

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

Injury No.: 99-137729

Employee: Garrick Clewis
Employer: ProPipe Corporation
Insurer: Ohio Casualty Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged October 22, 1999
Place and County of Accident: Alleged St. Louis, 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 November 29, 2004, as supplemented herein, and awards no compensation in the above-captioned case.

The dispositive issue is whether or not the employee sustained an injury due to an accident arising out of and in the course of employment. Section 287.120 RSMo. The administrative law judge determined that the employee did not sustain injury due to an accident arising out of and in the course of his employment, and the Commission agrees with this determination.

The determination of the issue of compensability of the accident in the instant case rests on the credibility of the evidence presented by the parties. Simply stated, which party presented the more credible, believable and trustworthy evidence? In the Award On Hearing the administrative law judge compared and contrasted the evidence presented by the parties; made findings as to which evidence was more credible, believable and persuasive; and concluded that the employer's evidence as to the principal issue, the compensability of the alleged accident, was more convincing, credible and worthy of belief. Based on these credibility findings, the administrative law judge found that the injured employee did not sustain an accident arising out of and in the course of his employment, which the Commission affirms, as the Commission sees no compelling reason to reverse any of the credibility findings of the administrative law judge.

The instant appeal does not present a novel issue to the Commission. If the facts and evidence presented by the employee are deemed to be credible, trustworthy and persuasive, either the administrative law judge or the Commission could find that there was an injury due to an accident arising out of and in the course of the employee's employment; or, on the other hand, if the facts and evidence presented in behalf of the employer are more believable, persuasive, credible and worthy of belief, the administrative law judge or the Commission can find that there was no injury due to an accident arising out of and in the course of employment.

In the instant case, both the administrative law judge and the Commission find the evidence proffered in behalf of the employer to be the more credible.

In summary fashion, the evidence reveals that employee was involved in a motor vehicle accident at approximately 2:30 p.m. on October 22, 1999; employee contends he was traveling from his jobsite to a supplier, ostensibly to pick up two thermostats, in order to complete his job for the day; and, upon picking up the two thermostats from

the supplier, he alleges he intended to return to the jobsite to complete his job assignment for the day.

On the other hand, the employer contends that employee had completed his work for the day at approximately 2:00 p.m.; that at the time of the motor vehicle accident, he was not intending to pick up any thermostats at a supplier; nor did he intend to return to any additional work for the day; rather, his work for the day was finished, and he was simply "going to and from work" at that point, and any injury sustained due to the motor vehicle accident consequently did not arise out of and in the course of his employment.

Upon reviewing the entire record, the Commission agrees with the fact-findings and determinations made by the administrative law judge, that the evidence proffered by the employer is the more credible as to the issue of whether or not employee sustained a compensable accident. The Commission specifically agrees with the fact-findings of the administrative law judge that as of the time of the motor vehicle accident in question, employee was not on any errand in behalf of the employer, and in fact, his job assignment for the day had concluded, and he was simply leaving work for the day. Accordingly, any possible injury that may have been sustained due to the motor vehicle accident is deemed not to have arisen out of or in the course of his employment.

The Commission emphasizes that based on the more credible evidence, the injured employee was not traveling to a supplier to pick up any thermostats; the injured employee had no intention of returning to any additional work for his employer that day; and the Commission specifically finds that employee's work duties for the day had been completed, and the motor vehicle accident occurred on his way home from work or to any other non-work related destination, and therefore any possible injury sustained is not compensable pursuant to the Workers' Compensation Act.

The administrative law judge amply discussed employee's lack of credibility in the Award On Hearing as to this issue, and the Commission sees absolutely no compelling reason to disturb these findings.

The evidence proffered by the employer, which the Commission finds to be believable, credible and trustworthy, clearly supports a finding that employee did not sustain an injury due to an accident arising out of and in the course of his employment. The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 29, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on 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 should be reversed.

The majority of the Commission concludes that the evidence presented by employer is more credible, believable, and trustworthy than the evidence presented by employee. I disagree.

There were two eyewitnesses to employee's activities at the IGA store on October 22, 1999; employee and Joe Felworth. Mr. Felworth was an owner of the IGA store. Mr. Felworth corroborated employee's testimony that employee left the IGA store to pick up parts for the IGA job and that employee planned to return to the IGA store after picking up the parts. I find it remarkable that neither the administrative law judge nor the majority of the Commission mention the testimony of Joe Felworth in their decision. Mr. Felworth was not shown to be interested in the outcome of this matter and I find his testimony credible.

Jackie Hempen, one of employer's officers, testified that employee was scheduled to work a forty-hour week, eight hours a day. She testified that if an employee began work at 7:00 a.m. and did not take a lunch break, the employee's workday would end at 3:00 p.m. Ms. Hempen testified that picking up parts needed for jobs was one of employee's job duties and that he was "on the clock" when he was performing such duties.

Employer's evidence does not contradict the testimony of employee and Mr. Felworth that employee was traveling to Mechanical Supply to pick up thermostats. Ms. Hempen testified that employee's regular workday is eight hours but employer paid employee for seven hours of work on October 22. That is consistent with employee's testimony that employee began work between 7 a.m. and 7:15 a.m. and was still working when he was involved in a motor vehicle accident around 2:15 p.m.

Employer asserts that employer's payment for only seven hours of work on October 22 compels a finding that employee had finished working *before* the time of the accident. It does not. It merely shows that employee did not claim wages for services performed after the accident happened. Of course, this is consistent with the behavior of an honest employee who only reports time for services actually performed.

Ms. Hempen testified that she called employee on Sunday, October 24, and told employee he could use a company truck on Monday, October 25. Her testimony that employer was offering employee a company truck to use is consistent with employee's testimony that he had a job to perform for employer on October 25.

On the other hand, the truck offer is inconsistent with Ms. Hempen's testimony that employer had no job for employee on October 25. I do not believe employer would allow employee to use employer's truck unless 1) employee's truck was damaged in an accident arising out of his employment, 2) employee would be performing services for employer, or 3) employee's truck damage was work-related and employee would be performing services for employer.

I find employee's version of events to be the most credible. I find employee was on his way to buy thermostats at the time of the motor vehicle accident. I find the accident occurred seven hours into employee's eight-hour shift. I conclude employee sustained an accident arising out of and in the course of employment on October 22, 1999.

I would reverse the award of the administrative law judge denying compensation. I would award compensation including past medical expenses, future medical care, and permanent total disability benefits. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Garrick Clewis

Injury No.: 99-137729

Dependents: N/A

Before the

Division of Workers'

Employer: ProPipe Corporation

Compensation

Department of Labor and Industrial

Insurer: Ohio Casualty Insurance Company

Hearing Date: September 1, 2004

Checked by: JED:tr

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: October 22, 1999 (alleged)
- 5. State location where accident occurred or occupational disease was contracted: N/A
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
See narrative award.
- 7. Did employer receive proper notice? Yes (actual notice by telephone from accident scene).
- 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: N/A
- 12. Did accident or occupational disease cause death? N/A Date of death? N/A
- 13. Part(s) of body injured by accident or occupational disease: N/A
- 14. Nature and extent of any permanent disability: N/A
- 15. Compensation paid to-date for temporary disability: N/A
- 16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Garrick Clewis

Injury No.:

99-137729

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$478.48/\$303.01
- 20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: No
- TOTAL: -0-
- 23. Future requirements awarded: N/A

Said payments to begin N/A 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:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Garrick Clewis	Injury No.: 99-137729
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	ProPipe Corporation	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Ohio Casualty Insurance Company	Checked by: JED:tr

This case involves a disputed motor vehicle accident resulting to Claimant on the reported accident date of October 22, 1999. The Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund ("SIF") is a party to this claim. All parties are represented by counsel. This case is five years old and Employer has paid no benefits to date. No Hardship Petition was previously heard and Claimant seeks a final award herein.

Issues for Trial

1. accident;
3. whether injury arose "out of" and "in" the course of employment;
4. medical causation/attribution;
5. liability for future medical expenses and nursing care;
6. nature and extent of temporary total disability;
7. permanent disability (PTD allegation);
8. liability of the SIF;
9. attorney lien of prior attorney.

FINDINGS OF FACT

1. Claimant, Garrick Clewis, was injured in a vehicular accident on October 22, 1999. Claimant was driving his own truck which was struck by another vehicle at 2:30 p.m. according to the police report.

2. The Claimant testified that his work hours on October 22, 1999, were from 7:00 a.m. to 2:00 p.m., and that he worked without a significant break from work during those hours on that date.
3. The Claimant testified that his vehicular accident occurred at approximately 2:30 p.m. on October 22, 1999. He testified that he called his Employer, Jacqueline Hempin, at 2:33 p.m. to report the accident.
4. The Claimant testified that he was paid his full wages for the week ending October 22, 1999, and that his payroll materials accurately reflected his work hours.
5. The Claimant's payroll records indicate that he worked from 7:00 a.m. to 2:00 p.m. on October 22, 1999.
6. The Claimant testified that he had no back problems before 1994.
7. The Claimant testified that he suffered a back injury in 1994, and subsequently underwent surgery by Dr. Scodary in 1996.
8. The Claimant testified that following his 1996 surgery that he felt great, and from that point forward he missed no time from work due to his back condition up until October 22, 1999. Payroll records for the years immediately preceding the subject reported accident reveal Claimant frequently missed working forty hours per week.
9. Claimant testified that he had a full recovery from his 1996 low back surgery prior to the reported injury. The medical records from Dr. Feinberg, who began treating Claimant in 1995 include the following notes:

January 18, 1999	pain is 10 out of 10
February 16, 1999	lumbar injection administered
April 1999	pain is 10 out of 10
May 1999	pain is 9 out of 10
June 1999	pain is 10 out of 10
August 23, 1999	pain is 10 out of 10
September 29, 1999	pain is 10 out of 10
10. The Claimant testified that prior to October 22, 1999 he had no neck pain problems.
11. The Claimant testified that he had no left knee problems following surgery for a 1980 injury.
12. The Claimant testified his back pain has doubled or tripled following his last surgery for his last injury. He testified that the areas in which he feels pain have increased from his back to his abdomen, down both legs into his feet, and up into his neck.

RULINGS OF LAW

Claimant's Testimony

Claimant testified that he was returning to Mechanical Supply around 2:00 p.m. and proffered Exhibit S in support thereof which was proffered as a receipt for two thermostats. The Exhibit contains two documents. However, the receipt from Mechanical Supply is dated October 26, four days after the reported injury and the receipt from St. Peter's Metro Electric Supply is dated October 21, the day before the reported accident. This testimony, impeached by Claimant's own Exhibit, is not credible and bears on Claimant's credibility generally.

Also, the testimony of Jackie Hempin squarely rebut Claimant's testimony about the entire context of the rush job and need to go for the two thermostats after the admitted conclusion of his work day. She stated the IGA was his personal customer and the only work since Claimant was otherwise on lay-off and she denied claimant was scheduled to work for Employer and, therefore, Claimant had no basis to assert IGA was a rush job. Her testimony was spontaneous and un rebutted.

Perhaps the most salient impeachment is the listing of extremely severe pain and ongoing treatment, including injection therapy, found in Dr. Feinberg's notes of monthly complaint as pain as 10 out of 10 during the year immediately preceding the reported injury. This symptom history contrast sharply with claimant' asserted condition of full recovery prior to the reported injury. Claimant's treatment continued with Dr. Feinberg after the

date of the reported injury. This is not a witness who can credibly testify that his motor vehicle injury was work related.

Whether Claimant's Subsequent Surgeries Arose Out of and In the Course of Employment

A claimant must prove all the essential elements of his claim. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo.App. 1990). Dolen v. Bandera's Cafe, 800 S.W.2d 163, 164 (Mo.App. 1990). In order to be compensable, the injury must result from conduct that occurs at a place where the employee may reasonably be expected to appear and in the performance of the duties of the employment or some task incidental thereto. Ludwinski v. National Courier, 873 S.W.2d 890 (Mo.App. 1994). Stockman v. J.C. Industries, Inc., 854 S.W.2d 24 (Mo.App. 1993). Here, since Claimant owned his own truck that he worked out of, he is subject to the exclusion from coverage of injuries incurred while traveling to and from work.

The *going to and coming from work rule* is that injuries sustained at such times are not compensable because the injuries are deemed not to arise out of and in the course of employment. This conclusion depends in part upon the inherent responsibility of all employees to present themselves for work and the fact that no employer has control over the public streets and sidewalks. See Bear v. Anson, 976 S.W.2d 553 (Mo.App. 1998). Cox v. Tyson Foods, Inc., 920 S.W.2d 534 (Mo.banc 1996). Hafner v. A.G. Edwards & Sons, 903 S.W.2d 197 (Mo.App.1995).

Another reason is that the fundamental construction of Section 287.120 RSMo (1994) suggests an injury occurs "in the course of employment" when, first, the employee is *at a place* where he might reasonably be expected to be and, second, the employee is performing some duty of the employment or some incident thereto. McCormack v. Stewart Enterprises, Inc., 916 S.W.2d 219 (Mo.App. 1995). Here, Claimant admitted working and being paid for seven hours work on the reported accident date. Claimant cannot baldly assert, which he essentially does here, that any time he is driving his truck he is on his way to a parts supply house.

In addition, nothing suggests that Claimant treated the accident as work related other than oral comments about what his conversation was with Jackie Hempen. Section 287.420 RSMo (2000) requires *written notice* of accident and injuries to prevent just this sort of self-serving allegation. No benefits were ever paid and Claimant, a union protected worker, sought no relief by hardship petition or otherwise.

The record compels a finding that Claimant did not sustain a work related accident.

Medical Causation

The claimant bears the burden of proving that not only did an accident occur, but it also resulted in an injury. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra.

The listing of ongoing severe symptoms and invasive treatments prevents a finding that the reported accident produced severe low back symptoms that did not pre-exist the reported accident. Such pain and treatment routinely precedes back surgery and, as is apparent here, preceded in excess of one year the January 2000 (second) low back surgery which Claimant asserts is work related. Claimant presented no expert testimony that prevents the necessary conclusion that the low back condition, warranting surgery two months later, preceded the reported accident (from which he drove home).

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof. Claim denied. The other issues are moot.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary J. Estenson
Acting Director
Division of Workers' Compensation