

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708241

KEVIN L. BROWN, EMPLOYEE

CLAIMANT

ZACHRY CONSTRUCTION CORP., EMPLOYER

RESPONDENT

ZURICH AMERICAN INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED MARCH 25, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on February 29, 2008, at Osceola, Mississippi County, Arkansas.

Claimant appeared pro se.

Respondents represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to workers' compensation benefits. On December 4, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Kevin L. Brown, the claimant; Edna Inez White; Gary Taylor; and Kevin Gant, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Kevin L. Brown, the claimant, with a date of birth of October 2, 1981, is a high school graduate who commenced his employment with respondent-employer on August 6, 2006, as a laborer. Claimant denies experiencing any physical problems prior to his employment with respondent-employer. Claimant's testimony reflects that his work hours varied, from 5:30 a.m. to 6:00 p.m. or 5:00 a.m. to 6:30 p.m.

Claimant maintains that he sustained an injury within the course and scope of his employment with respondent which resulted in the need for medical treatment and resulted in a period of temporary total incapacitation. Regarding the June 2007 date, and the basis for his claim, the testimony of the claimant reflects:

They had me - - if I remember correctly, they had me out there, I believe, fixing fences.

The only thing I can think and remember was that they had me using a post hole driver driving a post in the ground, and that's the only way I could have done it, hurt myself in there. (T. 10).

Regarding his onset of symptoms, which he attributed to his accidental injury, claimant testified:

Well, for several days I had been having a chest pain, and I even went to the safety office with it. On the 27th I went to the safety office because I had some kind of a sick spell, dizzy, stomach hurting. I believe my chest was hurting, too, that day. (T. 10).

The testimony of the claimant reflects the he operated the post-hole digger for two to three hours.

Claimant acknowledged that he did not recall a specific incident where, during the course of his employment, he experienced chest pain while exerting physical activity. Claimant maintains that when he first felt the chest pain he reported it to his supervisor, Monty Landeck:

I just told him that I was having some kind of problem with my chest, and that I needed to go to the safety office, and they sent me over. (T. 11).

Claimant maintains that upon reporting to the safety office he again relayed that he was having “some kind of chest problem”, and was provided some sinus medicine, which he took however was not afforded any relief from his symptoms. Claimant testified that he experienced pain in the center of his chest and on the right side as well. (T. 12).

The claimant did not continue working after June 28, 2007. Claimant’s testimony reflects that after reporting his chest pain to the safety office of respondent-employer on June 28, 2007, he completed his work day. After the claimant arrived home from work on June 28, 2007, he was later transported to the hospital by his mother because of his chest pain. While the claimant attributes his use of the pole hole drive on June 28, 2007, to his subsequent chest pain, he acknowledged that he had used it on prior occasions.

Following his June 28, 2007, hospital visit, claimant did not work the following day. Claimant testified that he did contact personnel of respondent-employer, the secretary, to inform them that he was unable to work:

I just told her that I had went to the hospital and stuff, and I wouldn’t be in the next day. (T. 15).

Claimant asserts that thereafter he contacted personnel at respondent-employer on several occasions during the time he was off.

Claimant testified that his family doctor is Dr. Biggerstaff. The testimony of the claimant reflects that he was seen on several occasions by Dr. Cullum. Claimant explained that Dr. Cullum was the physician on duty at the hospital at the time of his initial visit. Claimant’s testimony reflects that medical treatment he received for complaints attributed to the June 28, 2007, incident was had under the care of Dr. Cullum or at the hospital. Claimant estimates that

the total amount of the medical bills associated with June 28, 2007, claim is in excess of \$3,500.00. The testimony in the record reflects that while the claimant had group health insurance, the carrier has not paid anything on the incurred medical bills.

Claimant testified that the last time he saw Dr. Cullum was July 11, 2007, at which time he was released to return to work. The testimony of the claimant reflects that while he was physically capable of returning to work on July 11, 2007, he did not return to work. Claimant applied for and received unemployment compensation benefits in August 2007.

During cross-examination claimant concedes that he did not mention the post hole digger as the source of his chest pain at the time of his February 13, 2008, deposition. Claimant explained that following his deposition he got to thinking and realized that he was using the post hole digger. Claimant testified that he thought that he had told his doctor about the post hole digger.

Claimant acknowledged that he did not mention anything to his supervisor, Gary Taylor, or the safety man about using the post hole digger. Further, claimant acknowledged that during the February 13, 2008, deposition he testified that the only thing that he could come up with that might have caused his chest pain was lifting a water jug. Regarding his failure to identify Monty Landeck during his February 13, 2008, deposition as one of the individuals the reported his chest pain to claimant testified:

Well, on the 27th I had had a problem with my chest. That's when it started, but before that, I was sick. I'd been having some coughing and stuff and so - - (T. 22).

Claimant acknowledged that he had a bronchitis problem five to six months before he lost time from work in June 2007. The testimony of the claimant reflects that he did not distinguish to

Monty Landeck whether his trouble was with his bronchitis or chest problems:

I just told him that I was having a breathing problem, a dizzy problem and stuff, and that I didn't know what it was because my stomach was hurting and stuff, and so he didn't take no time. He just sent me to the safety. (T. 22-23).

Claimant acknowledged that he was aware of respondent-employer's rule regarding calling in to work, which required that he call-in every day. Claimant maintains that while he was off work in June/July 2007, he called in to respondent-employer every day. Claimant acknowledged that during the February 13, 2008, deposition he testified, "I called in a couple of times". (T. 24).

Regarding his prior health problems, the testimony of the claimant reflects that all of his life he had a lot of sinus, allergy-type problems that continue to bother him, however he had never had anything like bronchitis problem that developed five or six months before June 2007. Claimant concedes that the bronchitis was hurting in the same area of his chest as the location he attributes pulled muscles as the product of using the post hole digger. Claimant has not sought medical treatment for the bronchitis situation prior to June 2007, however was doctoring on it himself. Claimant acknowledged that bronchitis problems he was having was causing him to do a lot of sneezing and coughing. Claimant testified that the coughing became so bad that it interrupted his sleep.

Claimant's testimony reflects that the work he was doing during the pertinent time period, June 2007, was the same work as he had been doing, that there was nothing unusual, same equipment, same type of job pretty much with the water crew, which entailed taking the Igloos and emptying them and putting fresh water and ice in them. The afore was the claimant's

principle job. Claimant concedes that the bad coughing could have caused the pulled muscle in his chest.

The testimony of the claimant reflects that he left work on June 28, 2007, after having worked his entire shift without having any kind of specific event or accident. At approximately 10:00 p.m. , on June 28, 2007, claimant testified that his chest problems became severe and scared him to the point that he sought medical treatment at the hospital. Claimant testified that he was scheduled to work Saturday, following June 28, 2007, however he called in and reported that he was unable to do so.

Claimant concedes that he does not remember whether he told the people at work that his chest complaint/problem was related to his work, only that his chest was hurting. If caused by work, claimant testified during the February 13, 2008, deposition, the only thing that he could think of would have been lifting the water jugs.

The testimony of Ms. Edna Inez White reflects that she has been employed as the receptionist for respondent-employer since March 26, 2007. Among her job duties as a receptionist, Ms. White testified that she has records attendance of employees:

I take, when they call in in the morning time, I take it down the date they call in, I take their name, I take their badge number, I take their foreman's name, and I take the time they call in and the reason they call in. (T. 32).

Ms. White testified that the rule of respondent-employer is that an employee must call in every day if they're off. Ms. White maintains a handwritten log of phone calls comprising the afore. Regarding the mechanics of maintaining the handwritten call-in log, Ms White's testimony reflects:

Yes, sir. It comes in on the phone, and I take the message. Sometimes I talk to them, but sometimes it will come in on the recording. If they call in and if I'm not there, a recorder will come on and it will take what they say, and then I record it on paper and I keep up with that. (T. 32-33).

In reviewing the call-in log sheet of respondent-employer for the period June 25, 2007 through July 18, 2007, Ms. White testified that the claimant called in on two (2) occasions, June 28, 2007 and June 29, 2007. (T. 34).

Mr. Gary Lee Taylor, site service manager and equipment superintendent for respondent-employer since April 17, 2006, testified that he was a supervisor of the claimant. Mr. Taylor's testimony reflects that the claimant did come to him during the June 28, 2007, time frame and relayed that he was having chest pains. Mr. Taylor testified that he followed company procedure in the instance of the afore and the claimant to the safety office. Mr. Taylor maintains that the claimant did not relate his chest pains to any work-related duty, accident on the job or anything to do with his job for respondent-employer. The testimony of Mr. Taylor reflects that once the claimant was taken to the safety office, personnel of that office took over the handling of his complaints.

Regarding the call-in sheet/log maintained by Ms. White, Mr. Taylor testified that as superintendent he receives a copy of the afore every day. Further, the testimony of Mr. Taylor reflects that if an employee fails to call in three consecutive days employment is terminated. Mr. Taylor testified that the claimant's employment was terminated when he failed to call in three consecutive days during the time he was off work. Mr. Taylor acknowledged receiving a telephone call from the claimant on July 11, 2007, when the claimant relayed that he had been released to return to work, and informing him that his employment had been terminated.

Mr. Kevin Michael Gant, field safety manager for respondent-employer, has been employed by respondent since May 2006. Mr. Gant testified that in June 2007 his employment position with respondent was that of field safety facilitator. Mr. Gant acknowledge that in June 2007, the claimant was sent over to the safety department by Mr. Taylor. Regarding the claimant's physical complaints at the time of the afore Mr. Gant testified:

Yes. He said he wasn't feeling well, he had a felling [feeling] of shakiness and dizziness and heaviness on the chest. (T. 40).

Mr. Gant testified that the claimant appeared to be sick. The testimony of Mr. Gant reflects that after checking the claimant's vital signs, which were normal, there was a discussion regarding medical treatment:

Yes, because he appeared, like I said, to be sick and I told him there was nothing further we could do for him, and that he was recommended to see his personal physician. (T. 40).

Mr. Gant denies that the claimant ever relayed that his complaints were related to anything to do with his job or was caused by the job.

The medical in the record reflects that the claimant was seen at the emergency room of South Mississippi County Regional Medical Center in Osceola, Ar., on June 28, 2007, with complaints of chest pain. Two (2) chest ex-rays were obtain during the claimant's visit. The final report reflects the impression of "no acute cardiopulmonary pathology". (RX. #1, p. 1). Claimant was seen in follow-up to the June 28, 2007, emergency room visit by Dr. S. R. Cullom on July 6, 2007, at which time his complaint was assessed as chest pain - bronchitis . (RX. #1, p. 2).

The call-in logs maintained by respondent-employer for the period June 25, 2007, through

July 18, 2007, reflect the presence of two (2) entries regarding the claimant. A June 28, 2007, entry noted that the claimant called in at 5:26 a.m. and would be “late”, and a June 29, 2007, 5:19 a.m. entry noted that the claimant “will not ben In”. (RX. #1, p. 11).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical record and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On or about June 28, 2007, the relationship of employee-employer-carrier existed among the parties.
3. On or about June 28, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$313.00/\$235.00, for temporary total/permanent partial disability.
4. On or about June 28, 2007, the claimant did not sustain an accidental injury which is identifiable by time and place, that arose out of and in the course of his employment, caused internal or external physical harm to his body and required medical services by medical evidence supported by objective findings, in accordance with Ark. Code Ann. §11-9-102 (4)(A)(i).

CONCLUSIONS

Claimant asserts that he suffered an injury to his chest area while operating a post hole digger within the course and scope of his employment which required medical treatment and resulted in a period of total incapacitation from engaging in gainful employment. Claimant seeks corresponding medical and temporary total disability benefits. Respondents deny that the

claimant sustained an injury on or about June 28, 2007.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts a claim for workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. Specifically, claimant maintains that he sustained an injury to his chest while operating equipment in the discharge of his employment duties.

In order to prove entitlement to workers' compensation benefits for a specific incident injury a claimant has the burden of proving by a preponderance of the evidence that he suffered an accidental injury, identifiable by time and place, that arose out of and in the course of his employment, caused internal or external physical harm to his body and required medical services by medical evidence supported by objective finding. Ark. Code Ann. §11-9-102 (4)(A)(i).

In the instance claim, the evidence reflects that the claimant suffered from bronchitis problems for five to six months before he lost time from work after June 28, 2007. In connection with the bronchitis claimant acknowledged that the same produced severe spells of coughing to include waking him from his sleep. The credible evidence in the record reflects that when claimant registered complaints of chest pain to appropriate supervisory personnel of respondent-employer, it was in conjunction with other complaints, to include dizziness, stomach hurting, and general illness. There is no evidence in the record to reflect that the claimant attributed his chest pain to a work related injury or his employment duties with respondent at the time he registered the complaint with supervisory personnel of respondents.

Additionally, claimant concedes that at the time of his February 13, 2008, deposition he attributed the chest pains which resulted in him seeking emergency medical treatment on June

28, 2007, to lifting water jugs within the course and scope of his employment. Claimant did not cite the involvement of the use of a post hole digger in his employment with respondent-employer as the source of his injury.

While it is undisputed that the claimant sought and obtained medical treatment on June 28, 2007, relative to his complaint of chest pain, the evidence fails to establish by a preponderance a casual connection between the chest pain complaints and a work-related injury. There is no evidence in the record to reflect that the claimant's complaints of chest pain was the product of an injury rather than the acknowledged bronchitis.

Claimant acknowledged that there was not a specific incident which served as the basis for his complaint of chest pain. While the claimant offered the use of the post hole digger as the source of his chest pain and resulting medical treatment and incapacitation, prior the hearing February 29, 2008, hearing he had also offered the lifting of the water jugs as the basis for his claimed injury. In neither instance has the claimant cited a specific incident accidental injury, nor is there evidence in the record of rapid repetitive discharge of employment duties in either job task. The claimant has failed to sustain his burden by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with respondents on June 28, 2007. This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE