

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

Injury No.: 09-045713

Employee: Richard B. Hafley
Employer: Missouri Department of Corrections
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 December 27, 2010. The award and decision of Administrative Law Judge Carl Strange, issued December 27, 2010, 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 7TH day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Richard B. Hafley

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be modified to award more permanent partial disability benefits to employee.

First, there is no question that employee's aggravated plantar fasciitis of both feet is compensable under Missouri Workers' Compensation Law. However, it is my opinion, based upon employee's testimony and the medical evidence that the ALJ's award as to the nature and extent of permanent partial disability attributable to employee's occupational disease did not accurately account for employee's ongoing problems. It is my opinion that employee sustained 15% permanent partial disability of both the right and left lower extremities rated at the feet.

The ALJ found that as a result of the June 26, 2009, occupational disease, employee sustained 7% permanent partial disability of the right foot at the 155 week level and 9% permanent partial disability of the left foot at the 155 week level with a 10% loading factor. In arriving at this conclusion, the ALJ considered the independent medical evaluation reports of both Drs. Krause and Volarich.

Dr. Krause opined that employee's work at employer was not the prevailing factor in employee's plantar fasciitis and there was no objective evidence of permanent disability. The ALJ found that Dr. Krause's report is "clearly inconsistent since his own exam found mild left plantar fasciitis, right minimal tenderness around his plantar fascial insertion, left slightly limited hindfoot motion, left mild tenderness around his talonavicular joint, and left foot degenerative joint disease, but no permanent disability." Based upon Dr. Krause's inconsistencies, the ALJ found his opinions not credible.

On the other hand, the ALJ found credible Dr. Volarich's opinion that employee sustained an occupational disease to his bilateral feet on or about June 26, 2009, and that his employment was the prevailing factor in causing the resulting medical condition and disability.

While the ALJ found Dr. Volarich's opinions credible in concluding that employee's occupational disease arose out of and in the course of his employment, the ALJ inexplicably disagreed with Dr. Volarich's disability ratings. Dr. Volarich found that employee's occupational disease resulted in 15% permanent partial disability of both the right and left lower extremities rated at the feet. Without explanation, the ALJ found that the nature and extent of employee's permanent partial disability is much less than that opined by Dr. Volarich. The ALJ does not cite to or reference any evidence from the record to support his lower ratings of employee's nature and extent of permanent partial disability, nor does the ALJ state that he finds Dr. Volarich's ratings to lack credibility. With nothing more, it appears that it is simply his personal opinion that employee's permanent partial disability sustained is less than that which Dr. Volarich found.

Employee: Richard B. Hafley

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Deciding cases based upon personal opinions, unsupported by competent evidence, is not allowed under Missouri Workers' Compensation Law. In *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173 (Mo. App. 2004) (citations omitted), the court stated:

The Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base their findings upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence.

In sum, the administrative law judge's award is not supported by the competent and substantial evidence. Dr. Volarich's opinions regarding the nature and extent of employee's permanent disabilities are supported by the medical evidence and employee's testimony.

For the foregoing reasons, I believe the ALJ's award should be modified and employee should be awarded 15% permanent partial disability benefits of both the right and left lower extremities rated at the feet.

I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Richard B. Hafley

Injury No. 09-045713

Dependents: N/A

Employer: Missouri Department of Corrections

Additional Party: Second Injury Fund (Left Open)

Insurer: Self-Insured

Hearing Date: November 22, 2010

Checked by: CS/rf

SUMMARY OF FINDINGS

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? June 26, 2009.
5. State location where accident occurred or occupational disease contracted: St. Francois 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? 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 happened or occupational disease contracted: Employee was repetitively walking and standing causing an aggravation to his pre-existing plantar fasciitis.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Bilateral feet.
14. Nature and extent of any permanent disability: 7% of right foot, 9% of left foot and 10% loading factor.
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: N/A.
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate:

\$368.77 for temporary total disability
\$368.77 for permanent partial disability
20. Method wages computation: By agreement.
21. Amount of compensation payable:

30.8 weeks of permanent partial disability: \$11,358.12
22. Second Injury Fund liability: OPEN.
23. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Gary Matheny.

FINDINGS OF FACT AND RULINGS OF LAW

On November 22, 2010, the employee, Richard B. Hafley, appeared in person and by his attorney, Gary Matheny, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Assistant Attorney General Gregg Johnson. 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 the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about June 26, 2009, Missouri Department of Corrections was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about June 26, 2009, the employee was an employee of Missouri Department of Corrections and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of employee's occupational disease.
4. The employee's claim was filed within the time allowed by law.
5. The employee's rate for temporary total disability and permanent partial disability is \$368.77.
6. The employer has furnished \$0.00 in medical aid to employee.
7. The employer has paid no temporary total disability benefits.

ISSUES:

1. Accident/Occupational Disease.
2. Medical Causation.
3. Additional Temporary Total Disability.
4. Nature and Extent of Disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical Records of Dr. Dennis Sumski;
- B. Medical Records of Desloge Foot and Ankle;
- C. Medical Records of Quality Health Care;
- D. Quality Health Care Light Duty Slip;
- E. Report of Dr. David Volarich;

- F. Report of Dr. John Krause;
- G. Work Status Report of Mineral Area Regional Medical Center;
- H. Application for Leave;
- I. Employee's Report of Injury; and
- J. Plantar Fasciitis Risk Factors.

APPLICABLE LAW:

- 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).
- Under Section 287.067.1 RSMo., “the term ‘occupational disease’ is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.”
- Under Section 287.067.2 RSMo., “an injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”
- Under Section 287.067.3 RSMo., “an injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”
- Under Section 287.020.3 (1) RSMo., “ the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment.”
- Under Section 287.800.1 RSMo., “administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.”
- Under Section 287.800.2 RSMo., “administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of

workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.”

- Temporary total disability benefits are intended to cover the healing period, and are not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after his condition has reached the point where further progress is not expected. *Brookman v Henry Transportation* 924 S.W.2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company* 694 S.W.2d 488,489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition. *Brookman Id.* at 290.

FINDINGS OF FACT & RULINGS OF LAW:

Issue 1. Accident & Issue 2. Medical Causation

Missouri Department of Corrections (“employer”) has disputed the claim of Richard B. Hafley (“employee”) that he had an occupational disease to both of his feet and that the occupational disease was medically and causally related to his work exposure. In support of this contention, employer offered the opinion of Dr. John Krause. After examining employee and reviewing the records, Dr. Krause noted that employee had essentially a normal exam and no specific injury on the right, but has a history of plantar fasciitis with very little symptoms on his right and mild plantar fasciitis on his left. Finally, Dr. Krause opined that employee’s work at employer is not the prevailing factor in employee’s plantar fasciitis and there was no objective evidence of permanent disability (Employee Exhibit F). Dr. Krause’s report is clearly inconsistent since his own exam found mild left plantar fasciitis, right minimal tenderness around his plantar fascial insertion, left slightly limited hindfoot motion, left mild tenderness around his talonavicular joint, and left foot degenerative joint disease but no permanent disability. Further, Dr. Krause’s opinion fails to address whether or not employee’s work at employer aggravated employee’s underlying and pre-existing plantar fasciitis. Based on the evidence, I find that Dr. Krause’s opinions are not credible.

Employee offered the opinion of Dr. Volarich in support of his contention of an occupational disease and medical causation. According to Dr. Volarich, employee suffered an occupational disease in June 2009 causing a repetitive trauma injury to his bilateral feet and his work for employer was the substantial contributing factor as well as prevailing or primary factor causing the aggravation to his underlying and pre-existing plantar fasciitis that required conservative treatment. Employer has failed to offer sufficient evidence to discredit the opinions of Dr. Volarich. Consequently, I find the opinions of Dr. Volarich are credible in this matter.

Based on the evidence, I find that employee has satisfied his burden of proof on the issues of occupational disease and medical causation. I therefore find that employee has sustained an occupational disease to his bilateral feet on or about June 26, 2009 arising out of and in the

course of his employment and that his employment was the prevailing factor in causing the resulting medical condition and disability.

Issue 3. Additional Temporary Total Disability

Employee has requested an award of temporary total disability covering the time period from October 28, 2009 until February 22, 2010. Employer-insurer has paid no temporary total disability benefits and denied coverage for employee's occupational disease to his bilateral feet. The basis of employee's claim is that Dr. Laurence Lum took him off work on October 28, 2009 and Dr. Volarich placed employee at maximum medical improvement on February 22, 2010. According to Dr. Lum, employee was taken off work beginning on October 28, 2009 due to bilateral feet pain and spurs (Employee Exhibit D). In this matter, employee has claimed injury to his bilateral feet due to an aggravation of plantar fasciitis but not as a result of spurs. Based on evidence, I therefore find that employee has failed to meet his burden of proof that the basis of his temporary total disability was a result of the June 26, 2009 occupational disease. Employer is not required to pay and employee is not entitled to receive any temporary total disability benefits in this matter.

Issue 4. Nature and Extent of Disability

Finally, employee has requested an award for permanent partial disability benefits for his occupational disease to his bilateral feet. Based on the evidence and my above findings, I find that the employee sustained a seven percent (7%) permanent partial disability of the right foot at the 155 week level and a nine percent (9%) permanent partial disability of the left foot at 155 week level with a ten percent (10%) loading factor as a result of the June 26, 2009 occupational disease. While the seven percent (7%) disability of the right foot is equal to 12.25 weeks, the nine percent (9%) disability of the left foot is equal to 15.75 weeks. The ten percent (10%) loading factor is equal to 2.8 weeks. The simple sum is 30.8 weeks of permanent partial disability. Accordingly, the employer is therefore directed to pay the employee the sum of \$368.77 per week for 30.8 weeks for a total of \$11,358.12.

ATTORNEY'S FEE:

Gary Matheny, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Ms. Naomi Pearson