

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407316

LEE MERILA,
EMPLOYEE

CLAIMANT

DELTA MATERIAL HANDLING,
EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 21, 2005

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE PHILLIP WELLS,
Attorney at Law, Jonesboro, Arkansas.

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

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed April 12, 2005. The administrative law judge found, among other things, that the claimant sustained an injury arising out of and in the course of his employment on July 1, 2004. After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge. We find that the claimant sustained a compensable injury on July 1, 2004, and that the claimant proved he was

entitled to reasonably necessary medical treatment provided in connection with the compensable injury.

I. HISTORY

Lee K. Merila testified that he had been employed with Delta Material Handling since August 1997, where he was a sales representative. Mr. Merila described his work as including "Stopping at customers' locations, visiting with customers, taking them to lunch, demonstrating products, quoting repair estimates for breakdowns on equipment, things of that matter." The claimant testified that his job required travel, and that the respondents provided him with a company vehicle. The claimant testified that he was not authorized to use the vehicle for private purposes.

The parties stipulated that the employment relationship existed on July 1, 2004. The claimant testified:

Q. On the day of July 1, 2004, describe from the time that you woke up that morning, describe what you did.

A. I went to American Railcar - after leaving my house, I went to American Railcars. I don't remember the specifics, if I was dropping parts off or if I was quoting. They purchase quite a few pieces of equipment from me. From there I left to go to the office heading down Highway 49 and from that point that

was when I had my collision at the hilltop....

Q. And was your stop at American Railcar part of your business activity?

A. Yes. I stop there three if not four times a week in the mornings either for parts or for quotes. They do a lot of business through our company.

Q. Okay. And then after that stop at American Railcar you went to your place of employment, is that correct?

A. I was heading into the office.

Q. And it is my understanding that on the way to the office you were involved in a motor vehicle collision, is that correct?

A. Yes, sir.

The claimant was treated at St. Bernards Medical Center on July 1, 2004:

29 yo wm who was a restrained driver in a mvc that T-boned another automobile. Patient with a small burn to right arm from the airbag deploying. Also with mild discomfort in neck and left ankle. No LOC nor neuro deficits....

Does not want any pain meds nor anything for burn.

The claimant was discharged on July 1, 2004 with the following diagnoses: "1. MVA (Unspecified); 2. Burn, 1st Degree (Unspecified Site); 3. Cervical Strain." The claimant was instructed to follow up with Dr. Roland Hollis, the claimant's family physician.

The claimant testified that after leaving the emergency room, "I went in to the office and filled out an accident report for the company....From there I went home that afternoon and then I had scheduled vacation for the following week, you know, we started vacation after that."

The claimant testified on cross-examination that he did not know he had injured his rectal area at the time of the accident.

The claimant testified that he "hurt from head to toe" beginning July 2, 2004. "We still went on our vacation up to Bull Shoals with our motor home but I ached all over," the claimant testified. Three or four days later, "I thought I had a hemorrhoid starting," and "it just kept getting bigger and bigger and pretty soon, you know, there was quite a large swollen area on my left side of my butt cheek. And we

left the campsite a day early so I could go back to the emergency room."

The claimant was again admitted to St. Bernards on July 11, 2004. The claimant complained of buttock pain. A nursing triage noted indicated, "Pt states he was involved in a mvc on July 1st. Pt states he was seen here but had no x-rays or tests. Pt states the next day he began having pain around rectal area and now has severe pain in rectal area and pain from left leg to left butt cheek."

A Progress Note of Dr. Hollis on July 12, 2004 indicated, "Noted hemorrhoid 7/2/04. Has gotten worse. Can not stand pain....has burning sensation in groin." Dr. Hollis' notes indicated that he assessed, "Large Perirectal Abscess." Dr. Hollis noted a "large tender swollen perirectal abscess."

Dr. Hollis requested that the claimant consult with Dr. Mark Tullos, who examined the claimant and assessed the following on July 12, 2004: "The patient with perianal cellulitis. An abscess is not definitely palpable. I will return for further exam. Will plan for patient to have IV pain medication given to permit a better exam and will place

on broad spectrum antibiotic coverage. If no palpable abscess can be identified and patient does not respond promptly to antibiotic coverage will then pursue further imaging modalities with Ct scan and any other studies as needed based on clinical progress."

A CT of the claimant's pelvis was taken on July 13, 2004, with the resulting opinion, "5 cm x 3.7 cm perirectal abscess, slightly left of midline."

The claimant underwent an excisional debridement of peri-rectal abscess on July 14, 2004.

The claimant testified that he returned to work on July 19, 2004.

On correspondence provided by the claimant's attorney on September 22, 2004, Dr. Hollis checked a line beside the following sentence: "In my medical opinion, the motor vehicle accident of July 1, 2004, caused or contributed to the peri-rectal abscess of Lee Merila."

A pre-hearing order was filed on December 14, 2004. The claimant contended that he was involved in an automobile accident in the course of his employment with the respondents on July 1, 2004, "sustaining various injuries to

his right arm, neck, left ankle, and buttock." The claimant contended that "as a result of the motor vehicle accident, he developed a perirectal abscess which required surgery." The claimant contended that his condition and subsequent treatment should be held compensable and all appropriate benefits be paid.

The respondents contended that the claimant "was on his way to work when he was involved in a motor vehicle accident. He was not performing employment services and was not at work when the accident happened. His condition, a perirectal abscess, is not related to or caused by the accident. The claimant had no pain or injury contemporaneous with the accident. The condition did not arise until after the claimant got back from vacation."

The pre-hearing order indicated that a hearing would take place "on the issues of compensability of medical condition/treatment and controverted attorney fees[.]"

The parties deposed Dr. Hollis, a family practitioner, on January 12, 2005. Dr. Hollis testified that he had treated the claimant for approximately four years before the July 1, 2004 accident. Dr. Hollis testified that he saw the

claimant on or about July 12, 2004, and that he had observed "a large swollen mass" in the claimant's rectal area. The claimant's attorney questioned Dr. Hollis:

Q. Doctor, based on your knowledge of Mr. Merila's physical condition before July the 1st of 2004, your review of medical records both before and after his treatment on that day together with your clinical evaluation and observation of Mr. Merila, do you feel that the motor vehicle accident of July the 1st of 2004 was the major cause of his perirectal abscess that you treated?

A. I really feel like it was. You know, he had no problems - no history of any problems ever before there and just, you know, the timing of the events. I mean, to come on so acute and sudden like that right after the accident, and there was a pretty good, you know, trauma to that area. It wasn't just, you know, he slipped and fell. I mean, there was an impact.

Physiologically, I feel like that that impact could cause some small tears in the rectal mucosa and bacteria gain entry underneath the mucosa or the skin there and, you know, that's how an abscess sets up. It doesn't immediately set up the same day. You know, a day or two later it starts setting up and hurting. The history is consistent. He comes in a week later but this time it's all pus'd (phonetic) out and a big ole abscessed mass there. It has time to really enlarge and get worse and start to spread.

So, you know, I can see how that could happen from a pathological/medical point of view. And the history and the timing is all perfect, so, you know, I just have to believe that the accident had to have something to do with it.

Q. Again, from a medical standpoint you feel that that was the major cause of the condition?

A. I do.

Q. The diagnostic tests that Mr. Merila underwent, the surgical procedure to treat the condition, his hospitalizations, do you feel that those represented reasonable and necessary medical treatment for the perirectal abscess that he developed?

A. Certainly.

On questioning from the respondents' attorney, Dr. Hollis agreed that abscesses could occur without trauma, "but it's not the most common thing you see."

The administrative law judge found, in pertinent part: "4. On July 1, 2004, the claimant sustained an injury arising out of and in the course of his employment. 5. The claimant was temporarily totally disabled for the period beginning July 2, 2004, and continuing through July 19, 2004. 6. The respondent shall pay all reasonable hospital

and medical expenses arising out of the injury of July 1, 2004.”

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines “compensable injury” as “[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment.” Ark. Code Ann. §11-9-102(4) (B) (iii) provides that the term “compensable injury” does not include an injury that was inflicted upon the employee at a time when employment services were not being performed. The Arkansas Supreme Court has held that we are to use the same test to determine whether an employee was performing “employment services” as is used when determining whether an employee was acting within “the course of employment.” Collins v. Excel Specialty Prods., 347 Ark. 811, 69 S.W.3d 14 (2002). The test for determining whether an employee was acting within the “course of employment” at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the

employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. Pilgrim's Pride Corp. v. Caldarera, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

An employee is generally said not to be acting within the course of employment when he is traveling to and from the workplace. This "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment. Lepard v. West Memphis Mach. & Welding, 51 Ark. App. 53, 908 S.W.2d 666 (1995). The rationale behind this rule is that an employee is not within the course of his employment while traveling to or from the job. *Id.* There are exceptions to the going and coming rule. These exceptions are outlined in Jane Traylor, Inc. v. Cooksey, 31 Ark. App. 245, 792 S.W.2d 351 (1990):

- (1) where an employee is injured while in close proximity to the employer's premises;
- (2) where the employer furnishes the transportation and to and from work;
- (3) where the employee is a traveling salesman;
- (4) where the employee is injured on a special mission or errand;
- (5) when the employer compensates the employee for his time

from the moment he leaves home until he returns home.

The "furnishing transportation" exception to the going and coming rule does not apply when the transportation is furnished solely as a gratuity. Lepard, *supra*.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

In the present matter, the Full Commission finds that the claimant proved he sustained a compensable injury on July 1, 2004. The claimant was a credible witness who has been employed with the respondents since 1997. The claimant is a sales representative. On the way to work on the morning of July 1, 2004, the claimant stopped at a client's business as part of his sales duties for the respondent-employer. After making his sales call, the claimant resumed his drive to his place of employment. The claimant had a car wreck on the way to work. The Full Commission finds that several exceptions to the "going and coming" rule are applicable in

the present matter. See, Cooksey, supra. The claimant was (1) in close proximity to the employer's premises. The respondent-employer (2) furnished the claimant's transportation, and the respondent's furnishing of the claimant's transportation was not a gratuity. The claimant was (3) a traveling salesman, although he was not on a journey at the time of the accident. Reasonable minds could also find that stop at a client's business to be (4) a special mission or errand. The record does not clearly show whether or not (5) the claimant was compensated from the time he left home. However, the claimant did state at hearing, "my work starts when I see my first customer of the day."

The Full Commission finds that the claimant was performing employment services at the time of the July 1, 2004 motor vehicle accident. We find that the claimant sustained a compensable injury which caused physical harm to the claimant's body and which arose out of and in the course of employment. The claimant also established a compensable injury by medical evidence supported by objective findings. The decision of the administrative law judge is affirmed.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to medical treatment. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

The Full Commission finds in the present matter that the claimant proved he was entitled to all of the medical treatment of record, including the surgery performed on July 14, 2004. We have determined that the claimant sustained a compensable injury on July 1, 2004. The claimant was diagnosed as having a first-degree burn and cervical strain. The claimant credibly testified that he began suffering from pain in the buttocks the day after the compensable injury. When the claimant again sought emergency treatment on July 11, 2004, the claimant reported that his

pain had begun after the motor vehicle accident. On July 12, 2004, Dr. Hollis noted a large swollen peri-rectal abscess. This condition was confirmed by a CT scan. The claimant underwent an excisional debridement of peri-rectal abscess on July 14, 2004. Dr. Hollis agreed in September 2004 that the compensable motor vehicle accident "caused or contributed to the peri-rectal abscess of Lee Merila."

Dr. Hollis testified at deposition that the July 1, 2004 motor vehicle accident was "the major cause" of the claimant's surgical condition. The Full Commission is aware that the "major cause" element of Ark. Code Ann. §11-9-102(4)(E)(ii) does not apply in the present matter. Nevertheless, where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2003). Dr. Hollis opined in the present matter that the treatment provided the claimant was "certainly" reasonably necessary for the claimant's post-injury condition. Pursuant to Ark. Code Ann. §11-9-508(a), the Full Commission finds that the

claimant proved the medical treatment he received in this case was reasonably necessary in connection with the claimant's July 1, 2004 compensable injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury on July 1, 2004. We find that the claimant proved he was entitled to all of the medical treatment of record, including the surgery provided on July 14, 2004. The Full Commission therefore affirms the administrative law judge's findings with regard to compensability and medical treatment. The parties agree that the claimant's entitlement to temporary disability was not properly included as a hearing issue, so the Full Commission makes no findings with regard to temporary total disability compensation. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 1, 2004. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden proof. Specifically, I find that the claimant was not performing employment services at the time of his car accident.

After conducting a de novo review of the record, it is my opinion, the claimant was not performing employment services at the time he had his car accident. Arkansas Code Ann. § 11-9-102(4)(B)(iii)(Repl. 2002) states:

An injury is not compensable if it was inflicted upon the employee at a time when

employment services were not be performed, or before the employee was hired or after the employment relationship was terminated.

Whether the claimant is performing employment services depends on the particular facts and circumstances of each case. The following factors are to be considered in determining whether the claimant's conduct falls within the meaning of "employment services":

(1) whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests;

(2) whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work;

(3) whether the activity engaged in when the accident occurs is an unexpected part of the employment;

(4) whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work activities;

(5) whether the employee is compensated during the time that the activity occurs; and

(6) whether the employer expects the worker to stop or return from permitted

non-work activity in order to advance some employment objective.

Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). See; Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002); Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997); Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); White v. Georgia-Pacific Corporation, 66 Ark. App. 337, 989 S.W.2d 942 (1999); Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998); Beaver v. Benton County, 66 Ark. App. 153, 991 S.W.2d 618 (1999); Hightower v. Newark Public School System, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

In my opinion, the evidence demonstrates that the claimant had driven to the customer's location that was between the claimant's office and his house on the morning of the accident. However, he had returned to his normal route to work when the accident occurred. In fact, he was almost to the office when the accident happened. The claimant was in a company vehicle but the use of that

vehicle was gratuitous. The claimant could only drive it home, drive it to the office or make sales calls, but it was not a vehicle he could use for his own personal business. The claimant was not paid mileage for his trips to and from home and work.

In my opinion, the claimant's claim is barred by the going and coming rule. The going in coming rule precludes recovery for an injury sustained while the employee is going to and returning from his place of employment. Lepard v. West Memphis Mach. & Welding, Ark. App. 53, 908 S.W.2d. 666 (1995). The exception to the going and coming rule were outlined in the case of Traylor v. Cooksey, 31 Ark. App. 245, 792 S.W.2d 351 (1990). These exceptions are:

- (1) where an employee is injured while in close proximity to the employer's premises;
- (2) where the employer furnishes the transportation and to and from work;
- (3) where the employee is a traveling salesman;
- (4) where the employee is injured on a special mission or errand;
- and (5) when the employer compensates the employee for his time from the moment he leaves home until he returns home.

In my opinion, the claimant does not fit into any of these outlined exceptions. The claimant was injured on a public highway which was in close proximity to the employer's premises. However, this is not the circumstances to which the exception speaks. The employer did furnish the claimant's transportation to and from work, but, the claimant was not paid for milage or other expenses. The claimant was traveling on his usual morning commute at the time of the accident. The claimant in this case was subject to the same hazards as all employees trying to get to work. Further, the claimant was not acting as a traveling salesman at the time that he sustained his injuries. Although the claimant could arguably have been covered under this exception, the claimant was not on a sales call at the time of the accident, nor was he out looking for new business. He was merely on his way to the office. Clearly, the claimant was not on a special mission or errand. The claimant was going to the office. Further, the claimant does not fit into the last exception, because the claimant was not compensated from the time he left home until he returned home.

This case is akin to the Lepard supra case. The Court in Lepard found that the furnishing of transportation exception to the going and coming rule did not apply when the transportation was furnished solely as a gratuity. In this case, clearly, the claimant was being furnished the vehicle as a gratuity. In Lepard, an employee was killed in a motor vehicle accident when he was hit by a train while he was in the company vehicle. The company truck was loaned to the employee because the employee had transportation problems. Further, in Lepard the Court of Appeals stated that the test set forth in Traylor for dual purpose journeys was:

The decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to the perils...

Clearly, the claimant in this claim was not on a dual purpose journey at the time of the accident. He was merely going to work. He was not doing anything for the employer. He had already made his sales call and he was on his way back onto the highway on his regular route when the accident occurred.

This case is also akin to the case of Swearengin v. Evergreen Lawns, 85 Ark. App. 61, 145 S.W.3d. 830 (2004). Swearengin drives home the fact that furnishing transportation exception to the going and coming rule did not apply when the transportation was furnished solely as a gratuity.

Therefore, when I consider that the claimant was involved in a motor vehicle accident on his regular route to work, the fact that he was not paid for milage to and from work, the fact the claimant could not use the vehicle for personal business, I find that the claimant has failed to prove by a preponderance of the evidence that he was performing employment services at the time of his motor vehicle accident. Accordingly, I must dissent from the majority's finding that the claimant was performing employment services at the time of the accident.

If I were to find that the claimant was performing employment services at the time of his accident, a finding which I do not make, I find that there is no causal connection between the claimant's motor vehicle accident and the claimant's medical condition. The evidence demonstrates

that the motor vehicle accident was on July 1, 2004. The claimant was seen in the emergency room and evaluated after that accident. It was not until the claimant was on vacation for 4-5 days after the accident that he noticed that he had a swollen area to the right of his rectum. The abscess did not occur contemporaneously with the accident. In fact, the claimant stated that he did not even know that there was anything wrong with him until four or five days later, when he was on vacation.

Dr. Roland Hollis, the claimant's physician, testified that an abscess can occur without trauma. They can be caused by constipation or straining. He stated that if the motor vehicle accident caused the ulceration, it was likely that the claimant would have known about it at the time of the accident. The claimant testified that he did not know about it at the time of the accident. At the time that the claimant did notice it he was on vacation and camping out. He had loaded up a house trailer and a boat, and he was also going to the restroom somewhere other than his usual place at home. A perirectal abscess is common and it can be caused by a variety of everyday activities. Simply put,

there is no proof that the motor vehicle accident was the cause of the claimant's problem. To find otherwise, is conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Accordingly, I find that the claimant cannot prove a causal connection between his perirectal abscess and his motor vehicle accident.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner