

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO.: H002750**

SCOTT NICHOLS, Employee	CLAIMANT
HASKINS PRIME LOGISTICS, LLC, Employer	RESPONDENT
OLD REPUBLIC INSURANCE CO. Carrier	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, TPA	RESPONDENT

OPINION AND ORDER FILED APRIL 22, 2021

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

Counsel for the Claimant: HONORABLE WHITNEY B. JAMES, Attorney at Law, Little Rock, Arkansas.

Counsel for the Respondents: HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on January 26, 2021, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on November 25, 2020, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The Employee/Employer/Carrier relationship existed at all relevant times, including April 29, 2020, on which date the Claimant sustained a compensable left lower extremity injury for which certain benefits have been paid; and,
- (3) The Claimant's average weekly wage on the date of injury was sufficient to entitle him to compensation rates of \$458.00 and \$344.00 for temporary total and permanent partial disability benefits, respectively.

The pre-hearing Order of November 25, 2020, also reflected the issues to be adjudicated, as set forth below:

(1) Whether the Claimant is entitled to additional medical and temporary indemnity benefits (for as yet unspecified dates), and related expenses, in association with his compensable left lower extremity injury of April 29, 2020;

(2) Whether the Respondents are liable for sanctions and late payment penalties in association with controversion of the Claimant's total left knee arthroplasty which he alleges to be related to his compensable injury of April 29, 2020;

(3) Attorney's fees in relation to controverted indemnity benefits.

All other issues were reserved. During preliminary discussions, the pre-hearing Order of November 25, 2020, was introduced into the record as Commission's Exhibit No. 1 without objection. (TR 9) In addition, Claimant's Exhibit Nos. 1, 2, and 3 were introduced into the record without objection. (TR 9-12) Also during preliminary discussions and prior to introduction of the pre-hearing Order into the record, Counsel for the Claimant clarified that the latter sought temporary total disability benefits from September 5, 2020, through September 22, 2020, and temporary partial disability benefits from September 23, 2020, through November 2, 2020, without objection. (TR 6-7; see also TR 24)

Findings of Fact and Conclusions of Law

(1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;

(2) The Claimant has proven, by a preponderance of the evidence, that his left total knee arthroplasty was related to his compensable injury of April 29, 2020, is entitled to appropriate benefits associated therewith, inclusive of temporary total disability benefits from September 5, 2020, through September 22, 2020, and temporary partial disability benefits from September 23, 2020, through November 2, 2020.

(3) The Claimant has failed to prove, by a preponderance of the evidence, that the Respondents herein should be held liable for late payments sanctions or penalties; and,

(4) The Claimant is entitled to attorney's fees with respect to controverted indemnity benefits.

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). Further, 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.

In addition, it is well-known that an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (Ark. App. 2003)

Finally, 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).

Testimony

Allen Scott Nichols

Upon direct examination, *inter alia*, the Claimant testified that he worked for Respondent Employer as a Delivery Associate on April 29, 2020, the date of his compensable left knee injury, and that he still worked for such as of the date of the hearing. (TR 12-13) The Claimant denied that he had any issues with his left knee at the time of his compensable left knee injury of April 29, 2020, was working at full-duty on such date, but acknowledged that he had undergone bilateral knee surgeries in 2015 "to clean both of 'em out so that I could finish nursing school."

(TR 13-14) On April 29, 2020, following his completion of a delivery, the Claimant was confronted by a large dog that "locked on" to his left knee. (TR 15) Following his defensive efforts, the Claimant was "probably 15 or 20 yards from my van so I wasn't gonna stick around to, you know -- so I was headed to my van as quickly as possible." (TR 16)

With respect to his eventual total left knee arthroplasty performed by Dr. Adam Smith, the Claimant testified, *inter alia*, as follows:

Q: Okay. And did you have to go to any preoperative testing for that procedure?

A: Yes, ma'am, I did. The -- the-- probably 8 to 10 days out from my surgery, I guess, for blood work and things and that nature.

Q: To the best of your knowledge, did the Workers' Compensation Carrier pay for your pre-op testing?

A: To the best of my knowledge they did pay for the pre-op testing.

Q: Your surgery was on September 4th, correct?

A: Yes, ma'am. (TR 21)

And,

Q: Okay. When did you first find out that the carrier had denied this procedure?

A: It was the Thursday after the surgery, and my physical therapist -- actually, you know, I was in bed and was laid up, obviously, but my son was takin' care of me and he answered the phone, and the - - that -- that's -- I -- I found through the physical therapy people that they had denied my physical therapy. Now, I didn't know at that time exactly that the surgery had been denied but I knew therapy had been denied and that was the start of --

Q: Okay. If you had known that the surgery was denied, would you have gone ahead and had [it] anyway?

A: No ma'am, I wouldn't have been able to afford to -- to -- to put -- the -- put the percentage down.

Q: Right. Would you have waited and held off for a little bit?

A: Yes, ma'am. (TR 22-23)

The Claimant thereafter agreed that he had returned to full duty as of November 22, 2020, for Respondent Employer. (TR 25)

During cross-examination, and following acknowledgment of his bilateral knee arthroscopies in 2015, the Claimant participated in the following exchange with respect to his pre-existing bilateral knee problems:

Q: Okay. When did you go to work for Haskins Logistics?

A: July 29th of, I believe, -- let's see. I worked all of '20 so 2019.

Q: Okay. But now from reading these medical reports, it looks like Dr. Adam Smith at least talked to you about a total knee replacement in October of 2018; is that right?

A: If that was correct, it would have been on my right knee. If I had any problems at all, it was my right knee.

Q: Okay. Now, the medical records show you've got bilateral problems with your knees. You have the same thing in both knees; is that right?

A: No, sir, that's not correct.

Q: Well, is your right knee worse than your left knee?

A: My right knee -- if -- if there's a problem with my knees, it was [my] right knee.

Q: Okay. But at some point and time somebody mentioned that you needed a total knee replacement before this dog ever bit you.

A: It was probably -- to my understanding it might have been brought up concerning my right knee in the future.

Q: Okay.

A: Somewhere down the road, on my right knee, I was going to have to have a knee replacement. (TR 26-27)

At a later point, during re-cross examination, the Claimant described "extreme pain" in relation to the dog-bite to his left knee, but confirmed that such did not "break the skin." (TR 46)

Medical and Documentary Evidence

I have reviewed the entirety of the medical and documentary evidence submitted herein, the most salient and relevant of which are discussed below in further detail.

On April 29, 2020, the Claimant presented to Dr. Remel Buslig with respect to a bite that did not break the skin but resulted in a painful left knee after "*running* from dog." (CX 1 at 1; emphasis added) A radiographic study of the Claimant's left knee on the same date revealed pre-patellar soft tissue swelling and suprapatellar joint effusion, along with his pre-existing arthritic changes. (CX 1 at 4) Subsequently, on July 24, 2020, Dr. Victor Vargas wrote that:

Once again, I have made the patient aware that the osteoarthritis is now being caused by the dog bite accident. I hope the injection provided today decrease (sic) the patient's symptomatology...I am considering (sic) with a reasonable degree of medical certainty that the patient has reached maximal medical improvement for the *aggravation* of the pain at the osteoarthritic left knee *aggravated* after the dog bite." (CX 1 at 21; emphasis added)

However, the Claimant eventually underwent a total knee arthroplasty performed by Dr. Adam Smith on September 4, 2020. (CX 1 at 27 and CX 3 at 1-6) Previously, a peer review procured by the Respondents and authored by Dr. Clarence H. Fossier on August 5, 2020, indicated that a total left knee arthroplasty was warranted. (CX 2 at 3-4) Even so, on the very date of the Claimant's total left knee arthroplasty, September 4, 2020, the Respondents sent a letter to Ortho Arkansas which advised that such was not authorized, on the basis that "Medical information from your office shows needs (sic) for surgery to be related to pre-existing medical conditions that were being treating (sic)." (CX 2 at 6)

Adjudication

I note from the outset that I found the Claimant to have been a credible witness, given that he was candid in his acknowledgement of pre-existing bilateral knee problems and prior treatment for such.

There is no dispute that the Claimant sustained a compensable left knee injury on April 29, 2020, for which the Respondents paid certain benefits and did not cease such payment until the very date of the Claimant's total left arthroplasty -- the necessity for which their own procured peer review had acknowledged. The medical evidence cited above clearly reflects that the Claimant's pre-existing left knee condition was aggravated by the incident of April 29, 2020, whether by way of the actual dog bite itself or the Claimant's effort to escape the incident. There is simply no medical evidence to demonstrate otherwise, other than the mere existence of his pre-existing left-knee condition. I cannot conclude that such was sufficient cause for the Respondents to deny the Claimant's eventual total left knee arthroplasty.

While the Claimant's compensable left knee injury of April 29, 2020, may not have been the sole or even "major"¹ cause of his eventual need for a total left knee arthroplasty, it is clear from the medical evidence and the Claimant's credible testimony that such was certainly a factor in said need. See *Williams v. L&W Janitorial, Inc.*; 85 Ark. App. 1 (Ark. App. 2004)

Consequently, I specifically find that the Claimant has proven, by a preponderance of the evidence, that the additional treatment rendered by Dr. Adam Smith in relation to the Claimant's compensable left knee injury of April 29, 2020, was reasonably necessary pursuant to Ark. Code Ann. §11-9-508(a)(1), and that the Claimant is entitled to appropriate benefits associated therewith, inclusive of medical and related expenses, temporary total disability benefits from

¹ I note that the question of "major cause" is not at issue in the present matter, given that a gradual-onset injury has not been alleged and that permanent benefits are not presently in dispute.

September 5, 2020, through September 22, 2020, temporary partial disability benefits from September 23, 2020, through November 2, 2020, and associated attorney's fees. I am unable to conclude or find, however, upon the facts presented herein, that the Respondents' conduct amounts to intentional controversion or otherwise warrants sanctions or penalties.

Order

The Respondents are ordered and directed to pay benefits consistent with the findings of fact made herein. All accrued sums shall be paid in lump-sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. §11-9-809. Pursuant to Ark. Code Ann. §11-9-715, the Claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. One-half of this fee shall be payable by the Respondents, and one-half shall be payable by the Claimant from the indemnity benefits awarded herein. The Respondents are ordered and directed to pay the Court Reporter's fee within thirty days of billing pursuant to Commission Rule 099.20.

IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge