

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F104428

PATRICIA FISH,
EMPLOYEE

CLAIMANT

FOOD FAST HOLDINGS,
EMPLOYER

RESPONDENT

EMPLOYERS INSURANCE OF WAUSAU,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 21, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE J. RANDOLPH SHOCK,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE JAMES A. ARNOLD II,
Attorney at Law, Fort Smith, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The respondents appeal from a decision of the
Administrative Law Judge filed March 31, 2003. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 28, 2001, the relationship of employee-employer-carrier existed between the parties.
3. On January 28, 2001, the claimant earned wages sufficient to entitle her to weekly

compensation benefits of \$167.00 for total disability and \$154.00 for permanent partial disability.

4. On January 28, 2001, the claimant sustained a compensable injury to her right knee.
5. All medical expenses have been voluntarily paid by the respondent except the expense of the recommended total knee replacement.
6. The total knee replacement recommended by Dr. Bebout represents "reasonably necessary medical services" within the meaning of A.C.A. § 11-9-508. Pursuant to the provisions of this subsection, the respondent is liable for the expense of these services, subject to the medical fee schedule established by this Commission.
7. All appropriate temporary total disability benefits accruing prior to March 22, 2002 have been paid.
8. The claimant is entitled to additional temporary total disability benefits for the period of March 22, 2002 through a date yet to be determined. Specifically, the claimant has proven by the greater weight of the credible evidence that during this period that she continued within her healing period from the effects of her compensable right knee injury and had "not returned to work."
9. The respondent has controverted the claimant's entitlement to the payment of the expenses associated with the total knee replacement recommended by Dr. Bebout and any additional temporary total disability benefits accruing after March 21, 2002.
10. A reasonable fee for the claimant's attorney si the maximum statutory attorney's fee on all controverted benefits herein awarded.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an

additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the total knee replacement surgery recommended by the claimant's treating physician was a reasonable and necessary medical treatment for which the respondents were liable, and that the claimant was entitled to additional temporary total disability benefits from March 22, 2002, through a date yet to be determined. Based upon my review of the record, I find that the claimant has failed to meet her burden of proof.

The 52-year-old claimant is 5'6" and weighs over 200 pounds. She slipped during the course of her employment as a cook for the respondent on January 28, 2001, and injured her right knee. The claimant began her treatment with Dr. Bebout on March 23, 2001, and he performed arthroscopic surgery on April 12, 2001, to repair a torn

medial meniscus and to address the effects of degenerative disease found in the claimant's knee. Dr. Bebout returned the claimant to work on May 7, 2001, with restrictions. The claimant testified that she ultimately returned to her regular job on her regular schedule, and worked without restrictions or limitations until she was terminated on March 21, 2002, for reasons unrelated to her injury. The claimant agreed that had she not been terminated for reasons unrelated to her injury, that she felt like [she] would have been able to continue working at [her] regular job at full duty.

Following her arthroscopic surgery, the claimant attended scheduled follow-up appointments with Dr. Bebout in April, May, June, July, August, and September of 2001. A radiology report from an examination obtained on December 20, 2001, revealed only "moderate bilateral degenerative change. Right patellar tilt. Right knee effusion." The claimant saw Dr. Bebout on the date of this exam, and the report from that visit states that she was "still having difficulty with degenerative disease of the knee causing achiness and some stiffness." The claimant returned to see Dr. Bebout for a scheduled three-month

re-evaluation on March 21, 2002, to which Dr. Bebout reports:

Mrs. Fish is a 53-year-old female who follows up from injury to her right knee. This initially happened in January of 2001. She had arthroscopic debridement of the knee in April of 2001. She had medial meniscus tear and at that time, she did have some degenerative changes at the patella, a little bit on the medial joint line. Over the ensuing years, she has developed aggressively more arthritis following this injury to the point that she has very severe degenerative changes of both the patella and the medial joint compartments. . . . She is fairly overweight and all this is resulted in the point that she has end-stage traumatic arthritis and the only thing left to offer her is a total knee replacement.

In a letter to the claimant's attorney dated August 26, 2002, Dr. Bebout wrote:

While it is true that [the claimant's] knee was not normal at the time of her initial injury in January of 2001, I think that her arthritis has progressed fairly rapidly more so than one would think, which is natural causes and I can only blame it on her injury and having done the arthroscopic surgery. Therefore, I feel that the result of her arthritic condition at this time is a cause of progression of her initial injury in January.

The claimant was evaluated by Dr. Mulhollan, and in a report dated April 30, 2002, he wrote that the initial MRI obtained prior to the arthroscopic surgery "showed a complex tear of the medial meniscus and significant degenerative changes." He noted that the more recent radiographic examination showed severe degenerative processes in both knees. He concluded that total knee replacement surgery was a valid treatment option. However, in a letter dated May 9, 2002, Dr. Mulhollan wrote, "I really believe that the majority of [the claimant's] problem preexisted this injury. I think she hurt a very abnormal knee. She may or may not have torn the cartilage when she was injured. However, its removal did not create a need for knee replacement."

Employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. Ark. Code Ann. §11-9-508(Repl. 2002). What constitutes reasonable and necessary treatment under this statute is a question of fact for the Commission. Hill v. Baptist Med. Ctr., 74 Ark. App. 250, 57 S.W.3d 735 (2001). An injured employee has the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable

injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (D612291). The respondent is only responsible for medical services which are causally rated to the compensable injury. When subsequent complications are the natural and probable result of the original injury, the employer remains liable. However, the claimant must show, by a preponderance of the evidence, that there is a causal relationship between the compensable injury and the subsequent complications. Shirley A. Mitchell v. Circle K Corp., Full Commission Opinion October 21, 1998 (E608414).

Based upon my de novo review of the record, I find that the claimant failed to prove by a preponderance of the evidence that the recommended total knee replacement surgery is causally related to her January 28, 2001, compensable knee injury. The medical records reflect that the claimant had arthritic and degenerative changes of her knee prior to her injury. Dr. Bebout's records following her surgery demonstrate that he was treating the claimant for complaints related to her degenerative changes only. While Dr. Bebout opined in his August 2002 letter that the claimant's need for total knee replacement surgery is a result of her injury and subsequent arthroscopic surgery, his treatment notes,

which focus on the claimant's arthritis symptoms, do not support that opinion. I am more persuaded by the opinion of Dr. Mulhollan, that the claimant's knee problems existed prior to her injury, and that her injury and the subsequent surgery did not create the need for total knee replacement. Therefore, I dissent from the majority's finding that a total knee replacement is reasonably necessary medical treatment, causally related to the meniscus tear sustained on January 28, 2001.

I also dissent from the majority's finding that the claimant is entitled to additional temporary total disability benefits following her termination in March 2002. The claimant's injury to her knee is a scheduled injury. To establish entitlement to temporary total disability, she must prove that she remains in her healing period and has not returned to work. The evidence established that the claimant returned to work in a regular capacity prior to her termination. The claimant also testified that she could have continued working without restrictions after her termination. This is clearly not a case of a failed attempt to return to work. The medical records do not indicate that the claimant re-entered a healing period following her return to work. What the medical records do establish is

that the arthroscopic debridement surgery was successful and the claimant recovered from her injury and her surgery. The medical care she received following her termination from employment was the result of complaints related to degenerative and arthritic changes. Therefore, in my opinion, the claimant is not entitled to any additional temporary total disability.

Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner