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VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

DARRYL T. SIVERLING, Claimant

Opinion by WILDER
Deputy Commissioner

v. VWC File No. 236-16-64

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, Employer
-Self-Insured-

W. Mark Broadwell, Esquire - VIA PRIORITY MAIL
FORBES & BROADWELL
for the Claimant.

Jonathan H. Walker, Esquire - VIA PRIORITY MAIL
MASON, MASON, WALKER & HEDRICK, PC
for the Defendant.

Hearing before Deputy Commissioner WILDER in Hampton, Virginia on
July 8, 2008.

PRESENT PROCEEDING

This case is before the Commission on the claimant's March 14, 2008 application, alleging an injury by accident to his back on November 26, 2007. The claimant is seeking an award of medical benefits and compensation for temporary total disability beginning November 27, 2007 through April 13, 2008, for temporary partial disability beginning April 14, 2008 through April 28, 2008, for temporary total disability beginning April 29, 2008 through May 11, 2008, for temporary partial disability beginning May 12, 2008 through May 19, 2008, for temporary total disability beginning May 20, 2008 through May 21,

2008, and for temporary partial disability beginning May 22, 2008 and continuing, based on an average weekly wage of \$1011.22.

STIPULATION

The parties stipulated that the claimant's average weekly wage is \$1011.22.

DEFENSES

The employer defends the claimant's application on the grounds that he did not suffer a compensable injury by accident, that he was not disabled as a result of any compensable accident that is found to have occurred, and that he failed to make reasonable efforts to market his residual work capacity.

PRE-HEARING AND POST-HEARING EVIDENCE

Counsel for the claimant and the employer submitted Designations of Medical Records at the hearing, and all medical records designated were received in evidence as provided by Rule 2.2(B)(4) of the Rules of the Commission. The record remained open until August 5, 2008 so that counsel for the claimant could submit an additional medical records from Dr. Richard McAdam and so that counsel for the employer could submit wage records. These items were received by August 5, 2008, and the record was closed at that time.

ISSUES

Did Siverling suffer a compensable injury by accident? If so, was he disabled as a result of this accident? Did Siverling make reasonable efforts to market his residual work capacity?

SUMMARY OF RELEVANT EVIDENCE

Darryl Siverling testified that he injured his back around 10:30 a.m. on November 26, 2007 while working as a nuclear refueler for the Newport News Shipbuilding & Dry Dock Company (the shipyard). Siverling recalled that as he removed material from a vessel, including stainless steel standpipe caps that weighed approximately 140 pounds and measured three-and-a-half feet in height, he moved a cap without assistance, and he felt a pain in his lower back. Siverling later stated that he moved several caps when he felt the pain in his back. Siverling acknowledged that he moved several of these caps on the morning of November 26, 2007.

Siverling stated that after this incident, he developed a significant increase in his back pain after taking a lunch break. Siverling testified that he then reported his injury to his supervisor and received treatment from the shipyard's clinic. Siverling agreed that he signed a "Report of Occupational Injury (Illness)" at the clinic that described his injury and agreed with the accuracy of this description. Siverling acknowledged that he also signed an "Accident Questionnaire" on December 3, 2007 but disagreed with the description of the development of his back problems, contending that he experienced pain in his back at the time he moved the standpipe caps. Siverling agreed that in his hearing testimony that he stated that he may have moved from four to seven caps while in the "Accident Questionnaire" he indicated that he moved four of these caps two separate times.

Charles Lassiter, a claims facilitator for the shipyard, noted that he prepared this "Accident Questionnaire" based on a personal interview with

Siverling. Lassiter averred that before Siverling signed this document, he read to Siverling the information he had recorded and confirmed its accuracy. Lassiter acknowledged that he reviewed a "Medical Progress Record" of November 26, 2007 that indicated that "while lifting heavy materials today [Siverling] felt tightness in lower back pain radiates to left thigh."

Siverling first sought medical attention outside the shipyard's clinic on December 8, 2007 from Dr. Richard McAdam, a neurosurgeon. Dr. McAdam recorded the following history:

Mr. Siverling is a 39-year-old man with a two-week history of back pain and intermittent numbness on the inside of the left leg, which usually occurs after being on his feet for a long time. The patient states that on 11/26/07, the day of the onset of his symptoms, he had been lifting things at work all day; by lunch time he had developed back pain. He then developed left leg pain in the thigh and calf, and almost down to the foot.

Siverling acknowledged the accuracy of the history Dr. McAdam recorded. Dr. McAdam diagnosed Siverling as suffering from degenerative disc disease with a herniated lumbar disc at the L5-S1 level and performed a lumbar epidural steroid injection.

When this injection provided Siverling with no relief by January 11, 2008, Dr. McAdam recommended that he undergo a lumbar discectomy at the L5-S1 level. Dr. McAdam performed this procedure on February 15, 2008. After performing this surgery, Dr. McAdam directed Siverling to enter a course of physical therapy and initially directed him to remain off work.

Siverling stated that he did not work from November 26, 2007 through April 2008 and then returned to work at the shipyard on selective employment.

On June 2, 2008, Dr. McAdam "recommended that his restrictions be continued for six more weeks; he may return to his regular work after then." Nevertheless, on July 25, 2008, Dr. McAdam issued a disability slip stating that Siverling "is able to continue working, with the following restriction, for 90 days: -- no lifting more than 40 lbs." Siverling testified that before his November 26, 2007 injury, he worked some overtime hours at the shipyard but has worked only two hours of overtime since his return to work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Siverling did not prove that he suffered a compensable injury by accident. Siverling contended that he injured his back while moving a standpipe cap. It is noted that neither the November 26, 2007 "Employer's First Report of Injury (Illness)" or the November 26, 2007 note from the employer's clinic contradicts Siverling's testimony. On the other hand, the information contained in the "Accident Questionnaire" that Lassiter prepared and that Siverling signed on December 3, 2007 as well as the history recorded in Dr. McAdam's December 8, 2007 office note indicate that he suffered his back injury as a result of cumulative trauma rather than through a specific incident as required by Morris v. Morris, 238 Va. 578, 585, 385 S.E.2d 858, 865 (1989). Siverling did not testify with sufficient credibility to overcome this evidence and establish that he was injured in the manner alleged in his hearing testimony.

Therefore, Siverling's March 14, 2008 claim is denied. This case is ordered removed from the hearing docket.

REVIEW

You may appeal this decision by filing a request for review with the Commission within 20 days of receipt of this Opinion.

cc: Darryl T. Siverling
Newport News Shipbuilding & Dry Dock Co.
Newport News Shipbuilding & Dry Dock Co.