

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

Injury No.: 10-030832

Employee: Arsenio Arciga

Employer: AT&T

Insurer: Sedgwick Claims Management Services

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 30, 2010, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued November 30, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Arsenio Arciga

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Employee's claim for compensation in this matter stems from injuries employee sustained while working for employer on February 23, 2010. The administrative law judge denied compensation on a finding that she could not credit employee's version of the accident because there was contradictory evidence. I disagree with this characterization of the evidence.

Employee testified as follows. Employee worked for employer for approximately ten years as a systems tech repairing telecommunication lines. Employee's work involved climbing telephone poles, climbing down into manholes, and carrying ladders and equipment. On February 23, 2010, employee's boss instructed him to go help a coworker, Shane Curphey, whose truck was stuck in mud. When employee arrived, he first went around the truck and lifted and pushed to see if he could get the truck loose while Mr. Curphey gunned the truck's engine. Employee felt a popping or grinding in his shoulders while performing this motion. The two men then tried to tow the truck out of the mud using employee's vehicle. When all of these efforts failed, it was necessary to call a professional towing service. Employee initially believed his shoulders were just sore from the incident, but their condition continued to deteriorate. On or about March 12, 2010, employee told his boss, Matthew Perry, that he had injured his shoulders on February 23, 2010, when he was trying to get Mr. Curphey's truck out of the mud. Mr. Perry recommended employee see a chiropractor but did not file any paperwork or treat the conversation as employee's reporting a work injury. Employee went to the chiropractor, who diagnosed a rotator cuff tear and recommended employee see an orthopedic surgeon. Employee reported this recommendation to Mr. Perry, who sent employee to Concentra, where the doctors took him off work. Employer then denied any liability for employee's shoulder injuries, preventing him from receiving the medical treatment he needs to go back to work. Employee has been unable to work since April 30, 2010.

Employer presented Shane Curphey, who corroborated employee's testimony about employee coming out to help him get his truck out of the mud on February 23, 2010. Mr. Curphey did not recall employee getting behind his truck to try to push the truck out of the mud. Mr. Curphey expressed his opinion that it would have been "silly" for someone to do that because the truck was "impossibly stuck." Importantly though, Mr. Curphey did not affirmatively testify that employee never got behind his truck to try to push him out, but merely that he did not specifically remember employee being behind his truck. Mr. Curphey acknowledged he might not remember every detail of the incident.

Employer also presented Matthew Perry, who corroborated employee's testimony about discussing his shoulder condition on March 11 or 12, 2010. Mr. Perry denied that employee told him about the February 23, 2010, event that day or even that his shoulder had been injured on the job, but Mr. Perry admitted that employee told him certain

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aspects of his job were aggravating his shoulders. Mr. Perry testified that after employee saw the chiropractor, he called Mr. Perry to ask whether he could receive treatment for his shoulder under workers' compensation. According to Mr. Perry, employee stated that he didn't know what job incident caused the shoulder injury but wanted to just "charge it to any job accident." Mr. Perry testified that employee then told him a couple of days later, for the first time, that he was injured on February 23, 2010, when he was helping Mr. Curphey. Mr. Perry testified that he did not believe employee. Clearly, Mr. Perry made up his own mind that employee was lying about the incident on February 23, 2010, and this belief informs his testimony. It should be noted that Mr. Perry made up his mind about whether employee was being truthful before he had even performed any investigation into the matter.

In resolving the issue whether employee sustained an accident on February 23, 2010, the administrative law judge found: "Curphey testified that while [employee] did respond to help with the stuck truck, he did not push or attempt to lift the vehicle from behind." This finding is not supported by the record. As I noted above, Mr. Curphey did not specifically contradict employee's testimony that he tried pushing the truck, but rather stated that he did not *recall* that. Mr. Curphey also admitted that he may not remember everything about the incident. The administrative law judge has found a contradiction where there is none, perhaps because of Mr. Perry's unfounded suggestion that employee manufactured the February 23, 2010, event in order to commit workers' compensation fraud. As I noted, Mr. Perry decided early on that employee was lying about the accident, even though he wasn't there on February 23, 2010, and even though he could identify no real basis for disbelieving employee apart from his own suspicions.

I find employee's testimony credible. It seems likely and logical to me that employee would initially try pushing the vehicle out of the mud. It is consistent with normal experience that when a vehicle is stuck and help arrives, a common first step is to determine whether the vehicle can be freed by having one person push and another run the engine. Even if the attempt to push the vehicle only lasted a moment before it was abandoned as futile, it only takes a moment for a work accident to occur, and I find it unlikely that Mr. Curphey and employee would leap directly to trying to tow the truck out of the mud without first determining whether the problem might be solved by a more basic manual effort. I find that employee tried to lift and push the truck on February 23, 2010, and that he felt a popping or grinding in his shoulders at that time. I conclude that employee met his burden of establishing he sustained an accident on February 23, 2010, and that his resulting injuries arose out of and in the course of his employment.

Employee also met his burden on the issue of notice. Section 287.420 RSMo provides, in pertinent part, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

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The purpose of the foregoing section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003). By operation of the foregoing section, employee was required to provide written notice to the employer within 30 days of the accident, or show that the employer was not prejudiced by failure to provide such notice.

Employee did not provide a written notice to employer that met each of the criteria under the statute. See *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 830 (Mo. App. 2009). Thus, the question is whether employee demonstrated that employer was not prejudiced by his failure to provide statutory notice. "The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. ... If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer." *Soos*, 19 S.W.3d at 686 (citations omitted). Employee told Mr. Perry about the February 23, 2010, accident on March 11 or 12, 2010. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994). Because employee provided actual notice of his shoulder injuries to Mr. Perry on March 11 or 12, 2010, I conclude that employer had actual knowledge of employee's work injury. Accordingly, the burden shifts to employer to demonstrate it was prejudiced by employee's failure to provide statutory notice.

I find no evidence to suggest that employer was prejudiced by employee's failure to provide notice in a particular form. Mr. Perry was aware of employee's shoulder problems only sixteen or seventeen days after the accident, and employee kept him informed of his condition as he sought initial treatment from the chiropractor. As a result of this clear and ongoing communication between employee and Mr. Perry, employer had employee examined by its treating doctors at Concentra as early as April 30, 2010. Employer was thereby able to minimize the impact of employee's injuries and to have him evaluated by its physicians. Accordingly, I conclude that employer was not prejudiced by employee's failure to provide written notice, and employee's claim is not barred by § 287.420.

Employee proved he is entitled to temporary total disability benefits from employer beginning April 30, 2010.

Temporary total disability benefits are intended to cover the claimant's healing period. Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress.

Birdsong v. Waste Management, 147 S.W.3d 132, 140 (Mo. App. 2004) (citations and quotations omitted).

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The evidence reveals that employee has not yet reached the point of maximum medical improvement. To the contrary, the record reveals that the treating physicians recommend more treatment for employee. Meanwhile, the doctors at Concentra have restricted employee to no lifting, no pushing or pulling, no reaching above the shoulders, and limited use of the right arm. Employee testified that he hasn't worked for employer or anyone else since April 30, 2010. This evidence is sufficient to support an award of temporary total disability benefits from April 30, 2010 to the present.

Finally, employee proved he is in need of additional medical treatment. Section 287.140.1 RSMo provides, in pertinent part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Employee provided the report of Dr. Parmar, who opined employee has a work-related injury to his right shoulder. Dr. Parmar recommends an MRI be obtained of employee's shoulder and that employee undergo physical therapy. Dr. Parmar's opinion and recommendations are uncontested by any other physician on record. I conclude employee is in need of additional medical treatment for which employer is liable under § 287.140.1 RSMo.

I would reverse the award of the administrative law judge and enter a temporary award granting the temporary total disability benefits and the additional medical care to which employee is entitled.

Because the majority has determined otherwise, I respectfully dissent from the decision of the Commission.

Curtis E. Chick, Jr., Member

FINAL AWARD

Employee: Arsenio Arciga

Injury No: 10-030832

Dependents: N/A

Employer: AT&T

Additional Party: N/A

Insurer: Sedgwick Claims Management Services

Hearing Date: October 18, 2010

Checked by: PAM/cy

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: February 23, 2010
5. State location where accident occurred or occupational disease was contracted: Jackson 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? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No
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: Allegedly lifting and pushing a company truck which had become stuck in the mud.
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: Both shoulders

14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0
17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: N/A
21. Second Injury Fund liability: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Arsenio Arciga Injury No: 10-030832

Dependents: N/A

Employer: AT&T

Additional Party: N/A

Insurer: Sedgwick Claims Management Services

Hearing Date: October 18, 2010

Checked by: PAM/cy

On October 18, 2010, the parties appeared for a hardship hearing. The Employee, Arsenio Arciga, appeared in person and with counsel, Keith Mark. The Employer, AT&T, and Insurer, Sedgwick Claims Management Services, appeared through their attorney, Tom Clinkenbeard.

STIPULATIONS

The parties stipulated to the following:

- 1) That both the employer and employee were working subject to the Missouri Workers' Compensation Law;
- 2) That Arsenio Arciga was an employee of AT&T;
- 3) That a timely claim for compensation was filed and;
- 4) That no temporary total disability or medical benefits have been provided.

ISSUES

The issues to be resolved by this hearing are as follows:

- 1) Whether Arsenio Arciga sustained an accident or series of accidents arising out of and in the course of his employment with AT&T on February 23, 2010, continuing through April 30, 2010;
- 2) Whether Arsenio Arciga is in need of medical treatment and;
- 3) Whether AT&T received notice of Arciga's injury;
- 4) Whether Arsenio Arciga is entitled to temporary total disability from April 30, 2010 to date;
- 5) What is Arsenio Arciga's rate of compensation.

Arsenio Arciga, his supervisor, Matt Perry, and his co-worker, Shane Curphey testified at the hearing. In addition, narrative reports and/or treatment notes from Drs. Prem Parma, Santosh George, Concentra Medical Group, and the Bateman-Gatrost Chiropractic Clinic were received in evidence.

On February 23, 2010, Arsenio Arciga was contacted by his supervisor, Matt Perry, and instructed to travel to a nearby location where the company truck driven by a co-worker, Shane Curphey, had become stuck in the mud while servicing a construction site. The weather was described as a mixture of rain and snow. Upon arriving at Curphey's location, Arciga states that he positioned himself behind Curphey's truck where he attempted to lift and push the back of the truck while Curphey gunned the accelerator, all in an effort to move the truck forward. While engaged in this activity, Arciga described a sudden popping in both of his shoulders, worse on the right than the left. The two men were unable to move the vehicle, and a tow truck had to be called. Arciga states that he has been in varying degrees of shoulder discomfort ever since.

On March 13, Arciga first mentioned his injury to his supervisor, Perry, but did not seek to initiate workers' compensation reporting process at that time. Perry suggested he consult the Bateman-Gatrost Chiropractic Clinic. Arciga was told by the chiropractic clinic that he would need to see an orthopedic surgeon. In April Arciga again mentioned the February 23rd incident to Perry and inquired about workers' compensation benefits for the first time. A third conversation between the two men took place a day or two later.

Arciga described an incident in mid March when he attempted to push another private vehicle that was blocking his path. From March to April Arciga described increasing problems in association with carrying his equipment bag and the climbing of telephone poles and ladders.

Co-worker Shane Curphey testified that while Arciga did, in fact, come to his aid on February 23rd, he did not lift or push the truck. Curphey estimated that by the time Arciga arrived on the scene, his back tires were roughly six to eight inches deep in mud. He testified that any manual effort to remove the truck would have been so futile as to be "silly." Curphey connected a tow line to Arciga's vehicle only to have the line repeatedly snap when Arciga pulled forward. At that point, a tow truck was called and Arciga left the scene. Curphey also testified that had Arciga positioned himself behind his truck, he would have been completely coated with water and mud by the spinning tires. Curphey did not notice any mud on Arciga.

Supervisor Matt Perry testified that Arciga did mention shoulder discomfort to him on or about March 13, but he denies that any reference was made to the February 23rd incident or any other on-the-job injury. He states that Arciga merely mentioned he was experiencing discomfort in his right shoulder. Perry suggested that he consult with the Bateman-Gatrost Chiropractic Clinic where he had had a favorable experience the preceding year. He denied any further conversations with Arciga until on or about April 27, following Arciga's visit to the chiropractic clinic. Perry said Arciga approached him with concern about the suggestion for an orthopedic referral and whether workers' compensation might be available to cover it. According to Perry, Arciga said that he did not know how he hurt himself and suggested that one of his job duties simply be selected and listed as the cause of the problem. A third conversation between the two men took place later that week and, according to Perry, it was then that Arciga first came

forward to assert that he had been injured on February 23, 2010 while helping Curphey. At that point Perry initiated the workers' compensation process at AT&T but notified his superiors of his concern about the case.

A claimant has the burden of proving all essential elements of his claim. Thorsen vs. Sach's Electric Company, 52 S.W.3d 611 (W.D. Mo. 2001). In describing a sudden, unexpected onset of symptoms at a specific place and time on February 23, 2010, claimant predicates at least a part of his case upon the theory of "accident" as contemplated by §287.020.2 R.S.Mo. (2005). Proof of "accident" has been considered to be one of the essential elements that must be proven. Tangblade vs. Lear Corporation, 58 S.W.3d 662 (W.D. 2001). Likewise, medical causation is also considered an essential element of proof. Lawrence vs. Joplin R-VIII School District, 834 S.W.2d 789 (S.D. 1992).

Curphey testified that while Arciga did respond to help with the stuck truck, he did not push or attempt to lift the vehicle from behind. The chiropractic note from April 26, 2010 does not reference a lifting incident of February 23, 2010 but rather carrying equipment up and down ladders. The inconsistent testimony of Curphey and Arciga, coupled with the failure to mention the February 23, 2010 injury in Arciga's initial medical forms casts doubt on Arciga's version of events. Accordingly, I cannot find that Arciga sustained an accident on February 23, 2010. Arciga testified that but for the February 23rd event, the subsequent incidents would not have been injurious. Arciga's medical reports from Drs. Parmar and George both reference the February 23rd event as being the precipitating factor in the ongoing complaints and need for further diagnostic work-up. Although other work activities are mentioned, neither doctor has made a reference identifying them as "prevailing factors" in the current need for treatment nor is there any effort to isolate or apportion the contribution made between the February 23rd event and general repetitive use activities.

Accordingly, Arciga has failed to prove an essential element of his case and that the balance of the evidence does not sufficiently inform the Court so as to allow for recovery under some other theory of injury, exclusive of the February 23, 2010 occurrence. On that basis, compensation is denied. With the result described above, other issues submitted at trial do not need to be addressed separately.

Made by: _____

Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2010 by:

Naomi Pearson
Division of Workers' Compensation