

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701212

WILLIAM R. BEAN, EMPLOYEE	CLAIMANT
GLOBAL GEOPHYSICAL SERVICES EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 3, 2008

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on February 25, 2008, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by The Honorable J. Mark White, Attorney at Law, Bryant, Arkansas.

The respondents were represented by The Honorable Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on February 25, 2008, in Little Rock, Arkansas. A Prehearing Order was previously entered in this case on January 28, 2008.

The following stipulations were submitted by the parties, either pursuant to the Prehearing Order or at the start of the hearing, and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including January 23, 2007.

3. The claimant sustained a compensable right knee injury on January 23, 2007.

4. The respondents accepted the claim as compensable and paid some medical benefits.

5. The claimant is entitled to a temporary total disability rate of \$504.00, and a permanent partial disability rate of \$378.00.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Whether claimant is entitled to temporary partial disability from January 24, 2007 through June 30, 2007. The issue of temporary partial disability subsequent to the aforementioned date is reserved.

2. Whether the claimant is entitled to additional medical treatment in the form of a total knee replacement.

3. Attorney's fee.

The claimant contends that he was an employee of the respondent/employer on January 23, 2007, on which date he sustained a compensable aggravation of his pre-existing right knee injury; that he is entitled to the total knee replacement recommended by his treating physician; that respondents refuse to authorize and have thus controverted this proposed treatment; that after his injury, the respondent/employer placed him in a light duty position that paid substantially less than his average weekly wage; that he

is thus entitled to temporary partial disability benefits from January 23, 2007 through a date yet to be determined; and that he is entitled to an attorney's fee as provided by law. The claimant contends further he cannot afford a total knee replacement, although that is his preference.

At the beginning of the hearing, the claimant further contended that although a total knee replacement is not his ideal preference, the reality of his financial situation and his current disability dictate that he must have a total knee replacement in order to regain at least some of the wage earning capacity that he has lost as a result of his compensable injury.

The respondents contend that the claimant had a temporary aggravation of a pre-existing problem that ended shortly after the incident at work. The claimant has returned to light duty work on a permanent basis and no temporary partial disability is due. The respondent contends that the total knee replacement is not due to the January 23, 2007 incident. The claimant has a pre-existing major knee problem. The respondents further contend a total knee replacement is premature since claimant testified during his deposition that it was his desire to delay the total knee replacement as long as possible.

The documentary evidence in this case consists of the Commission's Prehearing Order of January 28, 2008, and the parties' Prehearing Responses were all marked as Commission's Exhibit No. 1.

Attorney White's February 4, 2008 letter was marked as Commission's Exhibit No. 2. The claimant's medical packet was marked as Claimant's Exhibit No. 1. The claimant's non-medical packet was marked as Claimant's Exhibit No. 2.

The following witness testified at the hearing: the claimant.

DISCUSSION

The claimant, age 44 (8/5/63), sustained an admittedly compensable injury to his right knee on January 23, 2007, while working for the respondent-employer. The claimant has a high school education. He has specialized training in air conditioning and refrigeration. The claimant also has training as a technician rigger, wherein he builds communication towers up to 2000 feet.

With respect to his injury, the claimant testified:

Q. Mr. Bean, we're here today on an injury that took place on January 23rd of 2007 to your right knee. If you would, just briefly explain to the Judge how that injury happened.

A. On that day I was working for Global Geophysical. I was one of the first seismograph drillers hired on that project. And we drilled seismograph holes and loaded them with explosives, and what we did is they just have a grid and we'd go out there with our, it's called a Meruka (phonetic), it's a hydraulic air drill, and it goes across country, rough terrain. It's like a bulldozer kind of with tracks on it. It's made for crashing through trees and rough country. I was the head driller. And me and my helper Brian Derringer was going out to our job. We got out to the job, got on our rig, and we drove out to our first holes. I think we drilled four or five that day. I'm not for sure how many, but we drilled a few. We was coming down the side of the mountain, pulled up on our next hole, drilled our hole,

and we started, Brian had got the explosives ready and Brian he handed it to me, and I started stuffing it, putting it in the hole. He got the loading stick and he put it on top of the explosives to push it further down in the hole. I had the wire lead charge line in my hand and was feeding it down. He pulled the stick back to ram it down the hole, and when he did he shoved real hard, and the prime cord came out of my hand. I fell on, to try to catch it from going down in the hole. When I did, my knee landed on, my leg landed, not my knee, my shin landed on -- when you drill a hole there's a big pile of dirt around the hole that comes out of the shavings out of the hole. And when I did, my shin got, just below my knee hit on that hill on that dirt shavings and pushed my leg back up. Massive pain, I couldn't stand up. I couldn't do nothing. Immediately my leg started swelling, my knee started swelling. And Brian had to help me up. And at that time my other helper and him got me on the Meruka and made a phone call to our drill coordinator. And he told Brian to bring me back to the, our truck and to follow him to the emergency room.

