

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F611005

NORMAN L. WALTERS, EMPLOYEE

CLAIMANT

DAVID E. JONES, INC., UNINSURED EMPLOYER

RESPONDENT

OPINION FILED July 17, 2007

Hearing before Administrative Law Judge O. Milton Fine II on April 25, 2007, in Morrilton, Conway County, Arkansas.

Claimant represented by Mr. Neal Hart, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Joe Cambiano, Attorney at Law, Morrilton, Arkansas.

STATEMENT OF THE CASE

On April 25, 2007, the above-captioned claim was heard in Morrilton, Arkansas. A prehearing conference took place on March 5, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. Along with the additional one regarding Claimant's average weekly wage and compensation rates, which I have blue-backed to the record, they are the following four, which I accept:

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

2. The employee/employer/carrier relationship existed on or about September 13, 2006, and at all relevant times.
3. This claim has been controverted in its entirety.
4. Claimant's average weekly wage was \$800.00, which places him at the maximum rates for the time period in question.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. The parties requested an additional one regarding the valuation of Claimant's average weekly wage, but this became moot when they reached the stipulation discussed above. Claimant also supplied an end date for the temporary total disability issue, resulting in the following being litigated:

Claimant:

1. Whether the Claimant sustained a compensable injury.
2. Whether Claimant is entitled to temporary total disability benefits from September 14, 2006 to December 8, 2006.
3. Whether Claimant is entitled to reasonable and necessary medical care.
4. Whether the Claimant is entitled to attorney's fees.

Respondent:

1. Whether Claimant sustained a compensable injury.

Contentions

Claimant:

1. Claimant contends that he suffered a compensable foot injury on September 13, 2006 and is entitled to receive medical and temporary total disability benefits related to same.
2. Claimant's attorney is entitled to receive the maximum statutory attorney's fees on all controverted benefits.

Respondents:

1. Respondent contends the injury incurred by the Claimant was not compensable. Such injury occurred after Claimant left Respondent's place of business.
2. Respondent contends that Claimant has fallen through his porch at home on numerous occasions while employed with David E. Jones, Inc.
3. Respondent contends that it was not a willfully uninsured employer and that Claimant signed a waiver of workers' compensation.
4. Respondent contends that Claimant agreed to follow the company's policies. The leave of absence policy was not followed by the Claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left foot on or about September 13, 2006.
4. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 14, 2006 to December 8, 2006.
5. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for his compensable left foot injury.
6. Claimant's attorney is entitled to a 25 percent attorney's fee on the temporary total disability benefits awarded herein pursuant to Ark. Code Ann. § 11-9-715(a)(1)(B) (Repl. 2002).

CASE IN CHIEF

Summary of Evidence

_____ Two witnesses testified at the hearing: Claimant and David E. Jones.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit 1, a compilation of Claimant's medical records, consisting of one index page and 33 individually numbered pages; Respondent's Exhibit 1, a Form AR-A, consisting of two pages; Respondent's Exhibit 2, a Request for Information From Previous Employer and DOT Alcohol and Controlled Substances Testing Record concerning Claimant, consisting of two pages;

Respondent's Exhibit 3, the Medical Treatment Report for Claimant from Terre Haute Regional Hospital, consisting of one page; and Respondent's Exhibit 4, the x-ray report for Claimant from Terre Haute Regional Hospital, consisting of one page.

Testimony

Norman L. Walters. Claimant testified that he is 49 years old and lives in Hector, Arkansas. He attended the 12th grade, but did not graduate from high school. He has been a truck driver for approximately 26 years. Claimant began working as a driver for Respondent around June 2005. Respondent has a flatbed division that hauls such items as equipment and lumber. In addition to leasing to owner-operators, Respondent ran at least four flat bed units. Claimant was employed to pull a flat bed trailer at the rate of 32 cents per mile. Because of the variety in the length of runs, Claimant's pay varied from \$1,000.00 to \$1,200.00 on a "good week" to \$300.00 on his "worst" one. He estimated his average to be \$700.00. While he did not travel all 48 states, Claimant's route took him from Texas to Pennsylvania, and his work week generally began on Sunday and lasted until Friday night or Saturday morning.

Claimant stated that on September 13, 2006, he had taken a load to Michigan and was in Terre Haute, Indiana preparing to return with a load of steel coils from a steel mill there. After he "boomed [the load] down" inside the mill, he was told to go to the parking lot of the mill to put his tarps on the load. The coils were made of treated metal and had to stay dry. He described the alleged accident as follows:

I was on the trailer. I spread my tarps out on it. The wind wasn't whipping real bad but it was a little bit breezy and I was, when I put my tarp on I was walking alongside of the coils and I was fixing the straps on the rub rail and putting them on the tarp to hold it down until I got down on the ground to finish it up. Well, I put one on and the strap had broke [sic], the rub strap.

And it come up and it was going to hit me in the face so I kind of turned to miss it and I lost my footing. And I felt myself falling. And I caught myself, you know, falling off the trailer but I landed on my feet on the asphalt parking lot. And as soon as I hit the parking lot my left ankle just went plumb under me and I hit the ground. And I mean it was the worst pain I'd ever been in. I couldn't get up or anything else, you know.

He estimated that he fell four and one-half to five feet, which is the approximate height of the trailer. Before he left on this trip, Claimant had never had a problem with his left foot and prior to September 13, 2006 had never been diagnosed with a fracture of the left foot.

He testified that another driver witnessed what had occurred and went and obtained Claimant's phone from the cab of his truck. Claimant used the phone to call the office of Respondent and talked to the dispatcher, Piper Richardson. It was a regular practice of the drivers to call Richardson about problems and then she would get with David E. Jones and then would tell the driver what to do. Claimant on this occasion told Richardson that he fell off his truck and that he may have broken his foot. She put him through to Jones. Claimant stated that he told Jones that he had fallen off his truck and that he though he had broken his foot. Jones did not tell him to seek medical care but said to call him back and let him know what Claimant had decided to do about it. He told Jones that he was in pain and was going to have to do something about it. In Claimant's words, Richardson told him "just do what you got to do."

The medical team from the steel mill came out and got Claimant's boot off. Claimant asked them to call an ambulance because he could not get up. He was place on a gurney and transported in the ambulance to the hospital. There, Claimant gave a history of his injury. He had symptoms of pain, swelling, tenderness in the left ankle, and numbness. He told the care givers that he had instant pain in his left ankle and foot after

the fall. X-rays were taken. Claimant received care, including crutches, an Ace bandage wrap of the ankle, and Ibuprofen.

Claimant stated that he hired a taxi to pick him up and take him back to the mill. Another driver helped Claimant to finish placing tarps on the load. Then, Claimant stated that he got into the truck and drove back to Morrilton. On the way, Richardson called him a couple of times to ask him how he was feeling. He told her he was hurting. Claimant described the return trip as "miserable." He stated that during the run, he had to stop and ice his foot down, which was swollen, and had to keep it propped up. Claimant described experiencing pain and numbness in his left foot during the trip. During the return trip, he did not experience any other injuries.

He testified that he arrived in Morrilton late in the afternoon on September 14, 2006. Claimant did not go into the office of Respondent. Jones did not come outside to talk to Claimant, but Richardson did. According to Claimant, Richardson did not offer to fill out an accident report or send him to a doctor. Medical care was not discussed.

Claimant stated that he went to St. Mary's Hospital in Russellville because he was in a lot of pain and the swelling was not going down. He was still having numbness and was on crutches at this point. At the emergency room, he gave the personnel a history of his injury, telling them that he thought he had a break and could not feel his toes. The care givers took x-rays and placed a splint on Claimant's foot. They indicated that he needed to ice his foot and continue to use crutches. He was also given medication and told that he needed follow-up care from an orthopedist.

Claimant saw Dr. Robert Garrison, an orthopedic surgeon in Russellville. He gave Dr. Garrison a history of the fall and described his symptoms. Dr. Garrison indicated that

he wanted Claimant to use his crutches and to ice his foot. He took Claimant off of work. Claimant did not work at that point, but was at home trying to heal. He continued to treat with Dr. Garrison, who placed him in a cast after waiting for the swelling to subside. The doctor continued to keep Claimant off of work. Eventually, Claimant began to improve, and Dr. Garrison prescribed physical therapy. In November 2006, the doctor reduced him from crutches to a cane. On December 8, 2006, Claimant told Dr. Garrison that he wanted to return to work that day. He testified that the reason he did this was although his foot was still in pain, "I didn't really have a choice. I was losing everything I had." During this time, Respondent was not paying Claimant a salary, workers' compensation benefits, or for any of his medical care. Between the accident and that point, Claimant had no income.

He testified that he applied to work for Tyson, but could not do so because of the stress of the job. From there, he worked for one week hauling rice hulls and sawdust shavings from an employer in Morrilton. Currently, he is employed at TXD Transport hauling water in a tanker truck. Except for driving, his only physical activity on the job is to hook a hose to the tanker.

Claimant stated that from the time he expressed a need to return to work and February 9, 2007, when he saw Dr. Garrison, he experienced a lot of pain up and around his ankle and in the bottom of his foot. He testified that he was still having pain on the day of the hearing. Dr. Garrison on February 9 referred him to a specialist at the University of Arkansas for Medical Sciences. The doctor there, Dr. Thomas, tried to inject the foot and has recommended at least one surgical procedure.

He testified that he can work and "walk around a little bit," but cannot climb steep hills and does not do a lot of heavy lifting anymore. He desires to have the procedures

recommended by Dr. Thomas if they will stop the pain. He has health insurance through TXD, but is unsure if it will cover this injury.

On cross-examination, Claimant testified that he fractured his ankle when he fell off of the truck. He agreed that the Terre Haute medical records indicated it was a sprain, and based on that, he drove back to Morrilton; but he stated that “now they’re saying it was fractured.”

Claimant stated that “[y]ou’re supposed to” use your left foot on the clutch when shifting gears on a truck, but that he was able to return to Morrilton without using his left foot by using his right foot on the clutch from a stop and by not even using the clutch while rolling—by shifting with the rpms of the motor. He stated that such a tactic is possible “providing you don’t have to stop too many times.” Claimant testified that he was able to accomplish it because there was nothing but interstate highway back to Morrilton.

When he returned to Respondent, he asked where Jones was but Richardson told him that he was busy.

Claimant testified that the first week after he went to work for Respondent, he did not understand that there was no workers’ compensation coverage. He admitted signing documents to this effect, but that he expected “some help” with his treatment after the accident. Claimant stated that he asked Jones for help one day after his return in order to go to the doctor, and that Jones gave him \$50.00. Thereafter, the two only had one conversation, after Claimant retained counsel. Claimant admitted that he never went to Respondent and filled out an accident report, but stated that Respondent never asked that he do so. He did not attempt to meet with Jones, but did not feel in any shape to do so.

Claimant also admitted that between September 13 and 22 of 2006, he sought no further treatment but kept placing ice on what he had been told was a sprain with the understanding that he would be up and around in three to four days. He did not work at all between September 22 and December 8 of 2006. Claimant stated that he applied to Tyson on December 4, 2006, before the release, because he wanted to have a job lined up. He has paid some of his medical bills. It was not until January 23, 2007, when he went to work for TXD, that he had steady work. Between his return to work and that point, he earned roughly \$2,000.00, or around \$500.00 per week on average.

On re-direct, Claimant testified that Dr. Garrison reviewed the x-rays from Terre Haute and found a fracture on them; his statement regarding this is on page 33 of Claimant's Exhibit 1.

When questioned by me, Claimant stated that the strap that broke on the trailer was a rubber bungee strap. He testified that in trying to avoid the strap, he turned towards the trailer, and that when he landed on his feet his left ankle turned under him. He was pretty sure that it buckled.

He stated that he left Terre Haute around 8:30 or 9:00 p.m. on the 13th, and arrived in Morrilton between 4:00 and 5:00 p.m. on the 14th. His route was Interstate 70 to Illinois, Interstate 57 into Missouri, Interstate 55 to West Memphis and then Interstate 40 to Morrilton. He stated that he could not use his left foot to operate the clutch, and did not do so. He again described how he was able to do this:

When I have to come to a stop I just take and I'd put the truck in neutral and use my right foot to brake it and come to a stop. And I hold my brake until it was time to go. I take my right foot and put it over on the clutch pedal, depress my clutch pedal and put it in first gear. Once I got rolling, I could shift it off the RPM's of the engine.

He agreed that this was not the preferred method of driving, but that he did what he had to do.

David E. Jones. Called by Respondent, Jones testified that among other businesses, he owns a trucking company that uses open flat trailers. He uses both owner-operators and employees as drivers.

Jones admitted that in "ignorance of the law," he took a form off of the Commission's website and had or asked employees to sign it to waive workers' compensation coverage. He emphasized that he did not force them to sign the form. Claimant signed the form in May 2005. Prior to September 13, 2006, there had never been any problem or talk about any injuries.

Jones testified that Claimant called from Terre Haute and said that he had fallen off of the trailer and had hurt his ankle. He stated that he got onto the Internet and located an emergency room in Terre Haute and arranged for his care there. Jones did not recall if Claimant checked back in after he went to the emergency room, but noted it would have been after Respondent's offices were closed. He stated that Claimant never called or came back to office to see if he still had a job, and that he had not seen him after the accident until the hearing. Jones testified that Respondent's handbook required drivers to fill out a report if they were sick or going to be off for a few days, to ensure compliance with Department of Transportation rules and regulations.

Jones stated that it was his understanding that Claimant had only a sprained ankle. He paid the bill for \$885.00 medical bill from Terre Haute and gave him \$50.00 to cover his taxi there. Prior to Claimant's seeking treatment from Dr. Garrison, Jones was unaware

that Claimant was still needing medical treatment. Claimant never returned to ask him for help of any kind.

Jones has a Class A CDL and testified that in his opinion, Claimant could not have driven from Terre Haute to Morrilton without using his left foot. He stated:

Q. All right. Driving back from Terre Haute to Morrilton, how would you do it without a left foot, let's say?

A. You really can't make that trip. A truck driver cannot make that trip without having to push the clutch in with his left foot. The reason why, if you have someone, if you are following someone and they decide they want to stop real quick, you can't just put it up in neutral and push the brake because the airbrake system, when the brakes are applied, then it doesn't take long for that compressor to lose its air pressure and when it does your brakes lock up. You have to keep the RPM's built up in order for that compressor to supply enough air—

Q. How do you keep the RPM's up?

A. That's because you keep your right foot on the gas and left foot on the clutch or if you have to gear down—now you can gear down without the clutch but that's just if you're, if it's clear and nothing in your way, no stop signs. But when you're taking off, for instance if you come up to a stop sign, you've got to have that foot on the brake and that foot on the clutch to get it completely stopped. And if you're on an incline, if the stoplight or stop sign happens to be on an incline, if your right foot is over on the clutch you've got nothing on the brake to keep it from rolling backward or forward. So, in my opinion it's just not possible to drive a truck without, and I'm talking big truck, without using the clutch.

Furthermore, he intimated in his testimony that Claimant could not have returned from Terre Haute within 20 hours, or at least have done so and comply with DOT regulations governing the time a driver can be behind the wheel and how much sleep is required thereafter.

Jones stated that during Claimant's tenure with Respondent, he had fallen off his porch (which Jones described as a "little rickety") on two occasions prior to the incident at

issue and had come to work hobbling. From this, Jones speculated/contended that Claimant could have fallen off the porch again in the nine days between his return from Terre Haute and his visit to the hospital in Russellville.

On cross-examination, Jones admitted that he did not obtain workers' compensation insurance until the Commission contacted him after this case began. All of his employees are covered now. He stated that he did computerized research regarding workers' compensation, but did not notice the place on the website that provided that employers with two or more employees have to have coverage. He only read the form that concerned the waiver, which he testified was the first document he came upon. Jones had never before gotten a quote from his insurance agent on workers' compensation. He did not consult the Commission or an attorney about whether Respondent needed coverage.

Jones testified that while he would have taken care of Claimant had he stayed in touch with him, his basic defense in the case was that Claimant willfully declined coverage. He also testified to Claimant's hypothetical concerning the drive home from Terre Haute as follows:

- Q. Let's say a truck driver has symptoms of what the doctors have diagnosed as an ankle sprain. He's got ankle swelling. He just fell from a flatbed directly onto his heel. He has pain. He's on medication. And he has numbness in his foot. Would that make it hard to drive an eighteen-wheeler using your left foot a bunch?
- A. It would make it more difficult than a [sic] normal but it could still be done.

He stated that if Claimant had told him he could not drive back from Terre Haute, he would have sent someone for the truck. He denied that when Claimant told him about the fall he

said, "do what you have to do." Jones stated that instead he told him to get it checked at the closest emergency room.

Jones admitted that he did not know if Claimant had seen a doctor for falling from the porch, and that he had no medical records showing that Claimant had sought treatment for his left foot prior to September 2006. He also admitted that in Respondent's Exhibit 2 he had indicated that Claimant's conduct while working for Respondent was satisfactory. He stated that he had found Claimant to be an honest person. Jones testified that he did not know that Claimant was treating with an orthopedic surgeon until he received the bills for the treatment.

On redirect examination, Jones disputed Claimant's testimony that he earned an average of \$700.00 per week, stating that "I wouldn't think that the average is that much."

Records

Claimant. The medical records of Claimant that were introduced at the April 25, 2007 hearing and are part of Claimant's Exhibit 1 reflect the following:

On September 13, 2006, Claimant presented to Terre Haute Regional Hospital with pain (which he rated a "10" on a 1-10 scale), swelling and tenderness in his left ankle, with radiating pain and numbness. He stated that he fell five feet off a semi trailer when a strap broke while "tarping [his] load" and experienced instant pain in his left ankle and foot. He was unable to put weight on the foot. The x-rays taken of the left ankle and foot were negative except for showing chronic degenerative arthritis in the ankle. He was diagnosed as having a left ankle sprain; the area was iced and wrapped in an Ace bandage, and he was given crutches and Motrin.

Claimant presented to Saint Mary's Regional Medical Center in Russellville on September 20, 2006 with left foot pain, which he stated happened when he "fell from semi truck last Wednesday." The record further reflects that Claimant's x-ray showed that it was just a sprain; but Claimant stated "It's gotta be broke," that he could not feel his toes. Examination showed the foot to have edema (with "marked swelling ecocyanosis of entire foot") and discoloration. Claimant had an Ace bandage and splint on the area, and could not bear weight on it. The x-rays of the ankle showed "soft tissue swelling, predominantly laterally," and "mild arthritic changes of the tibiotalar joint but no fracture or dislocation." He was diagnosed as having a soft tissue injury in the ankle, along calcaneus fracture in the left foot; and was he given a given Ibuprofen and a foot splint, told to keep the foot elevated, and not to work. Also, he was referred to an orthopedist.

On September 22, 2006, Claimant saw Dr. Robert Garrison. He presented with mild to moderate swelling around the left heel and ankle with some ecchymosis around the heel, but no gross deformity noted. Claimant was able to actively flex and extend his ankle and toes. While he had no tenderness around the ankle, he did so around the calcaneal region and forefoot. Dr. Garrison reviewed the x-rays taken at Saint Mary's and noted that they showed a nondisplaced calcaneal fracture, but no other fractures in the left foot or ankle. He diagnosed Claimant as having a left calcaneus fracture. He instructed Claimant not to drive or put any weight on his left lower extremity. Claimant was placed in a splint and on crutches. Once the swelling subsided, Dr. Garrison planned to place him in a neutral cast.

In a follow-up visit on October 6, 2006, Claimant presented with less swelling in the foot, but still with some tenderness and ecchymosis around the heel. X-rays showed the

fracture to be stable. He was placed in a cast and placed on light duty with no weight bearing on his left side. The cast was removed on October 27, 2006. He still had mild swelling; and x-rays showed the fracture as remaining stable. Dr. Garrison placed Claimant in a boot walker and continued the above restrictions.

On November 17, 2006, Claimant returned to Dr. Garrison. X-rays showed the fracture to be healed. He presented with limited range of motion in his ankle. He had some stiffness and still some swelling and tenderness in the posterolateral aspect of his calcaneus. The doctor sent him to therapy with the plan to send him back to work in three weeks if the examination showed improvement.

Claimant on December 8, 2006 told Dr. Garrison that he wanted to go back to work that day. The examination showed no tenderness around the calcaneus and no swelling. X-rays showed a healed fracture with good trabeculation across the fracture site. The doctor told him he would return him back to full duty with weight bearing and activities as tolerated. He told Claimant it is hard to predict if there would be arthritis in the subtalar joint. When Claimant returned on February 9, 2007, he complained of pain in the front of his left ankle, but no swelling. X-rays showed the fracture healed and no significant arthritic change in the subtalar joint. He referred Claimant to Dr. Ruth Thomas, an orthopedic foot and ankle specialist in Little Rock.

Dr. Thomas saw Claimant on March 7, 2007. He presented with severe pain and swelling in the anterior aspect and the lateral aspect of his ankle. He stated that he is unable to work. Examination showed a moderate degree of swelling in his left hindfoot. Dr. Thomas noted:

X-rays were reviewed today that the patient brought with him. The calcaneus fracture is evident in the original injury films from September 22nd. The most recent films demonstrate healing of the fracture site. The posterior facet was significantly depressed with his fracture and there is no doubt there is some degree of subtalar arthritis and subtalar articular pathology present. There also seems to be a fracture evident at the anterior process of the calcaneus as well.

Claimant's foot was injected with a solution of Marcaine and Depo-Medrol. The doctor wrote the following:

At this point we can essentially offer bracing treatment or surgical treatment that would be a triple arthrodesis. The patient seems to have posterior facet involvement of the fracture and will undoubtedly need a subtalar fusion at some point in the future. It seems that the anterior process of the calcaneus is involved as well possibly and that would necessitate a triple arthrodesis. It is also possible to treat with some bracing but I think it is quite clear at this point the patient is headed for a triple arthrodesis at some point. He is concerned about the fact that this case is going to be litigated. We feel it is probably best not to settle at this point because this patient will need considerable treatment of his medical problem in the future, possibly surgery within the upcoming months. Today we offered him an injection in the subtalar joint in order to assess how much relief we would provide with a subtalar fusion . . . If it is successful in relieving his pain for a while we are quite confident that a subtalar effusion would help him.

Dr. Thomas repeated the substance of the above in a March 7 letter to Dr. Kenneth Turner of Russellville.

Claimant returned to Dr. Garrison on April 4, 2007 and stated the he did not get much relief from the injection. However, on further questioning he "maybe got a few hours of relief." The doctor continued to recommend subtalar arthrodesis, but stated she would "leave it up to the patient if we proceed or go with shoe ear modification only."

On March 23, 2007, Dr. Garrison wrote the following to Claimant's counsel:

I received your letter in regards to Normal Walters, your client, in reference to his workers' compensation claim. I have had time to review the x-rays this week, from Terra Haute, Indiana, where he was seen after he fell from his

truck, strapping a load. I have also reviewed my chart and that is consistent with what he told me on September 22nd, 2006, when he came to see me. After review of the chart from Terra Haute again, he apparently fell from the semi, landing on his left foot, having immediate pain. Appropriate x-rays were taken at that time and he was given crutches. He was seen again on the September 20th, 2006, at our emergency department when he returned to Arkansas. X-rays showed a calcaneus fracture. I followed him up until February 9th, 2007, where x-rays did show a healed fracture but he continued to have pain in the heel area. I did review the x-rays from Terra Haute and I do see a fracture in the calaneus, by those x-rays. In regards to your question in your letter, it appears that the fracture was evident on September 13th, 2006, and this is consistent with his work related injury. It is my opinion that Mr. Walters' foot injury occurred in the manner in which he told me and the physicians in Indiana, with x-rays confirming that fracture by my review as an orthopaedic surgeon, on 09/13/06.

Respondent. As stated above, Respondent offered four exhibits into evidence.

Respondent's Exhibit 1 is a Commission Form AR-A, an Application for Certificate of Non-Coverage. It bears the name, address, Social Security number and signature of Claimant, and is dated May 17, 2006. In the attached Affidavit for Certificate of Non-Coverage, Claimant states that as a sole proprietor he has elected to be excluded as an employee from the mandatory insurance requirement.

Respondent's Exhibit 2 is a Tyson form entitled Request for Information from Previous Employer regarding Claimant. Signed by Karen Hedwick of Respondent, it reflects that Claimant worked there from May 2005 to September 2006, was a safe and efficient driver, had no accidents, left due to resignation, and had generally satisfactory conduct. But Respondent would not hire him again. The second page, a DOT and Alcohol and Controlled Substances Testing Record, reflects that Claimant committed no such infractions during his tenure at Respondent.

Respondent's Exhibits 3 and 4 are from Claimant's medical record from Terre Haute Hospital and have been discussed above in the context of Claimant's Exhibit 1.

ADJUDICATION**A. Compensability**

Claimant has alleged that he incurred a compensable injury to his foot on September 13, 2006 as a result of a fall he suffered in the course and scope of his employment by Respondent.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which the I find applies to the analysis of Claimant's alleged injury, defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.* If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Claimant testified that he injured his foot on September 13, 2006 by falling off a flat bed trailer while attempting to place a tarp over his load of steel coils that he was preparing

to haul from Terre Haute back to Arkansas. The medical records in evidence reflect that he went to the hospital in Terre Haute that day with swelling and tenderness in his left ankle, with radiating pain and numbness. While the x-rays taken there were read as negative in Terre Haute, and he was diagnosed only with a sprained ankle, Dr. Garrison reviewed the same films and determined that Claimant sustained a fracture in the calcaneus, and that it was his opinion that Claimant sustained it on the 13th and in the manner in which he has repeatedly described.

The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). Based upon my review of the evidence, I credit Dr. Garrison's findings.

Based on my review of this and the other evidence, including Claimant's testimony and the balance of the medical evidence, I find that Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his foot.

Respondent has argued that Claimant is not entitled to relief because he waived coverage through the Form AR-A that was admitted as Respondent's Exhibit 1. But Respondent stipulated that Claimant was an employee of Respondent on the date of the accident; and while Jones testified that some of Respondent's drivers are employees and some are owner-operators, Respondent has never sought to characterize Claimant as anything but an employee. As the Commission held in *Simpson v. Wayne Moore Const. Co.*, 2004 AWCC 34, Claim No. F207890 (Full Commission Opinion filed February 24, 2004), "certificates of noncoverage are not effective or valid as to employees."

Also, Jones testified that Claimant could not possibly have driven his truck from Terre Haute to Morrilton without using his left foot. However, Claimant stated that because of the pain he was experiencing, he did not use his left foot but rather used his right and shifted using the RPMS of the truck's engine.

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* Based upon my observation of these witnesses, I find that Claimant is the more credible witness on this and other points. In sum, Claimant is entitled to relief on this issue.

B. Temporary Total Disability

Claimant argues that he is entitled to temporary total disability benefits from September 14, 2006 to December 8, 2006. Claimant's compensable injury to his foot is scheduled. See Ark. Code Ann. § 11-9-521(a)(11). An employee who suffers a compensable scheduled injury is entitled to temporary total disability benefits "during the healing period or until the employee returns to work, whichever occurs first" *Id.* § 11-9-521(a). See *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must

demonstrate that the disability lasted more than seven days. Ark. Code Ann. § 11-9-501(a)(1) (Repl. 2002).

As recounted above, when Claimant returned to Dr. Garrison on November 17, 2006, x-rays showed his fracture to be healed. However, he presented with limited range of motion in his ankle, along with stiffness and still some swelling and tenderness in the posterolateral aspect of his calcaneus. Dr. Garrison sent him to therapy with the plan to send him back to work in three weeks if the examination showed improvement. On December 8, 2006 Claimant informed Dr. Garrison that he wanted to return to work that day. The examination showed no tenderness around the calcaneus and no swelling. X-rays showed a healed fracture with good trabeculation across the fracture site. Dr. Garrison released him that day to full duty with weight bearing and activities as tolerated. Hence, Claimant remained in his healing period from the time of the accident on September 13, 2006 until December 8, 2006. Hence, he is entitled to temporary total disability benefits for this period at the stipulated maximum rate of \$488.00 per week.

C. Reasonable and Necessary Medical Care

Claimant asserts that he is entitled to reasonable and necessary medical care related to his compensable injury. Section 11-9-508(a) provides that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and

necessary for the treatment of a compensable injury. *Brown, supra; Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Based upon my review of the evidence recounted above, I find that all medical treatment rendered Claimant and reflected in Claimant's Exhibit 1 to be reasonable and necessary.

D. Attorney's Fees

As the parties stipulated, and I accepted, this claim has been controverted in its entirety. Claimant's attorney is thus entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

CONCLUSION AND AWARD

Respondents is directed to pay benefits in accordance with the findings of fact set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondent in accordance with Ark. Code Ann. § 11-9-715. See *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge