

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

Injury No.: 01-169109

Employee: James W. Holley

Employer: Missouri Highway & Transportation Commission

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 31, 2009, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued December 31, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James W. Holley

Injury No. 01-169109

Dependents:

Employer: Missouri Highway & Transportation Commission

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Add'l Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Self-insured

Hearing Date: October 28, 2009

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No, claim denied in full with/re to Employer and the Second Injury Fund.
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 alleged accident or onset of occupational disease: Alleged to be May 21, 2001.
5. State location where alleged accident occurred or occupational disease was contracted: Lincoln 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? Issue not decided.
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? Issue not decided.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: (See award)
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by alleged accident or occupational disease: Alleged as back injury.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? None.

Employee: James Holley

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- 18. Employee's average weekly wages: \$502.85
- 19. Weekly compensation rate: \$353.23/\$314.26
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

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

Employee: James Holley

Injury No. 01-169109

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James W. Holley

Injury No: 01-169109

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Missouri Highway & Transportation Commission

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-insured

Checked by: RJD/cs

ISSUES DECIDED

The evidentiary hearing in this case was held on October 28, 2009 in Warrenton. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on November 18, 2009. The hearing was held to determine the following issues:

1. Whether Claimant sustained an accident arising out of and in the course of his employment with the Missouri Department of Transportation on or about May 21, 2001;
2. Whether the work accident of May 21, 2001, if sustained, is the cause of any or all of the injuries and/or conditions alleged by Claimant;
3. Whether Claimant's claim for compensation is barred by the statute of limitations, Section 287.430, RSMo;
4. Whether Claimant's claim for compensation is barred by the notice requirement of Section 287.420, RSMo;
5. Whether Employer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
6. The nature and extent of Claimant's permanent disability, if any; Claimant alleges he is permanently and totally disabled;
7. The liability, if any, of Employer for permanent partial disability benefits or permanent total disability benefits; and
8. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Lincoln County and adjoining counties, and thus Warren County is a proper venue for the hearing;
3. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;
4. That the applicable compensation rates are \$353.23/\$314.26, based on an average weekly wage of \$502.85;
5. That the notice requirement of Section 287.420 is not a bar to Claimant's claim; and
6. That Missouri Department of Transportation was an authorized self-insured entity for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, James William Holley; medical records; the deposition testimony of Dr. Robert Poetz; the deposition testimony of Dr. Daniel Kitchens; the deposition testimony of Mr. James E. Israel; the deposition testimony of Mr. James England; Claimant's Social Security Disability Report; Claimant's Application for Disability Benefits to Employer's Retirement System; and Missouri Department of Transportation Workers' Compensation Field Injury Report.

DISCUSSION

James William Holley ("Claimant") was born February 8, 1943. He was 66 years of age at the time of the hearing, and 58 years of age at the time of the alleged accident in this case. Claimant graduated from high school in Elsberry, Missouri in 1961 and attended college but did not receive a degree. Claimant worked for General Motors for 21 years, mostly in Indiana. In 1989, Claimant returned to Missouri and worked some part-time jobs for a few years. In 1995, Claimant began working for the Missouri Department of Transportation ("Employer") as a laborer or crew worker. This job required Claimant to operate trucks, rollers, graders, backhoes and mowers; it also required Claimant to perform flagging duties, scoop hot asphalt, trim trees, pick up garbage bags and set up traffic barriers.

Employee: James Holley

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Claimant alleges he sustained a work-related accident on May 21, 2001 which affected his back. Claimant had a prior history of back problems. Claimant had back problems from 1973 through the date of the alleged accident as a result of a herniated lumbar disc.

Claimant testified that on May 21, 2001, he was mowing an area at Route KK and U.S. Highway 61 in Lincoln County, north of Troy. He testified he was driving a front-wheel assist John Deere Tractor and was pulling a bat-wing mower. Claimant testified that an accident occurred late in his shift that day, when his tractor hit a "ditch check". Claimant testified that a ditch check is an area where hay bales had previously been placed to protect the integrity of the slope. Claimant testified that silt builds up next to the hay bales. After the hay bales disperse, the silt build-up remains and creates a ledge or "drop-off". Claimant testified that driving over a ditch check was like driving over a curb. Claimant testified that, when he drove his tractor over the ditch check, the air seat on his tractor "bottomed out", causing his lower back to "go out".

Claimant testified that, at the end of his shift on May 21, 2001, he told his supervisor, Robin Eveland, "I hit a ditch check". Claimant testified that he was experiencing pain in his low back, "at the belt line" from May 21, 2001 through June 21, 2001, but he continued to work for Employer, despite the back pain. Claimant testified that, by June 21, 2001, his back pain was so severe, he couldn't stand it anymore, and stopped working. June 21, 2001 was the last day Claimant worked for Employer.

Claimant testified clearly and unequivocally that he did not request medical aid from Employer at any time prior to August 2003, when he filled out a "Missouri Department of Transportation Workers' Compensation Field Injury Report."

Claimant saw his family practice physician, Dr. Gary Rucker, on June 25, 2001, complaining of low back pain radiating into hips. Claimant gave Dr. Rucker no history of an injury or accident, work-related or otherwise. Claimant requested sick leave from Employer sometime in late June 2001, but made no mention of a work-related injury or condition. On July 3, 2001, Claimant saw Dr. May Chatilla, and gave a history of low back pain worsening for one year. Claimant never made any mention to Dr. Chatilla of an injury or accident. Dr. Chatilla treated Claimant over the next several months with oral anti-inflammatory medications and a series of injections.

On July 30, 2001, while under Dr. Chatilla's care, Claimant completed an APPLICATION FOR DISABILITY BENEFITS with Employer's retirement system. Claimant indicated on the form that he was requesting "Normal Disability Benefits". Immediately below the selection option for "Normal Disability Benefits" is another selection option for "Work-Related Disability Benefits". Claimant did not select this option. The last sentence of this option reads: "This disability is a result of an injury incurred during the performance of my duties."

On September 5, 2001, while still under Dr. Chatilla's care, Claimant filed for disability benefits with the Social Security Administration. The first portion of Claimant's hand-written "Remarks" on page 9 of that application reads as follows:

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I have worked with this pain for many months. Until at such time the pain became intolerable and mobility became impossible because of pain. Thinking all along this was do (sic) to lower back surgery performed 29 yrs ago. Until I could no longer function (sic) at my job for chronic severe pain.

In October 2001, Claimant was hospitalized for a deep venous thrombosis in his left leg.

On March 13, 2002, Claimant was first seen by Dr. Robert Heim, a neurosurgeon. Dr. Heim's note of that date begins: "James Holley is a 59-year-old white male who is seen in office consultation at the request of Dr. May Chatilla. Mr. Holley was in his normal state of health until June 20, 2001 when he had a sudden onset of bilateral hip pain while driving a tractor at work." Dr. Heim performed surgery on March 28, 2002, consisting of a left L4-5 microdiscectomy. On June 24, 2002, additional surgery was performed by Dr. Heim, consisting of a microdiscectomy, neurolysis and foraminotomy at L4-5 on the left. On July 24, 2002, a third surgery was performed.

On August 15, 2003, more than a year after the last surgery was performed, Claimant completed a MISSOURI DEPARTMENT OF TRANSPORTATION WORKERS' COMPENSATION FIELD INJURY REPORT. On that form, Claimant filled in the "DATE OF INJURY/ILLNESS" box with "2nd Qtr 01". In the box titled: "IF ACCIDENT IS REPORTED MORE THAN 24 HOURS AFTER OCCURRENCE HAVE THE EMPLOYEE EXPLAIN REASON FOR DELAY IN REPORTING", Claimant wrote: "Didn't realize disc was herniated. Worried about my health, my wife's health until we both got better."

On September 29, 2003, Claimant filed, *pro se*, a CLAIM FOR COMPENSATION with the Missouri Division of Workers' Compensation, alleging a date of injury of "6/21/01". At some later date, Claimant alleged a May 21, 2001 date of injury.

Employer denies that Claimant sustained the accident alleged by Claimant. Claimant has the burden of proof on the issue. There was no witness to the alleged accident. The only evidence that the accident was sustained is Claimant's testimony, and, thus, his credibility on this issue is paramount. Unfortunately for Claimant, he has no credibility on this issue.

Claimant is alleging that an accident, occurring on May 21, 2001, caused him such severe distress that it caused him to quit work a month later, eventually required three surgeries, and has rendered him totally disabled. Claimant wants me to believe him in this regard. Yet, in order to believe him, I must also believe:

1. Despite such severe pain, Claimant waited 34 days before seeking medical attention;
2. Despite the significance of the pain due to the accident, Claimant did not tell the doctor that he had an accident or injury;
3. When Claimant saw another physician 42 days after the accident, he did not tell the doctor of an accident or injury, but rather told the doctor he had back pain worsening for one year;
4. Two months and nine days after the accident, Claimant filed for disability benefits, specifically stating that the disability was NOT due to a work-related injury;

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5. Three and one-half months after the accident, Claimant filed for Social Security disability benefits, stating "I worked with this pain for MANY months" (not ONE month as alleged at the hearing);
6. More than one year after undergoing the last of three surgeries, and almost 27 months after the accident, Claimant completed an injury report, but could only pinpoint the date as being in the second quarter of 2001; and
7. Claimant's Claim for Compensation alleges a date of injury of June 21, 2001 (the last day he worked for Employer).

There are simply too many contradictions for all of the above to be true. I find Claimant did not sustain a work-related accidental injury on or about May 21, 2001. Claimant compromised his credibility in this regard by making so many prior inconsistent claims and statements.

FINDINGS OF FACT

In addition to those facts to which the parties stipulated, I find the following facts:

1. Claimant alleges that he sustained a work-related accident on May 21, 2001, and that such accident resulted in a serious back injury, requiring three surgeries, and rendering him permanently and totally disabled;
2. Claimant waited 34 days after the alleged accident before seeking medical attention;
3. Claimant did not tell any of his physicians that he had an accident or injury;
4. When Claimant saw another physician 42 days after the alleged accident, Claimant told the doctor he had back pain worsening for one year;
5. Two months and nine days after the alleged accident, Claimant filed for disability benefits, specifically stating that the disability was not due to a work-related injury;
6. Three and one-half months after the alleged accident, Claimant filed for Social Security disability benefits, stating "I worked with this pain for many months";
7. Almost 27 months after the alleged accident, Claimant completed an injury report, reporting the date of injury as "2nd Qtr 01";
8. Claimant's Claim for Compensation, filed by Claimant *pro se*, alleges a date of injury of June 21, 2001;
9. Claimant's statements made after the date of the alleged accident are inconsistent with Claimant having sustained a serious work-related back injury on May 21, 2001, and Claimant has thus compromised his credibility;
10. Claimant was not a credible witness; and
11. Claimant did not sustain an accident arising out of and in the course of his employment with Employer on or about May 21, 2001.

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RULINGS OF LAW

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. Claimant did not sustain an accident arising out of and in the course of his employment with Employer on or about May 21, 2001;
2. Claimant's claim for compensation against Employer must be denied in full as there was not a compensable accident;
3. Claimant's claim for compensation against the Second Injury Fund must be denied as there was not a compensable accident; and
4. All other issues are moot.

ORDER

Claimant's claim against Employer is denied in full. Claimant's claim against the Second Injury Fund is denied in full.

Date: December 31, 2009

Made by/s/Robert J. Dierkes

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Naomi Pearson
Naomi Pearson
Division of Workers' Compensation