

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

Injury No.: 03-102859

Employee: Marjorie Grisham  
Employer: Mississippi Lime Company  
Insurer: Federal Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: Alleged April 25, 2003

Place and County of Accident: Alleged Ste. Genevieve 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 January 4, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Carl W. Strange, issued January 4, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27<sup>th</sup> day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe

the administrative law judge erred in concluding that employee failed to meet the burden of proof on the issues of accident and medical causation.

Employee has the burden of proving all the essential elements of a claim for workers' compensation benefits by reasonable probability, not absolute certainty. *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 138 (Mo.App. E.D. 2002). Employee must prove not only that the accident arose out of and in the course of his employment, but that the alleged injury was directly caused by the accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 279 (Mo.App. E.D. 1997) (overruled on other grounds).

The administrative law judge found that employee failed to satisfy the burden of proof on the issues of accident and medical causation. The administrative law judge found that those issues boil down to a question of credibility and neither the medical records nor the other evidence corroborated employee's version of the accident. The administrative law judge called employee's credibility into question because he believed that employee was inconsistent in reporting her injury.

However, her claim for compensation states that employee sustained injuries to her back while unloading materials. Employee provided similar testimony with regard to her injury stating that she was carrying a fifty pound bag of fertilizer when she stepped into a hole and twisted her back. She testified that she felt a pop in her back and an immediate onset of pain that radiated down her right leg. Employee testified that she reported the injury to employer in a timely manner. She believed that she mentioned the pop in her back to her supervisor the day of the injury. Employee believed she mentioned it once again to employer her next scheduled work day, at which time she told her supervisor that she sustained an injury and was seeking medical attention. She testified that she sought treatment from Dr. Grix after her injury, underwent physical therapy and continued to seek treatment from a pain management doctor, Dr. Smith. Employee had pre-existing back surgery in 1977, but recovered fully and was able to maintain full time employment without restriction. Employee testified that her previous surgery did not impede her work and that she lifted fifty pounds on a regular basis without difficulty.

Furthermore, employee's testimony was supported by the expert opinion of Dr. Jerome Levy. Dr. Levy testified that employee suffered a permanent partial disability of 17½% to the body as a whole as a result of her back injury on April 25, 2003.

Employee consistently reported symptoms, including severe back pain radiating into her right leg. Dr. Grix's medical record on April 30, 2003, notes that employee suffered back pain after stepping in a hole and twisting herself. Therefore, the medical records do in fact corroborate employee's version of the accident. It is certainly noteworthy that employee had worked for employer for twenty-seven-and-a-half years at the time of her injury. For this reason, I find employee to be credible and worthy of belief.

Therefore, employee has met her burden of proof by establishing that she suffered a back injury on April 25, 2003, and that her back condition is medically causally related to the accident. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny compensation.

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John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**AWARD**

Employee: Marjorie Grisham

Injury No. 03-102859

Dependents: N/A

Employer: Mississippi Lime Company

Additional Party: Second Injury Fund

Insurer: Federal Insurance Company

Hearing Date: December 14, 2006

Checked by: CS/gr

### **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 April 25, 2003
5. State location where accident occurred or occupational disease contracted: Alleged Ste Genevieve 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? Claim Denied/See Award
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: Employee alleged she stepped into a hole at work while carrying a 50 lb bag of fertilizer and hurt her back.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Alleged back
14. Nature and extent of any permanent disability: None/Claim Denied
15. Compensation paid to date for temporary total disability: \$0.00
16. Value necessary medical aid paid to date by employer-insurer: \$0.00
17. Value necessary medical aid not furnished by employer-insurer: \$0.00
18. Employee's average weekly wage: \$540.00
19. Weekly compensation rate:  
    \$360.00 for temporary total disability  
    \$340.12 for permanent partial disability
20. Method wages computation: By Agreement
21. Amount of compensation payable: None
22. Second Injury Fund liability: Open
23. Future requirements awarded: None

### **FINDINGS OF FACT AND RULINGS OF LAW**

On December 14, 2006, the employee, Marjorie Grisham, appeared in person and by her attorney, Geoffrey

Meyerkord, for a hearing for a final award. The employer was present by its Safety Director Rick Donovan. The employer-insurer was represented at the hearing by its attorney, Matthew Mocherman. The employee's claim against the Second Injury Fund was left open. 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 summary of the evidence and the findings of fact and rulings of law, are set forth below as follows.

#### **UNDISPUTED FACTS:**

1. On or about April 25, 2003, Mississippi Lime Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act.
2. On or about April 25, 2003, the employee was an employee of Mississippi Lime Company who is insured by Federal Insurance Company.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage was \$540.00, her rate for temporary total disability is \$360.00, and her rate for permanent partial disability is \$340.12.
5. The employer has furnished \$0.00 medical aid to employee.
6. The employer has not paid any temporary total disability benefits.

#### **ISSUES:**

1. Accident
2. Notice
3. Medical Causation
4. Nature and Extent of Disability

#### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

##### Employee's Exhibits

- A. Employee's claim for compensation;
- B. Medical Records from Dr. Gary Grix;
- C. MRI report dated May 22, 2003; and
- D. Deposition of Dr. Jerome Levy with attachments.

##### Employer-Insurer's Exhibits

1. Deposition Admissions of Employee (January 17, 2005);
2. May 24, 2003 Unum disability claim form;
3. "Weekly Indemnity Payments" (short term disability);
4. April of 2003 Post-it-note (Richard Stuppy);
5. Summary of contact with employee April 25, 2003 – June 4, 2003 (Richard Stuppy);
6. June 4, 2003 (2:00 p.m.) Memo from Richard Stuppy;
7. Employee Accident History;
8. July 7, 2003 Office Note (Dr. Grix);
9. June 2, 2003 Office Note (Dr. Grix);
10. July 24, 2004 Report (Dr. Robert J. Backer); and
11. May of 2004 Diagnostic Studies (5 pages).

#### **FINDINGS OF FACT:**

Based on the testimony of Marjorie Grisham ("employee"), Richard Stuppy ("employer's foreman"), Rick Donovan ("employer's safety director") and the medical records and reports admitted, I find as follows:

On April 25, 2003, the employee was employed as a powderman for Mississippi Lime Company. At the time of her alleged accident, the employee was working during the day shift carrying 50 lb bags of fertilizer which is an explosive catalyst.

At some point after her lunch break and during her shift, the employee alleges that she stepped into hole that had been

drilled for blasting the rock and twisted her back. According to the employee, she felt immediate severe pain and heard her back pop. There were no witnesses to the alleged accident and the employee admitted that she did not request treatment from the employer on April 25, 2003. (Employer-Insurer's Exhibit 1, page 3).

The employee initially testified that she may have first reported her accident officially to her supervisor, David McMillan, on the Monday following her alleged accident. However, the employer-insurer provided contradicting evidence from one of the employer's foreman, Richard Stuppy. The employee actually left a voice message on Monday stating that her feet were swollen and she was going to the doctor. The employee's message made no reference that the injury occurred at work. (Employer-Insurer's Exhibit 5).

The employee sought medical treatment for her back at the Medical Arts Clinic with Dr. Gary Grix on April 30, 2003. At that time, the employee complained of some radiating back pain that occurred Friday when she "stepped in a hole and twisted herself". (Employee's Exhibit B, page 11). Dr. Grix advised her to stay off work for the next couple of weeks.

An MRI was taken of the employee's lumbosacral spine at Parkland Health Center on May 22, 2003. It indicated that her back had "perineural fibrosis along the anterior border of the adjacent right S1 nerve root" and "mild type 1 degenerative disc desiccation with minimal narrowing at the L3-4 and L4-5 levels". Consequently, the MRI indicated that the present condition of her back was a result of the previous right L5-S1 paracentral disc surgery with residual perineural fibrosis. (Employee's Exhibit C).

On May 24, 2003, the employee filed a short term disability claim form with Unum. On that form, she marked the two respective boxes that indicated her condition was due to "sickness" and that her disability was not related to her employment. (Employer-Insurer's Exhibit 2, page 1). As a result of her claim to Unum, the employee received \$3,600.00 in compensation covering the time period of May 3, 2003 through July 13, 2003. (Employer-Insurer's Exhibit 3).

Her next visit with Dr. Grix on June 2, 2003 provided the first indication from the medical records that the employee's injury may have been work related. Dr. Grix's records note that the employee wanted a referral to Dr. Hulsey to see "if he thought an epidural injection might be indicated. She is refusing to see him until they can get evidence that this isn't a Workman's Comp. Claim. Patient is not claiming it as Workman's Comp. though she states that the initial injury where she stepped in a hole may have occurred while she was actually at work." (Employee's Exhibit B, page 10).

Shortly after her doctor's visit, the employee called the employer's foreman requesting a letter of rejection from worker's compensation stating that her injury was not work related. The employee informed Mr. Stuppy that "she was lifting heavy boxes at work, but that it didn't bother her at work." Additionally, she noted that the MRI indicated that her problem was that scar tissue was pressing against nerves. In response to Mr. Stuppy's further questioning, the employee admitted that she didn't get hurt at work. (Employer-Insurer's Exhibit 6).

On July 7, 2003, Dr. Grix noted that the employee "has finally decided to get it as a Workmen's Comp claim". (Employer-Insurer's Exhibit 8). The employee continued to treat with Dr. Grix until she was referred to a pain management specialist for epidurals in February of 2004. (Employee's Exhibit B, page 4).

The employee underwent a battery of tests in May 2004 for evaluation of her injuries at the request of Dr. Backer, a neurological surgeon. All of the tests indicated that the employee had significant pre-existing conditions caused from scar tissue, osteoarthritis and degenerative changes. Additionally, the employee had bulging in the lumbar and thoracic spines without impingement. (Employer's Exhibit 11). As a result of the tests, Dr. Backer released the employee to full duty. (Employer's Exhibit 10).

The employee offered the report and deposition of Dr. Jerome Levy in order to support her case. Dr. Levy evaluated the employee May 24, 2006 and found that she suffered a permanent partial disability of 17 ½ % of the body as a whole as a result of the injury to her back on April 25, 2003. (Employee's Exhibit D, page 27). On cross-examination, Dr. Levy admitted that he did not review treatment and evaluation records from Dr. Grix, Dr. Backer or Dr. Smith. (Employee's Exhibit D, page 19-20). Further, Dr. Levy admitted his opinion would be different if the employee's report as to when and how the accident occurred was incorrect or inaccurate. (Employee's Exhibit D, page 23).

## **APPLICABLE LAW**

Under the version of Section 287.020.2 RSMo. that was in effect at the time of the employee's accident, the term accident is defined to include only those injuries that are "clearly work related". Under this section, an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor".

The employee has the burden to prove all material elements of his claim. Melvies v Morris, 422 S.W.2d 335 (Mo.App.1968). The employee has the burden of proving not only that he sustained an accident that arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. Griggs v A B Chance Company, 503 S.W.2d 697

(Mo.App.1973).

## RULINGS OF LAW

### *Issue 1. and Issue 3. Accident and Medical Causation*

The ruling on the issues of accident and medical causation boil down to a question of credibility. The employee testified that she hurt her back when she stepped into a hole at work while carrying a 50 lb bag of fertilizer, but neither the medical records nor the other evidence corroborate the employee's version of a work related accident. In direct conflict with the employee's testimony, Mr. Stuppy testified that the employee told him that she didn't get hurt at work. (Employer-Insurer's Exhibit 6). The employee's credibility was further damaged when she admitted that she filed for short term disability benefits with Unum and claimed that the accident was not work related. (Employer-Insurer's Exhibit 2).

The medical records do not mention any possible work related accident until June 2, 2003, which is over one month past the date of the alleged injury. At that time, Dr. Grix notes that the employee is not claiming workman's compensation benefits but the injury where "she stepped in a hole **may** have occurred while she was actually at work". (Employee's Exhibit B, page 10). It was not until July 7, 2003 that the employee finally "decided to get it as a Workmen's Comp claim". (Employer-Insurer's Exhibit 8).

Based on the inconsistencies of the corroborating medical records and the testimony of other witnesses, I find that the employee's version of a work related accident and an injury to her low back is not credible. The employee has failed to satisfy her burden of proof on the issues of accident and medical causation, and her claim for compensation is therefore denied.

Given the denial of the employee's claim, the remaining issues are moot and shall not be ruled upon.

Date: \_\_\_\_\_

Made by:

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Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Ms. Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*