The claimant admitted to first seeking medical treatment for his compensable injury from the emergency room, and eventually coming under the care of Dr. John Yocum. He admitted to initially being reluctant to have the knee replacement because of the horror stories he had heard about them. However, the claimant essentially testified that he is now ready to undergo the surgery because his knee condition has worsened and because he is unable to perform any of his prior work, as he is unable to climb a tower. According to the claimant, he is unable to afford the surgery and do the things he used to do without being in massive pain.

At the time of his injury, the claimant admitted he was averaging \$1,200.00 per week. With respect to the physical requirements of his job, the claimant testified that as head driller

of a Meruka, he was required to operate the machine, drive the machine, walk through basically the wilderness because there were no sidewalks or roads, as he had to crash through trees, briars, creek, rocks and hills. The claimant also testified that he had to climb on and off the machine constantly so he could clean out the brush from the machine or it would catch fire. According to the claimant, he had to crash through trees and thickets, knocking stuff over into the machine, as he had to clean it out after every hole. The claimant admitted he had to do kneeling and jump over trees, which involved tripping, falling and everything else.

The claimant testified that he was able to perform the physical requirements of his jobs before the January 23, 2007 incident, but denies he was able to perform these requirements after this date. According to the claimant, since the incident, he has continued in excruciating pain, been unable to move his knee, run, climb stairs or carry any weight.

He testified his doctor placed him on restriction of no climbing of any sort and directed him to use only smooth surfaces due to his knee being so unstable.

The claimant admitted that his employer placed him in a different job after his injury, which was a lighter duty job. According to the claimant, after being in this position for about two weeks, he found out at that time that his pay had been reduced to \$10.00 an hour, as he worked forty (40) hours per week. He

admitted that his per diem remained the same during his tenure with the company. The claimant admitted to being discharged from the company on June 30, 2007.

He admitted to undergoing multiple surgeries for his knee with Dr. Yocum back in the 1990's. He also admitted to being seen by Dr. Yocum in 2001 following an injury, and to subsequently being seen by Dr. Hahn in 2002 for an arthroscopy. The claimant denied having any surgeries on his right knee after 2002, and did not recall seeing any doctor for his right knee two years before his January 23, 2007 injury. He also denied taking any medicine on a regular basis for his knee during the two years prior to his injury. He further denied any restrictions being imposed on him by a doctor for his knee during the two years before his injury. The claimant also denied any limitations on what he could do just two years prior to his injury. According to the claimant, before his injury, he had no problems performing his work duties.

Since his injury, the claimant testified that he is unable to play softball, coach as a league ball player for his kids, ride bikes, do lifting, or do anything on unstable ground due to his unstable knee. The claimant further testified that before his injury, he played softball every weekend, but denied having played any since his injury.

On cross examination, the claimant admitted that prior to his injury he had "a pretty bad knee." The claimant admitted to at

least five prior surgeries to his knee, as these surgeries date back to a motorcycle accident in the 1990's or maybe early 1990's. The claimant also admitted to filing several workers' compensation claims. He could recall only two prior claims for his knee. However, the claimant could not agree or disagree that within the last 10 years, he had filed a total of 15 workers' compensation claim.

The claimant finally admitted to filing two prior workers' compensation claims for his knee. To the best of the claimant's knowledge, in each instance, the claim resulted in surgery. The claimant also admitted to injuries involving his elbow, wrist and groin.

The claimant essentially admitted that during his deposition testimony, he testified that he has taken pain killers for his knee off and on ever since 1992. He admitted that since his deposition, he has changed his mind with respect to the surgery because he is unable to do any of the work that he needs to do in order to make a living. As of the date of the hearing, the claimant testified that he works installing insulation, as he works for Insultech. According to the claimant, he basically gives orders, does installing, puts installation in new buildings (the walls, floors and the ceilings).

He admitted he was working at Tyson's as a maintenance man at the time of his deposition. According to the claimant he was

unable to do the job. Before this, he worked at a quarry but was unable to do this job as well.

The claimant maintains that the respondent-employer fired him for being 15 minutes late for work. The claimant did not recall not showing up for work two days in a row although this was the reason given by the respondent-employer for his discharge.

According to the claimant, he missed 10 days from work with the respondent after his accident, at which point they returned him to work in the office, and then he went to work in a safety position. However, the claimant could not recall how long after his injury before he was brought into the safety side of it.

He testified he was paid his regular pay for a few weeks before being told by his party manager he could no longer pay him as a driller. The claimant did not know the exact date he told him this, but remembered it being only a matter of weeks.

The claimant essentially admitted that prior to his injury, he worked more than 40 hours per week. According to the claimant, before his injury, he sometimes worked 14-hour days, but was paid \$175.00 per day regardless of the number of hours he worked, as this was the set rate for a driller. The claimant denied having any injuries since January of 2007.

Upon being questioned by the Commission, the claimant testified that prior to his injury, he worked seven days a week, and was paid \$175.00 per day. However, after his injury, the claimant agreed

that he made \$10.00 per hour, and worked only 40 hours a week.

A review of the medical evidence of record demonstrates that the claimant first sought emergency treatment for his compensable knee injury on January 23, 2007 from Ozark Health Medical Center under the care of Dr. Paul Veach. He assessed the claimant with "right knee strain," for which he prescribed pain medication and directed the claimant to apply moist heat. Dr. Veach also placed the claimant on crutches and instructed the claimant to follow-up with an ortho.

The claimant underwent evaluation with Dr. Yocum on January 26, 2007. He reported:

Mr. Bean is a 43-year-old, white male who returns today for evaluation of his right knee. He injured the knee when he fell working at a seismograph company three days ago, the 23rd, landing on the front of the leg. He says he had the immediate onset of pain and subsequently developed swelling. The swelling has diminished, but remains quite painful. He was seen, evaluated, placed on crutches and given a knee immobilizer. He reports it remains fairly painful, but has improved. He has not had physical therapy. He has not taken anti-inflammatories. He has not had injection or imaging studies recently.

His past history is very significant regarding this same knee in that he underwent multiple operations back in 1990's and underwent ACL/PCL reconstruction. He was seen by me in 2001 following an injury and subsequently by Dr. Hahn in 2002 and underwent arthroscopy in 2002. Previous evaluations have indicated developing tricompartmental osteoarthritis as well as incompetent PCL graft.

On exam of the knee he has multiple healed incisions. There is mild effusion. He has medial joint line tenderness. Range of motion is 0 to about 100 with pain at the limits. He has no varus/valgus instability. The tibia rests in a posteriorly subluxed position relative to the femur with increased translation on drawer

testing. He has no neurovascular deficit.

X-rays of the knee were viewed and show tricompartmental osteoarthritis. There are two interference screws in the tibia, two in the femur and a single screw post in the medial side of the femur. The tibia is posteriorly subluxed on the lateral view.

It is my impression he has preexisting osteoarthritis. He has exacerbation with his recent injury. I am going to put him in a program of therapy. I have given him samples and prescription for Celebrex to try. He may return to light duty. We will see him back in two weeks and perhaps we can return him to regular duty at that time.

On January 30, 2007, Dr. Yocum reported:

Mr. Bean returns in follow-up of his right knee. He reports it has continued to aggravate him pretty severely. He has not been in for therapy yet. He has been taking Celebrex. He is also taking narcotic pain medication.

On exam he has continuing posterior subluxation of the tibia on the femur without significant effusion. He has mild tenderness at the medial joint line in the popliteal fossa. He has pain with terminal extension and flexion limited to about 90. He has no varus/valgus instability.

I have again discussed with him the preexisting arthritis. I have injected the knee today with steroids. He is to start therapy tomorrow. He will continue the Celebrex. We will see him back in a couple of weeks.

Dr. Yocum also returned the claimant to light duty work, effective January 31, 2007.

On February 13, 2004, Dr. Yocum reported:

Mr. Bean returns today now about three weeks out from his initial injury. He reports it remains pretty sore. He has been in a program of therapy. He reports that the injection at his last visit gave him fairly significant relief, but it only lasted for a few days. He does say it is better than prior to injection, however. He continues to use crutches and the knee immobilizer for

ambulation.

On exam he has no effusion. Motion is limited from about 15 to 80. He I [sic] able to straight leg raise.

We are going to go ahead and get an MRI of his knee to see if any changes are apparent as compared to previous MRI's in 2002 and 2004. We will have him return after the scan is completed. He will continue his therapy program.

Also, on February 13, 2004, Dr. Yocum continued the claimant's light duty work status.

On February 22, 2007, the claimant underwent an MRI of the right knee without contrast, with the following impression:

1. Postoperative changes from anterior cruciate ligament repair. The patient's graft appears torn and macerated and is poorly visualized. The alignment to the knee is preserved, however.
2. High-grade tear with of the posterior cruciate ligament is suspected. There is a large osteophyte/spur from the tibial plateau within the intercondylar notch posteriorly in the region of the posterior cruciate ligament.
3. Horizontal oblique undersurface tear to the posterior horn of both the medial and lateral menisci.
4. Severe osteoarthritic changes to the knee as above. Full-thickness cartilage defect is seen to the bilateral femoral condyles. The patellofemoral joint is grossly spared. A small to moderate-sized joint effusion with intraarticular loose body is appreciated to the posterolateral aspect of the joint space.
5. Small Baker's cyst with synovial thickening is identified.

Dr. Yocum reported the following on February 27, 2007:

Mr. Bean returns today in follow-up of his right knee. He has been in a continuing program of therapy. He feels he has made some improvement, though still is having

significant continuing discomfort.

On exam he has minimal residual effusion. His motion is improved. He now has 0 to about 100 degrees of flexion.

He has had the MRI that suggests severe osteoarthritic changes, chronic ACL and chronic PCL tears with medial and lateral meniscal remnant tears.

I feel his continuing symptoms are surely related to his osteoarthritis. I feel he has made improvement. I will have him continue the Celebrex therapy program. He may continue the p.r.n. Vicodin. We will see him back in follow-up in a few weeks. I have discussed with him that return to his previous job walking all day in rough country may not be realistic.

Again, Dr. Yocum continued the claimant's light duty work status.

On April 3, 2007, Dr. Yocum reported the following:

Mr. Bean returns today in follow-up of his right knee. He reports the knee remains quite symptomatic and is, in fact, even more so. He tried wearing some boots and misstepped last Thursday and says it has been even worse. He has had to use crutches since then.

On exam he has continuing clinical posterior subluxation of the tibia on the femur with minimal effusion. He has marked limitation of range of motion.

Once again, I have reviewed with him at length that he has had ACL and PCL deficient knee with posterior subluxation of the tibia on the femur documented by MRI exams dating back to 2002. He surely has had preexisting osteoarthritis as documented by the MRI's, previous x-rays and arthroscopic evaluation and treatment. I feel that now, two and a half months out from injury with significant continuing apparent severe discomfort, he is going to have to have a posterior stabilized knee replacement. I have discussed this is certainly going to mandate a lifestyle change for him. I have given him a steroid injection today in an effort to give him some transient relief. We will try to work through his insurance issues in an effort to proceed with knee replacement should his symptoms persist.

Dr. Yocum also continued the claimant's light duty work status, which was effective April 3, 2007.

ADJUDICATION

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant bears the burden of proving that he is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W. 2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W. 3d 1 (2000).

Here, the parties stipulated that the claimant sustained a compensable injury to his right knee on January 23, 2007. The respondents have paid some medical benefits. However, the respondents have since controverted the claimant's entitlement to additional medical treatment, in the form of a total knee replacement as recommended by his treating physician, Dr. Yocum. Specifically, the respondents essentially contend that the claimant suffered only a temporary aggravation of a pre-existing problem that ended shortly after the incident at work, and that the need for a total knee replacement is attributable to a pre-existing major knee problem.

After weighing the evidence impartially and without giving the benefit of doubt to either party, I find that the claimant proved

by a preponderance of the evidence that the treatment recommended by Dr. Yocum, in the form of a total knee replacement, is causally related to his compensable right knee injury of January 23, 2007,

Specifically, it is undisputed that prior to his compensable injury, the claimant suffered from a degenerative condition of the right knee, and that he sustained severe injuries to the right knee some time during the 1990's, as a result of a motorcycle accident, which resulted in multiple surgeries. The claimant also admitted to two prior workers' compensation claims for his knee, both of which resulted in surgery.

