

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No. SBR 247951

TIMOTHY TERRY,

Applicant,

vs.

CHIEF AUTO PARTS;
et al.,

Defendants.

FINDINGS & ORDER

REPRESENTATIONS:

PONCE & RITTER
By: Mark S. Shoup
Attorneys for Applicant

KEGEL, TOBIN & TRUCE
By: Beverly Newman
Attorneys for Defendant

The above-entitled matter having been heard and regularly submitted, the Honorable John F. Parker, Workers' Compensation Judge, now makes his decision as follows:

FINDINGS OF FACT

1. Timothy Terry, born December 30, 1947, at Victorville, California, on January 27, 1992, sustained an injury to his lungs arising out of and occurring in the course of his employment at a stocker/customer services representative, Occupational Group 48, by Chief Auto Parts, which was then permissibly self-insured, its workers' compensation liability is being adjusted by Scott Wetzel Services.

2. Applicant did not sustain injury to the eyes, nose and throat.

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3. The stipulations in the Minutes of Hearing of October 2, 1995, are true and incorporated herein by reference.
4. Applicant's injury caused no temporary disability.
5. Applicant's injury caused no permanent disability.
6. Applicant will not require further medical treatment to cure or relieve from the effects of this injury.
7. There are no funds available from which to allow an attorney's fee for applicant's attorneys.
8. All other issues have been rendered moot.

ORDER

IT IS ORDERED that applicant take nothing further by reason of his notice of claim dated February 3, 1992, or the application filed herein on January 23, 1995.

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DATED: 12.26.95

SAN BERNARDINO, CALIFORNIA
Filed and Served on all parties as
shown on the Official Address Record.

On: 12.26.95
By: M. Solis
M. Solis



JOHN F. PARKER
WORKERS' COMPENSATION JUDGE

TIMOTHY TERRY

vs.

CHIEF AUTO PARTS;
et al.,

WORKERS' COMPENSATION JUDGE:
DATED:

JOHN F. PARKER
DECEMBER 22, 1995

OPINION ON DECISION

This claim involves a claim of injury to the lungs, eyes, nose and throat, arising out of and in the course of employment allegedly having occurred on January 27, 1992. It appears that initially the defendant accepted the case as compensable, provided some benefits in regard thereto, and then after a Mandatory Settlement Conference wherein injury was admitted raised the issue of injury arising out of and occurring in the course of the employment, which was allowed by this Judge. Withdrawal from the stipulation of injury was permitted.

INJURY ARISING OUT OF AND OCCURRING IN THE COURSE OF THE EMPLOYMENT:

I am convinced that some exposure to some type of air pollution occurred on the date of the alleged injury. However, it was not the extent of any exposure as claimed by applicant. There was no smoke filled room. My determination is that there was some minimal exposure. Whether it was to propane fumes or fumes produced by the heating of relatively recent painting, need not be decided. Whatever injury did occur was to the lungs and was nominal or minimal.

In arriving at this conclusion testimony of all the witnesses is considered. Basically, there is a serious question of credibility of the applicant. I am inclined to believe the testimony of the defense witnesses rather than of the applicant. There is definite conflict in the testimony of the applicant with his testimony at the time of his deposition as pointed out by the questioning of defense counsel on cross-examination. There definitely was not the extent of any air pollution as alleged by applicant.

To me, the most convincing medical evidence in this matter is the evaluation of Vickie Y. Height, M.D. as set forth in her report of March 22, 1993. In particular, a paragraph from the report of Dr. Height, set forth on page 9 and which reads as follows is significant:

"In conclusion, there was the potential for exposure to exhaust fumes from propane gas on 01/27/92, which may have resulted in transient subjective symptoms. These subjective symptoms were reversible upon exposure to fresh air and resulted in no functional impairment, no evidence of permanent lung damage, and no short term, nor longterm residual symptoms."

"In addition, the mild obstructive lung disease noted on the pulmonary function test was consistent with continued cigarette smoking over a number of years."

Additionally, the attorney for applicant has raised the question of applicability of Labor Code Section 5402 and the presumption of compensability. In view of the sequence of events described above, there is some question as to whether that code section applies or not. I do not base my decision upon that code section, but upon the record as a whole, the medical report of Dr. Height, and my assessment of the credibility of the witnesses.

My finding is that the only injury which occurred was to the lungs. There was no injury to the eyes, nose, and throat.

EARNINGS:

In view of the decision on injury, temporary disability, and permanent disability, no specific finding is required on the issue of earnings.

TEMPORARY DISABILITY:

Applicant sustained no temporary disability in connection with the injury herein. Reliance is placed upon the report of Dr. Height, which is a part of Defendant's Exhibit A.

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PERMANENT DISABILITY:

Applicant sustained no permanent disability. Again reliance is placed on the report of Dr. Height.

FURTHER MEDICAL CARE:

Further medical care is not needed as a result of the injury herein.

ATTORNEY'S FEES:

There is no monetary award herein and no funds from which to allow a fee for the attorneys for applicant.



JOHN F. PARKER
Workers' Compensation Judge

JFP:ms