

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F500540

LOUIS R. MULANAX, EMPLOYEE	CLAIMANT
PERSONNEL CONSULTANTS, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED DECEMBER 14, 2006

A hearing in this case was conducted on September 7, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Evelyn Brooks, Attorney at Law, Fayetteville, Arkansas.

Respondents were represented by Robert Montgomery, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on August 1, 2006. 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; these are listed in the Prehearing Order and were confirmed at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on December 20, 2004 and at all other relevant times.

2. Claimant's average weekly wage was \$364.00.

3. Respondents controvert this claim.

At the September 7, 2006 hearing, the parties discussed the issues set forth in the

Prehearing Order. After agreeing to amend the third issue, the parties confirmed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable right arm injury on December 20, 2004.
2. Whether Claimant is entitled to medical benefits.
3. Whether Claimant is entitled to temporary total disability benefits from December 21, 2004 to October 31, 2005.
4. Whether Claimant is entitled to an attorney's fee.

DISCUSSION

Disposition of this claim turns on the statutory requirement that compensable injuries arise out of and in the course of employment. Therefore, this discussion will summarize the facts relevant to that issue.

At the time of the hearing Claimant was 39 years of age. Some time in late October or early November of 2004, he began working for Personnel Consultants, a staffing firm. On December 20, 2004, Claimant was dispatched to ABC Block, a small plant employing approximately ten people in the production of blocks. The plant manager and supervisor was a gentleman by the name of "Clint."

Claimant described an injury that allegedly occurred while he was working at ABC Block on December 20, 2004.

Q. Okay. And what were you doing at ABC Block?

A. I was chipping slag off of block with a big hammer. And, after a while, my arm got tired. I missed the chisel and the weight of the hammer forced extended the arm to where I felt just a big burning, pop sensation in my arm. And that's when I reported it to the guy that works there.

Q. Where, in your arm, was that sensation you just mentioned?

A. Right here, in the right forearm muscle.

....

Q. Who did you report the injury to?

A. I reported it to my supervisor there at ABC Block, and he told me to go over to Personnel Consultants and report it to them, so I walked across the street. I set down in front of Cindy, told her that I'd hurt my arm, pulled my arm sleeve up, and she just stared at me, like, what are you going to do? I said I was going to the hospital; I went straight to the hospital.

Claimant then began a course of treatment for what has been diagnosed as a moderate sized venous malformation in his right forearm. He has undergone exploratory surgery, as well as two sclerotherapy procedures, to address his condition. At the hearing, he testified to continuing problems with the use of his arm and numbness in three fingers and the thumb of his right hand.

Heather Brewer, branch manager for Personnel Consultants, testified on behalf of Respondents. She explained that "Cindy" Claimant mentioned was a staffing supervisor at the time of Claimant's alleged injury; Cindy's duties included filling shifts for clients. Brewer did not handle staffing unless the workload demanded her assistance.

Brewer processed workers' compensation claims. She described the procedure in place in December of 2004:

The protocol is, of course, the injured employee is to report to the immediate supervisor, and then to us, as well. That supervisor, at the time, will notify us. They are all instructed and trained, you know, to notify us immediately, if someone is injured. Then, if it is reported to someone other than myself, then they have to immediately notify me, whether I'm in the building or not. I'm always accessible, by cell phone. And then I come in; I do accident reports.

Brewer emphasized that if an injury was reported to Cindy, it was Cindy's responsibility to

immediately report that injury to her. Likewise, their clients' supervisors are trained to notify Brewer of any injuries involving a Personnel Consultants employee. Prior to Claimant's alleged injury, Clint had followed this procedure with another injured Personnel Consultants employee working at ABC Block.

According to Brewer, no one ever reported that Claimant injured himself on December 20, 2004.

Q. [W]ell, let's start with Mr. Mulanax. Do you recall him ever reporting to you that he had hurt himself?

A. No.

Q. Did you ever get a report of an injury, on December the 20th, from Cindy, regarding Mr. Mulanax?

A. No.

Q. Did you ever get a report of an injury, on December the 20th, 2004, from Clint?

A. No.

Q. Now, at what point, Heather, do you remember finding out, if you ever did -- or how did that work -- about learning that Mr. Mulanax was claiming he had been hurt working out there?

A. I started getting phone calls from doctors' offices. Just people asking, you know, for payment, and I had no idea that there was -- you know, I had no record of an accident.

....

Q. My question then would be, could Mr. Mulanax have told Cindy about it, and she not have told you?

A. We have had many work comp claims, and we have paid on many work comp claims. And I do not understand why she wouldn't have told me about this one and told me about many others. I don't see where that would have happened. That is her job.

The contemporary medical records are inconsistent. While page 2 of Claimant's

Exhibit #1 begins with a heading dated December 20, 2004, another date on that record, May 10, 2005, indicates that the record is not contemporary with Claimant's injury. Page 5 of Claimant's Exhibit #1 is a UAMS record dated December 21, 2004. It states that the mechanism of Claimant's work injury was a "direct blow." Dr. Randy Bindra's December 30, 2004 outpatient note records Claimant's history of "hammering with a heavy mallet with his right hand and chiseling mortar from bricks when he missed the spike with a mallet. There was no resistance and he felt a sharp pain and deformity in his right forearm." Of particular interest is an orthopaedic history form found at page 12 of Claimant's Exhibit #1. There is a place on the form for a patient to indicate that his current problem is the result of either a car accident, work accident, accident, or "other." On the form, the box next to "accident" is checked; the box next to "work accident" is blank. This form is signed by Claimant and is dated December 30, 2004.

Claimant must prove that he sustained a compensable injury as defined by Ark. Code Ann. § 11-9-102(4)(A)(i). Among other requirements, he must prove an injury "arising out of and in the course of employment..." Id. "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred. Gerber Prods. v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, ___ (1985). Claimant must sustain his burden of proving 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 failed to sustain his burden of proving by a preponderance of the evidence that he suffered a compensable right arm injury, specifically because he did not prove that his alleged injury arose out of and in the course of his employment. Claimant insists that he sustained an injury on December 20, 2004 and notified the appropriate personnel; Brewer is equally adamant that no one ever notified her of his alleged injury. While Dr. Bindra's December 30, 2004 outpatient note corroborates Claimant's testimony, the December 21, 2004 UAMS form, prepared the day after the alleged injury, is inconsistent in that it describes the mechanism of injury as a "direct blow." Perhaps most troubling is the December 30, 2004 orthopaedic history form signed by Claimant that indicates his current problem is the result of an "accident," not a "work accident." The evidence is, at best, a draw as to whether Claimant's injury arose out of and in the course of his employment; Claimant did not produce a preponderance of the evidence. Thus, he did not sustain his burden of proof.

Based on the foregoing, it is not necessary to discuss Claimant's requests for medical benefits, temporary total disability benefits, or an attorney's fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of his alleged injury, he failed to establish the compensability of his claim, and compensation must be denied. Reed v. Con Agra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744); see Ark. Code Ann. §§ 11-9-102(4)(F)(i) and 11-9-715(a)(2)(B)(ii).

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 December 20, 2004 and

at all other relevant times.

3. Claimant's average weekly wage was \$364.00.

4. Respondents controvert this claim.

_____5. Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment on December 20, 2004. Claimant's testimony concerning an injury and notice is rebutted by Heather Brewer's testimony; the medical evidence is inconsistent. In particular, the orthopaedic history form signed by Claimant on December 30, 2004 indicates that he suffered an "accident," not a "work accident."

6. Because Claimant failed to prove a compensable injury, it is not necessary to discuss his requests for medical benefits, temporary total disability benefits, or an attorney's fee.

ORDER

Claimant failed to sustain his burden of proving that he suffered a compensable injury on December 20, 2004. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml