

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H206758

CHRISTOPHER BERG, Employee	CLAIMANT
WEAR CONSTRUCTION MGMT., INC., Employer	RESPONDENT
CINCINNATI INSURANCE CO., Carrier	RESPONDENT

OPINION FILED MARCH 6, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JARID M. KINDER, Attorney, Fayetteville, Arkansas.

Respondents represented by KAREN H. MCKINNEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 13, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 30, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties at all relevant times.
3. The claimant was earning sufficient wages to entitle him to the maximum

compensation rates.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's right knee on August 12, 2022.
2. Reasonable and necessary medical treatment.
3. Temporary total disability benefits from August 12, 2022 through a date yet

to be determined.

4. Attorney fee.

At the time of the hearing claimant clarified that he is requesting temporary total disability benefits from September 12, 2022 through November 28, 2022.

The claimant contends he sustained a compensable right knee injury on August 12, 2022 while working for the respondent in Fort Smith, Arkansas. Despite objective evidence of injury, respondents denied compensability of claimant's injury. Claimant contends he is owed medical benefits and temporary total disability benefits from September 12, 2022 through November 28, 2022. Due to controversion of these benefits, respondents are obligated to pay one-half of the claimant's attorney's fee. Claimant reserves all other issues.

The respondents contend the claimant did not sustain a compensable injury to his right knee on August 12, 2022 or at any other time.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on November 30, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right knee on August 12, 2022.

FACTUAL BACKGROUND

The claimant is a 49-year-old man with a tenth grade education. He has undergone apprenticeships in tile setting and as a marble mason. He considers himself a tile mason by trade and has performed that type of work since the early 1990s.

Claimant worked for respondent as a journeyman carpenter, primarily installing grid ceilings. Claimant testified that his job required climbing ladders, kneeling, and being on his feet a majority of the day. He believes he began working for respondent in August 2022 and continued working there until November 2022.

Claimant testified that on August 12, 2022, he was working for respondent at a job at Alma High School. Respondent had on site a storage trailer which claimant was standing in on August 12, 2022 when:

I was stepping out of the trailer and I stepped on a screw.
I overextended the ankle, my knee, and it made a funny
sound and it got really warm pretty darn quick.

Claimant submitted into evidence a photo which he testified was taken the day of the incident. (Cl. Ex. 2, pg. 1) Claimant testified that some time later that day he reported the injury to his supervisor, Dahl Dunavant. Claimant stated that he finished his work day

and that evening his knee was painful and swollen. Claimant testified that he continued to work after the incident because he needed money and could tolerate some pain. He stated that he performed his job at a slower pace and that his knee was uncomfortable, sore, and swollen.

On August 28, 2022, claimant sought medical treatment at Baptist Emergency Room complaining of right knee pain. Claimant attributed his problems to an incident at work two weeks earlier. Claimant was diagnosed with a sprain of the medial collateral ligament and instructed to receive follow-up care with an orthopedic surgeon.

On September 14, 2022, claimant was evaluated by Lacey Kennon, APRN, at Baptist Orthopedics Clinic. She took claimant off work until claimant underwent an MRI scan and an evaluation by Dr. Tobey, orthopedic surgeon. Claimant's MRI was performed on September 27, 2022, and was read as showing a tear of the posterior horn of the medial meniscus.

On September 29, 2022, claimant was evaluated by Dr. Tobey who noted the medial meniscus tear and recommended surgery. Dr. Tobey performed surgery to repair the meniscus on October 6, 2022. After the surgery claimant underwent physical therapy and was released to return to work by Dr. Tobey on November 3, 2022. Claimant testified that he was laid off by respondent and after his release he went to work for Mars Pet Care on November 28, 2022 operating a forklift and working in a mixing room.

Claimant has filed this claim contending that he suffered a compensable injury to his right knee on August 12, 2022. He requests payment of medical, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his right knee on August 12, 2022. His claim is for a specific injury, identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury.

Initially, I do not find claimant's testimony particularly credible. Claimant testified that he had not had any issues with his right knee prior to August 12, 2022.

Q Now, prior to 8/12 of '22, did you have any issues with your right knee?

A Yes and no.

Q Okay. What do you mean by yes and no?

A My legs were - - my ankles were swollen. I went to the doctors.

Q Okay. So my question for you is did you have any issues with your right knee? You said your ankles.

A No.

However, the medical records indicate that claimant sought medical treatment for his right leg on June 14, 2022, from Dr. Aaron White, his primary care physician. Included in those complaints was right knee pain.

He is here today for right leg and knee pain and swelling. He states he lays tile and is frequently on his knees. His knee swelled up and was tender to touch but has since improved. (Emphasis added.)

While claimant testified that he sought medical treatment on that day because he was concerned that he might have diabetes, the record from Dr. White clearly reflects that claimant was complaining of right knee pain and Dr. White's diagnosis included: "Acute pain of right knee." Thus, I do not find claimant's testimony that he did not have right knee pain prior to August 12, 2022 to be credible.

Claimant also testified that he reported the injury on the day it occurred to his supervisor, Dahl Dunavant. However, Dunavant testified that while claimant did mention that he was suffering from knee pain on some unknown date, the claimant never indicated that he had injured himself or that he needed medical attention. Dunavant stated that if claimant had indicated that he had injured himself at work he would have contacted respondent's office manager, Lee Ann Vicary, and asked where he should take claimant for treatment.

Claimant also testified at the hearing that this conversation regarding the reporting of his accident occurred on August 12, 2022, the date of the injury. However, at his deposition, claimant testified that the conversation occurred approximately one week after

the accident.

Q You said you reported it to your supervisor because that is company policy; correct?

A The day it happened, yes.

Q And then I asked you again, “Did you tell anybody you needed treatment for an injury?” And what was your response? “Did you tell anybody you needed treatment for an injury? What was your response here starting on Line 21?”

A What was my answer?

Q Yes, right there “A”.

A “I went to Dahl and told him that if it gets to a point to where I just” can’t bear it - - “you now, I just – I need to go to the hospital. I am going to.” That is correct.

Q All right. I asked you, “When did you do that?” And what was your response?

A That conversation was the same day - -

Q I asked you, “When did you do that?” And what was your response?

A It was Friday, the day of the incident.

Q I am going to read here. It says, “I think it was from Friday. It was like a week. I think about a week, maybe.”

So in your deposition, you tell me you talked to Dahl a week after this; correct?

A No, ma’am.

Q That is not what your said in your deposition?

A My week was a week or so when I went to the emergency room, not when I reported the incident.

Q That wasn't my question; was it?

A I am confused.

Thus, claimant has given conflicting testimony regarding the date he mentioned any complaints to Dunavant.

Finally, while claimant contends that he suffered this compensable injury to his right knee on August 12, 2022, I note that he did not seek any medical treatment for his condition until August 28, 2022, more than two weeks later.

In summary, claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right knee on August 12, 2022. At the hearing, claimant denied having any prior right knee pain. However, the medical records indicate that claimant had sought medical treatment for right knee pain from his primary care physician on June 14, 2022. In addition, while claimant testified that he reported the injury to his supervisor, Dahl Dunavant, Dunavant testified that while claimant did indicate that his knee was hurting, claimant never indicated that he had injured himself at work or that he needed medical attention. Furthermore, with respect to this conversation, claimant testified at the hearing that it occurred on the date of the injury, August 12; however, at his deposition, claimant testified that this conversation occurred approximately a week later. Finally, claimant did not seek any medical treatment for any complaints of right knee pain until August 28, 2022, more than two weeks later. Given this evidence, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right knee on

August 12, 2022.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right knee on August 12, 2022. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondents are responsible for the court reporter's charges for preparation of the hearing transcript in the amount of \$708.45.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE