

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO.: H004413**

STEPHEN L. JOHNSON, Employee	CLAIMANT
MAINTENANCE WAREHOUSE, PULASKI COUNTY SPECIAL SCHOOL DISTRICT, Self-Insured Employer	RESPONDENT
ARKANSAS SCHOOL BOARDS' ASSOCIATION WORKERS' COMPENSATION TRUST, Carrier/TPA	RESPONDENT

OPINION AND ORDER FILED JUNE 23, 2022

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Pulaski County, Arkansas.

Counsel for the Claimant: HONORABLE DANIEL E. WREN, Attorney at Law, Little Rock, Arkansas.

Counsel for the Respondents: HONORABLE KAREN H. MCKINNEY, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on March 29, 2022, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on December 8, 2021, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The Employee/Employer/Carrier/TPA relationship existed at all relevant times, including July 2, 2020, on which date the Claimant sustained a compensable right knee injury for which certain benefits have been paid;
- (3) The Claimant's average weekly wage on the date of injury was sufficient to entitle him to compensation rates of \$698.00 and \$524.00 for temporary total and permanent partial disability benefits, respectively; and,
- (4) The Respondents have controverted the Claimant's entitlement to the additional benefits herein alleged.

The pre-hearing Order also reflected the issues to be adjudicated, as set forth below:

- (1) Whether the Claimant is entitled to additional medical treatment and associated expenses in relation to his compensable right knee injury of July 2, 2020;
- (2) Whether the Claimant is entitled to temporary total disability benefits from November 13, 2020, through a date yet to be determined; and,
- (3) Attorney's fees in relation to controverted indemnity benefits.

All other issues were reserved. During preliminary discussions, the Commission's pre-hearing Order of December 8, 2021, was introduced into the record without objection as Commission Exhibit No. 1. (TR 9) In addition, the parties' respective exhibits were likewise introduced into the record without objection. (TR 9-10) Finally, the parties' Joint Exhibit No. 1, comprised of the transcript of the oral deposition of Dr. Martin Siems taken on March 22, 2022, was introduced into the record without objection and retained in the Commission's file. (TR 10-11)

Findings of Fact and Conclusions of Law

- (1) The parties' stipulations are accepted as findings of fact herein, inclusive of the Commission's jurisdiction over this claim;
- (2) The Claimant has failed to prove, by a preponderance of the credible evidence, that he is entitled to additional medical treatment in relation to his compensable right knee injury of July 2, 2020, and has consequently failed to prove that he is entitled to additional temporary total disability benefits from November 13, 2020, through a date yet to be determined; and,
- (3) All other issues are reserved.

Applicable Law

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3).

In addition, Ark. Code Ann. 11-9-508(a)(1) provides that:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary *in connection* with the injury received by the employee. (Emphasis added)

It is well-known that in workers' compensation law, an employer takes the employee as he finds him, and that employment circumstances which aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (Ark. App. 2003) However, an aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. (*Id.*, citing *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

In order to demonstrate a compensable “specific incident” injury, a claimant must prove, by a preponderance the evidence, that he or she sustained an “accidental injury causing internal or external physical harm to the body...arising out of and in the course of employment” and which is identifiable by time and place of occurrence. Ark. Code Ann. §§11-9-102(4)(A)(i) and (E)(i). The alleged injury must also occur at a time when “employment services” were being performed and must be established by medical evidence supported by “objective findings.” Ark. Code Ann. §§11-9-102(4)(B)(iii) and (D). In turn, “objective findings” are those findings “which cannot come under the voluntary control of the patient.” Ark. Code Ann. §11-9-102(16)(A)(i). See also, Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3).

Further, Ark. Code Ann. §11-9-102(16)(B) requires that medical opinions addressing compensability and permanent impairment must be stated with a reasonable degree of medical certainty. In turn, the Arkansas Supreme Court has held that terms such as "could," "may," or "possibly" lack the definiteness required to meet the claimant's burden to prove causation pursuant to section 11-9-102(16)(B). *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (Ark. 2000)

With respect to temporary total disability benefits, such are payable for unscheduled injuries when an injured employee remains within his or her healing period and suffers a total incapacity to earn wages. *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244 (Ark. 1981) However, with respect to scheduled injuries, such as those presented herein, temporary total disability benefits are to be paid "during the healing period or until the employee returns to work, whichever occurs first." *City of Fort Smith v. Kaylor*, 2019 Ark. App. LEXIS 546.

Also, it is long-settled that questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar's Head Provisions Co.*, 2017 Ark. App. 133 (2017)). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant's credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)).

Finally, a claimant’s testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

Testimony

Stephen L. Johnson

Upon direct-examination, *inter alia*, the Claimant testified that he had worked as a plumber for Respondent Employer since November, 2012, before his right knee injury of July 2, 2020. (TR 12) On the latter date, the Claimant was working underneath a sink and felt a “pop in my right knee on the inside of my right knee” as he attempted to get up from underneath the sink. (TR 14) The Claimant acknowledged that he had previously suffered from bilateral knee arthritis “for a while,” had undergone a left total knee replacement in 2017 performed by Dr. Siems, had experienced a “fantastic” recovery from such which allowed him to return to full-time work within six or seven weeks, and had only dealt with right knee pain “Every great once in a while” following his left total knee replacement in 2017. (TR 16-17)

According to his testimony, the Claimant ultimately returned to Dr. Siems following his compensable right knee injury of July 2, 2020, and reached a point at which he could no longer put on his own shoes and socks or walk to his dock on the Little Red River to go fishing. (TR 19; 22-23) Following the Respondents’ controversion of additional benefits, the Claimant obtained a total right knee replacement under his private health insurance, which was performed by Dr. Siems on March 15, 2021. (TR 23-24) Thereafter, according to his testimony, the Claimant developed a post-operative infection in his right knee and underwent revision surgeries, again performed by Dr. Siems. (TR 24-25) Since then, his right knee is “not healing good,” and testified that “There’s no way I could” return to work. (TR 25-26)

With further respect to his total left knee replacement in 2017, the Claimant testified that such “took a lot of the pain away” from his right knee since he was no longer putting “all the pressure on my right – my right leg anymore.” (TR 26) The Claimant also acknowledged that his physicians had told him that he would require a total right knee replacement in the future due to his osteoarthritis. Specifically:

A: Yes, they had. I thought, well, that one went so good, in a year I’ll just go ahead and have my other one done.

Q: Why didn’t you have –

A: But –

Q: Go ahead.

A: Well, it relieved so much pain there was no need in it.

Q: On September 2 (sic), 2020, before you had popped – felt that pop in your knee, did you have any plan – active plan at that time to have your right knee replaced?

A: No. (TR 26-27)

During cross-examination, *inter alia*, the Claimant participated in the following exchange:

Q: And as you testified, you were taking the narcotic medication for your left knee before the left knee injury.

A: Yes, I was.

Q: You were also taking the narcotic medication for your right knee after the left knee replacement surgery.

A: Yes, very – very – very occasionally.

Q: And what you classified as occasionally was maybe once a month, maybe every couple of weeks. That was your testimony, right?

A: Yes, or even farther – I mean even – even farther.

Q: But before your right knee replacement – before this injury at work, you were taking narcotic pain medication for pain in your right knee, correct?

A: Yes.

Q: And you were taking – continuing to take Meloxicam for your arthritis in your right knee, correct?

A: Yes.

Q: And you continued on that Meloxicam from Dr. Reardon after the left knee replacement up until – and you're still taking it at the time of the incident in July of 2020, correct?

A: Yes, I was.

Q: So you were never without medication at your disposal for your right knee before this injury occurred. Isn't that a true statement?

A: Yes, it is. (TR 39-40)

In addition:

Q: So you knew that you had degenerative arthritis in your right knee and you knew because the doctors told you, you were going to need a total knee replacement in the right knee back in 2018.

A: I did, yes.

Q: All right. And I'm assuming Dr. Siems told you that's what you'd be looking at, correct?

A: Yes, he did.

Q: And you confided that to your P.C.P., Dr. Reardon?

A: Yes, I did. (TR 48)

Dr. Martin Siems

As noted above, Dr. Siems testified in this matter by way of oral deposition taken on March 22, 2022, the transcript of which was retained in the Commission's file as Joint Exhibit

No. 1. Dr. Siems, *inter alia*, testified that he first evaluated the Claimant on October 4, 2017, with respect to bilateral knee pain, albeit left greater than right. (JX 1 at 6-7; 9) Dr. Siems acknowledged that he had subsequently performed a left total knee replacement on the Claimant and, approximately six months later (February 13, 2018) also injected the Claimant's right knee with respect to his ongoing arthritis. (JX 1 at 12-13) With respect to the Claimant's primary care physician's notes of May 7, 2018, which reflected that the Claimant was "looking towards a total knee replacement in the right knee," Dr. Siems testified as follows:

Q: So either Dr. Reardon received that information from your office or from the Claimant. Would you agree with that statement?

A: Yes.

Q: And based upon your examination of the Claimant and his need for an injection in February of 2018, would it be a fair statement to say right total knee replacement was obviously a possibility at that point in time?

A: Yes. (JX 1 at 14-15)

According to his testimony, and following February 13, 2018, Dr. Siems did not evaluate the Claimant further until July 28, 2020, a date subsequent to the latter's initially compensable right knee injury of July 2, 2020. (JX 1 at 15) Dr. Siems thereafter ordered an MRI of the Claimant's right knee, which he stated had revealed:

Tricompartamental osteoarthritis with cartilage loss and osteophytes. That was abbreviated number one impression. The second impression is a small joint effusion, very small Baker cyst. The number three impression was complex macerated tear involving the posterior body of the medial meniscus. Two centimeter loculated ganglion or parameniscal cyst formation along the posteromedial margin of the medial tibial condyle. The number four is MCL strain with surrounding edema and partial interstitial tear of the distal fibers. (JX 1 at 18-19)

In addition, Dr. Siems participated in the following exchange:

Q: I agree. Thank you, Doctor. With regard to the MRI's findings, you would agree that the findings in number, the tricompartmental osteoarthritis, those are degenerative findings; is that correct?

A: Yes.

Q: Those findings of the MRI as identified in number one were not caused on July 2, 2020, when Mr. Johnson experienced a pop in his knee. Would you agree with that?

A: That's correct.

Q: And would the same also be true of number three, the complex macerated tear? Would that be a degenerative finding?

A: Yes.

Q: And with regard to the complex macerated tear and the findings under number three, would those likewise have preexisted the incident on July 2, 2020?

A: Yes.

Q: Number two, the small joint effusion. What would you attribute that to?

A: Likely arthritis *or* exacerbation of the arthritis. (JX 1 at 19-20; emphasis added)

Dr. Siems went on to testify that he did not think the Claimant's right knee pain was related to his Baker cyst, and that the latter's "partial interstitial tears" were "likely degenerative." (JX 1 at 20) In addition, Dr. Siems testified that the claimant "required a total knee replacement because he was having symptomatic arthritis of the knee and that's why I replaced his knee. You can have bone-on-bone changes and not require total knee replacement. I see people like that all the time." (JX 1 at 21)

Subsequently, Dr. Siems testified that the Claimant's right knee injury of July 2, 2020, "certainly tipped the course towards joint replacement." (JX 1 at 26) Also:

Q: Can you state within a reasonable degree of medical certainty that the work-related incident caused that need for surgery to accelerate?

A: Yes. (JX 1 at 28)

And:

Q: And how so?

A: Well, from his report, he was getting by just fine and doing okay up until the point where he had this injury at work. And from then, he just wasn't able to return. He had increased pain about the knee. And so it had to have some role in this downhill progress that he made to end up needing a total joint replacement. (*Id.*)

Dr. Siems further testified, in essence, that the Claimant had not reached the end of his healing period as of the date of the former's deposition but could perform sedentary work. (JX 1 at 29-30) Dr. Siems also agreed that the "major cause" for the Claimant's right total knee replacement was not the latter's injury of July 2, 2020. (JX 1 at 31) Upon further questioning with respect to the incident of July 2, 2020, having "tipped the course" of treatment thereafter, Dr. Siems, *inter alia*, testified that the former was "functioning and working and was able to work and then couldn't after this incident at work." (JX 1 at 33-24)

Also:

Q: And, Doctor, do you stand by your statement within a reasonable degree of medical certainty that this incident on the job had at least some effect on the need his knee surgery, total knee replacement?

A: Yes. (JX 1 at 36)

The remainder of Dr. Siems' deposition testimony essentially revolves around what amounts to "objective" or "subjective" findings in relation to this matter.

Medical/Documentary Evidence

I have reviewed the entirety of the medical evidence presented herein, the most salient

and relevant of which is discussed below in further detail. Medical and documentary evidence duplicated by the parties will only be cited to one party's exhibit.

On July 13, 2018, the Claimant presented to Dr. Joseph Reardon for an annual exam and reported that he had "recovered well" from his left knee replacement of December 17, 2017, but was "now dealing with the right knee which also has OA. Had recent steroid injection via ortho and this has helped. He only uses the norco (sic) sparingly." On the same date, Dr. Reardon also commented that the Claimant "will eventually need right total knee." (CX 1 at 1; 5) Previously, on July 26, 2017, during a visit to Dr. Reardon, the Claimant reported "? (sic) radiation of pain from the OA of the right knee." (RX 1 at 8) As also noted above, Dr. Siems provided a steroid injection with respect to the Claimant's right knee on February 13, 2018. (RX 1 at 39)

On July 2, 2020, the Claimant presented to Concentra Health Centers in relation to his compensable injury of such date with complaints of right medial knee pain. The Claimant was diagnosed with a right knee sprain and received a physical therapy referral in relation to such. (CX 1 at 6-8)

Following his return to Dr. Siems thereafter, the Claimant underwent an MRI of his right knee on August 21, 2020, which yielded findings consistent with those noted above with respect to Dr. Siems' deposition testimony. (CX 1 at 25) Dr. Siems evaluated the Claimant on the same day, and assessed "right knee medial collateral ligament tear, degenerative meniscal tear, OA right knee," once again injected the Claimant's right knee, and ordered physical therapy. (CX 1 at 28) On September 22, 2020, Dr. Siems noted that the Claimant had been "improving with physical therapy," and assessed "Right knee arthritis with bone-on-bone changes and medial collateral ligament sprain. (CX 1 at 33) On October 12, 2020, Dr. Siems prepared a surgical order for a total right knee arthroplasty in relation to "Unilateral primary osteoarthritis, right

knee.” (CX 1 at 40) Such surgery was performed, as noted above on March 15, 2021. (CX 1 57-58) On March 29, 2021, and in response to an inquiry from Counsel for the Claimant, Dr. Siems marked “Yes” with respect to whether the Claimant’s work-related injury on July 2, 2020, had played any role in the Claimant’s need for a total knee replacement. (CX 1 at 59)

Following his right total knee replacement of March 15, 2021, the Claimant developed a post-operative infection which required resection and revision surgeries on May 17, 2021, and August 18, 2021, again performed by Dr. Siems. (CX 1 at 72-73; 90-91)

Adjudication

I note from the outset that the Respondents have not controverted this matter in its entirety following their initial acceptance, but instead have relied upon the Claimant’s pre-existing condition with respect to his alleged need for a total right knee replacement.

Consequently, I am constrained to find that this matter hinges not upon objective findings or whether a compensable aggravation of a pre-existing condition occurred on July 2, 2020, but is instead governed by the above-cited Ark. Code Ann. §11-9-508(a)(1).

It is obvious from the record that the Claimant had received active treatment and medication for his highly symptomatic right knee well before July 2, 2020. Further, by his own admission and as reflected in the medical records, the Claimant expected to have his right knee replaced as early as 2018. To the extent that “objective findings” may be an issue in this matter, I note that Dr. Siems agreed during his deposition that virtually all of the Claimant’s MRI findings from August 21, 2020, were degenerative in nature, with one possible exception, e.g., the “small joint effusion.” Even with regard to such, Dr. Siems opined that it was related to “likely arthritis or exacerbation of the arthritis.” I afford more weight to Dr. Siems’ opinion that said finding was “likely” attributable to the Claimant’s pre-existing arthritis, and find that the

term “or” does not equate with the above-cited case law concerning “reasonable medical certainty.”

In sum, I cannot find that the totality of the record places the burden of the Claimant’s total right knee replacement of March 15, 2021, upon the Respondents, and that he has thus failed to prove, by a preponderance of the evidence, that such treatment was reasonably necessary in connection with his compensable injury of July 2, 2020, pursuant to Ark. Code Ann. §11-9-508(a)(1).

ORDER

Based on the foregoing discussion, including my observation of the witness and his testimony, review of the hearing transcript, the documentary evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find that the Claimant has failed to prove, by a preponderance of the evidence, that he is entitled to additional medical treatment in relation to his compensable right knee injury of July 2, 2020, and has consequently failed to prove that he is entitled to additional temporary total disability benefits from November 13, 2020, through a date yet to be determined

The Respondents are ordered and directed to pay the Court Reporter’s fee within thirty days of billing for such if they have not already done so.

IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge