

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H006569

JESSICA MELENDEZ, Employee	CLAIMANT
HEALTHCARE SERVICES GROUP, Employer	RESPONDENT
NEW HAMPSHIRE INSURANCE CO., Carrier/TPA	RESPONDENT

OPINION FILED FEBRUARY 16, 2021

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

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by JARROD S. PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 20, 2021, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 4, 2020 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed among the parties on August 11, 2020.

3. The claimant was earning an average weekly wage of \$348.81 which would entitle her to compensation at the weekly rates of \$233.00 for total disability benefits and

\$175.00 for permanent partial disability benefits.

Prior to the hearing the claimant withdrew the stipulation regarding her average weekly wage. Accordingly, average weekly wage is now an issue to be litigated.

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

1. Compensability of injury to claimant's left foot and ankle on August 11, 2020.
2. Temporary total disability benefits from August 12, 2020 through a date yet to be determined.

3. Medical.

4. Attorney fee.

5. Notice.

As previously noted, average weekly wage is now an issue to be litigated. It should also be noted that prior to the hearing the respondent withdrew the issue of notice.

The claimant contends that she sustained a compensable injury on August 11, 2020 and is entitled to temporary total disability benefits from August 12, 2020 to a date yet to be determined, medical treatment, and an attorney's fee. Claimant reserves all other issues.

Respondents contend the claimant did not suffer a compensable injury on or about August 11, 2020 and that her need for medical treatment is associated with idiopathic reasons and not a work-related injury.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The parties' stipulations that the Commission has jurisdiction of this claim and that the employee/employer/carrier relationship existed on August 11, 2020 are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left foot and ankle while working for respondent on August 11, 2020.

3. Claimant is entitled to temporary total disability benefits beginning August 12, 2020 and continuing through a date yet to be determined.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This will include reimbursement to claimant for out-of-pocket expenses.

5. Claimant earned an average weekly wage in the amount of \$367.17.

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

FACTUAL BACKGROUND

The claimant is a 48-year-old woman who began working for respondent on March 24, 2020, as a dishwasher. Claimant contends that she suffered a compensable injury to her left foot and ankle on August 11, 2020. Claimant described the incident as follows:

I was four hours into my shift. There was a CNA that needed some yogurts. My daughter told me to just go ahead and hand them their meal tickets. I walked over to where the cooler is where she was getting. I opened it up for her and I stepped forward and grabbed the tickets and when I turned to hand her the tickets, it just - - it instantly started, like my foot on

fire. I grabbed ahold of the milk cooler to keep from falling, but I couldn't put weight, pressure, nothing.

Claimant testified that immediately after this incident her daughter, who also worked for the respondent, brought her a chair to sit in and her daughter contacted Courtney Brown, claimant's supervisor, to report the injury. According to claimant's testimony, she was instructed to have her foot evaluated by one of the nurses at respondent's facility. Claimant testified that a nurse named Donna examined her foot and she was instructed to receive follow up care from her primary care physician or from the emergency room. Claimant testified that she went to the emergency room because she could not get in to see her primary care physician. Those emergency room records were not submitted into evidence.

Claimant was subsequently sent by respondent for an evaluation at MedExpress where she was evaluated by Carol Paitkowski, APRN. Paitkowski diagnosed claimant as suffering from a ruptured tendon and referred claimant to Dr. Kory Miskin, podiatrist.

Claimant was initially evaluated by Dr. Miskin on August 21, 2020 who diagnosed claimant as suffering from a rupture of the left Achilles tendon and ordered an MRI scan. Claimant underwent an MRI scan of her left ankle on August 26, 2020 which revealed a complete tear of the Achilles tendon as well as a complete tear of the anterior tibial tendon.

When claimant returned to Dr. Miskin on August 31, 2020, he recommended surgery to repair claimant's torn Achilles and tibial tendon. This surgery was performed by Dr. Miskin on September 25, 2020.

Claimant was non-weight bearing for a period of time after surgery and also

underwent physical therapy.

Claimant's last visit with Dr. Miskin before the hearing was on January 15, 2021. Dr. Miskin's medical report of that date indicates that claimant is reporting less pain and improved function. He recommended that claimant transition from a walking boot to a regular shoe. He also completed a note indicating that claimant could return to work as of February 1, 2021, with no limitations.

Claimant has filed this claim contending that she suffered a compensable injury to her left foot and ankle on August 11, 2020. She requests payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her left foot and ankle while working for respondent on August 11, 2020. Claimant's claim is for a specific injury identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proof. First, I find that

claimant has proven that she suffered an injury while arose out of and in the course of her employment and that the injury was caused by a specific incident, identifiable by time and place of occurrence. Claimant testified that she suffered the compensable injury to her left foot and ankle on August 11, 2020 while she was in the process of turning and handing tickets to another employee. As she was doing this she instantly had pain in her left foot. I find claimant's testimony regarding her injury to be credible.

At the hearing, respondent contended that claimant has given different versions as to how this incident occurred. In one of those versions she has indicated that her injury occurred when she was turning and struck her ankle against the milk cooler while in the process of handing the co-employee the tickets and in the second version she suffered the injury when she turned and simply made a step with her left foot.

After my review of claimant's testimony at the hearing and her testimony at the deposition, I do not find a significant enough difference in claimant's testimony to find that she is not credible or to find that she is telling a completely different story as to how her injury occurred. Claimant testified that when this incident occurred she was standing next to a milk cart. She further testified that in the process of turning she believed she struck the milk cart with her shoe because she heard a noise as she turned.

The noise that I heard is what made me assume or think that I had hit because I never felt my foot actually hit the corner of it. It was the noise that alerted me to it. But when I came down after turning towards the CNA - - because it's like a big school milk crate, carton things or coolers - - and when I turned and pivoted towards her to hand her the tickets was when I felt all the pain, but at the same time I heard the noise, so

I also note that claimant specifically testified at her deposition that she does not

know how she tore the tendon in her foot, only that it occurred during this incident on August 11.

Q. But when we go back and look at the accident reports and the reports of this injury and the medical, you've consistently reported this hitting the milk cooler as - -

A. I said - -

Q. - - being the cause?

A. - - that I wasn't sure how I tore it because that wasn't what I was asked. They asked me; they said, "How did you do this?"

And I said, "I was standing by the cooler, went to grab the tickets, came back, bumped it, and then that was when I fell."

Q. So what I'm asking is you've consistently told people - -

A. Yes.

Q. - - you bumped or hit the cooler?

A. Yes.

Q. Okay. Have you thought of any other possible explanations for the tendon rupture?

A. Maybe slid. I don't have any idea how I could have done it. (Emphasis added.)

Thus, while claimant testified that she believes her foot struck the milk cooler while she was in the process of turning to hand the tickets to a co-worker, she has also testified that she does not know how the tendon rupture occurred, only that it occurred during this process. As previously noted, I find claimant's testimony to be credible and do not find her testimony regarding this incident to be significantly inconsistent.

With regard to this specific issue, it should also be noted that claimant had worked

at her job as a dishwasher for four hours on August 11, 2020. Given the nature of claimant's tenon and Achilles' tear, it is difficult to believe that she could have worked for those four hours without it having been noticed by a co-worker or a supervisor. However, there is no evidence that claimant had any problems with her left foot or ankle until this incident when she was pivoting to hand tickets to a co-employee on August 11, 2020.

In addition, it should be noted that claimant was specifically asked at her deposition about prior problems with her left foot and ankle. Claimant denied having any prior left foot or ankle problems. However, the medical evidence indicates that claimant sought medical treatment from the Siloam Springs emergency room on September 25, 2016 for complaints of left foot pain and in her left heel. Claimant was given a splint and ACE wrap to wear. She was also prescribed medications and instructed to receive follow up care from her primary care physician. Claimant was also given discharge instructions for plantar fasciitis. There is no indication that claimant sought any additional medical treatment for left foot or ankle problems until after August 11, 2020. Claimant testified that she did not recall seeking the medical treatment on September 25, 2016. To the extent that she did seek medical treatment for the left foot and ankle on that date, I do not find that claimant's current complaints are the result of an incident in September 2016 as opposed to a new injury on August 11, 2020.

Nor do I find that claimant's injury was idiopathic in nature. Claimant was in the process of turning to hand tickets to a co-employee when she suffered the injury to her left foot.

Based on the foregoing evidence, I find that claimant has proven that she suffered an injury which arose out of and in the course of her employment and that it was caused

by a specific incident identifiable by time and place of occurrence.

I also find that claimant's injury caused internal or external harm to her body that required medical services or resulted in disability and that her injury was established by medical evidence supported by objective findings. Here, an MRI scan confirmed a tear of the claimant's Achilles' tendon as well as a complete tear of the anterior tibial tendon. Claimant underwent surgery by Dr. Miskin to repair those torn tendons on September 25, 2020.

Based on the foregoing, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left foot and ankle while working for respondent on August 11, 2020.

I also find that claimant is entitled to temporary total disability benefits beginning August 12, 2020 and continuing through a date yet to be determined. The injury to claimant's left foot and ankle is a scheduled injury. A claimant who suffers a scheduled injury is entitled to payment of temporary total disability benefits until they reach the end of their healing period or until they return to work, whichever is sooner. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). Claimant continues to remain in her healing period for her compensable injury. Dr. Miskin in his report of January 15, 2021 indicated that claimant could return to work with no limitations as of February 1, 2021. Claimant testified at the hearing that she had contacted the respondent about returning to work and that it was her intention to return to work on that date. Since the hearing in this claim was conducted on January 20, 2021, it is unknown whether claimant actually returned to work on that date. Based upon the evidence presented, I find that claimant has not reached the end of her healing period and based

upon the evidence submitted at the hearing, she had not yet returned to work. Therefore, she would be entitled to temporary total disability benefits beginning August 12, 2020 and continuing through a date yet to be determined. If claimant actually returned to work for respondent on February 1, 2021, claimant's entitlement to temporary total disability benefits would end as of that date.

I also find that respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This will include reimbursement to claimant for out-of-pocket medical expenses.

The final issue for consideration involves claimant's average weekly wage. Both parties have submitted into evidence wage records indicating that while working for respondent claimant earned total gross wages of \$6,976.25. The wage records also indicate that claimant was paid biweekly, and worked for 10 pay periods prior to her compensable injury. In calculating the proposed average weekly wage of \$348.81, respondent took claimant's total gross wages and divided by 20 weeks, the equivalent of 10 pay periods. As claimant correctly pointed out, she did not work for the entire first week of the first biweekly pay period. Claimant did not begin working for the respondent until March 24, 2020. Therefore, claimant did not earn her wages during a 20-week work period, but instead worked for the respondent for only 19 weeks. Dividing claimant's total gross wages of \$6,976.25 by 19 weeks results in an average weekly wage of \$367.17. I find that this is claimant's correct average weekly wage.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that

she suffered a compensable injury to her left foot and ankle on August 11, 2020. She is entitled to payment of temporary total disability benefits beginning August 12, 2020 and continuing through a date yet to be determined. Respondent is liable for payment of all reasonable and necessary medical services provided in connection with claimant's compensable injury. Respondent is also liable for reimbursing claimant for out-of-pocket expenses. Finally, claimant's average weekly wage equals \$367.17.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$454.25.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE