

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404122

RUDOLPH CONTRERAS,
EMPLOYEE

CLAIMANT

MASONRY STRUCTURES, INC.,
EMPLOYER

RESPONDENT

AIG CLAIM SERVICES, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 16, 2006

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 MELISSA ROSS,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed November 17, 2005. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The claimant has failed to prove by a
preponderance of the evidence that he suffered
a compensable injury.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

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.

Therefore we affirm and adopt the November 17, 2005, decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the Majority's decision affirming and adopting the Administrative Law Judge's November 17, 2005 opinion. In my opinion, Claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable right wrist injury while employed by respondents.

The parties agreed to litigate the following issues: 1)employee-employer relationship, 2)compensability, 3)temporary total disability benefits, 4)medical, 5)attorney's fee, 6)compensation rate.

Claimant is a 55-year-old man who sustained an injury to his right arm and wrist while working for the respondent employer on April 20, 2004. Claimant fell approximately six feet from a scaffold while carrying cinder blocks and landed on his right arm sustaining a fracture to his wrist.

The respondents paid some compensation benefits, but subsequently denied compensability. Respondents contend that the claimant did not sustain a

compensable injury and that he provided a false name and social security number to obtain a job.

In his November 17, 2005 opinion, which has been affirmed and adopted by the Majority, the Administrative Law Judge stated that the claimant had not proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent. The Administrative Law Judge stated that other than the claimant's testimony there is no other evidence on which to base a finding that he sustained an injury while working for the respondent. He further found that the claimant's testimony was not credible as the claimant had admitted to being an illegal alien and was untruthful in obtaining employment with the respondent. The claimant was working using a false name and social security number.

The first issue to be determined in this claim is whether claimant was an employee as defined by the Arkansas Workers' Compensation statute. Under Ark. Code Ann. §11-9-102(9)(A) the term employee is defined as follows:

"Employee" means any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any

contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession or occupation of his or her employer and excluding one who is required to perform work for a municipality or county or the state or federal government upon having been convicted of a criminal offense or while incarcerated.

It is clear that Claimant would be considered an employee as defined by this section. The fact that Claimant would be covered by the act is supported by Larson's Workers' Compensation Law 66-14:

Some states provide coverage to persons "whether lawfully or unlawfully employed." States courts that have construed this type of statutory provision have held that illegally employed aliens are covered by the act.

Although Claimant was hired under an assumed name and is an illegal alien, the respondents are not asserting that Claimant is altogether a different individual than the one hired by them under the name of Rudolph Contreras. In my opinion, it is clear that Claimant should be considered an employee of the respondents and covered by the Arkansas Workers' Compensation Laws.

The next issue to be determined in this claim is whether Claimant sustained a compensable injury as defined in the act.

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/she 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).

In my opinion, Claimant has met his burden of proving a compensable injury. Claimant testified that he fell from a scaffolding on April 20, 2004, causing an injury to his right wrist. Claimant has given this same history to his two treating physicians. Claimant was seen by Dr. Konstantin V. Berestenev on April 21, 2004. A letter document this visit states the following:

At the request of and authorization by Masonry Structures, we are seeing Mr. Rudolph Contreras. Mr. Contreras presents today for the injury from 04-20-04. The patient states that he was walking across some boards and fell on his outstretched right arm. It was approximately eight feet high above the ground and he landed on his outstretched arm. He complains of pain in his right wrist.

He has a swollen right wrist, but there is no evidence of open breaks of the skin. There is limited range of motion secondary pain, but there is no evidence of vascular compromise. There is no evidence of loss of peripheral pulsation. There is good distal capillary refill. X-ray of the right wrist shows fractures of the distal radial head and the right styloid process, but there is no evidence of displacement of the fragments. It seems to me that they are well aligned fractures at this time.

The claimant's injury sustained on April 20, 2004, was sustained in the course and scope of his employment, which caused internal harm supported by objective findings which required medical services.

The majority has denied compensability based upon a finding the Claimant is not a credible witness. 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). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of

belief. Id. The Commission cannot arbitrarily disregard any witness's testimony. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). The courts have clearly stated that the Commission cannot deny compensation simply because a claimant is untruthful. Instead, the lack of credibility must bear on a disputed issue to be relevant. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984).

In my opinion, Claimant's testimony with regards to the accident on April 20, 2004 is credible. The fact that he used a false name does not negate the fact that his history of the accident has been consistent and is supported by objective findings. Claimant was able to work on April 20, 2004, but was sent to the doctor by respondent employer on April 21, 2004 where he was diagnosed with a fractured wrist. In my opinion, Claimant has proved by a preponderance of the evidence that he sustained a compensable wrist injury on April 20, 2004.

The next issue to be addressed is Claimant's entitlement to temporary total disability benefits. In my opinion, Claimant is entitled to additional temporary

total disability benefits from November 4, 2004 through a date yet to be determined.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission.

In order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that she remains within her healing period; and (2) that she has not returned to

work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

Under Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997), Claimant is not required to show objective medical evidence in order to receive additional temporary total disability benefits. However, objective evidence of injury may be considered in determining whether the Claimant is within his or her healing period. If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total. Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Claimant has not been release by either of his physicians and has not returned to work. Claimant did testify that he had been doing odd jobs around town earning approximately \$20.00 a job and that he does these two or three days a week so that he may have some money for daily living. This, in my opinion, does not constitute an ability to perform remunerative labor with reasonable consistency and without pain and discomfort. Therefore, Claimant would be entitled to temporary total

disability benefits until the end of his healing period or until it can be shown that he has returned to work.

In the alternative, if it is found that Claimant has returned to work, Claimant should be entitled to temporary partial disability benefits.

An injured employee is entitled to temporary partial disability compensation during the time that he is within his healing period and suffers only a decrease in his ability to earn wages that he was receiving at the time of the injury. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

Claimant testified that prior to his accident he was working six to seven days a week and received four to five hundred dollars a week. Claimant testified that after the accident he was only working two to three days a week earning approximately twenty dollars a day. Claimant clearly has had a decrease in his earning ability. Therefore if it is determined that Claimant's working odd jobs is determined to be a return to work he would at the least be entitled to temporary partial disability benefits.

Respondents contend, as stated above, that even if the April 20, 2004 injury is found compensable,

additional medical treatment is not reasonably necessary. In my opinion, Claimant request for additional medical in reasonable and necessary in connection with his April 20, 2004 accident.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

Claimant was diagnosed with fractures of the distal radial head and the right styloid process by Dr.

Berestnev on April 21, 2004. Dr. Berestnev continued to follow that Claimant's progress. On May 19, 2004, Dr. Berestnev determined that Claimant's fracture was not stable and referred Claimant to a hand surgeon.

Claimant was then seen by Dr. R. Bryan Benafield on June 3, 2004. Dr. Benefield opined that Claimant was suffering from "post-fracture stiffness right wrist with possible associated carpal tunnel syndrome." Dr. Benefield provided conservative treatment and on August 12, 2004, he suggested that Claimant's median nerve should be investigated with a nerve conduction study. The nerve conduction study was denied. The last medical report in the record is from Dr. Benafield dated September 14, 2004, stating that he would see what happens with the nerve conduction study.

In my opinion, it is reasonable and necessary for Claimant to be afforded the opportunity of having a nerve conduction study done on his right wrist in order for his treating physicians to make an accurate diagnosis. There is no indication in the record that Claimant complained of any prior wrist difficulties. Claimant was performing his job duties for six to seven days a week up until April 20, 2004. After April 20, 2004, Claimant has not had full use his right hand.

A nerve conduction study is a reasonable and necessary procedure used in the normal course of the medical profession to help in the diagnosis of problems with the wrist of the nature of which the Claimant is complaining. As stated above, it is my opinion that claimant has shown by a preponderance of the evidence that a nerve conduction study is a reasonable and necessary medical procedure.

For the foregoing reasons, I respectfully dissent from the Majority's opinion and find that Claimant has proved by a preponderance of the evidence that the injury he sustained on April 20, 2004 is compensable. I also find that claimant is entitled to temporary total disability benefits from November 4, 2004 until a date yet to be determined and reasonable necessary medical treatment in connection with Claimant's right wrist injury.

SHELBY W. TURNER, Commissioner