

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405667

CARL SHELLEY

CLAIMANT

BASIC CONSTRUCTION COMPANY

RESPONDENT

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 14, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG 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

A hearing was held in the above styled claim on November 29, 2004, in Springdale, Arkansas. The deposition of Leroy Lowe was taken on December 9, 2004, and has been subsequently submitted as Claimant's Exhibit No. 2. The deposition of Lisa Kirchner was also taken on December 9, 2004, and was subsequently submitted as Respondent's Exhibit No. 2.

A Pre-Hearing Order was entered in this claim on July 20, 2004. 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. Immediately prior to the commencement of the hearing, a modification was made in regard to the first issue (reflecting that the claimant was only contending an injury to his right shoulder) and a clarification was made in regard to the second issue (identifying the claimant's alleged period of temporary total disability). A copy of this Pre-Hearing Order with those amendments noted thereon, has made Commission's Exhibit No. 1 to the hearing.

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

1. On all relevant dates, including February 26, 2004, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$280.00 for total disability and \$210.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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 sustained compensable injuries to his neck and right shoulder on February 26, 2004.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from March 16, 2004 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"Claimant has been seen by Dr. Blair Masters and believes that Dr. Masters has a conflict of interest because Dr. Masters had him do some temporary work for him. Claimant does not feel that Dr. Masters could now independently indicate that he would or would not be entitled to TTD since Dr. Masters became economically interested in him when he hired him to do some work. The claimant acknowledges and admits he did indeed do this work and it goes towards showing whether he has reached his healing period but he maintains that his work was not substantial and prolonged. He simply worked to keep from starving to death over the winter. In any event, the claimant requests that he be allowed to see another physician of the Commission's choosing."

In regard to these issues, the respondents contend:

- "(a) Claimant did not sustain an injury arising out of and in the course of his employment with the respondent employer;
- (b) Claimant cannot meet his burden of proof regarding any claimed gradual-onset injury to his neck and shoulders;
- (c) Claimant cannot meet his burden of proving a specific incident or injury;
- (d) Claimant is not entitled to an award of benefits."

DISCUSSION

_____The initial issue to be addressed is whether the claimant sustained "compensable" injuries to his neck and right shoulder on February 26, 2004. The burden rests upon the claimant to prove all of the elements necessary to establish a "compensable" injury to these portions of his body.

First, the claimant must prove that his alleged employment related injury satisfy the requirements of Ark. Code Ann. §11-9-102(4)(D). This subdivision requires that the claimant prove by medical evidence, the actual existence of the physical injuries or conditions alleged to be compensable. It further requires evidence of "objective findings" to support the existence of these injuries or conditions. The term "objective findings" mean the independent observation of physical abnormalities or deficits that are beyond the claimant's voluntary control.

In the present case, the medical evidence presented fails to "establish" the existence of any physical injury involving the claimant's shoulder. There is absolutely no medical evidence that would indicate any injury, condition, or abnormality affecting this portion of the claimant's body. Further, there is no evidence of any "objective" abnormalities or deficits noted with this portion of the claimant's anatomy.

Therefore, the claimant has failed to prove that the alleged compensable injury to his shoulder satisfies the requirements of Ark. Code Ann. §11-9-102(4)(D). The failure to prove this necessary element of compensability prevents a finding that he sustained a "compensable" injury to his shoulder, on or about February 26, 2004. His claim for benefits attributable to such an alleged injury must be denied and dismissed in its entirety.

The medical evidence presented does "establish" the existence of a physical injury or condition involving the claimant's neck or cervical spine. The reports and records of Dr. Blair Masters (a chiropractor) repeatedly diagnosed the claimant as

suffering from cervicalgia, cervicobrachial syndrome, cervical disc bulge or herniation, and cervical neuritis. It also appears from the reports of Dr. Masters that he had also diagnosed and was treating various defects involving the claimant's lumbar spine.

However, the evidence presented fails to document any "objective findings" to support Dr. Masters' various diagnoses involving the claimant's neck or cervical spine. Instead, these diagnoses appear to be based upon the claimant's complaints of pain, "tenderness to palpitation" (complaints of pain upon the application of pressure) over the claimant's posterior neck, a decrease in grip strength of the claimant's left hand, a loss of range of motion of the claimant's neck or cervical spine, and a loss of the "normal anterior curve" of the claimant's cervical spine. Clearly, all of these various factors fall under the claimant's voluntary control. Even the loss of the "normal anterior curve" of the claimant's neck or cervical spine could be dependent upon the way the claimant held his head and neck during the radiographic studies.

I would also note that Dr. Masters, in his radiographic examination of March 17, 2004, also notes a "narrowing of the following weight bearing discs spaces." However, he does not indicate the particular disc spaces addressed. As he was also treating the claimant for lower back difficulties and this examination included his lumbar spine, one would reasonably assume that "weight bearing disc spaces" would refer to the claimant's lumbar spine, rather than his cervical spine.

It must be noted that the records and reports of Dr. Masters fail to document the presence of any muscle spasms or rigidity, swelling or inflammation, or any other objective findings commonly associated with a physical injury to the claimant's cervical spine. In his radiographic study of March 17, 2003, Dr. Masters expressly notes that the x-rays of the claimant's cervical spine revealed no osseous injury, that the claimant's spine appeared essentially in the midline, and that all bodies, pedicles, laminae, spinous and articular processes all appeared within the limits of normal. A

report, styled "Physician's Orders/Certification of Medical Necessity" indicates "neurological" deficits, as well as pain, loss of range of motion, and muscle weakness. However, there is no indication as to what these "neurological" deficits may have been. This report was purportedly signed by Dr. Scott Fedosky, apparently an associate of Dr. Masters. It is interesting to note that in a detailed medical examination of that same date, the neurological portion of this examination was expressly noted to be normal in all aspects except for a decrease in grip strength of the claimant's left hand.

After consideration of all the evidence presented, it is my opinion that the claimant has also failed to prove that his alleged neck or cervical injury satisfies the statutory requirements set out for a "compensable" injury by Ark. Code Ann. §11-9-102(4)(D), specifically that the actual existence of the alleged physical injury must be supported by "objective findings." The claimant's failure to satisfy the statutory requirement of this subdivision prevents a finding that his neck or cervical difficulties represent a "compensable" injury, as that term is defined by the Act. Thus, his claim for benefits attributable to such an injury must be denied and dismissed in its entirety.

Even if the claimant had satisfied the requirements of Ark. Code Ann. §11-9-102(4)(D), he would have also had to satisfied the additional definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i). Three of these requirements are:

- (1) That the physical injury arose out of and occurred in the course of the employment;
- (2) That the physical injury was caused by a specific incident;
- (3) That the physical injury was identifiable by time and place of occurrence.

The only direct evidence presented by the claimant to prove these three requirements is his own testimony. Although the testimony of a party is never considered uncontradicted, this does not mean it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient (in and of itself) to prove any fact that it is legally competent to address. However, in the present case, I do not find that the claimant's testimony is sufficiently credible to prove that his neck and right upper extremity difficulties were the result of a physical injury that was caused by a specific employment related incident of February 26, 2004.

In his testimony, the claimant was emphatic that he "felt something pop" in his neck when he and a co-employee were lifting a generator to place it in a back of a truck at approximately 7:00 a.m. on the morning of February 26, 2004. However, a review of the initial records of Dr. Masters, dated March 10, 2004, reveal a different history of the onset of the claimant's difficulties with his neck and right upper extremity. These records show a history of an onset of the claimant's difficulties approximately two days prior to the initial visit on March 10, 2004. They also fail to note any particular incident or event as precipitating these difficulties. In regard to the express question as to the "mode of onset" of these difficulties, the response is simply given as a "?". This same report also notes the generic observation that the claimant "does concrete work." In a subsequent report of Dr. Masters, dated March 17, 2004, a history of an onset date of the claimant's difficulties is again given as March 8, 2004, and in response to the inquiry as to the condition's "origin," it is indicated that it is a "recurrence."

The claimant also appears somewhat nebulous, in regard to the date of onset of the cause of his difficulties, when he completed the AR-C on April 27, 2004 (Respondent's Exhibit No. 1, page 1). On this form, the claimant gave an accident date of February 26 or 27, 2004. In regard to the cause of his injury, the claimant

stated:

"Lifting heavy things-generator dirt compacter."

The generator is not isolated as the culprit until a history given by the claimant to Dr. Masters on May 27, 2004 (Claimant's Exhibit No. 1). This report states:

"Pulled something in neck while lifting generator at work."

However, this report further noted that this action resulted in the symptoms of a headache, nausea, and shoulder pain. Curiously, the onset date of these difficulties continued to be noted as March 8, 2004.

The claimant also testified that on the day of the incident, he told his foreman, Leroy Lowe, that he had pulled something in his neck that morning. However, he didn't remember if he told him how he had done it. Mr. Lowe somewhat corroborated the claimant's testimony. He testified that, at the end of the work day, the claimant came to him and told him that he had hurt his neck lifting the generator off the truck at the end of the shift. Mr. Lowe initially testified that this conversation took place some time in February of 2004. However, he subsequently conceded, on cross examination, that it could have occurred some time in February of March or 2004. He also stated that the day following this conversation, the claimant came back in, that he and the claimant "went and talked to Frank" (the project manager), that Frank told him to go to a doctor and the claimant did not continue to work after that time. The sequence of events described by Mr. Lowe would place his initial conversation with the claimant around March 9, 2004, rather than February 26, 2004. It is also curious that the claimant would specifically mention the lifting of the generator to Mr. Lowe and yet fail to mention it to Dr. Masters on his initial visit, shortly thereafter.

It must be noted that Mr. Lowe's testimony concerning the reporting of this incident is indirectly contradicted by the deposition of Lisa Kirchner, a paralegal for

respondent's counsel. Mr. Lowe also testified that he only knew the claimant on a casual basis and has only spoken to him one time, after his own termination by the respondent. He stated that, on this one occasion, the claimant called him and asked him if his employer, A&M Contracting, was hiring. Apparently, the claimant received a favorable response. In his testimony, the claimant stated that, in September of 2004, he went to work for A&M Contracting and was employed there until he was "essentially laid off," a "couple of weeks" later.

Thus, the greater weight of the credible evidence is not sufficient to prove that the claimant's difficulties with his neck and right upper extremity are the result of a physical injury that was caused by a specific employment related incident on February 26, 2004. As a result, the claimant has failed to satisfy the first three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i) that are necessary in order to establish a "compensable" injury to these portions of his body.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 26, 2004 the relationship of employee-employer-carrier existed between the parties.
3. On February 26, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$ 280.00 for total disability and \$210.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that he is sustained a "compensable" injury to his neck, and/or right shoulder on February 26, 2004. Specifically, he has failed to "establish" by medical evidence supported by "objective findings" the

actual existence of any physical injury or condition involving his right shoulder. He has also failed to prove the existence of any physical injury or condition involving his neck or cervical spine that is supported by "objective findings." Finally, the claimant has failed to prove by the greater weight of the credible evidence the occurrence of any physical injury to his right shoulder and/or cervical spine that arose out of and occurred in the course of his employment, was caused by a specific incident, and is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of any compensable injury and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge