

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

Injury No.: 04-107936

Employee: Arthur Brown
Employer: Ameristar Casino
Insurer: Hartford Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged March 31, 2004
Place and County of Accident: Alleged St. Charles 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 June 27, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued June 27, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Arthur Brown

Injury No. 04-107936

Dependents: None

Before the

Employer: Ameristar Casino

DIVISION OF WORKERS'
COMPENSATION

Additional Party: Second Injury Fund

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

Insurer: Hartford Insurance Company

Hearing Date: March 28, 2008

Checked by: GCG/ch

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: Not Applicable
5. State location where accident occurred or occupational disease was contracted:
Alleged St. Charles 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? 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:
Claimant alleged he was injured while pushing a cart on to an elevator.
12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: Not Applicable
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? Undetermined

18. Employee's average weekly wages: \$626.23
19. Weekly compensation rate: \$450.84/\$\$347.05 TTD/PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$0
- Unpaid medical expenses: 0
- 0 weeks of temporary total disability (or temporary partial disability)
- 0 weeks of permanent partial disability from Employer
22. Second Injury Fund liability: No
- 0 weeks of permanent partial disability from Second Injury Fund
- Permanent total disability benefits from Second Injury Fund: \$0
- Total: \$0
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Arthur Brown

Injury No: 04-107936

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Ameristar Casino

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

Additional Party Second Injury Fund

Insurer: Hartford Insurance Company

Checked by: GCG/ch

PRELIMINARY STATEMENT

Hearing in the above-referenced case was held before the undersigned Administrative Law Judge on March 28, 2008 in St. Charles County, Missouri. Arthur Brown (Claimant) was present, and represented by Ellen Morgan. Julie Hovermale represented Ameristar Casino (Employer), and Hartford Insurance Co. (Insurer). Assistant Attorney General Barbara Toepke represented the Second Injury Fund (SIF). The parties requested a final award. Attorney Ellen Morgan requested a fee of 25% as and for attorneys fees.

Claimant alleges he sustained an accidental injury/occupational disease arising out of and in the course of employment which resulted in injury to Claimant in January, February, or March 2004. The parties entered into the following stipulations: Claimant was an employee of Employer; Venue is proper in St. Charles County, Missouri; The Claim was filed within the time prescribed by law; The average weekly wage at the date of injury was \$626.23, resulting in compensation rates of \$450.84 for temporary total disability (TTD), and \$347.05 for permanent partial disability (PPD); Employer has not paid any benefits to date.

The following issues were presented for resolution. Accident/occupational disease; Medical Causation; Employer's liability for future medical treatment; Employer's Liability for past medical bills; Is Claimant entitled to TTD benefits in an amount to be determined; Nature and extent of claimant's disability; Liability of the Second Injury Fund; and lien for past due child support filed by Missouri Department of Social Services, Family Support Division.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. All exhibits offered by the parties have been received into evidence without objection. Certain exhibits offered into evidence contained handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights were ignored by the undersigned ALJ in reaching any decision on the issues presented in this case.

Claimant offered the following exhibits which were received into evidence:

- A. Dr. Robert Poetz Deposition
- B. Dr. Samuel Bernstein Deposition
- C. Copy Stipulation for Compromise Settlement, Injury No. 95-194436
- D. Medicaid Lien
- E. Medical Records, St. Charles SSM Medical Park, certified 1/30/08
- F. Medical Records, Internal Medicine, certified 7/11/05
- G. Volunteers in Medicine Records
- H. St. Charles Medical Group
- I. St. Joseph Health Center-St. Charles
- J. SSM Rehabilitation Institute
- K. St. Joseph Health Center-West
- L. Centre Point Corporate Health Services
- M. Injury Specialists/Dr. Feinberg
- N. Dr. Terrence McKellar
- O. St. Joseph Health Center-St. Charles
- P. St. Peter's Bone & Joint
- Q. St. Charles County Ambulance District

Employer offered the following exhibits which were received into evidence:

- 1. Dr. Russell Cantrell Deposition
- 2. Employer Accident/Illness Report
- 3. Employee's Deposition Transcript December 15, 2006
- 4. Employee's Deposition Transcript

The Second Injury Fund offered no exhibits.

Claimant testified since the time of the alleged accident in January, February or March of 2004, he has had two strokes, which have affected his memory. Regarding the alleged accident itself, he testified that he was pushing a

large heavy cart filled with coins from the casino floor onto an elevator. The elevator floor suddenly dropped with two wheels of the cart on it. Claimant testified he held on to the cart to keep it from crashing through the back of the elevator wall. He testified "it took everything you had to try to hold it back." He stated "you could hear the vertebrae in my back pop..."

Claimant testified an EMT who worked for Employer was right next to him when the alleged accident occurred, and asked if Claimant was alright. Claimant further testified the EMT later told him he should go see a doctor. Claimant went to St. Joseph's Hospital in St. Charles. He then began treatment with a chiropractor, Dr. McKellar.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the competent and substantial evidence presented in this case, including the testimony of Claimant, deposition testimony of expert witnesses, records received into evidence, and my personal observations, I find:

In a workers' compensation proceeding, the "claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and the injury." **Cook v. Sunnen Products Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D. 1996). The claimant does not have to establish the elements of his case on the basis of absolute certainty; it is sufficient if he shows them by reasonable probability. **Id.** "Probability means founded on reason and experience which inclines the mind to believe but leaves room for doubt." **Id.**

Further, the Division is charged with the responsibility of passing upon the credibility of witnesses. It may disbelieve testimony of a witness even though no contradictory or impeaching information is introduced. **Lawson v. Emerson Electric Co.**, 833 S.W.2d 467, 470 (Mo.App., S.D. 1992); **Page v. Green**, 686 S.W.2d 528, 530 (Mo.App., S.D. 1985). Contradictory or impeaching evidence may infer that the claimant did not carry a burden of proof upon a particular element of a claim. **Lawson**, supra.

Accident

Claimant's testimony regarding the alleged accident is not credible. Exhibit 2, the incident report signed by Claimant on February 20, 2004 indicates Claimant was "Standing at post at the fountain" at the time of the onset of symptoms. The report does not mention any incident involving an elevator or a cart.

Around the time of the alleged injury, Claimant sought treatment at the Emergency Room (ER) of St. Joseph's Hospital in St. Charles on at least four occasions. Exhibit K contains the records of the ER visits. The records contain several different accounts regarding the onset of back pain that are inconsistent with Claimant's testimony in varying degrees.

ER records from January 1, 2004, roughly seven weeks before the injury report (Exhibit 2) indicate that Claimant stated that he possibly had a recent injury. It did note he was pushing carts full of coins, but also indicated symptoms were "worse past 2 weeks."

ER records from February 22, 2004, two days after the report of injury, indicate that Claimant reported no recent injury and that he had back pain since December 2003.

ER records from March 18, 2004 indicate Claimant's back pain started December 23, presumably of the year 2003. They further report a back injury in '03.

ER records from March 30, 2004 indicate Claimant again reported no recent injury, and the onset of pain was one week ago. A report from Dr. Raymond J. Hu on the same date notes, "Significant history of back pain to his description for the last 4 or 5 months but with initial difficulties beginning several years ago."

A report from Dr. Ellis Taylor dated April 6, 2004, after Claimant was admitted to St. Joseph's Hospital notes

“The patient is a 43 year old man who in December of last year on the 23rd noticed pain in his mid back when he first got out of bed.”

According to the records of Dr. McKellar (Exhibit N), a chiropractor, Claimant began treatment on February 18, 2004, two days before the alleged accident reported in Exhibit 2. In a record dated February 18, 2004, the date of onset of low back pain is reported as December 17, 2003.

On June 20, 2005 Claimant’s deposition was taken by Employer (Exhibit 3). During the deposition, Claimant testified that the injury occurred while pushing a cart, with no mention of the elevator (Exhibit 3, p.16). He further indicated nobody was present at the time of the alleged injury (Exhibit 3, p. 17) contrary to his testimony during the hearing.

Claimant’s testimony on the issue of accident was not credible, as it is inconsistent with his prior statements and the other evidence in the record. Claimant has failed to establish by competent and substantial evidence that it is reasonably probable he was involved in a work accident in January, February, or March 2004, or specifically on February 20, 2004. Claimant has also failed to establish by competent and substantial evidence that it is reasonably probable he suffered any occupational disease relating to his employment with Ameristar Casino.

The Claim for compensation is denied. The Claim for compensation against the Second Injury Fund is denied. All other issues presented are rendered moot.

Date: June 27, 2008

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ JEFFREY W. BUKER
Jeffrey W. Buker, *Director*
Division of Workers' Compensation