

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506635

GARY D. PEARSON, EMPLOYEE	CLAIMANT
FOUR STATES FAIR, INC., EMPLOYER	RESPONDENT
CHARTER OAK FIRE INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JANUARY 12, 2006

Hearing held before the HONORABLE DALE DOUTHIT, Administrative Law Judge, November 1, 2005 at Texarkana, Miller County, Arkansas.

Claimant represented by HON. GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HON. PHILLIP P. CUFFMAN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in this matter on November 1, 2005, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing telephone conference was conducted on August 17, 2005, and a prehearing order was filed on August 18, 2005. At the full hearing, the parties announced that the stipulations, issues and their respective contentions were properly set out in the prehearing order, subject to any additional stipulations, contentions or issues agreed to at the hearing. a copy of the prehearing order was introduced into

evidence as Commission's Exhibit "1", and made a part of the record without objection.

The parties agreed that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including June 17, 2005; and that the claimant's applicable compensation rate is \$126.00 per week for TTD and PPD.

The issues to be presented for determination primarily concerned compensability; and if overcome, whether the claimant was entitled to TTD from June 20, 2005 through October 13, 2005, associated medical bills and attorney's fees.

The claimant contended, in summary, that he sustained compensable injuries to his back on June 17, 2005; that the medical treatment he has received to date has been reasonable, necessary and related to his injuries; that he should be awarded TTD benefits from June 20, 2004 through October 13, 2005; and that the respondent should be ordered to pay attorney's fees as provided by law.

The respondents contended at the prehearing conference that the claimant did not sustain a compensable injury.

The claimant, Gary Pearson, was the only witness called by the claimant's attorney. The respondents' only witness was Scott Page. The record is composed of the transcript of the November 1, 2005, hearing containing the Commission's Prehearing Order (Commission Exhibit "1"), a handwritten map (Claimant's Exhibit "1"), a handwritten letter (Respondents' Exhibit "1"), and approximately 51 pages of medical records (Joint Exhibit "1").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had the opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The parties' stipulations are reasonable and hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right lower extremity.
- 4) The respondents are responsible for all medical treatment related to the claimant's right lower extremity compensable injury of June 17, 2005.
- 5) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his back on June 17, 2005.

DISCUSSION

A. History

The claimant, age 50, was employed by Four States Fair, Inc. on June 17, 2005. The claimant testified that his job duties at that time consisted of signing in RVs and RV security. The claimant testified he would assign customers with

recreational vehicles specific hookup locations, take their payment, and then monitor the area in a security capacity during the night. The claimant testified he would work Wednesdays, Thursdays, and Fridays from 11:00 p.m. to 7:00 a.m. the following day.

The claimant testified that two times per night, in his security capacity, he would have to leave his "security building" and go inspect the "main building" to make sure it was secure. The claimant testified that his employer provided a golf cart to travel from the "security building" to the "main building" in order to make security checks. The claimant testified that during the dark morning hours of June 17, 2005 it was raining. The claimant testified that when it was raining he would always use his personal vehicle to make his "main building" security checks. The claimant testified that on the morning of June 17, 2005 it was "raining real hard" and "the wind was blowing and trash cans were going everywhere." A metal canopy was positioned near the security building, and on the morning in question the claimant testified he parked his car under the canopy due to the weather. The claimant testified as follows regarding what happened after he parked his vehicle under the canopy:

A. Well, it was like a split second, I mean, it was so surprising, the whole canopy come up and the bottom bar, I grabbed a hold of it because it was coming towards me.

Q. This canopy that you were parked under, did it have a cover that went all the way to the ground on both sides?

A. Yes, sir. Framed.

Q. Is it just one of those U-shaped frames?

A. Yes.

Q. And when you say the canopy pulled up, are you talking about from the ground level there?

A. Yes, sir.

Q. And how much of it pulled off?

A. The front end of it - because it went kind of at an angle and then it landed down and it only got my right leg. It was sliding down my leg and I grabbed - I was holding onto it, scared, and it landed on the fender of my car.

Q. And so what happened to the canopy itself?

A. It kind of twisted because it came at an angle, that one big wind did.

Q. What seemed to have twisted it?

A. That wind, I mean, it just picked it up and it just - it was so fast, you know - - - -

Q. Did the canopy strike you?

A. Yes, sir.

Q. Where did it strike you?

A. It hit my leg.

Q. Which leg?

A. My right leg. And it knocked me up against the car. I grabbed a hold of it but it was pretty heavy and it went on down my leg. It got to my knee cap and I was afraid that it was doing (sic) to take my knee cap off and so I had to pick it up.

Q. Okay. Was - do you have any idea what this weighted against you?

A. I don't know. I was so scared - I just don't know how much that thing weighed. (T. pgs 19 & 20, lines 6-25 & 1-15, respectively.)

The claimant testified that the incident with the canopy caused injuries to his right leg and back. Right after the canopy incident, the claimant called his immediate supervisor, Scott Page, who arranged for the claimant to go to the emergency room at Wadley Regional Medical Center.

B. Adjudication - Right Leg Injury

For the claimant to establish a compensable injury as a result of a specific incident which is identified by time and place of occurrence, the following requirement of A.C.A. §11-9-102(4)(A)(i) must be established.

- 1) Proof by a preponderance of the evidence of an injury arising out of and in the course of 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 medical findings, as defined in A.C.A. 11-9-102(16), establishing the

injury; and

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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish compensability of the claim, and compensation must be denied. *Mickel v. Engineered Specialty Plastics*, 56 Ark. App. 176, 938 S.W. 2d 876 (1997).

The respondents, while controverting this claimant its entirety, seemed to argue primarily that the claimant was not acting within “the course of employment” at the time of injury. Respondents argue that the claimant was on a “personal errand” at the time of injury because claimant was moving his personal vehicle to keep it from being damaged. The claimant testified that he had just returned from inspecting the “main building”, had used his own vehicle because it was raining, and parked under the metal canopy due to the weather. The claimant testified that it was customary for him to use his own vehicle to make rounds in bad weather. The claimant’s supervisor, Scott Page, also testified it would be reasonable for the claimant to use his own vehicle instead of the golf cart in bad weather. (T. pg. 63, lines 15-18)

There was great debate at the full hearing as to whether or not the claimant

Pearson, Gary D./F506635

had just returned from checking the main building in his own vehicle immediately before the canopy struck him, or whether he was merely moving his personal vehicle and, therefore, not performing employment services. Although the claimant's testimony somewhat contradicted his written statement and the testimony from Scott Page regarding his actions immediately prior to the canopy striking him, I find the claimant was still performing employment services in either scenario.

The Arkansas Supreme Court has held that the same test used to determine whether an employee was acting within "the course and scope of employment" is to be used to determine whether the employee was performing "employment services." *Collins v. Excel Spec. Prod.*, 347 Ark. 811, 69 S.W. 3d 14 (March 7, 2002). The test is whether the injury occurred "within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interests directly or indirectly." This test has also been previously stated as whether the employee is "engaged in the primary activity that he was hired to perform or in the incidental activities that are inherently necessary for performance of the primary activity. (Emphasis added.) *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W. 2d 956 (1996).

Employment services are performed when the employee does something that is generally required by his or her employer. In the present case, the claimant's duty was to

Pearson, Gary D./F506635

inspect other buildings on the premises. When the weather was bad, the claimant's own supervisor testified it was reasonable for the claimant to use his own vehicle when doing those inspections. The claimant's employer benefitted from the claimant using his own vehicle in bad weather. Even if the claimant had just moved his vehicle prior to being struck by the canopy, the employer's interests were still being advanced.

The evidence shows that as a result of the canopy striking the claimant, the claimant sustained a contusion to his right leg. The medical evidence contained on pages 3, 5 & 6 of JX-1 shows that the claimant's right leg received "abrasions" and "bruising". The record contains credible evidence that the right leg injury sustained by the claimant on June 17, 2005 arose out of and in the course of employment and caused physical harm which required medical services that is supported by objective findings in the medical evidence. Therefore, I find the claimant has proven by a preponderance of the evidence that he sustained a compensable right lower extremity injury, and the respondents are responsible for all medical treatment reasonably related to such injury, including, but not limited to, the treatment at the Wadley Regional Emergency Room on June 17, 2005.

Neither the medical records, nor the testimony from the claimant, indicates that the claimant's right leg injury resulted in temporary partial disability or temporary total disability. Therefore, the claimant is not entitled to any indemnity benefits related to his compensable right leg injury.

Pearson, Gary D./F506635

C. Adjudication - Back Injury

I find that the claimant has failed to prove a compensable back injury occurred on June 17, 2005, for two reasons. First, the claimant has failed to prove by a preponderance of the evidence that his back condition arose out of and in the course of his employment with Four States Fair, Inc. It is clear to this examiner that any problems with the claimant's back were pre-existing to the June 17, 2005 incident. Second, the claimant has failed to establish his back injury with objective findings.

The claimant testified that he had been on Social Security Disability since 1996 for, among other reasons, "a prior back injury." (T. pg. 27, lines 11-12) The claimant also stated that in 2001, while working for Tri-State, he was in a motor vehicle accident and hurt his back again. The claimant testified that he received a 5% impairment rating as a result of the 2001 motor vehicle accident. (T. pg. 29, lines 22-25 & T. pg. 30, lines 1-6). Most significantly, the claimant testified that his back problems never subsided all the way up to June 17, 2005. The claimant testified he was still receiving muscle relaxants from Dr. Charles Marrow as a result of the 2001 motor vehicle accident all the way through 6/17/05. (T. pg. 31, lines 2-12)

Even though the claimant testified his back pain felt different after the 6/17/05 incident, I question the credibility of the claimant in this regard. As stated earlier in this opinion, the claimant's testimony regarding his conduct immediately prior to the canopy striking him was highly contradictory with his handwritten statements and other witness

Pearson, Gary D./F506635

testimony. In addition, the medical exhibit at pg. 9 of JX-1 shows that the claimant reported to medical providers that his “low back” pain began on 7/18/05. The claimant clearly testified he was still having back problems from 2001 through 6/17/05, and never reported to those giving him treatment that he had been having back problems as early as 1996. Clearly, the claimant’s credibility regarding his back is suspect.

The claimant admitted to having received a 5% permanent impairment rating due to the 2001 MVA, and nothing in the medical evidence presented shows that his condition was worsened or even aggravated by the 6/17/05 incident. The lack of objective findings of a back injury occurring on 6/17/05 is another basis for denying compensability of the claimant’s back. On July 20, 2005, the claimant underwent an MRI of the lumbar spine. Dr. James Jean submitted the following impression of the claimant’s lumbar spine: (JX-1, pg. 36)

IMPRESSION: 1. Minimal degenerative changes of the lumbar spine at L5 and L5-S1 levels, as described.

An MRI of the claimant’s thoracic spine was also conducted on July 20, 2005. Dr. James Jean submitted the following impression of the claimant’s thoracic spine: (JX-1, pg. 37)

IMPRESSION: 1. Mild degenerative changes of the thoracic spine as described.

Nothing in the medical evidence indicates the claimant suffered an acute injury to his back or aggravated his pre-existing back problem on June 17, 2005. This examiner is

Pearson, Gary D./F506635

aware of the mention of “muscle spasms” in the medical records with regard to the claimant’s back; however, as mentioned, the claimant was already taking muscle relaxers due to previous back problems at the time of the 6/17/05 incident. The claimant’s degenerative back condition cannot be causally linked to the 6/17/05 incident.

For the reasons outlined, I find the claimant failed to prove compensability with regard to his back as a result of the 6/17/05 incident by a preponderance of the evidence. The record clearly shows the claimant had numerous back problems prior to 6/17/05, had received a 5% permanent impairment rating prior to 6/17/05, and was still taking muscle relaxants up to 6/17/05 because of his 2001 motor vehicle accident. All of those factors raise considerable doubt as to whether the claimant’s back problems arose out of his employment with the respondent-employer. Also, the lack of objective findings with regard to claimant’s back is another basis for denial. The claimant could not show any causal connection between the degenerative condition in his back and his employment with Four States Fair, Inc. Thus, a finding of compensability with regard to the claimant’s back is denied. The injured party bears the burden of proof in establishing entitlement to benefits under the Workers’ Compensation Act and must sustain that burden by a preponderance of the evidence. *Clardy v. Medi-Homes LTC Services LLC*, 75 Ark. App. 156, 55 S.W. 3d 791 (2001).

Pearson, Gary D./F506635

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable right lower extremity injury on June 17, 2005. The respondents are ordered to pay all reasonably necessary medical treatment related to the claimant's right lower extremity injury of June 17, 2005, pursuant to Rule 30. The claimant has failed to prove entitlement to any indemnity benefits associated with his right lower extremity injury, therefore, no attorney's fees are awarded herein.

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury on 6/17/05, therefore all claims for benefits associated with the claimant's alleged back injury are respectfully denied and dismissed.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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