

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

Injury No. 12-030357

Employee: Patton H. Van Hoogstraat
Employer: Gen. Geo. C. Marshall VFW Post 2184
Insurer: Missouri Employers Mutual Insurance Co.

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

Discussion

Medical Causation

Employee claims that while lifting a table for employer on or about April 14, 2012, he suffered accidental injury in the form of bilateral inguinal hernias. The administrative law judge determined that employee failed to meet his burden of proving a compensable injury. We agree with this result. However, we wish to provide some clarifications.

In a discussion on page 5 of his award under the heading "Accident and Injury Arising Out of and In the Course of Employment," the administrative law judge found that employee's claim for benefits under Chapter 287 was undermined by employee's apparent choice to utilize his own physicians, as well as the various discrepancies in the evidence with regard to the date and history of the alleged accident. We note, however, that the administrative law judge ultimately did not apply the relevant statutory test under § 287.020.3(2) RSMo to resolve the stated issue whether employee's claimed injuries arose out of and in the course of employment.

Similarly, in a discussion on page 6 labeled "Medical Causation," the administrative law judge considered which of the medical experts provided the more persuasive testimony, but did not apply the relevant statutory test under § 287.020.3(1) RSMo whether employee suffered an accident that was the prevailing factor causing the claimed medical conditions or disabilities.

Section 287.020.3 RSMo governs any discussion of these issues, and provides, as follows:

(1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Employee: Patton H. Van Hoogstraat

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(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The issue commonly designated as “medical causation” is encapsulated in the requirement under paragraph (1) above that “[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” After careful consideration, we agree with the administrative law judge’s (implied) finding that the opinions from employee’s expert, Dr. Gary Sides, are insufficient to satisfy this statutory requirement, for the following reasons.

We acknowledge that minor inconsistencies with regard to the date of injury or history of accident are not necessarily fatal to a claim, especially where “inconsistencies and contradictions in the claimant’s testimony [are] either explained by other testimony given by the claimant or there [are] other facts and circumstances in the case from which the Industrial Commission [can] reasonably determine what the true state of facts was and believe the claimant on that basis.” *Pate v. St. Louis Independent Packing Co., etc.*, 428 S.W.2d 744, 752-53 (Mo. App. 1968). Here, though, there are so many inconsistencies with respect to the timing, onset, and mechanism of injury, the activities in which employee was engaged at the time, the identity of the coworkers who purportedly witnessed the event, and whether employee continued working after the onset of symptoms, combined with a lack of any comprehensive explanation¹ for these contradictions, that we simply cannot rely on employee’s testimony to determine the correct facts. Likewise, although we are aware there is no requirement under Chapter 287 that the medical treatment records identify employment as the source of injury, *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 259 (Mo. App. 2010), the varying histories contained in the treatment records in this case compound the confusion over when and how employee’s hernias manifested.

In light of the foregoing considerations, we find that Dr. Sides’s opinions, however valid, rely upon factual assumptions that are not adequately established in the record.² For this reason, we cannot rely on them, and we conclude therefore that the claimed accident of

¹ Employee advanced the explanation that he didn’t know what a hernia was or whether he’d suffered any injury as the reason for his (apparent) delay in seeking medical treatment; and the explanation that he didn’t know anything about workers’ compensation proceedings as the reason for the discrepancies regarding the date of injury. While not inherently incredible, these explanations from employee fail to resolve the material discrepancies regarding what employee was doing at the time of the claimed injury, who was there, and whether employee finished his shift.

² Also, as employer suggests in its brief, Dr. Sides’s opinion (even if believed) that employee suffered his hernias in March 2012 would appear to preclude an award of compensation in this claim, owing to the requirement under § 287.195 RSMo that “[i]n all claims for compensation for hernia resulting from injury arising out of and in the course of the employment, it must be definitely proved to the satisfaction of the division or the commission: ... [t]hat the hernia did not exist prior to the accident or unusual strain resulting in the injury for which compensation is claimed.” Again, employee claims herein that his hernias resulted from an accident occurring on or about April 14, 2012; employee does not advance a gradual onset or occupational disease theory of injury.

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April 14, 2012, was not the prevailing factor causing the resulting medical conditions of bilateral inguinal hernias, or any disability associated therewith.

The remaining issues are moot, owing to employee's failure to meet his burden with respect to the issue of medical causation. Accordingly, we disclaim the administrative law judge's discussion and analysis with respect to the issue of notice, and whether employee suffered injuries arising out of and in the course of the employment.

Corrections

On page 1 of his award, in the 2nd and 3rd numbered paragraphs under the heading "FINDINGS OF FACT AND RULINGS OF LAW," the administrative law judge states that employee suffered an accident or onset of occupational disease, and that his injury or occupational disease was compensable under Chapter 287. These statements are inconsistent with the administrative law judge's ultimate decision and award, and thus appear to have been the product of typographical or clerical errors. In any event, we disclaim these erroneous statements.

On page 4 of his award, in the 1st sentence of the 12th numbered paragraph, the administrative law judge states: "Claimant offered the deposition of Dr. Russell Cantrell as Exhibit E." We correct the foregoing to read, as follows: "Employer offered the deposition of Dr. Russell Cantrell as Exhibit E."

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 4, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 21st day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Patton H. Van Hoogstraat Injury No.: 12-030357
Dependents: N/A Before the
Employer: Gen. Geo. C Marshall VFW Post 2184 **Division of Workers'**
Compensation
Additional Party: N/A Department of Labor and Industrial
Relations of Missouri
Insurer: Missouri Employers' Mutual Insurance Co. Jefferson City, Missouri
Hearing Date: February 3, 2015 Checked by: JED

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: Indeterminant
5. State location where accident occurred or occupational disease contracted: St. Louis County (alleged)
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Claimant allegedly injured himself moving tables in entertainment hall.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$400.00
- 19. Weekly compensation rate: \$266.67/\$266.67
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None

- 22. Second Injury Fund liability: None

TOTAL: -0-

- 23. Future requirements awarded: N/A

Said payments to begin immediately 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 N/A 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:

Employee:	Patton H. Van Hoogstraat	Injury No.:	12-030357
Dependents:	N/A	Before the	
Employer:	Gen. Geo. C Marshall VFW Post 2184	Division of Workers'	
Additional Party:	N/A	Compensation	
Insurer:	Missouri Employers' Mutual Insurance Co.	Department of Labor and Industrial	
Hearing Date:	February 3, 2015	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED

This case involves a disputed bilateral inguinal hernia injury resulting to Claimant with the reported accident date of May 1, 2012. Employer/Insurer admit Claimant was employed on said date and that any liability is fully insured. The Second Injury Fund (“SIF”) is not a party to this claim. Both parties are represented by counsel.

Issues for Trial

1. Notice;
2. accident;
3. whether injury arose out of and in the course of employment;
4. medical causation;
5. liability for unpaid medical expenses (stipulated at \$18,121.50);
6. liability for permanent partial disability.

FINDINGS OF FACT

1. Claimant testified that he worked fulltime for Employer setting up the Post hall for weekly and various entertainment events and handled stocking beer, lifting cases and half-barrels of beer.
2. Claimant testified he injured himself on a “Saturday” [in April 2012]. Claimant filed an original Claim and two Amended Claims each of which alleges a different accident date, or dates. The last Amended Claim (filed September 4, 2013) alleged an accident date of April 14, 2012.
3. Employer’s *Report of Injury* reflects a May 1 accident date with notification to Employer that same date. The accident giving rise to injury is the movement of a keg of beer. Also noteworthy is notice to the insurance administrator on May 2 with further annotation of Claimant’s return to

work on May 4. This *Report of Injury* was made by Gerald Ringe, deceased at the time of trial. (Exhibit A.)

4. David Larson, a casual helper at the VFW hall, testified at trial that Claimant was injured on April 14, 2012 and saw Claimant hold his right side with pain complaints. His girl friend, Linda Garrett gave similar testimony.

5. Richard Odell testified that Gerry Ringe and Dick Gill, both VFW officials took Claimant to St. Clare Hospital. Neither Mr. Ringe (deceased) nor Mr. Gill testified.

6. Claimant sought treatment for his inguinal bulges and pain on May 2, 2012 at St. Clare Hospital which records reflect a patient history of :

---“here with workmans comp (sic) for evaluation of possible hernia ...”
---“...he thinks he may have two hernias, has had for months and bulge out R [greater than] L with lifting beer kegs, with sl pain.” (*Brackets substituted.*)

7. No employer is identified in the medical records. The evidence contains no demand on Employer by Claimant for treatment.

8. Claimant underwent surgery for hernia repair by Dr. Bruce Brown at St. Mary’s Health Center (in St. Louis) which record reflects Dr. Victoria Allen as the referring physician. These notes do not reflect a work-related hernia injury. (Exhibit 3.)

9. Dr. Brown’s notes on May 9, 2012 reflect a patient history of right groin pain with bilateral bulges. It states, “This was noticed about a month ago. He recalls no specific incident at work.” (Exhibit F.)

10. Dr. Allen’s notes are not in evidence.

11. Claimant offered the narrative report of his expert, Dr. Gary Sides, whose opinion report, including accident scenario, is identified as Exhibit 6. Dr. Sides examined Claimant on April 17, 2013 and reviewed a limited number of medical records, i.e. he did not have the surgeon’s initial evaluation notes. Dr. Sides took a history from Claimant that he sustained abdominal pain from lifting tables at the VFW hall in “March of 2012.” His examination was essentially “unremarkable,” but he assigned 20 percent PPD of the body for both hernias.

