

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212229

LUIS NOVILLO

CLAIMANT

SMURFIT-STONE CONTAINER CORPORATION
SELF INSURED

RESPONDENT

CRAWFORD & COMPANY,
THIRD PARTY ADMINISTRATOR

RESPONDENT

OPINION FILED OCTOBER 14, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale,
Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by LES EVITTS, III, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

The hearing was initially commenced on June 30, 2003, in Springdale, Arkansas. However, due to the interpreter's pressing schedule, the hearing could not be concluded until July 17, 2003. The deposition of the claimant was taken on May 29, 2003, and has been admitted as Respondent's Exhibit No. 3.

A pre-hearing order was entered in this case on February 3, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. As there were no changes in any of these, a copy of the pre-hearing order was made Commission's Exhibit No. I to the initial hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. The appropriate weekly compensation rates are \$326.00 for total disability and \$245.00 for permanent partial disability.
3. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury to his right elbow on May 2, 2002.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from August 26, 2002 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant was injured on May 2, 2002, when he was working, packing cartons, and as shown by the December 10, 2002 report, felt immediate pain as he was doing this work and that his job duties became insufferable, and he was unable to continue as of August 26th. He now faces surgery and requests TTD from August 26th to an unknown date. After he told the employer he couldn't stand it anymore, and after this hard-working Hispanic worker stayed at his job for another four months, they rewarded him by sending him to Gary Moffitt who said there wasn't anything wrong with him and told him to work for another three days.

I bet Dr. Moffitt couldn't have worked even after May with his condition, but he certainly did what the company wanted him to do, and that was to tell this guy to keep working. Luckily, he got to Dr. Jim Moore, who has now schedule him for surgery. What we're requesting is medical and TTD and attorney fees."

In regard to these issues, the respondents contend:

"The respondents contend that the claimant did not sustain a compensable injury during the course and scope of his employment with the respondent while he was performing employment related services and therefore the claimant is not entitled to any benefits. The respondent further contends that the medical treatment sought by the claimant is not authorized, reasonable or necessary."

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his right arm, in the area of his right elbow, on or about May 2, 2002. The burden rests upon the claimant to prove this alleged compensable injury.

To meet this burden, he must first prove by the greater weight of the medical evidence, which is supported by "objective findings", the actual existence of a physical

injury or condition involving his right arm, or elbow. Ark. Code Ann. §11-9-102(4)(D). He must then prove by the greater weight of the credible evidence that any medically established and objectively supported physical injury or condition satisfies all of the definitional requirements contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) That the physical injury or condition must arise out of and occur in the course of the employment;
- (2) That the physical injury or condition must be caused by a specific incident;
- (3) That the physical injury or condition must be identifiable by time and place of occurrence;
- (4) That the physical injury or condition must result in internal or external physical harm to the claimant's body;
- (5) That the physical injury or condition must require medical services or result in disability.

The medical record shows that the claimant's difficulties in the area of his right elbow were initially diagnosed as epicondylitis. Initial x-rays were interpreted as normal. Subsequent x-rays and an MRI study performed in September of 2002, indicated the presence of a "loose body" in the claimant's right elbow joint. This resulted in a change in the claimant's diagnosis to "an irritation occasioned by a loose body in the right elbow joint". As a result of this new diagnosis, corrective surgery was performed to remove this loose body by Dr. Moore. However, extensive surgical exploration of the joint by Dr. Moore failed to reveal the actual presence of the suspected loose body (an indication that x-rays and MRI studies are not always as accurate as frequently believed). During the surgery, Dr. Moore did observe condromalacia at the edge of the head of the radius, which he opined was indicative of some old trauma and degenerative changes in that area. During the surgery, excess synovial fluid and a mild degree of synovitis was also found. Based upon these findings Dr. Moore's final diagnosis was condromalacia and synovitis of the elbow

Following the surgery and a brief recovery period with physical therapy, the claimant's right elbow symptoms appear to have been relieved. On April 3, 2003, Dr. Moore noted the claimant to be asymptomatic, in regard to his right elbow, and he released him from further treatment with no physical limitations or restrictions in regard to his right elbow.

After consideration of the medical record, I find that the claimant has presented sufficient medical evidence to "establish" the actual existence of a physical injury or condition involving his right elbow, in the form of chondromalacia and synovitis of the right elbow. Further, the actual existence of this condition is supported by objective visual findings made by Dr. Moore, during the surgical procedure on January 2, 2003. Therefore, in regard to his chondromalacia and synovitis of his right elbow, the claimant has satisfied the requirements of Ark. Code Ann. §11-9-102(4)(D).

It next becomes necessary to determine if the claimant has proven by the greater weight of the credible evidence that these medically established and objectively documented physical injuries or conditions involving his right elbow, satisfy the requirements of Ark. Code Ann. §11-9-102(4)(A)(i). In order to satisfy the first requirement of this subdivision, the claimant must prove by the greater weight of the credible evidence the existence of a causal relationship between these medically established and objectively documented physical injuries or conditions and his employment with this respondent, In order to satisfy the second requirement of this subsection, this employment related cause must be a "specific incident". In order to satisfy the third requirement of this subsection, the claimant must prove by the greater weight of the credible evidence the time and place that these injuries or conditions occurred.

The only direct evidence presented by the claimant to satisfy these first three requirements is his own testimony. The claimant's own testimony is the only direct evidence to prove the actual occurrence of any specific employment related incident on

May 2, 2002. His testimony is also the only direct evidence to prove the existence of a close temporal relationship between this specific employment related incident and the onset of symptoms indicative of the occurrence of a physical injury to his right elbow. Finally, his testimony is the only direct evidence to identify the time and place of his alleged employment related injury.

Although the testimony of a party is never considered uncontradicted, this does not mean that it can be arbitrarily disregarded. If the testimony of a party is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident and to prove the time and place of the initial onset of symptoms involving his right elbow, which would be indicative of the occurrence of a physical injury to this portion of his body.

However, after considering all the evidence presented, it is my opinion that the claimant's testimony, concerning these matters, is internally inconsistent, it conflicts with previous statements made by him, and is contradictory to his conduct and actions following the alleged incident and injury. Thus, it is not sufficient to prove the facts necessary to satisfy the requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

At the hearing, the claimant testified that he first began experiencing difficulties with his right forearm and elbow between his first break and his lunch break on May 2, 2002. These difficulties started while he and another employee were feeding large pieces of cardboard into a machine for processing into boxes, apparently a machine numbered 783 (T.9-10, initial hearing and T. 6-7, subsequent hearing). He also testified that on July 3, 2002, he experienced a significant increase in his right forearm and elbow symptoms, while feeding cardboard into another machine, 821-B (T.6-7, subsequent hearing).

The various medical reports and records contain somewhat differing histories of the onset of the claimant's right elbow difficulties. The claimant initially sought medical

treatment for his right elbow difficulties, from a Dr. Bledsoe and a Dr. Bingham on July 30, 2002. These physicians had previously been treating him for some time for ongoing difficulties involving both of his shoulders. At the time of the July 30, 2002 visit, the claimant continued to complain of difficulties with his shoulders and was seeking another steroid injection to this area. However, the following complaints are also noted:

“He is now having pain in his right forearm. Hurts with rotating his hand. No trauma, sleeping wrong on arm.” (Emphasis mine)

There is no mention of any work related incident or cause for these difficulties, either on May 2, 2002, July 3, 2002, or any other date.

The claimant returned to Dr. Bledsoe and Dr. Bingham on August 9, 2002. At that time, a different history of his right forearm and/or elbow complaints was recorded. In this history, a mention of the claimant’s employment was made, in regard to his right elbow complaints:

“Complains of right forearm pain for one month. For last few weeks he has had pain to right forearm, pain started at work, pain is worse with supination of arm on right, no trauma.”

However, there is no description of any specific employment related incidents, such as that described in the claimant’s testimony. There is also no mention of any difficulties with his right forearm or shoulder beginning in May of 2002.

On August 26, 2002, the claimant returned to Drs. Bledsoe and Bingham, with continued complaints involving his right forearm and elbow. Although this report recorded that the claimant reported increased difficulties with his right forearm and elbow with “working and lifting”, there is no mention of any specific employment related incident or accident being associated with the onset or the worsening of these difficulties, either in May or July of 2002.

On this visit, the claimant also sought and obtained the completion of a form which was necessary in order for him to receive for medical leave from the respondent. This form

was apparently completed by Kristy Walker, a certified physician's assistant for Drs. Bledsoe and Bingham. This completed form gives no indication that the claimant's elbow difficulties were in any way reported as being the result of a specific employment related incident.

When the claimant finally notified the respondent that he was claiming a work related injury, the respondent sent the claimant to Dr. Gary Moffitt, (the company physician). The claimant was initially seen by Dr. Moffitt on September 26, 2002. Dr. Moffitt's office notation and narrative report, bearing that date, contained somewhat differing histories of the onset of the claimant's right elbow difficulties. In his initial office notation, Dr. Moffitt records that the claimant reported that these difficulties began about "four months ago" when the claimant "lifted something heavy" and hurt his right arm. In his narrative report Dr. Moffitt notes that the claimant's difficulties with his right forearm and elbow have been present for a "few months" and notes the following history of the onset of these difficulties:

"It seems that on a specific date he remembered pulling on some corrugated material and felt a burning, painful sensation in the antecubital fossa and just distal to it of his right arm."

However, there is no mention of two specific incidents, as described by the claimant in his testimony.

On December 10, 2002, the claimant was initially seen by Dr. James Moore, an orthopaedic surgeon. This evaluation was performed at the request of his attorney. In his narrative report of December 10, 2002, Dr. Moore records the following history of the claimant's right elbow and forearm difficulties:

"This (right elbow and forearm symptoms) began in May-02. He was lifting heavy boxes and had a sudden pain in the elbow-pain continued-since August has been too painful to work."

Curiously, there is no mention of the alleged incident on July 3, 2002.

The various contradictions in the claimant's histories, regarding the onset of his right

elbow and forearm difficulties, must also be considered in light of his actions following the alleged incidents and injuries of May 2, 2002 and July 3, 2002. First, the record clearly shows that the claimant made no attempt to obtain medical treatment for any complaints or difficulties involving his right elbow or forearm, until he consulted the office of Drs. Bledsoe and Bingham on July 30, 2002. The office notation of that date further indicates that the primary purpose of the claimant's visit was his continued bilateral shoulder difficulties. His right forearm or elbow complaints appear to be mentioned merely as a corollary complaint. The claimant offers no reasonable explanation for his failure to seek medical treatment for almost three months following the alleged onset of his elbow or forearm difficulties on May 2, 2002, and almost a month following the alleged significant worsening of these complaints on July 3, 2002.

Secondly, the evidence shows that the claimant continued to perform his regular employment activities for this respondent for a substantial period of time following both of these alleged employment related incidents. The claimant continued to perform his regular employment activities for this respondent (some of which involved rather strenuous use of his right arm) through August 26, 2002. There is no indication that during this period the claimant required or even requested any assistance in performing his regular duties. Such actions would be clearly inconsistent with the magnitude of the continuous symptoms the claimant describes.

Finally, and most importantly, the claimant testified that he was well aware of the respondent's policy that all employment related injuries be reported immediately, regardless of severity. His testimony even show that he had followed this procedure in the past in regard to an employment related injury to his left wrist. However, the greater weight of the credible evidence shows that the claimant did not report any employment related injury to his right elbow or forearm, until September 26, 2002. Although the claimant testified that he told his supervisor that he was experiencing pain in his right forearm and

elbow on August 26, 2002 (when he applied for a medical leave of absence), he conceded that he did not tell his supervisor that these complaints were due to any employment related injury, particularly injuries on May 2, 2002 or July 3, 2002.

While I recognize that the claimant may have a language problem, this does not explain his failure to follow what he obviously knew to be established company policy in regard to the reporting of employment related injuries. The claimant offers no satisfactory explanation for his failure to timely report these alleged injuries. As previously indicated, he was aware of these established reporting procedures, had followed these procedures in regard to a prior employment related injury, and had experienced no adverse consequences or repercussions. The claimant's failure to timely report any work related elbow injury or injuries is clearly inconsistent with both the actual occurrence of a specific employment related incident or incidents and the sudden onset or worsening of right elbow or arm pain contemporaneous to the occurrence of an employment related incident or incidents.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence that any medically established and objectively supported injuries or conditions, which he may have experienced with his right elbow, were caused by a specific employment related incident, occurring on or about May 2, 2002, or July 3, 2002. Thus, he has failed to prove that any medically established and objectively documented injuries or conditions which he may have experienced with his right elbow constitute a "compensable injury", within the meaning of Ark. Code Ann. §11-9-102(4)(A)(i).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including May 2, 2002 and July 3, 2002, the relationship of employee-self insured employer-third party administrator

existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$326.00 for total disability and \$245.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a “compensable injury” to his right elbow on May 2, 2002 and/or July 3, 2002. Specifically, he has failed to prove by the greater weight of the credible evidence the occurrence of a physical injury to this portion of his body which is established by medical evidence and supported by objective findings, which arose out of and occurred in the course of this employment, which was caused by a specific incident, and which is identifiable by time and place of occurrence.
5. The respondents have denied the occurrence of any compensable injury to the claimant’s right elbow and/or forearm and have controverted his entitlement to any and all benefits attributable thereto.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge