

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F409768

JUVENAL PEREZ, Employee

CLAIMANT

BUILT-WELL CONSTRUCTION COMPANY, Employer

RESPONDENT

CONTINENTAL CASUALTY COMPANY, Carrier

RESPONDENT

OPINION FILED FEBRUARY 7, 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 FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 26, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 17, 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 at all relevant times.
3. The claimant was earning an average weekly wage of \$648.35 which would entitle him to compensation at the weekly rates of \$432.00 for total disability benefits and \$324.00 for permanent partial disability benefits.

4. Respondents have controverted this claim in its entirety.

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

1. Compensability of injury on April 1, 2004.

2. Temporary total disability benefits.
3. Medical expenses.
4. Attorney fee.

Subsequent to the pre-hearing conference the respondent also raised as an issue claimant's lack of notice pursuant to A.C.A. §11-9-701.

The claimant contends he was injured on April 1, 2004 when he injured his back while lifting sheet rock. Claimant contends he is entitled to temporary total disability, related medical, and an attorney's fee.

The respondents contend the claimant did not sustain an injury arising out of and in the course of his employment with respondent on April 1, 2004.

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 November 17, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by respondent.

FACTUAL BACKGROUND

The claimant is a 29-year-old man who attended high school in Mexico and has been in the United States since 1990. Claimant testified that he worked for respondent for approximately one year.

Claimant testified that on or about April 1, 2004, he was lifting sheet rock at work and felt something in his back. After this incident he began having pain in his legs for which he eventually sought medical treatment from Dr. Smith in Neosho, Missouri. Claimant also sought medical treatment from Dr. Karges who ordered an MRI scan which revealed a herniated disc at the L4-5 level and a protrusion at the L5-S1 level. Dr. Karges ordered physical therapy, epidural steroid injections, and medication.

Claimant filed this claim contending that he suffered a compensable injury to his back while working for respondent and seeking payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his back while working for respondent on or about April 1, 2004 while lifting sheet rock. 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 failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury.

First, while claimant contends that he suffered a compensable injury to his back while lifting sheet rock on or about April 1, 2004, claimant admittedly did not report the incident to the respondent even though he knew he was to report all injuries immediately. Claimant continued to work for the respondent and did not seek any medical treatment until May 28, 2004. The medical records from that visit indicate that claimant was complaining of pain in his right leg. The medical report notes that claimant performs construction work, but makes no mention of an injury having occurred at work.

Claimant eventually sought treatment from Dr. Karges on August 5, 2004 and a patient history form completed on claimant's behalf indicates that claimant's injury was work related. However, the office notes of Dr. Karges on that date indicate "no definite history of injury." As a result of claimant's complaints Dr. Karges ordered an MRI scan which revealed a herniated disc at the L4-5 level and a protrusion at the L5-S1 level. It was not until after this MRI was performed that claimant reported an injury to the respondent.

Testifying on behalf of respondent was Jose Martinez, the respondent's labor foreman, who has worked for respondent twelve and one-half years. Martinez testified that although he knew the claimant was missing work because of pain in his legs, Martinez testified that claimant never reported a work-related injury to him. Martinez' testimony is consistent with claimant's testimony that he did not report a work-related injury until after the MRI scan in September. This was some five months after the injury allegedly occurred.

In summary, claimant contends that he suffered a compensable injury to his low back while lifting sheet rock on or about April 1, 2004. However, by claimant's own admission he did not report the injury to the respondent on that date even though he knew

he was to report injuries immediately. Claimant continued to work for the respondent until July or August of 2004 and sought medical treatment but still did not report a work-related injury to the respondent until September 2004 after he had undergone an MRI scan. While the medical reports do note that claimant works as a construction worker, the medical reports do not contain a history of an injury lifting sheet rock as alleged by the claimant. In fact, the history contained in Dr. Karges' report of August 5, 2004 indicates that there was no definite history of injury. Given this evidence, I find that claimant has simply failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by respondent. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE