

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F404694

RAMON MARTINEZ, Employee	CLAIMANT
MANPOWER, INC., Employer	RESPONDENT
CNA INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED MARCH 11, 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 LEE MULDROW, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 23, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 29, 2004, and a pre-hearing order was filed on October 8, 2004. 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 June 20, 2002.
3. Respondents have controverted this claim in its entirety.

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 \$200.00 per week for temporary total disability benefits and \$150.00 per week for permanent partial disability benefits.

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

1. Compensability of injury of June 20, 2002.
2. Temporary total disability benefits.
3. Medical.
4. Attorney fee.
5. Statute of limitations.
6. Application of A.C.A. §11-9-102(4)(B)(i).

Prior to the hearing the respondents withdrew the statute of limitations as an issue.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "On June 20, 2002 claimant was injured while working next to his co-worker on the assembly line. Co-worker became angered when claimant produced work for co-worker faster than co-worker could keep up. Co-worker cursed claimant using racial slurs then hit the claimant in the face by slinging a bag that had a coffee cup inside, hitting the claimant and breaking both jaw bones, cracking his chin, and knocking out his teeth. Claimant was seen at Northwest Medical Center and by Dr. Sharrma. He requests temporary total disability and medical."

The respondents contend claimant did not sustain an injury arising out of and in the course of his employment; this claim is barred by the provisions of A.C.A. §11-9-102(4)(b)(i); and claimant cannot establish entitlement to temporary total disability 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 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 stipulations agreed to by the parties at the pre-hearing conference conducted on September 29, 2004, and contained in a pre-hearing order filed October 8,

2004, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage sufficient to entitle him to compensation at the rate of \$200.00 for temporary total disability benefits and \$150.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of bilateral mandible fractures.

4. Respondent is liable for payment of all reasonable and necessary medical treatment related to claimant's bilateral mandible fractures.

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

#### FACTUAL BACKGROUND

The claimant is a 50-year-old native of Honduras who has been in the United States for sixteen years. Claimant was assigned by the respondent to work at Tuff Industries on or about April 15, 2002. Claimant's job at Tuff Industries required him to cut steel for assembly. Claimant testified that prior to June 20, 2002, he had several verbal incidents with a co-employee named Antonio Vega. According to claimant's testimony Vega made numerous rude comments to him. It was claimant's belief that Vega did not like him because he worked too fast cutting steel and Vega could not keep up with the next step in the assembly process.

Claimant testified that on June 20, 2002, he was told by the assistant supervisor to get a forklift in order to gather pallets. On the way to get the forklift Vega and two other employees were walking toward the claimant. Claimant testified that he jokingly touched a pencil in the pocket of Alan Atwood, one of these employees. Claimant testified that Vega asked Atwood why he was being friendly with claimant. Claimant admitted that he in turn told Atwood that he should not trust Vega. Claimant was unsure as to whether

Vega heard this comment. Claimant testified that shortly after this exchange Vega returned carrying a bag and a cup of coffee and struck claimant from behind with the bag. Claimant testified that he fell to the floor and that Vega began kicking him.

The police were summoned and claimant was taken to the hospital where he was diagnosed as suffering from bilateral mandible fractures. Claimant underwent surgery to repair these fractures on June 21, 2002. Claimant was discharged from the hospital on June 22, 2002, and continued to receive medical treatment for some time after that date.

Claimant has filed this claim contending that he suffered compensable injuries as a result of this incident on June 20, 2002. He seeks payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee. Respondent contends that claimant's claim for compensation benefits is barred by A.C.A. §11-9-102(4)(B)(i).

### ADJUDICATION

Claimant contends that he suffered a compensable injury as the result of an assault by a co-employee while working for respondent on June 20, 2002. 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 identi-

fiable 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 in the form of bilateral mandible fractures while working for respondent on June 20, 2002. There appears to be no question that claimant's bilateral mandible fractures occurred as a result of this incident at work on June 20, 2002. Furthermore, the evidence indicates that as a result of this incident the claimant suffered an injury which caused internal physical harm to his body which required medical services and that he has offered objective findings establishing an injury. Claimant was taken to the hospital immediately after this incident and a CT scan was performed of claimant's facial bones. That CT scan revealed bilateral mandible fractures for which claimant underwent surgery the next day.

The respondents contend that claimant's injury is not compensable because it occurred as a result of a fight or altercation in which the claimant was the aggressor. According to A.C.A. §11-9-102(4)(B)(i) an injury to an active participant in an assault is not a compensable injury. In *Eckwood v. AERT*, Full Commission Opinion filed February 16, 2001 (E912606), the Commission discussed the factors which must be shown in order for A.C.A. §11-9-104(B)(i) to apply. In that case, the Court stated:

The Arkansas Court of Appeals has determined that Ark. Code Ann. §11-9-102(4)(B)(i) is written in the conjunctive and contains three prongs that must be satisfied before the statute acts as a bar to the claim. See, *Flowers v. Arkansas Hwy. And Transp. Department*, 62 Ark. App. 108, 968 S.W. 2d 660 (1998). According to *Flowers*, a claim is not compensable only if it is shown:

- (1) that the injured employee was an active participant in the assault or combat;
- (2) that the assault or combat is the result of non-employment-related hostility or animus; and

(3) that the assault or combat amounts to a deviation from customary duties.

In this particular case, I find insufficient evidence that the claimant was an active participant in the assault or combat. According to claimant's testimony Vega had previously made rude comments at the work place. On June 20, 2002 claimant was joking around with Alan Atwood when Vega interceded and asked Atwood why he was being friendly with the claimant. Claimant admitted that he at some point told Atwood that he could not trust Vega, but claimant made no physical threat at that time. According to claimant's testimony, he was subsequently struck by Vega and suffered the injury.

The only witness who testified under oath other than the claimant was Raul Porras who testified by deposition in a civil suit arising out of this altercation. Porras testified that he did not see the initial altercation or hear any statements made by the parties prior to the altercation. Instead, Porras testified that he heard shouting and when he looked he saw claimant on the floor with it looking like Vega had kicked claimant. Porras also testified that he observed Vega dancing around the claimant in a fighter's stance.

Documentary evidence submitted by the respondent includes police reports containing statements made by various individuals on June 20, 2002. In addition, handwritten statements from employees including Alan Atwood are contained in the documentary evidence. Apparently, none of these individuals continues to work for the respondent. While the statement purportedly made by Atwood might support a finding that claimant was the aggressor by throwing the first punch during the altercation, I do not find that these written statements are sufficient credible evidence to make a finding that claimant was in fact the aggressor on June 20. These statements were not made under oath and it is impossible to determine the veracity of these individuals' statements.

In summary, I simply find insufficient credible evidence proving that the claimant was an active participant in the assault on June 20. I find claimant's testimony that he was not

the instigator of the assault to be credible.

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 in the form of bilateral mandible fractures while working for respondent on June 20, 2002. There was some testimony from the claimant regarding injuries to other portions of his body including his neck and back. However, the only objective findings establishing an injury are those to the bilateral mandibles. Therefore, I find that this constitutes claimant's only compensable injury.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's bilateral mandible fractures.

I also find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury. Claimant's compensable injury is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury, 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). Furthermore, compensation for temporary total disability benefits is not payable for the first seven days of disability resulting from an injury, excluding the day of injury. A.C.A. §11-9-501(a)(1).

Following claimant's injury he was taken to the hospital and hospitalized. Surgery was performed on June 21 and claimant was discharged on June 22, 2002. While claimant continued to receive medical treatment subsequent to his discharge from the hospital on June 22, there is insufficient evidence that claimant remained totally incapacitated from earning wages following his discharge. While claimant testified that he was unable to work for four months after this incident, the medical record of Dr. Sharma dated August 22, 2002, indicates that claimant is already back at work. It is unclear from

a review of the remaining evidence as to when claimant actually returned to work. Nevertheless, it is claimant's burden of proving any periods that he suffered a total incapacity to earn wages. The medical evidence does not indicate that claimant was taken off work by his treating physicians subsequent to his discharge from the hospital. Therefore, claimant suffered a total incapacity to earn wages for only two days while hospitalized and pursuant to A.C.A. §11-9-501(a)(1) is not entitled to compensation for those two days.

#### AWARD

\_\_\_\_\_ Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of bilateral mandible fractures. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury.

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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE