

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

Injury No.: 04-141887

Employee: Frank Benoist
Employer: Peters-Eichler Heating
Insurer: American Home Assurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: On or about June 30, 2004
Place and County of Accident: St. Louis 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 March 5, 2007. The award and decision of Administrative Law Judge Joseph E. Denigan, issued March 5, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 13th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Frank Benoist

Injury No.: 04-141887

Dependents: N/A

Before the

Employer: Peters-Eichler Heating
Additional Party: Second Injury Fund (dismissed)
Insurer: American Home Assurance Company
Hearing Date: January 19, 2007

**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: JED:tr

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: On or about June 30, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 injured his back while manually unloading heavy pipe from a flat bed trailer.
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: Mid back
14. Nature and extent of any permanent disability: 10% PPD of the body referable to the lumbar spine
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Frank Benoist Injury No.: 04-141887

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$1,200.00
19. Weekly compensation rate: \$347.05 PPD
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:
40 weeks of permanent partial disability from Employer \$13,882.00
22. Second Injury Fund liability: No

TOTAL:

\$13,882.00

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

James Dowd

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Frank Benoist

Injury No.: 04-141887

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Peters-Eichler Heating

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

Additional Party: N/A

Insurer: American Home Assurance Company

Checked by: JED:tr

This case involves a disputed injury resulting to Claimant with the reported accident date of June 30, 2004. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is dismissed at the outset and is no longer a party to this claim. Both parties are represented by counsel.

Issues for Trial

1. Notice; and,
2. nature and extent of permanent partial disability.

FINDINGS OF FACT

Claimant testified that he sustained a back strain while manually off-loading oversized (twenty-foot) lengths of twelve-inch black pipe with other workers. He gave oral notice to his supervisor Tim Sanders who offered, but made no demands for, written filing of any *reports*. Reciprocally, Claimant made no contemporaneous demand for *treatment*. Employer did not require an IME at the time of the accident. Claimant continued to work full-time unrestricted duty during the nine months following the now-reported accident. Claimant continued to have problems with heavier tasks and experienced increased symptoms of pain and reduced range of motion with increased activity. He attempted to avoid such tasks.

Claimant first treated his symptoms nine months post-accident in March 2005 and his request for treatment resulted in an IME in April 2005 with Dr. Peter Mirkin, an orthopedist. Dr. Mirkin noted pain localized at the thoracic lumbar junction which is the same area Claimant indicated at trial, i.e. about six inches above the beltline. The clinical findings were noted as largely negative but subjective symptoms were consistent with the accident date and the chronic recurrent symptoms emblematic of soft tissue injury that has not fully resolved. Despite the accident history of lifting extreme weights, no radiological studies were ordered.

Claimant privately elected to treat with another orthopedist, Dr. Michael Burns who noted positive findings and ordered some radiological tests and physical therapy. His notes reflect repetitive lifting which is contrary to the original report of injury but consistent with the post-accident work record and minor re-injury inherent in pipefitters' heavy job requirements. X-ray examination revealed degenerative spurring but apparently well maintained disc spaces. Both his notes and that of the therapist reflect great progress without any suggestion of Claimant's lack of cooperation or anomalous findings. Despite the unusually dangerous condition of Claimant's work, no provider imposed or even suggested work restrictions upon cessation of treatment. The final diagnosis appears to be recurrent chronic lumbar strain phenomenon. He was advised to use his medication for episodic symptoms and return as needed.

Dr. Volarich took the accident history and noted the chronicity of symptoms and he embraced Dr. Burns' findings. He rated Claimant at twenty percent overall PPD of the lumbar spine with five percent thereof pre-existing the reported injury. Dr. Volarich imposed a series of restrictions including limitation of bending/stooping, curtailing lifting to seventy-five pounds, avoiding overhead work and fixed positions. He also suggested continued non-impact exercise.

Claimant's current complaints are the same as that reported to the orthopedists. He continues to work (officially) unrestricted but avoids heavier tasks when possible. He continues to self-treat symptoms at home. Claimant's testimony was unimpeached.

RULINGS OF LAW

Notice of Accident and Injury

The purpose of Section 287.420 RSMo (2000) is to give the employer timely opportunity to investigate the facts pertaining to whether the accident occurred and, if so, give the employee medical attention to minimize any disability. The requirement of written notice may be circumvented if the Claimant makes a showing of good cause or the employer is not prejudiced by the lack of such notice.

A Claimant must specifically prove the employer was not prejudiced by the lack of notice. A prima facie case of no prejudice is made upon a showing that employer had actual notice. No prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact-finder. Acts of the employer subsequent to the thirty day period are irrelevant to a determination of prejudice. The purpose of the thirty day period is to allow the employer opportunity for *timely* investigation. Actual notice after the thirty day period does not prevent the employer from being prejudiced. Willis v. Jewish Hospital, 854 S.W.2d 82 (Mo.App. 1993). Michael Soos v. Mallinckrodt Chemical Co., 19 S.W.3d 683 (Mo.App. 2000).

Here, it is undisputed Claimant did not provide Employer with written notice within thirty days of the alleged incident. Claimant asserts that he gave his supervisor actual oral notice on the day of the reported accident. Claimant's testimony about oral notice to his supervisor is cogent, reasonable and unrebutted by Employer. Most importantly, Claimant's notice to Employer was *timely*. Claimant reported the lifting incident and he also reported back symptoms.

Claimant finished his shift and neither investigation nor treatment ensued. While the duty to report an injury to an employer, set forth above, is imposed on the employee, a duty to report the accident to the Division is imposed on the employer. Section 287.380.1 RSMo (2000). This is typically the first step in an investigation afforded an employer under subsection 420. The record compels the conclusion that Employer received effective notice under the law.

* * *

Separately, Employer argues the unconventional pause before Claimant's first demand for treatment is a break in the causal chain of events and suggests any actual notice "expire[d]." (*No citation.*) Equally unconventional is Employer's failure to perform contemporaneous IMEs and undertake other risk containment procedures to limit the effects of the injury. Hindsight suggests prompt investigation, treatment and establishing MMI might facilitate a causation defense.

First treatment occurring on or about the time of lay-off is circumstantial. While unusual and perhaps suspicious, such characterization is not a rebuttal of Claimant's complaint of severe symptom onset. Claimant's injury is a case of unchanged pathology and one that is characterized by episodic symptomatology. Also, no evidence of new injury is suggested in the record which might otherwise raise doubt about the causal chain which had begun nine months earlier.

Neither party embraced statutory protections and Claimant rather casually self-treated until a more severe episode many months later. Moreover, Claimant's request was met with an IME rather than a denial. Claimant continued work for the same employer and under the same arduous demands typical of the trade. No prejudice to Employer is suggested by any acts of Claimant.

Nature & Extent of PPD

Claimant testified to current complaints of recurrent episodes of pain and stiffness. He continues to work and has no treatment plan. He self-treats with over the counter medications and heat. He also avoids activity that he knows aggravates his symptoms. Claimant's testimony was credible and unimpeached.

Dr. Volarich's overall PPD rating is somewhat excessive since it cannot be reconciled with either the treatment record or Claimant's activity level, specifically heavy work performed on a daily basis. His imposition of restrictions is, however, important in Claimant's case. Regardless of industry tolerance, the role of a medical expert, including a forensic expert, is to correctly and completely explain the subject's medical condition, including *prognosis*. See Section 287.210.5 RSMo (2000). Dr. Volarich imposed familiar spinal injury restrictions. The restrictions dovetail with Dr. Burns' prognosis.

Employer's expert on the other hand found no PPD, which opinion is not easily reconciled with the undisputed lifting accident (of remarkable weight), heavy job requirements and prognosis of the treating orthopedist. The accident scenario itself is significant and forms the basis of reasonable inference. Extreme exertion in lifting places inordinate amounts of pressure on the vertebral column, particularly vertical stacking. Here, the facts of the reported accident are uncontested and remain unrebutted in the evidentiary record. Indeed, Claimant's chronic complaints and those made at trial are consistent with various spinal column pathologies that may result from lifting accidents.

Dr. Mirkin did not realize any basis to recommend a treatment plan whereas Dr. Burns recommended physical therapy and reported significant improvement as a result. Claimant's treatment results, albeit obtained privately, evidence the genuineness of Claimant's symptoms, the therapeutic value of Dr. Burns' recommendations and the episodic nature of the spinal pathology. This record is sufficient basis upon which to

give greater weight to Dr. Burns' prognosis and on which to predicate an award of PPD.

While Dr. Burns did outline symptom control in his last note, it is palliative in nature and not easily characterized as future medical treatment in order to be the subject of an award. His comments also form the prognosis of ongoing degenerative process marked by recurrent symptoms of pain and stiffness that may require periodic treatment.

The record suggests a significant, measurable PPD that is limited by Claimant's undisputed activity level and the absence of an active treatment plan. Nevertheless, reasonable guarding in the absence of express medical restrictions is also reasonable and commonplace. Claimant exhibits PPD in the range of ten percent.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a ten percent PPD of the lumbar spine.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation