

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F801721

LARRY C. DAVISON, EMPLOYEE	CLAIMANT
NEWPORT SPECIAL SCHOOL DISTRICT, EMPLOYER	RESPONDENT
ARKANSAS SCHOOL BOARDS ASSOCIATION'S WORKERS' COMPENSATION TRUST, c/o RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 20, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on June 27, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. M. Scott Willhite, Attorney-at-Law, Jonesboro, Arkansas.

Respondent represented by Ms. Melissa Wood, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 27, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on May 7, 2008, and a Prehearing Order was filed on May 8, 2008. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the

parties at all relevant times, including December 20, 2007; that the claimant's average weekly wage was \$623.00, entitling him to compensation rates of \$415.00 per week for temporary total disability and \$312.00 per week for permanent partial disability in the event the claim was found compensable; and that the claim had been controverted in its entirety for purposes of attorney's fees.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that he sustained a compensable back injury which arose out of and during the course of his employment on December 20, 2007, and which was the result of a specific incident identifiable in time and place of occurrence, specifically, while participating in a faculty/student basketball game; that respondents should be held responsible for all medical and related expenses, together with continued reasonably necessary medical treatment; that he was entitled to temporary total disability for the period beginning April 3, 2008, and continuing through April 24, 2008; and that a controverted attorney's fee should attach to any benefits awarded. Claimant reserved the issue of entitlement to permanent disability.

The respondents contended that the claimant's injury did not occur while in the performance of employment-related services, and controvert the claim in its entirety. Alternatively, respondents maintained that they did not receive notice of

any alleged injury until January 28, 2008, and that they would not be liable for any benefits prior to receipt of the actual notice of the injury claimed. As a further alternative, should compensability be determined, respondents claim a credit or offset for any benefits paid pursuant to Ark. Code Ann. §11-9-411.

The claimant testified in his own behalf. The record is composed solely of the transcript of the June 27, 2008, hearing containing numerous exhibits, together with the evidentiary deposition of Suzanne Bailey, taken at the instance of the respondents which was introduced as "Joint Exhibit B" and retained in the Commission file in bound form.

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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury arising out of and during the course of his employment with Newport Special School District as a result of a specific

incident identifiable in time and place of occurrence on December 20, 2007, entitling him to appropriate workers' compensation benefits.

4. A preponderance of the credible evidence reflects that the claimant was performing employment services at the time of the December 20, 2007, injury.
5. The claimant is entitled to temporary total disability benefits for the period beginning April 3, 2008, which is the date claimant first missed work as a result of his injury and continuing through April 24, 2008, when he returned to work for the employer herein.
6. Respondents are responsible for all hospital, medical, and related expenses, including payment of related travel expenses for mileage traveled in obtaining medical treatment, and respondents remain responsible for continued, reasonably necessary medical treatment.
7. The failure to give written notice prior to January 28, 2008, is not a bar to the within claim.
8. Respondents are entitled to a credit or offset for the medical services provided to the claimant under a group health and accident insurance policy pursuant to Ark. Code Ann. §11-9-411. However, respondents may ultimately be required to reimburse the medical provider for benefits paid pursuant to the medical cost containment guidelines established by Commission Rule 099.30.

9. Respondents are not entitled to a credit or offset for the periods of time that the claimant received full salary while utilizing his accrued sick leave. Sick leave is not a loss of income or disability benefit contemplated by Ark. Code Ann. §11-9-411.
10. The claimant's entitlement to permanent disability benefits has been specifically reserved.

DISCUSSION

_____The relevant facts in this claim are basically undisputed. The claimant, Larry C. Davison, began working for the employer herein after graduating from college. The claimant started working in July, 2004. At the time of the hearing, the claimant was a coach and teacher for the Newport School District. The claimant was the head football coach, assistant baseball coach, and, in addition, taught health and physical education. It is undisputed that the claimant sustained a back injury while participating in a faculty/student basketball game which occurred during the end of the semester testing period, specifically, on December 20, 2007, which was the last day of school before the Christmas break. Although the claimant was not "required" to participate in the faculty/student game, he was clearly expected to participate. The event and the claimant's admitted injury occurred during school hours and on school premises. Further, it was an activity sponsored by the school. It is undisputed that the claimant's injury occurred on December 20, 2007. In fact, respondents' sole defense to the immediate claim was that the claimant was not

performing employment services. (Comm. Ex. 1)(Tr.34)

A compensable injury is an accidental injury causing internal or external harm that arises out of and in the course of employment. Ark. Code Ann. §11-9-102(4)(A)(I)(Supp. 2005). A compensable injury does not include an “[i]njury which was inflicted upon the employee at a time when employment services were not being performed.” Ark. Code Ann. §11-9-102(4)(B)(iii). An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002). The test for determining whether an employee was injured while performing employment services is the same as the test for determining whether an injury occurred out of and in the course of employment: whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly. *Id*; *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, the critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Collins, supra*.

The deposition of Suzanne Bailey was taken at the instance of respondents on June 20, 2008. Ms. Bailey is currently the superintendent at the Manard School. On December 20, 2007, Ms. Bailey was the principal of the Newport Junior High

School where the claimant worked. Her testimony establishes compensability of this claim. A portion of Ms. Bailey's testimony follows:

EXAMINATION BY MR. WILLHITE:

Q Good afternoon Ms. Bailey, my name is Scott Willhite. I am just going to ask you a few questions.

A Okay.

Q Do you recall what Mr. Davidson's [si] position was at the time in December, I believe this was December 20th?

A Yes. What position are you referring to? During the basketball game, or what he was employed as?

A[sic] As far as his employment position on December the 20th, 2007?

A He's our junior high head football coach and he taught PE and Health in junior high.

Q Okay. And, was there a requirement of the school that he be at school during certain hours of the day?

A Yes, he was to be at the school during his school work day, yes.

Q And, what were those hours typically?

A Well, school starts at seven fifty five and it's over at three fifteen, so he's required to be at school unless he'[s [sic] sick, or something.

Q Okay. And, oh [sic] December the 20th, was this a normal school day?

A Yes.

Q The children were there at the school that day?

A Yes.

Q And, was this game prior to the time that Mr. Davidson [sic] would be allowed to go home for the day?

A Yes.

Q Okay. So, it was on school property and it was during the time that Mr. Davidson [sic] was required to be at school?

A Yes.

Q And, it's my understanding from what you said earlier that Mr. Davidson's [sic] participation was voluntary in the basketball game?

A Yes.

Q However, isn't it true that he would have had to perform some duty regarding this game, either to supervise children, or play in the game, or to do some activity related to the game in his capacity as an employee of the school district that day?

A Right. If, he didn't want to play in the game, he could have done something else, yes.

Q Now, he selected one of the categories of things that he could have done playing in the basketball game as opposed to supervising the children?

A Yes.

Q But, it was mandatory for me to be in one of those capacities involving the game that, but he didn't have to actively play in the same, isn't that correct?

A Right. (Jt. Ex. B, pp.7-8)

Compensability having been established, the only remaining issues concern respondents' alternative defenses. First, respondents maintain that it did not receive notice of any alleged injury until January 28, 2008, and that it would not be liable for any benefits prior to the receipt of actual notice of the injury claimed.

Respondents' alternative contention is without merit. Ark. Code Ann. §11-9-701(b)(1) provides that failure to give notice shall not be a bar to any claim if the employer had knowledge of the injury.

The record reflects that the claimant reported his injury to co-workers, as well as his immediate supervisor, Kenny Black, who was the dean of students at the school. Admittedly, the claimant did not file a formal claim until on or about January 28, 2008. However, the claimant did not miss any work, and, in fact, continued working at all times while experiencing significant physical problems until requiring back surgery on or about April 3, 2008. The claimant returned to work with physical restrictions on April 24, 2008, while missing only three (3) weeks of work. This speaks volumes of the claimant's strong work ethic. Further, the record reflects that the claimant notified Mr. Black of the injury on December 20, 2007. Just because the claimant did not learn the true nature and extent of his injury until substantially later is not a bar to his claim for medical benefits beginning on the date the injury was reported. (Jt. Ex. A, p.24)

As a further alternative, respondents contend that should compensability be determined, it is entitled to a credit or offset for any benefits paid pursuant to Ark. Code Ann. §11-9-411.

Ark. Code Ann. §11-9-411(a) provides:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

The record reflects that respondents initially paid for a diagnostic MRI, but after controverting the claim, failed or refused to pay any further medical treatment. The remainder of the claimant's medical bills were paid under his wife's Blue Cross/Blue Shield health insurance. Although respondents are entitled to reduce its liability in an amount equal to, dollar-for-dollar, the amount of medical benefits the claimant has previously received, it should be required to reimburse the medical providers for said benefits pursuant to the medical cost containment provision of Commission Rule 099.30. Respondents would remain responsible for continued reasonably necessary medical treatment, as well as for reimbursing to the claimant, travel expenses for mileage traveled in obtaining medical treatment.

The record further reflects that the claimant was required to utilize his accrued sick leave for the twenty-one (21) days that he was required to take off work for his compensable injury and back surgery. The law is clear that respondents are not entitled to a credit or offset for such benefits. See, *Norman v. North Hills Service, Inc.*, AWCC F408828, Full Commission Opinion filed November 21, 2005; *Socha v. Northwest Airlines*, AWCC F500085, Full Commission Opinion filed April 7, 2006; *Conner v. Texarkana School District*, AWCC #F410155, Full Commission Opinion filed August 15, 2006.

In view of the foregoing, I hereby make the following:

AWARD

Respondent, Risk Management Resources, is hereby directed and ordered

to pay, to the claimant, temporary total disability benefits at the rate of \$415.00 per week beginning April 3, 2008, and continuing through April 24, 2008.

All benefits having accrued, respondents are to pay same in lump sum and without discount.

Respondents are further directed and ordered to pay and/or to reimburse the appropriate medical providers for all hospital, medical, and related expenses as the result of claimant's December 20, 2007, injury and respondents remain responsible for continued reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. M. Scott Willhite, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to, and limited by, Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge