

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

Injury No.: 04-053735

Employee: Thomas McDonald
Employer: Buckhorn Rubber Products, Inc.
Insurer: Self-Insured
Date of Accident: On or about May 6, 2004
Place and County of Accident: Hannibal, 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 December 28, 2006. The award and decision of Administrative Law Judge Ronald F. Harris, issued December 28, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms 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.

Given at Jefferson City, State of Missouri, this 22nd day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Thomas McDonald

Injury No. 04-053735

Dependents:
Employer: Buckhorn Rubber Products, Inc.
Additional Party:
Insurer: Self-insured
Hearing Date: November 15, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: RFH/cs

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: On or about May 6, 2004.
5. State location where accident occurred or occupational disease was contracted: Hannibal, 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? Self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Repetitious lifting of heavy items.
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: Both elbows.
14. Nature and extent of any permanent disability: 5% ppd of each elbow.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$2,115.00.
17. Value necessary medical aid not furnished by employer/insurer? \$4,599.00.
18. Employee's average weekly wages: \$476.45
19. Weekly compensation rate: \$317.63 per week for all benefits.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: \$6,670.23 (210 x 5% x \$317.63 x 2)
Unpaid medical expenses: \$4,554.00 Advance Physical Therapy

\$45.00 Hannibal Clinic

TOTAL: \$11,269.23

23. Future requirements awarded: None.

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:

Vicki Dempsey

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Thomas McDonald

Injury No: 04-053735

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Buckhorn Rubber Products, Inc.

Additional Party

Insurer: Self-insured

Checked by: RFH/cs

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on November 15, 2006. Attorney Vicki Dempsey represented Thomas McDonald (Claimant). Buckhorn Rubber Products, Inc. (Self-insured Employer) was represented by Attorney Vicky Anthony. The parties entered into certain stipulations and agreements as to the contested issues and evidence to be presented at the hearing.

At the start of the hearing, the parties identified the following as the only contested/disputed issues for disposition in this case:

1. Nature and extent of permanent partial disability (PPD)
2. Responsibility for unpaid medical bills to Advance Physical Therapy in the amount of \$4554.00 and to Hannibal Clinic in the amount of \$45.00
3. Whether Claimant is entitled to temporary total disability (TTD) benefits.

Claimant offered Exhibits A-1, A-2, B, C, D, E, F, G, H, and I and all were admitted into evidence. Employer/Insurer offered Exhibits 1 and 2, which were admitted into evidence (Exhibit 2 was admitted over objection).

Employer/Insurer also offered Exhibit 3, purported to be a copy of Claimant's attendance record from his personnel file. Claimant objected to admission of Exhibit 3 on the grounds that Claimant had previously requested, through counsel, his personnel file and had not seen or been provided with a copy of the document identified as Employer/Insurer Exhibit 3 prior to the hearing. Counsel for Employer/Insurer responded that she was not aware the document existed until ten (10) minutes prior to the start of the hearing. Ruling on the objection was taken under advisement.

A discourse on employment law would go beyond the scope of this award. Since Exhibit 3 has some relevance with respect to the reason for Claimant's separation from employment which in turn has limited relevance to the claim for TTD benefits, the objection is overruled and Employer/Insurer Exhibit 3 is admitted into evidence.

Any objections not specifically addressed in this award are overruled.

FINDINGS OF FACT AND RULINGS OF LAW

Only testimony necessary to support this award will be reviewed and summarized.

Claimant began working for the employer in early September 2003. Following an initial training period Claimant transferred to the waterworks department where he worked the third shift from 11:00 p.m. to 7:00 a.m. working anywhere from 44 to 48 hours a week. Claimant's job in the waterworks department involved moving cast iron plugs weighing generally 40 to 50 pounds each with a nightly target of moving 65 to 70 such plugs. Claimant testified that he generally met that target.

Claimant's hands and arms began bothering him and he testified he reported that to the night supervisor and a report was written up but the employer did not offer to send him to a doctor. Claimant sought treatment on his own and went to Dr. Leslie McCoy at the Hannibal Clinic. Dr. McCoy prescribed bilateral wrist braces for Claimant to wear at work but otherwise placed no restrictions on his work activity (Employer/Insurer Exhibit 2).

Claimant testified that he wore the wrist braces at work but continued to have problems. Claimant testified that he again reported that to the night supervisor but got no response. On May 6, 2004, Claimant saw Dr. Evans at the Hannibal Clinic. Following an examination, Dr. Evans suspected bilateral carpal tunnel syndrome and recommended nerve conduction studies (Claimant's Exhibit D).

Claimant testified that he was on light duty but was not able to operate the machine. According to the Claimant the employer told him not to come back until he could do his job. Claimant did not call or check in at work for several days after that. Claimant learned that his employment had been terminated June 4, 2004, after what the employer noted were three consecutive days of unknown or unexplained absences.

Employer sent Claimant to see Dr. Evan Crandall on February 16, 2005 for an examination. Nerve conduction studies were performed and interpreted as being normal, therefore ruling out carpal tunnel syndrome. Dr. Crandall essentially found nothing wrong with Claimant and rendered no diagnosis but did advise Claimant to do good stretching exercises and that he could take anti-inflammatory medication as needed.

Claimant then went back to Dr. McCoy on April 27, 2005. Dr. McCoy noted a positive Phalen's sign on both sides with tingling into the left elbow. The doctor felt claimant's problems were due to overuse syndrome and recommended therapy at Advance Physical Therapy. Claimant began therapy the next day and continued through June 22, 2005. An initial summary from Advance Physical Therapy on April 28, 2005, indicates positive for tennis elbow and golfer's elbow positive bilaterally. The records as well as Claimant's testimony indicate the therapy did help with his problems and that the therapist showed him some exercises to do at home which he continues to do.

Claimant did not work anywhere after his separation from employment with the employer in early June 2004 until the middle of September 2005, other than periodically cutting some grass with a riding lawn mower. Claimant testified he continues to have pain in his elbows and popping from time to time.

Jennifer Herron testified on behalf of the employer. Ms. Herron testified that she is the Human Resources Manager for the employer and has been employed with the employer since 1999. Ms. Herron testified that the employer has a back safety and ergonomics program to try to prevent workplace injuries. That program includes such things as how to stand, lift, when to use hoists, and stretching exercises.

Ms. Herron explained that the employer's policy requires employees to use a hoist to lift anything over 40 pounds but acknowledged there would be times when a hoist was not available and an employee might have to lift over 40 pounds. Ms. Herron went on to testify that parts could weigh anywhere from several ounces to over 1,000 pounds and that the parts were not marked as to weight.

Dr. Jerome Levy evaluated Claimant on November 18, 2005 (Claimant's Exhibit B), and was deposed on January 10, 2006 and again on August 22, 2006 (Claimant's Exhibits A-1 and A-2). Dr. Levy noted slight discomfort on motion of both elbows as well as tenderness on both sides of both elbows. Dr. Levy diagnosed Claimant as having medial and lateral epicondylitis (sometimes referred to as "tennis elbow"), both elbows as well as chronic strain of both elbows and assessed a 20% permanent partial disability of each elbow.

Employer/Insurer then provided Dr. Levy's report and the physical therapy records to Dr. Crandall and asked for his opinion in light of those documents. In a report dated August 15, 2006, the doctor again reiterated his opinion that Claimant did not have tendonitis or epicondylitis at the time he saw Claimant the one time on February 17, 2005. Dr. Crandall then went on to opine that if Claimant had developed a problem prior to seeing Dr. Levy since he had not been working for the employer it would have to be related to other activity such as a new job (the record shows the Claimant had not worked anywhere during the time in question), sports, home building or recreational activities (the record does not reflect why the doctor chose to list these specific possibilities). (Employer/Insurer Exhibit 1).

In an additional report dated September 6, 2006, Dr. Crandall also opined that the physical therapy was unnecessary based upon his evaluation of the Claimant in February 2005. He went on in that report to say the Claimant alleged tendonitis or carpal tunnel syndrome but did not have those problems and it was not related to or caused by his work at Buckhorn (Employer/Insurer Exhibit 1).

During cross-examination at his deposition taken October 24, 2006, Dr. Crandall acknowledged he was familiar with the type of work Claimant performed for the employer and that it would be possible to develop tendonitis or epicondylitis from that type of work (Employer/Insurer Exhibit 1 p. 25). The doctor also stated that he was familiar with Advance Physical Therapy; had referred patients to them and that their treatment plan would be routine if there had been a corresponding diagnosis (Employer/Insurer Exhibit 1 pgs. 26-30). Dr. Crandall also admitted that if Claimant had not worked anywhere else between his leaving this employer and the time he completed physical therapy (which the record reflects is the case) it could have been possible for an untreated condition to be related back to the employer but he did not believe that was the case here because he found no such diagnosis (Employer/Insurer Exhibit p. 41-42).

In the post-hearing memoranda filed by the parties there are references to such things as occupational disease and causation as though they were issues to be addressed in the award. The only issues raised at the hearing as being contested or disputed were those set out and numbered 1 through 3 in the "Preliminaries" section of this award. Neither occupational disease nor causation were identified as contested issues and therefore are deemed not to be in dispute and will not be addressed in this award. The scope of the award is confined to the issues stipulated by the parties at the hearing as being contested. *Boyer v. National Express Company*, 49 S.W.3d 700 (Mo. App. 2001).

Nature and extent of Permanent Partial Disability

As noted earlier Dr. Levy opined Claimant had sustained a 20% permanent partial disability of each elbow. The doctor also felt it appropriate to apply a loading factor because both elbows were involved.

Dr. Crandall opined Claimant had no permanent disability. However, Dr. Crandall's opinion is premised upon his conclusion that Claimant did not experience a work-related injury or occupational disease. Since that is not a justiciable issue for the reasons set out earlier in this award, Dr. Crandall's opinion necessarily must be discounted and is entitled to less weight than Dr. Levy's opinion.

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983). Claimant testified that he does still continue to have problems with pain and popping in both elbows although the home exercises the therapist taught him do help make the pain manageable. I find the Claimant has suffered a 5% permanent partial disability of each elbow at the 210 week level. However, the disability is not of such seriousness as to warrant applying a loading factor.

Responsibility for Advance Physical Therapy and Hannibal Clinic bills

Under Missouri Workers' Compensation Law, the Employer/Insurer has the right to direct medical care. However, where an employer has notice of an accident or illness and fails to provide medical care, the employer will be responsible for medical bills if they are incurred for treatment related to the accident/illness and if those bills are fair and reasonable. *Emert v. Ford Motor Co.*, 863 S.W.2d 629 (Mo. App. 1993).

Claimant testified he informed the employer of his problems but was not sent to a doctor until he was sent to Dr. Crandall in February 2005. Prior to that time Claimant sought medical attention on his own and had been wearing wrist

braces at work, per Dr. McCoy's note dated November 19, 2003 (Employer/Insurer Exhibit 2) for several months; again advised employer he was having problems but again was not sent to a doctor.

Dr. Crandall disputed the need for the physical therapy but did so on the basis of concluding the Claimant's problems had nothing to do with his employment at Buckhorn. As noted earlier in this award, that was not a contested issue and therefore renders Dr. Crandall's opinion of limited value. However, it is important that Dr. Crandall did note that the exercises Claimant was doing at Advance Physical Therapy were the type of things he would recommend (Employer/Insurer Exhibit 1 p.36); and that the treatment plan would have been appropriate had there been a corresponding diagnosis (Employer/Insurer Exhibit 1 pgs. 26-30). In fact there was a diagnosis by Dr. McCoy (although Dr. Crandall took exception to Dr. McCoy's terminology of "Overuse Syndrome").

The records from Advance Physical Therapy as well as Claimant's own testimony clearly indicate the therapy helped to relieve Claimant of some of the problems he was having as well as helping him learn how to deal with the pain. Dr. Levy testified that the Advance Physical Therapy bills and the Hannibal Clinic bills were reasonable, necessary and customary charges for the treatment rendered. The Employer/Insurer are responsible for and are ordered to pay Claimant \$4554.00 for the Advance Physical Therapy bill and \$45.00 for the Hannibal Clinic bill (NOTE: Claimant's Exhibit H shows Hannibal Clinic bills of \$119.00 and \$45.00. The parties agreed at the hearing that Employer had paid the \$119.00 bill and Claimant was only seeking payment for the \$45.00 bill).

Whether Claimant is entitled to TTD benefits

While it is true the Employer had been put on notice of Claimant's complaints and was aware that he was wearing wrist braces at work, there was no medical documentation limiting or restricting Claimant's work activities other than to say he was to wear the braces.

Claimant's testimony on this matter was confusing and contradictory. He stated that the doctor put him on light duty but clearly there is nothing in the record to support that contention. Claimant's testimony appeared to say that he wore the braces only a few days before being fired for not being able to do the work. However, a review of the record shows he started wearing the braces in November 2003 but his employment didn't end until June 2004.

Claimant has failed to meet his burden of proof that he is entitled to be paid temporary total disability benefits. Consequently, the claim for TTD benefits is denied.

CONCLUSION

In summary, Employer/Insurer is ordered to pay Claimant \$6,670.23 for PPD (210 x 5% x \$317.63 x 2-to account for both elbows). Employer/Insurer is also ordered to pay Claimant \$4599.00 (\$4554.00 for the Advance Physical Therapy bill and \$45.00 for the Hannibal Clinic bill). Claimant's claim for temporary total disability benefits is denied. Claimant's attorney is entitled to a 25% lien.

Date: December 28, 2006

Made by: /s/Ronald F. Harris

RONALD F. HARRIS

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret

Patricia "Pat" Secret, *Director*

Division of Workers' Compensation