

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308715

BILL PINKERTON, EMPLOYEE	CLAIMANT
LANDAIR TRANSPORT, INC., EMPLOYER	RESPONDENT
GREAT WEST CASUALTY CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 23, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 5, 2004 in Little Rock, Arkansas. A prehearing order was entered in this case on August 23, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. Employer-employee-carrier relationship at all pertinent times.

2. This claim has been controverted.
3. As of the date of the claimed right knee injury, August 1, 2003, claimant was earning wages entitling him to receive benefits at the maximum compensation rates of \$425/\$319 should this claim be found compensable.
4. The claimant's post-surgical healing period ended on March 11, 2004.

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

Claimant:

1. Entitlement to medical benefits (including knee replacement surgery).
2. A period of TTD.
3. Controversion.
4. Attorney's fees.
5. PPI.

Respondent:

1. Entitlement to medical benefits.
2. Entitlement to temporary total disability benefits.

3. Entitlement to permanent physical impairment benefits.
4. Entitlement to attorney's fees.
5. Offset for unemployment benefits received.

As a threshold matter, the respondents contend that the claimant did not sustain a compensable injury to his right knee while working for the respondent employer. Specifically, the respondents assert that the record does not contain evidence that the claimant sustained any injury demonstrable through objective findings.

The record consists of the October 5, 2004 hearing transcript and the exhibits contained therein.

DISCUSSION

To prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that 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, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) that the injury was caused by a specific incident identifiable by

time and place of occurrence. Ark. Code Ann. § 11-9-102 (4) (A) (i) (Repl. 2002). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

With regard to the objective findings requirement, Ark. Code Ann. § 11-9-102(4) (D) (Repl. 2002) provides that "A compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section." In this regard, Ark. Code Ann. § 11-9-102(16) (A) (i) provides that "'Objective findings' are those findings which cannot come under the voluntary control of the patient."

In the present case, Mr. Pinkerton was employed to drive a dedicated truck route to Florida twice per week with five stops per trip. On August 1, 2003, Mr. Pinkerton slipped and ultimately fell while unloading freight with a two-wheeled dolly in Daphne, Alabama. Mr. Pinkerton finished unloading the freight, drove on to Ft. Walton, Florida, where he paid two other people to unload freight, then spent a night on the road, and dropped the truck and trailer off in Russellville, Arkansas on August 2, 2003.

Mr. Pinkerton testified that his right knee swelled after the fall, but that the swelling went down somewhat before he first saw Dr. Mulhollan.

Mr. Pinkerton presented to Dr. James Mulhollan, a knee specialist, on August 5, 2003, and Mr. Pinkerton presented to Dr. Scott Bowen, another knee specialist, on August 14, 2003. Mr. Pinkerton testified that Dr. Bowen performed a right knee replacement surgery on August 27, 2003.

Based on Mr. Pinkerton's credible testimony, I find that the record establishes the occurrence of a specific incident in Daphne, Alabama on August 1, 2003, which caused injury to Mr. Pinkerton's right knee. Clearly, the dolly incident occurred during the course of Mr. Pinkerton's employment, and the resultant knee condition required medical treatment.

However, I find that the medical record in this case fails to support the existence of an injury sustained on August 1, 2003 with medical evidence supported by objective findings. In reaching this conclusion, I note that the medical reports in the record do contain several clearly objective diagnostic and clinical findings. For example, Dr. Mulhollan indicated on August 5, 2003 that MRI testing showed that Mr. Pinkerton's medial meniscus had been

virtually worn away. On August 14, 2003, Dr. Bowen indicated that Mr. Pinkerton's knee contained osteoarthritis as per x-ray examination; that the knee had a palpable click on hyper-extension; and that the knee had "fullness" in the popliteal fossa. In addition, Dr. Bowen indicated on December 9, 2003, that x-rays had indicated "loss of articular cartilage." However, in considering these findings, I note that Dr. Bowen also indicated that the loss of articular cartilage took years to occur, and Dr. Bowen has likewise indicated that the arthritis was present before the August 1, 2003 injury at issue in this claim. With regard to the worn medial meniscus, the click, and the fullness in the popliteal fossa, the record fails to establish what causal connection, if any, that these abnormalities may have to any new knee injury/aggravation sustained on August 1, 2003. Consequently, I find that the claimant has failed to establish by a preponderance of the evidence that any of these objective findings support the existence of any injury that occurred on August 1, 2003.

The claimant testified that he experienced swelling after the August 1, 2003 fall, and objective medical findings of swelling have previously been determined sufficient to establish the existence of a new

injury/aggravation. In the present case, although the word "swelling" does appear in Dr. Mulhollan's August 5, 2003 report, Dr. Mulhollan clarified on August 26, 2003 that the report of swelling was only by history, and not an actual observation on his part. Likewise, although Dr. Bowen reported a history of swelling on August 14, 2003, on clinical examination Dr. Bowen reported that no effusion was present. The claimant has therefore failed to establish any objective medical findings of swelling in the record.

Finally, the claimant's attorney argued that in a case such as this, where the claimant alleges that his injury is an aggravation of a pre-existing condition, the presence of objective medical findings of the pre-existing condition satisfy the objective findings requirement of Ark. Code Ann. § 11-9-102(4)(D). However, the Arkansas Courts have noted that "[a]n aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150(2003).

In Robison, as in the present case, the employer argued that the only objective findings in the record were objective findings of the pre-existing condition. However,

the Arkansas Court of Appeals affirmed the Commission's finding of a compensable injury under circumstances where, in addition to the objective medical findings of a pre-existing condition, the medical record also contained objective medical findings to support the existence of the alleged aggravation itself. Accord Ford v. Chemipulp Process, Inc., 63 Ark. App. 260 (1998) [Objective evidence of degenerative spondylosis and osteophyte insufficient to establish an aggravation]. Absent any further guidance directly on point from the Arkansas Courts to the contrary, I interpret that an injured worker must present objective medical findings to establish the existence of the alleged aggravation of a pre-existing condition, and cannot satisfy his burden of proof with objective medical findings only of the pre-existing condition which has allegedly been aggravated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Employer-employee-carrier relationship at all pertinent times.
2. This claim has been controverted.
3. As of the date of the claimed right knee injury,

August 1, 2003, claimant was earning wages entitling him to receive benefits at the maximum compensation rates of \$425/\$319 should this claim be found compensable.

4. The claimant's post-surgical healing period ended on March 11, 2004.

5. The claimant has failed to establish by a preponderance of the evidence that he experienced a compensable knee injury on August 1, 2003. Specifically, the existence of the alleged injury is not established by medical evidence supported by objective findings in the record.

ORDER

For the reasons discussed herein, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge