

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

Injury No.: 01-122821

Employee: Jesus Gonzalez
Employer: Miller Construction & Contracting Company
Insurer: Ohio Casualty Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: May 29, 2001

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 April 16, 2007. The award and decision of Administrative Law Judge Matthew D. Vacca, issued April 16, 2007, 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 12th day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Jesus Gonzalez

Injury No.: 01-122821

Dependents: N/A
Employer: Miller Construction & Contracting Co.
Additional Party: Second Injury Fund
Insurer: Ohio Casualty Insurance Co.
Hearing Date: February 13, 2007

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: MDV:tr

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: May 29, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Injured back when doors fell.
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: Back
14. Nature and extent of any permanent disability: 35% at the level of the body
15. Compensation paid to-date for temporary disability: \$28,516.46
16. Value necessary medical aid paid to date by employer/insurer? \$208,000.00

Employee: Jesus Gonzalez Injury No.: 01-122821

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$480.00
19. Weekly compensation rate: \$320.00/\$314.26
20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable:

140 weeks of permanent partial disability from Employer

\$43,996.40

(less \$5,000.00 advance stipulated by parties)

(5,000.00)

22. Second Injury Fund liability: No

TOTAL:

\$38,996.40

23. Future requirements awarded: None

Said payments to begin immediately 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jeff Swaney

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jesus Gonzalez

Injury No.: 01-122821

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Miller Construction & Contracting Co.

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

Additional Party: Second Injury Fund

Insurer: Ohio Casualty Insurance Co.

Checked by: MDV:tr

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PREFACE

Two claims were tried together, Injury Number 99-183147 and Injury Number 01-122821. Pursuant to 8 CSR 20-3.050 (1) (2) and (3), the resolution of the claims are dependent upon each other and the facts are inextricably intertwined. Therefore there will be one transcript generated although two awards will be issued. The earlier injury number, 99-183147, will be designated the master proceeding and the transcript and all of the evidence will reside with that file.

Exhibit E contains a medical record not relevant to this case. It pertains to another patient. I have not considered it in reaching my decision here. I have slashed a green line diagonally through said record.

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ISSUES PRESENTED

The issues presented in Injury Number 99-183147 are accident, notice, arising out of and in the course of employment, medical causation, nature and extent of any permanent disabilities and the statute of limitations. In Injury Number 01-122821, the issues presented for resolution by way of the hearing are the nature and extent of any temporary disability and the nature and extent of any permanent disabilities to include the liability of the Second Injury Fund. The Claimant contends that he is permanently and totally disabled as a result of the second injury working in combination with the first injury.

FINDINGS OF FACT

1. Claimant worked from 1998 to 2001 with Miller Construction & Contracting Co. as a carpenter.
2. Sometime in November of 1999 Claimant was working on a commercial building in Lima, Ohio and towards the end of the job he was lifting some heavy panels when he heard a pop in his back. At the time he didn't think much about the incident. He does not report feeling any pain.
3. Although Claimant was working directly alongside his Employer, John Miller, he did not mention the incident to his Employer. He drove back to St. Louis in the same truck with his Employer and never mentioned a lifting incident. Claimant testified that sometime after he returned home to St. Louis, he woke up one day after sleeping and "out of the blue" was unable to move.
4. Claimant admits that he never told the Employer about the back condition until five months later after Claimant had undergone surgery for repair of a herniated disc. It is not clear if Claimant ever told the Employer Claimant thought the disc repair was work related.
5. Claimant testified he is not certain of the date of the incident and he denies telling Dr. Berkin that he remained in Lima, Ohio with his Employer for six weeks following the panel lifting incident. Dr. Berkin's records indicate six weeks.
6. Claimant went to St. Anthony's Hospital when he first sought treatment for the back problem and the medical records there indicate his "wife" reports an onset of back pain while working in a crawl space. Claimant admits that he was working in a crawl space repairing a cold air return but that the pain in his back had existed for some time prior to his work in the crawl space. He denies back pain from a motor vehicle accident or an exacerbation about "1 year ago" as indicated in the records. That record also indicates a "long history of disc problems in back". He denies reporting on November 20, 1999 "back strain while working in crawl space at home" when he returned to St. Anthony's the next day.
7. This same history was reported one month later at a different hospital, Alexian Brothers, and the same "crawl space" onset was recorded. The back pain started "6 weeks ago ~ 2 days patient crawling through crawl space at fiancé's home installing a cold air return". Neither record reflects a work injury.
8. Claimant was eventually referred to Dr. Dacey who performed surgery in February of 2000. There was also no mention of a work related accident in Dr. Dacey's medical records. The Barnes-Jewish Hospital records make several references to one and two year old back pain with exacerbation in November 1999.
9. Claimant denies telling St. Anthony's or Alexian Brothers Hospital that he had injured himself while working in a crawl space or that he had a motor vehicle accident years ago. As mentioned, these medical records do not mention a work injury. He denies telling Dr. Dacey and the Barnes staff that he had had low back pain for two years that got worse in November.
10. Claimant testified that he returned to work for Miller Construction after surgery and continued working until May 29, 2001 when again he was working alongside his Employer in the warehouse when some commercial doors fell onto Claimant's back. He testified that his boss, John Miller, was working with him and saw the accident happen.
11. Claimant told his Employer that he was going to call the doctor who performed his prior back surgery and says he went to the emergency room where they prescribed him muscle relaxants and pain medication. He followed up with his physician and fell under the care of Dr. Phillip George who referred him to Dr. Kennedy.
12. Dr. Kennedy performed surgery with hardware implantation in July of 2003 and subsequently removed the implanted hardware in July of 2005. Claimant's medical care and lost time benefits were paid.
13. Claimant returned to work for Miller Construction Co. in about April of 2000 after the first back surgery and worked without difficulty up until May 29, 2001, the date of the second accident.

14. Following the second accident, he had three visits to the doctor after treatment at the emergency room. He continued to work following the second accident until September 1 when he was laid off by Miller Construction Co. Claimant contends he was fired because he was unable to work. He was off work for approximately one month and then went to work for Top Care Lawn from the Fall of 2002 until May of 2003 and then underwent the second surgery in July of 2003.
15. Claimant denies being uncooperative at his Functional Capacity Evaluation which indicates he failed 7 of 11 validity criteria regarding his activity tolerance. Claimant says he was unable to do what was requested and didn't want to harm his physical condition.
16. Claimant testified he could run and jump after the first surgery and that he had no problems whatsoever, that he could exercise everyday, run one to two miles every other day, and play soccer every Sunday. It was only after the second and third surgery he developed disability.

RULINGS OF LAW

Injury Number 99-183147

1. Claimant has not proven that he sustained an accident in November of 1999 which arose out of and in the course of his employment with Employer or that he gave notice of said accident to the Employer. Any back injuries from which he suffered beginning on or about November 1, 1999 until the date of the second accident on May 29, 2001 are not medically and causally related to any work performed for Miller Construction & Contracting Co.

DISCUSSION

Injury Number 99-183147

Claimant had every opportunity to report the alleged Lima, Ohio incident to his Employer. By his own admission he worked at least another week in Lima with his boss and drove back to St. Louis in a truck with his boss from the Lima, Ohio location and never once mentioned the back injury or any back complaints. Dr. Berkin's records suggest that the time period Claimant worked following the accident in Lima, Ohio until he returned to St. Louis may have actually been as much as six weeks. Either way, if Claimant had herniated a disc in Lima, Ohio, I think it would have merited some mention to his boss who worked alongside.

When the first opportunity for him to seek medical treatment arose, he does not mention the Lima, Ohio incident but points on two separate occasions to working in his girlfriend's crawl space. He never mentions any back injuries to his Employer until five months later after he had undergone surgery. Even then the record is unclear as to whether he reported the surgery as a result of a work injury.

I think Claimant's pointing to November 1, 1999 in Lima, Ohio is, at most, an afterthought. He experienced no pain in Lima, he just heard a pop. It wasn't until he returned home and in his own words "out of the blue" he was unable to move after having been sleeping that he first began having any symptoms. Whatever happened in Lima, Ohio, if anything, did not cause Claimant's back problems culminating in the first surgery.

RULINGS OF LAW

Injury Number 01-122821

1. Claimant sustained an accident on May 29, 2001 which arose out of and in the course of his employment with Miller Construction & Contracting Co. It appears he has been paid all the temporary total disability benefits that he is entitled to as a result of that accident and the injuries sustained therein during all periods for which he was healing and unable to work.
2. As a result of the injury on May 29, 2001, Claimant has sustained a 35% permanent partial disability measured at the level of the body as a whole.
3. Claimant is not permanently and totally disabled.
4. The November 1, 1999 injury did not cause Claimant any permanent partial disability. He testified that he was able to run one to two miles every other day and play soccer every Sunday after he returned to work following the surgery in February 2000. Thus, there is no preexisting disability upon which to ground Second

Injury Fund liability.

5. Claimant is therefore entitled to 140 weeks of permanent partial disability at the permanent partial disability compensation rate of \$314.26 for a lump sum total of \$43,996.40 for compensation for the May 29, 2001 accident and injuries.

DISCUSSION

There is no dispute the second accident took place, the only dispute is to the extent it has disabled the Claimant. The Employer paid all the necessary medical benefits and lost time benefits. I think the Claimant is overstating the severity of his pain and limitations. He worked for this Employer for at least one month following this second accident and did landscaping labor thereafter until he had surgery six months later. I find it hard to believe the surgery was so unsuccessful that it completely incapacitated Claimant. Given his credibility issues surrounding the first alleged accident in Lima, Ohio, I am hard pressed to credit his testimony with much weight.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation