

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

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

Injury No.: 97-499096

Employee: Jim Faulkner
Employer: Lear Corporation
Insurer: Zurich North America Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: July 19, 1997

Place and County of Accident: St. Louis County, 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 July 27, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued July 27, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jim Faulkner

Injury No.: 97-499096

Dependents: N/A

Before the

Division of Workers'

Employer: Lear Corporation

Compensation

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Zurich North America Insurance Co.

Hearing Date: May 4, 2007

Checked by: SC:tr

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: July 19, 1997
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.
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? 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:
While driving an automobile Claimant alleged he sustained injuries to his head, left hip, ribs, and lungs.
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, left hip, ribs, and lungs
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Jim Faulkner

Injury No.: 97-499096

17. Value necessary medical aid not furnished by employer/insurer? \$7,498.49

18. Employee's average weekly wages: \$667.23

19. Weekly compensation rate: \$278.42/disputed PPD rate

20. Method wages computation: Stipulated TTD rate

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

\$-0-

0 weeks of temporary total disability
0-

-

0 weeks of permanent partial disability from Employer
-0-

22. Second Injury Fund liability: No

Total:
\$-0-

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Harry Nichols

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jim Faulkner

Injury No.: 97-499096

Dependents: N/A

Before the

Division of Workers'

Employer: Lear Corporation

Compensation

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Zurich North America Insurance Co.

Checked by: SC:tr

PRELIMINARIES

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A hearing was held for a final award at the Missouri Division of Workers' Compensation (DWC) St. Louis office pursuant to a request from Jim Faulkner ("Claimant"). Claimant was represented by Attorneys Harry Nichols and Daniel Mannion. Lear Corporation ("Employer") and Zurich North America Insurance Co. ("Insurer") were represented by Attorney Stephen McManus. The parties agree the Second Injury Fund ("SIF") is to remain open. The record closed May 14, 2007 after submission of Claimant's medical deposition. Hearing venue is correct and jurisdiction properly lies with DWC. [\[1\]](#)

STIPULATIONS

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The parties have agreed that on or about July 19, 1997:

1. Claimant sustained an accident in St. Louis County, Missouri.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Zurich North America Insurance Co.
4. Employer had notice of the injury and a Claim for Compensation was filed within the time prescribed by law.
5. Claimant's rate for permanent partial disability (PPD) is \$278.42.
6. Employer has paid no temporary total disability (TTD) or medical benefits.
7. Claimant received his regular salary during the time period he was off work.
8. The injury was medically and causally related to the accident.

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ISSUES

1. Did the accident arise out of and in the course of employment?;
2. Liability for past medical expenses totaling \$7,498.49;
3. Rate;
4. TTD from July 20, 1997 through March 17, 1998 totaling \$17,680.00 (\$520.00 x 34 weeks);
5. PPD;
6. Second Injury Fund liability;

7. Does the penalty for alcohol use apply?;
8. Does the coming and going from the premises defense apply?; and
9. Voluntary recreational activity.

EXHIBITS

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Claimant's Exhibits A, B, D, E, and I are admitted. The following exhibits were excluded but retained: Exhibit C (See § 287.140.7 RSMo (2000), and Exhibits F, G, and H based on lack of foundation. [2] Employer offered Exhibits 1 through 4 which were admitted into evidence without objection. Any notations contained in the records were present when admitted into evidence.

SUMMARY OF EVIDENCE

All of the evidence was reviewed, but only evidence supporting this award is summarized below.

Live Testimony

Claimant is 50 years old and began working for Employer in 2002 at the Bridgeton facility as a department manager and second shift superintendent. He supervised other managers in the production of Ford Explorer seats. Mr. Jackson, the plant manager, supervised the day shift. Claimant supervised the second shift from 5:30 p.m. to 2:00 a.m. He met with Mr. Jackson during shift change each day to discuss work matters. Claimant testified he typically worked until 4:00 a.m. answering employee questions.

A golf outing was planned to celebrate Mr. Jackson's promotion and transfer to another state. Claimant testified co-employee Jerry Webb stated during a meeting that he could not attend the outing because of a prior commitment. Mr. Jackson replied he expected all management personnel to attend. Claimant further testified Mr. Jackson permitted him to leave work early Saturday morning to attend the outing later that day. Mr. Kurt Stromberg was instructed to finish Claimant's shift.

The golf outing began around 8:00 a.m. on July 19, 1997. A number of management personnel attended including Claimant. Claimant was not paid to attend the outing, no clients were present, and there was no plan to discuss business before, during or after the outing. None of the supervisors purchased drinks or food, according to Claimant. Claimant further testified he may have become intoxicated during the outing because he drank "quite a few" beers.

Several managers did not attend the outing, including Jerry Webb. Claimant knew of no supervisor who was fired, demoted, or reprimanded for not attending the outing.

During the outing, Mr. Jackson fell out of a golf cart and dislocated his shoulder. He was taken to the hospital by Steve Alderson, the production manager, Mr. Ries the IT manager, and Jeff Bowsa, Mr. Jackson's neighbor. Claimant testified he decided to go to the hospital after talking to Mr. Alderson and Mr. Reis. However, Claimant had no direct order to proceed to the hospital from Mr. Jackson or Mr. Alderson, his immediate supervisors.

Claimant testified he was involved in a one car automobile accident between 1:00 p.m. and 2:00 p.m. while traveling to the hospital. [3] Claimant was in a coma following the accident and has no memory of the accident or what happened immediately following it. He did not recall drinking in the car or leaving the outing with beer. His next recollection was being at St. John's Hospital with his parents a month after the accident. Claimant was told he was in the hospital due to injuries he sustained in a motor vehicle accident. Claimant sustained a fractured left hip, ribs, head injury, and collapsed lung which was repaired. Claimant received his full salary while he was off work.

Claimant has not received any medical treatment since being released from the hospital. He has no physician imposed work restrictions on his ability to push, pull, sit or stand.

Claimant testified he received two demotions after he returned to work. However, he chose not to return to his former job because he did not want responsibility for the entire shift. He transferred to the shipping department but was unable to perform the work. Claimant later worked as a receiving supervisor for eleven months until he decided to work for a different Employer.

Claimant returned to work for Finley Industries as a second shift supervisor. He next worked ten months for Johnson Marcraft building air conditioning units, before being terminated for poor performance. Claimant drove a forklift for seven months for True Fitness before being fired for not reporting an absence. Claimant has worked for The Home Depot for five years, earning raises and receiving satisfactory performance reviews.

Current complaints include left hip, rib pain and headaches. He has difficulty sitting for long periods and has short term memory loss. He adjusts for memory loss by writing reminders on post-it notes. He takes over the counter medications for headaches, and wears a left shoe spacer for stability.

Initially Claimant's medical expenses were covered by his wife's insurance. However, after leaving Employer, Claimant testified his subsequent employers would not cover his pre-existing conditions.

Jerry Webb is a quality engineer for Employer. In 1997, he was a second shift supervisor at the Bridgeton facility and reported to Claimant. He understood the 1997 golf outing was a going away party for Mr. Jackson and salaried staff were invited. No emails or written invitations were circulated before or after the event. He did not attend the outing. Mr. Webb was not informed that attendance was mandatory by Mr. Jackson, Mr. Alderson, or the Claimant. Mr. Webb was not demoted or reprimanded for not attending. Mr. Webb testified he knew of other employees that missed the outing but were not demoted or reprimanded for failing to attend.

He did not specifically recall a July 18, 1997 staff meeting, but testified daily meetings were held. He did not recall Mr. Jackson stating the golf outing was mandatory. Mr. Webb testified he would have attended any mandatory meeting.

Deposition Testimony

Joseph Hanaway, M.D., a neurologist, examined Claimant in July 2002 at the request of Claimant's attorney, for head injuries sustained in the 1997 automobile accident. Claimant displayed coordination problems. Dr. Hanaway diagnosed retentive memory problems, or short term memory loss. He found the July 1997 motor vehicle accident was the substantial factor in the development of Claimant's condition. Dr. Hanaway recommended a second examination by a neuropsychologist to determine the extent of memory loss. He testified the first test was performed too soon following the accident. However, he opined it was unlikely Claimant's medical condition would change after ten years.

David Peebles, M.D., a board certified neurologist examined Claimant at Employer's request and diagnosed a closed head injury, loss of consciousness and a small right parietal hemorrhagic contusion related to the July 19, 1997 accident. He testified the medical treatment provided was reasonable and necessary to cure the effects of the injury. He opined Claimant had attained maximum medical improvement (MMI), and recommended no further testing or treatment. He rated 10 % PPD of the body as whole for the head injury.

Dr. Peebles disagreed with Dr. Hanaway's recommendation to test Claimant. Dr. Peebles opined testing would only confirm the diagnosis: mild cognitive problems, higher executive dysfunction, and memory problems. Dr. Peebles did not expect Claimant would improve with additional testing or treatment nine and a half years following the accident.

Mark Jackson was plant manager of Employer's Bridgeton facility in 1997 and testified on behalf of Employer. The golf outing was a going away party for Mr. Jackson given by his staff members. Staff included

among others, Steve Alderson, Bob Ries, and Allan Fischer. Staff members invited the attendees. Mr. Jackson also invited his neighbor, Jeff Bowsa.

Mr. Jackson testified the outing was not mandatory. It was held on Saturday and was not connected to the production line. Several managers and half the salaried staff did not attend the outing. He testified the outing was not business related, therefore staff was not reprimanded for failure to attend. A number of staff did not attend and are still employed by the company.

Mr. Jackson did not recall conducting an operations meeting the day before the outing, or authorizing Claimant to leave work early to attend the outing. He testified Claimant ran the daily staff meetings. Mr. Jackson did not recall authorizing payment for the food or beer served during the outing.

Steve Alderson, an operations manager at the Bridgeton facility in 1997, testified on behalf of Employer. Mr. Alderson was second in command of the plant and Claimant reported to him.

Mr. Alderson attended the outing, but denied telling Claimant or anyone else it was mandatory. Supervisors were not pressured to attend. Mr. Alderson did not recall permitting Claimant to leave work early the day before so he could attend the outing. No customers were present. No business was conducted during the outing. Mr. Alderson testified he did not talk to Claimant after Mr. Jackson's accident or instruct him to proceed to the hospital.

Allan Fischer, a materials manager at the Bridgeton facility in 1997, testified on behalf of Employer. Prior to 1997 Mr. Fischer supervised Claimant. Mr. Jackson and Mr. Fischer did not require supervisors to attend the outing. Mr. Fischer attended the golf outing, but left after nine holes due to bad weather. He denied any repercussions for leaving early. He is still employed with the company. He knew of other employees who did not attend the outing, but did not know anyone that was reprimanded for failure to attend.

Medical Evidence

On July 19, 1997 Claimant received treatment at St. Joseph's Hospital-West for a closed head injury, diaphragmatic rupture, pelvic fracture, pulmonary contusion, and chin laceration. Claimant was unresponsive at the scene of the accident.

On the day of the accident, Kenneth Hacker, M.D., performed exploratory surgery to repair a hernia, insert a chest tube, and repair the chin laceration. Claimant was treated in the intensive care unit following surgery. Claimant was discharged to SSM Rehabilitation Institute on July 26, 1997.

On August 1, 1997, Claimant was transferred to St. John's Mercy Medical Center for rehabilitation where improvement was noted. On September 9, 1997, Claimant was admitted to Village North Manor Nursing Home for a brief course of treatment, and released home on September 18, 1997.

FINDINGS OF FACT and CONCLUSIONS OF LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant did not sustain an injury due to an accident which arose out of and in the course of his employment for the following reasons:

Burden of proof

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury fund Liability. ***Meilves v. Morris***,

422 S.W.2d 335, 339 (Mo. 1968). To prevail, Claimant must prove he sustained an injury by accident arising out of and in the course of his employment, and the accident resulted in the alleged injuries. **Choate v. Lily Tulip, Inc.**, 809 S. W. 2d 102, 105 (Mo. App. 1991) (Overruled on other grounds by **Hampton v. Big Boy Steel Erection**, 121 S.W. 3d 220, 223 (Mo banc 2003)).

Accident/arising out of and in the course of employment

Section 287.120.1 RSMo (2000) provides workers' compensation where an injured worker shows that his injury was caused by an accident "arising out of and in the course of the employee's employment." Section 287.020.3(1) requires an injury to arise out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. An accident arises out of the employment relationship "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." **Abel By and Through Abel v. Mike Russell's Standard Service**, 924 S.W.2d 502,503 (Mo. 1996) (citations omitted). An injury occurs 'in the course of' employment' "if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment." **Shinn v. General Binding Corp.** 789 S.W.2d 230, 232 (Mo. App.1990). "Arising out of" and "in the course of" are two separate tests. "[B]oth must be met before [an employee] is entitled to compensation." **Automobile Club Inter-Insurance Exchange v. Bevel**, 663 S.W.2d 242, 245 (Mo. Banc 1984).

The parties stipulate Claimant was involved in a motor vehicle accident on July 19, 1997. The issue is whether the accident arose out of and in the course of Claimant's employment.

I find the accident did not arise out of Claimant's employment. I do not find Claimant's testimony credible that management required attendance at the golf outing. Both of Claimants' supervisors, Mr. Jackson and Mr. Alderson, denied the outing was mandatory. They denied telling Claimant his attendance was required. Mr. Webb and Mr. Fischer both testified the outing was not mandatory. Claimant supervised Mr. Webb but did not tell him the outing was mandatory. Mr. Jackson denied authorizing Claimant to leave work early to attend the outing. There was no written document stating attendance was required. Claimant was not expected to perform work duties during the outing. No business was discussed. No clients or vendors attended the outing.

I find the accident did not occur in the course of Claimant's employment. His employment did not require him to be in the vicinity of Freymuth and Highway 40 where the accident occurred. The outing took place on Saturday, a non work day, and Claimant was not paid to attend. Claimant was not instructed by Mr. Jackson or Mr. Alderson to proceed to the hospital. In fact, Mr. Alderson denied talking to Claimant after Mr. Jackson's accident. Claimant was not performing his supervisory duties at the time of the accident. It is not clear who paid the green fees but Employer did not pay for the food or drinks.

Claimant's testimony is not credible regarding the time of accident. He testified the accident occurred between 1:00 p.m. and 2:00 p.m., however the police report stated the time of accident as 5:09 p.m., more than three hours later. The police officer at the scene of the accident noted a strong odor of alcohol emanating from Claimant. Claimant admitted he may have been intoxicated at the time of the accident because he had consumed "quite a few beers."

Therefore, I find Claimant was not fulfilling employment duties when the motor vehicle accident occurred. There is no doubt Claimant sustained serious injuries as a result of the motor vehicle accident; however I find the accident did not arise out of or in the course of his employment.

All other issues are moot.

CONCLUSION

Claimant did not sustain an accident which arose out of and in the course of his employment. The Second Injury Fund claim is dismissed.

Date: _____

Made by: _____

Suzette Carlisle

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker

Acting Division Director

Division of Workers' Compensation

[1] The parties were asked to submit proposed awards, however there is no indication a proposed award was submitted by Claimant.

[2] Several loose documents bearing the name "Missouri Rehabilitation Center" were contained in the record without connection to an exhibit. These documents were also excluded. Claimant's Exhibit J was referenced during the hearing but was not offered for admission and is not contained within the record.

[3] The police report reflected the time of accident as 5:09 p.m., and the police officer reportedly noted a strong odor of alcohol in the car, with full and empty beer cans in plain view.