

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502204

DAVID MELTON, EMPLOYEE	CLAIMANT
HARBOUR DISTRIBUTING CO., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED OCTOBER 6, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 17, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE NEAL L. HART, Attorney At Law, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to workers' compensation benefits.

On June 21, 2005, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of David Melton, the claimant, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

David Melton, the claimant, with a date of birth of June 28, 1975, completed the eleventh grade and later obtained his GED. Claimant commenced his employment with respondents on March 14, 2003, as a warehouse crew worker. Claimant asserts that prior to his accident in May 2003, he was perfectly healthy.

The testimony of the claimant reflects that in 2001 he was ticketed for DWI and speeding in a work zone. As a consequence of the afore, his driver's license was suspended by the Jacksonville, Arkansas District Court for three (3) years. Because of the status of his driving privilege, during the time of his employment by respondents claimant rode to work with Tony Faqua, his second cousin, who was also employed by respondents. The testimony of the claimant reflects that he was placed at respondent through a temporary agency, StaffMark, and after a period of two (2) weeks was hired as an employee of respondent.

The testimony of the claimant reflects that Mr. Faqua was the shift supervisor at respondent-employer. Claimant shared an apartment with Mr. Phillip Coffelt, who was also employed by respondent as a warehouse crew worker. Claimant testified that Mr. Faqua lived on Kerr Station Road in Cabot and would swing by and pick him up en route to work. The testimony of the claimant reflects that he and Mr. Coffelt worked the same shift as Mr. Faqua. Claimant's normal work hours was Monday through Friday, from 3:00 p.m. to 11:00 p.m. Claimant noted that at the time of his accident he had worked for respondent for eighty-eight (88) days.

Respondent is a liquor distributor. Regarding his regular job duties as a warehouse crew worker for respondents, claimant's testimony reflect:

I packaged the beer up on pallets, loaded them in the truck for the next morning's route to go out and deliver the beer. When they'd come in, I'd unload the trucks in the mornings - - when we got there on Our shift, we'd unload them and refill them. (CX. #2, p. 13).

Claimant explained that the number of hours he worked per week would fluctuate, sometimes from 3:00 to 11:00, and sometimes from 3:00 to 3:00 in the morning, depending on the holidays.

Claimant observed that there was a schedule in place:

No, they had a schedule they'd show us up there. And that particular weekend was Riverfest weekend. And I'd worked the weekend for the stands they have there at Riverfest. And that gave me the Monday off, being's I worked all night Saturday and Sunday night, plus the prior weekend. They gave me that Monday off. (CX #2, p.14).

The testimony of the claimant reflects that he received a separate check for work he performed on Saturday and Sunday, which was different from his normal paycheck.(CX. #2, p.18).

Claimant's accident occurred during the last week of May 2003. The Riverfest activities take place over the Memorial Day weekend. Memorial Day was observed on Monday, May 26, 2003. Claimant testified regarding how it came to be that he worked on Monday, May 26, 2003, and his subsequent injuries which serve as the basis of the present claim:

My supervisor, Tony Fuqua, had called and said that they were shorthanded, they didn't have enough people to run the shift, that, you know, he needed to get the trucks loaded by morning, he didn't have but him and one other guy. And he knew that I was better than the other guys, as far as loading the beer up, getting it done right and not having to back-track. So he asked me if I'm come in . I didn't want to. And he called back probably twenty minutes after that and said, "You know, I really need you to come in." He said, "I'll come get you and I'll bring you back home if you'd just come in and work this shift." (CX. #2, p. 14-15).

Claimant asserts that on Monday, May 26, 2003, Mr. Faqua was shorthanded with only two people a crew which usually operated with four to five people. Mr. Faqua was at work at the

time he called the claimant and asked him to work. Claimant testified that because Mr. Coffelt did not work that weekend, he was working his normal schedule, which included Monday.

While the claimant and Mr. Coffelt usually rode to work with Mr. Faqua, claimant's recollection is that on Monday, May 26, 2003, Mr. Coffelt's father had taken him to work.

The testimony of the claimant reflects that Mr. Faqua, who drove his own vehicle, arrived at approximately 5:00 p.m. , on Monday, May 26, 2003, transported his to work. Claimant maintains that Mr. Faqua charged him \$10.00 for coming to pick him up and take him to work. Claimant acknowledged that Mr. Faqua did not charge him every day for riding to and from work:

Well, no. Actually, it was - - he didn't have the gas. He was just - - he was one of them kind, he stayed broke all the time and he just needs the help, you know. He borrowed the ten dollars, more or less, for the gas, so - - but I did pay him. (CX. #2, p. 17).

Claimant noted that Mr. Faqua did not use the money to put gas in the truck, a fact which later led to the accident.

After being picked up at his apartment by Mr. Faqua, claimant went in and worked until 11:00 or 11:30 p.m. The testimony of the claimant reflects that the crew quit at the same time, and that he and Mr. Coffelt got into the vehicle of Mr. Faqua for the return trip home.

Claimant's testimony reflects, with respect to the ensuing events:

We was going towards the house on 167 going into Cabot. Run out of gas there a little bit before the Cabot exit. We got out of the truck to get gas. Walking down the road. Got probably a block and a half away from the vehicle and got hit by a car.

No, sir. We intended on - - he - - I tried to get him to stop in Sherwood to get gas, because I could see that it was low on gas, and I'd gave him the ten dollars. And he didn't. And I tried to get him to stop

in Jacksonville. And he thought, well, we can make it on to Cabot. And I didn't think he could. And, well, needless to say, I was right, we didn't. (CX. #2, p. 19).

Claimant estimates that the accident occurred between 11:55 p.m and 12:00 a.m. Regarding the accident site, claimant's testimony reflects:

We pulled off the interstate there, the freeway there, in front of Coffelt Road. That's Pickthorne Lake.

And we got out of the truck and we got on the access road and started walking towards Cabot. It would have been closer to walk on to Cabot there at the Highway 5 exit than it would have been to Jacksonville. We was walking on the side of the road, and we got probably a block, block and a half away from the truck, and that's when the vehicle struck me.

Ran off the road and struck me. (CX. #2, p. 20).

Claimant's recollection following the accident was being transported in a helicopter for medical treatment. The testimony of the claimant reflects that the accident was investigated by the Lonoke County Sheriff Department. Claimant testified that the driver of the vehicle that struck him is now in prison. According to the claimant the driver did not have insurance.

Claimant testified regarding the nature and duration of his medical treatment for the injuries he suffered in the May 2003 accident. Claimant was transported to Baptist Medical Center via helicopter:

Well, I was there for, I think, twenty days. And I was - - I healed up so quick that they released me. But I went back after two days. I was out two days and I went back. And I stayed there - - it was an in-and-out thing there for a total of a year's time just in and out, maybe a day here and then ended up going back. My body wasn't susceptible to - - I needed the antibiotic from my IV's and stuff like that. (CX. #2, p. 25).

Claimant suffered a loss of his right arm immediately in the accident and an amputation of his

left leg below the knee nine months later. During the course of his July 18, 2005, deposition claimant testified regarding his continuing medical treatment:

I go do therapy as far as my walking therapy on my legs, and I have to - - right now I have to continue to see a pain specialist because I have - - I'm trying to think of the pain they call it. It's chronic - - it's chronic pains I have with phantom pains, stuff like that. And I go in there and they do treatments there.

It used to be with Dr. Ackerman. And now they've moved me to United Pain Care in Sherwood. (CX. #2, p. 26).

Claimant testified that now he is on Medicaid, which pays 80% of his medical treatment cost and that his source of income is SSI, \$570.00 per month.

Claimant notes that he remains under the care of his primary care physician, Dr. Anna Herrera, and Dr. John Yocum, an orthopedic surgeon. Claimant noted his recent surgery under the care of Dr. Yocum:

And I had a steel rod put all the way from my knee down to my ankle. Because this leg, the break in it, was so bad, it's not healing up. And it's still not healed up, even though we got the rod in it. And he thinks by em walking around may stimulate the bone to grow. So that's our last procedure. If that don't work, you know, either I can just walk around with a rod and broke leg or get that one amputated, too. (CX. #2, p. 29).

Claimant also suffered internal injuries in the May 27, 2003, accident:

It made one of my kidneys fail. I mean, they didn't take it out. I mean, it still works. They put filters in there. And it lacerated my liver. And it busted a lot of my intestines. They had to stitch them back in. And, you know, of course they took my spleen out and stuff when they did the surgery. (CX. #2, p. 29).

The testimony of the claimant reflects that he has had between 17 and 20 surgeries as a result of the injuries suffered in the May 27, 2003, accident, with the last being in March 2005. (T. 10).

Claimant testified regarding the impact of his injury:

I've lost my home in the process of this. I have to have someone with me at all times to kind of - to help my put my leg on, to help me with my bathing, and, you know, it's hard for me to do pretty much anything by myself. (T. 13).

The testimony of the claimant reflects that both Mr. Coffelt and Mr. Faqua continued their employment with respondents for a period of time after the accident. The testimony of the claimant reflects that Mr. Faqua ultimately moved back to his home town of Nowata, Oklahoma.

The time card of the claimant in evidence reflects that on Monday, May 26, 2003, he started working at 6:00 p.m. Claimant noted the he normally clock in at 2:00 p.m. Claimant explained that the difference was the product of the fact that he was not scheduled to work on Monday, but came in at the request of his supervisor. Claimant acknowledged that the time card in evidence does not reflect entries indicating that he worked on Saturday or Sunday preceding the Monday of his accident. Claimant explained, regarding the afore:

Well, that particular weekend was the Riverfest weekend and Harbour Distributing sponsors some of that and they set up beverage stands and they needed a hand to work the weekend at the beverage stands and I volunteered for the work, and I worked that weekend, which gave me the Monday off for the weekend. (T. 14).

That was different - there was a different card that they had at the place where we worked at the Riverfest. We met up with the main guy, Rick. I don't know his last name, but he had us a separate piece of paper that we signed our name on and the time we started and at the end of the day when we cleaned out our beverage stands and put the back in the truck, we had to sign out and the time then. So, we had two separate cards, which that went on to this pay period. I mean, it was a different sheet. I don't know if he turned it in the office. . .

Rick - he's the main - I'm trying to think of what he is. He's the head of that place over there. He runs that particular distributing store - promotionals.

. . . We - when we come in to the Riverfest, we had to meet him at the truck where they kept the beverages, and there was a stand right there the he was at. We'd have to meet him there and sign in our times, you know, and get our schedules and what we're doing, you know - where we need to take drinks to and what we needed to - you know, there was two or three stands that I run particularly by myself. (T. 17-18).

Finally, claimant noted regarding the time card in evidence:

. . . I mean, it looks to be - I mean, everything here, other than the Saturday and the Sunday - and the reason that it don't show it on here is that the place of business is not open on Saturday and Sunday, so there's no one there and they don't - you know, they didn't have a portable punch clock, so we had to write it down on a piece of paper and turn it in to Rick, you know. (T. 19).

Claimant estimated that he work 21 to 22 hours that weekend. Claimant noted that when the weekend work was added to his regular hours, he made more that particular pay period than he made during any other.

Claimant acknowledged that at the time of the accident he lived in Cabot and respondent was located in Little Rock. Claimant did not own a vehicle and his driving privilege had been suspended during his employment with respondent. Claimant's testimony reflects that rode to work with Mr. Faqua, who was both his supervisor and cousin:

Just a couple of times with him. I usually rode with my roommate's dad. He'd give us a ride, or my girlfriend. (T. 21).

Claimant acknowledged that normally he traveled on Highway 167 in commuting between his home in Cabot and respondent-employer in Little Rock. Claimant concedes that at the time of the accident he had completed his work for the day, and at the time of the accident he was on his way home from work.

Claimant denies that he was on call relative to his job on Monday, May 26, 2003, when

he was persuaded to come in to work:

[They] got in a bind and he called me. He knew I was the better of the hands there; that with me there, it would have got done and he wouldn't have - the bigger guys over him wouldn't have been down his throat and I did it cause, you know, I wanted to be faithful to the company. I was two days away from my probation period with them, and, you know, I wanted to be faithful to the company and help in any way I could. (T. 26-27).

After a thorough consideration of all to the evidence in this record, to include the testimony of the claimant, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 27, 2003, the relationship of employee-employer-carrier existed among the parties.
3. On May 27, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$185.00/\$154.00, for temporary total/permanent partial disability.
4. On May 27, 2003, the claimant sustained an injury arising out of and in the course of his employment.
5. The claimant was temporarily totally disabled for the period commencing May 28, 2003, and continuing through the end of his healing period, a date to be determined.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of May 27, 2003.
7. The respondents have controverted this claim in its entirety.

CONCLUSIONS

The claimant commenced his employment with respondent on March 14, 2003, as a warehouse crew worker. On Monday, May 26, 2003, claimant was picked up at his residence and transported to work by his supervisor. After completing his shift at the respondent's facility claimant and his co-worker/roommate were being transported home by his supervisor when the vehicle ran out of gas. While the three vehicle occupants were walking to the service station to get gas for the claimant was struck by a vehicle which was driven by a drunk driver and suffered traumatic injuries.

Claimant seeks corresponding medical and indemnity workers' compensation benefits growing out the injuries. Respondents contend that the injuries suffered by the claimant on May 27, 2003, as a result of the motor vehicle accident are not compensable in that they were not sustained while he was in the course and scope of his employment nor were employment services being performed at the time of the accident.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of injuries having been sustained subsequent to the effective date of the afore provision. In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark Code Ann. § 11-9-102 (4) (A) (i). Should a claimant fail 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. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The credible evidence in the record reflects that claimant did not own a vehicle nor did he have driving privilege during his employment with respondents. Claimant typically rode to work with either his cousin, who also happened to be his supervisor, or a ride secured by his roommate, who also worked the same shift at respondent as the claimant. While the claimant usually worked Monday through Friday, the evidence reflects that during the Memorial weekend of May 2003, claimant worked Saturday and Sunday at a promotional stand sponsored by respondent-employer as a part of the Riverfest activities.

Respondent-employer warehouse facility is closed on the weekends. The time cards of the employees of respondent are located at the warehouse facility, as is the time clock. The claimant's hours worked during the Riverfest promotional on Saturday and Sunday, May 24-25, 2003, were recorded on a separated piece of paper. As a consequence of having worked during the weekend promotional claimant was not scheduled to work Monday, May 26, 2003.

On Monday, May 26, 2003, claimant was contacted by his supervisor and asked to work due to a shortage of the regular crew. Claimant's roommate was scheduled to work on Monday, May 26, 2003, and had reported for work in accordance with his schedule. The credible evidence reflects that approximately twenty (20) minutes following the initial telephone call of the claimant's supervisor requesting that claimant come in to work, the supervisor called again and asked the claimant to come in to work. During the second telephone call, the claimant was informed that he was "really" needed in order to get the trucks loaded. Further the un-

controverted testimony reflects that claimant was told that if he would agree to work the shift and get the trucks loaded the supervisor would come get him and bring him back home.

The fact that the time card of the claimant relative to May 26, 2003, reflects that he did not clock-in for work until 1800 (6:00 p.m.), which differs from other regular clock-in times of 1400 (2:00 p.m.) corroborates the credible testimony of the claimant that he was not scheduled to work on that date. The afore further corroborates claimant's account of his conversations with his supervisor on May 26, 2003, which ultimately resulted in him reporting for work.

The credible evidence reflects that as a result of the claimant's agreement to work on May 26, 2003, which was premised on the assurance of his supervisor that he would be picked up and taken home following the shift, the trucks of respondents were timely loaded such that the products could be distributed. Claimant completed his shift between 11:00 and 11:30 p.m. on May 26, 2003. In accordance with the assurance of his supervisor, claimant was being transported home to Cabot from the Little Rock facility of respondent when the supervisor ran out of gas. There is no evidence in the record to reflect that there was a stop between the time the claimant and his supervisor left the facility of respondent and the point that the truck ran out of gas. While walking to Cabot to get gas for the truck, the claimant suffered the injuries which serves as the basis for this claim when he was struck by a vehicle.

As noted above, the respondents take the position that the claimant did not sustain a compensable injury on May 27, 2003, pursuant to Ark. Code Ann. § 11-9-102 (4)(A), which is defined as an accidental injury causing internal or external physical harm to the body arising out of and in the course of employment. Ark. Code Ann. § 11-9-102 (4) (B) (iii) provides that a "compensable injury" does not include an injury that was inflicted upon the employee at a time

when employment services were not being performed. The Arkansas Supreme Court has ruled that the test to determine whether an employee was performing “employment services” is the same test used to determine whether the employee was acting within “the course of employment”. *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002). The test, as cited by the court, is whether the injury occurred within the time and space boundaries of the employment, when the employee is carrying out the employer’s interest directly or indirectly. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1(2002).

In the instant claim it is undisputed that the claimant had complete his shift at the Little Rock facility of respondent at the time he was injured. Further, the claimant was being transported on highway which was the usual route traveled when going to and from work at the time the vehicle ran out of gas. Claimant suffered his injuries when struck by another vehicle as he walked to a gas station where gas was to be secured for the vehicle. Claimant was en route home at the time the vehicle ran out of gas.

The going and coming rule ordinarily precludes recovery for an injury sustained while an employee is going to or returning from his place of employment. *Lepard v. West Memphis Machine and Welding*, 51 Ark. App. 53, 908 W.W.2d 666 (1995). The rationale for the afore being that an employee is not within the course of his employment while traveling to or from his job. *Brooks v. Wage*, 242 Ark. 486, 414 S.W.2d 100 (1967). There are several recognized exceptions to the going and coming rule: (1) where an employee is injured while in close proximity to the employer’s premises; (2) where the employer furnishes the transportation to and from work; (3) where the employee is a traveling salesman; (4) where the employee is injured on a special mission or errand; and (5) where the employer compensates the employee for his time

from the moment he leaves home until he returns home. *Jane Traylor, Inc. v. Cooksey*, 31 Ark. App. 245, 792 S.W.2d 351 (1990).

In the instant claim, the claimant was not scheduled to work on Monday, May 26, 2003. Claimant was persuaded to come to work by his supervisor in order to get the truck loaded for the morning distribution. In exchange for coming in to work, claimant was assured by supervisor that he would leave the Little Rock facility of respondent, travel to the claimant's residence in Cabot, pick the claimant up and bring him to the Little Rock facility of respondent, and take the claimant home after the shift was completed. Since the claimant was not scheduled to work, the effort of reporting to work, loading the trucks, and being returned home constituted a *special mission or errand* wherein the claimant suffered his injuries. Further, the respondents' interests were advanced directly by the claimant as a result of him having come in on his off day to load the truck. The afore was not concluded until the claimant was returned home in accordance with the assurance of his supervisor. Claimant suffered his injuries while being returned home by the supervisor. The evidence preponderated that the claimant was within the time and space boundaries of employment, when the claimant was carrying out the employer's purpose and advancing the employer's interest directly. Respondents have controverted this claim in its entirety.

Neither the nature nor the extent of the injuries suffered by the claimant in the May 27, 2003, is disputed. Claimant has undergone seventeen to twenty surgeries relative to the injuries growing out of the May 27, 2003, compensable accident, and remains under the active care of treating physicians relative to same. Claimant has not reached maximum medical improvement, nor has he been released to return to work by any treating physician relative to his compensable

injuries.

Ark. Code Ann. § 11-9-508 (a) mandates that the employer provide such medical services as may be reasonably necessary in connection with the injury received by the employee. *Cox v. Klipsch & Associates*, 71 Ark. App. 433, 30 S.W.3d 764 (2000). The evidence in the record preponderated that the medical treatment received by the claimant relative to his compensable accident of May 27, 2003, is reasonable and necessary in relation to the injuries growing out of the accident. Respondents have controverted this claim in its entirety.

A claimant is entitled to temporary total disability during his healing period if he shows by the preponderance of the evidence that he had a total incapacity to earn wages. *Carroll General Hospital v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The healing period is defined by Ark. Code Ann. § 11-9-102 (12), as that period for healing of an injury resulting from an accident. In the instant claim, the claimant continues to receive active medical treatment relative to the injuries growing out of the May 27, 2003, compensable accident. Claimant has not been release to return to work by his treating physician relative to his injuries. The evidence preponderated that the claimant had remained totally incapacitated from earning wages and within his healing period since May 28, 2003, and correspondingly entitled to temporary total disability benefits. Respondents have controverted this claim in its entirety.

The evidence in the record reflects that the claimant's hourly wage rate at the time of the May 27, 2003, compensable accident was \$7.00, for a forty (40) hour work week. Claimant normally worked five (5) day per week, Monday through Friday. Accordingly, the claimant earned wages sufficient to entitle him to a weekly compensation benefit rate of \$185.00, for temporary total disability and \$154.00 for permanent partial disability.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$185.00, for the period beginning May 28, 2003, and continuing through the end of his healing period as a result of the compensable injuries suffered in the employment of respondent on May 28, 2003. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medial relate travel, growing out of the compensable injuries of May 27, 2003.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge