

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F307156**

<b>MARK W. AUSTIN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>YOUR EMPLOYMENT SERVICE, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>WAUSAU INSURANCE COMPANIES, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 25, 2004**

Hearing before Administrative Law Judge J. Mark White on January 28, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Ben E. Rice, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On January 28, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on November 24, 2003, and a Prehearing Conference Order was entered that same day. A copy of the November 24, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including July 1, 2003; that on July 1, 2003, the claimant sustained a compensable injury to his right foot and ankle; and that the Respondents accepted the July 1, 2003, injury as compensable and paid medical benefits through July 12, 2003.

The parties agreed that the issues to be presented were whether the claimant is entitled to temporary disability benefits; whether additional medical treatment is reasonably necessary in connection with the compensable injury; and controversion and attorney's fees. At the hearing, the parties agreed to add the issue of determination of the claimant's average weekly wage and corresponding compensation rate.

The claimant contends that additional medical treatment is reasonably necessary in connection with his compensable injury; that he is entitled to temporary total disability benefits or temporary partial disability benefits; and that no light-duty work was offered by the respondents. At the hearing, the claimant contended that his average weekly wage and corresponding compensation rate should be calculated on a 40-hour workweek.

Respondents contend that the claimant was released to light duty and the respondent-employer had light duty available. At the hearing, the respondents contended that additional medical treatment was not reasonably necessary, and that

as a temporary worker the claimant should receive a compensation rate calculated by averaging his total earnings from the respondent-employer.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that additional medical treatment, specifically evaluation by a specialist as recommended by Dr. Almond, is reasonably necessary in connection with the compensable injury.
4. The claimant has failed to prove by a preponderance of the evidence that he remains totally incapacitated from earning wages.

5. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.
6. A preponderance of the evidence establishes that the claimant earned an average weekly wage of \$56, entitling him to a compensation rate of \$37 per week.
7. The claimant has failed to prove by a preponderance of the evidence that his average weekly wage has decreased as a result of his compensable injury.
8. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to temporary partial disability benefits.
9. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant sustained a compensable injury to his foot when he stepped out of a moving truck on July 1, 2003, and the truck backed over his right foot. At the time, he was working his first day on a job assignment provided by the respondent-employer, a temporary employment service. The respondent-employer's records reflect that the claimant had worked only one other assignment, for one day, prior to the assignment where he was injured. The claimant said he did not recall this

prior assignment. The claimant had previously worked for the respondent-employer in 1999.

The claimant was treated the day of his injury by Dr. Cynthia Almond, who diagnosed “sprains and strains” of the right ankle and foot. Dr. Almond prescribed medication and crutches and placed the claimant on light duty. The respondent-employer offered the claimant 40 hours per week of light-duty work at \$6 per hour, but the claimant did not take full advantage of the offer. The claimant acknowledged that he worked only four hours one week, six and a half hours another week, and twenty-five hours another week.

The claimant continued to treat with Dr. Almond and Dr. John Adametz through the end of July. On July 15, Dr. Almond recommended a bone scan to rule out an occult fracture of the ankle or foot. Her notes indicated she would release the claimant if the scan were negative. The record contains no direct report of the bone scan. However, Dr. Almond’s note of July 25 states that no fracture was seen on the bone scan, though there were apparently other findings that “may or may not be WC related.” Dr. Almond referred the claimant to a specialist, Dr. Stewart, for evaluation of the bone scan results. The claimant testified that the respondents subsequently controverted additional treatment and he never saw the specialist. The respondent-employer then terminated the claimant’s employment when the

carrier's adjuster advised them that the claimant's condition had resolved. However, Brad Hughes, the respondent-employer's president, testified that he offered to help the claimant find full-time work and the claimant declined his offer.

## **II. Adjudication**

### **A. Additional Medical Treatment**

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The claimant's authorized treating physician was, and remains, Dr. Cynthia Almond. The most recent record from Dr. Almond is dated July 25, 2003. In that treatment record, Dr. Almond notes, "Bone Scan: Rt foot/ankle. No fx seen. Other findings may or may not be WC related. Needs referral to Ortho foot specialist, Dr Stewart for eval of pt and Bone Scan results." Later on in the same record, Dr. Almond notes, "PATIENT REFERRED TO: An orthopedic surgeon and Dr Stewart, foot/ankle specialist. Copies of Xrays sent with pt."

Nothing in the record indicates that the claimant has ever seen a specialist

pursuant to this referral. Nothing in the record contradicts Dr. Almond's recommendation or suggests that her referral was unreasonable or unnecessary. Therefore, I find that the claimant has proven by a preponderance of the evidence that additional medical treatment, specifically evaluation by a specialist as recommended by Dr. Almond, is reasonably necessary in connection with the compensable injury.

### **B. Additional Temporary Disability Benefits**

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Because I find additional treatment to be reasonably necessary, it follows *a priori* that the claimant remains in his healing period. The question, then, is whether the claimant remains totally incapacitated to earn wages. Dr. Almond has opined that the claimant is capable of working with some restrictions, and the claimant did some light-duty work for the respondent-employer. Because there is nothing in the

record to suggest that his work capabilities have changed since he worked light-duty, I find that the claimant has failed to prove by a preponderance of the evidence that he remains totally incapacitated from earning wages. I therefore find that he has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

### **C. Average Weekly Wage and Compensation Rate**

Compensation is payable at a rate computed from the claimant's average weekly wage under the contract of hire in force at the time of the accident. ARK. CODE ANN. § 11-9-518(a)(1). The claimant was a temporary employee; the compensation rate of such employees represents exceptional circumstances for calculating wages. *Boyd v. Metro Temporaries*, 41 Ark. App. 12, 846 S.W.2d 668 (1993), citing *Travelers Ins. Co. et al v. Perry*, 262 Ark. 398, 557 S.W.2d 200 (1977). The Commission is empowered in such circumstances to determine the average weekly wage by a method that is just and fair to the parties. ARK. CODE ANN. § 11-9-518(c). The Supreme Court held in *Perry, supra*, that for a temporary worker working on a job assignment of less than a week, the average weekly wage should be computed by averaging the total earnings from all job assignments for the temporary employment company. *Boyd, supra*.

The difficulty for this claimant is that prior to the day of his injury, he had

worked only one job assignment for only one day. He had worked for the respondent-employer in 1999, but did not return to work for them until after his release from prison. There is no evidence in the record to establish what he earned in 1999. Further, whether the claimant was to have worked a full 40-hour workweek is a matter of dispute. The claimant testified that he was guaranteed a 40-hour workweek by the respondent-employer for the job assignment on which he was injured. The respondent-employer's president, Brad Hughes, conversely testified that no such guarantee was or could have been made, and that the particular job assignment on which the claimant was injured typically lasted no more than two days. I find the testimony of Hughes to be more plausible than that of the claimant. I find that a preponderance of the evidence establishes that the claimant was working on a job assignment of less than one week. I therefore conclude that per the Court's holding in *Boyd*, the claimant's average weekly wage should be determined by averaging his prior earnings.

However, I conclude that it is unfair to include in the computation of the claimant's average weekly wage his earnings for the day of the accident, because his injury cut that day short. His average weekly wage should be computed on the basis of earnings prior to that day; he worked only one day in the week prior to the week of his injury and earned \$56. I therefore find that a preponderance of the evidence

establishes that the claimant earned an average weekly wage of \$56, entitling him to a compensation rate of \$37 per week.

#### **D. Temporary Partial Disability**

An employee is entitled to temporary partial disability benefits where the employee's average weekly wage has decreased as a result of his compensable injury. ARK. CODE ANN. § 11-9-520. In the present case, the claimant's average weekly wage actually went *up* after his compensable injury, because the respondent-employer was willing to pay for 40 hours per week of light-duty work at \$6 per hour. The claimant failed to take full advantage of this offer, and he has failed to actively pursue other employment since then. Any loss of wages by the claimant is a result of his own choice not to work. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary partial disability benefits.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that additional medical treatment, specifically an evaluation by a specialist, is reasonably necessary in connection with his compensable injury. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of

law set forth herein.

No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. ARK. CODE ANN. § 11-9-715. Therefore, no attorney's fees are awarded herein.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge