

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

Injury No.: 96-160475

Employee: Billey O. Haynes, deceased
Employer: American Construction and Energy
Insurer: TIG Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
 of Second Injury Fund (Dismissed)
Date of Accident: September 4, 1996
Place and County of Accident: Independence, Jackson 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 July 8, 2008. The award and decision of Administrative Law Judge Carl Mueller, issued July 8, 2008, 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 3rd day of December 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Billy O. Haynes (dec) Injury No: 96-160475
Dependents: N/A
Employer: American Construction and Energy
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: TIG Insurance Co.
Hearing Date: June 4, 2008 Checked by: RCM/rm/pd

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes (medical expenses already provided only)
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: September 4, 1996
5. State location where accident occurred or occupational disease was contracted: Independence, Jackson 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 occurred or occupational disease contracted: Employee was moving a bundle of slab doors and injured his lower back.
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: Body as a whole
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? \$12,895.07
17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: \$492.00
19. Weekly compensation rate: \$328.00/268.72
20. Method wages computation: By stipulation.
21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred	\$12,895.07
Less credit for expenses already paid	(\$12,895.07)
Total Medical Owing	<u>\$0.00</u>

Temporary Disability

Total TTD Owing	<u>\$0.00</u>
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Permanent Partial Disability

None	\$0.00
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Total Award:	<u>\$0.00</u>
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22. Second Injury Fund liability: N/A
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Billey O. Haynes (dec)	Injury No: 96-160475
Dependents:	N/A	
Employer:	American Construction and Energy	
Additional Party:	State Treasurer as Custodian of the Second Injury Fund	
Insurer:	TIG Insurance Co.	
Hearing Date:	June 4, 2008	Checked by: RCM/rm/pd

On June 4, 2008, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Billey O. Haynes is deceased and his wife, Sherry Haynes was present and with counsel, William and Mathew Partin. The employer and its insurer appeared through attorney Kip Kubin. The Second Injury Fund appeared through Assistant Attorney General Maureen Shine. Preliminary matters were then addressed by the court. First, counsel for the claimant requested on the record before the submission of any evidence or testimony that the claim filed against the State Treasurer as custodian of the Second Injury Fund be dismissed with prejudice. Assistant Attorney General Shine was excused after the declaration was made by counsel for the claimant.

Former attorney for the employee, Frank Eppright also appeared. Attorney Eppright had filed a Motion to Withdraw and attorney lien totaling \$5,922.45, with \$3,422.45 in case expenses and fees in the amount of \$2,500.00. Attorney Eppright appeared at hearing and waived his attorney fee, but requested reimbursement of the \$3,422.45 in case expenses.

The primary issue the parties requested the Division to determine was whether or not Mr. Haynes suffered any disability from the accident arising out of and in the course of his employment, and if so, the nature and extent of that disability. For the reasons noted below, I find that Mr. Haynes sustained a compensable accident on September 4, 1996, but that the claimant failed to show that he sustained any permanent partial disability from the accident or that that accident was a substantial contributing factor in causing the claimant's disability.

STIPULATIONS

The parties stipulated that:

- On or about September 4, 1996 ("the injury date"), American Construction and Energy ("American") was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by TIG Insurance Co.;
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- Mr. Haynes was its employee working subject to the law in Independence, Jackson County, Missouri;

- Mr. Haynes sustained an accident arising out of and in the course of his employment with American on September 4, 1996;
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- Mr. Haynes notified American of his injury and filed his claim within the time allowed by law;
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- American provided Mr. Haynes with medical care costing \$12,895.07.

- Mr. Haynes had an average weekly wage of \$492.00 per week which yields a compensation rate for temporary total compensation of \$328.00 and a compensation rate for permanent partial disability of \$268.72;

- Mr. Haynes does not seek reimbursement for any medical costs; and,

- Mr. Haynes does not seek any payment of temporary total disability benefits.

ISSUES

The parties requested the Division to determine:

- Whether Mr. Haynes suffered any disability and, if so, the nature and extent of the Employee's disability?

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- Whether the accident caused the disability the employee claimed?
-
- Whether the Missouri Department of Social Services Medicaid Lien must be satisfied?
-
- Whether Research Medical Center's Application for Direct Payment Medical Fee Dispute must be satisfied?
-
- Whether Sherry Haynes is the proper party to this claim and/or whether she has been properly joined?

FINDINGS OF FACT

Sherry Diane Haynes testified on behalf of the deceased employee. In addition, claimant's counsel presented the following exhibits (and withdrew Exhibit G) which were admitted into evidence:

- Exhibit A – Medical Report, Daniel Downs, MD, September 7, 2006
- Exhibit E – Medical Report, G.R. Wurster, MD, November 1, 1999
- Exhibit F – Death Certificate of Billey O. Haynes, May 23, 2006

Claimant's counsel also offered the following exhibits which were objected to by the attorney for the employer both as not constituting a "complete medical report", and because the exhibits did not contain what claimant's counsel provided to him in its May 27, 2003 "60 day letter".

- Exhibit B – Medical Report, P. Brent Koprivica, MD, December 23, 2002
- Exhibit C – Medical Report, Stanley Butts, PhD, December 17, 1998
- Exhibit D – Medical Report, John Pro, MD, November 26, 2002.

The court sustained the objections to Exhibits B and D and neither exhibit was admitted into evidence. The court reserved the ruling on the objection to Exhibit C to the issuance of this award. Exhibit C is a report authored by a licensed psychologist who holds only a Ph.D. The "60-day" rule applies only to medical reports of "physicians". Walsh v. Treasurer of the State, 953 S.W.2d 632 (Mo.App. S.D.1997). Therefore, Mo.Rev.Stat. §287.210.7 does not apply to this report and I admit it into evidence.

Although the employer did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence:

- Exhibit 1 – Medical Report, David Ebelke, MD, February 7, 2001
- Exhibit 2 – Letter dated May 27, 2003 from Frank Eppright re: "complete medical report"
- Exhibit 3 – Medical Records Timeline Summary
- Exhibit 4 – Chronology of Drugs given to Claimant
- Exhibit 5 – Calendar showing dates employee received prescriptions listed in Exhibit 4
- Exhibit 6 – Curriculum Vitae, David K. Ebelke, MD

Based on the above exhibits and the testimony of Mrs. Haynes, I make the following findings.

Since the claimant is now deceased and did not testify, the court is limited in its factual record. The parties have stipulated that the claimant was injured on September 4, 1996 in Independence, Missouri. The histories in the medical reports indicate that he suffered pain in his low back while moving a bundle of slab doors. However, it is noted in the medical report from Dr. Ebelke, and the accompanying medical records,

that the employee gave a different version of the accident to the emergency room physicians at Research Medical Center on the accident date. Those records would indicate that the claimant injured himself the day before when he fell backward picking up sheetrock. See, Employer's Exhibit 1 at tab D, page 57.

The evidence in the record offered by the claimant, consists of three narrative medical reports from Daniel Downs, MD, with the accompanying medical records from St. Mary Hospital; the death certificate of Billy O. Haynes, which indicates he died on May 23, 2006; and the medical report from G. R. Wurster, MD. The employer offered a comprehensive medical report from David Ebelke, MD, with three volumes of medical records from different providers and his curriculum vitae; a summary and timeline of those records, a chronology of the narcotic medications obtained by the claimant and a calendar representation of those items. Exhibits 3-5 are used by the court as demonstrative aids in interpreting the medical records in Exhibit 1. The employer also provided the court with Exhibit 2, which is the 60-day letter from the claimant's prior attorney. That is not relevant to the factual record, but is relevant to the objections which the court considered during trial.

Those records allow the court to reconstruct the events after the date of the accident. On the date of the accident Mr. Haynes presented to the emergency room at Research Medical Center and gave a history of falling backward the day before while lifting sheetrock and injuring his back. See, Employer's Exhibit 1 at tab D, page 57. He indicated that he had pain in his back and shooting down his left leg. He received x-rays and was discharged without narcotic medications and with a diagnosis of mild back strain.

The claimant next saw Dr. DeBlase at Oak Grove Clinic on September 5, 1996 reporting right-sided back pain with radiation into the right leg. The doctor obtained additional x-rays and diagnosed the claimant with a back strain. He gave the claimant medications (vicodin and flexeril). He instructed the claimant to return on the following Monday (September 9) for another appointment. The claimant called the doctor the next day and requested something stronger for pain. On Sunday, September 8, he presented at the emergency room at the Medical Center of Independence. He reported that he had used up his 20 lortab in 2 days. He reported that Dr. DeBlase believed him to have a slipped disk. He was given more lortab and was instructed to return to Dr. DeBlase.

On the next day, he reported to the Family Practice Clinic at Truman Hospital East. He did not make any complaints of back pain and indicated to the doctor that overall he is doing quite well. They are under instructions not to issue the patient any narcotic medications. He returned to Dr. DeBlase on September 10, 1996 and indicated that he was feeling better and wanted to return to work. He was returned to regular duty by the doctor. He returned to Dr. DeBlase on September 13 complaining of increased pain and was given more narcotic medication and told to return in three days for recheck. The patient instead went to the emergency room at Research Medical Center on September 14. He was given more narcotic medication and told to rest for 48 hours. He went to the emergency room at Medical Center of Independence on September 16 complaining of back pain. He is given more narcotic medications. He next reported to the emergency room at Truman Medical Center West. He made no complaints of any back pain, but complained of headaches. He was given more narcotic medication, but was advised by the emergency room that they would no longer issue him narcotics through the emergency room. See, Employer's Exhibit 1 at tab C, page 246.

Mr. Haynes returned to the emergency room at Medical Center of Independence on September 28 with renewed complaints of back pain, but they refused to issue any narcotic medications. He then called Dr. DeBlase's office on the same day and obtained more narcotic medications. He continued to call Dr. DeBlase's office on September 30, October 1, and October 3 for additional narcotic medications. He is finally issued some on October 3. Mr. Haynes went to the emergency room at Research Medical Center on October 5 and reported low back pain. He requested additional narcotic medications, but they declined the request. This led to another call to Dr. DeBlase on October 7 for more narcotics. He next saw Dr. DeBlase

on October 11 and was given additional narcotic medications.

Mr. Haynes' care was then transferred to Dr. Michael Poppa who saw the claimant on October 25, 1996. The patient complained of lower back pain. The claimant was scheduled for an MRI and given more narcotic pain medications. He saw the doctor again on November 8, 1996, after the MRI was completed. The doctor suggested a series of epidural steroid injections.

Mr. Haynes next went to Truman West Medical Center on November 15, 1996. He did not complain of any back problems, but complained of headaches. He was given more narcotic medications. *Id.* at 241.

He was next seen by Dr. Poppa on November 18, 1996. He reported no improvement from the epidural injection. He was directed to take medications only as directed and returned to the doctor on December 2.

He reported to Truman West on November 27 again with complaints of headaches, but no mention of back pain. He was given additional narcotic medications. *Id.* at 2436. He returned to Dr. Poppa on December 2, but did not receive the second epidural injection. The same was rescheduled and he was instructed to return to the doctor on December 16. In the meantime, Mr. Haynes went to the emergency room at Truman West on December 7 and obtained narcotic medications for headache complaints; Truman East on December 10 for bronchitis, with no mention of back pain; Truman West on December 11 for chest pain and received narcotic medications.

Mr. Haynes returned to Dr. Poppa on December 16 and was given a surgical consult with Dr. McCormack on December 23, 1996 and additional narcotic medication. He continued to receive treatment at emergency rooms. He was seen at Truman West on December 19 and 25 with complaints of headaches. He was not given narcotics on the 19th, but was given some on the 25th. He was seen by Dr. McCormack on December 23 who suggested physical therapy.

He was again seen at Research Medical Center on January 3, 1997 complaining of low back pain. The doctor on call refused to give him narcotic medication, and he left the emergency room. See, Employer's Exhibit 1 at tab D, page 36. He went to Truman East on January 4, but made no complaints about back pain, only complaints about bronchitis. He went back to Truman West on January 11, 22, 25, February 4 and 8 complaining of right hand pain and headache and obtained more narcotic medications on each occasion.

Mr. Haynes was seen by Dr. Timothy Stepp on January 29, 1997; the doctor did not recommend surgery. Mr. Haynes eventually was released from Dr. Poppa's care on February 26, but not before he went to the emergency room at Independence Regional Medical Center on February 16, and twice on February 22 (the first time he was not given narcotics, the second time he was). He also presented at the emergency room at Truman East on February 24 and March 3 complaining of headaches and was given narcotics on the first visit but denied them on the second visit.

The claimant ceased working for the employer in February 1997, because the job they were doing was completed and he was laid off. A further examination of the records reveals that even after the claimant was released from care, the pattern of emergency room visits continued through 1999. Even examining the records prior to the injury, a similar pattern was evident from 1982 through his injury in 1996. Dr. Ebelke in his report notes the claimant had over 300 visits to clinics and emergency rooms from 1982 through 1999. The records after his release from care also note many additional incidents which claimant alleged caused him injury. For example he reported to various emergency rooms that he fell seven feet off a ladder (August 26, 1998); using a skill saw on a ladder (September 20, 1998); changing a tire (November 15, 1998); hanging Christmas lights (December 2, 1998); lifting his grandson (December 25, 1998); lifting his grandson (January 23, 1999); working on a car (January 30, 1999); falling on a car (March 20, 1999); doing heavy lifting (April 1, 1999); fall from a seven foot ladder (July 4, 1999); stepping in a mole hill (July 11, 1999); weed eating

(August 28, 1999) and digging a ditch (September 2, 1999) just for examples.

The patient eventually was seen by Daniel Downs, M.D. January 13, 2000. Dr. Downs treated the claimant eventually performing a two level fusion. Dr. Downs's reports do not make any mention of any preexisting problems or any intervening problems after the 1996 injury. There are four reports from Dr. Downs, however there do not appear to be any treatment notes, except for those from St. Mary's Hospital. Dr. Downs believed the claimant was permanently and totally disabled. See, Claimant's Exhibit A at 2.

The claimant was seen by G. R. Wurster, M.D. on October 6, 1999. Dr. Wurster opined that Mr. Haynes did not suffer from any psychiatric disorder and that he did have any permanent partial disability based on a psychiatric disorder. See, Claimant's Exhibit E at 5. Dr. Wurster opined that Mr. Haynes' "current disabilities are physical." *Id.*

The claimant was also seen by David K. Ebelke, M.D. on February 7, 2001. See, Employer's Exhibit 1 at 1. The doctor had previously seen the claimant in November, 1995, less than one year before this injury. Dr. Ebelke reviewed the past medical records on the claimant and estimated that he had approximately 300 visits with clinics and emergency rooms between 1982 and 1999 with varying complaints of headaches, right hand pain and back pain. Mr. Haynes was examined and found to be comfortable during the history portion of the examination. Mr. Haynes demonstrated a limp favoring his right leg. Dr. Ebelke found no back spasms, but did find a limited range of motion. Dr. Ebelke found Mr. Haynes to have equal reflexes and normal motor strength in his legs. He performed x-rays which showed a solid fusion.

Dr. Ebelke opined that the claimant did not suffer a disk herniation in the accident of September 4, 1996. *Id.* at 3, 5-6. He found through his review of records that the claimant had reported a number of injuries both before and after the accident of September 4, 1996 and he could not say that this accident was any more significant than any of the other injuries he reported. He concluded that the claimant was a drug seeker and found that the claimant did not have any disability from the September 4, 1996 injury. *Id.* at 6-7.

Sherry Haynes also testified. Her testimony confirmed that she was married to Mr. Billey O. Haynes at the time of the accident and that she remained married to him until his death in May 2006. She offered no information about his medical condition or how it affected him.

RULINGS OF LAW

In every workers' compensation case, the claimant has the burden of proof on all essential elements of the claim, including medical causation between the accident and the injury of which the employee complains. Groce v Pyle, 315 S.W. 2d 482 (Mo. App. W.D. 1958); Goleman v MCI Transporters, 844 S.W. 2d 463 (Mo. App. W.D. 1992). Speculation, conjecture or personal opinion cannot form a basis for an award of compensation in any area of required proof. Toole v. Bechtel Corp., 291 S.W.2d 874 (Mo. 1986). Proof that work is one of a number of possible causes for the injury and disability is not sufficient to form the basis for an award of compensation. Russell v Southwest Grease and Oil Co., 509 S.W.2d 776 (Mo. App. W. D. 1974). The claimant must prove that the accident was a substantial factor in causing the disability. See: Cahall v Cahall, 963 S.W.2d 368 (Mo. App. E. D. 1998) .

Here the court is presented with two radically different opinions: those of Dr. Downs and Dr. Ebelke. Dr. Downs opined that the claimant was rendered permanently and totally disabled as a result of the September 4, 1996 injury in isolation, seemingly because that was the history given him by the patient. If anything is clear from the voluminous medical records reviewed by the court, it is that the claimant was a suspect

medical historian.

However, Dr. Downs did not see the claimant until four (4) years after the accident. The only records submitted with Dr. Downs's reports are those of St. Mary's Hospital. See, Claimant's Exhibit A at pages 8 and above. Since the report for submission under the 60-day rule must contain all records reviewed by the doctor, the court must draw the inference that he was not provided with any of the medical records which were reviewed by Dr. Ebelke of his pre existing condition or the subsequent aggravating events he alleged. Dr. Downs apparently did not have the benefit of reviewing those records in preparing his opinions regarding the claimant. Without a complete medical history, the doctor's opinions are suspect and I find his opinions lack credulity and I give them no weight.

Also inconsistent with Dr. Downs' opinion is the fact that the claimant continued to work at full duty after the accident. The only reason given by the claimant for leaving work was that he was laid off after the job was completed. There is no evidence as to what efforts the claimant made to be employed after being laid off, no evidence as to his job search and certainly no evidence of how the injury impacted his ability to compete in the labor market. Without such evidence a claimant fails in his burden of proof to show he is permanently and totally disabled. See, Lane v Schreiber Foods, Inc, 903 S.W. 2d 616 (Mo. App. S.D. 1995). Dr. Ebelke was of the opinion that the claimant suffered no disability as a result of the accident. Based on the evidentiary records, as a whole, this court finds that claimant has failed to prove that he was incapable of any gainful employment when considering the accident of September 4, 1996 in isolation. The claimant is not permanently and totally disabled because of this accident.

The second issue the court must consider is whether the claimant has any permanent partial disability resulting from his September 4, 1996 accident. The only evidence, properly in the record, which addresses the issue of permanent partial disability is the opinion of Dr. Ebelke. He opined that the claimant had no permanent partial disability as a result of the injury. Dr. Downs did not address the issue of permanent partial disability. In many ways, Dr. Ebelke is in the superior position to judge the effects of the September 4, 1996 injury. He had seen the claimant less than one year before for a similar low back complaint. He also had the benefit of prior medical records and a more complete copy of the claimant's medical treatment after the injury than did Dr. Downs.

Moreover, besides the percentage of disability, the claimant must prove that the accident was a substantial contributing factor to the disability. Dr. Downs's opinion is not persuasive or probative on that issue because he seemingly did not have the medical records of Mr. Haynes' prior medical condition or the aggravations which occurred subsequent to the injury. Dr. Ebelke opined that he could not attach any greater significance to the September 4, 1996 injury than he could to the numerous other incidents reported in the medical records either before or after the accident at issue. Interestingly, the claimant's attorney seems to argue that Dr. Ebelke should be disregarded because he did not review all the records of Dr. Downs after the injury. However, that same criticism is more sharply focused on Dr. Downs because he did not see the claimant until four years after the accident and did not address the issues of preexisting conditions or subsequent aggravations of Mr. Haynes' back condition. If the court were to accept that logic, it would have to disregard all the medical opinions in the claim. The court finds the opinion of Dr. Ebelke to be credible, believable and based on a complete and thorough review of all of the medical records. Thus, I find and hold that the claimant failed to show that he suffered any permanent partial disability from the accident in question. Further the claimant failed to show that the accident was a substantial contributing factor in causing any disability. Therefore, the claimant is awarded no permanent disability for this accident.

In regard to the Medicaid lien that was filed by the State of Missouri. There is no evidence that the claimed treatment was authorized by the employer, so there will be no order for direct payment of those medical amounts. Since the claimant is not being awarded any monies for permanent partial disability, there are no funds to which the lien can be attached. The lien is recognized, but not satisfied.

Research Medical Center has also filed an application for direct payment of billings to that institution. There is no evidence to support that the services the claimant received were authorized by the employer, and direct payment of those expenses are denied.

Since the court has determined that the claimant is not permanently and totally disabled, it does not need to reach the issue of whether Sherry Diane Haynes is properly added to the proceeding or whether she would be entitled to any continuing benefits under the act. The benefits accrued to the date of death would be the only amounts she would be entitled to under the act. Since no award of permanent disability is being made, she is not eligible for any benefits under the award. The claimant is awarded the medical bills, previously paid by the employer and insurance carrier, but no other amounts.

Finally, pursuant to the request of the counsel for the claimant, the claim against the State Treasurer as Custodian of the Second Injury Fund is dismissed with prejudice.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation