

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312518

JAMES C. PONDER, EMPLOYEE	CLAIMANT
PARNELL TRUCKING, EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MARCH 9, 2005

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

Claimant represented by HONORABLE C. BURT NEWELL, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant sustained an injury on September 18, 2003, and awarding medical benefits. Based upon our de novo review of the record, we reverse the decision of the Administrative Law Judge.

The claimant was employed as a driver by the respondent employer. In 1980 he sustained a severe injury which resulted in the claimant having to have a skin graft on his left leg. The claimant was treated by Dr. Kincheloe for this injury. The claimant testified that he had no problems for 20 years after he

had the skin graft. However, the medical records and the opinion of Dr. Antione Hallak indicate otherwise. Dr. Hallak's chart note of October 9, 2003, reported that the claimant was "found to have a left hip wound covered by a skin graft with a non-healing area going all the way down to the muscle that has been draining for the past years." Dr. Daniel's office notes indicate that the claimant had an infected wound from a previous orthopedic procedure. Further, Dr. Hallak's chart note of October 16, 2003, indicates that the claimant has a long-standing non-healing wound at the left hip after he had a traumatic event 20 years ago.

The claimant contended that on September 18, 2003, he fell off the top of his truck while adjusting a tie-down. The claimant also testified that there was a metal bar that was exposed through the torn seat of the truck he was driving and each time he got in and out of the truck he rubbed that exposed bar.

Dr. Hallak testified during his deposition that he took the history of an open wound that had been draining for years from the claimant. We would note that Dr. Hallak's testimony is contrary to the claimant's testimony during the hearing. Dr. Hallak also testified that he did not see any cellulitis during his physical examination of the claimant's wound. He

explained that cellulitis is an infection of the surrounding skin which is an acute process and would have indicated that the injury had happened recently. He also testified that he saw no other evidence of recent trauma to the claimant's leg when he did his first examination. Moreover, he testified that he did not see any evidence of any repetitive trauma to claimant's leg.

Dr. Hallak's impression was that the claimant's injury was a difficult, on and off, non-healing wound caused by an old trauma. Finally, Dr. Hallak testified that the claimant's ulceration and inflammation was consistent with a chronic wound.

The claimant contends that he sustained a specific incident injury on September 18, 2003, when he fell on his buttocks while working for the respondent employer. The claimant also contends that his injury was the result of getting in and out of his truck and the friction of a metal rail sticking through the seat on the claimant's pre-existing skin graft. The claimant's testimony was that his leg had been hurting and then he fell off of a truck while tightening a tarp strap. The claimant testified that his leg was hurting and his old wound was full of pus and it had a fowl smell. The claimant did not notice any such problem during the day. It is important to note that the claimant could not even recall which date he allegedly fell off

of the truck. Even more importantly, the claimant testified that his fall was on his buttocks and not on his side where the wound was located. The claimant added that he did not fall on his hip. Dr. Hallak offered the following testimony during his deposition, "it would only be related to the wound if he fell on his left buttock sideways."

The claimant admitted on cross-examination that he only bumped the metal bar once and it hurt. After that he was careful to avoid it. He admitted that he could not point to any exact date when he started noticing pain in his leg.

Mr. Delbert Parnell, the claimant's employer, testified that the claimant did not advise him of any work-related injury, therefore he did not turn it over to his workers' compensation carrier. He also testified that he had no knowledge that the claimant contended that he sustained a work-related injury until October 18th, the day before the claimant filled out the accident report on October 19th. He also stated that the claimant fell on Thursday, but he did not find out about it until the following Saturday. The claimant indicated to Mr. Parnell that there was not anything wrong and he continued doing his normal job.

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).

After conducting a de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. The medical records bear out that the claimant was having problems with drainage from his skin graft for years. Dr. Hallak's testimony indicated that he did not see any cellulitis during the physical examination of the claimant's wound. He explained that cellulitis is an infection of the surrounding skin which is an acute process which would have indicated that the injury had happened recently and the claimant showed no such signs of recent injury. Simply put, we cannot find that the claimant has proved by a preponderance of the evidence that he sustained a compensable injury on September 18, 2003. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the majority opinion finding that claimant failed to prove that he sustained a compensable injury to his left lower extremity in September 2003. The opinion of the Administrative Law Judge should be affirmed and adopted.

The Administrative Law Judge has done an adequate job of detailing the particular evidence which constitutes a preponderance of the evidence in support of the compensability of this claim. Respondent repeatedly complains that the Administrative Law Judge did not make a finding on whether the injury was a specific incident injury or a gradual onset injury. However, the opinion clearly shows that the Administrative Law Judge found that the fall from the truck was the work-related accident that resulted in disability and the need for treatment. Further, the Administrative Law Judge cites the elements

necessary to prove a specific incident injury rather than a gradual onset one. While the infection process may very well have been started by the rubbing of a metal bar exposed through the torn seat cover while getting in and out of the truck, the fall clearly caused the disability and need for treatment. Either way, this condition is compensable. I know of no authority, and respondent certainly does not cite any, that says a compensable injury cannot ever be a combination of both a gradual onset injury and a specific incident injury.

I agree with the Administrative Law Judge's assessment that claimant presented credible testimony that while he had serious lower extremity problems in 1980, resulting in a skin graft on the left leg, he had not had any difficulties or medical treatment for over 20 years after the initial injury healed. Further, I believe Dr. Hallak's testimony supports the finding that there is a causal connection between claimant's left lower extremity problems and his employment with this employer.

Claimant has met his burden of proof by a preponderance of the evidence and the opinion of the Administrative Law Judge should be affirmed and adopted accordingly.

SHELBY W. TURNER, Commissioner