

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

Injury No.: 99-183538

Employee: Steven Holubeck
Employer: Dobbs Tire & Auto Centers, Inc.
Insurer: Dobbs Tire & Auto Centers, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: August 27, 1999
Place and County of Accident: St. Louis 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.

On November 5, 2006, employee filed a motion to submit additional evidence. Employee admits that his counsel elected not to submit the evidence. The Commission has considered the request to submit additional evidence and finds that the request fails to meet the standards set forth in Commission regulation 8 CSR 20-3.030(2). Specifically, the evidence is not newly discovered evidence and the evidence could have been produced at the hearing through the exercise of reasonable diligence. Employee's motion is denied.

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 26, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued July 26, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of December 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Steven Holubeck Injury No.: 99-183538
Dependents: Not Applicable Before the
Employer: Dobbs Tire & Auto Centers, Inc. **Division of Workers'**
Additional Party: Second Injury Fund Department of Labor and Industrial **Compensation**
Insurer: Dobbs Tire & Auto Centers, Inc. Relations of Missouri
Hearing Date: June 9, 2006 Jefferson City, Missouri
Checked by: GCG

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? Undetermined
3. Was there an accident or incident of occupational disease under the Law? Undetermined
4. Date of accident or onset of occupational disease: August 27, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Undetermined
7. Did employer receive proper notice? Undetermined
8. Did accident or occupational disease arise out of and in the course of the employment? Undetermined
9. Was claim for compensation filed within time required by Law? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Lifting a tire.
12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Undetermined
14. Nature and extent of any permanent disability: Undetermined
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

Employee: Steven Holubeck Injury No.: 99-183538

17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: Maximum rate
19. Weekly compensation rate: \$578.48/\$303.01
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: 0

22. Second Injury Fund liability: Open

TOTAL: 0

23. Future requirements awarded: None

Said payments to begin 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: David Swimmer

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Steven Holubeck	Injury No.: 99-183538
Dependents:	Not Applicable	Before the
Employer:	Dobbs Tire & Auto Centers, Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Dobbs Tire & Auto Centers, Inc.	Department of Labor and Industrial
Hearing Date:	June 9, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: GCG

INTRODUCTION

Hearing was held in the above referenced case before the undersigned Administrative Law Judge on June 9, 2006 in Franklin County, Missouri. Claimant was present and represented by Attorney David Swimmer. Maria Campbell represented Dobbs Tire & Auto Centers, Inc. (Employer), which is self-insured. There was an agreement by all parties that the issue of Second Injury Fund (SIF) liability would be left open. Assistant Attorney General Jill Selsor was present for said agreement and affirmed the consent of SIF.

The parties made the following stipulations: On or about August 27, 1999, Claimant allegedly sustained an accidental injury; the alleged injury occurred in St. Louis County, Missouri; venue is proper in Franklin County by consent of the parties; Claimant's average weekly wage is at the maximum rate, resulting in rates of compensation of \$578.48 for total disability benefits and \$303.01 for permanent partial disability benefits; Employer has not paid any benefits to date.

The issues in dispute are: Notice; occurrence of a compensable hernia pursuant to §287.195; accident; arising out of and in the course of employment; past medical care; future medical care; past temporary total disability (TTD) benefits; nature and extent of disability; if claim was filed within the statute of limitations.

FINDINGS OF FACT

Only the facts pertinent to the rulings in this award are included.

1. The Claim filed in this case has an injury date of September 1, 1999. However, at hearing, the parties stipulated to August 27, 1999 as the date of the alleged injury. Further, Claimant testified that the injury occurred on August 27 and that he saw Dr. Pettinger on August 28, 1999.
2. Claim for compensation was filed on December 26, 2002.
3. Claimant had a prior work related hernia injury in 1992.
4. Claimant testified this injury happened in substantially the same manner as the 1992 injury.
5. Claimant, by his own testimony, filed for and received Workers' Compensation benefits for the 1992 injury.
6. On August 28, 1999 Claimant told Dr. Pettinger that he re-injured the hernia "throwing" a tire.
7. Just after the injury, Claimant spoke with co-workers regarding Workers' Compensation.
8. Claimant was aware that the injury of August 27, 2006 was a work injury, but chose not to file a claim within the statute of limitations.
9. The parties stipulated that no benefits had been paid for the August 27, 1999 alleged injury.

CONCLUSIONS OF LAW

Section 287.430 states, in pertinent part:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death....The statute of limitations contained in this section is one of extinction and not of repose.

The parties stipulated that no benefits have been paid. Therefore, the longest period of time available for Claimant to have filed his claim would be three years from the date of injury. He did not file his claim until December 26, 2002, three years and 4 months after the alleged injury. As a result, it is not necessary to determine whether or not Claimant proved he is entitled to the longer three-year statute for Employer's failure to file an injury report, as that time period would have also elapsed.

Claimant, in a motion and trial brief, has asserted that the claim was timely filed. In support of this proposition, he cites **Welborn v. Southern Equipment Company**, 395 S.W.2d 119 (Mo.Sup.Ct. En Banc, 1965) and **Sellers v. Trans World Airlines, Inc.**, 752 S.W.2d 413 (Mo.App. 1988). Neither case provides support for that assertion. **Welborn** was decided on a contract theory, and well before the current statute of limitations was enacted. The Court held that a voluntary payment by employer revived the 1-year statute, which existed at that time. In Claimant's case, no such payments were made, and §287.430 specifically states that it is a statute of extinction and not repose.

Sellers is not relevant because the injury was a latent occupational disease, which was not obvious to the claimant in that case, or even the initial treating physicians. In this case, despite Claimant's obviously well-coached answer under direct examination that he did not know he was dealing with work injuries until September 2002 when talking to doctor in Springfield, the evidence is overwhelming that claimant did know his injury was a work injury. He testified that this injury occurred just like the hernia in 1992. He knew the 1992 injury was a work injury because he filed a claim. He also testified that he had discussions with co-workers about Workers' Compensation at the time of the injury. He also testified that a Dobbs store would get an annual bonus if there were no reported work injuries in a year, and that is why he decided not to pursue the case as a Workers' Compensation claim.

Claimant made a conscious decision not to file a Workers' Compensation claim. After his treatment for the hernia went awry, he apparently changed his mind. Unfortunately, §287.430 is clear regarding the extinction of a known claim.

CONCLUSION

Claimant's claim for compensation is barred by the statute of limitations. The claim for compensation is denied.

Date: July 26, 2006

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
Patricia "Pat" Secrest
Director
Division of Workers' Compensation