

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E712328

CRAIG DRIGGERS	CLAIMANT
DRIGGERS PAINTING CONTRACTORS	NO. 1 RESPONDENT
CUNNINGHAM LINDSEY CLAIMS INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED SEPTEMBER 3, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by MELISSA CRINER, Attorney, Little Rock, Arkansas.

Respondent No. 1 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 15, 2004, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on May 5, 2004. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

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

2. On October 4, 1997, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to his right ankle and left knee.

4. The claimant received a 5 percent impairment for his injuries.

5. The claimant is entitled to a compensation rate of \$293.00 for temporary total disability and \$220.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Statute of limitations.
2. Additional medical.
3. Possible wage loss over the 5 percent impairment to the body as a whole.
4. Attorney's fees.
5. Second Injury Fund liability.
6. Are the claimant's continuing left knee problems a result of his compensable injury or was there an independent intervening cause on October 18, 2000, which are now the cause of his knee problems.

In regard to the foregoing issues the claimant contends that as a result of the admitted compensable injury of October 4, 1997, the claimant sustained injuries to his right ankle and left knee as a result of a fall from scaffolding while painting in a premises in Uniontown, Arkansas. The fall was during and within the scope of the claimant's employment. The claimant had surgical intervention as a result of a bimalleolar fracture of the left tibia plateau on October 8, 1997. At the same time, the claimant had surgical intervention to the right ankle fracture consisting of an open reduction and internal fixation. The claimant was wheelchair bound

subsequent to surgery for approximately one month and was prescribed physical therapy through February 2, 1998. The claimant was returned to light duty work with restrictions on February 5, 1998, and continued his follow up medical treatment which was prescribed by his authorized treating physician, Dr. Frankie M. Griffin. The claimant received a 5 percent permanent physical impairment rating to the body as a whole as a result of the bilateral injuries on February 4, 1999. On February 7, 1999, the hardware was removed from the tibia at Crawford Memorial Hospital. The claimant continued medical treatment as prescribed by his treating physician and was given restrictions from working in high places and to avoid stairs on October 28, 1999. The claimant continued the annual review of his medical condition and was advised that he should continue his checkups on an annual basis, since "he does remain at risk for some long-term problems" as stated by Dr. Griffin at the January 11, 2001, examination. The claimant returned for follow up medical treatment on December 11, 2001, and December 5, 2002, as requested by his treating physician. These office visits were paid by the respondent's insurance carrier. On November 18, 2003, the claimant returned to the clinic for follow up medical treatment and was denied access to his treating physician by the respondent's insurance carrier. This claim for additional benefits ensued.

In regard to the foregoing issues Respondents No. 1 contend that the statute of limitations has run with regard to this claim. Alternatively, respondents contend that additional medical treatment is not reasonable and necessary and that claimant's sole

purpose for continuing to obtain medical treatment on an annual basis is to toll the statute of limitations.

In regard to the foregoing issues Respondent No. 2 contends that the claimant's injuries are scheduled and pursuant to Ark. Code Ann. §11-9-520(g) and Ark. Code Ann. §11-9-519(b), the claimant is not entitled to permanent partial disability benefits in excess of the anatomical impairment rating.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical documentation marked Claimant's Exhibit No. 1. Respondents No. 1 submitted medical documentation marked Respondents No. 1's Exhibit No. 1, supplemental documentation marked Respondents No. 1's Exhibit No. 2 and a letter from Dr. Thompson marked Respondents No. 1's Exhibit No. 3. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was 44 years old, had a high school education and has been employed as a painter for the past 25 years. The claimant testified that he works for the respondent and that this business is owned by his parents. The claimant testified and it has been stipulated by the parties that on October 4, 1997, while working for the respondent, the claimant fell from some scaffolding and broke his left knee and right ankle. The claimant testified that both of these injuries required surgery and that Dr. Frankie Griffin performed these surgeries. The claimant testified that Dr. Griffin has been following his progress for the past several years. The claimant testified that he continued with his

medical treatment with Dr. Griffin up until November 18, 2003, and that even though he had an appointment with Dr. Griffin, he learned that his scheduled appointment had not been authorized by the respondent. The claimant testified that he had seen Dr. Griffin for his injuries on December 5, 2002, and that at this visit it was his understanding that he was to return to the doctor in one year for a recheck or sooner if his symptoms worsened. The claimant agreed that he still has medical problems which he wants Dr. Griffin to address and that he has been seen by the doctor yearly since his accident in order for the doctor to follow his progress.

The claimant testified that in 1988 he had a job related injury in which he injured his left upper extremity. The claimant testified that he received treatment from Dr. Marvin Mumme and as a result of this injury was given a 20 percent impairment rating for his wrist. The claimant testified that he has some limitations as a result of this wrist injury in that he cannot carry a lot of weight, noting that he cannot carry a tape and tray like he used to.

The claimant testified that on October 18, 2000, he was cleaning in the paint shop when his left knee went out and he fell and hit a can and cut his left knee. The claimant agreed that a first report of injury was filled out by the respondent as a result of this accident. The claimant testified that he does not know why his left knee gave out but he had been walking on concrete and attributed his knee giving out to his 1997 injury. The claimant testified that he has had problems with his knee giving way following his 1997 injury but he had never fallen before. The

claimant testified that Dr. Griffin cleaned and bandaged the wound. The claimant testified that this wound healed and he has not had any specific medical problems as a result of this cut to his left knee. The claimant testified that he has continued to have problems with his left knee as a result of his October 4, 1997, injury and that these problems were not enhanced or any different as a result of his cut.

The claimant was asked what his specific problems were as a result of his 1997 injury. The claimant testified that he cannot walk on concrete very long, cannot climb ladders, cannot crawl around on the floor, cannot walk on stilts and he has problems with swelling in his knee and ankle. The claimant testified that he has problems with balance because he is continually having to shift his weight from one side to the other. The claimant testified that because of his discomfort and the swelling, he is not able to work the hours he once was able to work.

On cross examination by Respondent No. 1, the claimant agreed that he was released by Dr. Griffin to return to work in February 1998. The claimant agreed that in December 2002 he indicated to Dr. Griffin that his knee and ankle were doing very well and that he had no complaints. The claimant testified that currently he is experiencing swelling in his right ankle about once a month and this would be about the same for his knee. The claimant testified that he can stand about five to six hours but did not disagree with his answer in his deposition that he could stand for approximately seven hours during a working day.

On cross examination by Respondent No. 2, the claimant agreed that he was earning approximately thirteen dollars and hour at the time of his injury in 1997. The claimant testified that he has gotten a raise in his pay since 1997. The claimant agreed that he has not asked for rehabilitation benefits because he is back doing the same type work he had been doing and he is anticipating becoming the owner of the respondent's business once his parents decide to retire.

On redirect examination, the claimant testified that the reason he continues to be checked by Dr. Griffin once a year is so that the doctor can keep a check on his knee. The claimant explained that it is his understanding that he may need a knee replacement at some point. The claimant agreed that in Dr. Griffin's December 5, 2002, report the doctor had recommended that he continue with his activities as tolerated.

Mary Lou Driggers testified on behalf of the claimant stating that she is the claimant's mother and that her husband is the owner of the respondent's painting business. Ms. Driggers testified that she filled out the first report of injury dated October 18, 2000. Ms. Driggers agreed that this form was sent to her workers' compensation carrier and that she was unaware that it was a different carrier than she had in 1997. Ms. Driggers testified that she has worked on her insurance through Ken Clark with State Farm Insurance of Van Buren and he helps her handle her workers' compensation coverage. Ms. Driggers testified that she did not know who paid for the follow up doctor's appointments with Dr. Griffin for the treatment of the claimant's ankle and knee for his

1997 injury. This witness testified that as far as she knew she had the same insurance carrier all along. Ms. Driggers testified that the doctor's office would send the bill directly to the insurance company and she did not ever see the bills.

The medical records set forth that the claimant began receiving medical treatment for his right ankle fracture and left tibia plateau fracture in October 1997. Dr. Frankie Griffin writes on October 15, 1997, that he has seen the claimant who is one week status post open reduction and internal fixation of his right tibia pylon and his left tibia plateau fracture. The doctor recommended that he continue non weight bearing on both lower extremities, that the claimant's right ankle was placed in a short left cast and his left knee should remain in the Bledsoe brace. The medical records set forth that the claimant continued with follow up with Dr. Griffin for his knee and ankle fractures throughout the year 1997. On February 5, 1998, Dr. Griffin recommended that the claimant could gradually resume his activities as tolerated and he may return to work as long as he remains on the ground for his work. Dr. Griffin writes on April 2, 1998, that the claimant reports no complaints and he has resumed his work and having no difficulties. Dr. Griffin writes that the claimant understands that due to the nature of his fracture of his left knee, he may require some further treatment including possible arthroscopies as well as even knee replacement at some point in the future. Dr. Griffin notes that at the present time the claimant is doing well and has no complaints and recommended that the claimant return in six months or sooner if he has any new or worsening

symptoms. On October 6, 1998, Dr. Griffin recommended that the claimant continue to gradually resume activities as tolerated and that he is to return to his office as necessary. Dr. Griffin writes that the claimant understands that he is at risk to develop significant arthritis in both his left knee and right ankle due to the significant trauma and severity of his fractures. Dr. Griffin saw the claimant on December 10, 1998, where it is noted that the claimant reports pain in his right ankle with prolonged standing on hard surfaces as well as pain in his left knee with prolonged standing or prolonged weight bearing. Dr. Griffin again writes that, in his opinion, the claimant will be experiencing pain in his right ankle and left knee with prolonged weight bearing activities and further opines that prolonged weight bearing will speed up the claimant's arthritic process in these areas. The doctor notes that the claimant reports getting occasional sharp pain in the knee and the right ankle which would make him at risk for falls if he were to work at a height. Dr. Griffin writes that the claimant can return to work only on ground level and to avoid prolonged standing or weight bearing activities on hard surfaces. The doctor notes that the claimant is likely to continue to have symptoms and it would be reasonable to have annual follow up visits especially for his left knee. Dr. Griffin writes that eventually the claimant may require arthroscopic debridement of his left knee, injections or even a knee replacement.

On February 4, 1999, Dr. Robert Thompson assessed the claimant with a 5 percent whole body anatomical impairment rating for his injury sustained in his accident. The claimant underwent removal

of the hardware in his right ankle on July 7, 1999. The claimant continued to be seen by Dr. Griffin throughout 1999 for follow up of his right ankle hardware removal and treatment of a minor skin irritation as a result of this removal. On October 28, 1999, Dr. Griffin again writes that the claimant can continue to gradually resume his activities as tolerated, noting again that he understands that he may continue to have some difficulties with his knee and ankle and that ultimately further surgical procedures may be required. Dr. Griffin writes that the claimant reports that he did have a giving away episode with his left knee and he was cautioned to stay out of any high places and to avoid stairs. X-rays of the claimant's left knee on April 6, 2000, set forth that the claimant has good alignment with no change in the hardware position but there are early arthritic changes noted.

Dr. Griffin writes on October 19, 2000, that he has seen the claimant who reports that he fell across a paint can the day before and sustained a laceration to the anterior aspect of his left knee. The claimant was assessed with superficial laceration to his left knee and was treated with peroxide, sterile strips and medications. On December 11, 2001, Dr. Griffin examined the claimant's left knee and right ankle and again recommended that he return in eleven months for a recheck as to the status of his injuries. On December 5, 2002, Dr. Griffin writes that the claimant reports that he has some swelling in both his left knee and right ankle with prolonged weight bearing. Dr. Griffin notes that the claimant is to continue in his activities as tolerated and that he understands that he will have some aches and pains in the ankle and knee and may eventually

require further treatment. Again, Dr. Griffin recommended that the claimant return for an annual check up or sooner if his symptoms worsen.

The respondents contend that this claim is barred by the statute of limitations. The evidence presented sets forth that the claimant last received medical treatment for his compensable injuries on December 5, 2002, at which time it was recommended that he return to the doctor within a year for further checking of his compensable injuries. The claimant has testified that he scheduled an appointment with Dr. Griffin for November 18, 2003, and when he appeared for this appointment, he was informed that the respondent would not authorize his appointment with the doctor. The claimant, therefore, was denied medical treatment and the claim was controverted. The Commission file indicates that the claimant signed an AR-C on December 9, 2003, and filed this claim with the Commission on December 12, 2003. The record is clear that the claimant attempted to receive medical treatment within the one year period of time from his last doctor's appointment but was denied by the respondent. Therefore, I find that the statute of limitations does not bar this claim.

I find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injuries. The medical records set forth that this claimant sustained serious fractures to his ankle and knee for which Dr. Griffin has continually recommended annual check ups. Very early on in the claimant's medical treatment for his compensable injuries, Dr. Griffin had set forth that the claimant

would likely be in need of additional treatment for his knee and some of the later medical reports indicate that there was signs of arthritis setting into these injured areas. Therefore, I find that it is both reasonable and necessary for this claimant to continue to be seen by Dr. Griffin in order to monitor the status of this claimant's compensable injuries.

I find, based upon the evidence, that the claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss over and above the 5 percent whole body impairment which this claimant has been paid. The claimant sustained compensable injuries to his knee and his ankle which would entitle him to an impairment rating based on these extremities. These injuries are scheduled injuries and should have been assessed and paid according to the scheduled injury chart. Arkansas law has long held that injuries which fall within the scheduled injury category are limited to the amounts set forth in the code and that a claimant is not entitled to disability over and above the impairment rating for these scheduled injuries. I further find that there is no Second Injury Fund liability in this matter.

FINDINGS & CONCLUSIONS

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

2. On October 4, 1997, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to his right ankle and left knee.

4. The claimant received a 5 percent impairment for his injuries.

5. The claimant is entitled to a compensation rate of \$293.00 for temporary total disability and \$220.00 for permanent partial disability.

6. The respondent has failed to prove by a preponderance of the evidence that this claim is barred by the statute of limitations. See Jack v. Around the World Travel, Full Commission opinion June 15, 1995, Claim Number D916900. Also see discussion above.

7. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injuries. See discussion above.

8. Arkansas law prohibits the payment of wage loss over and above a scheduled injury. It has long been held that a claimant who suffers an injury or injuries which are scheduled is not entitled to wage loss over the impairment rating given for these injuries. Also see discussion above.

9. There is no Second Injury Fund liability in this matter.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injuries.

The claimant has failed to prove that he is entitled to wage loss over his impairment ratings or that there is any Second Injury Fund liability.

The statute of limitations does not bar this claim.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE