

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G407629

CRESTON MACKEY, Employee	CLAIMANT
CITY OF FAYETTEVILLE, Employer	RESPONDENT
MUNICIPAL LEAGUE WCT, Carrier	RESPONDENT

OPINION FILED APRIL 8, 2015

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

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

Respondents represented by J. CHRIS BRADLEY, Attorney, No. Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 12, 2015, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 7, 2015, 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.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties at all relevant times.
3. The claimant was earning an average weekly wage of \$1,136.00 which would entitle him to compensation at the weekly rates of \$617.00 for total disability benefits and \$463.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's left knee on or about July 26, 2014.
2. Payment of related medical bills.

3. Temporary total disability benefits from December 26, 2014 through a date yet to be determined.

4. Attorney fee.

At the time of the hearing claimant clarified that he is requesting temporary total disability benefits from December 26, 2014 through January 12, 2015, and temporary partial disability benefits from January 12, 2015 through January 19, 2015.

The claimant contends he sustained a compensable injury on or about July 26, 2014, at which time he was performing his physical training for his job when he sustained a left knee injury. Claimant was injured while physically training in furtherance of the physical fitness policy outlined by the police department. The police department was both directly and indirectly benefitting from claimant's physical training. The injury is compensable as claimant was advancing the employer's interest as well as the public interest in maintaining his physical fitness. Respondents have failed to pay medical bills, and claimant is entitled to the payment of medical expenses, temporary total disability benefits, and a controverted attorney fee.

The respondents contend the claimant did not sustain an injury; that if the claimant sustained an injury it did not occur when he was performing employment services for his employer but occurred while or as the result of the claimant's engaging in or performing recreational or social activities for the employee's personal pleasure.

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 witnesses and to observe their 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 January 7, 2015, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee on July 26, 2014.

3. Respondent is liable for payment of all medical treatment provided in connection with claimant's compensable left knee injury.

4. Claimant is entitled to temporary total disability benefits beginning December 26, 2014 through January 12, 2015, and temporary partial disability benefits for one week from January 12, 2015 through January 19, 2015.

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

FACTUAL BACKGROUND

_____ The claimant is a 39-year-old man who began working for the respondent in March 1998 as a civilian jailer. In November 1998 the claimant was hired as a police officer for the Fayetteville Police Department (hereinafter "FPD"). Claimant was a patrol officer from 1999 until 2004. From 2004 through July 1, 2009, claimant worked as an undercover narcotics officer and on July 1, 2009, claimant was promoted to sergeant. Claimant initially was a sergeant in the Patrol Division until 2011 when he was reassigned as a sergeant in the Criminal Investigation Division, a position which he currently holds. Claimant testified that he is responsible for overseeing seven detectives and is responsible for their case assignments, reviewing their cases, and clearing cases. Claimant is also on call, rotating with another sergeant every two weeks. Claimant testified that his job duties require him to respond to major crime scenes to collect evidence, transport evidence, and generally manage a crime scene.

Claimant testified that his job duties require him to remain physically fit in order to

perform essential job functions. Claimant also testified that respondent does not provide an opportunity to perform physical fitness while “on the clock”. In an effort to maintain his fitness, the claimant was participating in a CrossFit workout. During the course of a CrossFit workout on July 26, 2014, claimant was doing box jumps when he came down on his left leg and noticed immediate pain in his left knee. Claimant testified that he did not seek medical treatment at that time, but when he went to work on Monday, July 28, he was noticeably limping. Claimant testified that he informed his supervisor about the injury but thought it was simply a light strain.

Claimant testified that on July 30, 2014, he left for vacation and while on vacation the knee did not get any better. As a result, when claimant returned from vacation he sought medical treatment from Dr. Coker.

Claimant had previously undergone an arthroscopic procedure from Dr. Coker on his left knee on 2012 to repair a patellofemoral osteochondral defect and torn medial meniscus. Claimant had been released by Dr. Coker to return to him on an as-needed basis as of October 12, 2012. There is no indication that claimant sought any additional medical treatment for his left knee until he returned to Dr. Coker on August 11, 2014.

As a result of claimant’s left knee complaints, Dr. Coker ordered an MRI scan which revealed an osteochondral defect that Dr. Coker described as new. Although claimant and Dr. Coker discussed various surgical procedures, claimant went to Dr. Arnold for a second opinion. Dr. Arnold diagnosed claimant’s condition as left knee pain secondary to full thickness chondral defect - medial femoral condyle and he discussed various options with the claimant. Eventually, it was determined that claimant would undergo an arthroscopic procedure to harvest chondrocytes for subsequent implantation back into the claimant’s knee area. The original arthroscopic procedure to harvest the chondrocytes was performed on November 19, 2014. Unfortunately, the cells were not properly stored by the hospital and claimant underwent a second scope to harvest chondrocytes on November

26, 2014. Dr. Arnold performed surgery for reimplantation of the chondrocytes on December 26, 2014. Dr. Arnold eventually released claimant to return to work on half days before releasing him to full duty.

Claimant has filed this claim contending that he suffered a compensable injury to his left knee on or about July 26, 2014. He seeks payment of related medical treatment as well as temporary total disability or temporary partial disability benefits and a controverted attorney fee.

ADJUDICATION

_____ Act 796 of 1993 defines a compensable injury as “an accidental injury ... arising out of and in the course of employment.” A.C.A. §11-9-102(4)(A)(i). However, a compensable injury does not include an “injury which was inflicted upon the employee at a time when employment services were not being performed.” A.C.A. §11-9-104(B)(iii). Because Act 796 did not define the phrase “in the course of employment” or the term “employment services” the Arkansas courts have defined those terms. The Arkansas Supreme Court has held on several occasions that an employee is performing “employment services” when he is “doing something that is generally required by his or her employer.” *Texarkana School District v. Conner*, 373 Ark. 372, 284 S.W. 3d 57 (2008); *Wallace v. West Frasier South, Inc.*, 365 Ark. 68, 225 S.W. 3d 361 (2006); *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W. 3d 1 (2002); and *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W. 3d 14 (2002).

The Court has held that it uses the same test to determine whether an employee was performing employment services as it does when determining whether an employee was acting within the course of employment. Specifically, the Court has held that the test is whether the injury occurred “within the time and space boundaries of the employment, when the employee is carrying out the employer’s purpose or advancing the employer’s

interest directly or indirectly.” *Texarkana School District v. Conner, supra*. The Court has noted that the critical inquiry is whether the interest of the employer is being directly or indirectly advanced by the employee at the time of the injury. The Court has also noted that the issue of whether an employee was performing employment services within the course of employment depends upon the particular facts and circumstances of each case. *Conner, supra; Wallace, supra*.

In *Texarkana School District v. Conner*, the Court was faced with a situation wherein a janitor had left the school premises during his lunch break to perform a personal errand. Upon returning to the school premises, he went to park in his usual parking spot but discovered that a truck was blocking the main entrance to the lot. He then went to the back entrance of the lot that was secured by a locked gate. While attempting to unlock the gate he was struck by the gate and pinned under it. The primary issue in that case was whether the claimant was performing employment services. In finding that the claimant in *Conner* was performing employment services, the Court stated:

It is clear that in a case such as the present one, where an injury occurs outside the time and space boundaries of the employment, the critical inquiry is whether the employers' interest were being advanced, either directly or indirectly.

In this particular case, there is no question that at the time of the claimant's left knee injury he was not at work for the respondent and thus was not within the time and space boundaries of his employment. As in *Conner*, the critical question is whether respondent's interests were being advanced, either directly or indirectly, by the claimant at the time of his accident. As previously noted, claimant testified that at the time of his injury he was advancing the physical fitness policy of the FPD by performing a physical fitness workout and improving his physical fitness ability. Claimant testified that although a majority of his job involves sitting at a desk, he does have to go out in the field and fill in. Claimant testified that he must be able to physically defend himself and/or another officer. Claimant

also testified that respondent did not provide an opportunity to perform physical fitness on the clock so that it had to be performed off the clock.

Claimant introduced into evidence an annual performance review covering the time period from November 8, 2007 through November 8, 2008. On that performance review claimant was given a rating of 2 on physical conditioning which is "Below Expectations." The evaluator's comments indicate that claimant did not pass his last physical fitness test and under the goal's portion of the review stated: "Creston should develop a training plan to help improve his physical fitness test score."

Claimant's testimony that he was advancing his employer's interest either directly or indirectly at the time of his injury is corroborated by the testimony of Deputy Chief Mike Reynolds and the testimony of William Pope.

Mike Reynolds is the Deputy Police Chief for the FPD. Reynolds testified that the FPD is accredited by CALEA - Commission on Accreditation for Law Enforcement Agencies. Reynolds testified that the FPD became an accredited law enforcement agency in 2012. In order to become an accredited law enforcement agency, the FPD had to meet approximately 160 standards and Reynolds testified that one of these standards is a fitness policy. In conjunction with CALEA, respondent established a physical fitness policy and a copy of that policy was introduced into the record at Page 11 of Claimant's Exhibit B. That policy states that all personnel are encouraged to keep physically fit and maintain a satisfactory level of general health in order to accomplish the tasks of their jobs. If it is determined that the employee is unable to perform essential job functions or lacks the ability to perform their job duties without posing a direct threat to themselves or to others, the chief of police may require a determination by the employee's medical provider of fitness for duty.

Reynolds testified that the benefit of officer fitness is officer safety - not only for the safety of the officer, but for their fellow officers and for the public. Reynolds noted that one

of the essential job duties for police officers is to make arrests which requires a certain amount of muscular strength and cardiovascular endurance.

Significantly, Reynolds testified that it is a benefit to the department if the officers are engaged in physical fitness whether they are on or off the clock. Reynolds went on to testify that physical fitness was primarily performed off the clock.

Q. In regard to, say, Sergeant Mackey, is his physical fitness going to primarily occur off the clock?

A. Yes. Unfortunately, we would love to allow all of our officers the opportunity to work out on duty but we just don't have the manpower that it takes to allow that to occur.

Reynolds went on to testify that the officers are given latitude to determine the best physical fitness plan for themselves.

Q. In regard to the physical fitness plan, are the officers in the force given that latitude to pick what is best for them?

A. We have no restrictions on physical fitness for our law enforcement officers.

Finally, and most significantly, Reynolds testified that the activity claimant was performing at the time of his injury conformed with the FPD's policy.

Q. If the evidence is that Sergeant Mackey was participating in CrossFit physical fitness and injured his knee while off the clock, would that activity be in line with the Fayetteville Police Department's physical fitness policy?

A. Yes, it would be in line with the encouragement that we give our officers to go out and maintain a level of physical fitness to perform their essential job duties and also to meet expectations or exceed expectations on their performance evaluations.

Also testifying at the hearing was William Pope. Pope is an administrative lieutenant

for the FPD. He is in charge of all internal investigations, CALEA accreditation, and he is also responsible for training and the Warrants Division. Pope was previously responsible for fitness training for the FPD. He testified that the FPD leaves it up to each officer to determine their physical strengths and weaknesses and what they need to work on to maintain physical fitness. Pope testified that he was familiar with CrossFit and that it was his belief that that program was in line with the FPD's physical fitness policy.

Q. And do you feel like that's in line with the police department's physical fitness policy?

A. I do. And kind of the rationale behind the CrossFit is to elevate the heart rate for - and have a higher heart rate for a period of time and bring it down as in interval training and then bring it back up and so that interval training is very beneficial to law enforcement because that mimics the job in that we do have times where we go from sedentary to very active and then we are expected to control ourselves and bring our heart rate down and calmly handle our business.

Pope went on to testify that participating in CrossFit would be advancing the police department's policy of physical fitness.

Q. And by participating in CrossFit would he be advancing the police department's policy of physical fitness?

A. I think it would be good for himself, the other officers that he worked with and for the police department.

Q. What about the public?

A. Absolutely.

Q. And is that type of physical fitness encouraged?

A. Yes.

Finally, Pope also went on to testify that police officers can basically perform any type of physical activity they choose.

- Q. Does that policy allow that so your police officers can go and basically do any type of physical activity they want to?
- A. That's correct. We're not bound to a - or prohibited from doing certain activity.

Finally, with respect to this issue, it should also be noted that claimant introduced into evidence a job description of a police sergeant. That job description requires that an individual be able to make arrests and that they have the ability to respond to a physical attack and the ability to escape or subdue an attacker.

In summary, I find that by participating in the CrossFit program, claimant was advancing the interests of his employer either directly or indirectly. This was not simply a situation wherein an employer would wish all of its employees to be physically fit, but rather it was a job requirement. In order to effectively perform the job as a police officer, claimant and other police officers were required to be physically fit and capable of subduing suspects. Being physically fit is a part of the claimant's job description and it is a policy of the respondent in order to maintain its accreditation with CALEA. Significantly, the employees are not required to engage in any specific activities but are free to develop their own plan for physical fitness. In claimant's particular case, he chose to participate in the CrossFit program. According to the testimony of both Pope and Deputy Chief Reynolds, this program was within the respondent's physical fitness policy. Finally, it should also be noted that although this was a requirement of the claimant's job, claimant and other officers were expected to perform their physical fitness activities off the clock, not on the clock.

Having found that claimant was performing employment services at the time of his injury, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee while engaged in the CrossFit program on July 26, 2014. Claimant testified that when he was engaged in that program he landed on his left leg and felt immediate pain in his left knee. Claimant

subsequently sought medical treatment from Dr. Coker and Dr. Arnold and eventually underwent surgery from Dr. Arnold. I find that claimant's testimony is credible and entitled to great weight.

I also note that claimant has offered objective medical findings establishing an injury. As previously noted, the MRI scan revealed a full thickness chondryl defect of the claimant's medial femoral condyle. This is an objective finding. I also find that claimant has met his burden of proving by a preponderance of the evidence that his injury resulted in disability or the need for medical treatment. Here, claimant was taken off work by his treating physician and underwent surgery on December 26, 2014.

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee on July 26, 2014.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's left knee injury.

I also find that claimant is entitled to temporary total disability benefits beginning December 26, 2014 through January 12, 2015, and temporary partial disability benefits for one week from January 12, 2015 through January 19, 2015. The injury to claimant's knee is a scheduled injury. An employee who suffers a scheduled injury is entitled to temporary total or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). In this particular case, I find that claimant remained within his healing period and that he did not return to work until January 12, 2015. Submitted into documentary evidence is a note from Dr. Arnold indicating that claimant could return to work as of January 19, 2015, working half a day until February 2, 2015. In fact, claimant testified that he actually returned to work for the respondent a week earlier on January 12 working one-half day and continued to do so for one week. Based upon this evidence, I

find that claimant is entitled to temporary total disability benefits beginning December 26, 2014 through January 12, 2015, and temporary partial disability benefits for one week from January 12, 2015 through January 19, 2015.

ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee on July 26, 2014. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable left knee injury. Claimant is entitled to temporary total disability benefits beginning December 26, 2014 through January 12, 2015, and temporary partial disability benefits from January 12, 2015 through January 19, 2015. 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 respondents are ordered to pay the court reporter's charges for preparing the hearing transcript.

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