

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F411604

MICHAEL BOUGH, Employee	CLAIMANT
KITCHEN DESIGN, INC., Employer	RESPONDENT #1
LIBERTY MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT #2

OPINION FILED MARCH 29, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by PAUL E. THOMPSON, JR., Attorney, Fayetteville, Arkansas.

Respondent #2 represented by JEFFREY D. RICKARD, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On March 9, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 5, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked 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 claimant was employed as a corporate secretary by respondent.

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

1. Compensability of injury to claimant's left knee.
2. Temporary total disability benefits.
3. Medical.
4. Attorney fee.
5. Whether claimant was excluded from coverage under the workers'

compensation policy issued by Liberty Mutual.

Subsequent to the pre-hearing conference Attorney Jim Arnold withdrew from representation of Kitchen Design, Inc. Mr. Arnold continued to represent Liberty Mutual Insurance Company and Jeff Rickard appeared at the hearing on behalf of Liberty Mutual Insurance Company. Following Mr. Arnold's withdrawal as counsel for Kitchen Design, Inc., Attorney Paul E. Thompson, Jr. was hired as its attorney.

The claimant contends he injured his left knee while lifting cabinets and is entitled to temporary total disability, medical, and an attorney fee.

Respondent employer, Kitchen Design, Inc., contends that claimant was not an employee entitled to coverage under the Act; that claimant did not suffer a compensable injury under the Act; and that if claimant did suffer an injury to his left knee that the injury was not causally related to his employment with the respondent employer.

Respondent carrier, Liberty Mutual Insurance Company, contends that claimant did not sustain a compensable injury which arose out of and in the course of his employment with Kitchen Design, Inc., on June 30, 2004. In addition, Liberty Mutual contends that the claimant was excluded from coverage under Kitchen Design, Inc.'s workers' compensation policy.

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 witnesses and to observe their 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 the pre-hearing conference conducted on January 5, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left knee while working for the respondent employer.

FACTUAL BACKGROUND

The claimant is a 38-year-old man who has worked for the respondent employer on several occasions, with his last employment term beginning in July 2003. The respondent makes customized kitchen cabinets. Claimant's job duties for the respondent involved basic labor including sanding, delivering cabinets, and finishing cabinets. The respondent is a family company which was begun by Bobby King, claimant's stepfather.

Claimant contends that on June 29, 2004 he was loading cabinets onto a trailer and around 11:00 a.m. noticed that "knee was swollen, and I had hurt it". Claimant testified that he continued working that day and after work sought medical treatment from Dr. Huskins at the Mercy Medical Clinic in Rogers. Claimant returned to the Mercy Medical Center on July 8, 2004, and he was evaluated by Dr. Lueders. Claimant was instructed to seek follow-up treatment from Dr. Cooper in three weeks. Subsequently, an MRI scan was performed and Dr. Cooper diagnosed claimant's condition as an articular cartilage defect. Dr. Cooper performed surgery to repair this defect in September 2004.

Claimant has filed this claim contending that he suffered a compensable injury to his left knee while working for respondent on June 29, 2004. He seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

_____ Initially, I find that claimant was an employee of the respondent employer; therefore, claimant would be entitled to compensation benefits should he prove that he suffered a compensable injury. A.C.A. §11-9-108(b)(1) allows an officer of a corporation to exclude themselves from workers' compensation coverage. In this particular case, the respondent

employer obtained a workers' compensation policy which includes a page entitled "Workers' Compensation Rejection or Election of Coverages." The claimant signed this form rejecting coverage as secretary of the respondent employer corporation. I find that this attempt to name the claimant as the corporate secretary and exclude claimant from workers' compensation coverage was invalid. A.C.A. §11-9-108 states that no employee may waive his right to compensation. While the respondent employer has attempted to name claimant as a corporate officer in an effort to avoid workers' compensation benefits, the Courts have held that when a corporate officer's duties involve distinctly non-executive, non-supervisory, or even manual work, the Workers' Compensation Act applies. *Benafield Real Estate v. Mitchell*, 269 Ark. 670, 599 S.W. 2d 445 (Ark. App. 1980); *Fraternal Order of Eagles v. Kirby*, 6 Ark. App. 198, 639 S.W. 2d 529 (1982). In this particular case, there is no evidence that claimant performed any corporate duties. To the contrary, claimant worked for the respondent as a laborer in the manufacture of customized cabinets. A corporation cannot simply give a corporate officer title to an employee and thereby avoid liability for workers' compensation benefits. The evidence in this case clearly indicates that claimant was an employee who was not performing any corporate officer duties; therefore, the Arkansas Workers' Compensation Act is applicable to his claim.

_____ Claimant contends that he suffered a compensable injury to his left knee while loading cabinets onto a trailer on June 29, 2004. Therefore, claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the

injury caused internal or external physical 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;

(4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left knee while working for the respondent.

First, I believe it is important to note that claimant testified that he simply noticed his knee swollen after loading cabinets on to the trailer on June 29, 2004. Claimant testified that he does not recall twisting his knee or his knee popping. In fact, claimant testified that no dramatic incident occurred; instead, he simply noticed swelling after this activity.

Claimant sought medical treatment from Dr. Huskins at the Mercy Medical Center on July 29, 2004. The medical reports from that date reflect claimant complaining of back pain and spasm and does indicate that claimant gave a history of his knee swelling at times. The report also mentions old injuries including a motor vehicle accident. Significantly, the medical report from Dr. Huskins dated June 29, 2004 does not mention any knee injury having occurred at work on that date.

Claimant next sought medical treatment from Dr. Lueders at the Mercy Medical Center on July 8, 2004. Again, that medical report does not reflect a history of claimant having reported a history of left knee pain resulting from a work-related injury.

Prior to claimant's visit with Dr. Cooper claimant sought medical treatment at the emergency room of St. Mary's Hospital on July 20, 2004. The medical from that visit indicates that claimant was complaining of knee pain. However, it also indicates, "no hx

of injury.”

Claimant did subsequently receive medical treatment from Dr. Cooper who diagnosed claimant as suffering from an articular cartilage defect and performed surgery. In a report dated September 7, 2004, Dr. Cooper discussed the work relatedness of claimant’s knee injury.

He naturally asked me if I could say that his problem is 50% work related. Unfortunately, I just don’t believe that I can do that at this time. He also asked me if I could see if there was any damage from a car wreck 20 years ago. Of course, I can’t do that. The problem here is that 100 other people might be able to do the kind of job that he had without having this problem occur. I think his weight has something to do with it, because he does have diffuse wear and tear changes in his knee. I think it’s possible that a car wreck 20 years ago might have had something to do with this, particularly if he had subclinical articular cartilage damage. That may have been the thing that started the cycle of events. Did his heavy physical job have anything at all to do with this lesion? I think that is certainly possible, I’m just not able to quantify the individual contribution of the various factors to the development of his articular cartilage problem.

Thus, claimant’s primary treating physician, Dr. Cooper, who performed surgery on claimant’s knee was unable to state whether claimant’s knee condition was causally related to his work with respondent and certainly, Dr. Cooper did not causally relate claimant’s left knee problems to a specific injury which occurred on June 29, 2004.

At some point claimant became dissatisfied with Dr. Cooper’s medical treatment and sought medical treatment from Dr. Christopher Arnold. In a report dated October 26, 2004, Dr. Arnold stated that he would defer to Dr. Cooper with respect to the source of claimant’s symptomatology.

He presents today at the referral of his attorney. The question is raised if this was a workers compensation injury. I told him I did not think I was in a position to answer this. . . . I would defer this to Dr. Cooper to

make the decision as he has seen the patient from the initial onset of his knee symptomatology.

I don't feel comfortable commenting on if this was the direct relationship to a workman compensation injury and I would defer this to Dr. Scott Cooper, his orthopedic surgeon.

In summary, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable knee injury on June 29, 2004. Claimant sought medical treatment from Dr. Huskins on that date; however, the medical records do not reflect a report of a knee injury having occurred earlier that day. Likewise, when claimant sought medical treatment from Dr. Lueders on July 8, 2004, no mention was made of a knee injury having occurred on June 29. The emergency room report of July 20, 2004 reflects "no hx of injury." Finally, Dr. Cooper stated in his report of September 7, 2004 that he could not state that claimant's knee problems were related to his work with the respondent. Given this evidence, I find that claimant has simply failed to meet his burden of proving compensability.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable knee injury while working for the respondent employer. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE