

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112639

RONNIE KOEPESELL		CLAIMANT
KIRBY FREEMAN, DBA FREEMAN CONTRACTORS UNINSURED	NO. 1	RESPONDENT
BESHEARS PROFESSIONAL COMMUNICATIONS DBA PRO COMM INGROUND SERVICES, UNINSURED	NO. 2	RESPONDENT
SOUTHERN PERSONNEL MANAGEMENT	NO. 3	RESPONDENT
WAUSAU INSURANCE COMPANY, INSURANCE CARRIER	NO. 3	RESPONDENT

OPINION FILED AUGUST 29, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MARK FORD, Attorney, Fort Smith, Arkansas.

Respondent No. 1 represented by JOHN BEASLEY, Attorney, Fort Smith, Arkansas.

Respondent No. 2 represented by RODNEY MILLS, Attorney, Fort Smith, Arkansas.

Respondents No. 3 represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled case on June 10, 2003, in Fort Smith, Arkansas. A pre-hearing order was entered on October 10, 2002. This pre-hearing order contained essentially no stipulations, due to the fact that two of the respondents did not participate or participated without counsel.

At the commencement of the hearing, all parties agreed upon the following stipulations:

- (1) The claimant was not an employee of Southern Personnel Management at any time relevant to this claim. Thus, Southern Personnel Management and its workers' compensation carrier, Wausau Insurance Company, has no liability for any benefits in the present claim.

- (2) At the time of his alleged compensable injury, on October 17, 2001, the relationship of employee-uninsured actual employer existed between the claimant and Kirby Freeman, dba Freeman Contractors.
- (3) At the time of his alleged compensable injury on October 17, 2001, Kirby Freeman, dba Freeman Contractors was a subcontractor of Beshears Professional Communications, dba Pro Comm Inground Services.
- (4) At the time of his alleged compensable injury, on October 17, 2001, the relationship of employee-uninsured statutory employer existed between the claimant, and Beshears Professional Communications, dba Pro Comm Inground Services, within the meaning of Ark. Code Ann. §11-9-402.

These stipulations offered by the parties are hereby accepted as fact.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

- (1) Whether the claimant sustained a “compensable injury” to his left hand/index finger on October 17, 2001.
- (2) The claimant’s entitlement to the payment of medical expenses and temporary total disability benefits from October 17, 2001 through May 17, 2002.
- (3) Appropriate attorney’s fees for claimant’s attorney.
- (4) The appropriate weekly compensation rates.

In regard to these issues, the claimant contends that he sustained a compensable injury to his left hand/index finger on October 17, 2001. He contends that as a result of this compensable injury, he is entitled to the payment of expenses incurred for reasonably necessary medical services, temporary total disability benefits from October 17, 2001 through May 17, 2002, and the maximum statutory attorney’s fee for his attorney.

In regard to these issues, the respondents contend that the claimant did not sustain a “compensable injury”, as that term is defined by the Act , and controvert his entitlement to any benefits.

DISCUSSION

1. COMPENSABILITY

The central issue in this case is the question of whether the claimant sustained a “compensable injury” as that term is defined by the Act, to his left hand/index finger on October 17, 2001. The burden rests upon the claimant to prove all the facts necessary to prove the occurrence of an alleged “compensable injury”.

First, he must “establish” the actual existence of a physical injury to his left hand/index finger by medical evidence, which is supported by “objective findings”, Ark. Code Ann. §11-9-102(4)(D). After consideration of the evidence presented, it is my opinion that the claimant has met these requirements.

The medical evidence clearly “establishes” the actual existence of a physical injury involving the claimant’s left hand/index finger. This physical injury took the form of a laceration involving the soft tissue, radial volar proper digital nerve, the flexor digitorum profundus, and superficialis tendons. The actual existence of these physical injuries are supported by visual observations of the lacerations, which were made at the emergency room of St. Edwards Mercy Medical Center and subsequently made by Dr. R. Cole Goodman, the claimant’s primary treating physician.

The claimant must next prove that these medically established and objectively documented physical injuries satisfy the definitional requirements for a “compensable injury” contained in Ark. Code Ann. §11-9-102(4)(A)(i). These requirements are:

- (1) The physical injury must arise out of and occur in the course of the employment;
- (2) The physical injury must be caused by a specific incident;

- (3) The physical injury must be identifiable by time and place of occurrence;
- (4) The physical injury must cause internal or external physical harm to the claimant's body;
- (5) The physical injury must require medical services or resulted in disability.

After consideration of all the evidence presented, it is my opinion that the claimant has satisfied all five definitional requirements for a "compensable injury", as set out above.

It is undisputed that the claimant's injury occurred as the result of a specific incident or event and that it is identifiable by time and place of occurrence. The claimant experienced this "accident" during his regular working hours and at his assigned job site. This "accident" and resulting injury occurred while the claimant was performing activities necessary to carry out the particular job to which he had been assigned (i.e. the cutting of a plastic "zip ties" binding a role of co-axial cable in preparation of loading it into a machine for installation). Thus, the claimant's physical injury "arose out of and occurred in the course of his employment", and was caused by a specific incident, and is identifiable by time and place of occurrence.

In reaching this decision, I recognize that Kirby Freeman, the claimant's actual employer, testified that he had told the claimant to cut or remove the zip tie by using pliers. However, his testimony does not indicate that he prohibited the claimant or anyone else, from cutting the ties with a knife. I would also note that the claimant specifically denied that Mr. Freeman had told him to use the clippers to cut the ties. He also stated that "everyone", including himself, used a pocket knife for this purpose. Clearly, the use of a pocket knife for this purpose would not appear to be unreasonable or reckless. I simply find Mr. Freeman's testimony is not sufficient to prove that the claimant was engaged in a prohibited activity at the time of his injury, so as to support a finding that the claimant was not engaged in employment services at the time of his injury.

There also appears no doubt from the medical evidence presented, that this

physical injury resulted in internal and external physical harm to the claimant's body. This harm took the form of a laceration of the skin and other soft tissue, as well as severing nerves and tendons. Thus, this injury clearly satisfies the fourth requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

Finally, it is obvious from the medical evidence presented, that the magnitude and nature of this physical injury was such as to require substantial medical services, including the surgical repair of the severed tendon and nerve. The nature and magnitude of the physical injury, together with the extensive medical treatment it required, would logically and reasonably result in at least a period of "temporary disability" and likely in some degree of permanent impairment. Thus, the claimant has satisfied the fifth and final requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, the claimant has proven by medical evidence, supported by objective findings, the actual existence of a physical injury to his left hand/index finger that arose out of and occurred in the course of his employment with this respondent, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused both internal and external physical harm to his body, and that required medical services and resulted in disability. Thus, he has met his burden of proving the occurrence of a "compensable injury" to his left hand/index finger on October 17, 2001.

In reaching this decision, I also recognize that Inga Kasprzyzki, a co-employee, testified that while she was transporting the claimant to the emergency room at Mr. Freeman's request, the claimant volunteered the statement that he hoped that he wouldn't be given a drug test because he couldn't pass it. The claimant specifically denied making such a statement and I find his testimony to be more credible in regard to this purported statement. There is no indication that the claimant had any particular familiarity with workers' compensation procedures or the Workers' Compensation Act. Absent such knowledge, it is difficult to believe that the administration of such a test would even come

to mind.

However, even if the claimant, did in fact, make such a statement, it is insufficient, in and of itself, to prove the presence of illegal drugs, alcohol, or prescription medication used in contravention of physician's orders, with the meaning of Ark. Code Ann. §11-9-102(4)(B)(iv)(b). Although Mr. Freeman may have directed Ms. Kasprzycki to take the claimant to the emergency room, he did not attempt to pay for any services rendered there, including a drug test. The emergency room personnel did not note that the claimant appeared to be in any way impaired or under the influence of any drugs or alcohol. Neither Mr. Freeman nor Ms. Kasprzycki testified that the claimant was by his speech, mannerisms, or action, exhibiting any signs indicative of the presence of drugs or alcohol in his system at the time of his injury or at any time prior thereto.

Thus, the provisions of Ark. Code Ann. §11-9-102(4)(B) have not been proven to be applicable to this claim. The claimant's employment related injury would not be expressly excluded from the category of a "compensable injury" by the provisions of this subsection.

II. BENEFITS

Next, it is necessary to determine the nature and extent of the benefits to which the claimant is entitled as a result of this "compensable injury". The first of these benefits take the form of reasonably necessary medical services for the compensable injury. The burden again rests upon the claimant to prove that the medical services he has received actually constitute reasonably necessary medical services for his compensable injury.

Medical services are "reasonably necessary" when they are necessitated by or connected with the compensable injury and, at the time they are rendered, have a reasonable expectation of accomplishing the purpose for which they were intended. After consideration of all the evidence presented, it is my opinion that the medical services rendered to the claimant for the laceration to his left hand/index finger by and at the direction of the emergency room personnel of St. Edwards Mercy Medical Center and by

and at the direction of Dr. R. Cole Goodman represents “reasonably necessary medical services” for his compensable injury.

The evidence reveals that all the services rendered him by these medical providers were necessitated by or connected with the accidental laceration he received on October 17, 2001.

The medical evidence further shows that the services provided were of a type and nature generally recognized by the medical community as being appropriate for the evaluation and treatment of injuries of the type sustained by the claimant. The evidence further shows that these services not only had a reasonable expectation of accomplishing their intended purpose, but have in fact done so.

Pursuant to the provisions of Ark. Code Ann. §11-9-508, both of the respondents herein (Kirby Freeman dba Freeman Contractors and Beshears Professional Communications dba Pro Comm Inground Services) are liable for the expense incurred as the result of these services. This liability is subject to the medical fee schedule established by this Commission.

The next matter concerns the claimant’s entitlement to temporary total disability benefits for the period beginning October 17, 2001, and continuing through May 17, 2002. Once again the burden rests upon the claimant to prove his entitlement to these benefits.

The injury sustained by the claimant was to a portion of his anatomy that is “scheduled”, under Ark. Code Ann. §11-9-521. Therefore, his entitlement to temporary total disability benefits is controlled by subdivision (a) of this section. This subdivision entitles the claimant to temporary total disability benefits from the date of his injury until his healing period ends or he returns to work, which ever occurs first. He need not prove actual “disability” to be entitled to these benefits.

The duration of the healing period is a medical question, which must be resolved upon the basis of the greater weight of the credible medical evidence presented. The

healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in resolving or improving the actual physical damage produced by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a point where no further medical treatment offers a reasonable chance of improvement, then the claimant's healing period has ended.

In the present case, the medical evidence proves that the claimant has been under active medical treatment to improve the actual physical damage caused by his compensable injury through May 28, 2002. Clearly, this would appear to be a somewhat lengthy period of time for the type of injury sustained by the claimant. However, as Dr. Goodman points out, the claimant's healing period has been prolonged by his inability to obtain appropriate medical treatment for his compensable injury. In turn, this inability of the claimant to obtain the required appropriate medical treatment is due to the respondents refusal to meet their statutory obligation to provide the required treatment. Thus, the respondents cannot complain that the claimant's healing period has been unduly prolonged.

I would note that the respondents emphasized the fact that the claimant failed to keep some of his physical therapy appointments. However, the claimant adequately explains his inability to keep these scheduled appointments, that being a lack of finances to travel from his home to the physical therapy clinic. Clearly, this explanation is reasonable in light of the facts that the claimant had no income, was not being provided with reasonable expense money by the respondents to travel to the physical therapist, and it is no small distance from the claimant's residence to the physical therapy clinic. I do not find that the claimant unreasonably obstructed or refused any medical treatment for his compensable injury. The evidence fails to show that the claimant was in any way at fault for the lack of prompt appropriate medical treatment for his injury.

The claimant testified that he returned to work somewhere between five and seven

months following his injury. However, he gave no specific date. The medical evidence shows that the claimant was expressly directed by his treating physician to remain off work through at least some time in January of 2002, in order to aid in the healing of his compensable injury. Although Dr. Goodman did indicate that he would allow the claimant to return to a one-handed job, the respondents have provided the claimant with no such limited or light duty employment and the likelihood of obtaining such employment in the open job market would have been negligible. These medically imposed restrictions on his potential employment activities appeared to have continued through at least Dr. Goodman's evaluation on February 14, 2002.

After consideration of the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that he continued within his healing period from the effects of his compensable injury and had not returned to employment through March 17, 2002. Thus, he would be entitled to temporary total disability benefits during this period.

III. COMPENSATION RATES

The final issue to be resolved concerns the appropriate weekly compensation rates for the claimant's compensable injury. Ark. Code Ann. §11-9-518 provides that this compensation is to be based, absent "exceptional circumstances", on the average weekly wage earned by the claimant under the contract of hire in force at the time of the accident and in no case should be computed on less than a full time work week in the employment. The fact that the claimant's overall period of employment may have been limited in the number of weeks that it may have been available, is of no consideration in determining either the average weekly wage or the appropriate compensation rates, Chapel Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W. 2nd 915 (1994),

The evidence presented proves that the claimant's contract of hire provided for him to receive an hourly wage of \$8.00 and to work, at least , a regular forty hour work week

for the duration of his period of employment. This would yield an average weekly wage of \$320.00. The appropriate corresponding weekly compensation rates would be \$213.00 for total disability and \$160.00 for permanent partial disability.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 17, 2001, the relationship of employee-uninsured actual employer-uninsured statutory employer existed between the claimant, Kirby Freeman, dba Freeman Contractors, and Beshears Professional Communications, dba Pro Comm Inground Services).
3. On October 17, 2001, the claimant was not an employee of Southern Personnel Management.
4. On October 17, 2001, the claimant sustained a compensable injury to his left hand/index finger.
5. The medical services rendered to the claimant by and at the direction of personnel at the emergency room of St. Edwards Mercy Medical Center and by and at the direction of Dr. R. Cole Goodman for this compensable left hand/index finger injury constitutes reasonably necessary medical services, within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this section, both of the respondents are liable for the expense of these services.
6. The claimant is entitled to temporary total disability benefits, pursuant to Ark. Code Ann. §11-9-521(a), for the period of October 18, 2001 through March 17, 2002. He has proven that during this period he continued within his healing period from the effects of his compensable injury and had not returned to employment.

7. On October 17, 2001, the claimant was earning an average weekly wage of \$320.00, which would entitle him to weekly compensation benefits of \$213.00 for total disability and \$160.00 for permanent partial disability.
8. Both the respondents have denied the occurrence of a “compensable injury” to the claimant’s left hand/index finger and have controverted his entitlement to any benefits.
9. A reasonable fee for the claimant’s attorney is the maximum statutory attorney’s fee on all indemnity benefits herein awarded.

ORDER

The respondents Kirby Freeman, dba Freeman Contractors and Beshears Professional Communications, dba Pro Comm Inground Services, are jointly and severally liable to the claimant for temporary total disability benefits during the period of October 18, 2001 through March 17, 2002.

The respondents Kirby Freeman, dba Freeman Contractors and Beshears Professional Communications, dba Pro Comm Inground Services, are jointly liable for the expenses incurred for reasonably necessary medical services provided to the claimant for his compensable injury by and at the direction of the emergency room personnel at St. Edwards Mercy Medical Center and by and at the direction of Dr. R. Cole Goodman. Such liability shall be subject to the medical fee schedule established by this Commission.

The respondents Kirby Freeman, dba Freeman Contractors and Beshears Professional Communications, dba Pro Comm Inground Services are jointly and severally liable to the claimant’s attorney for the maximum statutory attorney’s fee on all indemnity benefits herein and hereinafter awarded. One-half of this attorney’s fee shall be the obligation of the respondents in addition to such benefits. The remaining one-half of this attorney’s fee shall be withheld by the respondents from indemnity benefits herein awarded to the claimant.

The respondents Beshears Professional Communications, dba Pro Comm Inground Services is entitled to recover from the respondent Kirby Freeman, dba Freeman Contractors any benefits which they may actually pay as a result of this Order. This shall include awarding a lien in this amount against any monies due or to become due to respondent Kirby Freeman, dba Freeman Contractors.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge