

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC FILE NO. F109947

LARRY E. AKINS, EMPLOYEE	CLAIMANT
DAVID GRINDLEY CONCRETE, EMPLOYER	RESPONDENT
TRINITY UNIVERSAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED APRIL 6, 2005

Hearing held January 13, 2005, before the Honorable S. Dale Douthit, Administrative Law Judge, Little Rock, Pulaski County, Arkansas.

Claimant, of North Little Rock, Arkansas, appeared pro se.

Respondents were represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above-captioned claim came on for a hearing in Little Rock, AR on January 13, 2005. A prehearing conference was held on November 10, 2004, and a prehearing order was filed on November 15, 2004. At the hearing the parties announced that the stipulations, issues and their respective contentions were properly set out in the prehearing order, subject to the additional stipulations, contentions and issues agreed to at the hearing. A copy of the prehearing order was introduced into evidence as Commission Exhibit #1, and made a part of the record without objection.

At the hearing, the parties stipulated the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all

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relevant times, and that the applicable TTD rate was \$267.00 per week and the applicable PPD rate was \$200.00 per week.

By agreement of the parties, the issues to be presented for determination were whether or not the claimant sustained a compensable injury and if so, whether the claimant is entitled to TTD benefits, medical payments, controversion and attorney fees. Respondent also requested the issue of potentially barring this claim due to the Statute of Limitations be addressed.

The claimant contended he sustained a compensable injury sometimes in May of 2001 to his back and legs, and that, as a result, he is entitled to TTD benefits from June 28, 2001 through July 22, 2001, and also from September 28, 2004 to a date yet to be determined.

The respondents contended that the claimant did not sustain a compensable injury and that there was an issue of the statute of limitations regarding this claim. Further, respondents contended the claimant is not entitled to benefits because there are no objective medical findings, and that the claimant is not entitled to any benefit for any period of time he was incarcerated.

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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The respondent has failed to show entitlement to dismissal pursuant to the Statute of Limitations argument.
- 4) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in May, 2001, supported by objective findings.

DISCUSSION

In May and June, 2001, the claimant was employed by David Grindley Concrete. During said employment, the claimant alleged he suffered compensable injuries to his back and legs. The claimant testified the alleged injuries were the result of a gradual onset over a three week period:

Q. And you didn't know exactly what day that happened?

A. Like I said, it happened over that period of three weeks.

Q. So you had a gradual progression of your back pain over three weeks?

A. Yes, sir, and it just - finally at the end, it just locked up. (T. pg. 19, lns. 14-19)

According to the claimant's testimony, it is difficult to determine the last day he worked for the respondent. However, at some point in May or June 2001, the claimant testified his gradual onset injury became so painful he could not continue to work. The claimant stated his employer denied medical treatment for his condition, and before he could see a doctor he was

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incarcerated as a result of a guilty plea for manufacturing methamphetamine on July 22, 2001. The claimant testified he never went to a doctor before going to prison. (T. pg. 20, lns 2-3) The claimant remained incarcerated until approximately 7/27/04.

During the claimant's incarceration Administrative Law Judge Dail Stiles entered an Order of Dismissal filed October 7, 2002. (RX 1) Based on the Order of Dismissal, the respondents now request this action be dismissed for being outside the statute of limitations. The respondents contended that since no claim for benefits was made within one year from the October 7, 2002 Order of Dismissal that this claim is barred by the Statute of Limitation. I find the respondents request deficient due to their reliance on the October 7, 2002 Order of Dismissal. In the case of *Dillard v. Benton County Sheriff's Office*, CA-04-025 (Ark. App. §9-22-04), the court specifically outlined proper dismissals for claims involving initial benefits; which the case at hand clearly was. The Court held that A. C. A. §11-9-702(a) covers initial benefits, and that dismissal must be preceded by a motion requesting such relief, and a hearing. The October 7, 2002 order was entered in violation of A. C. A. §11-9-702(a) since a hearing as required was never conducted. Based on respondents' reliance upon the October 7, 2002 Order of Dismissal for their renewed motion, I hereby deny this request.

To prove a compensable gradual onset back injury, a claimant must prove by a preponderance of the evidence that: 1) He sustained an injury that caused internal or external physical harm to the body; 2) the injury arose out of an in the course of his employment, and 3)

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the injury is the major cause of the disability or need for treatment. A.C.A. §§11-9-102(4)(A)(ii), 11-9-102(4)(A)(ii)(6) and 11-9-102(E)(ii). Furthermore, the injury must be established by medical evidence supported by objective findings. A.C.A.§11-9-102(4)(D)

In the case at hand, it is somewhat unclear from the record whether the claimant is pursuing a gradual onset, or specific incident compensable injury claim. However, in both instances, the claimant must establish the injury by medical evidence supported by objective findings. The claimant has failed to do so. The record shows the claimant only introduced one medical exhibit, and that was for treatment over three years after the alleged injuries. (CX 1) The claimant proffered other medical documents (Claimant's Proffered Ex 2 & 3). This examiner does not rely on the proffered exhibits for this opinion due to claimant's failure to provide respondents with the documents. The claimant acknowledged he had the documents prior to the full hearing date, but did not get them to opposing counsel (T. pg 6, lns 7-14). The claimant was given ample opportunity to request a continuance prior to the full hearing in the event discovery was incomplete. This court sent a letter to the claimant on 12/13/04 asking him if he was going to request a continuance, and advised claimant that if he was, he needed to do so clearly and in writing.

The Court: But you understand that on December 13th, one month prior to this hearing, I sent you a letter saying that if you needed a continuance in order to complete your discovery, to please advise me in writing as soon as possible?

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Mr. Akins: Yes, Sir.

The Court: And you failed to do that?

Mr. Akins: Yes, Sir.

_____ The Court: Well, based on that, I'm not going to consider anything today with regard to Claimant's proffered Exhibits 2 and 3. Mr. Ryburn, do you have any documentary evidence to submit today. (T. pg. 12, lns 22-25 & T. pg. 13, lns 1-7).

The claimant failed to get his exhibits to the respondents, and failed to request a continuance once he knew he wouldn't be able to comply with the prehearing order regarding discovery. The claimant knew thirty (30) days prior to the hearing he could not comply with the discovery provisions of the Prehearing Order (Commission Exhibit 1), and still took no action.

_____ The Court: Well, we had this prehearing conference back on November the 10th. At that time, discovery was ordered was to be completed within 30 days. Then I believe I sent you a letter on December the 13th of 2004, saying that I had received your December 7, 2004 letter.

Did you received my correspondence?

_____ Mr. Atkins: Yes, Sir. I was thinking that we probably needed to come down here and get something going on. Being as it's been four months, I thought to put it off would just hold up the system for every how long. (T. pg. 7, lns 8-21)

As stated, the claimant's one properly admitted medical report was over three years post

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alleged injury, and such does not suffice to prove the objective findings requirement. Further, the claimant has failed to prove his injury arose out of and in the course of his employment. The claimant testified he had back trouble and surgery before his employment with David Grindley Concrete (T. pg. 16, lns 19-25), and he testified he sustained injuries while incarcerated (T. pg. 20, lns. 8-15), after his employment with David Grindley Concrete. Further, without proving the elements previously mentioned, the claimant cannot prove by a preponderance of the evidence that the alleged injury is the major cause of the disability and need for treatment.

If the claimant was attempting to prove a compensable specific incident injury the claimant has failed to establish when the alleged injury occurred, (T. Pg. 19, lns 10-18), and as heretofore stated, the claimant has failed to prove by a preponderance of the evidence a compensable injury established by medical evidence and supported by objective findings.

ORDER

After careful consideration of all the evidence in this matter, and viewing such impartially, and without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

Therefore, respectfully, the above captioned claim is hereby denied and dismissed.

IT IS SO ORDERED.

S. Dale Douthit
Administrative Law Judge

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