

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409581

ROGELIO ROMERO, EMPLOYEE	CLAIMANT
HECTOR SUSTAITA, UNINSURED EMPLOYER	RESPONDENT #1
FULLER DRYWALL CORPORATION, EMPLOYER	RESPONDENT #2
TEXAS MUTUAL INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT #2(A)
SIMPSON HOUSING, EMPLOYER	RESPONDENT #3
CNA and WAUSAU INSURANCE COMPANIES, INSURANCE CARRIER/TPA	RESPONDENT #3
SUMMIT CONTRACTORS, INC., (SELECTIVE H R SOLUTIONS), EMPLOYER	RESPONDENT #4
CNA INSURANCE COMPANIES, INSURANCE CARRIER/TPA	RESPONDENT #4

OPINION FILED OCTOBER 24, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on October 3, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney-at-Law, Little Rock, Arkansas.

Respondent #1 did not appear.

Respondent #2 represented by Mr. Jim L. Julian, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2(A) represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

Respondent #3 represented by Mr. Michael E. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

Respondent #4 represented by Mr. Frank B. Newell, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted October 3, 2005, to address various issues as set out further below.

A prehearing conference was conducted in this claim on June 15, 2005, and a Prehearing Order was filed on June 16, 2005. All party respondents were represented at the prehearing conference, save respondent/employer #2. Because respondent/carrier #2(A) maintained that it did not insure said employer doing business in Arkansas, Fuller Drywall secured separate counsel following the prehearing conference who participated in subsequent discovery, as well as the formal hearing.

No stipulations were agreed to by the parties at either the prehearing conference or the October 3, 2005, hearing.

By agreement of all parties, the following issues were presented for determination:

- 1) Jurisdiction over any and all of the identified respondents.
- 2) Compensability.
- 3) If compensability is overcome, which, if any, of the respondents are liable for benefits.
- 4) Whether the claim is barred by the Statute of Limitations.

Claimant contended, in summary, that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on September 14, 2002, when he fell off a ladder and broke a leg while working for

one of the listed and joined respondents. Although the claimant maintained that he had been unable to work since the date of his injury, the claimant reserved issues related to the nature and extent of his injury pending a determination on compensability and respective liabilities of the parties. If compensable, claimant requested that the proper party be held responsible for all outstanding hospital, medical, and related expenses, together with continued, reasonably necessary medical treatment.

The respondent #1, Hector Sustaita, an alleged uninsured employer, did not appear at the hearing. In fact, the whereabouts of Mr. Sustaita are unknown and no notice of any proceedings against said party has ever been perfected.

Employer #2, Fuller Drywall Services, Inc., acknowledged that it performed a drywall contract at an apartment complex known as the Gables of Maumelle in 2002 and 2003; however, maintained that it only had one employee at the job-site, the superintendent, and that all other work was performed by sub-contractors. It contended that it did not have any employees or independent contractors with the claimant's name, and, further contended that, in fact, claimant did not contend that he was employed by respondent #2, but claims he was working for either Hector Sustaita or Guadalupe, neither or which contracted with employer #2 to perform any work on the Gables of Maumelle. Respondent #2 further contended that it was never aware of the contention by carrier #2(A) that it only responded to claims in Texas and nowhere else on behalf of the employer which would become an issue

requiring further litigation only if indeed employer #2 were responsible for benefits. Employer #2 did not wish to address the coverage issue, maintaining that Texas Mutual would only be responsible if it was found liable, and since the claimant was not its employee or an employee of any of its uninsured sub-contractors, that issue was moot.

Respondent/carrier #2(A) contended that the claimant did not sustain a compensable injury; that the Statute of Limitations had run with regard to this claim; that the claimant failed to provide timely notice of any injury, and, therefore, was not entitled to benefits until notice was received; that it provided coverage for respondent/employer #2 in Texas only and was not liable for any benefits for any extra-territorial claim; that the claimant was not an employee of Fuller Drywall and/or Texas Mutual Insurance Company; that the Arkansas Workers' Compensation Commission did not have jurisdiction over the Texas Mutual Insurance Company; that the claimant was not entitled to any benefits associated with this claim; and that it was not liable for any benefits regarding the claim. It requested that it be dismissed from the claim itself because it did not provide coverage in the State of Arkansas or, alternatively, based upon its remaining contentions.

Clearly, there is a policy dispute between employer #2 and its carrier. There is no dispute that the carrier insures the employer as reflected by the documentary evidence. The dispute involves the area of coverage. The employer pointed out that it requested, and apparently obtained, a certificate of insurance for a job in

Maumelle, Arkansas, from its insurance agent. As will be set out further below, since employer #2 is not responsible for benefits and the employer did not wish to litigate that issue, it will not be addressed.

At the prehearing conference, respondents #3 contended that the claimant was never an employee of Simpson Housing, and if the claimant was the employee of an uninsured contractor, it was not the proper statutory employer. At the hearing, respondents #3 pointed out that it was a property management company; that it had no construction employees whatsoever, and were not involved in the construction of the project in Maumelle, Arkansas. Respondents #3 moved for dismissal as a party respondent. No objections were raised by the remaining parties. Accordingly, an Interim Order was filed October 18, 2005, dismissing respondents #3 as party respondents.

Respondents #4 denied any liability, contending that the claimant was not an employee of Summit Contractors or Selective H R Solutions as of the date of his claimed injury; that the claimant was either an independent contractor or a sub-contractor on the date of his claimed injury; that the claim was barred by the Statute of Limitations; that the claimant was not an employee of an uninsured sub-contractor on the date of the alleged injury; specifically maintaining that the claimant was an employee of Fuller Drywall, an insured entity as of the date of the claimed injury.

The claimant testified in his own behalf. Kevin Brown was called as a

witness by respondents #2. The record is composed solely of the transcript of the October 3, 2005, hearing containing numerous exhibits.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim as well as all parties named herein.
2. On September 14, 2002, the claimant sustained a fracture to his right leg when he fell off a ladder being used as a scaffold while working for an uninsured employer identified as Hector Sustaita whose whereabouts is unknown.
3. The claimant has failed to prove any employment relationship with any of the named employers joined in this claim. Accordingly, the claimant has failed to prove that he sustained a compensable injury arising out of and during the course of his employment with any of the respondents herein.
4. The claim against the named respondents was filed on September 13, 2004. The claim is not barred by Statute of Limitations against respondents herein.
5. This claim has been controverted in its entirety.

DISCUSSION

Rather than conduct an exhaustive analysis of the record in this cause, suffice it to say that although it is apparent that the claimant sustained an injury on September 14, 2002, when he fell off a ladder and broke his right leg, there is no credible evidence whatsoever that the claimant's injury arose out of and during the course of his employment on any building project involving the parties properly joined as respondents to this claim. In fact, the record reflects that the claimant could not identify any prime contractor or sub-contractors involved in the construction of the apartments where he was injured. The only relevant testimony that the claimant could offer was that his injury occurred in Maumelle, Arkansas, and that he was hired and compensated by individuals identified as "Hector" and "Guadalupe." The record reflects that the claimant consulted an attorney in Texas, Eldarose Cardenas, and filed a claim against the four (4) named respondents on September 13, 2004, in order to toll the Statute of Limitations. However, as will be set out further below, it is apparent that the claimant's Texas attorney did not identify the proper potential employers. Further, the claimant candidly acknowledged that, with the exception of possibly Hector Sustaita, he could not identify any employers or contractors, and, for that matter, even the name of the apartment complex where the injury occurred. (Tr.38-44, 46-50, 54-59)(Cl. Ex. B)

The claimant is thirty-four (34) years old. He is unable to read or speak the English language having only obtained a limited education in Mexico. Again, the

claimant was unable to identify the specific location of his injury other than that he was working on apartment buildings in Maumelle, Arkansas. The claimant testified that he worked at the apartment complex for approximately six (6) months prior to the date of his injury. The claimant's job duties consisted exclusively of hanging drywall.

The claimant testified that he worked for an individual identified merely as Guadalupe in Texas before coming to Arkansas in 2002. Guadalupe hired the claimant to perform sheet rock work in Austin, Galveston, and Dallas, Texas, where he became friends with Hector Sustaita. The claimant later met an individual identified as Octavio who offered him a job in Arkansas. He stated that while working in Arkansas, he ran into Hector and Guadalupe and they offered him another job in Arkansas, at which time he went to work for said individuals. In fact, the claimant moved to Conway, AR, and lived with Hector and several other Mexican workers. He stated that the workers commuted to Maumelle, AR, each day to work on an apartment complex in Maumelle. He asserted that he worked on the same job site for approximately seven (7) months. Again, the claimant could not identify the contractor or any of the employers. He was always paid in cash by either Hector or Lupe (apparently Guadalupe), and his work duties were directed by said individuals. (TR. 39, 47-48)

Kevin Brown, the office manager for Fuller Drywall, was called as a witness for employer #2. He stated that the only project which his company contracted in

Arkansas involved the Gables of Maumelle in Maumelle, Arkansas. Fuller Drywall had the exclusive contract for the drywall application. He stated that the project began in August, 2002, one month before the claimant's injury which reflected that it was impossible for the claimant to have worked on the apartment complex known as the Gables of Maumelle for at least six (6) months prior to his injury. Further, Mr. Brown identified the sub-contractors that were working on the project during September, 2002, specifically, Juan Lopez, Jr., and Vincent Orlando. Suffice it to say that there is no credible evidence whatsoever that the claimant worked on the building project at the Gables of Maumelle or that any of the work was sub-contracted to one Hector Sustaita. Since this was the only building project involving employer #2 in the state of Arkansas, it is not possible that the claimant was injured at this job-site. Apparently, respondents #4 was the prime contractor on the project at the Gables of Maumelle and, therefore, it is, likewise, shielded from liability. A preponderance of the credible evidence reflects that the claimant has filed a claim against parties that cannot possibly be considered employers under our workers' compensation laws.

Although it is herein specifically determined that compensability cannot be established and that none of the named respondents are liable for benefits, the Statute of Limitations defense must be addressed. Respondent 2(A) argues that it has documents indicating that the claim was not filed until September 23, 2004, and that the claim is therefore barred by Statute of Limitations. (Tr.15)(Resp. Ex.

2(A), p.26)

Respondent's arguments concerning the Statute of Limitations is without merit. First, this Administrative Law Judge took administrative notice that the Commission file reflected the filings of multiple AR-Cs, indicating that a faxed copy was received by the Commission on September 13, 2004; that letters were sent by the Commission's Operation and Compliance Department to the respondents herein on September 17, 2004, and that computer entries reflect that the litigation file was created on September 14, 2004. Further, respondent's reliance on a Commission form AR-C with a date-stamp of September 23, 2004, is simply misplaced because other documentation provided by the respondent reflects that it had controverted the claim in a letter sent to the Commission prior to September 23, 2004. (Resp. Ex.

2(A), p.27)

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of 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 medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,
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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied. *Mikel vs. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has simply failed to establish, by a preponderance of the evidence, that he sustained an injury arising out of and during the course of his employment with any of the named respondents herein, save, possible respondent #1 which he has failed to properly notice. Accordingly, the within claim is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge