

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

Injury No.: 00-176164

Employee: John E. Downing
Employer: Missouri Highway and Transportation Commission
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: October 27, 2000
Place and County of Accident: Rocheport, 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 June 26, 2006, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued June 26, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents:
Employer: Missouri Highway and Transportation Commission
Additional Party: Second Injury Fund (N/a)
Insurer: Self-insured
Hearing Date: May 22, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: HDF/cs

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?
3. Was there an accident or incident of occupational disease under the Law?
4. Date of accident or onset of occupational disease: October 27, 2000
5. State location where accident occurred or occupational disease was contracted: Rocheport, 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?
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:
Fell down stairs at sand plant.
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: shoulders.
14. Nature and extent of any permanent disability: N/a.
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?
18. Employee's average weekly wages:
19. Weekly compensation rate:
20. Method wages computation:

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

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

22. Second Injury Fund liability: No

TOTAL:

23. Future requirements awarded: N/a.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John E. Downing

Injury No: 00-176164

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Missouri Highway and Transportation Commission

Additional Party Second Injury Fund (N/a)

Insurer: Self-insured

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned

administrative law judge on May 22, 2006. Memoranda were submitted by June 9, 2006.

The parties stipulated that on or about the 27th day of October, 2000, the claimant was in the employment of the Missouri Highway and Transportation Department; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was self-insured; a claim for compensation was filed within the time prescribed by law; the claimant's average weekly wage was \$458.08; the rate of compensation on the date of accident was \$305.38 per week for all benefits; no temporary disability benefits have been paid to the claimant to date; no medical aid has been provided.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) whether the claimant sustained an injury, 3) whether the alleged accident arose out of and in the course of employment, 4) the medical causation of the injury alleged, 5) whether appropriate notice was given, 6) the liability of the employer/insurer for past medical treatment in the amount of \$28,678.00, and 7) the liability of the employer/insurer for permanent disability.

FINDINGS OF FACT

The claimant, John Downing, testified that while working for the Missouri Highway and Transportation Department on October 27, 2000, he slipped on steps while descending at the Rocheport Sand Plant. Mr. Downing alleges that he injured his shoulders in the fall. Mr. Downing's accident was recorded in a sand sample record and a co-worker, James Duncan, was aware of the fall. Mr. Downing said he was able to save the sand he was carrying in a cake-like pan in the fall.

Mr. Downing filled out a "Missouri Department of Transportation Workers' Compensation Field Injury Report" at some point stating that he notified his employer on November 29, 2000. In this report, Mr. Downing described grabbing a hand rail with his right arm, scratching his right hand.

Mr. Downing's description of his fall at the hearing did not include a discussion of grabbing a hand rail but did include a description of Mr. Downing's scratch on his left hand.

Mr. Downing's medical records include his visits with his family physician, Dr. Sporleder. A November 10, 2000 entry in Dr. Sporleder's records documents a telephone call from Mr. Downing stating that he needed a note from Dr. Sporleder regarding Mr. Downing's ability to work. Dr. Sporleder's records document multiple other contacts with Mr. Downing in the following 11 months, none of which reference either shoulder until an entry of October 17, 2001, which reflects the following:

Chief complaint: Right shoulder pain. pt states couple years ago had x-rays done at west clinic which might have shown a collarbone fx. Pt has had problems since then

Dr. Krautmann's records include a November 6, 2001 record of Mr. Downing's complaints of pain in his right shoulder. They include Dr. Krautmann's conclusion that "he probably hurt this 6 - 8 months ago when he kind of caught himself falling and grabbed a rail."

A December 18, 2001 entry in Dr. Krautmann's records notes "bilateral shoulder pain. Left shoulder pops, limited ROM . . . This is the first mention of Mr. Downing's left shoulder pain in any medical record.

In November of 2002, Mr. Downing saw Dr. Rodgers who performed a right rotator cuff repair that month followed by surgery to the left shoulder in March of 2003.

A Missouri Department of Transportation Accident/Injury Investigation Report dated November 7, 2001, reflects the report of an October 27, 2000 work injury by Mr. Downing when he fell down

stairs at the Rocheport Sand Plant. Mr. Downing's supervisors noted on the form that they had only recently been notified that he had a shoulder injury as the result of his fall on October 7, 2000. Mr. Duncan's statement is attached and refers to Mr. Downing showing him (Mr. Duncan) his hand with which he caught himself "on top of a steel post."

APPLICABLE LAW

The employee has the burden of proving an accident occurred on October 27, 2000, and that it resulted, Griggs v. AB Chance Company, 503 S.W.2d 697, 703 (1974), as well as establishing a causal connection between the accident and the claimed injuries. Kerns v. Midwest Conveyor, 126 S.W.3d 445, 453 (Mo. App.) W. D. 2004). To be entitled to benefits the employee has the burden of proving not only that the accident arose out of and in the course and scope of employment but also that his alleged injury was directly caused by the accident. Kerns at 453.

An injury is compensable if it is clearly work-related. An injury is clearly work-related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor. RSMo. 287.020.2.

The employee has the burden of proving not only that an accident occurred on October 27, 2000, while in the course and scope of employment of MoDOT, but also proving that there is a causal link between the accident and the shoulder injuries. In addition, the employee has the burden of proving that the injury was "clearly work-related." To establish the claimed shoulder injuries as "clearly work-related" the employee must prove that the alleged fall that occurred on October 27, 2000, was a substantial factor in the cause of the resulting shoulder injuries and not merely a triggering or precipitating factor.

AWARD

The claimant, John Downing, while sustaining his burden of proof that he had an accident when he fell down some steps at the Rocheport Sand Plant on October 27, 2000, failed to sustain his burden of proof that he injured his shoulders as the result of his fall. Despite numerous visits with Dr. Sporleder in the year following October 27, 2000, Mr. Downing failed to mention his shoulder injuries to Dr. Sporleder until November 10, 2001, and even then referred only to his right shoulder pain for "a couple of years." The mechanism of a bilateral shoulder injury is unclear if Mr. Downing grabbed a rail or post with one arm to keep from falling as is noted in Mr. Downing's injury report or, as Mr. Downing testified, just fell down some steps while able to position his arms and hands sufficiently to save the sand sample he was holding. The complete lack of medical documentation of a work-related bilateral shoulder injury for more than a year after the alleged injury accompanied by the lack of a coherent narrative regarding the circumstances resulting in a bilateral shoulder injury defeat Mr. Downing's credibility in this claim.

All other issues raised for resolution are hereby rendered moot.

Date: July 26, 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" Secret
Patricia "Pat" Secret, Director
Division of Workers' Compensation