

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

Injury No.: 06-040382

Employee: Scott Knight
Employer: SUPERVALU, Inc.
Insurer: Old Republic Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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. We have read the briefs of the parties and heard the parties' arguments. After 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 4, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 4, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Scott Knight

DISSENTING OPINION

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

Employee worked for employer for approximately fifteen years as a truck driver. One of his work duties involved hooking up his truck to a tractor trailer. Part of this process required claimant to adjust the height of the trailer by cranking a dolly. Most of the time, the height of the trailer was such that employee could back his truck underneath the trailer, taking the weight off the trailer legs, and making it easier to crank the dolly. If the trailer was too high, however, it was necessary for employee to forcefully crank the dolly in order to take the tension off the trailer legs and lower the trailer so that it could connect with the truck. The action of cranking the dolly required employee to alternately push with both hands on top and pull with both hands back toward himself in a circular motion.

On March 3, 2006, employee backed his truck to a trailer that was too high. Due to the height of the trailer, it was difficult to crank the dolly, and it was necessary for employee to put his entire body into pushing the dolly bar. In mid-crank, employee felt an immediate pain that shot through the middle of his chest. While trying to sleep that night, employee was awakened by pain in his left shoulder. Because employee initially thought the pain in his left shoulder was minor, and because he was scheduled to take a vacation, he did not immediately tell his supervisor about the incident. However, when his situation continued to worsen during his vacation, employee went to see his family doctor, Dr. Terrell Mulford, on March 27, 2006. Employee hoped that Dr. Mulford could treat him conservatively and that his pain would subside without employee having to report a work injury or "bring in Work Comp." However, Dr. Mulford's treatment, consisting of medication and electrodes, was not successful in relieving employee's symptoms, which included pain in his left shoulder with numbness in his fingertips.

When employee returned to work on April 2, 2006, he was still suffering from soreness in his shoulder and numbness in his left fingers. On or about April 6, 2006, employee was again faced with a high trailer and was forced to use significant force to crank a dolly. While cranking the dolly in "high gear," employee experienced the same pain in his chest as previously experienced with a new pain shooting down his left arm. Employee rated his pain at the level of 10 out of a possible 10. Employee contacted the supervisor on duty and reported what happened when he was cranking the dolly. Employee was referred to human resources. Employee was told that if he was not 100% sure that his injury was work related, he should process it under his short-term disability carrier.

Employee returned to see Dr. Mulford with complaints of severe pain in his left shoulder and neck and numbness in his fingers. Employee was unable to work beginning April 8, 2006, due to his symptoms. An MRI was taken on April 11, 2006, which revealed degenerative changes but was found to be of poor quality. On April 14, 2006,

Employee: Scott Knight

- 2 -

Dr. Mulford referred employee to Dr. Bernard Randolph. On April 18, 2006, a second MRI revealed disc protrusion at the C6-C7 level.

On April 28, 2006, employer authorized treatment through Dr. Kia Swan-Moore. However, after examining employee, Dr. Swan-Moore was of the opinion that employee's symptoms and the herniated disc were caused by chronic degenerative changes. Dr. Swan-Moore opined that employee was unable to work effective April 28, 2006. Given the opinion of Dr. Swan-Moore, employer denied any further medical treatment.

On June 1, 2006, employee saw Dr. Scott Purvines. Dr. Purvines initially provided conservative treatment for employee's symptoms, but when this proved unsuccessful, he recommended employee undergo cervical spine surgery. On June 26, 2006, employee underwent a C6-C7 anterior cervical discectomy and fusion. Dr. Purvines opined that, while everyone has some level of degenerative disease in their spine, employee's problems were specific to the C6-C7 level, and employee's new problems arose at the time employee felt his symptoms. Employee returned to Dr. Purvines for follow-up treatment through August 13, 2006, at which time he was released without restrictions and returned to work. Employee experienced relief from the severe pain that he had prior to the surgery, but continued to have soreness in the neck and left shoulder with continued numbness of the first three fingers of the left hand.

Dr. Randolph examined employee on September 4, 2007, on behalf of the employer. Dr. Randolph opined that employee's condition was related to degenerative processes, and that the significant factors were progressive degenerative disc disease caused by aging and years of tobacco use. Dr. Randolph opined that the cranking of the dollies may have been a triggering event for the development of the herniated disc. Dr. Randolph acknowledged that employee could have suffered a traumatic injury but ultimately opined that a degenerative condition is the prevailing cause of employee's symptoms and disability.

Dr. Shawn Berkin examined employee on August 15, 2007, and offered his opinion on behalf of the employee. Dr. Berkin found that employee suffered from muscle tenderness and para cervical muscle tenderness from the C3 to C7 levels, and limited range of motion in the cervical spine. Dr. Berkin diagnosed a cervical strain with left side radiculopathy, a herniated disc at the C6-C7 and C5-C6 levels, and status post-cervical discectomy at the C6-C7 levels with hardware placement. Dr. Berkin opined that employee suffered a 40% disability to the body as a whole referable to the cervical spine. Dr. Berkin opined that employee sustained his injuries while cranking the dolly at work, and that the injury was the prevailing factor in causing employee's medical condition.

I find Dr. Berkin's opinion more credible than that of Dr. Randolph. Dr. Randolph's opinion as to causation of employee's symptoms and medical condition is tainted by Dr. Randolph's evident skepticism as to employee's account of the injury event. Dr. Berkin gave more consideration to the nature of the work activity of cranking the dollies and the degree of strain that would have resulted in the performance of this

Employee: Scott Knight

- 3 -

activity. I find that employee suffered a 40% disability to his body as a whole referable to the cervical spine. I find that employee's work activity of cranking the dolly on March 3, 2006, was the prevailing factor in causing both his injury and the resulting medical condition and disability.

Employee settled two previous workers' compensation cases for injuries that occurred in 1996 for 1% and 2% permanent partial disability to the cervical spine. Employee did not experience any significant residual symptoms referable to these two injuries.

The administrative law judge denied employee's claim for the injury caused by the accident on March 3, 2006, on a finding that employee failed to provide proper notice of his injury to employer as required under section 287.420, RSMo. That section provides, in pertinent part, as follows:

No proceedings for compensation for any accident 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, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

The purpose of the foregoing section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

Because it is uncontested that employee did not provide the written notice required by the statute, the question becomes whether employer was prejudiced by failure to receive the notice. I conclude that employer was not prejudiced. Employee was injured the day before a four week vacation. Employee was initially unaware of the extent of his injury, and was not engaged in any work duties for four weeks. Employee sought treatment only once during this period and was treated conservatively. Employer received actual notice of the injury on April 6, 2006, when, after attempting to perform his normal work duties, employee discovered the true extent of his symptoms. Most importantly, employer was able to have employee examined by Dr. Swan-Moore on April 28, 2006, and obtain a medical opinion before employee initiated the substantial course of treatment he received for his injury. This gave employer ample opportunity to assess the nature and extent of employee's injuries. Employer was afforded the opportunity to manage employee's care and to minimize any worsening of his condition. Employer acted on the advice of its chosen physician and denied medical treatment.

I would find that employee met his burden of establishing that employer was not prejudiced by his failure to provide timely notice. Additionally, I would find that employee met his burden of establishing he sustained a compensable injury on March 3, 2006, given the credible testimony of employee and the opinions of Dr. Berkin. Accordingly, I would reverse the award of the administrative law judge.

Employee: Scott Knight

- 4 -

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

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

Injury No.: 06-050856

Employee: Scott Knight

Employer: SUPERVALU, Inc.

Insurer: Old Republic Company

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 4, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 4, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Scott Knight

DISSENTING OPINION

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

Employee worked for employer for approximately fifteen years as a truck driver. One of his work duties involved hooking up his truck to a tractor trailer. Part of this process required claimant to adjust the height of the trailer by cranking a dolly. Most of the time, the height of the trailer was such that employee could back his truck underneath the trailer, taking the weight off the trailer legs, and making it easier to crank the dolly. If the trailer was too high, however, it was necessary for employee to forcefully crank the dolly in order to take the tension off the trailer legs and lower the trailer so that it could connect with the truck. The action of cranking the dolly required employee to alternately push with both hands on top and pull with both hands back toward himself in a circular motion.

On March 3, 2006, employee backed his truck to a trailer that was too high. Due to the height of the trailer, it was difficult to crank the dolly, and it was necessary for employee to put his entire body into pushing the dolly bar. In mid-crank, employee felt an immediate pain that shot through the middle of his chest. While trying to sleep that night, employee was awakened by pain in his left shoulder. Because employee initially thought the pain in his left shoulder was minor, and because he was scheduled to take a vacation, he did not immediately tell his supervisor about the incident. However, when his situation continued to worsen during his vacation, employee went to see his family doctor, Dr. Terrell Mulford, on March 27, 2006. Employee hoped that Dr. Mulford could treat him conservatively and that his pain would subside without the necessity of reporting a work injury or "involving Work Comp." However, Dr. Mulford's treatment, consisting of medication and electrodes, was not successful in relieving employee's symptoms, which included pain in his left shoulder with numbness in his fingertips.

When employee returned to work on April 2, 2006, he was still suffering from soreness in his shoulder and numbness in his left fingers. On or about April 6, 2006, employee was again faced with a high trailer and was forced to use significant force to crank a dolly. While cranking the dolly in "high gear," employee experienced the same pain in his chest as previously experienced with a new pain shooting down his left arm. Employee rated his pain at the level of 10 out of a possible 10. Employee contacted the supervisor on duty and reported what happened when he was cranking the dolly. Employee was referred to human resources. Employee was told that if he was not 100% sure that his injury was work related, he should process it under his short-term disability carrier.

Employee returned to see Dr. Mulford with complaints of severe pain in his left shoulder and neck and numbness in his fingers. Employee was unable to work beginning April 8, 2006, due to his symptoms. An MRI was taken on April 11, 2006, which revealed degenerative changes but was found to be of poor quality. On April 14, 2006,

Employee: Scott Knight

- 2 -

Dr. Mulford referred employee to Dr. Bernard Randolph. On April 18, 2006, a second MRI revealed disc protrusion at the C6-C7 level.

On April 28, 2006, employer authorized treatment through Dr. Kia Swan-Moore. However, after examining employee, Dr. Swan-Moore was of the opinion that employee's symptoms and the herniated disc were caused by chronic degenerative changes. Dr. Swan-Moore opined that employee was unable to work effective April 28, 2006. Given the opinion of Dr. Swan-Moore, employer denied any further medical treatment.

On June 1, 2006, employee saw Dr. Scott Purvines. Dr. Purvines initially provided conservative treatment for employee's symptoms, but when this proved unsuccessful, he recommended employee undergo cervical spine surgery. On June 26, 2006, employee underwent a C6-C7 anterior cervical discectomy and fusion. Dr. Purvines opined that, while everyone has some level of degenerative disease in their spine, employee's problems were specific to the C6-C7 level, and employee's new problems arose at the time employee felt his symptoms. Employee returned to Dr. Purvines for follow-up treatment through August 13, 2006, at which time he was released without restrictions and returned to work. Employee experienced relief from the severe pain that he had prior to the surgery, but continued to have soreness in the neck and left shoulder with continued numbness of the first three fingers of the left hand.

Dr. Randolph examined employee on September 4, 2007, on behalf of the employer. Dr. Randolph opined that employee's condition was related to degenerative processes, and that the significant factors were progressive degenerative disc disease caused by aging and years of tobacco use. Dr. Randolph opined that the cranking of the dollies may have been a triggering event for the development of the herniated disc. Dr. Randolph acknowledged that employee could have suffered a traumatic injury but ultimately opined that a degenerative condition is the prevailing cause of employee's symptoms and disability.

Dr. Shawn Berkin examined employee on August 15, 2007, and offered his opinion on behalf of the employee. Dr. Berkin found that employee suffered from muscle tenderness and para cervical muscle tenderness from the C3 to C7 levels, and limited range of motion in the cervical spine. Dr. Berkin diagnosed a cervical strain with left side radiculopathy, a herniated disc at the C6-C7 and C5-C6 levels, and status post-cervical discectomy at the C6-C7 levels with hardware placement. Dr. Berkin opined that employee suffered a 40% disability to the body as a whole referable to the cervical spine. Dr. Berkin opined that employee sustained his injuries while cranking the dolly at work, and that the injury was the prevailing factor in causing employee's medical condition.

Employee settled two previous workers' compensation cases for injuries that occurred in 1996 for 1% and 2% permanent partial disability to the cervical spine. Employee did not experience any significant residual symptoms referable to these two injuries.

Employee: Scott Knight

- 3 -

The administrative law judge denied employee's claim for the injury caused by the accident on April 6, 2006, on a finding that Dr. Berkin's opinion as to causation was not credible, and that employee offered insufficient probative medical evidence.

The ultimate determination of credibility of witnesses rests with the Commission. The Commission is not bound to yield to an administrative law judge's findings. 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 & Rubber Co.*, 147 S.W.3d 865 (Mo. App. 2004). I disagree with the credibility determinations of the administrative law judge. I find Dr. Berkin's opinion more credible than that of Dr. Randolph. Dr. Randolph's opinion as to causation of employee's symptoms and medical condition is tainted by Dr. Randolph's evident skepticism as to employee's account of the injury event. Dr. Berkin gave more consideration to the nature of the work activity of cranking the dollies and the degree of strain that would have resulted in the performance of this activity.

The administrative law judge also appears to ignore the fact that Dr. Purvines, the treating surgeon, found that employee's problems were specific to the C6-C7 level, and that they occurred at the time he felt the symptoms in his left side. There is no evidence that employee suffered from pain or numbness in his neck, left arm, and left hand prior to the work incident on April 6, 2006. Employee credibly testified that the activity of cranking the dollies could be extremely strenuous, that it sometimes required his whole body, and that he was exerting himself thus when he sustained the injury on April 6, 2006.

I conclude that employee suffered a 35% disability to his body as a whole referable to the cervical spine. I find that employee's work activity of cranking the dollies on March 3, 2006, and on April 6, 2006, was the prevailing factor in causing his injuries and the resulting medical condition and disability.

Accordingly, I would reverse the award of the administrative law judge. I would award claimant's past medical bills in the amount of \$34,577.99, temporary total disability benefits from April 8, 2006, through August 13, 2006 totaling \$11,989.88, and permanent partial disability of 35% of the body as a whole referable to the cervical spine, totaling \$51,111.20.

Because the majority has determined otherwise, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member