

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501577

MARCUS K. ELKINS, EMPLOYEE	CLAIMANT
ARKANSAS RIVER EDUCATION SERVICE CO-OP, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 18, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on August 26, 2005 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE KENNETH BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE MICHAEL RYBURN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is the compensability of the claim pursuant to Ark. Code Ann. §11-9-102 and §11-9-401(a)(2). All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant and benefits must be denied.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on January 19, 2005 at which time the claimant sustained multiple injuries in a motor vehicle accident (MVA). He was earning sufficient wages to be entitled to a compensation rate of \$466.00/\$350.00, in the event this

claim is found to be compensable. The respondents paid temporary total disability benefits until March 2, 2005 when the claim was controverted.

The claimant contends he was returning from a business trip in Helena when he was involved in a MVA. He sustained multiple injuries (left hip, right leg, left knee, right wrist, chest, low back) and seeks payment of medical expenses, temporary total disability benefits from January 20, 2005 to a date yet to be determined, and attorney's fees.

The respondents contend this claim is barred by the "going and coming" rule; §11-9-401(a)(2) barring intentional infliction of injury; and §11-9-102 barring injuries caused by intoxicants. The claimant was on his way to his home at the time of injury; he chose to drive after suffering four syncopal episodes on the day of injury; and he tested positive for methadone and opiates. The respondents further contend the blackouts are non-work related and the claimant was not placed at increased risk.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The claimant and his wife, Valerie were the only witnesses to testify at the hearing. The claimant uses a walker prescribed by Dr. Pollard.

The claimant, age 44 (D.O.B. April 2, 1961), has a Masters degree in elementary education and administration. His health history includes chronic back pain, gastric stapling, and surgical fusion at C4-C7 in 1999. At the time of the accident, the claimant was taking prescription medication (Neurotin, methadone, oxycontin) for pain management as recommended by Dr. Carl Covey. The claimant is a cigarette smoker (one pack per day for 20-25 years).

The claimant's job duties required him to travel throughout the State using his personal vehicle. He received travel reimbursement of 34¢ per mile. No evidence was submitted from the employer showing the employees were subject to any policy restrictions on travel while taking medication.

On Tuesday, January 18, 2005, the claimant was teaching class in Helena. He spent the night in Lula, Mississippi at the Isle of Capri Casino. The next day, Wednesday, January 19, 2005, he planned to visit Elaine Elementary School before returning home to White Hall.

After leaving the Casino, he stopped at a convenience store to get coffee about 7:30 A.M. The claimant returned to his car and lost consciousness. The next thing he knew, it was 9:30 A.M. and a man was tapping on his window to see if he was okay. The claimant stated he felt nervous and telephoned his wife. He decided to skip his business trip to Elaine and go instead to see his doctor at Healthcare Plus in Pine Bluff.

The claimant drove on to Stuttgart where he stopped for refreshments. He called his wife again around 11:50 as he was driving through Wabaseca. He declined his wife's offer of assistance, thinking he felt well enough to complete the journey.

The claimant lost consciousness again and was involved in a motor vehicle accident (MVA) with an eighteen wheeler. He had to be cut out of the car and was taken to the emergency room (ER). The claimant denied any history of blackouts or side effects from his prescription medication.

The claimant came under the care of orthopaedic surgeon, Dr. Pollard for treatment of a broken left hip, left knee, and right ankle. He has undergone two surgeries, on January 19, 2005 and January 21, 2005. In June, 2005 he was hospitalized for one month due to swelling in his leg. He

was prescribed blood thinners.

The claimant drew short-term disability benefits until June, 2005 at \$2,000.00 per month. In May, 2005, he began receiving his retirement benefits at \$500.00. He has also applied for Social Security Disability benefits.

The claimant denied any side effects from his pain medication that might have contributed to his accident. He stated he had been taking pain medication since 1996.

MEDICAL EVIDENCE

The ER report is faint, handwritten, and difficult to read. Apparently, the claimant was intubated and his medical history was supplied by his wife.

Dr. Frigon's consultation report of January 19, 2005 indicates she had treated the claimant for chronic pain along with Drs. Ketchum and Covey prior to the MVA. She listed his medications as Methadone, OxyContin, Neurontin and Topamax. She commented, "we also have to take a look at the great number of medicines he is using at times and the involvement thereof."

Dr. Kabani's consultation report of January 20, 2005, mentions "recent episodes of syncope, apparently four yesterday morning...The patient apparently is being managed by Dr. Frigon for chronic pain as well as dizziness, according to his wife.... According to his wife, he has had syncopal episodes off and on previously.

It should be noted that Dr. Pollard consulted with Dr. Covey about the claimant's pain medication, see Dr. Pollard's report of March 3, 2005. Not only was the claimant's medication continued, but Vicodin was added.

According to the Physician's Desk Reference (PDR), 59th Ed., (2005), somnolence (sleepiness), nervousness and dizziness are all associated with the claimant's medication.

Topomax, p. 2541 - an anti-seizure medication. Adverse reactions include: psycho-motor slowing, difficulty with concentration, speech and language problems, somnolence, fatigue, mood disturbance, nervousness and anxiety.

Patients should be warned about the potential for somnolence, dizziness, confusion, and difficulty concentrating and advised not to drive or operate machinery until they have gained sufficient experience on topiramate to gauge whether it adversely affects their mental and/or motor performance.

Neurotin p. 2589 - prescribed for management of neuralgia and prescribed as adjunctive therapy in treatment of seizures. Adverse reactions include: somnolence, dizziness, and peripheral edema.

Oxycontin p. 2818 - opiate prescribed for pain management. Adverse reactions include: nervousness, anxiety, sweating, asthenia, dizziness, headaches, respiratory depression, stupor, edema. The PDR discusses the frequency of the events during the initiation of therapy until a degree of tolerance is developed.

Of course, medication affects each person differently depending on the dosage, body weight, metabolism, and the interaction of combinations of certain drugs. No expert testimony from a physician or pharmacist was presented to explain how the claimant's medication affected him and there is no evidence that the claimant was misusing or abusing the medication. Also, the PDR seems to suggest that adverse reactions would appear at the onset of treatment. In this case, the claimant had been receiving pain management treatment for almost ten years.

FINDINGS AND CONCLUSIONS

The evidence of record shows the claimant was required to travel as part of his job with the school district. He used his personal vehicle and received travel reimbursement. For the past several years, he has used prescription pain medication for non-work related health problems.

On January 18, 2005, while en route to a school, he stopped for refreshments and lost consciousness for about two hours while parked at a convenience store. Instead of seeking help at a local emergency room or calling his employer for assistance, the claimant decided to continue driving.

The claimant telephoned his wife and told her he planned to skip his business appointment and return home to go to the doctor. On his way home, the claimant lost consciousness for a second time and was involved in a motor vehicle accident, resulting in serious injuries and disability. The medical etiology of the blackouts is unknown.

The respondents have controverted this claim under Ark. Code Ann. §11-9-102, barring injuries caused by intoxicants.

‘Compensable injury’ does not include:
...injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders.

The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician’s orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders.

While it is true the claimant is taking powerful pain medication for non-work related health problems, there is no evidence that the claimant was misusing or abusing that medication. Dr. Frigon treated the claimant both before and after the MVA and expressed concern about his medication after the accident. However, without further expert medical testimony, it would be speculation to find that the prescription medication caused the black-outs because they were ingested

in contravention of physician's orders.

The respondents have also denied this claim based on §11-9-401, barring intentional infliction of injury:

There shall be no liability for compensation under this chapter where the injury or death was substantially occasioned by the willful intention of the injured employee to bring about such compensable injury or death.

There is no evidence the claimant was trying to commit suicide or stage an injury to defraud the carrier. The claimant used poor judgement when he decided to continue driving after the first episode of syncope, but his actions do not rise to the level of "intentional infliction" of an injury.

Finally, this claim was denied based on the "going and coming" rule: The rule bars recovery to all employees who are injured while traveling to and from work. The policy reason behind this rule is that all persons, including employees, are subject to the hazards of travel. An employee is not considered to be acting within the "course of employment" during travel to or from the workplace.

There are some exceptions to the general rule which were altered by Act 796 of 1993. Even if travel is required as part of the claimant's job duties, the employee must still be performing "employment services" at the time of the accident. Kinnebrew v. Little John's Trucks, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999). The test to determine compensability is whether the injury occurred within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interests directly or indirectly. Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002), Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002).

I find that at the time of injury, the claimant had abandoned his business trip and was not performing employment services but was instead en route to his home and/or the doctor's office.

Therefore, this claim is barred by the "coming and going" rule.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employer-employee-carrier relationship existed among the parties on January 19, 2005 at which time the claimant sustained multiple injuries in a MVA. He was earning sufficient wages to be entitled to a compensation rate of \$466.00/\$350.00. The respondents paid temporary total disability benefits until March 2, 2005 when the claim was controverted.
2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge