

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613152

EVERARDO GARCIA,
EMPLOYEE

CLAIMANT

PORTLAND GIN & WAREHOUSE, INC.,
EMPLOYER

RESPONDENT

AG-COMP SIF CLAIMS,
TPA

RESPONDENT

OPINION FILED SEPTEMBER 16, 2008

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney
at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE BETTY J. HARDY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed October 17, 2007. The administrative law
judge found that the claimant did not prove he sustained a
compensable injury. After reviewing the entire record *de*
novo, the Full Commission reverses the administrative law
judge's finding. The Full Commission finds that the
claimant proved he sustained a compensable injury to his

left ankle. The claimant did not prove that he sustained an injury to his left great toe, or that medical treatment provided for his toe was reasonably necessary in connection with the claimant's left ankle injury.

I. HISTORY

Everardo Garcia Lopez, age 47, testified via deposition that he had worked for Portland Gin & Warehouse for 27 years. Mr. Lopez testified that he was an assistant manager, and that his work included sweeping, cleaning, and processing cotton. The parties stipulated that the employment relationship existed "on or about October 9 or 10, 2006, when claimant alleges he sustained an injury to his left ankle and big toe." The respondents' attorney questioned the claimant at deposition:

Q. How do you say that you hurt your foot or your ankle?

A. There's a hole there that we have to clean daily. There is dust where the cotton is; and if we don't clean it, stuff burns. We have to clean it. There are some steps there, and you can slip....You hold onto the little tubes, and you go down some steps....

Q. Did you slip while you were going down the tubes into the hole?

A. Yes, I slipped....

Q. What kind of shoes did you have on?

A. Work shoes.

Q. How did you land when you fell?

A. I fell, and my foot was bent....

Q. Did your ankle turn sideways?

A. Yes, to the side....

Q. Did anything else happen to your foot?

A. They send me to the warehouse where there's steel sticks, and I hurt myself with that. I told my supervisor, and they didn't take me to get help until seven days later....

Q. Are you saying you had any injuries from the fall; are you saying you injured yourself when you fell?

A. That's where I hurt myself, and then my supervisor put a bandage on and told me to keep working. You have to - like when you have a knife and you're trying to make it sharper, I was trying to sharpen the pieces of steel; and that's when I hurt myself.

Q. Mr. Garcia, I'm confused. Earlier when I asked if you got hurt, you started talking about some steps and falling down steps. Did you get hurt when you fell down steps?

A. Then they put a bandage over it and told me to keep working. So I had to go and sharpen the pieces of steel, and that's when I hurt myself.

Victor Saldana testified through an interpreter that he worked on the same shift with the claimant and, "They were working and when they got up, he realized that Mr. Garcia

was limping, he wasn't walking normal." Mr. Saldana testified that he first saw the claimant limping at the house where employees lived when they were not working. The information Mr. Saldana had regarding the claimant was, "he had slipped his leg on a ladder." Mr. Saldana testified on cross-examination that he did not see the claimant injure his ankle at work.

The claimant treated at Chicot Memorial Hospital on October 15, 2006. A physician assessment indicated that the claimant had fallen off a ladder and complained of left foot pain and swelling. The handwritten notes appeared to show left ankle swelling. A Radiology Report was done on October 15, 2006:

LEFT ANKLE: AP, LATERAL & OBLIQUE

There is a nondisplaced fracture at the tip of the lateral malleolus. The talus, distal tibia, and calcaneus are intact. The ankle joint is well maintained. There is marked soft-tissue swelling about the ankle.

IMPRESSION: A nondisplaced fracture at the tip of the lateral malleolus and marked soft-tissue swelling about the ankle.

LEFT FOOT: AP, LATERAL, & OBLIQUE

No definite evidence of acute fracture or dislocation is seen. The bones and joints appear normal.

IMPRESSION: Negative radiograph of the left foot. No definite evidence of acute fracture or dislocation is seen. There is some soft-tissue swelling on the dorsum of the metatarsals.

ADDENDUM:

A metallic object embedded in the big toe is seen.

Victor Saldana testified that he found out the claimant had something in his toe "When they took Mr. Garcia to the hospital and they took an x-ray." Mr. Saldana testified on cross-examination that he did not see the claimant get a piece of metal in his toe and that he did not see the claimant get a piece of metal in his shoe or slipper.

The claimant was diagnosed with Ankle Sprain and "Lateral Malleolar fracture (non-displaced very small)." The notes appear to have contained an instruction for the claimant to elevate his foot. The claimant was also taken off work for three days beginning October 15, 2006.

Dr. Askin Uysal examined the claimant on October 18, 2006 and noted, "Patient had a fall one week ago and started complaining of ankle pain his toe started getting swollen....His toe x-ray shows a small metal piece on the side on rt side - it also is more swollen today and Dr. Burge also looked at it. History is a bit sketchy via translator - says he fell on Wed and his ankle started hurting him on Wed and got worse. His toe started hurting him around Fri night to my understanding. He fell from a ladder on his ankle. He works at a gin factory. Denies

stepping over anything or anything getting stuck in his toe." Dr. Uysal's physical examination showed "Swollen ankle painful lt....Swollen big toe rt side red/tender/blistered." The assessment was "Fracture of ankle" and "cellulitis." Dr. Uysal noted, "will f/u with Dr. Burge and cbc today and start antibiotics this is most likely due to the metal piece in his toe that caused cellulitis wbc is normal."

Dr. Torrance A. Walker examined the claimant on October 20, 2006:

Mr. Garcia is a 46 y/o male who works near Lake Village at Portland Gin Company who comes in with his coworker today stating that he has development of an infection in his L great toe after it was injured on 10-09-06 by an unknown mechanism. He developed a gradual infection. He was seen by Dr. Uysal who gave him some antibiotics. The infection did not improve sufficiently, so he was referred here as a consult about the L great toe infection....

Examination of the L great toe shows he does have some diffuse swelling of his great toe with some erythema on the dorsum of it extending back to the base of the toe. He has multiple areas of dead epidermis which was debrided back on examination today. There is some drainage out of three wounds on the dorsum and the medial and lateral borders of the great toe....I am able to debride all of the overlying dead skin back to healthy tissue....After thorough debridement of this dead skin and toe, his foot was soaked for 5 minutes in a 1:1 mixture of Betadine and normal saline. His toe looked much better after this.

X-RAYS: Taken previously at Dr. Uysal's office show a small foreign body in his great toe. These x-rays were repeated after today's examination and they show no evidence of the previous foreign body that was present then. He does have some osteopenia of the distal phalanx of the great toe which may indicate some infection. This also could be due to disuse osteopenia. Only time will tell how this will respond.

Dr. Walker's impression was "L great toe infection."

Dr. Walker prescribed medication and recommended that the claimant soak his great toe in a peroxide and saline mixture twice a day.

A progress note dated November 15, 2006 indicated, "Pt states had injury at work & hurt toe. Apparently not healing well." A handwritten progress note on November 16, 2006 expressly indicated "stepped ? on iron. Hurt great toe. Denies crushing toe." It was also noted on November 16, 2006, "Great toe - swollen with large ulcer under toe. Edematous - indurated." A radiology report on November 16, 2006 showed "soft tissue swelling in the great toe. There is destruction of the distal great toe, consistent with osteomyelitis. Osteopenia is also present in the other toes and in the distal metatarsals. Arteries are calcified." The Impression was "Osteomyelitic changes in the distal great toe."

The claimant received emergency treatment in McAllen, Texas on November 21, 2006. According to a Trauma Flow Sheet, the claimant reported that his left foot had hit a piece of iron on October 7, 2006. A progress note on November 21, 2006 indicated that the claimant had a history of diabetes. A Radiology Report was entered on November 21, 2006: "A complex injury to the distal aspect of the proximal phalanx and distal phalanx of the first toe are seen. There is cortical disruption. There is separation of the joint. Extensive soft tissue swelling is noted. The rest of the osseous structures appear intact. The other cortical margins are well delineated. Vascular calcifications are seen." The impression was "Crush injury versus osteomyelitis affecting the first toe."

Dr. Ketan Patel examined the claimant on November 21, 2006:

Patient is a 45-year-old gentleman with history of diabetes who presented to the ER with complaint of left great toe pain and swelling for the past one and a half months. Currently patient had an injury to the left great toe 6-7 weeks ago and he was treated for injury as well as infection to the left toe and underwent a minor surgical procedure on his left great toe at another hospital. Since then patient continues to have pain and swelling to the left great toe....

PAST MEDICAL HISTORY:

Diabetes diagnosed one and a half months ago....

Left great toe has swelling with surrounding redness as well as a black necrotic ulcer on the base. Patient does have good pulses in the dorsalis pedis bilaterally. No other edema, clubbing or cyanosis noted in any of the extremities....

X-ray of the left foot done in the ER, I do not have the official result but the preliminary report shows multiple small fragments of the left great toe bone with soft tissue swelling.

Dr. Patel assessed "1. Left great toe abscess cellulitis and chronic necrotic ulcer. 2. Diabetes mellitus." Dr. Patel's treatment plan included a podiatry consultation. Dr. Joseph M. Caporusso examined the claimant on November 22, 2006:

This is a 45-year-old Latin-American male who apparently was in Arkansas and stepped on a thorn of steel through his shoe and apparently waited 7 days for treatment and then went to the hospital there and was treated and has had surgery....

The left first toe is about 3 times the size of the right and has a black Eschar plantarly....The x-rays are not available but the preliminary report that I can see from Dr. Patel is that there is a small fragment of the left great toe bone and soft tissue swelling most likely secondary to osteomyelitis is his clinical pictures.

Dr. Caporusso assessed "1. History of diabetes. 2. Neuropathy. 3. Infected osteomyelitis of the left hallux.

The patient will need amputation of the great toe....We will schedule the surgery for Friday if cleared medically."

A duplex of the arterial system of the claimant's lower extremities was taken on November 22, 2006, with the impression, "Significant infrapopliteal arterial segment obstructive disease in the right and left lower extremities."

The claimant underwent a Left great toe amputation on November 24, 2006. The pre- and post-operative diagnosis was "Ulcer, osteomyelitis, left great toe."

Dr. Jorge Martinez reported on November 28, 2006:

The patient is a 45-year-old Latin-American male with vague history of trauma to the left foot who presented to the outpatient clinic and was noted to have marked swelling of the toe as well as x-ray showing apparent crush injury of the bone questionable fracture versus osteomyelitis....Podiatry was consulted and the patient underwent amputation of the toe on 11/24/2006....

Dr. Martinez' discharge diagnosis was "1. Cellulitis and abscess of the left foot with osteomyelitis of the toe, status post amputation of the left first toe. 2. Diabetes mellitus."

A pre-hearing order was filed on May 9, 2007. The claimant contended that he "sustained compensable injuries

to his left foot and ankle on or about October 9, 2006, when he slipped from a ladder and subsequently injured his big toe from metal shavings. The claimant contends he is entitled to temporary total disability benefits beginning October 15, 2006, and continuing through a date yet to be determined and further contends he is entitled to medical benefits and attorney's fees."

The respondents contended that the claimant did not sustain a compensable injury on October 9 or 10, 2006. The respondents contended that the claimant could not prove he sustained a compensable injury to his left ankle or big toe. The respondents contended that "the claimant's complaints with his big toe, which apparently resulted in amputation, are not related to the claimant's employment with the respondent-employer."

The parties agreed to litigate the following issues:
"1. Compensability of claimant's alleged injury. 2. Claimant's entitlement to temporary total disability benefits. 3. Claimant's entitlement to medical benefits. 4. Controversion and attorney's fees. 5. What applicable compensation rate applies."

A hearing was held on July 19, 2007. Eddie Scherm testified that he was General Manager for the respondent-employer. Mr. Scherm testified for the respondents:

Q. Was there a point in time sometime in October of 2006 when Mr. Garcia came to you and indicated he was having a problem with his left ankle?

A. Yes....It was October the 11th, it was a Wednesday. It was at the 7 o'clock in the evening shift change. He came in with Red Garcia, who's a work sponsor and interpreter, and claimed that he had, that his ankle was hurting him and - but he couldn't tell us when it happened, and he had a couple of different versions of what happened.

Q. What did he tell you happened?

A. Well, he said that first he was - that he fell from this ladder, and then his next story was that he was pushed by another employee....But - and like I say, he couldn't say whether it was October the 9th or 10th that that occurred.

Q. Okay. What did you do in response to his statement to you on October the 11th of 2006?

A. Well, I asked him if he thought he needed to have medical attention and he declined. He didn't want to go to the doctor, didn't want to miss work. I looked at his ankle, didn't think it was, you know, swollen, but I, to humor him, I did put an Ace bandage on it....

Q. Did he put his shoe back on after that?

A. To the best of my knowledge, yes.

Q. Did you see any problems with his toe at that time, or did you look?

A. I did not look at his toe. He had socks on....

Q. Did he ever tell you that he got a piece of metal in his toe while working at the gin or anywhere around the gin area?

A. No....

An administrative law judge filed an opinion on October 17, 2007 and found, in pertinent part: "3. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury." The administrative law judge therefore denied the claim, and the claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines compensable injury:

(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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings

which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16).

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).

An administrative law judge found in the present matter, "3. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury." The Full Commission finds that the claimant proved he sustained a compensable injury to his left ankle. The parties stipulated that an employment relationship existed on or about October 9, 2006. The claimant testified that he slipped on a ladder at work, and that the accident caused his left ankle to be turned sideways. Victor Saldana did not personally witness the accident but subsequently noticed the claimant walking with a limp. Eddie Scherm, the respondent-employer's general manager, testified that the claimant told him he had fallen from a ladder. Mr. Scherm wrapped a bandage around the claimant's ankle. The claimant received emergency medical

treatment on October 15, 2006. A radiology report on that date showed soft-tissue swelling in the claimant's left ankle along with a non-displaced fracture at the tip of the lateral malleolus. The claimant was diagnosed as having an ankle sprain.

The Full Commission finds that the claimant proved he sustained an accidental injury causing physical harm to his left ankle on or about October 9, 2006. The injury arose out of and in the course of employment, required medical services, and resulted in disability. The accidental injury was caused by a specific incident and was identifiable by time and place of occurrence. The claimant established a compensable injury to his left ankle by medical evidence supported by objective findings not within the claimant's voluntary control.

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) (Repl. 2002). The claimant must prove by a preponderance of the evidence that he is entitled to additional 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. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The Full Commission has found that the claimant proved he sustained a compensable injury to his left ankle. The claimant did not prove that any treatment provided for his left great toe was reasonably necessary in connection with the injury to the claimant's left ankle. We recognize the October 15, 2006 radiology report identifying a metallic object in the claimant's big toe. There is no probative evidence of record demonstrating that the metallic object seen in the claimant's toe was a result of the October 9, 2006 ankle injury. Nor is there any probative evidence supporting the claimant's theory that the metallic object became embedded in the claimant's toe as a result of wearing slippers at work. The Full Commission notes Dr. Uysal's October 18, 2006 note regarding the claimant, "He fell from a ladder on his ankle. He works at a gin factory. Denies stepping over anything or anything getting stuck in his toe."

Dr. Walker cleaned the claimant's toe on October 20, 2006, reviewed another x-ray, and found "no evidence of the previous foreign body" that had previously been reported in the claimant's toe. The Full Commission finds that the claimant did not prove that any treatment provided for his toe was reasonably necessary in connection with the compensable injury. Nor did the claimant show that the ankle injury aggravated a pre-existing condition or otherwise caused medical treatment for his toe to become necessary. Finally, there is no probative evidence before the Commission demonstrating that the amputation of the claimant's toe on November 24, 2006 was in any way causally related to an accidental injury occurring on or about October 9, 2006.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant did not prove he sustained a compensable injury. The Full Commission finds that the claimant proved he sustained a compensable injury to his left ankle on or about October 9, 2006. The claimant did not prove that he sustained a compensable injury to his left great toe. The claimant did not prove that any of the

treatment provided for his toe was reasonably necessary in connection with the left ankle injury. For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority's opinion. I concur with the majority's finding that the claimant suffered a compensable left ankle injury on or about October 9, 2006. However, I must respectfully dissent from the majority's finding that the claimant failed to prove the compensability of the left great toe injury which resulted in amputation. Based on a de novo review of the record, I find that the claimant did sustain a

compensable left great toe injury and, therefore, I must respectfully dissent on this issue.

History

_____ The claimant worked for Portland Gin as a laborer and had worked for the company for 26 years. The claimant helped process cotton and, after he suffered a fractured ankle, he cleared the cotton gin of obstructions and swept the floors of the respondent's facility. The claimant does not understand English and cannot read or write in Spanish. He received only a third grade education in Mexico. All testimony received by the court from the claimant came through an interpreter.

At the July 19, 2007 hearing, the claimant testified that he injured his ankle on October 9, 2006 when he slipped off of a ladder at work. The claimant testified that as a result of the injury to his ankle, his ankle and foot became swollen. The claimant testified that he then wore a slipper or house shoe on his left foot as a result of the swelling. The claimant testified that his manager, Mr. Scherm, applied an "Ace" bandage to help the claimant's ankle and provided ice

for the swollen ankle. The claimant also testified that there were metal shavings on the floor at the respondent's facility.

The claimant testified that he then went to the Lake Village Emergency Room. The medical records indicate that there was both a fracture in the claimant's left ankle and a metal object in the claimant's left great toe. Subsequently, the claimant's toe became infected and required amputation.

The claimant's coworker, Victor Saldana, testified that prior to the injury on or about October 9, 2006, the claimant was in good health. Mr. Saldana testified that he subsequently noticed the claimant limping when he walked. Mr. Saldana also testified that he saw Mr. Scherm notice the claimant was limping and wearing a slipper on one swollen foot. Furthermore, Mr. Saldana testified that the claimant's work area had metal shavings on the floor.

The claimant's manager, Mr. Scherm, testified that there were metal shavings on the floor of the facility as a result of welding, grinding, and drilling.

Dr. T. Tuangsith of Chicot Memorial Hospital noted on October 15, 2006, that the claimant had a left ankle fracture and that a "metallic object embedded in the big toe is seen." Dr. Askin Uysal of Chicot Memorial Hospital x-rayed the claimant and noted both a fracture in the claimant's ankle and a "small metal piece" in his left great toe on October 18, 2006. The medical note from Dr. Uysal noted that the claimant reported he fell off a ladder and began hurting. The claimant also reported to Dr. Uysal that his toe began hurting soon thereafter.

Discussion

I find that in addition to proving a left ankle injury the claimant has proven through a preponderance of the evidence that he sustained a compensable left great toe injury which eventually resulted in amputation.

The medical records show that on both October 15 and 18, 2006, there was a metal object in the claimant's left great toe. This was the same foot where the claimant had fractured his ankle and was forced to wear a slipper instead of his normal work shoes while

working at the respondent's facility. Additionally, the claimant was put on light duty, which involved sweeping up and clearing the ginning mechanism of obstructions with a wooden pole.

The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). In Edens v. Superior Marble & Glass, 346 Ark. 487 (2001), the Arkansas Supreme Court held that "identifiable by time and place" meant subject to identification and did not require the claimant to specify the exact time of the occurrence. The Arkansas Supreme Court has stated that if "months" have passed between an accident and the manifestation of an injury, reasonable men might disagree about the existence of a causal connection. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W. 2d 172 (1962); Wentz v. Servicemaster, 75 Ark. App. 296, 57 S.W. 3d 753 (2001). The claimant and witnesses credibly testified and the medical records corroborate the fact that the claimant was injured while

working at the respondent's facility. The claimant attempted to continue working in the limited capacity that he was able, sweeping around the facility and clearing the ginning mechanism of obstructions with a sharpened mop handle, as instructed by his supervisor. The claimant, the supervisor and Mr. Saldana all testified that there were metal shavings on the floor of the ginning facility. The witnesses also testified that the claimant wore a thin slipper as a result of the ankle injury.

The medical records from October 15 and 18 revealed a metal object in the claimant's left great toe, clearly showing objective medical findings. Subsequently, the same toe that had the foreign metal object became infected and required amputation. This is no coincidence. The majority finds that it would be speculation to believe that the piece of metal came from the respondent's gin even though the facility manager testified that the respondent's facility had metal shavings on its floors. I find that it is not speculation or conjecture to conclude that the claimant

was injured with a piece of metal in his left great toe while working at the respondent's facility.

The majority has apparently disregarded the testimony of all the witnesses who stated that there were metal shavings on the floor of the respondent's facility. Even the facility manager testified that the facility where the claimant worked had metal shavings on the floors.

I find that to conclude that the claimant's toe injury is non-compensable is to ignore the evidence of record which clearly establishes the requisite causal connection between the left ankle injury, the work, and the left great toe injury. Any other determination flies in the face of common sense. The majority's determination is not based on the evidence of record, but on mere conjecture and speculation, which cannot take the place of proof. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

For the aforementioned reasons, I concur with the finding that the claimant has met his burden of proof by a preponderance of the evidence for a compensable specific incident ankle injury and dissent

from the finding that the subsequent amputation of the left great toe is not compensable.

PHILIP A. HOOD, Commissioner