

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G605091

PATRICIA G. KIZZIRE,  
EMPLOYEE

CLAIMANT

PETRUS STUTTGART, INC.,  
EMPLOYER

RESPONDENT NO. 1

CENTRAL ARKANSAS AUTO DEALERS SIF/  
RISK MANAGEMENT RESOURCES,  
INSURANCE CARRIER/TPA

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 13, 2023

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE KAREN H. McKINNEY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Vacated & Remanded.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed February 22, 2023. The administrative law judge granted the respondents' motion to dismiss. After reviewing the entire record *de novo*, the Full Commission vacates the administrative law judge's order dismissing the claim. We remand the matter to the administrative law judge for consideration of whether the respondents have paid for reasonably

necessary medical treatment provided in connection with the compensable injury to the claimant's right knee.

I. HISTORY

The record indicates that Pat Kizzire, now age 78, became employed with the respondents, Petrus Stuttgart, Inc. in January 1998. The parties stipulated that the claimant "sustained a compensable scheduled injury to the right knee" on December 21, 2015.

According to the record, the claimant treated at Baptist Health Stuttgart Medical Clinic beginning December 22, 2015 where the claimant was assessed with "Right knee pain." The claimant underwent a "Right knee arthroscopic partial lateral meniscectomy and tricompartmental chondroplasty" on July 18, 2016. The pre- and post-operative diagnosis was "Right knee lateral meniscus tear and osteoarthritis." The claimant testified that she underwent a right knee replacement in July 2017.

The claimant filed a Form AR-C, CLAIM FOR COMPENSATION, on November 28, 2017. The CLAIM INFORMATION section of the Form AR-C indicated that the claimant was claiming "additional benefits" to include Additional Temporary Total, Additional Temporary Partial Disability, Additional Permanent Partial, Additional Medical Expenses, Rehabilitation, and Attorney Fees.

The record indicates that the respondents paid temporary total disability benefits through February 25, 2018. On September 19, 2018, Dr. D. Gordon Newbern assigned the claimant a “right lower extremity impairment of 50%.” The parties stipulated that the respondents accepted a 37% permanent anatomical impairment rating.

A pre-hearing order was filed on January 30, 2019. The claimant contended, “Claimant contends that admitted compensable injuries were sustained to both knees 12/21/15. Claimant has had a knee replacement on the right side, for which she was given an impairment rating of 50%. Respondents have indicated they are only accepting 37%. The different (sic) is controverted. Claimant is also in need of treatment for her left knee/leg. Respondents are denying claim. Claimant reserves the right to pursue other benefits to which claimant may become entitled in the future. **Claimant’s attorney respectfully requests that any attorney’s fees owed by claimant on controverted benefits paid by award or otherwise be deducted from claimant’s benefits and paid directly to claimant’s attorney by separate check, and that any Commission Order direct the respondent to make payment of attorney’s fees in this manner.**”

The respondents contended, “Respondents contend that they accepted an injury to the claimant’s right lower extremity. Respondents further contend that the claimant did not sustain an injury to her left lower

extremity that is supported by objective medical findings. Finally, Respondents contend that the 50% rating assessed by Dr. Newbern on September 19, 2018 specifically uses portions of the Guides that use pain as a basis for impairment in contravention of Ark. Code Ann. §11-9-522(g) which provides that the Commission shall adopt an impairment rating guide to be used in the assessment of anatomical impairment and that the guide shall not include pain as a basis for impairment....”

The parties agreed to litigate the following issues: “**compensability (left leg pursuant to Ark. Code Ann. §11-9-102; medical treatment; additional thirteen percent (13%) in anatomical impairment; and attorney’s fees.** All other issues are reserved.”

A hearing was held on July 25, 2019. The claimant testified on direct examination:

Q. You are still undergoing active medical treatment and still under active care for your right knee in particular; correct?

A. Yes.

An administrative law judge filed an opinion on October 9, 2019. The administrative law judge found, among other things, that the claimant proved “she sustained a left knee injury on December 21, 2015, that remains untreated.” The administrative law judge directed the respondents “to pay an additional thirteen percent (13%) in anatomical impairment for the claimant’s right knee.” The administrative law judge found, “4. The

respondents are directed to pay all reasonable and necessary medical expenses for both knees within thirty (30) days of receipt, pursuant to Rule 30.”

The respondents appealed to the Full Commission. In an opinion filed August 14, 2020, the Full Commission reversed the administrative law judge’s October 9, 2019 decision with regard to the claimant’s left knee. The Full Commission found that the claimant did not prove she sustained a compensable injury to her left knee. The Full Commission also found that the claimant did not prove she sustained permanent anatomical impairment greater than the 37% rating accepted and paid by the respondents.

On May 19, 2021, the Full Commission granted a motion by Gary Davis to withdraw as the claimant’s attorney.

The record contains a **RESPONDENTS’ MOTION TO DISMISS** with a **CERTIFICATE OF SERVICE** dated October 12, 2022. The respondents stated in part:

1. Claim number G605091 involves an injury on December 21, 2015, when the claimant sustained a compensable injury to her right knee.
2. Respondents filed the First Report of Injury on July 19, 2016, and the AR-2 on July 27, 2016, accepting this as a compensable injury to the right knee....
3. Claimant filed an AR-C on November 28, 2017, requesting both initial and additional benefits....
4. Issues arose in this claim regarding whether the claimant also sustained a compensable injury to her left knee, claimant’s entitlement to additional medical treatment, and the claimant’s permanent impairment rating.

5. Following a hearing and appeal to the Full Commission, the Full Commission found that the respondents had paid the correct impairment rating and that the claimant did not prove she sustained a compensable injury to her left knee....
6. The Full Commission's August 14, 2000, opinion was not appealed and is now res judicata.
7. Claimant's attorney filed a Motion to Withdraw as Counsel on April 27, 2021, which was granted by the Full Commission in an order dated May 19, 2021....
8. All justiciable issues have been resolved by the hearing and Full Commission opinion.
9. Claimant has not requested a hearing on this claim in the last six months.
10. Pursuant to A.C.A. §11-9-702(a)(4), 11-9-702(d) and/or Commission Rule 099.13 Respondents move that claim G605091 be dismissed without prejudice for failure to prosecute this claim.

After a hearing, an administrative law judge filed an opinion on February 22, 2023. The administrative law judge ordered, "there is no alternative but to find that the Motion to Dismiss should be granted and this matter should be dismissed without prejudice at this time."

The claimant filed a notice of appeal to the Full Commission.

On May 12, 2023, the respondents filed a **MOTION TO ADMIT**

**ADDITIONAL EVIDENCE ON APPEAL TO THE FULL COMMISSION.**

The respondents moved to introduce into the record "a Conditional Payment Search from CMS to determine if Medicare has paid for any medical treatment that had been authorized by Respondents for claimant's compensable right knee injury."

The Full Commission filed a unanimous ORDER on June 23, 2023: “After consideration of Respondents’ motion with no objection by the Claimant to the motion and all other matters properly before the Commission, we find that the Respondents’ Motion To Admit Additional Evidence On Appeal To The Full Commission should be and hereby is granted.”

## II. ADJUDICATION

Ark. Code Ann. §11-9-702(Repl. 2012) provides, in pertinent part:

- (b) TIME FOR FILING ADDITIONAL COMPENSATION....
- (d) If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

An administrative law judge determined in the present matter, “I am compelled to find that the Motion to Dismiss should be granted due to the claimant’s lack of prosecution and the matter should be dismissed without prejudice.” The Full Commission does not affirm this finding.

The parties stipulated that the claimant sustained a compensable injury to her right knee on December 21, 2015. The claimant treated with various medical providers including Baptist Health Stuttgart Medical Clinic. The claimant filed a Form AR-C, CLAIM FOR COMPENSATION, on November 28, 2017. The claimant contended, among other things, that she

was entitled to “Additional Medical Expenses.” A pre-hearing order was filed on January 30, 2019 wherein the claimant contended that was entitled to an anatomical impairment rating greater than that accepted by the respondents. The claimant also contended, “Claimant reserves the right to pursue other benefits to which claimant may become entitled in the future.” The parties agreed to litigate issues including “medical treatment.”

A hearing was held on July 25, 2019. The claimant testified on direct examination that she was “still under active care” for her right knee. An administrative law judge filed an opinion on October 9, 2019. The administrative law judge found that the claimant sustained a compensable injury to her left knee in addition to the stipulated compensable injury to the claimant’s right knee. The administrative law judge ordered the respondents to pay an increased anatomical impairment rating. The administrative law judge also found, “4. The respondents are directed to pay all reasonable and necessary medical expenses for both knees within thirty (30) days of receipt, pursuant to Rule 30.” The respondents appealed to the Full Commission.

The Full Commission reversed the administrative law judge’s finding that the claimant proved she sustained a compensable injury to her left knee, and we reversed the administrative law judge’s finding that the claimant was entitled to an increased impairment rating. However, the Full



Commission did not disturb the administrative law judge's implicit finding that directed the respondents to pay for reasonably necessary medical treatment provided in connection with the claimant's compensable right knee injury.

The respondents now seek to dismiss the claim without prejudice. The respondents assert that the claimant has "failed to prosecute this claim." The record does not support this assertion. The Full Commission finds that the claimant has been diligent in prosecuting her claim. The parties stipulated that the claimant sustained a compensable injury to her right knee on December 21, 2015. The Full Commission did not modify or reverse the administrative law judge's October 9, 2019 opinion which directed the respondents to pay for all reasonably necessary medical treatment provided in connection with the compensable injury. There has not been a "want of prosecution" in the present claim, and the evidence demonstrates that the claimant has been diligent in requesting appropriate benefits.

The respondents have introduced into the record documentation of billing from various medical providers including the original medical provider, Baptist Health Medical Center Stuttgart. The Full Commission therefore vacates the administrative law judge's dismissal of this claim. We remand the matter to the administrative law judge for consideration of the

claimant's contention that the respondents have failed to pay for reasonably necessary medical treatment provided in connection with the compensable injury to the claimant's right knee.

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's determination that this matter should be remanded to the administrative law judge for consideration of whether the respondents have paid for reasonably necessary medical treatment provided for the claimant's 2015 right knee injury.

The facts in this matter are not in dispute. Prior to the respondent's October 12, 2022 Motion to Dismiss, the last filing was a May 19, 2021 order by the Full Commission granting a motion by Gary Davis to withdraw as the claimant's attorney. The claimant testified for the first time at the January 10, 2023 motion to dismiss hearing that after obtaining authorized medical treatment in 2020 which was paid for by the respondent carrier, the

claimant sought additional treatment on her right knee that was billed to and paid for by Medicare. (Hrng. Tr., P. 9). Concurrent with a May 12, 2023 motion to admit additional evidence on appeal, which was ultimately granted by the Commission, the respondents submitted a payment summary form from Centers for Medicare and Medicaid Services Conditional Payment Search reflecting its diligence in determining if Medicare has paid for any authorized treatment of the claimant's right knee. This summary shows that no payments have been made by Medicare since 2019. Thus, Medicare has not paid for any treatment of Claimant's compensable right knee injury after she last sought treatment in 2020 which was paid by the respondents. No hearing was ever requested by the claimant on this issue.

Our rules provide that "If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice." Ark. Code Ann. § 11-9-702(d). Further, Commission Rule 99.13 states "[u]pon meritorious application to the Commission from either party in an action pending before the Commission, requesting that the claim be dismissed for want of prosecution, the Commission may, upon reasonable notice to all parties, enter an order dismissing the claim for want of prosecution."

While the Majority finds that the claimant's ongoing medical treatment satisfies the Commission's requirement that a claim be diligently prosecuted, it is clear that without prompting by the motion to dismiss filed by the respondents, the claimant would not have addressed her nearly four-year-old concerns regarding Medicare billing. Further, there are no outstanding issues to litigate in this matter, nor has any hearing request been made on any issues since 2019. Those issues are res judicata. For these reasons, this matter should be dismissed without prejudice.

For the reasons stated above, I respectfully dissent.

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MICHAEL R. MAYTON, Commissioner