

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-048005

Employee: Charles Rogers

Employer: Dial Corporation

Insurer: Zurich American Insurance Companies

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, as modified herein. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge.

Preliminaries

The administrative law judge found employee sustained a hernia arising out of and in the course of his employment. Employer/insurer appealed arguing; 1) the administrative law judge erred in ruling that employee satisfied his burden of showing a medical-causal relationship between his alleged accident, hernia and need for surgery; and, 2) the administrative law judge erred in awarding past medical expenses in the amount of \$7,519.25

We modify the award of the administrative law judge as set forth herein.

Purported Corrected Award

The administrative law judge issued an award on January 7, 2013. On page 1 of the award, the administrative law judge answered "No" to question 8, "Did accident or occupational disease arise out of and in the course of employment?" The content of the administrative law judge's decision made plain that the administrative law judge found that employee's injury by accident arose out of and in the course of employment. On January 24, 2013, employer/insurer filed an Application for Review. On January 28, 2013, the administrative law judge issued a purported corrected award that changed the answer to question 8 to "Yes." The purported correction is ineffective because the administrative law judge issued the correction after employer/insurer filed its Application for Review. "[T]he legislature extended an ALJ the complete authority to determine a claim upon original hearing and ... this authority is not extinguished until twenty days passes or until the Commission's exclusive authority is triggered by an application for review filed pursuant to either section 287.470 or section 287.480."² To be clear, we answer question 8 to state that employee's injury by accident arose out of and in the course of his employment.

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

² *Thomas v. Treasurer*, 326 S.W.3d 876, 880 (Mo. App. 2010).

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Application of § 287.195 RSMo

We will address employer's first point as we consider whether employee satisfied § 287.195 RSMo. The administrative law judge failed to make findings regarding the elements of proof mandated by § 287.195 RSMo in claims for compensation based upon hernias. That section provides:

In all claims for compensation for hernia resulting from injury arising out of and in the course of the employment, it must be definitely proved to the satisfaction of the division or the commission:

- (1) That there was an accident or unusual strain resulting in hernia;
- (2) That the hernia did not exist prior to the accident or unusual strain resulting in the injury for which compensation is claimed.

We must make additional findings relative to the above elements of proof.

Employee's Efforts at the Time of Injury

The parties agree a conveyor gearbox weighing in excess of 200 pounds hung from the right side of a conveyor. The gearbox was threaded upon a shaft that turned the conveyor belt. On the date of employee's alleged injury, a problem arose with the conveyor and the gearbox had to be moved. There is conflicting evidence regarding why the gearbox had to be moved, but the parties agree the gearbox was stuck and would not move. Employee alleges he sustained his hernia while attempting to un-stick the gearbox.

According to employee, someone installed the gearbox the previous day but did not properly lock the gearbox down. When the conveyor belt was powered on, the gearbox became unseated from its bearing and the gearbox and shaft shifted 5 to 6 inches out of center. Employee testified the end-goal on the date in question was to shift the gearbox back into position and properly lock it down so gearbox was centered on the shaft. According to employee's supervisor Bruce Baget, on the date in question a gear in the gearbox stripped. Mr. Baget believed the end-goal of the gearbox project was to remove the gearbox from the shaft upon which it was threaded so employer could transfer the gearbox off-site for repair. As will be seen, this difference between employee's end-goal and Mr. Baget's end-goal is significant.

We believe that on the morning of his injury, employee and a co-worker were charged with reseating the gearbox, as described by employee. The gearbox was stuck and employee and his co-worker had difficulty getting the gearbox to move. The workers spent about 2 hours trying to loosen the gearbox from its stuck position. During this time, employee spent most of that time standing on the frame of the conveyor maneuvering a 5-foot pry bar to exert force on the gearbox in an effort to free the gearbox from its stuck position. Employee's supervisor, Mr. Baget, stopped by the machine two or three times and attempted to move the gearbox without success.

Employee testified that he moved the pry bar against the gearbox "any kind of way you could" to try to loosen the gearbox. One method employee tried was alternatively leaning back and forward in an effort to pull and push the pry bar with his body weight.

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Employee testified that while he was trying this out-and-back maneuver he experienced “a sharp pain in [his] belly.”

Mr. Baget testified of this method, “it can’t be done like that.” Explaining further, Mr. Baget explained employee “would have no leverage to do this” and employee would not have had a place to put his left foot so employee could center himself with the gearbox. Consequently, Mr. Baget concluded the only way employee could have been moving the pry bar was side-to-side across the front of his body.

We are not persuaded by Mr. Baget’s opinion regarding what maneuvering would accomplish the project’s goal because the direction of the force exerted to achieve the worker’s ultimate goal (gearbox completely on shaft) was different than the direction of the force that would have been exerted to achieve what Mr. Baget *thought* the worker’s goal was.

It may be true, as Mr. Baget testified, that employee could not have successfully removed the gearbox from the shaft using the out-and-back method (i.e. “it can’t be done like that”). But, if true, that fact would not render employee’s version of events implausible. Employee was not trying to remove the gearbox from the shaft at the time of his injury. Further, employee did not testify that he was successful in dislodging or moving the gearbox using the out-and-back method; employee testified only that the out-and-back method is what he was trying *at the time of the onset of his belly pain*.

We find that at the time employee experienced the acute onset of pain in his abdomen, he was exerting significant force on the pry bar by alternately leaning his body weight forward into the pry bar (away from his body) and using his body weight to pull back on the pry bar (toward his body). We find that the event constituted an accident.

Medical Causal Relationship

Dr. Musich believes that the work incident on June 4, 2008, was the prevailing factor in causing employee’s acute abdominal trauma, pain, and bulging that physicians diagnosed as a reducible umbilical hernia. Dr. Musich does not believe employee suffered from any significant pre-existing disability referable to his abdominal wall or intestinal contents.

In reaching her opinion, Dr. Shockley accepted Mr. Baget’s theory that employee could only have been maneuvering the pry bar side-to-side to exert force on the gearbox, as Mr. Baget demonstrated to her. That is, Dr. Shockley assumed employee was maneuvering the pry bar in a side-to-side manner when he experienced the onset of pain. Dr. Shockley opined that using that side-to-side motion, employee could not have been exerting sufficient force to cause a hernia. We have accepted employee’s testimony that he was moving the pry bar out and back when he experienced the onset of pain. Consequently, Dr. Shockley’s opinion about the amount of force employee would have exerted in a side-to-side maneuver is of little assistance to us.

For the forgoing reasons, we find the testimony of Dr. Musich is more persuasive than the testimony of Dr. Shockley. We find that employee sustained an accident resulting in

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hernia on June 4, 2008. Employee testified that he did not have pain in his abdomen before he experienced the pain in his abdomen while using the pry bar. Dr. Musich testified that his examination did not reveal a chronic abdominal wall injury. Employee's medical records do not reveal a history of abdominal wall injury or hernia. We affirm the administrative law judge's finding that employee sustained an injury by accident arising out of and in the course of his employment. We find that employee has definitively proven to our satisfaction that he sustained an accident June 4, 2008, resulting in hernia on June 4, 2008, and, that his hernia did not exist prior to the June 4, 2008, accident. We find the employee has proven the elements of § 287.195.

Past Medical Expenses

The record confirms that the parties stipulated that the amount of unpaid past medical expenses is \$190.00. Employee concedes as much in his brief. We modify the award of past medical expenses due from employer/insurer to employee from \$7,519.25 to \$190.00.

Award

We modify the award and decision of the administrative law judge as set forth herein.

We approve and affirm 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.

The January 7, 2013, award and decision of Administrative Law Judge Joseph E. Denigan is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

Given at Jefferson City, State of Missouri, this 2nd day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

John J. Larsen, Jr., Chairman

James Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Charles Rogers Injury No.: 08-048005
Dependents: N/A Before the
Employer: Dial Corporation **Division of Workers'**
Additional Party: N/A **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Zurich American Insurance Companies
Hearing Date: October 4, 2012 Checked by: JED:tr

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: June 4, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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? 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 occurred or occupational disease contracted:
Employee was hustling about an above-grade mounted gearbox using a pry bar to disengage it from the conveyor drive axle.
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: abdomen (umbilical hernia)
14. Nature and extent of any permanent disability: 5% PPD of the body referable to an umbilical hernia
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

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- 17. Value necessary medical aid not furnished by employer/insurer? \$7,519.25
- 18. Employee's average weekly wages: \$1,366.31
- 19. Weekly compensation rate: \$742.72/\$389.04
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	
St. Mary's hospital	\$6,529.25
Dr. Robert Meyer	800.00
Out-of pocket co-pays (amount stipulated)	190.00
 TTD benefits (stipulated amount)	 1,228.82
 20 weeks PPD from Employer	 7,780.80

22. Second Injury Fund liability: open

TOTAL: \$16,528.87

23. Future requirements awarded: None

Said payments to begin N/A 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:

Nicholas B. Carter

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charles Rogers	Injury No.: 08-048005
Dependents:	N/A	Before the
Employer:	Dial Corporation	Division of Workers' Compensation
Additional Party:	N/A	Department of Labor and Industrial Relations of Missouri
Insurer:	Zurich American Insurance Companies	Jefferson City, Missouri
Hearing Date:	October 4, 2012	Checked by: JED

This case involves an alleged work related hernia resulting to Claimant, with the reported accident date of June 4, 2008. Employer admits Claimant was an employee on that date and that any liability was fully insured. The Second Injury Fund remains open for a determination of liability at a future date. Both parties are represented by counsel.

Issues for Trial

1. accident;
2. whether injury arose out of and in the course of employment;
3. medical causation;
4. liability for medical expenses(out-of pocket amount stipulated);
5. nature and extent of temporary total disability (stipulated amount);
6. nature and extent of permanent partial disability.

FINDINGS OF FACT

1. Claimant is a veteran employee of 23 years with Employer who works in pipe fitting and mechanics in the maintenance/repair of equipment in Employer's production facility.
2. On the reported accident date, Claimant was hustling about a stalled above-grade mounted gearbox using a pry bar to disengage it from the conveyor drive axle. Claimant was working with a co-worker and a supervisor checked-in on their progress on this one to two hour project.
3. Claimant, along with his co-worker, used a long, 20 to 25 pound pry bar, while standing atop the edges of the conveyor belt carriage in an effort to remove a 200-300 pound gearbox from the three foot drive axle, or shaft, on which it was mounted.
4. Claimant exerted heavy body stress against the pry bar from a standing position in his efforts to disengage the gearbox as described.

5. During this repair job, Claimant experienced a sharp pain in his abdomen.
6. He reported the injury to the nurse that day who examined him and referred him to BarnesCare for treatment, also that same day.
7. On June 4, 2008, Dr. Karen Shockley at the BarnesCare clinic diagnosed a hernia and imposed a 20-pound lifting restriction. Claimant returned to work on restricted duty.
8. Claimant sought treatment with Dr. Meyer on June 25, 2008 who took a work-related patient history of “pulling a lever heavily” with sudden abdominal pain, diagnosed a hernia and performed surgery (umbilical herniorrhaphy with mesh implant) on June 27, 2008. Claimant lost time from work (in a stipulated amount).
9. Prior to this surgery, on June 12, 2008 Dr. Shockley wrote a letter to the company nurse caption “Charles Rogers Work Site Evaluation.” This one-page letter, including a single paragraph in which the description of a re-enactment is found, and where Claimant’s supervisor is performing the re-enactment, concludes Claimant’s activity, tasks, symptom onset and report of injury are not sufficient to “serve as the primary causal factor in Mr. Roger’s umbilical hernia[.]”
10. In February 2011, Dr. Shockley, in another brief document, describes this Evaluation as a “carefully formed opinion.” (The record is silent on her qualification in ergonomic science or accident re-enactments.) She reiterated her opinion, with slight variation, that Claimant’s hernia was not work related.
11. Dr. Meyer found the hernia work related. Claimant returned to work with the same job and same duties and without any restrictions from Dr. Meyer. Claimant retired in May 2009.
12. In addition, Claimant was evaluated by Dr. Musich in April 2010 and August 2011. He also found the hernia work related. He assigned a twenty percent PPD of the body referable to the hernia. He identified no unusual findings and his history was consistent with Claimant’s return to work.

RULINGS OF LAW

Accident and Injury

An accident arises out of the employment relationship “when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.” Abel v. Mike Russell’s Standard Service, 924 S.W.2d 502, 503 (Mo.1996). Claimant alleges he sustained injury by accident while he was working on a conveyor belt line gear box. Claimant testified about the position and stresses involved in realigning the drive belt. Employer offered the opposing testimony of a supervisor who checked-in on progress during the course of the project but did not fix the problem. Claimant’s co-worker did not testify. Claimant’s testimony included a detailed explanation that encompassed the facts of the co-worker’s participation and the intermittent presence of the supervisor. Claimant’s explanation of the

height, position and weights of the pry bar and gearbox were all cogent and un rebutted. The supervisor's testimony necessarily lacked the same credibility if only because he was not present during most of the project time. Claimant's testimony was corroborated by the BarnesCare notes of June 4, 2008 and the surgeon's notes.

Medical Causation

Both Employer's offers of the supervisor's testimony and the Work Site Evaluation were flawed and lacked sufficient probative value to be persuasive here. As alluded to above, there is nothing in the record to weigh the training and experience of Dr. Shockley to give expert character to Dr. Shockley's brief notes on the Evaluation. Thus, separate from her medical education/licensure, which was not challenged, Employer offers the doctor's letters to rebut Claimant's testimony. These letters lack the ergonomic details and cogence with the record, Dr. Shockley merely makes a series of forensic assertions that lack persuasiveness.

Further, rather than discuss medical causation, including a conventional statement about pre-existing condition or prior injury (together with any prior medical record or current medical record), Dr. Shockley purports to assess the credibility of Claimant's expert, Dr. Musich and purports to dispute the credibility of Claimant's patient history. Dr. Shockley reveals her lack of experience by suggesting employees give precise histories. It is noted employees routinely give histories before receiving any treatment or symptom relief; this is called stress. The credible evidence suggests project duration of nearly two hours. She purports to dissect Claimant's statement to the plant nurse and another [unidentified] statement; her own BarnesCare notes of June 4 lack detail and lack any note of suspicion; she accept the "pry bar" history, imposed a 20 pound restriction and concurred in the referral to "general surgeon." Her letters identify nothing that suggests a non-work related cause.

This unqualified tangent in Dr. Shockley's two one-page reports is inexplicable given her failure to address the contemporaneous notes of Dr. Meyers, the insidious nature of hernia pathology (the onset of which workers frequently work through), her willingness to exceed the normal inferences permitted a forensic expert, and, her own notes.

Medical Expenses and TTD Benefits

Claimant offered un rebutted evidence of the medical bills of St., Mary's Hospital and Dr. Robert Meyer in the amounts of \$800.00 and \$6,529.25, respectively. (Group Ex. A-2, A-3.) The parties stipulated the out-of-pocket and temporary total disability benefits in the amounts of \$190.00 and \$1,228.82, respectively. Employer offered no evidence on the necessity or reasonableness of these amounts. All of these benefits are awarded consistent with the above findings on accident and, injury and medical causation.

Permanent Partial Disability

Claimant testified that he returned to the same heavy work without restriction and without resumption of treatment. As described by his own expert, Claimant's hernia was well-healed and non-recurrent. He had typical residual complaints of paresthesia and tenderness none of which interfered with his return to heavy work as a mechanic. This record suggests PPD in the range of five percent of the body.

Conclusion

Accordingly, on the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained a work related hernia injury and sustained a permanent partial disability of five percent of the body as a whole. In addition, he is entitled to medical expenses of \$7,519.25 under Section 287.140.1 RSMo (2005). He is allowed \$1,228.82 for TTD benefits.

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge