STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
Tampa District

EMPLOYEE:
Jimmy Harrison
P.O. Box 1855
Plant City, FL 33564

EMPLOYER:
Coronet Industries, Inc.
Post Office Box 760
Plant City, FL 33564

CARRIER:
United States Fire Insurance Company
P.O. Box 958426
Lake Mary, FL 32795

ATTORNEY FOR EMPLOYEE:
Scott Eldridge, Esquire
Smith, Feddeler, Smith & Miles
832 S. Florida Ave.
Lakeland, FL 33801

ATTORNEY FOR EMPLOYER/CARRIER:
William H. Rogner, Esquire
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OJCC CASE NO.: 05-030636DEJ
D/A: 3/10/2004

COMPENSATION ORDER

AFTER PROPER NOTICE to all parties a hearing was held on July 3, 2008 before the undersigned Judge of Compensation Claims. The claimant was represented by Scott Eldridge, Esquire. The employer/carrier was represented by William H. Rogner, Esquire. The claimant was the only live witness. All other witnesses testified by deposition. At the conclusion of the merits hearing the undersigned issued a verbal ruling and asked the attorney for the employer/carrier to draft an appropriate order.

THE CLAIMANT AND THE EMPLOYER/CARRIER STIPULATED TO THE FOLLOWING:

1. The venue of the claim was in Hillsborough County.
2. Mediation was held on April 17, 2008.
3. There was an employer/employee relationship on the date of accident.

4. Workers' compensation coverage was in effect on the date of the accident. The period of insurance coverage for U.S. Fire Insurance Company was from October 1, 2002 through March 10, 2004.

5. The parties received timely notice of the final hearing.

6. The Judge of Compensation Claims had jurisdiction over the subject matter and the parties.

THE BENEFITS CLAIMED WERE:

1. Compensability of the claimant's neck injury.

2. Compensability of the claimant's pulmonary condition.

3. Authorization of past treatment for those conditions.

4. Authorization of future treatment for those conditions.

5. Costs and attorney's fees.

THE DEFENSES OF THE EMPLOYER/CARRIER WERE AS FOLLOWS:

1. There was no compensable accident in the course and scope of employment.

2. There was no injury in the course and scope of employment.

3. The claimant did not provide timely notice of his injuries.

4. The statute of limitations barred the claim.

5. There were not costs or fees due at the expense of the employer/carrier.

6. The employer/carrier sought an award of costs as a prevailing party.

THE FOLLOWING EXHIBITS WERE ADMITTED INTO EVIDENCE:

1. The pre-trial stipulation (joint exhibit #1).

2. The transcript of the hearing held on January 28, 2007 (joint exhibit #2).

3. The transcript of the claimant's deposition taken July 18, 2003 (joint exhibit #3).

4. The report from Dr. Keith J. Simon, M.D. dated June 19, 2007.

5. The deposition of Dr. Robert Henderson taken February 27, 2007 (employer/carrier exhibit #1).

6. The deposition of Dr. Mark Weinstein taken May 22, 2008 (employer/carrier exhibit #2).

7. The deposition of Dr. Ralph Rydell taken April 3, 2007 (employer/carrier exhibit #3).

8. The response to the Petition for Benefits dated February 27, 2008 (employer/carrier exhibit #4).

9. The deposition of Dr. Craig R. Wolff taken February 13, 2007 (employer/carrier exhibit #5).

THE FOLLOWING EXHIBITS WERE PROFFERED BY THE CLAIMANT, BUT NOT ADMITTED INTO EVIDENCE:

1. The deposition of Dr. Leonard Cosmo taken June 29, 2005 with exhibits.

2. The deposition of Dr. Allan Goldman taken January 3, 2008 with exhibits.

3. A composite of records maintained by the claimant relating to his alleged exposures at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

I have carefully considered all of the evidence submitted to me for consideration in making my findings of fact and conclusions of law. I have resolved the conflicts in the evidence and I have rejected all evidence and inferences that may be inconsistent with my findings of fact and conclusions of law. Although I have not painstakingly summarized all of the evidence offered I have reviewed and considered all of the evidence in reaching my ultimate conclusions. Of note for purposes of this order is that the carrier is U.S. Fire Insurance Company which is serviced by Crum & Forster. The carrier will be referred to as U.S. Fire.

I. The Evidentiary Rulings:

1. The claimant attempted to offer into evidence the depositions of Drs. Cosmo and Goldman. Dr. Cosmo was an IME physician and Dr. Goldman was an EMA physician, but in another case involving the same employer with a different date of accident and carrier. The instant employer/carrier objected to the admissibility of these two depositions.

2. The employer/carrier pointed out that the depositions were taken in a separate case and not the case relating to the March 10, 2004 date of accident. Moreover, U.S. Fire was not noticed and did not participate in these depositions. While Coronet Industries, Inc. was represented at the depositions, that representation was in connection with a different carrier and a different date of accident.

3. I find that the depositions are not admissible against Coronet Industries, Inc. and U.S. Fire for the March 10, 2004 date of accident. Neither physician was an authorized treating physician, an IME physician, or an EMA physician in this case. Moreover, Dr. Goldman though listed as the EMA in the pre-trial stipulation was objected to by the counsel for US Fire in that same form. In addition, Dr. Cosmo was listed as a witness and the employer/carrier objected to his testimony. No effort was made to designate or appoint either physician as an IME doctor following either the filing of the Petition in February or the pre-trial stipulation in April. Finally, I reject the claimant's argument that the employer/carrier's arguments in the trial memorandum somehow waived their objections to the admissibility of these two depositions. I accept the employer/carrier's attorney's argument with regard to why arguments needed to be made in the trial memorandum.

4. I also sustained the employer/carrier's objections to a composite of records maintained by the claimant which purported to document his exposure to various chemicals and substances. The documents were not listed on the pretrial. They were hearsay documents not subject to any exception to the hearsay rule.

II. The Rulings on the Procedural Motions:

1. Just days prior to the merits hearing the claimant sought a continuance. That request was denied by this Court. The claimant renewed the request for a continuance at the commencement of the merits hearing. That request was denied for the following reasons.

2. The primary stated purpose of the continuance was to allow the claimant to depose Dr. Simon in order to admit Dr. Simon's opinions into evidence. At the merits hearing the attorney for the employer/carrier waived all objections to the admissibility of Dr. Simon's report (which was otherwise inadmissable) and Dr. Simon's report was admitted into evidence. The fact that the claimant "might" be able to solicit additional information from Dr. Simon overcomes neither the statutory deadlines nor prejudice to the employer/carrier.

3. This case has been in existence since 2005. In January 2007 the parties appeared before me to try the case. The employer/carrier prepared for and attended the hearing on that day. Claimant's counsel took a dismissal of the Petitions. A Petition was filed thereafter and the employer/carrier once again prepared for and attended the merits hearing on the same issues. I find that further delay would prejudice the rights of the employer/carrier.

4. I find that the need for continuance was not beyond the control of the claimant and his attorney. Dr. Simon performed his independent medical examination in June, 2007. The claimant had one year to depose Dr. Simon and chose not to do so. The most recent of many Petitions was filed in February 2008. The pre-trial was held in April 2008. There were numerous opportunities to depose Dr. Simon. Failure to take his deposition was not beyond the claimant's control.

5. The claimant also moved for a post hearing deposition of Dr. Simon. That request was also denied for reasons outlined in the discussion above addressing the claimant's request for a continuance. Moreover, the employer/carrier waived its objections to the untimely filing of Dr. Simon's report and the report was admitted into evidence. There is no prejudice as a result of the claimant's failure or alleged

inability to depose Dr. Simon. Again, it could have been done at any point between June 2007 and the July 3, 2008 hearing.

6. Finally, the claimant sought a continuance because he did not receive notice of the July 3, 2008 hearing by mail. I find that the claimant had actual notice of the hearing since it was jointly coordinated between my office and the office of both attorneys. The claimant and his attorney actually attended the hearing so any alleged lack of written notice was not harmful.

III. The Pulmonary Claim:

1. For the reasons below I deny and dismiss with prejudice all Petitions and claims for cardio-pulmonary injuries during U.S. Fire's period of coverage. I deny any and all such claims under any theory, including a specific accident, repetitive trauma, exposure, or occupational disease.

2. I find that the claimant failed to meet his burden of proof to establish that any cardio-pulmonary condition was compensable. There is no medical evidence establishing, within a reasonable degree of medical certainty, that the major contributing cause of any alleged condition was exposure to any chemical or substance between October 1, 2002 and March 10, 2004.

3. The claimant alleges that he has plural plaquing in his lungs as a result of exposure to asbestos. Even if true, I would find that the claimant's asbestos exposure pre-dated the period of US Fire's coverage, October 1, 2002. I accept as true the claimant's assertions that he was exposed to asbestos while employed with Coronet Industries. I accept as true that the claimant's supervisors advised him and other employees of the exposure. I accept as true the claimant's testimony that he saw the asbestos on the job site. Finally, I accept the claimant's testimony that all asbestos in the claimant's work place was removed on or before February 1, 2002. Since the asbestos removal occurred prior to U.S. Fire's period of coverage, the claimant's last injurious exposure occurred on or before February 1, 2002.

IV. The Neck Injury Claim:

1. For the reasons below I deny and dismiss with prejudice all Petitions and claims for compensability of an alleged neck injury occurring during U.S. Fire's period of coverage. I deny the claim regardless of the theory of compensability, including a specific accident, exposure, or repetitive trauma.

2. I find that the claimant failed to meet his burden of proof to establish an injury suffered in the course and scope of his employment on or about March 10, 2004. I find that the claimant failed to establish, within a reasonable degree of medical certainty, that his employment was the major contributing cause of his neck condition.

3. The claimant offered the IME report from Dr. Keith Simon. Dr. Simon's impression was as follows:

> "1. The patient has chronic cervical pain, which he has tolerated to some extent over his years at work, where he had to be in very confining positions. This includes an injury to his head, which involved suturing as well as visit (sic) to his primary care doctor concerning his neck. It has now progressed to the point that it interferes with his ability to rehabilitate.
>
> 2. The above appears to be related to his employment with chronic progressive cervical spondylosis."

4. I find that the opinions of Dr. Simon are not competent, substantial evidence of a compensable injury occurring on or about March 10, 2004. My interpretation of Dr. Simon's report is that Dr. Simon opined that the claimant has chronic pain related to his employment activities, but that he also has chronic progressive cervical spondylosis, an unrelated condition. My conclusions with regard to Dr. Simon's opinions are consistent with the opinions of Dr. Weinstein, the other expert who testified in this case.

5. Moreover, Dr. Simon identified two specific factors relating to the claimant's work. He noted that the claimant had to "be in very confining positions." Based on the claimant's testimony, however, the claimant did not work in confining positions after 1997. That pre-dates U.S. Fire's period of coverage. Moreover, Dr. Simon mentioned an incident where the claimant suffered a blow to his head resulting in

suturing. That also occurred prior to U.S. Fire's period of coverage. Thus, I find that Dr. Simon's opinions do not support compensability or major contributing cause in this case.

6. I accept the opinion of Dr. Weinstein over that of Dr. Simon to the extent they conflict. Dr. Weinstein testified that the claimant has neck arthritis. The arthritis is due to the claimant's age and multi-factorial life history. Dr. Weinstein opined that the claimant's job activities were not the major contributing cause of his neck condition. I accept Dr. Weinstein's opinion and reject that of Dr. Simon to the extent it conflicts.

7. Finally, I note that the testimony of Drs. Wolff, Henderson, and Rydell support my conclusions. Dr. Wolff described at least a ten year history of longstanding neck pain. Dr. Henderson described a long, insidious onset of neck pain. He described arthritis in the claimant's neck. Dr. Rydell noted that the claimant had suffered from neck pain for many years. He also mentioned arthritis.

8. In light of my rulings addressing the claimant's failure to meet his burden of proof regarding compensability and major contributing cause I do not reach the employer/carrier's additional defenses of notice and statute of limitations.

WHEREFORE, it is ORDERED and ADJUDGED as follows:

1. All Petitions for benefits relating to a March 10, 2004 date of accident are DENIED and DISMISSED with prejudice.

2. The claimant did not suffer a compensable injury while in the employment of Coronet Industries between October 1, 2002 and March 10, 2004.

3. The claim for compensability of a cardio-pulmonary condition is DENIED and DISMISSED with prejudice.

4. The claim for compensability of a neck condition is DENIED and DISMISSED with prejudice.

5. The employer/carrier, as the prevailing party, is entitled to an award of taxable costs at the expense of the claimant. Jurisdiction is reserved on the amount.

DONE and ORDERED in Tampa, Florida, this 14 day of July, 2008.

Doris E. Jenkins
Honorable Doris E. Jenkins
Judge of Compensation Claims

THIS IS TO CERTIFY that the foregoing Order was entered on the 14 day of July, 2008, and that a copy thereof was sent by regular U.S. Mail to all parties noted previously at their last known address.

Candy McConchie
Candy McConchie
Executive Secretary