

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

Injury No.: 07-041219

Employee: Aaron Povilat
Employer: Duckwall-ALCO Stores, Incorporated
Insurer: Liberty Mutual Fire Insurance Company

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 August 17, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Gary L. Robbins, issued August 17, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Aaron Povilat Injury No. 07-041219
Dependents: N/A
Employer: Duckwall-ALCO Stores, Incorporated
Additional Party: N/A
Insurer: Liberty Mutual Insurance Company
Hearing Date: June 20, 2011 Checked by: GLR/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No.
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? April 25, 2007.
5. State location where accident occurred or occupational disease contracted: Mississippi 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? No.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee claims he injured his head, right lower extremity and body as a whole as he was trying to prevent a shoplifter from driving off in her car.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Head, right lower extremity and body as a whole.
14. Nature and extent of any permanent disability: Case was denied.
15. Compensation paid to date for temporary total disability: \$0
16. Value necessary medical aid paid to date by employer-insurer: Not disclosed.
17. Value necessary medical aid not furnished by employer-insurer: The employee claimed \$500.00.
18. Employee's average weekly wage: \$195.00
19. Weekly compensation rate: \$130.00 per week for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None.

There are no attorney fees in this case as the employee represented himself at trial.

FINDINGS OF FACT AND RULINGS OF LAW

On June 20, 2011, the employee, Aaron Povilat, appeared in person and served as his own attorney at the hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Kevin M. Johnson. The Court took judicial notice of all records contained within the files of the Division of Workers' Compensation. 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 statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation law and liability was fully insured by Liberty Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Duckwall-ALCO Stores, Incorporated.
3. On or about April 25, 2007 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The parties agreed that the employee's average weekly wage was \$195.00 per week. His rate for all purposes is \$130.00 per week.
6. The amount of medical aid provided by the employer-insurer was not disclosed at trial.
7. The employer-insurer paid \$0 in temporary benefits.
8. The employee has no claim for mileage.
9. The employee has no claim for additional medical care.

ISSUES

1. Statute of Limitations.
2. Medical Causation.
3. Past Medical Bills.
4. Additional Temporary Disability in the amount of \$27,040.00.
5. Permanent Total Disability.
6. Permanent Partial Disability.

Prior to trial the employee was encouraged to obtain counsel to represent him. He declined. Prior to trial the employee was asked if he needed a continuance in order to acquire additional evidence or medical records. He declined. However, at the request of the employee, the trial was delayed approximately 30 minutes to allow him to retrieve records that are identified as Employee's Exhibit C. Those records were admitted into evidence. The employee stated that Employee's Exhibit C contains all of the medical opinions he needs. The employee presented no evidence on the statute of limitations defense that was raised by the employer-insurer.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Various medical records.
- B. DVD of x-rays.
- C. Medical records.

All objections to these exhibits made by the employer-insurer are denied.

Employer-Insurer's Exhibits

None.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Prior to trial, the Court offered to continue the case to allow the employee to consult with or retain counsel. The employee declined. Prior to trial the Court offered to continue the case to allow the employee to gather additional evidence. The employee again declined a continuance from the trial date except to allow a short recess to allow him to obtain some documentation. The employee left the courtroom and returned after a short delay. During trial he presented the documentation that he received in the recess. Those documents were identified as Employee's Exhibit C and received into evidence.

The only witness to testify live at the trial was the employee, Aaron Povilat. He testified he worked for Duckwall-ALCO for only a few weeks before the date of injury of April 25, 2007. At that time, a shoplifter set off security alarms while exiting the store. The employee gave chase to the shoplifter as she entered her car. He testified he had his arm around the shoplifter. The shoplifter placed her car in reverse and dragged employee an indeterminable distance. Employee testified he injured his right ankle and shoulder at this time. He also said that his head struck the concrete.

The employee returned after the incident and continued to work until two days later. At that time, he presented to Missouri Delta Medical Clinic. The emergency room intake relays a history of injury similar to that which employee testified at hearing. Emergency room records relay complaints to the left lower extremity beneath the knee and right wrist as well as the center of the low back. The emergency room doctor gave a clinical impression of a concussion as well as a contusion to the right leg. A CT of the head showed no acute abnormalities and likewise x-rays of the lumbosacral spine, right lower extremity and left hand did not show any signs of fracture, dislocation, or other bony abnormality. The hospital then discharged employee from care.

Mr. Povilat testified he did not work for the next two weeks but then returned to his full duties at Duckwall-ALCO.

The employee next treated on July 17, 2007, at Missouri Delta Medical Center. He treated for a dental abscess and increased blood pressure. No mention is made of any traumatic accident three months earlier.

The employee next treated back at Missouri Delta Medical Clinic on January 26, 2009. Emergency room records list the reason for visit as “syncopal episode, injured wrist, chest pain.” Again, no mention is made as to the employee’s injury which occurred approximately two years prior. At trial, the employee denied any history of syncopal episodes, while the un rebutted emergency room records from January 26, 2009, relay employee’s passing out on the floor while getting out of the shower. Additionally, the same records show employee has had persistent pain in his left side since being injured in a carnival ride the previous summer (2008). The employee received a diagnosis of chest pain and went home.

The employee had additional treatment after his admission for syncopal episode. He presented to the Missouri Delta Medical Clinic Community Care Center on May 13, 2009, with sinus problems. He presented to the same location with a number of symptoms, including allergies, anxiety, and vomiting two months later. The employee underwent an echocardiogram in August of that year due to prolonged chest pain for the past twelve months. This diagnostic test showed decreased activity and other abnormalities indicative of ischemic changes. Additionally, employee had right foot x-rays taken August 6, 2009, well over two years after employee’s date of injury. This was the first right foot x-ray; earlier x-rays were taken of the tibia/fibula. The x-rays showed no abnormalities of the foot. By September 2009, employee asked for a referral to see a neurologist due to continuing headaches; this appears to be the first time which employee related all of his symptoms back to his injury which occurred about two and one-half years prior to this medical visit.

The employee presented medical bills related to treatment he received in September, October and November 2009. None of the treatment related to the emergency room care already provided by the employer-insurer.

Employee’s Exhibit 3 came from Bootheel Counseling Services. Mr. Povilat produced it the day of the hearing after the short recess. The report is in longhand, is signed by a Rosemary Simpson and appears to diagnose the employee with post-traumatic stress disorder, impulse control disorder, and other maladies such as asthma and high cholesterol. The April 25, 2007 accident does not appear to be discussed or even mentioned.

RULINGS OF LAW-

Statute of Limitations

Section 287.430 RSMo. sets out the law regarding the statute of limitations for workers’ compensation cases. In general, a claim must be filed within two years after the date of injury or

death or the last payment of compensation or medical expense paid for the injury or death. But if a report of injury or death is not filed by Section 287.380 RSMo., the claim for compensation may be filed within three years after the date of injury, or last payment.

The records of the Division of Workers' Compensation document that the employee filed his claim for compensation by his then counsel on April 5, 2010 claiming an April 25, 2007 injury. Division records also document that the employer filed a report of injury as of May 15, 2007.

Under Section 287.380 RSMo., the employer has thirty days in which to file a Report of Injury. As mentioned *supra*, the legal file contains documentation that the Missouri Division of Workers' Compensation received employer's notice of injury on May 15, 2007, within the thirty days after the April 25, 2007 date of injury. As such, employer-insurer's Report of Injury is timely.

The Court finds that the employer-insurer complied with the applicable provisions of Section 287.380. This gives the employee a two year statute of limitations to file a Claim for Compensation unless it be shown that some payments were made extending that statutory period. The employee filed his Claim for Compensation on April 5, 2010, almost three years after the date of injury. The employee presented absolutely no evidence concerning the statute of limitations and the timely filing of his Claim for Compensation or any circumstance that would extend the statutory period

A workers' compensation employee has the burden of proving all elements of his claim. **Davidson v. Missouri State Treasurer as Custodian of Second Injury Fund**, 327 S.W.3d 583, 588 (Mo. App. S.D. 2010). Therefore, unless a claim is timely filed, there is no jurisdiction to award compensation.

The Court finds that the employee has not met his burden of proof in presenting any evidence that might alter the two year statute of limitations as set out by statute. The Court finds that the employee did not present any evidence concerning any circumstances that might affect the statutory period such as payment of compensation. The parties stipulated that the employer-insurer did not pay any temporary disability compensation and the record does not establish when, let alone if, the employer-insurer paid any medical bills. The Court therefore finds that the employee's claim is barred by the statute of limitations.

The parties identified other issues in this case, however all issue are moot and irrelevant as the Court has ruled that the employee's claim is time barred. In the pretrial conference the employee stated that if the employer-insurer was successful on the statute of limitations defense then the other matters are "null and void". The Court would note however that if these matters were addressed, the employee would also fail in his burden of proof on all issues due to a lack of evidence.

ATTORNEY'S FEE

There are no attorney fees in this case.

Employee: Aaron Povilat

Injury Number 07-041219

INTEREST

There will be no interest in this case.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation