

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

Injury No.: 11-098440

Employee: Landon Sterling

Employer: Mid America Car, Inc.

Insurer: Missouri Employers Mutual 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 April 7, 2014. The award and decision of Administrative Law Judge Lawrence G. Rebman, issued April 7, 2014, is attached and incorporated by this reference.

The Commission further approves and affirms 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.

Given at Jefferson City, State of Missouri, this 16th day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Landon Sterling Injury No. 11-098440
Employer: Mid America Car, Inc.
Insurer: Missouri Employers Mutual Insurance Company
Additional Party: N/A
Hearing Date: February 6, 2014 Checked by: LGR/pd

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: May 12, 2011
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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: Employee was welding and burned his elbow.
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: Right upper extremity
14. Nature and extent of any permanent disability: 15% permanent partial disability body to the right elbow at the 210-week level

15. Compensation paid to date for temporary disability: None
16. Value necessary temporary disability not furnished by Employer/Insurer: 4 weeks x \$562.24 = \$2,248.97
17. Value necessary medical aid paid to date by Employer/Insurer: \$18,953.16
18. Value necessary medical aid not furnished by Employer/Insurer: \$0
19. Value for disfigurement: 4 weeks x \$418.58 = \$1,674.32
20. Employee's average weekly wages: \$843.32
21. Weekly compensation rate: \$562.24/\$418.58
22. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent partial disability compensation payable: 15 percent permanent partial disability body to the right elbow at the 210-week level – 31.5 weeks x \$418.58 = \$13,185.27.

Temporary total disability payable: 4 weeks x \$562.24 = \$2,248.97

Disfigurement: 4 weeks x \$418.58 = \$1,674.32

22. Future requirements awarded: N/A

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent in favor of John McKay, Claimant's attorney, for necessary legal services rendered.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Landon Sterling Injury No. 11-098440

Employer: Mid America Car, Inc.

Insurer: Missouri Employers Mutual Insurance Company

Additional Party: N/A

Hearing Date: February 6, 2014

Checked by: LGR/pd

On February 6, 2014, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Landon Sterling, appeared in person and with counsel, John McKay. The Employer and its Insurer appeared through counsel, Jeff Stigall.

STIPULATIONS

The parties stipulated to the following:

- 1) that the Employer, Mid America Car, Inc., was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on May 12, 2011 and was fully insured by Missouri Employers Mutual Insurance Company;
- 2) that Landon Sterling was its employee and working subject to the law in Kansas City, Jackson County, Missouri;
- 3) that Employee sustained an accident or occupational disease arising out of and in the course and scope of his employment;
- 4) that Employee notified the Employer of his injuries as required by law and his claim was filed within the time allowed by law;
- 5) that Employee's average weekly wage was \$843.32 resulting in a compensation rate of \$562.24 for temporary total disability and \$418.58 for permanent partial disability compensation;
- 6) that the Employer has paid no temporary total disability compensation but subsequent to the filing of the claim paid medical of \$18,953.16 and agrees to hold harmless Claimant for any unpaid medical bills.

ISSUES

The issues to be resolved by this hearing are as follows:

- 1) Whether the Employer and its Insurer are liable for permanent partial disability;
- 2) Whether the Employer and Insurer are liable for unpaid temporary total disability;
- 3) Whether the Employer and Insurer are liable for disfigurement; and

- 4) Whether the Employer and Insurer are liable for the attorney lien and attorney's fees for the medical bills which were denied and unpaid at the time the Claim for Compensation was filed.

FINDINGS OF FACT AND RULINGS OF LAW

The following Claimant's exhibits were admitted into evidence without objection:

| | | |
|-----------|--|-------------|
| Exhibit A | North Kansas City Hospital records | |
| Exhibit B | Centerpoint Medical Center records | |
| Exhibit C | North Kansas City Hospital bills (5/17/11 to 5/25/11): | \$35,715.07 |
| Exhibit D | Northland Hospital bills: | \$1,010.00 |
| Exhibit E | St. Luke's Hospital Physician bills: | \$826.00 |
| Exhibit F | Northland Anesthesiology bills: | \$680.00 |
| Exhibit G | Northland Radiology bills: | \$231.00 |
| Exhibit H | Dr. Koprivica May 7, 2012 medical report | |
| Exhibit I | Claim for Compensation filed December 13, 2011 | |
| Exhibit J | Answer filed 1/4/12 | |
| Exhibit K | 1/10/12 certified mail letter with return receipt for delivery 1/13/12 to counsel for employer and insurer | |
| Exhibit L | 1/13/12 Deposition Notice | |
| Exhibit M | 2/15/12 letter to counsel for employer and insurer | |
| Exhibit N | 3/9/12 certified mail letter with return receipt for delivery 3/13/12 to counsel for employer and insurer | |
| Exhibit O | Employer and insurer proof of payment of \$38,462.07 work comp bills for the discounted amount of \$18,953.16 with dates of payment from 3/30/12 to 7/31/12 as listed in the exhibit | |
| Exhibit P | Stipulation: 11/8/12 and 1/8/13 letters | |
| Exhibit Q | Attorney-Client Contract | |
| Exhibit R | Claimant Counsel's Affidavit and Trial Brief | |
| Exhibit S | 6/19/12 certified letter to counsel for employer/insurer | |
| Exhibit T | 6/25/12 file-stamped Notice of Report | |
| Exhibit U | 9/29/11 North Kansas City Hospital collection letter | |
| Exhibit V | 2/7/12 Executive Financial Consultants, Inc. collection fax. | |

The Employer and Insurer did not call any witnesses and did not offer any exhibits.

Based on the above exhibits and the testimony of the witness, this division makes the following findings:

Mr. Sterling testified to the following facts:

On May 12, 2011 during the course and scope of his employment by Mid America Car, Inc., Landon Sterling was welding when he burned his arm on some hot welding material called slag. Mr. Sterling did not think much of the burn and reported the burn to his employer. He was treated with peroxide and continued working.

Mr. Sterling testified that at the burn site he developed a blister and popped it. Then a few days later he developed swelling and thought that his symptoms was similar to a spider bite he had had years earlier. On May 17, 2011, he was having difficulty working because his arm swelled up so much that he could hardly bend it. He again reported his condition to his employer, and was instructed to keep working. Mr. Sterling condition deteriorated to the point where he began to vomit, Mr. Sterling was then seen in the Emergency room at North Kansas City Hospital. He was treated for an infection including surgical aspiration of the elbow infection 9 days with IV antibiotics (Ex. A, pp. 20, 44). The medical bills total \$38,462.07.

Mr. Sterling testified that before the burn injuries to his right upper extremity that he did not have any disabilities or restrictions. He testified that he missed work for a combined total of 4 weeks from mid-May until mid-June 2011. He requested an early release from his doctors to go back to work. Landon Sterling testified that presently the right arm and elbow is extremely sensitive. At times a gentle bump feels like he has hit his crazy bone. At other times he experiences intermittent sharp stabbing pain. The right upper extremity is weaker than before the burn injuries and hospitalization. There is a disfiguring scar that makes the skin and tissue in the elbow tighter.

Dr. Brent Koprivica medical report dated May 7, 2012 was admitted into evidence. Dr. Koprivica rated the right upper extremity at 15% permanent partial disability at the elbow or 210-week level. Ex. H, p. 10. Dr. Koprivica further opined that the burn injury of May, 2011 was the direct, proximate, and prevailing factor in Mr. Sterling's development of severe cellulitis of the right elbow along with secondary infected olecranon bursitis which required a surgical olecranon bursectomy (Ex. H, p. 8). Dr. Koprivica's medical examination found ongoing residual dysesthesias in the right elbow area from scarring along with loss of strength (Ex. H, p. 8). Dr. Koprivica reports that both the medical care and treatment were reasonable, necessary and the direct result of the burn injury of May, 2011 and that the medical bills of \$38,462.07 were medically reasonable and a direct necessity of the burn injuries at work (Ex. H, p. 9). Dr. Koprivica further opined that Mr. Sterling was temporarily totally disabled for 4 weeks from approximately May 17, 2011 until mid-June of 2011 due to the burn injuries at work (Ex. H, p. 9).

