

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401555

JOSE M. VASQUEZ, EMPLOYEE	CLAIMANT
DIAMOND CONSTRUCTION, INC., EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on October 8, 2004 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE ROBERT L. HENRY, III, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the compensation rate and the claimant's entitlement to payment of medical expenses, temporary total disability benefits, anatomical impairment and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on November 14, 2003.

The claimant contends he fell at work on his left side, sustaining minor skin abrasions that became infected, necessitating surgeries and skin grafts. He seeks payment of medical expenses (totaling \$99,663.78), temporary total disability from November 29, 2003 to March 2, 2004, a 25%

impairment rating to the body as a whole, as assessed by Dr. Thomas Ferrer, and attorney's fees. The claimant contends the average weekly wage is \$423.00.

The respondents contend the claimant did not sustain a compensable injury arising out of and in the course of his employment. Respondents also contend his medical symptoms are not causally related to any injury at work. Alternatively, in the event of an award, the respondents are not liable for expenses incurred before they received notice of the claim pursuant to Ark. Code Ann. §11-9-701. The respondents contend the average weekly wage is \$400.00.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the claimant's deposition incorporated by reference.

The following witnesses testified at the hearing: the claimant and his neighbor, Yolanda Aron; co-worker, Jose Roa; owner, Buddy Claiborne; insurance clerk, Becky Taylor, adjustor, Rudy Bischof. The claimant relied on the assistance of an interpreter, Debbie Diaz. Mr. Roa occasionally needed the interpreter's assistance.

The claimant, age 33 (D.O.B. June 27, 1971) was born in Guatemala. He had been working for the respondent-employer a few months prior to an incident on Friday, November 14, 2003, around 8:00 a.m. The construction crew was connecting pipe in a trench. The claimant was standing on top of the pipe when the earth began to cave in and he jumped to the embankment, scratching his left hip on a rock. He did not report a work related injury. He was able to complete his shift even though it hurt to walk.

On Monday, November 17, 2003, the claimant went to the emergency room (ER) for treatment of left hip pain and an allergic reaction to pain medication.

A crew member testified he observed no accident or injury involving the claimant. A few days prior to November 14, 2003, there was some movement of the soil, but it was not deep and no one was forced to jump from the pipe.

The owner testified the trench conformed to OSHA standards with sloping walls. He was not notified of any injury or accident involving the claimant.

Ms. Taylor testified the company employs several Spanish speaking employees but they have no interpreter. The management relies on some employees who speak both English and Spanish and they have their safety manual and forms translated into Spanish. The manual instructs employees how to report injuries. She testified the claimant returned to the office on Monday, November 17, for a scheduled drug test on the crew. The claimant advised he was ill and was excused from the test so he could go to the doctor.

MEDICAL EVIDENCE

The claimant presented to the emergency room on November 17, 2003 with a rash. He was diagnosed with urticaria, an allergic reaction to pain medication. He was prescribed benadryl and cautioned to avoid the pain medication he had taken prior to presenting at the hospital. He was also advised to follow-up with his general practitioner.

Subsequently, the claimant developed an abscess with necrotizing fasciitis of the left thigh, buttock and leg, requiring surgery and skin grafts (affecting both legs). Dr. Thomas Ferrer assessed a 25% rating to the body as a whole.

The claimant relied on the assistance of an interpreter at the hospital. The ER records show "self pay." Some of the records are handwritten and illegible.

11-17-03 UAMS:
Hx limited by language barrier.

PT c/o welps/rashes all over body/body Px/back Rt hip Px

10 yrs old, Ø apparent trigger, same stx as today went to ER for tx

Nurse's Note:

c/o Rash (?) Pain meds

Took 4 pain pills for leg pain on Fri. Broke out in "rash" worse today. Pt. reports swelling sensation in throat, hands. Took pain pills 2 lt leg pain that began Fri AM increased throughout the day. Ø injury lt thigh to hip.

11-29-03 UAMS:

Patient is a 33 year-old Latin-American male who had a history of trauma to his left lower extremity three weeks prior to admission. He gave a history through an interpreter that he had fallen on his left side with some minor skin abrasions. Patient said he had been taking NSAIDs over the counter prior to presentation to relieve the pain and that had not been successful.

2-5-04 UAMS:

This is a gentleman that sustained a trauma at work where he apparently fell on is (sic) left side. He took Motrin to relieve pain but he developed an allergic reaction to that resulting in overall body edema. ...Surgery was consulted because of a swollen left leg and cellulitis, which turned out to be an infection related to his trauma... He was noted to have necrotizing fasciitis involving his left posterior side of his leg, which extended to his anterior thigh to just above his knee and all the (sic) back into his buttocks at just about the level of the iliac crest. He was taken back to the OR approximately every 3 days until the wound was stabilized and clean... we placed a vacuum type dressing on it... He underwent treatment at home for several weeks until his wound was ready to be grafted.. put him back in the hospital for split thickness skin graft procedure on January 23, 2004.

Internist, Dr. Jim Morse, issued a letter dated June 25, 2004 after reading the claimant's deposition. He explained that necrotizing fasciitis is an infection of the tissues associated with microorganisms including streptococcus, staph, and anaerobes. Some cases (20%) occur with no predisposing skin infection, boil or trauma. Patients at risk include drug addicts (usually upper extremities), diabetics, surgical patients and those with abscesses around the rectum.

Dr. Morse expressed concern over the history of injury and the incubation period:

Blunt trauma through a set of denims* without a break in the skin is a proposition that I find difficult to accept as the cause of his necrotizing fasciitis.

The incubation period of some 2 weeks prior to his being seen is certainly a point that weakens his case because he should be symptomatic, certainly, within 3 to 5 days. The implication of this would be that the necrotizing fasciitis started with the last 5 days before he was actually seen on November 29. If the dates are correct then it would mean that he waited some 15 days to seek attention for an illness that should be symptomatic with systemic symptoms over a much shorter period of time.

*Conflicting information was presented about whether or not the claimant tore his blue jeans in the incident.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Failure to prove any one of these elements defeats the claim.

The Commission recently dealt with a similar injury in the case of Troy Buck v. Centerpoint School District, F200189 (February 12, 2003), affirmed by the Court of Appeals in an unpublished opinion October 13, 2004 (CA03-1463).

In a workers' compensation case, the burden rests on the claimant to establish his claim for compensation by a preponderance of the evidence. Bragg v. Evans St. Clair, Inc., 15 Ark. App. 53, 688 S.W.2d 959 (1985). A compensable injury is one arising out of and in the course of employment. The claimant must prove, among other things, a causal connection between his employment and the injury. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The issue is a question of fact for determination by the Commission, Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962).

The claimant's accident cannot be corroborated by co-workers and he did not report any injury to his employer either on the day of the accident, Friday, or when he returned to work on Monday. The lay testimony coupled with Dr. Morse's reservations about the onset of symptoms leads me to conclude that the claimant cannot meet his burden of proof by a preponderance of the evidence of record.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on November 14, 2003.
2. The claimant has failed to prove by a preponderance

of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

3. The respondents did not receive notification of this injury until February 12, 2004.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge