

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302300

DEWEY WILBANKS,
EMPLOYEE

CLAIMANT

TIMBER RIDGE GROUP, INC.,
EMPLOYER

RESPONDENT

ROYAL INSURANCE CO. OF AMERICA,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 21, 2005

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

Claimant represented by the HONORABLE EMILY S. PAUL,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JEREMY
SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal and claimant cross appeals an
opinion and order of the Administrative Law Judge filed
August 10, 2004. In said order, the Administrative Law
Judge made the following findings of fact and
conclusions of law:

1. There was an employer-employee
relationship on February 22, 2003.
2. The compensation rates are \$232/174.
3. The claimant has failed to prove by
a preponderance of the evidence that he
sustained a compensable heart injury

arising out of his employment.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained compensable upper extremity injuries arising out of his employment.

5. The respondents are estopped from denying responsibility of medical pursued as the direction of the employer between February 22, 2003, through February 27, 2004, at Saline Memorial Hospital and Emergency Room.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 10, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's

decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

A prior Administrative Law Judge's decision awarded the claimant certain medical benefits but found that he had not sustained a compensable cardiovascular injury or an injury to his arm as a result of an accident on February 22, 2003. I concur with the award of medical expenses but, for the reasons set out below,

respectfully dissent from the findings regarding the compensability of the claimant's injuries.

At the time of his injury, the claimant was employed at the respondent's rehabilitative facility. The accident occurred when the claimant was driving a van containing a co-worker and several of the respondent's clients on a day trip. While stopped for road construction, the left side of the vehicle was struck by an ambulance.

Immediately following the accident, the claimant began complaining of pain, tingling, and numbness in his left arm and chest pain. Acting upon advice of police officers and ambulance personnel at the scene, the claimant traveled to the Saline Memorial Hospital emergency room. An emergency room note dated February 23, 2003, indicates that the claimant's blood pressure was 195/117 but that an EKG was normal. The claimant then left the hospital against medical advice. Subsequently, the claimant sought additional treatment from the emergency room.

At the outset, I state that I disagree with the Administrative Law Judge's finding that the claimant did not suffer a compensable cardiovascular injury pursuant to A.C.A. §11-9-114. I believe that the

automobile accident was clearly an extraordinary and unusual event which caused the claimant's precipitous rise in blood pressure resulting in chest pains. It was these chest pains, in connection with the symptoms in the claimant's left arm that caused him to seek emergency room treatment. However, since the Majority is finding that the respondent is estopped from denying the medical treatment from the emergency room, this point is rendered moot.

My primary disagreement is with the Majority's finding that the claimant did not establish a compensable arm injury in the accident. After impartially reviewing the medical evidence, I find that the claimant suffered an injury to his left arm in the automobile accident which was later diagnosed as an ulnar neuropathy caused by nerve entrapment in the claimant's elbow. That finding is buttressed by the medical evidence contained in the medical reports of Dr. Scott Schlesinger, a Little Rock neurosurgeon, and Dr. Lon Burba, a Little Rock neurologist.

In his deposition, Dr. Schlesinger testified as to two possible causes of such neuropathy. He stated that a condition such as the claimant's was very rare. He also stated that while it would be rare for such a

condition to be caused by a traumatic injury, it is possible. Dr. Schlesinger elaborated and stated that if the claimant had been predisposed to develop such a condition, a traumatic injury could in fact trigger it.

In considering the causation of the claimant's arm problems, the Administrative Law Judge made contradictory conclusions which are being adopted by the Majority. In her opinion, the Judge stated, "Certainly, compensability does not have to be established by medical expert opinions on causation." That statement is undeniably correct. In support, the Judge correctly cited Wal-Mart Stores, Inc. v. Leach, 72 Ark. App. 231, 48 S. W. 3rd 540 (2001), which is one of several cases that have held that medical evidence is only necessary to establish the nature and extent of the injury. However, after correctly stating the law as to medical evidence and causation, the Administrative Law Judge then states, ". . . Dr. Schlesinger's opinions fall short of presenting an opinion rising to the level of reasonable degree of medical certainty that the claimant developed sudden onset bilateral ulnar neuropathy resulting from a vehicle accident with possibly no trauma." On that basis, the claim was denied.

It is illogical to conclude that medical evidence is not necessary to establish causation but then to deny the claim because the doctor did not opine that the condition was caused by a job related accident. To deny the present claim for that reason is an error of law.

When the facts surrounding the claimant's injury are examined, it is apparent that he suffered a compensable, job related injury to his left arm. Prior to the automobile accident of February 22, 2003, the claimant had not had any left arm problems. However, after the accident, the claimant suffered an immediate onset of pain, tingling, and numbness in his left arm and hand. Significantly, the ambulance impacted the claimant's vehicle on the left side, the side which was closest to his left arm. The temporal connection between the onset of symptoms and the traumatic event is simply too close to ignore. In my opinion, the facts are more than ample to support a finding that the claimant's ulnar neuropathy was the result of his job related accident.

Based upon the compensability of the claimant's job injury, he would certainly be entitled to appropriate medical and disability benefits. While

there does not seem to be any dispute that the treatment the claimant received from Drs. Burba and Schlesinger would be connected to his compensable arm injury, the respondent has raised objections to paying him temporary disability benefits based upon his arm condition. The Administrative Law Judge did not touch upon this issue since she found his arm condition to not be compensable. However, my review convinces me that the claimant is entitled to receive temporary total disability benefits during the requested time period.

The claimant's arm injury is a scheduled injury. Therefore, pursuant to A.C.A. §11-9-521 (a), a claimant is entitled to receive compensation for temporary total disability during his healing period or until the employee returns to work. Since the claimant's employer did not return him to work at any time after February 27, 2003, he would be entitled to receive temporary total disability benefits from that time, until he reached the end of his healing period on January 8, 2004.

The respondent has attempted to argue that the claimant returned to work for his brother during his healing period and has therefore disqualified himself for temporary disability benefits. However, this

argument is not supported by the facts of this case. Following his discharge from the hospital, the claimant, who was without any source of income, moved in with his brother. While living in his brother's household, the claimant provided care to his sister-in-law who was recovering from a stroke. The claimant also testified that his brother provided him approximately \$40.00 per month to pay for his personal expenses, such as cigarettes. I hardly think being taken in by a family member during a time of acute financial distress, and then helping care for a sick relative is "work" as that term is used in the Workers' Compensation Act. To say that this arrangement was employment such as to disqualify the claimant from receiving temporary total disability benefits is not a reasonable interpretation of the facts.

While I believe the award of medical benefits in this case is correct, I believe that the finding that the claimant did not suffer a compensable injury to his arm is not in accordance with the medical evidence presented herein. For that reason, I dissent from that portion of the Majority's decision.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part with, and dissent, in part from, the majority opinion affirming and adopting the Administrative Law Judge opinion.

My de novo review of this claim reveals that the claimant has failed to prove that he sustained a compensable injury arising out of his employment to his heart or his upper extremities. Therefore, I concur with these findings. However, I must dissent from the finding that the respondents are estopped from denying medical benefits as described in paragraph number three above.

An employer is generally only responsible for medical expenses when an employee is determined to have suffered a compensable injury. Ark. Code Ann. §11-9-102(5)(F)(i). However, the Arkansas Court of Appeals has applied the doctrine of estoppel to find an employer liable for medical treatment provided to the claimant at the respondents direction, where it also found that the injury was not compensable. Southern Hospitalities v. Britain, 54 Ark. App. 318, 925 S.W.2d 81 (1996). In the Britain case, the Court cited Snow v. Alcoa, 15 Ark. App. 205, 691 S.W.2d 194 (1985), wherein it had

previously set forth the elements of estoppel as follows:

1) The party to be estopped must know the facts;

2) He or she must intend that their conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe the other party so intended;

3) The party asserting the estoppel must be ignorant of the true facts; and,

4) The party asserting the estoppel must rely on the other party's conduct to his or her injury.

On February 22, 2003, a company van driven by the claimant was struck in the rear and the side panels by an ambulance trying to make its way around the van, which was fully stopped at the time. The claimant stated that he and another facility employee were accompanying several "clients" (patients of the head injury facility) on a day-trip when the incident occurred, and that none of the other passengers were injured. No significant damage was sustained to the van or ambulance. After checking on his passengers, the claimant stated that he drove to a nearby emergency room upon the advise and direction of a State Trooper who was at the scene. The claimant testified that he had informed the officer that he was having pain and numbness in his left arm, but he did not report this to ER personnel. A report of that

visit shows that the claimant was experiencing "substernal chest pain" at the time of his examination. After a brief examination, the claimant refused further treatment and he left the emergency room. In a report of that ER visit, Dr. Carroll Corbell makes the following statements:

The patient had his workup started and then decided he was not having any pain and would just rest better if he went home. I tried to dissuade him from this but he insisted that right now he was not having any problems and didn't feel like he needed his heart checked out.

The claimant testified that the respondent employer was notified of the incident prior to their return back to the facility. Thereafter, the claimant made a full report to his supervisor.

On February 24, 2004, the claimant stated that he contacted Ms. Dana Threadgill regarding his need for further medical evaluation and treatment concerning his left arm. Ms. Threadgill, who is the human resources coordinator for the respondent employer, testified that she offered to make an appointment for the claimant to be seen by with their authorized worker's compensation physician. Specifically, she stated:

I offered to make him an appointment with our worker's comp doctor, but for more immediate assistance, I told him the emergency room closest to him would have been Saline Memorial.

Ms. Threadgill further testified as follows:

Q. Okay. When [the claimant] asked you about getting checked out or getting some kind of evaluation, did you make any statements to him to suggest that any particular types of evaluation or treatment would be paid for by Timber ridge or its workers' comp carrier?

A. No.

Q. Okay. Did you tell him to go to the ER to get checked out?

A. Yes

...

Q. Okay. Did you make any guarantees to him or tell him anything upon which he thought he might rely that any kind of treatment would be covered under workers' comp.?

A. No.

Ms. Threadgill denied having any knowledge of the claimant's possible heart problems, which was a noted concern during his examination of January 22nd, and for which he was subsequently treated.

On February 24, 2004, the claimant was seen at the Saline Memorial emergency room for numbness in his left arm and chest pain. Thereafter, the claimant was admitted into the hospital where further testing revealed that the claimant suffered from significant coronary disease.

Shortly after the incident of January 22, 2004, the claimant was seen at the emergency room of

Saline Memorial Hospital, where he ultimately refused treatment. The claimant testified and the record confirms that the claimant refused this emergency treatment because he did not feel that he needed medical treatment at that time, and he did he believe that he could afford unnecessary medical treatment. Therefore, by his own admission, the claimant's emergency medical treatment of January 22, 2003, was unnecessary, unreasonable, and unrelated to his MVA of that same date. Furthermore, when the claimant contacted Ms. Threadgill on February 24, 2003, concerning his need for further medical treatment, she in no way indicated to him that, should he choose to return to the ER, the respondents would accept responsibility for payment of this treatment. The claimant chose to go to the ER that day for what ultimately turned out to be unrelated heart problems, of which the claimant had been made aware of two days earlier. Therefore, the respondent employer is not responsible for emergency medical expenses incurred by the claimant on either date. Moreover, estoppel does not apply to this case because the emergency medical treatment received by the claimant on January 22, 2003, and on January 24, 2003, was not authorized by the respondent. The evidence here clearly indicates that Ms.

Threadgill was not aware of the claimant's possible heart problems when she spoke to him on February 24th, nor did she intend for the claimant to act upon her suggestion that he go to the ER unless he sincerely believed that his problems were a result of his prior MVA. The evidence shows that due to his earlier examination and the fact that he refused treatment because he did not believe himself to be injured, the claimant was not ignorant of the fact that his problems were probably not related to the incident of January 22nd when he chose to return to the ER on January 24th. Therefore, and for all of the above-stated reasons, I must respectfully concur, in part with, and dissent, in part from, the majority opinion.

KAREN H. MCKINNEY, Commissioner