

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F407137 and F502421

JUSTIN FISHER, EMPLOYEE	CLAIMANT
THREE STATES SUPPLY CO., INC., EMPLOYER	RESPONDENT NO. 1
GALLAGHER BASSETT, INSURANCE CARRIER	RESPONDENT NO. 1
LEWIS FORD, EMPLOYER	RESPONDENT NO. 2
FARMERS INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 2

OPINION FILED MAY 19, 2006

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

Claimant represented by the HONORABLE EVELYN BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM FRYE,
Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE CAROL WORLEY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's
opinion filed September 27, 2005. The administrative law
judge found that the claimant proved he sustained a

compensable injury to his left knee while working for Respondent No. 1 on June 10, 2004. The administrative law judge found that Respondent No. 1 should pay for reasonably necessary medical treatment for the claimant's left knee subsequent to June 10, 2004, and that Respondent No. 1 should pay temporary total disability from June 11, 2004 until August 15, 2004.

After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that, on June 10, 2004, the claimant sustained a recurrence of the injury which occurred on June 16, 2003. We find that Respondent No. 2, Lewis Ford, is responsible for reasonably necessary medical treatment provided in connection with the claimant's compensable recurrence. The Full Commission also finds that Respondent No. 2 is responsible for temporary total disability compensation from June 11, 2004 until August 15, 2004.

I. HISTORY

The claimant is Justin Lynn Fisher, age 27. Dr. Tom Patrick Coker performed an arthroscopy of the claimant's right knee in September 2000. In December 2000, Dr. Coker

performed additional surgery after a displaced patellar fracture in the claimant's right knee. In May 2001, Dr. Coker performed an "excision painful hardware, right knee."

The parties stipulated that "on June 16, 2003, the relationship of employee-employer-carrier existed between Respondent No. 2 and the claimant." The parties stipulated, "Respondent No. 2 agree (sic) that on June 16, 2003, the claimant sustained a compensable injury to his left knee." The claimant testified that he was carrying a part downstairs and "my knee just popped on me and I hit the ground."

Dr. Konstantin V. Berestnev saw the claimant on June 16, 2003 and assessed "Left knee sprain in the area of the lateral collateral ligament."

An MRI of the claimant's left knee was taken on July 7, 2003, with the following impression:

1. Limited examination due to the patient's large size with no confirmation of normal anterior cruciate ligament. These findings are suspicious for either a very vertical anterior cruciate ligament or complete ACL tear and correlation with physical exam is recommended.
2. The posterior cruciate ligament as seen is intact.
3. No displaced tear of the menisci.

4. Increased signal intensity along the course of the medial collateral complex suggestive of MSL sprain. The lateral collateral complex is not well seen.
5. Degenerative thinning of the articular cartilage in all three compartments of the knee most suggestive of chronic degenerative osteoarthritis.
6. No displacement of the patella or confirmation of focal chondromalacia patella.
7. No demonstration of bony contusion.

Dr. Berestnev saw the claimant on July 29, 2003 and assessed "Left knee sprain and MRI findings of abnormal left knee ACL."

Dr. Coker noted on August 18, 2003:

Justin is a 24 year old who is being seen for left knee. I did his ACL about three or four years ago on the right he was doing fine. It's not bothering him other than some occasional patella femoral type complaints but he's very overweight, hyper-flexible. He hyper extends his knees and has genuvalgus knee. He tripped at work. This was two months ago. He felt something pop. He had a lot of pain. He was treated conservatively for a while. When he wasn't getting better, they MRIed him. They don't see an ACL. His menisci look fine. He had an open MRI and the windows to the ACL are not particularly good and I think his ACL is there on exam and the MRI just wasn't adequate.

His PCL though is intact. His menisci look good on his MRI so that's good. He is getting better. It's just slower than he would like. Pain is vague. There's some popping. Doesn't really give out. Doesn't talk like an ACL as far as the giving out stuff. He feels like something locks every once in a while. He's doing pretty good

with range of motion. He hyper-extends. No effusion. No masses. Stable to varus/valgus. Stable to cruciate....He's just very large and is very difficult to examine clinically, but I think his ACL is intact. I don't think he's having meniscal findings either with McMurray's test. I think he just has a sprained knee.

I'll see him again in another four to six weeks and re-examine him. If he's not better at that time, then we'll worry about possible 'scoping him but I don't think his ACL is torn.

The parties stipulated that "medical bills have been paid to August 18, 2003, by Respondent No. 2."

The claimant testified that he worked for Lewis Ford, Respondent No. 2, until February 2004. The claimant testified that he still "had some instability and I was having trouble with stairs....I was under the understanding that it was just a sprain and I was just having to deal with the pain." The claimant testified that his left knee had "never been the same" since the June 2003 injury.

The claimant testified that he subsequently attempted to work at Superior Industries, but "I couldn't handle it. It was too much standing."

The claimant testified that he began working for Three States Supply, Respondent No. 1, in May 2004. The claimant

testified that he still had trouble with his left knee "but I thought it was part of the healing process."

The parties stipulated that "on June 10, 2004, the relationship of employee-employer-carrier existed between Respondents No. 1 and the claimant." The claimant testified that he was working as a driver for Three States Supply. The claimant contended that he sustained an accidental injury on June 10, 2004. The claimant testified that while pulling a two-wheeler, "my knee just popped on me and I went down."

The record contains a Medical Summary and Clinic Visit Note dated June 10, 2004. The Note indicated that the claimant "fell at work, complaining of left knee pain, also has a cut to the back of his right leg." It was noted, "Cleaned and dressed superficial laceration on right posterior, distal calf. Healed scar on right anterior knee. ACL's are a bit loose bilaterally. No definite effusions but morbid obesity makes this difficult to assess." The Clinic Visit Note indicates that Dr. Randall Oates assessed left-knee sprain. The claimant was assigned physical restrictions. The treatment plan including the following: "We will be better able to rule out ACL tear on follow-up.

There is an 80% probability that this will resolve completely within 2-3 days....X-ray of left knee is unremarkable."

The claimant testified, "I was out of work for about two months - well, it was about two weeks - two or three weeks, something like that. I don't really remember the exact time."

The record indicates that Dr. Robert B. Wilson returned the claimant to work with temporary restrictions on June 17, 2004. The claimant testified that he attempted to return to light duty work, but "They told me they had no light duty and they told me to go home....That was, like, a week after June 10th. It was June 17th, 16th."

The claimant testified that he began working for National Home Centers on August 15, 2004.

The impression of Dr. Christopher A. Arnold on November 4, 2004 was "Left knee pain and instability....This appears to be related to a work injury. This occurred on 6/10/04....He has clinical findings consistent with an ACL tear. I told him I could not rule out other ligamentous injury or meniscal injury. I would recommend obtaining and

(sic) MRI and seeing him back after the MRI has been obtained."

An MRI of the claimant's left knee was taken on December 1, 2004, with the following impression:

THE ANTERIOR CRUCIATE LIGAMENT IS NOT DEMONSTRATED COMPATIBLE WITH THE PRESENCE OF A TEAR. THE POSTERIOR CRUCIATE LIGAMENT APPEARS INTACT. NO MENISCAL TEAR DEMONSTRATED. A LINEAR AREA OF SIGNAL ABNORMALITY IN THE LATERAL TIBIAL PLATEAU MAY REPRESENT A NONDISPLACED FRACTURE. PLEASE CORRELATE WITH RADIOGRAPHS AND/OR CT. NO OSTEOCHONDRAL LESION DEMONSTRATED.

Dr. Arnold noted the following on January 18, 2005: "RADIOGRAPHS (AP/LATERAL LEFT TIB-FIB) were reviewed and there is no fracture which I can appreciate. MRI was reviewed and he has an ACL tear. There is also some abnormality about the tibial plateau, possibly an occult fracture but I cannot rule out a resolving contusion." Dr. Arnold's impression was, "Left knee pain and instability." Dr. Arnold stated, "I think this is secondary to his work injury. He had a prior injury two years ago for which he was treated and released. If we want to be completely pure, we can obtain the results of the MRI just to show this was completely normal and the patient will try to do this. In any event, today most of his problems appear to be coming

from the ACL tear....He wants to have the knee fixed but is going to consider his options. The next issue is his contusion situated laterally. I did tell him I could not rule out a stress fracture and that I could not rule out other abnormality. My suspicion is that it all has to do from the resolving contusion from the initial injury when his knee gave way on him. If it is a fracture, he needs to stay off the knee."

However, Dr. Arnold noted the following on February 1, 2005:

I had a chance to review the MRI from 7/7/03. Although he states it was reported as clean, there appears to be an ACL tear at that particular time. This makes me suspect the ACL tear is chronic and most likely not related to his work accident of 6/10/04. We will convey this to him and have him follow up at his previously scheduled appointment.

A pre-hearing order was filed on April 15, 2005. The claimant contended that he "was injured on June 10, 2004. His left knee was injured when he slipped on wet metal as he was pulling a two-wheeler."

Respondent No. 1, Three States Supply Co., Inc., contended that "the claimant did not sustain a compensable injury and the problem that he has at this point is related

to long-standing left knee problems. Further, for the one month that the claimant worked for the respondent-employer he complained of left knee problems from the beginning."

Respondent No. 2, Lewis Ford, contended that "all appropriate benefits were paid associated with his injury while working for respondent-employer and that additional medical and TTD is not reasonable and necessary.

Respondents contend the claimant has filed a claim for an injury of June 10, 2004, and that the employer/carrier on risk at the time of that injury should be liable for any benefits associated with the claimant's continued left knee problems."

The parties agreed to litigate the following issues: "1. Compensability of the claimant's injury to his left knee on June 10, 2004, and/or a recurrence of his June 16, 2003, injury. 2. Related medical. 3. Temporary total disability from June 11, 2004 to August 15, 2004. 4. Attorney's fees."

Dr. Coker was deposed on June 22, 2005. The attorney for Respondent No. 2, Lewis Ford, questioned Dr. Coker with regard to the MRI of the claimant's left knee taken in July 2003:

Q. Have you reviewed that MRI?

A. Of his left knee?

Q. And I've got it on page 5 of what you've got in front of you.

A. Yes. I haven't seen the MRI itself lately, but I saw the report.

Q. Okay. Could you tell me a little bit about that report as far as the ACL?

A. They're suspicious for a ACL tear, or possibly the ACL is intact, and it's - it was just missed.

Q. And what does that mean?

A. An ACL can be hard to see on some people in their knees if it's oriented in a direction that's vertical. He's also a large guy, and so that exam in some machines may - may not be sensitive enough to catch. He had an open MRI, and those machines aren't quite as accurate, I don't believe, as other MRI's....

Q. So the MRI back in 2003 -

A. Uh-huh.

Q. - was suspicious for a tear. Is that correct?

A. Yes. Correct.

Q. Or it could not be seen at all.

A. Yes.

Q. Is that another possibility?

A. Yes.

Q. It looks like it also showed chronic degenerative osteoarthritis. Is that right?

A. Correct....The arthritis would have been just bad luck. I mean, some aging of the knee. That wouldn't have been the result of the injury in '03. Most likely, it - it had been there a while....

Q. Looks like you first saw him after that on August 18, 2003. Is that the -

A. Yes.

Q. - first date? Tell me that you saw that day.

A. I felt like the ACL was intact that day, and I thought he just had a sprained knee at that time....

Q. I've got one more MRI report for you to look at, if you would.

A. Uh-huh.

Q. And that's one that was taken on December 1st, 2004....What findings do you see there?

A. This one says, "His" - "The ACL is not demonstrated, compatible with a tear, cartilage is fine, and he may have a nondisplaced fracture in his tibia."

Q. So what is the difference between that one and the one from 2003?

A. Well, this one, I'm not sure if it's an open MRI or not. It's done at a different machine, and there's - some machines are better than others. But I - I haven't seen this MRI before - or ever. So it - it may have been better quality, they may have gotten to - they may have been able to see

the area of the ACL better. And he was more confident in calling it torn than before.

Q. "He," as in the technician reading it?

A. The MD, yeah. The radiologist. I mean, he - he doesn't say it's definitely torn, he just says it's not well demonstrated, and, therefore, a tear is suspected so ...

Q. Is it, to you, any more definite than the one from 2003?

A. No, it's pretty much the same language they used back here.

Q. So do you see any difference at all?

A. At all? Well, I haven't seen either MRI; I'm just looking at the report....

Q. Did you see any difference?

A. No. They both describe the fact they don't see any ACL; therefore, they assume that it may be torn. They both use virtually the same words....

Q. Is there any way you could state which injury would account for his need for treatment today, if he has any need at all?

A. No. There would be no way I could tell.

A hearing was held on June 28, 2005. The claimant testified:

Q. Do you still have any problems with your left knee?

A. Yes.

Q. What kind of problems do you have now?

A. I have some - still have some instability and still have some pain when I go to sleep at night.

The attorney for Respondent No. 1, Three States Supply, questioned the claimant at hearing:

Q. Mr. Fisher, the instability and pain and difficulty sleeping at night, those are the same complaints or problems you described earlier that you've had since 2003; is that a fair statement?

A. Yes....

Q. And in fact you told us that your - after June 10th of '04 that your knee got back to where you felt like you could do the regular job that you've done in the past. Is that a fair statement?

A. I've done - It got better. It hasn't ever got back to the way it was.

Q. And what you're saying is that it's not ever gotten back to where it was before June 10th of '03, correct?

A. Right.

The administrative law judge found, in pertinent part:

7. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left knee while working for Respondent No. 1 on June 10, 2004....

8. Respondents No. 1 should pay for the cost of all reasonable and necessary medical treatment for this claimant's left knee subsequent to June 10, 2004....

9. Respondents No. 1 should pay temporary total disability to this claimant from June 11, 2004, until August 15, 2004....

Respondent No. 1, Three States Supply Co., Inc.,
appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

_____Ark. Code Ann. §11-9-102(4) (A) defines "compensable
injury":

(i) An accidental injury causing internal or
external physical harm to the body ... arising out
of and in the course of employment and which
requires medical services or results in disability
or death.

An injury is "accidental" only if it is caused by
a specific incident and is identifiable by time
and place of occurrence[.]

A compensable injury must be established by medical
evidence supported by objective findings. Ark. Code Ann.
§11-9-102(4) (D). "Objective findings" are those findings
which cannot come under the voluntary control of the
patient. Ark. Code Ann. §11-9-102(16). The claimant's
burden of proof shall be a preponderance of the evidence.
Ark. Code Ann. §11-9-102(4) (E) (i).

In workers' compensation law, an employer takes an
employee as he finds him, and a preexisting disease or
infirmity does not disqualify a claim if the employment
circumstances aggravated, accelerated, or combined with the

disease or infirmity to produce the disability for which compensation is sought. *Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003). An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003).

A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The determination of whether there is a causal connection between the injury and the disability is a question of fact for the Commission. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986).

The administrative law judge determined in the present matter, "The claimant has testified to a specific incident while working for Respondent No. 1 and there are objective medical findings on a second MRI indicating an ACL tear."

The administrative law judge therefore found, "The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left knee while working for Respondent No. 1 on June 10, 2004." The Full Commission reverses this finding.

The claimant first sustained an injury to his left knee while working for Respondent No. 2, Lewis Ford, in June 2003. After an MRI in July 2003, Dr. Berestnev assessed "Left knee sprain and MRI findings of abnormal left knee ACL." However, Dr. Coker examined the claimant in August 2003 and stated, "I think is ACL is intact....I think he just has a sprained knee....I don't think his ACL is torn."

The claimant later began working for Respondent No. 1, Three States Supply, and the parties stipulated that an employment relationship existed there on June 10, 2004. The claimant testified that he slipped and felt a pop in his knee. However, there were no objective medical findings in the medical report on the date of accident. We recognize the language in the June 10, 2004 report, "ACL's are loose bilaterally", but the Full Commission does not find this description to constitute an objective medical finding of a traumatic left knee injury on June 10, 2004.

Dr. Arnold stated in November 2004, "He has clinical findings consistent with an ACL tear." Dr. Arnold stated in January 2005, "he has an ACL tear." But the Full Commission again notes Dr. Arnold's follow-up language in February 2005:

I had a chance to review the MRI from 7/7/03. Although he states it was reported as clean, there appears to be an ACL tear at that particular time. This makes me suspect the ACL tear is chronic and most likely not related to his work accident of 6/10/04. We will convey this to him and have him follow up at his previously scheduled appointment.

Since Dr. Arnold opined that an ACL tear had existed since at least July 2003, the Full Commission does not affirm the administrative law judge's implicit conclusion that the claimant had sustained an ACL tear as a result of the June 2004 incident. Dr. Arnold's opinion in this regard is supported by Dr. Coker's comparison of the 2003 MRI and 2004 MRI, to wit: "They both describe the fact they don't see any ACL; therefore, they assume that it may be torn." Dr. Coker testified, "There would be no way I can tell" which injury was the cause of the claimant's need for treatment. Dr. Berestnev had already opined in 2003 that the claimant had an "abnormal ACL." We also note the

claimant's testimony that his knee problems began in June 2003, not June 2004.

The Full Commission finds that the claimant sustained a compensable "recurrence" of his knee condition on June 10, 2004. We find that this condition was the result of the 2003 injury rather than the 2004 injury. Respondent No. 2 was "on the risk" at the time of the June 2003 injury and is liable for appropriate benefits to the claimant.

B. Temporary Disability

An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability compensation during his healing period or until he returns to work. *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 more 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 question of fact

for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

The administrative law judge found in the present matter, "Respondents No. 1 should pay temporary total disability to this claimant from June 11, 2004, until August 15, 2004." The Full Commission finds that Respondent No. 2, Lewis Ford, should pay temporary total disability compensation to the claimant for the period of June 11, 2004 until August 15, 2004.

The claimant testified that he was off work after the June 10, 2004 recurrence. Dr. Wilson returned the claimant to restricted duty on June 17, 2004; however, the claimant testified that he was refused light duty and was sent home. The claimant testified that he returned to work for another employer on August 15, 2004, thereby ending his entitlement to temporary total disability compensation. *Armstrong, supra*. We find that Respondent No. 2 is liable for temporary total disability compensation from June 10, 2004 until August 15, 2004.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant sustained a compensable injury on

June 10, 2004, for which Respondent No. 1 is liable. The Full Commission instead finds that the claimant sustained a compensable recurrence on June 10, 2004, and that Respondent No. 1, Lewis Ford is liable. The Full Commission finds that Respondent No. 2 shall is responsible for all reasonably necessary medical treatment provided in connection with the claimant's compensable recurrence. We find that Respondent No. 2 is liable for temporary total disability compensation from June 11, 2004 until August 15, 2004. The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

KAREN H. MCKINNEY, Commissioner