

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

Injury No.: 02-065518

Employee: James Hayes  
Employer: HJ Enterprises, Inc.  
Insurer: Zenith Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged May 6, 2002  
Place and County of Accident: Alleged Jefferson 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 November 18, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Linda J. Wenman, issued November 18, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29<sup>th</sup> day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
NOT SITTING

William F. Ringer, Chairman

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Alice A. Bartlett, Member

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

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: James Hayes Injury No.: 02-065518

Dependents: N/A Before the  
Division of Workers'

Employer: HJ Enterprises, Inc. **Compensation**  
Department of Labor and Industrial  
Additional Party: Second Injury Fund Relations of Missouri  
Jefferson City, Missouri  
Insurer: Zenith Insurance Company  
Hearing Date: August 18, 2004 Checked by: LJW:tr

### FINDINGS OF FACT AND RULINGS OF LAW

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 as May 6, 2002
5. State location where accident occurred or occupational disease was contracted: Jefferson County, MO. Parties waive proper venue by consent.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
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 occurred or occupational disease contracted: Claimant alleges injury to his left shoulder while pouring molten metal into a mold.
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: Alleged left shoulder
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: James Hayes Injury No.: 02-065518

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$422.40
19. Weekly compensation rate: \$281.60 / \$281.60
20. Method wages computation: Stipulated

### COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: None

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	James Hayes	Injury No.: 02-065518
Dependents:	N/A	Before the
Employer:	HJ Enterprises, Inc.	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Zenith Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: LJW:tr

### **PRELIMINARIES**

A hearing was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on August 18, 2004. The case was formally submitted on November 12, 2004. Attorney Craig Ortwerth represented James Hayes (Claimant). HJ Enterprises, Inc., (Employer) was insured by Zenith Insurance Company, and represented by Attorney James Kennedy. Second Injury Fund was to remain open.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: accident; arising out of the course and scope of employment; notice; medical causation; liability for past medical expenses; and nature and extent of permanent partial disability (PPD).

Claimant offered Exhibits A-C, and the exhibits were admitted into the record. Employer's Exhibits 1-2, and 5-6 were admitted into the record. Claimant objected to Employer Exhibits 3-4 citing violation of §287.215 RSMo. The parties were asked to address the objection in their post-hearing briefs, and the briefs have been reviewed. Claimant's objection to Exhibits 3-4 are overruled as the documents from Claimant's personnel file contain statements made to obtain employment, not as the result of an injury, and as such are not "statements" as contemplated by §287.215 RSMo. Any objections not expressly ruled on in this award are overruled.

## SUMMARY OF EVIDENCE

Only testimony necessary to support this award will be reviewed and summarized.

**Claimant:** Claimant testified that he began working in Employer's foundry in March 2002. He functioned as a molder, and his job duties included pouring melted molten from a steel pot that moved on an elevated conveyor belt. Claimant testified that he released a latch to tilt the pot and pour the mold. On May 6, 2002, Claimant testified that he felt a pop in his left shoulder when he missed a latch while attempting to tilt the pot to pour. Claimant immediately notified his supervisor "Kenny" about the incident, and Claimant finished his shift.

Claimant testified that Employer fired him because of "lawsuits" on May 9, 2002. At the time of termination, no mention was made by Employer of his recent injury, and no medical care was provided. On June 29, 2002, Claimant sought medical treatment with Dr. Poetz, and received treatment for approximately one month. Claimant's current left shoulder complaints include weakness and the inability to play basketball. Claimant acknowledged previous work injuries, but doesn't recall if he injured his left shoulder during those injuries.

Upon cross-examination, Claimant was confronted with evidence of twelve previous reports of injury filed by his prior employers, and not disclosed on his employment application. Claimant responded that he had told Employer's Human Resource representative that he did not list all his prior injuries because he could not remember them, despite receiving large settlements with some of the injuries. Claimant testified he was told if he couldn't remember not to list the injuries.

Claimant was also confronted with the differing history of the injury he provided to subsequent examining physicians. Dr. Poetz and Dr. Burke were told that the injury occurred while Claimant was pulling molten metal pots on a conveyer belt when the belt got stuck, forcing Claimant to pull harder injuring his left shoulder (Exhibit A & 1). Claimant responded that he told the physicians what had happened. Claimant contends that he was told for two months that he was an excellent worker, only to later concede that he was hired on April 24, 2002 and fired on May 9, 2002.

**Rudolph C. May:** Mr. May is a safety director for Employer. Mr. May confirmed that Claimant was hired in late April 2002. Mr. May was present when Claimant was terminated, and testified Claimant did not mention a recent work injury, or make a request for medical treatment. Mr. May first became aware of an alleged injury when he received notice of the injury from the Division of Workers' Compensation in July 2002.

Upon cross-examination, Mr. May acknowledged he was not present when Claimant completed his job application. Mr. May also acknowledged he did not ask Claimant if he was injured when he was terminated.

**Kenneth Ray Smith:** Mr. Smith has been a supervisor for Employer since 1995, and was Claimant's supervisor. On the alleged date of injury, two lines were in production. Mr. Smith testified Claimant worked on the C-line, which required an employee to pour using their right hand/arm. Mr. Smith indicated that an employee on that line could use only one hand to pour, the right, while the left hand rests while pouring. Mr. Smith testified that there were no conveyor breakdowns during the time of alleged injury, and Claimant never notified him that he had been injured. Mr. Smith enters all injuries, no matter how slight, into a log. Mr. May is notified of the injury, and medical care is offered if needed. Mr. Smith testified that his log for the alleged date of injury does not reflect an entry concerning Claimant (Exhibit 6).

Upon cross-examination, Mr. Smith acknowledged that he has been told in the past that potlatches would stick, but there were no latches on C-line. Only when three lines are in use are latches used. Mr. Smith conceded that he has no specific recollection of the alleged date of injury, because nothing unusual happened that day.

## FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

### **Issues relating to accident**

Section 287.020 RSMo., defines accident as an unexpected or unforeseen event or series of events that occur suddenly, without fault, and produce objective symptoms of an injury. The injury must be "clearly work related", and that term is defined as work being a substantial factor in the resulting medical condition. Further, an injury is not compensable merely because work was a triggering or precipitating factor.

On the date of hearing, Claimant alleged an "accident" that occurred on May 6, 2002. Claimant's sworn testimony at hearing was that he missed a latch while trying to pour a mold, injuring his left shoulder. Claimant's direct supervisor recalls no unusual incidents that day, and more importantly testified that on May 6, 2002, Claimant was working a line that did not have latches. The history of the alleged injury provided by Claimant to two separate doctors is very different from his sworn testimony. Claimant told the doctors that conveyor belt stuck, causing him to pull hard injuring his left shoulder.

Employer reports no conveyor malfunctions that day. Setting aside additional credibility issues raised by Employer, I do not find Claimant's sworn testimony regarding how the injury happened credible. Claimant has not met his burden to establish accident. As accident is not established, all other issues presented are moot.

**CONCLUSION**

Claimant has failed his burden to establish accident. Employer owes no benefits regarding this injury. Second Injury Fund was to remain open, but as the claim against Employer is denied, there can be no Second Injury Fund recovery, and the claim against Second Injury Fund is dismissed.

Date: \_\_\_\_\_ Made by: \_\_\_\_\_

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Gary Estenson  
*Acting Director*  
*Division of Workers' Compensation*