

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F811692

MARLAND SMOTHERS,
EMPLOYEE

CLAIMANT

MAIL CONSTRUCTION,
EMPLOYER

RESPONDENT

AIG CLAIM SERVICES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 29, 2009

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

Claimant represented by the HONORABLE MARC I. BARETZ,
Attorney at Law, West Memphis, Arkansas.

Respondent represented by the HONORABLE JARROD S. PARRISH,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed May 21, 2009. The administrative law judge
found that the claimant proved he sustained a compensable
injury. The administrative law judge found that the
claimant proved he was entitled to reasonably necessary
medical treatment and temporary total disability benefits.
After reviewing the entire record *de novo*, the Full
Commission affirms the administrative law judge's opinion.

I. HISTORY

Marland A. Smothers, age 45, testified that he began working for Mail Carrier Contractors in April 2007. Mr. Smothers testified that he drove trucks for the respondents. The parties stipulated that the employment relationship existed at all relevant times, including September 26, 2008. The claimant testified that while getting out of a truck cab, "my foot slipped, this left foot slipped and got away from me, and when I tried to catch myself, I twisted around like this here, and that's when I fell to the ground....I landed on this whole left side, but I landed on my leg the most." The claimant testified that he lay on the ground for about 20 minutes and then got up and limped on his left leg before eventually pulling himself back into the company truck.

The claimant testified that he reported the accident to Linda Thrasher, the respondents' terminal manager, the following Monday, September 29, 2008. Linda Thrasher testified for the respondents, "He came in, it was one morning after a run, and said, "I hurt my foot. He said he fell out of the truck and he hurt his foot, said something about getting it tangled up in the steps."

The claimant testified that he returned to work after a few days, but that his left leg was sore. The claimant testified that Linda Thrasher noticed him limping and told the claimant he needed to see a doctor. A Concentra Physician, Dr. Cary Anderson, examined the claimant on November 14, 2008:

Patient c/o injury to left knee on 9-26-08 as a result of slipping on fuel and twisting leg. Patient c/o left ankle injury on same date, but admittedly doing alright now. Left knee admittedly with severe pain since initial injury. No medical evaluation to date....

MUSCULOSKELETAL:

Left knee: The knee joint is stable. Knee shows no deformity. No ecchymosis. No knee effusion. No popliteal fossa swelling. Full range of motion. Normal gait. Apley's compression test. Mild pain with femoral grinding.

X-RAY/LAB REPORT:

Knee: Patient advised that the x-ray reading was preliminary. Negative.

Dr. Anderson assessed "1. Chondromalacia, knee." Dr. Anderson assigned modified activity, return to work with no squatting or kneeling. The claimant testified that the respondent-employer did not have light duty available. Ms. Thrasher agreed at hearing that light duty had not been available for the claimant.

A Certification of Health Care Provider (Family and Medical Leave Act of 1993), dated approximately November 17, 2008, indicated that the claimant had sustained a "Twisting injury to L knee causing chondromalacia."

A physical therapist palpated the claimant's left knee on November 17, 2008 and noted "Tenderness and increased tissue tone to palpation of medial/lateral tibiofemoral joint line and paripatella."

Dr. Anderson noted on November 18, 2008, "Patient has not been working because no light duty available." Dr. Anderson assessed "1. Chondromalacia, knee." The physical therapist reported on November 19, 2008, "Decreased tissue tone noted upon palpation post tx." The therapist noted on November 21, 2008, "Tenderness and increased tissue tone to palpation of medial tibiofemoral joint line." The therapist noted on November 24, 2008, "Tenderness and increased tissue tone to palpation of medial tibiofemoral joint line as well as medial patella."

Dr. Anderson's assessment on November 26, 2008 was "1. Chondromalacia, knee....2. Unspecified internal derangement of knee....(new diagnosis)." Dr. Anderson ordered an MRI, return for evaluation on December 2, 2008. The record

indicates that the respondent-carrier controverted additional medical treatment at about this time. The parties stipulated that the respondents controverted the claim in its entirety.

The claimant's personal physician, Dr. Holli Banks-Giles, examined the claimant on December 9, 2008: "He states that he was on the truck and his leg slipped and he fell landing on his left knee. He did go through physical therapy and went for evaluation by worksman's (sic) comp physician. He states that he denies his claim and told him that he had chondromalacia patella. He states that the knee did not swell but it was painful and hurt in the back of the knee. He is doing much better today....PHYSICAL EXAM:...EXTREMITIES without edema. Left knee is examined and he does have good range of motion, no swelling, no tenderness with movement."

Dr. Banks-Giles' assessment included "Left Knee Injury - This is pretty much resolved. So patient is released to go back to work with no restrictions." On a Return to Work Evaluation dated December 11, 2008, a physician at Concentra Medical Centers indicated that the claimant could return to work with no restrictions. The claimant testified that he

returned to work for the respondents on or about December 11, 2008.

A pre-hearing order was filed on February 25, 2009. The claimant contended that he sustained "a compensable knee injury arising out of and during the course of his employment as the result of a specific incident identifiable in time and place of occurrence on September 26, 2008; that he is entitled to temporary total disability beginning November 13, 2008, and continuing through December 11, 2008; that respondents should be held responsible for all outstanding medical and related treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded. Claimant reserves the right to additional indemnity benefits pending a determination on compensability."

The respondents contended that the claimant could not prove "that he sustained a work-related injury. Respondents maintain that the medical evidence does not contain any objective evidence to support a compensable injury."

The pre-hearing order stated, "By agreement of the parties, the primary issue to be presented for determination

concerns compensability. If overcome, claimant's entitlement to associated benefits must be determined."

A hearing was held on April 3, 2009. The claimant testified regarding his left lower extremity, "It do all right. Every now and then, you know, I get a pain in that knee every now and then....I don't have no swelling. I just have them pains every now and then."

An administrative law judge filed an opinion on May 21, 2009. The administrative law judge found that the claimant proved he sustained a compensable injury to his left knee. The administrative law judge found that the claimant was entitled to reasonably necessary medical treatment and temporary total disability benefits. The respondents appeal to the Full Commission.

II. ADJUDICATION

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

- (A) "Compensable injury" means:
 - (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The burden of proof of a compensable injury shall be on the employee, and the burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury to his left knee. The parties stipulated that an employment relationship existed on September 26, 2008. The claimant testified that as he was stepping out of the cab of a company truck, he slipped, twisted, and fell on his left side, landing on his left leg. The claimant reported the accident to the respondents' terminal manager. The claimant eventually began treating with the company physician, Dr. Anderson, and Dr. Anderson's

reports corroborated the claimant's testimony. Dr. Anderson saw the claimant on November 14, 2008 and assessed Chondromalacia of the knee. The claimant was referred for physical therapy. Beginning November 17, 2008, a physical therapist noted "Tenderness and increased tissue tone to palpation of medial/lateral tibiofemoral joint line and paripatella." The therapist entered similar notes on November 19, 2008, November 21, 2008, and November 24, 2008. These findings were noted in the Objective section of the physical therapist's treatment notes and were based on physical palpation of the claimant's left knee. The Full Commission finds, in the present matter, that the notation of "increased tissue tone to palpation" of the claimant's left knee was an objective finding and was not within the claimant's voluntary control.

The Full Commission finds that the claimant proved he sustained an accidental injury causing physical harm to his left knee. The accidental injury arose out of and in the course of employment, required medical services, and resulted in disability. The injury was caused by a specific incident, identifiable by time and place of occurrence on September 26, 2008. The claimant established a compensable

injury to his left knee by medical evidence supported by objective findings not within the claimant's voluntary control, namely, the reports by the physical therapist of "increased tissue tone to palpation" of the claimant's left knee. We thus affirm the administrative law judge's finding that the claimant proved he sustained a compensable injury to his left knee.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury to his left knee. The claimant proved that the medical treatment of record was reasonably necessary, including Dr. Anderson's recommendation of an MRI. See Ark. Code Ann. §11-9-508(a). The claimant proved he was entitled to an MRI only as recommended and upon the direction and referral of Dr. Anderson. The evidence demonstrates that the claimant remained within a healing period and did not return to work beginning November 14, 2008 through December 11, 2008. The claimant therefore proved he was entitled to temporary total disability benefits beginning November 14, 2008 and continuing through December 11, 2008. See *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The Full Commission therefore affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury, and that the claimant proved he was entitled to reasonably necessary medical treatment and temporary total disability benefits. Because we affirm the administrative law judge's finding with regard to compensability and related benefits, the Full Commission need not adjudicate the administrative law judge's *sua sponte* determination that the respondents should be estopped from controverting benefits. The estoppel doctrine raised by the administrative law judge in the present matter is moot. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to 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 affirming the decision of the Administrative Law Judge. The Administrative Law Judge found that a diagnosis of chondromalacia of the patella, or softening of the articular cartilage of the patella, to be an objective finding. However, even assuming for the sake of argument that chondromalacia is an objective finding, there is no evidence in the record that this condition arose out of claimant's employment. First, there is no evidence that this diagnosis was made with evidence or support of objective findings or whether it is merely a differential diagnosis. Second, there is no evidence that this condition is in any way related to the claimant's employment. Chondromalacia is clearly a degenerative condition.

Now the majority asserts that the physical therapist's finding of "tenderness and increased tissue tone to palpation of medial tibiofemora joint line" is an objective medical finding." I cannot agree. While it may have been listed under the objective section of the therapist's notes, this is not sufficient to render the findings objective within the scope of the workers' compensation statutes. "Tone" is defined by Dorland's Illustrated Medical Dictionary, 26th Edition as "the normal

degree of vigor and tension; in muscle, the resistance to passive elongation or stretch." Without evidence establishing that the increased resistance was not or could not be controlled by the claimant, such a finding is not objective medical evidence. Resistance may be subjective or objective depending on the testing. However, based on the evidence before the Commission, we are unable to reach a determination with regard to the objectivity of such a finding. Accordingly, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury.

I also feel compelled to address the secondary, or alternative reasoning, of the Administrative Law Judge for finding respondents liable for the benefits awarded. Specifically, I am troubled by the language in the Administrative Law Judge's opinion on Page 8 where he states:

"I feel compelled to further point out that even if the respondents' assertion that there is no medical evidence supported by objective findings to establish compensability, which I do not concede, respondents should be responsible for the claimant's medical

treatment, as well as the brief period of temporary total disability claimed because the claimant was simply following the directions of his employer and the employer's doctors. Respondents should be estopped from denying the benefits claimed. See, also, Southern Hospitality v. Britian, 54 Ark. App. 318, 925, S.W.2d 81 (1996)."

This is not law with regard to temporary total disability. In the case of Southern Hospitality v. Britian, 54 Ark. App. 318, 925 S.W.2d 81 (1996), the Court found that the employer directed the claimant to see the doctor and that the claimant was led to reasonably believe that such treatment would be covered by Workers' Compensation. Although the claimant's claim was ultimately controverted, and she was found not to have sustained a compensable injury, the Court stated that the employer was estopped from denying responsibility for the cost of the treatment rendered by Dr. Smith, "...notwithstanding the fact that Ms. Britian's back injury was ultimately deemed to be non-compensable." In my opinion, the Britian case only stands for the proposition that the respondents are responsible for payment of medical services and treatment that they directed. It says nothing

about temporary total disability and any other interpretation is an erroneous application of the Britian case to the facts at hand.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner