

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION  
(Reversing Award and Decision of Administrative Law Judge  
with Separate Dissenting Opinion)

Injury No.: 02-096095

Employee: Robert Palmer

Employer: Prime Tanning

Insurer: Self-Insured

Date of Accident: July 29, 2002 (Alleged)

Place and County of Accident: St. Joseph, Buchanan 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 associate administrative law judge (AALJ) is not supported by competent and substantial evidence and was not made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the associate administrative law judge dated October 26, 2004, and awards no compensation in the above-captioned case.

The award and decision of the associate administrative law judge is attached and incorporated by this reference.

This case involves a claimed injury to employee's right knee. Employee claims that the injury occurred at work when he jumped to avoid a large heavy tub. The tub had slid off of a forklift. As the tub was coming at employee, he grabbed a pole to his right and jumped to his left to get out of the way. The tub struck his right heel but did not knock him down. When he landed his knee felt wrong as if someone had struck him in the back of his right knee.

Employee states that his knee was swollen. He showed the swollen knee to his foreman. He sought medical treatment. A MRI was done which suggested a tear of the meniscus. An arthroscopy was recommended and six weeks of lost time benefits were paid. At that point the claim was denied.

At the hearing the foreman testified that he saw the incident. The tub did not strike employee nor did employee make an effort to avoid the tub. Employee did not jump until after the tub had ceased moving. The foreman saw no swelling nor any marks on the leg or knee. No swelling was noted in the emergency room records.

Employee had two previous operative diagnostic procedures to this same right knee. No pathology of significance was noted. Employee did not share this information with the treating physicians. A co-worker testified that employee had complained of his knees bothering him some few days before this incident.

Dr. Hood testified the MRI showed some bone bruising which is inconsistent with employee's history of injury. He was originally unaware of the prior problems. After considering the entire record, Dr. Hood opined that employee's injury is consistent with degenerative changes.

Dr. Sandow, employee's expert, likewise equivocates on his causation opinion when faced with the prior medical records.

The AALJ chose to accept employee's testimony and ordered further medical treatment. We reverse.

This case hinges on the credibility of employee and, of necessity, of the witnesses. Questions of credibility are within the province of the Commission. *Miller v. Penmac Personnel Services, Inc.* 68 S.W.3d 573 (Mo. App. S.D. 2002). We find that the AALJ erred in accepting the testimony of employee.

Not a single witness in this case concurs with the events as described by employee. No one saw the tub strike him. Two witnesses said the tub did not strike him. No one saw him jump. Two witnesses said he did not jump to avoid the tub.

Employee denied prior complaints of pain in the knee. A witness refutes this testimony. Employee did not tell the examining physician of his prior problems to the same knee. Employee says he had swelling in the knee immediately. This is refuted by the lay testimony of the foreman and by the medical records.

Given the total record, we find employee incredible and give his testimony no weight. *Chatmon v. St. Charles County Ambulance District*, 55 S.W.3d 451 (Mo. App. E.D. 2001).

Employee's entire case rested on his credibility. Accordingly, his case must fail. We award no compensation for this alleged incident.

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

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Secretary

DISSENTING OPINION

I must respectfully dissent from the opinion of my fellow Commissioners.

In my opinion the Award of the associate administrative law judge (AALJ) properly evaluates the testimony. The majority has placed more weight on the testimony of the co-employees to the detriment of employee.

The majority points to the testimony of the foreman who stated that the tub did not strike employee. The record shows a consistent history from employee to the foreman immediately after this incident. A written report made by the foreman within minutes of the incident states "empty tub hit Bob's tub. The empty tub caught the back of Bob's boot twisting his leg." Obviously something happened and that something corresponds with employee's testimony.

To expect 100% clarity and recall of movement in a circumstance such as this is unreasonable. It is likewise not reasonable to contend, as does employer, that employee stood stoically while a tub, weighing from 400 to 1400 pounds, came careening toward him.

The foreman says that the runaway tub hit a pole. The forklift driver said he was positive that it did not. The forklift driver testified, "I thought that it (the tub) did hit him, and it possibly could have."

If we are to discount employee's testimony because of what the foreman says, should we not discount the foreman because of the testimony of the forklift driver?

Dr. Hood was asked a hypothetical question on which he based his opinion of no causation between the meniscus injury and the incident.

The hypothetical posited 1) that the witnesses say the tub did not hit employee. This is only partially true in that one witness so testifies and the other does not know. 2) that there was no wetness on employee from the tub. Since this was an empty tub how could we expect wetness? 3) co-workers saw him limping a few days before the incident. There is no such evidence in the record. The hypothetical is fatally flawed and cannot be relied on as the basis for a medical

opinion.

As Dr. Hood stated: if we believe the witnesses, the injury is not related to the incident, but, if we believe employee, the mechanism of injury he described could cause the meniscus injury.

I believe employee and would affirm the AALJ. Employee's testimony, as a whole, is consistent. A liberal construction, giving the benefit to employee, mandates an award in his favor. *Hillyard v. Hutter Oil Company*, 978 S.W 2d 75 (Mo. App. S.D. 1998).

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John J. Hickey, Member

## TEMPORARY AWARD

Employee: Robert Palmer  
Injury No. 02-096095  
Employer: Prime Tanning

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: September 15, 2004 Checked by: RMM

Submitted: September 15, 2004

### 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: July 29, 2002.
5. State location where accident occurred or occupational disease contracted: Buchanan 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? 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 happened or occupational disease contracted:  
Employee was soaking cow hides.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Parts of body injured by accident or occupational disease: Right knee.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary disability and temporary partial disability:  
\$2,198.36
16. Value necessary medical aid paid to date by employer/insurer? \$1,916.64
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages:
19. Weekly compensation rate: \$338.01 / \$338.01
20. Method wages computation: By Stipulation.

#### COMPENSATION PAYABLE

21. Amount of compensation payable: None

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from employer beginning  
for claimant's lifetime.

Said payments to begin July 29, 2002 and to be payable and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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: Leah Burkhead.

The employer and insurer are hereby ordered and directed to provide claimant with such medical treatment including, but not limited to, surgery, as is reasonable and necessary to cure and relieve the injury to his right knee.

#### FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Palmer

Injury No. 02-096095

Employer: Prime Tanning

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: September 15, 2004 Checked by: RMM

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As stipulated by the parties, the issues to be decided are:

1. Accident;
2. Liability for medical treatment.

## FACTS

The employee, Robert Palmer, was employed for two months at the time of the alleged accident on July 29, 2002. A fellow employee was driving a forklift with a 400-pound tub on it. The tub slid off the forklift toward the employee. The employee tried to get out of the way but was hit on the heel.

The employee was immediately taken to the emergency room. The injury was diagnosed as a knee strain with right medial pain. On August 2, 2002, Dr. Fretz mentions a prior exam with "effusion". He orders an MRI, which shows a torn medial meniscus.

The employee testified to prior problems with his right knee. He stated he had two previous surgeries. The medical records indicate the surgeries were only diagnostic in nature. Both times the knee was found to be normal. (Exhibits A and 5).

Two MRI's performed prior to the employee working for Prime Tanning did not show a torn meniscus.

The employee complained about bilateral knee problems prior to the date of accident. He said this was due to placing his knees on the tub rim as he worked.

## CONCLUSIONS

On July 29, 2002, the employee was involved in an accident arising out of and in the course of his employment. The tub slid 45 feet towards the employee. The co-worker shouted out a warning. The employee had an immediate onset of pain and swelling. The employer took the employee to the emergency room and referred him to Dr. Fretz. An injury was diagnosed by both medical providers.

The employer argued that the employee was not struck by the tub nor did he make any movements that would cause an injury.

The first argument is there were no marks on the employee's rubber boots. This is a spurious issue. There is no evidence that rubber boots should have marks or what kind of marks after being struck by a non-sharp object.

Second, they argued the contents of the tub did not splash onto the employee, thereby demonstrating he was not struck. The testimony of the employee, not refuted by the employer, was that the work of pulling hides out of the tub constantly soaked his clothes. So how was one to know if the sliding tub splashed liquid on the employee?

Mr. Martinez, the forklift driver, testified the tub did not hit the employee. On cross-examination, he was confused as to whether the employee was hit. On page 14 of Exhibit 7, he states, "I don't know."

I find the employee to be a credible witness. He states he tried to jump out of the way but was struck. He also states everything happened so fast it's hard to describe exactly what happened, which I agree with.

Since the accident is found to be compensable, the question arises whether or not the employee needs treatment for the injuries sustained.

The employer points to the weight of the evidence involving previous problems with the knee. Dr. Sandow agrees that a lot of the employee's complaints are similar to the complaints that the employee had in the past. Dr. Hood is given a hypothetical question which he answers by saying the accident did not cause the employee's current injuries. It is noted that the hypothesized question includes facts not proven at trial. For example, there is no proof of prior limping. On cross-examination, Dr. Hood said the bone bruising could have been related to the accident.

The key to the issue therefore is the MRI ordered by Dr. Fritz just a few days after the accident. The MRI showed a torn meniscus. There is no evidence that the employee had a torn meniscus prior to July 29, 2002.

I hold that the employer/insurer are to supply all necessary and reasonable medical treatment to cure and relieve the employee's injuries to his right knee. Further, they are to provide other benefits under RSMO Chapter 287 as they come due.

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: Leah Burkhead.

Dated:10/26/04

Made by: /s/ R. Michael Mason

R. Michael Mason  
Associate Administrative Law Judge  
Div. of Workers' Compensation

A true copy: Attest:

/s/ Gary Estenson

Gary Estenson  
*Acting Director,*  
*Division of Workers' Compensation*