

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

Case No. 86 LA 542-230

ROBERT SHAY,

Applicant

vs.

WINCHELL DONUT CORP.;
NATIONAL UNION INSURANCE COMPANY,

Defendants.

FINDINGS, AWARD AND ORDER

An application having been filed herein; all parties having appeared and the matter having been regularly submitted, the Honorable L. W. WARREN, Workers' Compensation Judge, finds, awards and orders as follows:

FINDINGS OF FACT

1. Robert Shay did not sustain injury arising out of and occurring in the course of his employment during the period June 1980 to and including June 1981.
2. Applicant reasonably, actually and necessarily incurred expense for medical reports to prove a contested case, payable in amounts to be adjusted by the parties or determined herein upon the filing of a petition and supporting documents.

AWARD

AWARD IS MADE In favor of ROBERT SHAY against NATIONAL UNION INSURANCE COMPANY, of medical-legal costs as set forth in Finding 2 above.

ORDER

IT IS ORDERED that applicant take nothing on the claim filed herein.

Filed and Served by mail on: FEB 27 1992
On all parties on the
Official Address Record.
By: *Pauline H. H.*



L. W. WARREN
WORKERS' COMPENSATION JUDGE

HE

ROBERT SHAY

VS

WINCHELL DONUT CORP.;
NATIONAL UNION
INSURANCE COMPANY,

WORKERS' COMPENSATION JUDGE:
INJURIES:

LEONARD W. WARREN
JUNE 1980 THRU
JUNE 1981

OPINION ON DECISION

The applicant herein, a 47 year old franchise store manager, claims injury to his heart arising out of and occurring in the course of his employment with the defendant, Winchell Donut Corporation. It should be noted initially that there is a companion case which has already been litigated against a subsequent employer, the Southern California Rapid Transit District. There has been a finding of compensability for his heart and award of permanent disability and medical treatment.

We are concerned here with events that occurred in the years previous to his employment as a bus driver with the RTD, and his present employment as an office worker with the company.

Applicant's theory of the case is that pressures by the franchisor to eliminate him and bring in a cheaper staff led to stress causing a number of heart attacks. This man has quite an extensive and complex heart history going back a number of years.

Also present are a number of very significant off-the-job risk factors such as heavy cigarette smoking, obesity, high blood pressure and some very serious family problems. The applicant was examined previously by Dr. Bernard Smolens as an Agreed Medical Examiner, and his deposition was taken on June 9, 1988. In that deposition, Dr. Smolens admitted that he relied purely on the history as given by the applicant. In that report he attributed a considerable amount of this man's problems to his employment with Winchell's. However, after listening to this man's testimony and reading the reports, in particular that of Dr. Alvin Markowitz of May 3, 1989, we have concluded, with all due respect to Dr. Smolens, that based upon Dr. Markowitz' report no liability should be assessed against Winchell's .

We agree with the thesis of Dr. Markowitz that this is a case of retrospective rationalization of his difficulties with Winchell's. These retrospective memories, conflict with his testimony as to his enjoyment of being a small businessman and community figure. Further and most impressively is the fact that this man's history we found not to be exactly in accordance with some of the facts, in particular his testimony concerning smoking. That led us to have some doubts about his credibility. Further we agree with Dr. Markowitz concerning this man's personal history with his family, the details are found on page 3 of my Summary at lines 17 through 21.

In summary, we believe that before the RTD employment, the heart problems were not caused, aggravated or accelerated by his employment at Winchell's, but were the result of multiple risk factors clearly set forth in the file. Therefore, we must reluctantly conclude that the applicant shall take nothing on this claim.

MEDICAL-LEGAL COSTS:

Applicant reasonably, actually and necessarily incurred expense for medical reports to prove a contested case, payable in amounts to be adjusted by the parties or determined herein upon the filing of a petition and supporting documents.



L. W. WARREN

WORKERS' COMPENSATION JUDGE

LWW:ph