STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGE OF COMPENSATION CLAIMS
PORT SAINT LUCIE DISTRICT

EMPLOYEE:
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OJCC#: 08-009173RDM
VENUE: Saint Lucie County
D/A: 11/14/2007

ORDER ON THE MERITS

A MERITS HEARING was conducted in this matter. The parties enter into stipulations and frame the issues as follows:

A. The Judge of Compensation Claims (JCC) has jurisdiction over the parties and subject matter.

B. The parties were properly notified of the merits hearing.

C. As to the particulars of this case the parties agree:

1. Although it is not conceded claimant was injured in an industrial accident, any accident that might have occurred took place in Saint Lucie County, Florida.

2. There was an employer/employee relationship on all claimed dates of accident.

3. Workers' compensation insurance coverage applies.

4. Claimant's average weekly wage (AWW) is $831.92.

5. Medical benefits sought are prospective only.

6. All issues pertaining to attorney's fees and costs are reserved for subsequent hearing.

D. Claimant seeks the following:

1. Temporary total disability benefits (TTD) or temporary partial disability benefits (TPD) from March 28, 2008, to the date of hearing.

2. The provision of future medical care.

3. Attorney's fees and costs.

E. The employer/carrier (E/C) responds stating:

1. Inasmuch as no Petition for Benefits (PFB) has been filed for a date of accident occurring November 2, 2007, or any date other than November 14, 2007, E/C objects to consideration being given a claim based on a November 2, 2007, date of accident.

2. Claimant did not sustain an accident or injury arising out of and in the course of his employment at anytime in November 2007.

3. Claimant voluntarily limited his income.

4. Claimant did not timely notify his employer of the alleged accident.

5. Claimant's loss of earnings, if any, are unrelated to any industrial accident.

6. Claimant has received wages after March 28, 2008, which disqualifies claimant from being TTD and reduces any TPD recovery.

7. No medical evidence establishes a disability.

8. Claimant did not sustain an industrial accident that is the major contributing cause of a disability or a need for medical care.

9. General denial of all remaining claims.

F. E/C withdraws its apportionment defense.

This order disposes of all pending PFBs, to wit, those filed April 1, 2008, and April 11, 2008.

HAVING CONSIDERED the evidence presented, together with argument of counsel, I make the following determinations:

1. The JCC has jurisdiction over the parties and subject matter.

2. The parties were properly notified of the merits hearing.

3. The stipulations of the parties are accepted and incorporated by reference.

4. Claimant is 49 years old. He completed the

eleventh grade and obtained his GED. He has been employed most of his working life as a carpenter and is well-skilled in his trade.

At the time of this accident claimant worked for "Tradesmen International." This company furnished workers, including claimant, on a temporary basis to "Conking & Lewis Construction, Inc.." Claimant was working on a job for Conking & Lewis through Tradesmen when the alleged accidents occurred.

5. Claimant's relevant health history is discussed below. In general terms, he appears to be in good health, makes a favorable general impression and appears to be his chronological age.

Several factors warrant discussion even though they are placed in evidence without objection.

Claimant admits to having "five or six" felony convictions for breaking and entering and grand theft. These incidents occurred approximately in 1979, 1981 and 1985. He also admits to a misdemeanor conviction involving dishonesty or false statements in the form of falsifying a police statement occurring 1979 or 1981.

Because of the remoteness of these convictions, they are disregarded. § 90.61(1)(a), *Fla. Stat.* (2007); *See also, City of Miami v. Ross,* 695 So. 2d 486, 488 (Fla. 3rd

DCA 1997) (upholding trial court's refusal to allow impeachment with convictions occurring "many years ago").

Claimant has successfully obtained personal injury recoveries, apparently both in the workers' compensation and civil arenas. While these questions were asked by counsel in context of demonstrating claimant's familiarity with the need for promptly reporting accidents and specifically describing occurrences, I find the probative value to be outweighed by the potential unfairness of demonstrating claimant may be litigious and, hence, should not factor into the decision making process. This testimony is likewise disregarded. *See, Zabner v. Howard Johnson's, Inc.*, 227 So. 2d 543, 545-46 (Fla. 4th DCA 1969).

6. Claimant seeks recovery for two injuries. On November 2, 2007, claimant reports he and two other men were manipulating a heavy piece of lumbar. In the process the weight of the lumbar was abruptly placed on claimant's arms, jerking his elbows. This caused his right elbow to emit a loud popping sound overheard by coworkers including his supervisor and brother-in-law, Dale Owens. His right elbow began to swell noticeably and both were immediately painful. He applied ice and a heating pad to the injured areas. Shortly later he applied an ace bandage to the

right elbow which he continued to use for some time thereafter.

The second accident occurred November 14, 2007, when claimant was using a crowbar which slipped, causing him to fall and strike both elbows.

7. This was eventually, but not immediately, reported to the employer/carrier. Authorized treatment was first provided with Prima Vista Walk-In Clinic where claimant was attended by John Lau, M.D.. On Dr. Lau's recommendation claimant was provided an orthopedic surgeon, Scott S. Katzman, M.D.. The case was transferred to Lewis Starace, M.D., an elbow specialist associated with Dr. Katzman. Except for a progress note dated January 15, 2008, no evidence is presented from the treating orthopedic surgeons.

E/C initially provided this care under the pay and investigate provisions of section 440.20(4). Temporary disability benefits were paid until, apparently, March 28, 2008, when E/C controverted the case on several grounds.

8. Following E/C's action, claimant filed a PFB on April 1, 2008, alleging an accident occurred November 14, 2007. The PFB alleges "repetitive trauma to elbow" and seeks a CT scan and rehabilitation in accordance with Dr. Starace's recommendations.

A second PFB was filed April 11, 2008. The date of accident remains the same. This time the injury is described as occurring "…at work while holding 4x4." Claimant seeks TTD and TPD.

Mr. Owens testifies the accident occurring while handling lumbar took place Thursday, November 1, 2007. He is certain of this because it was the day after Halloween and everyone was bringing candy to the job.

E/C objects to consideration being given the claim for benefits stemming from a November 1 or 2 accident because no PFB has ever been filed for such an event.

Given that claimant's statement was taken early on in this matter, November 29, 2007, and his initial deposition taken July 10, 2008, at which time both events were reported, I find this works no prejudice to E/C. Therefore, both PFBs are amended to reflect both accident dates and claims arising from both alleged events will be disposed of by this order.

9. This case is decided by a combination of factors, some of which, standing alone, are minor.

In order to get paid, claimant completed a time card which he would present to his supervisor, Richard Hill, an employee of Conking & Lewis. Claimant's obligation was to note at a place provided on the card whether he had a work

related injury during the weekly period covered by the card. For the week beginning August 20, 2007, and ending August 24, 2007, claimant indicates having stuck a nail in his left palm.

A more ambiguous notation is made on the time card for the week ending September 21, 2007. Claimant indicates he has not sustained a work injury, but goes on to report, "Left knee may need to be look at."

No elbow injury is reported on any time card. According to claimant the reason for not doing so is he was "job scared."

10. Claimant had been treated for various problems by Moises Siperstein, M.D., since June 2006. This physician's qualifications are not placed in evidence although he is known to me as an internist. He saw Dr. Siperstein on the first occasion for a bilateral shoulder injury from lifting.

A few months later claimant reported low back pain from lifting.

In May and August 2007 Dr. Siperstein was seen for a variety of orthopedic complaints which claimant related to specific episodes.

On October 26, 2007, Dr. Siperstein treated claimant for bilateral forearm pain and left shoulder pain

exacerbated with activity. No cause was given. Claimant did not mention the puncture wound occurring August 2007.

Claimant called Dr. Siperstein's office on November 19, 2007, at approximately 9:25AM. Claimant inquired as to the status of his tetanus shots. He expressed concern about having been punctured with a "metal object" one month prior and was now having trouble bending his elbow. Personnel at the doctor's office recommended that he be examined promptly at an emergency room or walk-in clinic because a diagnosis could not be made over the telephone. (Dr. Siperstein was out of the office.)

11. John Lau, M.D., is an internist who was employed at Prima Vista Walk-In clinic and authorized by E/C to provide treatment. Claimant initially presented to Dr. Lau on November 19, 2007. The time of day is not given.

In the course of reporting to Dr. Lau claimant provided an "Employee Incident/Injury Report" also dated November 19, 2007. Responding to the question what caused the injury claimant states, "Not sure." In explaining why he did not report the incident to his supervisor claimant states, "Did not know I hurt myself. My arms were hurting but, did not think anything of it."

Claimant told Dr. Lau he had swollen and painful elbows. He could not give Dr. Lau an onset date or provide

a cause. He told Dr. Lau of having previously been treated for this problem by his personal physician with medications which did not help.

Dr. Lau's notes do not mention claimant complaining of a puncture wound. However, he is given a tetanus typhoid shot. Obviously, some discussion on point occurred.

On clinical examination claimant's right arm was particularly painful and could not be fully extended at the elbow. The left arm was less symptomatic.

On the next visit of November 21, 2007, claimant recalled having sprained his right elbow at work and during the process of the injury hearing a popping noise. Blood tests showed an elevated white blood count, suggesting an inflammatory response in the elbow ligament which was also swollen on appearance.

An orthopedic surgeon was recommended.

Dr. Lau had x-rays taken of the elbows. This revealed bilateral osteoarthritis, greater on the right.

12. Claimant underwent an independent medical examination at E/C's behest with John Davidson, M.D., a board certified orthopedic surgeon. Dr. Davidson testifies claimant may have atavistic spur near the left elbow. A definitive diagnosis could not be reached absent a CT scan.

Claimant certainly has a small amount of

osteoarthritis in both elbows.

According to this physician a spur could be dislodged in the type of accident claimant reports occurring. Or it can develop without a definitive cause or traumatic episode.

13. Claimant has the burden of establishing an industrial accident occurred and that accident is the major contributing cause of his injury. *Wintz v. Goodwill,* 898 So. 2d 1089, 1092-93 (Fla. 1st DCA 2005). I find claimant fails to meet this burden.

The likely scenario is that claimant developed elbow pain sometime near or shortly before November 19, 2007. This prompted him to call Dr. Siperstein, advise of the nail puncture occurring August 2007, and expressed concern regarding possibly contracting tetanus typhoid. When Dr. Siperstein's assistant told claimant to go to the emergency room, claimant then called his employer and requested medical treatment.

Claimant likely told Dr. Lau about the puncture wound prompting the tetanus typhoid shot. I infer from Dr. Lau's notes that this physician advised claimant tetanus typhoid was not the reason for his bilateral elbow pain. Claimant then told Dr. Lau he could not recall a specific cause.

It may very well be the October 26, 2007, treatment

with Dr. Siperstein for "bilateral forearm pain" was due to pain developing in this same area.

In any event, on his follow-up visit with Dr. Lau, two days after being first seen, claimant has an epiphany, recalling the dramatic episode of November 2, 2007, accompanied by a popping sound from the elbow loud enough for his coworkers to hear and followed by immediate swelling prompting the application of an ace bandage. This same alleged occurrence was not reported to the employer.

14. Simply put, claimant's version of events, considering his appearance before me as well as that of Mr. Owens, does ring true. I find claimant did not have an event or result happening suddenly either on November 1, November 2, or November 14, resulting in his present injury.

Furthermore, if the claim in the initial PFB is considered, that is, an injury caused by repetitive trauma, claimant fails to establish this by clear and convincing evidence. § 440.09(1), *Fla. Stat.* (2007).

15. Inasmuch as I find claimant fails to establish that he sustained injury by accident in the first instance, it is unnecessary the other defenses raised by E/C.

16. In accordance with the stipulation of the parties, all issues pertaining to attorney's fees and costs

which survive the foregoing findings, are reserved for subsequent hearing.

WHEREFORE, it is

ORDERED AND ADJUGED as follows:

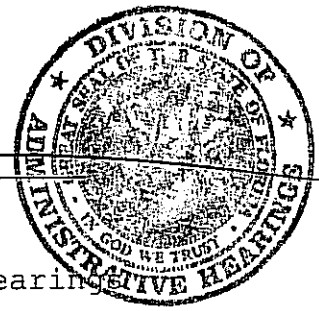
a. Claimant fails to establish that he sustained a compensable industrial accident at any point in November 2007, including November 1, 2007, November 2, 2007, or November 14, 2007.

b. The claim for temporary total and temporary partial disability benefits is denied.

c. The claim for medical care to treat claimant's bilateral upper extremity conditions is denied.

d. All issues pertaining to attorney's fees and costs which survive the foregoing findings are reserved for subsequent hearing.

DONE AND ORDERED in chambers, in Fort Pierce, Saint Lucie County, Florida, this 4 day of March, 2009.



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I HEREBY certify that a true and correct copy of the foregoing has been mailed via U.S. Mail to all of the parties on this 4 day of March, 2009.

Assistant to the Judge of
Compensation Claims