

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H208370

JASON HOUSE, Employee	CLAIMANT
PENSKE LOGISTICS, INC., Employer	RESPONDENT
OLD REPUBLIC INSURANCE CO., Carrier/TPA	RESPONDENT

OPINION FILED OCTOBER 2, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney, Fort Smith, Arkansas.

Respondents represented by JARROD S. PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 28, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 28, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. Claimant sustained a compensable injury to his right knee on June 15, 2022.
3. The claimant was earning an average weekly wage of \$1,100.00 which would entitle him to compensation at the weekly rates of \$733.00 for total disability benefits and

\$558.00.00 for permanent partial disability benefits.

4. Claimant has been assigned an impairment rating of 37% to his right lower extremity.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent disability benefits in an amount equal to 37% to the lower extremity.

2. Attorney fee.

The claimant contends he is entitled to permanent partial disability benefits for his compensable injury and that his attorney is entitled to the statutory fees.

The respondents contend that all appropriate benefits have been paid. The claimant suffered a twisting injury to his right knee resulting in a meniscal tear. Prior to his injury, he had surgery on his right knee and had a prior diagnosis of osteoarthritis which was deemed to be bone on bone. Dr. Creech's report of 8/30/22 indicated the claimant has had chronic right knee pain for years. Medical reports, including the surgical report, support the diagnosis of osteoarthritis being the sole need for the total knee replacement. In light of this, it is respondents' position that the claimant's work related meniscal injury is not the major cause of the need for the total knee replacement or the permanent impairment that has been assigned. Thus, it is respondents' position that they are not liable for that impairment rating.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on June 28, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 37% to the lower extremity for his compensable injury.

FACTUAL BACKGROUND

Claimant is a 51-year-old high school graduate who has primarily been employed as a truck driver for the last twenty-five years. He was involved in a motor vehicle accident in 1997 in which he injured his right hip and fractured his right femur and kneecap. This resulted in surgery on both his right hip and his right knee.

On June 15, 2022, claimant was working for respondent driving a truck hauling live turkeys from a farm to a processing plant. As he was pre-tripping his trailer by dollying up the landing gear, he stepped in a hole, causing his right knee to twist and pop.

After some initial treatment at MedExpress, claimant was referred to Dr. Trent Johnson, orthopedic surgeon, for treatment on July 15, 2022. Dr. Johnson noted that claimant had a history of post-traumatic arthritis of the right knee and diagnosed his current condition as an exacerbation of the arthritis in the right knee. Dr. Johnson prescribed physical therapy and gave claimant an injection.

In his report of August 12, 2022, Dr. Johnson noted that the injection had provided claimant only a few days of relief and that claimant's knee pain had gotten to the point

that it was no longer tolerable. Dr. Johnson referred claimant to Dr. Kramer for a total knee arthroplasty evaluation. Instead of seeing Dr. Kramer, claimant was sent by respondent for an evaluation with Dr. Jonathan Creech, orthopedic surgeon.

In a report dated August 30, 2022, Dr. Creech noted that claimant had a twisting injury at work that exacerbated his chronic right knee pain. Dr. Creech performed a right robotic total knee arthroplasty on November 16, 2022. Medical records following the surgery indicate that claimant had a good result from the procedure.

Dr. Creech sent claimant for a functional capacities evaluation and an impairment rating evaluation which were performed on April 19, 2023. The functional capacity evaluation determined that claimant gave a reliable effort with all consistency measures within expected limits. In addition, the impairment evaluation determined that claimant had an impairment rating of 15% to the body as a whole or 37% to the lower extremity.

Respondent has not accepted liability for the impairment rating and as a result, claimant has filed this claim contending that he is entitled to payment of permanent partial disability benefits based on the 37% impairment rating to the lower extremity.

ADJUDICATION

Claimant contends that he is entitled to payment of permanent partial disability benefits based on the 37% impairment rating assigned to him following his surgery. The relevant statutory law is codified at A.C.A. §11-9-102(4)(F)(ii) which states:

- (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a pre-

existing disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

A.C.A. §11-9-102(14)(A) defines “major cause” as more than fifty percent (50%) of the cause.

This statute was addressed by the Arkansas Supreme Court in *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W. 3d 591 (2008). In that case, Hickman slipped and fell hitting his right knee against a platform on April 26, 2002. An injury to Hickman’s right knee was accepted as compensable by Kellogg. (There was also an injury to Hickman’s back at that time, but issues involving the back are not relevant to this discussion.) An x-ray of Hickman’s right knee showed severe, multi-compartmental osteoarthritis with no findings of acute traumatic injury. An MRI of Hickman’s right knee dated August 15, 2002 showed a small joint effusion and degenerative arthritic changes in the right knee.

Hickman eventually underwent a total knee replacement surgery on September 29, 2004, and this surgery was accepted and paid for by Kellogg. Hickman’s treating physician assigned an impairment rating of 30% to the lower extremity for the surgery. Kellogg did not accept liability for the impairment rating and a hearing was conducted. Following decisions by an administrative law judge and the Full Commission, the Court of Appeals reversed and found that since Kellogg had stipulated that the knee was compensable, it could not avoid responsibility for surgery and the impairment rating. An appeal to the Arkansas Supreme Court followed.

The Court first noted the requirements of A.C.A. §11-9-102(4)(D) and (16). It then noted that in order for Hickman to be entitled to permanent benefits, he was required to show (1) he sustained an injury arising out of and in the course of his employment; (2) that the injury was caused by a specific incident; (3) that the injury caused internal or external physical harm to his body; (4) that the injury is supported by objective findings; and (5) that the injury was the major cause of the disability or need for medical treatment. The Court noted that the first four factors were supported by the evidence and the parties' stipulations. The Court stated:

With regard to the fifth factor, the key issue is whether, pursuant to Ark. Code Ann. §11-9-102(4)(F)(ii)(a), Hickman's compensable knee injury, stemming from his work-related April 26, 2002 accident, was the "major cause" of his resultant impairment rating.

The Court went on to find that Hickman failed to prove that his work injury was the major cause of his total knee replacement surgery and resulting impairment rating. In reaching its decision, the Court noted Hickman's pre-existing degenerative knee condition which had been described as significant as well as the diagnostic test showing severe post-traumatic degenerative arthritis with no acute findings of traumatic injury. Hickman's treating physician noted that these findings existed prior to the April 26, 2002 injury.

The Court also noted that medical records indicated that all physical evidence from Hickman's work-related injury had resolved itself by the time of his knee replacement surgery. And finally, the Court noted that Hickman's surgeon had opined that the severe pre-existing degenerative changes in his right knee were the major cause of the surgery and impairment rating.

In making its finding that Hickman had failed to prove that his injury was the major cause of the total knee replacement surgery and resulting impairment, the Court noted:

Further, there is no evidence that the need for Hickman's knee-replacement surgery and the resulting impairment would not have occurred but for the work-related injury.

In a footnote to that statement, the Court noted:

We note that when a compensable injury combines with a pre-existing condition to cause the need for treatment, such as knee surgery, permanent benefits are payable for the resulting impairment *only* if the injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. §11-9-102(4)(F)(ii)(b) (Supp. 2007) (emphasis added). Thus, the evidence of a causal connection between the employment-related injury and the need for surgery, which was sufficient for purposes of determining the compensability of the knee injury and the knee surgery, did not automatically resolve the key issue in determining entitlement to permanent benefits: whether the compensable knee injury was the *major* cause of Hickman's eventual need for a total knee replacement.

In other words, while a causal connection is sufficient to prove a compensable injury and liability for surgery, it does not automatically resolve the issue of permanent benefits which requires a showing that the injury was the major cause of the need for treatment and the resulting impairment.

In this case, claimant also had a significant history of a pre-existing degenerative condition. In 1997 claimant was involved in a motor vehicle accident which resulted in a fracture of the right femur and kneecap. Claimant underwent surgery on his right knee as a result of this prior motor vehicle accident. Although claimant testified that after he recovered from that injury and the resulting surgery he did not have any additional

problems with his right knee until after the June 15, 2022 injury, the medical records reflect otherwise.

On December 12, 2016, claimant was evaluated by Dr. James Long for complaints involving his left knee. Although the focus was on the left knee, Dr. Long's medical report indicates that an x-ray was also taken of claimant's right knee which showed diffuse arthrosis, particularly in the medial compartment and changes in the patellofemoral joint consistent with "significant posttraumatic degenerative change." Dr. Long's diagnosis from that evaluation included: Severe posttraumatic arthrosis of the right knee. In that same report, Dr. Long also stated:

The degeneration of the right hip and the right knee may eventually require replacement arthroplasty.
(Emphasis added.)

Claimant returned to Dr. Long on March 6, 2017 for a second injection in his left knee. Dr. Long again stated the following with respect to the right knee:

He has severe posttraumatic arthrosis of the right knee from fracture of the femur and injury around the patella that occurred in a motor vehicle accident in the 1990s.

Furthermore, in an office note dated June 29, 2021, Dr. Terri Lewelling stated:

History left hip replacement, has been told that he needs both knees replaced, shoulders hurt from previous injury. States he is not ready to see ortho. When it gets too bad, he will consider it.
(Emphasis added.)

Finally, approximately one month before the June 15, 2022 accident, claimant was seen by Dr. Lewelling for hypertension on May 11, 2022. Dr. Lewelling's note of that date

contains the following notation:

Knee bone bone on the right; Lots of pain all the time;
Pt is not helpful; walking is hard after ½ day; can go
back out after sitting 2 yrs [sic]; Last injection was
7-10 yrs ago; 1 mo benefit.

These complaints regarding claimant's right knee pain were noted only one month before his compensable injury.

As claimant correctly notes in his post-trial brief, his treating physicians opined that his work-related injury exacerbated the pre-existing arthritis in his right knee. However, as the Court in *Hickman* noted, evidence of a causal connection may be sufficient for proving compensability of the knee injury and liability for the knee surgery; however, the key issue in determining entitlement to permanent benefits is whether the knee injury was the major cause of the need for the total knee replacement.

I find that claimant has failed to prove by a preponderance of the evidence that his compensable injury was the major cause of the permanent disability or need for treatment. Claimant's pre-existing condition was described as severe posttraumatic arthrosis of the right knee. According to Dr. Lewelling's report of June 29, 2021, claimant had been told that he needed both of his knees replaced and that when "it gets too bad, he will consider it." Thereafter, in his report of May 11, 2022, Dr. Lewelling indicated that claimant's right knee was bone on bone and that claimant was having lots of pain. He also noted that claimant stated that walking was hard after one-half a day and that he had to sit for a period of time before returning to work.

While Dr. Creech suspected that claimant might have a meniscal injury or some other soft tissue injury on top of his arthritis, this was not established according to the

November 16, 2022 operative report. Instead, the operative report indicates a preoperative diagnosis of right knee osteoarthritis with a postoperative diagnosis as the same osteoarthritis.

Thus, while claimant's pre-existing arthritic condition was aggravated by the injury on June 15, 2022, resulting in payment of compensation of benefits and medical treatment, the injury was not the major cause of the permanent impairment or the need for treatment. Therefore, pursuant to A.C.A. §11-9-102(4)(F)(ii)(a) and (b), and the decision in *Hickman*, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to payment of permanent disability benefits in an amount equal to 37% to the lower extremity.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 37% to the body as a whole. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondents are responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$356.45.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE