

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513456

DEWAYNE LOUGHRIDGE, Employee	CLAIMANT
WAL-MART STORES, INC., Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED OCTOBER 16, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JOHN VERKAMP, Attorney, Fort Smith, Arkansas.

Respondents represented by TOD C. BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On September 20, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 25, 2007, and a pre-hearing order was filed on April 26, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties on December 8, 2005.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$179.00 for total disability and \$154.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's knee and ankle on December 8, 2005.
2. Temporary total disability benefits.

3. Medical.
4. Attorney fee.

At the time of the hearing the claimant clarified that his requested period of temporary total disability benefits would include a period from the date of the injury through March 1, 2006, the date he was last evaluated by Dr. Tomlinson.

The claimant contends he suffered a compensable injury to his knee and ankle on December 8, 2005, and that he is entitled to temporary total disability, medical, and an attorney fee.

The respondents contend that claimant did not suffer a compensable injury.

From a review of 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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on April 25, 2007, and contained in a pre-hearing order filed April 26, 2007, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee while employed by respondent on December 8, 2005.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left ankle while employed by respondent on December 8, 2005.

4. Respondent is liable for payment of all reasonable and necessary medical

treatment provided in connection with claimant's compensable left knee injury. This includes surgery performed by Dr. Tomlinson on January 5, 2006.

5. As a result of his compensable injury, claimant is entitled to temporary total disability benefits beginning January 5, 2006 and continuing through March 1, 2006.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 38-year-old man who is legally blind. As of December 8, 2005, the claimant had worked for the respondent almost two years. On that date, the claimant was working for the respondent as a people greeter. Claimant's job required him to greet people as they came into the store and provide them with a shopping cart.

Claimant testified that on December 8, 2005 he was performing his job and was in the process of twisting his body to push a cart into its proper place when his knee twisted. Claimant testified that he heard a pop and had immediate pain. Claimant testified that the pain sensation went from his thigh down to his left ankle. Claimant reported the incident to the respondent and completed an associate's statement that day.

Later that day, claimant sought medical treatment at the emergency room of Washington Regional Medical Center. X-rays of both the claimant's knee and ankle were negative. Claimant was diagnosed as suffering from knee and ankle pain and was provided medication and crutches. Claimant was subsequently evaluated by Dr. John Park, orthopaedic surgeon on December 13, 2005. Dr. Park noted mild effusion in the claimant's left knee and ordered an MRI scan.

The respondent subsequently sent claimant to Dr. Berestnev for an evaluation. Dr. Berestnev indicated that claimant's complaints were out of proportion to his physical findings and diagnosed claimant as suffering from a left knee strain and left ankle sprain.

Dr. Berestnev provided claimant with an air cast for his ankle and a splint for his knee. Dr. Berestnev also ordered an MRI scan of the claimant's left knee.

The MRI of claimant's left knee was performed on December 19, 2005 and was read as normal. Following that MRI scan, claimant returned to Dr. Berestnev on December 22, 2005. Dr. Berestnev diagnosed claimant's condition as a left knee strain with symptoms in excess of clinical findings. Dr. Berestnev went on to order physical therapy, medication, and work restrictions of a sit-down job.

On December 28, 2005, claimant was evaluated by Dr. Tomlinson, orthopaedic surgeon. Dr. Tomlinson eventually performed surgery on the claimant's left knee on January 5, 2006 to repair a meniscus tear.

Claimant has filed this claim contending that he suffered a compensable injury to his left knee and ankle while employed by respondent on December 8, 2005. He seeks payment of related medical benefits as well as temporary total disability benefits from December 8, 2005 through March 1, 2006.

ADJUDICATION

The claimant contends that he suffered a compensable injury to his left knee and ankle when his knee twisted while he was turning to move a cart into its proper place on December 8, 2005. The evidence submitted at the hearing indicates that claimant has a history of left knee problems. Claimant initially suffered an injury to his left knee in November 1999 when he injured it while performing martial arts. Claimant came under the care of Dr. Tomlinson who performed surgery to repair a lateral meniscus tear on November 18, 1999.

On July 19, 2000, claimant returned to Dr. Tomlinson with a one week history of knee pain following a martial arts tournament. Claimant reported additional pain in his left knee on August 9, 2000 after jumping in the water. Dr. Tomlinson performed a second

surgical procedure on claimant's left knee on August 15, 2000 to repair medial and lateral meniscus tears.

On June 6, 2001, claimant was evaluated by Dr. Harris, orthopaedic surgeon, for left knee pain following an incident while dancing. Claimant eventually returned to Dr. Tomlinson who performed a third surgical procedure on claimant's left knee on July 17, 2001. Shortly after that surgery claimant returned to Dr. Tomlinson on August 22, 2001 and indicated that his knee was starting to pop. The medical records contain no additional complaints of left knee pain until September 3, 2002, when claimant was evaluated by Dr. Pleimann for left knee pain after performing leg presses at a gym. Dr. Pleimann diagnosed a probable knee strain at that time. The medical records contain no other complaints of left knee pain until December 8, 2005.

Pursuant to the Arkansas workers' compensation law, an employer takes an employee as they find him, and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is compensable. *Olliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W. 3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W. 3d 900 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Insurance Company v. DuBois*, 54 Ark. App. 141, 923 S.W. 2d 883 (1996).

Thus, even though the claimant had a prior pre-existing knee condition, that condition can be compensable if it was aggravated by a work-related injury. Claimant contends that his injury occurred as a result of a specific incident identifiable by time and place of occurrence. For compensable injuries identifiable by time and place of occurrence, the claimant has the burden of proving the following by a preponderance of

the evidence:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee while employed by respondent on December 8, 2005.

First, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. Claimant testified that while he was in the process of turning to push a cart into its proper spot, his knee twisted, he heard a pop, and felt immediate pain in his left knee. Claimant reported this injury and completed an accident report for the respondent. Claimant was subsequently taken to the emergency room at Washington Regional Medical Center where he gave a history of injury consistent with his testimony.

Claimant testified and the emergency room record does indicate that claimant gave a history of his knee having hurt for two weeks. However, the emergency room report also indicates that claimant's left knee popped earlier that day. The emergency room record contains the following statement: "pt. states ' i turned but my leg didn't' had instant pain 'knee popped' ".

Subsequent medical records from treating physicians also contain a history of injury consistent with claimant's testimony. While the claimant did have a pre-existing history of problems with his left knee, claimant suffered an injury to that knee when it twisted while working for respondent on December 8, 2005. Claimant had not sought any medical treatment for his left knee since the time of his visit with Dr. Pleimann on September 3, 2002, more than three years earlier.

In short, based upon the claimant's testimony which I find to be credible as well as the remaining evidence presented, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and that claimant has offered medical evidence supported by objective findings establishing an injury. Here, while x-rays and even an MRI scan of the claimant's left knee were negative, Dr. Tomlinson nevertheless performed an arthroscopic procedure on claimant's left knee on January 5, 2006. During the course of that procedure Dr. Tomlinson discovered meniscus tears in the claimant's left knee. This observation by Dr. Tomlinson satisfies the remaining element of compensability.

In summary, even though claimant had a pre-existing left knee injury, a pre-existing injury which has been aggravated by a work-related injury is compensable. In this particular case, claimant had not sought medical treatment for his left knee injury since September 2002, more than three years earlier. Furthermore, while claimant admitted and the medical reports reflect that claimant informed his treating physicians that he had some knee pain approximately two weeks prior to December 8, 2005, claimant also described an injury caused by twisting which led to immediate pain and a popping of his left knee.

Based upon this evidence as well as the remaining evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee on December 8, 2005.

I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left ankle on December 8, 2005. While claimant was diagnosed by his treating physicians as having suffered a sprain to his left ankle, my review of the medical reports fails to reveal any objective findings establishing an injury to the claimant's left ankle. Therefore, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left ankle on December 8, 2005.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's left knee injury. This includes the surgery which was performed by Dr. Tomlinson on January 5, 2006.

The final issue for consideration involves claimant's request for temporary total disability benefits. Claimant has requested temporary total disability benefits beginning from the date of his injury through March 1, 2006. The injury to claimant's left knee is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

Claimant did not return to work for the respondent after December 8, 2005. However, the medical records do not indicate that claimant was taken off work by his treating physicians. Neither the emergency room record of December 8, 2005, Dr. Park's report of December 13, 2005, nor Dr. Berestnev's report of December 15, 2005 indicate that claimant had been taken off work as a result of his compensable injury. Dr. Berestnev in his report of December 22, 2005 indicated that claimant could work at a sit-down job.

When claimant was initially evaluated by Dr. Tomlinson on December 28, 2005, he indicated that claimant could bear weight as tolerated and made no mention of claimant's ability to work.

Based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning January 5, 2006, the date of his surgical procedure, and continuing through March 1, 2006, the date he was last evaluated by Dr. Tomlinson. Although claimant did not return to work for respondent subsequent to December 8, 2005, there is no indication that claimant was taken off work by his treating physicians prior to the date of his surgery on January 5, 2006.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee while employed by respondent on December 8, 2005. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left ankle while employed by respondent on December 8, 2005. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's left knee injury. This includes surgery performed by Dr. Tomlinson on January 5, 2006. Claimant is also entitled to temporary total disability benefits beginning January 5, 2006 and continuing through March

1, 2006.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$344.50.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE