

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406006

LARRY W. OATES

CLAIMANT

APPLICA

RESPONDENT EMPLOYER

LIBERTY MUTUAL INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED FEBRUARY 22, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE PETER O. THOMAS, JR., Attorney at Law, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on December 16, 2004. A prehearing conference was held on October 19, 2004 and a prehearing order was filed on October 20, 2004. A copy of the prehearing order was introduced into evidence as Commission Exhibit No. 1 without objection.

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

1. There was an employer-employee relationship on May 24, 2004.

2. The compensation rates are \$290/218.

The claimant contends he was injured in the course of his employment when he was attacked by another employee. The claimant contends he is entitled to medical benefits, temporary total disability benefits from May 24, 2004 through September 23, 2004, an 8% permanent impairment rating and attorney's fees.

Respondents contend the incident in question occurred at a time when employment services were not being performed and the incident is due to personal reasons and not the claimant's employment. Respondents contend there are no new objective medical findings to substantiate the impairment rating nor does the rating have a basis in the *AMA Guides, 4th Ed.* Respondents contend the claimant had previously been assigned a 5% anatomical impairment for an injury and, alternatively, contend that if a rating is owed the claimant, it would only be the difference in the 5% and the 8% rating. Respondents further contend that if the claim is found to be compensable, a credit for short term disability benefits paid the claimant should be credited the respondents.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Permanent impairment.
5. 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 May 24, 2004.
2. The compensation rates are \$290/218.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on May 24, 2004, when he was furthering the employer's interests.
4. Respondents are liable for reasonable and necessary medical treatment the claimant has pursued.
5. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages from May 24, 2004, until September 23, 2004.
6. The claimant has failed to prove by a preponderance of the evidence that he is entitled to a permanent anatomical impairment rating.
7. Respondents are entitled to a credit for any group benefits paid to the claimant pursuant to Ark. Code Ann. §11-9-411.

DISCUSSION

The claimant, 46 years old, drove a forklift for the respondent employer. At the hearing, the claimant discussed an incident that happened on May 11, 2004, when he and a co-employee were clocking in. Another employee, Willie Cawley, came up and began calling the claimant names and then followed him on his forklift while cursing and calling him names and making threats. The claimant reported the incident to

management of Mr. Cawley threatening him and management investigated the incident. According to the claimant, it was common knowledge around the plant that Mr. Cawley went around mumbling and making threats to kill people. The claimant testified that he had never had any contact with Mr. Cawley except at work.

According to the claimant, on May 24, 2004, it was Monday and there are department meetings before work begins and the employees in his department clock in 15 minutes early and go to the break room for the meetings. If the meeting is cancelled, the forklifts are not available so the employees go back outside to wait for time for their shift. Sometimes there was no meeting but you never knew ahead of time. The claimant testified that he was sitting at a picnic table outside talking to Torrey, a co-employee, about church and the first shift was coming out of the building. The claimant then felt a big blow from behind, hitting him on the back of the head and neck. According to the claimant, he went forward and then saw from the side, Mr. Cawley holding a metal pipe about to hit him again and he grabbed Mr. Cawley's arm and the pipe and untangled his legs from the picnic bench, pushed Mr. Cawley and ran. Roger Thornton, another employee, intervened and stopped Mr. Cawley from hitting the claimant again. The claimant reported the incident to Chris Newton, human resources manager, and asked that the police be called. The police were not called but statements were taken from witnesses and the claimant was sent to see Dr. Darin Wilbourn. The claimant saw Dr. Wilbourn on four occasions and was put on work restrictions and was sent home with no work available. According to the claimant, Dr. Wilbourn advised him to go follow up with his family doctor and he did go see Dr. Derek Lewis. Dr. Lewis indicated that the claimant might not be able to do all the twisting,

looking up and turning backwards on the forklift and that was about September 27, 2004. On September 28, 2004, the claimant was terminated from his employment.

The claimant testified that he was unable to work between the date of the incident and September 28, 2004. The claimant made a police report following the incident and also went to the prosecuting attorney's office and filed a complaint. Before an arrest warrant could be processed, the claimant had to have Mr. Cawley's address. The claimant did not have the address nor could he get Chris Newton to release that address to him or to the prosecuting attorney's office.

Under cross examination, the claimant verified that he had never had any conversation with Mr. Cawley until the time clock/forklift incident on May 11, 2004. The claimant verified that he did draw short term disability while he was off work. The claimant now is working part time driving a school bus in the morning and afternoon.

A "compensable injury" is defined as "an accident injury...arising out of and in the course of employment..." Ark. Code Ann. §11-9-102(4)(A)(i) (Supp. 2003). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed..." Ark. Code Ann. §11-9-102(4)(B)(iii) (Supp. 2003). An employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer." *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999). The test for determining whether the employee was performing employment services at the time of the injury is "whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or

advancing the employer's interest directly or indirectly." *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002).

Daryl Burnett, a co-employee of the claimant, testified that he works the same 3:30 shift the claimant works and they clock in about 3:15 in order to be ready to begin their shift at 3:30. The shift that leaves at 3:30 is clocking out at that time. Mr. Burnett witnessed Willie Cawley picking up the cigarette butt can and hitting the claimant over the head and neck without provocation. Mr. Burnett stated that Willie Cawley probably weighed about 270 pounds and was 6 feet tall. Mr. Burnett stated he had never seen the claimant have any contact with Mr. Cawley.

Torrey Russell, a co-employee of the claimant, testified that he was talking to the claimant on May 24, 2004, outside after they both had clocked in and were waiting to go inside and begin work. Mr. Russell saw Willie Cawley pick up a cigarette butt can and hit the claimant over the head without any provocation. Mr. Russell confirmed that the 3:30 shift arrives early and clocks in sometime between 3:15 and 3:30 in order to be able to begin their shift on time. Mr. Russell testified he believed there were about 100 on the 3:30 shift clocking in and probably 100 employees clocking out at 3:30, using one time clock.

Chris Newton, human resources manager, testified that Willie Cawley no longer works for the respondent and was terminated after the May 24, 2004, incident. Mr. Newton testified that the claimant was given permission to clock in at 3:15 in order to visit with the previous shift for a "hand off." Mr. Newton confirmed that the investigation of the May 24, 2004, incident revealed that the claimant was not doing anything to incite Willie Cawley when he was hit.

Angelique Jones, inventory control supervisor, testified that she had given the claimant permission to clock in at 3:15 and there are start up meetings every day. She stated it was possible that a meeting did not happen on a particular day; however, the people usually stayed inside and did not go back outside.

Respondents contend the claimant was not performing employment services at the time of the assault but was merely outside waiting to begin work. Claimant contends he had clocked in to attend a "hand off" meeting normally scheduled for Mondays but no meeting was held on the date of the incident so he was waiting outside.

In the present case, I find the claimant has proven by a preponderance of the evidence that he sustained a compensable injury while furthering the employer's interests and was performing employment services. I found the claimant to be a credible witness who described an incident where a co-employee came up from behind him and hit him across the head and neck with a cigarette butt can. The claimant presented credible testimony that he had no relationship with the assailant and that his only contact with him was at work and he did not socialize or interact at all with the assailant. The claimant also presented credible testimony that he clocked in at 3:15 and the incident happened on a Monday and each Monday there was a department meeting 15 minutes before the second shift was to begin. There was no department meeting the day of the incident but the claimant did not know that until after he arrived and clocked in. While the claimant was outside, he had arrived early for the meeting and was waiting to enter the building to begin his shift in a timely manner. The claimant was directly or indirectly furthering the employer's interest by arriving 15 minutes early

to participate in the department meeting even though the meeting was not held on that particular day. The claimant was also at work, clocked in and ready to begin his shift without any delays from a congested time clock.

Further, the medical evidence documented muscle spasms following the May 24, 2004, incident. Muscle spasms or involuntary contraction or tension and shortness in the muscles has been held to be an “objective finding.” See, *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997). Respondents are liable for all reasonable and necessary medical treatment the claimant has pursued for his compensable neck injury. Ark. Code Ann. §11-9-508.

The claimant next contends that he is entitled to temporary total disability benefits from May 24, 2004, through September 23, 2004. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present claim, I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages from May 24, 2004 through September 23, 2004. I found the claimant to present a credible account of the incident on May 24, 2004 and his subsequent medical care and treatment. The medical evidence supported the claimant’s contention of an aggravation of his pre-existing neck condition and acknowledged muscle spasms and medication was prescribed. The medical evidence also took the claimant off work and limited his

activities such that he was unable to return to his job. The medical documents the claimant was at maximum medical improvement on September 23, 2004.

The claimant next contends that he is entitled to an 8% permanent impairment rating, as assigned by Dr. Lewis on December 6, 2004. The claimant had previously been assigned a 5% permanent impairment for a previous work injury.

Any determination of the existence or extent of physical impairment must be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(B) (Repl. 2002). “Permanent impairment” has been defined as any permanent functional or anatomical loss remaining after the healing period had ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Further, the *AMA Guides* define “permanent impairment” as an “impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment.” The *AMA Guides* further qualify the definition by noting that “[a] permanent impairment is considered to be unlikely to change substantially and by more than [three percent] in the next year with or without medical treatment.” *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Further, the Commission was required to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission has adopted the *AMA Guides* to be used in this assessment. Ark. Code Ann. §11-9-522(g)(1)(A) (Repl. 2002); W.C.C. Rule 34. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the *AMA Guides*; the Commission may assess its own

impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Avaya v. Bryant*, 83 Ark. App. 273, 105 S.W.3d 811 (2003). A.W.C.C. Rule 34 specifically adopts the *Guides to the Evaluation of Permanent Impairment 4th Ed.*

I find the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional permanent benefits. First, Dr. Lewis utilized the *AMA Guides, 5th Ed.*, rather than the *AMA Guides, 4th Ed.* Dr. Lewis did not elaborate on how he arrived at the higher percentage rating. A review of the 5th Edition Guides revealed the section Dr. Lewis referred to in his report dealt with loss of motion and measurements associated with the loss and no specifics about the claimant were noted. The claimant has not had surgery following this incident but does have pain and muscle spasms. I am unable to find that the impairment rating assigned by Dr. Lewis is valid and satisfies the Arkansas Workers' Compensation laws and rules and regulations.

Ark. Code Ann. §11-9-411 provides that an injured worker's benefits shall be reduced in the same amount that other group health or disability benefits were received. Respondents are entitled to a credit for any group benefits that were paid the claimant.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on May 24, 2004, when he was furthering the employer's interests. Respondents are liable for reasonable and necessary medical treatment the claimant has pursued. The claimant has proven by a preponderance of the evidence

that he remained in his healing period and was unable to earn wages from May 24, 2004, until September 23, 2004. The claimant has failed to prove by a preponderance of the evidence that he is entitled to a permanent anatomical impairment rating. Respondents are entitled to a credit for any group benefits paid the claimant pursuant to Ark. Code Ann. §11-9-411.

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**