

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113243

MICHAEL SPERRY, EMPLOYEE	CLAIMANT
BEL ARCO, EMPLOYER	RESPONDENT NO. 1
FAIRFIELD INSURANCE COMPANY/ CANNON COCHRAN MANAGEMENT SERVICES INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MAY 3, 2011

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

Claimant represented by the HONORABLE FREDERICK S.
"RICK" SPENCER, Attorney at Law, Mountain Home,
Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL E.
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 and No. 3 waived appearance at the
hearing.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed December 22, 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 the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including November 6, 2001.
3. Claimant's compensation rates are \$187.00 and \$154.00.
4. Claimant sustained a compensable injury on November 6, 2001 to his right knee.
5. The prior Opinion in this matter of July 11, 2008, is the law of the case.
6. The parties agreed to stipulate that if claimant's wife, Vickie Sperry, was called as a witness, she would corroborate the claimant's testimony.
7. At the time of the hearing, the parties stipulated that respondents no. 1 will and are continuing to pay medical benefits for the claimant's right knee injury.
8. The claimant failed to establish a compensable consequence injury to his left hip by medical evidence supported by objective findings.
9. The claimant proved by a preponderance of the evidence a compensable consequence injury to his left knee.
10. The claimant proved his entitlement to medical treatment for his left knee.
11. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act, including, but not limited to temporary total disability.

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 December 22, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

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

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's findings. Specifically, I concur in the majority's finding that the claimant's hip problems are not related to his compensable injury. However, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that his left knee problems were a compensable consequence of his right knee injury.

The claimant injured his right knee on November 6, 2001. Ultimately, the claimant ended up having a total knee replacement, which was performed in

April of 2008. After a prior hearing regarding whether the knee replacement was related to the compensable injury, a finding was made in the claimant's favor. The issues in the present matter are whether the claimant sustained compensable injuries to his left knee and left hip. It was the contention of the claimant that the left hip and the left knee problems were due to his altered gait and altered weight bearing because of his right knee condition. In my opinion, the evidence demonstrates that neither the left knee nor the left hip are related to the claimant's right knee problems.

The evidence demonstrates that it was not until July of 2010 that the claimant mentioned a problem with his left knee. X-rays were taken of the claimant's left knee which indicated that it was normal. The claimant mentioned left hip problems to his doctor in February of 2008. Again, there are no tests documenting that anything is wrong with the claimant's hip.

The respondents sent the claimant to Dr. Tad Pruitt for an independent medical evaluation. Dr. Pruitt concluded that the claimant's healing period had ended and the claimant had a 37% permanent anatomical impairment rating to his leg due to the claimant's right knee replacement. Dr. Pruitt opined that the claimant's left hip problems were subjective in nature and there

were no objective findings. Dr. Pruitt did not mention the claimant's left knee at the time of the independent medical evaluation. The claimant had not mentioned any left knee problems to Dr. Pruitt.

The deposition of the claimant's treating physician, Dr. Chris Arnold, was introduced. Dr. Arnold agreed that there were no objective medical findings of hip problems, and that his opinion that the hip was related to the claimant's right knee problems was based upon his examination and the claimant's pain responses to palpation. He said there was some minor swelling of the claimant's left knee, but he could not definitively conclude exactly what caused the swelling.

The Administrative Law Judge found that the claimant's left hip problems were not related to the claimant's right knee replacement and this decision should be affirmed. However, the decision finding that the left knee was related should be reversed.

The evidence demonstrates that it was not until July of 2010 that the claimant indicated to any doctor or any other medical provider that he was having problems with his left knee. The claimant had a total knee replacement two years prior to the left knee problems. This was almost 10 years after the claimant's compensable injury and two years after the knee

replacement surgery. The evidence demonstrates that the claimant is 59 years old, and there can be other explanations for swelling in his knee. There was no objective medical testing of the claimant's left knee other than an X-ray, which was normal. Dr. Arnold had opined that the claimant had a meniscus tear, but admitted he would not know for sure until he got an MRI.

With regard to the left hip, there were no objective findings as well. The only evidence was a positive response to palpation with regard to pain that Dr. Arnold performed, which is purely subjective. The medical evaluation of Dr. Pruitt conclusively stated that there were no objective findings, of any hip problems. The only evidence we have of any related problems is the opinion of Dr. Arnold, whose testimony is based on conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Therefore, after I consider the fact that the claimant did not complain for almost 10 years after his right knee injury of left knee pain and almost 8 years

after that injury of any hip problems, and the fact that Dr. Arnold found no objective findings, I find that the claimant has failed to meet his burden of proof for the left knee and left hip problems.

Therefore, for all the reasons set forth herein, I must respectfully concur in part and dissent in part from the majority's opinion.

KAREN H. MCKINNEY, Commissioner