

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610075

CLIFFORD RAY FREEMAN	CLAIMANT
KINDER MORGAN, INC.	RESPONDENT
ACE AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 27, 2008

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 13, 2007, in Fort Smith, Arkansas. The deposition of Dr. Robert G. Bebout was taken on October 24, 2007. This deposition was admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on March 13, 2007. Prior to the commencement of the hearing, the parties announced that they could stipulate that all medical expenses had been paid through December 14, 2006. A copy of the pre-hearing order with this clarification noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On August 31, 2006, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation benefits are \$421.00 for total disability and \$316.00 for permanent partial disability.
3. The respondents paid temporary total disability from September 1, 2006 through December 14, 2006, permanent partial disability benefits for permanent physical impairment of 2 percent to the leg, and all medical expenses through December 14, 2006.
4. The respondents now controvert the claim in its entirety. By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:
 1. whether the claimant sustained a compensable injury to his left knee on August 31, 2006.
 2. The claimant's entitlement to medical services, temporary total disability from September 1, 2006 through December 14, 2006, permanent partial disability benefits for permanent physical impairment, and attorney's fees

In regard to these issues, the claimant contends:

"Claimant was injured on August 31, 2006. His left knee was injured when it was twisted as he exited his truck."

In regard to these issues, the respondents contend:

"Respondents accepted claimant's left knee injury as compensable, paid TTD, PPD, and medical expenses. Subsequently, respondent received claimant's prior medical records including a January 2006 MRI which is virtually identical to the September 7, 2006 MRI. The surgery Dr. Bebout performed was to repair the problems that have existed at least since January, 2006, well before the alleged August 31, 2006 injury. Respondents were

unaware of claimant's continued left knee problems and injuries after the 2005 left knee injury. Thus, respondent accepted Dr. Bebout's statement on September 13, 2006 that this was a new injury, unrelated to the 2004 injury. However, neither Dr. Bebout nor the respondent was aware of the treatment for the left knee by Dr. Asbury in January, February, and June 2006."

DISCUSSION

I. COMPENSABILITY

The primary issue in this case is the question of whether the claimant sustained a "compensable" injury to his left knee, as the result of a specific employment related incident on August 31, 2006. This case is somewhat unusual in that the respondents have paid essentially all of the actual benefits that the claimant is now seeking, even though the respondents now deny the occurrence of a compensable injury to the claimant's left knee, on August 31, 2006, and controvert this claim in its entirety.

However, the burden would now rest upon the claimant to prove that he sustained a physical injury to his left knee, which satisfies all of the statutory requirements for a "compensable injury" found in the Act. Under the circumstances of the present claim, these requirements are found in Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(D).

Under Ark. Code Ann. §11-9-102(4)(D), the claimant must first prove the actual existence of a physical injury to his left knee by medical evidence. He must further prove that the actual existence of this physical injury is supported by "objective findings", as that term is defined in Ark. Code Ann. §11-9-102(16)(A)(i).

The medical evidence in this case clearly reveals the existence of extensive physical injury or damage to the claimant's left knee. Dr. Robert Bebout, an orthopaedic surgeon, diagnosed the presence of the following physical injuries or damage:

- (1) Grade II chondromalacia central portion of the patella in the lateral facet;
- (2) Almost Grade IV chondromalacia trochlear notch primarily on medial surface;
- (3) Anterior cruciate somewhat stressed and not really functional, but intact;
- (4) Degenerative tear of the posterior mid-horn of the medial meniscus with fraying and a lot of wear on both the medial femoral condyle and the tibial plateau;
- (5) Damage to the lateral femoral condyle, Grade II chondromalacia.

The existence of all of the foregoing physical injuries or conditions is also supported by the independent observation of findings beyond the claimant's voluntary control. These "objective" findings consist of abnormalities noted on x-rays and MRI studies, as well as the actual visual observation of these defects by Dr. Bebout, at the time of the arthroscopic surgery on October 24, 2006. In addition, the existence of one or more of these conditions is further supported by the independent effusion of a fusion or swelling that was observed on both the radiographic studies and visual observations on clinical evaluations by various physicians, on and after August 31, 2006.

Thus, the claimant has satisfied the statutory requirements for a "compensable injury" to his left knee that are contained in

Ark. Code Ann. §11-9-102(4)(D). It next becomes necessary to determine if the claimant has proven that any of these medically established and objectively documented physical injuries or damage to his left knee also satisfy the definitional requirements for a “compensable injury”, which are contained in Ark. Code Ann. §11-9-102(4)(A)(i).

The definitional requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(A)(i) are as follows:

- (1) The physical injury or damage must arise out of and occur in the course of the employment.
- (2) The physical injury or damage must be caused by a specific incident.
- (3) The physical injury or damage must be identifiable by time and place of occurrence.
- (4) The physical injury or damage must cause internal or external physical harm to the claimant’s body.
- (5) The physical injury or damage must require medical services or result in disability.

In order to meet these definitional requirements, the claimant must prove the existence of a causal relationship between a specific employment related incident or accident, on August 31, 2006, and one or more of the medically established and objectively supported physical injuries or damage to his left knee. He must also prove that this employment related injury caused internal or external physical harm to his knee and was sufficient to reasonably require medical services or result in disability. However, he need

not prove the existence of this causal relationship to an absolute or mathematical certainty. He need only show that the existence of this causal relationship is likely or probable. Further, he need not prove that the physical injury caused by this specific employment related incident was the sole or even major cause of the total physical harm to his left knee or the sole or even major cause of his need for medical services. It is also clear that such a causal relationship may be in the form of an aggravation of a pre-existing injury or condition.

The greater weight of the evidence presented unquestionably shows that the claimant experienced a number of injuries to his left knee, prior to the alleged injury on August 31, 2006. In fact, these injuries were even prior to his employment with this respondent. In September of 2004, the claimant experienced an injury to his left knee that culminated in a surgical repair of tears to the medial and lateral meniscus and debridement of synovial tissue in the area of the patella.

The medical record further indicates that at the time of this injury, in 2004, the claimant already had significant degenerative changes to his left knee joint. There is also some indication in the medical evidence that the claimant may have fractured the knee cap or patella in his left knee at some point in time prior to September of 2004. However, no medical reports or records have been introduced that specifically deal with this injury.

An MRI study of the claimant's left knee on September 27, 2004, showed moderate joint effusion, slight lateral subluxation of

the tibia relative to the femur, a signal abnormality that was indicative of a tear of the lateral meniscus that extended to the femoral articular surface, a probable tear of the free edge of the medial meniscus in the area of the posterior horn, a large area of bone marrow edema beneath the medial tibial plateau that could be a bone bruise, and a strain of the anterior cruciate ligament.

On September 3, 2004, arthroscopic surgery was performed on the claimant's left knee by Dr. Robert Bebout, an orthopaedic surgeon. In this surgical procedure, Dr. Bebout removed a mild amount of fluid from the claimant's left knee, noted generalized synovitis of the left knee joint and debrided synovial tissue that was binding down the claimant's patella. Dr. Bebout further repaired a complex tear of the posterior to mid horn of the medial meniscus and a slight tear of the mid horn of the lateral meniscus. He further appears to have noted the absence of the posterior cruciate ligament (PCL). Dr. Bebout released the claimant from further care in November of 2004.

However, the records of Dr. Dale Asbury, the claimant's family physician, establish that the claimant continued to experience pain and other chronic complaints with his left knee, after his release by Dr. Bebout. In January of 2005, Dr. Asbury attempted to treat these chronic complaints with Synvisc injections. However, this treatment modality was unsuccessful in relieving any of the claimant's continued complaints.

The medical records of Dr. Asbury further show that in December of 2005, the claimant experienced another injury to his

left leg that clearly involved his left knee. Following this incident, the claimant appears to have had a substantial increase in his left knee complaints. These complaints include pain, edema, and effusion in the area of the left knee. Although Dr. Asbury indicated that this injury had almost totally resolved, by December 19, 2005, his subsequent records show otherwise. Ultimately, another MRI of the claimant's left knee was performed at Dr. Asbury's request, on January 25, 2006. This test revealed:

- (1) Moderate to large joint effusion slightly larger than that shown in the MRI study of 2004;
- (2) Tricompartment degenerative changes that included medial and lateral joint space narrowing and osteophyte formation;
- (3) Cartilage thinning of the posterior patella;
- (4) A complex tear of the posterior horn of the medial meniscus;
- (5) Degenerative changes without definite tear of the anterior horn of the lateral meniscus;
- (6) Probable tear of the posterior horn of the lateral meniscus;
- (7) A possible thin residual portion with chronic tear or even complete tear with scarring of the posterior cruciate ligament;
- (8) A partially intact anterior cruciate ligament with a few fibers present;
- (9) Mild bone marrow edema type change with the mid tibial plateau; and

- (10) Irregular appearance of the surface of the lateral tibial plateau that was similar to the prior study.

At the request of Dr. Asbury, X-rays of the claimant's left knee were performed on January 25, 2006. These x-rays also showed moderate knee effusion, a bone spur anterior to the tibial tubercle, small calcifications along the anterior tibial tubercle with moderate knee effusion, and lateral joint space narrowing. These x-rays were further interpreted as showing a progression of the effusion from the prior x-rays that were made on December 15, 2005.

On the basis of the claimant's chronic complaints and the results of these tests, Dr. Asbury recommended that the claimant undergo corrective arthroscopic surgery on his left knee. In his office notation of February 1, 2006, Dr. Asbury stated that the claimant has been experiencing significant difficulties with his left knee for some time. He further noted that the claimant was continuing to work, but only with pain. He stated that the claimant advised that he had started a new job and cannot afford to "fix" his knee defects, at that time. He stated that whenever the claimant was ready for "significant surgery", he was to advise Dr. Asbury and Dr. Asbury would "set it up".

On June 21, 2006, the claimant again consulted Dr. Asbury for complaints and difficulties involving his left knee. Dr. Asbury's report of that date particularly noted complaints of pain along the joint line on the lateral left side of the knee. However, on physical examination Dr. Asbury observed no effusion of the

claimant's left knee. Dr. Asbury again noted that the previous Synvisc injections were of no benefit. At that time Dr. Asbury prescribed oral medications with accompanying weight loss. He directed the claimant to return in four months or as needed.

On the morning of August 31, 2006, the claimant allegedly experienced a sudden and immediate onset of difficulties with his left knee, which he attributes to a specific employment related incident. This incident appears to be strikingly similar to the two prior employment related accidents in 2004 and 2005, which also precipitated immediate onsets of almost identical symptoms and complaints. Significantly, this incident or accident occurred on what the claimant knew would be the last day of his employment with this respondent.

The claimant concedes that this employment related accident was unwitnessed. The claimant's own testimony, is the only direct evidence he has presented to prove both the occurrence of a specific employment related incident, on August 31, 2006, and the existence of a causal relationship between this employment related incident and the onset or substantial increase in his left knee difficulties.

The record shows that the description of this incident that the claimant gave at the hearing, coincides with the description of the incident that was recorded by Dr. Bebout, in his report of September 13, 2006. However, there is a somewhat different description of this incident recorded by Dr. Terry Clark, in his report of August 31, 2006.

In the claimant's testimony and Dr. Bebout's report, the claimant was getting out of his truck, slipped, caught his foot between the frame and the door of the truck, twisted his left leg, and fell. The report of Dr. Clark only noted that the claimant was getting out of his truck, missed a step, and landed forcefully on his left lower extremity. Both of these descriptions mention five feet as the distance of the fall.

The claimant immediately reported the alleged incident and injury to the respondent and was sent by the respondent to Dr. Terry Clark, at the Cooper Clinic Occupational Medicine Center. Following his evaluation of the claimant, on August 31, 2006, Dr. Clark noted tenderness along the medial joint line, a positive McMurry's sign, but an otherwise stable knee. X-rays that were taken at that time showed the various pre-existing degenerative arthritic changes of the knee and effusion of the left knee joint. The initial diagnosis of the claimant's left knee difficulties by Dr. Clark was that of a strain. However, to rule out an internal derangement of the left knee, additional tests were ordered. This additional testing was primarily in the form of another MRI scan of the claimant's left knee that was carried on September 7, 2006.

The MRI study on the claimant's left knee was performed on September 7, 2006. This study was interpreted as showing:

- (1) Moderate to large joint effusion that was not as prominent as the effusion shown in the January 2006 MRI.
- (2) A probable tear of the posterior cruciate ligament, which was also shown on the prior January 2006 MRI.

(3) Degenerative changes of the knee, which were also shown on the prior January 2006 MRI.

(4) A tear of the medial meniscus, which was also shown on the January 2006 MRI.

(5) A probable tear of the central portion of the posterior horn of the lateral meniscus, which was also shown on the prior MRI.

(6) Bone marrow edema changes, which were also shown on the January 2006 MRI.

In fact, the interpretation of the September 7, 2007 MRI of the claimant's left knee was specifically noted as showing essentially the same characteristics to the MRI of January 25, 2006.

Ultimately, the claimant again came under the treatment of Dr. Bebout, who had performed the arthroscopic repair of the claimant's left knee in 2004. Although Dr. Bebout is in the same clinic as Dr. Clark (Cooper Clinic), the claimant testified that he was referred to Dr. Bebout by Dr. Asbury, his family physician (apparently Dr. Asbury was also the one who initially referred the claimant to Dr. Bebout in 2004). On October 24, 2006, Dr. Bebout again performed arthroscopic surgery on the claimant's left knee.

It is clear from the reports, operative note, and deposition of Dr. Bebout that this arthroscopic procedure was necessary in order to repair the tear to the claimant's medial meniscus and to debride degenerative changes (chondromalacia) to the protective covering over the surface of the claimant's patella. Although his operative report indicates that debridement was performed on the defects to the protective surface of the lateral femoral condyle, in his deposition he indicates otherwise (D. 26-27). During this arthroscopic procedure, Dr. Bebout also inspected the lateral

meniscus of the claimant's left knee, but found no tear. In his deposition, Dr. Bebout observed that MRI studies are not always accurate in showing meniscal tears, and that this was simply an incidence of a false positive on the MRI studies.

The tear of the medial meniscus, which was repaired by Dr. Bebout during the October 24, 2006 arthroscopic surgery was already present at the time of any incident on August 31, 2006. The medical evidence shows that this defect was present at the time of the MRI study in January of 2006. In fact, the presence of this defect was a primary factor for Dr. Asbury's recommendation for surgery at that time. I would also note that, in his operative report of October 24, 2006, Dr. Bebout classified this meniscal tear as a "degenerative tear". In his deposition, Dr. Bebout testified that his visual observations of this tear, during the October 24, 2006 arthroscopy, led him to believe that this tear was not "new" or recent. It was his expert medical opinion that this defect was present long before August of 2006. (T.32)

The medical evidence further shows that the chondromalacia or damage to the protective covering of the claimant's patella was degenerative in nature and long pre-existed any incident on October 31, 2006. These changes were noted on the MRI scan and the x-rays taken in January of 2006. In his deposition, Dr. Bebout classified this damage as chronic and arthritic changes. Again, he indicated that it was his expert medical opinion that this damage long pre-dated any incident on August 31, 2006 (Deposition, page 31).

In his deposition, Dr. Bebout stated that, in his expert medical opinion, the only “new” or recent physical damage to the claimant’s knee involved two small areas of the protective covering on the claimant’s lateral femoral condyle. He stated that these defect was not shown on any of the MRI studies, including the MRI on September 7, 2006. Nor, did this defect show on any of the x-rays. Dr. Bebout further stated that this would not be unusual and he would not have expected such a defect to be observable on either an MRI or an x-ray. In his deposition, Dr. Bebout testified that this damage to the surface of the lateral condyle of the claimant’s knee could have been caused by the described employment related accident on August 31, 2006 (T.31). However, Dr. Bebout further testified that his classification of this damage as a “new” or recent injury only meant that it likely occurred within a year prior to the October arthroscopy, and it was equally possible that this damage was present prior to August of 2006 (T.32).

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that a specific employment related incident on August 31, 2006 was the likely or probable cause of his difficulties with his left knee, after that date. First, I do not find the claimant’s testimony to be sufficiently credible to prove the occurrence of a specific employment related incident, on August 31, 2006, or to prove the likely existence of a causal relationship between such an incident and his subsequent left knee difficulties. The evidence shows that the claimant was a short-time employee of the respondent and that

this alleged accident and injury occurred on what he knew was going to be his last day of employment with the respondent. The claimant also conveniently failed to mention to Dr. Clark or Dr. Bebout that he had sustained a previous injury to his knee in December of 2005, that resulted in testing and recommended corrective surgery on the left knee. Secondly, the medical evidence shows a long history of difficulties with the claimant's left knee. More importantly, the greater weight of the medical evidence reveals that the probable cause of the claimant's left knee difficulties and need for medical treatment after August 31, 2006, was physical damage to various components of the claimant's left knee that were clearly present prior to August 31, 2006. The medical evidence overwhelmingly shows that this pre-existing damage was the cause for his need of the arthroscopic surgery and the cause of the permanent physical impairment assessed.

Therefore, I find that the claimant has failed to satisfy the statutory requirements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). The claimant's failure to prove these statutory requirements prevents a finding that he sustained a "compensable injury" to his left knee on August 31, 2006. I have no alternative but to deny and dismiss this claim in its entirety.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On August 31, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On August 31, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$421.00 for total disability and \$316.00 for permanent partial disability.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a "compensable injury" to his left knee on August 31, 2006. Specifically, he has failed to prove that, on that date, he sustained a physical injury to his left knee that arose out of and occurred in the course of his employment, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal or external physical harm to his body, that required medical services, or resulted in disability.

5. Although the respondents initially provided the claimant with essentially all the benefits he now seeks, they have subsequently denied the occurrence of any compensable injury to the claimant's left knee and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE