

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F308089 & F207379

BECKY MULDOON, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., EMPLOYER	RESPONDENT
TYNET CORPORATION, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 19, 2009

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed June 8, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 5, 2008, and contained in a pre-hearing order filed November 6, 2008, are hereby accepted as fact.
2. The total right knee replacement recommended by Dr. Barnes is reasonable

and necessary medical treatment for the claimant's compensable right knee injury of May 1, 2002.

3. The total right knee replacement recommended by Dr. Barnes is related to the claimant's compensable right knee injury of May 1, 2002.
4. The respondents shall bear the cost of the claimant's total right knee replacement and related medical treatment as recommended by Dr. Barnes.

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 June 8, 2009, 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.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority's finding that the claimant proved by a

preponderance of the evidence that she is entitled to additional medical treatment in the form of a total right knee replacement. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

This claim has previously been before the Commission on at least two occasions. The claimant sustained an admittedly compensable injury to her right knee on January 11, 2002 and again on May 1, 2003. In an opinion dated March 10, 2004, it was found that the claimant was entitled to additional medical treatment in the form of surgery that had been recommended by Dr. Martinbeau. In an opinion dated November 14, 2007, the Commission found that the claimant failed to prove by the preponderance of the evidence that she was entitled to additional temporary total disability benefits for the period March 15, 2006 through May 16, 2006 and a finding that the claimant failed to prove that she was entitled to benefits pursuant to Arkansas Code Annotated § 11-9-505 (a). At this time, the claimant, after having undergone three surgeries, is requesting a total knee replacement. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The question in this case is whether the total right knee replacement is necessary to treat the claimant's condition and whether it was, in fact, necessitated by her injury in May of 2002.

The evidence demonstrates that the claimant was hurt in 2002 while at work when she was walking down some stairs and fell, striking her anterior right patella

against a steel pole and catching the banister under her right axilla. An X-ray report dated January 23, 2002 showed a small avulsion fracture of the superior patella, but that there were no other fractures or dislocations and specifically no malalignment or malposition of the patella was described in the report. An MRI of her right knee was performed on January 29k, 2002, and reported by Dr. Neil Crow. Dr. Crow noted that there was a small joint effusion with some small signal changes in the posterior horns of the medial and lateral menisci and minimal edema in the distal quadriceps. Dr. Crow believed that these may have been related to a strain in the knee. Dr. Crow also did not note any malposition or malalignment of the patella in the MRI.

The claimant's initial treating physician, Dr. Allison, stated that there was "no effusion" and that there was a full range of motion in her knee in his February 8, 2002 report. Dr. Allison did not find any contusions or instability as of February 8, 2002. Dr. Allison did not comment or note any abnormality radiographically or by physical exam which could have been placed in a malalignment category. The X-rays that Dr. Allison reviewed were considered normal and Dr.

Allison released the claimant to activities as tolerated on February 27, 2002.

On June 12, 2002, Dr. Allison offered the claimant "patella bracing and more therapy as treatment." However, the claimant wanted a knee arthroscopy instead, stating that she believed there was damaged cartilage and wanted to have it evaluated. In fact, the claimant was not satisfied with her treatment by Dr. Allison and requested a change of physician to Dr. Martimbeau. She testified that she requested the change because she did not have any confidence in Dr. Allison.

Dr. Claude Martimbeau saw the claimant on August 27, 2002. Dr. Martimbeau diagnosed the claimant as having post-traumatic chondritis in the patellofemoral joint. After reviewing the X-rays and MRI's, Dr. Martimbeau concluded that there was "possible minimal degenerative change of the menisci" and that there were no other specific bony or joint lesions. Dr. Martimbeau did not mention any malalignment or malposition based on his initial physical exam.

Dr. Martimbeau saw the claimant again on September 16, 2002, and mentioned a "slight lateralization of the patellar tendon with slight

lateralizations of the pattelofemoral joint in isometric contraction." Dr. Martimbeau did not conduct any objective test to verify whether there was any malalignment in the patella.

On September 23, 2002, a CT was interpreted by Dr. Balsara. Dr. Balasara noted "mild lateral subluxation of the patella minimally more prominent in the contracted images." Dr. Martimbeau next noted that "transfer of the patellar tendon would be the only other option" for treatment.

Dr. Martimbeau proceeded with the open patellar tendon transfer in October of 2002. The claimant later returned to work after this procedure and then re-injured her knee when she stepped off a step. However, no change in the position of the surgical repair was noted in an exam conducted by Dr. Joe Paul Alberty on January 2, 2003. Dr. Martimbeau conducted a follow-up examination on January 8 and again confirmed that there was not change in the position of the surgical repair. On April 9, 2003, the claimant was found to be at maximum medical improvement as of March 12, 2003.

On June 24, 2003, Dr. Martimbeau reviewed a CT scan and reported that a nonunion was found. Dr.

Mulholland conducted an evaluation of the claimant on July 10, 2003, and noted that she weighed 180 pounds, which represented a gain of 30 pounds since her injury. Dr. Mulholland indicated a fibrous healing was present at the tibial tubercle and that he did not feel that there was any additional surgical problem. Dr. Mulholland believed that strength deficit and weight adjustments would be the appropriate treatment. The claimant's response was "quite negative" and she did not agree with any of the things that Dr. Mulholland recommended as treatment.

Although Dr. Mulholland did not believe additional surgery was necessary and thought the problems could have been treated conservatively with therapy and weight loss, Dr. Martimbeau recommended a tibial tubercle nonunion. On September 16, 2004, Dr. Martimbeau conducted an operative repair of the fibrous union in claimant's right knee. However, the patella was not visualized at that time. The healing of the tibial tuberosity proceeded slowly following the operation.

A CT scan was conducted in November 2004, and Dr. Martimbeau specifically found that this did not show any new specific findings." Dr. Martimbeau did find

degenerative changes on radiographs of September 7, 2004 and recommended re-surfacing the patellofemoral joint. Dr. Martimbeau conducted the operative procedure on March 9, 2005, but did not make any exam or operative findings as to the condition of the right knee. Dr. Martimbeau returned the claimant to work on June 14, 2005, with no restrictions. On December 20, 2005, she was found to have reached maximum medical improvement and no other specific treatment was offered.

On January 9, 2007, Dr. Martimbeau saw the claimant and she had continuing complaints of pain in her right knee. After conducting a physical exam, Dr. Martimbeau noted that an X-ray of the right knee and right leg showed no specific acute bony or joint lesion. At that point, Dr. Martimbeau did not order any specific treatment.

The claimant was not satisfied with Dr. Martimbeau's finding that no further specific treatment was needed, and she went to see Dr. Stephen A. Heim on her own. After seeing the claimant and reviewing her X-rays, Dr. Heim concluded that he did not have a great deal of experience in evaluating her condition and referred her to Dr. C. Lowry Barnes. The claimant saw Dr. Barnes on May 24, 2007. Dr. Barnes did not review

any of the claimant's previous medical records, including X-rays and MRI's that were conducted contemporaneously with her previous injury and treatment in 2002. After conducting a cursory review of her history and physical exam, he recommended that the claimant consider total knee replacement.

At the hearing, respondents submitted the independent medical evaluation of Dr. Earl Peeples, an orthopedic surgeon. Dr. Peeples performed an extensive and thorough evaluation. He reviewed the claimant's medical records documenting her treatment for the May 2002 injury, including X-rays and MRI's taken contemporaneously with her compensable injury and in conjunction with her treatment of the injury. The claimant refused to provide Dr. Peeples a copy of the medical records from Dr. C. Lowrey Barnes. Dr. Peeples also reviewed the claimant's past medical history, current symptoms, family history, social history, and conducted a physical exam. Dr. Peeples concluded that he did "not think total knee arthroplasty is currently indicated," nor that "her malalignment was created by the blow to the knee from her May 2002 injury." He further explained that "[t]raumatic malalignment would require significant bony or soft tissue damage which was

excluded both by the MRI performed within several weeks of the injury and by Dr. Allison's repeated exams." Dr. Peeples did not recommend "further additional treatment at present in terms of joint replacement." In fact, he believed that "it was worth considering arthroscopic intervention to hopefully relieve some of the clicking" in her knee. In his report, Dr. Peeples repeatedly explained in detail that the medical records, including MRI's and X-rays did not show that there was a patellar malalignment that could have been produced traumatically from the May 2002 injury, essentially because the MRI studies taken at the time did not support such a conclusion. Although Dr. Peeples did not observe any malalignment caused by a traumatic incident, he did note that even if there was any such malalignment, it would have been caused by a congenital defect in her knees rather than traumatic injury.

A review of Dr. Peeples' detailed explanation of his findings shows that his conclusions are entirely consistent with the history of the claimant's injury, treatment, and the objective tests on her knee that were conducted contemporaneously with her injury and her treatment.

Moreover, the report of Dr. Peeples states:

Dr. Martimbeau's notes were short. They never included comparison studies of the opposite knee. Skyline patella views shot symmetrically were not included in his reports. He elected to proceed with a transfer of the tibial tubercle usually reserved only for very severe deformities as there are soft tissue realignment procedures of the patellar tendon that can be done both arthroscopically, with lateral release, or open with repositioning of the distal tendon without moving the tibial tubercle. These soft tissue procedures obviously have the advantage of not creating the possibility of tubercle nonunion. (He does not document or justify his choice of technique.)

The first two surgeries failed and arthroplasty was performed based on symptoms. Of amazing significance to me is the omission by Dr. Martimbeau of any description of the appearance of the interior of the patellofemoral joint which would justify the arthroplasty.

This file provides no support for traumatic malalignment of the patella related to the incident in January 2002. I do not see documentation of anything other than very minimal subluxation as is commonly seen in individuals, and I cannot understand Dr. Martimbeau's haste to proceed with surgery without even comparing the opposite site via CT or plain radiographs. This raises questions about the appropriateness and wisdom of his operative proposals.

If one theorizes that malalignment was present and surgery was appropriately selected, the malalignment would be based on pre-existing or congenital factors. There is no evidence to indicate that there is any change in the alignment of the patella from its status prior to the blow on the stairs. If damage of the cartilage alone was the problem, then arthroscopic intervention and debridement of this, perhaps in association with a lateral release, would be the

appropriate procedure. Moving the tibial tubercle indicated Dr. Martimbeau planned a major change in the alignment of the patella and this implied a pre-existing anatomic malalignment situation, not a traumatic chondritis, as the reason for surgery.

At present, I do not recommend tricompartmental or total knee arthroplasty. Arthroscopic evaluation and release of soft tissue scar, I think, would help alleviate symptoms. Her standing radiographs show no evidence of critical narrowing of the medial or lateral compartments.

The claimant relies on the report of Dr. Barnes in support of her request for a total right knee replacement. However, Dr. Barnes' recommendations are not supported by the long history of objective studies, including X-rays and MRI's which showed no malalignment in her patella. The recommendations of Dr. Barnes are not only inconsistent with the claimant's prior medical records, but are diametrically opposed to the opinion of Dr. Peeples, who recommended a less drastic treatment of arthroscopic procedure. Moreover, Dr. Barnes' opinion is inconsistent with the claimant's treating physicians, none of whom found any history of significant malalignment in connection with her May 2002 injury.

The claimant testified that she has continued to have pain and popping in her knee since 2007. She claimed that she did not have any clicking before her

injury. She claims that she wants the knee replacement because she is tired of the constant pain and that she pretty much limps all of the time. The claimant explained that if she goes out shopping, her knee will start aching really bad and that the pain spreads like a burning pain and goes into her hip. She then said that she likes shopping and had to quit shopping because of the pain and the stiffness.

The claimant's protestations of her life activities being limited by her right knee injury are not credible. She admitted that after her employment with the respondent employer ended, she has been employed at Hanes and Nightlights in Clarksville. Both of these jobs had regular full-time hours. The claimant also admitted that she enjoys turkey hunting and deer hunting. In fact, she even went turkey hunting in Missouri for a week in 2008. The claimant further admitted that she can still do a regular activities of cooking, driving and housework, and that she keeps her grandchildren, ages 4 and 6, every other weekend.

Therefore, when I consider the fact that Dr. Peeples examined the claimant, and all of her records and stated that he did not think that the knee replacement was necessary, the fact that Dr. Barnes did

not even review all the tests of the claimant's treating physicians and her prior medical records, I cannot find that the claimant has proven by a preponderance of the evidence that a knee replacement is reasonable and necessary. Accordingly, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, Commissioner