

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506740

PEGGY A. DUGGAN, EMPLOYEE	CLAIMANT
ST. VINCENT HEALTH SERVICE, EMPLOYER	RESPONDENT NO. 1
ALTERNATIVE INSURANCE MANAGEMENT, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED DECEMBER 23, 2008

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

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID SIMMONS, 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 August 1, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which an employer-employee-claimant relationship existed among the parties when the claimant sustained a compensable right knee injury.

2. The claimant has proven by a preponderance of the credible evidence of record that Dr. Barnes' medical treatment is causally related to the compensable injury.

3. The respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Rule 30.

4. If they have not all ready done so, the respondents are directed to pay the court reporter, Linda Parker's, fees and expenses within thirty days of receipt of the bill. (sic)

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 August 1, 2008 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 respectfully dissent from the majority's finding that the claimant has proven by a preponderance of the evidence that she was entitled to additional

medical treatment. In my opinion, the claimant has failed to meet her burden of proof.

A review of the evidence fails to support a finding that the claimant's need for further medical treatment in the form of Synvisc injections is causally related to her compensable right knee injury. The evidence demonstrates that the claimant continued to exercise extensively after her compensable injury and at one point was told by Dr. Barnes that she "avoid long arc quads, squats, deep knee bends, etc." Additionally, the claimant had a history of chronic problems with her left knee. In fact, a May 8, 2004, MRI revealed a prior fracture. Dr. Barnes also testified that the claimant had surgery on her left knee prior to her compensable right knee injury and that these problems caused the claimant to put more stress on her right knee. More significantly the claimant had pre-existing arthritis in her right knee. Dr. Barnes testified as follows:

So, in Miss Duggan's case, her - she had arthritis in her knee - in her kneecap area before her injury. The question is why is she hurting now a few years after her injury? And the question was is this because of her injury or because of her arthritis? I mean it sounds - everybody wants doctors to be able to give you a

specific answer. But, unfortunately, nobody can say a hundred percent that that - that she would or would not have symptoms in September 2006 had she not been injured in 2004. If I had seen her before her injury in 2004 I have said Miss Duggan, I don't know when it's going to happen, but at some stage you're going to start having knee pain because your x-rays predict that you are.

Dr. Barnes made the following comments upon further questioning:

Q. Okay. And she has arthritis, I assume, when you first saw her?

A. Exactly.

Q. And in your opinion that arthritis pre-existed her injuries?

A. Yes.

Q. Okay. And now then the major cause of her symptoms is the arthritis?

A. Correct.

* * *

Q. Okay. And when you say you're not sure, that means you can't say within a reasonable degree of medical certainty when you're referring to Miss Bauer in that letter - excuse me - referring to treatment.

A. When I say I'm not sure that this would occur without the injury?

Q. Yes, sir.

A. Correct.

It is evident that the claimant would be having the same symptoms she is currently having even if she had not had the work related incident because of her pre-existing arthritis. In fact, Dr. Barnes stated that the injections recommended were for treating her arthritis. In my opinion, it would require speculation and conjecture to conclude that her current need for medical treatment is related to the work incident. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

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

KAREN H. MCKINNEY, Commissioner