

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

Injury No.: 11-096467

Employee: Jesus Pintor
Employer: Steak 'n Shake
Insurer: American Zurich Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find 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, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Clerical error

In the first paragraph on page 3 of his award, the administrative law judge states: "The evidence compels an award for the claimant for medical expenses, future medical care, temporary total disability benefits, and costs." These issues were not identified by the parties as in dispute at the hearing before the administrative law judge, and in the body of the award, the administrative law judge does not address any of these issues, or award any compensation other than permanent partial disability benefits. It thus appears that the above-quoted statement is merely a clerical error. We hereby delete the above-quoted statement from the award.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued February 15, 2013, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 7th 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: Jesus Pintor Injury No.: 11-096467
Dependents: N/A Before the
Employer: Steak n Shake **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: American Zurich Insurance Company Jefferson City, Missouri
Hearing Date: January 24, 2013 Checked by: EJK/lsn

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: November 26, 2011
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 occurred or occupational disease contracted:
The claimant, a fast food restaurant cook, suffered a closed head injury, cervical sprain, and lumbar strain when he slipped and fell on a plastic lid on the floor.
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: Head, neck, low back
14. Nature and extent of any permanent disability: 10% permanent partial disability to the body as a whole
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: \$3,453.94

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$272.82
- 19. Weekly compensation rate: \$181.88
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - 40 weeks of permanent partial disability from Employer \$7,275.20
- 22. Second Injury Fund liability: No
- TOTAL: \$7,275.20
- 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: Daniel J. Harlan, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jesus Pintor	Injury No.: 11-096467
Dependents:	N/A	Before the
Employer:	Steak n Shake	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	American Zurich Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a fast food restaurant cook, suffered a closed head injury, cervical sprain, and lumbar strain when he slipped and fell on a plastic lid on the floor. The issues for determination are (1) Permanent disability, and (2) Refusal to submit to additional medical care. The evidence compels an award for the claimant for medical expenses, future medical care, temporary total disability benefits, and costs.

At the hearing, the claimant testified in person and offered a deposition of Shawn L. Berkin, D.O., and medical records from Progress West Healthcare Center. The defense offered a medical report from Russell C. Cantrell, M.D., and medical records from Bertha A. Mera, M.D.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On November 26, 2011, the claimant, a fast food restaurant cook, suffered a closed head injury, cervical sprain, and lumbar strain when he slipped and fell on a plastic lid on the floor. He testified that he walked to the freezer to obtain a case of french fries and was returning to his work station when he was injured. The claimant stepped on a clear plastic lid lying on the floor and his feet went out from underneath him and he fell backwards striking the back of his skull against a metal shelf and landing flat on his back. The claimant was unconscious for a minute or two following the injury.

The claimant went to St. Luke's Urgent Care and after giving a history of a back and head injury with loss of consciousness, nausea and seeing spots, he was referred to Progress West Hospital. X-rays and other diagnostic testing at the hospital were negative, and he was diagnosed with a closed head injury and a back injury. He received a prescription for physical therapy and for Naprosyn for pain. He went to Barnes Care for physical therapy on November 30, December 7, December 14, and December 21, 2011. He was released and was advised that if further

physical therapy would be beneficial, Barnes Care would provide the physical therapy. The claimant elected not to receive further physical therapy.

The claimant testified the physical therapy did not improve his condition. He took over-the-counter pain relief medications, which did not relieve his pain. The claimant complained of a constant headache, stars in his eyes from the head injury, pain on both sides of his neck down into his shoulder blades and pain in his low back below the belt line on the left side.

The claimant worked full time for Hummert International performing manual labor placing soil in pots. The claimant did not tell his full-time employer that he was injured at his part time job, because he feared it might jeopardize his full-time job. The claimant testified that he lost several days of work following the injury. The claimant testified he was contacted by his prior employer, Baker Pool and Spa who offered him a position to return to work in 2012, but he refused. This work involved a great deal of bending, hard physical labor, and a work day which could last 14 hours.

The claimant testified at the hearing he had daily headaches in the back of his head where he struck the metal shelf. The claimant acknowledged that before this accident that he had headaches. In 2006, he had a CT scan of his brain which was negative.

The claimant testified he had migraine headaches with pain in the temples and the front of his head, but no pain at the back of his head. The claimant also testified at the hearing of pain in his neck causing difficulty sleeping at night because he could not get comfortable. Finally, the employee testified of low back pain on the left below the belt line. He experienced pain on a daily basis, but it bothered him more when he did a lot of bending and heavy labor. His testimony at the hearing and in his deposition was that he had not injured his head, neck or back before the injury of November 26, 2011.

Dr. Berkin

On August 15, 2012, Dr. Berkin examined the claimant and diagnosed a closed head injury, cervical strain, and lumbosacral strain. At that time, the claimant reported pain and tenderness in the lower back, aggravated by bending and lifting, and the claimant also reported difficulty sleeping at night because of the pain. The list of complaints did not include any description of problems with the head, neck, or upper back. The claimant denied any prior injuries to Dr. Berkin. With regard to the neck, clinical examination revealed full range of motion, a normal cervical curve, and only tenderness to palpation. With regard to the low back, there was some restriction of motion and tenderness to palpation. The assessment was a closed head injury, a cervical strain, and a lumbosacral strain. Dr. Berkin related these diagnoses to the injury occurring at work and rated the claimant's disability to the low back at 15% permanent partial disability to the low back and a 12 ½% permanent partial disability to the neck. See Exhibit B.

Dr. Cantrell

On November 28, 2012, Dr. Cantrell examined the claimant. See Exhibit 1. At that time the claimant presented with complaints of neck pain, parascapular pain and low back pain. Dr.

Cantrell found no tenderness of the cervical or thoracic spine areas, and range of motion of the neck was full. Examination of the low back revealed tenderness to palpation. Dr. Cantrell opined that there was no evidence of any permanent disability relating to the cervical spine or to the head. He opined that as a result of the November 26, 2011 accident, the claimant had sustained a possible mild concussion, a cervical strain, and a lumbosacral strain. He opined that the claimant had achieved maximum medical improvement relative to the concussion and the cervical strain. He did not find any disability associated with either of those conditions. He reported that prior doctors had not found any abnormalities during clinical examination of the cervical spine, post accident, and some records did not contain complaints of neck pain. Dr. Cantrell recommended additional physical therapy treatment for the claimant of 2 visits per week for 3 weeks. Dr. Cantrell opined that if the claimant did not receive the physical therapy, he rated the claimant's permanent partial disability to the back at 5% of the low back as a result of the accident. See Exhibit 1.

PERMANENT DISABILITY

The permanent nature of an injury must be shown to a reasonable certainty, and such proof cannot rest on mere speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). Disability is deemed "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The claimant has the burden of proving that the work-related injury caused the disability claimed. Rana v. Landstar TLC, 46 S.W.3d 614, 629 (Mo. App. W.D. 2001). When there is evidence of a pre-existing condition, the claimant can show entitlement to permanent disability benefits without any reduction for the pre-existing condition by showing it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id.

In this case, the claimant described daily pain in his low back, upper back, neck, and head, along with visual disturbances. He described difficulty sleeping and difficulty playing with his children. He claimed he had to turn down a higher paying job because of these ongoing complaints.

On the other hand, the claimant missed only two days from his part-time job, and none at all from his full-time. As of the date of hearing he continued to work both jobs in a full duty capacity for a total of 70 hours a week. He was under no restrictions with regard to either job, at any time. He testified he had never had to go home early, ask for special assistance, or take a day off due to his physical complaints. In spite of a long list of physical complaints, he declined the additional medical care which was offered to him on multiple occasions. However, his dedication to his work is also a consideration as well as his evaluation that the physical therapy that he received was not helpful.

Neither Dr. Berkin nor Dr. Cantrell noted any objective finding or study that would corroborate the claimant's claims of visual disturbances related to this accident. Further, the clinical examinations performed by both doctors for the neck and back were relatively benign, and do not support findings of any fractures or disc injuries. With regard to the job offer from Baker Pool and Spa, the claimant worked for that company previously and left that job due to a lack of work in colder months.

The defense contends that the claimant had a significant history of preexisting disability, but offered no substantial evidence to show the same. For instance, Dr. Cantrell suggested that the claimant had a history of a prior injury on January 13, 2010. Dr. Cantrell speculated “the injury had occurred in November to the back and head and noted the claimant had a CT scan to rule out a subdural hematoma.” Dr. Cantrell was referring to an office note of Dr. Bertha Mera which he believed was dated January 13, 2010, but in fact it was dated January 13, 2012 following the injury at Steak N Shake. The claimant’s testimony and a close inspection of Dr. Mera’s medical records shows that the claimant was treated on January 13, 2012 not January 13, 2010. The claimant’s testimony that he had no prior injuries to his head, neck, and back was un rebutted with substantial evidence.

Moreover, the claimant’s testimony with regard to his medical history has some inconsistencies. Although he initially and specifically denied any prior problems, he later testified that he had prior visual problems and “probably” had prior neck problems and preexisting back problems associated with lifting. On the other hand, the claimant’s age of 44 years suggests that any denial of any and all preexisting back pain would not have been credible.

The defense did not prove with substantial evidence that the claimant the claimant had any pre-existing permanent partial disability. Expert opinion evidence is generally required to prove permanent partial disability. See Section 287.190, RSMo 2000, as amended.

Based on the foregoing, the claimant is awarded a 10% permanent partial disability to the body as a whole.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation