

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F411602

ALLEN STEPP, Employee	CLAIMANT
COMSTAR ENTERPRISES, Employer	RESPONDENT
ST. PAUL TRAVELERS INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED MAY 10, 2005

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

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

Respondents represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 20, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 12, 2005, 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 existed between the parties at all relevant times.
3. The claimant was earning an average weekly wage of \$600.00 which would entitle him to compensation at the weekly rates of \$400.00 for total disability benefits and \$300.00 for permanent partial disability benefits.

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

1. Compensability.
2. Temporary total disability benefits.

3. Medical.
4. Attorney fee.

At the time of the hearing the claimant clarified his request for temporary total disability benefits to include the period July 21, 2004 through December 8, 2004.

The claimant contends that while fueling up his truck he was attacked by another truck driver and in the process his right eye was injured.

Respondents contend that the claimant did not suffer a compensable injury. Further, the claimed injury apparently arose out of a personal altercation having nothing to do with the employment and recovery is precluded by A.C.A. §11-9-102(4)(B)(i).

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 witness and to observe his 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 January 12, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right eye while employed by respondent on March 12, 2003.

3. Respondent is liable for payment of the initial medical treatment claimant received from the paramedics and the Spiceland Fire Department on March 12, 2003.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any compensation benefits over and above the initial medical treatment provided on March 12, 2003.

FACTUAL BACKGROUND

The claimant is a 56-year-old man whose primary occupation has been as a truck driver. In December 2001 the claimant began working for the respondent as a long-haul truck driver. On March 12, 2003, claimant was in the process of driving a load to Malvern, Pennsylvania when he pulled into a truck stop in Spiceland, Indiana to refuel his truck. Claimant testified that he waited behind one truck parked next to a fuel pump for approximately one and a half hours without ever seeing the driver of that truck. After one and a half hours another bay opened up and claimant moved his truck there and began fueling it. The driver of the other truck, Randal Ray Carville, finally came out of the truck stop to fuel his truck. Claimant testified that he did make a comment to Carville that his actions were inconsiderate. Claimant testified that he continued to fuel his truck and after several minutes Carville attacked him, striking him in the right eye and mouth. The police were called and Carville was arrested.

Claimant testified that following this incident he was treated by a paramedic and reported the incident to the respondent. Claimant testified that for approximately three days after this incident he could not see anything out of his right eye. After three days his vision improved but he still had some blurriness and double vision.

In February 2004 claimant left his job with the respondent and went to work for Tango Transportation. In July 2004 the claimant failed the eye examination of his D.O.T. physical. Following a visit to the optometrist, claimant was referred to Dr. Jordan, an ophthalmologist. Dr. Jordan diagnosed claimant as suffering from cataracts in both the right and left eye, with the right eye being substantially worse. Dr. Jordan performed surgery to remove the cataract on claimant's right eye on August 12, 2004. Claimant was off work at the behest of Dr. Jordan from July 21, 2004 through December 8, 2004.

Claimant has filed this claim contending that he suffered a compensable injury while employed by respondent on March 12, 2003. He seeks payment of related medical

treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Claimant's claim is for an injury to his right eye which occurred as a result of an altercation with Carville on March 12, 2003. Thus, 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 he suffered a compensable injury to his right eye.

Initially, I note that respondent contends that claimant did not suffer a compensable injury pursuant to A.C.A. §11-9-102(4)(B)(i). That section states that a compensable injury does not include:

Injury to any active participant in assaults or combats which, although they may occur in the work place, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which said assault or combat amounts to a deviation from custom-

ary duties; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries; (Emphasis added.)

Based upon the evidence presented in this case, I do not find that the claimant was an “active participant” such that his injury would not be compensable. While claimant did make a comment to Carville that he had been inconsiderate, I do not believe that statement rises to the level that one would find that claimant was an “active participant.” According to claimant’s testimony he made that statement to Carville and then proceeded to refuel his truck for several minutes before he was attacked from behind by Carville. The documentary evidence contains a police report which indicates that another witness observed this altercation and indicated that Carville was the aggressor, not the claimant. Furthermore, the police report notes injuries to the claimant’s right eye and mouth while noting no injury to Carville. Furthermore, the police report indicates that following the investigation Carville was arrested for battery.

Given the foregoing evidence, I do not find that the claimant was an “active participant” in the incident which took place on March 12, 2003. While claimant did make a statement to Carville, I do not find that that statement rose to a level which would have precipitated an assault. Therefore, I find that A.C.A. §11-9-102(4)(B)(i) does not bar claimant’s claim for a compensable injury.

I do find based upon the evidence presented that claimant suffered a compensable injury as a result of the incident on March 12, 2003 when he was assaulted by Carville. According to claimant’s testimony which I find to be credible and entitled to great weight he was assaulted by Carville after claimant had made a statement to him that he was being inconsiderate. At the time of this assault claimant was in the process of refueling his truck in order to continue on his way to making a required delivery in Pennsylvania. Claimant’s testimony regarding the circumstances surrounding the assault are also supported by the police report which is contained in the documentary evidence. Therefore, I find based

upon the evidence presented that claimant's injury 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 caused external harm to his body which required medical services and that claimant has offered objective evidence establishing an injury. According to the police report, the officers observed the claimant's right eye as bloodshot with redness in the eye area. The police report also indicates that the officers observed blood coming from the claimant's mouth. Claimant testified that he was treated by paramedics immediately after the assault and claimant's testimony is supported by the police report which indicates that claimant was seen by the New Castle paramedics and the Spiceland Fire Department. Given this evidence, I find that claimant has satisfied the remaining elements of compensability that the injury caused external injury to his body which required medical services and that the injury was supported by objective findings.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury on March 12, 2003 while employed by the respondent.

The next issue for consideration involves the compensation benefits to which claimant is entitled. Respondents are always liable for reasonable and necessary medical treatment provided in connection with compensable injuries. In this particular case, that would include the treatment the claimant received from the paramedics and the Spiceland Fire Department on the date of the injury. However, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional compensation benefits over and above the medical treatment on March 12, 2003.

After the incident on March 12, 2003, the claimant continued to work for the respondent until he went to work for another trucking company in February 2004. After the

initial medical treatment from the paramedics on March 12, 2003, claimant did not seek any additional medical treatment for his eye until July 2004. In July 2004 the claimant underwent his D.O.T. physical and failed his eye examination. After seeing an optometrist the claimant was referred to Dr. Jordan, an ophthalmologist who evaluated claimant on July 21, 2004. Dr. Jordan's medical report of that date notes a history of eye trauma in 1985, but makes no mention of the March 2003 incident. Dr. Jordan diagnosed claimant as suffering from a cataract in his right eye and an early cataract in his left eye. Dr. Jordan performed surgery to remove the cataract in claimant's right eye on August 12, 2004. Dr. Jordan's operative report of August 12, 2004 indicates the following:

A small dehiscence medially was found in the capsule. A dehiscence of the zonules. The vitreous appeared in the anterior chamber. The capsule was checked repeatedly and found to be stable except for the small area of dehiscence.

In a letter dated January 7, 2005, Dr. Jordan indicated that at the time of his surgery he discovered an "area of zonular rupture which made the surgery somewhat more difficult." Dr. Jordan went on to state that on the day after the surgery the claimant related to him the assault which took place in March 2003. Claimant contends that his surgical treatment is causally related to the incident which occurred in March 2003.

I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that the surgery performed by Dr. Jordan was caused or related to the incident in March 2003. First, I find insufficient evidence that the cataract in the claimant's right eye was caused or aggravated by the incident in March 2003. Although the cataract in claimant's right eye was more significant and resulted in surgery, Dr. Jordan also noted that claimant had a cataract in his left eye. Dr. Jordan has made no statement opining that claimant's cataract was caused or aggravated by this incident in March 2003.

Furthermore, to the extent that one could argue that the zonular ruptures were

directly related to the incident of March 2003, I find insufficient evidence that there were any specific medical costs related to the zonular rupture. Dr. Jordan did note that the zonular ruptures made claimant's surgery more difficult, but there is no indication that these ruptures resulted in increased medical costs of the surgery for removal of the cataract. Nor is there sufficient credible evidence indicating that the zonular ruptures caused or contributed to the time claimant was taken off work by Dr. Jordan.

In summary, even though the claimant did suffer a compensable injury to his right eye in March 2003, claimant did not seek any additional medical treatment for his right eye until July 2004, more than one year later. At that time the claimant was diagnosed as suffering from a cataract in his right eye. There is insufficient evidence indicating that this cataract was caused or aggravated by the incident in March 2003. Furthermore, to the extent that one could argue that the zonular ruptures were the result of claimant's compensable injury, I find insufficient evidence that the zonular rupture resulted in any additional medical costs or that claimant was taken off work as a result of those ruptures as opposed to his cataract.

Accordingly, other than payment for the initial medical treatment from the paramedics on March 12, 2003, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to any other compensation benefits as a result of his compensable injury.

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)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by respondent on March 12, 2003. Respondent is liable for payment of claimant's initial medical treatment received from the paramedics on that date. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional compensation benefits over and above the initial paramedic treatment.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE