

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405689

JOHN D. JONES

CLAIMANT

XTREME PIZZA, D/B/A DOMINO'S PIZZA

RESPONDENT EMPLOYER

AMERICAN HOME ASSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED JUNE 23, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE THOMAS W. MICKEL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE R. SCOTT MORGAN, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on June 2, 2005. A prehearing conference was held and a prehearing order was filed on April 19, 2005. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on August 20, 2003.
2. The compensation rates are \$400/325.

The claimant contends he sustained a compensable injury while traveling between work places on August 20, 2003, and is entitled to medical benefits, temporary total disability benefits from September 9, 2003 through November 10, 2003, and attorney's fees.

The respondents contend the claimant did not sustain a compensable injury while in the course and scope of his employment on August 20, 2003. The claim has been controverted in its entirety.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Attorney's fees.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was an employer-employee relationship on August 20, 2003.
2. The compensation rates are \$400/325.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment on August 20, 2003, and supported by objective findings.
4. The respondents are liable for all reasonable and necessary medical the claimant has pursued.

5. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from September 9, 2003 through November 10, 2003.

DISCUSSION

The claimant, 28 years old, had worked for the respondent employer for a year and a half or two years before the August 20, 2003, incident. The claimant was general manager for the respondent employer at the Bryant location and was paid a salary. The claimant described his job duties as, "Pretty much everything as far as the day-to-day operations - - making the pizzas; slapping out the dough; dealing with product quality; scheduling; cost control; projections; getting the store cleaned up; closing down the store; opening up the store; if we ran out of food, going and getting food." (T. p. 8, lines 7-12.) The claimant also added, "Attending training seminars or manager meetings." (T. p. 8, line 18.) According to the claimant, the manager meetings were mostly held at the owner's residence, which was in Conway at the time of the accident. The training sessions were held in hotel meeting rooms and at various stores.

The claimant testified that on August 20, 2003, he met the owner of the business at the Wyndham Hotel in North Little Rock for a scheduled meeting. The meeting was with corporate Domino's and various business things were discussed with the meeting lasting about two hours. According to the claimant, once he left the meeting he met the owner of the business at the Shell Station in Little Rock on Highway 10 and they rode together to the Domino's Pizza on Chenal Parkway. A demonstration of the correct way to make a new pizza was being presented and this process took about one and a half hours. According to the claimant, the owner drove him back to his vehicle at the Shell

Station and he proceeded back to the Bryant Domino's Pizza store that he manages. The claimant was rear ended by another car while he was two blocks from the store. According to the claimant, he was going straight to the store without any personal stops after leaving the training session.

The claimant called his employer and notified him of the motor vehicle accident. The claimant experienced upper neck pain, sometimes shoulder pain and headaches. The claimant's headaches persisted following the accident. The claimant sought emergency room treatment as well as treatment from Dr. Brad Tilley. The claimant remained off work until November 2003, but returned to work and continued to work for the respondent employer until January 16, 2004. The claimant has not worked since, because of neck pain.

The claimant verified that his group health insurance carrier paid some of his medical expenses and he received some disability payments for a while from his automobile insurance.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (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 harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2002). If the claimant fails to establish by a preponderance of the evidence any of the

requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment which is supported by objective medical evidence. The claimant presented credible testimony about a motor vehicle accident in which he was involved on August 20, 2003, while in the course and scope of his employment. The claimant presented undisputed testimony about attending a training seminar and then returning to his store to continue his job duties but was involved in the motor vehicle accident en route. The claimant sought medical attention for problems he believed stemmed from the motor vehicle accident. After a careful review of the medical records, I find the objective evidence requirement of Ark. Code Ann. §11-9-102(4)(D) (Repl. 2002) has been satisfied. See claimant's Exhibit 1, page 14, which identifies a physical therapy note by Ellen Haverstick, ". . . Pt. exhibited a decrease in muscle spasms."

A "compensable injury" is defined under the Workers' Compensation Code as:

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) (Repl. 2002). Section 11-9-102(4) of the Code further provides that a compensable injury must be established by medical evidence supported by "objective findings." See, Ark. Code Ann. §11-9-102(4)(D) (Repl. 2002).

The Code defines “objective findings” as those “which cannot come under the voluntary control of the patient.” Ark. Code Ann. §11-9-102(16)(A)(i) (Repl. 2002).

Act 796 of 1993 redefined the term “compensable injury” to exclude an injury that was inflicted upon the employee at a time when employment services were not being performed. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1997); Ark. Code Ann. §11-9-102(4)(B)(iii) (Supp. 2003). The same test is used to determine whether an employee was acting within the course of employment at the time of the injury as is used when determining whether an employee was performing employment services. *Privett v. Excel Specialty Prods.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002). The test is whether the injury occurred within the time and space boundaries of the employment while the employee was carrying out the employer’s purpose or advancing the employer’s interests directly or indirectly. *Id.*

An employee is generally not said to be acting within the course of employment when he is traveling to or from the workplace, and, thus, the “going and coming rule” ordinarily precludes compensation for injuries sustained while an employee is going to or returning from his place of employment. *Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000); *City of Sherwood v. Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). This general rule is in place because all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. *City of Sherwood, supra*. However, there are exceptions to the “going and coming rule” where the journey itself is part of the employment service, such as traveling men on a business trip and employees who must travel from job site to job

site. *Campbell, supra*. The Court in *Campbell* also noted that whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services. *Id.*

In the present case, I found the claimant to be a credible witness who presented details of attending a managers' meeting and then a training demonstration at another facility before going to his own store to perform his job duties. I found his testimony to be undisputed and to satisfy the requirement that he was furthering his employer's interests and his activity constituted employment services as he was driving to the Bryant store.

In the present case, the medical evidence discusses the claimant's complaints of neck pain and headaches following the August 20, 2003, motor vehicle accident with some testing and physical therapy. The physical therapy notes do indicate that the claimant exhibited a decrease of muscle spasms on December 6, 2003. It is well settled under the law that muscle spasms constitute objective findings sufficient to meet claimant's evidentiary burden. See, *Univ. of Ark. for Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997); *High Capacity Products v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

I find the claimant has satisfied the requirements of a compensable injury arising out of and in the scope of his employment and supported by objective findings. I find respondents are liable for all reasonable and necessary medical treatment the claimant has pursued. Ark. Code Ann. §11-9-508.

The claimant next contends he is entitled to temporary total disability benefits from September 9, 2003 through November 10, 2003. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to work from September 9, 2003 through November 10, 2003. The claimant presented testimony of headaches and neck pain such that he could not work and the medical records further document the claimant's complaints of headaches, dizziness, neck pain as well as fainting spells. While I was unable to find a note from the doctor specifically stating the claimant was taken off work for this two-month period in question, the testimony and medical reports supported the claimant's contention that he was unable to work and still in his healing period.

ORDER

The claimant has proven by a preponderance of evidence that he sustained a compensable injury arising out of and in the course of his employment on August 20, 2003 and supported by objective findings. The respondents are liable for all reasonable and necessary medical the claimant has pursued. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from September 9, 2003 through November 10, 2003.

The 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 respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**