

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504388

LAURIE KOLBEK, EMPLOYEE

CLAIMANT

I C CORPORATION,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED APRIL 10, 2007

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

Claimant represented by the HONORABLE THOMAS W. MICKEL,
Attorney at Law, Conway, Arkansas.

Respondents represented by the HONORABLE J. MATTHEW
MAULDIN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed May 26, 2006. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction over this
claim.
2. The employer-employee-carrier
relationship existed on or about
November 22, 2004.
3. The claimant sustained a compensable
injury on November 22, 2004.
4. The claimant proved by a preponderance
of the evidence that the lateral tibial

plateau fracture which she sustained on March 12, 2005 is a compensable consequence of her admittedly compensable November 22, 2004 left knee injury.

5. The claimant has experienced a period of additional temporary total disability from March 12, 2005 to June 20, 2005.
6. The additional medical treatment identified in the hearing transcript was reasonably necessary for and causally related to treatment of the claimant's compensable lateral tibial plateau fracture in the left leg sustained on March 12, 2005.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the May 26, 2006 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion 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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that the lateral tibial plateau fracture which she sustained on March 12, 2005, is a compensable consequence of her November 22, 2004, injury. A carefully conducted de novo review of this claim in its entirety reveals that the claimant's non-work related injury of March 12, 2005, constitutes an independent intervening cause, for which the claimant is not entitled additional benefits. Therefore, I find that the decision of the Administrative Law Judge should be reversed and additional benefits associated with the claimant's non-work related injury of March 12, 2005, should be denied.

The record reveals that the claimant sustained a compensable injury to her left knee on November 22, 2004, when she tripped over a cord at work. This incident resulted in a left knee patellar fracture, for which she was placed in a knee immobilizer. However, contemporaneous x-rays taken at the time of this incident revealed no evidence of ligament or meniscus tear. In fact, on November 30, 2004, based upon his physical examination and review of the x-rays, Dr. J. Tod Ghormley reported that the claimant's ligaments were

"grossly intact" in her left knee, and added that x-rays showed only a non-displaced patellar fracture. On January 4, 2005, the claimant returned to Dr. Ghormley, who reported that she was experiencing "less and less pain" in her left knee, and that she was "minimally tender" over her left patellar region. Dr. Ghormley opined that the claimant's left patellar fracture was "healing nicely". A routine MRI of the claimant's left knee conducted on January 6, 2005, confirmed a fracture of the claimant's lower pole of the left patella with associated edema in the adjacent patellar tendon. Although a partial tendon tear was suspected, a complete disruption did not appear evident. Furthermore, no ligament or meniscus tear was identified by this study.

The claimant continued to make satisfactory improvement in her recovery. On January 18, 2005, Dr. Ghormley reported that the claimant displayed good range of motion in her knee, but that her knee was continuing to buckle. He continued the claimant on a physical therapy strengthening program, with supplemental walking three hours per day. Dr. Ghormley stated that after her next appointment, they would repeat x-rays of the claimant's left knee, and "then probably send her back to work". Films taken on February 7, 2005, showed that the claimant's fracture had "gone

on to heal". Therefore, Dr. Ghormley released the claimant to return to light duty for two to three weeks, with the prospects of returning her to full duty thereafter. Dr. Ghormley wrote that he would see the claimant back in a couple of months for final x-rays and check-up.

Prior to her next appointment with Dr. Ghormley, the claimant was involved in a non-work related accident, which resulted in a new injury to her left knee. In his report dated March 15, 2005, Dr. Ghormley stated:

She had been followed on the workmen's compensation for a knee fracture, which she sustained on November 22, 2004. She is on March 12, 2005 was (sic) in two-wheeler, motorcycle who hit a powerhouse, and lost control at her hands and twist (sic) her knee. No catching or locking. She is able to bear weight without pain.

Dr. Ghormley added that the claimant showed tenderness over the medial joint line, and that she had a negative flip test, straight leg raise. "Ligaments are grossly intact," continued Dr. Ghormley, "she has bent her knees at about 100 degrees." Dr. Ghormley planned to have the claimant do weight bearing as much as possible, to wean herself off of crutches, and continue with range of motion exercises. He instructed the claimant to take

Tylenol for pain, and approved her returning to work in a week at a sitting job.

On March 16, 2005, the claimant was evaluated by arthroscopic knee surgeon, Dr. James S. Mulhollan. A repeat MRI of the claimant's left knee taken that same day revealed the following: an osteochondral fracture of the posterior aspect of the lateral tibial plateau; a contusion of the medial femoral condole; an old, partially healed patellar fracture; a small free margin tear of the body of the medial meniscus, and; a partial-thickness tear of the proximal fibers of the medial collateral ligament. In his report dated March 17, 2005, Dr. Mulhollan wrote:

On Saturday before my evaluation on March 16, she was on her three-wheeled bicycle. It failed to stop, due to brake malfunction, causing her to run into a fence, in her words, at about three miles an hour. She thought the injury was minor.

Based on his examination and review of the MRI, Dr. Mulhollan concluded that the claimant suffered from "profound osteopenia" (loss of bone mass) in her left patella, which he estimated was from the immobilization of her patellar fracture injury. Dr. Mulhollan did not think that the claimant's tibial fracture was directly related to her patellar fracture, but he added:

This extremity is decidedly osteoporotic. The trauma that caused the fracture was quite minor, even though it seemed to be associated with a historically significant mechanism. At the patient's age, the tibia should not fracture with such minor trauma.

According to his assessment of the claimant's condition, Dr. Mulhollan took her completely off of work.

In a letter dated March 24, 2005, Dr. Mulhollan offered an in-depth explanation of his opinion of the physiology of the claimant's injury to corporate physician for the respondent employer, Dr. Stephen L. Long. In re-articulating his explanation to the claimant concerning her question as to why "the other physician" did not recognize the presence of osteoporosis in her left knee, Dr. Mulhollan wrote:

I explained that we made an AP x-ray and a double skyline x-ray that showed both extremities on the same cassette. All of the films made in Conway are of a single extremity. There is no way to detect osteoporosis on a single film, due to the fact that the technique can be altered to create illusions.

Dr. Mulhollan further explained that he was able to recognize the claimant's tibial fracture injury, whereas the emergency room physician, the radiologist, and the

orthopedist who examined her films did not, because he is a sub-specialist with a greater capacity to recognize such "distractions". "My suspicion," stated Dr. Mulhollan, "is that the fracture of the lower pole of the patella was a distraction." He added that he could not "fault those physicians for not seeing the fracture". Dr. Mulhollan concluded by stating:

I explained to the patient that Arkansas utilized the 50-percent rule in such a matter. The traumatic incident that this patient describes, that is, a 2-3-mile-an-hour injury, quite minor, is not enough to fracture the tibial plateau in a 47-year-old female. Such tibial fracture is highly unusual except in an elderly patient. A 47-year-old factory worker with a normal weight does not qualify as that. If I listed the etiologic causes of her injury, I would say first that the presence of osteoporosis that is a direct outcome of the patellar fracture and immobilization is greater than 50 percent. The second cause is the trauma that was sustained, which constitutes less than half of the cause of her having this injury.

The claimant continued under the regular care of Dr. Mulhollan. However, On May 26, 2005, a second opinion was sought from Dr. Charles E. Pearce, who stated in his report as follows:

She had a second non-work related injury to her left knee in mid-March 2005, when she was riding a trike

down the driveway of her home. There was an incline and she stuck what is called a T-post. This caught her left foot (on the side of the injured patella) and caused a hyperflexion and twisting type injury to her knee. She from there was able to regain her footing on the trike and then struck a tree. She says that, initially, she had minimal pain in the knee and was able to ambulate for a period of time but, later that day, had increasing pain and swelling.

After briefly describing her ensuing course of treatment, Dr. Pearce stated further:

The question arose as to causation of her injury, as she was said to have "profound osteopenia" of her leg secondary to her initial on-the-job injury, which then set her up for a second injury. ...

Although osteopenia could have played a role in a fracture such as this, in this particular case, the pathoanatomy was never weight bearing on the involved extremity (She used one crutch and was, at the very least, partial weightbearing) and it would be very unusual for her to develop "profound osteopenia" without other metabolic processes being present. Also, it is well known among orthopaedists that plain radiographs are a poor quantitative evaluation of bone density. Lastly, I would judge that, despite the reported speed of the trike, (approximately 3 mph) when the injury occurred, the weight of such a heavy vehicle on an incline could produce significant force and easily produce what amounts to minimally displaced fractures in the tibial

plateau (which is the region known as the "metaphysis" and is susceptible to these types of injuries, even with normal bone quality).

Subsequently, in a report to Dr. Long dated June 14, 2005, Dr. Mulhollan responded to Dr. Pearce's comments with the following exception:

My office routinely x-rays both lower extremities on the same cassette. Side-by-side comparisons of bone quality provide a ready understanding of extremity strength, the use pattern of the extremity and even the level of symptoms. I would not be able to practice if I made single-extremity x-rays since so much information is overlooked without a side-by-side comparison.

When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary total disability benefits. Ark. Code Ann. §11-9-102(4)(F)(i)(Repl. 2002). Benefits are not payable for a condition which results from a non-work related independent intervening cause following a compensable injury which causes or prolongs disability or need for treatment. Ark. Code Ann. §11-9-102(4)(F)(iii)(Repl. 2002). Whether there is a causal connection between an injury and a disability and whether there is an independent intervening cause are questions of fact for the Commission to determine. Oak Grove Lumber Co. v.

Highfall, 62 Ark. App. 42, 968 S.W.2d 637 (1998).

Further, there is no independent intervening cause unless the subsequent disability is caused by activity on the part of the claimant that is unreasonable under the circumstances. Davis v. Old Dominion Freight Line, 341 Ark. 751, 20 S.W.3d 326(2000).

At the hearing of this claim in March of 2006, the claimant described the incident of March 12, 2005, as follows:

[t]he trike went over the top of one of the fence posts; and, as it did, it clipped the side of my foot and pulled my leg off the trike and back up against the fender. Then I got my leg back up on the trike on the running board to get my clutch pushed in, and the trike ran into a tree and stopped.

...
The front of the trike went alongside the fence post. ... The post went under the axle between the tire and the engine and then out the back.

The claimant's testimony at the hearing presents a different version of the history surrounding her wreck than she had given Dr. Mulhollan. For example, Dr. Mulhollan's report of March 17, 2005, mentions nothing about the claimant's motorcycle having rolled over the top of a fence post, or her leg having been pulled off of the vehicle in a twisting motion then up against a

fender. In fact, it is unclear from that report if Dr. Mulhollan even understood that the claimant was operating a motorized vehicle. Rather, Dr. Mulhollan's report reveals that he believed the claimant's three-wheeled "bicycle" had bumped to stop against a fence at a slow rate of speed. Therefore, it is understandable how Dr. Mulhollan could conclude that a tibial fracture could not have resulted from such a "minor" incident. According to the claimant's own testimony and the history she gave Dr. Pearce, however, she was driving her 1500 cc, three-wheeled motorcycle, which weighed between 800 and 1,000 pounds, down the steep incline of her long driveway when she experienced brake problems. The claimant's vehicle hit a pothole, causing it to veer off of her driveway into a fence row. The left rear tire of the motorcycle drove over the top of an iron fence post which caught the left fender, went under the axle, then between the tire and the engine before exiting. During this incident, the claimant's left foot was pulled off of her motorcycle by the fence post, then recoiled, striking the fender. Finally, the claimant's motorcycle came to a stop when it collided with a tree. The claimant admitted that the incident happened so quickly and that she was so shaken by it, that she was not certain how fast she was going when she hit the

fence post, or whether she had twisted her leg in the process. Although the claimant was able to walk, and even drive, immediately following this incident, her symptoms worsened throughout the day. By that afternoon, the claimant was at the emergency room with severe pain.

The claimant assented that Dr. Mulhollan may have misunderstood that she was operating a motorized vehicle at the time of the March 2005, incident. Further, the claimant agreed that Dr. Pearce's account of the incident is more detailed and consistent with her testimony.

As described above, the opinions of Dr. Mulhollan and Dr. Pearce differ as to the cause of the claimant's March 2005, injury. The Commission has the duty of weighing the medical evidence as it does any other evidence, and resolving any conflict is a question of fact for the Commission. CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993). Moreover, the Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and the medical evidence. Smith Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical

soundness and probative force. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999).

The Commission often assigns more weight to the opinion of a treating physician than to one engaged solely for the purpose of making an evaluation. However, in this case, the opinion Dr. Mulhollan, who had only been treating the claimant since her March injury, was based on an inaccurate history and understanding of the events which gave rise to the claimant's second injury. Dr. Pearce, on the other hand, gave a reasoned explanation of the claimant's injury based on accurate information concerning the mechanics of that injury. It was Dr. Pearce's opinion that the weight of the motorcycle on an incline, even at 3 miles per hour, "could produce significant force" to cause the type of injury sustained by the claimant on March 12, 2005. Moreover, the claimant's second injury was different from her previous, work-related injury. More specifically, the claimant sustained a fractured patella as a result of her November 2004 injury, with no objective signs of meniscus or ligament tears. The claimant sustained a fractured tibia, and tears to her meniscus and MCL as a result of the March 12, 2005, incident. In Dr. Mulhollan's opinion (to which the Administrative Law Judge, and now the majority, assigned

greater weight), the claimant's tibial fracture could not have occurred from such a "minor" incident as that described to him by the claimant, but for the loss of bone mass, which he opined resulted from her first injury. However, it is apparent that Dr. Mulhollan's opinion was arrived at without information as to factors essential to his conclusion: specifically, that the claimant was operating a 800-1,000 pound motorcycle with bad brakes down a steep incline when she plowed over a fence post and smashed into a tree. See, Rhea v. M-K Grocer Co., 236 Ark. 615, 370 S.W.2d 33 (1963). Based on the claimant's own testimonial account of this incident, reasonable minds could not conclude that it was "quite minor", which was the mistaken impression she gave Dr. Mulhollan. Therefore, greater weight should be assigned to the opinion of Dr. Pearce regarding causation of the claimant's second, non-work related injury, since his understanding of the claimant's accident was based on a more accurate account.

Based on the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that her non-work related injury of March 2005, was casually connected to her compensable injury of November 2004.

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

KAREN H. MCKINNEY, Commissioner