

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F809072

LARRY LONG,
EMPLOYEE

CLAIMANT

BALL CORPORATION,
EMPLOYER

RESPONDENT

FIDELITY & GUARANTY INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 17, 2010

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

Claimant represented by the HONORABLE ALAN LANE, Attorney at
Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE DALE BROWN, Attorney
at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed September 16, 2009. The administrative law
judge found that the claimant failed to prove he suffered a
compensable injury to his right knee. After reviewing the
entire record *de novo*, the Full Commission reverses the
administrative law judge's opinion. The Full Commission

finds that the claimant proved he sustained a compensable injury to his right knee.

I. HISTORY

Larry Dale Long testified that he had been employed with Ball Corporation for 22 years. Mr. Long testified that his job title was Operator, and that he was responsible for keeping a press running. The claimant's testimony indicated that he previously injured his right knee in about 2007: "I was at home and I was moving a old antique barber chair around. And it hurt pretty bad." The claimant testified that he underwent knee surgery as a result of the injury at home, and that he eventually returned to work with no restrictions.

The parties stipulated that an employment relationship existed on August 22, 2008. The claimant testified, "I had a curler jam and I went to take care of it. I stepped over a conveyor, and when I put my foot down, my back of my knee, it popped....I went ahead and did my job. It was about time to go home." The claimant testified that his knee swelled at home over the weekend, and that when he returned to work on Monday morning, "I went in and told my supervisor what happened."

Charles Goodman, the claimant's supervisor, testified for the respondents:

Q. On that Monday morning, did Mr. Long report to you that he had injured his knee or that he believed there was an incident that occurred on that Friday, before the shift began?

A. No....

Q. And when was the first time you knew about any injury that Mr. Long was reporting?

A. It was approximately 10 a.m.

Q. Okay. And what did Mr. Long tell you?

A. Gerald Hughes, my boss, the department manager, was sitting in there with me. We were having paperwork issues, tracking down. And so I had been in the office for an extended period of time that morning. He come in and told me that he had hurt his knee Friday but had not reported it; that he said that he thought Ball probably wouldn't cover this, but he was going to tell me about it....

I stayed and started the paperwork process at that time....And as soon as the morning meeting was over, that's when I removed him from his line, put him on the light duty, and we got the appointment for the doctor.

The claimant's testimony indicated that he worked at light duty and received medical treatment from Dr. Coker.

Dr. Terry J. Sites saw the claimant on October 2, 2008:

This is a first time orthopedic evaluation by me of the above named patient, a 48 year old, 6'2", 195 lb male with ongoing right knee pain since 08-22-08.

He was stepping over a conveyor belt at work when he twisted his knee and felt a pop, followed by a

large amount of swelling over the next couple of hours.

He saw Dr. Coker recently and had x-rays, continued observation was recommended....

He notes undergoing a right knee arthroscopy about 3 years ago where he may have had some cartilage removed as well as shaving, he notes a full recovery with no intervening problems with the knee. He did modify his activities after surgery in that he had been a runner in the past, was advised by his treating orthopedist to cease running activities. Prior to the recent injury he had some numbness in his 2nd and 3rd toes....

X-RAY: Review of x-rays, without report from Dr. Coker, demonstrates mild parapatellar osteophytes and mild medial joint space narrowing, consistent with non end-stage osteoarthritis....

Dr. Sites' impression was "1. Right knee torn medial meniscus. 2. Right knee posttraumatic osteoarthritis....Given the persistence of his right knee pain, catching and swelling, it is medically indicated that he undergo an MRI of his right knee, he desires to proceed."

Dr. Sites reported on October 13, 2008:

Larry returns to the clinic today for follow-up on his right knee MRI. I reviewed the films and report with the patient in detail, with changes consistent with a medial meniscus tear and/or postsurgical changes. He also has condylar changes as well. I reviewed his previous operative note from Dr. Mitchell, with significant chondral injury to the medial femoral condyle on a scope three years ago.

Because of his ongoing pain, changes in the medial meniscus and the condylar injury he desires to proceed with outpatient arthroscopy....

A pre-hearing order was filed on January 7, 2009. The claimant contended that "on August 22, 2008 he sustained an injury to his right knee while in the scope and course of his employment. Specifically, he was stepping over a conveyor and felt a pop in the back of his knee. The claim was initially accepted as compensable and he was sent to Dr. Wilson, but the claim has since been controverted. Claimant is in need of medical treatment with orthopaedic surgeon, Dr. Terry Sites, who is recommending surgery."

The respondents contended that the claimant "was not injured in the course and scope of his employment. The claimant's condition is due to a pre-existing condition."

The parties agreed to litigate the issues, "1. Compensability of injury to claimant's right knee on August 22, 2008. 2. Medical treatment."

Dr. Sites performed the following operative procedures on February 24, 2009: "1. Arthroscopy - knee - right. 2. Partial medial and lateral meniscectomy - knee - right. 3. Chondroplasty patella - separate procedure. 4. Chondroplasty medial compartment - incidental. 5. Major synovectomy." The post-operative diagnoses were "1. Torn medial and lateral meniscus - knee - right. 2.

Chondromalacia patella with grade 3 changes, possible previous chondral defect patella, medial facet. 3. Grade 3 chondromalacia medial femoral condyle. 4. Synovitis. 5. Vertical split ACL, but intact stability wise."

Dr. Sites noted on February 24, 2009:

It is more likely than not that the degenerative changes of the medial femoral condyle and the chondral defect of the medial facet of the patella are preexisting conditions. It is more likely than not that the lateral and medial meniscus tears are as a result of his injury on or about 08/22/08....

The claimant testified that he was off work for two months following surgery.

Dr. Sites reported on April 16, 2009:

Larry returns to the clinic today doing very well with his right operated knee. He occasionally takes an ibuprofen for pain.

PE: Examination reveals no effusion, his calf and thigh are soft and nontender....

I will allow him to return to regular work duties on 04-19-09, seeing him back in six weeks, and if doing well I will release him at that time, if not, he may need additional treatment such as gel injections or others....

A hearing was held on August 19, 2009. The claimant contended at that time that he was entitled to a period of temporary total disability. The claimant testified that his

knee was doing "great" and that he had returned to full work duty.

An administrative law judge filed an opinion on September 16, 2009. The ALJ found, in pertinent part, "3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right knee while employed by respondent on August 22, 2008."

The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

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 employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). Preponderance of the evidence means evidence of greater convincing force and implies an overbalancing in weight. *Barre v. Hoffman*, 2009 Ark. 373, ___ S.W.3d ___ .

In the present matter, the Full Commission finds that the claimant proved he sustained a compensable injury to his right knee. The claimant, a credible witness, testified that he felt a pop in his right knee while stepping over a conveyor at work on August 22, 2008. The claimant testified that he reported the accident to his supervisor the following Monday morning. The claimant's supervisor confirmed that the claimant reported, at approximately 10 a.m., that the claimant had sustained an injury at work the previous Friday. Dr. Sites' records corroborated the claimant's testimony. Dr. Sites noted on October 2, 2008 that the claimant had suffered from "ongoing right knee pain since 08-22-08. He was stepping over a conveyor belt at work when he twisted his knee and felt a pop, followed by a large amount of swelling over the next couple of hours." Dr. Sites performed surgery on the claimant and noted a torn medial and lateral meniscus in the claimant's right knee. Dr. Sites stated on February 24, 2009, "It is more likely

than not that the lateral and medial meniscus tears are as a result of his injury on or about 08/22/08." We find that Dr. Sites' opinion addressing compensability was stated within a reasonable degree of medical certainty in accordance with Ark. Code Ann. §11-9-102(16)(B).

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right knee. The claimant proved there was an accidental injury causing physical harm to the body which arose out of and in the course of employment. The accidental injury required medical services and resulted in disability. The injury was caused by a specific incident, identifiable by time and place of occurrence on August 22, 2008. The claimant established a compensable injury by medical evidence supported by objective findings, namely the meniscus tears noted by Dr. Sites. The administrative law judge's decision is reversed.

B. Temporary Disability

An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work. Ark. Code Ann. §11-9-521; *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The

healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

The Full Commission has determined in the present matter that the claimant sustained a compensable scheduled injury on August 22, 2008. The record indicates that the claimant was placed on light work duty immediately following the injury. The claimant underwent surgery to his right knee on February 24, 2009. The claimant testified that he was off work following surgery. Dr. Sites reported on April 16, 2009 that the claimant could return to regular work duties on April 19, 2009. The claimant testified at hearing that he had returned to regular work. The record therefore demonstrates that the claimant proved he was entitled to temporary total disability benefits from February 24, 2009 until April 19, 2009.

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 right knee on August 22, 2008.

We reverse the administrative law judge's finding that the claimant failed to prove he suffered a compensable injury. The claimant proved he was entitled to temporary total disability benefits from February 24, 2009 until April 19, 2009. Pursuant to Ark. Code Ann. §11-9-411, the respondents are entitled to an offset for group disability benefits received by the claimant. The claimant proved that the medical treatment of record, including surgery by Dr. Sites, was reasonably necessary in connection with the compensable injury to the claimant's right knee. 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 respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. In my opinion, the claimant has failed to meet his burden of proof.

Specifically, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent.

The evidence demonstrates that the claimant has a history of prior problems with his right knee. In 2006, he injured his right knee while moving an antique barber chair at his home and surgery was performed by Dr. Mitchell. The claimant was released with no restrictions and had no additional problems with his knee until August 22, 2008.

The claimant testified that he injured his knee when it twisted and popped as he stepped over a conveyor while on the way to un-jam his machine and that his pain at the time of the incident was 5 out of 10. He stated that as he was walking through the building to clock out 15 minutes later, it was necessary for him to stop momentarily because of pain in his knee. However, the videotape of the

respondent's time clock shows the claimant clocking out and he does not appear to be limping.

The claimant admitted that he did not report the injury to his mechanic, Mike Collins, with whom he was working on August 22. In addition, the claimant admitted that he did not report the incident to anyone with the respondent employer before leaving work that day. The claimant testified that he did not report the injury because the report he would be required to fill out was seven pages long and he thought his knee would get better.

The claimant stated that he went home after his shift ended and his right knee began swelling. The pain in his right knee was a "7" and his knee remained swollen over the weekend. The claimant testified that he primarily stayed in a chair because he believed it would make his knee feel better.

The claimant returned to work on Monday, August 25, 2008, at 7:00 a.m. and he performed his job duties for three hours. It was not until 10:00 a.m. that the claimant reported a work-related injury to his supervisor, Charles Goodman. The claimant explained his failure to report the injury earlier was that he could not get away from his press machine and he was waiting for Mr. Goodman to come by.

When I consider the claimant's testimony that he spent the entire weekend in his chair with his knee swollen, it is difficult to understand why he did not report the injury immediately upon his arrival at work on Monday, August 25. While the claimant testified that he was waiting for Mr. Goodman to come by and that he could not get away from his machine to report it earlier, the evidence does not support that explanation. Mr. Goodman is the press department supervisor and was the claimant's direct supervisor. Mr. Goodman testified that he arrives at the work floor at least ten minutes before his crew. In fact, the claimant admitted on cross-examination that Mr. Goodman is normally on the floor at least ten minutes before a shift begins. Given this, it is unclear why the claimant did not report the work-related injury to Mr. Goodman at that time. Furthermore, Mr. Goodman testified that the ends department has a group leader who is present on the floor and in charge at all times. The claimant admittedly did not report an injury to the group leader on Monday morning.

Finally, the claimant also testified that each machine has a "maintainer" who is an individual responsible for giving employees breaks for lunch or when they need to go to the bathroom. The claimant admitted that his

maintainer was present from 7:00 to 10:00 a.m. on Monday, August 25, 2008. Despite the presence of the maintainer, the claimant did not request a break in order to report an injury until 10:00 a.m.

While the claimant contends that he suffered a compensable injury to his right knee while stepping over a conveyor on that date, the claimant did not mention the incident to the co-employee with whom he was working on that date or report it to his supervisor. The claimant had previously reported work-related injuries immediately. The claimant testified that while on his way to clock out, it was necessary for him to pause because of pain in his knee and that he had developed a slight limp. However, a recording from the respondent employer showing the claimant walking up to clock out and then walking away does not reveal any sign of a limp. Furthermore, despite the claimant's testimony that his knee remained swollen over the weekend and that it was necessary for him to sit in his chair at home, the claimant still did not report a work-related injury when he arrived at work on Monday. The claimant's explanation that he did not report a work-related injury until 10:00 a.m. because he could not get away from his machine and he was waiting for a supervisor to

come by is contradicted by testimony that his supervisor was present on the floor at least ten minutes before his shift began and there were people who could have given the claimant a break earlier in that day. Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he suffered a compensable injury to his right knee while employed by respondent on August 22, 2008.

Therefore, for the reasons set forth herein, I respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, COMMISSIONER