

FINAL AWARD DENYING COMPENSATION
(Supplementing Award and Decision of Administrative Law Judge)

Injury No. 95-410846

Employee: Daniel Small
Employer: Red Simpson, Inc.
Insurer: Insurance Company of the State of Pennsylvania

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence and considered the whole record. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion. We agree with the administrative law judge's conclusion that employee's claim is barred by the statute of limitations found in § 287.430 RSMo, but for a reason different from those stated by the administrative law judge.

Law

Section 287.380 RSMo provided, in relevant part:

Except as provided in subsection 2 of this section, every employer or his insurer **in this state**, whether he has accepted or rejected the provisions of this chapter, shall within ten days after knowledge of an accident resulting in personal injury to any employee notify the division thereof and, and shall, within one month from the date of filing of the original notification of injury, file with the division under such rules and regulations and in such form and detail as the division may require, a full and complete report of every injury or death to any employee for which the employer would be liable to furnish medical aid, other than immediate first aid which does not result in further medical treatment or lost time from work, or compensation hereunder had he accepted this chapter, and every employer or insurer shall also furnish the division with such supplemental reports in regard thereto as the division shall require.

(Emphasis added).

Section 287.430 RSMo provided, in relevant part:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer **as required by section 287.380**, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death... The statute of limitations contained in this section is one of extinction and not of repose.

(Emphasis added).

¹ Statutory references are to the Revised Statutes of Missouri 1995 unless otherwise indicated.

Employee: Daniel Small

Discussion

As the party seeking to take advantage of the three-year claim-filing period of § 287.430, employee bears the burden of proving the three-year filing period was available to him. To do so, employee must prove that employer did not file a report of injury “as required by section 287.380...”

Section 287.380 only requires employers and insurers *in this state* to file a report of injury. Employee concedes in his brief that employer did not have an office or place of business in the state of Missouri at the time employee started working for employer. The record is devoid of evidence that employer or its insurer were “in this state” for purposes of § 287.380. Employee has not established that employer was required by § 287.380 to file a report of injury. Employee has not established that he is entitled to the benefit of the three-year claim filing period set forth in § 287.430 RSMo. We conclude the two-year claim filing period is applicable in this case.

The parties stipulated that employer made no payments to employee on account of his work injury during the period October 31, 2003, through August 7, 2006. Because the claim-filing period of § 287.430 is a statute of extinction and not of repose, employee’s remedy and his right under the statute were extinguished no later than October 30, 2005 – two years after the October 31, 2003, payment. Employee filed his claim for compensation on September 17, 2009. Employee’s claim is barred by the statute of limitations set forth in § 287.430.

We attach the May 6, 2014, award and decision of Administrative Law Judge Lisa Meiners. We affirm, adopt, and incorporate the administrative law judge’s findings, conclusions, award and decision to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 30th day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Daniel Small Injury No: 95-410846
Employer: Red Simpson, Inc.
Insurer: Insurance Company of the State of Pennsylvania
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: February 26, 2014 Checked by: LM/drl

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: September 12, 1995
5. Location where accident occurred or occupational disease was contracted: Beaumont, Texas, contract of hire in Missouri.
6. Was the above employee in the employ of the above employer at time of alleged accident or occupational disease? Yes
7. Did the employer receive proper notice? Yes
8. Did the accident or occupational disease arise out of and in the course of employment? Yes
9. Was the claim for compensation filed within time required by Law? No
10. Was the employer insured by the above insurer? Yes
11. Describe the work employee was doing and how the accident occurred or the occupational disease contracted: Employee suffered an electrical shock while working with electrical wires.
12. Did the accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right arm amputation and abdomen

14. Nature and extent of any permanent disability: Settled in Texas for \$63,446.46 on August 3, 2000.
15. Compensation paid to-date for temporary disability: \$33,934.25 for temporary disability at the Texas rate of \$392.00.
16. Value of necessary medical aid paid to date by employer? \$268,436.96
17. Value of necessary medical aid not furnished by employer? N/A
18. Employee's average weekly wages: \$735.42
19. Weekly compensation rate: \$490.28 for TTD and PTD; \$257.29 for PPD
20. Method of wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of Compensation payable from the Employer: No additional benefits are awarded. Claim is time barred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Employee: Daniel Small Injury No: 95-410846
Employer: Red Simpson, Inc.
Insurer: Insurance Company of the State of Pennsylvania
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: February 26, 2014 Checked by: LM/drl

The parties appeared for hearing on February 26, 2014. The Employee Daniel Small was present and represented by Mark Kelly. The Employer Red Simpson, Inc., through its Insurer, the Insurance Company of State of Pennsylvania, was represented by Brent Johnston. Regarding the stipulations of facts, the parties stipulated to the following and that as contained in Employer/Insurer's Exhibit 2:

STIPULATION OF FACTS

1. Daniel Small sustained a compensable, work-related injury while working in Texas for the Employer on September 12, 1995.
2. Daniel Small pursued a workers' compensation claim in the State of Texas in connection with his September 12, 1995 work accident.
3. Mr. Small's average weekly wage would be \$735.42, which would yield compensation rates of \$490.28 for temporary total disability and \$257.29 for permanent partial disability.
4. The Employer / Insurance Carrier have paid \$268,436.96 in medical expenses and \$97,380.71 in indemnity benefits.
5. The Employer / Insurance Carrier paid \$33,934.25 in temporary total disability benefits in connection with the Texas workers' compensation claim. Those benefits were paid from September 15, 1995, through April 21, 1997, at a weekly rate of \$392.00. The Employer / Insurance Carrier made two additional TTD payments between April 21, 1997, and November 24, 1997, at the rate of \$307.12.
6. Daniel Small was temporarily and totally disabled from September 13, 1995, through April 21, 1997.
7. The Employer / Insurance Carrier paid \$63,446.46 in permanent partial disability benefits in connection with the Texas workers compensation claim. Those benefits were paid at three different compensation rates: \$327.69, \$285.51, and \$285.57.

8. The Employer / Insurance Carrier have not paid any indemnity benefits to Mr. Small in connection with his 1995 injury since August 3, 2000.
9. No payments of any kind were paid by the Employer / Insurance Carrier in connection with Mr. Small's claim from October 31, 2003, through August 7, 2006.
10. Employer / Insurance is responsible for future medical treatment reasonably necessary to cure and relieve the effects of the injury.

ISSUES

The issues to be resolved by this hearing are:

1. Whether there is Missouri jurisdiction due to contract of hire;
2. Whether a claimant's claim for Missouri compensation is timely;
3. Whether the employer was required to file a report of injury;
4. Whether the employer is liable to the employee for underpayment of temporary total disability from September 13, 1995 until April 21, 1997 at a rate of \$490.28 since claimant was paid at the Texas rate of \$392;
5. Whether claimant sustained any disability and, if so, the nature and extent of that disability;
and
6. Whether the employer is liable to the employee for disfigurement.

Claimant credibly testified he accepted a job offer during a phone conversation with Red Simpson, Inc., while he was in St. Ann, Missouri. The claimant then, after receiving and accepting the job offer in Missouri, began work in Texas on September 5, 1995.

Claimant sustained a serious electrocution injury while working as a journeyman lineman for Red Simpson in Beaumont, Texas. As a result of the injury, claimant's right arm was amputated at the forearm. He now receives future medical care pursuant to a compromise settlement made in Texas in 2000.

Shortly after his 1995 accident in Texas, claimant returned to Missouri. The employer and insurer provided medical treatment in Kansas and temporary total disability benefits pursuant to Texas law. No total temporary disability benefits or medical treatments were provided pursuant to the Missouri Workers' Compensation statute.

The parties stipulated that the last temporary total disability payment made pursuant to Texas law was on November 21, 1997. The parties also admitted the claimant and the employer

reached a compromise settlement of \$63,446.46 on August 3, 2000, and that the employer was responsible for future medical care reasonably necessary to cure and relieve the effects of the injury that occurred in 1995. The compromise settlement reached in 2000 was made pursuant to Texas law. Claimant at the time he settled his case in 2000 was represented by a Texas lawyer even though he lived in Missouri. All benefits were paid under Texas law and future medical care received since 2000 have been provided for in Kansas pursuant to the Texas contract entered between the employer and the claimant. The parties also stipulated that the employer / insurer have not paid any indemnity benefits since August 3, 2000.

Claimant filed a claim for compensation in Missouri on September 17, 2009. Claimant argues the future medical care provided in Kansas by the Texas agreement made in 2000 allows him to file a claim for compensation in Missouri nine years after reaching an agreement in Texas. Claimant argues he is not time barred because the employer and insurer are providing ongoing medical treatment or ongoing medical payment pursuant to the compromise settlement in 2000 and that those benefits should be considered benefits being paid under the Missouri Workers' Compensation Act even though the benefits are being paid under Texas law. Claimant believes his claim for compensation filed on September 17, 2009, is timely because the employer/insurer failed to file a report of injury and that no more than three years have ever passed between future medical care provided in Kansas and payment made by the Texas employer to those Kansas providers.

The applicable section to this case, §287.430 R.S.Mo. states:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a conservator shall be deemed the termination of the legal disability from minority or disability as defined in chapter 475. The statute of limitations contained in this section is one of extinction and not of repose.

The claimant argues his claim is timely filed in Missouri nine years after he reached a compromise settlement in Texas because the employer / insurer are providing medical benefits pursuant to an injury and that those payments constitute as paid under this chapter. In the Missouri

Workers' Compensation case of in Brown v. Ozark Christian Schools of Neosho, 847 S.W.2d 888 (Mo. App. 1993), a widow filed a claim against the employer after her husband died in an accident on September 13, 1985. The sole issue of this case was whether the claim was barred pursuant to §287.430, R.S.Mo. 1983. The employee's wife filed a workers' compensation claim on July 25, 1990, arguing that the employer made direct payments to the funeral home on January 20, 1989, on May 11, 1989, and on January 4, 1990. In this case the payments made were more than three years after Brown's death. The Court found that the employer, regardless of his intention, was required to pay the reasonable expense of employee's burial, not exceeding \$2,000 under Missouri Workers' Compensation law, therefore, when the employer made that payment, it was deemed made under this chapter. The court decided the claim was timely.

However, in this matter, no payments have been made in the State of Missouri or pursuant to §287. All payments made were pursuant to Texas law, all medical treatment has been provided for in the State of Kansas. While there is Missouri jurisdiction, claimant had an opportunity to file this claim in Missouri before reaching the compromise settlement on August 3, 2000. Any payments for future medical treatment are pursuant to a compromise settlement or a contract made in the State of Texas and, therefore, I find claimant's claim for compensation in the State of Missouri time barred.

The case in Brown v. Ozark Christian Schools of Neosho is distinguishable since the payments made to the funeral home were made by a Missouri employer to a Missouri funeral home. Therefore, clearly those payments were made pursuant to, despite whatever the intention of the employer, under Missouri Workers' Compensation law. However, in this matter and with these particular set of facts, all payments were pursuant to the Texas compromise settlement to providers in Kansas, not Missouri.

Assuming arguendo the employer had to file a report of injury in Missouri, claimant had the opportunity to file a claim in Missouri either three years after the 1995 injury or the last payment made under this chapter. I find the last payment made pursuant to ANY Workers' Compensation statute was on August 3, 2000, when permanent partial disability benefits were paid. After August 3, 2000, the benefits being provided were pursuant to the Texas compromise settlement and claimant filed an untimely claim by filing his claim for compensation nine years after reaching a compromise settlement in Texas.

Since I find the claim for compensation time barred, all other issues are moot.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation