

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F710149

CONNIE SHUPPS, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., SELF-INSURED EMPLOYER	RESPONDENT
TYNET CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 20, 2010

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

Claimant represented by the HONORABLE STEVEN R. McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed March 29, 2010. In said order, the Administrative Law Judge made 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 or about April 13, 2007, when the claimant sustained a compensable left knee injury.

3. Based on an average weekly wage of \$542.00, the claimant would be entitled to compensation rates of \$361.00 for temporary total disability benefits and \$271.00 for permanent partial disability benefits.
4. The claimant received a change of physician to Dr. Scott Bowen on February 13, 2009.
5. The claimant was assigned a 10% impairment to the left lower extremity which has been paid.
6. Respondent has paid two weeks and three days of temporary total disability benefits and permanent partial disability benefits owed as a result of the 10% impairment rating to the left lower extremity.
7. Respondent has paid and or has agreed to pay all authorized medical treatment incurred through the date of the hearing.
8. Respondent has not controverted medical maintenance but has fully controverted the claimant's entitlement to a total left knee replacement.
9. Claimant has proven by a preponderance of the evidence that her need for additional medical treatment from Dr. Scott Bowen, including the recommended total knee replacement surgery, is reasonable and necessary and causally related to her compensable work-related injury in April of 2007.
10. Claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits when she undergoes the recommended total left knee replacement surgery and enters a new healing period until a date yet to be determined.

11. Respondent has fully controverted the claimant's entitlement to a total left knee replacement and associated benefits.
12. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

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 March 29, 2010, 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 findings that the claimant proved by a preponderance of the evidence that she was entitled to

additional medical treatment in the form of 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.

The claimant sustained an admittedly compensable injury to her knee on April 13, 2007. The claimant received medical treatment and ultimately received a 10% permanent anatomical impairment to the left lower extremity. This rating was paid by the respondents. The claimant received a change of physician to Dr. Scott Bowen on February 13, 2009. Dr. Bowen has recommended that the claimant have a total knee replacement.

The claimant is 44 years of age and she has worked as a laborer for Tyson since March 9, 1998. On April 13, 2007, she was working in Quality Control and tripped on a splinter, hitting her leg on a wooden pallet. She fell on her knee on the concrete floor. She began having pain and reported the injury to her supervisor. Her supervisor took her to the nurse's station where she was given Tylenol. Her knee was iced down for approximately fifteen to twenty minutes and the claimant went back to work. The claimant continued to work and eventually underwent knee surgery on September 18, 2007. Due to a mis-communication, she explained

that she returned to work the day after her surgery. She was taken off work for a couple of weeks following her surgery. The claimant has continued to work full time for the respondent employer.

The claimant treated with Dr. Torrence Walker until she was granted a change of physician to Dr. Scott Bowen. Dr. Bowen gave her three gel injections.

The claimant currently works on the pre-freeze line grading chicken which she can do sitting down. She has difficulty getting over the concrete bench and bending to put her shoe covers on. She also has difficulty walking in the plant due to the shoe covers and the steep incline when exiting the plant.

The claimant testified that she can no longer do yard work, walk around the track, or play with her kids. She explained that she has always been active. Her injury has affected her activities such as the laundry, the cooking, and other activities. She explained that she has to lay her leg a certain way in the bed to get comfortable and is in pain if she moves. The more weight and the longer she stands or walks causes the throbbing in her knee to get harder. The claimant testified that she burned her hand while trying to keep from falling and accidentally grabbed the burner on the stove. She explained that she has to cook

sitting down. She currently takes three or four Tylenol in the morning and three or four in the afternoon. She has begun taking a few additional each day since she was put on the night shift. She estimated that she can stand approximately 15 minutes. She testified that she could not return to her previous job because she could not do the required walking, bending, and stooping.

The claimant weighs between 220 and 240 pounds and is about 5'1" tall. The claimant agreed that the doctors had told her that her weight was not helping her knee problem. The claimant takes Tylenol and diabetes medicine. Her last medical treatment was in May of 2009.

The claimant initially sought treatment with Health Care Plus on July 24, 2007, with complaints of persistent pain in her left knee after a fall on April 13, 2007. She was treated conservatively with anti-inflammatory and physical therapy. She returned for a follow-up evaluation on July 30, 2007. At that time, she recalled a second similar incident on July 17, 2007. She reported some improvement and the doctor was able to wrap the knee with an Ace bandage which he could not do at the last visit due to the pain. She was referred to Dr. Torrence Walker, an orthopedic specialist.

On August 2, 2007, Dr. Walker evaluated the claimant and recommended a steroid injection and ordered an MRI. On August 31, 2007, the claimant underwent an MRI on her left knee. The MRI revealed

1. Grade II chondromalacia in all three compartments of the knee with a small suprapatellar joint effusion.
2. MR suspicion of an incomplete free-edge tear in the body of the medial meniscus involving the inferior leaf. No displaced fragment.

Based on the MRI findings of a left knee medial meniscal tear and chondromalacia patella, Dr. Walker recommended an arthroscopy. On September 18, 2007, the claimant underwent a left knee arthroscopic partial medial meniscectomy and a left knee arthroscopic abrasion chondroplasty. The claimant was released to light duty on October 4, 2007.

On October 30, 2007, the claimant returned to Dr. Walker for a follow-up evaluation with continued complaints of aching pain in her knee. She also reported popping in the knee. He recommended physical therapy for aggressive stretching and quadriceps strengthening. She was continued on light duty work with no repetitive bending, squatting, or prolonged standing.

On December 20, 2007, Dr. Walker noted that the claimant returned for a follow-up evaluation after three months of physical therapy. He noted that she is down to taking six Tylenol daily and overall has "improved considerably". His examination revealed that the claimant's knee "appears normal." He assessed the claimant as being at maximum medical improvement and assigned a permanent anatomical impairment rating of 5% to lower extremity and a 2% whole person impairment. He released the claimant to full duty work with no restrictions.

On July 10, 2008, the claimant sought medical treatment with complaints of left knee pain with popping. She was given pain medication, referred to Dr. Walker, and returned to light duty. On August 4, 2008, the claimant was evaluated by Dr. Walker. Dr. Walker noted that the claimant stated that the pain began about a month ago when she twisted her knee again while at work. She reported that the pain had progressively gotten worse. He administered a diagnostic injection with Lidocaine which reduced the pain by 50%. He recommended Celebrex, physical therapy, and the use of a patellar knee sleeve.

On September 9, 2008, the claimant returned to Dr. Walker with complaints of left knee pain. He noted

that she reported a burning type of pain along the medial aspect of the knee radiating down into the tibia. She reported that her symptoms remained the same with some relief with the knee brace. Dr. Walker informed the claimant that she has mild arthritis in her knee, but due to the reported recent twisting type injury, Dr. Walker ordered a repeat MRI of the left knee and continued her on her current work status. On October 7, 2008, Walker notes that the clinical and MRI findings reveal changes in the knee which are indicative of an altered weight-bearing pattern. He noted that her symptoms should resolve with continued anti-inflammatory treatment and activity modification. He noted that she has had pain for over five to six months and is to a point near maximum medical improvement. He referred her for a functional capacity evaluation (FCE).

On October 20, 2008, the claimant underwent the FCE. The FCE results showed that the claimant demonstrated the ability to perform work within the medium physical demand classification. On October 30, 2008, the claimant returned to Dr. Walker who diagnosed the claimant with traumatic arthropathy of the left knee. He determined that she had reached maximum medical improvement and recommended her continued treatment include weight loss, anti-inflammatories,

Tylenol, and other topical analgesic. He noted "I do not recommend any additional surgical intervention." He recommended that the claimant return to a more sedentary type of job that would allow her to get up, walk around, stretch her knee, and rest on a regular basis. He assigned a 10% permanent anatomical impairment to the lower extremity, which is a 4% whole person impairment.

On February 13, 2009, the claimant was granted a change of physician from Dr. Walker to Dr. Scott Bowen. On February 24, 2009, Dr. Bowen noted that the claimant reported that she has become increasingly debilitated with inability to stand, walk, and perform activities of daily living. She reported constant pain and occasional catch and swelling of the left knee. Dr. Bowen diagnosed her with left knee osteoarthritis and morbid obesity. He noted that the x-rays revealed noticeable changes from films taken two years earlier and discussed with her that "the arthritic change could be exacerbated from her previous surgery". He noted "I do think her weight is a factor at this time." He recommended Visco supplementation, low impact activities and continued restrictions at work.

On March 23, 2009, Dr. Bowen reported that the claimant had developed significant arthritis. He noted that "I believe it is related to the meniscus tear which

has been accepted as a workers' compensation injury. In that regard, it is related to the original injury of April 13, 2007. This is my opinion to a reasonable degree of medical certainty." He added that it is also evident that her increased weight could aggravate the condition. On March 26, 2009, Bowen wrote "based on the one time exam and history that the patient provided, I do feel at this time that her osteoarthritis related to her original fall that resulted in her cartilage tears and subsequent surgery." He noted that her arthritis was a progressive condition and that she should be considered for a lap band type procedure.

On April 2, 2009, the claimant returned to Dr. Bowen for a follow-up evaluation. He noted that she reported that she "has been doing fairly well" and had lost approximately 18 pounds. He administered the first OrthoVisc injection. She returned on April 9, 2009, for the second injection. He noted that she did not notice much improvement following the first injection. He took the claimant off work until the 11<sup>th</sup> to give her rest.

On April 16, 2009, the claimant returned to Dr. Bowen for the third and final injection. Dr. Bowen noted "She has noted some improvement in a non-weight bearing setting up to this point but overall she is

still quite uncomfortable." Dr. Bowen noted that he would return her to work as of April 18, 2009.

On May 28, 2009, the claimant returned to Dr. Bowen for follow-up evaluation. He noted that she did not get any relief at all from the OrthoVisc injections and that she was dragging her leg and complained of progressive pain since her surgery in 2007. He diagnosed her with progressive post meniscectomy arthritis. Dr. Bowen recommended a total knee replacement because she was not a candidate for a partial knee with a BMI of greater than 40.

On June 4, 2009, Dr. W. Ray Jouett opined that the request for a total knee replacement be denied because the claimant had "multiple compartmental arthritis". He noted that a scope of the knee was done for a degenerated cartilage which he noted did not lead to a total knee. He observed:

1. Bumped her knee.
2. Approved for arthroscopic surgery. This turned out to be degenerative knee.
3. Now a request for a total knee.
4. She is said to be morbidly obese.
5. This is a arthritic degenerative joint, obese, and history of a bumped knee.

On December 31, 2009, Dr. Walker wrote:

Upon review of my notes, Ms. Shupps suffered an acute meniscal tear, which was treated operatively. She had a subsequent injury to her knee, which included a traumatic arthropathy. At the previous surgery, she had some evidence of early degeneration of her cartilage on the medial femoral condyle and the trochanteric groove. This revealed a total of two compartments that had early cartilage degeneration. She was advised that weight loss and anti-inflammatories would help with the underlying arthritis that was seen in her knee at the time of the arthroscopy. A total knee arthroplasty is indicated for her knee if non-operative treatments fail to provide relief from her arthritic related symptoms. The underlying chondromalacia in her knee and early arthritis, based on my record, would indicate that she had a pre-existing condition in her knee.

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.

In my opinion, a review of the evidence demonstrates that the claimant has failed to meet her burden of proof. Specifically, a total knee replacement is not reasonable and necessary medical treatment. The medical evidence demonstrates that the claimant has degenerative knee problems. The claimant is also morbidly obese, weighing between 220 and 240 pounds and she is only 5'1" tall. Each of the doctors were of the opinion that the claimant should lose weight because the knee problems were being caused by the claimant's weight. Dr. Bowen, in fact, told her that every pound of weight she would lose would equate to taking 5 pounds of weight off of her knee.

Further, the claimant's treating physician stated in a December 31, 2009 note that the claimant was advised that weight loss and anti-inflammatories would help with her underlying arthritis. In fact, the claimant's chondromalacia and early arthritis were

indications that she had a pre-existing condition in her knee.

Simply put, the evidence demonstrates that the claimant had degenerative knee problems before the injury. The underlying condition for which the claimant is seeking the total knee replacement is degenerative and not based upon her injury. The claimant is also obese, which adds extra problems with her knees. The claimant has been advised to lose weight and she has not. Therefore, I cannot find that the total knee replacement is reasonable and necessary medical treatment. Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, Commissioner