

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607086

HAROLD CAVERLY	CLAIMANT
CV'S FAMILY FOODS	RESPONDENT
BENCHMARK INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 28, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JOHN VERKAMP, Attorney, Charleston, Arkansas.

Respondents represented by WALTER MURRAY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 9, 2007, in Fort Smith, Arkansas. The deposition of Dr. Stephen Heim was taken on December 4, 2007, and was admitted as Respondents' Exhibit No. 1, by agreement, on December 26, 2007.

A pre-hearing order was entered in this case on July 17, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties announced that they had agreed on the appropriate weekly compensation rate. The claimant also announced that he was amending his contention to reflect that he was only seeking temporary total disability benefits for the period of May 24, 2006 through July 5, 2006. A copy of the pre-hearing order, with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On May 23, 2006, the relationship of employee-employer-carrier existed between the parties.
2. The weekly compensation rates are \$117.00 for total disability and \$117.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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

1. whether the claimant sustained a compensable injury to his right hip on May 23, 2006.
2. The claimant's entitlement to medical services, temporary total disability from May 24, 2006 through July 5, 2006, and attorney's fees.

In regard to these issues, the claimant contends:

"The claim is compensable and all reasonable necessary related medicals and compensation should be paid. The claim has been controverted in its entirety."

In regard to these issues, the respondents contend:

"The claimant has not indicated specific dates for temporary total disability and no specific amount of permanent partial disability has been requested. Respondents deny this claim in its entirety. Further, respondents deny that the claimant's injury arose out of or in the course and scope of his employment."

DISCUSSION

I. COMPENSABILITY

The first issue addressed concerns the question of whether the claimant sustained a "compensable injury" to his right hip in a

specific employment related incident on May 23, 2006. The burden rests upon the claimant to prove all of the requirements necessary for his alleged injury to represent a “compensable injury”, as that term is defined by the Act.

First, the claimant must prove that his injury satisfies the statutory requirements of Ark. Code Ann. §11-9-102(4)(D). Under this subsection, the claimant must establish by medical evidence the actual existence of the physical injury that is alleged to be compensable. Furthermore, the claimant must show that the actual existence of this physical injury is supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

In the present case, the medical evidence clearly “establishes” the actual existence of a physical injury, in the form of a fracture to the neck of the claimant’s right femur. The medical evidence further shows that the actual existence of this injury is supported by purely “objective findings”, in the form of abnormalities noted on various x-ray studies and abnormalities visually observed by Dr. Stephen Heim during corrective surgery. Therefore, the claimant has satisfied the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D).

Based upon the claimant’s contentions, he must next prove that this medically established and objectively supported physical injury to the neck of his right femur satisfies all of the

definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

These definitional requirements are:

- (1) The injury must arise out of and occur in the course of the employment.
- (2) The injury must be caused by a specific incident.
- (3) The injury must be identifiable by time and place of occurrence.
- (4) The injury must cause internal or external physical harm to the claimant's body.
- (5) The injury must require medical services or result in disability.

The question of whether the injury arose out of and occurred in the course of the claimant's employment is intertwined with the provisions of Ark. Code Ann. §11-9-102(4)(B)(iii). This subdivision expressly excludes from the definition of "compensable injury" any injury that occurred when employment services were not being performed.

The testimony of the claimant is the only evidence presented to prove that the accidental injury to his right femur arose out of and occurred in the course of his employment and occurred while employment services were being performed. Although the testimony of a party is never considered uncontradicted, neither can it be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the time, place, and circumstances

surrounding the occurrence of his accident and to prove a reasonably close temporal relationship between this accident and the initial onset of symptoms indicative of the occurrence of his subsequent diagnosed injury.

The claimant testified that, on May 23, 2006, he was employed by the respondent as the night manager of the CV's Family Food Store in Greenwood, Arkansas. At approximately 9:30 p.m., he was performing his assigned duties necessary to close the store. He clocked out, set the alarm, unlocked the door, exited the store along with another employee, and locked the door. He then proceeded to his car, which was parked in the store parking lot. While walking to his car, he was watching the other employee, Lauren Brazell, to make sure that she got to her car safely. He admitted that he was never directly told that it was his duty, as the store manager, to make reasonably sure that other employees got safely to their cars, but that he felt that this should be his obligation. While walking to his car, he tripped over a concrete barrier in the parking lot and fell. He experienced immediate discomfort in his hip and leg and called out to the other employee for assistance. With her help, he was able to get up and into his car. He then drove home. The next morning, he sought medical treatment and was diagnosed as suffering from a broken femur.

I find the claimant's testimony to be credible and an accurate depiction of the circumstances and events surrounding the fall on May 23, 2006 and the immediate onset of his difficulties with his right hip, which were subsequently diagnosed as a fracture of the

femoral neck. Not only did the claimant appear truthful, when giving his testimony at the hearing, but his description of these events coincides with the history that he subsequently related to his treating physician. I would also note that the claimant is a longtime employee of the respondent, and is obviously highly motivated, as he returned to his employment with his respondent within six weeks of his relatively significant injury. Clearly, such a fall could reasonably cause the femoral fracture, and there is no evidence of any other equally likely cause.

However, the question remains as to whether this credible testimony shows that the claimant's accidental fall and injury arose out of and occurred in the course of his employment with this respondent and occurred at a time when employment services were being performed. One of the factors to consider is whether the accident occurred within the general boundaries of time and place of his employment. Clearly, the claimant's accident occurred on the premises of the respondent's store. As the night manager for the entire store, the general spatial boundaries of the claimant's employment would not be limited to any particular area of the store, but would reasonably extend to the entire premises of the store that he was managing. Although the claimant's testimony reflects that he had already clocked out and was no longer being paid for his time, his testimony, and the testimony of his superior reflects that he was expected to perform additional duties after he was "off the clock". Thus, the mere fact that he had clocked out would not be sufficient, in and of itself, to prove that the

claimant was outside the general temporal boundaries of his employment when the fall occurred.

Had the claimant merely been walking to his car with no other duties to perform for the respondent, at the time of his fall, then his fall and resulting injuries would not have arose out of and occurred in the course of his employment with this respondent, nor would the fall and resulting injury have occurred while employment services were being performed. Thus, the claimant would have no remedy for his injury and damages under the Arkansas Workers' Compensation Act and could only seek compensation from the respondent for his injury by way of a tort action for any negligence on the part of the respondent.

However, the claimant's credible testimony only shows that, at the time of his fall, he was not merely walking to his vehicle to depart for home, but was also watching another employee of the respondent (a 16-year old girl) to see that she got safely to her car and exited the premises. The claimant conceded that he had never been expressly told that it was one of his job duties, as a store manager, to insure that teenage personnel were able to get to their cars safely, it was his opinion that such action should be. I agree.

As a store manager, the claimant would reasonably be expected to have an obligation to reasonably insure the safety and welfare of the employees that are under his supervision, while the subordinates were on the respondent's premises. Clearly, this action by the claimant would directly advance the employer's

interest by fulfilling the employer's legal obligation to take reasonable necessary action to insuring the safety and welfare of all its employee and business invitees, while they are on its premises (once Ms. Brazell, a cashier, had clocked out and exited the store, she may no longer have been an "employee", but would still remain a "business invitee" for tort liability purposes). Had the claimant not been watching Ms. Brazell, it is quite probable that he would have not tripped over the concrete divider and his resulting injury would have been avoided.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant's accidental fall and resulting injury, on May 23, 2006, arose out of and occurred in the course of his employment with the respondent and occurred at a time when employment services were being performed. Thus, the claimant has satisfied the first definitional requirement for a "compensable injury", under Ark. Code Ann. §11-9-102(4)(A)(i) and his resulting injury would not be expressly excluded from the definition of "compensable injuries" by Ark. Code Ann. §11-9-102(4)(B)(iii).

The claimant's credible testimony is also sufficient to prove that the fracture of the neck of his right femur was caused by a specific incident and is identifiable by time and place of occurrence. Therefore, the claimant has satisfied the second and third definitional requirements for a "compensable injury" under Ark. Code Ann. §11-9-102(4)(A)(i).

The medical evidence presented unquestionably shows that the claimant's injury resulted in a fracture of the neck of his right femur. This fracture would unquestionably constitute internal physical harm to this portion of his body. Thus, he has satisfied the fourth definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

The very nature of this injury and the degree of physical harm it produced is sufficient to prove that this injury reasonably required medical services, including surgical intervention to stabilize the fracture. It is also apparent that an injury of this nature and magnitude would result in significant limitations on the claimant's potential employment activities, at least temporarily. Thus, the injury produced at least a period of temporary disability. This would satisfy the final definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, I find that the claimant has proven by the greater weight of the evidence that on May 23, 2006, he sustained a "compensable injury" to his right lower extremity. I further find that the greater weight of the credible evidence also shows that this injury occurred while employment services were being performed.

II. BENEFITS

Next, it is necessary to address the nature and extent of the benefits to which the claimant is entitled under the Act for his compensable injury. The burden rests upon the claimant to prove his entitlement to the specific benefits he now seeks.

Under Ark. Code Ann. §11-9-508, the claimant would be entitled to “reasonably necessary medical services” for his compensable injury. However, the claimant must still prove that the services he has actually received constitute “reasonably necessary medical services”, as that term is used in the Act.

Medical services are “reasonably necessary” when they are necessitated by or are connected with the compensable injury. These medical services must also have a reasonable expectation of accomplishing the purpose or goal for which they are intended, at the time the services are rendered. However, it is not necessary that these medical services did, in fact, ultimately accomplish their intended purpose or goal.

In the present case, it is obvious that the medical services provided the claimant by and at the direction of Dr. Stephen Heim were all necessitated by or directed toward the claimant’s compensable injury, in the form of a fracture of the neck of his right femur. All of the medical services provided to the claimant by and at the direction of Dr. Heim were of a type and nature that is generally recognized by the medical community, in this area as being appropriate for the evaluation and treatment of injuries such as that experienced by the claimant. Dr. Heim is a competent board certified orthopaedic surgeon with particular expertise in the evaluation and treatment of the type of injuries such as that experienced by the claimant. It cannot be presumed that he would intentionally provide unreasonable or medically inappropriate services.

Therefore, I find that the medical services provided to the claimant by and at the direction of Dr. Heim for the fracture of the neck of his right femur represent “reasonably necessary medical services”, as that term is used in Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services. However, such liability is limited by the medical fee schedule established by this Commission.

The remaining benefits sought by the claimant at this time, consist of temporary total disability benefits for the period of May 24, 2006 through July 5, 2006. In order to be entitled to these benefits, the claimant must prove that, during this period, he continued within his healing period from the effects of his compensable injury. He must also prove that he had not returned to work during this period (should his compensable injury be considered a scheduled injury, under Ark. Code Ann. §11-9-521) or that he was actually rendered totally disabled for this period by his compensable injury (should his compensable injury be considered an “unscheduled” injury, Ark. Code Ann. §11-9-522).

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period is that period of time necessary for the actual physical damage caused by the compensable injury to resolve or at least stabilize. Once the underlying physical damage from the compensable injury has resolved or at least stabilized, at a level where nothing further in the way

of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended.

In the present case the medical evidence shows that the claimant was under active medical treatment for the compensable injury to his right femur from May 24, 2006 through August 9, 2006 (Dr. Heim's deposition, page 8). Thus, claimant continued within his healing period during the entire interval that he now seeks temporary total disability benefits.

The evidence presented also shows that the claimant did not return to work until July 6, 2006, when he returned to employment with the respondent at light duty. The claimant has continued to be employed by the respondent since that time.

The evidence presented further reveals that the claimant was medically restricted by Dr. Heim from performing any type of employment, as a result of his compensable injury, for the period of May 24, 2006 through July 5, 2006. Clearly, such a medical restriction would be reasonable and appropriate in light of the nature and severity of the claimant's compensable injury. Thus, the claimant has proven that he was actually rendered totally disabled by his compensable injury during the period of May 24, 2006 through July 5, 2006.

In summary, I find that the claimant has proven that he is entitled to temporary total disability benefits, as provided by the Act, for the period of May 24, 2006 through July 5, 2006. The respondents are liable for temporary total disability benefits, at the appropriate weekly compensation rate, for this period.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On May 23, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On May 23, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$117.00 for both total disability and permanent partial disability.

4. On May 23, 2006, the claimant sustained a compensable injury, in the form of a fracture of the neck of his right femur. Specifically, the claimant has established by medical evidence, which is supported by objective findings, the actual existence of this physical injury. He has further proven by the greater weight of the credible evidence that this injury arose out of and occurred in the course of his employment with the respondent, that it was caused by a specific incident, that it is identifiable by time and place of occurrence, that it resulted in internal physical harm to his body, that it required medical services, and that it produced disability (at least, temporarily).

5. The claimant has proven by the greater weight of the credible evidence that at the time of his accident and injury he was performing employment services, in that the activities he was performing directly advanced the interests of the respondent-employer.

6. The medical services provided to the claimant by and at the direction of Dr. Stephen Heim represent reasonably necessary

medical services for the claimant's compensable injury, under Ark. Code Ann. §11-9-508. The expense of these services is the liability of the respondents herein, subject to the medical fee schedule established by this Commission.

7. The claimant has proven by the greater weight of the credible evidence that he was rendered temporarily totally disabled by the effects of his compensable injury for the period of May 24, 2006 through July 5, 2006. Specifically, he has proven that during this time he continued within his healing period from the effects of his compensable injury, had not returned to work, and was, in fact, rendered totally disabled by the effects of the compensable injury.

8. The respondents have denied the occurrence of any compensable injury and have controverted this claim in its entirety.

9. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary total disability benefits herein awarded and any subsequent benefits to which the claimant may be directly entitled.

ORDER

The respondents shall pay to the claimant temporary total disability benefits, at the appropriate weekly rate, for the period of May 24, 2006 through July 5, 2006.

The respondents shall be liable for the expense incurred for the reasonably necessary medical services provided to the claimant for his compensable injury by and at the direction of Dr. Stephen

Heim. This liability is subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this attorney's fee shall be withheld by the respondents from these benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE