

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

Injury No.: 04-105870

Employee: Rusty Sprouse  
Employer: Superior Asphalt Company  
Insurer: ACIG Insurance Company  
Date of Accident: September 22, 2004  
Place of Accident: Kansas City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the whole record. Pursuant to §286.090 RSMo, the Commission affirms in part and reverses in part the award and decision of the administrative law judge dated July 27, 2007.

The Commission affirms the determination of the administrative law judge in all respects except the assessment against employer for costs and attorney's fees under section 287.560. The award and decision of Administrative Law Judge Lisa Meiners, is attached and incorporated by this reference to the extent it is not inconsistent with the findings, conclusions, award, and decision herein.

The Commission finds that employer had reasonable grounds to defend this matter based upon the conflicting and wavering testimony of Dr. Morack and the discrepancy between his medical records and employee's testimony regarding when the work accident occurred. As such, the Commission reverses the portion of the award of the administrative law judge concluding that employer did not have such reasonable grounds. The remainder of the award of the administrative law judge awarding employee benefits is affirmed.

Given at Jefferson City, State of Missouri, this 8<sup>th</sup> day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

SEPARATE OPINION FILED

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

SEPARATE OPINION  
CONCURRING IN PART, DISSENTING IN PART

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed in its entirety, and

further, that employer should be assessed costs and attorney's fees for this appeal as it too is unreasonable.

In pertinent part, section 287.560 RSMo provides that if "the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them."

In *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo.App. 2003), the employer was assessed costs and attorney's fees for two separate injuries under sections 287.560. *Id.* at 250. For the first injury, the employee was sent to a doctor by the employer to determine if her injury was work related, and if it was, the employer told her it would pay benefits and medical expenses. *Id.* The doctor found the employee's injuries to be work related. *Id.* Despite this, the employer failed to pay benefits or medical expenses of the employee. *Id.* The employer defended the second injury on the grounds that the employee's work did not cause her injury. *Id.* It concluded that certain medical records showed that employee's injury was not work related. *Id.* The Court found that those records did not include any such conclusion, and therefore, did not give the employer a reasonable basis for denying the claim. *Id.*

In *Monroe v. Wal-Mart Associates, Inc.*, 163 S.W.3d 501 (Mo.App. 2005), the employer's own doctor opined that employee's injury was caused by her work. *Id.* at 504. "Despite [the doctor's] unequivocal conclusion that Claimant's hernia was the result of the alleged work place injury, [employer] continued to deny compensation." *Id.* The court found this conduct to be "egregious and outrageous." *Id.* at 508. The court further stated that "like the employer in *Landman*, at the hearing, Wal-Mart did not call witnesses or present any medical evidence . . . and instead only pointed to alleged discrepancies in the medical records." *Id.* Those medical records "do not provide Wal-Mart with a reasonable basis for denying" employee's injury was work related. *Id.*

The facts in this case are strikingly similar to those in both of the above cases. Employer's own doctor found that employee's injury was caused by his work accident. Employer relies on Dr. Ebelke's testimony in response to employer's question of whether vomiting could have caused employee's injury. Dr. Ebelke replied yes, and further, that anything or nothing could have caused the injury. Employer alleges that this leads to the conclusion that employee's injury was not work related. Just as in *Landman*, the records here draw no such conclusion, and therefore, do not give employer a reasonable basis to deny this claim.

Employer also focuses on an alleged discrepancy in Dr. Morack's medical records. Those records indicate that employee reported his injury before it happened. First, this is clearly impossible. Second, Dr. Morack's corrected deposition testimony shows that he was told of the injury later in the day on September 22, 2004, after the accident occurred. Therefore, no discrepancy exists. Employer presented no medical evidence of its own to show an alternative theory of causation. Its denial rests only on that alleged discrepancy and its conjecture and speculation as to other unsupported causation theories. As in *Monroe*, this conduct is "egregious and outrageous."

Employer's unconscionable denial of this claim for the past 40 months has placed an extreme burden on employee, and has caused him to accrue undue costs and attorney's fees in the pursuit of his deserved benefits. For this reason, I would affirm the award of the administrative law judge in its entirety. Additionally, I would assess employer the costs and attorney's fees in connection with this appeal since employer's denial is still unreasonable.

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John J. Hickey, Member

## AWARD

Employee: Rusty Sprouse

Injury No. 04-105870

Dependents: N/A

Employers: Superior Asphalt Company

Insurers: ACIG Insurance Company

Additional Party: N/A

Hearing Date: June 27, 2007

Checked by: LM/cg

#### 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: September 22, 2004.
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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. Employee injured his low back when a seat of a Superior truck Claimant drove "bottomed out."
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: Low back.
14. Nature and extent of any permanent disability: 15 percent.
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0
17. Value necessary medical aid not furnished by employer/insurer? \$18,140.35
18. Employee's average weekly wages: Maximum rate
19. Weekly compensation rate: \$675.90/\$354.05
20. Method wages computation: By stipulation.

#### COMPENSATION PAYABLE

21. Amount of compensation payable:
  - unpaid medical expenses - \$18,140.35
  - 9/23/04 to 3/21/05 - weeks for temporary total disability (temporary partial disability) \$17,573.40
  - 60 weeks for permanent partial disability from employer \$21,243.00
  - costs of proceeding under 287.560 in attorney's fee \$14,239.19
  - and \$2,540.16 in expenses

22. Second Injury Fund liability: N/A

TOTAL: \$73,736.10

23. Future requirements awarded: N/A

Said payments to begin upon receipt of Award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Michael Fitzgerald.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rusty Sprouse

Injury No: 04-105870

Dependents: N/A

Employers: Superior Asphalt Company

Insurers: ACIG Insurance Company

Additional Party: N/A

Hearing Date: June 27, 2007

Checked by: LM/cg

The parties appeared for a hearing on June 27, 2007. The Employee, Mr. Rusty Sprouse, was present and represented by Michael Fitzgerald. The Employer, Superior Asphalt Company, and Insurer, ACIG Insurance Company, was represented by Paul Cowing.

## STIPULATIONS

The parties stipulated to the following:

- 1) That the Employer, on September 24, 2004, was an Employer operating subject Missouri workers' compensation law;
- 2) That its liability was fully insured by ACIG Insurance Company;
- 3) That Rusty Sprouse was its Employee;
- 4) That Rusty Sprouse was working subject to the law in Kansas City, Missouri;
- 5) That Mr. Sprouse notified the Employer of the injury as required by law;
- 6) That the claim was filed within the time allowed by law;
  
- 7) That the temporary total disability rate was \$675.90 and a permanent partial disability rate of \$354.05;
- 8) That the Employer has paid no medical expenses or temporary benefits in this case.

## ISSUES

The issues to be resolved by this hearing include:

- 1) Whether the Employee sustained an accident arising out of and in the course of his employment on September 22, 2004;
- 2) Medical causation;
- 3) Whether the Employer must reimburse the Employee for medical expenses totaling \$23,325.35;
- 4) Whether the Employee is entitled to temporary total disability benefits from September 23, 2004 to March 21, 2005 in the amount of \$17,573.40;
- 5) Whether the Employee suffered any disability, and if so, the nature and extent of Employee's disability;
- 6) Whether the Employer must reimburse the Employee the cost of this proceeding for defending the claim without reasonable ground pursuant to §287.560.

I find, based on the following evidence, that on September 22, 2004, Claimant sustained a herniated disk that occurred within the course and scope of his employment with Superior Asphalt Company. Claimant credibly testified that, in the afternoon of September 22, 2004, the seat of a Superior Asphalt Company truck Claimant drove "bottomed out" when Claimant drove into a crevasse at a construction site near Little Blue Parkway and I-70. Although Claimant felt a burning sensation in his low back, he worked the rest of the day on September 22, 2004. All medical records and the history contained in them corroborate Claimant's testimony. As such, I find Claimant sustained injury to his low back that arose out of and in the course of his employment on September 22, 2004.

On the evening of September 22, 2004, Claimant had difficulty walking and experienced pain, numbness of

the right lower extremity. The following day, Claimant's wife drove him to their chiropractor, Michael Morak. On September 23, 2004, Chiropractor Morak arranged an MRI to be completed and took Claimant off work for ten days. Claimant dropped the off-work slip to his supervisor but did not inform his Employer of the work injury until October 1, 2004.

On October 1, 2004, Claimant informed his supervisor of the work accident and the need of surgery. Thereafter, his Employer sent Claimant to Dr. David K. Ebelke, an orthopedic surgeon. Despite the workers' compensation carrier denying Claimant's claim as compensable, Dr. Ebelke operated at the L5-S1 level. Dr. Ebelke did not find Claimant to be at maximum medical improvement until March 21, 2005.

The Employer makes issue that the September 22, 2004 accident was not a substantial contributing factor of Claimant's injury. Instead, the Employer argues that vomiting two days before the alleged date of injury was a substantial contributing factor to Claimant's medical condition. I strongly disagree with the Employer's analysis of this case based on the only medical doctor's opinion admitted into evidence.

Dr. Ebelke opined Claimant not only to be a credible patient, but that the bottoming out of the Superior Asphalt truck on September 22, 2004, was a substantial contributing factor to Claimant's need for surgery and Claimant's physical condition. Dr. Ebelke rated 15 percent permanent partial disability body as a whole as a result of the September 22, 2004 work accident.

Although Chiropractor Michael Morak testified, and he, too, found Claimant's description of events of September 22, 2004 to be accurate, I find an orthopedic surgeon's opinion regarding medical causation to hold greater weight. Since I find, based on Dr. Ebelke's testimony, that the medical treatment Claimant received as a result of the September 22, 2004 accident was necessary, the Employer is also responsible for Claimant's medical bills.

Claimant requests the amount of \$23,325.35 be paid by the Employer. However, Dr. Ebelke testified that the amount of \$13,260.00, in Exhibit H, was "fictitious." Instead, Dr. Ebelke stated the reasonable customary charge for lumbar surgery is \$6,000.00 and \$600.00 to \$900.00 charge for his physician assistant, or a total of \$6,900.00. Like the medical expenses of \$6,900.00 as outlined in Exhibit H, I find the North Kansas City Hospital charges in the amount of \$10,040.35 and the MRI charge from St. Joseph Imaging Center were incurred as a result of the September 22, 2004 work injury. Additionally, the North Kansas City Hospital bill of \$10,040.35 and the St. Joseph Imaging Center bill of \$1,200.00 were reasonable and necessary in order to cure and relieve the symptoms of the September 22, 2004 compensable injury. Therefore, I order the Employer liable for the unpaid medical expenses in the amount of \$18,140.35. (Exhibit H, I and Dr. Ebelke's deposition, Exhibit 5.)

The Employer is also liable to Claimant for the time period Claimant was temporarily totally disabled. I find, based on Dr. Ebelke's testimony that Claimant was unable to work in the open labor market from September 23, 2004 until March 21, 2005. The Employer must pay Claimant \$17,573.40 in past temporary total disability benefits.

The Employer is responsible for 15 percent permanent partial disability body as a whole as a result of the September 22, 2004 accident. This is the only rating offered and admitted into evidence. Indeed, Claimant is unable to lift heavy objects as he did prior to September 22, 2004. Due to the work injury, Claimant is unable to drive certain types of truck which limits his ability to find employment. Likewise, Claimant also is unable to operate vibrating riding equipment as he did prior to September 22, 2004. Claimant sustained 15 percent permanent partial disability body as a whole as a result of the September 22, 2004 accident.

Lastly, Claimant requests the cost of this proceeding pursuant to Missouri Statute 287.560, alleging the Employer defended without reasonable grounds. I find the Employer's defenses to be unreasonable and contrary to the evidence presented. The Employer argued that the Claimant told the chiropractor of the injury at 10:00 a.m., approximately five hours before the injury occurred, and as such, the Claimant lied about the work injury since it had not yet occurred. However, the Employer completely disregarded the chiropractor's statement that he

was told of the work injury on September 22, 2004 later in the day and not at 10:00 a.m. (See errata sheet for the transcript of Michael Morak.)

The Employer also theorized Claimant herniated his low back by vomiting two days prior to the work accident. There is no medical testimony and/or records stating the vomiting incident was a substantial contributing factor of Claimant's herniated disk. Instead, Dr. Ebelke, the doctor originally authorized by the Employer, opined that the September 22, 2004 accident was a substantial contributing factor to Claimant's work injury. The Employer is assessed \$2,540.16 as outlined in Exhibit E, and attorney's fees in the amount of \$14,239.18 for unreasonable defenses. (See *Monroe vs. Wal-Mart Associates, Incorporated* 163 S.W. 3d 501 (MoApp. 2005))

The Employer is liable for 15 percent permanent partial disability body as a whole as a result of the September 22, 2004 accident or \$21,243.00. Additionally, the Employer is liable for \$17,573.40 in unpaid benefits from September 23, 2004 to March 21, 2005, as well as medical bills in the amount of \$18,140.35. Costs and attorney's fees in the amount of \$16,779.34 are assessed against the Employer pursuant to §287.560.

Date: \_\_\_\_\_  
\_\_\_\_\_

Made by:

Lisa Meiners  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeff Buker  
*Acting Deputy Director*  
*Division of Workers' Compensation*