

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F208607

DONALD W. LOVELESS, EMPLOYEE	CLAIMANT
CONAGRA FOODS, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 17, 2003

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Russellville, Pope County, Arkansas.

The claimant was represented by HONORABLE LAURA J. MCKINNON, Attorney at Law, Fayetteville, Arkansas.

The respondents were represented by HONORABLE WILLIAM F. SMITH, Attorney at Law, Russellville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on August 27, 2003 in Russellville, Arkansas. A prehearing order was entered in this case on or about April 17, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employer-employee-carrier relationship existed between the parties on all relevant dates.
3. The claimant earned sufficient wages to entitle him to the maximum compensation rates in effect on May 31, 2002.

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 specific incident injury to his left foot on May 31, 2002, and whether the claimant failed to properly report any injury pursuant to Ark. Code Ann. § 11-9-701.
2. Whether the claimant is entitled to reasonably necessary medical treatment.
3. Whether the claimant is entitled to temporary total disability benefits or temporary partial disability benefits from May 31, 2002 to August 19, 2002, and whether the respondent is entitled to a credit for any other benefits paid to the claimant.
4. Whether the claimant is entitled to a controverted attorney's fee.

The record consists of the transcript of the August 27, 2003 hearing, with exhibits contained therein.

DISCUSSION

Issue One: Did the claimant sustain a compensable specific injury to his left foot on May 31, 2002 and did the claimant properly report an injury pursuant to Ark. Code Ann. § 11-9-701?

A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the

compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant asserts that he injured his left foot stepping off of a catwalk at work on the morning of May 31, 2002. The respondents assert that the claimant did not experience an injury to his left foot at work that day as he asserts.

If the claimant's testimony as to "what happened" at work is credible, then there appears to be no dispute that what happened on the catwalk would be considered a "specific incident" within the meaning of Act 796 of 1993. Furthermore, a series of x-rays taken of the claimant's left foot beginning on May 31, 2002 indicate a non-displaced fracture. Therefore, a foot injury, is established by medical evidence supported by objective medical findings, and those same objective medical findings are indicative of internal physical harm to the body which required medical services and which resulted in at least temporary disability. Therefore, there appears to be no dispute that the claimant has satisfied the last three elements necessary to establish a compensable injury. The threshold issue in

this case is whether or not the claimant has established by a preponderance of the evidence in the record that he in fact sustained his injury at work on May 31, 2002.

For my part, I note with interest that Dr. Allison's contemporaneous May 31, 2002 report contains a history of the claimant experiencing an incident involving his foot at work earlier that day. Likewise, Mr. Hottinger's testimony establishes that, when the claimant called him after the claimant visited Dr. Allison's office on May 31, 2002, the claimant informed Mr. Hottinger that he felt that he had injured his foot at work earlier that day. Likewise, Ms. Kelleybrew's testimony indicates that when she spoke to the claimant on Monday, the claimant chose to file the injury on disability, instead of on workers' compensation, because the claimant did not report the injury "timely" under Conagra's company policy. Notably Conagra's "Employment Guide" in the record advises employees that "[f]ailure to notify the supervisor and the Medical Department of a work-related injury on the day it occurs will result in disciplinary action."

After hearing the live testimony of the witnesses, and observing their demeanor, I find credible the claimant's testimony that he experienced what he thought was a minor

foot injury stepping off the catwalk on the morning of May 31, 2002, and that he did not report an injury before he left because it hurt a little, but wasn't hurting bad enough that he thought he needed to report it. I also find credible the claimant's testimony that he did not feel when he left at two-thirty that he had an injury severe enough to require that he go to the doctor, but that he turned out to be mistaken because the injury became more painful while he was at K-Mart to get something to eat after work. Consequently, I find that the claimant sustained a work-related foot injury and that the more severe symptoms later at K-Mart were a progression of that work injury.

B. Notice

Ark. Code Ann. § 11-9-701(a)(1) provides:

Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

Furthermore, Ark. Code Ann. § 11-9-701(b)(1) provides that:

Failure to give the notice shall not bar any claim: (A) If the employer had knowledge of the

injury or death; (B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; (C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

In the present case, I find from Mr. Hottinger's undisputed testimony that the claimant's discussion with him on the evening of May 31, 2002, regarding the occurrence of an alleged work related injury, provided the respondent adequate notice to satisfy the exception in Ark. Code Ann. § 11-9-701(b) (1) (A) as of the time that the telephone conversation occurred. Therefore, I find that the notice requirements of Ark. Code. Ann. § 11-9-701 are not a bar to the claimant's claim to benefits after that telephone conversation occurred. However, there is no dispute that the claimant did not telephone Mr. Hottinger until after his first medical treatment with Dr. Allison on May 31, 2002. Under these circumstances, I find that the respondents are not liable for the treatment provided by Dr. Allison on May 31, 2002 in light of the notice requirements of Ark. Code Ann. § 11-9-701.

Issue Two: Is the claimant is entitled to reasonably necessary medical treatment?

After reviewing the medical records, it appears to me that Dr. Allison's treatments between May of 2002 and March

of 2003 have to date been appropriate and reasonably necessary for the nature of the left foot injury the claimant sustained. I therefore find that the respondents are liable for the medical treatment received in this case except for the treatment provided by Dr. Allison on May 31, 2002.

Issue Three: Is the claimant entitled to temporary total disability benefits or temporary partial disability benefits from May 31, 2002 to August 19, 2002, and is the respondent entitled to a credit for any other benefits paid to the claimant?

A. Temporary Disability

The claimant seeks an award of temporary total disability benefits. In Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001), the Court of Appeals addressed the requirements for demonstrating entitlement to benefits for a scheduled injury:

We hold that the plain meaning of the language employed indicates that an employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated that he is actually incapacitated from earning wages.

In the present case, the claimant's wife's testimony establishes that the claimant was off work from May 31, 2002 to August 19, 2002. Furthermore, Dr. Allison's records

indicate that the claimant did not reach the end of his healing period until at least October 2, 2002. Therefore, the preponderance of the evidence establishes that the claimant remained within his healing period and had not returned to work in maintenance at Conagra during the period for which he seeks temporary total disability compensation.

Conagra suggests that the claimant should be entitled to, at most, temporary partial disability compensation, and not temporary total disability compensation during the period that he seeks because there is no dispute that the claimant continued to participate to at least some degree in a separate family-operated lawn mowing business prior to returning to work for Conagra on August 19, 2002. However, I note that the claimant engaged in these lawn mowing services as a separate business both before and after the injury in question. Since the claimant was working both types of jobs both before and after his injury, I find that the claimant's continued limited post-injury participation in the family's lawn mowing business is not a bar to a finding of temporary total disability with respect to his work in maintenance at Conagra. See Walbash Mart Stores,

Inc. v. Westbrook 77 Ark. App. 167, 72 S.W.3d 889 (2002);
Stevens v. Mountain Home Sch. Dist., 41 Ark. App. 201, 850
S.W.2d 335 (1993).

Therefore, for the reasons discussed herein, I find that the claimant has established by a preponderance of the evidence that he is entitled to temporary total disability compensation for the period from May 31, 2002 to August 19, 2002.

B. Credit

The record indicates that the claimant's medical expenses were at least partially paid by Blue Cross, and these payments are subject to the provisions of Ark. Code Ann. § 11-9-411. The medical benefits payable by the respondent shall be reduced in an amount equal to, dollar-for-dollar, the amount that Blue Cross paid for the claimant's medical treatment. The respondent is also directed to hold in reserve for a period of five years a sum equal to the potential subrogation claims of Blue Cross. See generally Calvin D. Dooley v. Automated Conveyor Systems, Inc., Full Workers' Compensation Commission, Opinion filed January 8, 2003 (F100282). I note from Mrs. Loveless' testimony that the claimant did not receive any disability payments prior to the hearing.

Issue Four: Is the claimant is entitled to a controverted attorney's fee?

The respondents contended at the hearing that the claimant did not sustain an injury at work. The respondents have therefore controverted this claim in its entirety. The claimant's attorney is therefore entitled to a controverted attorney's fee pursuant to Ark. Code Ann. § 11-9-715(a) (1) (B) .

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employer-employee-carrier relationship existed between the parties on all relevant dates.
3. The claimant sustained a compensable left foot injury on May 31, 2002.
4. The respondents are not liable for the medical treatment provided to the claimant prior to his report of injury to Mr. Hottinger on the evening of May 31, 2002.
5. The claimant is entitled to all other reasonably medical treatment for his work-related left foot injury.
6. The claimant is entitled to temporary total disability benefits from May 31, 2002 to August 19, 2002.

7. The claimant's attorney is entitled to a controverted attorney's fee on the indemnity benefits awarded herein.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge