

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

Injury No.: 05-135932

Employee: Eugene Brown
Employer: Cenveo Color Art
Insurer: Missouri Printing Industries Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 20, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued September 20, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Eugene Brown

Injury No.: 05-135932

Dependents: N/A

Employer: Cenveo Color Art

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

Additional Party: Second Injury Fund

Insurer: Missouri Printing Industries Trust

Hearing Date: July 14, 2010

Checked by: MDL

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 15, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:
Employee was moving a table
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$1,393.64
16. Value necessary medical aid paid to date by employer/insurer? \$5,209.24

Employee: Eugene Brown

Injury No.: 05-135932

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$1,160.80
- 19. Weekly Compensation Rate: \$696.97/\$365.08
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: 0

22. Second Injury Fund liability: No

TOTAL: 0

23. Future requirements awarded: None

Said payments to begin 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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eugene Brown

Injury No.: 05-135932

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Conveo Color Art

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

Additional Party: Second Injury Fund

Insurer: Missouri Printing Industries Trust

Checked by: MDL

PRELIMINARIES

A hearing was held on July 14, 2010 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Eugene Brown ("Claimant") was represented by Mr. Dean Christianson. Cenveo Color Art ("Employer") and its Insurer, the Missouri Printing Industries Trust were represented by Mr. Todd Hilliker. The Second Injury Fund was represented by Assistant Attorney General Kay Osborne. Mr. Christianson requested a fee of 25% of Claimant's award.

The parties stipulated that between August 1, 2005 and January 1, 2006, Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the city of St. Louis, Missouri; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated Claimant was earning an average weekly wage of \$1,160.80 resulting in rates of compensation of \$696.97 for Total Disability benefits and \$365.08 for Permanent Partial Disability benefits. Employer paid TTD benefits of \$1,393.64 representing a two week period. Employer also paid medical benefits of \$5,209.24. The parties stipulated in the event Claimant is found to be permanently and totally disabled, benefits should commence on February 10, 2009.

The issues for determination by hearing are: what is the date of accident;¹ medical causation; liability of Employer for past medical expenses in the amount of \$38,998.11; liability of Employer to provide future medical treatment; liability of Employer for past TTD benefits from February 1, 2007 through February 10, 2009; nature and extent of permanent partial disability; whether Claimant is permanently and totally disabled; liability of the Second Injury Fund; and dependency.

SUMMARY OF EVIDENCE

Claimant is a 55 year old married man with three grown children. Claimant has an 11th grade education, and never graduated from high school, although he obtained his GED. Claimant was in the Marines from 1972 to 1976, and received an honorable medical discharge

¹ Whether the accident occurred before or after August 28, 2005 determines which version of Chapter 287 RSMo will be applied.

after breaking his neck in 1976. Claimant had no training outside school. He does not have computer skills, and is unable to use the internet or e-mail.

Claimant worked for Employer from 1985 until February 28, 2006. Claimant has not worked in any capacity since February 28, 2006. Since he stopped working Claimant has undergone six surgical procedures related to a condition of acute diverticulitis with perforation and a large pelvic abscess which was subsequent to and totally unrelated to the work related accident. Claimant has a history of alcohol pancreatitis, alcohol abuse, drinking a pint a day, drinking whiskey in his coffee, drinking during the day and before medical appointments.

Before the work related accident, Claimant sustained two prior work related injuries to his low back, both of which resulted in surgery. Claimant underwent a lumbar discectomy for a herniated disc at L5-S1 on the left with Dr. Mirkin in April, 2000. Claimant received a settlement from that injury for 20% PPD of the body as a whole. Claimant re-injured his low back on June 5, 2002, and underwent a left L5-S1 microdiscectomy with Dr. Krettek in November 2002. Claimant received a settlement from that injury based on 27-1/2% PPD of the body as a whole.

Claimant testified on August 15, 2005, he was in the process of moving a heavy table with three other employees when he felt a pop in his left groin and buttocks and he "went down". Claimant did not seek immediate medical treatment, but finished out his shift. Claimant testified he did not want to miss work, and he continued to work. He was already taking Percocet his doctor prescribed for him because of his back and neck pain. He testified his hip pain was getting worse and beginning in January 2006, he occasionally fell down because his leg gave out.

The injury was not reported to Employer until late January 2006. Treatment for Claimant was authorized by Employer's supervisor on January 27, 2006. A patient information sheet signed by Claimant states he injured his back on August 16, 2005 at 5:00 moving a stacker table. Dr. Homan's office transcript dated January 30, 2006 indicates Claimant gave a history of injuring his low back on August 15, 2005. Claimant reported the sudden onset of severe pain in his left lower back and into the left buttock. Dr. Homan examined Claimant's hips and noted no pain on passive range of motion testing. Dr. Homan diagnosed lumbar radiculopathy and lumbar strain, and prescribed physical therapy. Claimant returned to Concentra, and on February 6, 2006, an MRI of the lumbosacral spine was ordered which was performed on February 10, 2006.

Claimant was referred to Dr. Bernardi, a neurosurgeon, on February 28, 2006. After taking a history and performing an examination, Dr. Bernardi suspected a recurrent radiculopathy or segmental instability at L5-S1, or the possibility of hip disease. He ordered x-rays of the hip which were interpreted by the radiologist as demonstrating avascular necrosis ("AVN") of the left hip. Claimant was referred to Dr. Haupt, a board certified orthopedic surgeon, for further evaluation.

Dr. Haupt examined Claimant on March 7, 2006, and reviewed the x-rays which he believed demonstrated a developing area of AVN involving the left femoral head, and evidence of a probable fracture within the area of the AVN. Dr. Haupt recommended an MRI to confirm the diagnosis of AVN. Dr. Haupt believed the presentation was more chronic and preexisting but had become more symptomatic as a result of the left hip having a fracture into the articular surface. At that time, Dr. Haupt stated: "the work injury of 8/1/05 [sic] may have been a

contributor to developing such a fracture causing his remarkable discomfort. In my opinion it is unlikely that the work injury of 8/1/05 was the cause of the AVN, more than likely just the cause of the collapse of the femoral head with a small fracture as a result of that heavy activity in the presence of his preexisting AVN.” He suggested the possibility of a total hip replacement, but stated the need for the total hip replacement was the preexisting AVN. He stated that if he could confirm that Claimant had AVN, then ultimately it is quite likely that he would have had collapse of the femoral head regardless of his activity level. Dr. Haupt subsequently clarified his opinion on causation stating the work injury of “8/1/05” [sic] would not be considered a substantial factor in the development of Claimant’s AVN.

Claimant saw Dr. Haupt again on April 5, 2006. Dr. Haupt and his assistant noted that upon entering the room, Claimant appeared to have alcohol on his breath. Subsequently Claimant was released from Dr. Haupt’s care to follow up for medical treatment for his hip through his private insurance. In March, 2006, Claimant developed a perforated sigmoid diverticulitis and a large pelvic abscess and underwent a Hartmann’s procedure/sigmoid colectomy on March 16, 2006. He continued to receive extensive medical treatment and multiple subsequent surgeries related to the diverticulitis and pelvic abscess.

Claimant underwent a total hip replacement performed by Dr. Chalk on August 25, 2008.

Claimant was examined by Dr. Cantrell, a board certified physiatrist, testified on behalf of Employer. Dr. Cantrell examined Claimant on June 19, 2007 and took a history from Claimant of the injury occurring on August 15, 2005. He reviewed the relevant medical treatment records, and opined the alleged accident of August 15, 2005 was neither the prevailing nor the substantial factor in the cause of Claimant’s AVN of the left hip. Dr. Cantrell testified even though Claimant told him he never had hip complaints before August 2005, the medical records documented Claimant had presented with prior hip complaints. Dr. Cantrell further noted Claimant did not present for medical care for approximately five months after the date of the alleged injury, and it would be highly unlikely for an individual who had suffered an acute hip fracture of the femoral head to be able to continue to perform their usual activities. Dr. Cantrell noted when Claimant saw Dr. Homan in late January 2006; his presenting complaints were not of groin pain as might be expected with acute hip pathology, but rather low back and buttock pain, which is not expected with intra-articular hip pathology. Furthermore, Dr. Homan’s examination in late January 2006 revealed full range of motion of the left hip, and the absence of any pain and a negative Patrick’s test, all of which would be positive if someone were suffering from advancing AVN. Dr. Cantrell also pointed out that the MRI Dr. Haupt ordered revealed marrow edema in the left femoral head, and arthritis in both hips. He testified marrow edema would typically be seen in the context of an acute fracture, yet his reported injury was seven months earlier, so if he had sustained a fracture of the femoral head in August, 2005, any marrow edema that would have occurred as a result, would have resolved in that seven month time frame. Dr. Cantrell noted the Claimant had risk factors for the development of AVN from prior steroid use and a history of alcohol use/abuse.

Dr. King, a practicing orthopedic surgeon who regularly performs hip replacement surgeries testified on behalf of Employer. Dr. King reviewed Claimant’s medical records, and opined the injury of August 15, 2005 was not a substantial factor in the need for Claimant’s left total hip replacement. Dr. King believed the need for the replacement was due to AVN. In his opinion the most logical factor or contributing factor to the condition was alcohol abuse. In his

opinion it was the AVN that led to the need for the total hip replacement and he did not believe than any injury sustained in August for which Claimant did not seek any treatment until January 2006, would be a substantial factor in changing the natural history of his condition.

Claimant was evaluated by Dr. Volarich on September 14, 2009. Dr. Volarich is board certified in nuclear medicine, nuclear cardiology, occupational and preventive medicine, and as an independent medical examiner. Dr. Volarich is not an orthopedic surgeon, and does not actively treat patients with hip conditions. Dr. Volarich reviewed Claimant's medical records, examined Claimant, and noted a number of deficits related to Claimant's prior low back surgeries, as well as his total hip replacement. Dr. Volarich diagnosed mild lumbar strain and left hip compression trauma causing aggravation of underlying AVN and degenerative arthritis status post left total hip joint replacement.

Dr. Volarich did not have an opinion on the cause of the AVN. He stated there are certain conditions that can cause AVN, the most common being the use of steroids as well as alcoholism. Dr. Volarich did not believe alcohol was the cause of Claimant's AVN because "after talking to him he was not drinking a pint a day, he was having two or three cocktails maybe a night or several times a week." Dr. Volarich did not have a history that he was drinking enough volume of alcohol for it to be a factor. Dr. Volarich thought it was an "open question" as to whether the AVN preceded the work related accident but stated he took a history of Claimant being asymptomatic prior to the August 15, 2005 event, and thus it was the substantial event causing his condition to become symptomatic and progress. Dr. Volarich opined the medical treatment Claimant received for his AVN was reasonable and necessary and attributable to the alleged injury of August 15, 2005. Dr. Volarich opined Claimant had preexisting disabilities of 50% PPD of the body as a whole due to his back surgeries and chronic lumbar syndrome; 20% PPD of the body as a whole referable to the cervical spine due to his fractures at C6 and C7; 20% PPD of the left elbow due to epicondylitis; 25% PPD of the left shoulder; and 20% PPD of the left ankle. Dr. Volarich opined Claimant is permanently and totally disabled as a result of the work injury in combination with his preexisting medical conditions.

Mr. Timothy Lalk, a vocational rehabilitation counselor testified on behalf of Claimant. Mr. Lalk reviewed Claimant's medical records, interviewed Claimant and performed vocational testing. Mr. Lalk opined Claimant is permanently and totally disabled and unable to compete in the open labor market.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

I find Claimant's accident occurred on August 15, 2005. The parties stipulated an accident occurred between August 15, 2005 and January 6, 2006. Claimant testified the injury occurred on August 15, 2005, and his testimony is uncontroverted. Although I do not find Claimant to be credible, particularly with regard to his alcohol abuse, no evidence was offered by Employer to refute Claimant's testimony with regard to the date of injury.

Claimant failed to meet his burden of proving his work related accident of August 15, 2005 was a substantial factor in causing his left hip condition, the condition of AVN, or any

resulting medical treatment or permanency. The overwhelming weight of the medical evidence leads to the conclusion that Claimant's work accident was not the medical cause of his left hip condition. Drs. Haupt and King agreed the work accident in August 2005 was not a substantial factor in the need for his total hip replacement or his hip complaints.² Dr. Volarich's opinion is not credible because it lacks foundation. In arriving at his opinion Dr. Volarich assumed Claimant's alcohol consumption was minimal, and Claimant's hip condition was asymptomatic before the August 15, 2005 accident. Both of those assumptions are wrong. Claimant's alcohol abuse is well documented throughout the medical records. Claimant's testimony with regard to his alcohol use was not credible. Upon cross examination Claimant was argumentative and evasive. The greater weight of the medical evidence supports the conclusion that Claimant's August 15, 2005 accident was not a substantial factor in causing Claimant's left hip complaints and subsequent medical treatment.

I specifically find Employer is not liable for past medical expenses, future medical treatment, and past TTD benefits. On the issue of PPD, although the parties stipulated to an accident, there is no credible evidence as to the PPD that resulted from the work injury alone. The claim for PPD benefits is denied. Because Claimant failed to establish any PPD resulted from the primary injury, the claim for PTD benefits from the Second Injury Fund is denied. The dependency issue is moot.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

² Cr. Cantrell testified work was neither the prevailing nor **the** substantial factor in the cause of Claimant's AVN of the left hip. (Emphasis Added)