

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

Injury No.: 09-073619

Employee: Terence McAndrew
Employer: Metro Materials, Inc.
Insurer: Bituminous Casualty Corporation

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 20, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued March 20, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20TH day of August 2013

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Terrence McAndrew

Injury No.: 09-073619

Dependents: N/A

Employer: Metro Materials, Inc.

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Bituminous Casualty Corp.

Hearing Date: January 16, 2013

Checked by: MDL

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? Yes
4. Date of accident or onset of occupational disease: September 15, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
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:
Employee fell while walking into work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: alleged right shoulder
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$1,083.54
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: Terence McAndrew

Injury No.: 09-073619

- 17. Value necessary medical aid not furnished by employer/insurer? \$16,543.00
- 18. Employee's average weekly wages: \$1,333.86
- 19. Weekly compensation rate: \$722.36/\$422.97
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: 0
- 22. Second Injury Fund liability: N/A
- TOTAL: 0
- 23. Future requirements awarded: None

Said payments to begin 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: Terrence McAndrew

Injury No.: 09-073619

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Metro Materials, Inc.

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

Additional Party: N/A

Insurer: Bituminous Casualty Corp.

Checked by: MDL

PRELIMNARIES

A hearing was held on January 16, 2013 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Terrence McAndrew ("Claimant") was represented by Mr. Douglas Salsbury. Metro Materials, Inc. ("Employer") and its insurer Bituminous Casualty Corporation were represented by Ms. Lucy Lahey. Mr. Salsbury requested a fee of 25% of Claimant's award.

The parties stipulated that on or about September 15, 2009 Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; the appropriate compensation rates are \$722.36 for Temporary Total Disability ("TTD") benefits and \$422.97 for Permanent Partial Disability ("PPD") benefits; and Employer paid TTD benefits of \$1,333.86 based on a rate of \$666.93 a week from September 22, 2009 until October 5, 2009.

The issues for resolution by hearing are whether Claimant sustained an injury arising out of and in the course of employment on or about September 15, 2009; whether Claimant's accident was the prevailing factor in causing both the medical condition and disability; liability of Employer for past medical benefits of \$16,543.00; and whether Employer is liable for past TTD benefits.

SUMMARY OF EVIDENCE

Claimant has worked for Employer as a Teamster driving a cement truck since 1996. Ninety percent of his job as a concrete truck driver requires the use of both hands. He is required to throw chutes which weigh approximately 30 pounds over his shoulder. The chutes can weigh more if there is a heavy concrete build up.

On June 1, 2009, Claimant testified he fell off of a bicycle in his yard at home and landed on his right side.¹ Claimant took a couple of days off work after his bicycle accident for

¹ In his recorded statement to Insurer, Claimant stated he was riding his bicycle down the road and "had an accident, went off the bike."

his shoulder to recuperate. On June 3, 2009 Claimant went to St. Anthony's Urgent Care where x-rays taken were negative.

Claimant then went to a chiropractor on June 5, 2009. Claimant stated he hurt his right shoulder trying to protect his motorcycle when it fell over the previous weekend. He reported landing on his right arm and shoulder with intense pain starting immediately after the injury, and the symptoms were aggravated by lifting, sleeping, reaching, twisting, movement, and household chores. His chiropractic examination was positive for supraspinatus press test on the right and he was diagnosed with a rotator cuff strain. Claimant returned to the chiropractor on June 8, 2009. His pain was at 7 out of 10. His right shoulder region at the anterior shoulder area, specifically the deltoid, had severe restricted movement. On June 24, 2009, the chiropractic records reflect Claimant's symptoms were still aggravated by reaching and movement. Claimant testified after one visit to the chiropractor he was fine, and he returned to work, was able to do his job, and never had any problems performing any of his duties for three and one-half months after his bicycle injury. However, during that time frame, Claimant took some vacation days to let his shoulder rest.

Claimant went to his family physician on September 8, 2009, where he gave a history of continued right shoulder pain and weakness following a fall from a bike in June 2009 onto the right shoulder. Claimant indicated pain and decrease in function had returned since he stopped chiropractic treatment. He had complaints of difficulty lifting anything and when reaching back. Objective findings on examination included trouble raising the arm more than 5 to 10 degrees above the shoulder, and painful and weaker with attempts to lift or push upward against resistance. Under "Reason for Visit" it states "patient thinks his right rotator cuff is torn because he is having so much trouble when he lifts his arm". A right shoulder MRI was ordered.

Claimant denied telling his family doctor that he thought his rotator cuff was torn, and his pain and decrease in function had returned since stopping chiropractic treatment. He testified although he didn't want to have an MRI, the nurse practitioner told him to say those things so the MRI would be approved. He testified he was advised by the nurse practitioner he would be unable to obtain an MRI if he did not say those things. Claimant testified the nurse practitioner ordered the MRI, and it was scheduled for September 16, 2009.

On September 15, 2009 Claimant was working for Employer when he exited his truck, and while walking into the plant, he fell and hit his right side including his right arm and shoulder, on a concrete slab. After he fell he felt massive pain throughout his right side and it took him a few minutes to get up. He could move his shoulder, but it was stiff and tender. He got up and worked his way into the plant and tried to do his work. He was in pain but he returned to work the next day.

On September 16, 2009 Claimant kept his appointment for his previously scheduled MRI. The MRI showed a moderate sized complete rotator cuff tear involving the entire supraspinatus tendon and superior fibers of the subscapularis tendon with significant supraspinatus tendon retraction.

Following his September 15, 2009 accident his pain continued to progress throughout the week, and by the end of the week his shoulder became excessively stiffer. Claimant did not miss

any time from work after the September 15 fall because of pain or problems with his right arm or shoulder.

On September 22, 2009 Claimant had another accident when he stepped out of the cab of his truck, and he lost strength in his right arm, and fell hitting his right shoulder on the ground. After the second work accident Claimant was unable to move his arm anymore.

Dr. Fagan performed surgery on December 23, 2009. The post-operative diagnosis was right rotator cuff tear, acromioclavicular arthritis, and subluxation of biceps tendon of the right shoulder. Claimant had physical therapy after his surgery and was off work three and one-half months.

Dr. Fagan prepared a medical report dated April 16, 2010, in which he opined the fall out of his truck is what caused Claimant to tear his rotator cuff. In a subsequent report of July 7, 2011, Dr. Fagan changed his medical opinion. Dr. Fagan stated Claimant told him about a bike accident he had approximately four months before the injury, but he had nothing in his records regarding a trip and fall on September 15, 2009. Dr. Fagan stated that on the history form Claimant filled out he put the date of injury as September 22, 2009. Because the MRI scan was dated September 16, 2009, obviously the fall from the truck did not cause the injury that was found on the MRI scan and at the time of surgery. He stated that it is possible the September 15, 2009 accident caused the injury, but he did not have enough information to say within a degree of medical certainty.

Dr. Fagan testified on behalf of Claimant. Dr. Fagan testified the cause of Claimant's injuries to his right shoulder was most likely the fall at work on September 15. Dr. Fagan testified he thought the work accident caused the injury because he did not think it would have been possible for Claimant to drive a truck at work during the time that transpired between the bicycle accident and the MRI. Dr. Fagan believed the bicycle accident in Claimant's driveway to be minor.

Dr. Fagan was unaware the MRI was ordered on September 8, 2009. He had never reviewed the records from Claimant's primary care physician. On cross-examination when presented with Claimant's subjective and objective findings on September 8, 2009 at his family doctor, Dr. Fagan testified the findings were not inconsistent with a rotator cuff tear and could represent a tear. Dr. Fagan testified he had relied on Claimant's statements that he was not having any problems with his right shoulder until he fell on the cement slab, but based upon the records from Claimant's family doctor, Dr. Fagan testified he wouldn't believe Claimant wasn't having any problems; otherwise he wouldn't have had an MRI.

Dr. Wayne testified on behalf of Employer. Dr. Wayne testified the prevailing factor producing the right shoulder pathology and subsequent symptoms was a June 2009 fall from a bicycle. He testified the work accidents of September 15 and 22, 2009 were not the prevailing factors in causing Claimant's need for surgery for his shoulder. Dr. Wayne testified within a reasonable degree of certainty that Claimant does not have a permanent partial disability as a result of his work accidents. In arriving at his opinion, Dr. Wayne testified Claimant's prior history, particularly the findings of the Nurse Practitioner were classical signs and symptoms of a rotator cuff tear, and that is why the MRI was ordered.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law I find:

Claimant failed to meet his burden of proving that the work accidents of September 15 and/or 22, 2009 were the prevailing factors in causing his rotator cuff tear injury that necessitated surgery. I find the opinion of Dr. Wayne to be more credible than Dr. Fagan's.

Dr. Fagan relied upon Claimant's statements that he had no problems following his bike accident until he fell at work upon the cement slab. Claimant's testimony is refuted by the medical records. In addition, Dr. Fagan stated it is possible the September 15, 2009 accident caused the injury, but he did not have enough information to say within a reasonable degree of medical certainty, although he testified the cause of Claimant's right shoulder injury was most likely the fall at work. Dr. Fagan testified the September 22, 2009 accident obviously did not cause Claimant's injury.

Unlike Dr. Fagan, Dr. Wayne reviewed all of the treatment records including the Urgent Care x-ray report, the Chiropractic records, and Claimant's family doctor before rendering his opinion. The medical records from Claimant's chiropractor and family physician support Dr. Wayne's medical opinion.

I do not find Claimant to be credible. I do not believe his testimony that the nurse practitioner told him to say he suspected he had torn his rotator cuff or insurance would not authorize an MRI. I also do not believe his testimony that he had one visit to the chiropractor and then his shoulder was fine. The medical records simply do not corroborate his testimony. In addition, Claimant gave inconsistent histories of the bicycle accident.

Because I find Claimant's falls at work were not the prevailing factors in causing his medical condition and disability, the remaining issues are moot, and the Claim for Compensation is denied.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation