

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309148

BEN GIEFER	CLAIMANT
WILLIS SHAW EXPRESS, INC.	RESPONDENT
CRAWFORD & COMPANY INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 24, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CONSTANCE CLARK, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on June 7, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on March 21, 2005. 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 August 21, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his right ankle on August 21, 2003.

4. Temporary total disability has been paid from August 22, 2003, through December 4, 2004.

5. The claimant is entitled to a weekly compensation rate of \$413.00 for temporary total disability.

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

1. Additional temporary total disability from December 5, 2004, to a date to be determined.

2. Attorney's fees.

In regard to the foregoing issues the claimant contends that he was injured on August 21, 2003. His foot and ankle were injured when he tripped over round surface yellow reflectors that were on the pavement.

In regard to the foregoing issues the respondents contend that the claimant sustained a compensable accidental injury to his right ankle in the course and scope of his employment on August 21, 2003. The respondents timely accepted this claim as compensable and have paid, and continue to pay, all of the claimant's related medical expenses. The respondents discontinued the payment of TTD benefits effective December 5, 2003, on the ground that the claimant was non-complaint with his physician's instructions and was performing tasks around his farm which indicated that he was not totally disabled from working. The respondents reserve the right to amend these contentions after the completion of investigation and discovery.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted a report from Dr. Pena

dated May 25, 2005, marked Respondents' Exhibit No. 1 and a video tape marked Respondents' Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he is 29 years old and began working for the respondent in January 2003 as a truck driver. The claimant testified and it has been stipulated by the parties that he sustained a compensable injury to his right ankle on August 21, 2003, while working for the respondent. It has also been agreed that all medical bills have been paid for his compensable injury and that TTD was paid up to December 5, 2004.

The claimant testified that following his injury he was taken to the emergency room for immediate treatment and it was recommended that he be seen by a specialist which was provided by the respondents the next day. The claimant testified that this accident occurred while he was in Florida and that the respondents flew him to his home in Minnesota since he was unable to work. The claimant testified that he was initially treated by Dr. Ivantz. The claimant testified that he was placed in a splint brace but was unable to bear weight on his foot. The claimant testified that eventually the doctor put a cast on his foot and once the cast was taken off, he began physical therapy. The claimant testified that his doctor then placed him in an Arizona brace explaining that this brace was a leather brace which is molded to his foot and leg. The claimant testified that he wore this brace up until his surgery on July 19, 2004.

The claimant testified that Dr. Hernando Pena did surgery on his foot on July 19, 2004. The claimant testified that following his surgery he had a restriction of no weight bearing on his right foot and that after about ten weeks, he was encouraged to start trying to walk with the use of two crutches and a boot. The claimant testified that he was supposed to drop to one crutch with the use of the boot and then to no crutch with the use of the boot within a month before going back to see the doctor. The claimant testified that he went in to see his physician two weeks early because he was having a difficult time dropping to one crutch. The claimant testified that it was not until January 2005 that he was able to get around without the use of crutches and at that time began using a cane. The claimant stated that, "My cane, I stopped using that right when the doctor wrote in the letter saying that--- to drop the cane and not be an old man." The claimant testified that he is still under the care of his doctor and has not been given a written release.

The claimant testified that he was aware that there was a surveillance tape made of him. The claimant testified that there are about one and a half to three seconds of him on the November 2 date. The claimant testified that he was wearing black cloths and that his gray crutches were shining in the sun. The claimant testified that the tape shows him getting out of the passenger' side of the front seat of the automobile that his sister was driving. The claimant testified that most of the tape is of his family primarily of his dad, noting that there is a good closeup of his father at the elevator in Owatonna and another showing his dad

out in a field feeding hay with an orange tractor. The claimant testified that his father is a dairy farmer. The claimant testified that he currently is living with his mother and father because he did not have a place to stay after he was injured. The claimant testified that he has not done any farm work from the date of his injury to present and he did not have any problems with his right foot prior to his compensable injury.

On cross examination, the claimant testified that he was weight bearing on his right foot prior to his July 2004 surgery. The claimant testified that he has started driving recently in order to get back and forth to his work hardening program. The claimant testified that back in November 2004 he was not able to drive and that his mother would take him to the doctor. The claimant remembers that he did drive himself one time to physical therapy in December 2004. The claimant again testified that he does not do any farm chores but that before his injury he did do a few repairs. The claimant testified that he is 5 feet 7 inches tall and weights approximately 268 pounds having gained about eight to ten pounds since his surgery. The claimant testified that his father is just a little taller than he is but did not know how much his dad weighed. The claimant acknowledged that the person on the video tape has a limp noting further that his dad has had knee surgery and has a limp. The claimant agreed that if he had been on the tape he would have been using crutches. The claimant also agreed that Dr. Pena had hoped to release him in November or December 2004 but that release date has continued to be pushed back. The claimant testified that when he saw Dr. Pena in May 2005

the doctor asked him a few questions and told him that he wanted him to go through a functional capacity evaluation. The claimant testified that the doctor indicated that his fusion was not going to fail and that after his functional capacity evaluation he anticipated releasing the claimant. The claimant testified that since Dr. Pena did not assess any physical restrictions as to his foot he plans to get out and look for work.

On redirect examination, the claimant testified that he has been driving himself to his work hardening sessions and that these sessions continued on into May 2005. The claimant testified that while he was in work hardening he went on a over night fishing trip with a friend. The claimant testified that he talked with his work hardening therapist and got his ok for this fishing trip. The claimant again agreed that he began driving to his physical therapy sessions in December further noting that his doctor had not released him to return to work by the time of this hearing.

On recross examination, the claimant testified that his father drove him from Minnesota for this hearing. The claimant testified that he did drive probably fifteen to twenty miles of the trip.

Joseph Giefer testified that he was the claimant's father and that he is a farmer in Minnesota. Mr. Giefer testified that he has viewed the video tape which has approximately one or two seconds of tape of his son on November 2 when they were off to vote. Mr. Giefer testified that the majority of the tape is of him.

On cross examination, Mr. Giefer testified that he has a red baseball cap and in fact that is his favorite hat. Mr. Giefer agreed that none of the tape depicts his son driving or walking.

Mr. Giefer testified that he drove his son for this hearing but that his son drove approximately 30 miles of the trip.

I reviewed the video tape which is marked Respondents' Exhibit No. 2 and due to the quality of the tape it would be impossible to identify anyone on the tape. There is, however, an orange tractor, some dogs and several cows in the video. The claimant as well as the claimant's father have testified that the individual riding on the orange tractor and hauling hay is the claimant's father and that the claimant's participation in the video is just for a few seconds at the very first of the tape. Both witnesses seem to be quite credible, therefore, I will take their word for who is on the tape.

The medical records set forth that the claimant was seen on April 7, 2004, by Dr. Pena for treatment of his right foot. After examination and review of the claimant's various studies, Dr. Pena diagnosed the claimant with having post traumatic arthritis with loose bodies and right subtalar joint. Dr. Pena writes on August 4, 2004, that the claimant is two weeks post right subtalar fusion and doing well. Dr. Pena writes that the claimant's cast was removed and his incision inspected as well as sutures removed. The claimant was then placed in a short leg cast and it was suggested that he bear weight of about thirty pounds on his heel using crutches for the next four weeks. On October 13, 2004, the claimant was seen by Dr. Pena reporting that he is having pain in his forefoot and hind food area with any type of ambulation when he advances his weight bearing status. Dr. Pena notes that at the last visit the claimant was encouraged to wean himself off the

crutches. Dr. Pena recommended that the claimant return to the use of his crutches for another month. It is noted that the claimant will not be able to return to work until complete consolidation of the fusion has taken place. Dr. Pena writes on November 10 that the claimant has continued to be on non weight bearing with the use of a CAM walker and crutches for the past six weeks. Dr. Pena recommended that the claimant advance his weight bearing status and prescribed physical therapy to wean himself off the crutches and the CAM walker. Dr. Pena notes that he is expecting to return the claimant to full speed on January 1, 2005. On December 22, 2004, Dr. Pena writes that the claimant continues to improve and reports he is ready to drop his last crutch and resume regular ambulation. The doctor notes that the claimant continues working with physical therapy. Dr. Pena, upon physical examination, notes that the claimant still struggles to do a single leg toe raise as he has been immobilized for such a long time and does not have sufficient strength over his posterior tibialis tendon. Dr. Pena notes that he anticipates the claimant being able to return to work on February 1, 2005, and that he does not anticipate the claimant reaching MMI until one year from his surgery. On January 26, 2005, Dr. Pena writes that the claimant presents with minimal antalgic gait and no walking assistive device. The doctor notes that the claimant is wearing regular shoes. The claimant did report that he has problems with uneven terrain and he does have some pain over the posterior aspect of his ankle joint. Dr. Pena recommended that the claimant undergo a CT scan of his foot in order to rule out pseudoarthrosis and notes that if he presents with a solid union,

they will advance him as far as they can through his pain in order to mobilize his scar tissue. On February 23, 2005, Dr. Pena writes that the claimant's CT is significant for showing complete consolidation of his subtalar joint and that there were no other signs significant for having any degenerative joint disease. Dr. Pena encouraged the claimant to continue increasing his level of activities. Dr. Pena writes that he encouraged the claimant to drop his cane, denied the claimant's request for a handicap parking permit as well as any discussion of permanent disability. Dr. Pena does write that the claimant is not cleared to return to activities. Dr. Pena writes on March 23, 2005, that the claimant is undergoing work hardening and that he will be better able to comment about work ability when the claimant's work hardening program is finished in four to six weeks. Dr. Pena writes on May 31, 2005, that the claimant presents with excellent and symmetric alignment of both lower extremities. Dr. Pena encouraged the claimant to have a functional capacity evaluation in order to assess how much activity he can tolerate during a day of work. The doctor notes that the claimant will be evaluated after the FCE in order to be cleared for activities and further notes that the claimant, at this point, has no physical restrictions regarding both of his feet.

After a review of this complete record, I find that the claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability from December 5, 2004, through May 31, 2005. The medical records clearly set forth that the claimant's healing process was slower than anticipated and

that his doctor, Dr. Fernando Pena, did not release him to return to work until May 31, 2005. The claimant, by his testimony, has indicated that he has been actively participating in physical therapy as well as a work hardening program up through May 2005 for his compensable injury. Therefore, the respondents should pay additional temporary total disability to this claimant from December 5, 2004, to May 31, 2005.

FINDINGS & CONCLUSIONS

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

2. On August 21, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his right ankle on August 21, 2003.

4. Temporary total disability has been paid from August 22, 2003, through December 4, 2004.

5. The claimant is entitled to a weekly compensation rate of \$413.00 for temporary total disability.

6. The claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability from December 5, 2004, to May 31, 2005. See discussion above.

7. The respondents have controverted this claimant's entitlement to additional benefits.

8. 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 temporary total disability from December 25, 2004, to May 31, 2005. Therefore, the respondents should pay temporary total disability to this claimant from December 5, 2004, to May 31, 2005.

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