

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409768

JUVENAL PEREZ,  
EMPLOYEE

CLAIMANT

BUILT-WELL CONSTRUCTION CO.,  
EMPLOYER

RESPONDENT

CONTINENTAL CASUALTY CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 5, 2005

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

Claimant represented by the HONORABLE EVELYN BROOKS,  
Attorney at Law, Fayetteville, Arkansas.

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

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals from an administrative law judge's opinion filed February 7, 2005. The administrative law judge found "Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent." After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. History

The claimant, age 30 (6/15/75), moved from Mexico to the United States in 1990. The claimant attended high school in Mexico, but is unable to speak or understand English and requires an interpreter, which was provided for him during the hearing. The claimant had worked for the respondent approximately one year putting up frames and Sheetrock. On April 1, 2004, while working the claimant maintains that he sustained a compensable back injury as he lifted some Sheetrock. However, the claimant maintains that he continued working and did not report his injury, but his pain continued to worsen.

A review of the medical evidence of record shows that the claimant did not seek medical treatment for his alleged back injury until May 28, 2004. Hence, the claimant first sought treatment for his back condition from the Freeman Neosho Physicians Group, in Missouri. At that time, the claimant complained of pain in the right leg, which had a duration for some time. The claimant was given Naprosyn and instructed to follow up if his pain continued. Although this report states that the claimant performs construction-type work, it makes no mention that the claimant suffered a work-related injury on or about April 1, 2004, or any other time.

On June 22, 2004, the claimant returned to the clinic with continued complaints of leg pain. He reported that his leg was hurting a lot and that he was missing a lot of work due to this, as he complained of an aching-type pain. Therefore, the claimant was subsequently referred to Dr. Melvin Karges.

On August 5, 2004, the claimant underwent initial consultation with Dr. Karges due to bilateral leg pain that had been present for the past two to three months. The claimant reported his symptoms as not being bad in the mornings, but progressively increased when on his legs. Dr. Karges reported, "He denies any history of any falls or car accidents. There is no definite history of injury." Dr. Karges's impression was, "Mechanical low back pain of unclear etiology; lumbar radicular with bilateral lower extremity pain with standing suggestive of lumbar degenerative disc disease, and lower extremity pain which may also be due to other metabolic abnormalities." As a result, the claimant was referred for x-rays of the lumbar spine along with an MRI scan without contrast.

An MRI was taken on August 10, 2004, with the following impression:

IMPRESSION:

1. Broad based disc protrusion at L4-5 causing impingement on both L5 nerve root and bilateral foraminal stenosis.
2. Smaller central disk protrusion at L5-S1 causing mild impingement on both S1 nerve roots.

On August 24, 2004, the claimant was seen by Dr. Karges for follow-up of low back and lower extremity pain. At that time, Dr. Karges's impression was "right L4/5 herniated nucleus pulposus with right lower extremity radicular pain as well as central L5/S1 disc protrusion with probable secondary radicular pain." Therefore, Dr. Karges referred the claimant for physical therapy and lumbar epidural injections. Dr. Karges also took the claimant off work until he could be re-assessed in three to four weeks.

The claimant underwent a lumbar epidural steroid injection under fluoroscopic guidance on September 9, 2004, which was performed by Dr. John Knudsen III. Dr. Knudsen reported that the claimant tolerated the procedure well. In addition, he wrote, "Mr. Perez reports that four months ago, he developed pain in both legs with pain going all the way down to the ankles."

A hearing was held before the administrative law judge on January 26, 2005. At the hearing, the claimant gave testimony. According to the claimant, he is unable to work because his legs hurt. The claimant testified that before

his alleged accident he did not have any physical problems that kept him from working. The claimant essentially testified that after he and Mario (a coworker), lifted approximately 20 sheets of Sheetrock, he felt something in his back, but he did not know what it was. At that time, the claimant testified that he believed he had only dislocated something because he was not in a significant amount of pain. However, the claimant testified that he began having trouble after that, as his legs began hurting.

The claimant testified that prior to this alleged incident, he had not had a back injury, nor had he sought treatment for a back injury or problems. According to the claimant, he waited some three or four weeks after his alleged accident before seeking treatment for his back. During this period, the claimant testified that his legs started hurting a little and then it got worse and worse. Although the claimant could not recall exactly when he last worked for the respondent, he remembered it being around the eight or seventh month of last year (2004). The claimant testified that he had trouble carrying out job duties of lifting heavy things and walking.

The claimant admitted to not reporting the accident to the respondent until after the MRI had been performed.

According to the claimant, at that point, he realized his back problems were from the accident. The claimant testified he has had no other accidents except for the alleged April 1, 2004 incident. The claimant admitted that he did not report the alleged injury to his supervisor or any of his coworkers. The claimant also admitted to having worked some three or four months after the alleged injury. The claimant testified that as of April of 2004, he understood that he was required to report injuries right away.

Mr. Jose Martinez, a labor foreman for the respondent, gave testimony during the hearing. Mr. Martinez testified that the claimant missed three or four days before he told him he was having leg pain. According to Mr. Martinez, at that time, the claimant was telling his supervisor that he was unable to work because he was having some leg pain, as he as going home early or some days he would come in late. According to Mr. Martinez, he learned that the claimant was claiming a work-related injury when a doctor's clinic in Joplin or somewhere in Missouri called their office to say they had somebody who had come in with a workmen's comp claim. According to Mr. Martinez, he asked the claimant why

he never told anybody he had gotten hurt, and he told him he did not want to get in trouble.

On cross-examination, Mr. Martinez testified that the claimant had been a good worker although he would miss some days here and there due to being sick. He also testified it was remarkable to him that the claimant was missing a lot of days of work.

A prehearing conference was held in this case on November 17, 2004, and a Prehearing Order was filed on that same date. The parties agreed to the following stipulations: 1). The Arkansas Worker's Compensation Commission has jurisdiction of the within claim; 2). The relationship of employee-employer-carrier existed among the parties at all relevant times; 3). The claimant was earning an average weekly wage of \$648.35 which would entitle him to compensation at the weekly rates of \$430.00 for total disability benefits and \$324.00 for permanent partial disability benefits; and, 4). Respondents have controverted this claim in its entirety.

Subsequent to the prehearing conference, the respondent filed an amended prehearing questionnaire, raising as an issue the claimant's lack of notice pursuant to A.C.A §11-9-701.

The parties agreed to litigate the following issues:  
1). Compensability of injury on April 1, 2004; 2). Temporary total disability benefits; 3). Medical expenses; and, 4). Notice.

The claimant contended he was injured on April 1, 2004 when he injured his back while lifting Sheetrock. The claimant contended he is entitled to temporary total disability, related medical, and an attorney's fee.

In contrast, the respondent contended that the claimant did not sustain an injury arising out of and in the course of his employment with respondent on April 1, 2004.

After a hearing before the Commission, the administrative law judge found "Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent."

The claimant appeals to the Full Commission.

## II. Adjudication

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 administrative law judge found that the instant claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by respondent. The Full Commission affirms this finding.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). In comparing the claimant's testimony to the preponderance of the evidence, the Full Commission finds that the claimant was not a credible witness. Although the claimant contends that he suffered a compensable back injury while working for the respondent on April 1, 2004 while lifting Sheetrock, he admitted that he did not promptly report the incident to respondent/management (even though he had been aware he was

required to report all injuries right away), nor did he mention it to any of his coworkers. The medical evidence of record reflects that the claimant did not see a physician for approximately nine weeks after the alleged incident. When the claimant did report to a physician on May 28, 2004, he did not report the alleged lifting incident. In fact, when the claimant underwent initial consultation with Dr. Karges on August 5, 2004, the claimant expressly denied "any history of any falls or car accidents, and he reported that there was no definite history of injury." Moreover, there is absolutely no mention of a work-related injury in any of the other medical evidence of record, and the claimant did not report this alleged incident as a work-related injury to the respondent until after the MRI of August 10, 2004 had been performed, which was some 19 weeks after the alleged incident. While we recognize that this medical evidence establishes the existence of an injury, neither the medical nor non-medical evidence establishes a causal connection between the claimant's work activities and his back problems revealed in the August MRI. Since the claimant failed to prove a causal connection between his back condition and his employment with the respondent, he cannot meet his burden of proof.

Therefore, based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by respondent.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

This claim is denied and dismissed.

\_\_\_\_\_IT IS SO ORDERED.

\_\_\_\_\_  
OLAN W. REEVES, Chairman

\_\_\_\_\_  
KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I respectfully dissent from the majority opinion affirming the Administrative Law Judge's February 7, 2005

decision, in which, it was found that "Claimant had failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent employer."

The claimant alleged that he suffered a compensable injury on April 1, 2004. According to the claimant, he and a coworker were moving some sheet rock panels when the panels fell pinning the claimant's coworker underneath. The claimant testified that he and another coworker began lifting the sheet rock panels. According to the claimant, he began having pain in his legs following this incident. He further testified that he continued to experience a significant amount of pain in his legs in the following weeks. The claimant, who is not an English speaker and testified through an interpreter, stated that he continued working for the respondent and did not notify him of a job related injury, until he underwent an MRI scan in August 2004. However, he did begin missing work shortly after the injury.

This portion of the claimant's testimony was corroborated by Mr. Jose Martinez, a supervisory employee of the respondent employer, who testified on behalf of the respondent. According to Mr. Martinez, the claimant was a

good employee who rarely missed work. Mr. Martinez further stated that he was surprised that the claimant had begun missing a lot of work. He also stated that the claimant told him that he was missing work because of his severe leg pain.

The claimant first sought medical treatment for his condition from the Freeman Neosho Physician's Group on May 28, 2004. In a handwritten progress note of that date, Dr. Bryan Smith listed complaints of right leg pain which had lasted for some time. The doctor also noted that the claimant was working ten hour days in construction and after three or four hours, his leg would become very painful. In a second note dated June 22, 2004, the doctor stated that the claimant's legs were hurting and that he was missing a lot of work. The pain was described as an "aching" type of pain. The claimant was referred to Dr. Melvin Karges, a rehabilitation specialist in Joplin, Missouri.

In his report of August 5, 2004, Dr. Karges notes that the claimant has been suffering from bilateral lower leg pain for the preceding two to three months. He also described the claimant's pain as progressively increasing while he is on his feet. He also noted the claimant's work in the construction industry. As a result of this

examination, Dr. Karges directed the claimant to undergo an MRI scan of his lower back. That scan, which was performed on August 9, 2004, discovered that the claimant had a broad based disc protrusion at L4-L5 causing impingement on both L5 nerve roots. The scan also found a smaller disc protrusion at L5-S1 which was also causing impingement on both S1 nerve roots. In reviewing the MRI scan, Dr. Karges stated in his report of August 24, 2004 that the claimant was suffering from a right L4-L5 herniated nucleus pulposis and a central L5-S1 disc protrusion. Dr. Karges also referred the claimant to Dr. John Knudson of the Freeman Pain Center for epidural steroid injections.

The Administrative Law Judge denied the claim finding that the claimant was unable to prove he suffered a job related injury. Based upon my de novo review of the evidence, it is my opinion that the claim was compensable.

In my opinion, the testimony provided by the claimant was credible and is in no way refuted by any evidence presented by the respondent. I also believe that the claimant's failure to give a prompt notice of his injury was due to his language problem in that he is not an English speaker. Even though this failure to give notice was repeatedly cited by the Administrative Law Judge and the

respondent in their brief, as a basis for denying the claim, it should be noted that there are no provisions in the Workers' Compensation Act that requires a claim to be reported to an employer in any particular time frame in order for that claim to be compensable. In fact, the late reporting of the claim by itself does not effect the compensability of the claim. At most, the claimant's late reporting would merely limit the benefit the claimant would be entitled to after the date was notice was provided.

In summary, it is my belief that the claimant was a credible witness and that his testimony, when taken in consideration of his communication difficulties and the findings of his medical providers, is sufficient to establish the occurrence of a compensable injury. I would therefore reverse the Administrative Law Judge and award benefits.

---

SHELBY W. TURNER, Commissioner