

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403016

TONY CHAVEZ, EMPLOYEE	CLAIMANT
PEPPER SOURCE, EMPLOYER	RESPONDENT
TRANSPORTATION INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 15, 2005

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE KENNETH OSBORNE, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE FRANK NEWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed March 7, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to his elbow and head.

4. The claimant is entitled to a workers' compensation rate of \$215.00 for temporary total disability and \$161.00 for permanent partial disability.

5. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right shoulder and right knee when he slipped and fell at work on January 5, 2004.

6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable injuries.

7. The respondents should pay temporary total disability to this claimant for those periods of time he was off work as a result of his compensable injuries up to his release on August 18, 2004.

8. The respondents have controverted this claimant's right knee and right shoulder injuries.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically,

we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the March 7, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in

accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained compensable injuries to his right shoulder and right knee when he slipped and fell at work on January 5, 2004. In my opinion, a de novo review of the record, demonstrates that the claimant has failed to meet his burden of proof.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if

it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that he sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Id. Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions

addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4) (E) (i) (Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

The evidence in this case demonstrates that the claimant cannot meet his burden of proof that he sustained injuries to his right knee and right shoulder. The claimant's testimony, when compared to the medical evidence, is fraught with inconsistencies. The claimant alleged that he sustained an injury on January 5, 2004. However, the accident report that the claimant's supervisor completed indicated that the incident occurred on January 12, 2004. When the claimant was asked about the January 12, 2004, incident report, the claimant responded, "I don't recall anything, or signing anything." Ruben Morin, the claimant's supervisor, filed a report dated January 12, 2004, describing injuries reported on that date by the claimant. Mr. Morin

testified that his report was accurate. He never testified that the claimant fell on January 5, 2004. He stated that on the date the form was completed, he took the claimant into the break room and they completed the form together.

The medical evidence demonstrates the claimant had multiple complaints of knee pain prior to the January 7, 2004, doctor's visit. Dr. Daidone, in his report dated January 7, 2004, noted that the claimant had been complaining of right knee pain for "several months." The claimant's complaints of knee problems were significant enough to prompt Dr. Daidone to x-ray the claimant's knee. Dr. Daidone discussed the improvement in the swelling of the claimant's knee. He also observed that the claimant had been exposed to two types of trauma; work related and presumably, non work related. There is no mention whatsoever in these records that the claimant fell on January 5, 2004. Dr. Daidone's assessment was osteoarthritis.

Dr. Daidone examined the claimant approximately one month later where he noted that the claimant had a "slip" at work. His notes do not indicate

when the slip occurred, but he continued to diagnose the claimant with osteoarthritis.

Simply put, when I consider the testimony of the claimant, in light of the medical evidence, I cannot find that the claimant proved by a preponderance of the evidence that he sustained compensable injuries to his right shoulder and right knee in a work related incident on January 5, 2004. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner