

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

Injury No.: 04-129105

Employee: Kendall Jones

Employer: Chester Bross Construction Company

Insurer: Builders' Association Self-Insurance

Date of Accident: October 4, 2004

Place and County of Accident: West Plains, Howell County, Missouri

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, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated November 14, 2006.

Preliminaries

The dispositive issue is whether or not employee sustained an injury due to an accident arising out of and in the course of employment. Section 287.120.1 RSMo. The administrative law judge determined and concluded that employee met his burden of proof that he did sustain an injury due to an accident arising out of and in the course of his employment.

A timely Application for Review with the Commission was submitted alleging that the award issued by the administrative law judge was erroneous because he erred in: 1) finding that employee suffered an accident arising out of and in the course of his employment; 2) awarding medical treatment; and 3) not ordering reimbursements of medical benefits paid by the employer.

For the reasons set forth in this award and decision, the Commission reverses the administrative law judge's award.

We would like to make note of clerical errors in the administrative law judge's award. On the first page under *Findings of Fact and Rulings of Law*, the date of accident (3) was listed as October 15, 2001; however the correct date of onset is October 4, 2004. Additionally, the description of how the accident happened (11) was listed as overuse of hands and arms when employee alleged injury after bending over to pick up a metal crate.

Principles of Law

The Commission reviews the record, and, where appropriate, it will also determine the credibility of witnesses and the weight of their testimony, resolve any conflicts in the evidence, and reach its own conclusions on factual issues independent of an administrative law judge. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228 (Mo.App. S.D. 2003).

The ultimate determination of credibility of witnesses rests with the Commission. The Commission should take into consideration the credibility determinations made by an administrative law judge. However, the Commission is not bound to yield to an administrative law judge's findings, including those relating to credibility, and the Commission is authorized to reach its own conclusions. The law only requires the Commission to take into consideration the credibility determinations of an administrative law judge and not give those determinations deference. *Kent v. Goodyear Tire and Rubber Co.*, 147 S.W.3d 865 (Mo.App. W.D. 2004).

A decision made by an administrative law judge in a workers' compensation proceeding does not in any way bind

the Commission and in fact, the Commission is free to disregard an administrative law judge's findings of fact. *Bell v. General Motors Assembly Div.*, 742 S.W.2d 225 (Mo.App. E.D. 1987).

Summary of Facts

The findings of fact and stipulations of the parties were recounted in the award of the administrative law judge; therefore, the pertinent facts will merely be summarized below.

Employee testified that he suffered an injury on October 4, 2004 while performing work for his employer. Employee testified that on that day, he bent over to pick up a metal grate weighing about 500 lbs. with the help of a co-worker and felt a popping sensation in his neck and back. Immediately after his injury, employee testified that he began experiencing pain in his back and neck as well as numbness in his left arm. Employee did not report the accident to his supervisor the day of the accident and he finished his work shift. Employee was unable to recall when he reported his injury to the employer.

Employee saw Dr. Spurling prior to his alleged injury on September 24, 2004 and the medical records note pain in his left shoulder and back. Employee saw Dr. Spurling again on October 22, 2004 after his alleged injury; the medical records from that visit do not reference any work injury, but note pain in his left shoulder radiating down both arms as well as a history of bulging discs and arthritis in his neck. The medical records from that visit also note that Dr. Spurling suspected most of employee's shoulder pain was due to referred pain from his neck with a known history of cervical disc disease. Employee returned to see Dr. Spurling on October 25, 2004 and reported neck pain, decreased range of motion in his neck, tingling in both hands and pain in his low back. The record indicates that employee had a problem with pain in his low back and neck for years. The medical records from that visit specified that the symptoms he reported during that visit started that day and there was no reference to a prior work-related injury. Dr. Spurling recommended performing an MRI of employee's neck.

A report of injury was filed with the employer on October 26, 2004. Employee failed to tell his employer about his previous appointments with Dr. Spurling or the prior treatment received for his left shoulder, neck and low back. Employee went to urgent care under authorization of the employer on October 26, 2004. At that time he was given a recommendation to undergo a cervical MRI. An MRI of the cervical and thoracic spine was conducted on October 29, 2004. Employee was referred to Dr. Green and was first seen in his office on December 1, 2004. Employee complained of low back and neck pain. Employee had an MRI of the lumbar spine on December 30, 2004. Dr. Green reviewed the MRI which showed disc displacement at C5-6 and C6-7 as well as mild disc displacement and degenerative changes at L4-5. Dr. Green noted that his cervical MRI confirmed cervical disc disease and recommended a CT/Myelogram. Employee was sent to Dr. Chabot for evaluation on February 25, 2005 at the direction of the employer. Dr. Chabot recommended further treatment with pain management, physical therapy and possible epidural steroid injections. Dr. Chabot released employee to work with limited work duties, including no lifting over 15-20 lbs.

Employee received temporary total disability benefits through approximately April 11, 2005, at which time benefits were ceased and terminated by the employer.

Findings of Fact and Conclusions of Law

Upon careful review of the entire record, including the testimony, as well as the medical records offered and admitted into evidence, the Commission determines and concludes that the more believable evidence supports a finding that employee did not sustain an injury due to an accident arising out of and in the course of his employment as required by section 287.120 RSMo.

Due to the numerous irreconcilable inconsistencies in employee's testimony as well as lack of corroboration of employee's version of the accident/injury, the Commission will not defer to the credibility findings of the administrative law judge. The Commission makes its own findings of credibility and in so doing, reverses the award issued by the administrative law judge. Employee failed to meet his burden of proof that there was an injury due to an accident arising out of and in the course of his employment.

The administrative law judge concluded that despite the fact that employee did not always demonstrate to be an

accurate historian; he was credible regarding the facts surrounding his October 4, 2004 injury. This Commission disagrees with that conclusion.

Employee testified that he was injured when lifting a metal crate with a co-worker. There is little if any evidence corroborating employee's version of the alleged accident and injury. Employee could have had his co-worker, who was allegedly present at the time of injury, testify at trial; however, failed to do so.

A report of injury was completed October 26, 2004. Employee worked as usual from October 4, 2004 until October 26, 2004 without reporting any injury to employer. Employee's delay in reporting his injury is inconsistent with employee's testimony that he experienced an immediate onset of severe back pain at the time of the injury. It is also highly suspect that employee claims not to remember when he reported his injury to his employer. Employee sought treatment from his treating physician on two separate occasions after his alleged accident. Employee complained of pain in both his neck and back during each of the office visits, yet there is no mention of the alleged work incident in the doctor's notes. Employee initially claimed that he did not remember whether he told the doctor of his work injury and then later testified on cross-examination that he did in fact tell the doctor about his work injury. Contrary to employee's testimony, the medical record does not make reference to any work incident on October 4, 2004, nor does it reflect an onset of symptoms on October 4, 2004. Rather, the record reflects that employee's symptoms began on the day of the office visit.

The Commission further finds that after reporting the alleged accident on October 4, 2004, employee attempted to conceal or not reveal his prior back/neck problems, and when attempting to reconcile such a history, the credibility of employee was further undermined. Employee admittedly experienced back and neck problems and sought treatment for said conditions prior to his alleged work injury; however, he did not disclose this information to his employer. Additionally, we find it highly unlikely that employee would fail to report his injury to his treating physician when he had two separate opportunities to do so; especially since he was seeking treatment for pain in his low back and neck. We find it suspicious that he only reported the injury to his employer after he was told that he needed costly testing, specifically an MRI of his neck.

The record clearly demonstrates that employee was unable to remember critical details regarding the events surrounding his injury, including when he reported his injury to his employer and when he sought treatment for his injury. Employee's testimony was unclear and contradictory. In addition, he was unresponsive to a considerable number of questions posed to him at trial. Employee stated numerous times that he was unable to remember when asked about the details surrounding his injury. Employee claimed to have a poor memory; however he not only failed to remember details, but changed his testimony on many occasions.

Employee's testimony and assertions as to the facts and circumstances surrounding his alleged work injury and treatment were neither credible nor supported by the evidence. The contradictions and inconsistencies in his testimony were substantial and irreconcilable. Employee's inconsistency and unresponsiveness raise severe credibility issues. As a result, the record is lacking evidence supporting employee's claim. Employee failed to meet his burden of proof with regard to whether he suffered an accident arising out of and in the course of his employment.

Furthermore, the medical testimony provided on behalf of employee was lacking in credibility as it was based in large part on the history provided by employee. Dr. Berkin did not reconcile the inconsistencies in the history provided by employee or address the medical records contradicting employee's assertions. Therefore, Dr. Berkin's opinion that employee's condition resulted from the accident of October 4, 2004 is without merit. We instead find the testimony and opinion provided by Dr. Cohen most credible and worthy of belief. Subsequent to examining employee and reviewing all of employee's relevant medical records, he opined that employee's condition was associated with chronic complaints and not specifically associated with his work injury.

After careful review, we find that because employee's testimony is fraught with inconsistencies and not supported by the evidence. Employee's testimony and that of his medical expert lacks credibility and reliability, preventing any finding, determination or conclusion that employee sustained an injury due to an accident arising out of and in the course of his employment.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee did not suffer an accident arising out of and in the course of his employment on October 4, 2004 and reverses the award of the administrative law judge.

The employer's request for reimbursement for temporary and total disability benefits paid to employee is denied as the Commission does not have jurisdiction to consider this matter.

The temporary award and decision of Administrative Law Judge David L. Zerrer, issued November 14, 2006, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 22nd day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary