

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303732

CHRISTOPHER WHITTEN	CLAIMANT
US PIZZA COMPANY	RESPONDENT
UNION STANDARD INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 16, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

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

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 8, 2006, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 5, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On April 9, 2003, the relationship of employee-employer-carrier existed between the parties.

3. There was an event on April 9, 2003.

4. The claimant's average weekly wage was \$538.46.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injuries to his neck, face and back.

2. Related medical.

3. Attorney's fees.

In regard to the foregoing issues the claimant contends that his neck, face and back were injured on April 9, 2003, when he was physically assaulted by a co-worker.

In regard to the foregoing issues the respondents contend that the claimant suffered an alleged injury on April 9, 2003, when he became in a fight with a co-worker, Mr. Trey Waller. In October 2003, a lawsuit was filed in Washington County Civil Court. The information the respondents have is that Mr. Waller and the claimant got into an altercation in which the claimant was pushed by Mr. Waller and then the claimant hit Mr. Waller twice. At that point, a fight ensued in which the claimant suffered some relatively minor injuries. The claimant was treated at Washington Regional Medical Center for a small bruise or abrasion on the cheek. He did not have any marks or injuries to his neck. A CT scan of the head was negative and x-rays of the cervical spine were normal as well. The claimant apparently has received chiropractic treatment from various chiropractors and the respondents do not have all of those records. It is anticipated that claimant's counsel will be sending those either prior to or at the time of the conference. As far as the third party lawsuit, the claimant apparently settled the claim for \$11,500.00. Also, it is evident that the claimant has returned to work since he left U.S. Pizza

and, in fact, recently left the country for employment abroad. The respondents are unclear as to exactly what the claimant is asking for as far as temporary total disability.

Prior to testimony, the claimant objected to the presence of Mr. Tom Waller in the hearing room as the respondents' representative. After argument from both counsel, the claimant's objection was overruled and Mr. Waller was allowed to stay in the hearing room.

The documentary evidence submitted in this matter consists of the Commission's Exhibit No. 1. The claimant submitted medical records marked Claimant's Exhibit No. 1. The claimant proffered the statement of Lori Britton which was marked Claimant's Proffer No. 1. This was done after the respondents objected to the admission of Ms. Britton's statement. This objection was sustained at which time the claimant proffered the statement.

#### DISCUSSION

The claimant testified that he was forty-three years old and had begun working for the respondent about three and a half years earlier. The claimant testified that he was hired by the respondent to manage the Copper Bar which was in the process of being remodeled into a full time business which was located underneath the respondent's pizza business. The claimant testified that Trey Waller is the son of the owner, Judy Waller, who is the owner of the respondent/business.

The claimant testified that on April 9, 2003, he got a call from Mr. Trey Waller complaining about a faucet which needed to be

fixed in the bar area. The claimant testified that Lori Britton, the general manager of the respondent's business, had asked Mr. Waller or one of his workmen to look at the faucet which had previously been installed in the bar area. The claimant testified that the faucet which Mr. Waller was complaining about was not in the bar area but that Mr. Waller was not listening to anything that was being said because he was yelling, being belligerent and irrational. The claimant explained that Mr. Waller had been hired to build a liquor cabinet in the bar area but instead of constructing the cabinet he began acting as an agent for his mother or the respondent/business and not as a contractor. The claimant testified that at the time of this telephone conversation, he had known Mr. Waller for about two to three days. The claimant testified that after Mr. Waller hung up on him, he went upstairs and talked to Lori who was outside in the parking lot. The claimant testified that Ms. Britton was on the telephone with Tony Butler who was the general manager for all of the respondent's businesses and before he could have much of a conversation with Ms. Britton, Mr. Waller came out into the parking lot. The claimant testified that he and Mr. Waller began to exchange words. The claimant testified that Mr. Waller started coming toward him and that Lori had gotten in between them as the conversation began to escalate. The claimant testified that Mr. Waller was reaching over Lori swatting at him and all of a sudden Lori got out of the way. The claimant testified that Mr. Waller started jumping up and down all the way around him bouncing around him telling him to hit him.

The claimant testified that he stood with his hands completely to his side saying he was not going to fight, that he did not fight. The claimant testified that Mr. Waller came up and put his chest directly against his chest and said that he was nothing but a pussy and spit directly in his mouth. The claimant testified that at that point he pushed Mr. Waller away. The claimant testified that at that point they both got a hold of each other's cloths. The claimant testified that Mr. Waller out weighs him approximately one hundred pounds. The claimant testified that he ended up hitting Mr. Waller twice to get him off of him. The claimant testified that Mr. Waller picked him up and the next thing he knew he was on the ground on his stomach and Mr. Waller was on his back and had him in a choke hold cutting off his air. The claimant testified that he could not breath and began to panic because he could not get his breath. The claimant testified that Garth and Chris came out of the kitchen to get Mr. Waller off of him at which point Mr. Waller starting fighting with them. The claimant testified that in the process of Mr. Waller trying to fight off the other two men he was dragging him around the parking lot by the neck. The claimant testified that finally Mr. Waller was pulled off of him and after the police arrived, he was taken to Washington Regional Medical Center. The claimant testified that he was not charged with anything by the police.

The claimant testified that at the emergency room he had x-rays taken of his neck and head. The claimant testified that he could not swallow and was given pills for the pain in his throat.

The claimant testified that after he was seen at the ER, he was later seen by Dr. Magness within the next day or two. The claimant testified that Dr. Magness checked his throat out and prescribed Tylenol 3. The claimant testified that he also was seen by Dr. Whitelaw, a chiropractor, because his throat started getting better but he was having headaches and at that time he realized his neck was hurt. The claimant testified that Dr. Magness did a digital motion x-ray of his neck and he also gave him adjustments for his neck. The claimant testified that for the first month or so he saw Dr. Whitelaw about three times a week although he continued to have headaches and lower back pain. The claimant testified that he was having headaches really bad due to a bone sticking out where his vertebrae was twisted. The claimant testified that he is still seeing Dr. Whitelaw but it is not as often perhaps once or twice a month or perhaps even a month and a half between visits.

The claimant testified that he has seen Dr. Cyril Raben for his neck and back. The claimant testified that he underwent an MRI and that Dr. Raben has recommended that he continue with treatment with Dr. Whitelaw. The claimant testified that the Crime Victim's Replication Program paid \$10,000.00 toward his medical expenses which at one point had paid Dr. Whitelaw in full. The claimant testified that subsequent to this he has incurred more medical.

The claimant testified that he has seen a chiropractor in the past but just for general adjustments and message, not for anything specific. The claimant testified that the treatment which he receives from Dr. Whitelaw seems to help relieve some of his

headaches by moving the vertebrae back into place. The claimant testified that the duration of the benefits from this treatment vary from session to session. The claimant testified that his neck problems have caused him limited range of motion which has hindered some of his activities as well as some of his work opportunities.

The claimant, on cross examination, testified that he is self employed as a painter. The claimant testified that he does residential painting and when he has work can earn up to \$1000 a week. The claimant indicated that subsequent to this accident he spent some time in Italy but upon coming back he has been doing odd jobs. The claimant testified that he has just gotten back from a month long stay in California where he earned \$2,500.00 doing residential painting. The claimant testified that he went to California with a friend to go surfing but was unable to participate in this sport because his neck and shoulders would not allow him to swim out on the board. The claimant testified that when he was in Italy he worked for a yoga center cooking and cleaning. The claimant testified that before he went to Italy he worked cleaning houses for about a year to a year and a half. The claimant testified that when he went to the emergency room after his altercation the problem which he reported was his throat. The claimant testified that at the time he was in the emergency room it was his throat that hurt so bad he could barely swallow and that was all that was in his thoughts. The claimant testified that while he was at the ER he does not remember whether he had a headache or not. The claimant was asked about a medical report

dated May 19, 2003, where he reports headache and some right hip pain. The claimant explained that these problems developed within days after his incident. The claimant agreed that after he was released to return to his primary care physician, he went on his own to Dr. Whitelaw. The claimant testified that his attorney who was hired to file a law suit against the respondent and Mr. Waller had recommended Dr. Whitelaw. The claimant testified again that in the mornings when he wakes up, his vertebrae feels out of line but as the day goes on it loosens up but by the end of the day or into the evening it starts getting tight again. The claimant testified that the adjustments do not seem to make the vertebrae stay in line. The claimant testified that his lumbar spine problems have never been that big of a deal and that Dr. Whitelaw has not specifically worked on his lumbar area since November 11, 2003. The claimant testified that the pain which he is experiencing in his neck area is totally different from the tightness he might occasionally feel in his lower back brought on by general activities of living. The claimant testified that it was his understanding that the medical records showed that there was a stretched ligament at C1 and he has a slight herniation between C5-6 and C6-7 as per his MRI.

The claimant testified concerning his altercation with Mr. Waller on cross examination, stating that there was nothing keeping him from walking away during the early part of the altercation. The claimant testified that when Lori Britton stepped out from between himself and Mr. Waller, Mr. Waller started bouncing around

on the ground all around him. The claimant testified that he and Mr. Waller were engaged in unflattering comments to one another and when Mr. Waller charged the claimant, bumped him in the chest and spit in his mouth was when he pushed him away, all 250 pounds of Mr. Waller. The claimant testified that he and Mr. Waller grabbed each others cloths at which time he stepped back and hit Mr. Waller twice. The claimant testified that Mr. Waller then picked him up and threw him down. The claimant testified that it was when he was on the ground that Mr. Waller began choking him.

On redirect examination, the claimant testified that when he went to the hospital in May, he was referred to Dr. Magness who subsequently referred him to the Ozark Spinal Association where Dr. Whitelaw practices. The claimant testified that he has never been arrested and has never had a workers' compensation claim before.

Trey Waller testified that he resides in Little Rock and has his own business named U S Operations. Mr. Waller testified that he draws a weekly check from U S Pizza and that the owner of U S Pizza is his mother, Judy Waller. Mr. Waller testified that he was at the U S Pizza location in Fayetteville in order to build some liquor storage cabinets. Mr. Waller testified that before April 2003, he had never met the claimant. Mr. Waller testified that while he was trying to complete his work, the claimant and Lori Britton would say condescending things to him to try to slow his work down. Mr. Waller testified that on the morning in question there had been lots of talk between Tony Butler, the general manager, Lori Britton, the claimant and himself and he wanted all

of them to get together and talk through the problems which were being discussed. Mr. Waller testified that the claimant stated that he had had it and started cursing him as well as getting up on the balls of his feet and bouncing around screaming obscenities. Mr. Waller testified that Lori though all this activity was funny and got in between them. Mr. Waller testified that when the claimant got himself worked up enough he reached around Lori and hit him in the side of the head at which time Lori started backing off. Mr. Waller testified that when Lori got out from in between them, he walked over and spit in the claimant's face and said, "Now finish what you started," at which time he backed away from the claimant. Mr. Waller testified that Lori came back out and got in between them, then the claimant started screaming obscenities and at that time he, Mr. Waller, started responding with obscenities. Mr. Waller testified that when Lori was in between them he put his hands behind his back and told the claimant that he was not going to hit him. Mr. Waller testified that he started leaning his head around and asking the claimant if he needed a bigger target at which time the claimant hit him another three times and that was when he went around Lori and grabbed the claimant around his legs. Mr. Waller testified that he physically subdued the claimant in order to stop him from hitting him. This witness explained that he was laying on top of the claimant across his body with the claimant's back on the ground where he could not reach back and keep hitting him. Mr. Waller testified that the claimant, with his one free arm, continued hitting, pulling and grabbing at him. Mr.

waller was asked if he carried the claimant around the parking lot by his neck or did he charge him and Mr. Waller responded, "No." Mr. Waller testified that Lori Britton came out the back door of the business saying she saw the whole thing he just started hitting the claimant pointing at me, Mr. Waller, at which time she started telling the other two employees that came out the back door and they separated them. Mr. Waller testified that he went in and called the police. This witness testified that he was not arrested at that time. Mr. Waller testified that some nine months later, charges were filed against him as well as a civil suit was filed. Mr. Waller testified that upon advise of counsel he plead no contest to the criminal charges. Mr. Waller testified that he did not receive any jail time as a result of his plea and he does not know the exact outcome of the civil lawsuit.

On cross examination, Mr. Waller testified that he spit in the claimant's face because he knew it was wrong to hit him. Mr. Waller testified that he plead no contest to the assault charges because he was told to by his attorney. This witness testified that he does not know what the terms of his no contest plea. Mr. Waller testified that the claimant hit him four times but he did not require medical attention nor did he have any medical bills as a result of this incident. Mr. Waller testified that he has some idea of the negotiations of the civil suit settlement but due to the fact that he switched legal counsel in the mist of all these proceedings he was not clear as to the terms. The witness testified that he has no idea why Lori Britton was paid \$750.00 in

the settlement. Mr. Waller testified that while he had the claimant subdued on the ground, he had his right arm around the claimant's right side of his neck and under his arm. Mr. Waller testified that he weighed approximately 240 to 250 pounds at present and weighed the same in April 2003. Mr. Waller read from his statement written at the time of the event which indicates that the claimant was verbally abusing him and he told the claimant to come on and do what he had to do. Mr. Waller testified that the claimant was the aggressor and that he was the one standing flat footed. Mr. Waller agreed that the contusions to his elbows and knees occurred when he tackled the claimant. Mr. Waller testified that bad feelings developed the day before due to his bringing to the attention of the general manager that the claimant and Lori Britton were spending money without regard to the respondent's best interest. Mr. Waller testified that he had felt the repercussions of his mother calling him telling him not to make the managers at this store mad. Mr. Waller testified that it did not bother him that his mother called to tell him not to get cross ways with the management but that it did bother him for the claimant and Lori Britton to be condescending and abusive to him.

The medical records set forth that the claimant was seen at Washington Regional Medical Center on April 9, 2003, with complaints of neck pain. The history given by the claimant set forth that one hour earlier he was physically assaulted and choked. Upon physical examination, it is noted that the claimant has no abrasions or contusions although mild soreness is experienced in

his neck area. It is noted that the claimant has a small abrasion over his right eyebrow and cheek, that his breathing sounds normal and he has no respiratory distress. The claimant was discharged with a diagnosis of contusion and abrasions. X-rays taken of the claimant's cervical spine were negative. The claimant was again seen at the emergency room of Washington Regional Medical Center on May 19, 2003, with complaints of headache. The claimant reports that he was involved in an altercation on April 9, 2003, and has been having pain ever since. A CT scan of the claimant's head made on May 19, 2003, was negative.

The claimant was seen by Stephen Whitelaw on June 4, 2003, for his complaints of cervical and lumbar spine pain. After examination, the claimant was diagnosed with cervical and lumbar strain as well as tension headaches. Adjustments were given to the claimant for his cervical as well as lumbar area and it was recommended that he stay on this program of chiropractic manipulative therapy. The claimant continued under the care of Dr. Whitelaw all through June, July, August, September, October and November 2003. On November 11, 2003, Dr. Whitelaw writes that the claimant's lumbar spine pain secondary to his injury has resolved and that he still has occasional minimal cervical spine pain. Dr. Whitelaw writes that a digital motion x-ray of the claimant's cervical spine was done on October 22, 2003, and it was found that he had a posterior longitudinal ligament damage present upon flexation by an anterolisthesis of C4 on C5. This test also showed damage to the anterior longitudinal ligament indicated by a

retrolisthesis at C5-C6 and C6-C7 and also damage to the capsular ligaments on the right facet joints at C4-C5 and C5-C6. Dr. Whitelaw recommended that the claimant continue his home exercise program and will continue to be seen at a rate of every two weeks. The claimant continued to be seen by Dr. Whitelaw from November 2003 through March 2005.

The claimant was seen by Dr. Cyril Raben on February 14, 2006, with complaints of headache and left shoulder pain as well as left hip pain. After taking a history from the claimant, reviewing Dr. Whitelaw's motion x-ray and the claimant's CT scan, the claimant was examined by Dr. Raben and assessed with having cervical derangement and or herniation, TMJ abnormality as well as shoulder impingement. Dr. Raben recommended an MRI of the claimant's cervical spine and an appointment was made with Dr. Scott Bolding for an evaluation of his TMJ problem. The claimant underwent an MRI of his cervical spine on June 6, 2006, which revealed a straightening of the normal cervical lordosis, degenerative disc disease at C5-6 and C6-7 with mild disc bulging minimally effacing the thecal sac but no demonstration of disc protrusion. Dr. Raben writes on June 12, 2006, that he has seen the claimant following his cervical MRI and writes that this test shows some degeneration at C5-6 and C6-7 with a very small disc herniation that is not operable.

After a complete review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his neck, face and back while

working for the respondent on April 9, 2003. The claimant has testified that he was attacked by an employee of the respondent after heated words concerning business matters of the respondent. Mr. Waller, the respondents' only witness, testified that he was not the aggressor in the altercation, however, his testimony is seriously questioned. There is objective medical evidence of injury as set forth in the digital motion x-rays taken by Dr. Whitelaw as well as the MRI which was taken some years following the claimant's altercation. The respondents, therefore, should pay for the cost of this claimant's medical treatment for his compensable injuries sustained on April 9, 2003, to his neck, face and back.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 9, 2003, the relationship of employee-employer-carrier existed between the parties.
3. There was an event on April 9, 2003.
4. The claimant's average weekly wage was \$538.46.
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on April 9, 2003, while working for the respondent. See discussion above.
6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable injuries.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his neck, face and back on April 9, 2003, while working for the respondent.

The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable injuries.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE