VIRGINIA: 03/17/95
IN THE WORKERS' COMPENSATION COMMISSION

PORFIRIO R. BARNES, SR., Claimant

Opinion by TARR
Chairman

v. VWC File No. 166-10-43

EARL INDUSTRIES, INC., Employer
LEGION INSURANCE COMPANY, Insurer

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for the claimant

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for the defendants

REVIEW on the record before Chairman Tarr, Commissioner Joyner and Commissioner Diamond at Richmond, Virginia.

The claimant requests review of the November 21, 1994 Opinion of the Deputy Commissioner finding that he did not give timely notice of his September 13, 1993 industrial accident. Upon consideration of the narrow issue presented and the record developed in this case, we find that oral argument requested by the claimant is not necessary and would not be helpful. Barnes v. Wise Fashions, 16 Va. App. 108, 428 S.E.2d 301 (1993).

The evidence in this case establishes that the claimant had been authorized to work overtime on the weekend of September 13, 1993, and he tried to gain entry to the employer's premises in the early morning that day through a side gate. However, the lock on the gate had recently been changed, and the claimant

could not enter. He tried to attract someone's attention by waving his hand, and cut himself on wire along the top of the

gate and fence. The Deputy Commissioner accepted the credible testimony of the claimant to establish this injury by accident, and that finding has not been appealed. However, the Deputy Commissioner denied the claim for benefits on the grounds that timely notice was not given pursuant to Va. Code Ann. 65.2-600, specifically noting that "Barnes did not testify to whom he gave notice at Earl." This finding is not supported by the record.

Va. Code Ann. 65.2-600 provides that an injured employee "shall immediately on the occurrence of an accident or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident." The employer argues on review that no written notice was given, but written notice is unnecessary if the employer has actual notice through a foreman or superior officer. Kane Plumbing v. Small, 7 Va. App. 132, 371 S.E.2d 828 (1988); quoting Dept. Game, Etc. v. Joyce, 147 Va. 89, 136 S.E. 651 (1927). The claimant testified that he immediately reported his injury to Ron Matusek, a vice president of the corporation, and that Matusek even transported the claimant to the Maryview Medical Center Emergency Room, where his wound was sutured with six stitches. His uncontradicted testimony establishes actual notice to the employer on the day of the accident. Moreover, actual notice was also proved through the testimony of supervisor John Campbell, who testified that he saw the claimant after he returned from the emergency room, and that the claimant explained that "he was trying to get somebody's

attention. Then he started waving his hand like this, and hit the constantina [sic] wire." This is the very incident and injury found to be compensable as an injury by accident, subject to the notice defense.

We next address the issue of disability, which the Deputy Commissioner did not reach. The evidence establishes that the claimant returned to work at lighter duty with the employer after his accident and was last employed by Earl Industries on September 19, 1993. There is no evidence that he was incapacitated from work as a result of his occupational injury. The medical records show that the claimant suffered a lacerated hand that was sutured on September 13, 1993. The sutures were to be removed approximately one week later. We cannot say from this record that the claimant was unable to return to his pre-injury work because of his industrial injury. Moreover, even if we were to presume some residual incapacity, it is clear from the record that the claimant was not totally disabled, and he presented no evidence that he made reasonable efforts to market his residual capacity after leaving Earl Industries. Therefore, disability compensation may not be awarded. National Linen Service v. McGuinn, 8 Va. App. 267, 380 S.E.2d 31 (1989).

Upon this record, we find that the claimant gave timely notice of his accident to the employer, and the November 21, 1994 Opinion denying the claim on this ground is therefore REVERSED. Because the claimant has not proved a compensable disability, he

shall be awarded medical benefits only.

AWARD

An Award is hereby entered in favor of Porfirio R. Barnes, Sr. against Earl Industries, Inc. and Legion Insurance Company for payment of medical care related to the occupational injury for as long as necessary.

$200.00 is awarded to Attorney David M. Tichanski for services rendered in this case, which amount shall be paid by and collected directly from the claimant.

This case is REMOVED from the Review Docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days.