

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F503951

MARTIN HERRERA, Employee

CLAIMANT

NORTHWEST CUSTOM FRAMING, INC.,
Uninsured Employer

RESPONDENT

OPINION FILED SEPTEMBER 8, 2005

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

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

Respondents represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On August 24, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 8, 2005, and a pre-hearing order was filed on June 9, 2005. 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 time of the pre-hearing conference there were no stipulations entered into between the parties.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle him to compensation at the rate of \$202.00 per week for temporary total disability benefits.

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

1. Whether claimant was an employee of respondent.
2. Compensability.
3. Notice.
4. Temporary total disability benefits.
5. Medical.

6. Attorney fee.

The claimant contends he suffered a compensable injury while employed by the respondent. He requests temporary total disability, medical, and an attorney fee.

The respondent contends the claimant was not an employee of Northwest Custom Framing, Inc. and Northwest Custom Framing, Inc. was not a statutory employer. That further, the respondent contends that in the alternative the claimant did not sustain an injury which arose out of and in the course of his employment and further raise notice as a defense.

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 witness and to observe his 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 parties' stipulation that claimant earned sufficient wages to entitle him to compensation at the rate of \$202.00 per week for temporary total disability benefits is hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he was an employee of the respondent.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent.

4. Claimant is entitled to temporary total disability benefits beginning March 18, 2005 and continuing through March 28, 2005.

5. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

6. Respondent has failed to prove by a preponderance of the evidence that

claimant failed to provide notice of his injury.

7. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

FACTUAL BACKGROUND

The claimant is a 36-year-old man who testified that he was hired as a carpenter by the respondent. Claimant had worked for the respondent for approximately three months and on March 17, 2005 was on a ladder putting up framing when the ladder fell causing claimant to fall to the floor. According to claimant's testimony, other employees at the job site contacted a supervisor named Abraham who eventually came to the job site and claimant informed him that he had injured his back.

According to claimant's testimony no one offered him any medical treatment at that time. Claimant was seen at the emergency room at the Washington Regional Medical Center on March 18, 2005. The medical reports reflect a history of injury following a fall with claimant complaining of pain in his back, shoulders, across his chest, and his right knee. Claimant was diagnosed as suffering from contusions with an additional diagnosis of "abrasion back strain sprain." Numerous x-rays were taken on that date of various body parts with no abnormalities found with the exception of a mild compression fracture at T-12. The x-ray report indicates that the fracture is less than 25% and that the age of the fracture is undetermined. The significance of this compression is unknown since the medical reports from the hospital do not indicate that claimant was diagnosed with that condition.

Claimant again returned to the emergency room on March 20, 2005 where he was diagnosed as having suffered a fall with contusions and was discharged with instructions to get his prescriptions filled. Claimant was also provided a note indicating that he could return to work on March 28, 2005.

On April 8, 2005, the claimant again returned to the emergency room complaining of pain in various parts of his body. Claimant was instructed at that time to follow up with an orthopaedic surgeon regarding pain in his knees.

Claimant has not returned to work for the respondent or any other employer since the date of his injury. In addition to treatment at the emergency room, claimant has also been evaluated by Dr. Kent Moore, chiropractic physician.

Claimant has filed this claim contending that he suffered a compensable injury while working for respondent on March 17, 2005. He seeks payment of temporary total disability benefits, medical benefits, and a controverted attorney fee. Respondent contends that claimant was not an employee and that claimant failed to provide notice of his injury.

ADJUDICATION

The initial issue for consideration is whether claimant was an employee of the respondent. Based upon the evidence presented, I find that claimant was an employee of the respondent. First, claimant testified that he was hired to work for the respondent by an individual named Mike who was the main supervisor of the respondent and did not speak Spanish. Claimant further testified that another supervisor named Abrahm did speak Spanish and it was Abrahm that instructed him when to begin work and when to quit work. According to claimant's testimony the tools he was using on the day he was injured belonged to the respondent.

In addition, documentary evidence in the form of payroll records supports the finding that claimant was an employee of the respondent. Finally, I note that no employees of the respondent were present to testify regarding claimant's relationship to the respondent. In summary, after consideration of all relevant evidence, including the testimony of the claimant which I find to be credible, as well as the remaining evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he was an

employee of the respondent on March 17, 2005.

Claimant contends that he suffered a compensable injury when he fell from a ladder on March 17, 2005. Claimant's claim is for a specific incident 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 met his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent.

First, I find that claimant has met his burden of proving by a preponderance of the evidence that the injury arose out of and in the course of his employment with respondent and that he has offered proof that the injury was caused by a specific incident identifiable by time and place of occurrence. According to the claimant's testimony he suffered his compensable injury on March 17, 2005, when a ladder he was using fell, causing claimant to fall to the floor. Claimant sought medical treatment from the emergency room the next day on March 18, 2005, and that emergency room record contains a history of injury consistent with claimant's testimony. Based upon this evidence, I find that claimant has

proven that the injury arose out of and in the course of his employment with respondent and that it was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services or resulted in disability and that he has offered medical evidence supported by objective findings establishing an injury. As previously discussed, claimant sought medical treatment from the emergency room on March 18, 2005. At that time claimant was diagnosed as suffering from multiple contusions with an additional diagnosis of an abrasion to his back. Claimant was prescribed medications and was taken off work at that time. These contusions and the abrasion are objective findings which are sufficient to establish compensability.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by respondent on March 17, 2005.

Having met his burden of proving by a preponderance of the evidence that he suffered a compensable injury, claimant is entitled to payment of all reasonable and necessary medical treatment provided in connection with his compensable injury. This includes but is not limited to claimant's treatment from the emergency room as well as treatment by Dr. Kent Moore.

Claimant also contends that he is entitled to temporary total disability benefits. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

Claimant testified at the hearing that he has not worked for the respondent or any other employer since the date of his injury on March 17, 2005. It is claimant's testimony

that he has continued to need medical treatment and that he has been unable to return to work. Even if one were to assume that claimant has remained within his healing period for his compensable injury, the claimant still has the burden of proving by a preponderance of the evidence that he suffered a total incapacity to earn wages. When claimant sought medical treatment from the emergency room on March 18, 2005, claimant was taken off work. At the time of claimant's next visit to the emergency room on March 20, 2005, claimant was given a work slip indicating that he could return to work as of March 28, 2005. Although claimant did not return to work for respondent or any other employer as of that date, there are no other medical records indicating that claimant's treatment physicians were of the opinion that he suffered a total incapacity to earn wages. To the contrary, the last medical report addressing claimant's ability to return to work is the March 20, 2005 slip indicating that claimant could return to work as of March 28, 2005.

Accordingly, for the foregoing reasons, I find that claimant is entitled to temporary total disability benefits beginning March 18, 2005 and continuing through March 28, 2005. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The final issue for consideration involves respondent raising notice as a defense. A.C.A. §11-9-701 requires employees to provide immediate notice of an injury unless they

are physically or mentally unable to do so. Failure to provide notice of an injury will bar benefits until such time as the notice was given. Here, I find insufficient evidence that claimant failed to provide proper notice of his injury to the respondent. First, according to claimant's testimony, other employees of the respondent were present at the time he fell. Furthermore, one of those employees apparently contacted a supervisor named Abraham who came to the job site. Claimant testified that he reported the injury to Abraham on that date. Furthermore, claimant testified that the day after his fall he took paperwork from the hospital to Abraham at the job site and was told that no additional work was available for him. I find that claimant's testimony is credible and entitled to great weight. Based upon claimant's testimony as well as the lack of any evidence to the contrary, I find that claimant provided notice to the respondent of his injury immediately after it occurred. Therefore, I find no merit to respondent's defense of lack of notice.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent on March 17, 2005. Respondent is liable for payment of all reasonable and necessary medical expenses provided in connection with claimant's compensable injury. Claimant is also entitled to temporary total disability benefits beginning March 18, 2005, and continuing through March 28, 2005. Finally, respondent is also liable for payment of the preparation in the transcript in this case which totals \$228.00.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE