

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

Injury No.: 06-007512

Employee: Kenneth J. Douglas
Employer: Sharkey Transportation Inc.
Insurer: Great West Casualty Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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, considered the whole record, read the briefs of the parties and heard oral arguments, 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 October 3, 2008. The award and decision of Administrative Law Judge Ronald F. Harris, is attached and incorporated by this reference.

In his application for review filed with the Commission, the employee alleges inter alia, that the award issued was erroneous because the administrative law judge failed to consider whether or not employee contracted an occupational disease due to repetitive motion arising out of and in the course of his employment. Section 287.067 RSMo. Due to this alleged error employee requests the Commission to remand the matter to the administrative law judge for additional consideration.

The Commission finds that the administrative law judge correctly weighed and evaluated all issues presented and denies employee's request for remand.

The Commission notes the following claims for compensation were filed: the initial claim for compensation filed April 17, 2006, alleging the injury occurred due to a repetitive task; an amended claim for compensation filed August 10, 2006, alleging the injury occurred while performing a repetitive task; and an amended claim filed March 9, 2007, alleging that the injury occurred while employee was driving a tow motor, and while so doing ran into another tow motor jerking his neck.

The Commission further notes on pages 4 and 5 of the transcript the parties stipulated to the following issues: the employee alleges he sustained an injury by way of an accident arising out of and in the course of employment; and an issue to be resolved was whether there was an accident arising out of and in the course of employment. Other issues were also stipulated but there was no issue as to whether or not employee sustained an occupational disease arising out of and in the course of his employment due to repetitive motion.

Since the parties did not stipulate to any issue as to whether or not employee sustained an occupational disease arising out of and in the course of his employment due to repetitive motion, the administrative law

judge would have acted in excess of his powers pursuant to section 287.495 RSMo, by considering such issue in the award. The Commission and the administrative law judge are guided by the holding in *Boyer v. National Express Co., Inc.*, 49 S.W.3d 700 (Mo.App. E.D. 2001), which states the following:

The Rules of the Department of Labor and Industrial Relations, in particular, 8 CSR 50-2.010(14), provide: "hearings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the state of Missouri shall apply. Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues." Therefore, the ALJ should confine the evidence during the hearing to the stated contested issues. *Lawson v. Emerson Electric Company*, 809 S.W.2d 121, 125 (Mo.App. S.D. 1991). Stipulations are controlling and conclusive, and the courts are bound to enforce them. *Spacewalker, Inc. v. American Family*, 954 S.W.2d 420, 424 (Mo.App. E.D. 1997). A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish. *Id.* In *Lawson*, our colleagues in the Southern District concluded that the Commission acted in excess of its powers in making its award on grounds not in issue. *Lawson v. Emerson Electric Company*, 809 S.W.2d at 126.

Boyer, 49 S.W.3d at 705.

The administrative law judge and Commission are precluded from going beyond the issues stipulated for trial and to do so either would be acting without or in excess of its powers pursuant to section 287.495 RSMo, by making such an award.

Given at Jefferson City, State of Missouri, this 7th day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

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Secretary

AWARD

Employee: Kenneth J. Douglas

Injury No. 06-007512

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Sharkey Transportation Inc

Additional Party: Second Injury Fund (SIF)

Insurer: Great West Casualty Company

Hearing Date: July 30, 2008

Checked by: RFH:lw

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 January 12, 2006
5. State location where accident occurred or occupational disease was contracted: Hannibal, Marion 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? See Award
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: Allegedly while driving a tow motor ran into another tow motor.
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: Allegedly left shoulder, back, BAW
 - Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$440.31
19. Weekly compensation rate: \$293.56/\$293.56
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

TOTAL:

22. 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: N/A

PRELIMINARIES

The above-referenced workers' compensation claim was heard by the undersigned Administrative Law Judge on July 30, 2008. Attorney Vicki Dempsey represented Kenneth Douglas ("Employee"). Attorney James Hansen represented Sharkey Transportation, Inc. d/b/a Shipper's Rental ("Employer") and Great West Casualty Company ("Insurer"). By agreement, the claim against the Second Injury Fund was left open. The parties entered into certain stipulations and agreements as to the contested issues and evidence to be presented at the hearing as set forth below.

STIPULATIONS

1. The Missouri Division of Workers' Compensation has jurisdiction over this case;
2. Venue is proper in Marion County;
3. The claim for compensation was filed within the time prescribed by law;
4. Both the Employee and the Employer were operating under the provisions of the Missouri Workers' Compensation laws at all relevant times;
5. The Employee's average weekly wage was \$440.31;
6. The compensation rate for both TTD and PPD is \$293.56;
7. The Employee was off work for surgery from May 8, 2006 to June 16, 2006 or approximately 5.3 weeks;
8. The Employer was insured by Great West Casualty Company at all relevant times; and
9. The Employer/Insurer has paid no medical or TTD benefits to date.

ISSUES

The parties requested the Division to determine the following issues:

1. Whether proper notice was given to the Employer;
2. Whether Employee sustained an accident arising out of and in the course of employment;
3. If sustained, whether the alleged accident was the prevailing factor and the cause of the injuries and disability alleged;
4. Whether Employer/Insurer shall be ordered to pay Employee's medical bills in the amount of \$57,979.07;
5. Whether Employee is entitled to 5.3 weeks of temporary total disability (TTD) benefits; and
 - Nature and extent of Employee' permanent partial disability, if any.

Additionally, a child support lien has been submitted on this claim and was noted prior to commencement of the hearing.

EVIDENCE

The evidence consisted of the testimony of the Employee; a medical report and deposition testimony of Dr. Jerome F. Levy; testimony of Miles Murphy, Employer's general manager; a medical report and deposition of Dr. David Lange; medical records, medical bills and records from Employee's personnel file.

Any exhibits containing markings, highlighting, etc. were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled. Only evidence necessary to support this award will be summarized below.

FINDINGS OF FACT

Employee worked as a forklift/tow motor operator for the Employer from April 2005 until his resignation February 20, 2006. He worked the three to eleven shift at first, and later switched to days. His duties involved loading and unloading boxes of product with the use of a "tow motor". Approximately half of his time on the tow motor was spent backing up the equipment which required turning his body to look over his right shoulder and only use his left arm to steer the tow motor. The equipment was described as having a bucket seat with a roll bar and cage only two or three inches above his head.

Employee alleges he was involved in two accidents while operating the tow motor. The first occurred on July 12, 2005 when he hit a pole in the warehouse that resulted in damaging the concrete pole and bending the tow motor. He hit his head on the cage of the tow motor, putting a knot on his scalp. He did not seek medical attention. The accident was reported and the employer suspended the employee for two days because of the accident. (Employer/Insurer's Exhibit E).

A second accident allegedly occurred on or about January 12, 2006. This time Employee claimed he ran into another tow motor driven by a co-worker. Again he claimed that he banged his head on the cage. He did not seek medical attention on that date and no damage was done to either tow motor. Employee did not report

the incident to the Employer.

On or about January 27, 2006 Employee reported pain in his left shoulder to his supervisor Jim Marshall who instructed him to report the injury to general manager Miles Murphy. Employee wasn't sure what was causing the pain, but using his left arm to steer the tow motor caused his shoulder to hurt. Employee did not mention to either Mr. Marshall or Mr. Murphy anything about a tow motor incident on January 12, 2006, or approximately some two weeks earlier. That same day there was an incident in the employer's parking lot when Employee engaged in a heated exchange of words with a truck driver. Employee was reprimanded for his actions and given a three day suspension.

Although no report of injury was filed by the Employer regarding an alleged accident on January 12, 2006, the Employer did report this alleged accident to their insurance carrier, Great West Casualty Company, as evidenced by a denial of compensation letter sent to Employee dated April 3, 2006. (Employee Exhibit M).

The records reflect, and Employee testified that he sought treatment on his own at the Hannibal Clinic with Dr. Melissa Rendlen on or about January 31, 2006. The doctor prescribed some pain pills and ordered an MRI of the left shoulder. (Employee Exhibit C p.2) Dr. Rendlen referred him to the Midwest Orthopedic Group where Employee first saw Dr. Bieniek with complaints of left shoulder pain on February 7, 2006. Dr. Bieniek ordered a cortisone injection and physical therapy. (Employee Exhibit D p.5) This treatment did not alleviate the pain.

An MRI of the cervical spine was ordered showing herniated discs in the neck. (Employee Exhibit E p.4). Dr. Burton examined Employee on May 8, 2006 at which time the Employee discussed the July 2005 tow motor accident but made no mention of any accident occurring on January 12, 2006. (Employee Exhibit D p.3) Dr. Burton performed cervical discectomies at C5-6 and C6-7 and cervical fusion with a bone graft from his iliac crest (Employee Exhibit G p.5). Thereafter, Employee was off work for 5.3 weeks. He never returned to work for the Employer as he had resigned on February 20, 2006. Employee now works for APAC where he works on bridges.

Employee was released without restrictions on June 16, 2006, (Employee Exhibit D p.1) but still complains of stiffness in his neck and loss of muscle and grip strength in his left arm. He also claims difficulty pushing or pulling with his left arm. He no longer bowls or plays ball with his children. Employee still takes over the counter Tylenol or ibuprofen for pain.

Employer has not provided any medical treatment or TTD benefits. Employee seeks payment of medical bills in the amount of \$57, 979.07 as well as TTD benefits for the 5.3 weeks he was off work following the surgery.

Employee filed his initial claim for compensation in this case on April 17, 2006 alleging injury to his left shoulder from repetitive tasks on January 12, 2006. An amended claim was filed on August 10, 2006 alleging injury not only to left shoulder, but back and body as a whole. On March 9, 2007, the claim was amended again changing Paragraph 8 from repetitive tasks to "while driving a tow motor, ran into another tow motor jerking his neck."(Employer/Insurer's Exhibit C).

Miles Murphy, the Employer's general manager, testified to multiple conversations he had with Employee regarding his alleged shoulder pain. On several occasions Murphy asked Employee how he was injured and he provided no specifics as to any incident or any tow motor accident. He discussed general, vague notions that he "hurt his shoulder sometime the week before." Murphy told Employee he needed specifics to be able to report an accident if one had occurred. Murphy testified Employee then tried to convince him to say that "[i]t happened last Friday then." Murphy testified he would consider that to be falsifying information and he determined Employee was making a false claim.

When questioned about any notification to his physicians of the alleged tow motor accident on January 12, 2006, Employee testified he "thought" he told Dr. Rendlen. However, a review of the medical record and Dr. Rendlen's office note of January 31, 2006 states Employee made complaints of left arm pain from a chronic use injury. (See Employee's Exhibit C). On his initial visit with Dr. Bieniek, Employee stated there was no single event that caused his problems. He stated to Dr. Bieniek he used his arm to turn the steering wheel on his tow motor over a period of time and began to develop shoulder pain. (Employee's Exhibit D, page 5).

When seen by Dr. David Lange, on behalf of the Employer, Employee told Dr. Lange he was involved in two (2) tow motor accidents which occurred in March 2006 and April 2006. (Employer/Insurer's Exhibit B). On cross examination he conceded these accidents could not have happened as described since he resigned from the Employer in February 2006. Dr. Lange took a history from the employee, examined the employee and eventually reached his diagnosis and conclusions. Based on the lack of support in the documents he reviewed and the medical records, Dr. Lange indicated it was his opinion Employee did not suffer a work related injury on January 12, 2006. Further, none of his work activities had anything to do with the onset of his cervical radiculopathy. Dr. Lange opined that Employee had degenerative changes consistent with aging and smoking and that within a reasonable degree of medical certainty, the work activities were not a prevailing, or any factor, in causing the cervical radiculopathy of the employee or any alleged disability. (Employer/Insurer's Exhibit A).

At Employee's request, Dr. Jerome Levy performed an evaluation on February 1, 2007. Dr. Levy took a history noting a tow motor accident on January 12, 2006 in which the Employee ran into another tow motor jerking his neck in a whiplash type injury. Dr. Levy does not note in his history the tow motor accident on July 12, 2005. Dr. Levy concluded Employee had suffered a 35% permanent partial disability of the body as a whole as a result of the accident of January 12, 2006 and the work related repetitive activities around that date. However, the doctor admitted his opinion was largely based upon Employee's history of a tow motor accident occurring on January 12, 2006 and if there was no tow motor accident the doctor would have to evaluate such a person with that history. (Employee's Exhibit A, p. 20).

A thorough review of the evidence and testimony leads me to conclude Employee's assertion of an accident occurring on January 12, 2006 is simply not consistent with or corroborated by the evidence. As a result, I find Employee's version of the alleged accident on January 12, 2006 is not credible. Dr. Levy acknowledged he relied on Employee's history of an accident occurring on January 12, 2006 in arriving at his conclusions. Consequently, I also do not find Dr. Levy's opinion to be credible.

RULINGS OF LAW

Issue 1: Whether proper notice was given to the Employer

Section 287.420, RSMo requires written notice be given to the employer no later than 30 days after the accident unless the employer was not prejudiced by the failure to receive written notice. In instances where written notice has not been provided as required, the employee has the burden of showing that the employer was not prejudiced. *Hannick v. Kelly Temporary Services*, 855 S.W.2d 497, 499 (Mo. App. 1993) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

The Courts have long held that the purpose of the notice requirement is to give the employer a timely opportunity to investigate the facts surrounding the accident, and if an accident occurred, to provide the employee with medical attention in order to minimize the disability. *Gander v. Shelby County*, 933 S.W.2d 892, 895 (Mo. App. 1996).

One way for an employee to meet the employee's *prima facie* burden of showing that the employer was not prejudiced by the failure to give written notice is to demonstrate the employer had actual notice of the accident. *Saylor v. Spiritas Industrial*, 974 S.W.2d 536 (Mo. App. 1998).

Although Employer/Insurer raises notice as an issue, Employee's Exhibit M clearly indicates both the employer and the insurer were aware of an alleged accident occurring on January 12, 2006. That letter also indicates the insurer had performed an investigation and had made the decision to deny compensability. Consequently, Employer/Insurer was not prejudiced by the failure to provide written notice. The notice issue is resolved in favor of the Employee.

However, simply putting Employer/Insurer on notice of an alleged accident is not enough to establish that an accident did actually occur.

Issue 2: Whether Employee sustained an accident arising out of and in the course of employment.

Issue 3: If sustained, whether the alleged accident was the prevailing factor and the cause of the injuries and disability alleged.

A number of changes were enacted to the Workers' Compensation Act ("Act") effective August 28, 2005. The definition of "accident" was one such change.

Effective August 28, 2005, Section 287.020.2 defines accident as "...an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift..."

Section 287.020.3 defines injury as "...an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and the disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." The employee bears the burden of proving all the essential elements of his claim. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo. App. 1996).

Employee initially filed a claim alleging an injury as the result of repetitive motion activities. In the Employee's second amended claim signed by the Employee on February 27, 2007, he changed the claim from repetitive motion to then alleging a specific event occurring at work on January 12, 2006.

A review of the evidence and testimony indicates the Employee is not a very good historian. For example, he told Dr. Lange that he had been involved in two accidents at work in 2006, one in March and one in April. Since he terminated employment on February 20, 2006 that clearly could not have been true.

However, it is apparent from Dr. Levy's report the Employee was very specific about an incident he claimed occurred on January 12, 2006 in which he described running into another tow motor which jerked his neck in a whiplash type of injury. Strangely, it appears the Employee did not mention to Dr. Levy the July 12, 2005 tow motor accident.

During his testimony at the hearing Employee again was very specific in describing an accident he alleged occurred on January 12, 2006. Employee testified he was driving his tow motor toward the back of

the building when another tow motor, operated by a Chris Simmons, darted down the aisle. Employee testified that he hit the brakes but hit the other tow motor anyway.

However, there is nothing in any of the medical records to support Employee's allegation regarding a specific event having occurred on January 12, 2006. Other than Employee's testimony the only other reference in any of the evidence referring to an accident allegedly occurring on January 12, 2006 was when he went to Dr. Levy for an IME. Employee testified that he was not sure if he told Dr. Rendlen of the January 12, 2006 accident but he did tell the doctor he "hit the pole" which was what happened in the July 12, 2005 accident.

I simply do not believe, especially after he terminated employment on February 20, 2006, that he would not have described the alleged accident of January 12, 2006 to any of the treating doctors and yet describe it so vividly at the hearing. Yet, he did describe the July 2005 tow motor accident to Dr. Burton, the doctor who performed the surgery.

While I acknowledge it is possible, especially for a poor historian, to be confused with the exact date an accident occurred it is not possible the Employee confused the July 2005 and the alleged January 2006 incidents. He very clearly described the July 2005 incident in which he ran into a pole, damaging both the pole and the tow motor and the January 2006 incident in which he ran into another tow motor, named the other driver and testified there was no visible damage to either tow motor.

Employee's testimony regarding the alleged accident on January 12, 2006 is simply not credible and is inconsistent with the medical records. Consequently, I conclude Employee has failed to meet his burden of proving an accident occurred at work on January 12, 2006.

While it is not necessary to do so, I would also point out had the Employee met his burden of proof with respect to the accident he still failed to meet his burden of proving that the alleged accident was the prevailing factor in causing his condition and disability. While Dr. Levy attempts to relate the Employee's condition and disability to the alleged accident of January 12, 2006, he apparently was unaware of the July 2005 tow motor accident and as a result would not be able to render a credible opinion as to whether the alleged January 2006 incident was or was not the prevailing factor in causing the Employee's condition and disability.

Section 287.800.1 states that the statutes are to be strictly construed and paragraph 2 of that section provides that all evidence is to be weighed impartially without giving the benefit of the doubt to either party.

The Employee has failed to meet his burden of proving that he suffered a work related accident on January 12, 2006 for which he would be entitled to benefits under the Workers' Compensation Law. Employee's claim for workers' compensation benefits is denied.

Having ruled against the Employee on this issue all other issues are moot and will not be addressed.

CONCLUSION

Employee has met his burden of proving that sufficient notice of an accident allegedly occurring on January 12, 2006, was given to the Employer/Insurer. However, Employee has failed to meet his burden of proving he suffered an accident at work on January 12, 2006 for which he would be entitled to benefits under the Workers' Compensation laws. Employee's claim for benefits is denied.

Date: _____

Made by: _____

Ronald F. Harris
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation

At various times throughout the evidence there are references to a "fork lift" and at other times a "tow motor". Both refer to the same piece of machinery. For purposes of consistency only the term "tow motor" will be used in this award.

I cite several cases herein that were among many overruled by *Hampton* on an unrelated issue. Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.