The claimant credibly testified that prior to the incident, he had to take medication for his knee from time to time, but he denied having received any medical treatment for his knee two years prior to the incident. He also denied any restrictions being imposed on him by a doctor for his knee during this period of time. The claimant testified that prior to the incident he had no problems performing his job duties. However, the claimant testified that since his injury, he has continued in excruciating and immobilizing pain, and he has been placed on medical restrictions. According to the claimant, his injury has resulted in his inability to perform prior work and engage in certain recreational activities. The claimant denied having sustained any subsequent injury to his knee. The claimant testified he is now willing to undergo the total knee replacement.

Dr. Yocum opined on January 26, 2007, that the claimant's recent injury exacerbated his preexisting osteoarthritis, and on

February 27, 2007, he opined that he felt the claimant's ongoing symptoms were related to his osteoarthritis. On April 3, 2007, Dr. Yocum wrote, "I feel that now, two and a half months out from injury with significant continuing apparent severe discomfort, he is going to have to have a posterior stabilized knee replacement...."

In Williams v. L & M Janitorial, Inc., 85 Ark. App.1, 145 S.W. 3d 383 (2004), the Arkansas Court of Appeals pointed out that in workers' compensation law, an employer takes the employee as he finds him. Therefore, based on the expert opinion of Dr. Yocum (there being no medical expert opinions to the contrary), the testimony elicited from the claimant during the hearing, and there being absolutely no evidence of any subsequent trauma or new injury, I find that the claimant's compensable right knee injury of January 23, 2007, is at least a contributing factor in his need for a total knee replacement. See Thomas v. Entergy Arkansas, Inc., Full Workers' Compensation Commission, Opinion filed January 24, 2006 (F308759). As such, I am compelled to find that the knee replacement surgery recommended by Dr. Yocum is causally related to the claimant's compensable injury of January 23, 2007. Pursuant to Ark. Code Ann. § 11-9-508, the respondents are liable for the expense of the additional treatment, in the form of a posterior stabilized knee replacement, as recommended by his treating physician, Dr. Yocum.

The claimant also contends that he is entitled to temporary partial disability from January 24, 2007, and continuing through

until June 30, 2007.

Temporary partial disability is that period within the healing period in which the employee suffers only a decrease in the capacity to earn the wages he was receiving at the time of the injury. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The claimant's compensable injury to his right knee was a scheduled injury. An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability compensation during his healing period or until he returns to work, whichever occurs first. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The instant claimant sustained a compensable injury to his right knee on January 23, 2007. Dr. Yocum saw the claimant on January 26, 2007, at which point, he placed the claimant on light duty work. The medical evidence demonstrates that Dr. Yocum continued the claimant's light duty work status from January 2007 through April 3, 2007. At which point, Dr. Yocum continued the the claimant's light duty work status, as this is the last record of treatment. The claimant's testimony establishes that his light duty work status was continued from April 2007, through the date of the hearing.

The claimant testified that he returned to limited work duty for the respondent-employer after his compensable injury, but was paid his regular wages for a few weeks. Although the claimant could not recall the exact date for termination of his regular pay, his

testimony indicates that he worked limited duty with lower wages from approximately mid-February 2007, until June 30, 2007. At which point, the claimant was discharged. However, the claimant's testimony and the documentary evidence establish that the termination of his employment with the respondent-employer was due to reasons unrelated to his compensable injury. The medical evidence and the claimant's testimony demonstrate that the claimant has remained within his healing period since the date of his compensable injury. The evidence shows that the claimant had not returned to full wages since on or about mid-February 2007, and continuing through until June 30, 2007, so as to prove his entitlement to temporary partial disability during this period of time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including January 23, 2007.
3. The claimant sustained a compensable right knee injury on January 23, 2007.
4. The respondents accepted the claim as compensable and paid some medical benefits.
5. The claimant is entitled to a temporary total disability rate of \$504.00, and a permanent partial disability rate of \$378.00.
6. The claimant proved by a preponderance of the evidence his entitlement to a total knee replacement pursuant to the provisions of Ark. Code Ann. § 11-9-508. Therefore, the respondents are liable for the expense of this treatment under the Act.

7. The claimant proved by a preponderance of the evidence his entitlement to temporary partial disability from on or around mid-February 2007, and continuing through and until June 30, 2007.
8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the controverted temporary partial disability compensation awarded herein.

AWARD

The respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein this Opinion.

Maximum attorney's fees are herein awarded to the claimant's attorney on the controverted indemnity benefits, pursuant to Arkansas Code Ann. § 11-9-715.

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

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

The issue of temporary partial disability subsequent to June 30, 2007 is reserved.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge

CH/ml