

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H108270

ORVI GALEAS, Employee	CLAIMANT
EVERS CONSTRUCTION & FIRST COMP INSURANCE CO.	RESPONDENT #1
VG CONSTRUCTION & LIBERTY MUTUAL INSURANCE COMPANY	RESPONDENT #2
REYES PEREZ, Uninsured	RESPONDENT #3

OPINION FILED JANUARY 11, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by RANDY P. MURPHY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by ZACH RYBURN, Attorney, Little Rock, Arkansas.

Respondent #3 not represented by counsel.

STATEMENT OF THE CASE

On December 7, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 18, 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 stipulation:

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

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

1. Compensability of injury to claimant's head and left elbow on August 5, 2021.
2. Liability between the parties for payment of compensation benefits.
3. Temporary total disability benefits from August 5, 2021 through a date yet to be determined.
4. Payment of medical benefits, both past and present.
5. Claimant's average weekly wage.
6. Attorney's fee.

At the time of the hearing claimant clarified that he is requesting payment of temporary total disability benefits beginning August 6, 2021 and continuing through December 10, 2021.

The claimant contends he sustained a compensable head and left elbow injury when he fell while working on August 5, 2021. He contends he is entitled to temporary total disability benefits from August 6, 2021 to December 10, 2021, payment of past and future medical benefits, and a controverted attorney fee. Claimant contends that his average weekly wage is \$1200.00 based upon \$200.00 per day, six days per week. The claimant reserves all other issues.

Respondent #1 contends that the claimant was working for VG Construction at the time of the incident.

Respondent #2 contends that the claimant was not an employee of VG Construction. He did not sustain a compensable injury.

Respondent #3 did not set forth his contentions.

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 May 18, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his head and left elbow on August 5, 2021.

3. Claimant is entitled to all reasonable and necessary medical treatment provided in connection with his compensable injury.

4. Claimant is entitled to payment of temporary total disability benefits from August 6, 2021 through December 10, 2021.

5. Claimant earned an average weekly wage of \$880.00 per week which would entitle him to compensation at the rates of \$587.00 for total disability benefits and \$440.00 for permanent partial disability benefits.

6. Respondent #2 is liable for payment of compensation benefits pursuant to A.C.A. §11-9-402(a).

7. Respondent #2 has controverted claimant's entitlement to compensation benefits.

FACTUAL BACKGROUND

Claimant is a 27-year-old man who previously performed roofing work. Claimant

testified that in August 2021 he was performing roofing work for Ivan Carpio and Eric Daniel. He testified that he worked for them for a year.

On August 5, 2021, while performing his job as a roofer, claimant was climbing a ladder to the roof of a house located at 2585 Westminster Lane in Springdale. When he got to the top he slipped and fell to the ground, landing on his head and left elbow. Claimant was taken to the emergency room at Northwest Medical Center in Springdale where a CT scan of the head revealed a fracture of the right frontal sinus and an x-ray of the elbow revealed a fracture of the proximal left ulna and radial head. Claimant underwent surgery on August 13, 2021 by Dr. Allard to repair the left elbow fracture and he underwent a second procedure in November 2021 to remove hardware in the elbow.

Claimant testified that after seeing a physician for his frontal sinus fracture he has not seen a physician for that condition in almost a year. Dr. Allard indicated in a report dated December 10, 2021 that claimant could return to work as of that date without restrictions. Claimant returned to work performing tile repair and was working as of the date of the hearing.

Claimant has filed this claim contending that he suffered a compensable injury to his head and left elbow as a result of the fall on August 5, 2021. He requests payment of temporary total disability benefits from August 6, 2021 through December 10, 2021, as well as payment of medical expenses and a controverted attorney fee.

ADJUDICATION

The first issue for consideration involves compensability. Claimant contends that he suffered a compensable injury to his head and left elbow when he fell off a roof on

August 5, 2021. Claimant's 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 met his burden of proof.

First, I find that claimant has proven by a preponderance of the evidence that his injury arose out of and in the course of his employment and that the injury was caused by a specific incident, identifiable by time and place of occurrence. Claimant testified that he was performing roofing work for Ivan Carpio and Eric Daniel on August 5, 2021 and that he slipped and fell to the ground from the roof that day, injuring his head and left elbow. This history of injury is consistent with the history of injury noted in the medical records submitted into evidence. Based upon the foregoing, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment and that the injury was caused by a specific incident, identifiable by time and place of occurrence.

I also find that claimant has proven that the injury caused internal or external physical harm to his body that required medical services or resulted in disability and that

he has offered medical evidence supported by objective findings establishing an injury. Following his fall on August 5, claimant was taken for medical treatment at the emergency room at Northwest Medical Center. A CT scan of the head revealed a fracture of the right frontal sinus and an x-ray of the elbow revealed a fracture of the proximal left ulna and radial head. These findings constitute objective evidence.

Dr. Allard performed surgery to repair the elbow fracture which included internal fixation and he performed a second surgery to remove the hardware in November. The surgery by Dr. Allard satisfies the requirement that the injury caused internal or external harm that required medical services.

Based on this evidence, I find that claimant has established the remaining elements of compensability and therefore find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his head and left elbow on August 5, 2021.

I also find that claimant is entitled to payment for medical treatment provided for his compensable injuries and that he is entitled to payment of temporary total disability benefits from August 6, 2021 through December 10, 2021. The injury to claimant's left elbow is a scheduled injury. A claimant who suffers a scheduled injury is entitled to temporary total or temporary partial benefits during their healing period or until they return to work; regardless of whether there is a total incapacity to earn wages. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

Claimant remained within his healing period and did not return to work from the day after his accident (August 6, 2021) until he was released to return to work by Dr. Allard on December 10, 2021. Therefore, I find that claimant is entitled to temporary total

disability benefits from August 6, 2021 through December 10, 2021.

The next issue for consideration is claimant's compensation rate. After my review of the evidence, I find that claimant earned an average weekly wage of \$880.00. Claimant testified that he was paid \$200.00 per day while working for Ivan Carpio. He also testified that he often worked six days per week. Accordingly, claimant contends that his average weekly wage equals \$1200.00 per week. I do not agree that the evidence supports that rate.

In order to have an average weekly wage of \$1200.00, claimant would have had to work six days per week to earn that amount every week he worked for Carpio. However, claimant testified that there were some weeks he worked less than six days per week.

Q On the times when it would rain a lot, would you work a little less than the six days?

A Yes.

Q Some weeks you could work six days, some weeks you could work no days?

A Sometimes three days or four days.

Thus, according to claimant's testimony he did not work six days per week every week; therefore, his average weekly wage could not have equaled \$1200.00. Claimant also testified that the least amount he made a week was \$880.00.

Q What is the least money you ever remember making in a week?

A Eight hundred eighty, that was the least, when we really couldn't work.

Claimant admitted that he does not have any records showing the amounts he was paid. Claimant has the burden of proving by a preponderance of the evidence his average weekly wage. Based on his testimony, I find that claimant's average weekly wage equals \$880.00. While he testified that there were weeks that he earned more than \$880.00, the number of weeks that occurred is unknown in relation to the number of weeks he earned only \$880.00. Therefore, I find based on the evidence presented that claimant's average weekly wage equals \$880.00. This would entitle claimant to benefits at the rates of \$587.00 for total disability benefits and \$440.00 for permanent partial disability benefits.

The final issue for consideration involves liability for payment of compensation benefits between the parties. Claimant testified that he was working on August 5, 2021 for Ivan Carpio and Eric Daniel. He further testified that he had worked for them for one year and that during that period of time he did not work for any other employers.

Pursuant to A.C.A. §11-9-402(a), where a subcontractor fails to secure compensation, the prime contractor shall be liable for compensation unless there is an intermediate subcontractor who has coverage.

In this claim, Respondent #1, Evers Construction, was the general contractor of remodeling work that was being performed according to the testimony of Sonia Mendoza, one of the owners of Evers Construction. She testified that Respondent #1 does not perform roofing work, so Respondent #1 subcontracted the roofing work to VG Construction, respondent #2. Respondent #2 in turn subcontracted the roofing work to Reyes Perez. The contract between Respondent #2 and Perez was submitted into evidence as Pages 17 through 26 of Claimant's Exhibit 2.

Testifying at the hearing was Reyes Perez. Perez testified that he was unable to perform any of the roofing work on the home because he had to leave for Florida and he contacted Ivan Carpio.

Q And then did you ever do any work on that house?

A No. We were - - well, we already agreed that I was going to do that house myself and the people that worked with me, but I had to leave on the 4th to Florida and I told VG Construction that I did not have time to do that house. So then he asked me to find somebody or if I had somebody that could do it and I called Ivan Carpio and he said he had time; that he would do it.

The contract between Perez and Ivan Carpio was submitted into evidence as Pages 34 through 36 of Claimant's Exhibit 2.

At this point it should be noted that Ivan Carpio was not present at the hearing. Instead, he was released as a party by the remaining parties at a pre-hearing conference. Claimant chose not to proceed against Carpio because he is uninsured; instead, claimant has chosen to proceed primarily against Respondent #1 and Respondent #2 who are both insured. The fact that Carpio was uninsured and a determination was made that Carpio would not be made a party to the claim was confirmed by Attorney Murphy during a discussion at the hearing.

Pursuant to A.C.A. §11-9-402(a), I find that Respondent #2 is liable for payment of compensation benefits. Claimant worked for Ivan Carpio, an uninsured subcontractor. Carpio obtained the subcontract from Reyes Perez who is also an uninsured subcontractor. Perez obtained a subcontract from Respondent #2, VG Construction, which does have workers' compensation coverage. While Respondent #1 was the

general contractor, the statute indicates that the general contractor will be liable for compensation if there is not an intermediate subcontractor who has coverage. In this case, Respondent #2 is a subcontractor who has coverage; therefore, Respondent #2 is liable for payment of appropriate compensation benefits.

With respect to this issue, I note that Respondent #1 contends that based upon testimony from Perez that the subcontract between Perez and Carpio was not signed until after the injury occurred. However, I do note that the contract is dated the same day of the accident, August 5. Furthermore, according to Perez's testimony he did not perform any of the work on the home, but instead contracted with Carpio to perform that work. Even if one assumes that the written contract was not signed until after claimant's fall, the evidence clearly indicates that there was an oral contract for Carpio to perform the work which was being performed on August 5 and resulted in claimant's fall and subsequent injury. Accordingly, I find no merit to this contention.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his head and left elbow on August 5, 2021. Claimant is entitled to payment of all reasonable and necessary medical treatment provided in connection with his compensable injuries. In addition, claimant is entitled to payment of temporary total disability benefits from August 5, 2021 through December 10, 2021. Claimant's average weekly wage equals \$880.00 per week. Finally, pursuant to A.C.A. §11-9-402(a), Respondent #2 is liable for payment of compensation benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney

fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondent #1 and Respondent #2 are liable for the court reporter's charges for preparation of the hearing transcript, with each to pay the sum \$430.20 representing one-half of the total transcript amount.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE