

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F804835

KAREN G. GLOVER,
EMPLOYEE

CLAIMANT

PULASKI COUNTY SPECIAL SCHOOL,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 29, 2009

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

Claimant represented by the HONORABLE KENNETH A. OLSEN,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. HARDY,
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 December 17, 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 the relationship of employer-employee-carrier existed among the parties on February 12, 2008, at which time the claimant sustained a compensable ankle injury at a compensation rate of \$522.00/\$392.00. Medical expenses, temporary total disability benefits and a seven percent (7%) anatomical rating have been accepted.

2. The claimant's injury was an aggravation of a pre-existing condition. The seven percent (7%) rating represents objective medical evidence of a permanent aggravation which combined with pre-existing degenerative joint disease resulting in the need for additional medical treatment.

3. The claimant has proven, by a preponderance of the evidence of record, that surgery is reasonable and necessary and causally related to her injury.

4. Respondents are directed to pay Dr. Nguyen's medical expenses within thirty (30) days of receipt pursuant to Rule 099.30.

5. As the respondents controverted the causal connection of this claim, an element of compensability, attorney's fees are owed.

Pursuant to the Full Commission decisions of *Coleman v. Holiday Inn*, (November 21, 1990) (D708477), 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, Linda Parker's, fees and expenses within thirty (30) days of receipt of the bill.

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 December 17, 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.

A. WATSON BELL, 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 she was entitled to additional medical treatment for her right ankle in the form of a total ankle replacement. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

There is no doubt that the claimant sustained a compensable injury to her right ankle in the course and scope of her employment. The respondents paid benefits for medical treatment, temporary total disability, and permanent partial disability benefits in the form of 7% permanent anatomical impairment rating. At this time, the claimant is need of a total ankle replacement or ankle fusion and wants the respondents to pay for this replacement. In my opinion, the claimant has failed to meet her burden of proof by a

preponderance of the evidence that she is entitled to a total ankle replacement at the respondents' expense.

The medical evidence indicates that the claimant was involved in a motor vehicle accident in 1994 where she sustained a severe injury to her right ankle. The claimant underwent three surgeries for her crushed right ankle injury. In July of 2003, the claimant was seen by her family physician for right ankle pain. The medical report shows:

On exam, the anterior talofibular ligament is swollen and tender. She has diminished range of motion with flexion and extension as well as lateral version. Ankle films show extensive degenerative changes.

The claimant was referred to Dr. David Gilliam who examined the claimant on August 12, 2003. The Gilliam noted in his report:

The 43-year-old female is seen in consultation at the request of Dr. Ken Johnston with the chief complaint of right ankle pain. She has pain, swelling and giving way, worse over the past month. She has had intermittent pain over the past several years. She also developed stiffness and stiffness is worse overnight.

Dr. Gilliam also noted an antalgic limp on the right, diffused tenderness and limited range of motion. He assessed the claimant with post traumatic

osteoarthritis of the right ankle. His notes stated that he discussed "surgical arthrodesis of the right ankle" and consideration of consultation with Dr. Nguyen for consideration for surgical intervention. At that time, the claimant elected for non-operative treatment.

After the February incident, the claimant was referred to Dr. Nguyen. Dr. Nguyen noted, in a report dated April 2, 2008:

At this point, she has got severe posttraumatic arthritis that is likely aggravated or exacerbated by her recent injury. I discussed with her that we can treat this with her boot, giving it time to settle down. She says the pain has become severe and debilitating and I think the last option is ankle fusion or ankle replacement and she wishes to consider these having repeated flare-ups over the past several years with the most recent one causing severe debilitating pain.

...

In a letter dated April 22, 2008, Dr. Nguyen referred to the claimant's condition as a temporary aggravation and that it would require about three months to settle down.

Finally, in a report dated July 18, 2008, Dr. Nguyen stated that the claimant's "ankles have settled down" and "I think this point though for her work related injury she has reached maximum medical

improvement with a permanent partial impairment of ...
7% for the foot for her exacerbation and aggravation of
the ankle arthritis."

In a letter to the claimant's attorney dated
May 21, 2008, Dr. Nguyen stated:

The patient does have severe
posttraumatic arthritis without
prior x-rays I would be unable to
determine if there has been recent
change given the recent Workers'
Compensation injury 02-12-08 versus
a longstanding pre-existing
arthrosis.

In my opinion, the medical evidence does not
support the request that the respondents pay for an
ankle fusion or replacement for the claimant's February
2, 2008, work-related injury. The evidence demonstrates
that the claimant sustained an aggravation of a pre-
existing condition that was temporary in nature and
resolved according to the records of her treating
physician. The additional treatment in the form of an
ankle fusion or ankle replacement was not due to the
aggravation but due to the fact that the claimant had
developed severe degenerative joint disease long before
the February 2, 2008, accident. As evidenced by the
medical records, the claimant was recommended as early
as 2003 to see Dr. Nguyen for problems associated with

her ankle. The medical evidence shows that the claimant had a severe injury to her right ankle in January of 1994, due to a motor vehicle accident, had several surgeries and had treatment throughout the years for right ankle pain. As early as August of 2003, the claimant was shown to have posttraumatic osteoarthritis and surgery was even discussed at that time. In my opinion, it requires conjecture and speculation to find that the claimant's request for additional medical treatment was due to the claimant's work related injury. 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 must respectfully dissent from the majority award of additional medical treatment.

KAREN H. MCKINNEY, Commissioner