

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

Injury No.: 05-063411

Employee: David Duly
Employer: Morton Buildings
Insurer: Zurich American Insurance
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 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 August 13, 2010. The award and decision of Administrative Law Judge Kenneth J. Cain, issued August 13, 2010, 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 24th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: David Duly

SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding compensation in this claim. However, I must respectfully dissent from the portions of the award and decision of the majority of the Commission denying past medical expenses and setting a lower-than-proved permanent partial disability rating. Based on my review of the entire record, I believe the decision of the administrative law judge should be modified to increase the award of permanent partial disability and grant past medical expenses.

It is undisputed in this case that employee sustained a permanent partial disability due to back injuries he suffered on June 6, 2005. The administrative law judge awarded claimant permanent partial disability of 7.75% relative to his body as a whole (BAW). This figure represents a split between the initial 12.5% rating of Dr. Truett Swaim and the 3% rating of Dr. James S. Zarr, a specialist in physical medicine and rehabilitation.

I am persuaded that between these two doctors, Dr. Swaim was the most qualified and persuasive expert. Dr. Swaim is a board certified orthopedic surgeon and medical examiner. He initially opined that employee's BAW disability was 12.5%, and the administrative law judge apparently found him credible (as evidenced by the split rating). This opinion, however, was generated without benefit of an MRI. Consequently, after an MRI was done on November 25, 2008, Dr. Swaim increased his rating to 25% based on the significant multiple abnormalities revealed. Since Dr. Swaim (but not Dr. Zarr) based his later rating on this more objective test, I would rely on his opinion.

The administrative law judge, however, discounted Dr. Swaim's revised, higher rating (even though it enjoyed the benefit of the additional information provided by the MRI) because he believed that Dr. Swaim "was not aware of Claimant's intervening accident" that allegedly occurred on September 18, 2005. But the evidence shows that Dr. Swaim was aware of this incident, as revealed in the comments of his previous evaluation and the medical records of Dr. Wayne L. Morton (specifically, the entry dated September 22, 2005) that Dr. Swaim had reviewed before issuing his addendum report.

Furthermore, a careful review of the evidence shows that no new or intervening accident took place in September 2005. Employee credibly testified that, after June 6, 2005, he was missing work and having incidences where he would experience a sharp pain like a knife in his mid-to-low back. This pain did not seem to coincide with particular events; it struck randomly. The pain was so intense that it would drop employee to his knees. It would "lock" up his back. He had suffered four or five such incidences between June 6 and September 18, 2005. On that latter date, employee was again brought to his knees after getting out of a car to walk into a restaurant. But his experience on September 18 was "like what [he] had felt before." It was the "same incidence [sic] that [employee] had on these other occasions"

Immediately prior to this September 18 occasion, employee was not having any different symptoms or pain. Employee testified forthrightly that he had been helping some friends move several days prior to that event, but had not felt any different or

Employee: David Duly

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suffered any repercussions from that exercise. The only reason this event translated into a trip to the hospital was because employee was out-of-town when it occurred, and his wife wanted to be careful.

We have no evidence that the help he provided friends in moving caused any change in pathology whatsoever. Employee simply mentioned this moving activity at the hospital and to his doctor in response to the questions of whether he had lifted anything heavy or exerted heavily in the last few days. In fact, it was error for the administrative law judge to repeatedly assert that an intervening accident took place in September 2005. The administrative law judge lacked the medical expertise necessary to conclude that a change in the pathology of employee's back took place. See *Kuykendall v. Gates Rubber Co.*, 207 S.W.3d 694, 711-712 (Mo. App. S.D. 2006).

The extent and percentage of a disability is a finding of fact within the special province of this Commission. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo.App. W.D. 2000) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003)). The Commission may consider all of the evidence, including the employee's testimony, and draw reasonable inferences in arriving at the percentage of disability. *Id.* Thus, based on the best evidence, I would find that employee sustained a permanent partial disability of 25% BAW.

Lastly, employer should be liable for the medical expenses in the amount of \$4,981.93 owing to Matthews-Richards Healthcare Management. It bears saying again that all are in agreement that employee suffered an injury arising out of and in the course of his duties for employer on June 6, 2005. Since there is no medical opinion to support the finding that an intervening accident occurred in September 2005, all of the medical expenses for which employee supplied documentation (Tr. 141 et. seq.) should have been included in the award. Employee had properly requested that employer authorize these services and expenses. When employer refused, employee sought treatment on his own. These services from Matthews-Richards, including the MRI, confirmed employee's work-related injury and the extent of those injuries.

Based upon the foregoing, I conclude that the award should be modified to grant employee permanent partial disability of 25% BAW, as well as past medical expenses owed to Matthews-Richards Healthcare Management in the amount of \$4,981.93. I respectfully dissent from the portions of the award and decision of the majority of the Commission to the contrary.

John J. Hickey, Member