

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-065695

Employee: Robert Huff
Employer: Terrace Retirement Apartments
Insurer: Accident Fund Insurance Company of America
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated December 23, 2008.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Ronald Harris, issued December 23, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Robert Huff

Injury No. 06-065695

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Terrace Retirement Apartments

Additional Party: Second Injury Fund (left open)

Insurer: Accident Fund Insurance Company of America

Hearing Date: October 15, 2008

Checked by: RH:lw

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
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: May 10, 2006
5. State location where accident occurred or occupational disease contracted: Columbia, Boone 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 happened or occupational disease contracted: Lifting a roll of carpet, lost grip and dropped the carpet.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: Body as a whole (hernia)

- 14. Compensation paid to-date for temporary disability: None
- 15. Value necessary medical aid paid to date by employer/insurer? None
- 16. Value necessary medical aid not furnished by employer/insurer? N/A

Employee: Robert Huff

Injury No. 06-065695

- 17. Employee's average weekly wages: \$850.38
- 18. Weekly compensation rate: \$566.92/\$365.08
- 19. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 20. Amount of compensation payable: Employer/insurer to provide medial treatment

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge for a hardship hearing on October 15, 2008. The Division had jurisdiction to hear this case pursuant to §287.110 R.S.Mo. Attorney Todd Werts represented Robert Huff (“Claimant”). Attorney John Kafoury represented Terrace Retirement Apartments (“Employer”) and Accident Fund Insurance Company of America (“Insurer”). By agreement, the Second Injury Fund did not appear and is left open. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS

1. The Claimant and the Employer were operating under the provisions of the Workers’ Compensation Law on or about May 10, 2006;
2. An employment relationship existed between the Claimant and Employer on or about May 10, 2006;
3. The Employer’s liability was insured by Accident Fund Insurance Company of America;
4. The Claimant’s average weekly wage was \$850.38;
5. The rate of compensation for temporary total disability would be \$566.92 and for permanent partial disability would be \$365.08;
6. A claim for compensation was timely filed; and
7. The Employer/Insurer has paid no medical or TTD benefits to date.

Additionally the parties stipulated that in the event the disputed issues are resolved in favor of the Claimant, the claimant’s condition is medically causally related to the alleged accident and that Employer/Insurer would be liable for medical treatment.

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ISSUES

The parties requested the Division to determine:

1. Whether Claimant sustained an accident arising out of and in the course of his employment on or about May 10, 2006;
 - Whether the Claimant provided proper notice of the alleged accident;
 - Whether the Employer/Insurer is liable for providing medical treatment; and
4. Whether either the Claimant or the Employer/Insurer are entitled to costs and attorney’s fees pursuant to Section 287.560 RSMo.

EXHIBITS

Claimant's Exhibits A through D and Employer/Insurer's Exhibits 1 through 4 were offered and admitted into evidence. Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

Only evidence necessary to support this award will be summarized below.

FINDINGS OF FACT

Claimant testified he began performing maintenance work for the employer in approximately 1999. He testified that his duties varied including such things as painting, driving the bus, changing light bulbs, working in the kitchen, and just "whatever needed to be done".

Claimant testified that on May 10, 2006, he and a co-worker, Charles Hammers, had taken a 42 foot by 12 foot large roll of carpet off a truck, placed it on a cart and rolled the carpet to the door where it was to be unloaded. Claimant testified this roll of carpet was larger and heavier than what they would typically use. Claimant and Mr. Hammers got on each end of the carpet and lifted it off the cart. Claimant was surprised by the weight of the carpet, lost his grip and dropped the carpet.

Claimant immediately felt a "terrible pulling" in his right side at or just above the belt line. He testified that he then went downstairs and told Lois Walker, employer's manager, that he injured his side while lifting the carpet. He testified he was not told to fill out a report. Since the accident occurred shortly before his normal quitting time, Claimant remained at work but went home a little early that day. That evening Claimant woke up with a knot protruding from his side.

Claimant then went to see Ms. Kathy Batton, a nurse practitioner with whom he would normally treat. Ms. Batton suspected a hernia and referred him for a CAT scan. After seeing Ms. Bratton, Claimant testified he went in and saw Ms. Walker and told her he probably had a hernia. He said Ms. Walker felt the knot on his side and said "Oh God!"

Following the CAT scan, Claimant was told that not only did he have a hernia but he also had colon cancer. Treatment then focused on the colon cancer as the doctor said the hernia could not be repaired until he recovered from the colon surgery. Claimant stated that he did continue to work up to the colon surgery on June 7 but did not do any strenuous work during that time. Claimant testified that he spoke frequently with Ms. Walker during the time leading up to the surgery. When Claimant was informed he could return to light duty after the surgery, he called Ms. Walker but was informed that he had quit and no longer had a job.

Claimant testified that he had a prior back injury in 1990 or 1991 and began drawing railroad disability payments in either 1992 or 1993. Claimant testified that he had spoken to an attorney about working while drawing the railroad disability and based upon his conversation with the attorney he called himself an independent contractor when he began working for the employer. He acknowledged he plead guilty to a felony of receiving pay and disability at the same time. Claimant was placed on probation and ordered to make restitution in the amount of \$127,000 one-half of which he has presently repaid.

Charles Hammers testified on behalf of the employer/insurer. Mr. Hammers denied Claimant stated that he had hurt himself while lifting the carpet on May 10, 2006. Hammers did acknowledge they would move carpet from a truck inside maybe every 3 weeks. Ms. Walker or the Claimant would go pick up the carpet and would usually take the Claimant's truck. Hammers did not recall the employer changing to a different type of carpet in 2006 and did not recall the carpet ever being more than 25 feet.

Ms. Lois Walker, employer's manager, also testified on behalf of the employer/insurer. Ms. Walker denied Claimant ever told her that he had hurt himself at work lifting carpet. She did recall Claimant asked her to feel his side and that she responded "Oh God". Ms. Walker stated she did not learn Claimant was alleging a work related accident until she received the Claim for Compensation in July 2006. Initially, Ms. Walker testified the rolls of carpet were 12 feet by 28 feet but later admitted the carpet rolls could have been up to 42 feet.

Ms. Walker testified Claimant was paid as an independent contractor and would submit invoices of his work in order to be paid. Both Claimant and Ms. Walker stated that the invoices were a summary and did not include an extensive list of all duties the claimant might have performed on any given day.

Having carefully considered the testimony of the Claimant, Mr. Hammers and Ms. Walker I find the Claimant's detailed description of the events occurring on and shortly after May 10, 2006 to be credible and worthy of belief.

RULINGS OF LAW

Issue 1: Whether Claimant sustained an accident arising out of and in the course of his employment on May 10, 2006.

Section 287.020.2 defines accident as "...an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."

Claimant's detailed description of the events occurring May 10, 2006 in which he described the unloading, moving, lifting and ultimately dropping the roll of carpet, if believed, clearly meets the statutory definition of an accident arising out of and in course of his employment.

Employer/Insurer argue Claimant is not credible at least to some extent on the basis of Mr. Hammers testimony that he did not recall Claimant alleging that he hurt himself while moving carpet on May 10, 2006. In addition Mr. Hammers did not recall the employer in 2006 going to a different type of carpet or a larger roll than normal as the Claimant testified. However, Mr. Hammers admitted he had no independent recollection of just what they were doing at work on May 10, 2006 and eventually did acknowledge some of the rolls of carpet might be a little longer than normal. Indeed, Ms. Walker also did acknowledge some of the carpet rolls could have been up to 42 feet as the Claimant testified the roll of carpet was on May 10, 2006.

Additionally, employer/insurer's reliance on Claimant's invoices not specifically detailing the unloading of carpet on May 10, 2006, is also not persuasive as both Claimant and Ms. Walker agreed the invoices were merely summaries and that not all the tasks performed by Claimant were detailed on the invoices.

Since I have found Claimant's description of the events on May 10, 2006 to be credible, I conclude Claimant has met his burden of proving he suffered an accident arising out of and in the course of employment on May 10, 2006.

Issue 2: Whether Claimant provided proper notice of the alleged accident.

Section 287.420, RSMo requires written notice be given to the employer no later than 30 days after the accident unless the employer was not prejudiced by the failure to receive written notice. In instances where written notice has not been provided as required, the employee has the burden of showing that the employer was not prejudiced. *Hannick v. Kelly Temporary Services*, 855 S.W.2d 497, 499 (Mo. App. 1993) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

The Claimant testified that he personally informed Ms. Walker, the employer's manager, the day of the accident as well as in the following days when they were also discussing his colon cancer. Claimant's testimony of the conversation the day of the accident is consistent with Ms. Walker's admission that she felt the hernia and stated "Oh God" even though she denied he told her he had gotten hurt at work. Having found the Claimant to be credible, I accept this testimony as true.

Further, although Ms. Walker stated that she did not know of the alleged work related accident until she received the Claim for Compensation in July 2006; her testimony was that she would have done nothing differently had she learned of the alleged accident in May.

I find Claimant has met his burden of proving that he provided proper notice of the accident in that he provided the employer with actual notice and employer was not prejudiced by the failure to provide written notice.

Issue 3: Whether Employer/Insurer is liable for providing medical treatment.

The parties stipulated that in the event the disputed issues were resolved in Claimant's favor, the Claimant's condition was medically causally related to work and that the Employer/Insurer would be liable for medical treatment for the hernia. Since the issues of accident and notice have been resolved in Claimant's favor, the Employer/Insurer is liable for medical treatment in accordance with the parties' stipulation on this matter.

Issue 4: Whether either the Claimant or the Employer/Insurer are entitled to costs and attorney's fees pursuant to Section 287.560 RSMo.

Claimant contends he is entitled to an award of attorney fees and costs in the amount of \$2,444.50 (Claimant's Exhibit D) and Employer/Insurer's attorney requests \$1,000.00 in attorney's fees and costs pursuant to Section 287.560.

Section 287.560 provides in pertinent part as follows: "...if the division or the commission determines that any proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them." The whole cost of the proceedings consists of "all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees." *Monroe v. Wal-Mart Associates, Inc.*, 163 S.W.3d 501 (Mo. App. 2005) quoting *DeLong v. Hampton Envelope Co.*, 149 S.W.3d at 555 (Mo. App. 2004).

While the division or the commission has the discretion to order costs pursuant to 287.560 it should only be ordered where the issue is clear and the offense is egregious. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003) (overruled on other grounds by *Hampton* 121 S.W.3d 220).

After careful consideration of the testimony and evidence presented in the instant case I conclude that neither the Claimant nor the Employer/Insurer's conduct rises to the "egregious" standard enunciated by the Court in *Landman*. Consequently, both the Claimant's and the Employer/Insurer's claim for attorney fees and costs are denied.

The issue of an appropriate attorney's fee for Claimant's attorney will be revisited at the time a final award is issued.

CONCLUSION

Employee has met his burden of proving that he suffered an accident arising out of and in the course of his employment on May 10, 2006 and that he provided proper notice of that accident to the employer. Asper the stipulation of the parties, the parties agree claimant's condition is medically causally related to the accident and that the Employer/Insurer is liable for medical treatment. Both the Claimant's and the Employer/Insurer's claim for costs and attorney's fees pursuant to Section 287.560 RSMo are denied.

This award is temporary or partial in nature, is subject to further order, and the proceedings are hereby continued and left open until a final award can be made.

Date: _____

Made by: _____

Ronald Harris
Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation

Both parties have stipulated to the Employee's status as a covered employee within the meaning of the Workers' Compensation Act. Hammers would later state some of the carpet might be 3 feet longer.