

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603615

ISAAC M. LEE, EMPLOYEE	CLAIMANT
TALIAFARO, EMPLOYER	RESPONDENT
TRANSPORTATION INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MAY 2, 2007

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on February 6, 2007 at Hope, Hempstead County, Arkansas.

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

Respondents represented by HON. ROBERT H. MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on February 6, 2007, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing order was entered in this matter on October 24, 2006. At the hearing the parties announced that the stipulations, issues, and their respective contentions were properly set out in the prehearing order, subject to additional stipulations, contentions and issues agreed to at the hearing. A copy of the prehearing order was introduced into evidence as Commission Exhibit "1", and made a part of the record , without objection.

At the hearing the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including February 20, 2006.
- 3) The claimant's average weekly wage was \$400.00 per week, which would entitle claimant to a TTD rate of \$267.00 per week.

By agreement of the parties, the primary issue at the full hearing was compensability and, if overcome, to what extent claimant would be entitled to associated indemnity benefits, medical benefits and attorney's fees.

At the full hearing, claimant contended the following:

- 1) Claimant sustained compensable injuries to his right knee on February 20, 2006, during the course and scope of his employment.
- 2) Claimant has been off work since February 20, 2006, and should be awarded temporary total disability benefits from February 20, 2006, to a date to be determined, all associated medical treatment and attorney's fees.
- 3) The medical treatment claimant has received to date

has been reasonable, necessary, and related to the
February 20, 2006, injury.

Respondents contended at the full hearing that claimant did not sustain a compensable knee injury and that any injury the claimant sustained was suffered outside the course and scope of his employment with the respondents. Respondents contended that any injury sustained by the claimant was sustained while he was not performing employment services.

DISCUSSION

The claimant has alleged that he sustained a compensable right knee injury on February 20, 2006. At the time of his injury, claimant was employed by respondents as a maintenance man at Smith-Keys Apartment complex in Texarkana, Arkansas. Claimant testified that around 7:45 a.m. on February 20, 2006, he was going to open up the laundry room and shop at the apartment complex, when he slipped on some ice and injured his right lower extremity.

As part of his compensation, claimant was provided an apartment and utilities at the Smith-Keys Apartment complex where he provided maintenance. The claimant testified he shared his maintenance responsibility with another co-worker, and that they would alternate carrying the pager week to week. The evidence showed the worker carrying the pager was basically on call 24/7.

Claimant testified that on the day of his accident, he was entrusted with the

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pager.

Q. Okay. Now, I think that you and I have looked at the calendar and the 20th, that was on a Monday, is that right?

A. Yes, sir.

Q. Now, the Friday before this Monday, who went on-call that Friday?

A. I was on-call that Friday.

Q. As I understand it, the on-call shift would start at 5:00 o'clock p.m. on Friday?

A. Yes, sir.

Q. And you would have been on-call and been on the property working until the following Friday at 5:00 p.m.?

A. Yes, sir. (T. pg. 14, lines 11-24)

In fact, over the weekend preceding the claimant's injury, claimant testified he was called out four times. One of the times he was called out on his pager was at 1:00 a.m. Saturday morning to light a heater for one of the tenants. (T. pg. 45, lines 9-14)

Claimant testified that after his fall at 7:45 a.m. on February 20, 2006, he was not able to get off the ground for about five minutes. Finally, the claimant stated an assistant manager helped him up off the ground and she took him to St. Michaels

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Hospital. At St. Michaels, the claimant received x-rays for his leg and it was put in an immobilizer.

Subsequently, claimant was referred to Dr. Hilborn, an orthopedist. Dr. Hilborn recommended an MRI; however, claimant testified the insurance carrier would not authorize the treatment. Between February and May of 2006, the claimant and Dr. Hilborn tried to get the claimant an MRI, but to no avail. In May of 2006 respondents sent claimant to another doctor who also recommended an MRI, but once again the respondents failed to get the claimant the MRI.

The claimant testified he has been unable to work since his fall in February of 2006. After his fall, claimant never returned to his apartment supplied by the respondents, instead he went to Louisiana to live with his sister. At the hearing on February 6, 2007, the parties stated on the record the claimant was finally going to get his MRI the day after the full hearing. It took nearly one year from the date of the claimant's fall to get the recommended MRI. Respondents main reason for denying the claimant's needed medical treatment was because they believed the claimant was not performing employment services at the time of his fall. I disagree, and find the claimant was performing employment services at the time of his fall on February 20, 2006.

In order 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) proof by a preponderance of the evidence that an injury occurred arising out of and in the scope of employment; (2) proof

by a preponderance of the evidence that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings 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. Ark. Code Ann. §11-9-102(4)(Repl. 2005).

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

Respondents contended the claimant did not sustain his leg injury while in the course and scope of his employment and that he was not performing employment services at the time of the injury. A.C.A. §11-9-102 (4)(B)(iii) provides that an injury is not compensable if the injury is sustained at a time when employment services are not being performed. The Full Commission has used the test for determination of employment services as whether the employee is directly or indirectly advancing the interest of the employer at the time of the injury. *Conner v. Texarkana School District*, Full Commission Opinion filed August 15, 2005, Claim No. F410155.

I find the claimant provided sufficient evidence at the hearing to meet the standard. Further, I find the claimant was a very credible witness. It is clear to this examiner that the claimant was directly advancing the interest of his employer at the time of the injury. The claimant was going to open the laundry room and shop for the

apartment complex in which he was serving.

Respondents wanted to make hay with the argument that the injury happened at 7:45 a.m. and that the claimant routinely didn't start until 8:00 a.m. That argument is weak under the set of facts in this claim. The claimant was on-call 24/7 when he had the pager and no one disputed the claimant's testimony that he had the on-call pager at the time of the accident. Also, respondents paid to have the claimant live on-site at the complex. Clearly, the respondents knew they had the benefit of their maintenance man being available at all times he was on-site. The claimant testified he could be called out at any time, including 1:00 a.m. in the morning.

The facts of this case are similar to those in Conner v. Texarkana and Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W. 2d 558 (1999). In both of those cases the claimant was on a designated work break when their injuries occurred; however, since they were subject to being "on-call" at the time of their injury, the claimant's were both found to be carrying out their employment duties.

Here, even if the claimant was not "on-call", I would still find the claimant was advancing the interest of his employer at the time of his injury. He was in route to open common areas for the benefit of the other tenants and for the benefit of his employer. I conclude that the claimant's accident was job-related and that his injuries are compensable.

The medical reports contained in the record show the claimant had swelling and bruising around his right knee. The reports show objective medical evidence of

some type of injury to the right knee; however, respondents frustrated the healing process by not allowing the claimant to receive the recommended diagnostic testing (MRI).

Since the claimant has not been allowed to receive the medical attention the doctors have recommended, I find he is still within his healing period. To be entitled to temporary total disability benefits the claimant must show he remains within his healing period and that he has not returned to work. The claimant has satisfied both of those requirements and I find the claimant is entitled to TTD benefits for February 20, 2006 through a date yet to be determined.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(a). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. I find claimant has met his burden and respondents are responsible for all medical treatment associated with the claimant's right knee; including, but not limited to, all medical contained in the record and the MRI now recommended.

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 an opportunity to hear the testimony of the claimant and to observe his demeanor, the

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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 stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right knee on February 20, 2006.
- 4) Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 20, 2006, to a date yet to be determined; but at least through the date of the full hearing in this matter which occurred on February 6, 2007.
- 5) Claimant has proven by a preponderance of the evidence that respondents are responsible for all medical treatment related to claimant's right knee contained in the record; and, but not limited to, the MRI now recommended.
- 6) Claimant is entitled to the maximum attorney's fee allowed by Arkansas Law consistent with the findings herein.
- 7) All issues not specifically addressed herein are hereby

reserved.

AWARD

Respondents are herein directed and ordered to pay the claimant TTD benefits at the stipulated rate from February 20, 2006, to a date to be determined. Respondents are to pay all reasonable related medical expenses for treatment of claimant's right knee contained in the record and for the MRI now recommended as well as all future reasonable, necessary and related treatment to the claimant's right knee. Respondents are directed and ordered to carry out the directives contained in the Findings of Fact and Conclusions of Law recited herein. Said sums accrued shall be paid in lump sum without discount.

Maximum attorney fees are herein awarded to claimant's attorney, the Honorable Gregory R. Giles, pursuant to A.C.A. §11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. §11-809 until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge