

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

Injury No.: 08-115832

Employee: Robert Dungan
Employer: Fuqua Homes, Inc.
Insurer: Liberty Mutual Fire Insurance

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 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 June 5, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge David L. Zerrer, issued June 5, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Robert Dungan

Injury No. 08-115832

Dependents:

Employer: Fuqua Homes, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party:

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

Insurer: Liberty Mutual Fire Insurance

Hearing Date: April 8, 2013/April 29, 2013

Checked by: DLZ

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: December 18, 2008
5. State location where accident occurred or occupational disease was contracted: Benton 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? Yes
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? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant fell on ice
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: Head/body as a whole
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? \$1,363.44

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$880.18
- 19. Weekly compensation rate: \$586.78/\$404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: Yes No Open

TOTAL: NONE

- 23. Future requirements awarded: None

Employee: Robert Dungan

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Dungan

Injury No: 08-115832

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Fuqua Homes, Inc.

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

Additional Party:

Insurer: Liberty Mutual Fire Insurance

Checked by: DLZ

On the 8th day of April, 2013, the parties appeared before the undersigned Administrative Law Judge for an emergency hardship hearing seeking additional medical treatment. The Claimant appeared in person and by his attorney, Thomas Pirmantgen. The Employer appeared by its attorney, Jason Lloyd. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is not a party to this claim. The record was ordered to be left open until 5:00 p.m. April 29, 2013.

The parties entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 18th day of December, 2008, Fuqua Homes, Inc., was an employer operating subject to the Missouri Workers' Compensation Law; the Employer's liability was fully insured by Liberty Mutual Fire Insurance; on the alleged injury date of December 18, 2008, Robert Dungan was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about December 18, 2008, Claimant sustained an accident, which arose out of the course of and scope of employment; the employment occurred in Benton County, Missouri, and the parties agree that Pettis County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; at the time of the claimed accident, Claimant's

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average weekly wage was \$880.18, sufficient to allow the following compensation rates: \$586.78 for temporary total disability and permanent total disability, and \$404.66 for permanent partial disability; no temporary disability benefits have been paid prior to the date of this hearing; the Employer has paid medical benefits in the amount of \$1,363.44, prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award. The parties further stipulate that the Report of Injury was filed with the Division on January 8, 2009. The parties further stipulate that the last date medical expenses were paid by the Employer was February 19, 2009.

ISSUES

Whether the Claim for Compensation was filed within the time prescribed in Chapter 287?

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries?

DISCUSSION

Claimant offered, and there was admitted without objection, Exhibits A, B, and C.

Robert Dungan Jr., claimant herein, testified in his own behalf. Claimant testified that he was employed by Employer for more than 20 years at the time of his accident and that his employment was terminated in September 2011.

Claimant testified that on December 18, 2008, he was dispatched to a home in the rural area south of Warsaw, Missouri, to perform some repairs on a mobile home purchased from Employer. Claimant was at the work site when he slipped on ice in the area of his work trailer, causing Claimant to fall and hit the back of his head on the icy ground.

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Claimant testified that when he awoke, he was inside the house of the customer where he was working and that he had been unconscious for a period of time. Claimant notified Employer what had occurred and Employer sent someone to the job site to pick up Claimant. Claimant stated that when he awoke after the incident he had neck pain. The pain continued during the first week after the accident but the pain grew worse with time. Claimant further testified that the pain in his neck is a sharp pain that is increased when turning to the left or right or up or down.

Claimant testified that in 2009 he had to purchase a new mattress to help alleviate his neck pain and also different shoes. In November 2010 Claimant sought treatment on his own with Dr. Kuhns. Dr. Kuhns administered steroid injections but they did not relieve the pain in Claimant's neck. Claimant stated that his pain is progressively worse.

Claimant testified that before he went to see Dr. Kuhns, he talked to Bill Turley, Plant Manager, about his continued pain symptoms. Claimant stated that the plant manager told him that the Employer would support Claimant in getting his neck injury taken care of. Claimant also talked to an insurance adjuster, Mr. Juan Escandon, who told Claimant "you have to do what you have to do."

Claimant also testified that he thought Dr. Kuhns' treatment bills were being paid by Employer's insurer, but later learned they were paid by Claimant's private health insurance carrier.

Claimant is seeking further treatment for his injury suffered December 18, 2008.

On cross-examination, Claimant admitted that he returned to work after about three days of being off work. He also admitted that he was given restrictions when he returned to work, but could not recall the specific restrictions. Claimant further admitted that Employer

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accommodated Claimant's restrictions by assigning him office duties for several days before Claimant returned to full duty.

Claimant admitted that when he was talking to Mr. Escandon in November 2010 about seeing a doctor for more treatment, he was not authorized to seek treatment on his own. On re-direct examination Claimant testified that he was told if he sought additional treatment it would "be on my own."

Exhibit B sets out the report of independent medical evaluation of Dr. Garth Russell. Dr. Russell reported that he took a history of the Claimant, reviewed certain medical records, conducted a physical examination of the Claimant, and set out certain findings and opinions in his report.

Dr. Russell diagnosed Claimant with a concussion with loss of consciousness and a cervical and lumbar strain which resulted in traumatic brain syndrome; acute and chronic cervical strain, and chronic lumbosacral strain, healed with residual impairment.

Dr. Russell further opined that Claimant's condition was indicative for surgical interventions with no specific recommendation.

Employer offered no oral or written evidence at the hearing.

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FINDINGS OF FACT AND RULINGS OF LAW

Whether the Claim for Compensation was filed within the time prescribed in Chapter 287?

The parties have stipulated on the record that Claimant suffered an accident on December 18, 2008. The parties have stipulated that a report of injury was filed with the Division on January 8, 2009, and further that the last date that Employer paid for medical treatment was February 19, 2009. Claimant's original Claim for Compensation was signed October 26, 2011, and was filed with the Division of Workers' Compensation on October 31, 2011.

Employer alleges that Claimant's claim was filed outside the dates prescribed by Section 287.430. Claimant alleges that the last date of payment of medical expenses was after November 2011, when Claimant saw Dr. Kuhns. The parties do not dispute that any medical treatment payment to Dr. Kuhns was paid directly by Claimant or Claimant's personal health insurance carrier.

Claimant alleges that pursuant to Section 287.800 the provisions of Sections 287.430 and 287.140 must be strictly construed to mean that the statute of limitations set out in 287.430, as it applies to medical treatment expense paid, as set out in Section 287.140, applies to *any* (italics added) medical treatment and not restricted to medical treatment paid by the Employer.

This issue was addressed by the Court of Appeals in *Bryan v. Summit Travel, Inc.* 984 S.W.2nd 185 (Mo. App. W.D. 1998). That case involved the same question as this claim, being the definition of the words "under this chapter" as they relate to when medical expenses were paid and by whom. Claimant argues that 287.800 requires the term "under this chapter" to include all medical treatment payments which were administered to cure and relieve the effects of the injury.

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The parties do not dispute that the Claimant's claim was filed out of time when considering the last date that medical expenses were paid by the Employer, February 19, 2009. Since the medical treatment expense payments upon which Claimant relies were paid by Claimant or Claimant's private insurer, neither of whom have an obligation to provide medical treatment under Chapter 287, the rulings in *Bryan (Id.)* would apply.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant's claim was filed on October 31, 2011. I further find that the last payment of medical expense paid "under this chapter" was paid February 19, 2009. I further find that, notwithstanding the provisions of Section 287.800, the requirements for timely filing a claim for compensation, set out in Section 287.430, and the holdings reached in *Bryan v. Summit Travel, Inc.(Id.)* remain in force and effect.

Therefore, I find that Claimant's Claim for Compensation was not filed within the time prescribed in Section 287.430. Claimant's Claim for Compensation is dismissed for failure to be timely filed.

I find this issue in favor of Employer.

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Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries?

Based on the findings and rulings set out above the issue of future medical care is moot. Claimant is not entitled to any future medical care which may have been necessary to cure and relieve the Claimant of the effects of the injury of December 18, 2008.

I find this issue in favor of Employer.

Made by: _____
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation