

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F903084

JOHN FORTE, EMPLOYEE

CLAIMANT

CITY OF JACKSONVILLE, EMPLOYER

RESPONDENT

**ARKANSAS MUNICIPAL LEAGUE
WORKERS' COMPENSATION TRUST,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED MARCH 9, 2010

Hearing before Administrative Law Judge Barbara Webb on December 9, 2009, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Mr. Scott A. Scholl, Attorney at Law, Jacksonville, Arkansas.

The respondents were represented by Mr. J. Chris Bradley, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on December 9, 2009, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on October 13, 2009. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the October 13, 2009 Pre-hearing Order is made a part of the hearing record.

By agreement of the parties, the stipulations as submitted by the parties in the Pre-hearing Order are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on or about August 25, 2008, when the claimant contends he sustained a compensable injury.
3. Based on an average weekly wage of \$759.22, the claimant would be entitled to a compensation rate of \$506.00 for temporary total disability benefits.

ISSUES

By agreement of the parties, the issues presented at the hearing were as follows:

1. Compensability of claimant's alleged August 25, 2008, injury.
2. If found compensable, claimant's entitlement to appropriate benefits.
3. Controversion and attorney's fees.

The record consists of a one volume transcript of the December 9, 2009 hearing, consisting of the testimony of John Forte, Chris Gallupo, Travis Perrow, and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (Transcript of 911 Call - 8/25/2008); Claimant's Exhibit No. 2 (Criminal Justice Institute Course Registration Request); Claimant's Exhibit No. 3 (Photograph of Incident Scene); Respondents' Exhibit No. 1 (Pulaski County Sheriff's Office Photograph List); Respondents' Exhibit No. 2 (Photographs of Incident Scene); Respondents' Exhibit No. 3 (Photograph of Incident Scene with

Handwritten Notes); Respondents' Exhibit No. 4 (Diagram of Incident Scene); Respondents' Exhibit No. 5 (On-Scene Measurements). In addition, I have blue-backed the deposition transcript of Brent C. Oldham, M.D., filed on December 28, 2009, which is hereby incorporated into the record of this proceeding.

FACTUAL BACKGROUND

John Forte is 44 years of age (d.o.b. 02/01/66). He graduated high school and has completed 28 hours of college. After high school, he managed health clubs. He also worked as an agent with the Arkansas Crime Information Center "ACIC" for 10 years. He began working for Jacksonville Police Department as a police officer in 2005. He completed the police academy and has continued ongoing training at the Criminal Justice Institute. As a police officer for 10 years, he has received five letters of commendation, two letters of appreciation, and twice was named the Lifesaver of the Year for the department. He has never received any negative action as a police officer until he received a letter of counseling in August of 2009.

He testified that on August 25, 2008, he and his partner responded to the scene where a suspect had begun firing an assault rifle on fellow officers. Once at the scene, he testified that he was trying to provide cover for Officer Alberson, who was behind a tree. As Alberson came towards him, the suspect began firing at him. He returned fire with his shotgun and Alberson ran back to the tree. He testified that they were pinned down there for three hours with the subject periodically firing on Officer Alberson. During the incident, the suspect told the negotiators that he

intended to shoot all the officers behind the tree. Eventually, Officer Alberson was shot but recovered. The suspect was killed by a sniper.

Forte testified that when they first arrived he did not know the power of the rifle. After the first shot, Forte testified he knew that they were completely outclassed. He explained that their fear was that the suspect would come out of the house and immediately go to Alberson who was not able to see because every time he moved his head, the suspect would fire shots toward him.

Forte testified that he received his second Lifesaving Award for his actions on that day. He explained that all officers involved in the shootout were offered counseling. He did not seek counseling immediately. He explained that he knew his stress level was higher but that he believed it was a normal reaction and the department was extremely shorthanded. He began having trouble sleeping and requested to go to a Criminal Justice Institute Course on law enforcement stress. He was denied authorization to attend the class.

Forte testified that he eventually had a situation and was sent to counseling at the Professional Counseling Associates. Forte explained that he had a severe nightmare approximately four months after the shootout. He explained that his nightmares were very vivid and were always gunfights. He said that sometimes the gunfights were with a person he perceived to be the suspect.

Forte testified that he did not think he had PTSD but was tired all the time. He explained that he had always been a health fanatic, but everything had completely changed. He thought he was sleeping but he was not. He received

counseling and medication. He currently takes Invega and Seroquel. He testified that the medications make him lethargic and thirsty. He has continued counseling and believes that his treatment has been helpful. He described his current symptoms:

My symptoms are I wake up, I move things, I have to check things repeatedly. When I say check things repeatedly, I mean to wretched excess, and I can't help it. It's – You know, I have to check the stove, I have to check the front doors, I have to check the windows, and I have to do it over and over and over.

He explained that this is called “walking a perimeter” with PTSD. He testified that he feels vulnerable to attack when he gets ready to go to sleep and has to keep checking and cannot sleep if there is any movement in the house. He is no longer working and surrendered his weapon voluntarily. He explained that he was released back to light duty but that the department would not let him do any light duty. His current status is unpaid medical leave. His health insurance has been cancelled and his medication is \$739.00 a month. Forte testified that the department stopped paying for his counseling and he has survived on physician samples for the last four months. He testified that he is barely getting by. He testified that he has not been released to fully duty. He testified that he was willing to try to go back to work at something other than police work. He testified that he had purposely removed himself from any stressful situation and believes that he is as good as he is going to get.

On cross-examination, Forte agreed that he went to the scene wearing protective equipment. He explained that he initially talked with a counselor, but was

told to go back to work. His first day off from work was on March 2, 2009. He went to his personal physician because he was exhausted due to sleep problems. He was referred to a sleep study. He was diagnosed with sleep apnea and provided a CPAP machine. He told the doctor about his dreams and flashbacks. He had reported the flashbacks in October, but was told that it would go away with the passage of time. When he told Chief Sipes that his doctors believed he had PTSD, he was ordered to see Dr. Dawn Harris, a psychologist. He is currently under the treatment of Dr. Harris and Dr. Oldham, a psychiatrist. He testified that he had applied for disability retirement but has not received it. The doctor recommended the disability since they would not return him to active duty. He continues to receive unemployment benefits and is current on his child support obligations. He explained that he is currently receiving some sick time from the department which goes to the payment of his child support. He was directed to go to another psychologist or psychiatrist by the Chief, but did not go because he had no income and was on unpaid medical leave. He explained that he contacted his attorney and the attorney sent a letter to the Municipal League requesting that they be able to pick the doctor since the department had selected the other doctors.

Forte testified that he had never actually seen a stabbing or shooting before this event. He explained that his doctor released him to light duty on June 18, 2009. He sent a letter pleading for light duty and went in and pleaded for light duty. He testified that at one time there were four light-duty officers in the warrants office. He explained these officers were unarmed and in street clothes. Forte testified that

the Chief told him that he didn't have anything for "somebody with your condition." He testified that he had applied at different law firms because they hire police officers as investigators.

Officer Chris Gallupo testified that he worked as a canine handler for the Jacksonville Police Department. He testified that he and Officer Forte were working extra duty doing bicycle patrol on the day of the shooting. He testified that he rode with Forte to the area where the disturbance was located, i.e. where shots were being fired. Gallupo testified that they were on the front porch while random shots were being fired and then moved behind a Ford Explorer with some other officers. He recalled that Alberson was behind the tree. He testified that they had to shoot two separate series of suppression fire of approximately 16 rounds. Gallupo testified that Forte had to leave the cover of the vehicle to fire at the residence. He testified that Forte provided cover with suppression fire as he and another officer assisted Alberson after he had been shot to an area where he could be extracted. He testified that he did not take direct fire, but was in the area where shots were being fired on the scene. He did not observe Forte taking direct fire. He testified that on that day Smith had committed crimes of attempted homicide, discharging a firearm in the city limits, aggravated assault, among other crimes. He testified that it would be a crime if someone pulled a weapon and pointed it at a police officer or fired it in the general area. He estimated that Smith had fired well over a hundred rounds. Alberson received a gunshot wound to his left side, but recovered. Gallupo received a Lifesaving Award from the actions taken that day. He testified

that Forte could have been in the shooter's line of vision at the time he went from cover to shoot at Smith after he had shot at Alberson.

Travis Perrow testified that he was a detective for the Jacksonville Police Department. He testified that he was an officer behind the Explorer during the shooting. He explained that he was behind the engine and in the safest spot on the car. He testified that Forte had a shotgun and in order to get some rounds off had to expose himself to the shooter by stepping away from the car to take up a position. He could not say whether Forte took direct fire. He testified that Alberson, Williams, and Lutke had taken direct fire. After Williams and Lutke got to safety, Alberson was in the worse position and took most of the direct fire. He testified that the incident was scary but that he got over it. He testified that he and his fellow officers were in danger that day and that brandishing a weapon in front of a police officer was a crime.

Dr. Oldham testified by deposition that he graduated medical school at UAMS in 1988 and completed a residency in psychiatry in 1992. He testified that Officer Forte had been a patient since April 17, 2009. He explained that Forte also sees Dr. Harris for therapy. He is responsible for medication management. He testified that Forte presented with complaints of anxiety and depression as a result of his involvement in a shootout in August of 2008 and was having post traumatic stress disorder symptoms. He conducted his initial evaluation on April 23, 2009. He did not perform any tests. He diagnosed Forte with post-traumatic stress disorder, "PTSD". Oldham explained that PTSD is

a condition that arises when a person has been involved in a specific, significant stressful event. It often produces symptoms of anxiety, depression, may include intrusive thoughts of the event, may produce sleep disturbance, may produce nightmares of the event, may produce flashbacks of the event.

Dr. Oldham explained that PTSD can be acute, chronic, or delayed. He testified that Forte had chronic or delayed PTSD. He testified that Forte's problems with PTSD were caused by the primary event, i.e. his involvement in the shootout. He added that Forte has also had some emotional effects due to the delayed settlement regarding Workmen's Compensation.

The Diagnostic and Statistical Manual of Disorders ("DSM") is a manual published by the American Psychiatric Association. The manual lists specific diagnoses and the diagnostic criteria for each diagnosis. The most current edition of the DSM is the IV-R. He explained that there are some differences between the Fourth Edition and the IV-R Edition, as far as criteria for different disorders. He explained that the IV-R Edition of the Manual lists the diagnostic criteria for PTSD as

A) the person has been exposed to a traumatic event in which both of the following have been present: The person witnessed, experienced, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others. Two, the person's response involved intense fear, helplessness or horror.

(B) the traumatic event is re-experienced in one or more of the following ways: One, recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Two, recurrent distressing dreams of the event. Three, acting or feeling as if the traumatic event were recurring. Includes a sense of re-living the experience, illusions, hallucinations, and dissociative flashback

episodes, including those that occur upon awakening or when intoxicated. Four, intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

(C) persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness, not present before the trauma, as indicated by three or more of the following: One, efforts to avoid thoughts, feelings, or conversations associated with the trauma. Two, efforts to avoid activities, places, or people that arouse recollections of the trauma. Inability to recall an important aspect of the trauma. Markedly diminished interest or participation in significant activities. Five, feeling of detachment or estrangement from others. Six, restricted range of affect. Seven, sense of foreshortened future.

(D) persistent symptoms of increased arousal, not present before the trauma, as indicated by two or more of the following: Difficulty falling or staying asleep, irritability or outbursts of anger, difficulty concentrating, hypervigilance, and exaggerated startle response.

(E) duration of the disturbance of symptoms is more than one month.

(F) the disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Oldham testified that Forte met enough of the criteria to make the diagnosis of PTSD under the DSM. He explained that Forte

definitely experienced and witnessed an event in which himself and others were in physical danger of death. He had re-experienced the traumatic event through recurrent and intrusive distressing recollections of the event. He has had flashbacks of the event. He has had nightmares of the event. He has had diminished interest in participation in significant activities, feelings of detachment, restricted range of affect. And he has had efforts to avoid feelings or conversations associated with the trauma. He has had difficulty falling and/or staying asleep, some irritability, hypervigilance.

Oldham testified that based on a reasonable degree of medical certainty that Forte has met adequate criteria to make the diagnosis of PTSD. He testified that

the severity of Forte's condition has been assessed using an Axis IV evaluation as a Global Assessment of Functioning, i.e. "GAF score". Forte was initially evaluated as a 41 which is interpreted "Serious symptoms or serious impairment in social, occupational, and school functioning." Oldham testified that he last saw Forte on October 5, 2009, and would estimate his GAF score at that time to be about 71 which is interpreted "Some mild symptoms, some difficulty in social, occupational or school functioning, but generally functioning pretty well, has some meaningful interpersonal relationships."

Oldham explained that the symptoms of PTSD may go into remission but it would be difficult to predict what would happen under a stressful event. PTSD is accompanied by anxiety and depression. Oldham testified that Forte exhibited both anxiety and depression. He does not consider Forte to be a danger to himself or others. Forte is currently being treated by medication and therapy. He testified that Forte does not suffer from any other diagnosis. He explained that as of his last visit with Forte in October, he believed Forte could carry a weapon and return to work. He saw no evidence that Forte was malingering or trying to make up his symptoms. On cross-examination, Oldham testified that he meets with the claimant at various intervals to discuss symptoms and medications and adjust the medications as appropriate. He testified that he currently sees the claimant every month or two and did not anticipate that Forte would be required to take medication the rest of his life. He testified that he signed a letter dated September 17, 2009, in which he opined that Forte should be considered disabled from police work. Oldham testified that

he would recommend that Forte return to work on a trial basis under light duty for a period of time and if he responded well, then to escalate his responsibility and perhaps return to full duty. He indicated that he would not recommend Forte to return to full employment, uniform, with a weapon as of December 3, 2009. He agreed that the claimant's need for medication and talk therapy was indeterminate.

DISCUSSION

_____The claimant contends that he suffered a compensable mental injury on August 25, 2008. The claimant contends he is entitled to temporary total disability benefits from the date of the incident through a date yet to be determined, and attorney's fees. The claimant reserves all other issues, including any claim for permanent partial disability and wage loss disability benefits.

The respondents contend that the claimant claims benefits pursuant to Ark. Code Ann. § 11-9-113. Respondents contend that in the absence of a physical injury, claimant is not entitled to benefits because he was not a victim of a crime of violence.

I. Mental Injury

A.C.A. § 11-9-113 provides that a mental injury or illness is not compensable unless it is caused by a physical injury to the employee's body except where the employee is a victim of a crime of violence and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence. The statute further provides that no mental injury or illness is compensable unless it is diagnosed by a licensed

psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders. The statute further provides that in any claim by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits.

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury.

In the instant case, the claimant has proven by a preponderance of the credible evidence that he suffered a compensable mental injury or illness as a result of his duties as a police officer with the Jacksonville Police Department. The uncontradicted evidence demonstrates that on August 25, 2008, John Forte was involved in a shootout during which a fellow officer was wounded and the assailant was shot and killed by sniper fire. He continued working until March 2, 2009, when he voluntarily surrendered his weapon and sought psychiatric and psychological treatment due to symptoms of depression, anxiety, and post-traumatic stress disorder. The respondents have controverted compensability in this case on the basis that the claimant did not suffer a physical injury. Respondents submit that the

claimant was not a victim of a violent crime and therefore does not fall within the exception set out in A.C.A. 11-9-113 that does not require victims of violent crime to prove that their mental injury was caused by a physical injury. It appears that respondents believe that the claimant was not shot nor the intended target of the assailant's shooting and therefore was not a victim of this crime. However, it is clear from all of the testimony offered by the officers at the scene that the claimant was clearly in an area in which he was directly exposed to the random gunfire in his attempts to save a fellow officer for an extended period of time. As the other responding officers indicated, when a suspect brandishes a weapon in the presence of a police officer, he has committed a crime. In the instant case, the evidence demonstrates that the suspect not only had a weapon but shot a substantial number of rounds from inside a house in the general direction of the police including Forte, shot a police officer, and refused to surrender until he was shot and killed by sniper fire. Clearly these officers, including Forte, were in an increased risk of danger and were victims of the suspect's criminal conduct. See, Marshall v. Madison County, 81 Ark. App. 57, 98 S.W.3d 452 (2003). In the Marshall case, the chief deputy was involved in a shootout and suffered compensable mental injuries as a result of the incident. Although the deputy was hit by bullet fragments, he sought treatment after six months for depression, anxiety, and post-traumatic stress disorder. In the Marshall case, the claimant sought additional disability benefits beyond the twenty-six weeks provided in the statute. The court noted that as a victim of a violent crime, the claimant did not have to

prove that their mental injury was caused by a physical injury, but was limited to the twenty-six week limitation on disability benefits set out in A.C.A. 11-9-113(b)(1). Similarly, the claimant in this case does not have to prove that his mental injury was caused by physical injury, but is limited to the twenty-six week limitation on disability benefits.

Finally, I find that the claimant has proven that his diagnosis of PTSD has met the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”). The claimant relies on the testimony of Dr. Oldham, a licensed psychiatrist, who testified in detail the correlation of the basis of his diagnosis to the DSM criteria. Hope Livestock Auction Co. v. Knighton, 67 Ark. App. 165, 992 S.W.2d 826 (1999). Dr. Oldham explained that the claimant

definitely experienced and witnessed an event in which himself and others were in physical danger of death. He had re-experienced the traumatic event through recurrent and intrusive distressing recollections of the event. He has had flashbacks of the event. He has had nightmares of the event. He has had diminished interest in participation in significant activities, feelings of detachment, restricted range of affect. And he has had efforts to avoid feelings or conversations associated with the trauma. He has had difficulty falling and/or staying asleep, some irritability, hypervigilance.

Oldham testified that based on a reasonable degree of medical certainty that Forte has met adequate criteria set forth in the most current version of the DSM to make the diagnosis of PTSD.

II. Controversion and Attorney’s Fees

Based on my review of the evidence in this case, I find that respondents have fully controverted compensability and payment of all medical and indemnity benefits. Claimant's attorney is entitled to a statutory attorney's fee on the disability benefits awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on or about August 25, 2008, when the claimant sustained a compensable mental injury.
3. Based on an average weekly wage of \$759.22, the claimant would be entitled to a compensation rate of \$506.00 for temporary total disability benefits.
4. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical benefits associated with his compensable injuries.
5. The claimant has proven by a preponderance of the evidence that he is entitled to twenty-six (26) weeks of disability benefits.
6. The respondents have fully controverted claimant's entitlement to disability benefits. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

AWARD

The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge