

FINAL AWARD DENYING COMPENSATION
(Reversing Temporary Award of Administrative Law Judge)

Injury No.: 06-128555

Employee: Harry Horton
Employer: Veolia Environmental Services
Insurer: New Hampshire Insurance Company
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 § 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the temporary award of the administrative law judge and deny compensation on this claim. The award and decision of Administrative Law Judge Joseph Denigan is attached hereto solely for reference.

Preliminaries

The primary issue to be decided is whether employee has met his burden of establishing he sustained a work accident on September 30, 2006. We find that he did not. Employee's testimony regarding the events surrounding the alleged accident is inconsistent with his prior testimony and is inconsistent with the testimony of all other witnesses in this case. Employee's testimony is not credible.

The administrative law judge found the testimony of employer's witnesses not to be credible or persuasive. We disagree with the administrative law judge's conclusions in this regard and with his reasoning in reaching those conclusions. We find nothing in the testimony of employer's witnesses that undercut their credibility. We find employer's witnesses credible.

Accident

Employee testified at trial that the alleged accident occurred while he was helping a forklift driver unload portable toilets from a flat bed truck. Employee testified they unloaded the first toilet, which was an empty toilet. According to employee, as he began to climb on the truck to pull the second toilet forward, the forklift hit the truck causing it to shift side to side. Employee contends that when the truck shifted the second toilet fell from the truck and landed on employee, pinning him to the ground. Employee testified the toilet was full of human waste and weighed approximately 300 pounds.

Employee admitted that during his deposition he testified that the wind blew the toilet off the truck.

Employee admitted that during his deposition he testified the toilet he was unloading was empty.

Employee testified that Mr. Hansel lifted the toilet off of employee's body.

Employee: Harry Horton

- 2 -

Elmer Hansel testified by deposition. Mr. Hansel testified that no portable toilet fell from a truck and pinned employee to the ground and that Mr. Hansel did not lift a portable toilet from employee.

Employee testified that after the toilet fell on him he was covered in human waste. He testified he stormed into the shop where he encountered Troy Tusing, his supervisor, who asked what happened. Employee said he told Mr. Tusing the toilet fell on employee and that employee's shoulder hurt, but that employee thought he would be okay. Employee said Mr. Tusing told him to get cleaned up and go back to work.

Mr. Tusing testified by deposition. Mr. Tusing denies that the conversation just described happened. Mr. Tusing testified he is unaware of a toilet falling on claimant and he is unaware of employee injuring his shoulder at work.

Three other employees testified for employer. Brian Williams, Glen Schafer and Molly Andrews all testified that they had no knowledge of a toilet falling on employee.

Because we find employee is not credible, we give no weight to employee's testimony regarding the occurrence of the accident.

The only other evidence of a toilet-falling incident is in the medical records. The first mention of a toilet falling on employee is in the November 1, 2006, record of Dr. Metcalf. Of course, the description of the accident appearing in Dr. Metcalf's record was merely a recording of the history given to Dr. Metcalf by employee. The history is no more credible than employee. The same is true of the accident description appearing in the December 20, 2006, record of Dr. Ritchie, and the report of Dr. Poetz.

In summary, all evidence of a toilet falling on employee originated with employee. Employee is not credible. We find that employee has failed to establish he sustained an accident when a toilet fell on him while working for employer.

Conclusion

For the foregoing reasons, we conclude that employee did not sustain an accident arising out of and in the course of employment. We deny all compensation. All other issues are moot.

Given at Jefferson City, State of Missouri, this 1st day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Harry Horton

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on 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 affirmed. In particular, I agree with the administrative law judge's findings regarding credibility. I do not find the testimony of employer's witnesses persuasive.

I would affirm the award of the administrative law judge and grant employee medical treatment and temporary total disability benefits. I respectfully dissent from the decision of the majority of the Commission to deny benefits in this case.

John J. Hickey, Member