

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

Injury No.: 04-078278

Employee: Michael McDonald

Employer: Ever Ready Electric & Service

Insurer: Westport Insurance Corporation
(TPA: Gallagher Bassett Services)

Date of Accident: Alleged June 10, 2004

Place and County of Accident: Alleged Doniphan, Ripley 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, read the briefs, 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 February 27, 2008, as supplemented herein.

The administrative law judge concluded that employee failed to satisfy his burden of proof on the issues of accident and medical causation and denied his claim for compensation. Employee filed a timely Application for Review with the Commission alleging that the administrative law judge erred in finding that employee did not meet his burden of proof on the issues of accident and medical causation; and the award is not supported by competent and substantial evidence. We disagree and affirm the award of the administrative law judge.

However, the Commission must address an error in the administrative law judge's award. In the Findings of Fact section of the award, the administrative law judge stated:

Although the employer's material and labor records indicate that the employee worked on June 10 and June 11, the records indicate that his stepson, Clayton Cobb, did not work with the employee on June 11, 2004 (Employer-Insurer Exhibits 7, 8 & 9).

We find that the evidence shows that Clayton Cobb worked on June 11, 2004. Therefore, Clayton Cobb could have witnessed employee's allegation that on June 11, 2004, at lunch time, employee laid down on the concrete on the flat of his back to alleviate his pain. Accordingly, we modify the February 27, 2008 award to correct the error and find that Clayton Cobb worked on June 11, 2004.

The Commission agrees with the ultimate conclusion reached by the administrative law judge that employee failed to meet his burden of proof on the issues of accident and medical causation. Therefore employee's

claim for compensation is denied.

The award and decision of Administrative Law Judge Carl Strange, issued February 27, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Michael McDonald

Injury No. 04-078278

Dependents: N/A

Employer: Ever Ready Electric & Service

Additional Party: N/A

Insurer: Westport Insurance Corporation
(TPA: Gallagher Bassett Services)

Hearing Date: December 13, 2007

Checked by: CS/kh

SUMMARY OF FINDINGS

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? Alleged June 10, 2004
5. State location where accident occurred or occupational disease contracted: Doniphan, Ripley County, 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? 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? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: EE alleged that he was installing furnaces in a small closet when he felt a twinge in his left shoulder and neck.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Alleged Neck
14. Nature and extent of any permanent disability: Claim Denied
15. Compensation paid to date for temporary total disability: \$0.00
16. Value necessary medical aid paid to date by employer-insurer: \$0.00
17. Value necessary medical aid not furnished by employer-insurer: Claim Denied
18. Employee's average weekly wage: \$563.50
19. Weekly compensation rate:
 \$375.67 for temporary total disability
 \$347.05 for permanent partial disability
20. Method wages computation: By Agreement
21. Amount of compensation payable: Claim denied
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None

FINDINGS OF FACT AND RULINGS OF LAW

On December 13, 2007, the employee, Michael McDonald, appeared in person and by his attorneys, Jay R.

Yorke and Michael A. Moroni, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, John R. Fox. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about June 10, 2004, Ever Ready Electric & Service was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Westport Insurance Corporation with a third party administrator of Gallagher Bassett Services.
2. On or about June 10, 2004, the employee was an employee of Ever Ready Electric & Service and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage was \$563.50, his rate for temporary total disability is \$375.67, and his rate for permanent partial disability is \$347.05.
5. The employer has furnished \$0.00 medical aid to employee.
6. The employer has paid no temporary total disability benefits.

ISSUES:

1. Accident
2. Notice
3. Medical Causation
4. Previously Incurred Medical Aid
5. Nature and Extent of Disability

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical Records of Dr. Blair;
- B. Medical Records of Dexter Hospital;
- C. Medical Records of Dr. Alan Chen;
- D. Medical Records of Dr. Riyadh J. Tellow;
- E. Medical Records of St. Francis Medical Center;
- F. Medical Records of Cape Neurosurgical Associates;
- G. Medical Records of Dexter Hospital;
- H. Deposition of Dr. Jerome Levy; and
- I. Medical Bill Summary and Medical Bills.

Employer-Insurer's Exhibits

1. Report of Injury;
2. Claim for Compensation;
3. Employer's Policy Manual;
4. Employee's Acknowledgement of Receipt of Policy Manual;
5. Medical Records of Employee;
6. Deposition of Dr. Kitchens;
7. Material and Labor Record of June 10, 2004;

8. Material and Labor Record of June 10, 2004; and
9. Material and Labor Record of June 11, 2004.

FINDINGS OF FACT:

Based on the testimony of Michael McDonald (“employee”) and the medical records and reports admitted, I find as follows:

On March 12, 2004, the employee was working for Ever Ready Electric & Service (“employer”) and received a copy of the company’s policies (Employer-Insurer Exhibit 3). On that same date, the employee acknowledged receipt of a copy of the policies (Employer-Insurer Exhibit 4). Section 10 of the company’s policies regarding accidents and injuries states “Reporting should be done as soon as possible” “if it is a minor incident we encourage you to report it to Larry, Paulette, or John Dell, as soon as possible. Failure to report could result in forfeiture of benefits” (Employer-Insurer Exhibit 3, page 2). At the time of the hearing, the employee testified that on June 10, 2004 he was lifting small furnaces into closets and installing them over water heaters. Further, he noted that each furnace weighed 30 pounds and that they installed approximately 10 furnaces on that date. According to his testimony, he leaned back when he lifted a furnace and felt a twinge in his left shoulder and neck. At that time, the employee did not report the incident to the employer, but instead he testified that he told Larry Everett in the break room on June 14 or June 15.

The employee’s first doctor’s visit occurred on June 18, 2004 when the employee went to Dr. Blair. According to Dr. Blair’s records, the employee had “recurrent left neck and shoulder pain usually has about one episode per year over the last few years this time he woke up with it for about 3 days” (Employee Exhibit A, page 1). His next doctor visit occurred on July 20, 2004 with Dr. Alan Chen. According to Dr. Chen’s records, the patient was examined on that date and reported pain in left shoulder with numbness in his arm occurring two months prior that increased last week (Employee Exhibit C, page 2). A CT of the cervical spine revealed “some mild bulging of the annulus” at C6-C7 (Employee Exhibit B, page 3). On July 23, 2004, Dr. Riyadh J. Tellow ordered an MRI of the cervical spine that revealed an “acute large disc fragment herniation at C5-C6 centrally appears to impinge on the spinal cord and existing nerve roots bilaterally at this level” (Employee Exhibit D, page 3). On that same date, the employee was admitted to St. Francis Medical Center (Employee Exhibit E). Dr. David G. Yingling performed an anterior C5-6 discectomy with allograft fusion (Employee Exhibit F, page 3). The employee was discharged from the hospital on July 25, 2004. The following day he was treated at Dexter Hospital for mental instability (Employee Exhibit G).

On August 2, 2004, a report of injury was filed with the Division of Workers’ Compensation indicating that the employee’s date of injury was July 20, 2004 (Employer-Insurer Exhibit 1). It was filled out by Paulette Everett based on information provided to her by the employee. The employee’s claim for compensation dated the following day indicated that June 10, 2004 was the date of the injury (Employer-Insurer Exhibit 2). At the time of the hearing, the employee testified that he remembered the correct date of the injury because it was the same day as his stepson’s birthday. Further, the employee testified that he worked with his stepson on the following day when he laid down on the breezeway in pain. Although the employer’s material and labor records indicate that the employee worked on June 10 and June 11, the records indicate that his stepson, Clayton Cobb, did not work with the employee on June 11, 2004 (Employer-Insurer Exhibits 7, 8 & 9). On September 30, 2004, Dr. Yingling examined the employee and noted that he was essentially asymptomatic. On April 13, 2006, Dr. Jerome Levy examined the employee and opined that the employee suffered a permanent partial disability of thirty percent (30%) of the man as a whole due to his neck as a direct result of the accident of June 10, 2006. Further, Dr. Levy noted that the employee had a pre-existing permanent partial disability of five percent (5%) of the man as a whole due to his neck (Employee Exhibit H, Deposition Exhibit B, page 4). At the time of the hearing, the employee admitted that he had pre-existing problems in his neck and left shoulder due to diving headfirst into a shallow pool at age 14. Since that time, he had had several incidents of muscle spasms and neck problems over the years. On September 7, 2006, Dr. Daniel Kitchens examined the employee and opined “there is no correlation of his work injury and his cervical disc herniation” and the resulting surgery. Further, Dr. Kitchens noted that the employee had a permanent partial disability of seven percent related to his cervical disc herniation and the resultant cervical surgery (Employer-Insurer Exhibit 5, page 8). A summary of the employee’s medical bills has been admitted as Employee Exhibit I.

At the time of the hearing, the employee testified that he has range of motion problems in his neck, pain in his

neck and shoulders, problems sitting and driving for prolonged periods, stiffness in his neck and shoulders, and difficulty holding his head up. Further, he noted that he has not had any medical treatment since Dr. Yingling released him.

APPLICABLE LAW:

The burden is on the employee to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only he sustained an accident that arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A.B. Chance Company*, 503 S.W.2d 697 (Mo.App.1973).

Under the version of Section 287.020.2 RSMo. that was in effect at the time of the employee's accident, the term accident is defined to include only those injuries that are "clearly work related". Under this section an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor".

RULINGS OF LAW:

Issue 1. Accident & Issue 2. Medical Causation

The employee's version of a work related injury to his neck has too many inconsistencies to be credible. First, the testimony of employee and the medical records confirm that the employee had prior symptomatic neck problems. Next, the employee did not report a work related injury when he first went to the doctor on June 18, 2004. In fact, Dr. Blair's records indicated that he woke up with pain in his neck and left shoulder "about 3 days" prior which would be June 15, 2004. When he saw Dr. Chen on July 20, 2004, the employee reported pain in left shoulder with numbness in his arm occurring two months prior that increased last week. This would mean that the pain and numbness started around May 20 of 2004. Finally, the employee gave the employer an injury date of July 20, 2004 on August 2, 2004. On the following day, he provided his attorney with an injury date of June 10, 2004.

Based on these facts and the other evidence, I find that the employee has failed to satisfy his burden of proof on the issues of accident and medical causation. There is not enough credible evidence to support a finding that the lifting incident was a substantial factor in causing the employee's neck injury or his need for neck surgery. The employee's claim for compensation is therefore denied.

Even if the employee met his burden on accident and medical causation, his claim would have been denied on the basis of notice and lack of good cause for failure to give notice. Given the denial of the employee's claim, the remaining issues are moot and shall not be ruled upon.

Date: _____ Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Director
Division of Workers' Compensation

