

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F806041

FRANCES JOHNSON	CLAIMANT
SILOAM SPRINGS SCHOOL DISTRICT	RESPONDENT
RISK MANAGEMENT RESOURCES/TPA CARRIER	RESPONDENT

OPINION FILED MAY 4, 2009

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by CONSTANCE CLARK, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On February 3, 2009, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on December 31, 2008, and a pre-hearing order was filed on January 6, 2009. A copy of the pre-hearing order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

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

2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant's weekly compensation rate will be determined at a later time.

4. The claimant sustained a compensable left foot injury on October 17, 2007, while employed by the respondent.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's right shoulder injury.
2. Related medical.
3. Temporary total disability.
4. Permanent partial disability.
5. Attorney's fees.
6. Claimant's applicable temporary total disability and permanent partial disability rates.

Claimant's contentions are:

"Claimant sustained a compensable injury while working for Respondent on or about October 17, 2007. At that time, Claimant slipped and fell, injuring her left foot. As a result of Claimant's foot injury, she was placed in a boot, which was the direct cause of a fall that resulted in Claimant injuring her right shoulder on March 19, 2008. The Respondents have failed to pay medical bills associated with Claimant's shoulder injury."

Respondents' contentions are:

"The respondents acknowledge that the claimant sustained a compensable accidental injury to her left foot when she fell while working for the Siloam Springs School District on October 17, 2007. The respondents have paid (and continue to pay) the claimant's medical expenses for treatment of that injury. On March 19, 2008, the claimant lost her footing while walking down some steps at her parents' home and injured her right shoulder. The respondents contend that the claimant did not injure her right shoulder in the course or scope of her employment and that her right shoulder difficulties are not causally related to her compensable left foot injury. The

respondents deny all responsibility for the claimant's right shoulder injury. The respondents reserve the right to amend these contentions after the completion of investigation and discovery."

The claimant is a fifty-two-year-old female employed by the respondent as a counseling secretary/registrar. She suffered an admittedly compensable injury to her left foot on October 17, 2007, while performing employment services for the respondent. The medical treatment for her admittedly compensable injury to her left foot required the claimant to wear a boot on her left foot.

In testimony to the Commission, the claimant had the following exchange on direct examination:

Q. Okay, for the record I'm going to have you describe this boot a little bit. Do you actually fit a shoe into the boot or do you have your shoe off and you put your foot into this boot?

A. You don't have your shoe on. You just have socks on and you just slip your foot into it and then Velcro it tight onto your foot.

Q. Okay, and what size of foot do you have?

A. 10½ to 11.

Q. And this boot is actually bigger than - than your shoe?

A. Yes.

Q. And for the record can you describe this - the heel on the back and how that looks and how would you describe that?

A. The heel is open on it in the back here and then it has a lip off the back of the boot that sticks out probably about quarter of an inch on the back of it.

Q. And we've submitted a photograph of the boot, which is marked as 3d, is that a

accurate photograph of the boot and the lip that you're describing?

A. Yes.

The central issue in this matter surrounds a fall the claimant alleges occurred on March 19, 2008. It is the claimant's contention that while at her parents home. She was descending down a small flight of stairs when her boot caught the lip of a step and caused her to fall. She received medical treatment by Dr. Sites as a result of this fall, and was diagnosed with a large rotator cuff tear and an AC joint arthropathy with inferior spurs.

On May 6, 2008, the claimant underwent the following procedures for her right shoulder difficulties as reported in Dr. Sites report of operation:

1. Arthroscopy - shoulder - right.
2. Arthroscopic subacromial decompression.
3. Rotator cuff repair, mini-open - right.
4. Arthroscopic glenohumeral synovectomy/debridement biceps tendon - non-incidenta1.
5. Distal clavicle resection.

To prove that the injury to the claimant's right shoulder is a compensable injury the claimant must prove that there is a causal connection between her admittedly compensable left foot injury and the injury to her right shoulder. In City of Van Buren Municipal League WC Trust v. Spears, 2007 WL4327930 which states, "When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury, and the basic test is whether there is

a causal connection between the injury and the consequences of such.”

To receive benefits, the claimant must also overcome Ark. Code Ann. §11-9-102(4)(F)(iii) which states, “Under this subdivision (4)(F), benefits shall not be payable for a condition which results from a non work-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A non work-related independent intervening cause does not require negligence or recklessness on the part of a claimant.”

In the present case the claimant was attempting to negotiate four steps at her parents home. She was doing so with a boot on her left foot that was required for her admittedly compensable injury. It is the claimant’s credible testimony that the boot got caught on one of the steps causing her to fall. At which time she reached for the rail and injured her shoulder.

The claimant also credibly testified that she had negotiated these steps hundreds of times without the boot prior to the accident. There is a causal connection between the claimant’s admittedly compensable injury and her injury to the right shoulder from the fall. If the claimant did not have on the boot, I do not believe she would have fallen. Inasmuch, the shoulder injury which was the result of a fall is causally connected to her admittedly compensable injury.

As to the respondents’ Ark. Code Ann. §11-9-102(4)(F)(iii) argument of an independent intervening cause, Arkansas law is well

settled in Davis v. Old Dominion Freight line, Inc., 341 Ark. 751 (2000). To be an independent intervening cause the claimant must have been acting unreasonable under the circumstances. Here the claimant was going down four steps with a medically prescribed boot on her left foot. The medical record indicates no restriction on the claimant's ability to move up or down steps. The claimant also testified that she was under no such restriction.

Respondents contend that it was unreasonable not to use the hand rail when going down the steps. The claimant testified that she did not use the hand rail until she started to fall. After review of the pictures of the steps submitted into evidence and their description during testimony, I believe that it was reasonable for the claimant not to use the hand rail. There was no independent intervening cause for the claimant's shoulder difficulties.

MEDICAL TREATMENT

The claimant's right shoulder injury on March 19, 2008, is a compensable injury. The claimant sought and received medical treatment for her right shoulder. I have reviewed those medical records regarding treatment to her right shoulder including the surgical procedures performed. The treatment regarding her right shoulder submitted into evidence in this matter is both reasonable and necessary to treat her compensable right shoulder injury.

TEMPORARY TOTAL DISABILITY

The claimant also requested that the Commission consider temporary total disability benefits regarding her right shoulder.

The medical records indicate that she had surgery performed on her right shoulder on May 6, 2008. At that time the claimant was rendered temporarily totally disabled. Dr. Sites released the claimant back to work on May 27, 2008, with some work restrictions. I find that the claimant was temporarily totally disabled from May 6, 2008, until May 27, 2008. She is entitled to temporary total disability benefits for that time frame.

PERMANENT PARTIAL DISABILITY

As a result of her injury and surgery to claimant's right shoulder, Dr. Sites authored a letter on November 20, 2008, regarding the claimant's permanent disability. His letter in part stated:

“Utilizing AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, table 27, her distal clavicle resection results in a 10% right upper extremity impairment, and based on the mild residual weakness from her rotator cuff repair she has a 4% right upper extremity impairment, with a combined right upper extremity impairment of 14% , 8% whole person impairment if applicable. These statements are made within a reasonable degree of medical certainty based upon the objective factors above.”

After a review of the medical records and the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, I disagree with Dr. sites.

In his evaluation of the claimant's permanent impairment, Dr. Sites considered the 10 percent right upper impairment for the distal clavicle resection that is found in the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 27. However, his consideration is for an isolated distal clavicle resection

which is not the case here. He also assessed 4 percent to the right upper extremity for residual weakness from her rotator cuff repair. This seems to be a subjective rather than objective finding as it relates to residual weakness, a subjective finding.

The AMA Guides, Page 3/61 under the heading of Arthroplasty States:

“Arthroplasty of a joint may be carried out with or without an implant. Simple resection arthroplasty is given 40% impairment of the joint value; implant arthroplasty is given 50% impairment of the joint value. Table 27 provides impairment ratings for the upper extremity for arthroplasty of specific joints, based on these values.”

Table 27 gives the total shoulder arthroplasty a 24 percent impairment to the upper extremity. I find this to be the case in that the following procedures were performed on the claimant's right shoulder:

1. Arthroscopy - shoulder - right.
2. Arthroscopic subacromial decompression.
3. Rotator cuff repair, mini-open - right.
4. Arthroscopic glenohumeral synovectomy/debridement biceps tendon - non-incidental.
5. Distal clavicle resection.

It is clear that the procedures performed were over the whole right shoulder not just an isolated distal clavicle that was considered by Dr. Sites. The claimant is entitled to 24 percent to the upper right extremity which translates to 14 percent to the whole person using the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 3.

COMPENSATION RATES

It is the respondents' contention that the claimant is entitled to an average weekly wage of \$413.88. That average weekly wage would translate to a temporary total disability rate of \$276 per week and a permanent partial disability rate of \$207 per week. The respondents contend that the claimant's salary of \$21,522.00 should be divided by fifty-two weeks which would give the claimant the afore mentioned average weekly wage of \$413.88.

It is the claimant's contention that the claimant's salary of \$21,522.00 should be divided by forty weeks. This would result in an average weekly wage of \$558.05 which translates into a temporary total disability rate of \$358.70 per week and a permanent partial disability rate of \$269 per week.

The claimant is employed by respondents who contract her to work for them. The contract was submitted into evidence as Respondents' Exhibit #2. It is clear that the contract is for a period of 200 days and for the rate of \$21,522.00. The relevant sections of Ark. Code Ann. §11-9-518 are as follows:

“(a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of accident and in no case shall be computed on less than a full-time workweek in the employment.

(C) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.”

The claimant relies on Magnet Cove School District v. Barnett, 81 Ark. App. 11, 97 S.W.3d 909 (2003), a case in which the average weekly wage of a teacher contracted to work 188 days was computed by dividing her total compensation by the stated length of the contract which was thirty-nine weeks.

The respondents contend that the Arkansas Supreme Court's decision in Sierra v. Griffin Gin, 374 Ark. 320, 2008, overruled the Court of Appeals decision in Magnet Cove, I disagree. In the Sierra case the Supreme Court upheld the workers' Compensation Commission's decision to compute the average weekly wage for the claimant by dividing the claimant's salary by fifty-two weeks instead of the nine weeks for which the claimant was contracted.

In doing so the Supreme Court Stated:

"Based on our standard of review and the record before us, we must affirm the Commission's decision. See Texarkana School Dist., supra. We cannot say that reasonable minds could not reach the Commission's conclusion that Sierra's average weekly wage should be computed by dividing the total wage by 52 weeks rather than 9 weeks. Accordingly, viewing all of the evidence in a light most favorable to the Commission, we affirm on this point."

To understand the Court's decision, we must look at the workers' Compensation Commission's reasoning in Sierra. The Commission found that the claim represented an exceptional circumstance found in Ark. Code Ann. §11-9-518(c). The Commission reasoned that:

"This claim is distinguishable from prior cases primarily because the claimant was under contract to work for nine weeks, versus an unlimited number of weeks throughout the year

depending on the weather or other factors, or pursuant to a yearly, renewable contract.”

In the present case, we have a renewable contract with a respondent school district. This is not a case of an exceptional circumstance. The decision by the Supreme Court in Sierra did not overrule the decision in Magnet Cove as the respondents contend it distinguished an “exceptional circumstance” from a contract such as the claimant had. Here the Magnet Cove case controls.

The claimant’s average weekly wage should be calculated by dividing her salary of \$21,522.00 by 40 weeks. Her average weekly wage is \$538.05 which translates to a temporary total disability rate of \$358.70 per week and a permanent partial rate of \$269 per week.

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 witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on December 31, 2008, and contained in a pre-hearing order filed January 6, 2009, are hereby accepted as fact.

2. There is a causal connection between the claimant’s admittedly compensable injury of October 17, 2007, to her left foot

and the injury she sustained on March 19, 2008, to her right shoulder.

3. The claimant was acting reasonably when she descended stairs at her parent's home while wearing her medically prescribed boot.

4. There was no intervening independent cause that occurred on March 19, 2008, in regard to the claimant's right shoulder injury.

5. The claimant suffered a compensable injury on March 19, 2008, when she injured her right shoulder.

6. The medical treatment provided to the claimant for her right shoulder difficulties was both reasonable and necessary.

7. The claimant is entitled to temporary total disability benefits as a result of her compensable right shoulder injury from May 6, 2008, until May 27, 2008.

8. The claimant is entitled to a permanent impairment rating of 24 percent to the upper right extremity which translates to a 14 percent impairment to the body as a whole regarding her right shoulder.

9. The claimant's average weekly wage shall be calculated by dividing \$21,522.00 by 40 weeks. which translates to an average weekly wage of \$538.05. The claimant is entitled to a temporary total disability rate of \$358.70 per week and a permanent partial disability rate of \$269 per week.

10. The claimant's attorney is entitled to an attorney's fee in this matter as set out in the Arkansas workers' Compensation Act.

ORDER

_____The respondents shall pay the claimant temporary total disability benefits that she is entitled to from May 6, 2008, until May 27, 2008 at a rate of \$358.70 per week. The respondents shall pay the claimant benefits related to her permanent impairment of 14 percent to the body as a whole. The permanent partial disability rate is to be \$269 per week. The claimant is entitled to the reasonable and necessary medical treatment for her compensable right shoulder difficulties. These medical costs shall be paid by the respondents. The claimant's attorney is entitled to an attorney's fee in this matter as set forth by the Arkansas Workers' Compensation Act.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE