

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

Injury No.: 06-133713

Employee: Bobby Rowden
Employer: McCarthy Building Companies
Insurer: Ace American Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 25, 2009, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, March 25, 2009 issued, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of August 2009.

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

FINAL AWARD

Employee: Bobby Rowden

Injury No. 06-133713

Dependents: N/A

Employer: McCarthy Building Companies

Additional Party: Second Injury Fund

Insurer: Ace American Insurance

Appearances: Sam Eveland for the employee
Julie Madsen for the employer-insurer

Hearing Date: December 22, 2008

Checked by: LCK/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? No
- Was the injury or occupational disease compensable under Chapter 287? No
- Was there an accident or incident of occupational disease under the Law? No
- Date of accident or onset of occupational disease? N/A
- State location where accident occurred or occupational disease contracted: N/A
- Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
- Did employer receive proper notice? N/A
- Did accident or occupational disease arise out of and in the course of the employment? No
- Was claim for compensation filed within time required by law? Yes
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted: N/A
- Did accident or occupational disease cause death? No
- Parts of body injured by accident or occupational disease: N/A

- Nature and extent of any permanent disability: N/A
- Compensation paid to date for temporary total disability: None
- Value necessary medical aid paid to date by employer-insurer: None
- Value necessary medical aid not furnished by employer-insurer: N/A
- Employee's average weekly wage: N/A
- Weekly compensation rate: N/A
- Method wages computation: N/A
- Amount of compensation payable: None
- Second Injury Fund liability: None
- Future requirements awarded: None

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: N/A.

FINDINGS OF FACT AND RULINGS OF LAW

On December 22, 2008, the employee, Bobby Rowden appeared in person and by his attorney, Sam Eveland, for a temporary or partial award. The employer-insurer was represented at the hearing by their attorney, Julie Madsen. The employee's claim against the Second Injury Fund was left open. At the time of the hearing, the parties agreed on certain undisputed facts and identified the facts that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

- McCarthy Building Companies was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured by Ace American Insurance Company c/o Gallagher Bassett.
- On or about December 14, 2006, Bobby Rowden was an employee of McCarthy Building Companies and was working under the Workers' Compensation Act.
- The employee's claim was filed within the time allowed by law.
- The employee's injury was medically causally related to the alleged accident.
- The employer-insurer has not paid any medical aid.
- The employer-insurer has not paid any temporary disability.

ISSUES:

- Accident
- Notice

Claim for additional medical aid.

EXHIBITS

Employee's Exhibits

- Medical report of Dr. Raskas
- Medical report of Dr. Berkin
- CT report
- Medical records of Dr. Frissell
- Medical records of Ste. Genevieve Memorial Hospital
- Medical records of Dr. Rengachary

Employer-Insurer's Exhibits

- Deposition of Bobby Rowden
- Deposition of Byron Black
- Deposition of Larry VanMeter
- Medical records of Physical Health and Rehab
- Division of Workers' Compensation records

Judicial notice of the contents of the Division's files was taken.

WITNESSES: Bobby Rowden and Lester Stone, Jr.

BRIEFS: The employee's brief was received on January 5, 2009. The employer-insurer's brief was received on January 8, 2009.

FINDINGS OF FACT:

The employee was walking with a cane at the hearing. He was born in 1953. The employee started working for McCarthy in September of 2006. His last day on the job was August 7, 2007. He worked on one job site, which was the Holcim Concrete Plant, as a skilled laborer.

In his deposition, the employee testified that he had no other workers' compensation claims or any injury where the employer or their insurance company paid for his medical bills. He testified that prior to December of 2006, he had not injured either of his legs.

The employee testified at the hearing, that prior to his fall he had no injuries to his back or neck, and had no other workers' compensation claims. The employee agreed that in 1995, while working at Bridwell, he had a low back strain. He testified that he went to St. Anthony's Hospital where he was given a shot and sent home for a week. He had no ongoing problems. The Division file for the 1995 case is Injury Number 95-166937 which showed a pulled back muscle. The employee was paid for lost time and the employer-insurer paid medial bills.

The Division files show a low back injury on November 12, 1991, while the employee was working for McBride and Sons which was Injury Number 91-164329. The employee was seen at St. Anthony's and by Dr. Elcock. The employee testified that he does not recall the 1991 injury. The Division files show a 1986 injury for the employee which was Injury Number 86-139322. The employee had an attorney and filed a claim. Dr. Strickland, an orthopedic surgeon rated the employee at 5% for a low back strain, and 5% for a right leg laceration. The employee settled his case for 2% of the body and 2.5% of the leg at the knee. The

employer-insurer paid medical bills.

The employee testified that before December 14, 2006, he did not have any back problems. The medical records of Physician's Health and Rehab in Ste. Genevieve show that on April 1, 2003, the employee saw Dr. Kuenzel, a chiropractor for his low back. In 1991, the employee had low back pain and muscle spasms.

In 2003, the onset was five days ago with no injury or accident. In the physical examination, it was noted that the employee had low back pain which was sharp if he got up from a seated position. His legs gave out when the pain hits. The employee denied numbness and tingling in the legs. His low back gets stiff, especially when he is not moving around.

The employee testified that around 7:00 p.m. on December 14, 2006, he fell at work. It was quitting time. He was climbing up a wooden ladder and was about 10 feet up when he fell backwards. He hit Lester Stone, who was coming up the ladder. When he fell, his working crew of around eight people was present. There were quite a few other employees also present. He remembered Russ, Vinny, and Bobby Wolfong being present. The employee testified that after he fell, he was on the ground for a minute or so. He got up and asked Lester Stone if he was okay. The employee and Lester Stone climbed up the ladder and went to the office. They reported the accident to Larry VanMeter, the general foreman, which is the procedure to be followed after an accident. The employee told Mr. VanMeter that he had fallen off a ladder and landed on Lester Stone. Mr. VanMeter asked if he and Lester were okay, and the employee stated that he had a bruise on his right leg, and it was stiff. To his knowledge, there was no written report made. In his deposition, the employee testified that the only bruises he had were on his right leg from his hip down past the knee.

The employee testified that the employer's policy was to report any injury to the general foreman. He did not fill out any written paper work for his fall and never asked McCarthy for treatment. To his knowledge, Mr. Stone did not fill out any paperwork for the fall.

In his deposition, the employee testified that he reported the injury to Larry VanMeter the night of the injury and again the next morning. That night, Larry VanMeter did not have him fill out an accident report. The employee did not ask for medical treatment, and Mr. VanMeter did not offer him any. The next morning Mr. VanMeter asked if the employee was okay and he stated that he was. There was nothing filled out.

The employee testified that Bart Burgess was a shop steward/union representative but does not know if he was there when he fell. The employee had a conversation with him the next day. The employee testified Bryon Black had been a foreman but was not the foreman on the day he fell. The employee cannot remember if Mr. Black was present when he fell but a couple of days after the injury he talked to Mr. Black in the office trailer before starting work. Everyone was joking about the fall, and he told Mr. Black that he fell and landed on Lester Stone. Byron Black asked if he was okay. In his deposition, the employee testified that Byron Black was around when he fell.

Mr. Stone testified that he started working for McCarthy on December 4 or 5 of 2006. He worked with the employee on the same crew. He remembered the employee falling off a ladder sometime around December 10-14 of 2006. At the end of the shift, they had to go up a ladder that was 10-12 foot high. For safety, he would wait for the person ahead of him to get to the top before starting to go up. When the employee was at the top of the ladder, Mr. Stone looked down to get his lunch box, and the next thing he knew, the employee fell on him which drove him to his knees. The employee hit him on the left shoulder with his legs or hip, and glanced off of him. The employee hit the ground with his head and legs, and knocked his hard hat off. Bobby Wilfong asked if they were okay. Mr. Wilfong first helped the employee up, and then helped Mr. Stone up. Mr. Stone's left shoulder was hurting the next day but it healed up.

Mr. Stone testified that the employer's safety policy is for the employees to report an accident or near miss to the supervisor who will take it to the safety department. He did not fill out a report. The correct procedure for

reporting an injury was to tell their supervisor, Larry VanMeter. They told Larry VanMeter about the injury in the labor trailer where everybody signed in and out of. Mr. VanMeter asked if they were okay and they said they were. Mr. Stone did not know if Mr. VanMeter made a written report.

Mr. Stone testified that Bryon Black is a foreman for McCarthy, but was not his foreman at the time of the fall. Mr. Black knew about the fall because he was in the trailer when they told Mr. VanMeter about the fall. Bart Burgess, the shop steward, was also in the trailer when Mr. VanMeter was informed about the fall.

Everybody in his crew knew about it, including Russell, Bobby Wilfong, and Vinnie. They all were making fun of him since he broke the employee's fall. Mr. Stone was laid off around December 20-21 of 2006, until he was called back in March of 2007. He last worked at McCarthy on April 12, 2008, when he was laid off.

Larry VanMeter testified by deposition on September 18, 2008. Mr. Van Meter has worked for McCarthy for 21 years and is working at the Holcim Concrete plant in Ste. Genevieve. He has been the laborer general foreman for 15 years. He was Bobby Rowden's supervisor in December of 2006. The employees are supposed to report on the job injuries to him, and he then reports them to the safety person. Bobby Rowden did not report to him that he had sustained a work injury or an injury on the job. The first time that Mr. VanMeter became aware that the employee was claiming an injury at work was a week before his deposition when he was told by the office personnel.

Mr. VanMeter testified that the employee never told him that he fell off of a ladder, hurt his back or neck at work, or had hurt his back or neck at all. None of the other employees that he worked with in December of 2006 told him that Mr. Rowden was injured on the job. Byron Black is a foreman for the company and was working in December of 2006. Mr. VanMeter supervised Mr. Black. Mr. Black never told him that Mr. Rowden was hurt and never mentioned a fall off of a ladder. Lester Stone worked with him in December of 2006, and never reported to him that the employee had injured himself or fell off of a ladder. Mr. Stone never reported to him that Mr. Stone had been injured in any kind of incident.

Byron Black testified by deposition on November 19, 2008. Mr. Black has worked at McCarthy for 10 years. He has worked the last couple of years at the Holcim Cement project and is the labor foreman. Bobby Rowden is one of the laborers that he worked with in December of 2006. He was not his direct supervisor. Mr. Black's supervisor was Larry VanMeter, who is the immediate supervisor over all of the laborers and is the general foreman. Mr. Black testified that he did not see the employee fall in December of 2006. Mr. Rowden never told him that he had fallen off of a ladder and fell onto Mr. Stone. Mr. Rowden never told him that he had hurt his back or neck at work or that he had hurt his back or neck at all. Mr. Stone did not tell Mr. Black that Mr. Rowden had fallen off a ladder and fell onto him. Mr. Black did not ever hear about any injuries to Lester Stone.

At the time of the deposition, Mr. Black was aware that Bobby Rowden was claiming he fell off a ladder and had an injury in December of 2006. Mr. Black stated that he thought sometime in 2007, Bart Burgess told him that there had supposedly been an accident when Bobby Rowden fell off a ladder and hit Lester Stone on the way down. Mr. VanMeter later told him about it and that there were going to be depositions taken. He could not remember for sure when it was.

Mr. Black testified that the company policy is to immediately report an injury large or small or a near miss to the supervisor who then gives written notice to the office or safety department. Accident reports and near miss reports are written reports. On December 14, 2006, Mr. Rowden would not have reported an accident to Mr. Black because he was not his direct supervisor. Larry VanMeter was the labor general foreman and was the person an accident would have been reported to.

The employee testified that he did not seek medical treatment at the time of the fall. In early March of 2007, the employee stated that he started having problems and that his legs were ice cold and heavy. In his

deposition, the employee testified that he did not ask for medical treatment because he thought he had bad circulation. When asked why he believed that his problems were due to the fall off the ladder, the employee answered because did not have problems before the fall.

The employee testified that the first time he saw a doctor was in April of 2007, which was a chiropractor. He did not know if he had an injury at that time.

The medical record from April 23, 2007, show that the employee saw Dr. Kuenzel a chiropractor at Physician's Health and Rehab for lower back pain. The employee completed and signed a new patient information form. The section for work or injury insurance information was not filled out. Listed as to what caused the problem or the symptoms to occur was "lifting shovel". Listed as to when the problem or symptoms begin was "week ago". The pain drawing showed pain in both legs. The employee had pain, stiffness and tingling in his legs. The onset of pain was gradual. In the section titled "If your problem or symptoms are due to an accident or injury please complete below"; the sections for "auto accident" and "work related or other injury" were left blank. During the examination on April 23, Dr. Kuenzel noted that the employee had low back pain just below the belt line in the center of the back and denied pain radiation down the legs. The onset was one week ago. The question whether he had it in the past was checked yes with no known "inj/act". The employee worked 100 hours the week before. The pain increased with stiffness after sitting. The employee got a lot of charley horses in his legs and his legs felt cold. It was noted that the employee did not keep his April 24 appointment because he was feeling great.

The employee testified that the next doctor he saw was Dr. Frissell. He told him that he had fallen from a ladder.

On July 12, 2007, the employee saw Dr. Frissell at Family Healthcare for pain, heaviness and coldness in his legs. His chief complaint was bilateral leg pain and numbness. Both knees had felt cold and heavy for six months. The next word that was in the record was "started", and although difficult to interpret, the next handwritten words appear to be "no trauma". The records then stated coldness six to seven years ago. Based on these findings, Dr. Frissell diagnosed neuropathy nerve condition and referred the employee for a neurological exam.

On July 20, 2007 the employee saw Dr. Frissell for a heavy and cold feeling in his legs. The duration of the symptoms was six months. The employee had paresthesia in both lower legs with heaviness and was scheduled to see a neurologist.

The employee testified that he told Dr. Rengachary that he fallen from a ladder.

The employee saw Dr. Rengachary on July 30, 2007 for lower extremity numbness and pain. The prior medical history was only notable for elevated cholesterol and myocardial infarction. The employee stated that his symptoms had been ongoing for seven to eight months. He had some low back pain but denied neck pain. The employee had a sensation of coldness and heaviness in his legs as well as night jerking of the legs. The employee was not on any new medications to explain the symptoms. The employee had lower extremity numbness, pain and coolness in a stocking distribution. Even though his symptoms correspond to a peripheral neuropathy, his reflexes were brisk. Dr. Rengachary focused in on myelopathy and myopathy, and ordered a lumbar and cervical MRI.

The August 3, 2007 lumbar MRI with a history of myelopathy leg numbness and low back pain showed a small herniated disc at L5-S1; mild facet joint osteoarthritis L3-4 through L5-S1. The August 3, 2007, cervical MRI, with a history of cervical pain with probable myelopathy due to spinal stenosis, showed acquired spinal stenosis at C3-4 and C4-5. At C5-6 there was marked spinal stenosis. At C6-7 there was mild acquired spinal stenosis. At C7-T1 there was a broad base herniation without spinal cord compression

or neuroforaminal narrowing.

The employee testified that from September of 2006 till August of 2007, there was a period of layoffs. He was laid off about three times for a couple of weeks each time. On August 7 when he was laid off, he was not doing well physically. He was not getting around very good, his legs were heavy and cold, and felt numb. He complained a lot at work and struggled with the jobs. He has not worked since August 7, 2007.

On August 13, Dr. Rengachary performed a nerve conduction study and EMG for an eight month history of bilateral leg pain, numbness and weakness. The nerve conduction studies and EMG's were normal.

On August 16, 2007 the employee saw Dr. Frissell mainly for a cholesterol issue but also for numbness in both lower extremities below the knee and weakness in both lower extremities. He had exertional leg pain and neck problems.

On August 23, Dr. Rengachary sent Dr. Kennedy a letter referring the employee to him for lower extremity heaviness and numbness as well as gait difficulties. The employee's cervical spine showed a significant degree of stenosis. Although not mentioned in the report, he believed there were cord signal changes but any significant neuropathy was excluded with nerve conduction studies.

The employee's original claim was dated on August 20, 2007, and filed with the Division on August 24, 2007. The Report of Injury filed with the Division show that the employer was notified of the alleged accident on September 4, 2007.

On September 5, 2007 the employee saw Dr. David Kennedy, a neurosurgeon. The employee over the last several months has had heaviness in the lower extremities, difficulty with coordination of gait, numbness and occasional weakness in the feet. The employee thought it may have begun in relationship to a fall off a ladder, but he was not sure. Dr. Rengachary ordered an MRI of the cervical spine, which demonstrated significant spinal stenosis of the cervical spine area. Dr. Kennedy stated that his review of the August 3 cervical MRI demonstrated significant spinal stenosis of C4-5 and C5-6. Dr. Kennedy diagnosed spinal stenosis with a resultant cervical myelopathy. Dr. Kennedy stated the employee would clearly need operative intervention and ordered a cervical myelogram.

On September 19, 2007 a cervical myelography was performed for a history of neck pain that radiated into the left arm with left hand numbness. The test showed spondylethic bone formation at C3-4 and C4-5 with significant blunting of the C6 and C5 nerve root sheathes bilaterally. There was spinal canal stenosis at C5-6. There may be some evidence of spinal canal narrowing at C3-4 and C4-5. The post myelogram CT scan showed that following a work related injury, the employee developed neck pain, left arm pain, and left hand and arm numbness. The conclusion was a left disc protrusion/extrusion at C6-7, advanced degenerative and spondylethic changes at C5-6, and suggested severe spinal canal stenosis at C5-6.

On January 16, 2008 the employee saw Dr. Frissell due to lower back pain and bilateral leg pain right worse than left, and a numb right foot sole which started in March of 2006. The employee had been having problems for about two years with a gradual onset. The employee had joint pain/stiffness in the lower back and legs and muscle aches in the back and legs.

The employee went to the Ste. Genevieve Memorial Hospital emergency room on January 24, 2008, for low back pain with a yesterday morning onset. The employee had fallen and woke up in severe pain. The past medical history was neuropathy in the lower legs, ankles and feet.

On March 13, 2008 the employee was seen by Dr. Berkin. The employee told Dr. Berkin that when he was coming out of a silo at the Holcim plant he fell 12 feet from a ladder onto a deck. He struck his neck but denied any loss of consciousness. He had a bruise to his right arm. He continued to work but over the following three months, his legs became cold and heavy. Dr. Berkin diagnosed a cervical strain aggravating underlying cervical spondylosis and multiple bulging cervical discs resulting in spinal canal stenosis and cervical myelopathy. Dr. Berkin thought that the employee would benefit from further treatment.

On July 29, the employee saw Dr. Frissell with back soreness. The employee had fallen last week and had right ankle pain and abrasions. Both feet had been numb for a year with the right greater than the left. There was joint pain/stiffness and pain in the lower back, and muscle aches in the back and legs. He was waiting on workers' compensation to approve surgery.

Dr. Raskas performed an independent medical examination on August 8, 2008. The employee had a chief complaint of inability to walk, gait disturbances and growing heaviness in his legs. The employee told him that in April of 2006, he fell off of a ladder at work. He was about 12 feet in the air, landed on a guy, ricocheted off, and landed on his right side and hit his head. His whole right side was bruised and his neck was sore and stiff initially but he thought it would get better. He had some low grade neck stiffness but nothing too severe that he thought required any medical treatment. His legs started to become heavy and sore in March of 2007. He was having trouble with falling down and losing his balance. By August of 2007, the employee was unable to work anymore. On physical exam, the employee had significant gait disturbances and his gait was spastic. He cannot heel and toe walk and cannot tandem gait walk. There is some spasticity throughout his lower extremities but not in his upper extremities. The range of motion of his neck was limited. Dr. Raskas stated it appeared the employee sustained a cervical spinal cord contusion which has led to the slow progressive development of myelopathy as a result of his fall. He had pre-existing cervical spondylosis with stenosis but appeared to be fully functioning well until after the fall. The myelopathy caused his gait disturbances was a result of the fall and the fall is a prevailing factor in the development of his myelopathy condition. Dr. Raskas stated that the diagnosis from any injury that may have occurred on December 14, 2006 was a spinal cord contusion and cervical myelopathy. The incident was the prevailing factor for the claimant's current need for medical treatment which would likely be an anterior/posterior cervical fusion from C3-C7.

RULINGS OF LAW:

Issue 1. Accident

The employer-insurer has denied that on December 14, 2006, the employee sustained an accident arising out of and in the course of his employment.

The burden of proof is on the employee to prove all material elements of his claim. See Marcus v. Steel Constructors, Inc., 434 S.W.2d 475 (Mo. 1968) and Walsh v. Treasurer of the State of Missouri, 953 S.W.2d 632,637 (Mo. App. 1997). The employee has the burden of proof that his injuries were the result of an accident that arose out of and in the course of employment. See Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 419-420 (Mo. App. 1993) and Smith v. Donco Construction, 182 S.W.3d 693, 699 (Mo. App. 2006).

A claim for compensation may be decided solely upon a finding of lack of credibility of uncontradicted and unimpeached testimony. See Cox v. General Motors Corporation, 691 S.W.2d 294 (Mo. App. 1985), Beyer v. Howard Construction Company, 736 S.W.2d 78 (Mo. App. 1987), Smart v. Chrysler Motors Corp., 851 S.W.2d 62, 64 (Mo. App. 1993) and Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525 (Mo. Banc. 1993).

There are a number of evidentiary problems that support a finding that the employee has failed to meet his burden of proof on the issue of accident. These problems are addressed as follows:

The testimony of the employee is inconsistent with the other evidence.

In his deposition and at the hearing, the employee testified that he had no prior workers' compensation claims or injuries where an employer-insurer paid for his medical bills. During his deposition, he testified that he did not have any prior injury to his legs. The Division files show that the employee had a 1986 injury to his right leg and low back, where he filed a claim, the employer-insurer paid medical bills, and the employee settled that case for 2% of the body and 2.5% of the right leg at the knee level. The employee had a 1991 injury to his low back where he was treated by several health care providers. The employee had a 1995 back injury where he lost time and the employer-insurer paid medical bills.

The employee testified that after his 1995 low back injury that he had no ongoing problems; and that prior to December 14, 2006, he did not have any back problems. In April of 2003, the employee went to a chiropractor and received treatment due to low back pain and his legs giving out.

The employee testified at the hearing and in his deposition that the immediately after the fall, he and Lester Stone reported the accident to Larry VanMeter. The employee testified in his deposition that the day after the injury, he reported the injury a second time to Mr. VanMeter. Mr. VanMeter testified that the employee did not report to him that he sustained a work injury. The first time he was aware that the employee was claiming a work injury was a week before his deposition. The employee never told him that he had fallen off a ladder, or hurt his neck or back at work.

The employee testified at the hearing that a couple of days after the accident, he talked to Byron Black and told him that he fell and landed on Lester Stone. Byron Black testified that the employee never told him that he had fallen off a ladder and fell onto Mr. Stone. The employee never told him that he hurt his neck or back either at work or in general.

In his deposition, the employee stated that Byron Black was present when he fell. Byron Black testified that he did not see the employee fall in December of 2006.

The employee testified that his problems did not begin until early March of 2007. When he saw Dr. Kuenzel on April 23, 2007, the employee wrote down that it started a week ago.

The employee testified that he told Dr. Frissell and Dr. Rengachary that he had fallen from a ladder. There was nothing in the medical records of Dr. Frissell or Dr. Rengachary that he had a fall from a ladder.

The employee testified that as a result of the fall the only bruise he had was on his right leg. The employee told Dr. Berkin that he bruised his right arm as a result of the fall. The employee told Dr. Raskas that his whole right side was bruised.

These inconsistencies have an adverse effect on the credibility of the employee.

The employee's testimony at the hearing is inconsistent with his testimony during his deposition.

During his deposition, the employee testified that Byron Black was around when he fell. During the hearing, the employee testified that he could not remember if Mr. Black was present when he fell. This inconsistency has an adverse effect on the employee's credibility.

The testimony of Lester Stone is inconsistent with the other evidence.

Mr. Stone testified that he and the employee told Larry VanMeter about the fall from the ladder. Mr. VanMeter testified that Mr. Stone never reported to him that the employee injured himself or fell off a ladder. Mr. VanMeter testified that Mr. Stone never told him that he had been injured in any kind of incident.

Mr. Stone testified that Byron Black knew about the fall because he was in the trailer when Mr. VanMeter was informed about the fall. Mr. Black testified that Mr. Stone did not tell him that the employee had fallen off a ladder

and fell onto him, and did not hear that Mr. Stone had any injuries.

This has an adverse affect on Mr. Stone's credibility.

The employee's delay in seeking medical attention does not support a finding of accident.

The first time that the employee received medical treatment was on April 23, 2007, more than four months after the alleged accident where the employee allegedly had a traumatic fall off of a 10 foot ladder. This has a negative impact on the employee's claim that he had a work accident.

The medical history given by the employee to the initial treating health care providers does not corroborate the testimony of the employee regarding the alleged accident.

The employee testified that on December 14, 2006 he fell backwards approximately 10 feet off a ladder, hit Lester Stone, and had a right leg bruise and stiffness.

The first treatment after the alleged accident was on April 23, 2007 when the employee saw Dr. Kuenzel a chiropractor. In the records, the employee stated that his symptoms began a week ago, that he had worked 100 hours last week, and it was due to lifting shovel. The section to be completed for a workers' compensation case was left blank, and the doctor noted no known accident or injury.

The first time that any medical record mentions the fall was on September 5, 2007, when the employee saw Dr. Kennedy almost nine months after the alleged accident and six months after the employee stated he developed symptoms. There were three other doctors that the employee had seen prior to Dr. Kennedy and none of their records mention the alleged 10 foot fall.

This lack of corroborating medical history to the initial health care providers for months substantially affects the credibility of the employee on the issue of accident, and does not support a conclusion that the employee sustained a work related accident.

Conclusion:

Based on a thorough review of the evidence including the cumulative effect of the evidentiary problems discussed above, I find that the employee and Lester Stone were not credible, and the employee failed to satisfy his burden of proof on the issue of accident. I further find that the employee did not sustain a work-related accident on December 14, 2006 that arose out of and in the course of his employment. The employee's claim for compensation is denied. Although this case was heard as a temporary hearing, the award is final. Given the denial of the employee's claim on the issue of accident the remaining issues are moot and will not be ruled upon.

Based on the denial of the employee's claim against the employer-insurer, the employee's claim for compensation against the Second Injury Fund is also denied.

Date: _____

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Peter Lyskowski
Acting Division Director
Division of Workers' Compensation