

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F310832

LOUIS GUYER, Employee	CLAIMANT
UNITED AUTO GROUP/LANDERS CHEVROLET, Employer	RESPONDENT
ACE AMERICAN INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED MARCH 3, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by R. CHRIS PARKS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On February 16, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 22, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on August 14, 2003.
3. The claimant sustained compensable injuries to his ribs and wrist on August 14, 2003.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$283.00 which would entitle him to compensation at the rate of \$189.00 per week for temporary total disability benefits and \$154.00 per week for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's hip.
2. Temporary total disability benefits from August 14, 2003 through a date yet to be determined.
3. Medical related to hip.
4. Attorney fee.

The claimant contends that he sustained a compensable hip injury arising out of and in the course of his employment with respondent on or about August 12, 2003. On that date the claimant was working as a washer/detailer when he fell on his right side, injuring various body parts, including wrist, ribs, and hip. The claimant later was diagnosed with a hip fracture and required a total hip replacement on September 16, 2003. As a result of this compensable injury, the claimant has been temporarily disabled from August 14, 2003 through the present, and is entitled to the payment of medical expenses related to the hip and an attorney fee. All other benefits are reserved under the Act.

The respondents contend the claimant sustained a compensable injury on August 14, 2003 and that they paid all appropriate benefits for such injury. Respondents contend the claimant sustained a subsequent injury to his hip which is not compensable and therefore claimant is entitled to no further benefits. In addition, respondents contend that claimant's hip injury is the result of a fall(s) at home.

From a review of the record as a whole, to include medical reports, documents, 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 made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference

conducted on September 22, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$283.00 which would entitle him to compensation at the rates of \$189.00 for temporary total disability benefits and \$154.00 for permanent partial disability benefits is also hereby accepted as fact.

3. The claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of a fracture to his hip on August 14, 2004.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable hip injury; including, but not limited to, surgery performed by Dr. Harris.

5. Claimant is entitled to temporary total disability benefits beginning September 12, 2003 and continuing through January 5, 2004.

6. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

FACTUAL BACKGROUND

The claimant is a 50-year-old man with an eighth grade education who was hired by the respondent in June 2002 to perform detail work washing and cleaning cars. On August 14, 2003, the claimant was using a chamois to dry off a truck and as he jumped down from the truck fell on the right side of his buttocks. Claimant testified that as a result of this fall he had pain in his hip, ribs, and wrist. The respondent accepted as compensable injuries to the claimant's ribs and wrist.

Claimant sought medical treatment from Dr. Abernathy the day after his injury. At the time of that visit claimant was evaluated for his right wrist injury, rib injury, and x-rays

were taken of claimant's right hip. X-rays of the claimant's right hip at that time were negative. Dr. Abernathy released claimant to return to work with restrictions and continued to see claimant for follow-up treatment.

Dr. Abernathy's medical records reflect a history of two additional incidents occurring at the claimant's home. First, Dr. Abernathy's note of September 12, 2003 indicates that claimant tripped in his driveway less than 10 days ago. In addition, Dr. Abernathy's note of September 15, 2003 states that claimant's medical condition had improved since the time of his injury until he was seen on September 12 when claimant was unable to work because of pain in the anterior groin. Dr. Abernathy described this as a new complaint and ordered a second x-ray of the claimant's pelvic area. This x-ray revealed a right femoral neck fracture. Dr. Abernathy's notes also contain a history of claimant having called for an additional evaluation on September 8 after he fell in the bathroom. As a result of the hip fracture, Dr. Abernathy referred claimant to Dr. Harris who performed surgery to repair the claimant's right hip fracture on September 16, 2003. Claimant continued to remain under the care of Dr. Harris and according to Dr. Harris' deposition testimony claimant was released to return to light-duty work as of January 5, 2004.

As previously noted, the respondent accepted as compensable injuries to claimant's ribs and wrists as a result of the fall on August 14, 2003. However, claimant has filed this claim contending that his hip fracture is also a compensable injury resulting from that fall.

ADJUDICATION

Claimant contends that his right hip fracture occurred as a result of the fall on August 14, 2003. As such, claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of

an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 injury;
- (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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that his right hip fracture is a compensable injury which resulted from the fall on August 14, 2003. First, I believe it is important to note that there is no question that claimant complained of hip pain immediately after the fall on August 14, 2003. When claimant sought medical treatment from Dr. Abernathy on August 15 he complained of an injury to his right wrist, right ribs, and his right hip area. As a result of those complaints Dr. Abernathy ordered an x-ray which did not reveal a fracture. Furthermore, according to Dr. Abernathy's medical records, the claimant's condition improved until September 12 when he was unable to continue working because of pain in his anterior groin area. According to Dr. Abernathy, this was a new complaint and he ordered a second x-ray of the claimant's hip area which revealed a hip fracture. This complaint did not occur until after claimant gave a history to Dr. Abernathy of having tripped in his driveway and having fallen in his shower.

Based upon this evidence, one could easily conclude that claimant's right hip fracture did not result from the August 14 fall, but instead resulted from one of the subsequent incidents at his home. However, Dr. Duke Harris has testified that in his

opinion the claimant's right hip fracture resulted from the August 14 fall, not the subsequent incidents.

As previously noted, Dr. Harris performed surgery to repair the claimant's right hip fracture on September 16, 2003. On September 29, 2003, Dr. Harris authored a report stating that in his opinion the claimant's hip injury was caused by the fall which occurred on August 14, 2003. Dr. Harris was asked about his opinion regarding causation at his deposition of November 4, 2004. Even though the first x-ray did not reveal a fracture of the claimant's right hip and even though Dr. Harris was made aware of the two incidents at claimant's home, it was nonetheless his opinion that a causal connection existed.

Q. I apologize. That was probably a poorly-phrased question. Is it fair to say that you can't say within a reasonable degree of medical certainty, as we sit here today, whether Mr. Guyer's hip fracture was a result of the work-related accident or the two falls that Dr. Abernathy reported after that accident?

A. I think it was a cause of his original injury.

Q. And what is - -

A. I think his original injury produced enough symptoms that an x-ray of his hip was made. It would not be uncommon to have a nondisplaced fracture of the hip similar to a crack in your windshield that you can see in some positions and can't see in other positions, and for that crack to then extend without an injury until it displaces or moves out of place, where it becomes obvious on the x-ray. Can I say that with certainty? No, but I think that's the most likely scenario.

Q. If Mr. Guyer had new complaints to Dr. Abernathy about his hip that he had not had before the two falls, would that make that a less likely scenario?

A. No, sir. Nondisplaced hip fractures in this area are reasonably common. I'll see three or four a year. The x-ray looks normal, the patient is asked to be on crutches or a walker when I see them, and they feel better and do fine for a week. Somewhere between 10 days and three weeks, that fracture is at its weakest and that's when it's most likely to displace or the crack complete and the bone moving up. You can then see it on x-ray.

Q. It is possible that the two falls, the fall in his driveway and the fall in his bathroom, could have caused the fracture that we saw on the September x-rays that weren't present before?

A. Yes, sir. That's correct.

Q. Is there any way to say within a reasonable degree of medical certainty, as we sit here today, which of those events produced this injury?

A. I can't say that with certainty. My impression is that it's more likely that it happened at the first injury.

While Dr. Harris did not testify that he was "certain" that claimant's fracture occurred on August 14, he did testify that in his opinion it was "more likely" that the fracture occurred as a result of the fall on August 14 and simply did not manifest itself until several weeks later. According to Dr. Harris this is not an unusual situation.

With respect to Dr. Harris' opinion, I note that the Commission discussed the state of "reasonable degree of medical certainty" in *Guerra v. Langston Gin Company, Inc.*, Full Commission Opinion filed January 5, 2004 (F005245). In that case the Commission stated:

A physician does not have to incorporate the precise phrase, "reasonable degree of medical certainty" in his opinion. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W. 2d 909 (1998). Nor does a doctor have to be "absolute" in his opinion. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W. 3d 760 (2001). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. *Howell v. Scroll Tech.*, 343 Ark. 297, 35 S.W. 3d 800 (2001).

Thus, while Dr. Harris did not use the exact words "reasonable degree of medical certainty", my review of his testimony makes it clear that it is Dr. Harris' opinion within a reasonable degree of medical certainty that claimant's hip fracture resulted from the fall of

August 14, 2003.

In summary, while there is evidence which would lead to a finding that claimant's right hip fracture did not occur until after his fall of August 14, 2003, I find that claimant has met his burden of proving by a preponderance of the evidence that his right hip fracture occurred as a result of the fall on August 14, 2003. My opinion is based primarily upon the opinion of Dr. Harris. While Dr. Harris' opinion is not controlling as to causation, I find that his opinion is entitled to great weight.

Accordingly, based upon the evidence presented, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury in the form of a hip fracture which arose out of and in the course of his employment with respondent and that it was the result of a specific incident identifiable by time and place of occurrence. I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury resulted in physical harm to his body which resulted in disability and the need for medical treatment and also that claimant has offered medical evidence supported by objective findings establishing an injury. Therefore, claimant has met his burden of proving by a preponderance of the evidence that his right hip fracture is a compensable injury resulting from the fall on August 14, 2003.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right hip fracture.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 12, 2003, and continuing through January 5, 2004. Claimant's injury to his hip is an unscheduled injury. In order to be entitled to temporary total disability benefits for unscheduled injuries, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272

Ark. 244, 613 S.W. 2d 392 (1981). Here, while claimant may have been within his healing period from the date of his injury, claimant was not taken off work by Dr. Abernathy until September 12, 2003. Furthermore, according to the deposition testimony of Dr. Harris, claimant was released to return to light-duty work as of January 5, 2004. Based upon this evidence, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages from September 12, 2003 through January 5, 2004. Accordingly, claimant is entitled to temporary total disability benefits for this period.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of a fracture to his hip as a result of the fall on August 14, 2003. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's hip fracture. Claimant is entitled to temporary total disability benefits beginning September 12, 2003 and continuing through January 5, 2004. Respondent has controverted claimant's entitlement to temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This

fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE