

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F404305

SERGIO LOPEZ, Employee	CLAIMANT
CONCRETE & REINFORCING, Employer	RESPONDENT
EMC INSURANCE COMPANIES, Carrier	RESPONDENT

OPINION FILED FEBRUARY 3, 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 R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On December 15, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 30, 2004, 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 relationship of employee-employer-carrier existed among the parties on February 20, 2004.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$347.00 for total disability benefits and \$260.00 for permanent partial disability benefits.
4. Respondent controverts this claim in its entirety.

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

1. Compensability of injury to back on February 20, 2004.

2. Temporary total disability benefits.
3. Related medical benefits.
4. §11-9-505(a) benefits.
5. Attorney fee.

Subsequent to the pre-hearing conference the respondent raised as an issue the claimant's illegal status in the United States as a complete bar to workers' compensation benefits.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant was injured on February 21, 2004 while working as a rod buster earning \$13.00 an hour. Because he was a Mexican and has no protection from the law, the company fired him. They fired him during the period of time that he was under treatment of a doctor. While this might not constitute discrimination the claimant is of the opinion that the statutes provide that he gets 52 weeks of benefits because there is work available that he could have done. The claimant requests these benefits in addition to the TTD and medical. He wishes to reserve permanent impairment pending a decision as to compensability."

The respondents' contentions as set forth in its pre-hearing questionnaire are as follows: "Respondents contend that the claimant did not sustain a compensable injury as that term is defined by Act 796." Further, the respondents contend that the claimant's illegal status in the United States serves as a complete bar to his right to receive workers' compensation benefits.

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 June 30, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on February 20, 2004.

3. Respondent is liable for payment of medical treatment provided in connection with claimant's compensable low back injury through February 23, 2004. This medical treatment includes the emergency room visits of February 20 and February 23. Respondent is not liable for any medical benefits subsequent to February 23, 2004.

4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any temporary total disability benefits as a result of his compensable injury.

5. Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505(a).

6. Respondents have failed to prove that claimant's illegal status in the United States operates as a bar to the receipt of compensation benefits.

FACTUAL BACKGROUND

_____The claimant is a 32-year-old man who has been in the United States for four years. Claimant admitted that he is in the United States illegally and that he has used a false social security card to obtain employment. Claimant went to work for the respondent in August or September 2003. Claimant testified that although he presented the false social security card to respondent, he did inform respondent that the card was invalid and that he was in the United States illegally.

Claimant contends that on February 20, 2004, he was attempting to move a heavy

beam and that as he bent over felt pain in his low back. Claimant testified that he sat down for several minutes and eventually reported this incident to his supervisor, David Boyd. Claimant testified that he informed Boyd that he wanted to go to the hospital and Boyd informed him that his services were no longer needed and he would be given his last check.

On the night of February 20, 2004 claimant sought medical treatment from the emergency room at Washington Regional Medical Center. Claimant's condition was diagnosed as a back strain and he was taken off work for three days. On February 23, 2004, claimant was again seen at the emergency room and was given a final diagnosis of acute low back pain/strain. Claimant was released to return to work on February 27, 2004.

Claimant did not return to work for the respondent after February 20, 2004. Claimant has worked for other employers on a short-term basis in North Carolina and in Oklahoma City. Claimant next sought medical treatment for his back condition on September 20, 2004 from Dr. Raben. Dr. Raben recommended an MRI scan which was performed. A nurse in Dr. Raben's office in a note dated November 19, 2004, stated that Dr. Raben was not present to review the MRI scan but that it appeared that claimant had degeneration at the L4-5 level.

Claimant has filed this claim contending that he suffered a compensable injury to his low back while working for respondent. He seeks payment of medical benefits, temporary total disability benefits, benefits pursuant to A.C.A. §11-9-505(a) and a controverted attorney fee. Respondent contends that claimant did not suffer a compensable injury and that claimant's illegal status in the United States bars him from receiving compensation benefits.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his low back while lifting

a heavy metal beam on February 20, 2004. 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 to his low back while working for respondent on February 20, 2004.

As previously noted, claimant testified that he suffered an injury to his back on February 20, 2004 when he felt pain in his low back area while lifting a heavy beam. According to claimant's testimony he reported this incident to his supervisor, David Boyd, and requested permission to seek medical treatment. According to claimant's testimony, Boyd informed him that his services were no longer needed. Testifying at the hearing was David Boyd, claimant's supervisor. Boyd acknowledged informing claimant that his services were no longer needed on February 20. However, Boyd testified that claimant had a history of needing off work and February 20 was no different. Boyd testified that

claimant did not report an injury to him, but simply indicated that he wanted to leave and go home. Because this had occurred on several other occasions, Boyd testified that he terminated the claimant's employment.

The medical records indicate that claimant obtained medical treatment from the emergency room at Washington Regional Medical Center on the night of February 20. The emergency room record indicates that claimant gave a history of his low back pain beginning some four to eight hours earlier after lifting a heavy metal bar at work. X-rays of the claimant's lumbar spine were negative, claimant was given medication, and he was diagnosed with a back strain. Claimant was also taken off work for three days and was told to follow up with his family physician.

Claimant's next visit at the emergency room occurred on February 23, 2004. Claimant was again diagnosed with acute low back pain/strain and was released to return to work without restrictions on February 27, 2004.

I find based upon the evidence presented that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury which 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. Claimant testified that he suffered the compensable injury to his back while lifting a heavy metal bar. Although claimant testified that he reported this injury to Boyd and Boyd testified that claimant did not report an injury, the emergency room records of February 20 reveal that claimant gave the medical personnel a history of a work-related injury earlier that day. In making this finding, I do acknowledge that claimant is in the United States illegally and that he used false social security papers to obtain employment. However, those facts alone do not lead me to conclude that claimant's testimony is not credible under the circumstances presented in this particular case wherein the hospital emergency room records from the date of injury indicate that claimant gave a history of injury consistent with his testimony.

Furthermore, I believe it is important to note that although Boyd testified that claimant did not report an injury to him on February 20, Boyd did acknowledge that on the night of February 20 he received a phone call from Juan Luna, a friend of claimant's, stating that claimant was at the hospital and had injured his back.

Given the emergency room records reflecting a history of injury consistent with claimant's testimony, as well as Boyd's acknowledgment that he was contacted by Juan Luna on the night of February 20 reporting an injury to claimant's back, I find claimant's testimony regarding his injury to be credible. Based upon claimant's testimony as well as the remaining evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back which 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 and resulted in disability and that he has offered medical evidence supported by objective findings establishing an injury. The emergency room record of February 23, 2004, reflects that the medical personnel observed paraspinous muscle spasms. Muscle spasms are an objective finding. *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W. 3d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W. 2d 546 (1997). Furthermore, as a result of claimant's compensable injury, it was necessary for him to seek medical treatment from the emergency room wherein he was given medication and taken off work for several days. Given this evidence, I find that claimant has satisfied the remaining elements of 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 to his back while working for respondent on February 20, 2004.

Although I have found that claimant suffered a compensable injury and that he was taken off work for several days as a result of that compensable injury, claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits. Pursuant to A.C.A. §11-9-501(a)(1), compensation to an injured employee is not paid for the first seven days of disability resulting from an injury. Here, when claimant sought medical treatment from the emergency room on February 20, he was taken off work for three days. Claimant's next visit with the emergency room occurred on February 23, 2004, at which time claimant was released to return to work on February 27, 2004. Accordingly, claimant's disability, excluding the date of his injury, extended for only six days; therefore, claimant is not entitled to temporary total disability benefits.

Respondent is liable for medical treatment provided in connection with claimant's compensable injury. This medical treatment includes the emergency room visits of February 20 and February 23.

Claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional medical treatment or temporary total disability benefits for his compensable injury subsequent to February 27, 2004, the date he was released to return to work by the emergency room physician. Although claimant did not return to work for the respondent subsequent to February 20, claimant testified that he did return to work for other employers on a short-term basis. In fact, claimant attempted to work with a brick layer in North Carolina. According to claimant's testimony, he re-injured his back while attempting to perform that job.

Q. Okay. Which makes you back - - here just a month or so ago you were in - - or a couple of months ago, you were in South Carolina. Correct?

A. Yes.

Q. Did you work when you were in South Carolina?

A. No.

Q. Not at all?

A. I attempted to go to work there, but the first day I re-injured myself, so I couldn't do it.

Q. Where did you try to go to work?

A. It was just someone that I saw on the street. It's a brick layer and I just asked him for work.

Q. How much was he going to pay you?

A. I believe it was 8 an hour.

Q. How did you re-injure yourself?

A. The very first day when I attempted to lift or pick up a block like a big brick, that was enough to re-injure myself.

Q. Okay. Did you - - Did it cause new pain?

A. Yes.

A. However, what happened is, like I said, that day that I attempted to work, I felt really bad. I started in the morning and I continued work until I was done. But I didn't say anything to my employer about my feeling bad that day. The following day I was having problems moving as soon as I was getting up there.

Q. And this is in South Carolina?

A. North Carolina.

Q. North Carolina. This is the - - the - - doing the brick work?

A. Yes.

Q. So you worked the whole day?

A. (Witness nods head.)

Q. Is that a "yes"?

A. Yes.

Q. Okay. Since that time, has your back been worse than it was?

A. Well, from - - from that moment on, what happened is that

I didn't go back to work, so the pain went away. I don't know if the muscle went back to the way it was supposed to, but ...

Q. But that - - that day of working in North Carolina made your back worse?

A. Yes, it did.

It was after this incident and some seven months after his compensable injury that claimant next sought medical treatment from Dr. Raben on September 20, 2004. Claimant has the burden of proving by a preponderance of the evidence that a causal connection existed between the medical treatment in September 2004 and his original compensable injury. I find that claimant has failed to meet that burden of proof. Not only was the medical treatment with Dr. Raben some seven months after he had been released to return to work by the emergency room physician, but according to claimant's deposition testimony this occurred after he had re-injured his back while lifting a heavy block for a brick layer in North Carolina. Having failed to establish a causal connection between his need for additional medical treatment in September 2004 and his original compensable injury, claimant is not entitled to additional medical treatment or temporary total disability benefits subsequent to February 27, 2004.

Claimant also contends that he is entitled to compensation benefits pursuant to A.C.A. §11-9-505(a) because respondent failed to return him to work. In order to receive benefits pursuant to A.C.A. §11-9-505, claimant must prove that respondent had suitable employment available within his restrictions which it refused to provide to claimant without reasonable cause. I find that claimant has failed to meet his burden of proof with respect to this issue. First, claimant has offered no evidence that respondent had any jobs available within claimant's physical limitations. According to claimant's testimony at the hearing, after he left the job site on the date of his injury he did not call or go by to talk to anyone at the respondent. Claimant testified that he did not contact Boyd or anyone else with the respondent to tell them his status. Furthermore, I find claimant's testimony

regarding his ability to work to be conflicting. On one hand, claimant testified that he was unable to work after February 20, and on the other hand he contends that he was capable of working and that respondents should have provided him employment. For these reasons, I find that claimant has failed to establish his entitlement to compensation benefits pursuant to A.C.A. §11-9-505(a).

The final issue for consideration involves respondents' contention that due to claimant's illegal status in the United States, he is barred from receiving compensation benefits. The applicable statute is codified at A.C.A. §11-9-102(9)(A) which states:

'Employee' means any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied,

Respondent contends that the phrase "whether lawfully or unlawfully employed" modifies the term minor pursuant to the decision in *Cummings v. J. J. Newberry Company*, 211 Ark. 854, 203 S.W. 2d 187 (1947). I disagree with the respondent's interpretation of the decision in *Cummings* and A.C.A. §11-9-102(9)(A). While the Court in *Cummings* did determine that a minor who was unlawfully employed was nevertheless covered by workers' compensation, the Court did not state that the phrase "whether lawfully or unlawfully employed" applies only to minors. To the contrary, my reading of the statute indicates that "employee" includes any individual who is lawfully or unlawfully employed, not just minors. The phrase "whether lawfully or unlawfully employed" applies to any employee, not just minors. Therefore, respondents' contention that claimant's employment was unlawful and not subject to the provisions of the Arkansas Workers' Compensation law, is without merit. To hold otherwise would encourage the hiring of individuals with an illegal status in order to avoid payment of compensation benefits should an injury occur.

Finally, I note that pursuant to A.C.A. §11-9-1001, administrative law judges are not

to liberalize, broaden, or narrow the scope of workers' compensation. A finding by myself that individuals in this country illegally are not entitled to workers' compensation benefits would be an impermissible narrowing of the workers' compensation laws which is prohibited by A.C.A. §11-9-1001.

Accordingly, I find that claimant's claim for compensation benefits is not barred by his status.

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)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on February 20, 2004. Respondent is liable for payment of medical treatment rendered to claimant at the emergency room on February 20 and February 23, 2004. Claimant is not entitled to temporary total disability benefits having missed only six days of work. Claimant has failed to prove by a preponderance of the evidence that any medical treatment or disability subsequent to February 27, 2004 is causally related to his compensable injury. Claimant has also failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505(a). Finally, claimant's illegal status does not bar his claim for compensation 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)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE