

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504702 (04/19/05)

DANIEL J. PALUCH, EMPLOYEE

CLAIMANT

**GRMI, INC., D/B/A THE OLIVE GARDEN
ITALIAN RESTAURANT, EMPLOYER**

RESPONDENT

LIBERTY MUTUAL INS. CO., CARRIER

RESPONDENT

OPINION FILED AUGUST 29, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 4, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant appeared pro se.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style claim to determine the claimant's entitlement to workers' compensation benefits. Several pre-hearing conferences were conducted in this claim, the last being May 20, 2008, with a Pre-hearing Order of the same date being generated. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Daniel J. Paluch - the claimant, and Alan Brown, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Daniel J. Paluch, the claimant, with a date of birth of October 2, 1955, has a bachelor's degree. Claimant testified that he was employed by respondent for about eleven (11) years.

Claimant explained:

I was a, I started out in the kitchen, I started in the dish room, started, and went to the kitchen and became a server. I have another job.

I work for the Little Rock Police Department and so, in between, when I could work evenings I would at the Olive Garden. With the police department your shift changes. (T. 10).

During his employment with the Little Rock Police Department claimant worked at the Little Rock city jail. The claimant's employment with the Little Rock Police Department ceased when the city jail was closed and the Pulaski County Regional Detention Center opened.

The present claim grows out of an assault of April 19, 2005, in which the claimant sustained injuries. The claimant was working the lunch shift on April 19, 2005, which covered the time frame of 11:00 a.m. until 5:00 p.m. In describing the incident/assault, the testimony of the claimant reflects:

It just so, I worked the smoking section which usually clients, guest don't come in until noon, because they are smokers, whatever. Well, unfortunately I was the only one busy that day and I had about four tables. Usually you only have three, but I had four tables, I was busy. I came back to the kitchen with a hand full of dishes, I saw Dezmond Robinson standing right in front of me, I made a right to go to the dish room to put the dishes on the racks to wash them, and all of a sudden I felt a blow to the head. I thought it was a mistake, I thought he was trying to put a boiler pan in the dish room until he did it two more times, kind of bent over my head. I dropped the dishes, my teeth fell out, my glasses fell off. The blow came pretty hard and I went to defend myself, I really can't say what happened, and then I just noticed that a whole bunch of people were on top of me and him, breaking us up at one

point. (T. 11-12).

While acknowledging that their paths had cross during the course of performing their respective job duties claimant denied any previous personal contact with Mr. Robinson. (T. 12).

Regarding the damage to his teeth in the assault, claimant explained the he had a partial and that when they fell out and hit the floor they cracked and had to be replaced. The testimony of the claimant reflects that his eyeglasses were also broken in the assault.

The claimant's testimony reflects that the incident occurred on the west end of a long hallway and that the office of the general manager, Ms. Dee Hester, was on the east end. Following the incident claimant was furnished an incident report by Ms. Hester and directed to go to the emergency room. Claimant testified:

Yes sir, I did. They told me to, I can't remember how long I spent there, and they told me to go to the, because it was a workers' comp claim, I couldn't see my own physician. He wouldn't see me. And I was told to go to the family clinic. That took probably about twenty phone calls before I finally had an appointment in May. (T. 13-14).

There in testimony of the claimant to reflect that he went to the emergency room of UAMS on more than one occasion for complaints associated with the injuries growing out of the April 19, 2005, incident. Claimant explained that he returned to emergency room prior to obtaining the May 2005, appointment at the Family Clinic "because I kept getting this bad headache". (T. 14).

The testimony of the claimant reflects that medical treatment rendered to him by medical personnel at UAMS and at the Family Clinic consisted of medication and diagnostic tests. Claimant maintains that he was not provided an release by his treating and/or examining physicians to return to work. Claimant's testimony reflects that the medical bills for the treatment he received in connection with his injury growing out of the April 19, 2005, incident

remain unpaid.

Claimant testified he was fired by respondent-employer because of the incident. Following the afore claimant applied for and received unemployment compensation benefits. Claimant estimates that he received the afore benefits within three weeks of filing for same. Claimant continued to receive unemployment compensation benefits until he secured new employment with Carinas when the new restaurant was opened in west Little Rock.

In addition to replacement of dental work and eyeglasses as a result of the April 19, 2005, incident claimant testified regarding residual physical problems attributable to the assault:

Well, they suggested chiropractic care. I wen to Dr. Newers for a while and that was doing good but I just had a knot in the back of my neck so I, one of the doctors from the Med Center had suggested I go to see Dr. Barron. He's over on Rodney Parham. And he looked at me and gave me a steroid shot in my neck and I was like, wish he had done that ten weeks ago. (T. 15-16).

The testimony of the claimant reflects that the general manager, Ms. Hester, witnessed the April 19, 2005, incident. Nevertheless his employment was terminated. Claimant's testimony reflects:

She saw it. It was their policy, because it's a corporate entity, their corporate policy is if two people are involved in an altercation both people get fired. I've seen that several times at the restaurant. Mr. Robinson should have been fired three or four times because he started altercations that never went anywhere. He was just a little skinny kid. That's why, when I walked in I didn't even notice him because, I don't think he weighed a hundred pounds. Well, I mean, he did, but I really paid any mind to him, I never took him as a threat and to this day I don't have a clue why he attacked me. You know, I was like the old gazelle there, you know, that's the only thing I can figure. (T.16-17).

Claimant asserts that he sustained twenty (25) weeks of loss wages, from the time of the termination of his employment by respondent-employer until he actually obtained another job.

Claimant acknowledged that he received unemployment compensation benefits of \$160.00 per week. Claimant testified that he received a total of \$2,211.00, in unemployment compensation benefits. Claimant further asserts that he was under active medical treatment relative to the injuries growing out of the April 19, 2005, incident the whole time.

During cross-examination claimant testified that he had no idea why the was attacked by the other employee and struck at least three (3) time with the metal tray. Claimant denies doing anything to provoke the attack.

Claimant acknowledged that he had hypertension prior to the April 19, 2005, incident. Claimant maintains that while he took medication for the hypertension, the incident aggravated it even more. Claimant acknowledged that he was treated for headaches at the time of the emergency room visit following the April 19, 2005, incident:

Correct. I mean, when they sent me home that told me not to drive and they told my son to keep me up and not let me sleep or something and to ask me my name every two hours. I mean, they gave me all the things that you do for somebody that has a concussion. (T. 21).

The testimony of the claimant reflects that neither his partial dental or eyeglasses damaged in the April 19, 2005, incident could be repaired but had to be replaced. Claimant concedes that he applied for unemployment shortly after the April 19, 2005 incident. Claimant acknowledged that one of the requirement for unemployment was that he be able to work. The testimony of the claimant reflects regarding the afore:

I don't know if it asks you that, but if you asked for any work. I discussed this before, that's probably right. I don't know, I didn't get a job offer. So I don't know, you know, I didn't, I was a waiter and I was just in pain. (T. 24).

Claimant testified that he was not able to work "comfortably" during the time he received

unemployment benefits. The testimony of the claimant reflects that until he received the steroid injection from Dr. Barron he had pain in his neck which prevented him from working. Claimant testified that he did not go back to work until after the injection by Dr. Barron.

Claimant maintains that after twenty-five (25) weeks he got the injection from Dr. Barron and was thereafter able to return to gainful employment:

Yeah. When they suggested that I go see Dr. Barron instead of seeing this chiropractor cause apparently it wasn't doing the full thing for me. The chiropractor, I would be good for that day but the next day I was back in pain. (T. 25).

Claimant maintains that during the twenty-five (25) weeks that he was unable to work, and for which he now seeks temporary total disability benefits, he was recuperating from his injuries growing out of the April 19, 2005, incident.

Regarding his efforts at finding a job or employment during the time he was recuperating from the injuries growing out of the April 19, 2005, incident, claimant testified:

I was looking for something that I could do. And apparently I couldn't be a waiter, and it just didn't look good when you put down as a waiter that you were fired for fighting, if it was your fault or not. So I was actually looking for something a little different. I enjoyed waiting tables because it gave me time to take care of my kids, you know. (T. 25-26).

Claimant acknowledged that there was a requirement while receiving unemployment benefits that he seek employment:

Yes. I had to, after about ten weeks you have to go on job searches, which I did. I filled out the, I continued to shop.

I can't really recall. You just, you know I was always looking for another good waiter's job because I worked in fine dining for a long time, and that was always fun. But I enjoyed the Olive Garden because I got a lot, like I said, I was there for ten, eleven years. I had a lot of, you know, I go grocer shopping and little kids still run up to me and say you were

my waiter at Olive Garden, you know. I enjoyed that. (T. 26).

Claimant acknowledged that because he was on probation for a felony it prevented him from getting some jobs. Claimant testified that he has since returned to court and gotten his record cleared. Regarding the hindrance to finding employment of a felony on his record, the testimony of the claimant reflects:

Yes. Most of them have that little thing that says have you ever been convicted of a felony. It will not keep you from getting the job. That's not true. (T. 27).

The claimant received unemployment benefits until he found the new job as a server at Carinas, an Italian food restaurant. Claimant added:

Correct. I might even have collected afterwards because you get x amount of dollars, as long as you claimed your income, when it started out, we all weren't working forty hours a week so you know until they got rolling and motivated I might have collected a little longer. (T. 27).

Claimant's testimony reflects that the residuals from the April 19, 2005, incident have gone away or resolved:

As much as I can remember. Actually its not so much my head as my neck. I do have degenerative conditions in the regions. Now whether that was caused by that or not, you know, that should be in the report too. She even says that.

That I would have arthritis and this and that. I mean, they were speculating, that's all, matter of fact, they even sent me to see a doctor for my heels, and I was like, what does that, and they said, well, you know, your neck is connected, it goes all the way down to your heels and I went to OrthoArkansas. (T.28-29).

The claimant acknowledged that he is in arrears in child support payments.

Alan Brown testified that in April 2005, he was employed at respondent-employer and witnessed the attack involving the claimant and another employee. Mr. Brown worked the same

shift as the claimant on April 19, 2005. Regarding his observation of he attack, Mr. Brown testified:

I saw, I thought it was interesting because Desmond left his station, went to the back kitchen, walked through, picked up a bread tray, which he didn't need. (T. 33).

Mr. Robinson's work station L station.

It was L station. And walked to the other side of the restaurant, which the restaurant is set up where you have one side, waiters work one side, and the side I was working in, there is an alley that runs between the two. Daniel was on the other side, when he came in through the door, I mean, he jumped up and just hit him straight down on the top of his head with a bread tray. And it was a heavy gauge tray. So I mean, its not like a thin, flimsy one, this one was heavy, and repeatedly hit him. (T. 33-34).

Mr. Brown testified that he was one of the people that pulled the two employees apart. Mr.

Brown's testimony reflects that he saw the claimant's partial dental and eyeglasses on the floor.

Regarding any damage to the afore, Mr. Brown testified:

Well, because of the amount of people that came in, I happened to be up close and I just stepped to the back and other people were, they were useless by the time he left. (T. 34).

Mr. Brown's testimony reflects regarding his ability to observe the claimant when the departed the restaurant following the incident:

No. Not really, because I was trying to work. I know he was worried about being able to drive. (T. 34).

Mr. Brown testified that he did not observe any physical injury on the claimant, however added:

No. I could see he was bleeding but I did not see the scar. (T. 34).

During further examination, Mr. Brown testified that the claimant did not start the fight.

Further, regarding any altercation he may have had with Mr. Robinson, Mr. Brown's testimony

reflects:

Many. And everybody did. I mean, he was actually a street fighter that they should have never hired. (T. 35).

During cross-examination, Mr. Brown testified regarding the damage to the claimant's partial dental and eyeglasses:

I did not physically see them damaged. I know he did leave without his glasses, because he was concerned about driving without them. (T. 36).

Regarding his actions in breaking up the altercation, Mr. Brown testified:

No. I just put my arms around him and walked him back to the side. He did not try to continue the attack after he was attacked. When it was broke up and they told him to step back and he stepped back. Some of the others had the others had the other guy and had him restrained. (T. 36).

The record reflects the presence of an incident report of April 19, 2005, regarding the claimant which was completed by his supervisor. The afore document reflects that the claimant was struck in the head by another person with a tray and recited the injury as "concussion". (CX. #1, p. 1). The evidence further reflects the presence of a Little Rock Police Information Report of April 21, 2005, regarding the assault involving the claimant and Desmond which occurred on April 19, 2005. (CX #1, p. 3-4).

The medical in the record reflects that the claimant was seen at UAMS emergency room on April 21, 2005, relative to a head injury. (CX. #1, p. 5-7). On May 7, 2005, the claimant was again seen at the emergency room of UAMS relative to headache. The discharge sheet regarding the afore visit of the claimant directed that the claimant refrain from driving while taking Vicoden; that the claimant return for further treatment if his pain worsen; and that he schedule a

follow-up appointment with internal medicine. (CX. #1, p. 8). The evidence in the record reflects that the claimant was seen on May 11, 2005, at the Family Medical Center by Dr. Sikandar Murad relative to head trauma. The medical record regarding the visit noted the primary insurance provider as “worker’s comp”. The report reflects that a follow-up appointment was scheduled for Friday. (CX #1, p. 10-11).

There is documentation in the record to reflect that the claimant was seen in follow-up at Family Medical Center on July 8, 2005; July 15, 2005; and July 22, 2005. (CX. #1, p. 12-14). The evidence in the record further reflect that on April 27, 2005, claimant purchased a Max Partial Dental Cast Meta totaling \$1098.00, from Dr. Ned Alley, DDS. (CX. #1, p. 15-19).

The record reflects the presence of documentation evidencing the purchase of eyeglasses at J.C. Penney Optical on July 27, 2005, totaling \$813.80. The claimant has also furnished wage records which reflect that he was paid weekly. For the pay period beginning May 10, 2004, and ending May 16, 2005, the claimant received a check on May 21, 2004. The gross earning reflected as having been earned by the claimant was \$623.55. Documentation regarding the afore reflects that the same was comprised of tips, overtime, and the claimant’s regular. Claimant maintains that his average weekly wages were \$400.00.

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical records and supporting documentation, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On April 19, 2005, the relationship of employee-employer-carrier existed among

the parties.

3. On April 19, 2005, the claimant earned an average weekly wage of \$400.00, which generates compensation benefit rates of \$267.00/\$200.00, for temporary total/permanent partial disability.

4. On April 19, 2005, the claimant sustained an injury arising out of and in the course of his employment, pursuant to Ark. Code Ann. §11-9-102 (4)(A)(i).

5. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he was rendered temporarily total disabled from engaging in gainful employment as a result of the April 19, 2005, compensable injury.

6. The respondents shall pay all reasonable hospital, and medical expenses arising out of the compensable injury of April 19, 2005.

7. The respondents have controverted this claim in its entirety.

CONCLUSIONS

The claimant asserts that as a result of injuries sustained in an unprovoked assault by a co-worker while within the course and scope of his employment he incurred medical treatment which was reasonably necessary in the treatment of his injuries and was rendered totally incapacitated from engaging in gainful employment for a period of twenty-five (25) weeks. Claimant seeks the afore corresponding workers' compensation benefits. Respondents deny that the claimant is entitled to any workers' compensation benefits or that he sustained a compensable injury while within the employment of same.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having

been sustained subsequent to the effective date of the afore provisions. In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A) (i). *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). An accidental injury also includes injury or damage to prosthetic appliances, including eyeglasses, hearing aids, contact lenses. A compensable injury does not include injury to any active participant in assaults or combats, which are the result of non-employment-related hostility or animus of one, both or all to the combatants. Ark. Code Ann. §11-9-102 (4)(B)(i).

The credible evidence in the record reflects that on April 19, 2005, the claimant, while discharging his employment duties, was assaulted in an unprovoked attack by a co-worker. Claimant received at least three (3) blows to the head with a metal bread sheet by the co-worker. Further, the credible evidence in the record reflects that the claimant was bleeding as a result of the blows and the damages were sustained to the claimant's eye glasses and dental prosthesis.

The credible evidence reflects that the claimant sought and obtained treatment relative to the April 19, 2005, injuries at the emergency room of UAMS. The record reflects that respondent was provided information sufficient to characterize the claimant's injury as a concussion as a result of the blows to the head sustained in the assault. The nature and

mechanics of the claimant's injury is amply supported by the credible testimony in the record. Further, the medical reflects that the claimant was prescribed narcotic medication in the treatment of his injury. Alan Brown provided credible testimony of the claimant bleeding following the assault, as well as the damage to the claimant partial dental prosthesis and eyeglasses. The Arkansas Court of Appeals has observed that there will be times when a claimant's account of a work-related incident and the resulting injury is the only evidence available as to the causation between the two. In such cases, the issue of causation resolves down to a matter of credibility. The weight and credibility of the testimony are matters exclusively within the province of the Commission. *Stephen Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

In the instant claim, the claimant has sustained his burden of proof by a preponderance of the credible evidence that he sustained an injury arising out of and in the course of his employment of April 19, 2005, when he was assaulted in an unprovoked attack by a co-worker. Further, the injury required medical treatment, and is supported by objective findings. Further, the evidence preponderates that the claimant sustained damage to his eyeglasses and dental prosthesis which had to be replaced. Respondents are liable for the cost of the replacement of the afore. Respondents have controverted this claim in its entirety.

Ark. Code Ann. §11-9-508 (a) mandates that the employer provide such medical services as may be reasonably necessary in connection with an employee's injury. *Cox v. Klipsch & Associates*, 433 Ark. App. 433, 30 S.W.3d 764 (2000). What constitute reasonable and necessary medical treatment is a question of fact for the Commission. *Wackenhut Corporation v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). In the instant claim, the claimant has submitted

credible evidence of the medical treatment he received in connection with the April 19, 2005, compensable injury. The evidence submitted by the claimant reflects that he paid for some of the medical treatment and apparatus in connection with the treatment of his injury. The documentation correlates with the time period of the claimant's active receipt of medical treatment relative to the April 19, 2005, compensable injury. Respondent controverted the compensability of the claimant's claim. The evidence preponderates that medical treatment rendered to the claimant by UAMS, the Medical College Physician Group, UAMS Family Medical Center, Dr. Edwin Barron, and Dr. Darren Beavers, was reasonably necessary in connection with the claimant's April 19, 2005, compensable injury. Respondents have controverted this claim in its entirety.

A claimant is entitled to the payment of temporary total disability during his healing period if he shows by a preponderance of the evidence that he had a total incapacity to earn wages. *Carroll General Hospital v. Green*, 54 Ark App. 102, 923 S.W.2d 878 (1996). The healing period is defined as the period for healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102 (12). While the evidence preponderates that the claimant received active medical treatment in connection with the injury growing out of the April 19, 2005, assault, there is no medical in the record reflecting that any of his treating physicians directed that he remain off work while undergoing the treatment. Claimant acknowledged that he received unemployment compensation benefits following the termination of his employment by respondent until he secured new employment. In order to receive the afore unemployment compensation benefits claimant had to actively seek employment and to hold himself out as ready, willing and able to work. The claimant has failed to sustain his burden of proof by a

preponderance of the evidence that he was rendered temporarily totally disabled for the requisite period of time to entitle him to the payment of corresponding temporary total disability benefits.

AWARD

Respondents are herein order and directed to pay all reasonably necessary medical, hospital, nursing, and other apparatus expenses growing out of and in connection with the treatment of the claimant's compensable injury of April 19, 2005. The afore include reimbursing the claimant for the cost of replacement of his eyeglasses, dental prosthesis and prescription medication, totaling \$2048.85, and medical treatment totaling \$3,882.15. Said sums accrued shall be paid in lump without discount.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. §11-9-809, until paid.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE