

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

Injury No.: 11-054387

Employee: Kevin Johnson  
Employer: City of Carthage  
Insurer: Missouri Rural Services Worker

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, we find 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 § 286.090 RSMo, we affirm the award and decision of the administrative law judge dated March 21, 2013, as corrected herein. The award and decision of Administrative Law Judge Robert H. House, issued March 21, 2013, is attached and incorporated by this reference.

Line 14 of page 1 of the administrative law judge's award reads:

Nature and extent of any permanent disability: \$425.19

We correct line 14 to read:

Nature and extent of any permanent disability: Permanent partial disability, 1.25 weeks.

In all other respects we affirm the administrative law judge's award. We further approve and affirm 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 28<sup>th</sup> day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Kevin Johnson

Injury No. 11-054387

Dependents: N/A

Employer: City of Carthage

Additional Party: N/A

Insurer: Self-insured

Hearing Date: February 25, 2013

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

Checked by:

### 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: July 16, 2011
5. State location where accident occurred or occupational disease was contracted: JASPER COUNTY, MO
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:  
LIFEGUARD
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: FRONT TOOTH
14. Nature and extent of any permanent disability: \$425.19
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

- 17. Value necessary medical aid not furnished by employer/insurer? \$770.00
- 18. Employee's average weekly wages:
- 19. Weekly compensation rate: \$425.19
- 20. Method wages computation: AGREEMENT

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: \$770.00

-0- weeks of temporary total disability (or temporary partial disability)

1.25 weeks of permanent partial disability from Employer for \$531.49

\$770.00 for disfigurement from Employer

- 22. Second Injury Fund liability: NO

TOTAL: \$2071.49

- 23. Future requirements awarded: YES – FUTURE MEDICAL CARE LEFT OPEN TO CURE AND RELIEVE EMPLOYEE FROM THE EFFECTS OF HIS INJURY.

Said payments to begin IMMEDIATELY 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 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

BRUCE COPELAND

Employee: Kevin Johnson

Injury No. 11-054387

## **FINDINGS OF FACT and RULINGS OF LAW:**

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## **AWARD**

The parties presented evidence at a final hearing on February 25, 2013. Claimant appeared in person and with his attorney, Bruce Copeland. Employer/Self-Insurer appeared through its attorney, Jim Kelley. The parties presented five issues for determination:

1. Whether claimant sustained an injury by accident arising out of and in the course and scope of employment, with employer/self-insurer raising the affirmative defense of "horseplay."
2. The nature and extent of any disability with the parties agreeing that should I find the case compensable that the claimant would be entitled to 1.25 weeks of permanent partial disability for the loss of one tooth.
3. Whether claimant was entitled to past medical benefits in the amount of \$770.00, which the parties agree was as a result of the alleged accidental injury and would rise or fall with the determination of accident.
4. Whether claimant was entitled to future medical care to cure and relieve him of the effects of the injury.
5. Whether claimant is entitled to disfigurement for the loss of a tooth.

No past medical benefits nor temporary total disability benefits were provided by employer/self-insurer to claimant. The parties agree that claimant is entitled to the maximum

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rate of compensation for the date of injury for permanent partial disability in the amount of \$425.19 per week.

Claimant was the only witness who testified at the hearing. Claimant was born July 28, 1996. He was an employee of the City of Carthage, performing the duties of a lifeguard. On July 16, 2011, he was injured while engaged in an incident in which another employee was shooting him with a "squirt" gun filled with soda. Claimant was keeping the other employee at bay by holding a chair with its legs in the air facing the other employee. The other employee grabbed the chair and pushed it toward claimant, chipping one of claimant's teeth. Employer/self-insurer alleges that this was "horseplay" which would deny claimant any benefits because the incident does not rise to the level of an accident under the law. Claimant's earlier had used the "squirt" gun filled with water to shoot the other employee. Claimant testified that this type of activity was a regular occurrence for the seven weeks of his employment for the City of Carthage. According to claimant the manager of the pool who supervised all of the lifeguards would tell the participants who were using "squirt" guns to "knock it off." However, the activity continued on a regular basis, including at times when assistant managers were present without any warnings or directions to stop the activity. At no time was anyone disciplined for the activity of using "squirt" guns. Thus, use of squirt guns was conducted on a regular basis without any ramifications to any of the employees. These activities were conducted at times when supervisors or managers were present. It is clear that the activities were conducted in the presence of assistant managers

Although changes to the Missouri workers' compensation law in 2005 overturned all prior cases dealing with what constituted an accident under the law, there is nothing within the revised statute specifically addressing horseplay. Consequently, I find it appropriate to consider the earlier case decisions regarding horseplay as a guide to my decision in this case. As set for the in *Wisely v. Sysco Foods*, 972 SW2d 313 (Mo.App E.D. 1998), which discussed numerous cases involving the activities of horseplay, the court held that if an injury was sustained during horseplay which had become an incident or risk of employment, then that accidental injury was compensable even if the party was an aggressor or voluntary participant in the activity. This was true even when there had been supervisor's warning to stop the horseplay. I find and conclude that the activities which resulted in the ultimate accidental injury to claimant in this case were pervasive at the City of Carthage pool where claimant worked as a lifeguard and were an incident or risk of his employment. As a result, I find and conclude that claimant was injured through activities which arose out of and in the course of employment and were the prevailing factor in causing both his condition (the chipped tooth) and his disability.

As a result of finding that claimant sustained an accidental injury at work, I find that claimant is entitled to the past medical care which resulted from his accidental injury. The parties agree that claimant's dental care in the amount of \$770.00, which employer/self-insurer has yet to pay, was necessitated by his accidental injury at work. Consequently, I order employer/self-insurer to pay to claimant \$770.00 to cover the cost of his past medical care.

It is also clear that claimant has lost the equivalent of one tooth as agreed upon by the parties. As a result, I find and conclude that claimant is entitled to permanent partial disability to

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the extent of 1.25 weeks of disability for the loss of a tooth. Thus, I order employer/insurer to pay to claimant \$531.49 for such disability.

Claimant seeks future medical care as a result of his accidental injury at work. Future medical care is a distinct and separate benefit under workers' compensation law as set out in §287.140.1 and §287.140.8, RSMo. It is clear that dental care is a part of future medical care under the workers' compensation law as held in *Wildman v. Plaza Motor Company*, 941 SW2d 719 (Mo.App. E.D. 1997). The Court in *Wildman* read together §287.140.1 and §287.140.8 to require employers and insurers to provide future medical care and artificial devices as necessary to cure and relieve claimants from work-related injuries. The Court specifically found that dental care and the providing of artificial devices for dental care was included within those sections without the necessity of an exhaustive list of every possible artificial device needing to be listed. In this case, claimant has already been provided with a "cap" on his tooth. However, because of claimant's age, the dentists providing the prior care have opined that claimant's tooth has not fully erupted to the extent that a crown could be used at this time to treat claimant's injury. It is clear from claimant's testimony and the medical records that when claimant's tooth is fully erupted, a crown may be fitted. Consequently, I find and conclude that claimant is entitled to such future medical care as is necessary to cure and relieve him from the effects of his injury including, but not limited to, the crown which claimant's treating dentists believe is necessary to treat his chipped tooth.

Claimant has also sought disfigurement for the loss of his tooth. Disfigurement is another distinct and separate benefit under the law. §287.190.4 of the Missouri workers' compensation statute provides for up to 40 weeks of disfigurement when an injured employee is seriously and permanently disfigured about the head, neck, hands, or arms. Additionally, dental injuries are specifically shown as falling within the provisions of that section under the Missouri Code of State Regulations, specifically 8 CSR 50-5.010, which provides that disfigurement shall be allowed for the loss of a front tooth, the specific injury in this case, in an amount sufficient to cover the reasonable cost of artificial teeth. Employer/self-insured argue that claimant is not entitled to both disfigurement and future medical benefits. There is nothing within the statute nor any case decision which supports that assertion. It is clear that Missouri workers' compensation has many distinct and separate benefits. In this case the benefits that result from claimant's injury include permanent partial disability, medical benefits for the past dental care, future medical care for future dental needs, and disfigurement. Those benefits are required under separate sections of the statute. There is nothing within the statute, nor is there any case decision, that would exempt employer/self-insurer from providing any one of those benefits to the exclusion of any other benefit which employer/insurers are required to provide under the law. It appears that the employer/self-insured's argument is simply that the amount that the regulation requires for disfigurement would equate to the amount which would be required for future or past medical care and should exclude one of the other benefits to be provided to an injured worker. That assertion is not supported under Missouri law. Indeed, even the case cited by employer/self-insured, a Missouri Labor and Industrial Relations decision, does not support its position. That case, *Lopez-Cepero v. Famous Barr*, injury number 93-031513 contained dicta regarding the issue of future medical care in conjunction with or to the exclusion of disfigurement. In that case, the Commission affirmed a decision of the administrative law judge allowing disfigurement which did not follow the specific amounts set out in the regulation for the cost of medical care or

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artificial teeth but instead allowed 35 weeks of disfigurement. The employer representative, Chris Wrigley, opined that future medical care and disfigurement were mutually exclusive. However, future medical care was not presented as an issue in that case, so that issue was not raised. The assertion of Commissioner Wrigley is merely dicta without the force and effect of law and does not relate to the actual issues in the case. No other statute or case was cited by either party regarding this issue. As a result, I find and conclude that claimant is entitled to disfigurement in the amount of \$770.00, the cost of the treatment and artificial teeth (in this instance a cap) which has been provided to him by his parents who paid for such dental care.

Claimant asserts that he will be entitled to additional disfigurement in the event replacement dental devices are required as future medical benefits. Claimant has provided no basis in law for that assertion. I order disfigurement only to the extent of the past medical provided as set out above.

I allow claimant's attorney, Bruce Copeland, 25 percent of all amounts awarded herein which shall constitute a lien upon this award.

Made by: \_\_\_\_\_

Robert H. House  
*Administrative Law Judge*  
*Division of Workers' Compensation*

**Signed March 15 2013**