

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F408485

MARIO MEJIA, Employee	CLAIMANT
CRYSTAL LAKE FOODS, Employer	RESPONDENT
COMPCARE ADMINISTRATORS, Carrier	RESPONDENT

OPINION FILED APRIL 27, 2006

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

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

Respondents represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On March 27, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 10, 2004, 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 in April 2004.

At the end of the hearing the parties agreed to stipulate that claimant's average weekly wage should be calculated at the rate of \$8.76 per hour for 40 hours per week. This results in an average weekly wage of \$350.40 and compensation rates of \$234.00 for temporary total disability benefits and \$175.00 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 claimant indicated that the requested period of temporary total disability benefits would include August 4, 2004 through September 21, 2004.

The claimant contends he was injured when his left foot was struck by a pallet jack. He requests temporary total disability, medical, and a controverted attorney fee.

The respondents contend the claimant did not sustain a compensable injury. Alternatively, the respondents state that if the claimant did sustain a compensable injury, which is denied, the respondents' first notice of the injury was the filing of the AR-C.

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 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 November 10, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant was earning an average weekly wage of \$350.40 which would entitle him to weekly compensation rates of \$234.00 for temporary total disability benefits and \$175.00 for permanent partial disability benefits is likewise accepted as fact.
3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left foot while working for respondent in April 2004.
4. Respondent is liable for all reasonable and necessary medical treatment

provided in connection with claimant's compensable left foot injury.

5. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury.

FACTUAL BACKGROUND

The claimant is a 61-year-old Hispanic man who began working for respondent in July 2002. Claimant testified that he has performed various jobs for the respondent over the years. Claimant testified that on Friday, April 23, 2004, he was using a pallet jack to move "tumblers" when the jack ran over his left foot and smashed it. Claimant admitted that he did not report the injury at that time because he did not think it was a "big deal." Claimant continued to work the remainder of his shift which was approximately 30 minutes before going home. Claimant testified that when he got home he noticed his foot was purple and swollen.

Over the weekend claimant received no medical treatment other than the taking of Ibuprofen. On Monday, April 26, 2004, claimant sought medical treatment from Dr. Rebecca Lewis. Dr. Lewis comes to the respondent's plant on a weekly basis. Dr. Lewis' medical report of April 26, 2004 indicates that claimant was seen for a chief complaint of a sore on his left toe which had existed for approximately two weeks. Dr. Lewis' medical report also states, "He reports no real history of injury." Dr. Lewis diagnosed claimant as suffering from an ulceration of the left fifth toe over the dorsal surface and she prescribed medication. At some point the claimant also received medical treatment from Dr. Mueller, a podiatrist. The medical records indicate that Dr. Mueller ordered various tests including a blood test and bone scan. The bone scan report dated August 5, 2004 indicates that findings were consistent with osteomyelitis involving the fifth toe and region of head of the left fifth metatarsal.

Subsequent to that testing the claimant again returned to Dr. Lewis on August 9,

2004, at which time she noted gangrenous changes on the left fifth toe of the claimant.

Claimant has filed this claim contending that he suffered a compensable injury to his left foot while working for the respondent on or about April 23, 2004. He seeks payment of related medical treatment, temporary total disability benefits beginning August 4, 2004 and continuing through September 21, 2004, as well as a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his left foot; specifically, to his left toe when he smashed it with a pallet jack while working for respondent on or about April 23, 2004. Claimant's claim is for an injury caused by a specific incident 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 left foot while working for the

respondent.

As previously noted, claimant testified that he suffered the injury to his left foot when a pallet jack he was using rolled over his left foot "smashing it." Claimant testified that he did not report the injury at that time because he did not believe it was a "big deal." Claimant continued to work the remainder of his shift which lasted approximately 30 more minutes before returning home and discovering that his foot was purple and swollen.

When claimant returned to work on Monday he sought medical treatment from Dr. Rebecca Lewis, a physician who came to respondent's plant on a weekly basis. Admittedly, Dr. Lewis' office note of April 26, 2004 indicates that claimant's problem had existed for approximately two weeks and it does not mention a work-related injury, but to the contrary indicates that claimant reported no history of injury. In addition, in a handwritten note dated December 30, 2004, Dr. Lewis indicated that she had no recollection of the claimant stating that his injury was work related.

The claimant is Hispanic and does not speak English. As a result, when claimant sought medical treatment from Dr. Lewis an interpreter, Lorraina White, was present. White was the human resources manager for the respondent and also acted as an interpreter for Hispanic employees. Claimant testified that when he sought medical treatment from Dr. Lewis he informed White how he had injured his foot. White confirmed claimant's testimony. White appeared at the hearing and testified that she interpreted for the claimant when he sought medical treatment from Dr. Lewis. White testified that the claimant indicated that he had hurt his foot and toe with the pallet jack and she relayed this information to Dr. Lewis. I find the testimony of White to be credible and entitled to great weight. Based upon the testimony of claimant and White, I find that claimant did in fact give a work-related history to Dr. Lewis when he initially sought medical treatment on April 26, 2004. I also find that claimant's statement to White constituted notice of his work-related injury.

Based upon the testimony of the claimant and White which I find to be credible and entitled to great weight, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury to his left foot which arose out of and in the course of his employment with the respondent and that this injury 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 internal physical harm to his body which required medical services and that he has offered medical evidence supported by objective findings establishing an injury. Here, Dr. Lewis noted an ulceration of the claimant's left fifth toe at the time of her initial evaluation on April 26, 2004. In addition, a bone scan ordered by Dr. Mueller revealed findings consistent with osteomyelitis of that toe and Dr. Lewis subsequently observed gangrenous changes of the claimant's left fifth toe. I find that this evidence satisfies the remaining elements of compensability.

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 to his left foot while working for respondent in April 2004.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable left foot injury.

Claimant contends that as a result of his compensable injury he is entitled to temporary total disability benefits beginning August 4, 2004 and continuing through September 21, 2004. The injury to claimant's left foot is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). In this particular case, the claimant testified that when he sought medical treatment from Dr. Mueller, Dr. Mueller took him off work for a period of time. Indeed, Dr.

Lewis' medical report of August 9, 2004 indicates that claimant has been off work. However, there is insufficient evidence indicating that claimant was taken off work by Dr. Mueller or any other treating physician. The medical evidence does not contain any statement from claimant's treating physicians indicating that he was unable to work. In fact, claimant had continued working from the time of his injury in April 2004 through August 3, 2004. Even though claimant may have been off work subsequent to August 3, 2004, I find insufficient evidence indicating that this was at the behest of one of his treating physicians. Based upon this evidence, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

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).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left foot while working for respondent in April 2004. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable left foot injury. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

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).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE