

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

Injury No.: 04-095986

Employee: Ronald Bryant
Employer: Color Art Printing, Inc.
Insurer: Missouri Printing Industries
c/o Corporate Claims Management
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: On or about May 1, 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 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 November 3, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued November 3, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of September 2006.

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

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge is in error and should be reversed.

Employee requested a hardship hearing seeking a temporary award of medical treatment for a torn medial meniscus and temporary total disability. The administrative law judge denied all benefits in a final award after concluding that employee failed to meet his burden of proving medical causation.

In this case, employee testified about how he injured himself. He explained that he never had any acute injury to his knee before the work accident. Three witnesses at work remember the events surrounding the work accident. Employer's expert testified that the mechanism of injury described by employee could have caused the medial meniscus tear. However, because other medical records suggest that employee suffered some chronic knee problems, Dr. Haupt could not state within a reasonable degree of medical certainty, that the accident caused the tear.

As this matter was before the administrative law judge on a request for a temporary award seeking medical treatment, the standard of proof for causation was not reasonable certainty but, rather, reasonable probability.

"To obtain an award for temporary disability and medical aid, the claimant must prove the injury's cause by a reasonable probability." *Loepke v. Opies Transp.*, 945 S.W.2d 655, 660 (Mo. App. 1997), quoting *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995). Dr. Haupt's belief that the accident could have caused the medial meniscus tear combined with the evidence that employee had no acute knee injury before the work accident is sufficient to satisfy this standard.

Medical opinion testimony, as here, "which speaks in terms of likelihood rather than certainty, is admissible and probative." *Dean v. St. Luke's Hosp.*, 936 S.W.2d 601, 605 (Mo.App. 1997). "Such testimony, particularly when combined with other credible evidence of a nonmedical character, can be enough to support an award" *Id.*; see *Miller v. Penmac Pers. Servs., Inc.*, 68 S.W.3d 574, 580 (Mo. App. 2002) (quoting *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994)) ("Cautious or indefinite expert testimony on medical causation combined with lay testimony can provide sufficient competent evidence to support causation of injury.").

Elliott v. Ind. W. Express, 118 S.W.3d 297, 301-302 (Mo. App. 2003).

"Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt.'" *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 611, 620 (Mo. App. 2001) (citations omitted).

I believe employee has shown a reasonable probability that the work accident caused his medial meniscus tear. I would award medical treatment for the injury and any related temporary total disability.

For the foregoing reasons, I must dissent from the award of the majority of the Commission.

John J. Hickey, Member

FINAL AWARD

Employee:	Ronald Bryant	Injury No.:	04-095986
Dependents:	N/A		
Employer:	Color Art Printing, Inc.		
Additional Party:	Second Injury Fund		
Insurer:	Missouri Printing Industries c/o Corporate Claims Management		
Hearing Date:	August 30, 2005	Checked by:	KOB:tr

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

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? Yes.
4. Date of accident or onset of occupational disease: on or about May 1, 2004
5. State location where accident occurred or occupational disease 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 happened or occupational disease contracted: Claimant alleges he twisted his knee on skids, but does not know on what day the accident occurred.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: N/A
14. Compensation paid to-date for temporary disability: \$0
15. Value necessary medical aid paid to date by employer/insurer? \$1,565.85
16. Value necessary medical aid not furnished by employer/insurer? \$0

Employee: Ronald Bryant Injury No.: 04-095986

17. Employee's average weekly wages: \$1,084.40

18. Weekly compensation rate: \$662.55 / \$347.05

19. Method wages computation: By agreement.

COMPENSATION PAYABLE

20. Amount of compensation payable: \$0

21. Second Injury Fund liability: No, the claim against the Second Injury Fund is denied. \$0

TOTAL: \$0

22. 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: Ronald Bryant Injury No.: 04-095986
Dependents: N/A Before the
Employer: Color Art Printing, Inc. **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Missouri Printing Industries c/o
Corporate Claims Management Checked by: KOB:tr

PRELIMINARIES

The matter of Ronald Bryant ("Claimant") proceeded to hearing on August 30, 2005, at the Division of Workers' Compensation in the City of St. Louis to determine whether Claimant sustained a compensable accident and injury. Attorney Susan Brown represented Claimant. Attorney Jeff Proske represented Color Art Printing, Inc. ("Employer"), and its Insurer, Corporate Claims Management. Because Claimant is seeking a temporary award, the Second Injury Fund, although a party, did not participate in this hearing. Implicitly, Employer requested a final award.

Although the parties are uncertain about the exact date of the alleged injury, they agreed that on or about May 1, 2004, Claimant sustained an accidental injury. At the time Claimant earned an average weekly wage of \$1,084.40, which corresponds to rates of compensation of \$662.55 for total disability benefits and \$347.05 for permanent partial disability benefits. Employer paid \$1,565.85 in medical benefits. Employment, venue, and timeliness of the claim were not at issue.

The issues to be determined are:

1. Did Claimant provide proper notice under the Missouri Workers' Compensation law; and
2. Is Claimant's medical condition causally related to his accident?

Employer agreed that if Claimant's claim is found to be compensable, he has a right to treatment and other benefits under the workers' compensation law. This includes medical treatment to cure and relieve the effects of his injury.

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is a 62-year-old gentleman who retired in December 2004 after eighteen years as a stitcher operator for Color Art Printing, Inc., in Crestwood. Claimant's most recent job was a stitcher operator. This involved the set-up, running, and caring for the stitcher machines, which were used to put books together. He ran the binding machines.

On a date in the first half of May, Claimant sustained an injury while performing his duties. Specifically, he was working the 627 stitcher, and had to walk around the machine to the other side. In the process of doing so, he stepped on some paper that was hanging off skids left too close to the end of the machine. In doing so, he slipped and while he was falling his right knee hit an iron post at the end of the 279 stitcher. The post is an iron post that is approximately 5 by 5 inches. Claimant had been having problems with skids of paper being placed too close to the end of the machine, and had previously complained and attempted unsuccessfully to remedy the situation. After he fell on this particular day, he got very aggravated, and went to the office where several supervisors are located, including Rodney, Schlumper, and Koppman. Claimant testified he raised hell for about five minutes because he was very frustrated with the problem of having the paper too close to the machine. He told Rodney he was shutting the machine down and was going to clear the space so he could perform his work properly. He told his supervisors that he had bumped his knee. However, he did not say he was hurt. No one offered treatment at that time. No report of injury was made at that time, although he did "scream and yell and cuss a lot."

Sometime later, Claimant was going to Dr. Cantazaro, his doctor for diabetes and general medical issues. He had been complaining about his knees. Dr. Cantazaro said he needed to see an orthopedic specialist, and Claimant saw Dr. Milne who ordered an MRI. Upon reviewing the MRI, Dr. Milne indicated Claimant had suffered a torn medial meniscus, and if he did not want to live with it, he would have to have surgery. Upon receiving this information, Claimant approached supervisors and reported that he had an injury, which he now attributed to the day he fell after slipping on paper and hitting his knee on the iron post. Kenny, Rodney, and Claimant conspired among themselves, or as Claimant said, "put their brains together," and determined that someday in May was the date the accident had occurred. Claimant had never gone to the doctor for his knees before the injury and fall, but was having problems now. His symptoms consisted of swelling.

Employer sent Claimant to Concentra when they learned he was claiming a work related injury. At Concentra, the doctor treated him for a sprained knee, despite the fact he showed an MRI report indicating he had a torn medial meniscus. Treatment consisted of ice packs on the knee several times in a row.

When Claimant attempted to arrange treatment through Dr. Milne, he had to get clearance from several other medical doctors, including his lung, heart, and diabetes doctors. When Claimant was ready to proceed with the operation, the HR person from Employer stopped the surgery, and directed him to Concentra. Claimant would like to undergo the treatment if his medical conditions would so permit.

Claimant testified he has had no prior injuries. However, he did have treatment at some point for both knees because of arthritis, and took muscles relaxers for aches, but this was only after the weather had been cold and rainy for approximately three weeks in a row. Claimant never missed work because of his knees, although he did miss time because of other medical conditions.

Claimant testified that currently his right knee is swollen. Although he rolled up both pants legs to show me, the space that he indicated under his knee was not that visibly different than his opposite knee. He testified that his knee hurts all the time and prohibits him from doing things he would like to do, like playing with his grandchildren. The pain is constant and throbbing now, as compared to the arthritis pain which came and went with damp weather. Part of the deterioration in Claimant's physical condition includes worsening of his other problems plus nerve problems and depression.

Claimant admitted that he could have given inconsistent or incorrect dates and periods of complaints to both Dr. Cantazaro and Dr. Milne when he first went to see them. He also admitted that he did not tell them about tripping over the skid, because he did not at that time associate his pain with the incident at work. Claimant had his treatment bills paid

through his health insurance. Claimant admitted that the May 25 day was a fabricated date. Claimant admitted that he was diagnosed with arthritis of the knees and shoulder by Dr. Quinones.

Claimant admitted that when his granddaughter was two years old (she will be four years old September 11) he was carrying her down the steps into the garage when he tripped and fell. In order to prevent injury to his granddaughter, Claimant twisted so that she landed safely on her feet when he fell to the ground. He elbowed his spleen and hurt himself. He did not hurt his knee. Claimant was also in two subsequent motor vehicle accidents, in which he hurt his ankle and received bruises from a seatbelt. Claimant did not think his knee complaints were work related when he initially treated for it. He did tell Rodney that his knee was starting to really hurt from falling down the other day, and then he went to Dr. Cantanzaro.

Other Fact Witnesses

Four employees of Employer testified by deposition: Bindery supervisors Rodney Lewis and David Laufman, Ken Schlemper the department manager/supervisor, and Safety Director Melissa Giljum. All these witnesses agree that Claimant had an accident at work in May 2004 involving his right knee that occurred when Claimant had to climb over skids improperly placed near his machine. The witnesses agree Claimant reported the accident to his supervisors on the day it happened, but because Claimant declined medical treatment and was not claiming an injury, Employer made no official report of injury. When Claimant reported an injury to his knee and requested medical treatment, on or about June 10, 2004, Employer's witnesses agree Employer send Claimant to Concentra for treatment. Mr. Schlemper and Mr. Lewis confirm no one involved remembered the exact date on which Claimant twisted his knee, but all remember that it happened, and the date of injury used, May 25, 2004, was a reasonable guess as to the exact date.

Medical Evidence

Dr. Paul Cantanzaro, Claimant's family physician since August 2003, treats Claimant primarily for his other health concerns, including diabetes and heart problems, but not his knees. He testified that Claimant's medical record of March 25, 2004 reflects complaints of bi-lateral knee pain with damp weather, and right worse than left knee pain with motion on exam. On May 13, 2004, the record indicates Claimant said his right knee became painful "three months ago," and the exam revealed some fluid on the joint. On August 27, 2004, Dr. Cantanzaro noted right knee swelling, and diagnosed right knee pain, but did not offer the cause, although he remembers Claimant saying he fell at work. He deferred to Dr. Milne regarding a detailed diagnosis of, and treatment for, the knee problems, and had no indication of prior knee problems.

The records of Dr. Michael Milne indicate Claimant had an initial visit on May 25, 2004 for his knee. The health questionnaire Claimant completed indicated that the knee problem did not result from a specific accident, although Claimant placed a "?" after the question "how did you get injured," and did not indicate whether the problem resulted from a "WORK injury." Claimant indicated in writing that he had the condition for "4 months." He was taking Bextra for his knees at the time of his initial visit to Dr. Milne. The transcribed notes of Dr. Milne reveal that on May 25, 2004, Claimant stated he had right knee pain for approximately four months with chronic intermittent swelling and occasional sharp, stabbing pain. The MRI exposed a tear of the medial meniscus, for which the doctor planned an arthroscopy, following medical clearance. Over the next several visits, Claimant's knee condition deteriorated, and Dr. Milne expressed growing concern over Claimant's fitness for surgery due to his other health conditions. While the last records indicate Claimant was preparing for a date certain surgery in mid-July, they stop before the surgery was carried out.

Claimant's treatment at Concentra began July 10, 2004, with a reported injury date of May 25, 2004, and a history consistent with Claimant's testimony at hearing. Claimant's brief session of physical therapy was suspended on June 17 until after surgery.

Dr. Haupt examined Claimant once for Employer to address the issue of causation. Dr. Haupt agreed with the diagnosis and treatment advocated by Dr. Milne. Although he agreed the mechanism of injury described by Claimant (tripping on skids, twisting his knee, and striking it on the machine) could result in the knee injury he sustained, Dr. Haupt was concerned with the apparent confusion regarding the mechanism of injury. Specifically, Dr. Haupt noted the records of Dr. Milne suggest an onset of symptoms several months prior to the alleged May 2004 work accident, which Claimant tried to explain in various ways, including he made an error, was not focused, was not completely open, and is hard of hearing. He also noted a similar contradiction in the records of Dr. Cantanzaro of May 13 that indicate Claimant's knee became painful three months ago. Because of the inconsistencies in the records, Dr. Haupt could not say with medical certainty that one single injury of May 2004 resulted in the tear for which Claimant now required medical treatment.

FINDINGS OF FACT AND RULINGS OF LAW

Based on careful and comprehensive consideration of all the evidence, including witness testimony, medical records, expert opinions, and application of the Law of Missouri, I find:

1. Claimant gave sufficient notice under the Missouri Workers' Compensation Law.

The facts in this case surrounding notice are interesting. No one disputes the fact Claimant had an accident at work when he was stepping over misplaced skids, slipped, twisted and banged his knee. Claimant loudly and angrily informed his supervisors of his accident, not an injury, and complained about the skids, which helped the witnesses to remember the event. However, Claimant declined treatment, leading Employer's representative to not complete the proper injury reports. It was not until Claimant requested treatment some one to five or more weeks later that Claimant and his supervisors attempted to pinpoint the day Claimant tripped on the skids, and Employer generated a formal report of injury, on or about June 10, 2005. Employer concedes it had notice of the time and place of the accident, but alleges because Claimant did not specify the nature of the injury, his notice is lacking.

Section 287.420, RSMo, requires that written notice be given to the employer as soon as practical but not later than 30 days after the accident. The purpose underlying the notice requirement is twofold. *Saylor v. Spiritas Industrial*, 974 S.W.2d 536 (Mo.App. E.D. 1998). First, the notice requirement is designed to ensure that the employer will be able to conduct an accurate and thorough investigation of the facts surrounding the injury. *Id.* The second purpose of the notice requirement is to ensure that the employer has the opportunity to minimize the employee's injury by providing prompt medical treatment. *Id.* Thus, in cases where the employer does not have actual notice of the accident, courts have examined whether the claimant has proffered evidence on both the employer's ability to investigate the accident and the minimization of the employee's injury in determining whether the employer was prejudiced by the claimant's failure to provide written notice. See *Id.*; *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 504-05 (Mo. App. 1968).

The 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. *Dunn v. Hussman Corporation*, 892 S.W.2d 676, 681 (Mo. App. E.D. 1994). Claimant has the burden of showing that the employer was not prejudiced. *Hannick v. Kelly Temporary Services*, 855 S.W.2d 497, 499 (Mo.App. E.D. 1993), *overruled in part by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). One way a claimant may meet claimant's prima facie burden of showing that an employer was not prejudiced by the failure to give written notice within thirty days is to demonstrate that the employer had actual notice of the accident. *Saylor, Id.* Missouri Courts have held that no prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact finder. *Id.* Here, I find that Employer had actual notice of the accident. Even if the written notice occurred more than 30 days after the accident, there is no prejudice suffered by Employer since it had ample opportunity to investigate the facts. Employer even published warnings regarding misplaced skids in the company newsletter in an attempt to minimize future problems. They also had the opportunity to provide treatment in a timely manner. Whenever the accident occurred, Claimant gave sufficient notice to Employer under the Law.

2. Claimant did not meet his burden of establishing a causal link between his accident of May 2004, and the injury for which he now requires medical treatment.

While Claimant has established an accident and an injury, his proof of a connection between the two is lacking. Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002), *overruled in part by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003); *see also Davies v. Carter Carburetor, Division ACF Industries, Inc.*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). Considering the record as a whole, I am unable to find that Claimant has established his accident is the cause of his knee injury.

Claimant testified that he did not think he needed medical treatment on the day of the accident, but shortly thereafter the symptoms got worse, and he went to his family doctor, who then referred him to an orthopedic specialist. He did not deny he had preexisting, symptomatic arthritis, but tried to distinguish the arthritis pain from his torn medial meniscus pain, which he said was worse and started soon after his fall. Claimant did not mention the fall at work to his treating doctors until after Dr. Milne made the recommendation for surgery.

There are inconsistencies between Claimant's description of the onset of his right knee symptoms at hearing, and the histories recorded in two separate medical records. Specifically, when Claimant first saw orthopedist Dr. Milne, he indicated on the intake questionnaire that he had the condition for which he was being treated *for four months*. Furthermore, he did not attribute the knee injury to any accident, work-related or not. Dr. Milne repeats the history on the intake questionnaire in his transcription. The history of onset in the Milne record is inconsistent with an injury date in May 2004. Likewise, the records of Dr. Cantanzaro are inconsistent with a May 2004 knee injury. On May 13, 2004, the record indicated Claimant said his right knee became painful "*three months ago*," which would place the onset of symptoms well before the alleged injury date sometime in May 2004. While Claimant might be able to explain one irregularity in his medical records, it is much harder to excuse the fact there are two consistent irregularities in two separate records.

Coupled with the evidence that the symptoms arose well before the accident is the fact Claimant himself could not associate the fall with his injury until after the need for surgery arose. If the symptoms arose shortly after the fall, and were indeed markedly different than his prior symptoms, it should have been easy for Claimant to put two and two together. But, Claimant did not even mention the fall when he went for treatment within a few days or weeks of the accident, and he could not remember the date of the fall when filing his accident report in June. Claimant himself did not associate his symptoms with the work accident until well afterwards, suggesting the accident did not cause markedly different symptoms than what Claimant was living with before the accident.

Dr. Haupt, the only doctor to offer an opinion on causation, admitted the type of accident Claimant described could cause the type of injury Claimant has. However, he felt there were too many inconsistencies in the medical records. Citing many of the contradictions discussed above, Dr. Haupt felt he could not related the accident to the meniscus tear with a reasonable degree of medical certainty. Rather, the records reflect a chronic injury pattern, with complaints and swelling months before the May 2004 accident. I find Dr. Haupt's testimony credible, convincing, and consistent with other evidence of record.

I find that due to the inconsistencies regarding the onset of symptoms, the failure of the Claimant to identify the date of injury, the inability of the Claimant to associate the accident and injury until after the need for surgery became apparent, and other sound evidence in the record, Claimant has not met his burden of establishing a causal link between his accident and injury.

CONCLUSION

I find Claimant provided proper notice of his accident, but did not establish the causal connection between his current knee injury and the accident that occurred sometime in May 2004. Therefore, Claimant's claim for workers' compensation benefits is denied. The claim against the Second Injury Fund is likewise denied. This is a final award.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation