

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G005376

HOLLY WEST, Employee

CLAIMANT

CELEBRATION PYROTECHNICS, Uninsured Employer

RESPONDENT

OPINION FILED JULY 5, 2012

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

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

Respondents represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On June 13, 2012, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 30, 2011, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

There were no stipulations entered into between the parties.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Employee/employer relationship on July 4, 2008.
2. Compensation rate.
3. Compensability of injury to claimant's hand and wrist on July 4, 2008.
4. Related medical.
5. Temporary total disability benefits from July 4, 2008 through a date yet to be determined.
6. Attorney fee.

At the time of the hearing the claimant clarified her requested period of temporary total disability benefits to include July 4, 2008 through August 15, 2008.

The claimant contends she sustained a compensable injury while working for respondent on July 4, 2008 when she sustained an injury to her left hand and wrist. She contends she is entitled to the payment of related medical, temporary total disability benefits, and an attorney fee. Claimant contends that her compensation rate should be \$200.00 based upon a payment of \$300.00 per job.

The respondent contends that claimant was not an employee on July 4, 2008, but instead was a volunteer attempting to obtain a license. Respondent contends that claimant would be entitled to compensation at the minimum rate of \$20.00 if this claim were compensable.

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 Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed between claimant and respondent on July 4, 2008.
3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left hand while employed by respondent on July 4, 2008.
4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable left hand injury.
5. Claimant is entitled to temporary total disability benefits beginning July 4, 2008 and continuing through August 15, 2008.

6. Claimant is entitled to compensation at the rate of the \$20.00 minimum as set forth in A.C.A. §11-9-501(b).

7. Respondent has controverted claimant's entitlement to unpaid indemnity benefits.

FACTUAL BACKGROUND

_____The claimant currently lives in Roland, Oklahoma with her husband and two children. In July 2008 the claimant worked a full time job at FWCC, Inc. in Muldrow, Oklahoma, performing data entry and billing. The claimant also on occasion worked with Alesha Bennett, the owner of respondent, a pyrotechnics firework company. On occasion claimant would work for Bennett setting up and shooting firework shows. On July 4, 2008 the claimant was working with respondent to perform a firework show at Van Buren when she suffered an injury to her left hand. The claimant was using a road flare to light small shells. Claimant testified that she lit three shells at a time and one did not go off and when she went to check on the fuse and light it the shell went off with her hand over the tube.

After this accident claimant was taken by ambulance to Sparks Hospital where she was diagnosed with multiple fractures of the left index finger, damage to the middle finger and thumb, as well as a burn injury to her hand. Claimant underwent surgery by Dr. Bise which included insertion of pins in her index finger.

Claimant has filed this claim contending that she suffered a compensable injury while employed by the respondent. She seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

_____Initially, I find that the Arkansas Workers' Compensation Commission has

jurisdiction and that the respondent had the requisite three employees sufficient for workers' compensation purposes. Claimant testified that working on the night of July 4, 2008, in addition to herself was her husband, Alesha Bennett, and Alesha Bennett's husband. These four employees are sufficient to invoke the Arkansas Workers' Compensation jurisdiction. A.C.A. §11-9-102(11)(A).

I also find that claimant was an employee of the respondent on July 4, 2008, not a volunteer. The claimant testified at the hearing and I find her testimony to be credible and entitled to great weight. Claimant testified that she had performed some three or four jobs for Bennett over the course of 2007 and 2008 involving firework shows. For each of these shows claimant was paid some cash. In addition, claimant testified that at one point Bennett paid for her to attend a one-day fireworks training course in Missouri. Claimant also testified that Bennett provided all of the equipment and supplies used in the firework shows and that she made all the decisions as to how the fireworks were to be shot.

Based upon the claimant's testimony which I find to be credible, I find that claimant was an employee of the respondent on July 4, 2008.

I also find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left hand while employed by respondent on July 4, 2008. Here, claimant contends that she suffered a compensable injury to her left hand when a firework went off while her hand was over the tube. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in

disability or death;

(3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;

(4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that the injury arose out of and in the course of her employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. Here, as previously discussed, claimant testified that she suffered the injury to her hand when the shell went off with her hand over the tube while she was checking on a delayed fuse. At the time of this injury claimant was performing the job which she had been assigned by Bennett.

I also find that the injury caused internal and external physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury. Here, claimant was taken to the emergency room where she was diagnosed with multiple fractures of the left index finger, damage to the middle finger and thumb, as well as a burn injury to her hand. As a result of this compensable injury claimant had pins inserted during surgery by Dr. Bise.

Based upon the foregoing evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left hand while employed by respondent on July 4, 2008.

Having found that claimant suffered a compensable injury, I find that respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

The next issue for consideration involves claimant's request for temporary total

disability benefits. The injury to claimant's hand is a scheduled injury. A claimant who suffers a scheduled injury is entitled to receive temporary total or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first, regardless of whether there is a total incapacity to earn wages. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2000). Here, claimant is requesting temporary total disability benefits beginning July 4, 2008 and continuing through August 15, 2008. I find that during this period of time the claimant was within her healing period and that she had not returned to work for the respondent or her other employer. At the time of her hospitalization Dr. Bise completed a form indicating that claimant would need to be off work a minimum of one month. Dr. Bise reiterated this in a note dated July 29, 2008, in which he indicated that claimant would need to be off work for at least three more weeks.

Based upon this evidence, I find that claimant remained within her healing period and that she had not returned to work for the requested period of time from July 4, 2008 through August 15, 2008. Accordingly, claimant is entitled to temporary total disability benefits for this period of time.

The final issue for consideration involves claimant's compensation rate. Claimant contends that her compensation rate should be \$200.00 based upon a payment of \$300.00 per job while respondent contends that claimant would be entitled to the minimum compensation rate of \$20.00.

A.C.A. §11-9-518(c) states that if because of exceptional circumstances the average weekly wage cannot be fairly and justly determined by the formula set out by statute, the Commission may determine the average weekly wage by a method that is fair and just to all parties concerned. A.C.A. §11-9-501(b) states that the minimum compensation rate shall be \$20.00 per week.

After reviewing the evidence presented, I find that claimant's compensation rate

should be the minimum of \$20.00 per week. Claimant's contention that her compensation rate should be based on \$200.00 per week based upon a payment of \$300.00 per job would not be a fair and just representation of the claimant's average weekly wage. First, the evidence does not indicate that claimant was paid \$300.00 per show. When asked about a check made payable to her husband in the amount of \$500.00, claimant indicated that she was to be paid \$300.00 and her husband was to be paid \$200.00 of the \$500.00. However, this \$300.00 was not for one fireworks show but two. Claimant testified at the hearing that in addition to the fireworks show in Van Buren where she was injured, the payment was also for setting up and tearing down a show which was not shot in Alma. Thus, claimant was not paid \$300.00 per show.

In addition, I note that claimant also testified that she had only worked at three or four firework shoots over the course of two or three years. For instance, the claimant admitted that in 2008 she had earned a total of \$375.00 from respondent. While claimant was unsure exactly how much she had earned during the calendar year of 2007, she admitted that it was less than \$600.00 because she had not claimed any income on her taxes it was her understanding that the income did not have to be claimed if it was less than \$600.00.

Based upon this evidence, it would not be fair and just to determine claimant's compensation rate based upon an average weekly wage of \$300.00 per week and a compensation rate of \$200.00 when she earned significantly less than that amount. Instead, I find that claimant is entitled to compensation at the rate of the minimum \$20.00 per week. The \$20.00 minimum would entitle claimant to a yearly amount of \$520.00 which would exceed the amount she was paid in 2008 and there is insufficient evidence that she earned more than that amount in 2007 while there is evidence that claimant did earn less than \$600.00.

In summary, claimant's work with the respondent would be described as sporadic

at best. According to her testimony she only worked three or four shows for the respondent over the course of at least a two-year period. Based upon this evidence as well as the amounts paid to the claimant, I find that she is entitled to compensation at the rate of \$20.00 per week as set forth in A.C.A. §11-9-501(b).

AWARD

The Arkansas Workers' Compensation has jurisdiction of this claim. On July 4, 2008 the employee/employer relationship existed between claimant and respondent. On July 4, 2008 claimant suffered a compensable injury to her left hand. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits from July 4, 2008 through August 15, 2008. Claimant is to be paid compensation at the rate of \$20.00 per week. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondent is ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$264.90. Respondent is entitled to a credit for \$100.00 which was paid at the time of the hearing. Therefore, respondent is liable for the balance in the amount of \$164.90.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE