

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

Injury No.: 04-142156

Employee: Jon E. Akins
Employer: Leonard's SNS, Inc.
Insurer: Missouri Restaurant Association
Administered by Alternative Risk Services
Date of Accident: August 1, 2004
Place and County of Accident: Springfield, Greene County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 13, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge David L. Zerrer, issued June 13, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 6th day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents:
Employer: Leonard's SNS, Inc.
Additional Party:
Insurer: Missouri Restaurant Association, administered by Alternative Risk Services
Hearing Date: April 4, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: DLZ

FINDINGS OF FACT AND RULINGS 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: August 1, 2004
5. State location where accident occurred or occupational disease was contracted: Springfield, Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant allegedly fell on face and head
12. Did accident or occupational disease cause death? No Date of death?
N/a
13. Part(s) of body injured by accident or occupational disease: Face, hands and body as a whole
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? \$16,924.00
18. Employee's average weekly wages: \$453.75
19. Weekly compensation rate: \$302.50
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

Unpaid medical expenses: -0-

-0- weeks of temporary total disability (or temporary partial disability)

-0- weeks of permanent partial disability from Employer

-0- weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning , for Claimant's lifetime

22. Second Injury Fund liability: Yes No Open

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential (N/a) payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: NONE

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jon E. Akins

Injury No: 04-142156

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Leonard's SNS, Inc.

Additional Party

Insurer: Missouri Restaurant Association, administered by Alternative Risk Services
Checked by: DLZ

On the 4th day of April, 2006, the parties appeared before the undersigned Administrative law Judge for a final hearing. The Claimant appeared in person and by attorney, Terry Tolbert. The Employer appeared by and through its

attorney, Greg Carter. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is not a party to this claim.

The parties have stipulated to certain facts which are not at issue in this claim as follows, to wit: On or about the 1st day of August, 2004, Leonard's SNS, Inc., was an employer operating subject to the Missouri Workers' Compensation Law; the Employer's liability was fully insured by Missouri Restaurant Association, administered by Alternative Risk Services; on the alleged injury date of August 1, 2004, Jon Akins was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the employment occurred in Greene County, Missouri, and Greene County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$453.75, sufficient to allow a compensation rate of \$302.50 for temporary total disability and permanent partial disability; no temporary disability benefits have been paid prior to the date of this hearing; no medical benefits have been paid prior to the date of this hearing; the Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award. Claimant seeks reimbursement of \$16,924.00 in medical expenses for medical care not authorized by Employer.

ISSUES

Whether the Claimant sustained an accident.

Whether the accident arose out of the course of and scope of employment .

Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

Whether the Employer is obligated to pay for past medical expenses.

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

Any temporary total benefits owed to the Claimant.

The nature and extent of any permanent disabilities.

DISCUSSION

Jon Akins, claimant herein, testified on his own behalf. Claimant testified that he worked at the Employer's business as the 3rd shift manager and was so working on August 1, 2004, when the alleged injury occurred. Claimant testified that his duties as shift manager during the 3rd shift (from late night to early morning in this 24-hour restaurant) included being in charge of the kitchen and that after 2:00 a.m. Claimant was the only employee working in the kitchen cooking and preparing meals, etc.

Claimant testified that between 2:30 and 3:00 a.m., he exited the rear of the restaurant to smoke a cigarette. While

outside Claimant noticed two trash bags that needed to be carried to a dumpster which was located approximately 80 feet from the back of the restaurant. Claimant testified that he was in the process of carrying these two bags of trash to the dumpster when he noticed a vehicle pull into the ordering area of the drive-up lane. Claimant stated that he put the bags of trash down outside the dumpster station because he knew he would have to cook an order occasioned by the vehicle in the drive up lane. Claimant testified that he started to walk across the parking lot from the area of the dumpster towards the restaurant. Claimant testified that he does not know what happened but when he woke up he was lying on the ground and there was some blood near his head and a tooth lying next to him. Claimant testified that he does not remember tripping or stumbling. Claimant testified that the last thing he remembers is the vehicle pulling into the drive-up lane at the restaurant.

Claimant testified that he went inside the restaurant and the other employee called the 2nd shift manager to report the occurrence in the parking lot. Claimant testified that the 2nd shift manager told Claimant to go to the hospital.

Claimant testified that he went to the hospital where he was treated for a laceration on his chin. X-rays were taken on August 2, and a metal plate was surgically implanted into Claimant's jaw with screws to treat a diagnosed mandible fracture. Claimant further testified that he is missing one tooth as a result of the injury and that the top of Claimant's hands were scraped as well as the right side of Claimant's face.

Claimant testified that he told the 2nd shift manager that he did not know what happened but that he must have fallen or blacked out. Claimant further testified that the parking lot where Claimant's injury occurred did not have any curbing, no holes and no obstructions. Claimant testified that he does not know of anyone who saw him fall.

Claimant testified that he was hospitalized for three days after the incident and that after he was released from the hospital, Claimant met with the general manager of the Employer and that Claimant told the general manager he did not know what happened and that he must have blacked out. Claimant testified at the hearing that he does not know what happened to cause his injury and that he did not think he was attacked. Claimant testified that he returned to work with his jaw wired shut on Thursday after the incident on Sunday, a period of four days that Claimant was off work.

On cross-examination Claimant admitted that the parking lot in the area between the restaurant and the dumpster was smooth. Claimant further admitted that he had scrapes on the back of his hand and that he did not know if his hand or his head hit the ground first. Claimant further admitted that he was not missing any money when he regained consciousness and that he was still wearing his head set used for taking orders from the take out lane.

Claimant admitted that he wrote the statement set out in Employer's Exhibit 1 and that the statement states that Claimant "blacked out" and when Claimant "came to", he was on the ground in a pool of blood.

Michelle Akins testified on behalf of Claimant. Michelle Akins testified that she is the spouse of Claimant. Mrs. Akins testified that she traveled to the hospital emergency room after receiving a telephone call that Claimant had been injured. Mrs. Akins testified that when she first saw Claimant, his head was wrapped in bandages, there was blood on his chin, and the right side of his face was swollen. Mrs. Akins testified that Claimant had surgery on his jaw and that part of the result of the surgery was that Claimant's jaw was wired shut.

Mrs. Akins testified that currently Claimant has some trouble eating and chewing his food, partially because Claimant's mouth will not stay closed when he eats food. She further testified that when it is cold, Claimant complains of pain in his jaw. Mrs. Akins testified that to her knowledge, Claimant did not have anyone who would hurt him purposely.

FINDINGS OF FACT AND RULINGS OF LAW

Whether the Claimant sustained an accident/occupational disease.

Whether the accident/occupational disease arose out of the course of and scope of employment.

Claimant testified that he remembers walking toward the restaurant building from the area of the refuse dumpster. The evidence established that the distance from the building to the dumpster was about 80 feet. Claimant urges that Claimant is entitled to benefits because the act of taking trash to the dumpster and the act of returning to the restaurant to wait on customers serves the benefit of the Employer. Although there is substantial and competent evidence to establish that Claimant was acting in the course of his employment at the time of the injury, I find that there is insufficient substantial and competent evidence to establish Claimant's injury occurred within the scope of his employment. There were no witnesses to whatever occurred to injure the Claimant. The Claimant testified at the hearing that he remembers walking across the parking lot, that the parking lot was smooth and dry, and that when he regained consciousness, he was lying on the parking lot surface. Claimant cannot say what happened to cause him to get from a position of walking on the parking lot to a position of lying on the parking lot. There is no evidence to show that Claimant was assaulted. There is no direct evidence to show that Claimant tripped and fell. There is no medical evidence that supports the serious nature of the injury with a trip and fall with nothing more. Claimant has the burden of proof to a reasonable belief that his injury was caused by something that occurred within the scope of, as well as within the course of, employment. The test is two pronged, and each test is independent of the other. After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant has failed to sustain his burden that an accident occurred within the scope of Claimant's employment. I find this issue in favor of Employer.

Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

Whether the Employer is obligated to pay for past medical expenses.

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

Any temporary total benefits owed to Claimant.

The nature and extent of any permanent disabilities.

Based on the findings and rulings set out above wherein I find that Claimant is not entitled to benefits because Claimant failed to prove that an injury occurred within the scope of his employment, the remaining issues are moot. I find these issues in favor of the Employer.

No benefits are awarded to the Claimant.

Date: June 13, 2006

Made by: /s/ David L. Zerrer
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secest
Patricia "Pat" Secest
Director
Division of Workers' Compensation