

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM F608889**

**RICHARD D. RODGERS,  
EMPLOYEE**

**CLAIMANT**

**NILES ROSS CONSTRUCTION,  
INC., DBA ROSS ELEVATOR,  
EMPLOYER**

**RESPONDENT**

**COMMERCE & INDUSTRY  
INSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED AUGUST 17, 2007,**

Pursuant to a hearing conducted June 26, 2007, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

**STATEMENT OF THE CASE**

This was a hearing primarily to consider whether the claimant's right ankle injury is compensable under the employment services requirement of Ark. Code Ann. §11-9-102.

The claimant contended that his right ankle was injured at a time when employment services were being performed and that he should be awarded benefits, including reasonably necessary medical and related expenses and temporary total disability benefits from August 4, 2006, until November 20, 2006, as well as an attorney's fee. Other possible issues were reserved.

The respondents conceded that the claimant suffered an injury, but contended simply that the injury was not compensable because it did not arise at a time when employment services were being performed.

The record, which included documentary evidence and the testimony of the claimant, Niles Ross, Raymond Dixon, and Karen Ross was closed at the conclusion of the hearing consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employee-employer-insurance carrier relationship existed at all pertinent times; an injury to the claimant's right ankle on August 3, 2006; the maximum compensation rates apply, if the claim is compensable; and the claim has been controverted in its entirety.

3. The preponderance of the evidence shows that on August 3, 2006, the claimant suffered a compensable injury to his ankle, arising out of and in the course of his employment, at a time when employment services were being performed, so that he is entitled to benefits.

4. The preponderance of the evidence shows that as the result of his compensable injury the claimant received reasonable necessary medical care, including surgery, for which the respondents are responsible.

5. The preponderance of the evidence shows that the healing period for this scheduled injury ended October 31, 2006, and that the claimant did not return to work during that time so that he is entitled to temporary total disability benefits from August 4, 2006, until October 31, 2006. Although the respondent employer might have cooperated with the claimant regarding limited duty

employment, the preponderance of the evidence fails to show that an offer of light duty employment within the claimant's physical limitations was made at any particular time.

6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

### **DISCUSSION**

On August 3, 2006, the claimant, a construction worker 41 years of age at the time of the hearing, injured his right ankle when he slipped and fell while walking down a hill at a residential job site where he was helping install an elevator. He heard a pop at the time of the fall and, after the pain and swelling worsened, he was taken by a co-worker to Southwest Regional Medical Center. The emergency room note states "Tripped walking down hill at job site Greers Ferry. Turned ankle...", and gives the diagnosis of a distal fibula fracture. This injury required surgery, which was performed September 8, 2006, by Dr. Bernard Crowell, an open reduction internal fixation of the lateral malleolus fracture.

The medical record includes a report from Dr. Crowell dated October 10, 2006, indicating that he had examined the claimant, viewed current x-rays of his ankle, and recommended that he return to the office in three weeks for evaluation, start using a brace, and begin 50% weight bearing. Later, an October 31, 2006, note from Dr. Crowell indicated that the claimant was experiencing mild stiffness and should follow-up as needed. This note did not schedule another appointment for treatment and did not indicate that the claimant was in an off-work status or continued in his healing period. Thus, the claim for temporary total disability for this scheduled injury should end as of October 31, 2006.

Ark. Code Ann. §11-9-102(4)(B) provides, inter alia, that injuries are not compensable if they occur “when employment services were not being performed”. The respondents now controvert this claim on the theory that the injury occurred when employment services were not being performed. There is some variation in the testimony concerning the occurrence of the injury in relation to the lunch break and performance of employment services.

The claimant testified that he and Ray Dixon had arrived that morning in his personal vehicle at a home on Greers Ferry Lake where he was to assist in the installation of a three-story elevator. He stated that the driveway had not been finished and he had to park on the road on a hill above the home. He kept his tools and their lunches in his vehicle.

The claimant also testified that at that time they were installing the car for the elevator, had already installed the floor, and had moved the car up to the second floor. He testified that he was putting in the wiring and Ray Dixon was working below, attaching the floor to the elevator. He stated that it was hot on August 3 and they had brought fans to try and keep cool, although the air conditioning in the house was working and it was not that bad in the house.

The claimant stated that he worked all morning and had to leave the house a couple of times to get things from his vehicle. He stated that “...it was a kind of big hill, we tried to bring just what we needed so we wouldn’t be weighed down heavily, plus it was so hot...” Tr. at 10.

The claimant stated that somewhere between 12:00 and 1:00 most of the electrical had been installed and he needed to secure the conduit to keep it from flopping around when the elevator car went up and down. He testified that he told Ray that he needed to get some cable ties so he could secure these wires, so he would go to the car and get those and get our lunches and then we will stop for lunch when you are finished and I am finished.

The claimant testified that the cable ties were in the trunk and the lunches were in the backseat of his vehicle. He also testified that he intended to work with the cable ties two or three more minutes to secure the wires so the wires would not get caught up, and then eat lunch. He stated that on the way back down the hill from his vehicle he started to slide, heard a pop, and knew immediately something was wrong.

The claimant also stated that he felt he was injured and did not go back to the house but went to the garage and told Ray that he had done something pretty bad to his ankle so let's go ahead and stop for lunch. Tr. at 12. After his condition had worsened, the claimant told Ray Dixon to go ahead and go back to work after lunch and he would meet him in there or he would have to take him to the emergency room. He then called Niles Ross, his employer, and told him he was at lunch and something bad had happened to his leg and was going to lay there and maybe take a few aspirin and keep his leg up to keep the swelling down. He stated that he told Mr. Ross that he would go back to work if he felt better or, if not, Ray would take him to the emergency room. Mr. Ross told him to call Karen Ross at the office. On cross-examination, the claimant admitted that during the phone call with Karen Ross, she had said there might be some things he could do at the office and that he told her the doctor had told him to stay home and keep his leg up.

The claimant further testified that, after the accident, the insurance adjustor would not indicate whether the claim was accepted but kept telling him that there were plenty of free clinic around. Tr. at 17. The adjustor's notes, which appear as Cl. Ex. 2, indicate that the employee was obtaining cable ties which hold wires together, fell and injured bottom part of right leg, the fibula.

Niles Ross testified that the claimant called him that day and told him he was going down the hill, fell down, and heard something pop and thought he had a serious injury. Mr. Ross

said that he told him to go to the emergency room and then discussed whether to start his treatment in Heber Springs or in Little Rock, where it would be more convenient for the claimant to finish his treatment. Mr. Ross stated that the claimant said he fell down coming back from lunch. Mr. Ross made no notes of the conversation. He also stated that a few days later, he called the claimant and the claimant told him he had gone to his car to get lunch and some cable ties. Mr. Ross said that during the first conversation, the claimant did not discuss what he was carrying at the time of the incident.

Mr. Ross also testified that the claimant asked him about using workmen's comp and he told him, yes, "I thought he could. I didn't - - I thought he was on the job and he was injured, so that's my - - you know I, I thought he should use it." Mr. Ross also testified that in this particular place, he would say they would have brought their lunches because it is quite a ways to go for lunch, although he did not know if the claimant went to his car to eat or exactly what was going on. Mr. Ross further explained that it didn't make any difference "...whether he was coming back or what he was doing. All I was interested in, he fell down the hill. I was interested in that." Tr. at 39.

Ray Dixon testified that he "guessed" they walked out together to get their lunches from the claimant's car on the street. He said that he got his out, he thought it was in the front, and went back down the hill into the house, without the claimant. He also stated that he was not watching what the claimant was doing, but later went back out and saw some guys helping him up. Mr. Dixon testified that the claimant was "almost at the top, almost. Somewhere in the middle, right before, not at the bottom, somewhere in between." Tr. at 42. He did not remember the claimant asking about ties before he went to lunch but heard later that the claimant was getting some cable ties. He confirmed that they did eat lunch in the garage, as the claimant had stated. He stated that they could not then

get back into the house because of the claimant's leg. He also testified that he remembered previously stating that they ate in the garage that day because it was cold outside. At the hearing, he also stated that he did not think "it was August, though, when it happened at that time." He did confirm that the elevator job was at a point where cable ties were needed, at least where the claimant was working.

Mr. Dixon further testified that, although they had arrived at the car at the same time, the claimant did not immediately come down with his lunch, but was there at the car longer than Mr. Dixon, who merely grabbed his lunch, without looking for cable ties, and came directly back.

Karen Ross, the daughter of Niles Ross, testified that the claimant called her that day and said they were coming back from lunch, he fell down the hill, hurt his ankle, and heard something pop. Ms. Ross stated that the conversation was brief and the claimant did not mention anything about getting cable ties, but did say he had spoken with Mr. Ross.

Ms. Ross also testified that she called him later to see how he was doing and told him he might be able to help in the office, but she did not remember when the conversation took place. She testified that the claimant refused because it might mess up his case and that he never came back to work. However, on cross-examination, she admitted that the claimant did say that he would have to keep his leg elevated, but they did not discuss how that might affect his ability to work in the office. She also confirmed that there was a temporary summer worker in the office at that time.

The testimony of the witnesses is consistent in placing the claimant on the hillside at the work site when he fell and injured his ankle. Both Mr. Niles Ross and Ms. Karen Ross understood that the claimant had finished lunch and was at the job site going down the hill to the house. The claimant indicated that he was coming down the hill bringing lunch and cable ties in order to do

more work before eating lunch. The testimony of Ray Dixon indicated that both he and the claimant arrived at the vehicle at the same time, but that the claimant stayed at the vehicle longer than did Mr. Dixon, which would be consistent with the claimant's testimony that he was obtaining cable ties which were to be used at the work site below.

Thus, the preponderance of the evidence shows that the claimant was indeed bringing cable ties from his vehicle to the workplace below, as well as his lunch, if not Mr. Dixon's lunch, when the accident occurred. Mr. Dixon was probably more attentive to his own lunch and work activities and not closely monitoring the activity of the claimant. Nevertheless, Mr. Dixon's testimony is not inconsistent with the claimant having stopped at his vehicle to bring cable ties back to the work site. The testimony of Mr. Ross and Ms. Ross tends to show that the incident occurred as the claimant returned to work after eating lunch on the job site. This could easily have been a misunderstanding related to the claimant's assertion that he called them after the lunch hour had been undertaken. In short, the claimant is more likely to have been the better observer of his own activity at the time of the incident. Moreover, bringing cable ties back to be used at the work site is sufficient to satisfy the employment service requirement of the statute.

However, if it should be determined that the claimant suffered his injury going down the hillside returning to work after eating in his car on the job site, as that location required, this would also satisfy the employment services requirement of the Act. Thus, the claimant's injuries occurred at a time when employment services were being performed and are compensable.

As noted above, the claimant received medical care which is generally undisputed by respondents, and was reasonably necessary for the type of injury he received. The final medical record indicates that his healing period ended October 31, 2006. While the respondents may well

have been willing to try to accommodate the claimant with light duty work, the evidence fails to show that a definite offer of employment was made at any particular time, consistent with his need to take care of his injured ankle.

**AWARD**

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

---

RICHARD B. CALAWAY  
Administrative Law Judge