

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F500019

TEDDY SELBY, Employee	CLAIMANT
PTB CONCRETE, LLC, Employer	RESPONDENT #1
HANOVER INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED MARCH 1, 2006

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

Claimant represented by EMILY PAUL, Attorney, No. Little Rock, Arkansas.

Respondent #1 represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 25, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 2, 2005, and a pre-hearing order was filed on November 3, 2005. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed between the claimant and respondent #1 in December 2004.

At the time of the hearing the parties agreed that claimant earned sufficient wages to be entitled to the maximum compensation rate in effect for 2004 of \$453.00 for temporary total disability benefits and \$340.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's back on December 15, 2004.
2. Temporary total disability benefits from January 15, 2005 through August 10, 2005.
3. Related medical.
4. Claimant's entitlement to permanent partial disability benefits, including a 9% rating and wage loss.
5. Second Injury Fund liability.
6. Attorney fee.

The claimant contends that on January 15, 2005 he hurt his back while lifting trowel machines for the respondent employer. He contends he is entitled to reasonable and necessary medical treatment, and that he was temporarily totally disabled from January 15, 2005 through August 10, 2005, the date he was assessed at maximum medical improvement and given a 9% rating to the body as a whole by Dr. Vincent Runnels. Claimant contends that he is entitled to permanent partial disability benefits and that he has experienced a loss in wage earning capacity and is therefore entitled to wage loss disability and/or vocational retraining. Claimant contends that his claim has been controverted and his attorney is entitled to a controverted attorney fee.

Respondent #1 contends the claimant failed and/or refused to report any injury within the course and scope of his employment until the filing of the AR-C in January 2005. The claimant has a pre-existing back condition for which the respondents are not responsible and to which the claimant has attributed any back complaints in the past. The claimant did not sustain a new injury or an aggravation of a prior injury.

Respondent #2 contends that it has no liability in regard to this claim.

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 the pre-hearing conference conducted on November 2, 2005, and contained in a pre-hearing order filed November 3, 2005, are hereby accepted as fact.

2. The parties' stipulation that claimant was earning sufficient wages to entitle him to the maximum compensation rates in effect for 2004 of \$453.00 for temporary total disability benefits and \$340.00 for permanent partial disability benefits is likewise accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while working for respondent on December 15, 2004.

FACTUAL BACKGROUND

_____The claimant is a 45-year-old man who worked for the respondent as a concrete finisher. Claimant testified that on December 15, 2004 he was in the process of finishing several concrete slabs at a subdivision in Centerton with other employees of the respondent. Claimant testified that most of the respondent's employees including Bob Saylor, respondent's project manager, and Roger Bride, respondent's job superintendent, had left the job site in Centerton and had gone to another job site in Fayetteville.

In order to finish the concrete slabs it was necessary to run a trowel machine on each slab. Claimant testified that they were shorthanded that day and that in order to get the trowel machine from one slab to another he and the other employees had to load the machine into the back of a pickup truck, drive it to the next slab, and unload it. Claimant testified that around 2:00 or 3:00 p.m. while lifting the trowel machine into the back of the

truck he felt a sharp pain in his back. Claimant testified that he continued to work the remainder of his shift and also reported for work the next day. After working on December 16, 2004, the claimant sought medical treatment from the emergency room in Gravette. Claimant was seen for complaints of right hip/low back pain which he attributed to lifting at work. The claimant subsequently received medical treatment from the VA hospital as a veteran. Claimant underwent surgery for a herniated disc at the VA in Little Rock in 2005.

Claimant has filed this claim contending that he suffered a compensable injury to his low back while working for respondent on December 15, 2004. Claimant seeks payment of related medical treatment, temporary total disability benefits from January 15, 2005 through August 10, 2005, permanent partial disability benefits including a 9% rating and wage loss, and a controverted attorney fee. In addition to these issues, respondent #1 has also raised as an issue the liability of the Second Injury Fund.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his back while lifting a trowel machine while working for respondent on December 15, 2004. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) 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;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing

the injury;

(4) 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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with the respondent.

First, I believe it is important to note that claimant has a significant history of prior low back problems. A review of the medical reports from the VA Hospital in Fayetteville contains numerous notations describing claimant's prior low back problems as "chronic" in nature. As a result of those prior back problems the claimant underwent surgery at the VA in Little Rock in September 2003. Medical records from the VA taken shortly after the surgery indicate that claimant was still complaining of pain which was not controlled by medication. I also note that claimant testified that he had occasional back pain even before this alleged incident of December 15, 2004.

Furthermore, even though the claimant gave a history of injury consistent with his testimony to the medical providers, claimant's testimony indicates that he did not report the alleged injury to the respondent until after he had sought medical treatment or his testimony at the very least is inconsistent regarding the reporting of an injury.

First, claimant testified that he did not report his injury to his supervisors, Bob Saylor and Roger Bride, on the day it occurred because they were not present on the job site but instead had gone to work on another job in Fayetteville. However, claimant admitted on cross examination that he could have gotten in touch with either Saylor or Bride to report an injury had he chosen to do so.

In addition, on direct examination claimant testified that he did not inform Saylor of an on the job injury until four or five days after it had occurred and after he had gone to the

emergency room for medical treatment.

Q. When did you actually notify Bob that you had had an on-the-job injury?

A. About four or five days later I called him and he was on vacation.

Q. Is this before or after you had gone to the emergency room for the injury?

A. After.

Claimant later reiterated that it was four or five days after his visit to the emergency room that he contacted Saylor informing him that he had suffered an injury, would not be able to work, and that he was going to file for workers' compensation benefits.

On cross examination claimant seemed to contradict his prior testimony regarding the reporting of an injury. On cross examination claimant testified that he saw both Saylor and Bride on December 16, the day after his injury. According to claimant's testimony Saylor and Bride saw him limping and asked him if he was going to be any good that day. Claimant testified that he informed both Saylor and Bride that he had injured his back the day before loading the trowel machine onto the truck.

Testifying on behalf of respondent #1 was Bob Saylor. Saylor is the respondent's project manager and has known claimant for several years. Saylor testified that employees are to report injuries to him and if he is not present they are to be reported to Roger Bride, the job superintendent. According to Saylor's testimony the claimant did not report an injury to him on either December 15 or December 16. Saylor testified that he did not learn of claimant's injury until he had left for vacation in California after December 20. Also testifying on behalf of respondent #1 was Roger Bride. Bride testified that when employees are hired they are told they are to report all injuries to either him or Saylor. Bride testified that he would see claimant on an average of three or four times a day and that if he was not present claimant could have contacted him by telephone. Bride testified

that claimant did not report an injury on either December 15 or December 16. Bride testified that he did not learn that claimant was claiming an injury until after a claim had already been filed.

Claimant was also asked in interrogatories to state the first time and first person to whom his injury was reported. In response claimant indicated that he first reported the injury to Bob Saylor on December 19.

Finally, I note that according to claimant's testimony he was working with other employees of the respondent to load the trowel machine at the time his injury occurred. According to claimant's testimony he told these individuals that he had injured his back and that they also saw him limping. However, these individuals were not called to testify in support of claimant.

In summary, claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for the respondent. This claimant has a history of low back problems which has been described in the medical reports as "chronic" on numerous occasions. Claimant's prior low back problems resulted in surgery to his low back area. Claimant now contends that he suffered a new injury to his low back as a result of lifting a trowel machine on December 15, 2004. Although claimant gave a history of injury consistent with his testimony to the medical providers, claimant admittedly did not report the injury to his supervisors on the day it occurred. While those supervisors were not physically present at the time of the injury, claimant admitted that he could have contacted them by telephone. Furthermore, claimant was present at the job site with his supervisors the next day on December 16, 2004. Although claimant subsequently contended that he reported the injury to Saylor and Bride on that date, claimant had previously indicated that he did not inform Saylor of a work related injury until four or five days after it had occurred. This is supported by Saylor's testimony that he did not learn of a work related injury until he had left for vacation in California on December

20. It is also supported by claimant's answers to interrogatories regarding his first report of injury. In addition, Bride also testified that claimant did not report a work related injury on either December 15 or December 16. Bride testified that he did not learn of an alleged work related injury until after claimant had already filed a claim. Given this evidence, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back which arose out of and in the course and scope of his employment with the respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while working for the respondent. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE