

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202727

ANDY E. SANDERS, EMPLOYEE	CLAIMANT
BACKUS PAINT & BODY SHOP, EMPLOYER	RESPONDENT
UNION STANDARD INSURANCE COMPANY, CARRIER	RESPONDENT

**OPINION FILED DECEMBER 29, 2005**

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

Claimant represented by HONORABLE BEN E. RICE, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE ANDY E. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed February 3, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on January 21, 2002 at which time the claimant sustained a compensable right knee injury at a compensation rate of

\$129.00. Medical expenses and temporary total disability benefits (from March 18 to June 21, 2002 and from November 11 to November 24, 2003) have been paid.

2. The claimant's healing period ended June 26, 2002 based on Dr. Martin's assessment that he was not a surgical candidate. Respondents are directed to pay temporary total disability benefits from June 22, 2002 to June 26, 2002.

3. The claimant is not entitled to a Functional Capacity Evaluation based on statutory or case law.

4. The claimant is entitled to continuing medical treatment for pain management. If the parties cannot agree on a medical provider, the Commission will appoint a general practitioner to monitor the claimant.

5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

6. If they have not already done so, the respondents are directed to pay the court reporter within thirty days of this award.

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.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I must respectfully dissent from the opinion of the Majority affirming and adopting the Administrative Law Judge's decision. After a de novo review of the testimony and the medical records in evidence, it is my opinion that the Administrative Law Judge's decision should be reversed and the claim should be remanded back for further evaluation.

The first accident suffered by the claimant occurred on January 21, 2002, when he fell while climbing out of a van which was being repaired. In this fall, he landed on his hands and knees, scraping his hands and causing a sudden onset of pain in his right knee. The claimant testified that his knee began to swell immediately following his injury and it caused him considerable problems even though he finished working that day, and continued to work for the ensuing month. In February 2002, a second incident occurred when he was underneath a vehicle working

on a front end alignment. The vehicle's gear box fell while he was underneath the car and it struck his right knee exacerbating his previous problem.

The claimant continued working and did not seek medical treatment until he saw Dr. Obomo Asemota on March 8, 2002. In a progress note of that date, Dr. Asemota noted that the claimant had a "workers' comp. injury" and was complaining of pain and swelling in his right knee. However, Dr. Asemota noted that there was no swelling at the time he saw the claimant but that the knee did appear to be tender with limited range of motion. He had the claimant undergo an x-ray which was performed on the date of the examination. The x-ray did not reveal any definite pathology.

The claimant continued to have problems with his knee and Dr. Asemota eventually referred the claimant to Dr. John Lytle, a Pine Bluff orthopedist. In his report of March 18, 2002, Dr. Lytle set out a history of job related injuries and noted that the claimant was complaining of knee pain. However, Dr. Lytle stated that the knee was not swollen and had no outward signs of trauma or injury.

Because of the claimant's persistent complaints, Dr. Lytle directed the claimant to undergo an MRI scan which was performed on April 22, 2002. According to the radiologist report of that date, the MRI did not reveal a meniscal or ligament tear but did find evidence of fluid in the joint space. In his next visit with the claimant, Dr. Lytle noted in a report of May 9, 2002 that the claimant still had significant symptoms in his leg. Dr. Lytle did notice gross swelling of the claimant's knee but it was attributed to a knee brace the claimant was wearing. In order to determine the extent of the claimant's problems, Dr. Lytle recommended an exploratory arthroscopy of the claimant's knee.

The respondent, who, up to this time had not controverted any aspect of the claimant's claim, declined to pay for exploratory arthroscopy surgery and, instead, directed the claimant to see Dr. Kenneth Martin, a Little Rock orthopedic surgeon. Dr. Martin did not believe any surgical treatment of the claimant's knee was appropriate but instructed the claimant to undertake a home exercise

program. Dr. Martin also recommended the claimant have a second MRI scan on his knee.

The claimant was also seen by Dr. Greg Massanelli, on January 28, 2003. Dr. Massanelli noted a history of significant knee pain and directed the claimant to undergo an MRI scan. This scan was performed on January 31, 2003. The scan found a small edema but no meniscal tear. However, the scan did find evidence of a medial collateral ligament sprain and mild chondromalacia in the patellofemoral compartment. When Dr. Massanelli saw the claimant again on January 28, 2003, the doctor set out in a progress note of that date that he believed the claimant would benefit from a steroid injection but that surgery was not recommended. He also stated that the claimant should undergo a functional capacity evaluation to see what the extent of his physical abilities were. While the respondent continued to accept the claimant's claim as compensable and continued to provide the claimant benefits, they refused to pay for a functional capacity evaluation of the claimant.

In November 2003, the claimant also saw Dr. James Mulhollan, a Little Rock orthopedist specializing in arthroscopic surgery of the knee. In his report of November 11, 2003, Dr. Mulhollan noted that x-rays indicated that the claimant had mild osteopenia in his right knee but no mal-alignment. He also noted the claimant having quadriceps atrophy and tenderness over the medial plateau. Dr. Mulhollan concluded that the osteopenia was indicative of the claimant having favored his right extremity which was consistent with an organic pathology. The doctor's diagnosis was of chronic pes anserine bursitis. Lastly, Dr. Mulhollan stated if the claimant did not improve this week, he should begin using an electric stimulator. In a letter to Ms. Ann Goodbar, the respondent's claim adjuster, dated November 11, 2003, Dr. Mulhollan opined that the claimant had reached his maximum medical recovery and that he would be entitled to a 2% anatomical impairment to his lower extremity.

Except for a short period in November, the respondent terminated payment of temporary disability benefits to the claimant on or about July 21, 2003. They

also continued to refuse to provide the claimant an exploratory arthroscopic procedure as recommended by Dr. Lytle. Eventually, the respondent did agree to a functional capacity examination but Dr. Massanelli believed that too much time had passed since he had last seen the claimant and would not arrange it without seeing the claimant again. Consequently, the evaluation was never performed. Because of the respondent's refusal to provide him any disability benefits after July 21, 2003, or the exploratory arthropathy or functional capacity exam, the claimant filed a claim for those benefits and requested a hearing before an Administrative Law Judge.

At the hearing, the claimant's entitlement to the requested medical treatment and temporary disability benefits were submitted for determination. The Administrative Law Judge held that the claimant was entitled to further medical treatment but that the exploratory arthroscopic procedure was not reasonable or necessary and that the functional capacity evaluation was not medical treatment and that the claimant therefore was not entitled

to one. In addition, the Administrative Law Judge held that the claimant had reached the end of his healing period in June 2003, and was therefore not entitled to any additional temporary disability benefits. From that decision, the claimant filed the present appeal.

In my opinion, the Administrative Law Judge's decision should be reversed and the claim should be remanded for further evaluation.

The first issue is the Judge's conclusion that the functional capacity evaluation is not medical treatment and, therefore, the claimant is not entitled to one. In my opinion, this conclusion is neither logical nor supported by relevant case law. In finding that a functional capacity evaluation was not medical treatment, the Administrative Law Judge stated, "it was a tool used to evaluate the claimant's physical stamina and ability or to assess vocational rehabilitation or job placement assistance. There is no authority mandating an FCE and, in fact, the Commission adjudicates claims without FCE's all the time."

It is true that many cases are decided without benefit of a functional capacity evaluation. However, to deny such an evaluation because it is only intended to evaluate "the claimant's stamina and ability" is no more logical than denying an MRI scan because it only measures a claimant's physical condition. By the standard imposed by the Administrative Law Judge, almost all commonly accepted diagnostic tests would not be considered medical treatment and would not be allowed.

Functional capacity evaluations are routinely prescribed by doctors to determine a claimant's physical status and to provide a basis for impairment ratings and return to work releases. The tests are normally arranged by doctors and are performed by a physical therapist or other medical personnel. In fact, the medical nature of the FCE in this case is evidenced by the respondent's insistence that it be arranged by Dr. Massanelli. If the functional capacity evaluation is not a form of medical treatment then I fail to see why it is recommended by a physician and performed by other medical professionals. Clearly, the information

developed from the functional capacity evaluation could be used by Dr. Massanelli, or any other appropriate physician, to determine the nature and extent of the claimant's injury, what future treatment, if any, would be beneficial to him, and the extent of his permanent impairment.

It is my opinion that the Administrative Law Judge was mistaken when she stated that there was no legal basis for requiring a functional capacity evaluation to be performed. A claimant's entitlement to a functional capacity evaluation was at the heart of the decision of the Arkansas Supreme Court in Gansky v. High Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). In that case, an Administrative Law Judge had deferred a determination on a claimant's entitlement to temporary total disability benefits until a functional capacity assessment had been completed. The Commission reversed the Judge's reservation of the issue and held that the claimant was not entitled to such benefits. The Court of Appeals affirmed that decision. However, the Supreme Court in Gansky reversed both the Court of Appeals and the Commission. The Court held that a determination of

the claimant's entitlement to temporary total disability benefits could not be made "until all of the medical treatment, that is, the *Functional Capacity Assessment*, was completed." Obviously, the Supreme Court of this state has held that functional capacity assessments are a form of medical treatment. In my opinion, the Administrative Law Judge was entirely incorrect in her conclusion that the evaluation directed by Dr. Massanelli was not medical treatment and that the claimant was not entitled to it. I believe that the Administrative Law Judge's decision to this extent should be reversed and the respondent should be ordered and directed to arrange for the claimant to undergo such an assessment under the direction of Dr. Massanelli. If necessary, the respondent should provide whatever follow up evaluation Dr. Massanelli requires prior to arranging for the functional capacity evaluation.

I also believe that the Administrative Law Judge's decision should be remanded back to her because of numerous factual errors in her Opinion. In my opinion, these errors suggest that the Administrative Law Judge did not

sufficiently review the medical evidence and, consequently, she should re-evaluate this claim further.

In denying the claimant additional temporary disability benefits, she stated:

As I interpret the medical evidence, the healing period ended in June 2002, when Dr. Martin released the claimant. By that time, both Dr. Agnew and Dr. Martin had concluded that the claimant was not a surgical candidate. After that, the treatment was offered to help the claimant cope with the pain, but no other medical treatment was offered that would improve the condition of his knee.

However, a review of the medical report referred to by the Administrative Law Judge reflects that neither report is in accord with her interpretation. The report by Dr. Agnew is dated May 22, 2002 and concerns whether the claimant should undergo a diagnostic arthroscopic procedure. Dr. Agnew, who never actually saw the claimant, was of the opinion that the treatment was not necessary. He did not comment on any other treatment the claimant should receive. Also, while Dr. Martin did not believe the claimant was, at that time, a surgical candidate, he also stated that he

would like to review the claimant's MRI after which he would reconsider any recommendations for surgery. He also recommended that the claimant undergo a home exercise program and stated in his letter that he advised the claimant that it might take a year to 18 months for his condition to subside.

The Administrative Law Judge also states in her opinion that physical therapy notes showed that the claimant had injured his knee mowing his yard on April 10, 2002, and that he had a preexisting football injury to his knees. However, I was unable to locate any such physical therapy notes in the record.

The Administrative Law Judge also stated in her Opinion that the respondent had accepted the claim as compensable but "there were some discrepancies in his account of the accident." However, the Judge does not state what these discrepancies were, nor if there was any evidence where the claimant had alleged any type of injury other than the fall in January 2002, or the incident with the gear box in February 2002. The only discrepancies apparent are those

in the physical therapy notes, which were unable to be located in the record, which the Judge referred to in her Opinion.

Significantly, even the respondent concedes in their reply brief that the Judge was inaccurate in a number of her conclusions as set out above. I believe that the Judge's failure to accurately summarize the evidentiary record in her Opinion suggests that she did not sufficiently evaluate and review the evidence in this case. Therefore, it is my opinion, that this case should be remanded to the Administrative Law Judge for a more complete evaluation of the record. It is also my opinion, that in regard to the claimant's entitlement to further disability benefits, the Administrative Law Judge should take note that there are no medical opinions to the effect that the claimant reached the end of his healing period until that set out by Dr. Massanelli in his report of June 28, 2003. Dr. Mulhollan later stated that he concurred in that conclusion.

In summary, it is my opinion that the Administrative Law Judge's decision should be reversed and

remanded. Specifically, it is my opinion that the Administrative Law Judge's holding that a functional capacity evaluation is not medical treatment should be reversed and the respondent should be ordered to promptly provide a functional capacity evaluation to the claimant. Further, it is also my opinion, that the case be remanded back to the Administrative Law Judge to reconsider the decision that the claimant is not entitled to temporary disability benefits and to confine the evaluation to the evidentiary record submitted.

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SHELBY W. TURNER, Commissioner