clearly reflect that the claimant's right knee chondromalacia was a pre-existing condition. (RX-2, pg. 25) After August 23, 2006, both Dr. Gati (RX-2, pg. 71) , and Dr. Lipke, (CX-1, pgs. 15 & 18) opine that the claimant's right knee problems is solely chondromalacia. Dr. Gati, in his 10/6/06 report, assigns zero percent (0%) of the claimant's chondromalacia to her on-the-job acute work injury.

Based on the medical records, I find the claimant has failed to prove by a preponderance of the evidence entitlement to additional TTD after August 23, 2006. I agree with Dr. Gati that claimant's healing period for her compensable injury ended on 8/23/06. I find that the claimant reached MMI for her March 16, 2006, work injury on

August 23, 2006. Based on these findings, the parties agreed issue #4 outlined herein would be moot. (T. pg. 6, lines 7-11) (T. pg. 7, lines 6-9)

**B. ADDITIONAL MEDICAL TREATMENT**

An employee shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(a) The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W. 3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact. for the Commission. Wackenhut Corp. v. Jones, 72 Ark. App. 158, 40 S.W. 3d 333 (2001)

The claimant has failed to prove by a preponderance of the evidence that additional medical treatment as proposed by Dr. Lipke is reasonably necessary for the treatment of her compensable injury. The primary condition for which Dr. Lipke is recommending injections is chondromalacia. As stated above, chondromalacia was a pre-existing condition for which the claimant was treated for prior to her March 16, 2006 compensable injury. In fact, Dr. Gati opined that zero percent (0%) of the claimant's chondromalacia is related to the acute work injury. (RX-2, pg. 25) The medical evidence clearly shows that the additional treatment now requested by the claimant is not related to her compensable injury of March 16, 2006, and is therefore denied.

**C. ATTORNEY'S FEE**

Claimant asserts that respondents controverted the ten percent (10%) impairment rating and therefore should be ordered to pay a controverted attorney's fee associated therewith. The facts are essentially undisputed regarding the rating from Dr. Gati. Dr. Gati's rating report is dated November 8, 2006; however, even claimant's counsel acknowledged that Comp Choice didn't receive the report until November 28, 2006. (T. pg. 9, lines 23-24 & Pg. 10, lines 1-18) Comp Choice then forwarded the report to AIG, and Amber Lowe, the claims adjuster for AIG in this particular claim, testified she received the report on December 8, 2006, and issued the first PPD check on December 15, 2006.

Whether a claim is controverted is a fact question that must be determined from the circumstances of each particular case. Masonite Corporation v. Mitchell, 16, Ark. App. 209, 600 S.W. 2d 409 (1985) The mere failure to pay compensation benefits does not amount to controversion, in and of itself. Revere Copper & Brass, Inc. v. Talley, 7 Ark. App. 234, 647 S.W. 2d 477 (1983)

Here, the respondents' adjuster credibly testified that she received the rating on December 8, 2006, and issued a check on December 15, 2006. I do not find that delay of seven days amounted to the respondents controverting the ten percent (10%) impairment rating to the claimant's right lower extremity. For whatever reason, Dr. Gati waited nearly twenty (20) days to send out his 11/8/06 report, which caused the greatest period of delay in the claimant receiving her payment for permanent partial disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704.

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional TTD benefits from August 23, 2006 through November 1, 2006, and is therefore denied.
- 4) The claimant reached maximum medical improvement from her March 16, 2006 work injury on August 23, 2006.
- 5) The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment recommended by Dr. Lipke is related to her March 16, 2006 compensable injury, and is therefore denied.

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6) Respondents did not controvert the claimant's ten percent (10%) permanent impairment to the right lower extremity, and therefore attorney's fees do not apply.

**ORDER**

The claimant has failed to prove by a preponderance of the evidence entitlement to the additional benefits she has requested herein. Therefore, this claim is hereby, respectively, denied and dismissed.

IT IS SO ORDERED.

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S. DALE DOUTHIT  
Administrative Law Judge