North Kansas City contacted the employer May 23, 2011 and requested payment for the medical treatment, including the future surgery (Ex. A, pp. 169, 170). The employer and insurer denied the claim (Ex. A, pp. 169, 170). Accordingly, Landon Sterling retained counsel (Ex. Q). A Claim for Compensation was filed December 13, 2011 alleging unpaid medical bills (Ex. I).

January 4, 2012 the employer and insurer filed an answer in which they denied liability for the claim including the medical bills (Ex. J).

January 10, 2012 by certified mail, counsel for claimant provided copies of over \$35,000.00 in unpaid bills (Ex. K).

January 31, 2012, the employer and insurer deposed Mr. Sterling (Ex. L).

February 15, 2012, Mr. Sterling offered a compromise settlement of \$46,053.60 on the condition that the case was settled by April 16, 2012 before expert witness fees were incurred (Ex. M).

March 7, 2012, by phone, counsel for claimant verbally confirmed with Jeff Stigall that counsel for claimant was claiming a 25% attorney's lien on the \$38,462.07 unpaid medical bills for Mr. Sterling's work injuries (Ex. R, p. 2).

March 9, 2012, by certified letter to Jeff Stigall, counsel for claimant gave formal written notice pursuant to R.S.MO. 484.140 that he was claiming a 25% lien on all sums paid including payment for the unpaid medical bills (Ex. N; Ex. R, p. 2).

April 16, 2012, the deadline for settling the case expired with no offer of settlement being made by either the employer or its insurer (Ex. R, p. 2).

May 16, 2012, after Mr. Sterling had been forced to incur additional expenses of an expert witness examination and written report (Ex. H), the employer and insurer suggested settlement for \$5,895.09. There was no defense expert report to substantiate that amount (Ex. R, p. 3).

June 19, 2012 by certified mail based on the medical report and findings of Dr. Koprivica, which are contained in Ex. H, Mr. Sterling submitted his revised offer to settle all issues for \$54,843.78 computed as \$38,462.07 unpaid medical plus \$3,196.44 unpaid temporary total plus \$13,185.27 for 15% permanent partial disability of the right elbow at the 210-week level (Ex. S).

June 25, 2012, Claimant's Notice of Report was file-stamped by the Division verifying the copies of Claimant's expert rating report and opinions along with exhibits including the unpaid medical bills were provided to the employer and Insurer (Ex. T).

October 23, 2012 Claimant and counsel participated in a mediation with the employer and its insurer.

Conclusions of Law

It is well established that "The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." Royal v. Advantica Rest. Grp., Inc., 194 S.W.3d 371, 376 (Mo.App. W.D.2006) (citations and quotations omitted). "Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission." *Id.* (quoting Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App. W.D.2000)). Pursuant to the statute, an injury shall be deemed to arise out of and in the course of the employment only if the accident is the prevailing factor in causing the injury. MO.REV.STAT. §287.020.2 (2011).

The fact-finder in a workers' compensation proceeding has wide discretion in assessing the credibility of the witnesses and may even decide a case upon its disbelief of an uncontradicted and unimpeached opinion. Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 527 (Mo. banc 1993) (quoting Ricks v. H.K. Porter, Inc., 439 S.W.2d 164, 167 (Mo.1969)). However, the fact-finder may not substitute its opinion on the question of medical causation of an injury for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994). "[T]he question of causation is one for

medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliott v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D.2002).

Permanent Partial Disability

The first issue to be determined by this Court is whether the employer and insurer are liable to Landon Sterling for any permanent partial disability. Dr. Koprivica’s rating of 15% permanent partial disability at the right elbow or 210-week level is uncontradicted and corroborated by the testimony of Landon Sterling. Based on the exhibits, the uncontradicted report of Dr. Koprivica, and the employee’s testimony, this division finds that the employee has sustained a permanent disability resulting in a compensable work injury on May 12, 2011 due to the prevailing factor of being burned while welding on the job at Mid America Car, Inc. This Division finds that Mr. Sterling has a compensable work-related injury resulting in a 15% permanent partial disability to the right upper extremity at the 210-week level or 31.5 weeks at a compensation rate of \$418.58 which equates to \$13,185.27 which the employer and its insurer owe and are hereby ordered to pay.

Temporary Total Disability

The second issue to be determined in this matter is whether the employer and insurer are liable for unpaid temporary total disability. Dr. Koprivica testified that it was medically necessary for Claimant to be off work 4 weeks and Claimant himself testified that he missed 4 weeks of work. Claimant testified that he returned to work early by asking for an early release and because he had bills to pay. An award of 4 weeks unpaid temporary total disability is reasonable, necessary, and due to the prevailing factor of the work injury of May 12, 2011. Unpaid temporary total of 4 weeks at \$562.24 each equates to \$2,248.97 which is owed by the employer and its insurer.

Disfigurement

The next issue to be determined in this matter is whether the employer and insurer are liable for disfigurement. Dr. Koprivica describes the scar in his medical report, Ex. H, and the Division has inspected the scar to the right elbow area and determines that a reasonable award for disfigurement is 4 weeks at \$418.58 each computing to \$1,674.32 that the employer and insurer is ordered to pay.

Attorneys Fees

The final issue to be determined in this matter is whether the employer and its insurer are liable for any medical bills which were unpaid at the time the claim was filed but were paid following the representation of Mr. Sterling by Counsel. And, if so, whether those bills that have been paid should be subject to Counsel attorney’s fees. Counsel believes he is entitled to recover a percentage of the value of the undiscounted medical bills due to his efforts in securing payment for the medical bills which were denied and unpaid at the time of his representation and which were demanded to be paid at the time the claim was filed.

The parties stipulated at the hearing that the employer had paid medical expenses in the amount of \$18,953.16 which represented the discounted value of all known medical expenses for Mr. Sterling and the employer/insurer agree to hold harmless claimant for any unpaid medical bills.

There are no allegations that either party has been unreasonable in the prosecution or defense of this matter. §287.560 RSMo.

Counsel argues that an employer waives its right to pay previously denied medical bills if it denies the claim once it is filed. In support of this argument, Counsel cites to Crowell v. Hawkins, 68 S.W.3d 432 (Mo. App. 2001). In Crowell, the employer and insurer, resumed paying those temporary total benefits just before trial on denial of payment of temporary total benefits. The court in Crowell held that pursuant to §287.203 RSMo the employer and insurer must pay the employee's attorney's fees and costs even though the temporary total hearing was never held. §287.203 was amended in 2005 to remove the requirement that reasonable costs shall be awarded to a prevailing party. Neither Crowell nor §287.203 RSMo are instructive on the attorney's fee issue before the division.

In addition, Counsel argues that payment of medical bills must be made to the employee and his attorney, not direct payment to the medical providers. In support of this argument counsel cites Skinner v. Morgan, 306 S.W.3d 149 (Mo. App. 2010); § 287.220.5. R.S.Mo. The Skinner case involved an uninsured employer claim against the second injury fund. After a hearing and award ordering the Second Injury Fund to compensate the claimant for unpaid medical bills and the Second Injury Fund paid the medical providers directly. The court of Appeals found that the claimant was the only person obligated to pay the bills and therefore he should have been paid directly. The applicable law, §287.220.5, RSMo stated, in pertinent part.: “If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the **fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer**[.]” (Emphasis in Skinner, Id).

Unlike the Skinner case, Mr. Sterling's employer, Mid America Car, Inc., has an obligation to provide and pay for medical care directly. §287.140.1 RSMo. Furthermore, the case held employer is not liable to the Claimant for the full retail amount of the bills unless employer proves claimant is not legally subject to further liability or reimbursement requirements.) Farmer-Cummings v. Personnel Pool, 110 S.W.3d 818 (Mo. 2003); Proffer v. Federal Mogul Corp., 341 S.W.3d 184 (Mo. App. 2011). In the present case the parties stipulate that all medical bills were unpaid at the time the Claim for Compensation was filed. However, the employer paid \$18,953.16 in medical expenses within a few months of Mr. Sterling's deposition and agrees to hold the employee harmless from any additional claims for unpaid bills.

Counsel also cites a recent case of Lake v. Levy, 390 S.W.3d 885 (Mo. App. 2013). In the Lake case, the worker had \$45,001.72 in medical bills paid by Missouri Medicaid. The facts indicate that the Labor and Industrial Relations Commission entered an award in Claimant's favor, which included a twenty-five percent (25%) attorney fee award to Lake specifically on the medical expenses of \$45,001. The employer paid Missouri HealthNet directly even though plaintiff's attorney claimed an attorney's lien of 25%. The Court of Appeals upheld the attorney

lien and found that pursuant to section §484.130 RSMo, Lake had an attorney lien from the commencement of the action. §484.130 RSMo states in pertinent part:

The compensation of an attorney or counselor for his services is governed by agreement, express or implied, *which is not restrained by law*. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment. (Emphasis added)

Section 287.260 RSMo, provides, in pertinent part:

All attorney's fees for services in connection with this chapter shall be subject to regulation by the division or the commission and shall be limited to such charges as are fair and reasonable and the division or the commission shall have jurisdiction to hear and determine all disputes concerning the same.

Based upon the statutory provision of §484.130 and §287.260 RSMo, the Division has the authority to make a determination of whether the attorneys fees in matters before it are fair and reasonable.

Arledge v. Progressive Tire Distribution, 924 S.W.2d 506 (Mo.App. W.D. 1996.) dealt with the determination of a reasonable attorney's fee involving attorneys fees and subrogation interest. Mr. Arledge was killed in a motor vehicle accident and his widow and dependant filed a third party claim as well as a workers' compensation claim. The Attorney for the claimant recovered attorney's fees in the amount of \$114,485.77 in the third party claim and the Honorable Mark Siedlik awarded \$5,000 in attorney's fees in the workers' compensation case. The Commission upheld the attorney's fee award.

On appeal Appellants, asserted that the Commission erred in awarding an attorney fee to appellants' attorney, that is so inadequate and unreasonable as to constitute an abuse of discretion.

“An attorney fees award by the Commission will be reversed only when it is established that the allowance was so inadequate and so unreasonable to constitute an abuse of discretion.” *Id.*, citing Faulkner v. St. Luke's Hosp., 903 S.W.2d 588, 594 (Mo.App.1995); Page v. Green, 758 S.W.2d 173, 175 (Mo.App.1988). “The determination of a fair and reasonable fee involves a balancing of many interests. The fee certainly cannot be arbitrarily set and must be supported by evidence in the record regarding the necessity, reasonableness, and fairness of the fee.” *Id.*, citing Page, 758 S.W.2d at 176, quoting Dean Timothy J. Heinsz, in Missouri Workers' Compensation (Law and Practice) § 21-2, p. 200, (1984). “This standard gives the appellate court little room to “second guess” the Commission.” *Id.* citing Faulkner, 903 S.W.2d at 594.

In the present matter, Counsel has not itemized the time spent obtaining medical bills or corresponding with opposing counsel to seek payment of the medical bills at issue. The evidence indicates that: Counsel filed a claim on behalf of Claimant on December 14, 2011; sent a demand letter on January 10, 2012, attended the deposition of the claimant on January 31, 2012; sent

medical records and medical bills on February 15, 2012 and received a response that Medical bills would be paid on March 7, 2012 (Ex I, K, L, M, N).

Again there is no evidence or allegation that this case has been defended unreasonably. In fact the employer and insurer have not contested the claimant's ratings nor the value of unpaid temporary total disability. The only issue appears to be whether counsel is entitled to assert a lien on medical bills that were unpaid at the time of the filing of a claim. Based upon the evidence before the division it does not appear that counsel has undertaken any significant representation that would exceed the scope of the customary 25% contingency fee that is standard in Workers Compensation. Claimant's demand for attorney's fees on the value of the undiscounted medical bills that were paid promptly after the claim for compensation was filed is denied.

Conclusion

In summary, Mr. Sterling is awarded compensation for his injury to his left elbow in the amount of 15% at the 210-week level for a total of \$13,185.27; unpaid temporary total of 4 weeks at \$562.24 each equates to \$2,248.97 plus 4 weeks of disfigurement at \$418.58 totaling \$1,674.32. Total benefits awarded is \$17,108.56.

Claimant's counsel, John McKay, is entitled to attorney's fees of 25% of the sums recovered for his services rendered in obtaining benefits for the Mr. Sterling.

Made by: _____
LAWRENCE J. REBMAN
Administrative Law Judge
Division of Workers' Compensation