

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H307385

| | |
|---|------------|
| PAUL SHELLY, Employee | CLAIMANT |
| R BARTEL, INC., Employer | RESPONDENT |
| STATE AUTO INSURANCE COMPANIES, Carrier | RESPONDENT |

OPINION FILED JUNE 5, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 13, 2024, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 27, 2024 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 November 3, 2023.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$743.00 for total disability benefits and \$557.00 for permanent partial

disability benefits.

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

1. Compensability of injury to claimant's left big toe on November 3, 2023.
2. Related medical benefits.
3. Temporary total disability benefits from November 4, 2023 through February 2, 2024.
4. Permanent partial disability benefits.
5. Attorney's fee.

The claimant contends he sustained a compensable injury when he broke his toe as a result of a job related incident on November 3, 2023 and that as a result he developed complications in his left big toe that resulted in the necessity of that toe being amputated. Claimant contends he is entitled to temporary total disability benefits from November 4, 2023 until February 2, 2024 and reasonably necessary medical treatment. Claimant contends he is entitled to permanent disability benefits because of the amputation of his big toe. Claimant contends his attorney is entitled to an appropriate attorney's fee.

The respondents contend the claimant was not injured at work on November 3, 2023. The claimant had a diabetic ulcer on his left big toe prior to November 3, 2023. He allegedly stumped the left toe at work but there is no proof that an injury occurred due to that incident. The claimant broke the same toe about one year prior to the incident at work. The toe was later amputated due to the diabetic foot infection and osteomyelitis. The claimant also had a right foot pressure injury that was treated at the same time. The right foot was not injured at work. The major cause of any permanent impairment is not the incident at work.

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 his 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 stipulations agreed to by the parties at a pre-hearing conference conducted on March 27, 2024 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left great toe on November 3, 2023.
3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable left great toe injury. Respondent is not liable for payment of any medical treatment associated with claimant's right foot.
4. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning November 4, 2023 and continuing through February 2, 2024.
5. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits for the loss of the great toe in the amount of 32 weeks. A.C.A. §11-9-521(a)(12).
6. Twenty-five percent (25%) of the indemnity benefits payable to claimant are to be withheld and forwarded to the appropriate agency for payment of claimant's past due

child support. A.C.A. §11-9-110(d).

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

FACTUAL BACKGROUND

Claimant began working for respondent as a fiber technician, installing fiber optic cable, on February 22, 2023. Claimant's job duties required him to install fiber optic cable. Claimant testified that on November 3, 2023, he was in the process of carrying some fiber optic cable to a trailer when his left foot struck an underground concrete vault. Claimant testified that he paused his work momentarily before regathering himself and continuing to work. Claimant estimated that after this incident he was on his feet for an additional six hours.

Claimant testified that he did not arrive at home until approximately 10:00 p.m. on the night of November 3, 2023. It was after arriving at home that he determined that he had injured his left toe.

Q And how did you determine – how did you first realize that your toe was actually injured?

A Well, just by feeling, you know. After it happened, I didn't take my boot off or nothing. I continued to work. When I got home that night, I took my boot off and I had seen some swelling in it and it was turning colors.

And I just got in the shower and kind of started feeling a little bit feverish and took some ibuprofen and went to bed. And I got up the next morning and it had swollen even bigger, so that is when I decided to go to the emergency room.

Claimant went to the emergency room on November 4, 2023, where he was seen

by Dr. Seiter, a podiatrist who had previously treated claimant for foot issues. Claimant was diagnosed as having suffered a fractured great left toe with a severe infection. On November 5, 2022, claimant underwent surgery which consisted of an amputation of the left great toe and a right foot full thickness wound excision.

As a result of this injury and surgery, claimant was taken off work by Dr. Seiter. Claimant testified that he was released to return to work by Dr. Seiter on February 2, 2024, and he returned to work for respondent on February 5, 2024.

Claimant has filed this claim contending that he suffered a compensable injury to his left great toe while working for respondent on November 3, 2023. He requests payment of temporary total disability benefits, permanent partial disability benefits, payment of medical benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his left big toe on November 3, 2023, when he struck his left foot against an underground concrete vault. 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 his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left great toe on November 3, 2023.

First, I find that claimant met his burden of proving that his injury arose out of and in the course of his employment and that the injury was caused by a specific incident identifiable by time and place of occurrence. As previously noted, claimant testified that on November 3, 2023, he was working for the respondent and was in the process of pulling on some fiber optic cable when he struck his left foot against a concrete vault. Claimant testified that he paused for a period of time before continuing his job activities. When claimant got home that night and took his boot off he discovered that his left toe had swelling and was turning colors. The next morning the swelling had increased and he sought medical treatment.

The documentary evidence introduced by the claimant contains an investigative report performed by Douglas Renard, the Director of Safety and Fleet Operations for the respondent. Renard's report basically corroborates claimant's statements regarding the accident. To that point, there is no indication that claimant was not working for respondent at the time this injury occurred or that he was not engaged in employment services. To the contrary, I find based upon claimant's testimony as well as the remaining evidence that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment and that it was the result of a specific incident identifiable by time and place of occurrence.

I also find that claimant has proven that his injury caused internal harm to his body

that required medical services or resulted in disability and that he has offered medical evidence supported by objective findings establishing an injury. With respect to these issues, it is important to review claimant's prior problems with his feet. The medical records indicate that on June 6, 2023, claimant presented to the emergency room for right foot erythema with right foot diabetic ulcers. Claimant was subsequently evaluated by Dr. Seiter on June 8, 2023 and he indicated that claimant was having moderate pain overlying wound sites of the plantar bilateral first metatarsal heads, right greater than left. Dr. Seiter's diagnosis of the claimant's condition included a pressure ulcer of the right foot, stage 3; pressure injury of toe of left foot, stage 2; pressure ulcer of toe of right foot, stage 2; Type 2 diabetes; and left foot pain. The medical records indicate that claimant continued to be evaluated by Dr. Seiter for treatment involving both his left and right foot over the course of the next few months. That treatment primarily consisted of cleansing the feet with soap and water and applying antibiotics with protective dressing.

In the report dated September 9, 2023, Dr. Seiter indicated:

Patient additionally demonstrates resolution of previous ulceration underlying the plantar aspect left hallux.

Dr. Seiter's diagnosis of the claimant no longer mentioned any pressure injury of a toe on the claimant's left foot at that time. The resolution of the left hallux issues was also noted by Dr. Seiter in his report of October 17, 2023. All of this occurred before the incident on November 3, 2023.

It is also important to note that Dr. Seiter answered various questions proposed to him in a letter dated May 1, 2024. The first question that Dr. Seiter addressed was

whether the claimant revealed to him that he had a work-related injury. In response to that question, Dr. Seiter indicated that claimant did not reveal a work-related injury to him. Instead, he stated that his recollection was that claimant had an infected ulceration of the left great toe and that this was a new finding. However, a report of a work-related injury is reflected in the notes of Nurse McKenzie dated November 4, 2023. Specifically, Nurse McKenzie stated:

Pt presents to ED via POV with c/o L toe pain. Pt states he stumped his toe yesterday on concrete and woke up this morning to it being severely swollen, painful, and leaking fluid with sores on L big toe. Pt states this morning L leg was red and inflamed radiating up the leg to the groin area.

Thus, claimant did report a work-related injury at the time he initially sought medical treatment at the emergency room on November 4, 2023.

Dr. Seiter also indicated that claimant gave a history of having fractured his left great toe over a year ago before November 3, 2023, and that he had never sought medical attention. Claimant testified that he had informed Dr. Seiter that he thought he had broke his toe a year to a year and a half ago, but had been informed that there was nothing that could be done for a broken toe.

Regardless of whether claimant had previously suffered a fracture to his left toe, it is the opinion of Dr. Seiter that claimant's amputation of the left big toe resulted from the injury which occurred on November 3, 2023. In response to questions posed to him, Dr. Seiter indicated in his report of May 1, 2024:

2. Did the claimant already have a pre-existing cellulitis/osteomyelitis condition of the toe?

No, but he had reported swelling ever since a previous fracture.

3. The claimant told you he broke the left big toe 1 to 1.5 years previously and never went to the doctor. The x-rays and MRI showed a broken toe. Is it likely that the broken toe was due to the previous accident and not the incident on 11/3/2023?

It is unlikely that the previously noted left great toe fracture was not the cause of infection and ulceration prior to the incident on 11/3/2023 as patient had no history of infection to this area in previous evaluations.

4. What is the medical consequences of stumping the left toe on 11/3/2023?

In this situation it resulted in an ulcer formation that ultimately led to infection of the bone requiring partial left hallux amputation.

5. What is the major cause of the amputation of the left big toe?

Diabetes? Secondary contributing factor

Cellulitis? Secondary contributing factor

Osteomyelitis? Primary contributing factor

The injury at work? Primary causative factor

6. Is it likely that that osteomyelitis developed overnight between 11/3/2011 (sic) and 11/4/2023.

Review of chart indicates patient was previously on IV antibiotics for infection about the right foot. Given limited information regarding injury or left great toe and date of injury it is difficult to ascertain as to timeframe for involvement of the osteomyelitis.

Thus, according to the opinion of Dr. Seiter, claimant's injury at work was the primary factor in the claimant's need for amputation of his left big toe. I find that Dr.

Seiter's opinion is entitled to great weight.

Based upon the opinion of Dr. Seiter as well as the remaining evidence presented in this case, I find that claimant has proven that his injury caused internal harm to the body that required medical services and resulted in disability. I also find that claimant has offered medical evidence supported by objective findings establishing an injury. Here, testing revealed a fractured toe as well as an infection which resulted in the amputation of the left great toe.

Based on the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left great toe on November 3, 2023.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes the surgical procedure performed by Dr. Seiter to amputate claimant's left great toe. With respect to this issue, I note that in addition to the amputation of claimant's left great toe, Dr. Seiter also performed a wound excision on the claimant's right foot on November 5, 2023. Respondent is not liable for payment of any medical benefits associated with claimant's right foot.

I also find that claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning November 4, 2023 and continuing through February 2, 2024. The injury to claimant's left great toe is a scheduled injury. A claimant who suffers a scheduled injury is entitled to temporary total disability benefits during their healing period or until they return to work. A.C.A. §11-9-521(a); *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). Here,

claimant was taken off work by Dr. Seiter beginning on November 4, 2023, and he did not release claimant to return to work until February 2, 2024, according to claimant's testimony. I find that claimant's testimony is credible and entitled to great weight and therefore find that claimant is entitled to temporary total disability benefits beginning November 4, 2023 through February 2, 2024.

I also find that claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits for the loss of his great toe in the amount of 32 weeks. Claimant's surgery resulted in the total amputation of his left great toe which according to A.C.A. §11-9-521(a)(12) would entitle him to payment of permanent partial disability benefits in an amount equal to 32 weeks. With respect to this issue, I find that claimant's compensable injury was the major cause of his permanent impairment.

Claimant testified at the hearing that he owes back child support. Pursuant to A.C.A. §11-9-110(d) up to 25% of weekly compensation benefits may be withheld for payment of past due child support. Accordingly, I find that 25% of the indemnity benefits payable to claimant are to be withheld and forwarded to the appropriate agency for payment of claimant's past due child support.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left great toe on November 3, 2023. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable left great toe injury. Respondent is not liable for payment of any medical benefits provided for claimant's right foot. Claimant is entitled to

temporary total disability benefits beginning November 4, 2023, and continuing through February 2, 2024. Claimant is entitled to permanent partial disability benefits in an amount equal to 32 weeks for the amputation of his left great toe. Twenty-five percent (25%) of the indemnity benefits payable to claimant are to be withheld and forwarded to the appropriate agency for payment of claimant's past due child support.

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 liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$401.95.

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

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE