

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

Injury No.: 01-113069

Employee: William Maloy
Employer: Cabinet & Bath Supply, Inc.
Insurer: Fire & Casualty Insurance Company of Connecticut
Date of Accident: April 20, 2001
Place and County of Accident: Nixa, Christian 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. 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 24, 2003, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued November 24, 2003, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

Secretary

DISSENTING OPINION

I must respectfully dissent from the award and decision of the majority of this Commission affirming the award and decision of the administrative law judge. 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.

The administrative law judge denied compensation after concluding that the injury did not occur as described by

the employee. The administrative law judge based her conclusion “on the fact that none of the other people who testified that they were present when the mantel was lifted, moved, and reassembled remembered anything about the mantel being dropped, the claimant hurting himself, needing help, acting like he was in pain, or anything unusual at all happening regarding the mantel.” The administrative law judge’s conclusion implies a finding those witnesses were credible.

Employee’s witnesses are not credible

The record developed at a remand hearing subsequent to the trial, convinces me that most of employer’s witnesses are not credible.

- Mr. Barton and Mr. Hambelton each admitted fabricating a story that Mr. Bean was stealing from employer in an effort to get Mr. Bean fired.
- Mr. Barton testified that Mr. Barton and Mr. Hambelton were acting in concert in this corrupt scheme. Mr. Hambelton testified that Mr. Hambelton acted alone.
- Mr. Bean admitted to threatening physical harm against any employee who contacted OSHA about potential safety violations.
- Mr. Barton testified that he concocted a story to leave employee with the impression that Mr. Bean pressured witnesses to lie on the stand at the hearing on employee’s claim. Mr. Barton testified he lied to employee to rile employee up in the hopes that employee would confront Mr. Paris about the alleged misdeeds of Mr. Bean.

Mr. Paris owns all of the stock of employer. Mr. Paris testified at the remand hearing. Mr. Paris’ testimony suggests to me a lack of concern for the safety of employees and at least a tacit approval of dishonest tactics by employees.

- Mr. Paris acknowledged that he had taken no disciplinary action against Mr. Bean for threatening physical harm against employees who report suspected safety violations to OSHA.
- Mr. Paris acknowledged that he had taken no disciplinary action against Mr. Barton for admittedly lying and scheming in an effort to get Mr. Paris to fire Mr. Bean.

The lies and actions admitted by Mr. Barton, Mr. Bean, Mr. Hambelton, and Mr. Paris at the remand hearing convince me it is error to give credence to any of their testimony regarding the alleged work accident. Mr. Barton’s web of lies convinces me that employee’s version of events is credible.

Employee is credible

Mr. Barton most recently claimed he made up the story he told employee about co-workers lying on the stand at the original hearing. Mr. Barton explained that he lied to make employee mad. This explanation does not make sense. Why would employee get mad if Mr. Bean told employees to deny knowledge of a work accident if there had been no work accident? That testimony would be the truth.

Mr. Barton’s desired outcome -- employee’s anger -- would only occur if employee really suffered a work accident and injury, and he learned Mr. Bean told his co-workers to deny knowledge of the work accident. I believe that is what happened in this case.

I find employee’s version of events to be credible. I find employee suffered a compensable injury in the manner he described. I would issue a temporary award of compensation awarding past medical expenses, further medical care, and temporary total disability benefits.

For the foregoing reasons, I must respectfully dissent from the award of majority affirming the administrative law judge’s denial of compensation in this matter.

John J. Hickey, Member

FINAL AWARD

Employee: William Maloy Injury No. 01-113069

Dependents: n/a

Employer: Cabinet & Bath Supply, Inc.

Additional Party: n/a

Insurer: Fire & Casualty Insurance Company of Connecticut

Hearing Date: 6/24/03 Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law?
No
4. Date of accident or onset of occupational disease: N/a
5. State location where accident occurred or occupational disease contracted: N/a
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
No
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment?
No
9. Was claim for compensation filed within time required by Law? No
10. Was employer insured by above insurer? No
11. Describe work employee was doing and how accident happened or occupational disease contracted:
N/a.
12. Did accident or occupational disease cause death? NO Date of death? N/a
N/A
13. Parts of body injured by accident or occupational disease: N/a
14. Nature and extent of any permanent disability: N/a

15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: William Maloy Injury No. 01-113069

17. Value necessary medical aid not furnished by employer/insurer? 0
18. Employee's average weekly wages: N/a
19. Weekly compensation rate: N/a
20. Method wages computation: N/a

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning n/a, for Claimant's lifetime

22. Second Injury Fund liability: Yes No Open

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for weeks beginning n/a
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Maloy Injury No. 01-113069

Dependents: n/a

Employer: Cabinet & Bath Supply, Inc.

Additional Party: n/a

Insurer: Fire & Casualty Insurance Company of Connecticut

Hearing Date: 6/24/03 Checked by: MEH

On June 24, 2003, the parties appeared before the undersigned administrative law judge for a temporary hardship hearing. The employer appeared represented by Maria Campbell, and the claimant appeared in person represented by Robert Grosser. Memoranda of law were submitted by July 23, 2003.

The parties stipulated that on or about April 20, 2001, Cabinet and Bath Supply was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Fire and Casualty Company of Connecticut. On the alleged injury date of April 20, 2001, William Maloy was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. This employment occurred in Christian County, Missouri. The claimant's claim was filed within the time prescribed by Section 287.430. At the time of the claimed accident/occupational disease claimant's average weekly wage was \$710.59, sufficient to allow the compensation rate of \$473.72 for temporary total disability and \$314.26 for permanent partial disability benefits. No temporary total disability benefits have been paid. The employer has paid no medical benefits. The attorney fee sought is 25%.

ISSUES:

1. Whether the claimant sustained an accident/occupational disease.
2. Whether the claimant gave the employer proper notice.
3. Whether the accident arose out of the course and scope of employment.
4. Whether the accident caused the injuries and disabilities for which benefits are now being claimed.
5. Whether the employer is obligated to pay for past medical expenses.
6. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
7. Any temporary total disability benefits owed to the claimant, both past and future.
8. Whether employer and insurer is entitled to a credit to past medical bills paid by private health care provider because employer and insurer paid 80% of the premiums.

FINDINGS OF FACT:

The employer makes and installs cabinetry. The claimant worked for the employer as a cabinetmaker. On Friday, April 20, 2001, he had finished building a large fireplace mantel made of cherry. This mantel was to be moved from the warehouse to the showroom. This fireplace consisted of two pieces, a top and bottom. To be

moved and installed, these pieces were taken apart and reassembled in the showroom. When assembled, the mantel was approximately nine feet high. The bottom piece was approximately five feet eight inches tall and the top piece was three feet four inches tall. They were both about nine feet wide. The top piece weighed 200-300 pounds.

The employee testified that he and a co-worker moved the piece. They began by stepping up on an 18-inch workbench and lifting the top piece off of the bottom piece. The employee said that when he stepped backwards off the bench while holding the mantel, he felt a pain in his back and almost dropped the mantel. He said that he did not drop it but caught it and felt a severe pain in his back. He said there was a jerk when he caught it. He said a co-worker helped him put the mantel on a table. He said that other co-workers had to wheel the mantel in for him and he only screwed it into place. He said other guys offered to help him. He testified that he talked to Kevin Bean, his supervisor, and told him he hurt his back. He said he told him that he pulled his back out of place and the other workers were going to help him install the mantel. The employee also said that after this he did no more lifting that day.

When he got home from work he laid on the floor and his wife rubbed his back. He then went to bed. His wife testified that she was aware he had an injury when he got home that night. She does not remember the exact date but knows it was a Friday. He said he called Joan Summers on Friday night or Saturday morning about installing some cabinets for her. At this time he said he had to call Brian Kaiser to help him. He said that Brian Kaiser was there when he installed the mantel and that he reminded him what happened and then he agreed to help.

Kevin Bean, the manager of CBS, confirmed that the fireplace was moved from the warehouse to the showroom on a Friday. He observed parts of the moving process in the showroom. He, as well as several other employees, were watching the mantel being moved. He did not see who lifted the bottom piece in the showroom. He remembered the claimant having his hands on the mantel but does not recall if he lifted it or not. He said the employee did not tell him at any time that afternoon that he had hurt his back and did not appear to have hurt his back.

Co-worker Mike Ham Belton testified that he was working for the employer the day the mantel was moved. He was in the warehouse when the mantel was being moved. He does not remember the claimant saying he hurt his back or acting like he was hurt. He never heard the claimant say he was hurt or that he needed help. He did not see the mantel almost being dropped.

Paul Barton, another employee, was in the warehouse when the fireplace was being moved. He does not remember the claimant saying he hurt his back or say that he would need help because he hurt his back. He did not see the mantel almost being dropped. He does not recall any issue of the mantel almost being dropped. He saw the mantel put onto the dolly and then he left.

The employer employed Brian Kaiser at the time of the alleged accident. The claimant was his supervisor and he helped him build the mantel. He also helped him move it from the warehouse to the showroom. On the day of the move, he said they finished the mantel and set it up in the showroom. They took it down by standing on a trim table. This table was about knee high. He and the claimant took down the mantel and set it on the table.

He could see the claimant clearly. He does not remember the mantel almost being dropped. He does not remember the claimant needing help. He said another person helped balance the mantel but did not help lift. While taking the top off, the claimant did not appear to injure himself or to be in pain. He does not remember anything unusual happening that day. After they took the top off, they lifted it from the table to the floor. They then put both pieces on carts and wheeled them to the showroom. When they were in the showroom, no one else helped them lift. They did not have a table to lift the top from. They had to lift it twice because they had trouble getting it to fit because the ceiling was too low. He said the claimant helped lift the top piece both times.

Brian Kaiser helped the claimant install kitchen cabinets the day after the alleged accident. The claimant had asked him to help early in the week on Monday or Tuesday. While they were installing the cabinets, the claimant did not say anything about hurting his back or appear to be in pain or have trouble doing his work.

Joan Summers testified that she hired claimant to make and install some kitchen cabinets for her. She recalls that it was a Saturday in April 2001 but does not recall the date. She is sure it was before the middle of May because she had an event at her house at this time and knows the installation was done before it occurred. She recalls that she had discussed the installation with the claimant. He called her before the day he put them in, and he said he was not sure if he could do it because he was having back pain. On cross-examination she was asked about conflicting testimony between a statement given previously and the testimony at hearing. At one time she says it was 3-4 weeks between the call and installation and here she says it was 3–4 weeks from when she gave him a deposit to installation. She said that the claimant came and did the work with assistance from a helper. She said the claimant was basically watching the other person. She recalled the claimant had on a back brace.

The claimant said he called on Monday morning and talked to Kevin Bean and told him he was going to see a chiropractor. He continued to see the chiropractor for the next couple of days and did not return to work. He does not remember if he told the employer about going to the emergency room. He talked to Mr. Bean after the MRI on May 2, 2001. The claimant had returned to work by that time.

The employee's medical records show previous chiropractic treatment for low back pain. The claimant testified that he went to the chiropractor for "maintenance." He was treated by chiropractor Kandy Ackley for low back pain on April 18, 2000; June 4, 2000; June 19, 2000, and June 21, 2000. Dr. Ackley's record for April 24, 2001, the Tuesday after the Friday of the alleged accident, states that the claimant presented with "acute low back pain and bilateral leg pain for one day. The pain began immediately after he was lifting/installing cabinets by himself for CBS. He came into the office presenting with sharp stabbing low back pain of 10/10 on the pain scale." He also saw Dr. Ackley on April 25, 26, and 28. On the 28th he was referred to the emergency room at Cox Hospital.

The claimant was seen at the emergency room of Cox Hospital on April 26, 2001. According to his history, the claimant said his pain began two days before and denied any recent injury. The pain was in the right side of the mid back radiating down the right posterior thigh, and the employee gave a history of prior episodes of back

pain. An MRI was ordered and was performed on May 2, 2001, that showed a herniated disc at L4-5.

The employee was referred to Dr. Bert Park. He examined the claimant on May 10, 2001. There is no mention of any injury at work in the claimant's history. On May 17, 2001, the claimant underwent a lumbar semihemilaminectomy with microscopic removal of the disc at L4-5. There is again no mention of a work injury in the records.

The next medical record is for September 29, 2002, at Cox Hospital Emergency Room. His chief complaint is back pain. Dr. Lea. examined him, whose history states the employee had symptoms waxing and waning since his surgery and then an increase in problems over the previous week to ten days. There was a consultation that day with Dr. Charles Mace. Diagnostic tests showed an extruded disc fragment at L4-5 and a herniated disc at the same level. The claimant was sent to Cox Health Systems Outpatient Rehabilitation Services on October 8, 2002. The history was given for the first time of an injury on the job on April 20, 2001, while lifting a heavy mantel that began to fall and him catching it.

The claimant saw Dr. Mace in his office on October 9, 2002. He also saw the claimant on January 20, 2003, at which time the claimant first gave a history of lifting cabinets at work in April 2001 causing the need for the prior surgery. Dr. Mace testified that the claimant had a recurrent disc fragment coming out of the postoperative period after surgery for a herniated disc. He testified there is a 5% risk of this happening after a discectomy, and he believes this is what happened to the claimant. He also testified that assuming the claimant's first surgery occurred immediately following lifting a 200-300 pound object and feeling immediate pain upon lifting that object that he would relate the first surgery to the lifting incident. His opinion was based on the history given and could change if the facts did not occur as described. He recommended another surgery to repeat the laminectomy and microdiscectomy to remove the disc fragment that was there.

Dr. Norbert Belz reviewed the claimant's records on behalf of the employer and insurer. He was asked to assume that the employee did not experience back pain while moving the mantel on April 20, 2001. He was also asked to assume that the claimant installed cabinets on Saturday, April 21, 2001. He was also asked to assume that the symptoms started on this Saturday or the following Sunday or Monday. He testified that based on these assumptions and the medical records, the lifting of the mantel on April 20, 2001, was not a substantial factor to the development of the herniated disc for which surgery was performed in May 2001. He felt it was not plausible for a person with a herniated disc to install cabinets on April 21, 2001. He felt that the recurrent disc diagnosed on September 29, 2002, was a new injury with an onset seven to ten days before diagnosis. He felt that if a recurrent disc happened 16 months after the surgery, it was a new herniation.

Dr. Dirk Aylander, an orthopedic surgeon, also examined the claimant's medical records on behalf of the employer. Based on the same facts assumed as Dr. Belz, he reached the same conclusions. He felt the lifting of the mantel was not related to the herniated disc for which the claimant was operated on in May 2001. He felt the September 2002 herniation was a new event.

CONCLUSIONS OF LAW:

The first issue to be determined is whether the claimant sustained any accident on April 20, 2001, while

lifting a mantel. This is always one of the most difficult determinations to make as it requires an examination of all the facts testified to by the witnesses and the credibility of those witnesses. After carefully reviewing all of the evidence, I find that the injury did not occur as the claimant describes on April 20, 2001. This is based on the fact that none of the other people who testified that they were present when the mantel was lifted, moved, and reassembled remembered anything about the mantel almost being dropped, the claimant hurting himself, needing help, acting like he was in pain, or anything else unusual at all happening regarding this mantel. Also, Brian Kaiser, who helped the claimant with the mantel and the cabinet installation the next day, did not remember anything unusual or any complaints being made by the claimant of his back hurting. He was contacted at the beginning of the week to help, prior to the alleged injury, not the day before the installation. I also found him to be a credible witness. Also, Ms. Summers was inconsistent in when the call was made to schedule the installation.

But one of the most important factors is the lack of a history of this injury occurring in the medical records for months after this happened. The claimant gave conflicting histories mainly regarding installing cabinets by himself on Monday, April 23, 2001, but nothing about Saturday, April 21, 2001, moving and installing the mantel, until October 8, 2002, 17 ½ months after the alleged injury. The history given in medical records is given much weight as it has an inherent reliability as patients will give an accurate history to health care providers who are going to be treating them for the described problems. On this basis, I give these contemporary histories great weight and have done so in this case. Given all the facts as a whole, I do not find claimant's description of the facts surrounding the alleged injury and shortly afterwards credible. This is a final award denying compensability.

As a result of this ruling all other issues are moot.

Date: November 24, 2003

/s/ Margaret Ellis Holden

Margaret Ellis Holden

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

/s/ Renee Slusher

Renee Slusher

Director

Division of Workers' Compensation