

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F700802

S.C. GREGORY, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., SELF-INSURED EMPLOYER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND, CARRIER	RESPONDENT NO. 2

OPINION FILED AUGUST 19, 2010

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

Claimant represented by the HONORABLE ROBERT R. CORTINEZ II, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING, Attorney at Law, 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 November 17, 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 employer/employee relationship existed on May 11, 2005, when the claimant sustained a compensable injury to his left knee.
3. The claimant's earnings were sufficient to entitle him to compensation rates of \$423.00 for temporary total disability benefits and \$317.00 for permanent partial disability benefits.
4. Respondent No. 1 accepted the claimant's left knee injury as compensable, paid temporary total disability benefits, medical expenses, and paid a 19% permanent partial impairment rating to the left lower extremity which was assigned January 12, 2007.
5. Respondent No. 1 has controverted the claimant's total knee replacement on January 24, 2008, and any benefits that flow therefrom.
6. Respondent No. 1 has paid short-term disability and group health benefits.
7. The claimant has failed to prove by a preponderance of the evidence that his need for additional medical treatment from Dr. Newbern, specifically the total knee replacement on January 24, 2008, was causally related to the compensable work-related injury of May 11, 2005.
8. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any indemnity benefits associated with the January 24, 2008, total knee replacement.
9. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability

benefits from January 24, 2008, until a date yet to be determined.

10. The claimant has failed to prove that he is entitled to additional permanent partial disability benefits.
11. The claimant has failed to prove that he is permanently and totally disabled as a result of the compensable work-related injury of May 11, 2005.

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 dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the respondents are liable for the total knee replacement performed on January 24, 2008 and all benefits that flow therefrom.

The Court of Appeals addressed a claim for medical benefits under strikingly similar circumstances as those presented by the case at hand, in Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). There, the claimant suffered a compensable injury to her knee and, as a result, had surgery which was accepted and paid for by the respondent. When she experienced additional problems and needed further surgery, in the form of a knee

replacement, the respondent denied responsibility. The employer took the position was that the additional medical treatment requested was for pre-existing degenerative changes and not causally related to the original compensable injury. The claimant in Williams had significant pre-existing degenerative findings which her doctors agreed were not caused by the injury. The doctors also agreed that the degenerative changes were not the "major reason" for the need for additional treatment and that "most of the cause" for the knee replacement pre-existed her injury. However, the medical opinions established that the compensable injury was "a factor" in the claimant's need for surgery. Based on this medical evidence, the Commission denied the claim finding that: (1) the claimant had failed to prove a causal connection between the compensable injury and the requested surgery; (2) that the claimant was symptomatic prior to the incident at work and would have required surgery regardless of the work-related injury due to the progressive nature of the disease; (3) the surgery was recommended to treat the pre-existing arthritis, not the work-related injury; and (4) there was no evidence that the degenerative disease was worsened by the injury. 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, in claims for medical benefits, 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., supra.

Here, the claimant's treating surgeon, Dr. Gordon Newbern, opined that the claimant needed knee replacement

surgery due to his on-the-job compensable injury of May 11, 2005. Claimant's left quadriceps muscle had been ripped from his knee as a result of a fall from a "shaker" table while cleaning the Tyson chicken plant for weekly USDA inspections.

The uncontroverted testimony received by the Administrative Law Judge was that, prior to the claimant's injury to his left knee of May 11, 2005, the claimant had never injured his left knee or any other part of his body that required any hospital stays or any medical treatment other than a one-time doctor's visit. In addition, the uncontroverted testimony by the claimant was that he hadn't sustained any other injury, other than his work-related left knee injury, since the date of May 11, 2005.

The claimant's injury was severe and disabling. He testified at the hearing that "I realized that my kneecap had moved up into my thigh and I knew I was in trouble".

The claimant was seen at St. Vincent ER and diagnosed with a potential patella or kneecap fracture and ordered to followup with Dr. Gordon Newbern, who was the authorized treating surgeon chosen by the respondents.

The claimant was seen by Dr. Newbern on May 13, 2005. Dr. Newbern opined that he suspected "significant injury partial or complete tear of quadriceps tendon", and ordered an MRI.

On May 16, 2005, Dr. Newbern interpreted the MRI report and observed a complete rupture of the quadriceps tendon from the patella after the fall while at work, and recommended surgery. Dr. Newbern performed the quadricep tendon repair surgery on May 26, 2005.

On October 21, 2005, six months post-surgery, the claimant continued to experience symptoms and relates that his left knee does not support his weight. Dr. Newbern prescribed additional physical therapy and commented that 57-year-olds do not rebuild muscle strength as rapidly as younger people and finds visible atrophy in both thighs and calves.

On March 20, 2006, claimant presented to Dr. Newbern with tenderness and limping on the left knee. Dr. Newbern administered steroid injections and scheduled a return visit with the potential for an additional MRI. On April 5, 2006, Dr. Newbern reports to the respondent-insurance carrier his findings of atrophy, neuroma, and scar

tissue, and that the claimant is still in his healing period.

Dr. Newbern saw the claimant on April 24, 2006, for pain and inhibited motion, and again on June 12, 2006, when Dr. Newbern opined:

Persistent lateral retinacular area of pain and tightness after quadriceps tendon and lateral retinacular repair due to traumatic injury which happened at work.

Surgery was scheduled on August 3, 2006, at which time Dr. Newbern surgically removed retained sutures, revised scar tissue, and a lateral retinacular release was performed.

On December 29, 2006, the claimant returned to Dr. Newbern with continued pain complaints. Dr. Newbern suspected a lateral meniscus tear and scheduled an MRI, which showed a possible tear of the posterior horn of the medial meniscus. The MRI shows "changes consistent with quadriceps tendon repair". Dr. Newbern released the claimant at that time, and assigned a 19% P.I.R. to the lower extremity.

On March 5 and March 12, 2007, the claimant returned to Dr. Newbern with increased pain, swelling and

discomfort. Dr. Newbern recommends another arthroscopy to determine the cause of claimant's symptoms.

The respondents sent the claimant to Dr. Russell Allison, an orthopaedic surgeon, to obtain an I.M.E. Dr. Allison examined the claimant and agreed with Dr. Newbern's assessment of meniscus tear and arthroscopic surgery. On January 6, 2007, the respondents authorized arthroscopic surgery which was performed by Dr. Newbern, and a medial meniscus tear was repaired and fraying cartilage loss was reported on the patella.

On July 30, 2007, Dr. Newbern issued an opinion and stated:

I do believe that his work related injury is the main cause that has led to the deterioration of his knee so rapidly over the past 1-1½ years and it is the reason that he would need a knee replacement.

The respondent then sent most of the claimant's medical records to another orthopaedic surgeon, Dr. James M. McKenzie. Dr. McKenzie did not actually physically examine the claimant, however, on September 17, 2007, he opined that the knee replacement was not work-related.

The majority, by affirming and adopting the Administrative Law Judge, has erroneously, and without any medical or legal justification, afforded Dr. McKenzie's one-time incomplete medical records review more weight than the opinion of the respondent authorized treating physician. In deposition, Dr. McKenzie admitted to never seeing the claimant and testified that he could defer to treating surgeon's findings. Dr. McKenzie also testified that he found no fault whatsoever with Dr. Newbern's treatment. Dr. McKenzie states that it is possible, as the treating physician, that Dr. Newbern's opinions are correct and accurate. Dr. McKenzie testified that Dr. Newbern is the only source who can give the best opinion as to the claimant's medical condition. Finally, Dr. McKenzie agreed that Dr. Newbern's report of July 11, 2008, is medically possible and that Dr. McKenzie never even reviewed the July 11, 2008 report or any of the MRI films.

On October 19, 2007, Dr. Newbern stated:

OBJECTIVE

I have reviewed the arthroscopic prints of Mr. Gregory from both his surgery on October 2, 2006, and August 6, 2007. There is 1 image from the 2006 surgery showing

some grade 2 chondromalacia changes of the medial femoral condyle. This is not well described in the op report, but the images do document this. That surgery was a lateral retinacular release and removal of irritating suture. The subsequent images, 10 months later, show that he went on to develop degenerative meniscus tear and significant fraying of the medial femoral condyle cartilage and the tibial plateau cartilage, and fraying of the lateral tibial cartilage, as well.

His original quadriceps rupture occurred in May 2005, and it was repaired at that time. After that injury, the knee required mobilization for an extended period of time, which is known to have negative effects in the cartilage. He has continued to have pain and swelling in the knees, which has never done extremely well for an extended period of time after this initial injury.

It is my contention, which is at variance with the peer review performed on my care and recommendations for Mr. Gregory, that the spiraling degenerative change of the knee was very much set in motion by the trauma to his knee back in 2005 and by steady worsening of the knee

and persistent pain. Support for this rationale is further present by the fact that his right knee is continuing to do well, even though he has been carrying more of his weight since this all started in 2005.

If I was asked to within a greater-than-50%-degree of medical certainty whether his knee would be much more prone to have deteriorated given the circumstances of his injury and quadriceps tendon repair and subsequent immobilization, I would have to say that this injury to the knee and subsequent treatment set in motion the changes that have resulted in the ongoing deterioration of his knee.

At this point, it is only to be well remedied with total knee replacement in my opinion. Had there been prolonged periods of the knee doing well after the repair and him continuing to have trouble with the knee, then I think one could say that the degenerative changes in the knee being set in motion by his injury were not related. The history simply does not bear this out.

ASSESSMENT:

Continued pain and swelling from degeneration of the left knee that is temporarily

related and set in motion by fall from a height and acute rupture of quadriceps rupture, which was repaired.

Dr. Newbern goes on to specifically mention that he will send this report to the respondents, but that the claimant may need to appeal to the workers' compensation commission if the respondents continue to deny the knee replacement surgery:

I have explained to Mr. Gregory that I would write this letter explaining the connection of his injury to the current state of his knee and my recommendation for knee replacement still stands if the Synvisc injections fail to give him relief.

He understands that if the workers' compensation carrier continues to feel that this deterioration of the knee is not related to his work-related injury, then he could appeal the case. Perhaps, this will be done. We will see him back in a week to monitor his progress.

Despite Dr. Newbern's opinion, the respondent denied the total knee replacement. The claimant used his private health insurance and the knee replacement surgery

was performed on January 24, 2008. On July 11, 2008, Dr. Newbern stated:

This knee replacement was done on a knee that already had damaged extensor mechanism, which was a complete quadriceps tendon rupture that was repaired surgically. However, this continued to give him symptoms. This is a knee that had given Mr. Gregory no trouble prior to falling off of a shaker table while at work at Tyson's while he was he was doing a sanitation procedure. At that point, the troubles with his left knee started. He continued to deteriorate and to have significant and gradual steady worsening of his symptoms. He had a prolonged period of immobilization while the quadriceps tendon repair was healing. It is known in much of the basic science about cartilage that immobilization can cause damage. Also, the trauma of landing on the floor may have initiated the deterioration of the knee joint at that time, as well...

I maintain that despite a workers' compensation consulting physician stating that the deterioration of the knee is not related to his work, I would soundly disagree with the assessment. My opinion is still firm that Mr.

Gregory's knee did not experience deterioration until he suffered the fall, the quadriceps tendon repair, the long period of immobilization and stiffness, subsequent persistent swelling with the eventual deterioration of the cartilage requiring knee replacement. To me, the cause-and-effect relationship is plain and obvious.

I agree with Dr. Newbern. He is the treating physician chosen by the respondent, and even Dr. McKenzie stated that he would defer to his opinion. Additionally, Dr. McKenzie's review of the medical records was admittedly incomplete. As such, the majority's reliance upon Dr. McKenzie's opinion to deny this claim is erroneous. Furthermore, in light of Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 45 S.W.3d 383 (2004), I find that the opinion of the majority is contrary to the law. Clearly, the claimant's compensable knee injury was at least a factor in his need for a total knee replacement. As stated by Dr. Newbern, "the cause and effect relationship is plain and obvious." Substantial evidence does not support the majority opinion, and it should be reversed.

Gregory - F700802

-17-

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner