

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G101501

DAVID DONAHUE, Employee	CLAIMANT
BENTON CO. SHERIFF'S DEPARTMENT, Employer	RESPONDENT
ASSOCIATION OF ARKANSAS COUNTIES WCT, Carrier	RESPONDENT

OPINION FILED FEBRUARY 1, 2012

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by J. LESLIE EVITTS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On January 18, 2012, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 12, 2011, and a pre-hearing order was filed on October 14, 2011. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to his right knee on July 19, 2010.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$432.00 for total disability and \$324.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment for his compensable right knee injury.

The claimant contends that as a result of his compensable injury Dr. John Huskins and Dr. John Mertz have both recommended additional treatment and surgical intervention for his right knee.

The respondents contend that all medical benefits to which claimant is entitled have been paid. Respondents contend that on April 11, 2011, claimant's treating physician, Dr. Mertz, confirmed that claimant had reached maximum medical improvement in regard to his right knee and that he agreed with Dr. Terry Sites that claimant was entitled to a 10% impairment rating to the right lower extremity. Respondents contend that all indemnity benefits to which claimant is entitled have been paid. Additionally, respondents contend that no compensable event is the major cause of the claimant's current disability or need for medical treatment, and that any additional medical treatment is not reasonable or necessary as a result of his compensable injury. The respondent further contends that the medical treatment sought by claimant is not authorized, reasonable, or necessary as a result of a work-related injury.

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 made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 12, 2011, and contained in a pre-hearing order filed October 14, 2011, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that

he is entitled to additional medical treatment for his compensable right knee injury.

### FACTUAL BACKGROUND

\_\_\_\_\_The claimant is a 56-year-old man who graduated from high school and has some additional vocational schooling. Claimant began working for the respondent in 1999 and has worked there continuously with the exception of a three to four month period of time. Claimant's current position is detail deputy. As the detail deputy, claimant takes trustee inmates in a van to various job sites for work duties and supervises them while at the job site.

The claimant suffered a compensable injury to his left knee on March 31, 2010 while running at a law enforcement training facility. Following that injury the claimant received medical treatment from his family physician, Dr. Huskins, and he provided claimant an injection in the left knee on April 8, 2010.

On July 19, 2010, the claimant suffered a compensable injury to his right knee when his knee popped while he was stepping onto the running board of the respondent's van. Claimant reported the injury and received medical treatment at his next scheduled visit with Dr. Huskins on July 21, 2010. At the time of that visit Dr. Huskins referred claimant for an orthopaedic evaluation. As a result, claimant came under the care of Dr. Mertz, an orthopaedic surgeon. Dr. Mertz ordered an MRI scan which revealed a tear of the claimant's medial meniscus and lateral meniscus. Dr. Mertz recommended surgery and performed the surgery on claimant's right knee on August 27, 2010.

The medical records subsequent to claimant's surgery indicate that claimant had some improved pain relief but that he continued to have some medial pain in his right knee. In a report dated September 9, 2010, Dr. Mertz recommended that claimant receive a Synvisc injection in his right knee in three months. Claimant returned to Dr. Mertz on December 9, 2010, and although an initial report indicated that the injection was given at

that time, the parties have indicated that claimant did not undergo that injection until February 8, 2011.

In a letter dated December 20, 2010, Dr. Mertz responded to a series of questions posed to him by Ann Wilson, nurse case manager for the respondent. He indicated that the pathology identified during surgery that resulted from the July 19, 2010 injury was the medial and lateral meniscal tears. He also indicated that claimant's current symptoms were mostly related to a pre-existing pathology or at least 75%. He further indicated that his recommended Synvisc injection was the result "of the exacerbation of his wear and tear changes from his 7/19/2010 preexisting degenerative joint disease. The patient was not having enough difficulty prior to his injury to need Synvisc injection, so I have stated that the Synvisc injection relates intimately to his 7/19/2010 injury." Dr. Mertz in that same letter went on to indicate that claimant might need a partial knee replacement in the future which in his opinion was a result of the pre-existing pathology although he did note that claimant was doing well until he exacerbated the arthritic condition with new cartilage tears on July 19, 2010.

Following receipt of this letter from Dr. Mertz, claimant was sent by the respondent to Dr. Sites for an evaluation. In a report dated January 24, 2011, Dr. Sites indicated that claimant's torn medial and lateral menisci were more likely than not related to the July 19, 2010 work injury. He also opined that claimant's current symptoms were more likely than not the result of his pre-existing degenerative arthritis. With respect to the proposed Synvisc injection, Dr. Sites noted that that injection is normally treatment for osteoarthritis. It was his opinion that claimant's osteoarthritis was more likely than not a pre-existing condition. However, he also noted that the claimant's knee injury and subsequent surgery more likely than not created an exacerbation of that pre-existing arthritis. Accordingly, he recommended that claimant receive a one-time injection for that aggravation. Dr. Sites went on to indicate that he believed that any future knee replacement would more likely

than not be the result of a progression of the pre-existing arthritis. He also indicated that claimant would reach maximum medical improvement approximately eight months after the Synvisc injection and that claimant had a permanent physical impairment rating in an amount equal to 10% to the body as a whole.

As previously noted, claimant was given the Synvisc injection by Dr. Mertz on February 8, 2011. In a report dated April 11, 2011, Dr. Mertz indicated that the injection did not help claimant's condition very much. He recommended that claimant undergo vocational rehabilitation to train him for a lighter duty job with more sitting. He agreed with Dr. Sites that claimant was at maximum medical improvement and that he was entitled to a 10 percent impairment rating.

The medical records indicate that claimant continued to be evaluated by Dr. Mertz and Dr. Huskins for pain in his right knee. Dr. Mertz in a report of June 12, 2011 again indicated that claimant was a candidate for knee replacement. In a letter dated July 14, 2011, Dr. Mertz indicated that at least 51% of claimant's need for his right knee replacement was related to his work activities with respondent. In response, respondent requested another opinion from Dr. Sites who disagreed with Dr. Mertz's opinion and again stated that in his opinion any future right knee replacement would more likely than not be the result of a progression of the pre-existing right knee arthritis.

Claimant has filed this claim contending that he is entitled to additional medical treatment for his compensable right knee injury.

#### ADJUDICATION

\_\_\_\_\_ In Arkansas workers' compensation law, an employer takes the employee as it finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Hickman v. Kellogg, Brown, & Root*, 372 Ark. 501, 277 S.W. 3d 591 (2008); *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An

aggravation of a pre-existing non-compensable condition by a compensable injury is itself compensable. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W. 3d 336 (1999). Furthermore, a pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with a disease or infirmity to produce the disability for which workers' compensation is sought. *Hickman, supra*.

Here, there appears to be no question that claimant suffered from some pre-existing arthritis in his left knee. However, to the extent that claimant's compensable right knee injury aggravated that pre-existing condition, respondent is liable for that aggravation. I find from reviewing the totality of the evidence in this case that claimant's compensable right knee injury aggravated his pre-existing arthritic condition and that he is entitled to additional medical treatment for that aggravation which includes continued treatment from Dr. Mertz.

In response to claimant's contention, respondent relies in large part upon the opinion of Dr. Sites that claimant's current symptoms and any potential knee replacement are the result not of a compensable injury but rather the result of a progression of claimant's pre-existing right knee arthritis. Dr. Sites based his opinion in part upon claimant's history that prior to his work-related injury he did have some occasional mild aching pain in his right knee for which he took Ibuprofen.

Claimant did testify at the hearing that he did have some occasional pain in his right knee prior to July 19, 2010. However, claimant testified that this occurred only approximately once a year and that after he took the Ibuprofen his condition resolved. However, after claimant's most recent injury, he has continued to have pain on the inside of his right knee.

Claimant's testimony regarding his knee problems is corroborated in part by the testimony of John Wall and Gary Zielke. Wall has been employed at the Benton County Fairgrounds for five years and he testified that he is familiar with claimant because

claimant has brought the inmate work detail from the sheriff's office to the fairgrounds to perform various job duties. Wall testified that prior to claimant's injury when he observed claimant supervising the inmates, claimant never set down and did not appear to have any limitations with his knee. After the injury Wall testified that he noticed that claimant cannot stand for very long periods of time and that he cannot walk around the 60 acres of fairgrounds as he was able to do previously.

Also testifying at the hearing was Zielke who is employed by Habitat for Humanity in Benton County. Zielke likewise testified that he was familiar with claimant because of the inmate work detail and that he has known claimant for seven or eight years. Zielke testified that when Habitat for Humanity runs short on workers they call the sheriff's department and it will send out an inmate work crew to help in the building process. Zielke testified that claimant has primarily been the deputy supervising the work crew. Zielke testified that prior to claimant's right knee injury he did not observe claimant having any physical disabilities or limitations. He testified that after the injury claimant favored his right leg when he walked and that his condition has progressively worsened. He testified that he notices claimant now has to sit in a chair a lot.

I believe it is also important to note that there is no indication that claimant sought or received any medical treatment for any problems with his right knee prior to July 19, 2010.

Furthermore, with respect to Dr. Sites' opinion, I note that even Dr. Sites in his original report of January 24, 2011 indicated that claimant's right knee injury aggravated claimant's pre-existing arthritic condition. When he agreed that claimant should undergo a Synvisc injection, Dr. Sites stated:

Synvisc injections are a treatment for osteoarthritis. The osteoarthritis is more-likely-than-not a pre-existing condition. However, his right knee injury on 07/19/10 and the subsequent surgery on 08/27/10 more-likely-than-not created an exacerbation of his arthritis.

\_\_\_\_\_ (Emphasis added.)

While Dr. Sites indicated that a one-time injection would treat this aggravation, the important fact is that it was Dr. Sites' opinion that claimant's injury and his subsequent surgery exacerbated claimant's pre-existing arthritis. While Dr. Sites believed that one injection would be sufficient to resolve this exacerbation, the medical evidence indicates that the injection was not beneficial and that claimant continued to have problems with his right knee for which he sought medical treatment from Dr. Mertz and Dr. Huskins.

It should also be noted that while Dr. Mertz had originally indicated that claimant was at maximum medical improvement, that claimant subsequently returned to him of continued complaints of right knee problems. As a result, Dr. Mertz has indicated that claimant is in need of additional medical treatment for his right knee. Likewise, it is the opinion of Dr. Huskins that claimant may need a partial joint replacement and according to his letter report of June 30, 2011 "this appears to be a progressive problem related to his injury on July 19, 2010."

In summary, this claimant suffered from a pre-existing arthritic condition in his right knee. While claimant testified that he did have occasional stiffness which prompted him to take Ibuprofen, claimant testified that this occurred approximately one time a year and that his condition resolved after he took the medication. There is no evidence that claimant sought or received any medical treatment for his right knee prior to the injury of July 19, 2010. Claimant's testimony regarding his knee condition is corroborated by the testimony of both Wall and Zielke who testified regarding claimant's limitations with his right knee after the injury as compared to the problems prior to the injury. Furthermore, as previously noted, even Dr. Sites was of the opinion that claimant's right knee injury and the subsequent surgery had aggravated claimant's pre-existing arthritic condition. Although it was his opinion that that condition would be resolved following one injection, the evidence indicates that claimant's condition was not resolved following that injection.



Instead, the medical records indicate that the injection did not help claimant's condition and that he has continued to have additional problems with his right knee since that time. Finally, I note that both Dr. Huskins and Dr. Mertz have been claimant's treating physicians throughout this period of time and have had the opportunity to evaluate and treat the claimant on a number of occasions. I find that their opinions regarding aggravation are credible and entitled to great weight.

Based upon all of the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable right knee injury.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable right knee injury. This additional medical treatment is to be provided by or at the direction of Dr. Mertz.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$406.85.

IT IS SO ORDERED.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE