

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

Injury No.: 04-030578

Employee: Eric Clark

Employer: Brian W. Dancey

Insurer: Missouri Employers Mutual Insurance Company

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 June 10, 2009. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued June 10, 2009, is attached and incorporated by this reference.

The Commission further 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.

Given at Jefferson City, State of Missouri, this 22nd day of October 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Eric Clark Injury No. 04-030578
Dependents: N/A
Employer: Brian W. Dancey
Additional Party: N/A
Insurer: Missouri Employers Mutual Insurance Company
Hearing Date: 3/16/09 Checked by: MEH

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: 3/31/04
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
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:
CLAIMANT WAS SHOT IN THE EYE BY A NAIL FROM A NAIL GUN.
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: LEFT EYE
14. Nature and extent of any permanent disability: 15%
14. Compensation paid to-date for temporary disability: NONE
16. Value necessary medical aid paid to date by employer/insurer? NONE

Employee: Eric Clark

Injury No. 04-030578

- 17. Value necessary medical aid not furnished by employer/insurer? \$14,294.93
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$266.67
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$14,294.93

5 weeks of temporary total disability (or temporary partial disability)

21 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0 weeks, beginning N/A
and N/A, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: NONE

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:

JOHN WISE

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eric Clark Injury No. 04-030578
Dependents: N/A
Employer: Brian W. Dancey
Additional Party: N/A
Insurer: Missouri Employers Mutual Insurance Company
Hearing Date: 3/16/09 Checked by: MEH

The parties appeared before the undersigned administrative law judge on March 16, 2009, for a final hearing. The claimant appeared represented by John Wise. The employer and insurer appeared represented by Mike Mayes.

The parties stipulated to the following facts. On or about March 31, 2004, Brian W. Dancey was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Missouri Employers Mutual Insurance Company. On the alleged injury date of March 31, 2004, Eric Clark was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about March 31, 2004, the claimant sustained an accident. This employment occurred in Greene County, Missouri. The claimant notified the employer of his injury as required by Section, 287.420, RSMo. The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo. At the time of the alleged accident, the claimant's average weekly wage was sufficient to allow a compensation rate of \$266.67 for temporary total and permanent partial disability compensation. No temporary disability benefits have been paid. The employer and insurer have

paid no medical benefits. The attorney fee being sought is 25%. An attorney lien has been filed by claimant's previous attorney, David Vaughn, for \$450.71. If the injury is found to be compensable, the parties agree five weeks of temporary total disability and medical bills were incurred as shown in Exhibit A and Exhibit B would be payable by the employer.

ISSUES:

1. Whether the accident arose out of the course and scope of employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The employer is a contractor who builds custom homes. On March 31, 2004, the claimant was working for the employer. He was framing a house with his supervisor, Brent Rayman, a guy named Luke, and another that the claimant could not recall his name.

The claimant testified by deposition. He said that the day before the accident, a nail gun was being shot by the workers at each other. He said that he did not recall anyone messing around and shooting at each other before that. Claimant said that he told them he was tired of it and to stop. He did not recall Mr. Dancey ever specifically talking to them about shooting nails or that he would fire anyone who did. He did recall him saying that he would fire someone that did not keep busy and slacked off. He did not talk to Mr. Dancey about nail guns being fired.

On the day of the accident, he was in the attic and the others were shooting a nail gun at him between the joists. He said he had to hide behind a bow truss and that he eventually shot back at them. Claimant was on a ladder and he shot away from them. He got down off the ladder to cut a board when he testified Brent Rayman said "never put down your weapon" and told him to dance. Mr. Rayman then shot the gun at claimant's feet, and a nail ricocheted off the floor and struck the claimant in the eye.

Claimant stopped and checked his eye. He could not see anything in the mirror but his vision was blurry. He asked his co-workers to look at it and they could not see anything. He said that they continued to shoot nails at him so he threw down the board he was holding and got in his car and called Brian Dancey.

Claimant testified that he told Mr. Dancey about them shooting nails at him, he got off the ladder to cut a board, being told not to put down a weapon, being told to dance, and being fired out and hit in the eye. He said he was tired of it and was going home. He said Mr. Dancey asked if he was going to the hospital and said he would not pay for it if he did. Claimant said he called Mr. Dancey from the hospital and was either told he was fired at that time or the next day. He called him again a couple of weeks later to get his check.

Brent Rayman testified by deposition. He testified that the claimant was up in the rafters of the house they were building and was shooting him with a nail gun. He said a few hours later claimant was down and shot at him again. He stated that he did not shoot the gun at the claimant directly but admitted that he shot his nail gun at the floor by the claimant. He said the nail ricocheted off the floor and struck the claimant in the eye. Although Mr. Rayman was the claimant's foreman, he did not contact the owner, Mr. Dancey, or take any steps to initiate disciplinary proceedings against the claimant. He also testified that other forms of horseplay including verbally "giving each other a hard time" and throwing gloves had not been disciplined.

Brian Dancey testified by deposition. He is the sole owner of his business, Dancey Custom Framing. Brent Rayman was a lead man in March 2004. He testified that Mr. Rayman was terminated the day after the incident on March 31, 2004, as a result of his involvement in the horseplay. Mr. Dancey testified that he had warned the claimant and everyone on the worksite about horseplay after discovering nails stuck in the wall board all over the house. He said he

told them it would not be tolerated. He said that after the accident the claimant called him and told him he was hit in the eye. He said the claimant did not ask for medical treatment. Mr. Dancey said he went to the job site, and Mr. Rayman admitted to shooting the nail that bounced up and hit the claimant in the eye. As a result, he terminated both the claimant and Mr. Rayman. Mr. Dancey said that he talked to the claimant again about picking up his check, and he did not request medical treatment. The claimant gave a written statement about the accident.

The issue presented in this case is whether the accident arose out of the course and scope of employment and the claim, or whether it is not compensable due to arising out of horseplay. After carefully considering all of the evidence, I do not find it necessary to make a specific credibility determination. The two main facts which the witnesses disagree on is who initiated the horseplay and whether the claimant was told it would not be tolerated. I do not find either of these facts to be controlling. It is undisputed that Mr. Rayman was the claimant's supervisor. The fact that both the claimant and Mr. Rayman agree on is that Mr. Rayman fired the nail that ricocheted off the floor and struck the claimant in the eye.

Mr. Dancey had knowledge of prior horseplay on his worksite. Although he testified that he orally warned his employees, no one had been disciplined. Furthermore, Mr. Rayman was a supervisor and therefore acting as an agent of the employer. He had knowledge of the horseplay and was not only a participant, but was the one who fired the nail causing the injury. Therefore, I find that the accident was not a deviation from employment; rather, it arose out of and in the course and scope of employment. The accident is compensable.

Therefore, pursuant to the stipulations entered at hearing, the claimant is awarded five weeks of temporary total disability, past medical bills totaling \$14,294.93, and 15% of the left eye at the 140-week level.

Attorney for the claimant, John Wise, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Date: June 10, 2009

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation