

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F507564

**JACKIE A. CLARK,
EMPLOYEE**

CLAIMANT

**ARKANSAS STATE HIGHWAY
& TRANSPORTATION DEPT.,
EMPLOYER**

RESPONDENT

**ARKANSAS INSURANCE DEPARTMENT,
PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED MARCH 21, 2006,

Pursuant to a hearing conducted December 21, 2005, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Dennis J. Davis, Attorney at Law, Bryant, Arkansas, appearing for the claimant, and

Mr. William L. Wharton, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over whether the claimant suffered a compensable injury to his right foot during an otherwise compensable motor vehicle accident.

On July 19, 2005, the claimant was injured when the dump truck he was operating was struck from the rear by an eighteen wheeler on Interstate 30, near Benton, Arkansas. The respondents acknowledged that the claimant sustained certain compensable injuries, including injuries to his ribs and low back, for which they paid benefits for temporary total disability and medical care. Initially, the parties were not aware of a possible foot injury.

The claimant testified that, although he had noticed his right foot was sore at the time, he thought it was merely bruised and was not concerned with it because his ribs were hurting so badly. The claimant also acknowledged that previously he had suffered a crush injury to his right foot in

1989 which was followed by four surgeries and had resulted in some numbness since that time. He further acknowledged that, after the motor vehicle accident in 2005, that he learned that he was diabetic. However, he testified that he had not had any infected ulcer on his foot prior to the motor vehicle accident.

Following the motor vehicle accident, the claimant received treatment for his ribs and back and returned to work on or about August 18, 2005. As he continued to work, the condition of his foot began to worsen and he started to notice that his sock was wet on his right foot. He testified that he thought one of his calluses had come off and he did not really think anything about it initially.

However, on or about September 12, he consulted Dr. Russell Burton for the problem with his foot. The medical record from that time indicates that the ulcer was then larger than the size of a quarter and was very deep down into the muscular layer of the foot. On September 15, 2005, the claimant was examined by Dr. Jerry W. Dixon who wrote that the claimant had the 1989 crush injury and motor vehicle accident in July, 2005, and has had longstanding callus on plantar surface of the right foot and noticed two weeks ago that the lateral callus just fell off, which was very unusual. Thereafter, the claimant's fourth toe would intermittently swell, then return to normal. Eventually, the claimant noted drainage from the bottom of his foot and that the fourth toe stayed swollen. Dr. Dixon recommended an urgent orthopedic consultation with Dr. Ralph D. Cash.

Dr. Cash examined the claimant on September 15 and wrote that he has had an insensitive foot because of his previous crush injury and surgeries. An MRI report dated September 16, 2005, noted findings consistent with osteomyelitis in the fourth metatarsal and the fourth proximal phalanx, as well as an ulcer extending to the skin surface at the distal aspect of the fourth metatarsal on the plantar aspect of the foot. It also noted subcutaneous edema and soft tissue edema surrounding the

third and fourth metatarsals. On September 22, 2005, Dr. Cash performed surgery, involving excision of the fourth metatarsal and proximal phalanx of the right fourth toe secondary to osteomyelitis and history of trauma.

At the hearing, the claimant contended that, during the motor vehicle accident, he also sustained a compensable injury to his left foot and should be awarded related medical expenses and temporary total disability benefits from September 12, 2005, until a date to be determined. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant suffers from an ulceration of his right foot, along with osteomyelitis, neither of which is related to the motor vehicle accident. They further contended that the claimant suffered from pre-existing diabetes and a previous injury to his foot, and that there is no medical evidence, stated within a reasonable degree of medical certainty, that shows a causal connection between his current foot problems and the motor vehicle accident.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant suffered compensable injuries to his ribs and lower back as a result of a motor vehicle accident arising out of and in the course of his employment July 19, 2005; and his average weekly wage was \$525.47.

3. The preponderance of the evidence shows that the claimant suffered a compensable injury to his right foot which resulted in the development of osteomyelitis.

4. The claimant has received medical care, including the care of Dr. Ralph D. Cash, which was reasonably necessary in connection with his compensable injury and is the responsibility of the respondents, pursuant to Ark. Code Ann. §11-9-508.

5. As a result of the injury to the claimant's right foot, a scheduled injury, he is entitled to temporary total disability benefits from September 12, 2005, until a date to be determined, so long as he continues in the healing period and is not earning wages, consistent with Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146 (2001).

6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The parties deposed orthopedic surgeon Dr. Ralph Cash on December 14, 2005. Previously, on October 3, 2005, Dr. Cash had written to the respondents and stated that "with the degree of medical certainty, I can't tell you for certain that he had an injury." The remainder of the letter, and Dr. Cash's deposition testimony, indicated that his lack of medical certainty related to the occurrence of the injury, since he was not present to witness it directly.

Dr. Cash testified that he was aware of the claimant's reported history of an earlier crush injury and surgeries which had left his foot somewhat insensitive and, further, that he had discovered that the claimant also suffered from diabetes, previously unbeknownst to the claimant. On direct examination, he agreed that if the claimant jammed his foot into the floorboard during the motor

vehicle accident, this could cause subcutaneous irritation to the callus, which then caused the callus to fester, drain, become infected, and then start the osteomyelitis process. Dep. at 13. On cross-examination, he testified that if the claimant had a wreck and did jam his foot into the floor he thought it would be a reasonable chain of events to have that kind of problem. Dep. at 16. He also acknowledged that the claimant's condition could develop without an accident or be the result of a different injury such as stepping on a nail or rubbing a hole in his foot. Dep. at 17, 18. However, he also acknowledged that if the claimant jammed his foot into the floorboard during the motor vehicle accident, the accident would have been the precipitating cause for the ulcer and the osteomyelitis to form, within a reasonable degree of medical certainty. Dep. at 19.

The claimant is required to prove entitlement to benefits by a preponderance of the evidence, and not to a scientific certainty. Here, the preponderance of the evidence shows that the motor vehicle accident did occur and the claimant very likely jammed his right foot hard down on the brake pedal. The record further shows that, although the claimant had pre-existing diabetes and a 1989 foot injury and surgeries, followed by the development of calluses on his foot, over the subsequent years, there had been no sign of infected ulcers or osteomyelitis until after the motor vehicle accident during his employment.

The motor vehicle accident involved operating a lead block truck which was intended to protect workers on the highway from being struck by oncoming traffic which had failed to change lanes as directed by the highway department road crew. Thus, it was equipped with a crash attenuator on the rear of the vehicle. At the time of the incident, there was a sign truck approximately one thousand feet behind the claimant on the shoulder of the road with an arrow directing traffic away from the right lane, followed by another truck with a flashing arrow indicating

that traffic should move to the left lane. The claimant's vehicle was then located in the right lane protecting the workers with its air brakes locked down and the air brake pulled, waiting. Just before the moment of impact, he saw the oncoming vehicle in his rearview mirror and instinctively jammed the brake pedal to the floor, causing an indentation on the floorboard. This appears to be the kind of event that could well have caused damage to his previously injured diabetic foot, which he did not fully appreciate due to the lack of sensitivity in the foot. However, until the infection had developed, which may have taken six to eight weeks, according to the testimony of Dr. Cash, the claimant was not especially aware that he had suffered a significant injury to his foot. While it is possible that he could have spontaneously developed a sore on his foot, he had not done so for several years, even following his previous foot surgery. Thus, the preponderance of the evidence is consistent with the claimant's position that the accident is the source of an injury to his foot which resulted in osteomyelitis and necessitated surgery and his off-work status, even though there may be other less compelling and more speculative explanations for his condition.

There is no dispute that the claimant's treatment for his foot was reasonably necessary in connection with the condition of his foot, within the meaning of Ark. Code Ann. §11-9-508. As to temporary total disability benefits, Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146 (2001) provides that, in the case of a scheduled injury such as an injury to the foot, the worker is to receive compensation for temporary total disability during the healing period or until he returns to work, whichever occurs first, regardless of actual incapacity to earn wages. Here, the claimant's diagnosis and healing period were first noted in the medical record on September 12, 2005, and appears to have continued up until the time of the hearing. It also appears that the claimant has not returned

to work during that time, so that he is entitled to temporary total disability benefits as he has requested.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge