

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212230

FRANCISCO NARANJO

CLAIMANT

SUPERIOR INDUSTRIES

RESPONDENT

CROCKETT ADJUSTMENT,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED AUGUST 18, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in
Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville,
Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville,
Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 6, 2005
2005, in Springdale, Arkansas. A pre-hearing order was entered in
this case on March 8, 2005. This pre-hearing order set out the
stipulations offered by the parties and outlined the issues to be
litigated and resolved at the present time. A copy of the pre-
hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are
hereby accepted:

1. On September 3, 2002, the relationship of employee-self
insured employer-third party administrator existed
between the parties.
2. The appropriate weekly compensation rates are \$260.00 for
total disability and \$195.00 for permanent partial
disability.
3. On September 3, 2002, the claimant sustained a

compensable injury to his back and left elbow.

4. There is no dispute over the payment of medical expenses, at the present time, except for any treatment for the alleged head injury.
5. No temporary disability benefits were paid.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether the claimant also sustained a head injury in the accident on September 3, 2002.
2. The claimant's entitlement to medical services for the alleged head injury.
3. The claimant's entitlement to temporary total disability benefits from September 4, 2002 through September 16, 2002 and March 17, 2003 through October 22, 2003.
4. In the alternative, the claimant's entitlement to benefits, under Ark. Code Ann. §11-9-505(a) for the period of March 17, 2003 through October 22, 2003.
5. Appropriate attorney's fees.
6. whether the claimant is barred from receiving temporary total disability under Ark. Code Ann. §11-9-526.

In regard to these issues, the claimant contends:

"It is the claimant's contention that claimant sustained a compensable injury arising out of and in the course of employment with the respondents on or about 9/3/2002. As a result of this compensable injury, the claimant has been temporarily disabled and/or entitled to 505 benefits from 9/3/2002 until 10/22/2003, inclusive of periods of light duty limitations when the claimant was not provided suitable work by the respondent, and has incurred

medical expenses, including physical therapy which remains controverted. Claimant contends entitlement to workers' compensation benefits as set forth in the issues response in the prehearing information filing, and specifically, reasonable necessary and related medical expenses; temporary total disability benefits from DOI to 10/22/2003, permanent partial/total disability benefits (reserved); and controverted attorney fees. All other benefits are reserved under the Act."

In regard to these issues, the respondents have not filed a prehearing questionnaire setting out their contentions. However, it is apparent that they have denied the occurrence of any compensable injury to the claimant's head and have controverted his entitlement to any benefits attributable thereto. The respondents have also controverted the claimant's entitlement to any temporary disability benefits and any benefits under Ark. Code Ann. §11-9-505(a). As the respondents requested at the prehearing conference that the applicability of Ark. Code Ann. §11-9-526 be made an issue, it can be assumed that they contend the claimant unreasonably refused suitable employment.

DISCUSSION

I. COMPENSABILITY OF THE CLAIMANT'S ALLEGED HEAD INJURY

The claimant contends that he also sustained a compensable injury to his head in the employment related incident on September 3, 2002. The burden rests upon the claimant to prove this alleged compensable injury. In order to meet this burden, the claimant must show a physical injury to his head that satisfies all of the statutory requirements for a "compensable injury" that are set out in the Act.

The first of these requirements are contained in Ark. Code Ann. §11-9-102(4)(D). This subdivision requires that the claimant “establish” by the greater weight of the credible medical evidence the actual existence of a physical injury to his head. This subdivision further requires that the actual existence of this injury must be supported by “objective findings,” as that term is defined in Ark. Code Ann. §11-9-102(16)(A)(i).

The initial medical evidence (the reports and records of the emergency room of Washington Regional Medical Center, dated September 3, 2002) failed to record a history of any injury to the claimant’s head in the employment related incident on September 3, 2002. These reports expressly note that the claimant did not experience any “loss of consciousness” or “strike his head” in the fall on September 3, 2002. Even more importantly, there is no mention of the observation of any “objective findings” to suggest an injury or trauma to the claimant’s head. There is no record of any abrasions, bruising, swelling, redness, etc. to this portion of his body.

Curiously, these initial medical records contain an entirely different description of the cause of the claimant’s fall on September 3, 2002. In these records, it is noted that the claimant’s report of the incident, given through a Spanish interpreter, was that he simply got dizzy and fell, while working in a hot steamy environment. There is no mention of the claimant being struck and knocked down by a forklift.

The claimant was subsequently seen by Dr. Bryan Abernathy, a

general practitioner. In his report of September 7, 2002, Dr. Abernathy records a history of the incident occurring when the claimant was hit from behind by a forklift in the approximate area of his knees which "flipped" him and he landed on his right elbow, upper back, and head. This would appear to be a rather bizarre or unusual result from being struck in the approximate area of the back of the knees. However, this history goes on to expressly record that the claimant did not experience any loss of consciousness in the fall, but simply "kept eyes closed and laid still until help arrived." According to Dr. Abernathy's records, this history was taken from the claimant with the use of the claimant's wife as an interpreter.

On the basis of this history, Dr. Abernathy diagnosed a concussion or closed head injury. However, the records and reports of Dr. Abernathy also failed to note the observation of any "objective finding" to support this diagnosis.

The first mention of a loss of consciousness is not found until the claimant was seen by Dr. Mark Powell on January 30, 2003. This history corresponds to the claimant's testimony at the hearing. Again, no mention was made by Dr. Powell of any "objective findings" to support an injury to the claimant's head.

While any discrepancies concerning the claimant's description of the incident or any statements made by the claimant concerning the possibility of an injury to his head could arguably be due to the claimant's inability to speak English, this language barrier would have no effect on the physical examinations performed by the

various physicians involved in this case. These clinical findings would be the same regardless of the claimant's ability to speak English, or even speak at all. There is absolutely no mention in any of the medical evidence of the presence of any "objective finding to support the presence of a physical injury to the claimant's head. If the claimant had sustained a blow to his head sufficient to produce a loss of consciousness, one would reasonably expect it to also produce some "objective findings" such as bruising, swelling, and abrasions, etc.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove the actual existence of any physical injury to his head, which is supported by "objective findings." Thus, he has failed to prove the occurrence of a "compensable injury" to this portion of his body, within the meaning of Ark. Code Ann. §11-9-102(4)(D). His claim for any benefits attributable to this alleged injury must be denied.

II. TEMPORARY TOTAL DISABILITY BENEFITS

The next issue to be addressed concerns the claimant's entitlement to temporary total disability benefits for the periods of September 4, 2002 through September 16, 2002, and March 17, 2003 through October 22, 2003. Again, the burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the claimant must show that he continued within his healing period from the effects of his compensable injuries. In regard to the compensable injury to his elbow, a scheduled injury, he must also show that he had not "returned to work." In

regard to the compensable injury to his back, an unscheduled injury, he must also prove that he was rendered totally disabled from performing regular gainful employment as a result of his compensable back injury.

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the credible medical evidence presented. The healing period from the effects of a compensable injury ends when the actual physical damage caused by the compensable injury totally resolves or stabilizes at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement.

The evidence shows that the claimant has been treated for his compensable elbow injury by a number of physicians. The last of these physicians was Dr. Mark Powell, an orthopaedic surgeon. In his reports of May 8, 2003 and May 29, 2003, Dr. Powell opined that the claimant had reached maximum medical improvement (MMI) for the compensable elbow injury by May 8, 2003.

Dr. Powell is a competent orthopaedic surgeon with particular expertise in the area of orthopaedic medicine associated with the treatments of injuries and elements of the upper extremities. His opinion concerning the duration of the healing period from this compensable scheduled injury is persuasive.

I would also note that a functional capacity evaluation was performed on the claimant on May 14, 2003. This testing was interpreted as showing no objectively ratable permanent impairment

resulting from the claimant's compensable elbow injury.

I find that the claimant has failed to prove that he continued within his healing period from the effects of his compensable elbow injury, after May 8, 2003. Thus, he would not be entitled to temporary total disability benefits for this injury after that date.

The medical evidence indicates that the claimant has been evaluated and treated by a number of physicians for his compensable back injury. These include not only Dr. Abernathy and Dr. Kendrick, but also Dr. Vincent Runnels and Dr. Kelly Danks (both neurosurgeons).

The medical evidence fails to show that the claimant received any active medical treatment for his compensable back injury after April 18, 2003. In a report, which is dated May 1, 2003, Dr. Runnels states:

"I am going to return him (the claimant) to work with restrictions when he is released from his elbow fracture. I think driving a forklift might just be the ticket as long as he did not have to lift things on and off the forklift. He has worked at Superior Wheel for the last two years. I am giving him a letter to see if this cannot be arranged when he has been released from his elbow fracture. However, the spondylophyte is old. I suspect he has suffered a facet strain at 3-4 in the accident but his back looks much older than he does. He is going to continue to have problems if he has to do a lot of lifting."

There is no evidence that the claimant received or required any further active medical treatment directed toward the resolution, improvement, or stabilization of any actual physical damage to his back that was caused by his compensable injury, after his visit

with Dr. Runnels on April 18, 2003.

While the claimant was seen by Dr. Danks for an evaluation on October 24, 2003, no treatment was provided or recommended by Dr. Danks for the claimant's compensable back injury. Following his evaluation Dr. Danks states:

"Low back pain, secondary to on the job injury with the evidence of degenerative disease. I do not see any evidence of radiculopathy. I did review his Superior Industries International job description, and with the exception of lifting greater than 40 pounds, I have no problem with these activities. I gave the release to return to work, and I will see him back as needed."

I find that the greater weight of the medical evidence fails to show that the claimant continued within his healing period from the effects of his compensable back injury after April 18, 2003. Therefore, he would not be entitled to temporary total disability benefits attributable to this compensable injury after that date.

It therefore becomes necessary to address the second requirement for the claimant's entitlement to temporary total disability benefits, that being whether he had not "returned to work" or has been rendered disabled from performing regular gainful employment by his compensable injuries during any portions of his healing periods from the effects of his compensable injuries.

The records of Dr. Abernathy indicate that he advised the claimant to refrain from engaging in any type of employment between September 6, 2002 and September 20, 2002. On September 20, 2002, Dr. Abernathy released the claimant to return to limited or light

duty that required lifting no more than 15 pounds, no working over head, no use of the arms above chest level, and no operating or working with moving or hazardous equipment.

However, the claimant appears to have already returned to limited or light duty work for the respondent shortly after the compensable injuries. His job consisted of inspecting and marking defective automobile rims. This position complied with all of the various physical restrictions placed upon his employment activities, as a result of his compensable injuries. The specific dates missed by the claimant prior to September 20, 2002, are shown by the respondent's attendance records. These dates are September 4, 9, 11, 12, and 13, 2002.

The claimant apparently continued in this limited or light duty position until on or about March 16, 2003. The claimant testified that at that time he was called into the respondent's office and told that he would no longer be provided this limited or light duty position. He was informed that he "would have to go on disability." The claimant stated that he was given certain forms to sign and others to take to the doctor to fill out and return. The claimant's testimony in this regard is corroborated by the documents contained in Claimant's Exhibit No. 4. It is also obvious that the claimant had been diligent in performing the light duty job he had been given (i.e. the inspector position) for a period of many months. It would appear unlikely and illogical that the claimant would suddenly refuse to continue in this position and is far more likely that this change in the claimant's status was

precipitated by the respondent.

Christopher Todd, the respondent's safety manager, testified that it was the respondent's policy to provide injured employees with employment within any physical restrictions or limitations imposed by the employment related injuries. He further testified that he never saw the claimant working at any position, after his compensable injuries, that would exceed his physical limitations or restrictions. It was also his testimony that immediately following the compensable injury, the claimant was put on a "pallet jack job," which could be done one-handed. This appears to differ from the claimant's testimony that he was placed in an "inspector" position. He stated that he did not recall any one trying to force the claimant to do another job or any job beyond the claimant's restrictions and limitations. It was his testimony that on October 1, 2003, the Human Resource Department of the respondent's notified him that the claimant had simply stopped coming to work. When he was advised of this fact, he sent the claimant the letter found in Respondent's Exhibit No. 1.

I find it somewhat curious that the Human Resource Department did not advise Mr. Todd that the claimant had simply stopped coming into work until six months after the fact. Although Mr. Todd's testimony would indicate that he had some day to day familiarity with the employment activities of the claimant, this would seem unlikely, in light of the fact that he was oblivious to the claimant's absence for over six months.

After consideration of the evidence presented, it is my opinion that the claimant's testimony, concerning the circumstances and events surrounding his cessation of work for the respondent in March of 2003, is the more credible. It would appear from the greater weight of the credible evidence that, for some reason, the respondent decided to no longer provide the claimant with limited or light duty employment on or about March 17, 2003. It would also appear that the respondent's also elected to ignore the statements made by Dr. Powell on the Family Medical Leave Act form, dated March 24, 2003. The respondent's appear to have simply placed the claimant on Family Medical Leave Act status and refused to pay any temporary total disability benefits.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that he is entitled to temporary total disability for his compensable injuries for the periods of September 4, 9, 11, 12, and 13, 2002, and beginning again on March 17, 2003 and continuing through May 8, 2003. The claimant has proven by the greater weight of the credible evidence that during this time he continued within his healing period from the effects of his compensable injuries (specifically his compensable right elbow injury) and had not "returned to work" during these periods. I find that the greater weight of the credible evidence fails to prove that the claimant is entitled to temporary total disability benefits after May 8, 2003. The claimant has failed to prove that he continued within his healing period from the effects of any

compensable injuries after May 8, 2003.

It is my further opinion that the respondent's have failed to prove that, during any of the above periods, the claimant unjustifiably or unreasonably refused suitable employment offered by the respondent. I find that the greater weight of the credible evidence shows that the respondent's elected to cease providing the claimant with appropriate or suitable light duty employment on or about March 17, 2003. The greater weight of the credible evidence does not show that the claimant has, at any time "refused" any suitable employment offered to him by the respondent. Therefore, the claimant is not barred from receiving temporary total disability benefits during the foregoing periods by the provisions of Ark. Code Ann. §11-9-526.

III. BENEFITS UNDER ARK. ANN. §11-9-505(a)

The final issue concerns the claimant's entitlement to benefits under Ark. Code Ann. §11-9-505(a). This subsection provides:

"Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of refusal for a period not to exceed one year.

In determining the availability of employment, the continuance and business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collected bargaining agreement with the respect to

seniority shall control.”

In order to be entitled to the benefits provided by this subsection, the claimant must show that the respondent had suitable employment available that was within his physical and mental limitations and refused, without reasonable cause, to return him to such a position. After consideration of the evidence presented, it is my opinion that the claimant has failed to prove that the respondent had suitable employment available that was within his physical and mental limitations.

Although the respondent apparently initially created a position for the claimant that was within his physical and mental limitations, they are not required to do so by Ark. Code Ann. §11-9-505(a). This subsection does not require that an employer tailor-make or create an employment position that would not otherwise exist. Only the regular or usual employment positions offered by the respondent are considered in determining the availability of “suitable employment.” Even then, these regular or usual employment positions must be open or available.

The claimant has failed to prove that the light duty inspector position he was initially provided by the respondent was a usual or regular employment position. He has failed to prove that any other regular or usual employment positions maintained by the respondent would be within his physician restrictions and limitations. Finally, he has failed to prove that, if such suitable employment positions exist, they were available at any time during the period in question.

Based upon my foregoing findings and conclusions, I further

find that the claimant has failed to prove that Ark. Code Ann. §11-9-525(a) is applicable in the present claim. Therefore, his request for benefits under this subsection must be denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On September 3, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On September 3, 2002, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$260.00 for total disability and \$195.00 for permanent partial disability.
4. On September 3, 2002, the claimant sustained compensable injuries to his back and left elbow.
5. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a "compensable injury" to his head in the employment related accident or incident on September 3, 2002. Specifically, he has failed to prove the occurrence or existence of a physical injury to his head by medical evidence that is supported by "objective findings."
6. There is no dispute over the payment of expenses incurred for reasonably necessary medical services required by the claimant's compensable back and left elbow injury and all such expenses have or will be paid.

7. Based upon the finding that the claimant has failed to prove a “compensable injury” to his head, he would not be entitled to any medical services necessitated by or connected with his alleged head injury.
8. The claimant was rendered temporarily totally disabled as the result of the effects of his compensable injuries (primarily his compensable elbow injury) for the periods of September 4, September 9, September 11, September 12, and September 13, 2002, and from March 17, 2003 through May 8, 2003.
9. The claimant has failed to prove that he is entitled to any additional temporary total disability benefits after May 8, 2003. Specifically, he has failed to prove that he has continued within his healing period from the effects of any of his compensable injuries after that date.
10. The claimant has failed to prove that he is entitled to benefits under Ark. Code Ann. §11-9-505(a) for the period of March 17, 2003 through October 22, 2003, as he has failed to prove that the respondent’s had available during this period suitable employment that was within his physical and mental limitations.
11. The claimant is not barred from receiving any temporary total disability benefits by the provisions of Ark. Code Ann. §11-9-526. Specifically, the respondent has failed to prove that the claimant unjustifiably refused any

suitable employment (i.e. within his physical limitations and restrictions) that was offered to him by the respondent during the periods in question.

12. The respondents have controverted the claimant's entitlement to any benefits attributable to his alleged head injury, any temporary disability benefits, and any benefits under Ark. Code Ann. §11-9-505(a).
13. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

ORDER

The respondents shall be liable for all reasonably necessary medical services required by the claimant for his compensable elbow and back injuries. The respondents shall not be liable for any medical expenses incurred as the result of services rendered to the claimant for his alleged head injury.

The respondents shall pay to the claimant temporary total disability benefits for the periods of September 4, 9, 11, 12, and 13, 2002, and March 17, 2003 through May 8, 2003.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded, which have heretofore accrued,

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are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge