

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G300314

JOSE MARTINEZ, EMPLOYEE

CLAIMANT

3 D ROOFING, UNINSURED EMPLOYER

RESPONDENT

OPINION FILED APRIL 8, 2014

Hearing before ADMINISTRATIVE LAW JUDGE AMY GRIMES, in Fort Smith, Sebastian County, Arkansas.

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

Respondent represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On January 13, 2014, the above captioned claim came before the Workers' Compensation Commission in Fort Smith, Arkansas, for a hearing. A pre hearing conference was conducted on November 19, 2013, and a pre hearing order filed that same day. A copy of the pre hearing order has been marked as Commission's Exhibit No. 1 and with modification and without an objection is made part of the record. The parties agree to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The relationship of employee-employer-insurance carrier existed on September 27, 2012.
3. This case is controverted in its entirety.
4. The rates of compensation are to be determined.

The following issues are to be litigated:

1. Whether claimant sustained a compensable injury to his right leg on September 27, 2012.

2. Whether claimant is entitled to payment of medical bills.
3. Whether claimant is entitled to additional treatment for his right leg.
4. Whether claimant is entitled to temporary total disability from September 27, 2012 to September 15, 2013.
5. The amount of compensation rates for TTD and PPD.
6. Attorney fees.

The claimant contends (including affirmative defenses) that: he sustained a compensable injury while working for respondent on or about September 27, 2012. At that time, claimant sustained a right leg injury while in the course and scope of his employment. The respondent made no contentions at this time as discovery is ongoing.

The stipulations agreed to by the parties at the pre hearing conference are hereby accepted as fact. From a review of the record as a whole to include medical reports, documents, and having heard testimony and observed the witness and his demeanor, the following decision is rendered.

#### FACTUAL BACKGROUND

The claimant, in this matter, began working for the respondent in May or June of 2011. He worked Monday through Friday six to eight hours. The claimant testified that he began work at 6:30 or 7:00 A.M. and finished work at 4:00 or 4:30 in the evening(Record, 6). The claimant stated he would meet the other workers at Don Sigmon's residence. Mr. Sigmon is the owner of 3-G Roofing. He continued that Mr. Sigmon set the work hours(Record, 6). The

claimant testified that Mr. Sigmon also made the job assignments. He continued that the made thirteen dollars and hour for "tear off" and "\$25 a square for putting down shingles"(Record, 7). The claimant stated that Mr. Sigmon kept a notebook with the names of the workers for the week. He kept track of the hours worked and squares put on roofs during the day(Record, 8). The claimant continued that at the end of the work week, he was paid. He added he was paid cash for his work and he would sign "the book"(Record, 8). The claimant continued to testify that he was being paid an average of \$400 dollars per week prior to his accident on September 27, 2012. He added that he was not provided with any type of stub and Mr. Sigmon was in possession of the "notebook"(Record, 9). The claimant stated that he was satisfied with the Court using the \$400 as an average weekly wage(Record, 9). The claimant stated there was a total of six workers employed with the respondent, including Mr. Sigmon. He added that Mr. Sigmon also did some of the work(Record, 9). The claimant continued that if Mr. Sigmon did not supervise a job, Earl would be the supervisor. He added that in addition to roofing houses and removing decking, he also worked cleaning up and carrying equipment for the jobs. The claimant also stated that he also helped maintain the equipment(Record, 10, 11). He added that the equipment was provided by Mr. Sigmon and the equipment was transported to the job site in company vehicles by either Don or Earl(Record, 10).

The claimant testified that on September 27, 2012, he reported to work at Mr. Sigmon's home and then rode to the job site, with

Earl(Record, 11). The claimant stated, that on that day, he was tearing off a roof. He stated, "the toe board that I was on gave way and the momentum took the roof with me and I went over the edge. I fell"(Record, 11). The claimant testified that the roof was almost straight up and down and he fell off the edge of the roof(Record, 11-12). The claimant continued that the toe board was provided by Mr. Sigmon. He added that there was a safety rope in place that had been attached by Earl(Record, 12). The claimant testified that once he started to fall, the momentum of his weight caused the nails holding the rope to open and the rope to come loose(Record, 12-13). He continued that he had nailed up the toe board and Earl had nailed up the rope. The claimant stated that he nailed the toe board the way he had been trained(Record, 13).

The claimant testified that when he fell from the roof, he broke his right tibia in four places. The medical records from September 27, 2012 reflect the claimant's admittance to the hospital(Claimant's No. 1, p. 1-3). The records submitted also made note of x-ray findings of an "open tib/fib fracture" and not a plan to proceed with operative fixation(Claimant's No. 1, p. 4). The claimant testified that Mr. Sigmon, Earl and another worker, Ronnie, were all at the work sight when he fell. Mr. Sigmon and Earl were supervisors(Record, 13). The claimant stated that he was doing everything he was supposed to do under the direction of Mr. Sigmon and Earl(Record, 13). The claimant was life flighted from the job site. He testified that the life flight bill was in excess of \$17,000(Record, 13; Claimant's No. 1, p. 29). The claimant was

in the hospital five or six days. The bill for the hospital stay was \$88,000 (Record, 14). The claimant submitted hospital billing records. Those records reflect that the hospital bills total \$88,797.36. Additionally, they reflect that the hospital took an uninsured discount of \$22,196.84. The balance listed on the hospital statement reflects a total of \$66,595.52 (Claimant's No. 1, p. 39). The claimant continued to testify that he had surgery while in the hospital. The record reflects that the claimant's surgery took place on September 29, 2012 (Claimant's No. 1, p. 10-14). Dr. Daus performed the surgery. The nurse's notes in the operative record state the following: "I spoke with the patient's supervisor, Don Sigmon. Inquired about this injury and if this was related to work comp. Per Mr. Sigmon, this is not work comp. He states, "he was just careless; he was supposed to put some nails into a board that he was standing on and slipped." Phone call was then ended by Mr. Sigmon (Claimant's No. 1, p. 15). Dr. Daus noted on November 29, 2012 that at eight weeks post right tib-fib fracture the claimant was doing well with a well healed incision (Claimant's No. 1, p. 76). On January 8, 2013, Dr. Daus noted a well-healed incision with no evidence of hardware failure (Claimant's No. 1, p. 78). On April 16, 2013, again Dr. Daus noted that healing was progressing. The doctor also noted that the claimant would need follow up x-rays of the right tibia upon return to the clinic (Claimant's No. 1, p. 79). He noted that the claimant would likely be released from the clinic at the next visit (Claimant's No. 1, p. 79). The claimant testified that he was

under Dr. Daus' care until June 11, 2013 when he was released to return to work(Record, 14). The claimant testified that he found work on September 15, 2013, at Tyson Foods in Berryville. He stated that on June 11, 2013 he began to actively look for work(Record, 15). The claimant stated that he was on crutches for six to seven months, then went to a walking boot and was released from everything on June 11, 2013(Record, 15, 16). The claimant testified that he could not have worked as a roofer while using crutches or a walking boot(Record, 16). He added that he was on restrictions while he was using the crutches and the walking boot. Those restrictions kept the claimant from any physical work(Record, 17). The claimant stated that as of the date of the hearing, his medical bills totaled \$125,000. He added that he did not receive any physical therapy because he did not have any insurance. The claimant continued that he was provided with home exercises, which he performed(Record, 17-18).

#### DISCUSSION

The Commission cannot ignore the issue of the claimant's employment status. The claimant, here was clearly an employee of the respondent. The evidence presented confirms that the claimant reported to work at the company owner's residence for transport to job sites and was supervised by the business owner or another employee. Furthermore, the claimant testified that the equipment he used for work was provided by the respondent. The claimant was paid weekly either by the hour or per square of shingles installed. The claimant, in this matter, was not working as an independent

contractor but as an employee as part of a roofing crew working for the respondent.

Next, the Commission must address whether the claimant sustained a compensable injury to his right leg on September 27, 2012. A.C.A. §11-9-102(4)(A)(i) defines compensable injury as:

"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."

The claimant must prove by a preponderance of the evidence that he sustained a compensable injury as defined under A.C.A. §11-9-102(4)(A)(i). See also §11-9-102(4)(E)(i). A preponderance of the evidence means the evidence having greater weight or convincing force. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W. 2d 442 (1947). Furthermore, to be compensable under the same burden, the claimant must prove that the existence of physical injury or damage is supported by medical evidence. A.C.A. §11-9-102(4)(D) requires that a compensable injury must be established by medical evidence.

The statute also requires that the medical evidence submitted be in the form of objective findings. Objective findings are defined in A.C.A. §11-9-102(16)(A)(i), as those findings which cannot come under the voluntary control of the patient. The statute requires those medical opinions addressing compensability, must be stated within a reasonable degree of medical certainty, A.C. A. §11-9-102(16)(B). The Arkansas Court of Appeals has

addressed this issue in previous opinions. The Court in 1998, affirmed the Commission's finding that the claimant did not sustain a compensable injury when there was no evidence connecting objective medical findings to an alleged specific incident, Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W. 2d 5 (1998).

This claimant, in contrast to the claimant in Ford, presented documentary evidence in the form of multiple doctors' notes and records. These notes and records connect the objective medical findings to the specific incident that occurred on September 27, 2012. These records documented his treatment from the day of the injury, through his leg surgery and post operative recovery. The claimant testified that he fell from a roof while working on a roofing job for the respondent. He stated, on the day, he fell he was being supervised by either Mr. Sigmon or Earl. Additionally, the claimant testified that he was treated for a broken tibia, had surgery, was put on restrictions and released to return to work in June of 2013. The claimant has presented credible testimony as to his accident and his treatment. Furthermore, he has presented medical evidence to support his claim that he suffered a work related injury.

The claimant must prove by a preponderance of the evidence that he sustained a compensable injury and the compensable injury must be supported by objective medical findings. Here, the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right leg on September 27, 2012. He has also produced objective medical findings to support



his claim. Clearly, the fall while at work on September 27, 2012 caused the claimants need for treatment to his right leg.

The Commission has next been asked to address the issue of the claimant's entitlement to the payment of medical bills for the treatment of his right leg injury. This claimant was treated by life flight transport as well as Mercy Hospital.

Arkansas Code Annotated §11-9-102(F) (i) states:

"When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter."

Once it is settled that the claimant sustained a compensable injury, the question of medical services must be determined by looking at the facts in question and determining if the medical services are reasonably necessary for the treatment of the claimant's injury. A.C.A. §11-9-508(a) requires that:

"The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aides, and other apparatus as may be reasonably necessary in connection with the injury received by the employee."

What constitutes reasonable and necessary treatment under Ark. Code Ann. §11-9-508(a) is a fact question for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d (50 (1984)). Here, the claimant testified that upon falling from the roof, he was treated and transported by life flight. He was then admitted to the Mercy Hospital where he remained for five to six days. During his hospital stay, the claimant underwent surgery to

repair his injured right leg. This claimant incurred \$17,000 in life flight expenses as well as \$66,000 plus in hospital bills. It should be noted that the hospital deducted some \$22,000 as an uninsured discount. Interestingly enough, the medical records reveal, upon inquiry, the claimant's boss advised the claimant's injury is not a workers' compensation injury. Mr. Sigmon added, "he was just careless; he was supposed to put some nails into a board that he was standing on and slipped." Clearly, this employer had no intention of providing any coverage for injured employees. The respondent in this matter had no workers' compensation insurance. The claimant testified that he had no insurance. Therefore, this claimant was left with some \$80,000 plus in medical bills. This claimant would not have needed medical attention but for the fact that he fell from a roof while working for the respondent. Clearly, from the claimant's testimony and the medical evidence provided the treatment that the claimant received was reasonable and necessary for the treatment of his compensable injury from September 27, 2012. The claimant, in this case, has provided sufficient evidence to prove that the medical treatment he was provided was reasonable and necessary for the treatment of his compensable injury. Therefore, he is entitled to payment of those medical bills incurred while being treated for his compensable injury. The claimant has also asked the Commission to determine if he is entitled to additional medical treatment for his right leg. In this matter, there was no evidence presented of any pending medical treatment not provided or recommendations made for

additional treatment. Despite the fact that the Commission has been asked to address this issue, I cannot make a finding as to the claimant's entitlement to additional medical treatment.

The Commission has also been asked to determine the claimant's compensation rates. The claimant testified that he had an average weekly wage of \$400. There was no further evidence presented of the claimant's weekly wage. The claimant testified that his wage records were kept in a notebook belonging to the respondent. This notebook is not in evidence and the claimant's wage payments were made in cash. Based on the claimant's average weekly wage of \$400, the claimant's compensations rates are \$266 for TTD and \$200 for PPD.

Finally, the claimant has asked the Commission to determine if he is entitled to TTD from September 27, 2012 to September 15, 2013. The claimant, in this case, has been found to have suffered a scheduled compensable injury of his lower extremity (the tibia-knee to ankle). A.C.A §11-9-521(a) states, in relevant part, that an employee who suffers a scheduled injury is entitled to receive TTD or TPD benefits during their healing period or until the employee returns to work, whichever occurs first. The employee is entitled to these benefits regardless of whether they have demonstrated that they are actually incapacitated from earning wages. The Arkansas Court of Appeals addressed the award of benefits to employees with scheduled injuries under A.C.A §11-9-521(a) in Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822(2001). Here, the claimant's testimony confirms that he

did not work from September 27, 2012 until he was employed by Tyson on September 15, 2013. However, this claimant, by his own testimony stated that he was released to return to work on June 11, 2013. The claimant's healing period ended on that date. Applying A.C.A §11-9-521(a), the claimant is entitled to TTD benefits from September 27, 2012 until June 11, 2013. The claimant here, did not return to work on June 11, 2013, but not because he remained in his healing period but because he did not find employment until September 15, 2013. Clearly this claimant remained only in the healing period until June 11, 2013 when he was released. He therefore, is entitled to TTD under the Courts holding in Wheeler and under A.C.A §11-9-521(a) from September 27, 2012 until June 11, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant has proven by preponderance of the evidence and by objective medical findings that he suffered a compensable injury to his right leg on September 27, 2012.
2. Having met the burden of proving a compensable injury the claimant is entitled to payment of medical bills incurred for the treatment of his compensable injury. He has proven that the treatment he received for his compensable injury was reasonable and necessary.
3. The claimant has not provided any recommendations for additional medical treatment or evidence of pending treatment that has not been provided. Therefore, I

cannot make a finding as to the claimant's entitlement to additional medical treatment.

4. Having reviewed the evidence, the claimant's compensation rates are \$266 for TTD and \$200 for PPD.
5. The claimant is entitled to TTD from September 27, 2012 until June 11, 2013 when he was released to return to work.
6. The claimant's attorney is entitled to the appropriate attorney's fee based on the above findings.

ORDER

The claimant suffered a compensable injury to his right leg on September 27, 2012.

The respondents shall pay for medical bills incurred by the claimant for the treatment of his compensable right leg injury.

The respondents shall pay TTD benefits from September 27, 2012 until June 11, 2013.

Additionally, the respondents shall pay to the claimant's attorney the maximum statutory attorney's fee.

IT IS SO ORDERED.

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AMY GRIMES  
ADMINISTRATIVE LAW JUDGE

April 8, 2014

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Mr. Mark Freeman  
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RE: Jose Martinez v. 3 D Roofing  
WCC No. G300314

Counselors:

Enclosed you will find a copy of the Opinion rendered on today's date in above referenced case along with instructions and information for an appeals process.

Sincerely,

Amy Grimes  
Administrative Law Judge

dr

Enclosure  
Certified Return-Receipt

cc: Mr. Jose Martinez  
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Berryville, AR 72616