

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

Injury No.: 99-171511

Employee: Michael G. Gibbons

Employer: The Quaker Oats Company

Insurer: Self-Insured

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 September 30, 2009. The award and decision of Administrative Law Judge Lisa Meiners, issued September 30, 2009, 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 20th day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Michael G. Gibbons

Injury No. 99-171511

Dependents: N/A

Employer: The Quaker Oats Company

Insurer: Self-Insured

Additional Party: N/A

Hearing Date: September 2, 2009

Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: December 7, 1999.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, 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? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While in the course and scope of employee's work, employee attempted to remove a 350-pound vacuum pump resulting in an injury of his low back and right leg.
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: Body as a whole.
14. Nature and extent of any permanent disability: Permanent Total Disability.
15. Compensation paid to-date for temporary disability: -0-.

16. Value necessary medical aid paid to date by employer/insurer? \$11,224.60.
17. Value necessary medical aid not furnished by employer/insurer? \$11,333.73.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$578.48/\$303.01.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: The employer is liable to employee for permanent total benefits of \$578.48 per week for Claimant's lifetime. The Employer is liable to Claimant for temporary total disability benefits from December 14, 1999 to March 15, 2000 and January 19, 2001 to June 4, 2002 as well as outstanding medical expenses of \$11,333.73.
22. Future requirements awarded: Employer is to provide employee with additional medical care required to cure and relieve the symptoms related to the injury of December 7, 1999.

Said payments to begin as of the date of the award 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 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Mike Knepper.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael G. Gibbons

Injury No. 99-171511

Dependents: N/A

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FINDINGS OF FACT AND RULINGS OF LAW

On September 2, 2009, the parties appeared for hearing. Michael Gibbons, the Claimant, appeared in person with Counsel Mike Knepper. The Employer, Quaker Oat Company, and its insurer, Old Republic Company Insurance was represented by Kevin Johnson.

STIPULATIONS

The parties stipulated to the following:

- 1) That Employee was an employee and working subject to the law in St. Joseph, Missouri;
- 2) That the Employer and Insurer was Old Republic Insurance Company;
- 3) That there was a change of venue to Kansas City;
- 4) That the Claimant has complied with the statute of limitations;
- 5) That the Employer has paid \$11,224.60 in medical expenses and no temporary total disability benefits;
- 6) That the wage rates are \$578.48/\$303.01.

ISSUES

The issues to be resolved by this hearing are as follows:

- 1) Whether the Employee sustained an accident arising out of and in the course of his employment on December 7, 1999;
- 2) Whether the Employee provided notice as required by law;
- 3) Whether the Employer is liable to Claimant for past temporary total disability benefits from December 14, 1999 to March 15, 2000, and from the period of January 19, 2001 to June 4, 2002;
- 4) Whether the Employee sustained any disability and, if so, the nature and extent of the disability;
- 5) Whether the Employer is liable to the Employee for past medical expenses in the amount of \$26,848.17;
- 6) Whether the Employer is liable to the Employee for future medical care as a result of the December 7, 1999 accident; and, lastly,

- 7) Whether the Employer complied with the Temporary Award issued April 30, 2001, and if not, should the medical expenses be doubled under §287.510.

FINDINGS

Based on the evidence and testimony, I find the following: On December 7, 1999, Claimant attempted to remove/unhook a vacuum pump from a motor while in the course and scope of his employment with Quaker Oats. Claimant credibly testified that he felt a hot burning sensation of his right buttock and right lower extremity as he attempted to slide the 350 pound vacuum pump. Indeed, Carl Williams, a co-worker of Claimant, observed Claimant hobbling immediately after Claimant attempted to move the pump.

Mr. Williams informed their supervisor that Claimant sustained an accident. Indeed, the transcript of the temporary hearing and Temporary Award reveal two other co-workers observed Claimant removing the heavy pump the evening of December 7, 1999. That evening Claimant finished his shift thinking he sustained a mere muscle strain.

Several days later, co-employee Williams saw Claimant's right leg collapse and Claimant fall while at work. At that time, Claimant informed co-workers he needed medical treatment because his right leg "did not work" and he had a large lump the size of a golf ball on his right buttock. Claimant thought the large lump was cancer and did not associate his current complaints with the work activity of December 7, 1999.

The parties request this award address whether Claimant sustained an injury by accident that arose out of and in the course of his employment with Quaker Oats on December 7, 1999. I find based on the testimony and evidence presented that Claimant sustained an accident when he attempted to unhook and move a 350 pound vacuum pump on December 7, 1999. The lay testimony presented at the temporary hearing of April of 2001, as well as Carl Williams' and Claimant's testimony lead to this finding.

The Employer argued and presented evidence that moving a 350 pound vacuum pump did not cause the chronic right piriformis syndrome along with right leg sciatica diagnosed by the majority of physicians. The Employer presented the testimony and reports of Dr. Michael Poppa and a Dr. Quintero. Although Dr. Poppa diagnosed Claimant with piriformis syndrome, he found the lifting incident did not cause the piriformis syndrome. Instead, Dr. Poppa diagnosed Claimant's piriformis syndrome as idiopathic. Dr. Poppa then assessed a 5 percent permanent partial disability due to a work-related soft tissue injury superimposed upon his pre-existing condition.

The Employer also presented a neurologist, Dr. Quintero. Dr. Quintero also opined Claimant had a pre-existing history of right buttock and leg pain and that Claimant's current condition had an insidious onset. Although the majority of physicians diagnosed piriformis syndrome, Dr. Quintero is the only one to disagree with this diagnosis. Instead, Dr. Quintero suggests Claimant has a psychogenic process such as somatoform, conversion disorder or malingering.

Claimant on the other hand presented the testimony of Dr. Crislip, Dr. Abrams and Dr. Koprivica who all found the lifting incident of December 7, 1999, was a substantial contributing factor to Claimant's current piriformis syndrome with right leg radiculopathy. The Claimant also presented a psychologist, Dr. Schmidt, who diagnosed Claimant with depression as a result of the chronic pain syndrome from the work-related injury of December 1999. Schmidt did not believe Claimant suffered from a conversion disorder or was malingering. Dr. Schmidt assessed a 20 percent permanent partial disability as a result of depression. Another physician, Dr. Freeman, also found the lifting incident exacerbated Claimant's piriformis syndrome.

I find that the Employer's experts' opinions lack credibility and are against the weight of the evidence. Moreover, Dr. Quintero wrote Claimant has a psychogenic process in his report but on cross-examination denied diagnosing Claimant with the very opinions written in his report. As such, I find his written opinion inconsistent with his deposition testimony as well as his overall opinion against the weight of all the experts' opinions.

Indeed, Claimant since the lifting incident of December 7, 1999, has chronic debilitating back and right leg pain not experienced prior to the last work injury. Since December 7, 1999, Claimant's right leg gives out causing him to fall on various occasions and as a result doctors prescribed a cane and knee brace. Claimant can sit not more than 30 minutes without changing positions and his standing tolerance is approximately 20 minutes. Lastly, Claimant worked full time without restrictions prior to December 7, 1999. Based on the evidence presented, I find the piriformis syndrome and right leg radiculopathy causally related to the lifting incident of December 7, 1999. Indeed, this finding is based on Drs. Abrams, Crislip, Koprivica and Freeman. As such, I find the lifting incident was a substantial contributing factor causing an exacerbation of the piriformis syndrome and right leg complaints.

I also find Claimant had occasional non-disabling symptoms of his low back and right leg prior to December 1999. Indeed, there are only two medical records, one from 1994, and one from 1998 admitted that reveal Claimant experienced lumbar radiculitis prior to December 7, 1999. This leads me to find that Claimant worked full time without hindrances or obstacles regarding his low back and right leg prior to December 1999. This finding also comports with Dr. Mujica and Dr. Cathcart that Claimant had some pre-existing symptoms.

The Employer argues that Claimant did not provide notice pursuant to Missouri Statute 287.420.

§287.420 "Written notice of injury to be given to employer – exceptions. No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby."

I find Claimant through co-employee Williams gave actual notice of the injury to the Employer. Regardless, Claimant informed the plant nurse of his right buttock and leg pain within 30 days of the injury. On February 3, 2000, Claimant personally informed his employer upon realizing that the knot of his low back was work related rather than cancer. I find Claimant personally notified his Employer as soon as he was informed by a physician the condition was work related.

The Employer argues that because Claimant did not give the history of the December 7, 1999 incident when he went to Dr. Mujica and Dr. Cathcart that therefore it is not work related. Indeed, both doctors saw Claimant on December 14th and 17th and diagnosed Claimant with low back pain with right radiculopathy unknown etiology. And based on their recommendations Claimant underwent epidural injections of the lumbar spine. Although Claimant did not mention the lifting incident to Drs. Mujica and Cathcart, Claimant soon after informed Dr. Kenton Freeman on January 14, 2000.

Even though Claimant did not inform Drs. Cathcart and Mujica of the work related injury, I do not find the Employer was prejudiced. Indeed, Claimant had not undergone extensive medical care at that time so the Employer was not prejudiced. Further, the Employer at that time had ample opportunity to investigate the incident since several coworkers were available for cross-examination. As such, I find the Employer was not prejudiced by Claimant giving them notice on February 3, 2000.

The next issue is whether the Employer is liable to Claimant for past temporary total disability benefits from the time periods of December 14, 1999 to March 15, 2000, and January 19, 2001 to June 4, 2002, at a weekly rate of \$578.48. It is the Claimant's burden to show he is temporary totally disabled during these time periods.

Claimant did not work from December 14, 1999 to March 15, 2000, since he was under active medical care for the work-related injury of December 7, 1999. Indeed, on March 15, 2000, Dr. Freeman released Claimant to light duty with the restrictions of no lifting over 15 pounds, no prolonged bending or sitting for more than five minutes. I find from December 14, 1999 to March 15, 2000, that Claimant was unemployable in the open labor market. Moreover, the Employer is liable to Claimant for temporary total disability benefits from December 14, 1999 until Claimant was released back to light duty which was accommodated on March 15, 2000.

The Claimant also requests past temporary total disability from January 19, 2001 until June 4, 2002. The Employer provided accommodated light duty employment for Claimant from March 16 until the plant closed on January 19, 2001. I note that a Temporary Award was issued on April 30, 2001 ordering the Employer to provide treatment to Claimant. On October 2, 2001, Claimant then received the only authorized medical care pursuant to the Award until Dr. Aschberger found Claimant reached maximum medical improvement on June 4, 2002. As such, the Employer is liable to Claimant for past temporary total disability benefits from the time period he was under authorized care from April 30 to June 4, 2002. Indeed, he was under such restrictions that no employer would have hired him during that time period.

I also find the Employer is liable to Claimant for temporary total disability benefits from January 19, 2001 until April 30, 2001. Claimant was under severe doctor's restrictions and still in need of medical care as evidence of the Temporary Award of April 30, 2001. Although Claimant received unemployment for a limited time during this period, the State of Missouri asked for a refund. The basis of the State's demand for a refund is that "Claimant is not able to work" (Exhibit EE). As such, I find Claimant to be temporary totally disabled within the open labor market during the time period of January 19, 2001 until April 30, 2001.

The next issue is whether Claimant sustained disability and if so the nature and extent of that disability. Claimant argues that his physical condition and resulting restrictions from the lifting incident render him unemployable in the open labor market. As noted earlier, as a result of the December 7, 1999 lifting incident, Claimant's right leg collapses causing him to fall on many occasions. He has a cane and a knee brace. Claimant can sit not more than 30 minutes without changing positions and his standing tolerance is approximately 15 to 20 minutes. His walking is extremely limited to 15 to 20 minutes. Lastly, Claimant last worked in January of 2001.

Further, I find Claimant testified credibly. I make this finding after observing his demeanor while testifying during the hearing. Additionally, Claimant during the hearing suffered with muscle spasms of his right quadriceps that were observed and noted by the administrative law judge. These spasms as observed are the spasms that keep Claimant awake during the night. Claimant has suffered with muscle spasms since the December 1999 accident.

Many experts' opinions were admitted into evidence on this issue. Dr. Bernie Abrams, Dr. Crislip and Dr. Koprivica, and a psychologist Allan Schmidt found Claimant was unemployable in the open labor market as a result of the December 7, 1999 lifting incident.

These physicians place severe physical restrictions on Claimant due to the December 7, 1999 accident. Dr. Abrams, a neurologist, restricted Claimant to no walking, standing and no sustained sitting. Dr. Abrams recommended Claimant to periodically recline to relieve pain. Another physician, Dr. Tim Moser, restricted Claimant to lifting/carrying not more than 10 pounds. Dr. Koprivica found Claimant should not squat, crawl, kneel or climb. Dr. Koprivica, like many other doctors, believe Claimant should limit walking and standing to 15 minutes.

On the other hand, the Employer presented a neurologist, Dr. Quintero, and an opinion of Michael Poppa. Dr. Quintero never placed restrictions upon Claimant because he felt Claimant did not sustain a work-related injury. Rather, Dr. Quintero found Claimant's clinical course inconsistent with piriformis syndrome. Instead, Dr. Quintero felt Claimant had an underlying psychogenic disorder.

Unlike Dr. Quintero, Dr. Poppa diagnosed Claimant with piriformis syndrome but did not feel the accident caused it. Instead, Dr. Poppa diagnosed soft tissue injury and assessed 5 percent permanent partial disability body as a whole. Dr. Poppa opined Claimant is able to work without restrictions.

Both parties presented vocational experts regarding this matter. The Claimant presented Mary Titterington who found Claimant unemployable in the open labor market based on the doctors' restrictions. The Employer presented Katie Montoya who found Claimant could work as a cashier attendant, retail clerk and/or operate machinery. I disagree with Ms. Montoya, as well as Drs. Poppa and Quintero. Instead, I find Mary Titterington's opinion, along with Abrams, Koprivica and Crislip's to be more credible regarding Claimant's physical abilities and unemployability.

Indeed, Ms. Titterington found based on the restrictions of Drs. Freeman, Abrams, Crislip, and Koprivica that Claimant could not work. Ms. Titterington also believes employers would not hire Claimant since he has a low level of functioning, frequently falls, uses a cane and leg brace, as well as uses heavy narcotic medication. Ms. Titterington found Claimant, a high school graduate to be unemployable. I agree.

As further indicia of Claimant's credibility, as well as his unemployability as a result of the December 7, 1999 accident, Claimant attempted vocational rehabilitation. Vocational rehabilitation sent him to massage school in Colorado. Claimant relocated attempting to be retrained as a massage therapist at the Boulder College of Massage Therapy. The Director of Student Affairs, however, requested Claimant to withdraw his application based on Claimant's physical limitations (see Exhibit AAA). As such, I find based on the evidence presented that Claimant is unemployable in the open labor market as a result of the December 7, 1999 accident.

The Employer is liable to Claimant for permanent total disability benefits beginning June 4, 2002, the day the authorized treating physician found Claimant at maximum medical improvement, and continuing for Claimant's lifetime.

The Employer is also liable to Claimant for future medical care in order to cure and relieve the effects of the December 1999 accident. Dr. Abrams, Dr. Crislip, Dr. Koprivica and psychologist Schmidt state that Claimant needs future medical care as a result of the December 1999 accident. Drs. Koprivica, Abrams and Crislip all believe Claimant needs Botox injections to minimize the muscle spasms, physical therapy and medications in order to cure or relieve effects of the piriformis syndrome caused/exacerbated by the December 7, 1999 accident. Schmidt recommends Claimant undergo counseling in order to

develop adaptive measures for dealing with pain and depression. As such, I find Claimant is entitled to receive future medical care in order to cure and relieve the symptoms of the December 7, 1999 accident.

The Claimant also requests the Employer to reimburse \$26,848.17 of outstanding medical expenses. I find Claimant demanded treatment of his work-related injury prior to the temporary hearing of April 30, 2001. Indeed, Claimant personally called the plant nurse regarding his injury in December of 1999. However, the Employer did not provide authorized medical care until ordered by the Temporary Award of April 30, 2001. As such, the Employer is liable to Claimant for outstanding medical expenses contained in Exhibits UU, XX and YY. These bills were incurred prior to April 30, 2001, were related to the work-related injury as well as the Employer was aware that Claimant was in need of additional medical care. These bills total \$243.35.

The Employer provided authorized care pursuant to a Temporary Award until June 4, 2002, the date of maximum medical improvement. However, I find that Claimant put the Employer on notice of Claimant's need of additional medical care after June 4, 2002, when Barbara Hodina sent a demand letter for payment of outstanding medical expenses, (Exhibit LL). Indeed, Ms. Hodina's letter indicates she attempted monthly bills of Apria Healthcare to Quaker Oats as a result of a work-related injury. As such, I find the Employer was aware and demand of medical treatment was made to the Employer as a result of this letter. Therefore, I find the Employer responsible for medical expenses incurred after April 14, 2006.

The Employer is therefore liable to Claimant for the following medical bills incurred after April 14, 2006.

Exhibit PP - \$7,932.74

Exhibit MM - \$66.42 for orthopedic fitting on June 29, 2006

Exhibit NN - \$243.52

Exhibit RR - \$1,044.76

Exhibit SS - \$1,732.86

Exhibit VV - \$70.08

I find the medical expenses above are related to the December 7, 1999 accident and were reasonable in order to cure and relieve the symptoms of the compensable work accident. Further as evidence of Ms. Hodina's letter to the Employer requesting payment of medical expenses incurred from a work-related injury, I find the above bills were incurred after the Employer was aware Claimant was seeking additional medical care for the work-related accident.

The expenses outlined in Exhibits WW, TT, QQ and OO were either unauthorized, i.e., incurred between June 4, 2002 up to April 14, 2006, and/or completely unrelated to the work accident. Regardless, the Employer is liable to Claimant for \$11,333.73 for outstanding medical expenses.

Next the Claimant requests this award address whether the Employer complied with the Temporary Award issued on April 30, 2001. The Temporary Award not only found the lifting incident on December 7, 1999 a compensable injury but also found the Employer liable to provide medical treatment as may be necessary in order to cure and relieve the effects of the compensable piriformis syndrome.

As a result of the Temporary Award, the Employer sent Claimant to Dr. Aschberger, (Exhibit A). Claimant underwent conservative managed care under Aschberger and then was released from care on June 4, 2002. Dr. Aschberger opined Claimant may return as needed and noted Claimant may require physical therapy for maintenance purposes. I find that the Employer complied with the Temporary Award by providing authorized treatment under Dr. Aschberger. Claimant was treated and then found to

be at maximum medical improvement and therefore this issue of treatment is one of future medical care. As such, I do not find doubling medical expense is warranted in this matter.

The Employer is liable to Claimant for permanent total disability benefits beginning June 4, 2002 at a weekly rate of \$578.48 for Claimant's lifetime. The Employer is liable to Claimant for past temporary total disability benefits from December 14, 1999 to March 15, 2000 and from January 19, 2001 to June 4, 2002 at a weekly rate of \$578.48. The Employer is also liable to Claimant for past outstanding medical expenses of \$11,333.73.

Date: _____

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2009, by:

Naomi Pearson
Division of Workers' Compensation