

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

Injury No.: 04-132527

Employee: Tobias H. Fortenberry
Employer: M & M Market Management
Insurer: American Family Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: Alleged August 20, 2004
Place and County of Accident: Alleged Perryville, 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 December 11, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Gary L. Robbins, issued December 11, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Tobias H. Fortenberry

Injury No. 04-132527

Dependents: N/A

Employer: M & M Market Management

Additional Party: N/A

Insurer: American Family Mutual Insurance Company

Hearing Date: September 28, 2006

Checked by: GLR/kh

SUMMARY OF FINDINGS

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 August 20, 2004
5. State location where accident occurred or occupational disease contracted: Alleged Perryville, 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? No
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 happened or occupational disease contracted: The employee alleged he injured his right knee while conducting an inventory at a store in Perryville, Missouri.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Alleged right knee.
14. Nature and extent of any permanent disability: None. See Award.
15. Compensation paid to date for temporary total disability: \$0
16. Value necessary medical aid paid to date by employer-insurer: \$0
17. Value necessary medical aid not furnished by employer-insurer: No benefits paid. See Award.
18. Employee's average weekly wage: \$425.00
19. Weekly compensation rate: \$283.35 for temporary total, permanent total and permanent partial disability.
20. Method wages computation: By agreement
21. Amount of compensation payable: \$0
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None

No attorney fees are ordered in this case.

FINDINGS OF FACT AND RULINGS OF LAW

On September 28, 2006, the employee, Tobias H. Fortenberry, appeared in person and by his attorney, James J. Sievers, for a hearing for a final award. Rachael R. Brown represented the employer-insurer at the hearing. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was acting under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by American Family Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease, the employee was an employee of M & M Market Management and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage is \$425.00. His rate for temporary total and permanent total disability is \$283.35 per week. His rate for permanent partial disability is \$283.35 per week.
5. The employer-insurer provided no medical aid in this case.
6. The employer-insurer provided no temporary disability benefits in this case.

ISSUES

1. Whether on or about August 20, 2004 the employee sustained an accident or occupational arising out of and in the course of his employment?
2. Whether the employer had notice of the employee's accident?
3. Whether the employee's injury was medically causally related to his accident or occupational disease?
4. Whether the employer-insurer is liable for past medical bills?
5. Nature and extent of permanent partial disability?

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Report of David T. Volarich, D.O
- B. MRI dated October 4, 2005
- C. Medical records from Christian Northeast-Northwest Hospital
- D. Medical records from HealthSouth Rehabilitation of Florissant
- E. Medical records of Rafat S. Nashed, M.D.
- F. Medical records of Frank O. Petkovich, M.D.
- G. Medical records from St. John's Mercy Sports & Therapy
- H. Unpaid medical bills

Employer-Insurer's Exhibits

1. Medical report of Russell C. Cantrell, M.D.
2. Division of Workers' Compensation Medical Treatment Form
3. Division of Workers' Compensation Claim for Compensation
4. Division of Workers' Compensation Report of Injury
5. Division of Workers' Compensation Stipulation for Compromise Settlement

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

Three witnesses testified live at trial, Tobias H. Fortenberry, the employee, Mark Tons, President and owner of M & M Market Management and Susan Tons, Vice President and co-owner of M & M Market Management (herein after referred to as M & M or employer).

The employee testified that he worked for M & M for about three years. He indicated that his employment involved market research and auditing of stores that sold cigarette products. As part of his duties he drove to stores and would inventory the product that was there. The goal was to determine which products sold the best. On average, the employee indicated that he traveled to three or four stores a week and then would return to the home office in Chesterfield, Missouri.

The employee testified that he had an injury to his right knee on or about August 20, 2004. At trial, he indicated that he was

counting product at a store. He said he squatted to count some of the cartons, and when he got up he stumbled and felt a pop in his right knee. After the injury, he testified that he drove to another store and completed an audit there before returning to his home in St. Louis. He indicated that the next day he audited three more stores before returning to the office in Chesterfield. He said that he saw Jackie-a manager, and was told that a store had not been done properly and asked him to redo it. The employee testified that he complied and redid the work. He testified that his knee hurt and it was hard to get in and out of a car. The next day he said that his knee got worse and worse. He additionally testified that on the day of the injury, he did not tell anyone at the store that he had injured his knee.

After he returned to the home office, the employee testified that he told Mr. Toms and Venessa that he had messed up his knee the last trip. He indicated that when he first told them about the knee problem, he did not ask for any medical care. However, the employee testified that he told Mr. Toms that he was going to see Dr. Nashed before he ever did so.

The employer-insurer conducted a cross-examination of the employee during trial. The employee testified by deposition in March 2005. During his testimony, the employee stated that he might have mentioned the knee problem to Dr. Nashed before October 29, 2004 and he might have asked his personal doctor about his knee. He testified that he is positive that the injury occurred while he was in Perryville at Smokes To Go. In his deposition, he apparently testified that the injury happened at Forsake Of Argument. At his deposition, the employee apparently stated that he first noticed pain when he walked up the steps at his house. He denied that statement at trial and indicated that the pain started when he initially stood up and got worse when he was driving back from Perryville. He then agreed with his deposition testimony where it is reported he said he first noticed he hurt himself when he was trying to get in and out of the vehicle.

Dr. Nashed had been treating the employee for other problems prior to August 20, 2004. One of his records dated September 25, 2003 reports that the employee was complaining of pain in his left knee. The record additionally reports that the employee stated that he did not know how he hurt his knee. Follow up records concerning the left knee revealed degenerative changes.

The first record that Dr. Nashed has about the employee's right knee is dated October 29, 2004. That record states "He is mainly complaining today about his right knee but also about his neck". The record does not contain any history about a work related injury occurring on or about August 20, 2004. Dr. Nashed saw the employee on November 12, 2004 and recommended surgery. The employee had right knee surgery on November 30, 2004. There are other records from Dr. Nashed dated December 9, 2004, December 30, 2004, January 27, 2005, and February 11, 2005; all dealing with the right knee. There is no mention of any work related accident or injury in any of these records. The first mention that Dr. Nashed has of a work related injury occurs in his record dated March 25, 2005. That record reports "**He informs me today that the injury that began since his pain in the right knee occurred between August 20, 2004 and August 23, 2004. He squatted down while at a store where he was doing his job. His then felt pain in the right knee. He drove on further on to the rest stop. When he got out of the car his knee swelled up. He did not seek immediate treatment because he thought it would get better and therefore he showed up next to see me on October 29, 2004 at which time we discussed the problem with his right knee and went on towards evaluation and eventually treatment of it.**" He is doing very well and has recovered nicely from the surgery". (emphasis added) On April 14, 2005, the employee reported that his knee was 80% better than it was before surgery.

Additional medical records about the right knee show that the employee was seen at Christian Hospital on October 29, 2004. The records indicate that the employee was there as he felt that his right knee was about to give out. The report further states, "**He has not had any history of recent injury**". (emphasis added)

In 1999 the employee had received previous treatment to his right knee. Dr. Petkovich's medical record dated October 4, 1999 reports a forklift injury to the right knee. In this instance the report indicated that the employee reported a work related injury and gave a history of how the injury occurred.

Dr. Volarich saw the employee on November 7, 2005 and prepared a report dated the same date. In the report Dr. Volarich reported that his opinions are based on the premise that the history given by the employee and other information was true and accurate.

In the history that was provided to Dr. Volarich, the employee indicated that after the injury he had a two-hour trip back to St. Louis, and that when he arrived, he was unable to get out of his car without assistance. At trial the employee testified that he audited other stores after he said he hurt his knee. Based on his examination and review of records, Dr. Volarich provided several opinions:

1. The work accident of August 23, 2004 is the substantial factor as well as the prevailing factor causing the medial meniscus tear and the need for surgery.
2. The employee has reached MMI.
3. The employee has a 40% permanent partial disability to his right knee due to the accident.
4. The employee will need care for pain syndrome such as medication and PT.

Dr. Cantrell performed an IME evaluation of the employee on March 28, 2006. He also took a history from the employee. In that history the employee is reported to have said that he did not seek immediate medical care and did not seek medical care for quite some time. The record also indicated that the employee was terminated in June 2005. Dr. Cantrell provided

opinions that:

1. The employee is at MMI.
2. The employee has a 12% permanent partial disability of his right knee, 8% from the meniscal pathology and 4% preexisting.
3. The employee does not need further care.

A Report of Injury was filed in this case. The report indicates that the employee filled out the form. On the form there is a space to put "Date Employer Notified". The report reads that the employee notified the employer "11-4-04".

Mark Tons testified that in 2004, his company had ten to fifteen employees. He testified that this is the first workers' compensation claim that has been filed against his company. He indicated that he saw Mr. Fortenberry maybe once a week.

Mr. Tons further testified that he did not become aware that the employee filed a workers' compensation claim until he got notification about the claim from the insurance company. He indicated that he first became aware of the employee's knee injury when the employee told him that he needed time off for surgery. He testified that the employee never told him when he injured his knee or that he injured his knee while at work. He also testified that he did not know that the surgery was supposed to be for a work related injury.

Ms. Susan Tons testified that she was present at the office in August 2004 and talked to the employee frequently. She indicated that the employee began employment in 2002 as a traveling auditor, and became an editor in 2005. She testified that the employee's position was switched after there were scheduling and time off problems, and as there were issues in the stores regarding the employee's behavior.

Ms. Toms testified that the employee never told her that he was going to see a doctor in September and October of 2004. She indicated that the employee advised her in November 2004 that he was not going to be able to work due to a knee surgery and that he wanted to be paid for his off time. She indicated that she advised the employee that he could be off, but he would not be paid. She also testified at that time the employee wanted to know the name of her insurance company. When she asked why, she stated that the employee said he wanted to file a workers' compensation claim, as he could not be off for days without pay. Ms. Toms testified that she told the employee that this was elective surgery, he did not get hurt at work and that he did not have a workers' compensation claim.

Ms. Toms testified that she did not know how the employee hurt his knee; he never told her that he hurt himself while at work and he never asked for medical care for his right knee. Ms. Toms indicated that she did not question the employee about his knee as he is a private person and does not share information. She testified that she first became aware that a workers' compensation claim had actually been filed when she received a claim form in the mail.

RULINGS OF LAW:

Accident

The employer-insurer has disputed accident in this case. The evidence that was presented by the employee on the issue of accident is all derived from his testimony and his credibility. If a decision is to be made finding that the employee sustained a work related accident on or about August 20, 2004, the testimony of the employee and his supporting evidence will have to be found to be credible, convincing and consistent. Unfortunately for the employee, the Court found the testimony of the employee to be mendacious, inconsistent and in general contradicted by other more credible evidence.

Other than his own testimony or prior statements, the employee offered no additional witness or statements to verify that an accident occurred as indicated by the employee. The employee specifically stated that he did not tell anyone on the scene that an accident took place. The employee claims that he told Mr. Toms, Ms. Toms and Vanessa, and other employees at M & M that he had a work related accident shortly after the accident. No one from M & M verified this statement, and more importantly, both Mr. Toms and Ms. Toms specifically testified that the employee never reported that he had a work related incident. They indicated they did not know there was a workers' compensation injury or claim until they received notification in the mail.

The medical records are extremely important and telling. They also do not support a position that the employee had a work related accident on or about August 20, 2004. The first medical record in evidence that mentions the right knee is the October 29, 2004 report from Christian Hospital. The employee was seeking care for his right knee, yet when he is asked about the accident, the report reads, "He has not had any history of recent injury". This information does not support the employee's position, and in addition is in contradiction to the express testimony of the employee in that he claims he told others that he hurt his knee. In addition, the Report of Injury further refutes the testimony of the employee. The employee is supposed to have filled out the Report of Injury himself. In that report, it indicates that the accident was not reported to the employer until "11-4-04". Either the employee reported the accident at M & M shortly after the event, or he did not tell the employer about the accident until 11-4-04. The employee cannot have it both ways. In any event, the Court does not find either version to be supported by the evidence or credible.

Dr. Nashed is the physician who evaluated the employee's right knee injury and the physician who performed surgery on November 30, 2004. Dr. Nashed has medical records concerning the right knee beginning on October 29, 2004 and

continuing through July 21, 2005. Dr. Nashed saw the employee on five occasions between October 29, 2004 and March 25, 2005, including surgery. However, the first time that a work related event is ever mentioned is on March 25, 2005. It is at that time, some seven months after the accident that Dr. Nashed first makes any entry regarding a work related event. This is the first occasion where there is any independent verification of a work related event, however the source is still the employee.

The testimony of Mr. And Ms. Tons was found to be credible and believable. Their testimony directly disputed the testimony of the employee in all respects. The medical records further attest to the fact that the employee's testimony is not credible or reliable. The Court finds no reasonable basis to believe that the employee who claims he injured his right knee on August 20, 2004, and who claims that told his superiors and co-workers of the accident, would on October 29, 2004 report that he had not recently injured his knee. The Court finds no logical basis why a patient would go about seven months before he tells his treating physician the details of his supposed accident. To say that the employee might have told the medical providers or that the medical providers forgot to write it down or wrote it down inaccurately is just not believable given all of the evidence in this case.

The Court just does not believe the testimony of the employee taken in its best light. Even disregarding the inconsistent statements of the employee and the testimony of the Tons, the medical evidence does not support the position of the employee. The Court believes that the medical evidence presented is the most credible and independent evidence in this case. The Court also believes that the medical evidence does not support the overall position of the employee.

The Court after considering all of the evidence finds that the employee has not met his burden of proof on the issue of accident. The Court finds that the employee had not presented credible evidence that he sustained a work related accident or occupational disease on or about August 20, 2004 that arose either out of or in the course of his employment. The Court does not believe that the evidence supports the position of the employee where he claims that he injured himself on August 20, 2004 while working in Perryville, Missouri.

Notice-Medical Causation -Additional Medical Aid-Nature and Extent of Disability

As the Court has found that the employee did not prove that a compensable accident arose out of and in the course of his employment, the issues of Notice, Medical Causation, Additional Medical Aid and Nature and Extent of Disability are moot and will not be addressed in this Award.

The employer-insurer is not ordered to provide any benefits in this case.

Employee: Tobias Fortenberry

Injury No.: 04-132527

ATTORNEY'S FEE

No attorney's fee is ordered in this case.

INTEREST

No interest is ordered in this case.

Date: _____

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Patricia "Pat" Secrest
Director
Division of Workers' Compensation

