

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

Injury No.: 02-030519

Employee: Dana Jones
Employer: AAA Automobile Club of Missouri
Insurer: Self-Insured/
Missouri Merchants & Manufacturers Association
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: Alleged February 13, 2002
Place and County of Accident: Alleged St. Louis County

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 12, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued December 12, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join Commissioner Bartlett in affirming the award of the administrative law judge and denying benefits in this matter.

William F. Ringer, Chairman

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon 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 reversed.

Two medical experts testified: Dr. Joseph Hanaway and Dr. Peter Mirkin. The physicians disagree about the nature of the injury employee suffered and the nature and extent of his resultant disability. Dr. Hanaway is of the opinion that the work accident caused the L4-5 disc herniation. The disc herniation has not been surgically repaired. Dr. Hanaway believes that the herniation will undoubtedly cause employee problems over time. Dr. Hanaway cautioned employee that he must always work carefully, particularly when engaging in heavy work such as bending, carrying, pushing, pulling, or lifting. Dr. Hanaway believes the unoperated disc herniation results in a 20% permanent partial disability of the body as a whole.

Dr. Mirkin admits that the MRI reveals a disc protrusion. Dr. Mirkin testified it is impossible for him to tell if the protrusion pre-existed the work accident, occurred at the time of the work accident, or occurred after the work accident. Dr. Mirkin's testimony reveals he believes it is possible that the disc herniation occurred during the work accident. Dr. Mirkin admitted that the MRI reveals an annular tear and that an annular tear is a weakening of the structure and integrity of the disc. Notwithstanding his admissions, Dr. Mirkin attributes employee's symptoms to a lumbar strain as a result of the work accident, which strain resulted in no permanent disability.

Dr. Mirkin is simply not credible. Although Dr. Mirkin could not rule out the possibility that the work accident caused the disc herniation, he nonetheless concludes that all of employee's back pain and problems were due to a lumbar strain -- a *muscular* problem.

Regarding causation of the disc herniation, one medical expert believes that the work accident caused the herniation and one medical expert cannot rule out the possibility that the work accident caused the herniation. No expert testified that the accident did not cause the herniation. An employee does not have to establish the elements of his claim with absolute certainty.

In a workers' compensation proceeding, all doubts should be resolved in favor of the employee and in favor of coverage, but a claim will not be validated where some essential element is lacking. The claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and the injury. The claimant does not, however, have to establish the elements of his case on the basis of absolute certainty. It is sufficient if he shows them by reasonable probability. "Probability means founded on reason and experience which inclines the mind to believe but leaves room for doubt."

Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo. App. 1996) (citations omitted).

The revelation of a disc herniation on the MRI conducted while employee was suffering acute pain symptoms shortly after the work accident certainly inclines my mind to believe that the work accident caused the disc herniation. Employee has proven that his work accident caused his L4-5 disc herniation.

The next question is whether employee suffered any permanent disability as a result of the herniation.

"Disability" is defined as "inability to do something"; "deprivation or lack of esp. of physical, intellectual, or emotional capacity or fitness"; "the inability to pursue an occupation or perform services for wages because of physical or mental impairment"; "a physical or mental illness, injury, or condition that incapacitates in any way." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).

Loven v. Greene County, 63 S.W.3d 278, 284 (Mo. App. 2001).

It is not imperative that an employee show he missed work in order to prove a disability. "[W]hile missing work suggests the requisite earning loss, other factors are considered in determining whether and at what point an employee has lost earning ability." *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 760 (Mo. App. 1997).

The testimony of Dr. Hanaway establishes that employee must forever limit the way he performs many activities in an attempt to forestall inevitable back problems. Employee is *unable to do things* the way he has in the past. Employee will forever be *deprived of the physical fitness* he possessed before the disc herniation. The disc herniation has forever *diminished employee's earnings capacity* because he is less physically able than he was before the disc herniation. See *Loven* "disability" definition, *supra*. The testimony of Dr. Hanaway is the most credible, persuasive, and worthy of belief. Employee has sustained a permanent partial disability of 20% of the body as a whole.

I respectfully dissent from the decision of the majority of the Commission reversing the award of permanent partial disability benefits against employer/insurer.

John J. Hickey, Member

AWARD

Employee:	Dana Jones	Injury No.:	02-030519
Dependents:	N/A	Before the	Division of Workers'
Employer:	AAA Automotive Club of Missouri	Compensation	
Additional Party:	Second Injury Fund (Open)	Department of Labor and Industrial	Relations of Missouri
Insurer:	Self-Insured/ Missouri Merchants & Manufacturers Association	Jefferson City, Missouri	
Hearing Date:	September 6, 2005	Checked by:	JED:tr

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 13, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Moving a wheeled wastebasket.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: No lost time (NLT)
16. Value necessary medical aid paid to date by employer/insurer? \$2,721.58

Employee: Dana Jones Injury No.: 02-030519

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$313.47
19. Weekly compensation rate: \$208.98/\$208.98
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No
- TOTAL: -0-
23. Future requirements awarded: No

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Dana Jones	Injury No.:	02-030519
Dependents:	N/A	Before the	
Employer:	AAA Automotive Club of Missouri	Division of Workers'	
Additional Party:	Second Injury Fund (Open)	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Self-Insured/ Missouri Merchants & Manufacturers Association	Checked by:	JED

This case involves a disputed injury resulting to Claimant with the reported accident date of February 13, 2002. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund (SIF) is a party to this claim but was left open for a determination of liability at a future date. Both parties are represented by counsel. The single issue for trial is the nature and extent of permanent partial disability.

FINDINGS OF FACT

Dispositive Evidence

1. Claimant reported a back injury while moving a wheeled wastebasket on the reported accident date. He sought treatment later that same day.
2. Claimant was diagnosed with a back strain and given some medications. He had physical therapy but was not placed of work. Employer accommodated his medical restrictions.
3. An MRI remarkable for an L4-5 disc protrusion occasioned referral to an orthopedist, Dr. Mirkin, who diagnosed, nevertheless, a back strain relative to the clinical findings at hand. In early May 2002, Claimant requested and received released and return to full duty.
4. Claimant neither requested nor received further treatment for the reported injury after May 2002.
5. Claimant's expert, Dr. Hanaway, examined him in August 2002 and June 2004 with normal findings each time. Nevertheless, Dr. Hanaway assigned a twenty percent PPD of the body referable to the low back citing the radiological finding of disc protrusion.
6. Dr. Mirkin assigned no PPD and left unchanged his diagnosis of lumbar strain. He noted the simple recovery and long passage of time and return to work without any permanent symptoms.
7. Claimant's testimony was not evidence of PPD. His testimony regarding permanent pain symptoms contrast with both experts and his return to unrestricted work.

RULINGS OF LAW

Permanent Partial Disability

Dr. Hanaway was unable to reconcile the no lost time aspect of this case with a credible theory that the reported injury was sufficient to cause or aggravate the radiological finding. Given Claimant's activity level and the benefit of two years passage of time, his PPD opinion is simply untenable and undercuts his credibility, generally. In addition, Claimant's testimony regarding ongoing pain is difficult to reconcile with his activity level which is notable for no lost time post accident, cessation of treatment a few month after the accident and a return to full duty without complaint. Dr. Mirkin noted Claimant's clear progress and quick recovery. Nothing in the opinion

evidence suggests a treatable disc pathology. Like Dr. Hanaway, Dr. Mirkin had the opportunity for periodic review and found no clinical findings that suggested any PPD.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof. Claim denied. The SIF claim is moot.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation