

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

Injury No.: 08-114802

Employee: Tyler Kelsey
Employer: Loy Lange Box Co.
Insurer: Accident Fund Insurance Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence and considered the whole record. We find that the award of the administrative law judge allowing compensation 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 by this supplemental opinion.

We offer this correcting award to replace the references to § 287.160.1 RSMo on pages 7 and 8 of the administrative law judge's award with references to § 287.120.6 RSMo.

In other respects, we affirm the award and decision of the administrative law judge. We 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.

The November 1, 2012, award and decision of Administrative Law Judge Kathleen M. Hart, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

¹ Statutory references are to the Revised Statutes of Missouri 2008, unless otherwise indicated.

AWARD

Employee: Tyler Kelsey

Injury No.: 08-114802

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Loy Lange Box Co.

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

Additional Party: n/a

Insurer: Accident Fund Insurance Co.

Hearing Date: August 14, 2012

Checked by: KMH

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 30, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis
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:
Claimant injured his left upper extremity when his hand was crushed in a machine.
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: left upper extremity at the elbow
14. Nature and extent of any permanent disability: 60% left upper extremity at the elbow
15. Compensation paid to-date for temporary disability: \$2,641.89
16. Value necessary medical aid paid to date by employer/insurer? \$65,011.54

Employee: Tyler Kelsey

Injury No.: 08-114802

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$623.38
- 19. Weekly compensation rate: \$415.60/\$404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Underpayment of temporary total disability	\$2,641.89
126 weeks of permanent partial disability from Employer	\$50,987.16
15 weeks of disfigurement from Employer	\$6,069.90

22. Second Injury Fund liability: No

TOTAL:	\$59,698.95
--------	-------------

23. Future requirements awarded:

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

James Fox

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tyler Kelsey

Injury No.: 08-114802

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Loy Lange Box Co.

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

Additional Party: n/a

Insurer: Accident Fund Insurance Co.

Checked by: KMH

A hearing was held on the above captioned matter August 14, 2012. Tyler Kelsey (Claimant) was represented by attorney James Fox. Loy Lange Box Co. (Employer) was represented by attorney John Fox. The SIF claim was dismissed prior to hearing.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

Claimant injured his left hand at work. Employer provided treatment and TTD. Employer asserts a 50% drug penalty applies to reduce Claimant's TTD, PPD, and medical benefits.

STIPULATIONS

The parties stipulated to the following:

1. Claimant was injured by accident December 30, 2008 while in the course and scope of his employment.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Accident Fund Insurance Co.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage was \$623.38. Claimant's rates for TTD and PPD are \$415.60 and \$404.66 respectively.
6. Claimant was paid TTD benefits totaling \$2,641.89. This represents TTD from 12/31/08 through 2/24/09, and 5/20/09 through 5/24/09. Employer assessed a 50% drug penalty against Claimant's TTD benefits.
7. Employer paid \$65,011.54 in medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Future medical care.
2. Permanent partial disability.
3. Applicability of a 50% drug penalty to past and future benefits.

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 32 year-old male who worked for Employer approximately 4 years as a Shipping Supervisor, Forklift Operator, and Machine Operator producing corrugated board and cardboard boxes. Claimant last worked for Employer in February 2012. He is not currently working for reasons unrelated to his work injury. Claimant is left hand dominant, but writes with his right hand.
2. On December 30, 2008, Claimant was working the 3:20 p.m. through 11:50 p.m. shift. At approximately 7:30 p.m., a co-worker's machine malfunctioned. The vacuum belt that pulls paper into the machine slipped off the roller. Claimant had operated that machine before, and was taught how to manually fix the machine. He got down on his back into the crawl space under the machine, and reached up to loosen the bolts and take tension off the belt. He had his left hand on the belt, and his hand got sucked into the machine up to his mid forearm. His arm was stuck in the machine for two to three minutes before he and a co-worker could loosen some bolts in order to remove his arm.
3. Claimant was taken to the Emergency Room at St. Alexius Hospital. The records indicate Claimant was cooperative, well groomed, and had normal speech. Given the extent of damage to his arm, he was soon transferred to Barnes Hospital and began treating with Dr. Goldfarb.
4. Dr. Goldfarb immediately performed surgery consisting of compartment release and repair of tendons that were avulsed from the muscle belly from his index through small fingers. Dr. Goldfarb referred Claimant to Dr. Dave for pain management before he started a physical therapy program. Claimant followed up with Dr. Goldfarb and attended physical therapy for several months. Throughout this time, Dr. Dave treated him with various medications to relieve his pain.
5. Claimant returned to light duty, but continued to have problems with his left arm. In order to give Claimant more function and motion in his thumb, Dr. Goldfarb performed a second surgery in May 2009 to transfer a tendon from his little finger to his thumb and to separate the web space between his thumb and index finger. After a functional capacity evaluation, Dr. Goldfarb released Claimant from treatment in August 2009. He imposed

permanent work restrictions to include “limitation of gripping of 25 pounds with the affected hand, limitation in lifting more than 30 pounds from waist to overhead. He should avoid climbing heights and repetitive grasping/fine manipulative skills, require more frequent breaks than normal.” He noted Claimant had decreased grip strength, decreased sensation, and decreased mobility. He rated Claimant’s disability at 40% of the left upper extremity.

6. Claimant continues to treat with Dr. Dave for management of chronic pain due to nerve damage. He takes Oxycodone four times a day. He sees Dr. Dave every 2-3 months and believes this treatment will continue indefinitely. Claimant testified he is able to work and function well with his current medications.
7. Employer paid for Claimant’s treatment with Dr. Dave until last year. Since then, Claimant has been paying for this treatment on his own. He pays a discounted bill of \$95 per visit and pays approximately \$75 per month for prescriptions.
8. Claimant was able to return to work full duty, but at a less strenuous position. He could not do the heavy manual work of a machine operator. He was not able to lift heavy items and could not manipulate his hand as required to operate a machine. He returned to work in shipping, which is a lighter job. He drove a forklift all day and set up a machine for others to operate. He was able to run the bander machine because it involved mostly pressing buttons to band boxes and put on labels.
9. Claimant continues to have significant symptoms in his left upper extremity. He can close his hand, but can’t make a complete fist. He has lost pinch strength, grip strength and dexterity. He lost independent motion in the fingers, and has to move all four fingers together to flex and extend them. He has limited range of motion in his thumb. He has no feeling in his thumb and middle and index fingers. His hand always feels cold. He has a constant throbbing and pulsing pain that is generally manageable with medications, but increases with any activity. He does not have much motor skill or fine movement with his hand. Repetitive activity causes pain. He needs to take frequent breaks at work to rest his hand. He can’t write, use hand tools, button a shirt cuff, or squeeze a toothpaste tube. He can’t tie his shoes, and wears slip on shoes now. He can no longer play the guitar, participate in sports, or tie a lure to go fishing. Claimant has extensive scarring on his hand and forearm.
10. Claimant’s expert, Dr. Schlafly, noted significantly reduced grip strength and pinch strength. He noted Claimant’s thumb tendon transfer was working well, but he still had weak thumb opposition. He opined Claimant had a severe crush injury which caused injury to his muscles, tendons, and the median nerve of the left hand, wrist, and forearm. He recommended Claimant continue treating with Dr. Dave so he could continue to work. He agreed with Dr. Goldfarb’s permanent restrictions and rated Claimant’s disability at 75% of the left elbow.
11. Dr. Goldfarb also noted the severity of Claimant’s injury. He testified it is unusual that one tendon is pulled out from the muscle, and Claimant had multiple tendons pulled out from the muscle. This could lead to complete loss of function. He opined Claimant

worked hard in therapy, and made excellent progress. He rated Claimant's disability at 40%, and specified the disability should be at the entire extremity given Claimant's level of functioning. He deferred to Dr. Dave in regard to the issue of ongoing pain management.

12. Employer's Alcohol and Illegal Drug Policy provides in part that employees shall not use prohibited drugs while on the job or on Company property. Employees are not allowed to work while under the influence of illegal drugs. The policy also requires employees to submit to drug tests when there is evidence of drug use on Company property. The policy allows a supervisor to initiate drug testing when there is reason to believe an employee is impaired by the use of drugs. The policy ends by stating Employer will not tolerate use on the premises, or allow employees to work while under the influence of drugs.
13. Claimant underwent a drug test at St. Alexius hospital shortly after his injury. The toxicology experts agree the urine sample revealed that THC, marijuana's active ingredient that causes the physical effects or altered sensation, was no longer in Claimant's system. The test was positive for a marijuana metabolite, carboxy-THC. This lasts in the body for an average of 3 days after smoking or ingesting marijuana.
14. The experts each testified after someone smokes marijuana, the physical effects of the marijuana can last about four to five hours. The test shows Claimant smoked or ingested marijuana at some point before his work injury, but the exact time of usage can't be pinpointed. The experts further agreed there was no evidence suggesting Claimant was physically impaired by marijuana at the time of the accident. They agreed even if Claimant had smoked marijuana right before he left for work, he would not have been suffering any impairment or physical effect at the time of the accident.
15. Claimant's toxicology expert, Dr. Christopher Long, opined this positive drug test could not be correlated in any manner to impairment because carboxy-THC is not pharmacologically active, and has no effect on humans. He estimated the level of carboxy-THC in Claimant's urine sample is in line with someone who had used marijuana 24-48 hours, or even a week, before the drug test. He testified Claimant was not impaired in any way, to any extent, at the time of the accident. The medical records reveal there was no suspicion on the part of the staff at St. Alexius that Claimant was impaired by any drug. The injury was not sustained in conjunction with the use of marijuana, and he could not conclude Claimant had used marijuana on the date of the injury.
16. Employer's toxicology expert, Dr. Rozman, testified he could not pinpoint when Claimant last smoked marijuana, and couldn't even say it was within five hours or 24 hours before the accident. There was no evidence suggesting Claimant was physically impaired by the use of marijuana at the time of the accident. There was no evidence he smoked marijuana within the five hours before his accident. There was no evidence Claimant was smoking marijuana while at work on the date of the accident.
17. Claimant testified the last time he smoked marijuana before the drug test was about a week before the work injury. On the date of injury, he got up about noon, ate a meal, and

went to work. At the time of the injury, he did not feel the effects of any marijuana and it had been days since he smoked. He did not feel sleepy, fatigued, and did not feel his motor skills were slowed. He testified he was not under the influence at the time of the injury, and no one at Employer thought he was. Claimant testified he is aware of Employer's drug policy. He did not get suspended because of the positive drug test.

18. Claimant is credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant did not violate Employer's drug policy, and Employer is not entitled to a drug penalty reduction in benefits.

Employer contends Claimant's benefits should be reduced by 50% in accordance with Section 287.160.1 (RSMo 2005), which provides:

"Where the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs."

The first step in analyzing the applicability of this section is to determine whether Claimant violated Employer's rules or policy relating to a drug-free workplace. Employer's policy states in part:

"Employees shall not use, possess, sell or transfer prohibited drugs or alcohol, which may impair the ability to perform assigned duties in a safe and productive manner while on the job or on Company property...."

Employees will not be permitted to work while under the influence of alcohol or illegal drugs in their system. The company will require employees to submit to appropriate tests for illegal drugs and/or alcohol when there is evidence of drug or alcohol use, on Company property.

This test may be initiated upon observation by a member of supervision when given reason to believe that an employee is impaired by the use of alcohol or illegal drugs or whose behavior or work performance causes a supervisor to believe illegal drugs or alcohol have been consumed....

We will not tolerate use on the premises, or allow employees to work while under the influence of drugs or alcohol."

In reviewing this policy, the first question is whether Claimant used, possessed, sold or transferred prohibited drugs while on the job or on Company property. There were no witnesses presented who saw Claimant using marijuana on Company premises. Claimant testified he did not use marijuana while on the job or on the premises. Both of the toxicologists agreed it was difficult to pinpoint when Claimant last smoked marijuana, but the drug test results showed Claimant did not have THC in his system. This indicates it had been at a minimum five hours, and more likely longer than that, since Claimant had ingested marijuana. Given the time he began work on the date of injury and the time the drug test was taken, Claimant did not use marijuana while on the job or on Company property.

The next part of Employer's drug policy prohibits an employee from working while under the influence of illegal drugs. The toxicologists agreed Claimant had smoked or ingested marijuana before the injury. After reviewing the test results, the toxicologists agreed it is difficult to pinpoint the exact time of usage, but the evidence suggests, and the tests confirm, Claimant was not physically impaired at the time of the accident. No supervisor suspected Claimant was impaired while at work or initiated a drug test on the date of injury. The early medical records do not indicate a suspicion Claimant was impaired by any drug. I find Claimant was not "under the influence of alcohol or illegal drugs in his system" at the time of the accident.

Employer's drug policy focuses on the use of drugs on company premises and on prohibiting employees from working while impaired or under the influence of drugs. I find Claimant did not violate any provisions of Employer's drug policy. Therefore, Section 287.260.1 does not apply and Claimant's benefits shall not be reduced.

2. Claimant sustained 60% PPD to his left elbow and 15 weeks of disfigurement, and is entitled to \$57,057.06 in compensation.

Claimant has significant permanent limitations and restrictions on employment opportunities due to the injury. Based on my observations of Claimant, the opinions of the medical experts, and Claimant's credible testimony regarding his ongoing symptoms and restrictions, I find Claimant has sustained 60% PPD to his left elbow and 15 weeks of disfigurement. At his compensation rate, he is entitled to \$57,057.06 in compensation.

3. Claimant is entitled to future medical care.

Section 287.140.1 (RSMO 2005) provides Claimant is entitled to medical treatment as may reasonably be required to cure and relieve the effects of the injury. This includes pain management and medications. Future medical care to relieve a claimant's pain should not be denied simply because he or she has reached maximum medical improvement. *Landman v. Ice Cream Specialties, Inc.* 107 S.W.3d 240 (Mo. 2003)(overruled on other grounds).

Claimant was released at MMI in 2009. He has continued to treat with Dr. Dave since he reached MMI. Fortunately Claimant was able to return to work, but he credibly testified to his ongoing need for pain management in order to continue working. Dr. Schlafly recommended Claimant continue treating with Dr. Dave, and Dr. Goldfarb testified he would defer to Dr. Dave on this issue.

I find Claimant has met his burden to establish a need for future medical care and pain management. I find Employer responsible to provide Claimant with this treatment.

4. Claimant is entitled to additional TTD benefits.

Employer reduced Claimant's TTD benefits by 50% based on the results of the drug test. Having found Claimant did not violate Employer's drug policy, Claimant is entitled to reimbursement for the reduction, and Employer is ordered to pay Claimant \$2,641.89 in past TTD.

TTD benefits are intended to cover a claimant's healing period from the work accident. Pursuant to this award, Claimant may undergo additional treatment in the form of pain management. If he is unable to work while undergoing such treatment, Employer is ordered to provide TTD benefits to cover the healing period associated with such treatment.

Made by: _____
KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation