

TEMPORARY AWARD ALLOWING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 05-119892

Employee: John Bennett  
Employer: Yellow Transportation, Inc.  
Insurer: Yellow Transportation, Inc.  
Administered by Gallagher Bassett Services  
Date of Accident: September 18, 2005  
Place and County of Accident: Kansas City, Jackson 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, read the briefs, heard oral argument 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 July 18, 2007, as supplemented herein.

We affirm the finding of the administrative law judge that employee notified employer of his injury; that he sustained an accident arising out of and in the course of his employment; and that employer is responsible for providing employee with additional medical care to cure or relieve the symptoms of employee's injury.

Section 287.420 RSMo (2006), states:

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.

If employee fails to provide employer with notice, it is employee's burden to show that the employer was not prejudiced by the failure to give timely notice. Employee met his burden as he was able to show that he reported his injury to employer on September 23, 2005. We find that employer was not prejudiced by employee's failure to give written notice within thirty days of the accident as employer had actual notice of the accident.

Based on the foregoing, the Commission concludes and determines that employee gave notice to employer by reporting the accident; that employee sustained an accident arising out of and in the course of his employment; and that employee is entitled to future medical benefits as may be determined necessary to cure and relieve employee's work-related condition.

The case is remanded to the Division of Workers' Compensation with the employer being responsible to provide workers' compensation benefits as appropriate pursuant to the provisions of the Workers' Compensation Act due to this compensable accident.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made.

Given at Jefferson City, State of Missouri, this 18<sup>th</sup> day of December 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**TEMPORARY AWARD**

Employee: John Bennett

Injury No. 05-119892

Dependents: N/A

Employer: Yellow Transportation, Inc.

Insurer: Yellow Transportation, Inc.,  
administered by Gallagher Bassett Services

Additional Party: N/A

Hearing Date: June 20, 2007

Checked by: ESF/lh

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 18, 2005
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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? 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: While in the course and

scope of his employment driver was removing items from his truck when his left foot slipped and fell backwards landing on his left shoulder.

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: left upper extremity.
14. Nature and extent of any permanent disability: Not determined at this time.
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: \$1,328.29.
19. Weekly compensation rate: \$696.97/\$365.08.
20. Method wages computation: By Stipulation.

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: Employee did not request any particular monetary compensation. The only benefits Employee requested at this time was the additional medical care to be provided by the employer. This employer shall provide Employee with any and all medical care which shall cure or relieve the symptoms due to the injury to Employee's left shoulder.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: Not determined at this time.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all benefits paid hereunto his attorney Mike Stang.

### **FINDINGS OF FACT and RULINGS OF LAW:**

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The Employee and Employer appeared for a temporary hearing. The Division had jurisdiction to hear this case pursuant to §287.110. Employee, John Bennett, appeared in person and was represented by Michael Stang. The employer and insurer appeared by and through their attorney, Robert Wonnell.

### STIPULATIONS

The parties stipulated to the following:

- 1) that on or about September 18, 2005, Yellow Transportation, Inc., was an employer operating subject to the Missouri workers' compensation law and its liability was fully insured by Yellow Transportation, Inc., administered by Gallagher Bassett Services;
- 2) that John Bennett was its employee who was working in Kansas City, Jackson County, Missouri at the time of the injury;
- 3) that Employee's claim was filed within the time allowed by law;
- 4) that Employee's average weekly wage was \$1,328.29 resulting in a compensation rate of \$696.97 for temporary total disability and \$365.08 for permanent partial disability compensation;
- 5) that Employer has paid no temporary total disability payments nor any medical payments to date.

### ISSUES

The issues the parties requested the Court to determine are:

- 1) whether the Employee sustained an accident or occupational disease arising out of and in the course of employment;
- 2) whether the Employee notified the Employer of his injuries as required by law;
- 3) whether the Employer must provide the Employee with additional medical care;

### FINDINGS AND RULINGS

The Claimant testified on his own behalf and the following exhibits were presented, all of which were admitted into evidence jointly without objection:

- A – Medical records, Volume I
- B – Medical records, Volume II
- C – Depositions of John Bennett, Dr. Michael Poppa and Dr. James Zarr

The Employer offered testimony of Pat Day, a dispatcher for Yellow Transportation; Alvin Schrepel, a line haul operations manager for Yellow Transportation; and Sam Mynatt, an injury coordinator and work compensation administrator for Yellow Transportation, Inc. Further the following exhibits were admitted into evidence without objection:

- 1 – Medical authorization form and Employee's statement of injury;
- 2 – Employee's notice of injury or reoccurrence and supervisor's report;
- 3 – Yellow Freight 9/2005 calendar
- 4 – Handwritten notes

After reviewing all of the above evidence and testimony, the Court makes the following findings. John Bennett, hereinafter referred to as Employee, is a 64-year-old male who was working for Yellow Transportation, Inc., at the time of his injury on September 18, 2005. The Employee testified that he was injured when he was

removing equipment from his truck when his foot slipped and he fell back landing on his left shoulder and elbow. He testified that when he fell he laid there for a moment and someone in the yard came and helped him get back up. He did not recall who it was; it was dark. He sat for a while to make sure he was all right. He finished getting the last few things out of the truck and then went on into the office. He had apparently cut or scraped his elbow causing it to be bloody so that when he filled out or signed the sign-in sheet apparently he got blood on it. He believed that the dispatcher who was on duty that evening was Pat Day. He filled out his paperwork for the dispatcher but did not mention his fall as he was not too concerned about it. He felt he would be able to shake it off and go on. He drove on home which was approximately two and three-quarter hours. The next day while he was home in Nebraska, he became concerned because of pain in his left side, his chest, his shoulder and his arm. Employee had previously had serious cardiac complications requiring surgery and was very concerned that he was having additional cardiac problems. He went to Community Memorial Hospital and was admitted for his complaints of pain in the left side. A full cardiac workup was done ruling out any cardiac complications. Upon discharge he did mention to his doctor that he felt that it was possible that his left-sided pain was due to the fall that he received a few days before.

In returning the next week to work he spoke with Alvin Schrepel his supervisor. Mr. Schrepel was confused because Employee was supposed to have gone in for surgery on his right shoulder that week but Employee explained to him that apparently the surgery was canceled as the Employer/Insurer wanted to have a second opinion regarding the surgery. At that time, Employee states he told Mr. Schrepel that he had also injured his left shoulder but Mr. Schrepel did not appear concerned and walked away without any further discussion. Employee was eventually seen for a second opinion by Dr. Michael Gross on October 24, 2005, who recommended rather than surgery he should have steroid injections on the right shoulder. Employee did finally undergo surgery for his right shoulder on December 22, 2005, which was performed by Dr. Reckmeyer. Prior to that time on November 21, 2005, Employee was seen by Dr. Reckmeyer for his right shoulder. At that time, Dr. Reckmeyer notes that "complicating the situation is a new injury to the left shoulder. He reportedly slipped and fell off the semi-tractor trailer on September 18<sup>th</sup> and injured his left arm and shoulder. He says he reported this to his boss but did not file a formal complaint/report of injury. Since that time he has had considerable difficulty and weakness and pain. The shoulder had a previous rotator cuff repair done in 1999. He had been functioning well without complaints of pain and weakness. Now he has difficulty reaching and lifting as well as pain at night with sleeping. He is here now to sort out this overall situation". Dr. Reckmeyer further stated, "Regarding his left shoulder, I believe he has a recent injury which is responsible for his current symptoms. He has all the signs and symptoms of a rotator cuff tear. Given this is a work-related injury, an MRI scan is appropriate to further evaluate this." This MRI scan was denied by the Employer. As stated before, Employee did undergo his right shoulder surgery and followed up with physical therapy at Lincoln Physical Therapy Associates. Throughout the physical therapy notes, there are numerous comments regarding problems performing certain therapy activities due to Employee's complaints of left shoulder pain.

Employee noted in his testimony that although he had surgery on his left shoulder for rotator cuff repair in 1999, he had no problems since and his shoulder had worked fine with no pain or loss of motion between 1999 and the date of his fall in September 2005. Today he feels that he is limited in lifting the arm and suffers pain and discomfort in the shoulder. He cannot lift it straight up above the shoulder level. He cannot reach up to take a glass out of a cupboard. He stated that he was on light duty from August 2006 to September 2006 and he has a retirement date of December 16, 2006, although his last day he actually worked was in October of 2006. He states that he recalls meeting with Sam Mynatt with regard to talking to him about his right shoulder but he doesn't recall having talked to him about his left shoulder.

On cross-examination, Employee admitted to filling out the Employee's Statement of Injury, which he signed on December 12, 2005, stating a date of incident of September 18, 2005, and a date of reporting it of September 23, 2005. Regarding his identification of Pat Day as the dispatcher at work on the day he fell, in cross-examination he said he thought it was Pat but he could easily be wrong as different dispatchers work on different days. He simply stated that is who he thought it was when he went in. He doesn't recall who gave him the paperwork to fill out but reiterated that when he told Mr. Schrepel that he fell and hurt his left shoulder that Mr. Schrepel simply turned and walked away and didn't say anything, that there was nothing to the conversation other than that. He admitted that he went to Community Memorial Hospital on his own on September 19<sup>th</sup> without permission but stated he went there because he thought he was suffering from heart problems.

Employer offered the testimony of Mr. Pat Day who has been an employee with Yellow Transportation for eight years as a line haul supervisor in the dispatch center. He described his work duties and stated that on September 18, 2005, he was not at work, he was on vacation at Myrtle Beach. He remembers it specifically because that was the time period when his son met his great-grandmother. He never saw Employee with blood on him but he has seen others with blood on them and always asks them what had happened. He admitted that Mr. Mynatt had asked him about the Employee's accident. He stated that he had no recollection of it.

Mr. Alvin Schrepel also testified on behalf of Employer. He was also a line haul operations manager. He oversees the road driver board and investigates accidents or injuries and does paperwork, which is then turned over to the workers' compensation coordinators. He submitted a calendar which showed that Pat Day was not working on September 18, 2005. Mr. Schrepel stated that he had no recollection of a discussion with Employee in September of 2005, about his left shoulder injury. He does recall that at some point there was a discussion with Employee but he believes it was in either late 2005 or early 2006. He did recall Mr. Mynatt calling and asking about the accident. He also reiterated the procedure when a worker reports an injury, which is to: No. 1, give them medical attention; No. 2, give them paperwork; and, No. 3, send them to a company doctor if they did not need immediate attention. On cross-examination he admitted that his involvement in workers' compensation claims has recently become more involved. He admitted that with regard to any conversation he may or may not have had with Employee on September 23, 2005, he clarified that he does not recall the conversation as opposed to that he did not believe it happened. He noted the dispatchers who were working that night could have been either Greg, Roger, Jerry, Jim, Jeff or Rod. However, he did not bring anybody who was actually on that night who might have been the dispatcher Employee spoke with.

Employer also had Mr. Sam Mynatt testify. He had been working for Yellow Freight for four years. He was now a workers' compensation administrator. He did the investigation of the September 2005 injury. When he was notified of the injury, he talked to both Mr. Schrepel and Mr. Day. His notes from those discussions were admitted as Exhibit 2 and 4. His interview with Mr. Bennett was done by telephone. He noted that the report of injury was not the standard situation, as it was filed much later than the actual incident. On cross-examination he was asked why he didn't check to confirm who was working as dispatcher the night of the accident. He had no answer. He was also asked about why he didn't have employee's report in his possession at the time of the investigation. Again he did not know. Finally he did not know whether those above him who made the decision to deny this claim, had all the documentation, including Employee's report, when they made such decision.

The first issue to be resolved by this Court is whether the Employee sustained an accident arising out of and in the course of his employment. The testimony by Employee was that he was removing articles from his truck after the end of a drive when he lost his balance and slipped and fell on his left side and shoulder. He was helped up by another person, sort of shook things off, went in, filled out his paperwork and went on home thinking that his shoulder would be fine. The next day he went to the hospital complaining of left shoulder pain, chest pain and arm pain, thinking he was suffering from cardiac problems. Because he had been a cardiac patient, he was put through a complete cardiac workup finding nothing wrong with his heart. At the end of this time period, it was determined that his left shoulder problems were possibly due to the fall that he had had. He did discuss this with his doctors after the fact, having felt that throughout the entire process it was heart complaints that were causing his problems. The determination of this matter hinges upon Employee's credibility. Employer points out that there are too many inconsistencies in Employee's testimony and in the evidence for this incident to be believable.

This Court, however, feels differently. It is true that Employee made a mistake when he named Pat Day as the dispatcher on duty that evening. However, that is one of the few inconsistencies this Court has found in his testimony. Employee went to a hospital with left shoulder pain, which understandably he related to his heart as opposed to the fall, the next day after he claims he fell. After ruling out heart problems it occurred to Employee that his fall may have been the instigator of his shoulder problems and he then conveyed this information to his doctors. When questioned about why he didn't discuss it with Dr. Gross, the second opinion doctor he testified he wanted to talk to Dr. Gross about his left shoulder but was told specifically not to as the exam was only for his right shoulder. The Employee did however, complain to his doctors, including his treating physician, and throughout his physical therapy. It is apparent that Employee sustained some type of left shoulder injury in September of 2005. Not only are there consistent complaints throughout the medical records, but the complaints in and of themselves are consistent from Mr. Bennett. His story does not vary with regard to what happened on September 18<sup>th</sup>. This Court also takes into consideration a number of other factors which supports Employee's credibility. He is very

conscientious about his health, as he immediately went to a doctor when he was concerned about cardiac problems. He takes his medication as required by his doctors. When he was going through physical therapy after his right shoulder surgery, he was very consistent, did not miss therapy and according to the therapist worked very hard at recovery for his right shoulder. Further, from Mr. Bennett's work history it is clear that he has always worked for a living, has always tried to maintain a job, and has had virtually no downtime with regard to his employment history. All of these are factors that this court takes into consideration when determining whether or not the witness is credible. Based upon all those factors, this Court finds that Employee is credible and believes that his testimony regarding his fall from his truck on September 18, 2005 is accurate.

The Court feels that Employee has carried his burden with regard to proving that an accident occurred. Employer on the contrary has submitted no information to show that the accident did not happen and further has given no other possibilities of what could have occurred to Employee's left shoulder to cause the symptoms that he has consistently complained of since September 18, 2005. It concerns this Court that the investigation into this accident was perfunctory at best. Although Employee gave the name of Pat Day as the dispatcher who was working the evening that he fell, Mr. Day had no recollection of that event upon being questioned by Mr. Mynatt. It did not occur to Mr. Mynatt that he should have verified that Mr. Day was actually working that evening. Mr. Mynatt had no notes from his conversations with Mr. Schrepel and he apparently did not have a copy of Employee's report of injury in front of him when he spoke to Employee. It appears that the entire investigation was poorly handled. Therefore, based upon Employee's testimony, which this Court finds credible, as well as the underlying evidence of reports to various doctors about his injury, this Court determines that Employee did sustain an accident arising out of and in the course of his employment.

The next issue to be resolved by this Court is whether the Employee notified the Employer of the injury as required by law. Employee stated that on September 23<sup>rd</sup> when he returned to work he had a discussion with Mr. Schrepel, his supervisor, regarding why he was not having his right shoulder surgery. Employee told Mr. Schrepel he had been scheduled for a second opinion and his surgery cancelled and further that he had just injured his left shoulder as well. Mr. Schrepel's response to Employee was simply that he did not seem concerned and walked away from the conversation. Employee also filed his Statement of Injury December 12, 2005, where he noted that he spoke to Mr. Schrepel on September 23<sup>rd</sup>, 2005. As it has been determined that Employee's testimony is credible, this Court believes that in fact Employee did have a discussion with Mr. Schrepel regarding the fact that he had injured his left shoulder as well. Mr. Schrepel was not able to deny that this conversation occurred, he simply couldn't recall whether it did or not. In weighing the evidence herein, Employee's testimony was much clearer and convincing with regard to this matter. Therefore, this Court does believe that Employee did give notice to Mr. Schrepel regarding his injury on September 18, 2005, and that this notice was given on September 23, 2005, which was within the 30-day notice requirement. Even if this Court found that Employee did not give notice within the 30 days required, Employer must show that it was prejudiced by failure to receive such notice within 30 days. Employer has failed to produce any evidence to show that any prejudice was caused to Employer for not receiving notice within 30 days. Within a month or two after the injury itself, there was a written notice to Employer and sometime thereafter Employer finally investigated the matter. Therefore, this Court does find that Employee gave proper notice to Employer within the 30 days as required by law.

The last issue to be determined is whether the Employer must provide Employee with additional medical care. Employer's doctor, Dr. Zarr, stated that he did not believe that if a fall occurred it was the prevailing factor in Employee's left shoulder symptoms and that the prevailing factor was a pre-existing condition of Employee's shoulder. However, there is no evidence to show that there were any pre-existing complaints by Employee regarding his left shoulder. Certainly he had surgery in 1999 to his left shoulder, but by all accounts, including Employee's testimony, Employee never complained of shoulder pain after that date and in fact was working full duty with no hindrance or interference with his job duties with regard to his left shoulder. There are no doctor reports or any other type of reports regarding any problems he was having with his left shoulder. In cross-examination during Dr. Zarr's deposition, he admitted that to make a determination that the Employee's fall, if it happened, was not the prevailing factor, it would have been important to determine whether or not there was a significant change in his shoulder condition and that an MRI would have been helpful at the time to determine this. However, in the alternative in Dr. Poppa's deposition, it is noted that during his heart workup, which turned out to be negative for an acute coronary event, Employee did have positive signs of minor elevations in certain enzymes that are present based on muscle breakdown from a musculoskeletal injury. There was no indication based upon the serum markers that there had been an acute coronary event, but there was an elevation in those area of

muscle damage indicating that the elevations occurred as a result of an injury. In reviewing the two doctors' medical reports, as well as their depositions, Dr. Poppa's discussion of not only the proof that Employee had an accident causing injury, but also that it was the prevailing factor, is more convincing than Dr. Zarr's. Therefore this Court finds that employer must provide Employee with additional medical care.

This Court therefore finds that Employee sustained a fall on September 18, 2005 while in the course and scope of his employment, causing injury to his left shoulder, the Employee gave notice as required by law and the accident is the prevailing factor regarding the injury to his left shoulder. This Court finds that Employer is responsible for medical care to left shoulder and therefore Orders Employer to provide Employee with additional medical care which shall cure or relieve the symptoms to Employee's left shoulder caused by the fall of September 18, 2005. Finally, this Court awards to Michael Stang, attorney for Employee, 25 percent of all benefits paid herein.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Emily S. Fowler  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeff Buker  
*Acting Director*  
*Division of Workers' Compensation*