

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F413307

DAVID WRIGHT,
EMPLOYEE

CLAIMANT

WAL-MART,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JUNE 20, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 22, 2006 in Little Rock, Arkansas. A prehearing order was entered in this case on December 2, 2005. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

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

1. An employee-employer relationship existed between the claimant and respondent on June 12, 2004, and at all other times relevant to this claim.

2. The claimant's average weekly wage on June 12, 2004 was \$233.43 per week, entitling the claimant to compensation rates of \$156.00 for total disability and \$154.00 for permanent partial disability if this claim is found compensable.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

Claimant:

1. Compensability.
2. Medical expenses.
3. Temporary disability (January 18, 2005 until July 18, 2005 - TTD or PPD after that date are reserved).
4. Controversion.
5. Attorney's fees.

Respondent:

1. Compensability of the claimant's alleged June 12, 2004 injury.
2. Claimant's entitlement to medical treatment.
3. Indemnity benefits.
4. Attorney's fees.
5. Notice (December of 2004).

The record consists of the March 22, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

1. Compensability of the Claimant's Alleged June 12, 2004 Knee Injury.

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, I find that the claimant has established by a preponderance of the evidence each of the elements necessary to establish a compensable knee injury caused by a specific incident that occurred on or about June 12, 2004. In this regard, the claimant's testimony, as

corroborated by former co-worker John Pigg, establishes that an incident occurred in module 7 at the Wal-Mart Distribution Center in Searcy. Mr. Wright stepped onto a pallet with motor oil stacked on it. The pallet was on rollers and rolled backwards, and the oil fell onto Mr. Wright, knocking him off the pallet and out into the module. Mr. Pigg did not observe the accident, but heard a loud crashing noise and walked over to observe Mr. Wright pinned between the belt and the pallet of oil that had fallen and pinned him.

The testimony of the claimant, as corroborated by former co-worker Calvin Foster, establishes by a preponderance of the evidence that Mr. Wright began to experience persistent problems with his leg which he attempted to work through without reporting an injury to management. When his knee problem persisted, Mr. Wright applied for and received a transfer to the truck re-fab center, working on trailers rather than engaging in the lifting required to fill orders. Shortly thereafter, Mr. Wright reported his knee injury to management on or about December 17, 2004. After a period of investigation, Wal-Mart advised Mr. Wright that Wal-Mart was not accepting liability for his alleged work-related knee injury, and Mr.

Wright was advised on January 18, 2005 that he could no longer work at the distribution center until his knee condition resolved.

In light of the nature of the specific incident where the oil fell on Mr. Wright, his lack of documented knee problems prior to that incident, and the persistent nature of his knee problems after that incident, I find that the claimant has established that his knee injury at issue arose out of and in the course and scope of his employment, and that the injury has caused internal harm to the body which required medical services and resulted in at least temporary disability.

I also find that the claimant has established his compensable knee injury by medical evidence supported by objective findings. In this regard, I note that after a short period of treatment by Dr. Michael Justus, Mr. Wright was evaluated on several occasions by Dr. Scott Smith. Dr. Smith observed symptoms which he considered consistent with patellar tendinitis and possible meniscal injury. Mr. Wright then received an evaluation by Dr. James Mulhollan, who also caused an MRI of the knee to be performed. As a result of that MRI, Dr. Mulhollan and Dr. Mark Sateriale, the attending radiologist, noted signal change in the knee

in areas consistent with patellar tendinitis (or possible tendon tear) and consistent with abnormality of the medial meniscus. In light of Mr. Wright's lack of any knee symptoms prior to the incident which occurred at Wal-Mart in June of 2004, I find that Mr. Wright has established by a preponderance of the evidence a causal connection between the objective signal abnormalities indicated in the MRI performed in Dr. Mulhollan's office and the injury which he sustained to his knee on June 12, 2004 and which persisted thereafter.

For the foregoing reasons, I find that the claimant has established by a preponderance of the evidence each of the elements necessary to establish a compensable knee injury on June 12, 2004.

2. Notice.

Arkansas Code Annotated § 11-9-701(a)(1) provides:

Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

Furthermore, Ark. Code Ann. § 11-9-701(b)(1) provides that:

Failure to give the notice shall not bar any claim: (A) If the employer had knowledge of the injury or death; (B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; (C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

In the present case, the preponderance of the evidence establishes that Mr. Wright provided Wal-Mart notice of his injury on or about December 17, 2004, and the preponderance of the evidence in the record fails to establish the existence of any of the statutory grounds for excusing notice to the employer prior to that date. Therefore, I find that the respondents are not liable for any indemnity or medical benefits in this claim prior to December 17, 2004. However, as of the time of the hearing, neither party was aware of any medical treatment or indemnity benefits that accrued prior to December 17, 2004.

3. Temporary Disability (January 18, 2005 until July 18, 2005).

The claimant's work related injury at issue is a knee injury, therefore the claimant's injury is considered a scheduled injury. See Ark. Code Ann. §11-9-521(a). For a

scheduled injury, a claimant is entitled to temporary total disability benefits until the healing period ends or until the claimant returns to work, whichever occurs first.

Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002). The healing period continues until the injured employee is as far restored as the permanent character of the injury will permit. The healing period ends once the underlying condition has become stable and when nothing further in the way of medical treatment will improve the permanent character of the injury. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The persistence of pain is not sufficient, by itself, to extend the healing period provided that the underlying condition has stabilized. Id.

In the present case, I find that the claimant has established by a preponderance of the evidence that he remained within his healing period for his compensable knee injury as of July 18, 2005, as he asserts. In this regard, I note that as of June 28, 2005 when Dr. Mulhollan proposed increased physical activity the respondents were not paying benefits. The claimant did not have access to physical therapy, and Dr. Mulhollan was encouraging the claimant to borrow a stationary bicycle and/or to swim in a lake near

his home in order to promote knee movement. In a letter dated July 5, 2005, Dr. Mulhollan indicated that the claimant was very markedly limited beyond engaging in sedentary activities, and in his February 7, 2006 deposition, Dr. Mulhollan indicated that an arthroscopic surgery may be appropriate. However, the claimant has also been lost to treatment by an appropriate knee specialist due to Dr. Mulhollan's retirement and due to the respondent's refusal to provide Mr. Wright treatment for his knee condition. Under the circumstances presented in this case, I find that the claimant has established by a preponderance of the evidence that he had not reached maximum medical improvement as of the date of his attorney's July 18, 2005 letter to Dr. Mulhollan seeking Dr. Mulhollan's opinion regarding possible permanent partial impairment related to the knee injury.

I also find that the claimant is entitled to temporary total disability compensation from the date of his release by Wal-Mart on January 18, 2005 and continuing until the end of the period at issue, July 18, 2005. The reasoning of the Arkansas Court of Appeals in Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W.3d 899(2002) appears to be relevant to the "return to work" circumstances presented in the

present case. In this regard, while one might argue that Mr. Wright "returned to work" when he continued to work for the respondents between June 12, 2004 and January 18, 2005, I note that in Biles the claimant (1) kept working after his injury, (2) continued to work for six months until he was terminated by his employer for alleged misconduct, and (3) was fully performing his job prior to termination. Notwithstanding claimant's continued work in Biles, the Court of Appeals reasoned for purposes of a temporary total disability award that:

In light of the legislative purpose, it would be ludicrous to assume that the legislature sought to penalize workers who sustain scheduled injuries, or to deter such workers from making a good-faith effort to return to the work force following such an injury. Section 11-9-521(a)'s brief reference to temporary disability benefits merely establishes the right of a worker who has sustained a scheduled injury to such benefits, and was clearly not intended to bar additional temporary total disability benefits following an unsuccessful attempt to return to the workforce. See Roberson v. Waste Management, 58 Ark. App. 11, 944 S.W.2d 858 (1997).

"Return to work" is not defined by the Act, and we think it would be a gross perversion of the purpose of the Workers' Compensation Act to hold that appellee "returned to work" pursuant to § 11-9-521(a) by continuing to report to work following his injury. In our view, appellee never left work. Appellee could not leave work - without being terminated for absenteeism - until he had been evaluated by a physician and given an off-work slip. Appellee requested medical care and

evaluation, but appellant refused to provide it. No reasonable construction of the term "return to work" would permit an employer to coerce an injured worker to abandon his claim to temporary disability benefits by denying him reasonable and necessary medical treatment for an admittedly compensable injury. [footnote omitted]

Likewise, in the present case, since the claimant never left work immediately following the June 12, 2004 injury until his termination in January of 2005, I find that this period of employment was not a "return to work" within the meaning of Ark. Code Ann. § 11-9-521(a) pursuant to the Court's reasoning in Biles, supra. Since there appears to be no dispute that the claimant has remained off work thereafter, and since I find the claimant within his healing period until at least July 18, 2005, the claimant has established by a preponderance of the evidence that he is entitled to the period of temporary total disability compensation at issue.

4. Medical Expenses.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. §

11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

In the present case, I find that all of the medical treatment specifically documented in the March 22, 2006 hearing transcript is reasonably necessary for treatment of Mr. Wright's compensable knee injury. In addition, I note that Mr. Wright's period of treatment in a knee immobilizer did not resolve his knee injury as Dr. Mulhollan had hoped, and Dr. Mulhollan's treatment was limited due to the respondent's controversion of this case prior to Dr. Mulhollan's retirement. I find because of the persistent nature of Mr. Wright's knee injury that additional medical treatment including, but not limited to, an evaluation by another knee specialist as proposed by Dr. Mulhollan in his August 4, 2005 office note, is reasonably necessary to treat Mr. Wright's compensable knee injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. An employee-employer relationship existed between

the claimant and respondent on June 12, 2004, and at all other times relevant to this claim.

2. The claimant's average weekly wage on June 12, 2004 was \$233.43 per week, entitling the claimant to compensation rates of \$156.00 for total disability and \$154.00 for permanent partial disability if this claim is found compensable.

3. The claimant has established by a preponderance of the credible evidence that he sustained a compensable knee injury on or about June 12, 2004.

4. The claimant has established by a preponderance of the credible evidence that he is entitled to temporary total disability for the period at issue from January 18, 2005 until July 18, 2005.

5. The claimant has established by a preponderance of the evidence that all of the medical treatment documented in the hearing record was reasonable and necessary for treatment of his compensable knee injury, and the claimant has established by a preponderance of the evidence that additional medical treatment, including but not limited to, evaluation by a knee specialist is also reasonably necessary for treatment of his compensable injury.

6. The respondents are not liable for any medical

treatment or period of disability which occurred prior to their receipt of notice of injury on December 17, 2004.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809. See also Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge