

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

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

Injury No.: 05-072941

Employee: Roger Bock

Employer: City of Columbia

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: July 28, 2005

Place and County of Accident: Columbia, Boone County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the whole record. Pursuant to §286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated October 30, 2007, and determines no compensation is to be awarded.

Preliminaries

The issue stipulated at trial was the nature and extent of employee's permanent partial disability, if any.

The administrative law judge determined and concluded that employee sustained a permanent partial disability of 7.5% of the right lower extremity at the 155 week level.

A timely Application for Review with the Commission was submitted alleging, among other things, that the administrative law judge erred in finding that the employee suffered a permanent partial disability as a result of an injury arising out of and in the course of employment in that there exists no medical expert evidence indicating that the employee suffered any permanent partial disability, and the award is therefore not supported by competent and substantial evidence. Employer alleges, furthermore, that the award is based on a visual inspection of employee's leg which employee admits had recently been re-injured, and therefore the award encompasses disability related to a subsequent unrelated event.

For the reasons set forth in this award and decision, the Commission reverses the administrative law judge's award.

Summary of Facts

The findings of fact and stipulations of the parties were recounted in the award of the administrative law judge; therefore, the pertinent facts will merely be summarized below.

Employee was employed with the City of Columbia as a maintenance mechanic when he sustained a work-related accident on July 28, 2005. Employee's injury occurred when a metal pipe struck employee's right leg and lacerated the skin. Employee sought treatment on August 1, 2005, and he was diagnosed with having cellulitis. Employee was seen by Dr. Kinkade for treatment on August 8, 2005 and again on August 11, 2005 at which time his wound was debrided and he was prescribed pain medication. Dr. Kinkade noted in employee's visit on August 25, 2007, that there were no signs of cellulitis and that the wound was healing well. Employee returned to see Dr. Kinkade on September 8, 2005 and it was noted that employee had bumped the original wound causing re-injury. Employee saw Dr. Kinkade on September 22, 2005 and new signs of infection were noted. On September 29, 2005, employee saw Dr. Katsaros and it was noted that employee's cellulitis was improving and employee could work regular duty with restrictions. On October 4, 2005, Dr. Kinkade noted that there were no longer any signs of cellulitis and employee was released to work without restrictions. Employee returned to see Dr. Kinkade on November 3, 2005, and it was noted that employee denied any discomfort whatsoever regarding the injury and that there was a small scab from the re-injury, but no signs of cellulitis.

Employee testified that he suffered achiness and muscle soreness with weather changes. He testified that he suffers re-injury to the wound due to thinner skin over that area. Employee testified that he had suffered re-injury on numerous (6-12) occasions. Employee last sought treatment for the injury in November of 2005.

Findings of Fact and Conclusions of Law

Upon careful review of the entire record, including the testimony, as well as the medical records offered and admitted into evidence, the Commission determines and concludes that employee failed to prove the nature and extent of his permanent partial disability, solely attributable to the work-related injury.

Employee bears the burden of proving all material elements of his claim. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 241 (Mo.App S.D. 2003). "The testimony of . . . lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence." *Id* at 234. The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Moriarty v. Treasurer of Mo.*, 141 S.W.3d 69, 73 (Mo.App E.D. 2004). The proof of disability must be based on competent and substantial evidence and not merely on speculation. *Id*. Employee is barred from recovering permanent partial disability benefits if employee fails to offer expert testimony regarding the percentage of disability derived from the compensable injury. *Id*.

The administrative law judge found:

This case is different from most in that there are no estimates of disability from physicians in this case. It is obvious from the medical records and from a visual inspection that Claimant sustained a large and serious abrasion to his right lower leg, that he had a stormy recovery course with infection and re-infection, that the wound is indented, quite discolored, and that the skin is thinner. Claimant's complaints of muscle aches and soreness are, of course, subjective, but it is quite obvious from the visual inspection that some degree of continued and permanent discomfort is to be expected.

Also considering the nature of Claimant's work, some continuing disability is expected.

The administrative law judge went on to conclude that claimant sustained a permanent partial disability of 7.5% of the right lower extremity at the 155 week level.

In a workers' compensation case, employee must establish all elements of his claim, including the nature

and extent of his disability; which employee has clearly failed to do in this case. Employee chose not to offer any expert testimony regarding the degree of disability attributable to his work injury. It is a well established fact that medical expert testimony is required in order to establish the percentage of disability, if any, attributable to the work injury.

In the case at hand, as noted by the administrative law judge, no medical expert testimony was offered regarding the percentage of employee's permanent partial disability solely attributable to the work-related injury. In addition, since there were subsequent non work-related injuries to the same area necessitating additional medical care and treatment, it was incumbent on employee to prove the nature and extent of permanent partial disability attributable to the work-related injury, separating the disability from the subsequent injuries by expert testimony; employee's failure to do so bars recover of permanent partial disability. *Plaster v. Dayco*, 760 S.W.2d 911, 913 (Mo.App. S.D. 1988) and *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. W.D. 1992), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Furthermore, an expert opinion is necessary when the injury is beyond lay understanding. *Id.* However, employee relies on his lay witness testimony to support his claim when it is apparent that the injury is beyond lay understanding. While employee's testimony could have been used to support medical expert testimony to determine the degree of disability; it cannot solely be relied upon as the basis for determining the nature and extent of his disability. Consequently, it is impossible for employee to have proven the nature and extent of his disability.

The administrative law judge's award is based upon employee's subjective complaints as well as the administrative law judge's own observations of the employee's right leg at trial, some two years after the injury and without consideration of subsequent non-work-related injuries to the same area. This is purely speculative and is not a sufficient basis upon which to render a determination with regard to the percentage of permanent partial disability. The administrative law judge's award of permanent partial disability is not supported by competent and substantial evidence and must be reversed.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee failed to prove the nature and extent of his permanent partial disability and therefore is not entitled to compensation in this case.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued October 30, 2007, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 15th day of April 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I join the majority in reversing the decision of the administrative law judge to deny compensation in this case; however, I write separately to state my reasoning.

In the instant case, employee principally attempted to meet his burden of proof to establish the nature and extent of his disability based on his testimony at trial, along with medical records including eight office visits with Dr. Kinkade, and one with Dr. Katsaros. Employee did not present evidence from any treating doctor, or any medical expert, regarding the extent of his disability attributable to his work injury.

I am perplexed by employee's failure to attain an expert opinion regarding the degree of his disability. In any event, the record does not contain any medical expert opinion as to the nature and extent of employee's disability. Employee did not present any evidence proving the degree of his permanent partial disability. Case law clearly dictates that an expert opinion is necessary to determine the percentage of disability and a failure to provide an expert opinion bars recovery of permanent partial disability benefits. *Moriarty v. Treasurer of Mo.*, 141 S.W.3d 69, 73 (Mo.App E.D. 2004); *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App E.D. 1994) (overruled on other grounds); *Plaster v. Dayco Corp.*, 760 S.W.2d 911, 913 (Mo.App S.D 1988).

If there was any medical evidence or expert opinion supporting the administrative law judge's finding, I would have no doubt affirmed the award. However, without such evidence, I regrettably must reverse the award finding employee sustained a 7.5% permanent partial disability.

I agree with the majority that employee has failed to meet his burden proving the nature and extent of his disability. For that reason, I join in the decision of the majority to deny compensation in this case.

John J. Hickey, Member

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

AWARD

Employee: Roger Bock

Injury No. 05-072941

Dependents:

Employer: City of Columbia

Additional Party: Second Injury Fund (Deferred)

Insurer: Self-insured

Hearing Date: October 17, 2007 Checked by: RJD/cs

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: July 28,2005.
5. State location where accident occurred or occupational disease was contracted: Columbia, Boone 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? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was involved in a demolition project when a large pipe hit the floor, bounced and hit employee's right shin.
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: Right lower extremity.
 - Nature and extent of any permanent disability: 7.5 percent ppd of the right lower extremity at the 155-week level.

15. Compensation paid to-date for temporary disability: \$3,436.71.
 16. Value necessary medical aid paid to date by employer/insurer? \$2,000.00.
 17. Value necessary medical aid not furnished by employer/insurer? None.
 18. Employee's average weekly wages: \$555.17.
 19. Weekly compensation rate: \$365.08.
- Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

Permanent partial disability from Employer: 11.625 weeks of permanent partial disability benefits \$4,244.06.

22. Second Injury Fund liability: Deferred

Total: \$4,244.06.

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 15% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Samuel Trapp

Employee: Roger Bock

Injury No: 05-072941

Dependents:

Employer: City of Columbia

Additional Party Second Injury Fund (Deferred)

Insurer: Self-insured

Checked by: RJD/cs

An evidentiary hearing was held in this case on October 17, 2007 in Columbia. Roger Bock ("Claimant") appeared personally and by counsel, Samuel Trapp; City of Columbia ("Employer") appeared by counsel, Rick Montgomery. The hearing was held to determine the nature and extent of Claimant's permanent partial disability.

The parties stipulated to all jurisdictional issues. The parties also stipulated that Claimant sustained an accident arising out of and in the course of his employment with the City of Columbia ("Employer") on July 28, 2005. The parties also stipulated that Claimant's average weekly wage was \$555.17, and that the compensation rate for permanent partial disability is \$365.08. The only issue to be decided is the nature and extent of Claimant's permanent partial disability, if any.

FINDINGS OF FACT AND RULINGS OF LAW

As stipulated, I find that Claimant, a maintenance mechanic at the City of Columbia power plant, sustained a work-related accident on July 28, 2005. I find that the accident occurred as a large, heavy piece of 5" pipe, 3/8" thick, fell from a distance onto a concrete floor, bounced off the concrete floor, and struck Claimant's right shin. A large are of skin was ripped off; Claimant testified that it was 1/4" or less from the bone. I viewed Claimant's right lower leg, and there is a large discolored area, about the size of a baseball, where the skin was ripped off.

Claimant testified that the accident occurred on a Friday. (July 28, 2005 was actually a Thursday.) Nevertheless, Claimant testified that he was instructed to keep the leg elevated during the weekend. (The first medical record, chronologically, in evidence is dated August 1, 2005, which was a Monday. Therefore, I am not sure from whence came the "instructions".) Claimant testified that the injury got worse over the course of the weekend. Claimant was seen by a physician on August 1, 2005. At this point, he was diagnosed as having "cellulitis" and was given a tetanus shot, was given an antibiotic, Augmentin, and was instructed to keep the wound clean and dry, and to keep the leg elevated. Claimant then came under the care of Dr. Michael Kinkade. When seen by Dr. Kinkade on August 8, 2005, Claimant was still painful, the area was swollen and tender, and an abscess was noted. Claimant's antibiotic was changed to Levaquin, and he was to continue to elevate the leg. When seen on August 11, 2005, the wound was debrided, and pain medications were also prescribed. Claimant was instructed as to dressing changes and was given a topical antibiotic.

When Claimant was seen on August 19, 2005, his wound was finally healing well; he was continued on Levaquin and ibuprofen, and instructed to discontinue his Vicodin. Claimant was continued on work restrictions.

On August 25, 2005, the cellulitis had resolved, but the wound was still tender. The Levaquin was discontinued. Claimant was to continue his daily dressing changes with a topical antibiotic. Claimant was seen again on September 8, 2005; he had bumped the area of the initial wound getting out of the shower and sustained another abrasion. Swelling, though less than on the previous visit, was still noted, but no signs of infection were seen. Claimant was instructed to continue to keep the new abrasion covered with topical antibiotics and dressing. When Claimant was seen on September 22, 2005, new signs of infection were noted and Claimant was again placed on Levaquin. When Claimant was seen on September 28, 2005, the Levaquin was continued.

On October 4, 2005, Dr. Kinkade noted that the cellulitis had again resolved and Claimant was returned to work on full duty. On November 3, 2005, Claimant was released by Dr. Kinkade. On that date, Dr. Kinkade noted that Claimant had recently sustained an additional abrasion in the area, with a small scab in the periphery of the initial abrasion, but no swelling, erythema or bruising, and no signs of cellulitis.

Claimant testified that his current complaints are muscle aches and soreness with weather changes, that the skin is thinner, that the area is subject to reopening, and that the area does not heal well when re-injured. As noted above, there is an area on Claimant's right shin, about the size of a baseball, that is quite discolored and is noticeably indented.

The sole issue to be decided is the nature and extent of Claimant's permanent partial disability, if any. The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo. App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo. App. 2003); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

This case is different from most in that there are no estimates of disability from physicians in this case. It is obvious from the medical records and from a visual inspection that Claimant sustained a large and serious abrasion to his right lower leg, that he had a stormy recovery course with infection and re-infection, that the wound is indented, quite discolored, and that the skin is thinner. Claimant's complaints of muscle aches and soreness are, of course, subjective, but it is quite obvious from the visual inspection that some degree of continued and permanent discomfort is to be expected. Also considering the nature of Claimant's work, some continuing disability is expected.

I find that Claimant has sustained a permanent partial disability of 7 ½% of the right lower extremity at the 155 week level. This results in 11.625 weeks of permanent partial disability benefits at the stipulated rate of \$365.08, totaling \$4,244.06. Employer is ordered to pay Claimant the sum of \$4,244.06 for permanent partial disability benefits.

Claimant's attorney, Samuel Trapp, is awarded 15% of the permanent partial disability benefits awarded herein as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon, until paid.

Date: October 30, 2007

Made by: /s/Robert J. Dierkes
Robert J. Dierkes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Jeffrey W. Buker
Jeffrey W. Buker
Division Director
Division of Workers' Compensation