

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F501331

JUSTIN OGLE, EMPLOYEE

CLAIMANT

**CALICO TRAILER MANUFACTURING
COMPANY, EMPLOYER**

RESPONDENT

**BRIDGEFIELD CASUALTY INSURANCE/
SUMMIT ADJUSTING, CARRIER/TPA**

RESPONDENT

OPINION FILED AUGUST 31, 2005

A hearing in this case was conducted on June 30, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Richard H. Mays, Attorney at Law, Heber Springs, Arkansas.

Respondents were represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on May 17, 2005; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations. Two of these stipulations are found in the Prehearing Order and were confirmed by the parties at the hearing. The third stipulation was agreed upon at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on January 17, 2005 and at all other relevant times.
2. Respondents controvert this claim in its entirety.

3. Claimant's temporary total disability benefits rate is \$217.00.

At the June 30, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. Due to the stipulation concerning Claimant's temporary total disability benefits rate, the third issue concerning Claimant's average weekly wage was withdrawn. Thus, the parties agreed that the remaining issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable injury to his left elbow on January 17, 2005.
2. Whether Claimant is entitled to reasonably necessary medical benefits.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to an award of attorney's fees.

Claimant contends that he sustained a compensable injury to his left elbow on January 17, 2005. He seeks medical and temporary total disability benefits, as well as an attorney's fee. He argues that the requirement that he support his medical evidence by objective findings is unconstitutional when applied to a soft tissue injury such as his. He also argues that the Respondents should be estopped from raising an objective findings defense, since Respondents denied Claimant an MRI study.

Respondents controvert this claim. They argue that there are no objective findings in the record, and that there is no proof of causation. Respondents object to Claimant's argument concerning constitutionality on the basis that it wasn't raised prior to the hearing.

THE RECORD

In a discussion following the submission of testimony at the June 30, 2005 hearing, the parties agreed to brief certain issues. These briefs were timely filed. Therefore, the

following briefs are hereby identified as part of the record in this matter, and will be blue-backed:

1. Claimant's Post-Hearing Brief received July 21, 2005; and
2. Respondents' Brief received July 26, 2005.

DISCUSSION

A. Compensability

Claimant began working for the Respondent employer as a builder's helper on December 3, 2004. After approximately three weeks, Claimant transferred to the "break-and-shear" area where he assisted in cutting, bending, and forming metal used to build horse trailers. Claimant described these sheets of metal as "full sheets, 5-by-12 sheets, 4-by-10's," that would "weigh anywhere from 60 to 100-plus pounds a piece." He described his job as follows:

And you'd have to go, you got a big table you pull down to the stacks, and you'd have to grab them 5-by-12 sheets or 4-by-10, you'd have to grab them by hand, and you'd have to kind of flip them and roll them and, at the same time, throw them up on the table. And once you got a big stack of anywhere from 5 to 20 to 30 pieces at a time, you wheeled it back to the break-and-shear, and you got your measurements. Sometimes you would have to cut it down, instead of 5-by-12, you might have, you know, four-and-a-half by just whatever, depending on the metal they need. Well, you're constantly -- you got to break every bit of it and you got to put V's in every bit of it, so once you cut it, you got to flip it over and throw it around, and you got to bend it two times. ... [Y]ou are just constantly, all day long, flipping and twisting and turning and throwing this metal around all day.

Claimant did this job for two and a half or three weeks prior to his injury on January 17, 2005.

I was working all morning long, doing the same thing, and about two, approximately two o'clock -- it was after afternoon break so it was after two o'clock -- me and Billy was throwing the metal around and breaking it down,

and when I went to flip a piece -- me and him went to flip a piece, it was like a rubber band busted in my -- like a pop in my elbow. And I couldn't grip and my whole hand and arm got real numb, tingly. And, I mean, I couldn't even hold a three-pound sledgehammer or do anything. So I went to my supervisor and told him what happened.

The Respondent employer sent Claimant to complete a drug test and then sent him to Dr. Lawrence Meyer.

Dr. Meyer treated Claimant twice; at the first visit, Claimant recalled that his left "elbow in my arm was swelled up." Dr. Meyer eventually referred Claimant to Dr. Dennis Luter. Claimant testified that his elbow was still swollen the first time he presented to Dr. Luter, and that Dr. Luter put his arm in a cast. After the cast was removed, Dr. Luter referred Claimant to physical therapy. Claimant testified that the therapist "did a lot of exercises and a lot of heat therapy and all kinds of stuff, soaked it and stuff, shot it up with steroids and everything else, and electro-shock and everything like that. It opened up more, but, I mean, it didn't do it all the way."

Dr. Luter continued to treat Claimant until June 15, 2005, at which time Claimant was released to return to work. Claimant testified that Dr. Luter sought to refer Claimant for an MRI, but Respondents would not approve and he could not pay for the MRI out of his own pocket. As of the time of the hearing, Claimant's arm was "doing all right" but that "if you work it hard during the day, you will know it the next couple of days." He further testified that he could only open his left arm so far "without real bad pain in the elbow right here. And, you know, as far as grip, it still ain't 100 percent as strong as my right."

Claimant submitted a number of depositions that were accepted into evidence; these depositions generally corroborate his testimony. Billy Pierce worked with Claimant in the "break-and-shear" area; he testified that Claimant "was a hard worker." He did not

observe Claimant acting injured or impaired in any way prior to the time Claimant complained of his injury.

Dr. Meyer's January 17, 2005 examination notes reveal an assessment of medial epicondylitis. He noted that Claimant's medial epicondyle was "very tender" and that his grip was perhaps slightly weaker on the left; otherwise, he noted that Claimant's left upper extremity was "neurovascularly intact." He restricted Claimant's lifting and prescribed medication; he also apparently prescribed a device, but the word is illegible. Dr. Meyer's January 25, 2005 notes record that Claimant reported "pain has not improved at all." Claimant also reported that he was not allowed to work but that he "needs to go back to work." The notes indicate that Claimant remained tender in his left elbow, but they also appear to specifically note the absence of swelling. Dr. Meyer again assessed persistent left medial epicondylitis and referred Claimant to an orthopaedic specialist.

Dr. Luter first examined Claimant on January 26, 2005. Claimant reported that "on the 16th, he was using the elbow doing heavy lifting of sheet metal when he felt a sudden severe pain associated with a loud 'pop' in his left elbow."

His exam reveals that he moves the arm carefully and slowly, but he is able to come into full extension and can flex up above neutral. He is extremely tender directly over his flexor tendon origin. There even seems to be a small palpable defect just distal to his medial epicondyle compared to his other elbow. However, his flexor tendons are all working....

X-rays of his elbow appear unremarkable. There is one irregularity in the articular surface of the olecranon which may be a normal variant but could represent a small defect in his articular cartilage that would be consistent with a loose body catching in his elbow.

Dr. Luter thought Claimant "most likely has the diagnosis of that of a partial flexor tendon origin tear, although he and I did discuss the possibility of a loose body in his elbow as

well.” Dr. Luter placed Claimant in a long arm cast and refilled his Hydorcodone prescription. He again examined Claimant on February 9, 2005. After taking Claimant out of his cast, he noted that Claimant remained tender over his elbow. X-rays were repeated; Dr. Luter recorded that “[h]is x-rays today still appear satisfactory.” He opined that “this is a soft tissue injury,” and kept Claimant off work for a couple more weeks.

Claimant again presented to Dr. Luter on February 23, 2005. Claimant reported that “[h]is pain is a lot better, but it is not completely gone.” Dr. Luter noted pain upon extension past a certain point, and that Claimant “doesn’t seem to have any swelling today.” He prescribed additional physical therapy to regain Claimant’s extension, and sought to schedule Claimant for an MRI “[b]ecause of his persistent symptoms.” As noted above, Respondents refused an MRI.

Respondents’ Exhibit #1 consists of a letter from Respondents’ counsel dated May 23, 2005, and Dr. Luter’s response dated June 15, 2005. When asked to identify “any objective medical finding to substantiate the cause of the claimant’s left elbow condition,” Dr. Luter replied: “Objective medical findings include local tenderness over his flexor origin and a loss of extension of the elbow.” Dr. Luter did note that Claimant’s “x-rays ... were normal”; he did not identify any other studies or tests. He also confirmed that Claimant “was given a note to return to full duty on his office visit on 6-15-05.”

1. Absence of Objective Findings

The employee has the burden of proving a compensable injury. Carman v. Haworth, Inc., 74 Ark. App. 55, 59, 45 S.W.3d 408, ___ (2001). To be compensable, an injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under

the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Claimant must sustain his burden of proving the elements of a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant has not sustained his burden of proving objective findings in support of the medical evidence. While I do not question Claimant’s complaints of pain, the record does not reveal any objective findings in support of his claimed left elbow injury. Dr. Meyer’s records do not report any findings which cannot come under the voluntary control of the Claimant. On January 26, 2005, Dr. Luter did note that there seemed “to be a small palpable defect just distal to his medial epicondyle compared to his other elbow.” However, on that date and again on February 9, 2005, Dr. Luter noted that the x-rays appeared “unremarkable” or “satisfactory.” In his June 15, 2005, letter, Dr. Luter did not identify any true objective findings and confirmed that Claimant’s x-rays “were normal”; he made no reference to swelling or a palpable defect.

Claimant argues that his testimony concerning swelling in his left elbow constitutes an objective finding. Claimant cites Hickson v. Southern Refrigerated Transp., Full Workers’ Compensation Commission Opinion filed June 23, 2005 (F211073), in support of his argument. However, that case is distinguishable for at least two reasons: (1) objective findings do not appear to have been an issue; and (2) the opinion states that a particular doctor “observed swelling.” In this case, neither doctor affirmatively reported swelling. Respondents cite Overstreet v. Pontiac Coil, Inc., Full Workers’ Compensation

Commission Opinion filed November 2, 2004 (F307136); it is on point. There, the “claimant offered the testimony of her daughter and friend to establish objective medical findings,” testifying that they observed claimant’s bruising. The Commission responded:

In our opinion the testimony offered by the claimant, the claimant’s daughter, and the claimant’s friend is not sufficient to establish objective medical evidence. The law requires medical evidence not simply objective findings. In our opinion, observations by these lay persons of bruising to the back and thigh does not satisfy this statutory requirement.

Id. In light of Overstreet, Claimant’s testimony concerning swelling cannot constitute an objective finding; there must be medical evidence of the objective finding.

I acknowledge Stone v. Aztec Paving & Heavy Constr., Full Workers’ Compensation Commission Opinion filed March 2, 2000 (E807346). After noting a doctor’s observation of “less swelling” in a subsequent medical record, the Commission stated: “In our opinion, it may be inferred that [the doctor] detected swelling” during an earlier examination; the Commission found that this testimony corroborated the claimant’s testimony about swelling in his knee. Id. However, in that case the Commission noted “multiple objective findings,” including contusion, inflammation, and effusion. Multiple findings do not exist in this case. Even if their statements are read to imply the presence of swelling on other occasions, Dr. Meyer’s report of the absence of swelling on January 25, 2005, and Dr. Luter’s February 23, 2005 observation that Claimant “doesn’t seem to have any swelling today,” when weighed against the studies and remaining medical proof, simply do not amount to a preponderance of the evidence. This is particularly true when one notes that Dr. Luter’s June 15, 2005 letter absolutely fails to mention swelling in response to a question concerning objective findings.

2. Estoppel

Claimant argues that Respondents should be estopped from arguing the absence of objective findings. He notes that Respondents would not allow the MRI recommended by Dr. Luter, and reasons that “Respondents should not be allowed to deny a reasonable request from an attending physician for a medical test that would aid in the diagnosis of an injury, and then claim the shield of the necessity of ‘objective medical evidence’ of a soft tissue injury when the denied test would have aided in the diagnosis.”

I find that Claimant failed to prove that Respondents should be estopped from raising an objective findings defense. Claimant did not prove all of the elements of estoppel. See Southern Hospitalities v. Britain, 54 Ark. App. 318, 322, 925 S.W.2d 810, __ (1996) (listing elements of estoppel). For example, there is no proof that Claimant was ignorant of the true facts. Thus, estoppel is not applicable in this case.

3. Constitutionality of the Objective Findings Requirement

Claimant argues that the objective findings requirement is an unconstitutional violation of Ark. Const. art. 2, § 13, to the extent that it deprives Claimant of a remedy for his soft tissue injury under the workers’ compensation law. This issue is not listed in the Prehearing Order; it was not discussed at the start of the hearing; Claimant only raised this issue following the submission of testimony at the end of the hearing. Respondents objected to the raising of this constitutional issue for the first time at the end of the hearing; in the alternative, Respondents generally argue that the requirement, as applied to soft tissue injuries, is constitutional.

I find that this issue has been raised in a timely fashion. “All legal and factual issues

should be developed at the hearing before the Administrative Law Judge. The Full Commission has refused to consider issues not timely raised before an Administrative Law Judge.” Mickey v. Arkansas Methodist Hosp., Full Workers’ Compensation Commission Opinion filed July 22, 2003 (F002633) (citations omitted). While Claimant waited until the end of the hearing to raise this issue, Respondents have not argued that additional facts are necessary for its resolution. Both parties have had an opportunity to brief this issue; Respondents were allowed to submit their brief after Claimant’s brief was submitted. Since Claimant’s issue is a matter of law, and since both parties have had an opportunity to develop this issue, it may be considered “developed” as between the parties.

However, I find that this issue should not be considered because Claimant failed to comply with Ark. Code Ann. § 16-111-106(b). That provision requires any party challenging the constitutionality of a statute to serve “a copy of the proceeding” upon the Attorney General. Id. The Commission has held that it is not required to consider a constitutional argument when a party has not notified the Attorney General. See Fowler v. Sanyo Mfg., Full Workers’ Compensation Commission Opinion filed August 20, 2002 (D505825). There is no proof in the record that the Attorney General has been notified of Claimant’s challenge.

Even if the Attorney General had been notified, I find that the objective findings requirement is constitutional. As a general matter, the Full Commission has already declared this provision constitutional.

It is presumed that all legislative enactments are constitutional and, any doubts concerning it must be resolved in favor of constitutionality. It also [has] been held by the United States Supreme Court that when any procedure is challenged on the grounds of constitutionality, the primary focus is on the fairness and accuracy of the decisions that come from the

procedure. There is no evidence that the provisions in question result[] in any unfairness or inaccuracy. We do not see any basis whatsoever for finding that the provisions of the Workers' Compensation Act, relating to objective findings, is [sic] in any way unconstitutional.

Barnard v. Wal-Mart Stores, Inc., Full Workers' Compensation Commission Opinion filed April 3, 1998 (E607182 & E614185) (emphasis supplied) (citations omitted). Thus, Ark. Code Ann. § 11-9-102(4)(D)'s objective findings provision is constitutional.

Further, I note that Claimant is not deprived of a remedy contrary to Ark. Const. art. 2, § 13; he retains a remedy. The Arkansas Supreme Court recently noted:

In addition, Article 2, section 13 of the Arkansas Constitution states, "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character...." It is clear from our case law and our constitution that a worker whose injury is not covered by the [workers' compensation law] is not precluded from filing a claim in tort against his employer.

Automated Conveyer Systems v. Hill, ___ Ark. ___, ___ S.W.3d ___ (May 5, 2005). Claimant has a remedy - he may sue in tort - therefore there is no violation of Article 2, section 13 of the Arkansas Constitution.

To summarize, I find that Claimant timely raised his constitutional challenge. However, because he did not comply with Ark. Code Ann. § 16-111-106(b), his challenge may not be considered. Even if the constitutional challenge could be considered, the Full Commission has held the objective findings provisions of the workers' compensation law constitutional; and, Claimant has not been deprived of a remedy.

B. Medical and Temporary Total Disability Benefits

Based upon the foregoing, Claimant's request for medical and temporary total disability benefits must be denied. When an employee is determined to have a compensable injury, he is entitled to medical and temporary disability benefits as provided

by the workers' compensation law. Ark. Code Ann. § 11-9-102(4)(F)(i). Since Claimant did not establish a compensable injury, he is not entitled to these benefits.

C. Attorney's Fee

Claimant is not entitled to an award of an attorney's fee. Such fees are allowed only on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). Since no indemnity benefits are awarded herein, an award of an attorney's fee is not proper.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on January 17, 2005 and at all other relevant times.
3. Respondents controvert this claim in its entirety.
4. Claimant's temporary total disability benefits rate is \$217.00.
5. Claimant did not sustain his burden of proving a compensable injury, because he did not prove objective findings in support of the medical evidence. Claimant's studies were normal; the doctors did not identify any objective findings; and Claimant's testimony concerning swelling does not satisfy the statute's requirements.
6. Claimant did not sustain his burden of proving estoppel in this case, because he did not prove all of the necessary elements. For example, Claimant did not prove that he was ignorant of the true facts.
7. Claimant's challenge to the constitutionality of the objective findings requirement was timely raised.

8. Nonetheless, Claimant's challenge to the constitutionality of the objective findings requirement cannot be considered, because he did not notify the Attorney General of his challenge as required by Ark. Code Ann. § 16-111-106(b). The record is silent concerning any such notice.

9. In the alternative, the Commission has declared the objective findings provisions of the workers' compensation law to be constitutional.

10. In the alternative, because Claimant has a remedy - he may file a claim in tort against his employer - the objective findings requirement in Ark. Code Ann. § 11-9-102(4)(D) does not violate Article 2, section 13 of the Arkansas Constitution.

11. Because Claimant did not establish a compensable injury, he is not entitled to medical or temporary total disability benefits.

12. Because no indemnity benefits are awarded herein, Claimant is not entitled to an attorney's fee.

ORDER

Claimant failed to sustain his burden of proving that he suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml