

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214247

TONYA APPLING,
EMPLOYEE

CLAIMANT

LITTLE ROCK CANCER CENTER,
EMPLOYER

RESPONDENT

ST. PAUL FIRE & MARINE INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 9, 2005

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney
at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JOSEPH KILPATRICK,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed March 2, 2005. The administrative law judge
found that the claimant proved she was entitled to
additional temporary total disability "commencing August 30,
2001, and continuing through June 28, 2004, as well as
attorney's fees." After reviewing the entire record *de*
novo, the Full Commission affirms as modified the opinion of
the administrative law judge. The Full Commission finds
that the claimant proved she was entitled to temporary total
disability compensation beginning December 31, 2001, until

January 9, 2003. We find that the claimant proved she was entitled to additional temporary total disability beginning May 28, 2004 until December 13, 2004.

I. HISTORY

Tonya Appling, age 43, was assessed with the following in November 1999: "1. Left knee pain. 2. Left leg pain - possible sciatica. 3. Morbid obesity."

Ms. Appling testified that she was employed as a medical assistant with the Little Rock Cancer Center in 2001. The claimant testified that her job involved continuous walking, standing, and being on her feet.

The parties stipulated to a date of injury of June 1, 2001.

The record indicates that the claimant treated with Dr. Ralph D. Cash beginning July 18, 2001, "This young lady hurt her knee around the first of June. She was working with a patient and twisted her right knee." Dr. Cash stated that the claimant was unable to work. Dr. Cash noted on July 25, 2001, "Still walking with a limp, effusion, marked medial joint line tenderness. MRI shows complex tear, posterior horn of medial meniscus, as I expected clinically."

On August 3, 2001, Dr. Cash preoperatively diagnosed, "Tear of medial meniscus, left knee." Dr. Cash indicated that he performed "1) Partial medial meniscectomy, posterior horn in right knee [emphasis supplied]. 2) Chondroplasty, medial femoral condyle with a shaver." The "operative procedure" portion of Dr. Cash's report indicated that he performed surgery on the claimant's left knee." The postoperative diagnosis was "Tear of medial meniscus. Chondromalacia in medial femoral condyle." (The claimant's testimony indicated that the August 2001 surgery was to her left knee.)

Dr. Cash noted on August 24, 2001, "Still has a little tightness of her knee and some swelling and aching. Overall she is much better. No locking or snapping. I am going to have her work off her crutches and continue quad sets and recheck in 3 weeks. I think she could go back to her work."

On a slip prepared August 24, 2001, Dr. Cash indicated that the claimant could return to restricted work on August 27, 2001.

The claimant testified that she recalled receiving full wages for periods of time she was off work before August 30, 2001.

The claimant testified:

Q. August the 30th of 2001 is the last day that you worked out there?

A. Yes.

Q. Why is that? What happened?

A. I just, I couldn't do it. It was just too painful. I would go home at the end of the day just in such pain. I just couldn't do it, it was just too hard.

Q. What would happen when you would get home in the evenings?

A. I would have to take two pain pills and just go to bed and put heat and ice on my leg....

Q. So did you go to your employers and just say, you know, "I can't do this anymore"? Is that what you did?

A. Yes, sir.

Q. So you started being off from work at that time?

A. Yes, sir.

Q. Were you continuing to be under Doctor Cash's care during that time?

A. Yes, sir.

The respondents' attorney cross-examined the claimant:

Q. You always, while you were in your healing period from your arthroscopic surgeries, received wages from your company, is that correct?

A. Yes, sir, up until the last of August.

Q. And that's when you went to them and said, "I quit my job"?

A. Yes, sir.

Q. I mean, you walked in and said, "I can't do this and I quit"?

A. Yes, sir.

Q. At that point the doctor had released you to return to work?

A. Light duty, yes, sir.

Q. And they gave you light duty, didn't they?

A. It involved sitting all day long.

Q. And you didn't want to do that?

A. I couldn't. It was just too much just to sit. I can't sit for too long or stand for too long, it was just -

Q. But they gave you light duty work and you said, "I'm just going to quit my job," is that right?

A. Well, no, not like that, but yes, I did quit my job.

Q. You didn't go look for any other work, did you?

A. No, sir.

Q. You just stayed home?

A. Yes, sir.

Dr. Cash reported on November 9, 2001, "Tonya comes in today for follow up from her June injury to her left knee. This knee is getting stronger....We are going to continue therapy to try to fully rehabilitate this knee and I will follow the left knee injury in a month. In addition to this today she is having pain, sharp pain over the opposite right knee and this actually seems to be getting worse. She had an injury of this right knee around the 29th or 30th of September."

An MRI of the claimant's right knee was taken on December 4, 2001, with the following impression: "1. The patient has a mild knee effusion with a small amount of subcutis edema in the anterior infrapatellar subcutis space, most likely related to recent injury. 2. There is foreshortening of the body and posterior horn regions of the medial meniscus, with a small undersurface defect at the base of the body of the medial meniscus. There is no evidence of menisco-capsular separation, and there is no evidence of bucket handle or free fragment. 3. There is benign hemopoietic marrow replacement, as was noted on the prior MRI of the left knee dated 7-23-01."

Dr. Cash initially attempted conservative treatment of the claimant's right knee, but he stated on December 21, 2001, "I think at this point she needs arthroscopy on the right knee. She has a tear of the medial meniscus."

Dr. Cash testified that he performed right knee surgery on December 31, 2001.

The claimant received follow-up care following surgery on the right.

Dr. Cash stated on April 19, 2002, "I think in a month, she could go to light duty. She has actually stopped, quit the job. I don't think she is going to be able to return to the type of work she was doing before....I think probably a period of healing is going to last a couple of months."

Dr. Cash wrote to the respondent-carrier on June 19, 2002:

Her problems with her knee certainly are aggravated by her excessive weight. I think from the injury stand point she has reached a period of healing of this initial knee done in August of the left knee. On the right knee done in December I have not felt she has reached a period of healing and in fact has not really done that well with arthroscopy....This lady is going to ultimately need total knees, not directly related to this injury but just this injury is one more factor in a history of her knee deteriorating. I did not give her a specific rating last time I saw her....Her insurance is not going to approve this

on a Workman's Compensation and I am not sure what her other insurance would do, but I will get her back in in the near future and give her a final rating as I think she has probably reached a maximum healing or getting close to it from her injuries....

Dr. Cash continued to provide follow-up treatment.

Dr. Cash examined the claimant's knees on October 31, 2002 and stated, "This is a traumatic advanced osteoarthritis....I think a total knee is certainly in her future....Even if she has a total knee it is going to be hard to send her back 8 to 10 hours a day standing on her feet as a medical assistant and not wear these knees out, especially at age 40....She is certainly unable to return to her previous job."

Dr. Cash stated on November 26, 2002, "It is my understanding that the Workman's Comp may not cover these total knees. This is a gray area. We are talking aggravation of pre-existing type injuries which according to AR law as my understanding doesn't always cover a Workman's Comp. She does have private insurance that would perhaps cover total knee replacements or additional surgery if she needed it."

Dr. Jerry J. Lorio examined the claimant on January 2, 2003:

A patient seen for a second opinion from Dr. Cash. A 40-year-old female who has been through a lot in the last year and a half. She had a Workman's Comp injury to the left knee. I think she had a meniscal tear that underwent arthroscopy. During that time she fell post-operatively and injured the right knee and had a partial meniscectomy. The standing X-rays we have today show stage III to IV osteoarthritis....She is now 5' 8", 300 pounds and she has not worked since her surgery which she works as a medical assistant....

A: Bilateral knee osteoarthritis having failed standard treatment with exercises, injections, and medications.

P: I don't think she is a good candidate for a partial knee replacement because of weight. I think the best next surgical solution would be a total knee arthroplasty. Obviously at age 40 there is the concern that it will not last a lifetime. But if her pain is to the point where she can't stand it, I think the next surgical step would be for a total knee arthroplasty.

The respondents' attorney stated at hearing that the respondents ceased paying temporary total disability on or about January 9, 2003 and began paying permanent partial disability.

Dr. Cash wrote on February 28, 2003:

I received your letter concerning Ms. Tonya Appling. As you Sknow (sic), her total disability is quite severe, but actually from the meniscectomies, I did a debridement and partial

medial meniscectomy of both the left and right knee. According to the American Medical Association Fourth Edition manual for impairment, table 64, page 85, a partial medial meniscectomy is 2% impairment to the lower extremity and 1% to the person as a whole. Therefore, Ms. Appling as a direct result from the surgery she had would have 1% to the body for the left knee, plus a 1% for the body for the right knee, which would be 2% to the body as a whole. Unfortunately this has left her with a total impairment much greater than this. As you have noticed from my previous records, I think she is a candidate for a total knee, although I am a little hesitant because of her very young age.

The claimant testified that she received benefits for 2% impairment ratings for both knees.

The claimant presented to Dr. Cash on September 3, 2003: "She twisted her left knee about 2 weeks ago. She is hobbling....I think she has some traumatic synovitis here....I am going to treat this with rest and time. Again we discussed possible arthroscopy but she has such a significant damage to her knee that repeat arthroscopy in my opinion would not help this knee. I think she is a candidate for a total knee at some time although I am trying to get her to delay that as much as possible."

The claimant continued to follow up with Dr. Cash, who stated on February 4, 2004, "At this point she had (sic) end

stage osteoarthritis of her knee and I think she is a candidate for a total knee replacement."

The parties deposed Dr. Cash on February 25, 2004. Dr. Cash testified that the claimant's chondromalacia in her knees was "down to bone on bone now." Dr. Cash agreed that, as of the time of the deposition, he had performed two surgeries on the claimant. The claimant's attorney questioned Dr. Cash:

Q. Doctor, after you asked Dr. Lorio to communicate with this lady, you provided a report January 9, 2003, that's where you talk about the impairment rating, correct?

A. What date?

Q. January 9, 2003.

A. That's correct.

Q. Now, is this the date of maximum medical recovery?

A. That's certainly what I felt, she had made maximum recovery.

Q. Let me ask you before this time, before this time, we know that you had given her back in August of 2001 restricted duty release. You mentioned a few minutes ago that you were encouraging this lady to try to do something?

A. That's right.

Q. Do you think that she should have been working during this time?

A. No, she couldn't....

Q. Doctor, the January 9, 2003 report, does that report accurately reflect your opinion regarding permanent impairment of each knee, taking the totality of each knee into consideration?

A. That's correct....

Q. Do you still consider this lady to be disabled?

A. Yes.

Q. Restricted?

A. Yes.

The respondents' attorney questioned Dr. Cash:

Q. And the surgery you did was successful in terms of you did what you expected to do?

A. That's right. I went in and took out the meniscus. That worked well. Unfortunately, it doesn't always relieve the pain....I didn't have any complications.

Q. I mean, you went in to do what you did and it came out like you thought it would?

A. That's correct.

Q. On both knees, is that correct?

A. That's correct.

Q. And you wrote to Ms. Hall and said for those surgeries, here's what the rating would be and that's in the note of - it's a letter to her, we've already talked about it, February 28, 2003, is that correct?

A. That's correct....

Q. At least on September 25th, you didn't think she was going to need a total knee, is that correct?

A. That sounds maybe correct....

Q. So, you don't think she needs a total knee now, is that correct?

A. Oh, I think she needs total. There's no question in my mind now, not even any doubt. She needs two total knees.

Q. Well, why did you say in September that you don't think she needed one?

A. I can't tell you that....

Q. You're not recommending that she have it, are you?

A. I've tried to get this lady not to have it but I think she, even with the risks that she's got, she's got to make that judgement....It's either live with it or do the total knee. And I think her pain on the scale that I observe people, the way she walks in here is fairly severe. And another thing I guess you're thinking too, have I made up my mind whether I will do the total knee. That's another point. I'm not ready to say that I'll take that risk - ...

Q. Can you say, now you recommended or say she's going to need a knee replacement? Is that the result of the meniscectomies you did or is that a combination of her weight, the osteoarthritis, the chondromalacia and all those things?

A. I think it's a combination of everything together.

Q. How much of it is related to the surgeries?

A. I'm not sure I know that answer.

Dr. James S. Mulhollan examined the claimant and reported to the attorneys on May 13, 2004:

First of all, there is no ready remedy for the patient's predicament besides joint replacement. Since she weighs over 300 lbs and is only 42 years old, the surgery will be undertaken with significant extra risk. At the same time, if it is not performed, the patient will probably continue to gain weight and can be expected to have a totally unacceptable eventual outcome.

The MRI observations are highly suggestive that most of the damage present in the knees occurred after the initial injury. The operative reports are not especially clear in that regard. The initial x-rays are missing, so there is no possibility for any sort of comparison in my office.

Estimates of the patient's predicament have to be based on multiple considerations. Based on the amount of joint space narrowing, that is, 2 mm remaining, this qualifies as an impairment of 20 percent of each extremity or 16 percent of the whole body, that is, 18 percent x two. I think it should be taken into account that the patient has a severe varus or bowleg deformity, which is quite aggravating, as is her marked weight excess. I think 35 percent of each extremity or approximately 14 percent of the whole body in each case is probably an accurate statement of her present predicament. Incidentally, that is the approximate level of impairment she would have if she had successfully performed bilateral joint replacements.

I was specifically asked if I agreed with what Dr. Cash testified in his deposition. Figuring out exactly what Dr. Cash thinks is exceedingly difficult for me. I believe she has less physical impairment, but I think we agree that she needs to have a joint replacement. I have the impression that Dr. Cash tends to blame her predicament on her injuries, and I agree. It is certainly aggravated by her body weight, but her injuries are probably the main factors here.

Dr. Cash noted on May 28, 2004, "Tonya has been approved for total knees." On May 28, 2004, Dr. Cash took the claimant off work until surgery on June 28, 2004.

Dr. Cash performed a left total knee replacement on June 28, 2004.

The claimant's attorney indicated at hearing that the respondents began paying temporary total disability on June 28, 2004.

Dr. Cash noted on July 12, 2004, "Had surgery on 6-28-04 needs to be off for 3 months."

The claimant testified with regard to the left knee surgery, "It's like night and day. There's no pain anymore, which is unbelievable."

Dr. Cash stated on July 16, 2004, "Total knee is doing well....I plan on doing supervised therapy for about 2 weeks and then regular therapy and then probably in about 3 months

once this has healed we will plan on doing the opposite total knee."

On October 13, 2004, Dr. Cash took the claimant off work until December 13, 2004.

A pre-hearing order was filed on October 25, 2004. The parties stipulated that the respondents "accepted the claim and paid appropriate medical benefits and some indemnity benefits, as well as a two percent physical impairment rating to each lower extremity. Respondents paid for additional medical benefits of knee replacement surgery for each lower extremity and paid indemnity benefits from and after the date of the knee replacement surgery."

The claimant contended that "since her injury was a scheduled injury, she never reached maximum medical improvement and is therefore entitled to temporary total disability from August 30, 2001." The respondents' contentions indicated, "Respondents believe that the claimant had reached maximum medical improvement until she elected to have the knee replacement surgery and that all appropriate benefits have therefore been paid."

The parties agreed to litigate the following issue: "Claimant's entitlement to additional temporary total

disability benefits and controverted attorney's fees on the benefits previously paid, as well as those sought."

A hearing was held on December 2, 2004. The claimant's attorney indicated at that time that the claimant had undergone only one knee replacement surgery, and that the second surgery was scheduled for December 13. The claimant contended that she was entitled to temporary total disability compensation from August 30, 2001 through June 28, 2004. The claimant agreed at hearing that she had not worked since leaving the respondent-employer, and that no job had been offered to her.

The administrative law judge found, in pertinent part:

4. Claimant has not returned to work since August 30, 2001, the date of the second knee injury;
5. Objective findings exist that claimant was unable to return to work at any time after the injury of the second (right) knee, despite impairment ratings issued by Dr. Cash on January 9, 2003;
6. Claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability indemnity benefits commencing August 30, 2001, and continuing through June 28, 2004, as well as attorney's fees.

The respondents appeal to the Full Commission.

II. ADJUDICATION

The claimant sustained compensable injuries to her left and right knees, which were scheduled permanent injuries. Ark. Code Ann. §11-9-521(a). This statute expressly provides that for scheduled permanent injuries, the injured employee is to receive temporary total disability compensation during the healing period or until the employee returns to work, whichever occurs first. See, Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become stable, and if nothing further in the way of treatment will improve that condition, the healing period has ended. Id. Whether an employee's healing period has ended is a factual determination to be made by the Commission. Ketcher Roofing Co. v. Johnson, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

In the present matter, the claimant sustained an injury to her left knee on June 1, 2001. Dr. Cash operated on the

claimant's left knee on August 3, 2001. Dr. Cash returned the claimant to restricted work on August 27, 2001. The claimant testified that she received full wages for periods of time she was off work, before August 30, 2001. However, the claimant testified that she voluntarily quit work on August 30, 2001. The record shows that appropriate light duty was provided the claimant at that time; the preponderance of evidence does not support the claimant's assertion that she was physically unable to perform sitting work for the respondent-employer.

Ark. Code Ann. §11-9-526 provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

The evidence does not show that the present claimant justifiably refused the appropriate light-duty work provided her on August 30, 2001 and following. The Full Commission has previously found that, when an employee refuses work suitable to her capacity, she is not entitled to temporary disability. See, *Fluitt v. Arlington Hotel Co., Inc.*, Workers' Compensation Commission F011961 (April 1, 2003).

See also, Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

The Full Commission therefore does not affirm the administrative law judge's determination that the instant claimant was entitled to temporary total disability beginning August 30, 2001. The record indicates that the claimant injured her right knee in September 2001. The respondents apparently paid benefits related to the claimant's right knee, and Dr. Cash performed right knee surgery on December 31, 2001. The Full Commission finds that the claimant entered a healing period for her right knee on that date, so that the claimant proved she was entitled to temporary total disability beginning December 31, 2001.

Dr. Cash stated in October 2002 that the claimant was "unable to return to her previous job." The parties appear to agree that Dr. Cash assigned a permanent impairment rating for both knees on January 9, 2003. The claimant essentially contends that she remained within a healing period for both knees despite the bilateral impairment rating assigned, and that she was therefore entitled to continued temporary total disability after January 9, 2003.

However, the respondents correctly point out that "permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. Excelsior Hotel v. Squires, 83 Ark. App. 26, 115 S.W.3d 823 (2003), citing Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

When Dr. Cash assigned bilateral impairment ratings on January 9, 2003, the claimant by definition reached the end of her healing period for her compensable injuries. We note that the respondents began paying permanent partial disability at that time.

Dr. Cash took the claimant off work on May 28, 2004, and he performed left knee replacement surgery on June 28, 2004. The Full Commission finds that the claimant proved she was entitled to additional temporary total disability beginning May 28, 2004. We note that the respondents indeed began paying temporary disability on June 28, 2004. The clear weight of evidence before the Commission indicates that knee replacement surgery was causally related to the compensable injury. Dr. Cash kept the claimant off work until December 13, 2004.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved she was entitled to temporary total disability compensation beginning December 31, 2001, the date the claimant underwent surgery to her right knee. The claimant proved she was entitled to temporary total disability until January 9, 2003, when the bilateral impairment rating was assigned by Dr. Cash. We find that the claimant proved she was entitled to additional temporary total disability beginning May 28, 2004, when Dr. Cash took the claimant off work for left knee surgery. This period of temporary disability continued until December 13, 2004, the date that Dr. Cash opined that the claimant could return to work. The Commission is unable to award temporary disability for surgery on the right knee, because there is not yet medical evidence before the Commission demonstrating that the claimant underwent right knee surgery.

The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 1996). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an

additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.