

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

Injury No.: 05-143101

Employee: Ben Degonia
Employer: Christian Disposal
Insurer: Missouri Employers Mutual Ins. Co.

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 23, 2009, as supplemented herein.

The administrative law judge concluded that employee failed to meet his burden of proof on his claim that he sustained an injury arising out of and in the course of his employment. Accordingly, the administrative law judge denied employee's claim that he be awarded past medical treatment, future medical treatment, and temporary total disability benefits. We agree with this conclusion. We offer this supplemental opinion in order to make certain additional findings.

Section 287.460.1 mandates that an award in a contested workers' compensation case be accompanied by findings of fact and conclusions of law. *Parrott v. HQ, Inc.*, 907 S.W.2d 236, 244 (Mo. App. 1995). The Missouri Supreme Court has declared that such statutory requirements "contemplate an unequivocal affirmative finding" as to what the pertinent facts are. *Michler v. Krey Packing Co.*, s253 S.W.2d 136, 142 (Mo. banc 1952).

Stegman v. Grand River Reg'l Ambulance Dist., 274 S.W.3d 529, 533 (Mo. App. 2008).

In the award dated September 23, 2009, the administrative law judge made findings as to the credibility of the employee's testimony regarding the alleged work injury in this case, and concluded that employee failed to prove that it is reasonably probable that he sustained a work related injury. However, the administrative law judge did not make affirmative findings as to what happened on May 6, 2005, the date that employee claims he sustained an accident at work.

We agree with the credibility determination of the administrative law judge. We find that on May 6, 2005, employee did not sustain an "accident," as that term is defined under the Missouri Workers' Compensation Law. We further find that employee did not sustain an injury arising out of and in the course of his employment on May 6, 2005.

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Because the Commission otherwise agrees with the findings, conclusions, and analysis by the administrative law judge in the award dated September 23, 2009, employee's claim that he be awarded past medical treatment, future medical treatment, and temporary total disability benefits, is denied.

The award and decision of Administrative Law Judge Grant C. Gorman, issued September 23, 2009, is affirmed, and is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Ben Degonia

Injury No. 05-143101

Dependents: None

Employer: Christian Disposal

Additional Party: None

Insurer: Missouri Employers Mutual Ins. Co.

Hearing Date: June 24, 2009

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

Checked by: GCG/ch

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: Alleged May 6, 2005
5. State location where accident occurred or occupational disease contracted: St. Charles 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? No
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 happened or occupational disease contracted: Claimant alleges he fell from a trailer.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Lumbar Spine.
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? \$0
16. Value necessary medical aid not furnished by employer/insurer? None

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- 17. Employee's average weekly wages: Over statutory maximum
- 18. Weekly compensation rate: \$675.90 TTD/\$354.05 PPD
- 19. Method wages computation: Stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable: \$0

TOTAL: \$0

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:

Robert Butler

Employee: Ben Degonia

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ben Degonia

Injury No: 05-143101

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Christian Disposal

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

Additional Party None

Insurer: Missouri Employers Mutual Ins. Co.

Checked by: GCG/ch

PRELIMINARY STATEMENT

The parties appeared for evidentiary hearing on June 24, 2009 at the Division of Workers' Compensation in St. Charles County, Missouri. Claimant was present in person, and represented by Robert Butler. Christian Disposal (Employer) and its insurer, Missouri Employers Mutual Insurance Company (Insurer) were represented by Shelley Wilson. Attorney Robert Butler requested a fee of 25% on any monetary award made on Claimant's behalf. Claimant requested a temporary award; however, a final award is issued as the alleged injury is not compensable.

The parties made the following stipulations: Claimant was an employee of employer pursuant to Chapter 287 RSMo. on May 6, 2005; venue is proper in St. Charles County; the claim was filed within the time prescribed by law; at the relevant time Claimant's average weekly wage would place his compensation rates at the statutory maximum resulting in rates of compensation of \$675.90 for total disability benefits and \$354.05 permanent partial disability (PPD) benefits; and Employer has not paid any benefits to date.

The issues presented for resolution are:

1. Whether Employer/Insurer received proper notice of the alleged injury under the law.
2. Whether an accident occurred under the law.
3. Whether the alleged work accident was the medical causation of the Employee's injury.
4. Whether Employer/Insurer is liable for past medical treatment related to the alleged accident of May 6, 2005.
5. Whether Employer/Insurer is liable for future medical treatment related to the alleged accident of May 6, 2005.
6. Whether Employee is entitled to past temporary total disability related to the accident of May 6, 2005 beginning June 1, 2006.

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SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

The following exhibits were offered by the parties and received into evidence without objection:

Employee's exhibits:

- A. Deposition of Dr. Anthony Marguerita of 06/13/09
- B. Records of Dr. Anthony Marguerita from 07/17/08-01/30//09
- C. Records of Berland Imaging, Inc of 06/03/08
- D. Records of Missouri Baptist Medical Center from 06/10/08-07/01/08
- E. Records of Dr. Timothy Kuklo of 06/07/07
- F. Records of Dr. Paul J. Sheehan from 12/05/05-04/23/07
- G. Records of Dr. Gregory H. Smith from 08/22/05-11/01/05
- H. Records of Dr. Kevin D. Weikart from 06/14/05-12/26/05
- I. Records of DePaul Health Center from 12/08/05-09/27/06
- J. Medical bills
- K. Notice of termination dated 7/28/05.

Employer's exhibits:

- 1. Deposition and Report of Dr. Bernardi of 05/15/09;
- 2. Deposition of Employee, Benjamin DeGonia of 12/13/07.

Claimant testified on his own behalf at the hearing. Claimant testified he was the CEO of Christian Disposal and that his boss was the owner, Tim Drury. He testified on May 6, 2005 he was performing an inspection on a 12 to 14 foot high truck trailer and that while climbing a ladder to the deck on the top trailer, he slipped and fell to the ground and landed in a seated position. He testified the immediate onset of pain was to his "butt" as that is where he landed, but that later he had pain in his back and legs.

Claimant testified he told Aggie, the Human Resources Manager, about the incident, but no accident report was made. He further testified that the company was for sale at that time, so when he informed Tim Drury about the incident approximately two weeks later, Claimant and Mr. Drury agreed that Claimant would seek medical treatment through group health insurance. Claimant explained this was done because "it was my impression we did not want to incur any additional insurance costs or any increases to the company."

Claimant testified he first sought medical treatment with Dr. Kevin Weikart, his personal physician, on June 14, 2005. He testified he told Dr. Weikart about the alleged work injury. Claimant later began treatment with Dr. Gregory Smith, a pain management specialist,

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on August 22, 2005. Claimant testified he told Dr. Smith about the alleged work accident. Claimant began treatment with Dr. Paul Sheehan December 5, 2005. Claimant testified Dr. Sheehan was a relative, and they discussed the fact that the injury occurred at work, but that it would not be included in records in order for Claimant to treat with Dr. Sheehan under group health insurance.

Claimant testified after he received the termination letter (Exhibit K), he continued to be employed by Employer, and that Mr. Drury informed him the purpose of the letter was to keep Claimant's salary "off the books" for purposes of the sale. Claimant further testified the negotiations with the prospective buyer between May and August included a provision that Claimant would remain employed with the company for one year after the sale.

Claimant had surgery on his back in January 2006, which was performed by Dr. Sheehan. Claimant testified he was told by Mr. Drury that Mr. Drury wanted his salary off the books on the last day of December for tax purposes. He further testified he was told his health insurance would be taken care of, and he anticipated returning to work in February or March. Claimant testified the last payment made on his behalf by employer was a check for COBRA benefits for January, 2006. Claimant testified that despite the fact that he was no longer "on the books" or receiving benefits from Employer, he was contacted by Mr. Drury and attended a meeting on behalf of Employer with the City of Warrenton in February or March, 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the competent and substantial evidence presented in this case, including the testimony of Claimant, deposition testimony of expert witnesses, records received into evidence, and my personal observations, I find:

In a workers' compensation proceeding, the "claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and the injury." **Cook v. Sunnen Products Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D. 1996). The claimant does not have to establish the elements of his case on the basis of absolute certainty; it is sufficient if he shows them by reasonable probability. **Id.** "Probability means founded on reason and experience which inclines the mind to believe but leaves room for doubt." **Id.**

Further, the Division is charged with the responsibility of passing upon the credibility of witnesses. It may disbelieve testimony of a witness even though no contradictory or impeaching information is introduced. **Lawson v. Emerson Electric Co.**, 833 S.W.2d 467, 470 (Mo.App., S.D. 1992); **Page v. Green**, 686 S.W.2d 528, 530 (Mo.App., S.D. 1985). Contradictory or impeaching evidence may infer that the claimant did not carry a burden of proof upon a particular element of a claim. **Lawson**, supra.

Claimant's testimony is not credible. If his testimony at hearing were believed, it only serves to demonstrate Claimant is willing to use deception to achieve his objectives. However, the inconsistencies and contradictions within the testimony renders it unbelievable.

Claimant alleges approximately two weeks after the injury on May 6, 2005, he discussed the need for medical treatment and made an agreement with Tim Drury to proceed under group

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health insurance, yet he did not seek treatment for almost another month. Claimant also claims he gave Dr. Weikhart a history consistent with his hearing testimony. The information contained in Dr. Weikhart's records neither fully supports nor refutes Claimant's position. The records are handwritten and some portions are not legible. The record of June 14, 2005 does reference a fall from a deck; however, there does not appear to be any reference to a truck, a ladder, or it being work related. It is also inconsistent that Claimant would make the explicit decision to proceed under group health and then give the doctor a history of a work injury.

The information in Dr. Smith's records expressly refutes Claimant's testimony. Dr. Smith reports Claimant provided a four year history of back pain with spontaneous onset, including prior treatment by chiropractors. Dr. Smith's records also indicate the information included in the doctor's notes is taken from a written form completed by Claimant, making it less likely the doctor misunderstood or wrote the information down incorrectly. Again, it would be inconsistent for Claimant to proceed with treatment under his group health plan and inform Dr. Smith that this was work related as Claimant states he did.

Dr. Sheehan's records also do not note any work related accident, and in fact indicate there was no precipitating event. Claimant explains this away by stating that he lied in order to be able to have Dr. Sheehan as his treating physician, and that Dr. Sheehan was aware of the lie, and complicit in it to the extent he did not put any reference to a fall at work in his records. In fact, Dr. Sheehan reiterated the fact Claimant reported no precipitating event in the note dated 5/8/06. The fact that Claimant concedes he was willing to lie about the onset of his condition in order to have Dr. Sheehan treat him through group health further demonstrates the implausibility of his testimony that he told Dr. Weikhart and Dr. Smith that he fell at work.

Claimant's prior deposition testimony regarding his last contact with Tim Drury is quite different than the testimony he gave at the hearing. In the deposition he states his last contact with Mr. Drury was in January 2006, and that Mr. Drury would not return his telephone calls. However, at the hearing, Claimant testified he spoke to Mr. Drury after January 2006, and actually attended a meeting with the City of Warrenton on behalf of Employer in February or March of 2006.

Claimant has failed to prove that it is reasonably probable he sustained a work related injury; the claim for compensation is denied. All other issues are moot.

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Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 23rd day of September, 2009.

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