

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403629

DAYNE THROWER	CLAIMANT
DILLMEIER ENTERPRISES, INC.	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY INSURANCE CARRIER	RESPONDENT
AIG CLAIM SERVICES, TPA	RESPONDENT

OPINION FILED JANUARY 31, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JOE D. BYARS, Attorney, Fort Smith, Arkansas.

Respondent represented by R. SCOTT MORGAN, Attorney, Pine Bluff, Arkansas. and WAYNE HARRIS, Attorney Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on in the above styled claim in Fort Smith, Arkansas on November 23, 2004. The deposition of Michael Ferrua was taken on November 16, 2004 and has been admitted as Respondent's Exhibit No. 4.

A pre-hearing order was entered in this claim on September 1, 2004. This pre-hearing order set out the stipulations offered by the parties and the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 at the hearing.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 11, 2004, the relationship of employee-employer-carrier-third party administrator existed between the parties.

3. The appropriate weekly compensation rates are \$391.00 for total disability and \$261.00 for permanent partial disability.
4. 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 a compensable injury to his left knee on March 11, 2004.
2. The claimant's entitlement to medical services, temporary total disability benefits from March 12, 2004 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

1. The claimant, Dayne S. Thrower, contends that he suffered a compensable injury arising out of and in the course of his employment with the Respondent. The Respondent-Employer failed to pay temporary total disability from March 11, 2004, through a date yet to be determined. On March 11, 2004, Dayne S. Thrower was performing employment services for his employer and injured his left knee, which constituted an accidental injury and the major cause of Dayne S. Thrower's temporary total disability and the need for additional medical treatment. Dayne S. Thrower's compensable injury is the major cause of his temporary and/or permanent disability and need for treatment.

In regard to these issues, the respondents contends:

1. Respondents would contend the claimant did not suffer a compensable injury on March 11, 2004.

DISCUSSION

The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his left knee, as the result of a specific incident on March 11, 2004. The burden rests upon the claimant to prove all of the necessary elements of a "compensable injury."

The first of these elements are contained in A.C.A. §11-9-102 (4) (B). This subdivision requires that the claimant prove by medical evidence the actual existence of the physical injury or condition that is alleged to be compensable. Further, it requires proof of "objective findings" to support the actual existence of this physical injury or condition.

In the present case, the medical evidence presented is sufficient to "establish" the actual existence of a physical injury or condition involving the claimant's left knee. Further, the medical evidence contains ample "objective findings" to support the actual existence of such a physical injury or condition. These objective findings include abnormalities noted on radiographic studies, principally, an MRI performed on the claimant's left knee on March 19, 2004. Thus, the claimant has satisfied the requirements of A.C.A. §11-9-102 (4) (B).

The claimant must next prove that this medically established and objectively documented physical injury or condition satisfies the definitional elements for a "compensable injury" that are contained in A.C.A. §11-9-102 (4) (A) (i). These definitional elements are:

- (1) That the physical injury or condition arose out of and occurred in the course of the employment;
- (2) That the physical injury or condition was caused by a specific incident;
- (3) That the physical injury or condition is identifiable by time and place of occurrence;
- (4) That the physical injury or condition caused internal or external physical harm to the claimant's body;
- (5) That the physical injury or condition required medical services or resulted in disability.

The only direct evidence presented by the claimant to prove the first three of these elements or requirements is his own testimony. In this regard, the claimant testified that he was performing his regular employment duties on March 11, 2004. These duties required that he run two pieces of glass through a cutting machine, at the same time. He stated that he removed one piece that had been appropriately cut and placed a new piece into the machine to be cut. As he was going down the platform to restart the machine, his foot slipped between the two sections of the platform, causing him to fall. He stated that when he fell, he had immediate pain in his left knee and experienced a pulling or popping sensation. His testimony initially indicated that he fell completely to the floor. He testified:

"When I laid there, I hollered, and when I was on the ground, Mike turned, but he didn't pay any attention."
(Emphasis mine).

On cross examination, the claimant testified that he didn't recall whether his entire body was on the ground, following the fall. He further stated:

"It could also mean that I was partial. I don't remember. I could have went to the knee, to the hip, to the elbow, to the shoulder. I don't recall."

Finally, he testified that his only "recollection" was that "some part" of his body was on the ground.

The claimant stated that immediately following this incident, he was immediately taken to the office where he filled out the appropriate paperwork. Shortly thereafter, he sought medical attention for his left knee and has continued in need of treatment thereafter. He denied any prior injury or complaints with his left knee prior to the described accident.

The testimony of a party, is never considered uncontradicted. However, this does not mean that it can be arbitrarily disregarded. If such testimony is found to be credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident and to establish the existence of a close temporal relationship between such an incident and the onset of difficulties indicative of a physical injury to his left knee.

However, after consideration of all of the evidence presented in this case, I do not find the claimant's testimony to be sufficiently credible to prove either the occurrence of specific employment related incident on March 11, 2004, or the contemporaneous onset of his left knee difficulties on that date. The claimant described numerous co-employees in the area around his work station at the time of this alleged accident. He also testified that for some time after the fall, he laid on the floor hollering. Yet there is absolutely no evidence that any of his co-employees

saw him fall or even saw him lying on the floor. Michael Ferrua (the co-employee who the claimant testified "looked" at him while he was lying on the floor) expressly denied in his sworn deposition that he observed the claimant fall or that he observed the claimant lying on the floor. Mr. Ferrua, Brad Renshaw, and William Charles Wilson all testified that they observed the claimant shortly after the alleged fall and did not recall any portion of the claimant's clothing being "wet." They also stated that the area around the machine where the claimant allegedly fell was generally wet and that any part of the claimant that came into contact with the floor (i.e., the walkway and mats) should also have been wet.

There is also the matter of the claimant's unexplained absence the day prior to the alleged incident (March 10, 2004) and his unexplained low productivity on March 11, 2004, prior to the alleged incident. The payroll records from the respondent show that the claimant was absent on March 10, 2004. The claimant, in his testimony, could not recall whether or not he worked on March 10, 2004. If, as the payroll records show, he did not work, he offered no explanation for his absence. Cody Tran, the plant manager for the respondent, testified that in the five hours of the claimant's shift, prior to the alleged accident, the claimant only ran 22 pieces of glass, whereas the next shift ran 68 pieces in two and a half hours. Even assuming that the claimant had to make one change over in the machine (according to Mr. Tran it would have taken approximately 15 minutes to change the machine and according to the claimant's testimony this could have taken as much as an hour), the claimant offers no explanation for this unusually low production rate for that portion of his shift prior to the alleged fall.

The claimant's credibility, in general, is not helped by the fact that he made material misrepresentations in the pre-employment physical that he completed on January 16, 2004. On his medical history questionnaire, he indicated that he had not

been involved in any industrial accidents, that he had never received any compensation for an industrial injury or disease, that he had no history of non-industrial injuries, and that he had never had any operations. From the evidence presented, including the claimant's testimony, all of these responses were knowingly inaccurate.

The claimant's criminal record further detracts from his general credibility. At the hearing, the claimant conceded that he had been convicted of two felonies, one of which was for unemployment benefit fraud.

After consideration of all of the evidence presented, I simply cannot find that the greater weight of the credible evidence proves that the medically established and objectively documented physical injuries or defects involving the claimant's left knee were caused by a specific employment related injury on March 11, 2004, as described by the claimant. Thus, the claimant has failed to prove by the greater weight of the credible evidence that he sustained a physical injury to his left knee that arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, and is identifiable by time and place of occurrence. As a result of his failure to prove the first three elements of a "compensable injury," required by A.C.A. §11-9-102 (4) (A) (i), his claim for benefits attributable to this alleged compensable injury must be denied and dismissed in its entirety.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 11, 2004, the relationship of employee-employer-carrier-third party administrator existed between the parties.

3. On March 11, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$391.00 for total disability and \$261.00 for permanent partial disability, should this claim have been held compensable.
4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a "compensable injury" to his left knee on March 11, 2004. Specifically, he has failed to prove the occurrence of a physical injury to his left knee on that date, which arose out of and occurred in 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 a 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