

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600208

GEORGE LAKING,
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,
EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 27, 2007

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CURTIS L. NEBBEN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The claimant appeals and the respondent cross-appeals
an administrative law judge's opinion filed May 16, 2007.
The administrative law judge found that the claimant proved
he sustained compensable injuries, and that the claimant was
entitled to temporary total disability compensation from
December 30, 2005 to January 10, 2006. After reviewing the
entire record *de novo*, the Full Commission affirms the
administrative law judge's opinion as modified. The Full

Commission finds that the claimant proved he sustained compensable injuries, and that the claimant proved he was entitled to temporary total disability from December 30, 2005 through February 3, 2006.

I. HISTORY

George William Laking, age 60, testified that he began working for Wal-Mart in June 2004. Mr. Laking testified that he was a sales clerk in the produce department. The parties stipulated that the employment relationship existed at all relevant times, including December 30, 2005. The claimant testified on direct examination:

Q. Will you tell the Judge what happened December the 30th, 2005?

A. Yes, sir. I came to work, believe it was a Friday. I had to work 9 to 6. And punched in and went to work....Jonathan would have been there, so I would have asked him, you know, what's, you know, what's the condition of the floor, what was the truck like. In other words, how much product had come in, is there anything needed on the floor, had management come by and said anything....So got to work putting product out....

Q. Okay.

A. I would assume around 9:20, somewhere between 9:20 and 9:30 I had gone back into the cooler with a short little cart and was putting turnip greens and mustard greens on it....And as I turned around, there was Jonathan with this mallet in his hand, which was unusual because we don't use that mallet except when we're taking the steel shelves

apart or putting them back together. And the thought, the last thought I had was, why does he have this mallet in his hand. And the next thing I knew, he took it, took it and whacked me right over the right eye....

Q. Prior to this, had you and Mr. Estes had any kind of altercation?

A. No, sir.

Q. Okay. Any heated words that day?

A. No, sir.

Q. Okay. What is, you went to the emergency room; correct?

A. They took me to the emergency room.

An emergency department nursing assessment indicated, "A laceration approximately 4-6 cm is noted over the left eyebrow. Active bleeding noted over left eyebrow. Complains of pain and swelling of the posterior occipital scalp. There is pain and swelling noted over the right shoulder....Extended exam of the left orbit. A 4-6 cm orbital laceration noted. The left orbital area is pain and swelling."

Dr. Christopher Knox noted on December 30, 2005:

Dr. Bennett reports negative CT's of the head and facial bones. The shoulder films are highly suspicious for a scapular fracture just medial to the glenoid area. He recommends a CT scan for further evaluation. Dr. Bennett reports an

essentially negative CT scan, and based on comparison plain films from the opposite shoulder, cannot definitely say that he has a fracture.... 58 y/o man says he was working in the produce cooler at Wal-Mart and he turned around and was hit in the head with a rubber mallet by a co-worker.... He says he's never had cross words with the co-worker who hit him and he can't think of a motive for the co-worker to do such a thing....

The claimant was diagnosed as having left orbital hematoma, left eyebrow laceration, left ear laceration, right occipital contusion, and right shoulder pain.

The record contains a Harrison Police Department Incident Report dated December 31, 2005. According to the Incident Report, the complainant was Wal-Mart and the alleged offense was Aggravated Assault. The Report identified the suspect as Jonathan Wayne Estes.

The claimant began treating with Dr. Kevin T. Jackson on January 3, 2006. Dr. Jackson examined the claimant and assessed the following: "1) Status post assault on Dec. 30, 2005/Workman's Comp claim. 2) Large laceration over the left forehead. 3) Laceration of the left ear. 4) Right shoulder pain with posterior right shoulder mass which appears to be swollen, enlarged muscle. 5) Visual changes with concerns for possible intra ocular injury. 6) Elevated blood pressure."

Dr. Jackson's treatment plan included an ophthalmologic evaluation, and he stated, "It is unlikely that he will be able to work given his injuries and probable concussive head injury and given the overall physical appearance."

On a Return To Work slip dated January 4, 2006, Dr. Jackson indicated that the claimant could return to restricted work "after eye Dr. clearance."

The police department Incident Report indicated that Jonathan Estes was arrested on January 5, 2006. Mr. Estes wrote the following Statement on January 5, 2006:

I Jonathan Estes admitt (sic) striking George inproduce (sic) with a rubber hammer. He provoked me and I let it go. He provoked my daughter and I struck him down. He threatened to kill me, and said he had plans for my organs for wich (sic) craft hobby practices. I just ignored him until he through (sic) a box empty at my feet and said it was for my daughter and he threatened to kill her, so on instinked (sic) I assaulted him with the rubber hammer as a (sic) act of defense for my family and I. I just wanted him to get the message to mind his own buisness (sic) and leave his treats (sic) to people and children to his self. I realize I probably didn't make the best decision. I love my wife and kids and I believe in defending thim (sic) to my best. I decided to take the pressure off every one and tell the truth. I would have told sooner. I was hoping it would ride out.

Dr. Jackson noted on January 10, 2006, "Patient presents for suture removal. He has kept his right upper

extremity in a sling secondary to severe right shoulder pain and concerns of a possible scapular fracture. He saw the ophthalmologist and had an eye exam which is apparently okay. His vision is much improved....He continues to have a large mass over his right posterior shoulder which is less tender than on prior exam. He has better range of motion of his right shoulder." Dr. Jackson assessed: "1) Right shoulder pain. 2) Status post assault. 3) Lacerations to his head, healing well."

Dr. Jackson's treatment plan included scheduling of physical therapy for the right shoulder and he stated, "Continue on light duty for the next week in regards to his right upper extremity. I think that otherwise he can return to normal activity with the left side of his body....See him back in one week for recheck. Perhaps at that time we can release him to full duty work."

Dr. Jackson examined the claimant on January 17, 2006 and noted, "Has not been able to start the physical therapy as Wal-Mart called him today and told him that since this was an assault that it was not a workman's comp claim, at least here in Arkansas....Still has a considerable sized mass over the right posterior shoulder. Probably $\frac{1}{2}$ - $\frac{3}{4}$

the size it was last week. Range of motion is significantly improved but he still cannot do anything overhead....Would really benefit from physical therapy but it looks like Wal-Mart is not going to pay for that now....I showed him how to do some home physical therapy maneuvers. He will call me when he feels like he is ready to go back to work and we will release him at that point."

Dr. Jackson gave the claimant a Return To Work slip on February 4, 2006 and wrote, "It is ok for George to return to work on light duty." The claimant testified that he returned to work at Wal-Mart on February 4, 2006.

Dr. James D. Langston examined the claimant on March 30, 2006 and noted "soft tissue swelling of right scapula area."

The claimant testified that he underwent shoulder surgery on April 17, 2006. The record indicates that Dr. Langston performed "Excision lipoma right posterior shoulder." Dr. Langston's diagnosis was "Posterior shoulder lipoma." Dr. Langston returned the claimant to work without restriction on April 27, 2006.

A pre-hearing order was filed on January 8, 2007. The claimant contended that he "sustained a compensable injury

to his head, neck and shoulders on or about December 30, 2005, when a co-worker attached (sic) him with a hammer and beat him severely." The claimant contended that he was entitled to reasonably necessary medical treatment, and temporary total disability from December 30, 2005 to March 3, 2006.

The respondent contended that the claimant "did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act." The respondent contended that the claimant's injury "was the result of non-employment hostility."

The parties agreed to litigate the following issues: "1. Whether Claimant sustained a compensable injury. 2. Whether Claimant is entitled to temporary total disability benefits. 3. Whether Claimant is entitled to medical treatment."

A hearing was held on March 20, 2007. At that time, the claimant modified his contention with regard to temporary total disability, stating that he returned to work on February 4, 2006.

The claimant's attorney called Jonathan Estes as a witness:

Q. Are you still working at Wal-Mart?

A. No.

Q. What happened?

A. I made a mistake and they fired me.

Q. Okay. And what was that mistake?

A. I hit George....I got hot and remembered three, three incidents, but I really, what I did, I agree what I did was uncalled for....

The respondents' attorney cross-examined Mr. Estes:

Q. Do you have an infant daughter, or did you at the time?

A. Yeah, at the time. I just, there was a box sitting on a pallet and it had her name on it. And I remembered that, and two other incidents, and I just messed up and got hot and hit him.

Q. And I appreciate your honesty about admitting that you made a mistake. What were the other two incidents? We need to go into those today, sir.

A. Yeah. Well, there was a floral lady that cut the end of her finger off, and he was laughing about it, and I didn't think it was very funny....

Q. And what was the other incident?

A. The other one, he was talking about, he had something that I thought was weird, but I still shouldn't did what I did....

Q. I understand that.

A. But he, he said something like he had a collection of something or another in jars or something from Texas or something another. And he

said he lost it in the move or something another.
And I just thought it was odd....

Q. And you hit him because you felt provoked; is that correct?

A. Yes, I believed that.

Q. Okay. And didn't have anything to with anything that happened at Wal-Mart, did it?

A. Other than -

Q. Did it - I'm sorry, go ahead.

A. Other than me being offended when Sherry had that accident and he was laughing about it....

The claimant's attorney questioned Jonathan Estes on re-direct:

Q. Mr. Estes, did George provoke you on that day, on December the 30th? I mean, did he do something?

A. The day that I hit him?

Q. Yes, sir.

A. No, he didn't say nothing. I just made a bad decision. I should have just quit and got a different job.

Q. So y'all weren't actively in an argument that day, were you?

A. No.

Q. Okay. Do you think Mr. Laking even knew that was coming when you hit him?

A. No.

On cross-examination by the respondent's attorney, the claimant denied that he ever had any prior conflicts with Jonathan Estes. The claimant testified on cross-examination:

Q. There was nothing concerning the work at Wal-Mart that played a part in this altercation, is there?

A. No.

Q. Y'all weren't fighting over time schedules or who should put up the radishes, were you?

A. No, sir.

Q. Okay. And you deny making any statements to Jonathan Estes concerning his family; is that right?

A. I had no concern with his family.

Q. Okay. Or Jonathan himself?

A. No, sir. He, he, my opinion of him at the time was he was a good worker. You know, he was quiet, he kept to himself. Unlike some of my co-workers who will stand around and talk for long periods of time while I'm out on the floor, he did not. He, he was, you know, he was active, actively working.

The administrative law judge found, in pertinent part:

3. Claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his head and shoulder on December 30, 2005.

4. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his neck on December 30, 2005.

5. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from December 30, 2005 to January 10, 2006 at the stipulated rate of \$224.00 per week.

6. Claimant has proven by a preponderance of the evidence that the treatment that was rendered to him as set forth in the medical record evidence, with the exception of the examination by the cardiologist, Dr. Ron Revard, was reasonable and necessary.

The claimant appeals to the Full Commission and the respondent cross-appeals.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) provides:

(A) "Compensable injury" means:

(i) 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[.]

(B) "Compensable injury" does not include:

(i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which said assault or combat amounts to a deviation from customary duties[.]

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

preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). 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).

The administrative law judge found in the present matter that the claimant sustained compensable injuries on December 30, 2005. The Full Commission affirms this finding. The claimant was performing employment services for the respondent on December 30, 2005 when he was attacked by a co-worker. Jonathan Estes struck the claimant several times with a hammer. The record before the Commission shows that the claimant was performing employment services when he was attacked, and that the claimant was not an active participant in the assault. The claimant's injuries were therefore compensable. *See, Flowers v. Arkansas Highway & Transp. Dep't*, 62 Ark. App 108, 968 S.W.2d 660 (1998).

The record therefore demonstrates that the claimant sustained an accidental injury which caused physical harm to the body, arose out of and in the course of employment, and which required medical services and resulted in disability. The compensable injury was caused by a specific incident

identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings, including left orbital hematoma, left eyebrow laceration, left ear laceration, right occipital contusion, and a right shoulder injury (documented by medical reports of swelling and lipoma).

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12).

In the present matter, the administrative law judge found that the claimant proved he was entitled to temporary total disability compensation from December 30, 2005 to January 10, 2006. The Full Commission finds that the claimant proved he was entitled to temporary total disability from December 30, 2005 through February 3, 2006. The claimant sustained a compensable injury on December 30, 2005, thus beginning a healing period for the claimant's post-accident left hematoma, left eyebrow laceration, left

ear laceration, right occipital contusion, and right shoulder injury. The record indicates that the claimant was not able to immediately return to work as a result of the December 30, 2005 compensable injury.

The claimant began treating with Dr. Jackson on January 3, 2006. Dr. Jackson noted that the claimant was suffering from lacerations, right shoulder pain including a mass which appeared to be swollen, and visual changes. Dr. Jackson kept the claimant off work. The Full Commission recognizes that Dr. Jackson attempted to place the claimant on light work duty beginning January 10, 2006. However, Dr. Jackson also noted that the claimant continued to suffer from a large mass over his right shoulder. Dr. Jackson recommended physical therapy. The record therefore indicates that the claimant continued within his healing period as of January 10, 2006, and that the claimant was not physically able to return even to restricted work on that date. Dr. Jackson noted on January 17, 2006 that the post-injury mass on the claimant's posterior right shoulder was still present. Dr. Jackson also noted that the respondent has not allowed the claimant to treat with a physical therapist. Dr. Jackson stated on January 17, 2006, "He will call me when he feels

like he is ready to go back to work and we will release him at that point."

On February 4, 2006, Dr. Jackson released the claimant to return to light-duty work. The claimant testified that he returned to work for the respondent-employer on February 4, 2006. The record therefore indicates that the claimant was no longer totally incapacitated to earn wages as of February 4, 2006. The claimant states in his Notice of Appeal that he is entitled to temporary total disability compensation beginning December 30, 2005 until February 3, 2006. The claimant does not contend that he is entitled to any period of temporary total disability after February 4, 2006. The Full Commission finds that the claimant proved he was entitled to temporary total disability compensation from December 30, 2005 through February 3, 2006.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant sustained compensable injuries as the result of a workplace assault on December 30, 2005. The claimant proved that all of the treatment of record, except for treatment provided by Dr. Revard, was reasonably necessary in connection with the compensable injuries. The claimant proved that he was entitled to

temporary total disability beginning December 30, 2005 through February 3, 2006. The Full Commission therefore affirms the administrative law judge's opinion as modified. 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. In the present claim, there is clear evidence as to the assailant's motivation for striking the claimant with a rubber mallet at work. Whether justified or not, claimant's assailant testified that he felt

threatened by the claimant both verbally and by the act of the claimant presenting him the box with his daughter's name on it. The claimant's fascination with witchcraft was not lost on the assailant. The record clearly reveals that the motivation for the assault was personal in nature and was, in no way related to claimant's employment. As such, the claimant's injuries are not compensable. Pigg v. Auto Shack, 27 Ark. App. 42, 766 S.W.2d 36 (1989). Moreover, claimant was an "active participant" in that he instigated the assault by presenting his assailant with the box with his daughter's name on it, and is therefore precluded from recovering pursuant to A.C.A. § 11-9-102(4)(B)(i).

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

KAREN H. MCKINNEY, Commissioner