

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F709032

BARBARA FRY, EMPLOYEE	CLAIMANT
CITY OF BALD KNOB, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE WORKERS' COMPENSATION TRUST, CARRIER/TPA	RESPONDENT

OPINION FILED JULY 27, 2010

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed December 14, 2009.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Because its admission will help to "best ascertain the rights of the parties" under

Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2002), Claimant's Proffered Exhibit 2, the transcript of her deposition taken August 11, 2009, will be admitted into evidence and given due weight.

4. The claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to her right knee, either in the form of a new injury, compensable consequence, or compensable aggravation of a pre-existing condition.
5. The claimant has not proven by a preponderance of the evidence that she is entitled to reasonable and necessary treatment of her right knee.
6. The claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits from September 15, 2008 through October 20, 2008, and from October 21, 2008 to the date she returned to work as a dispatcher.
7. The claimant has proven by a preponderance of the evidence that she is entitled to a controverted attorney's fee on the amount of additional indemnity benefits awarded herein.

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.

Thus, we affirm and adopt the 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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent in part from the majority opinion, because I find that the injury to the claimant's right knee is compensable and that she is entitled to medical and indemnity benefits for the right knee injury and to attorney's fees on this controverted claim. I concur in part with the majority opinion that she is entitled to

temporary total disability benefits from September 20, 2008 through October 20, 2008, and from October 21, 2008 until the date she returned to work as a dispatcher, but I would extend the benefits until March 25, 2009 when she was released from care. I also agree that she is entitled to attorney's fees on this award.

As a preliminary issue, the majority determined that the proffered deposition of the claimant, taken by the respondents and the admission of which the respondents objected, was admissible under Section 11-9-705(a)(1), because it would help to "best ascertain the rights of the parties." I agree with this ruling as an appropriate exercise of the Commission's wide latitude in evidentiary matters.

COMPENSABILITY OF THE CLAIMANT'S RIGHT KNEE INJURY

The claimant sought medical and indemnity benefits for her right knee injury. There is no question that the claimant suffered a compensable injury on August 17, 2007, involving her right lower leg. The issue here is whether there is a causal relationship between her need for treatment of her right knee and that compensable injury, in the form of a compensable consequence or the aggravation of

a pre-existing condition. These theories are so intertwined in this claim as to be inseparable. The compensable consequence of the injury is the aggravation of the pre-existing condition.

First, there must be a compensable injury. The claimant suffered an admittedly compensable injury to her right lower leg, for which she received treatment to her right foot, ankle, Achilles tendon and right knee. Objective findings of the injury to her Achilles tendon are found in the MRI and in the surgical observations of Dr. Nguyen. Objective findings of the injury to her right knee are found in the November 2007 MRI which showed a soft tissue contusion or hematoma along the anterior tibia extending from the inferior pole of the patella to the distal third of the leg without cortical thickening or underlying fracture, as well as effusion. In July 2008, Dr. Nguyen also observed crepitation in her right knee.

I disagree with the majority which did not find a causal connection between the objective findings in the claimant's right knee and the August 2007 injury. The claimant testified that she experienced no knee problems other than one event in high school prior to her 2007

injury. The majority finds this to be incredible, because the claimant had a diagnosis of degenerative joint disease after the injury. However, the medical records reveal no history of knee problems to support the speculation that she must have had knee problems, because she had a diagnosis of degenerative joint disease. The record is devoid of mention of prior knee problems, because they did not occur. There is also no evidence that the existence of degenerative joint disease requires the existence of symptoms.

The majority also found that the claimant's testimony regarding her knee pain was inconsistent. At the hearing, the claimant stated that she could not pinpoint what was wrong in her leg at the time of the injury, because her whole leg from the toe to the knee was "messed up." It was swollen, and she had shooting pains going up from her foot to her knee. At her deposition, she stated that her whole lower leg was swollen and that she did not know what was going on, and that "after doing a lot of the physical therapy is when I noticed that my knee kept hurting." She also stated that her knee did not hurt when she had her injury, but it was swollen.

At first glance, her deposition and hearing testimony may seem to conflict, but I disagree with the majority's conclusion that the testimony conflicts to the detriment of her credibility. At the deposition, she was specific that her knee did not hurt at the time of the injury and that her right knee "kept hurting" with physical therapy. She was also clear that her whole lower leg, from knee to toe, was involved, making it difficult to differentiate the actual focus of the injuries. At the hearing, the claimant made the same statements, that her whole lower leg was swollen and that she could not differentiate what actually hurt. She described the pain she felt immediately after the injury, that if she moved her toes, she had "pain shoot all the way up through my knee." This is not conflicting testimony. At the hearing, she was describing the pain in her ankle, shooting up in her leg, but at the deposition, she was only addressing the knee. The claimant differentiated between knee pain and pain shooting from her ankle up to her knee.

I find that the claimant's objective findings of a contusion or hematoma, effusion and crepitation to be directly related to the August 2007 injury.

When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). The basic test is whether there is causal connection between the two episodes. Id. A causal connection is established when the compensable injury is found to be "a factor" in the resulting 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 claim, the claimant had no history of knee problems, other than a brief episode more than twenty years prior to the injury. She did have a diagnosis of degenerative joint disease in her right knee, which is not surprising given her heavy work history. However, she did not experience knee pain or limitations prior to the injury in either knee, a fact supported by the medical records and her work history. She does not have left knee problems at all. The claimant suffered a traumatic injury to her right leg when her foot slid in between the bars of a cattle

guard, causing it to fold up against her shin and rupturing her Achilles tendon. She testified that her leg was swollen from her knee to her toes, that she had shooting pains from her ankle up to her knee, that her knee alone did not hurt initially, and that her right knee "kept hurting" when she began physical therapy. She related the knee pain to the casts and boots which caused her to have an altered gait and which pulled on her knee when she sat and to her physical therapy which required the involvement of her knee.

On April 29, 2009, Dr. Nguyen stated that the claimant had right knee degenerative joint disease with patellofemoral syndrome which "may be related" to her altered gait from the Achilles tendon injury. In July 2009, he wrote that the claimant's arthritis "may be aggravated by her Achilles problem and altered gait." He qualified this statement by saying that he did not have "any objective data that states that the majority of her knee condition is related to this altered gait," because she did have moderate to severe pre-existing medial joint space narrowing and arthritis.

Dr. Nguyen's statement concerning objective data and major cause is based upon a lack of understanding of the

law in Arkansas and his role in this matter. Objective findings are not necessary to prove causation. They are necessary to prove the existence of an injury, which in this case exist in the form of observations of crepitation and MRI evidence of effusion in her knee. Furthermore, major cause is not an issue in this claim. Dr. Nguyen's statement that there "may" be a causal connection between the altered gait and knee condition does not defeat the claimant's position, just because it is not specific enough. There are plenty of facts from which the Commission can draw the conclusion that the claimant's injury and treatment thereof are causally connected to her knee problems.

The claimant had a pre-existing condition in the form of arthritis in her knee. This condition was asymptomatic prior to her injury. The claimant was able to engage in an active lifestyle and heavy labor and to maintain two physically demanding jobs despite this condition. However, after her severe injury to her right lower leg and during the treatment of that injury, the claimant developed knee pain. There was no other traumatic event to her knee after the August injury. The claimant stated that the pain started during physical therapy for her

compensable injury and that her boots and casts irritated her knee as well.

This is a straightforward claim, where there was an asymptomatic pre-existing condition which became symptomatic after a compensable injury and the treatment of that injury. The claimant's compensable injury either caused or precipitated the need for medication and surgery. As in Estridge v. Waste Management, 343 Ark. 276, ___, 33 S.W.3d 167, ___ (2000), "that is clear." It is undisputed that the claimant had a pre-existing condition in her right knee. However, that condition did not become symptomatic until the 2007 accident and the resulting treatment which directly impacted her right knee. The 2007 compensable injury is a factor in the need for treatment of the claimant's right knee, and under Williams, supra, the claimant is entitled to the treatment provided by Dr. Nguyen.

I find that the claimant has suffered a compensable injury to her knee as a result of the August 2007 compensable injury. She is entitled to workers' compensation benefits for this right knee injury, including reasonable and necessary medical treatment. The claimant

has received limited treatment for her right knee which was covered by the carrier, including an MRI in November and injections. The claimant's knee is not stable, and there is further reasonable and necessary recommended treatment in the form of injections to address her pain and possibly even surgery. The claimant is entitled to the treatment of her right knee as recommended by Dr. Nguyen. The claimant may be entitled to indemnity benefits as a result of this treatment in the future.

TEMPORARY TOTAL DISABILITY BENEFITS

I agree with the majority's conclusions as to temporary total disability benefits, except that I would end that period on March 25, 2009. The respondents conceded at hearing that they were liable for benefits from September 15, 2008 to October 20, 2008. The claimant was prematurely released to work on October 20, 2008, but was unable to continue. After that date, she required treatment, including diagnostic studies and active care, and Dr. Nguyen noted that her tendon was "healing" and not healed. Dr. Nguyen finally released her upon the respondents' refusal to approve a functional capacity evaluation on March 25, 2009. There is no evidence that the claimant was employed as a

dispatcher before she was released in March, and therefore, I would award temporary total disability benefits through March 25, 2009. Essentially, the majority has left the record open indefinitely to introduce evidence of her return to work, which is unnecessary and inappropriate.

CONCLUSION

After my de novo review of the entire record, I must respectfully dissent in part from the majority opinion, because I find that the injury to the claimant's right knee is compensable and that she is entitled to medical and indemnity benefits for the right knee injury and to attorney's fees on this controverted claim. I concur in part with the majority opinion that she is entitled to temporary total disability benefits from September 20, 2008 through October 20, 2008, and from October 21, 2008 until the date she returned to work as a dispatcher, but I would extend the benefits until March 25, 2009 when she was released from care. I also agree that she is entitled to attorney's fees on this award.

For the foregoing reasons, I must respectfully dissent in part and concur in part.

PHILIP A. HOOD, Commissioner