

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211461

MARQUES FISCHER, EMPLOYEE

CLAIMANT

CAPITAL HOTEL, EMPLOYER

RESPONDENT

CHUBB GROUP OF INS. CO., CARRIER

RESPONDENT

OPINION FILED JULY 14, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 30, 2003, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondents represented by the HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine claimant's entitlement to workers' compensation benefits.

On March 11, 2003, a prehearing conference was conducted in this claim, from which a prehearing order of March 13, 2003, was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission's Exhibit #1. Further, the parties entered stipulations relative to the claimant's compensation benefit rate in the event the claim is found to be compensable.

The testimony of Marques Fischer, the claimant, Ricco Porter, Khalil Moussa, and Joseph Rantici, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Marques Fischer, the claimant, with a date of birth of July 17, 1952, commenced his employment with respondent on or about May 2, 2002. Claimant is a high school graduate with four years of post-secondary education, with a work history consisting principally of that of a professional Chef. Claimant's employment with respondent was terminated on September 11, 2002.

At the time claimant commenced his employment with respondent on May 2, 2002, he was hired as a broiler cook, with duties which consisted of cooking steaks and hamburgers. In late July 2002, claimant was moved to the bakery department and with duties preparing pies, cakes, breads, and rolls. Claimant denies that he experienced any limitations or restrictions on his physical activities relative to his right upper extremity prior to his employment of respondent. Further, claimant maintains that he was able to successfully discharge his assigned job duties prior to September 9, 2002. Claimant denies during the course of his employment with respondents prior to September 9, 2002, that he experienced difficulties with co-workers or supervisory personnel. Finally, claimant maintain that he had not been the subject of any disciplinary action by respondent, to include write ups, prior to September 9, 2002.

Claimant maintains that on September 2, 2002, he suffered an injury within the course and scope of his employment with respondent, which serves as the basis of the present claim. In describing the baking department of respondent, claimant's testimony reflects:

The baking department is kind of by itself, kind of little. You go in and on the left hand side is a mixer, a confection mixer, on a stand. It's tall and it has a cage. You can turn it on, but it won't go. You've got to - - you know, the mixing bowl is probably about this big around, this high. (T.12-13)

Claimant, who is five feet seven inches tall, estimated that the diameter of the mixing bowl was approximately two to four feet in diameter and approximately two feet tall. Further, testified that the bowl was constructed of one-half inch metal. Claimant noted that typically lifting the mixing bowl required to people. While noting that most times he had help lifting the mixing bowl, he also testified that it was possible to lift the bowl off of the stand and pull it to the work table alone.

Claimant's testimony reflects that on September 9, 2002, he worked alone in the bake shop area. Claimant testified that after pouring four boxes of blueberry mix, he weighing five pounds, into the mixing bowl, he added eight quarts of buttermilk and a gallon of water. Once the dough was mixed he began the process of removing the bowl from the stand. Claimant maintains that as he lifted the bowl off the stand the contents shifted and bowl came down on his right hand resulting in his injury. Claimant notes that the bowl was one-half full with the blueberry dough contents at the time it landed on the right side of his right hand. Claimant further noted that a substantial portion of the dough or contents of the bowl spilled onto the floor during the accident.

The testimony of the claimant reflects that the nearest work site to the bake shop, the site of the accident, was the office of the food and beverage manager, which is directly across. Claimant testified that the food and beverage director, Khalil Moussa, was in his office at the time of the accident. Claimant's testimony reflects:

I went up to him, and at the time, if he was sitting on his desk this way, he would see right into the room. But he would turn around and he was knocking about on his computer. (T. 23)

Claimant maintains that as he entered the office of Mr. Moussa he extended his right hand in order to report the injury, however it was his impression that Mr. Moussa thought the reason that he was

extending his hand to shake hands. Mr. Moussa relayed that he was too busy to shake his hand at the time. Claimant testified :

I told him the bowl fell on me hand because there was dough all over the ground, and he sat and looked straight ahead and he seen it. (T.24)

Thereafter, claimant maintains that Mr. Moussa took a pen, placed it down, and directed him to pick it up. Claimant noted that when he picked up the pen with his right thumb and index finger Mr. Moussa told him that the finger was not broken. Mr. Moussa told the claimant to come back later because he was very busy and that he would attend to the injury at that time. Claimant asserts that he was informed by Mr. Moussa that he did not have the forms for a work-related accident, but that he would get them later. Claimant testified that although he returned to Mr. Moussa on several occasions on the date of the accident, September 9, 2002, he was never furnished any forms nor was assistance render with respect to medical treatment. Indeed, claimant asserts that when he went back to Mr. Moussa the third time on September 9, 2002, he requested medical treatment. Claimant's testimony reflects, with respect to the afore:

Can I leave and go to the hospital or the doctor about me hand? He - - his exact word was, it probably proves we've got a lot to do. If you go, if you leave, you are leaving on your own. Your job may not b e here when you get back. Somebody else may be here. (T.27)

Claimant testified that he work his entire shift on September 9, 2002, because he was afraid that if he left he would get fired. Claimant testified that he was scheduled off work the following day, September 10, 2002. Claimant's testimony reflects he received a call from his supervisor, Chef Ricco, and that when he returned the telephone call he was directed not to come in to work at 7:00

a.m., his next scheduled shift, which was September 11, 2002, but rather to come in at 2:30 p.m. Further, claimant maintains that Chef Ricco relayed, during the telephone conversation that he had heard about the accident or injury to the claimant's hand on September 9, 2002. Claimant further testified that during the conversation with Chef Ricco he was told that at the time he came in at 2:30 p.m. the two of them would sit down and talk.

Claimant's testimony reflects that when he arrived for work on September 11, 2002, pursuant to the direction of Chef Ricco he did have a conversation with him:

He had me to sit down. I sat down. And I focused on me hand. And he said I'm going to take you out of the bakery department and put you into the salad for light duty work until your hand get better. (T. 31)

Claimant further testified that Chef Ricco told him that he would get back in touch with him at 6:00 p.m., however, failed to do so. Claimant acknowledged that he was in the salad area the entirety of his shift on September 11, 2002, however maintains that he did not perform any appreciable job duties because of residuals relative to his right hand injury.

Claimant's testimony reflects that at exactly five minutes until 6:00 p.m. on September 11, 2002, the general manager, Joseph Rantici, came out and asked him about his hand. Claimant asserts that there was no further discussion with Mr. Rantici aside from the afore inquiry.

Claimant testified that he next talked with Chef Ricco the following day, which would have been September 12, 2002, when he received a telephone call from him. With respect to the conversation, claimant's testimony reflects:

He told me, he said I'm very sorry of what happened and how things went down. It should not have been that way. (T. 34)

Claimant's testimony reflects that on September 11, 2002, the food and beverage manager called him into the office at about 10:30 p.m. Claimant testified regarding the meeting with the food and beverage manager, Khalil Moussa:

They look at me hand. He look at me hand. I apologize to them. I say I'm sorry because I didn't work. The other people didn't work for me, but I try me best. And he looked - - and he pulled out, you know, and he said you no longer work here. (T.36)

Claimant asserts that Mr. Moussa pulled out a check from his lapel pocket and gave it to him.

Claimant acknowledged that the time he commenced employment with respondent he received an employee handbook, which set forth the procedure for reporting work related injuries. (T. 55). Nevertheless, during direct examination claimant testified that the manual stated that if you get hurt at work you have to go to the nurse and the nurse would treat it. (T.25)

Claimant acknowledged that he first received medical treatment relative to the right hand on September 24, 2002, at Baptist Memorial Hospital in North Little Rock. Thereafter, claimant maintains that he next sought and obtained treatment from a doctor in Cabot, Dr. Schultz. Claimant's testimony reflects that Dr. Schultz prescribed medication, replaced the cast which had been placed on his hand by the emergency room personnel at Baptist Health Memorial, and authored a slip directing claimant to remain off work. Claimant testified that while he was provided a follow-up appointment with Dr. Schultz, he did not return to him because the workers' comp carrier had denied coverage for the claim. Claimant specifically noted that while at Dr. Schultz's office a telephone call was made to Chef Ricco, his supervisor at respondent-employer, regarding workers' compensation coverage. Claimant further noted that he telephoned the general manager of respondent-employer regarding medical treatment relative to his hand injury as well as his final pay

check.

The testimony of the claimant reflects in addition to medical treatment at the emergency room Baptist Memorial Hospital and from Dr. Schultz's clinic, he also sought and obtained treatment at emergency room of UAMS.

Claimant's testimony reflects that his hand did not improve between the date of injury and the time he returned to work on November 11, 2002, for another employer. Claimant operated a drill press with the subsequent employer, a company in Jacksonville, Arkansas, and on January 27, 2003, he was laid off. Thereafter, claimant sought and obtained employment at Remington Arms Company as a cook in the plant cafeteria. Claimant's employment with Remington ceased due to matters not related to the claimed September 9, 2002, right hand injury.

Stephen Eric Ricco Porter, executive Chef of respondent-employer, testified that he had been employed by respondent for fifteen years. Chef Ricco testified that while he was familiar with the claimant, it was not until the day prior to the May 30, 2003, hearing in this claim, he learned claimant was alleging having sustained a work-related injury on September 9, 2002. Chef Ricco testified that he had no knowledge of an injury to the claimant on September 9, 2002, or at any other relevant time frame. Further, Chef Ricco noted that he was not at work on September 9, 2002, the same happen to be a day off-work for him. Further, Chef Ricco denied that he telephone the claimant on September 10, 2002, and relayed that he was aware of the September 9, 2002, injury.

Chef Ricco credibly testified that he was unaware of any claimed injury to the claimant's right hand September 2002, or any other point prior to May 1993. Further, Chef Ricco denies that claimant was assigned to the salad area for light duty work by him as a result of a September 9, 2002, right hand injury. Likewise, Chef Ricco denies having a conversation with the claimant on

September 11, 2002, wherein he informed the claimant that they would talk about his hand injury as 6:00 p.m. on said date.

Chef Ricco testified that at the time claimant was employed by respondent on May 2, 2002, he underwent a ninety day probationary period. Further, Chef Ricco noted that once the claimant was moved from the position of boiler cook to the bake shop department after the ninety day period he was placed on an additional thirty days probation. The testimony of Chef Ricco reflects that claimant's employment was terminated on September 11, 2002, due to poor job performance, not having to do with any limitation or restriction on the claimant's employment activity but the quality of his work. Further, Chef Ricco noted that at the time of the claimant's termination claimant was still in the second probationary period. Chef Ricco's testimony reflects that the last time he saw the claimant he did not appear to have any physical problems. At the time claimant was returning his uniform. Chef Ricco testified:

He was returning his uniforms and he was rubbing his hand. And I did ask him a question what is wrong with your hand, and he said he had hurt his hand. But he was just returning his uniforms and I was to give him his check. (T.74)

Chef Ricco testified that the claimant did not relay during the aforementioned conversation that he had hurt his hand at work.

Chef Ricco acknowledged that he did receive a telephone call while the claimant was at Dr. Schultz's office. Specifically, Chef Ricco testified that the call came in from a staff member of Dr. Schultz's office. Chef Ricco noted that at the time the telephone call was received from the office of Dr. Schultz, it was approximately three weeks after claimant had left the employment of respondent. Chef Ricco noted that at the time the staff member began to explain that the claimant

was there for treatment of an injury allegedly received at work, he immediately directed the call to the personnel department of respondent.

With respect to the site of the alleged accident, Chef Ricco testified that the bake shop area contains an industrial mixer with mixing bowl. The mixing bowl sat approximately two to four inches off the floor when in the mixer. Further, Chef Ricco noted that the mixing bowl is approximately two feet in diameter and two feet tall. The mixing bowl is on a rack or lift which stands approximately four feet tall.

Chef Ricco testified regarding the policy for reporting work-related injuries:

We have one process. You notify your supervisor, and if your supervisor isn't there or around, you notify a security guard or a person, which is Human Resources. (T. 79)

The testimony in the record reflects that security personnel are available 24-hours a day, and that the necessary forms for reporting accidents are located at the security guard station. The security guard thereafter turn in the accident report to personnel director.

Mr. Khalil Moussa is the food and beverage director at respondent-employer. Mr. Moussa has been employed by respondent for seventeen years. The testimony Mr. Moussa reflects that he was in fact working on September 9, 2002, however he denies that the claimant reported having sustained a work-related injury to him on said date. Further, Mr. Moussa denies that he heard a loud noise or commotion which could be attributed to the mixing bowl falling to the floor. Additionally, Mr. Moussa denies that he saw either the large mixing bowl on the floor in the bake shop or the contents from the mixing bowl spilled on the floor in the bake shop on September 9, 2002. Mr. Moussa's testimony reflects that he has no knowledge of the claimant having sustained a work-

related injury on September 9, 2002 or any other point while in the employment of respondent. Further, Mr. Moussa denies that he had the claimant pick up a pen with his right hand at a point and time when claimant reported having sustained a work-related injury. Mr. Moussa denies that he informed the claimant that the claimant might lose his job if he sought medical treatment for his hand on September 9, 2002, or any other point.

Finally, Mr. Moussa testified that while he was present at the time that claimant's employment was terminated, he was not the individual to notify the claimant of the termination of his employment nor did he provide the claimant his pay check on September 11, 2002. Mr. Moussa noted that the claimant worked his entire shift on September 11, 2002. Mr. Moussa testified that he had an occasion to see the claimant on several occasions during the course of the day while the claimant was employed by respondent, and at no point did he observed the claimant evidencing restrictions or limitation relative to his hand in the discharge of his employment duties.

Joseph Rantici, the general manager for respondent-employer, testified that he has been employed by respondent for a period of ten years. Mr. Rantici denies that he had a conversation with the claimant on September 11, 2002, in which he inquired of the claimant about the claimant's hand. Indeed, the testimony of Mr. Rantici reflects that he first learned that the claimant was asserting having sustained a work-related injury while employed by respondent in late September 2002, when he received a telephone call from a doctor's office regarding a workers' comp claim on behalf of the claimant. Mr. Rantici testified that the termination of claimant's employment with respondent on September 11, 2002, was approved by him and that the basis for the termination was a performance issues. Mr. Rantici noted that the claimant was still on probation at the time of his termination.

The medicals in the record reflect that on September 24, 2002, claimant was seen at the emergency room of Baptist Memorial Medical Center with a complaint of right hand pain. Claimant reported that he had dropped a bowl on his right hand on September 9, 2002, and had experienced intermittent discomfort thereafter. The emergency room report noted that examination of the claimant's right hand disclosed swelling over the medial aspect. An x-ray of the claimant's right hand during the September 24, 2002, visit revealed a fifth metacarpal fracture. Finally, the September 24, 2002, emergency room record noted that the claimant was to follow-up with an orthopedic (Dr. Sharp) and to return to the emergency room sooner if he developed further symptoms. (CX. 1, p1-3)

After a thorough consideration of all the evidence in this record, to include the testimony of the witnesses, and review of medicals and other documentary evidence, I make the following:

FINDINGS

- _____1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 9, 2002, the relationship of employee-employer-carrier existed among the parties.
3. On September 9, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$245.00/\$184.00 for TTD/PPD benefits.
4. On September 9, 2002, the claimant did not sustain an injury arising out of and in the course of his employment.

CONCLUSION

Claimant was employed by respondent as a cook from May 2, 2002, through September 11, 2002. Claimant maintains that he suffered an injury to his right hand on September 9, 2002, within the course and scope of his employment with respondent which required medical treatment and

rendered him totally incapacitated from engaging in gainful employment from the date that he last discharge employment duties with respondent on September 11, 2002, until he secured new employment on November 11, 2002. Respondents deny that the claimant suffered a compensable injury while within the employment of same and controvert this claim in its entirety.

The present claim is one governed by the provision of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits and a result of an injury sustained subsequent to the effective date of the afore provision. In the instant claim, since claimant maintains entitlement to workers' compensation benefits as a result of a specific incident identifiable by time and place of occurrence he must establish by a preponderance of the evidence:

- (1) An injury arising out of and in the course of employment;
- (2) That 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, as defined in Ark. Code. Ann. §11-9-102(16), establishing the injury; and
- (4) That the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann, §11-9-102(4)(A)(i)(Repl. 2002)

If claimant fails to establish by a preponderance of the evidence either of the requirement for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Plastic Specialty Company, 56 Ark. App. 126, 938 S. W. 2d 876 (1997).

Claimant maintains on September 9, 2002, while removing a large commercial grade mixing bowl from its stand, the contents in the bowl shifted causing the bowl to fall over and crush the right

side of his right hand. Further, claimant maintains that the accident resulted in a substantial portion of the contents of the bowl spilling onto the floor. Claimant asserts that the injury was reported to supervisory personnel of respondent on the date of occurrence, to include the food and beverage director, Khalil Moussa. Claimant also maintains that his immediate supervisor, Chef Ricco Porter was aware of the injury as was the general manager of respondent-employer, Joseph Rantici. Each of the afore individuals identified by the claimant as having knowledge of the September 9, 2002, injury has denied knowledge of any injury to the claimant or notice of any alleged injury sustained by the claimant while the employment of respondent.

Claimant's employment with respondent was terminated on September 11, 2002. The testimony of the claimant reflects that the termination of his employment was the product of his September 9, 2002, compensable injury and inability to perform his job duties subsequent to the occurrence of same. The credible evidence in the record reflects that the claimant's employment was terminated on September 11, 2002, based upon job performance. Further, claimant was within a second probationary period at the time his employment was terminated due to job performance rather than any restrictions or limitations brought by any alleged work-related injury.

Claimant asserts that after the occurrence of the September 9, 2002, work-related injury he reported same to supervisory personnel of respondent, however, an accident report was never completed. Claimant testified that on subsequent occasions he requested permission to obtain medical treatment relative to his right hand injury and that the same was denied. Claimant acknowledged that he did not complete an accident report relative to his injury nor did he contact security personnel of respondent in order to obtain an accident report or to report the accident. The evidence in the record reflects that claimant was aware of respondent's procedure with respect to

reporting workers' compensation injuries and accidents. Indeed, during the hearing in this claim claimant had in his possession the handbook and material furnished to him regarding the filing of workers' compensation claims which he secured at the time he began his employment with respondent. Claimant was familiar with reporting work-related injuries and the importance of documenting same. The evidence in the record reflects that claimant has had previous workers' compensation claims in the employment of other employers and that a failure to document same served as the basis for denying one such claim.

Claimant's employment with respondent ceased on September 11, 2002. Claimant maintains that he continued to work following the September 9, 2002, injury, although he experienced pain and swelling in the right hand which limited his ability to perform his regular job duties. The evidence in the record reflects that claimant first sought medical treatment relative to a right hand complaint on September 24, 2002, at the emergency room of Baptist Health Memorial Hospital, in North Little Rock. It is undisputed that at the time claimant sought the afore treatment he relayed a history of having sustained an injury to his right hand on September 9, 2002, while employed by respondent when a bowl fell on it. The September 24, 2002, emergency room visit was in excess of two weeks subsequent to claimant's alleged September 9, 2002, injury, and thirteen days following the termination his employment with respondent.

The credible testimony of the witnesses of respondent reflect that claimant did not report a work-related injury to same either on September, 2002 or at the time of his employment was terminated on September 11, 2000. Further, the testimony of Khalil Moussa, the food and beverage director, reflected claimant concluded his work shift on September 11, 2002, after he was informed that his employment was been terminated by respondent for job performance. Mr. Moussa's

testimony reflects that he did not observe the claimant evidencing limitations or restrictions relative to his right hand in the discharge of his employment duties either on September 11, 2002, or any date prior thereto. The evidence in the record reflect that claimant had utilized the emergency rooms at UAMS and Baptist Memorial Hospital for medical services prior to September 2002..(RX. 1)

The claimant has failed to sustain his burden of proof by a preponderance of the credible evidence that he sustained an injury arising out of and in the course of his employment with respondent on September 9, 2002. This claim is respectfully denied and dismissed.

IT IS SO ORDER.

Andrew L. Blood
Administrative Law Judge