

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-005717

Employee: Donald Tracy
Employer: Bilyeu Plumbing
Insurer: Nationwide Mutual Insurance Company
Date of Accident: January 11, 2005
Place and County of Accident: Jefferson City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated November 14, 2005.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued November 14, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22nd day of May 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Donald Tracy

Injury No. 05-005717

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Bilyeu Plumbing

Additional Party:

Insurer: Nationwide Mutual Ins. Co.

Hearing Date: October 3, 2005

Checked by: HDF/cs

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?
4. Date of accident or onset of occupational disease: January 11, 2005.
5. State location where accident occurred or occupational disease contracted: Jefferson 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 happened or occupational disease contracted: Injured left shoulder when loading a water softener into a truck.
12. Did accident or occupational disease cause death? No. Date of death?
N/a
13. Parts of body injured by accident or occupational disease: Left shoulder.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? \$144.51.

16. Value necessary medical aid not furnished by employer/insurer? \$296.65

Employee: Donald Tracy

Injury No. 05-005717

17. Employee's average weekly wages:

18. Weekly compensation rate: \$297.06 for all benefits.

19. Method wages computation: By agreement.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: \$296.65
(Future – unknown)

weeks of temporary total disability (or temporary partial disability) Unknown (future)

TOTAL: \$296.65

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

No attorney's fee was requested.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donald Tracy

Injury No: 05-005717

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Bilyeu Plumbing

Additional Party:

Insurer: Nationwide Mutual Ins. Co.

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on October 3, 2005. Memoranda were by due by November 7, 2005.

The parties stipulated that on or about the 11th day of January, 2005, the claimant was in the employment of Bilyeu Plumbing; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Nationwide Mutual Insurance Company; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; the rate of compensation on the date of the alleged accident was \$297.06 per week for all benefits; no temporary disability benefits have been paid to the claimant to date; medical aid has been provided in the amount of \$144.51.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) the causation of the injuries alleged, 3) the liability of the employer/insurer for past medical treatment in the amount of \$296.65, 4) the liability of the employer/insurer for past temporary total disability benefits from January 31, 2005, through the present, 5) the liability of the employer/insurer for further medical treatment, and 6) the liability of the employer/insurer for further temporary total disability benefits.

FINDINGS OF FACT

The claimant, Donald Tracy, was 51 years old as of the date of hearing. Mr. Tracy began working for John Bilyeu Plumbing, Inc. (Bilyeu) in July of 2004 and worked through January of 2005. As a plumber for Bilyeu, Mr. Tracy did both commercial and residential plumbing.

On January 11, 2005, Mr. Tracy was picking up a water softener at a local appliance store when, while moving the water softener from the loading dock to the back of a truck bed, the person assisting him pulled on the water softener, thereby pulling Mr. Tracy's left shoulder with the water softener. Mr. Tracy said that he felt an electric shock of pain, but said nothing to the person helping him with the water softener. Mr. Tracy said he told M. Bilyeu that evening that he had hurt his left shoulder but would work until week's end.

Mr. Tracy was seen by a nurse at St. Mary's Health Center on January 24, 2005, who diagnosed a sprain of the left shoulder. An MRI taken of Mr. Tracy's left shoulder on that same date reflects the radiologist's impression that "AC joint injury suspected based on the slight separation of the AC joint on the images taken with weights."

When Mr. Tracy was seen on January 28, 2005, by Christine Hurt, the nurse with St. Mary's Health

Care West, he was released to return to work with a 20-pound lifting, pushing, pulling restriction, as well as restricted lifting from the knee to shoulder height and a restriction from ladder climbing. Ms. Hurt noted that Mr. Tracy was not working due to his blood pressure. By the time Mr. Tracy was ready to return to work, Mr. Bilyeu had replaced him.

Mr. Tracy presented a bill for \$296.65 for physical therapy with St. Mary's Health Center for which he was referred by Dr. Elliott's nurse, Christine Hurt. Ms. Hurt's notes reflect that the workers' compensation carrier approved the physical therapy.

