

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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CLERK OF COURT, CLERMONT COUNTY, OHIO

NANCY A. MEYERS :
Plaintiff : **CASE NO. 2016 CVD 01198**
vs. : **Judge McBride**
OHIO BUREAU OF WORKERS' : **DECISION/ENTRY**
COMPENSATION, ET AL. :
Defendants :

Fox & Fox Co., L.P.A., Bernard C. Fox, Jr. and Christopher Kneflin, counsel for the plaintiff Nancy A. Meyers, P.O. Box 207, Amelia, Ohio 45102.

Beirne & Wirthlin Co., L.P.A., J. Stephen Wirthlin, counsel for the defendant, James Annalee, Inc., Right at Home, 1745 Madison Road, Cincinnati, Ohio 45206.

Ohio Attorney General's Office, Workers' Compensation Section, Steven P. Fixler, counsel for the Ohio Bureau of Workers' Compensation, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202.

This cause came before the court for trial on November 30, 2017. At the conclusion of the trial, the court took the issues raised under advisement.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

EXHIBIT OBJECTIONS

The court reviewed the depositions of Dr. Arthur Lee, M.D. and Dr. Michael J. Rozen, M.D., and considered the objections therein. The following objections are hereby overruled:

1. Dr. Lee's deposition, pg. 37.
2. Dr. Rozen's Deposition, pg. 23.
3. Dr. Rozen's Deposition, pg. 57.
4. Dr. Rozen's Deposition, pg. 77.
5. Dr. Rozen's Deposition, pg. 79.
6. Dr. Rozen's Deposition, pg. 76.

PROCEDURAL BACKGROUND

The present case involves a denied workers' compensation claim. The plaintiff Nancy A. Meyers currently has allowances from the Bureau of Workers' Compensation to participate in the workers' compensation fund for a right knee sprain and patellofemoral syndrome of the right knee. The plaintiff sought administratively to amend her claim to include additional conditions of peroneal tendinitis of the right knee and for right patellofemoral joint chondromalacia in Claim No. 14-835442. The additional claims, however, were denied.

On August 26, 2016, the plaintiff filed a notice of appeal from two Hearing Officer Decisions dated July 12, 2016, which denied the above additional conditions. That same day, she filed a complaint asking to be found entitled to participate in the workers' compensation fund for the additional conditions and requested recovery of costs and statutory attorney fees.

The court held a bench trial on November 30, 2017. At trial, the plaintiff testified on her own behalf, and the parties also submitted deposition testimony from their

respective experts. At the outset of trial, counsel for the plaintiff indicated that the plaintiff would not move forward on the claim for peroneal tendonitis of the right knee, only right patellofemoral joint chondromalacia. As such, the court only considered the plaintiff's claim as to the latter condition. At the conclusion of the trial, the court took the matter under advisement.

STANDARD OF REVIEW

Pursuant to R.C. 4123.512(A), "[t]he claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case * * *." Appeals made under R.C. 4123.512 are reviewed by the trial court *de novo*.¹ R.C. 4123.5211(D) provides that the "[t]he court * * * shall determine the right to participate or continue in the fund upon the evidence adduced at the hearing on the action."

FINDINGS OF FACT

The plaintiff Nancy A. Meyers injured her knee while working as a nursing assistant. She was employed with the defendant James Annalee, Inc., Right at Home, and lived in Amelia, Ohio as of July 6, 2014. On that date, she was doing in-home care services for an elderly patient. The patient had slipped and fallen on the floor, and the plaintiff was trying to pick her up. When doing so, she heard a pop in her right knee and

¹ *Hornschemeier v. Buehrer*, 12th Dist. Clermont No. CA2016-11-079, 2017-Ohio-7071, ¶ 13, quoting *Bennett v. Admr., Ohio Bur. Of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, ¶ 17.

then immediately felt pain. She could barely move, and her right knee became swollen and was black and blue. The plaintiff had not previously had any problems with her right knee, nor had she had any treatment on her right knee before July 6th.

The following day, the plaintiff sought medical treatment with Dr. Patrick Weadick, a chiropractor. She already had an appointment with Dr. Weadick scheduled for an unrelated issue with her back. The plaintiff came in complaining of pain in her right knee, and Dr. Weadick diagnosed her condition as involving knee pain and swelling. He suggested physical therapy and MRI imaging.

Thereafter, Dr. Weadick referred the plaintiff to Dr. Arthur F. Lee, M.D., who is a board certified orthopedic surgeon. She first saw Dr. Lee on July 23, 2014. Initially, Dr. Lee believed that the plaintiff had a knee sprain and a possible meniscus tear, based upon some initial x-rays. On August 11th, Dr. Lee had the plaintiff undergo an MRI of her right knee. He found that there were changes in the patellofemoral joint with lateral patellar tilt, chondral blistering within lateral patellar facet, and that there was no full-thickness ulcer. There was also a small joint effusion present. He diagnosed her with mild patellofemoral chondromalacia, which is arthritis of the knee. During his testimony, Dr. Lee opined within a reasonable degree of medical probability that the mild patellofemoral chondromalacia preexisted the plaintiff's July 6, 2014 work injury.

The expert for the defense, Dr. Michael J. Rozen, M.D., also a board certified orthopedic surgeon, agrees that the plaintiff had a preexisting condition of mild patellofemoral arthrosis at the time of her July 6, 2014 injury.

Dr. Lee continued to treat the plaintiff for chronic anterior knee pain. He gave her an intra-articular steroid injection, had her use a brace, and had her do physical therapy,

some of which she had to do at home due to lack of transportation. Unfortunately, the treatment did not significantly improve the plaintiff's symptoms. Dr. Lee did not prescribe additional pain medication to the plaintiff because she was already on pain medications for an unrelated injury. Notes by Dr. Lee on January 8, 2015 indicate that the plaintiff had tenderness in her patellofemoral joint and some limitation in knee flexion by pain and body habitus. He continued to diagnose her with patellofemoral syndrome of the right knee, which involves knee pain. He recommended that she remain on physical therapy, lose weight, and continue using pain medications that she was already being prescribed.

The plaintiff continued to treat with Dr. Lee throughout 2015. In September 2015, Dr. Lee had an x-ray taken of the plaintiff's right knee and found that the mild patellofemoral chondromalacia was now moderate. Following a visit on September 10, 2015, Dr. Lee recommended arthroscopic intervention with chondroplasty, synovectomy, and patellofemoral realignment. He conducted the procedure on September 15th, during which he found that the plaintiff had grade III diffuse chondromalacia in her right patellofemoral joint with lateral tracking of the patella with tight lateral structures. The procedure included chondroplasty of the patellofemoral joint and lateral compartment of the knee, lateral release, and partial synovectomy.

When Dr. Lee compared his operative findings to the prior MRI that was taken in August 2014, approximately a month after the plaintiff's injury, he concluded that there was progression of patellofemoral chondromalacia subsequent to the plaintiff's work injury from July 2014. In his deposition testimony, Dr. Lee opined that the plaintiff's patellofemoral chondromalacia had progressed from mild in July 2014 to

moderate/grade III in September 2015. He believes that, to a reasonable degree of medical probability, the plaintiff's work injury in July 2014 substantially aggravated the preexisting patellofemoral chondromalacia, causing it to change from mild to moderate/grade III. He bases this opinion on the plaintiff's symptomology, her clinical examination, the MRI scan, and the operative findings.

At a follow-up appointment on February 2, 2016, the plaintiff reported significant pain, and she had a constant catch in the lateral patellofemoral compartment. In March 2016 the plaintiff had a second MRI, in which the radiologist concluded the patellofemoral chondromalacia was mild.

After examining the testimony of both experts, the exhibits entered into evidence, and the testimony of the plaintiff, the court finds Dr. Lee's testimony that the plaintiff substantially aggravated a preexisting condition of patellofemoral chondromalacia to be reliable and credible. Both doctors agree that, at the time of the July 2014 injury, the plaintiff suffered from mild patellofemoral chondromalacia. However, Dr. Lee opined that the patellofemoral chondromalacia progressed to moderate/grade III patellofemoral chondromalacia by September 2015, when he conducted orthopedic surgery on the plaintiff. Dr. Lee concluded that the change in patellofemoral chondromalacia was proximately caused by substantial aggravation arising from the July 2014 injury.

Dr. Rozen, on the other hand, opined that the plaintiff still has mild patellofemoral chondromalacia following her surgery and that her injury in July 2014 did not substantially aggravate this preexisting condition. Instead, he believes that her patellofemoral chondromalacia is the result of natural deterioration and is still mild. In addition to the plaintiff's symptomology presented throughout her treatment with Dr.

Lee, Dr. Rozen also cites to the MRI taken in March 2016 indicating that the plaintiff's patellofemoral chondromalacia was mild.

Dr. Lee has reviewed the March 2016 MRI report and disagrees with the radiologist's conclusion that the plaintiff's patellofemoral chondromalacia was mild. Dr. Lee concludes that the plaintiff's patellofemoral chondromalacia has worsened based on the findings in the March 2016 MRI, which found mild subchondral edema along the lateral facet with overlying full thickness chondrosis.

The court acknowledges Dr. Rozen's concerns regarding the plaintiff's second MRI results. However, the court finds that these concerns were addressed amply by Dr. Lee's testimony, and the court finds Dr. Lee's testimony as a whole to be persuasive. Although Dr. Rozen does not believe that the plaintiff's patellofemoral chondromalacia progressed from mild to grade III/moderate, Dr. Rozen also did not have the benefit of reviewing the MRI films from August 2014, the x-ray films, or the images from the orthopedic surgery, as Dr. Lee had. On the whole, the court is persuaded by Dr. Lee's opinion that the plaintiff had mild patellofemoral chondromalacia as of her work injury on July 6, 2014, and that she now has moderate/grade III patellofemoral chondromalacia as a direct and proximate result of the workplace injury she incurred.

LEGAL ANALYSIS

On appeal the claimant, who is the plaintiff, bears the burden of demonstrating her right to partake in the workers' compensation fund.² To demonstrate a right to participate in the workers' compensation fund, the claimant must establish, by a

² *Buehrer*, 2017-Ohio-7021 at ¶ 13, quoting *Bennett*, 2012-Ohio-5639 at ¶ 17.

preponderance of the evidence: “(1) an injury received in the course of, and arising out of, employment, and (2) a proximate causal relationship between the injury and the harm or disability.”³ When expert medical testimony is necessary to establish a causal connection between a workplace injury and a subsequent physical condition, “* * * the proof must establish a probability and not a mere possibility of such causal connection.”⁴ “[A]n event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue.”⁵

What constitutes an injury is defined in R.C. 4123.01(C), which provides, in relevant part:

“‘Injury’ includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee’s employment. ‘Injury’ does not include: * * *

(4) A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.”⁶

Thus, workers’ compensation does not cover conditions that preexisted the injury unless the injury substantially aggravates the preexisting condition.⁷ Moreover, R.C. 4123.01, as quoted, requires the claimant to present evidence that the condition existed

³ *Buehrer*, 2017-Ohio-7021 at ¶ 14, quoting *Bennett*, 2012-Ohio-5639 at ¶ 18.

⁴ *Briggs v. Franklin Pre-Release Ctr.*, 12th Dist. Madison No. CA2013-10-035, 2014-Ohio-2477, ¶ 21, quoting *Jefferson v. CareWorks of Ohio, Ltd.*, 10th Dist. Franklin No. 10AP-785, 2011-Ohio-1940, ¶ 17.

⁵ *Tepe v. Tepe*, 4th Dist. Highland No. 11CA13, 2012-Ohio-1482 at ¶ 12, quoting *Stinson v. England*, 69 Ohio St.3de 451, 455, 633 N.E.2d 532 (1994).

⁶ R.C. 4123.01(C)(4).

⁷ *Briggs*, 2014-Ohio-2477 at ¶ 11, citing R.C. 4123.01(C)(4).

before the injury, and that the injury substantially aggravated the preexisting condition.⁸ A claimant is not able to prove a substantial causal relationship using "mere magic words of direct causation without evidence to directly support it."⁹

In cases in which the preexisting condition was asymptomatic, courts have observed that " * * * providing an initial reference point becomes difficult, especially where the pre-existing condition has never been diagnosed."¹⁰ Even so, "[l]ack of pre-injury evidence, however, does not preclude a claimant from establishing the existence of a pre-existing condition."¹¹

In examining the present case, prior to the plaintiff's injury, she had never experienced pain in her right knee. As a result, she had not had a medical professional diagnose her with patellofemoral chondromalacia of the right knee before July 6, 2014, no x-rays or MRI scans of her right knee predate the injury, and there are no surgeries of the right knee preceding the injury. Even so, both Dr. Lee and Dr. Rozen agree that the plaintiff, before the injury, had mild patellofemoral chondromalacia.

As discussed, the experts disagree with whether the plaintiff's patellofemoral chondromalacia in her right knee has been substantially aggravated by her workplace injury. For the reasons discussed above, the court finds that Dr. Lee's testimony is credible and holds that her workplace injury substantially aggravated her mild patellofemoral chondromalacia such that she now has moderate/grade III patellofemoral chondromalacia. Dr. Lee's conclusion is supported by objective diagnostic findings,

⁸ *Briggs*, 2014-Ohio-2477 at ¶ 11, citing R.C. 4123.01(C)(4).

⁹ *Tepe*, 2012-Ohio-1482 at ¶ 12, quoting *Trent v. Barry Electric Auto-Lite Co.*, 168 Ohio St. 77, 82, 151 N.E.2d 540 (1958).

¹⁰ *Briggs*, 2014-Ohio-2477 at ¶ 12, quoting *Lake v. Anne Grady Corp.*, 6th Dist. Lucas No. L-12-1330, 2013-Ohio-4740, ¶ 20.

¹¹ *Briggs*, 2014-Ohio-2477 at ¶ 12, quoting *Strickler v. Columbus*, 10th Dist. Franklin No. 13AP-464, 2014-Ohio-1380, ¶ 8.

objective clinical findings, and objective test results in the form of x-rays, MRIs, and operative findings.

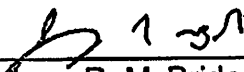
To conclude, the court finds that the plaintiff has proven by a preponderance of the evidence that she received moderate/grade III patellofemoral chondromalacia of the right knee in the course of and arising out of, her employment with the defendant, and (2) there exists a proximate causal relationship between her injury on July 6, 2014 and her moderate/grade III patellofemoral chondromalacia in her right knee.

CONCLUSION

Based on the analysis and findings above, the court hereby finds that the plaintiff Nancy A. Meyers shall be permitted to participate in the Ohio Workers' Compensation system for the additional condition of patellofemoral joint chondromalacia.

IT IS SO ORDERED.

DATED: 6-8-18



Judge Jerry R. McBride