

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 04-024122

Employee: Dwayne Chapman
Employer: Swisher Mower
Insurer: Virginia Surety Co., Inc.
c/o Cambridge Integrated Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: March 25, 2004
Place and County of Accident: Warrensburg, 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. We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the June 8, 2006, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The administrative law judge denied temporary total disability benefits for the period June 1, 2004, through June 23, 2004. We modify that portion of the award.

TTD benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition.

Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo. App. 1996).

As of May 13, 2004, Dr. Anderson was not sure if employee could expect further medical progress so he recommended that employee be evaluated by a neurosurgeon. Dr. Anderson medically excused employee from work for the purpose of obtaining the consultation. Employee could not reasonably be expected to work against his physician's medical restriction nor could an employer reasonably be expected to employ employee while he was medically restricted from working. On June 23, 2004, Dr. Ciccarelli performed the neurosurgical consultation. He formed the opinion that employee sustained a lumbar strain in the work accident. Dr. Ciccarelli imposed no work restrictions and concluded that employee had reached maximum medical improvement, the first such opinion rendered.

We conclude that, in addition to the temporary total disability awarded by the administrative law judge, employee is entitled to temporary total disability benefits for the period June 1, 2004, through June 23, 2004. We modify the administrative law judge's award accordingly.

The Commission approves and affirms the administrative law judge's allowance of attorney's fee herein as being

fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued June 8, 2006, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 22nd day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Dwayne Chapman

Injury No. 04-024122

Dependents:

Before the
DIVISION OF WORKERS'
COMPENSATION

Employer: Swisher Mower

Department of Labor and Industrial

Additional Party:

Relations of Missouri
Second Injury Fund (left open)
Jefferson City, Missouri

Insurer: Virginia Surety Co., Inc., c/o Cambridge
Integrated Services

Hearing Date: May 15, 2006

Checked by: HDF/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: March 25, 2004.

5. State location where accident occurred or occupational disease was contracted: Warrensburg, 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: Felt pain when picking up a housing unit to a lawn vacuum.
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: Back, body as a whole.
14. Nature and extent of any permanent disability: 2.5 percent of the body as a whole.
15. Compensation paid to-date for temporary disability: \$843.99.
16. Value necessary medical aid paid to date by employer/insurer? \$3,765.01.
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$422.00.
19. Weekly compensation rate: \$281.33 for all benefits.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

10 weeks of permanent partial disability from Employer: (10 x \$281.33 = \$2,813.30)

22. Second Injury Fund liability: Open

TOTAL: \$2,813.30

23. Future requirements awarded:

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Rick E. Koenig

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dwayne Chapman

Injury No: 04-024122

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

Dependents:

Employer: Swisher Mower

Additional Party Second Injury Fund (left open)

Insurer: Virginia Surety Co., Inc.,
c/o Cambridge Integrated Services

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on May 15, 2006. Memoranda were submitted by June 2, 2006.

The parties stipulated that on or about the 25th day of March, 2004, the claimant was in the employment of Swisher Mower; the claimant sustained an injury by accident; the accident arose out of and in the course of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Virginia Surety Company, c/o Cambridge Integrated Services; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; the claimant's average weekly wage was \$422.00; the rate of compensation on the date of accident was \$281.33 per week for all benefits; medical aid has been

provided in the amount of \$3,765.01.

The issues to be determined by hearing included 1) the liability of the employer/insurer for temporary total disability benefits from June 1, 2004, through June 23, 2004, and 2) the nature and extent of permanent disability.

The employer/insurer acknowledged liability for temporary total disability benefits between May 11, 2004, and May 31, 2004.

FINDINGS OF FACT

The claimant, Dwayne Chapman, sustained a back injury on or about March 25, 2004, while employed by Swisher Mower when he picked up a housing unit for a lawn vacuum. Mr. Chapman described a sharp pain in his mid-back below the belt line which then became less intense and then progressed. Mr. Chapman saw Dr. Douglas Anderson on March 26, 2004, who diagnosed a back strain, prescribed Bextra and Flexeril, limited Mr. Chapman to sedentary work and gave Mr. Chapman home exercises. Mr. Chapman again saw Dr. Anderson a month later, on April 26, 2004, after which an MRI was performed. The MRI showed a “tiny tear at L4-5 disc annulus fibrosis as well as degenerative disc disease at the same point.” (See Dr. Anderson’s May 6, 2004 office note). On May 13, 2004, based on Mr. Chapman’s complaints of back pain, Dr. Anderson kept Mr. Chapman off work and recommended a neurosurgical consultation.

Dr. John Ciccarelli of the Spinal Institute of Kansas City saw Mr. Chapman on June 23, 2004, and found Mr. Chapman to have sustained a “temporary lumbar strain secondary to work related activities on 3/24/04 (sic).” (June 23, 2004 report of Dr. John Ciccarelli.) Dr. Ciccarelli’s only finding was of “some mild hypersensitivity to light touch with respect to the lumbar region.” No further treatment, work restrictions or permanent disability were recommended.

Mr. Chapman stated that repetitive bending was and continues to be painful for him, particularly after six or seven hours.

A videotape depicts Mr. Chapman energetically mowing very high grass with a push mower on May 15, 2004. Mr. Chapman testified that he mowed prior to May 15, 2004, and continues to mow.

Dr. James Stuckmeyer, board certified orthopedic surgeon, evaluated Mr. Chapman on January 10, 2005. In his January 28, 2005 report, Dr. Stuckmeyer diagnosed Mr. Chapman with a lumbar strain as the result of his March 25, 2004 accident. Dr. Stuckmeyer’s physical examination reflected “tenderness primarily at L4-5, L5-S1”; straight leg raising, muscle strength and range of motion testing revealed no deficits. Dr. Stuckmeyer opined to a 15-percent permanent partial disability as the result of Mr. Chapman’s accident. No additional treatment was recommended.

APPLICABLE LAW

Temporary total disability benefits are discussed in the case *Hannelore Cooper v. Medical Center of Independence*. Section 287.020.7 defines “total disability” as the “inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Temporary total disability is a judicial creation that is defined by case law and not by statute. See *Herring v. Yellow Freight Systems, Inc.*, 914 S.W.2d 816, 820 (Mo. App. 1995). The purpose of temporary disability benefits is to cover the employee’s healing period, *id.* Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Williams v. Pillsbury Company*, 694 S.W.2d 488, 489 (Mo. App. 1985). Temporary total disability benefits are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. A temporary award is not warranted when further progress is not expected. In determining whether an employee is totally disabled, the main issue, is “whether an employer, in the usual course of business, would reasonably be expected to employ the employee in the employee’s present physical condition.” *Brooklyn v. Henry Transp.* 924 S.W.2d 286, 290 (Mo. App.

1996). Claimant was paid temporary total disability benefits from 5/11/04 to 5/31/04. Claimant is claiming temporary total disability benefits are due from 5/31/04 to 6/23/04.

AWARD

The claimant, Dwayne Chapman, has failed to sustain his burden of proof that he was temporarily totally disabled after May 31, 2004. Mr. Chapman was obviously able to engage in vigorous lawnmowing on May 15, 2004, and there is no evidence that Mr. Chapman's condition on May 15, 2004, was different from his condition at any subsequent time. Mr. Chapman himself testified to his physical capabilities and limitations prior and subsequent to mid-May of 2004 and noted no distinctions. Likewise, the physicians who evaluated Mr. Chapman, Dr. Stuckmeyer and Dr. Ciccarelli, noted no period of time during which Mr. Chapman was not able to engage in gainful employment.

Mr. Chapman has sustained his burden of proof that he has a permanent disability of two and one-half percent (2 ½%) of the body as the result of his March 25, 2004 work injury. Both evaluating physicians noted only sensitivity to touch in Mr. Chapman's back. All other physical findings were normal. No evaluating physician imposed any limitations on Mr. Chapman's activities. Mr. Chapman is depicted in the videotape of May 15, 2004, as aggressively mowing tall grass with a push mower. Mr. Chapman himself described his only limitations as back pain after hours of repetitive bending.

Date: June 7, 2006

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secrest
Patricia "Pat" Secrest, *Director*
Division of Workers' Compensation