

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

Injury No.: 92-187060

Employee: Dennis M. Korenak  
Employer: Marina Bay Resort  
Insurer: Liberty Mutual Fire Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: Alleged November 30, 1992

Place and County of Accident: Osage Beach, Camden 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. We have reviewed the evidence and considered the whole record and we find that the award of the associate administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act, except as modified herein. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the June 23, 2005, award and decision of the associate administrative law judge. We adopt the findings, conclusions, decision, and award of the associate administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We simply do not find credible the testimony of employee that he was hit by a boom while working for employer in January 1993. The testimony of employee regarding the history of his jaw problems is inconsistent with all of the other evidence on the whole record.

Employee's January 27, 1994, claim for compensation alleged that on or about November 30, 1992, at approximately 3:00 p.m., employee sustained injury to his left jaw, head, upper back, and body as a whole when, in the course and scope of his employment, a hook from a boom truck hit employee in the left jaw. According to employee, the boom pinned employee against a wall. During his October 24, 2004, testimony, employee asserted that this boom incident occurred in the first week of January 1993.

Employee testified that his jaw was fractured on December 8, 1992, when an individual, without provocation, struck him as he was entering a tavern. The force of the alleged strike was so great that it rendered employee unconscious. The unprovoked assault was so sudden employee was unable to determine if the assailant was male or female or if the assailant hit him with a fist or in some other manner. December 9, 2002, medical records from two separate hospitals – Lake of the Ozarks General Hospital and University of Missouri Hospitals and Clinics – record that employee reported a history of injuring his jaw while changing a tire on a semi-truck. We find it inconceivable that two hospitals would independently record the same erroneous history of employee's injury. We find employee told the hospital staffs he injured his jaw while changing a tire.

Employee testified that he presented to Dr. Puckett within two or three days of the alleged boom incident and related the boom incident to Dr. Puckett. There is a medical record in Dr. Puckett's records of a follow-up visit on January 12, 2006. The record, signed by a David M. Witten, M.D., does not mention the boom incident. It does note, in part, "[t]here has been partial but incomplete healing of the fracture of the left mandibular angle," and "[n]o unusual P.O. findings are seen." We do not believe any physician would fail to record in his records a patient report that one month post-surgery, the steel hook of a boom struck the patient in his surgically repaired jaw. We find employee did not report to Dr. Witten or Dr. Puckett that a boom hit his jaw within days, or even months, after the alleged accident.

Other than employee's testimony, the only evidence in the record supporting a finding of accident is the testimony of Mr. Tarwater, employee's cousin. Mr. Tarwater testified that at approximately 10:30 a.m. on some cold day he saw employee roll away from a boom Mr. Tarwater was operating. Mr. Tarwater did not see the boom or the hook of the boom

strike employee. Mr. Tarwater assumed that the boom struck employee because employee rolled away. Mr. Tarwater testified that the boom did not pin employee against a wall. Although he helped employee get up after the incident, Mr. Tarwater had no recollection of employee's physical appearance immediately following the incident and could not recall any discussion with employee regarding the incident.

Employee's descriptions of his jaw injuries are inconsistent with all of the other evidence. Employee's description of the work injury is inconsistent with the testimony of his cousin who denied employee was pinned against a wall by the hook of a boom. No contemporaneous medical records relate the mechanisms of injury described by employee for the alleged work injury or the alleged non-work injury. Over time, employee alleged two different work accident dates. We might be able to overlook a minor discrepancy in the date of the alleged accident if the alleged dates did not straddle the jaw fracture and initial surgery. These remarkable and easily verifiable time posts should have made identification of the approximate date of the alleged second jaw injury a rather simple task at the time the claim for compensation was filed little more than a year later.

For the foregoing reasons, we conclude that employee's testimony regarding the alleged accident is not trustworthy or believable. Employee has not met his burden of proving he sustained an accident arising out of and in the course of his employment. We deny the claim for compensation.

The award and decision of Associate Administrative Law Judge David L. Zerrer, issued June 23, 2005, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of July 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

CONCURRING OPINION FILED

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John J. Hickey, Member

Attest:

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Secretary

CONCURRING 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 denying compensation should be affirmed without modification.

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John J. Hickey, Member