Mr. Tracy settled a previous workers' compensation claim for a left shoulder injury on August 10, 2000, for \$18,000.00, representing 24.5 percent of the left shoulder. On September 16, 2002, a claim for a December 11, 2001 right shoulder injury was settled on October 17, 2003, for \$23,981.78, reflecting permanent disability of 27.5 percent of the right shoulder. Mr. Tracy claimed permanent and total disability against the Second Injury Fund as the result of the combination of his right and left shoulder injuries and settled his Second Injury Fund claim for \$55,000.00 on March 30, 2004.

Dean Farris, an employee of the company selling the water softener, testified that he was attempting to load the water softener from the driver's side of the truck onto which the water softener was being loaded while Mr. Tracy was on the passenger side. Mr. Farris was not aware on January 11, 2005, that Mr. Tracy had been hurt.

John Bilyeu, the owner of Bilyeu, testified that Mr. Tracy told him on January 11, 2005, that his left shoulder was hurt but did not elaborate on an injury while picking up the water softener. It was on January 17, 2005, when Mr. Tracy called Ms. Bilyeu seeking authorization for medical attention for the left shoulder that Mr. Bilyeu discovered that Mr. Tracy was alleging a work injury to his left shoulder.

After completing the week of January 11, 2005, at work, Mr. Tracy did not work again until January 26 and 27, 2005, on each of which days he worked eight hours for Bilyeu. Bilyeu had light-duty work for Mr. Tracy after January 24, 2005; however, Mr. Tracy did not work after January 27, 2005, for personal reasons, including a doctor's appointment, a family visit and high blood pressure. When Mr. Tracy called Mr. Bilyeu on February 14, 2005, about returning to work, Mr. Bilyeu had replaced him and had no further work for work.

Prior to January 11, 2005, in the fall of 2004, Mr. Tracy slipped on his apartment steps. Mr. Tracy sought no medical treatment for any injuries after this incident.

Dr. Joann Mace, M.D., specialist in physical medicine and rehabilitation, as well as Medical Director of Physical Medicine and Rehabilitation for Capital Region Medical Center, testified by deposition that she examined Mr. Tracy on August 9, 2005. Dr. Mace opined that Mr. Tracy's work injury on January 11, 2005, was a "substantial factor" with regard to his left shoulder injury. Dr. Mace also diagnosed "acromioclavicular separation, depression, disturbed sleep cycle, hypertension exacerbated by anxiety and pain, functional impairment in activities of daily living and work capabilities and financial compromise as causally related to the January 11, 2005 accident. Dr. Mace opined that Mr. Tracy should be restricted from work and that Mr. Tracy have an MRI of his left shoulder and possibly an arthrogram of the left shoulder, as well as a referral to an orthopedic physician. Dr. Mace recommended medication for pain control, depression and anxiety and hypertension along with management of the hypertension by a primary care physician.

During cross-examination, Dr. Mace clarified her recommendation for Mr. Tracy saying that he needed to be seen by an orthopedic surgeon for a confirmation of her diagnosis.

Dr. Mace admitted that she is not a psychiatrist or psychologist and said that even though she could not diagnose depression in every patient she could diagnose depression "in this patient."

Records of the Division of Workers Compensation pertaining to Mr. Tracy's history of work injuries include a settlement of an August 10, 2000 left shoulder injury based on 24.5 percent of the left shoulder. Dr. Vale's report is included in the records pertaining to the August 10, 2000 left shoulder injury. Dr. Vale's description of the August 10, 2000 left shoulder injury is "rupture of the left biceps muscle tendon unit as well as disruption of the anterior superior left shoulder labrum and small rotator cuff tear." With regard to the future of the left shoulder, Dr. Vale had the following to say:

However, it was very openly discussed with patient that he must use good judgment in the loading and repetitive use of the left upper extremity. When careful consideration is given to the intraoperative findings and note that it was not possible to repair the SLAP lesion of the left shoulder, activity modification becomes even more critical. Weighted work at or above shoulder level on the left should be, in general, avoided. If weighted work is performed above left shoulder level it should be of weights less than 15 pounds. The patient should also avoid, other than infrequent rotary motions of the left shoulder and avoid vibration, torque, and impact exposures to the left upper extremity which could result in further disruption of the remaining biceps muscle tendon units. Weighted work should be performed at the mid range of elbow flexion, extension, pronation, and supination and weighted work should be avoided at extreme of elbow flexion and/or extension. Maximum weights handled in the left upper extremity alone should be limited to 20 to 25 pounds on an occasional basis and less than 15 pounds on a frequent basis.

(Dr. Vale's report regarding Mr. Tracy's left shoulder injury of August 10, 2000, based on Dr. Vale's visit with Mr. Tracy on September 27, 2001, is included in Employer/Insurer's Exhibit 1).

Dr. Galbraith also evaluated Mr. Tracy's left shoulder on May 22, 2001, and opined that Mr. Tracy should lift no more than 30 to 35 pounds overhead for single lifts and that Mr. Tracy should do no chronic repetitive overhead work as the result of the 2000 left shoulder injury. Dr. Galbraith opined that Mr. Tracy's disability as the result of his October 26, 2000 left shoulder surgery was 18 percent of the left shoulder. Dr. Galbraith's post-operative diagnosis was 1) a non-reparable biceps tendon tear in the left shoulder, 2) a non-reparable SLAP tear, (3 a left shoulder rotator cuff tear which was debrided, and) impingement syndrome of the left shoulder.

APPLICABLE LAW

Section 287.020.2 provides as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

A claimant must prove all the essential elements of his claim. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo. App. 1990). Dolen v. Bandera's Café, 800 S.W.2d 163, 164 (Mo. App. 1990). although the law is to be liberally construed in favor of providing benefits, a claimant still must prove all the elements necessary to its claim. Sanders v. St. Clair Corporation, 943 S.W.2d 12, 16 (Mo. App. S.D. 1997). The employee has proven the essential elements of his claim because he has produced credible evidence that this accident of 1/11/05 happened and that his current shoulder complaints are related to an accident occurring on that date.

AWARD

The claimant, Donald Tracy, has sustained his burden of proof that he was injured in an accident on January 11, 2005. Mr. Tracy's testimony regarding the accident and injury is credible and is not disputed. While Mr. Farris was not aware of Mr. Tracy's injury at the time it occurred, he also testified that Mr. Tracy was on the other side of the truck bed during the loading activity. Mr. Bilyeu was aware of Mr. Tracy's left shoulder pain on the day the accident and injury occurred; he just did not know how the accident and injury occurred. Medical records of Christine Hurt, the nurse who initially treated Mr. Tracy, reflect Mr. Tracy's report of a left shoulder injury while moving a water softener. X-rays taken on January 24, 2005, reflect an acromioclavicular separation. Dr. Mace also diagnosed an acromioclavicular separation. Mr. Tracy's prior left shoulder injury was to the left biceps tendon, the anterior superior left shoulder labrum

and the left rotator cuff, areas distinct from the acromioclavicular joint.

Mr. Tracy has also sustained his burden of proof that he is entitled to payment of the physical therapy bill in the amount of \$296.65. Ms. Hurt's records reflect the authorization of the employer/insurer for this therapy on January 26, 2005, after a discussion with "Barb Selby at insurer."

Mr. Tracy has failed to sustain his burden of proof that he is entitled to temporary disability benefits. Mr. Tracy was able to work for a week following the January 11, 2005 accident and injury, as well as on January 26 and 27, 2005. Contemporaneous medical records reflect no total restriction from work for Mr. Tracy. Mr. Tracy failed to return to work thereafter for personal reasons, including high blood pressure and a visit from family members. When Mr. Tracy was ready to return to work with Bilyeu, Mr. Bilyeu told him that he had replaced him. Dr. Mace's opinion pertaining to temporary total disability is discounted where factors outside of her area of medical expertise, including a disturbed sleep cycle and depression are included in her assessment of Mr. Tracy's ability to return to work.

Mr. Tracy has sustained his burden of proof that he is entitled to medical treatment for the left shoulder separation of the acromioclavicular joint. Dr. Mace's opinion with regard to this diagnosis is credible and supported by the January 24, 2005 x-rays. Also, as noted previously, this is a distinct injury from Mr. Tracy's previous injury to his left shoulder.

The issue of further temporary total disability benefits is resolved in the same manner as is the issue of past temporary disability benefits insofar as the evidence presented in this hearing. This finding does not, however, preclude Mr. Tracy's right to temporary disability benefits should medical treatment for the left shoulder acromioclavicular separation warrant a period of temporary disability.

Date: November 14, 2005

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret
Patricia "Pat" Secret, *Director*
Division of Workers' Compensation