12. Claimant offered the deposition of Dr. Russell Cantrell as Exhibit E. Dr. Cantrell examined Claimant and took a patient history of accident occurring on April 12 or 13, 2012 while lifting tables and beer. Physical examination was essentially negative but because of the surgeries he assigned 4 percent PPD to each hernia. Dr. Cantrell gave an opinion that the reported accident was not the prevailing factor in causing Claimant’s double hernia on or about April 14, 2012.

13. Claimant was generally credible inasmuch as his responses were spontaneous and cogent. However, many of his references were very vague and indefinite rendering much of his testimony unreliable. The various histories given to VFW members/guests, the medical providers and the two trial experts make it difficult to find Claimant's testimony reliable.

RULINGS OF LAW

Notice

The purpose of Section 287.420 RSMo (2005) is to give the employer timely opportunity to investigate the facts pertaining to whether the accident occurred and, if so, give the employee medical attention to minimize any disability. The requirement of 30 days' written notice may be circumvented if the Claimant makes a showing of good cause or the employer is not prejudiced by the lack of such notice.

A Claimant must specifically prove the employer was not prejudiced by the lack of notice. A prima facie case of no prejudice is made upon a showing that employer had actual notice. No prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact-finder.

Here, it is undisputed Claimant did not provide Employer with written notice within thirty days of the alleged incident. Claimant asserts that he gave his friends actual oral notice on the day of the reported accident. Such reports to agents of Employer resulted in the *Report of Injury* being filed by Mr. Ringe with the insurance administrator on May 2, 2012, with an accident date of May 1, 2012.

This filing suggests Claimant's testimony about oral notice to his friends is, most importantly, *timely*. However, the substance and detail of the content of that notice is variable. Claimant stated he injured his abdomen by stacking tables in the hall. Claimant testified in detail about the table number, size, frequency, and arrangement of this table duty. Even if inaccurate, a timely *Report of Injury* was filed. The record compels the conclusion that Employer received effective notice under the law.

Accident and Injury Arising Out of and In the Course of Employment

Sections 287.020.2-3 RSMo (2005), state that an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The confused evidence herein prevents a finding of a compensable injury. It may be observed, by way of understanding, that neither party embraced protections afforded by exercising medical benefits provisions inasmuch as Employer required no medical examination contemporaneous with the accident and Claimant rather casually contracted private treatment rather than make demand for treatment from Employer to cure and relieve the effects of the injury. See Section 287.140 RSMo (2005). In addition, while there is testimony about agents of Employer accompanying Claimant to St. Clare Hospital, there is no evidence of authorization of

treatment. On the contrary, there is evidence of private billing of Claimant for unauthorized care. Also, these agents did not testify.

Accordingly, evidence of corroborating contemporaneous patient history in medical records reflecting, and memorializing, work-related accident and/or injury is not available as is typically found. The St. Clare records suggest a work accident but place it happening “months ago.” Subsequently, the surgeon’s May 9 notes, offered by Employer, do not suggest a work accident and place it “a month ago” (or the April 14 date as per the last Amended Claim and Claimant’s trial testimony). Again, the *Report of Injury* reflects a May 1 accident date.

Thus, Claimant and his witnesses generated facts for three different dates of accident: first, statements to Gerald Ringe, as agent of Employer, resulting in a May 1 accident date; second, by pleading (and testimony, and history to the surgeon) suggesting an April 14 date, and still another by his patient history at the emergency room at St. Clare suggesting an accident date with symptoms “... months” before the emergency room visit. Nothing in the record suggests Employer controlled the providers selected by Claimant. The medical record is consistent with private treatment as allowed under Section 287.140.1 RSMo (2005).

The mechanism of injury also varies among the sources of proof comprising the evidentiary record. The trial testimony and Claimant’s expert suggests lifting tables as does his expert, Dr. Sides. Whereas the *Report of Injury* indicates lifting kegs of beer, Employer’s expert references both tables and beer being lifted, and, lastly, the surgeon who notes no mechanism of injury but only symptom onset. Contradictory evidence regarding the essential facts of a compensable injury undermines the basis of complaint and demand for benefits under Chapter 287.

Medical Causation

These discrepancies are found in the expert reports which raise doubts about whether they were fully informed. Assuming, *arguendo*, that Claimant proved a compensable injury, the Claim, nevertheless, fails for insufficient credible evidence of medical causation. It is reasonable to expect forensic experts to be fully informed on the facts of accident and injury. Claimant’s accident history given to the VFW witnesses contrasts with those given each of the experts proffered by the parties. For example, Dr. Sides relies on a March 2012 accident period and Dr. Cantrell relies on a mid-April date. Separately, Dr. Brown, the surgeon selected by Claimant, relies on the representation that “no specific incident at work occurred.” Dr. Sides was poorly informed on the medical record. Dr. Cantrell was better informed on the treatment record and more persuasive generally than Dr. Sides.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof. The remaining issues are moot. Claim denied.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge