

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

Injury No.: 04-064365

Employee: Andrew Hayden

Employer: Thi of Baltimore

Insurer: ACE USA

Date of Accident: June 29, 2004

Place and County of Accident: St. Louis, 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 February 8, 2006. The award and decision of Administrative Law Judge Joseph E. Denigan, issued February 8, 2006, 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 18th day of September 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon 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 should be modified. I believe the administrative law judge erred in concluding that employee's injury resulted in a permanent disability at the level of the shoulder. Employee suffered a disability to the body as a whole.

Employee offered the expert medical testimony of Dr. Berkin. Dr. Berkin diagnosed claimant with a left pectoralis muscle tear. Dr. Berkin testified that employee suffered a permanent partial disability of 20% of the body as a whole.

Employer/insurer offered the expert testimony of Dr. Markenson. Dr. Markenson also diagnosed a partial pectoralis tear. Remarkably, Dr. Markenson believes that the pectoralis tear resulted in a 7% permanent partial disability measured at the shoulder.

Employee complained of pain and cramping in his chest. Employee also complained of loss of strength when performing with his left arm and loss of balance when performing with both arms.

The administrative law judge and Commission majority accept the opinion of Dr. Markenson as credible. I do not. Based upon employee's description of his problems resultant from the work injury, I find Dr. Berkin's opinion that employee sustained a disability to the body as a whole to be the most credible. I would award to employee permanent partial disability of 20% of the body as a whole.

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

John J. Hickey, Member

AWARD

Employee:	Andrew Hayden	Injury No.:	04-064365
Dependents:	N/A	Before the	
Employer:	Thi of Baltimore	Division of Workers'	
Additional Party:	N/A	Compensation	
Insurer:	ACE USA	Department of Labor and Industrial	
Hearing Date:	December 2, 2005	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED: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: June 29, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:

Employee was taking trash out and lifting trash into a dumpster.

- 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: Left shoulder
- 14. Nature and extent of any permanent disability: 7.5% of the left shoulder
- 15. Compensation paid to-date for temporary disability: None
- 16. Value necessary medical aid paid to date by employer/insurer? \$6,096.94

Employee: Andrew Hayden Injury No.: 04-064365

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$186.67
- 19. Weekly compensation rate: \$280.00
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

17.4 weeks of permanent partial disability from Employer	\$3,248.06
Underpayment of temporary partial disability benefits	\$298.67

- 22. Second Injury Fund liability: No

TOTAL: \$3,546.73

- 23. Future requirements awarded: None

Said payments to begin N/A 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:

Christopher Geldmacher

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Andrew Hayden	Injury No.:	04-064365
Dependents:	N/A	Before the	
Employer:	Thi of Baltimore	Division of Workers'	
Additional Party:	N/A	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	ACE USA	Checked by:	JED

This case involves bilateral elbow repetitive traumas resulting to Claimant with the reported onset date of June 29, 2004. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is a party to this claim but remains open for a determination of liability at a future date. Both parties are represented by counsel.

Issues for Trial

1. nature and extent of permanent partial disability;
2. disfigurement; and
3. liability for under payment of TPD benefits.

FINDINGS OF FACT

Stipulations

The parties stipulated that the employee's compensation rate was \$186.67 for both temporary total disability and permanent partial disability. Employer paid \$6,096.94 in medical expenses and no TTD (indemnity) benefits to date. Also stipulated was the amount of TPD unpaid during Claimant's light duty healing period (i.e. \$298.67).

Dispositive Evidence

1. Claimant sustained a tear of his left pectoral muscle on the reported accident date while lifting large (80-100 pound) trash bags into a dumpster.
2. A second MRI on August 16, 2004 was positive for the pectoral tear. Dr. Markenson did not recommend surgery and place Claimant at MMI about three months post-accident.
3. Claimant sought no more treatment after August 24, 2004.
4. Dr. Berkin examined Claimant and reported an essentially negative physical examination, including no weakness, together with a patient history that Claimant was able to perform his duties as a waiter without any problems. Dr. Berkin assigned a twenty percent PPD of the body as a whole (400 week level).
5. Claimant was examined By Dr. Markenson again on August 23, 2005 and reported a history of no problems performing his job. Noting only mild discomfort in an otherwise negative physical examination, Dr. Markenson assigned a seven percent PPD of the left shoulder.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation