

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F207905

DANNY V. CATES, EMPLOYEE

CLAIMANT

**FRANK VILLINES,
UN-INSURED EMPLOYER**

RESPONDENT

OPINION FILED SEPTEMBER 30, 2005

A hearing in this case was conducted on July 7, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Laura J. McKinnon, Attorney at Law, Fayetteville, Arkansas.

Respondent was represented by Jeffrey Malm, Attorney at Law, Harrison, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held in this claim on April 26, 2005; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations; these stipulations can be found in the Prehearing Order, and were confirmed by the parties at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on July 11, 2002 and at all other relevant times.

2. Claimant's average weekly wage was \$250.00.

3. Respondent controverts this claim in its entirety.

At the July 7, 2005 hearing, the parties discussed the issues set forth in the

Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable injury on July 11, 2002.
2. Whether Claimant is entitled to reasonably necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability or temporary partial disability benefits from July 11, 2002 to a date to be determined.
4. Whether Claimant is entitled to benefits under Ark. Code Ann. § 11-9-505(a)(1).
5. Whether Claimant is entitled to an attorney's fee.

Claimant contends that he fell in the course of his employment on July 11, 2002, resulting in compensable injury to his left shoulder, back, and left knee. He seeks medical treatment for his condition. He also seeks temporary total disability, temporary partial disability, and § 11-9-505(a)(1) benefits, as justified by the proof. Finally, Claimant also seeks an attorney's fee.

Respondent specifically contends that Claimant's back injury is not causally connected to his work. Respondent offers no contentions with regard to Claimant's left knee and left shoulder injuries. Respondent argues that Claimant's back injury was diagnosed and treated after he left his employment.

DISCUSSION

Claimant underwent back surgery at L4-5 in 2000. Dr. Ronald Williams' December 11, 2002 note reports that Claimant "had back surgery for right leg pain in Tulsa about two years ago and did quite well with that." Claimant testified that he was able to meet the physical requirements of his job for Respondent, and that he "was feeling great and everything" until the incident on July 11, 2002.

Claimant was delivering money in Eureka Springs on July 11, 2002, working out of an armored car with a fellow employee.

July 11th, we was in Eureka Springs at the Community Bank. And, anyway, I had the dolly with all the money on it into the bank. When it did, the dolly tilted -- the weight, you know, brought the dolly up. Well, I put my left foot on the axle to bring it back, two bags of quarters fell off of it. And Inzel [Claimant's fellow employee] picks the two bags of quarters up when I was bringing it back and threw them back on the dolly. When it did, it caused the dolly to come back. And, when it did, well, I went backward. I couldn't hold it; I went backward. And when it did, the dolly landed on my leg, and I hit my back against that step thing, you know, down. And then the shoulder hit the concrete back there.

...

... And then that ridge part, right there, is what caught me in the lower part of the back. And then the shoulder hit the pavement on down below.

...

And then Inzel just picks up the dolly and takes it on in, and leave me -- you know, leaves me out there. Well, I got up, and then I couldn't hardly walk on that left leg.

...

Hurting worst was my leg and everything. Then the shoulder. Then, when we came back -- we had to work the rest of that day -- I told him I'm going to have to go to the hospital or do something, because something's wrong, you know.

Claimant notified his employer of his incident and injury later that same day.

Claimant sought medical treatment. An emergency room nursing record dated July 11, 2002 reports that Claimant “[f]ell onto L knee and back onto back after attempting to unload dolly hand truck. Relays L knee, L hip & mid lumbar back pain denies numbness tingling.” A radiology report prepared that same day notes, as to Claimant’s left knee, “[p]ossible small chip of the patella without other abnormality noted.” It also reported that “[n]o acute fracture of the left shoulder or scapula identified.” Claimant was provided with a brace for his left knee, taken off work, and referred for additional medical treatment.

Dr. Charles Ledbetter examined Claimant on July 17, 2002. In his note of that date, Dr. Ledbetter recorded the following history:

[Claimant] was in Eureka Springs on 7/11/02 going into the bank, and the dollie he was pushing with money on it came backwards and hit his left leg and he fell on his left shoulder. The dolly apparently had a lot of metal money on it and he was going up a ramp and this hit his left knee and knocked him down. He fell on his shoulder on the ground.

Upon examination, Dr. Ledbetter observed "a mild effusion of the knee joint." Claimant's left shoulder x-rays were normal; the study of his left knee revealed "degenerative arthritis of the left knee and there is a bone spur adjacent to the patella." Dr. Ledbetter opined that Claimant "probably aggravated pre-existing degenerative arthritis of his knee." Claimant was directed to remain off work until August 5, 2002.

Claimant continued a course of treatment with Dr. Ledbetter. At his August 5, 2002 visit, Dr. Ledbetter noted that Claimant's "shoulder now is doing okay." Dr. Ledbetter also noted that Claimant continued to have effusion in his left knee. Claimant was directed to remain off work until August 19, 2002. On August 6, 2002, Dr. Robert Ahrens completed a Form AR-3, noting that he treated Claimant's left upper extremity and left lower extremity; there was no mention of Claimant's back.

On August 13, 2002, Claimant reported to an emergency room complaining of "mid back pain radiating to chest, shortness of breath, left arm numbness." A form recording Claimant's history and physical notes "a past history of cerebrovascular accident and asthma, also to include chronic back pain"; this form does not refer to Claimant's July 11, 2002 incident. This emergency room visit caused Claimant to miss his next appointment with Dr. Ledbetter, so Claimant was directed to remain off work until August 27, 2002.

An MRI study of Claimant's left knee was undertaken on August 15, 2002. This

study produced the following opinion: "A small suprapatella effusion is noted. No other abnormalities are identified." Dr. Ledbetter reviewed the report of this study on August 27, 2002 and concluded:

It shows no internal derangement. It does show evidence of osteoarthritis. There are no ligamentous injuries and no meniscal tears. ... I think the patient can return to work from an orthopedic standpoint.... I see no permanent impairment or loss of physical function as a result of his injury.

Dr. Ledbetter released Claimant to return to regular duty on August 27, 2002.

The medical records in evidence record that Claimant complained of back pain on September 5, 2002; September 19, 2002; and October 10, 2002. The October 10, 2002 entry records that Claimant's "back still hurting down L leg & burning feeling [with] numbness into L thigh." Claimant underwent an MRI of his lumbar spine on October 22, 2002. It produced an impression of: "1. Diffuse osteoarthritis. 2. Multiple level degenerative disc disease. 3. Probable post surgical scarring to the left of midline at L4-L5. 4. Moderate to large size posterior left sided HNP at L5-S1." On November 27, 2002, Dr. Ahrens took Claimant off work and reported a need for a neurosurgical consultation.

Claimant presented to Dr. Ronald Williams on December 11, 2002. Referencing Claimant's back surgery in 2000, Dr. Williams' note records the following history: "He did fine until he fell at work on July 11 of this year. That has been followed by back pain going into both legs, but predominately the left and goes as far as the calf." Dr. Williams noted that Claimant's previous epidural steroid injections were not effective. After examining Claimant and his MRI, Dr. Williams agreed with Claimant's request to go ahead with surgery. Claimant underwent a microdiscectomy at L5-S1, on the left, on January 3, 2003.

Respondent Frank Villines, Claimant's employer, testified that from July 11, 2002,

until Claimant's termination on September 6, 2002, Claimant never came in and reported a back problem. Villines "thought it was his leg and his shoulder" that were hurt. Villines also testified that once Claimant came to his place of employment wearing his brace on his right knee, not his left knee.

Connie Brooks testified on behalf of Respondent; Brooks was employed by Respondent and worked with Claimant. She recalled: "When we first hired him, when we would be waiting to work at night, he'd talk about his injuries to his ankles and his knees and his back from jumping out of a helicopter." She also recalled that when Claimant was off work due to his injury, he once came to the office wearing his leg brace on his right leg.

Barbara Villines, the wife of Frank Villines, testified on behalf of Respondent; she worked with Claimant. She stated that when she talked to Claimant on July 11, 2002, after the incident, "he said that his knee had hurt a little bit, but that was it." She denied hearing anything about Claimant's back being injured prior to his termination. She also reported that "on the 6th of July, he came in and said that he had fallen at the campground where he was staying and hurt his shoulder."

Respondent introduced into evidence a signed but undated copy of Claimant's Form AR-C. This form was admitted into evidence without objection by Claimant. In that part of the form designated to "describe the part of body injured and cause of injury," Claimant recorded: "Left knee and left shoulder." There is no mention of Claimant's back.

A. Compensability

Claimant must prove that he sustained a compensable injury.

"Compensable injury" means: ... an accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or

death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i); see Hargis (War Eagle) Transp. v. Chesser, ___ Ark. App. ___, ___ S.W.3d ___ (September 8, 2004). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

The employee must sustain his burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

Claimant argues that he sustained compensable injury to his left shoulder, back, and left knee. Compensability will be discussed with regard to each of these three areas.

1. Left Shoulder

I find that Claimant did not sustain his burden of proving a compensable injury with regard to his left shoulder. Specifically, a review of the evidence fails to disclose objective findings in support of a compensable injury. The July 11, 2002 radiology report notes that “[n]o acute subluxation, dislocation or fracture is identified” in Claimant’s left shoulder. Dr. Ledbetter recorded on August 5, 2002 that Claimant’s “shoulder now is doing okay. He’s not having any particular problems with that.” In the absence of objective findings, Claimant did not prove a compensable injury to his left shoulder.

Because Claimant failed to prove that his alleged shoulder injury is compensable, it is not necessary to discuss either medical or temporary disability benefits with regard to

his left shoulder. See Ark. Code Ann. § 11-9-102(4)(F)(i).

2. Back

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he sustained compensable injury to his back on July 11, 2002. The incident wherein Claimant was struck by the dolly, fell, and hit his “back against that step thing,” at the Community Bank in Eureka Springs on July 11, 2002, constitutes an accidental injury. This incident caused physical harm to Claimant’s body. The emergency room nursing record dated July 11, 2002 reports that Claimant fell onto his left knee and back and (among other things) reported lumbar back pain. Claimant related his physical condition to this incident in his initial consultation with Dr. Williams, who identified a disc herniation at L5-S1. This physical harm arose out of and in the course of Claimant’s employment: he was injured while delivering money from an armored car to a bank, part of his regular job duties. The medical records prove that Claimant’s injury required medical services; he underwent treatment, including epidural steroid injections and a microdiscectomy at L5-S1 on January 3, 2003. There are objective findings in support of Claimant’s medical evidence, in the form of an MRI of Claimant’s lumbar spine taken October 22, 2002. This study reported a “[m]oderate to large size posterior left sided HNP at L5-S1.”

I acknowledge Respondent’s argument that Claimant’s back injury is not connected to his work. Both Frank Villines and his wife denied hearing about a back problem prior to the termination of Claimant’s employment; the signed but undated copy of Claimant’s Form AR-C admitted into evidence makes no reference to a back problem. Nonetheless, the evidence of greater convincing force weighs in Claimant’s favor.

If the claimant’s disability arises soon after the accident and is logically

attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award. But if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the commission's conclusion is controlling.

Hall v. Pittman Constr. Co., 235 Ark. 104, 105-6, 357 S.W.2d 263, ___ (1962) (citations omitted). Here, there are no medical records indicating that Claimant sought treatment for his back from the time of his first back surgery in 2000 to the date of his incident, July 11, 2002. He testified that he struck his back "against that step thing" in his compensable accident. Then, the emergency room nursing record dated July 11, 2002 - the same date as the incident - documents that Claimant reported falling on his back and complained of lumbar back pain. While his back may not have been the focus of his initial treatment immediately thereafter, there is no other explanation in the record for the subsequent back treatment he received. Claimant specifically denied any other injury after July 11, 2002.

3. Left Knee

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he sustained compensable injury to his left knee on July 11, 2002. As noted above, Claimant's July 11, 2002 incident constitutes an accidental injury; it arose out of and in the course of Claimant's employment. This accidental injury caused physical harm to Claimant's left knee; the July 11, 2002 emergency room nursing record reports that Claimant complained of left knee pain. This physical harm required medical services, in the form of a brace, medication, and other medical treatment, as reflected in the medical records. Dr. Ledbetter noted effusion in Claimant's left knee on July 17, 2002 and August 5, 2002. Effusion in the knee constitutes an objective finding. See Long v. L & J

Mechanical, Full Workers' Compensation Commission Opinion filed September 30, 2003 (F008439).

B. Medical Treatment

Claimant seeks medical treatment for his left knee and back. An employer shall 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). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers' Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, ___ Ark. App. ___, ___ S.W.3d ___ (March 16, 2005).

1. Back

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to medical treatment for his compensable back injury. Dr. Williams noted on December 11, 2002, after referencing Claimant's back surgery in 2000: “He did fine until he fell at work on July 11 of this year. That has been followed by back pain going into both legs, but predominantly the left and goes as far as the calf.” Prior epidural steroid injections failed to provide Claimant with relief. Dr. Williams performed surgery on January 3, 2003, a microdiscectomy at L5-S1 on the left. When he examined Claimant on September 23, 2003, Dr. Williams reported that he “still has some degree of

pain in the left leg, although it is much better than pre-operatively.” That this surgery provided Claimant with some relief indicates that it was reasonably necessary to reduce or alleviate his symptoms resulting from his compensable injury. Further, the medical treatment was connected with Claimant’s injury. There are no medical records indicating that Claimant needed medical treatment for his low back prior to July 11, 2002; on that date, he reported injuring his back and experiencing back pain. There is no subsequent explanation for Claimant’s need for medical treatment for his back.

2. Left Knee

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to medical treatment for his compensable left knee injury of July 11, 2002. The medical records indicate that he subsequently received treatment for this injury, including a brace. On August 27, 2002, Dr. Ledbetter determined that Claimant did not sustain permanent impairment or loss of physical function in his left knee, and that he could return to work. This medical treatment was necessary to diagnose Claimant’s injury and to reduce or alleviate his symptoms resulting from that injury. Further, the medical treatment is connected to Claimant’s compensable injury. The medical record does not document left knee complaints prior to July 11, 2002; an injury is reported on that date, promptly followed by medical treatment for Claimant’s left knee.

C. Temporary Disability Benefits

Claimant seeks either temporary total disability or temporary partial disability benefits from July 11, 2002 to a date to be determined by the proof. A patient instruction sheet dated July 11, 2002 took Claimant off work until released by Dr. Ahrens. Dr. Ahrens referred Claimant for left knee treatment from Dr. Ledbetter, who kept Claimant off work

until August 27, 2002, as evidenced by notes dated July 17, 2002; August 5, 2002; and August 19, 2002. On August 27, 2002, Dr. Ledbetter opined that Claimant could return to work from an orthopedic standpoint.

As will be discussed further below, Claimant attempted to return to work; he did work on a part time basis for two weeks. Claimant's employment with Respondent was terminated on September 6, 2002. Claimant testified that he attempted to find another job without success; he did not testify that he could not work.

Dr. Ahrens took Claimant off work in a note dated November 27, 2002; the note states that Claimant "need[s] neurosurgical consult." Claimant then came under Dr. Williams' care for treatment of his back. After his January 3, 2003 surgery, Claimant was scheduled to see Dr. Williams for a follow-up visit in six weeks' time. On February 13, 2003, Dr. Williams noted to Claimant's attorney that Claimant had not yet returned for his follow-up visit, and that "to answer your questions about his work status would require a work evaluation." Such an evaluation does not appear in the record. Following his surgery, Claimant apparently did not present to Dr. Williams again until September 23, 2003; in a letter of that date, Dr. Williams notes that Claimant presented "today. I had not seen him since his surgery."

At the hearing, Claimant testified that he continued under Dr. Williams' treatment for a while after his surgery, but that he is not currently under Dr. Williams' care. He found a job on December 16, 2004. He denied working anywhere between the date Respondent terminated his employment, September 6, 2002, and the date he took his new job, December 16, 2004.

1. Temporary Total Disability Benefits

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Fred's, Inc. v. Jefferson, ___ Ark. ___, ___ S.W.3d ___ (March 31, 2005). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The "healing period" is that period for healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(12). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 228, 79 S.W.3d 414, ___ (2002). The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 12, 2002 until August 27, 2002. Within that time, the medical records document that Claimant was taken off work on July 11, 2002 due to his compensable left knee injury. Since he was taken completely off work, he sustained an incapacity to earn any wages. Dr. Ledbetter's August 27, 2002 note and release for Claimant to return to work demonstrate that, with regard to his left knee injury, Claimant's healing period ended on that date. Claimant testified that he then attempted to return to work for the Respondent; he did not testify that he was incapable of working. Thus, Claimant is entitled to temporary total disability benefits from July 12, 2002 until August 27, 2002.

I further find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from November 28, 2002 until January 3, 2003. Claimant was taken off work on November 27, 2002, due to his compensable low back injury. Up to and including the date of his surgery, he was not able to earn any wages at all. However, Claimant failed to prove that he was disabled, or that his healing period extended, beyond January 3, 2003. He did not show up for his six-week follow-up visit with Dr. Williams; apparently, Claimant did not believe he needed additional medical treatment for his back. There is simply no proof in the record that Claimant was incapacitated from earning wages after, or that his healing period extended beyond, the date of his January 3, 2003 surgery. Thus, Claimant is entitled to temporary total disability benefits from November 28, 2002 until January 3, 2003.

2. Temporary Partial Disability Benefits

Temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. Arkansas State Highway & Transp. Dep't v. Breshears, 272 Ark. 244, 246-47, 613 S.W.2d 392, ___ (1981). In addressing temporary partial disability, one of the issues to be determined is whether a claimant suffered disability as a result of his injury. See Palazzolo v. Nelms Chevrolet, 46 Ark. App. 130, 134-35, 877 S.W.2d 938, ___ (1994). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8).

I find that Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to temporary partial disability benefits. From August 27, 2002,

when Dr. Ledbetter released Claimant to return to work, until November 27, 2002, when Dr. Ahrens took Claimant off work, there is no indication that Claimant was under any restriction relating to his ability to work. Claimant testified that he wanted to go back to work, even though he was experiencing pain in his back and leg; this testimony does not prove that Claimant suffered a decrease in his capacity to earn wages after August 27, 2002. Likewise, after January 3, 2003, the date of Claimant's back surgery, there is no indication in the record that he suffered any decrease in his capacity to earn wages. Claimant simply failed to sustain his burden of proof with regard to temporary partial disability benefits.

D. Section 11-9-505(a)(1) Benefits

Respondent initially hired Claimant to work as a security guard; he patrolled a route on the south side of Harrison. At some point he began to work on the armored car, but still worked three nights a week on the patrol route. After obtaining his August 27, 2002 release, Claimant attempted to return work. Claimant recalled being told that Respondent had already hired someone else to work in the armored car, but he was put to work on a part-time basis running a patrol route on the north side of Harrison. He apparently only worked sixteen hours one week, and then twelve hours the next, before Respondent terminated his employment on September 6, 2002. He testified concerning the basis for his termination:

Q. There was something in the unemployment record, we know, that they're saying that you had some problems doing your route. Skipping -- as I understand it, you stop at different security routes, and you skipped some. Can you tell me what was going on?

...

A. I've always ran the south side.

Q. The south side of what?

A. South side of Harrison business. And then John Davis ran the north side, and then Linda Daniels ran the central. And, anyway, I'm used to, you know, the south side area. And, when I come back, he knew I didn't know the north side, so he put me on the north side, and I didn't know all the north side area. And I hadn't even been trained or nothing for the north side.

Q. Did anybody show you what to do?

A. No, I kept getting hollered at over the radio and everything, because I wasn't at certain areas, at certain places, at certain times. And then, probably, about the last week, I was finally getting right down where I was finding everything on time, you know, getting there. And then that last night is when he went and fired me.

Claimant testified that he was willing to learn the route on the north side of Harrison, and that he would still be working for Respondent if possible. He recalled that he never had any complaints about his work until he was injured.

Frank Villines explained the duties of a security guard on patrol: "You get out and check doors on businesses and residences, if we happen to have one at that time. And just keep an eye on everything we was hired to protect." He recalled that Claimant began working as a security guard in November of 2001. When Claimant persistently requested to be put on the armored car, Villines assigned him to do that work prior to his injury.

When Claimant returned on August 27, 2002, Villines told Claimant "that I'd hired somebody else, and I couldn't just give him their job and let them go. That I'd have to work him part-time. And he said, well, part-time's better than nothing." Villines recalled coming upon Claimant one night thereafter, when Claimant was on duty.

A. So I was going home. I saw a patrol car at Ramsey Motors. I pulled in and watched the guard, and it happened to be [Claimant]. So I watched him, and he was just kind of wondering up through the lot, just looking around. And I pulled up there, and I said, "Look, you can do your job and do it right. I don't care what your lawyer told you about you not talking to me. You work

for me; you're going to do what I tell you or you can go find you another job."

...

Q. ... Was there a problem?

A. That he wasn't doing his job right.

Q. Okay. And what --

A. He wasn't physically going out and checking each car.

Q. Okay, that's what I'm asking.

A. He was just walking up through the parking lot.

Villines finally terminated Claimant "[f]or not doing his job." He recalled receiving "complaints from supervisors, my assistant, Connie Brooks, his supervisor, Steve Miller, that he didn't have no idea what he -- where they were at. If they needed help, they didn't feel comfortable about him backing them up." Villines denied terminating Claimant for hiring an attorney; he reiterated that he fired Claimant because "[h]e couldn't do his job. He, physically, was doing his job, but he mentally -- he just acted like he really wanted me to fire him. That he really didn't care."

On cross-examination, Villines testified that Claimant had ridden the north route with some of the other security guards, prior to being assigned the route on his own. Villines testified that a new employee would have a probationary period of about a week to learn a new route; they would be trained by riding with someone else. As to Claimant, Villines explained that "you've got to remember that he worked for me for almost ten months before I fired him. He had already been trained to do it." Claimant was not given a supervisor to ride with him when he returned to work because he "was not a new employee."

Villines testified to another incident involving Claimant:

I heard him call in on the radio one night that he couldn't find 121. Which

121 happens to be First National Bank. Well, it's Bank of America now. Bank of America North. He couldn't find Bank of America North. He had drove by it. It's a big building. It says Bank of America. And so Steve Miller responded to him on the radio, since he was his supervisor. And he said he was at Hudson Tire and Battery, which is a mile and a half from Bank of America. So Steve went there and met him in the parking lot of Hudson Tire and Battery and told him, follow me, I'll show you where Bank of America is. So they get to traffic light, and Steve says, turn left behind me. He turns right and goes down the bypass.

Villines insisted that Claimant had already been trained, so that it was not necessary for a supervisor to ride with him.

Steve Miller testified that he worked for Respondent as a supervisor over security guards; Miller worked with Claimant. He recalled when Claimant returned to work in August 2002; he described Claimant's job duties at that time: "He would drive around in the car, and drive up to businesses, get out and walk around them. Make sure all the doors were secure." Miller confirmed that Claimant had been out on the north route before he was allowed to do it by himself. In Miller's opinion, Claimant had already been trained to do his job. He testified that Claimant "was confused and lost a lot" on more than one occasion. Miller testified that Claimant was physically able to do the job, and that he never complained about any physical problems. However, "we were concerned. Because, if we needed backup, you know, someone might get shot. ... I was worried about being somewhere, and him not being able to find me if I was in a situation."

Brooks testified that when Claimant returned in August 2002, he was physically able to do his job. She recalled that Claimant was not returned to the armored car when he returned "[b]ecause there wasn't an opening, at that point, on the armored car. So we had to put him -- we had to put him to work somewhere, and the patrol is where we had an opening at that time." She explained that they had to have somebody else on the armored

car, and could not hold the position open while Claimant was off work.

Claimant seeks benefits under Ark. Code Ann. § 11-9-505(a)(1).

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

Id. Several requirements must be met before this statute applies: the employee must prove by a preponderance of the evidence (1) that he sustained a compensable injury; (2) that suitable employment which is within his physical and mental limitations is available with the employer; (3) that the employer has refused to return him to work; and, (4) that the employer's refusal to return him to work is without reasonable cause. Torrey v. City of Fort Smith, 55 Ark. App. 226, 230, 934 S.W.2d 237, ___ (1996).

Claimant satisfied the first two parts of the Torrey test. This Opinion finds that he did prove by a preponderance of the evidence that he sustained a compensable injury. Likewise, the testimony recited above reflects that there was suitable employment within his physical and mental limitations available with Respondent, the security guard patrol route on the north side of Harrison.

I find that Claimant did not prove that Respondent refused to return him to work. Indeed, the testimony of Villines and Brooks establishes that although the armored car position was not available, Claimant was offered an available patrol route position. This position was apparently within Claimant's limitations; he had performed this type of work prior to his compensable injury, and seemed physically and mentally able afterwards.

Even if it could be found that Respondent refused to return Claimant to work, I find

that Respondent's refusal to return him to work is not without reasonable cause; Respondent had reasonable cause. Claimant had the ability to do his job. He was already trained to be a security guard, and had patrolled the southern route before. Villines' testified that Claimant had driven the northern route with other personnel prior to being assigned that route. Miller confirmed that Claimant had been out on the north route before he was allowed to do it by himself. However, the testimony of Villines and Miller establishes that Claimant simply was not doing his job; on occasion he was confused and lost, and he did not follow instructions as to inspecting property. Respondent's refusal to return Claimant to work is not related to his compensable injury; it is related to his failure to properly perform the job he was trained to do and experienced in doing.

F. Attorney's Fee

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This Opinion awards Claimant temporary total disability benefits; the parties stipulated that Respondent controverted this claim in its entirety. Thus, Claimant is entitled to an award of attorney's fees pursuant to the statute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on July 11, 2002 and at all other relevant times.
3. Claimant's average weekly wage was \$250.00.
4. Respondent controverts this claim in its entirety.
5. Claimant did not sustain his burden of proving a compensable left shoulder

injury. There are no objective findings establishing such an injury in the record.

6. Claimant sustained his burden of proving that he suffered a compensable back injury on July 11, 2002. An accidental injury occurred when Claimant was struck by a dolly, fell, and hit his “back against that step thing” at the Community Bank in Eureka Springs on that date. Claimant’s complaint of lumbar back pain, as recorded in the emergency room nursing record dated July 11, 2002, demonstrates that the accidental injury caused physical harm to Claimant’s body. Since Claimant was performing his regular job duties at the time, this physical harm arose out of and in the course of his employment. The medical records prove that Claimant’s injury required medical services, including epidural steroid injections and a microdiskectomy at L5-S1 on January 3, 2003. An MRI of Claimant’s lumbar spine taken October 22, 2002, showing a herniated disc at L5-S1, constitutes an objective finding.

7. Claimant sustained his burden of proving that he suffered a compensable left knee injury on July 11, 2002. His July 11, 2002 incident constitutes an accidental injury that arose out of and in the course of his employment. The July 11, 2002 emergency room nursing record documents that the accidental injury caused physical harm to Claimant’s left knee. Medical services in the form of a brace, medication, and other treatment, were required to treat this physical harm. Dr. Ledbetter noted effusion in Claimant’s left knee, which constitutes an objective finding.

8. Claimant sustained his burden of proving that he is entitled to reasonably necessary medical treatment in connection with his compensable back injury. Dr. Williams reported that Claimant’s January 3, 2003 microdiskectomy at L5-S1 provided Claimant with some relief, indicating that it was necessary to reduce or alleviate his symptoms resulting

from his compensable injury. This medical treatment was connected with Claimant's injury; the need for treatment did not arise until his July 11, 2002 incident.

9. Claimant sustained his burden of proving that he is entitled to reasonably necessary medical treatment in connection with his compensable left knee injury. Claimant's medical treatment for this injury, including a brace, was necessary to diagnose Claimant's injury and to reduce or alleviate his symptoms resulting from that injury. Further, the medical treatment is connected to Claimant's July 11, 2002 compensable injury: there is no indication of left knee complaints prior to that date; an injury is reported on that date, promptly followed by medical treatment for Claimant's left knee.

10. Claimant sustained his burden of proving that he is entitled to temporary total disability benefits from July 12, 2002 until August 27, 2002, and then from November 28, 2002 until January 3, 2003. The medical records document that Claimant was taken completely off work due to his compensable left knee injury on July 11, 2002; he remained off work, under doctor's orders, until released on August 27, 2002. He therefore sustained a total incapacity to earn wages within this healing period. Claimant was again taken off work on November 27, 2002, and remained off work until his January 3, 2003 surgery. Again, he suffered a total incapacity to earn wages within this healing period due to his off-work orders. However, there is no proof in the record that Claimant was incapacitated from earning wages after, or that his healing period extended beyond, the date of his January 3, 2003 surgery.

11. Claimant did not sustain his burden of proving that he is entitled to temporary partial disability benefits. There is no testimony in the record that Claimant was unable to work from August 27, 2002 until November 27, 2002. Likewise, after January 3, 2003, the

date of Claimant's back surgery, there is no indication in the record that he suffered any decrease in his capacity to earn wages.

12. Claimant did not sustain his burden of proving that he is entitled to benefits under Ark. Code Ann. § 11-9-505(a)(1). Respondent did not refuse to return Claimant to work: Claimant returned to work as a security guard on a patrol route. Even if it can be said that Respondent refused to return Claimant to work, Respondent's refusal was not without reasonable cause. Respondent had reasonable cause: Claimant did not satisfactorily perform his job duties, which is unrelated to his compensable injury.

13. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715. The parties stipulated that Respondent controverted this claim, which would include the disability benefits awarded in this Opinion.

AWARD

Respondent is directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

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

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml