

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302655

MAX ODOM, EMPLOYEE

CLAIMANT

MED SOURCES LIMITED, EMPLOYER

RESPONDENT

TWIN CITY FIRE INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED FEBRUARY 4, 2004

Hearing before Administrative Law Judge J. Mark White on January 8, 2004, in Hope, Hempstead County, Arkansas.

Claimant represented by Ms. Shannon Muse Carroll, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by Mr. Gene Williams, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 8, 2004, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on September 8, 2003, and a Prehearing Conference Order was entered that same day. A copy of the September 8, 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; and that the claimant earned sufficient

wages to be entitled to the maximum compensation rates.

The parties agreed that the issues to be presented were whether the claimant was an employee of respondent; whether the claimant sustained a compensable injury for which he is entitled to medical and indemnity benefits; and controversion and attorney's fees. The parties agreed to reserve the issues of temporary partial disability, permanent partial disability and unpaid travel expenses.

The claimant contends that he was an employee of the respondent-employer and that he sustained a compensable injury on February 1, 2003, when he was testing a four-wheeler owned by respondent-employer which had just been returned from the shop; that the four-wheeler ran off the road, hit trees and flipped over; that the claimant sustained injuries in the form of a broken left elbow, broken left femur, broken knee, broken vertebrae in his back, and right shoulder injuries; that the claimant also suffered a head injury which has caused personality changes and memory loss; that his actions of testing the four-wheeler were part of his duties as the four-wheeler was used by respondents to reach injured persons who might otherwise be unreachable; that it was his job as the treating physician to ensure that this vehicle was in working order; and that he is entitled to ten weeks of temporary total disability benefits for the time he was off work due to this injury.

Respondents contend that if the claimant was an employee, he did not sustain

a compensable injury within the course and scope of his employment; and that the claimant's alleged head injury is the result of a pre-existing condition from a previous head injury in which the claimant was involved in an assault and was struck in the head. At the hearing, the claimant withdrew his claim for this head injury, any connected personality changes, and long-term care for the head injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, the letter brief submitted by the claimant, 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 "right to control" as a factor in determining employment status is not implicated by a doctor's professional clinical independence.
3. The claimant has proven by a preponderance of the evidence that the respondent-employer had the right to control the method and means of the claimant's administrative work.

4. The claimant has proven by a preponderance of the evidence that he was an employee of the respondent-employer.
5. The claimant has proven by a preponderance of the evidence that he was engaged in employment services at the time of his injury.
6. The claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment.
7. The claimant has proven by a preponderance of the evidence that his injury caused internal and external physical harm to the body requiring medical services; that his injury was caused by a specific incident identifiable by time and place of occurrence; and that the existence and extent of his injury is established by medical evidence supported by objective findings.
8. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on February 1, 2003.
9. The claimant has proven by a preponderance of the evidence that he was in his healing period and totally incapacitated from earning wages in the ten weeks after his accident.
10. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits for those ten weeks.
11. The claimant has proven by a preponderance of the evidence that he is

entitled to all medical treatment reasonably necessary in connection with his compensable injury.

12. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant is a physician who has been worked for the respondent-employer since May, 2000, as executive medical director of the Nashville Medical Clinic. He is the only physician practicing in the clinic, and he oversees both clinical and administrative functions. He has previously worked for the respondent-employer in other states. The respondent-employer is one of a number of affiliated corporations owned by an investor in Louisiana. Each corporation is formed to provide the services of a single doctor; the doctors are segregated into separate corporations for liability purposes, so that the liability of one doctor or corporation will not affect the assets of the other doctors or corporations.

The story of this case actually begins in September, 2002, when the claimant was in New Orleans for a continuing education conference. During his trip, the claimant was attacked by muggers and seriously injured. The muggers dislocated his right shoulder from its socket and severely beat him on the head. Since that time,

he has suffered repeated episodes of vision loss, lasting anywhere from five to twenty seconds. The claimant testified that his eye doctors have told him the problem stems from a neurologic injury to the pathways in his occipital cortex. He testified he had once had an episode of vision loss while driving his car, though he did not have an accident at that time.

On Saturday, February 1, 2003, the claimant was driving a four-wheeled all-terrain vehicle (ATV) along a trail near Lake Greeson. Sandra DeJean was riding on the ATV with him. The claimant testified that he experienced another episode of vision loss and attempted to slow the ATV down. He remembered that a sharp curve lay ahead, and he turned the vehicle in anticipation of that curve. The ATV instead went over a cliff, throwing the claimant and DeJean into a tree. Both sustained multiple, serious injuries.

The primary dispute in this claim is why the claimant was riding the ATV, and why DeJean was with him. DeJean was formerly the office manager of Nashville Medical Clinic, and DeJean and the claimant had been romantically involved until shortly before the accident. The claimant testified that DeJean broke off their relationship and moved out of the claimant's house in December, 2002, and that DeJean was laid off from her job with the clinic in January, 2003. The medical records, however, record that in the days after the accident the claimant repeatedly

referred to DeJean as his “fiancée.” DeJean did not appear at the hearing; the respondents subpoenaed her but were unable to successfully serve her with the subpoena.

Based on the past romantic relationship, and based on the references to DeJean as the claimant’s fiancée, the respondents essentially contend that the claimant was on a date when he sustained his injuries. The claimant offers a substantially different explanation.

The claimant testified that the ATV is owned by the respondent-employer and was bought along with another ATV for the clinic’s official use. He testified the vehicles were bought to provide him a means to get from his home to the clinic should the roads be closed by snow or ice, and secondarily for use in extracting patients from remote areas. He testified that both vehicles had recently been repaired and that he intended to take the ATVs out for a test drive, to ensure that they had been successfully repaired. He testified that DeJean had called him earlier that day to discuss the possibility of her returning to work for the clinic as an independent contractor. The claimant testified that he and DeJean had discussed this possibility at an earlier date, and that he offered to discuss the details of the agreement with DeJean if she would come with him to test drive the ATVs. He had worked at the clinic seeing patients that day until mid-afternoon; he testified that

he had time to either test drive the ATVs or talk to DeJean, but not both, unless she were to come with him on the trip. He testified that he could not have the discussion by phone, but that it had to be done in person because of the sensitive nature of what he wanted to discuss. He testified that he intended to discuss a non-competition clause, standards for her performance, and an agreement that she would do the work for at least a year so as to justify the clinic's investment in the training that would be required.

James White, the general counsel and chief operating officer of the respondent-employer, corroborated much of the claimant's testimony. He testified that the ATVs had recently been repaired, and that he expected the claimant to test drive them to ensure they were in working order. White testified that the respondent-employer's interests were furthered by the claimant test driving the ATV as he did. White testified that the claimant could test drive the ATV anywhere so far as he and the respondent-employer were concerned. He testified that one of the claimant's job responsibilities was to ensure "that the assets of the clinic are maintained and operate in an appropriate fashion," including the ATVs.

After the accident, the claimant was airlifted to St. Joseph's Hospital in Hot Springs where he immediately underwent surgery. The surgical repair of his left elbow failed, and the claimant was referred to a specialist with the Mayo Clinic in

Minnesota. The claimant paid his own way to Minnesota, where another surgery was successfully performed on his elbow. The claimant has returned to the Mayo Clinic for follow-up care since that time.

II. Adjudication

A. Employment Status

The determination of whether one is an employee or an independent contractor is a question of fact. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). The primary factor to consider is whether the employer has the right to control the means and the method by which the work is done, but neither that factor nor any other feature of the relationship is alone determinative. *Id.* The courts have identified other factors that may be considered, including:

- (1) The right to terminate the employment without liability;
- (2) The method of payment, whether by time, job, piece or other unit of measurement;
- (3) The furnishing, or the obligation to furnish, the necessary tools, equipment and materials;
- (4) Whether the person employed is engaged in a distinct occupation or business;
- (5) The skill required in a particular occupation;

(6) Whether the employer is in business;

(7) Whether the work is an integral part of the regular business of the employer; and

(8) The length of time for which the person is employed.

Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982).

The respondents contend that the claimant was an independent contractor because he retained the right to control the means and method of his clinical work and his treatment of patients. I find this argument unpersuasive. As the claimant testified, physicians have a professional and ethical obligation to control all treatment decisions and to make such decisions in the best interests of the patient. Treatment decisions cannot ethically be delegated to or subordinated to the control of a corporation or other non-doctor. This obligation is akin to that of a lawyer's duty of professional independence. *See* Rules 2.1 and 5.4, Arkansas Rules of Professional Conduct. If I were to conclude that a doctor's control of treatment is sufficient to render a doctor an independent contractor, then such a conclusion would render *every* doctor an independent contractor. Not only that, such a holding would by extension render every lawyer an independent contractor, since lawyers possess the same type of professional and ethical obligation. Such a holding is far too broad; I am unaware of any case law supporting such a proposition, and the respondents have referenced no authority for it.

Therefore, I conclude that the “right to control” as a factor in determining employment status is not implicated by a doctor’s professional clinical independence. The proper question is whether the employer retains the right to control the method and means of the doctor’s non-clinical work – e.g., his administrative decisions. In this case, the testimony of the claimant and his supervisor establishes that the claimant did not retain the ultimate right to control administrative decisions. Though the doctor made such decisions as clinic director, his decision-making authority was subordinate to that of the corporation and its officers. I find that the claimant has proven by a preponderance of the evidence that his employer had the right to control the method and means of his administrative work.

As for the remaining factors, the testimony of both witnesses unequivocally establishes that the claimant’s employment may be terminated by either party without liability; that the claimant was paid with a monthly housing and vehicle allowance, a monthly draw, and annual profit sharing payment; that the respondent-employer furnished all necessary tools and equipment; that the claimant was employed in a distinct occupation requiring great skill; that the respondent-employer is in business; that the claimant’s work was an integral part of the respondent-employer’s business; and that the claimant is employed for an indefinite

period of time. I also note that the claimant owned no ownership interest in the respondent-employer or any of its affiliated corporations, though White testified that the claimant has the right to buy in to the corporation in the future. Considering these factors, and considering the “right to control” discussion above, I find that the claimant has proven by a preponderance of the evidence that he was an employee of the respondent-employer.

B. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) 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 existence and extent of 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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). 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. *Id.*

Employment Services

To prove a compensable injury, the claimant has the burden of proving by a preponderance of the evidence that he was engaged in employment services at the time of his injury. *Clardy v. Medi Homes LTC Services LLC*, Workers' Compensation Commission E911499 (Oct. 27, 2000), *aff'd on other grounds*, 75 Ark. App. 156, 55 S.W.3d 791 (2001); ARK. CODE ANN. § 11-9-102(4)(B)(iii). An employee is performing "employment services" when he is doing something that is generally required by his employer. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002). The same test is used to determine whether an employee was performing "employment services" as is used when determining whether an employee was acting within "the course of employment"; the test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Id.*

The respondents essentially contend that the claimant was on a date with his girlfriend at the time of his injury and that he was not performing employment services at the time. They question the reasonableness of the claimant saying he was

test-driving the four-wheelers, when he in fact undertook this "testing" in a remote wooded area more than 20 miles away from his home and office with a woman with whom he had recently been romantically involved.

I note as an initial matter that the claimant's credibility is suspect. In particular, his testimony regarding his romantic relationship with DeJean simply does not square with the other evidence of record. The claimant excused the references to a fiancée in the Mayo Clinic records as a result of the Clinic's centralized, computerized records. But a handwritten physical therapy note, dated the day after the claimant's admittance and surgery, also refers to the claimant's fiancée. The claimant excused the references by saying he was under the influence of medication. To bolster his excuse, he points to a history record showing that the (male) claimant has undergone four pregnancies and possibly a pap smear. He testified that he gave this information shortly after his surgery while he was still under the effect of anaesthesia. But the record to which he refers, admitted as Claimant's Exhibit No. 2, is dated September 9, 2003, months after the surgery. A corresponding treatment note establishes that the claimant returned to the clinic for a follow-up visit on September 9. What he said in that visit is entirely immaterial to what he told the clinic staff upon his initial admission. The true status of his relationship with DeJean I do not claim to know; but the evidence plainly

demonstrates that the claimant referred to her as his fiancée on at least two occasions.

The testimony of James White was more credible; it was plausible, internally consistent and consistent with the other evidence in the record. But I note that the record suggests that the respondent-employer has paid for some, if not all, of the claimant's medical care for this injury. Because it appears that the respondent-employer has a significant financial interest in the outcome of this litigation, I do not take White's testimony as uncontroverted.

Admittedly, were the claimant's testimony the only evidence regarding the relationship of the test-drive with the employment, I would find his testimony to be implausible. But such is not the case; his testimony in this regard is fully corroborated by the testimony of White. Both witnesses agree that the claimant was fulfilling his job duties at the time of his injury. The claimant may lack credibility overall, but his specific testimony as to the relationship between his employment and his riding the ATV that day is specifically corroborated by White. Though I do not take White's testimony as uncontroverted, there is simply no evidence in the record to credibly rebut it. For me to find that the claimant was not engaged in employment services at the time of his injury would require me to arbitrarily disregard White's testimony, and this I may not do. *See, Edens v. Superior Marble &*

Glass, 346 Ark. 487, 58 S.W.3d 369 (2001). Therefore, I find that the claimant has proven by a preponderance of the evidence that he was engaged in employment services at the time of his injury.

In making this finding, I note that the claimant could have sustained an accident such as this regardless of whether Sandra DeJean was with him, and regardless of where he chose to test the four-wheeler. A similar accident could just as easily have occurred outside the medical clinic or near the claimant's home.

I also note that my conclusion does not foreclose the possibility that the claimant brought DeJean with him for personal, romantic purposes. Whether he did or not ultimately does not matter, because the testimony establishes he would have eventually taken the ATVs out for a test drive regardless of whether DeJean had come. Though it may not be directly applicable, I find the dual-purpose doctrine to be instructive in this regard. The doctrine holds that injury sustained during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer that would have caused the trip to be taken by someone even if it had not coincided with the personal journey. *Lytle v. Arkansas Trucking Servs.*, 54 Ark. App. 73, 923 S.W.2d 292 (1996); see generally 1 Arthur Larson, *Larson's Worker's Compensation Law*, §§ 16.01, 16.10 (2002). The decisive test for application of the "dual-purpose" trip

doctrine must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils; service to the employer need not be the sole cause of the journey, but it must be at least a concurrent cause and sufficient within itself to occasion the journey. *Id.*

The testimony of the claimant and of White establishes that service to the respondent-employer was at least a concurrent cause and sufficient within itself to occasion the claimant's ATV ride. The claimant's duty to test the ATV and ensure it was in proper working order would have placed him in this peril regardless of whether DeJean had been present. It is reasonable to think that the best place to test an ATV is in rough terrain, thus the claimant's choice of a distant testing location matters not. Therefore, I conclude that the claimant's reason for having DeJean with him is irrelevant; all that matters is whether he had a legitimate employer-related purpose for taking the ATV out for a ride as he did. The evidence establishes that he did have such a purpose, and that he was pursuing his employer's interests in doing so.

Conclusion

An injury arises out of one's employment when a causal connection between work conditions and the injury is apparent to the rational mind; the employment need not be the sole or proximate cause; all that is required is that there be a

substantially contributory causal connection between the injury and the business in which the employer employs the claimant. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). In other words, the injury must be a natural and probable consequent or incident of the employment and a natural result of one of its risks. *J. & G. Cabinets v. Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980). It has already been established that the claimant's employment encompassed testing of the four-wheeler; the claimant's injury is quite obviously a natural result of the risk of using a four-wheeler. Because of this, and because I find that the claimant was engaged in employment services at the time of his injury, I must also find that the claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment.

In making this finding, I realize that the claimant testified his accident occurred when he temporarily lost his sight and was unable to see to maneuver the four-wheeler. This testimony does raise the question of whether this injury is idiopathic. The word "idiopathic" is defined as (1) peculiar to the individual, (2) arising spontaneously or from an obscure or unknown cause; idiopathic injuries begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin. *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496

(1987) (citations omitted). Idiopathic injuries do not arise out of the employment unless the employment contributes to the risk or aggravates the injury by, for example, placing the employee in a position which increases the dangerous effect of a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. *Id.* Even if the injury in this claim were idiopathic, a finding which I do not make, it is clear that the employment contributed to the risk by placing the employee on a moving four-wheeler, a position which increased the dangerous effect of his loss of sight. Therefore, an idiopathic origin will not bar the compensability of this claim.

Considering the credible evidence of record, in particular the claimant's medical records, I find that the claimant has proven by a preponderance of the evidence that his injury caused internal and external physical harm to the body requiring medical services; that his injury was caused by a specific incident identifiable by time and place of occurrence; and that the existence and extent of his injury is established by medical evidence supported by objective findings. Therefore, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury on February 1, 2003.

C. Entitlement to Benefits

Temporary Total Disability

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).

The claimant testified that he returned to work ten weeks after his accident. None of his doctors have released him from care, and the medical evidence makes clear that he continued to receive treatment for his injuries for months after this ten-week period. Given these facts, given the seriousness of his injuries, and given the medications he was using at the time, I find that the claimant has proven by a preponderance of the evidence that he was in his healing period and totally incapacitated from earning wages in the ten weeks after his accident. I therefore find that he has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits for those ten weeks.

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). Even if it is demonstrated that a preexisting condition is also a causal factor, the claimant has met his burden of proof so long as he proves that the work injury combined with or aggravated the preexisting condition to bring about the need for the treatment. *General Elec. Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

There is nothing in the evidence to suggest or establish that the medical treatment received by the claimant has not been reasonably necessary. The parties have not contended that any particular treatment was or was not reasonably necessary. Therefore, I find that the claimant has proven by a preponderance of the evidence that he is entitled to all medical treatment reasonably necessary in connection with his compensable injury.

AWARD

The claimant has proven by a preponderance of the evidence that he

sustained a compensable injury on February 1, 2003; that he is entitled to temporary total disability benefits; and that he is entitled to medical treatment 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.

The claimant's attorney, Ms. Shannon Muse Carroll, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge