

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F610291**

**KEVIN SANDERS, EMPLOYEE**

**CLAIMANT**

**ARKANSAS DEPARTMENT OF CORRECTION,  
EMPLOYER**

**RESPONDENT**

**PUBLIC EMPLOYEE CLAIMS DIVISION,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED DECEMBER 31, 2007**

Hearing before Administrative Law Judge Barbara W. Webb on September 25, 2007, and October 8, 2007, in Little Rock, Pulaski County, Arkansas.

Claimant appeared pro se.

Respondents represented by Mr. Richard S. Smith, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on the above-styled claim on September 25, 2007, and October 8, 2007, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on August 7, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

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

2. The employer/employee/carrier relationship existed on September 6, 2006, when claimant sustained a compensable injury.
3. The claimant was earning sufficient wages to entitle him to a compensation rate of \$458.00 for temporary total disability and \$344.00 for permanent partial disability benefits.
4. Respondents have paid temporary total disability benefits through March 14, 2007, and medical benefits.

By agreement of the parties, the issue presented at the hearing is Claimant's entitlement to additional medical benefits and associated temporary total disability benefits from March 14, 2007, to a date yet to be determined.

#### **CONTENTIONS**

The claimant contends he sustained a compensable injury on September 6, 2006, and is entitled to additional benefits, including surgery as recommended by Dr. Richardson.

The respondents contend the claimant is not entitled to any additional benefits. The respondents contend that claimant postponed scheduled surgery on two occasions and misled respondents as to the reasons for doing so. The respondents contend that claimant has had several normal MRIs and appears to have reached the end of his healing period. The respondents contend that the claimant was rehired on August 15, 2007, and was employed until August 29, 2007.

The record consists of a one volume transcript of the September 25, 2007, hearing, consisting of the testimony of the claimant, Kevin Sanders, and Loretta

Williams and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (September 11, 2007, letter from Dr. Richardson); Claimant's Exhibit 2 (Surgery Scheduling Request); Claimant's Exhibit 3 (Medical Records); Claimant's Exhibit 4 (Incident Reports); Respondents' Exhibit No. 1 (Medical Records); Respondents' Exhibit No. 2 (September 18, 2007, letter from Mr. Smith and Essential Job Function Test; Respondents' Exhibit No. 3 (- Deposition of Kevin Sanders taken on August 15, 2007). The record also consists of a one volume transcript of the October 8, 2007, hearing, consisting of the testimony of Brandon Green, Margaret Langley, Terry Lucy and the claimant, Kevin Sanders.

#### **FACTUAL BACKGROUND**

The claimant, Kevin Sanders, is 41 years of age (b.d. 8/10/66). He lives in Wynn, Arkansas. He is not currently employed. He was previously employed at the Arkansas Department of Correction as a sergeant. He explained that when he returned to work on August 15, 2007, he was brought back in as a basic correction officer. He served as a sergeant for approximately five years. He held a correctional officer position for approximately two and a half years prior to his promotion as sergeant. Prior to working at the Department of Correction, he worked as a machine operator at the Addison Shoe Company from 1991 to 1999. Prior to his employment with the shoe manufacturer, he worked as a baler for the Earl Mattress Factory. He was employed with Earl Mattress for approximately eight years. He graduated high school and was trained as an auto parts clerk at the Gary

Job Corps Center in 1994. He was trained as a correctional officer through a basic training course in Tucker, Arkansas, and received some management training. He described the injury that was accepted as compensable on September 6, 2006, as follows:

There was a fight that broke out in the barracks. I run down to the barracks, went inside the barracks to handcuff. I grabbed one of the inmates and handcuffed him. As I was bringing him down the steps, I don't know if my foot got caught in one of the steps at the bottom of it, but anyway I tripped and fell to the floor and I felt my ankle bend.

He explained that he injured his right ankle while working at the East Arkansas Regional Unit. Immediately following the incident, he went inside the control booth, took his boot off and noticed his ankle swelling. At that time, he explained that he hopped down to the infirmary and got an ice pack and put it on his ankle. He wrapped it and put his boot back on. He reported the incident to his supervisor. The next day, he saw Dr. Jacobs. At that time, x-rays were taken and it was determined that the bone was possibly fractured. He was referred to see Dr. Dickson in Jonesboro. Dr. Dickson x-rayed his ankle and diagnosed him with a fibular sprain. His ankle was placed in a big boot that he wore for six to eight weeks. He returned to the doctor due to continued swelling in his ankle and complaints that the bone was still popping out of place. He was referred to Dr. Richardson, an orthopedic surgeon, on December 5, 2006. Dr. Richardson placed him in a smaller ankle brace and ordered physical therapy which he underwent for four to six weeks. He testified that he went back in because the bone was still jumping out of place. At that time, Dr. Richardson determined that he needed to

have surgery on the ankle. He returned to work on August 15, 2007. He received temporary total disability benefits through March 14, 2007. He explained that after March 14, 2007, all benefits were cut off. He testified that he was scheduled for surgery on February 27, 2007. He cancelled the surgery due to going to a funeral in Kansas City, Missouri, the weekend before. He contacted Ms. Langley on Monday and explained to her that he was not going to be able to have surgery. He told her that he didn't have the surgery because he went to a funeral. The surgery was rescheduled for March 6, 2007. He again cancelled the surgery because he was having second thoughts. He advised he had then talked to Margaret Langley and was told by her that he was going to have the surgery and that she wasn't going to cancel the surgery. At that time, he told her his house had burned down so he was not going to have the surgery. Subsequently, he talked to Dr. Dickson and his personal doctor, Dr. Jacob, and learned that Dr. Richardson was one of the best surgeons and that the Campbell Clinic was a well-known surgery facility. Based on that, he decided to go ahead and have the surgery because he was told that was the only way his ankle would be back 75 to 80 percent. His surgery was scheduled for April 10, 2007. He was ready to proceed to surgery. At that time, he was contacted by Ms. Langley who told him that she was stopping everything and they weren't paying for anything. He was released back to work on light duty but never released to go fully back to work. He explained that there was no such thing as light duty at the Arkansas Department of Correction. He did not check into whether a job would be made available to him on light duty. He talked to Langley's supervisor

about his need to have the surgery and to go back to work. He was told that he had been discharged from the Department of Correction and had lost all of his benefits. He believed that he had been discharged on December 15, 2006. He returned to the Department of Correction in August of 2007. He underwent a job function test. He left the test under the belief that he had not passed the running part of the exam. He was contacted after the exam and told to go to Pine Bluff to pick up uniforms. Apparently, he had misunderstood and had passed the physical and then tried to return to work. He explained that he tried to return to work wearing the ankle brace but that standing on the concrete floor caused a tremendous amount of difficulty and his swelling worsened. He left employment on August 29, 2007, due to continued problems with his ankle. He testified that he had not continued to get medical treatment because he could not afford treatment and that he had not had the surgery that Dr. Richardson recommended. He explained that his ankle was sore and continued to swell, that he could not leave his house without wearing the ankle brace and that if he took his shoe off, the bone would continue to pop out of place. He testified that on August 29, 2007, he attempted to contact his supervisor, Mr. Harmon, the warden. He was not aware of any jobs at the Department of Correction that he could perform under his current condition.

On cross-examination, he admitted that he told Terry Lucy and Margaret Langley that he had a conflict on the first date of surgery even though the funeral wasn't on the same day as the surgery. He admitted that he had lied about his house burning down. He admitted that on the question on the functional test

whether he had any disability, he answered "no" and that he did not advise the examiner of his fracture. He testified that he believed that he should be returned to at least a sergeant position and that there were sergeant positions available.

Loretta Williams testified for the respondents. She testified that the claimant was rehired on August 15, 2007, and that he would have been notified of his hiring prior to that date. She explained that the claimant worked until August 29, 2007, until he resigned from his position. She explained that she was notified by the doctor that the claimant was able to return to work regular duty on January 3, 2007, but that he had been discharged on December 4, 2006, due to health reasons. She testified that there was no light duty work available in Security and that in order for him to get light duty, he would have to apply for another job. She explained that he was discharged in December because he had used up all of his leave time. She explained that once the leave time was exhausted, the employee would be automatically terminated if they did not have a definite return date with the assumption that they would be ultimately rehired. She explained that once the employee is terminated, they have to go through the interview process. She explained that the claimant had applied for a correctional officer position. She explained that he would have to return to regular duty before his family medical leave ran out in order to be returned to his regular job. She admitted that in January and February of 2007 there were vacancies at the Department of Correction.

Brandon Green also testified for the respondents. He explained that he was a coordinator of pre-employment testing at Jefferson Regional Medical Center in

their outpatient physical therapy. He explained that he had been in the job for three years. He testified that he performed essential job functions test on a contract basis with the Department of Correction. He explained that he performed a job function test on the claimant on July 31, 2007. He testified that the claimant had passed each and every part of the test and that the claimant knew that he had passed the test when he left the test site. He did not recall the claimant wearing an ankle brace during the test.

Margaret Langley testified on behalf of the respondents. She testified that she was a claims manager for the Public Employees Claim Division and had 28 years of experience handling workers' compensation claims. She testified that the claimant cancelled the first surgery due to a funeral. The surgery was rescheduled but was later cancelled by the claimant for the stated reason that his house had burned down. She subsequently learned that the claimant's house did not burn down. She reviewed the claimant's files and noted that both MRI's were normal. She notified the claimant that she had cancelled the surgery and that benefits would be discontinued for non-compliance with medical treatment. She denied making any racial or derogatory remarks either to or about the claimant.

Terry Lucy also testified for the respondents. He testified that he was the Assistant Director of the Public Claims Division. He had one contact with the claimant on March 19, 2007. He returned a phone call to the claimant about termination of his benefits. He explained that to the claimant that surgery had been postponed on two occasions under false misrepresentations. The claimant

admitted that he had fabricated the story about his house burning down. He explained to the claimant that his misrepresentations had led them to question the veracity of any symptoms or complaints expressed in the medical records. The claimant did not make any complaints about Langley other than displeasure over the denial of benefits. He specifically did not recall or make note of any reference by the claimant to the alleged racial or derogatory remark.

Medical records reflect that the claimant was treated by Dr. Jacobs and referred to Dr. Brian Dickson after twisting his ankle during a fight while working at the Department of Correction in September of 2006. He was assessed with a right peroneal tendon subluxation and placed in a fracture boot. An MRI was performed on October 17, 2006. On November 5, 2006, the claimant returned for follow-up. Dr. Dickson noted that the MRI resulted in negative findings and that there was no longer any subluxation in the claimant's ankle when rotated. On December 5, 2006, he was seen Dr. Richardson on referral by Dr. Dickson. He was assessed with a Grade III ankle sprain with possible syndesmotic ligament injury. On January 3, 2007, he was released to full duty without restrictions. On February 7, 2007, Dr. Richardson noted that the claimant has a peroneal tendon subluxation on the right. He noted that all conservative measures had been tried and that due to the "significant peroneal tendon subluxation", he would need a fibular groove deepening procedure with repair of the peroneal retinaculum. Another MRI was performed on February 21, 2007, resulting in unremarkable findings. Surgery was scheduled but postponed by the claimant twice and cancelled by the adjuster on the third date due

to suspension of benefits. By letter dated September 11, 2007, Dr. Richardson advised that the surgery "is necessary to help alleviate Mr. Sanders' symptoms of continued pain and swelling over the lateral ankle on the right."

## **DISCUSSION**

### **Additional Medical Treatment**

The respondents have accepted the injury as compensable and paid medical expenses and temporary total disability benefits from September 6, 2006 until March 19, 2007, when the claimant's surgery was cancelled and benefits were suspended after the respondents learned that claimant had postponed recommended surgery twice due to false reasons.

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury.

Here, there is no dispute that the claimant's injury was compensable. The evidence demonstrates that there is objective medical evidence which established the current need for surgery. Rather, what is disputed is whether the claimant has unreasonable abandoned his treatment and whether the surgery is reasonable and necessary in relation to the compensable injury in light of the normal MRI findings.

This is not a case where the claimant must establish that the compensable injury was the “major cause” of the need for the surgery since the claimant thus far is only seeking medical benefits and temporary total disability. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 145, 923 S.W.2d 883, 885(1996). Instead, the respondents must take the claimant as they found him and the proper determination is whether there is sufficient evidence to establish that the compensable injury was a factor in the need for the surgery. Williams v. L& W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 183 (2004).

In the instant case, the medical records of Dr. Dickson and Dr. Richardson support the conclusion that the claimant’s ankle condition was more than just a sprain and that the claimant requires the recommended surgery by Dr. Richardson. This medical evidence is further substantiated by the testimony of the claimant. The claimant testified that he had continued to have swelling and subluxation problems with his ankle despite the conservative treatment. While admittedly the MRI reports reported unremarkable findings, I find that the claimant’s continuing complaints of pain and swelling after completion of conservative treatment and the medical opinion of Dr. Richardson for right peroneal retinacular repair and fibular groove deepening to repair the lateral ankle ligaments are compelling evidence of the claimant’s need for additional medical treatment. Based on the clear weight of the preponderance of the evidence in this case from claimant’s treating physicians, I find that the recommended surgery and continuing medical treatment provided by

Dr. Richardson to be reasonable and necessary and related to the compensable injury.

**ADDITIONAL TEMPORARY TOTAL DISABILITY**

Claimant is contending that he is entitled to additional temporary total disability benefits from March 14, 2007, to a date yet to be determined. The claimant is entitled to temporary total benefits if he can satisfy a two-prong test: (1) claimant must be within his healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). The evidence demonstrates that the claimant was released by Dr. Dickson to return to light duty work, but was not able to return to work due the unavailability of light duty work within the prison. Although he was released to full duty work in January of 2007, the claimant did not seek re-employment after his termination from the Department of Correction due to the expiration of his leave time. The evidence demonstrates that the claimant unsuccessfully attempted to return to work in August of 2007, and has remained off work as of the date of the hearing. The claimant seeks additional temporary total disability from March 14, 2007. However, the evidence demonstrates that the claimant was scheduled for surgery in February of 2007 and March of 2007, but failed to have the recommended surgery. Moreover, the evidence demonstrates that the claimant misrepresented the reasons

he postponed the surgery – on the first date, when he told the adjuster that he was at a funeral when he had attended a funeral the week before and on the second date by telling the doctor and adjuster that his house had burned down. Based on the preponderance of the evidence, I find that any delay in treatment was caused by the claimant's own misrepresentations and unreasonable refusal to seek further medical treatment. Therefore, I find that the claimant is not entitled to temporary total disability benefits since he has been released to return to work until such time as he undergoes the recommended surgery. However, I do find that claimant will enter a new healing period upon undergoing the recommended surgery and will be entitled to temporary total disability benefits from the date of the surgery until a date yet to be determined.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on September 6, 2006, when claimant sustained a compensable injury.
3. The claimant was earning sufficient wages to entitle him to a compensation rate of \$458.00 for temporary total disability and \$344.00 for permanent partial disability benefits.
4. Respondents have paid temporary total disability benefits through March 14, 2007, and medical benefits.

5. Claimant has proven by a preponderance of the evidence that his need for additional medical treatment from Dr. Richardson, including the recommended surgery as set out in the letter dated September 11, 2007, is reasonable and necessary and causally related to his compensable work-related injury in September of 2006.
6. Claimant misrepresented the reasons for postponement of the recommended surgery on two occasions.
7. Claimant has not proven by a preponderance of the evidence that he is entitled to continued temporary total disability benefits from March 14, 2007, until a date yet to be determined, since he was released to return to work prior to suspension of his benefits in March of 2007.
8. Claimant is entitled to temporary total disability benefits when he enters a new healing period from the date he undergoes the recommended surgery until a date yet to be determined.

**AWARD**

The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

**IT IS SO ORDERED.**

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**BARBARA WEBB**  
Administrative Law Judge