

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

Injury No.: 03-129228

Employee: Jerry Brown
Employer: USF Holland
Insurer: Insurance Company of the State of Pennsylvania
Date of Accident: October 12, 2003
Place and County of Accident: St. Louis, 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 December 28, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued December 28, 2004, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this

case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

William F. Ringer, Chairman

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DISSENTING OPINION

I have reviewed and given consideration to 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 award and decision of the administrative law judge should be reversed and a temporary or partial award and decision be issued awarding employee medical care.

I find employee to be a credible witness. The medical records relied upon by the administrative law judge to deny employee's claim have not been proven to me to be more credible than employee's testimony. The administrative law judge determined that the medical records did not corroborate or support employee's testimony. There is no dispute that employee has a herniated disc at L4-5. This is not the type of injury that employee could be expected to understand what caused it. He had been jostled and bounced in a truck that by all accounts was one of the roughest trucks that drivers for employer had driven. Two of employee's co-workers independently corroborated the roughness of driving employee's truck. The fact that some of the treating doctors did not record in the treatment notes that employee drove a truck that rode rough and bounced him is not indicative that it did not happen. See, *Redd v. Earl Henderson Trucking*, 154 S.W.3d 483 (Mo. App. 2005).

Employee's testimony was corroborated by two of his co-workers and that of Dr. Cho. There is no evidence that the treatment records were accurate in recording employee's history. As such, the credible testimony of employee, the two co-workers, the opinions expressed by Dr. Cho, and to a certain extent the opinions expressed by Dr. Mirkin, establish that employee sustained an injury to his lumbar spine through the course and scope of his employment through being jostled and bounced as a truck driver for this employer. Even Dr. Mirkin admitted that if a driver is driving a truck that is bouncing with the seat rocking back and forth while the driver is trying to stabilize himself, could cause a disc to herniate. Dr. Mirkin also admitted that not every person who herniates a disc will have an immediate onset of pain so that the person knows the exact moment that the disc herniated. Some individuals have a higher tolerance for pain than others. Employee must be one of those individuals. The objective medical evidence has documented a large herniated disc at L4-5 that is compressing on a nerve root and causing symptoms, yet employee continues to work as a truck driver.

Additionally, employee had to drive the rough riding truck with a broken seat, which is a safety violation and placed employee's health and safety at significant risk. It was this broken seat that substantially contributed to the condition of employee's lower back. From November 2002 until June 24, 2003, the seat would slide back approximately eight inches, and then violently stop when the seat would go back as far as it could and twist sideways. Employee would have to hold onto the steering wheel in order to reach the pedals. This occurred two to three times per week until the seat was fixed. Every time this happened, employee would strain his back. Employee noted an aggravation in his lower back pain when the seat broke.

I find employee has met his burden of proving that he sustained an occupational injury during the course and scope of his employment. I further find that he is in need of further medical treatment. I would issue a temporary or partial award and order employer/insurer to provide further medical care.

Because my fellow Commissioners affirm the award and decision of the administrative law judge, I respectfully dissent.

John J. Hickey, Member

AWARD

Employee: Jerry Brown Injury No.: 03-129228
Dependents: N/A
Employer: USF Holland
Additional Party: N/A
Insurer: Insurance Company of the State of Pennsylvania
Hearing Date: September 20, 2004

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

Checked by: MDV:tr

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: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
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? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? No
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
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: N/A
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-

Employee: Jerry Brown Injury No.: 03-129228

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: \$1,200.00
- 19. Weekly compensation rate: Maximum
- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jerry Brown

Injury No.: 03-129228

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: USF Holland

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

Additional Party: N/A

Insurer: Insurance Company of the State of Pennsylvania

Checked by: MDV:tr

PREFACE

The issues presented for resolution by way of this hearing are occupational disease, arising out of and in the course of employment, medical causation, past medical expenses, future medical care, rate, and temporary total disability.

FINDINGS OF FACT

1. Claimant has been a truck driver for the past 31 years. He has a tenth grade education and has received a GED. He was in the Marine Corps from 1958 to 1962 and has worked at Swift Company in a packinghouse, Altman Southern Railroad as a switchman from 1963 to 1971 and began driving trucks in 1971 continuing up until the present.
2. Claimant went to work for USF Holland, the Employer herein, in 1996 and has worked there until the present.
3. Claimant drives an 18-wheel tractor-trailer over the road. This is a slip seat operation meaning he drives halfway on a regular run, ten to twelve hours driving the truck, and then another driver takes over. He has made this run for the last four years and works five days a week. He has been married for 41 years and lives in Glen Carbon, Illinois.
4. Claimant is 63 years old, born March 14, 1941.
5. Claimant drives truck #21085 ninety-five percent of the time.
6. Claimant contends that truck #21085 has an extremely rough ride with vibrations and it vibrates so bad that a can of coke on the dashboard would tip over.
7. Claimant contends that the vibrations cause him to bounce up and down continuously while on the highway 20 to 30,000 times a day. The problem is more pronounced when the trailer is empty, the heavier load holds the axles down.
8. Claimant has a better drive with this particular vehicle when the weight is even or front centered. But when the weight is centered in the back it gets a teeter-totter type ride. Light freight is usually placed in the front of the vehicle and the vehicle bounces with light loads.
9. There is a hand valve to set air in the axles but it doesn't hold pressure. Apparently vibrations cause the valve to move and it gets the pressure off kilter. Claimant must continuously reset or tighten that valve down. The air ride on truck #21085 has been adjusted several times and that helped but other trucks are not as rough.
10. In November of 2002 the truck vibration got worse. Claimant fell over to his side when the vibrations in the truck became particularly severe. The truck seat would become unlatched and shift back and forth forwards and backwards six to eight inches.
11. On June 23, 2003 the seat was replaced.
12. Between November of 2002 and when the seat was replaced in June 2003, the seat latch became unlatched two to three times a week for seven to eight months.
13. Claimant reported the problems with the truck to Bernie Ford in November of 2002. He was experiencing gradual back pain which went into his legs for several months.
14. Prior to November Claimant would have sporadic back pain on the nature of 1 to 2 on a scale of 1 to 10. Now he has a more constant pain of approximately 9 on a scale of 1 to 10.
15. Claimant saw his regular doctor, Dr. Grieling, who referred him to Dr. Penn, a physical therapist, who referred him to Dr. Linn.
16. Steroid injections were performed four times and Claimant underwent water therapy.
17. Claimant saw a television ad for the Back Pain Institute and wants treatment with the Back Pain Institute.
18. Claimant was off six weeks from October 12 to November 24 and the treatment helped until he got back into the truck after six weeks and then it started hurting again.

19. Claimant turned in a form and was sent to Dr. Mirkin. Bernie, his supervisor, told him to fill out that form.
20. Dr. Cho believes Claimant needs some form of back surgery but the union turned him down because they believe his problems are work related.
21. Claimant travels the St. Louis to Joliet, Illinois route. He passed his CDL exam in November of 2003.
22. Claimant remembers an incident on November 1, 2002 when, while at 7411 Hall Street, when he was backing up, the driver seat became unlatched and he bounced around. This had not happened before this date.
23. Claimant talked with Barb Hartig on July 11, 2003, at Travelers and her told her of the latch problem but never mentioned the "rough ride".
24. Claimant saw Dr. Pamong at the Back Pain Institute and filled out a form but did not mention the rough ride, simply the latch incident. He didn't mention the rough ride to Dr. Grieling and when Dr. Penn asked Claimant if his problems were related to work he said he did not know.
25. At trial Claimant denies saying to Dr. Penn that he did not know what was causing his back pain.
26. On some records of February 7, 2003 Claimant told a therapist that he had pain in his back for two weeks and did not know the cause of the pain and that he experienced pain for five years. (Exhibit 1).
27. March 28, 2003 records indicate radiating pain for four to five years. Claimant denied this at trial.
28. In Exhibit 3 Claimant was telling Dr. Pamong on October 6, 2003 that he had low back and hip pain for three years.
29. Claimant has been treating at Anderson Hospital with water therapy.
30. Dr. Linn notes that Claimant has had back pain for quite some time and the records do not mention a latch problem with his truck or a rough ride.
31. Claimant testified at trial that he had no prior back problems.
32. Claimant served four months for a felony conviction of aiding and abetting larceny.

RULINGS OF LAW

1. Claimant has not sustained an occupational disease which has been demonstrated to arise out of and in the course of employment with USF Holland. This being so, all the remaining issues are rendered moot.

DISCUSSION

It appears Claimant has been placed between a rock and a hard place by his union and group health insurer who would like to avoid payment for Claimant's back related medical bills by characterizing his problems as work related. It appears, however, that Claimant has had longstanding back problems and the medical records did not corroborate or support his version of the work related series of events. The burden of proof rests on Claimant. *White v. Henderson Implement Company*, 879 S.W.2d 575, 581 (Mo.App. W.D. 1994). There is conflicting evidence on the issue of medical causation. Claimant has failed to show by a preponderance of the evidence that an occupational disease has occurred. Finding no set of facts clearly compelling, I am not inclined to believe Employee's version of events any more than Employer's version or their experts. Thus, Claimant fails in his burden of proof. *England v. Regan Marketing*, 939 S.W.2d 62 (Mo.App. 1997).

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary J. Estenson
Acting Director
Division of Workers' Compensation

