

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306405

JAMES D. OOSTDYK, EMPLOYEE	CLAIMANT
LITTLE ROCK WINNELSON CO., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 6, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on October 6, 2003, at Little Rock, Pulaski County, Arkansas.

Claimant appeared Pro Se

Respondents represented by the HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

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

On August 19, 2003, a prehearing conference was conducted in this claim from which a prehearing order of August 20, 2003, was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission's Exhibit #1.

The testimony of James Oostdyk, the claimant, and Benny Harmon, coupled with other documents comprise the record in this claim.

DISCUSSION

James D. Oostdyk, the claimant, with a date of birth of January 16, 1949, is a high school graduate with a two years of post-secondary education and an associate degree. The testimony of the

claimant reflects that he was employed by respondent, a plumbing and supply business, on two separate occasions, with the first being in 1995. Claimant maintains that during his second period of employment with respondent he suffered an injury to his back, which is the subject of the present workers' compensation claim.

Claimant is veteran of the U.S. armed services, however denies experiences any problems or complaints relative to his back prior to his employment with respondent. Claimant asserts that since 1959, when he joined the armed services he has only received medical treatment from the VA or military doctors.

Claimant testified that in July or August 1998, while discharging employment duties for respondent he suffered an injury to his low back lifting a water heater for a customer. Claimant acknowledged that he initially, in filing his claim for workers' compensation benefits, Form AR-C on June 17, 2003, asserts that the injury had been sustained in August 1999. (RX 1, p7). Claimant asserts that after further reflection and an investigation he determine the injury had in fact occurred in July or August of 1998, as opposed to 1999.

The testimony of the claimant reflects that at the time of the 1998, injury his job duties in the employment of respondent was doing receiving work in the warehouse and pulling orders and helping customers. Claimant's testimony reflects, with respect to the July/August 1998, injury:

I was helping a customer load a water heater. I believe it was like a 100 gallon or 75 gallon water heater in the back of his pickup. And, he almost dropped it and I guess he kind of like dropped his end a little bit and I got all the weight and I was trying to, you know, keep it from falling off the truck so I guess -- I didn't hear anything snap or anything but when I got up to move I could feel a lot of pain. And, then I got home and I couldn't hardly walk and Jackie had to help me

out of the car. (T.24-25)

Claimant noted that the injury occurred at the end of the work day, and that he did not report the incident to his supervisor, but rather drove home, an approximately one hour drive. Claimant explained that he wanted to see what condition his back would be in the following morning.

Claimant's testimony reflects that he notified his supervisor, Mr. Kim Emerson, the following morning of the accident. Further, claimant maintains that he sought and obtained medical treatment at the VA hospital for his back complaint the day after the occurrence. Claimant acknowledged that prior to obtaining medical treatment relative to the back injury he consumed alcoholic beverages.

The testimony of the claimant reflects that he was off work for a period of six months following the injury and that he underwent treatment at the VA hospital during that period. The testimony of the claimant further reflects that he continued to receive his regular salary from respondent-employer the entirety of the six month period that he was off work. Claimant's testimony reflects that the only expenditure he incurred relative to medical treatment was a \$7.50 co-payment for a prescription medication. Otherwise, claimant noted that his medical care was had at the VA hospital.

Claimant asserts that after the six month period he was released to light duty work and presented the document to respondent-employer. Claimant resumed performing light duty in the employment of respondent and either January or February, 1999. Claimant continued in the employment of respondent following the afore until May 8, 2003, when he was fired. Claimant asserted that he was unaware of the reason for the termination of his employment by respondent.

The claimant's testimony reflects that after his employment by respondent was termination

he filed for unemployment benefits in May 2003. On further question by respondents' attorney, claimant acknowledged that the unemployment division ruled his employment with respondent ceased or terminated due to misconduct. Additionally, claimant acknowledged that he received unemployment benefits at a weekly rate of \$253.00, for the period July 20, 2003 through August 23, 2003. A review of the Arkansas Employment Security Department records relative to the claimant reflects that claimant was disqualified for eight weeks of unemployment benefits due to misconduct. (RX 1, p34)

Claimant's testimony reflects that in mid-August, 2003, he secured employment as a security guard at an hourly rate of \$7.50. Claimant maintains entitlement to temporary total disability benefits from the time his employment with respondent was terminated on or about May 8, 2003, until August 2003, when he secured employment as a security guard.

Claimant was directed to furnish an appropriate authorization with respect to securing medical records. Claimant has failed or refused to execute a medical release such that respondent would be in a position to secure medical records from the VA Administration. As a consequence of the afore, the record does not reflect medical reports relative to the claimant's treatment associated with the claimed July/August 1998 injury.

Comprising the record in this claim is the testimony of the claimant, the September 3, 2003, order entered by the Commission directing the claimant to answer interrogatories and request for production of documents filed by the respondents, a limited medical authorization dated September 29, 2003, executed by the claimant, the employment security records relative to the claimant's claim for employment benefits, and a April 29, 1995 Baptist Memorial Hospital-Eastern Ozark record relative to the claimant.

From all of the evidence, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. At all times pertinent the relationship of employee-employer-carrier existed among the parties.
3. The claimant earned wages sufficient to entitle him to weekly compensation benefits of \$240.00/\$180.00, for TTD/PPD benefits.
4. In July 1998, the claimant did not sustain an injury arising out of and in the course of his employment.

CONCLUSIONS

Claimant asserts on or about July/August 1998, he suffered an injury to his low back while discharging employment duties for respondent, which required medical treatment and resulted in a period of total incapacitation. Claimant asserts that when he returned to the employment of respondent he was under medical restrictions relative to his employment activities, and that at the time his employment was terminated by respondent on May 8, 2003, he remained under the afore restrictions. Claimant maintains that he is entitled to the payment of temporary total benefits from May 8, 2003, until such time as he secured new employment on or about August 18, 2003.

Respondents argue that their first notice of the claimant's claim for injury was the filing of the Form AR-C by the claimant asserting the August 1999, injury, which was filed on June 19, 2003. In furtherance of the afore, respondent asserted a defense of the statute limitation as a bar to the claim. Alternatively, respondents maintain that the major cause for the claimant's need for medical treatment is the results of the previous disc herniation which occurred prior to the date of

any alleged injury.

The present claim is one governed by the provision of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. Claimant refused to execute an unrestricted medical release authorization so that respondent could secure his medical records. Further, claimant maintains that since his release from the armed services any medical treatment he has received has been under the care of military physicians or the VA hospital. Respondents did secure a April 29, 1995, medical record from Baptist Memorial Hospital - Eastern Ozark, relative to the claimant. Claimant does not dispute that he in fact received medical treatment in Cherokee Village as reflected in the medical document, however asserted that the same may have been obtained during a time he was not employed by respondent. (RX4). As a consequence of claimant's refusal to execute the medical release authorization, the medical reports offered by the claimant were excluded from this record.

It is undisputed that claimant was employed by respondent during the pertinent time period. Claimant acknowledged that he initially, in filing his claim for workers' compensation benefits, asserted that the injury had occurred in August 1999. (RX 1, p7). Claimant testified that during the deposition he was able to determine that the date of injury was in July or August 1998. Further, claimant noted that as a result of the injury he sought and obtained medical treatment at the VA hospital and was directed to remain off work. Claimant was off work for a period of six months, during which time he continued to received his regular weekly wage from respondent-employer.

Claimant asserts that he sustained a specific incident injury identifiable time and place of occurrence. Respondents do not dispute that claimant was employed by same during the pertinent

time period, whether 1998 or 1999. While at the time claimant completed a Form AR-C and filed claim for workers' compensation benefits with the Commission on June 17, 2003, he indicated that the date of injury was August 1999, he subsequently, during a deposition, determined that the date of injury was in either July or August 1998. In Edens v. Superior Marble and Glass, 346 Ark. 487, 58 S.W. 3d 369 (2001) the Arkansas Supreme Court noted:

A strict construction of the statute does not require, as prerequisite to compensability, that the claimant identified the precise time and numerical date upon which an accidental injury occurred. Instead, the statute only requires that the claimant prove that the occurrence of the injury is capable of being identifiable. *Supra* 492.

The evidence in the record reflects that during the course of claimant's deposition, he was able to identify the date of injury as July/August 1998. Further, the evidence in the record reflects that claimant was off work for a period of six months during which time he received his regular weekly pay from respondent. The preponderance of the evidence reflects that respondent-employer was aware of claimant's injury as asserted in that claimant continued to receive his regular weekly pay for a period of six months following the occurrence of the incident. Respondents assert that the filing of a claim for workers' compensation benefits as reflected in the June 17, 2003, Form AR-C filed by the claimant with the Arkansas Workers' Compensation Commission should serve as a bar to the present claim, pursuant to Ark. Code Ann. §11-9-702. Indeed, Ark. Code Ann. §11-9-701(b) provides that failure to give notice should not bar any claim if the employer had knowledge of the injury. In the present claim the fact that claimant continued to receive his regular wages for a period of six months following the claimed injury of July/August 1998, is evidence that respondent-employer had knowledge of the claim.

The record reflects that claimant returned to employment with respondent six months following the claimed July/August 1998, injury, and continued to discharge employment duties through May 8, 2003. Claimant's own testimony reflect that he was able to discharge his employment duties until the date that his employment was terminated by respondent on May 8, 2003. While claimant initially denied having knowledge of the basis for the termination of his employment by respondent, on cross-examination he acknowledged that he was terminated for misconduct. Specifically, the evidence reflects that claimant call his supervisor, Mr. Kim Emerson on the night of May 8, 2003, and had a disagreement with same. There is evidence in the record to reflect that at the time of the May 8, 2003, telephone conversation, the claimant was intoxicated. Claimant was to report for work on May 9, 2003. The evidence reflects that claimant did not report for work as directed. As a consequence of the afore, claimant's employment was terminated. (RX 1, p6)

The claimant filed for unemployment benefits after his employment with respondent was terminated in May 2003. A review of the employment security department records relative to the claimant reflects a ruling that the claimant was discharged from his job on May 8, 2003, because he was absent from work and he failed to property notify his employer. Claimant's actions were deemed misconduct connected with his work, and, as a consequence, he was disqualified from receiving unemployment benefits beginning May 12., 2003, for a period of eight weeks. Thereafter, commencing July 20, 2003, claimant received weekly unemployment benefits at the rate of \$253.00, until he secured new employment in August 1993.

The present claim of the claimant relates principally to a claim for temporary total disability benefits from May 8, 2003, until July 20, 2003. Further, if claimant was indeed within his healing

period subsequent to July 20, 2003, as a result of a work-related injury sustained in the employment of respondent he would be entitled to the difference between his compensation benefit rate and his unemployment compensation benefit rate during the period of time that he received unemployment benefits through August 18, or 19, 2003. Additionally, since securing employment on or about August 19, 2003, which paid a reduced rate then while employed by respondent, claimant could either be entitled to payment of temporary partial disability provided that he was still within his healing period.

Since claimant failed to comply with the orders of the Commission there is no medical in the record to corroborate or to establish that he was within his healing period as a result of a work-related injury on or after May 8, 2003. Indeed, the evidence in the record fails to reflect that the claimant suffered a compensable injury in its employment with respondent. In order for the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, claimant must meet the requirements for Ark. Code Ann. §11-9-102(5)(A)(i).

Specifically, claimant established proof by a preponderance of the evidence of an injury arising out of and in the course of his employment; proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-8-102(16), establishing the injury; and proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish the compensability of the claim

and compensation must be denied. Mickel v Engineered Specialty Plastic., 56 Ark. App. 126, 938 S.W.2d 876 (1997). In the instant claim, there is no medical evidence supported by objective finding of an injury having been sustained by the claimant on July/August 1998. This claim is respectively denied and dismissed.

IT IS SO ORDER.

Andrew L. Blood
Administrative Law Judge