

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610075

CLIFFORD FREEMAN,
EMPLOYEE

CLAIMANT

KINDER MORGAN, INC.,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 10, 2008

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

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

Respondents represented by the HONORABLE E. DIANE
GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed February 27, 2008. 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 of this claim.
2. On August 31, 2006, the relationship of employee-employer-carrier existed between the parties.
3. On August 31, 2006, the claimant earned wages sufficient to entitle him to weekly compensation

benefits of \$421.00 for total disability and \$315.00 for permanent partial disability.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a "compensable injury" to his left knee on August 31, 2006. Specifically, he has failed to prove that, on that date, he sustained a physical injury to his left knee that arose out of and occurred in the course of his employment, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal or external physical harm to his body, that required medical services, or resulted in disability.

5. Although the respondents initially provided the claimant with essentially all the benefits he now seeks, they have subsequently denied the occurrence of any compensable injury to the claimant's left knee and have controverted this claim in its entirety.

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.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury

covered by the Act; however, the claimant has failed to establish the elements necessary to prove the compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the February 27, 2008 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant failed to prove the compensability of a left knee injury occurring on August 31, 2006. From a de novo review of the record, I find that a preponderance of the evidence establishes the compensability of the claimant's injury and that he should have been awarded the benefits he requested.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority

without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and conclusions contained in that decision are now the majority opinion. Death & Permanent Total Disability Trust Fund v. Branum, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

HISTORY

The claimant suffered from pre-existing knee problems. He had a prior injury and surgery in 2004 by Dr. Robert Bebout. He had a subsequent injury in 2005, for which surgery was recommended and declined by the claimant.

On August 31, 2006 the claimant was employed as a truck driver for the respondent-employer. On that date, the claimant was getting out of his truck when he caught his foot between the frame and the door of the truck, twisted his left leg, and fell a distance of five feet. The injury was reported to his employer immediately. On the same day, the employer sent the claimant to Dr. Terry Clark, who indicated that the claimant had "missed a step coming out of his truck and landed forcefully on his left lower extremity and developed pain in his left knee". Dr Clark found "tenderness to palpation of the left knee over the

medial joint line" and a positive McMurry's sign. X-rays showed arthritic changes and effusion. Dr. Clark diagnosed a "left knee strain" and ordered an MRI to rule out internal derangement of the knee. The MRI showed effusion, a partial tear of the posterior cruciate ligament, a tear of the medial meniscus, and a probable tear of the central portion of the posterior horn lateral meniscus. The claimant was referred to Dr. Robert Bebout, the physician who had performed his previous surgery. Dr. Bebout performed another knee surgery on October 24, 2006.

In his deposition, Dr. Bebout was questioned in detail concerning the causal relationship between the 2006 surgery and the August 31, 2006 injury. Dr. Bebout examined the pre-injury MRI of January 25, 2006, and testified that it contained basically the same findings as the post-injury MRI of September 7, 2006. However, during surgery Dr. Bebout found new damage to the claimant's knee which he said was recent and which he attributed to the August 31, 2006 injury. Specifically, he said that "he did have some damage to the lateral femoral condyle, the end of the thigh bone itself, which was new". Dr. Bebout explained how he determined that the lateral femoral condyle damage was new and why that

finding would not have been present at the time of the pre-injury MRI of January 25, 2006, as follows:

Q. ... And you have no way of knowing had you performed this surgery after seeing the MRI in January of '06 whether or not you would have found the exact same thing that you found in October of '06 when you performed the surgery, do you?

A. The only thing, like I said, that looked fairly recent was the injury to that lateral condyle. That looked like that was fairly acute, but the changes behind the kneecap looked older. They didn't look like they were new. The meniscus tear, it is hard to say exactly how long that had been there, whether that had been there just a couple of months or that had been there for a year. It is hard to say about that.

Q. All right. Tell me what you saw in regard to those changes on the lateral side of the thigh bone which made you believe that they seemed to be fairly acute?

A. The injury pattern itself, the damage to the surface of the bone or actually the cartilage that covers the bone, cushion over the bone, it had sharper edges. The edges of that damage were not smooth and rounded off like they had been there a while and he had been walking on it and he just kind of wore it down over time. It looked like they were fresher, like it was a fresher injury spot.

Q. And that is because the edges were sharper?

A. Yes.

Dr. Bebout also indicated that the surgery was performed primarily for the treatment of the new injury to the lateral femoral condyle and that he did not really do anything during surgery to correct the chronic pre-existing conditions, as follows:

Q. ... And how did you deal with that particular problem? Do I understand shaving it?

A. Yes, we tried to debride it where the fragments that are kind of loose and hanging from the bone that are not well attached, that are not firmly attached to the bone, we debride those that are loose and readily peel off the bone, try and smooth that area off.

Q. And you also did the same thing to the chronic area that you had found?

A. No, I mean that was -- it was very thinned out. There weren't like ridges and valleys and anything to really smooth down to one surface level, so I didn't really do anything to that area.

ANALYSIS

A finding of compensability in this case calls for proof, by a preponderance of the evidence, of a

specific incident, identifiable by time and place of occurrence, arising out of and in the course of employment, causing physical harm to the body, requiring medical treatment or resulting in disability, which is established by medical evidence and supported by objective findings. Ark. Code Ann. §11-9-102(4)(E)(i); §11-9-102(4)(A)(i); and §11-9-102(4)(D).

The Administrative Law Judge found the claimant's proof insufficient on two of the statutory requirements for compensability. Firstly, he found that the claimant's testimony was not sufficiently credible to prove the occurrence of a specific employment related incident. Secondly, he found that the evidence did not show a causal relationship between such an incident and his subsequent left knee difficulties.

With regard to the proof of the occurrence of a specific employment related incident, the evidence clearly established that the claimant suffered a specific incident injury to his left knee on August 31, 2006. In fact, the evidence that the claimant sustained an accident on that date was so obvious that the respondents made payment of all temporary total disability benefits and medical expenses through December 14, 2006, and permanent partial disability

benefits for a 2% percent impairment to the leg. The only reason the respondents controverted this claim was that prior medical records were discovered which showed, according to their interpretation, pre-existing findings which were identical to those which appeared post-injury. The Administrative Law Judge stated the respondents' contentions as follows:

Respondents accepted claimant's left knee injury as compensable, paid TTD, PPD, and medical expenses. Subsequently, respondent received claimant's prior medical records including a January 2006 MRI which is virtually identical to the September 7, 2006 MRI. The surgery Dr. Bebout performed was to repair the problems that have existed at least since January, 2006, well before the alleged August 31, 2006 injury. Respondents were unaware of claimant's continued left knee problems and injuries after the 2005 left knee injury. Thus, respondent accepted Dr. Bebout's statement on September 13, 2006 that this was a new injury, unrelated to the 2004 injury. However, neither Dr. Bebout nor the respondent was aware of the treatment for the left knee by Dr. Asbury in January, February, and June 2006.

While a comparison of objective findings, documented before and after the injury, is important to a determination of causation, this would have no bearing on whether an incident actually occurred on August 31,

2006. Obviously, even the respondents believed that a specific employment-related incident occurred, and for good reason. The injury was reported immediately. The claimant obtained treatment on the day of injury. The history of injury given to the employer matched the medical reports. And most importantly, there was no testimony from any witness or documentary evidence introduced which contradicted the claimant's description of the accident.

With regard to causation, this is primarily a medical question. The medical evidence of record revealed that the claimant had chronic pre-existing problems in his left knee. However, he suffered new damage to his lateral femoral condyle as a direct result of the August 31, 2006 accident, according to Dr. Bebout. In addition, Dr. Bebout testified that the October 24, 2006 surgery was performed principally for the treatment of the new lateral femoral condyle damage. The claimant had one surgery before this injury and one surgery after his injury. Dr. Bebout performed both surgeries and was in an excellent position to distinguish between pre-existing and post-injury conditions. There were no medical opinions of record contradicting the opinions of Dr. Bebout. Under these

circumstance, reasonable minds could not conclude that the claimant failed to establish a causal relationship between his left knee problems and the August 31, 2006 injury.

In Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004), the Arkansas Court of Appeals addressed a similar claim involving pre-existing conditions. In Williams, the claimant suffered a knee injury superimposed upon significant pre-existing degenerative conditions. The claim was denied based on the respondents' allegation that the medical treatment requested was for pre-existing conditions, as opposed to the compensable injury. In Williams, the doctors agreed that the degenerative changes were not the "major reason" for the need for additional treatment and disability and that "most of the cause" pre-existed the injury. However, the medical opinions established that the compensable injury was "a factor" in the claimant's need for surgery. The Court of Appeals reversed the Commission's decision and remanded the case for an award of benefits, stating:

Both doctors can be fairly said to have testified that appellant's fall at work was not the major cause, but that it was, at least, a factor in

her resulting inability to work and need for knee-replacement surgery...the Commission had found that appellant had failed to prove a causal connection between her compensable injury and her need for total-knee-replacement surgery. Moreover, the Commission concluded that '[t]here is no evidence that the degenerative disease was worsened by the work-related injury.' Even reviewing the evidence in the light most favorable to the Commission's findings, we conclude that they are not supported by substantial evidence. Appellees had to take appellant as they found her, and the compensable injury that she suffered was a factor in her need for the additional surgery. (emphasis added.)

Therefore, a causal connection is established when the compensable injury is found to be "a factor" in the resulting inability to work and need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). In this case, the accident of August 31, 2006 was unquestionably a factor in the claimant's disability and need for treatment. As such, causation has been established.

In conclusion, the claimant proved, by a preponderance of the evidence, that a specific

employment-related incident occurred on August 31, 2006 and that the disability and medical expenses which resulted were causally related to that incident. For this reason, I must respectfully dissent from the majority opinion denying the compensability of this claim.

PHILIP A. HOOD, Commissioner