

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

Injury No.: 03-142654

Employee: Jeffrey Jones

Employer: Bimbo Bakeries USA

Insurer: Ace American Insurance Company

Date of Accident: December 22, 2003

Place and County of Accident: Jefferson City, Cole 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, 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 21, 2004.

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 Hannelore D. Fischer, issued December 21, 2004, is attached and incorporated by this reference.

Employee's attorney made a request at oral argument for costs and fees to be awarded based on an allegation that employer/insurer's appeal was frivolous. The request is denied. The award of attorney's fees of 25% of the compensation awarded by the administrative law judge is affirmed.

Given at Jefferson City, State of Missouri, this 13th day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

Attest: John J. Hickey, Member

Secretary

SEPARATE OPINION

I concur with and join in the majority's opinion affirming the award and decision of the administrative law judge. I dissent from the portion of the majority's decision to deny costs requested by employee for employer/insurer's frivolous appeal to the Labor and Industrial Relations Commission (Commission).

Employer/insurer argued that employee's claim must be denied because he did not present expert medical testimony causally connecting his torn meniscus to his work accident. It has been the longstanding law in the State of Missouri that expert medical testimony is not always necessary to establish medical causation where causation is within the understanding of a layperson. *Knipp v. Nordyne, Inc.*, 121 S.W.3d 220 (Mo. 2003). That is the situation we have before us. Prior to December 22, 2003, employee did not have a torn meniscus. He slipped and twisted his knee on December 22, 2003. Shortly thereafter, he was diagnosed with a torn meniscus. Finding causation under these circumstances does not require a great leap of faith nor does it require a physician's testimony to find that when employee twisted his knee, he tore the meniscus.

Employer/insurer's argument that employee is not entitled to temporary total disability benefits was likewise frivolous. The fact that employee may be able to sell pencils on the street is not indicative of his ability to work. Employer relieved employee of his duties at work due to "liability issues." Employee is unable to walk without a knee brace. He is trained to perform physical labor. Employee wishes to have the surgery to repair his knee, so that he can return to work. He is under active medical care. The evidence clearly establishes that employee is temporarily and totally disabled and case law establishes his entitlement to receive temporary total disability benefits.

Because employer/insurer's defense of this claim before the Commission was frivolous, unreasonable and without any legitimate chance of prevailing on appeal, I would award employee his costs of defending the appeal before the Commission.

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee: Jeffrey Jones

Injury No. 03-142654

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

Dependents:

Employer: Bimbo Bakeries USA

Additional Party:

N/a

Insurer: Ace American Insurance Company

Hearing Date: October 21, 2004 Checked by: HDF/cs

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: December 22, 2003.
5. State location where accident occurred or occupational disease contracted: Jefferson City, 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 happened or occupational disease contracted:
(see award).
12. Did accident or occupational disease cause death? No. Date of death?
N/a
13. Parts of body injured by accident or occupational disease: Left knee.
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?

Employee: Jeffrey Jones

Injury No. 03-142654

17. Employee's average weekly wages: \$700.00.

18. Weekly compensation rate: \$466.69 ttd/\$347.05 ppd.

19. Method wages computation: By agreement.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:

33 weeks of temporary total disability (or temporary partial disability) $33 \times \$466.69 = \$15,400.77$ --
(amount owed from May 1, 2004, to present). Ongoing benefits awarded.

TOTAL:

Each of said payments to begin 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Robert Angstead

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jeffrey Jones

Injury No: 03-142654

Before the
DIVISION OF WORKERS'
COMPENSATION

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Bimbo Bakeries USA

Additional Party N/a

Insurer: Ace American Insurance Company

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on October 21, 2004. Memoranda were submitted by December 13, 2004.

The parties stipulated that on or about the 22nd day of December, 2003, the claimant was in the employment of Bimbo Bakeries USA; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Ace American Insurance Company; a claim for compensation was filed within the time prescribed by law; the claimant's average weekly wage was \$700.00; the rate of compensation on the date of accident was \$466.69 per week for temporary total disability benefits, \$347.05 per week for permanent partial disability benefits; no temporary disability benefits have been paid to the claimant to date; no medical aid has been provided.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) whether appropriate notice was given, 3) the liability of the employer/insurer for past and further medical treatment, and 4) the liability of the employer/insurer for past and further temporary total disability benefits (from May 1, 2004, forward).

FINDINGS OF FACT

The claimant, Jeffrey Jones, was employed as a route salesman by Bimbo Bakeries USA (Bimbo) when, on December 22, 2003, he slipped on a piece of cardboard while loading unused or outdated bakery products back onto his truck. The cardboard was on a loading ramp which traversed the 35-inch height difference between the ground and the truck. Mr. Jones contacted Dave Starns, his direct supervisor, by cell phone. Initially, Mr. Jones told Mr. Starns that his injury was minimal. Mr. Jones then proceeded to his last stop. Later that afternoon, Mr. Jones called Mr. Starns again to let him know that the condition of his knee had deteriorated and Mr. Starns advised Mr. Jones to take care of his knee.

The following day, Mr. Jones went to see Judy Wienke, the nurse practitioner in Dr. Strong's office. Ms. Wienke prescribed a brace which Mr. Jones picked up at the JCMG pharmacy associated with Dr. Strong's office.

On March 12, 2004, Mr. Jones saw Dr. Strong complaining of left knee pain. Dr. Strong had an MRI of Mr. Jones' left knee performed and referred Mr. Jones to Dr. Krautmann, an orthopedic surgeon. On March 25, 2004, Dr. Krautmann recommended an arthroscopy of Mr. Jones' left knee.

On March 30, 2004, Mr. Jones was seen by Dr. Janet Elliott, who diagnosed a torn medial meniscus in Mr. Jones' left knee. Mr. Jones told Dr. Elliott on March 30, 2004, that he was injured on December 29, 2003, when he "was pushing baskets up to the ramp when [his] left foot slipped on a piece of cardboard and . . . twisted [his] left knee."

In early May of 2004, Mr. Jones was relieved of his duties as a route salesman for Bimbo after a substitute driver was sent to handle the route in anticipation of Mr. Jones' need to be off after surgery. Mr. Starns testified that Mr. Jones was taken off of his route because of "liability issues."

The medical records reflect the following information: 1) in July of 2003, Mr. Jones saw Dr. Strong, complained of left knee pain and received a prescription for Celebrex, 2) on December 23, 2003, Mr. Jones saw Nurse Practitioner Wienke complaining of left knee pain after twisting his left knee on the ice one week earlier followed by missing a step that night and jamming his left knee, 3) Nurse Practitioner Wienke diagnosed degenerative joint disease and a ligamentous strain in the left knee and prescribed a left knee brace, 4) on March 12, 2004, Mr. Jones saw Dr. Strong complaining of left knee pain after a "reinjury" one month earlier, 5) a March 17, 2004 MRI of the left knee revealed "a complex tear of the posterior horn and posterior body of the medial meniscus."

Dr. Krautmann's records reflect a March 25, 2004 notation that Mr. Jones "injured his left knee in January when he slipped on the snow pushing a cart."

Mr. Starns' asserted that Mr. Jones told him of a slip on a piece of cardboard on January 26, 2004, with an assurance that he had no permanent injury, followed by a complaint of ongoing left knee pain in March when Mr. Starns saw Mr. Jones. In March of 2004, he encouraged Mr. Jones to see his own doctor, but was then advised by his human resources department that Mr. Jones needed to see a physician authorized by Bimbo. It is this conflict in the histories given to various medical providers and Mr. Starns' testimony that he initially learned of an injury in January of 2004 that has caused the employer/insurer to question whether Mr. Jones sustained a work-related accident on December 22, 2003.

APPLICABLE LAW

Section 287.020.2 provides as follows:

The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work

related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

Section 287.420 provides as follows:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby.

AWARD

The claimant, Jeffrey Jones, has sustained his burden of proof that he sustained an accident on December 22, 2003. Mr. Jones' testimony regarding the events of that day is credible and, while not supported by the medical records, is not completely inconsistent with them either. Most importantly, Mr. Jones' testimony is not completely inconsistent with that of his supervisor, Mr. Starns, in that only the actual date on which the accident involving the left knee injury occurred is in dispute. Both Mr. Jones and Mr. Starns testified that Mr. Jones injured his left knee after slipping on cardboard. Mr. Starns recollection of the date on which he first heard of the incident is not necessarily determinative given that the original medical treatment was minimal and there was no initial indication that a serious injury was involved. Moreover, Mr. Starns' lack of familiarity with workers' compensation matters is evident given that Mr. Starns did not realize that his employer could and wished to direct medical treatment. Therefore, it is easily possible that Mr. Starns failed to accurately record his initial information regarding Mr. Jones' injury.

Likewise, Mr. Jones has sustained his burden of proof that he notified his employer by telephoning his direct supervisor, Dave Starns, on the date of his accident and left knee injury. As noted in the previous paragraph, Mr. Starns' testimony regarding the accident and his notification thereof is identical to Mr. Jones', with the exception of the date on which the accident occurred.

With regard to his temporary total disability benefits dating back to May 1, 2004, Mr. Jones has similarly met his burden of proof that he is entitled to a weekly payment of benefits. Mr. Jones testified that he was taken off of his route after Mr. Starns sent another driver to handle the route in anticipation of Mr. Jones' surgery. Mr. Starns testified that Mr. Jones was relieved of his duties due to "liability issues." Mr. Starns testified that Mr. Jones is still an employee of Bimbo. Thus, the only reasonable conclusion is that Mr. Jones was removed from his position by his employer because he is unable to work as the result of his workers' compensation claim.

Finally, Mr. Jones has sustained his burden of proof that he is entitled to past and further medical treatment for his left knee injury. Mr. Jones' testimony, as noted earlier, is credible regarding the circumstances of his accident and his notice to his employer via his direct supervisor. Mr. Jones was given a brace to wear a day after the December 22, 2003 accident and

following medical treatment includes the torn medial meniscus diagnosis. Dr. Krautmann's recommendation for arthroscopic surgery of the left knee is certainly plausible and is not contraindicated by Dr. Elliott, the physician to whom Mr. Jones was referred by the employer/insurer.

Date: December 21, 2004

Made by: /s/Hannelore D. Fischer

HANNELORE D. FISCHER

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

/s/Gary J. Estenson

Gary J. Estenson

Acting Director

Division of Workers' Compensation