

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

Injury No.: 01-169515

Employee: Jason Wacker  
Employer: Trans States Airline  
Insurer: Employers Insurance Company of Wausau  
Date of Accident: Alleged September 15, 2001  
Place and County of Accident: Alleged St. Louis County, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 22, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued June 22, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16<sup>th</sup> day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Dependents: N/A

Employer: Trans States Airline

Additional Party: N/A

Insurer: Employers Insurance Company of Wausau

Hearing Date: March 28 and April 1, 2005

Before the  
**Division of Workers'**

**Compensation**

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

Checked by: MDL:tr

### 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? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
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 occurred or occupational disease contracted:  
Employee was injured while playing in a golf tournament.
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: N/A
14. Nature and extent of any permanent disability: -0-
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Jason Wacker

Injury No.:

01-169515

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$642.52
19. Weekly compensation rate: \$430.34/\$329.42
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

23. Future requirements awarded: N/A

Said payments to begin N/A 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:	Jason Wacker	Injury No.: 01-169515
Dependents:	N/A	Before the
Employer:	Trans States Airline	<b>Division of Workers'</b>
Additional Party:	N/A	<b>Compensation</b>
Insurer:	Employers Insurance Company of Wausau	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDL:tr

### PRELIMINARIES

A hearing was held on March 28, 2005, at the Division of Workers' Compensation in the City of St. Louis. Jason Wacker ("Claimant") was represented by Mr. Richard Lecinski. Trans States Airline ("Employer") and its Insurer, Employers Insurance Company of Wausau, were represented by Mr. Fielding Poe. Claimant's attorney requested a fee of 25% of benefits awarded.

The parties stipulated that on or about September 15, 2001, Claimant sustained an accidental injury; at that time Claimant was an employee of Employer; and venue is proper in the City of St. Louis. The parties further stipulated that Claimant was earning an average weekly wage of \$645.52 resulting in applicable rates of compensation of \$430.34 for total disability benefits and \$329.42 for permanent partial disability benefits. Employer has paid no benefits.

The issues for determination by hearing are whether Claimant's accident, which occurred on September 15,

2001, arose out of and in the course of his employment; whether Claimant provided the requisite notice of injury to Employer; liability of Employer for past medical benefits of \$835.27; liability of Employer for future medical care; liability of Employer for temporary total disability benefits; nature and extent of permanent partial disability sustained by Claimant; and whether the claim is barred by the statute of limitations.

## FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

### *Claimant's Testimony*

On September 15, 2001, Claimant had worked for Employer for six months as an avionics technician when he broke his leg while participating in a golf tournament. He first learned of the golf tournament from his manager and supervisor. He overheard a conversation about the golf tournament and approached them and told them that he would like to play. Claimant worked Tuesday through Friday in ten-hour shifts. In order to play in the tournament, he had to have his schedule rearranged. The day of the tournament, Claimant and a co-worker arrived late because they got lost. During the tournament Claimant was offered free beer and food.

As Claimant was teeing off he went to retrieve his ball. He started walking down a hill, and picked up momentum and speed. As he ran down the hill, his knee locked and he heard a crack. When he fell his leg was lying across his other leg. Claimant was picked up by Abbott Ambulance and taken to Memorial Hospital. Claimant underwent surgery on his leg and was in the hospital for a week. Following his release from the hospital, he went to stay with his grandmother for a week and then went home. Claimant testified that he was off work for three to four weeks and received no sick pay. He was provided with light duty when he returned. Claimant testified that his fracture was in the middle of his femur. He now has pins and hardware with a titanium rod. According to Claimant, his doctor recommended that he leave the hardware in.

Claimant testified that before the accident he played indoor soccer, basketball, baseball, and golf. Currently, he is unable to run a lot. He doesn't play any sports now but golf. Running is uncomfortable and his range of motion is poor. Claimant testified that he has pain in his hip when he sits for a long period. He is stiff and his leg rotation is not what it used to be. He has knee pain in cold weather. His knee is out of socket and won't line up.

Claimant is currently working in roof sales in Florida. He has a partner who does measurements, but he must occasionally go out on a roof. Climbing up a ladder is difficult.

According to Claimant, his personal motivation for participating in the golf tournament was that he heard the owner of the company and the vendors that the company does business with would be there. He thought it would be good for his career in helping him to move up in the company.

Claimant was not a purchaser, buyer or a supervisor. His attendance was not required at the tournament and was strictly voluntary. Claimant paid no fee to participate in the golf tournament and was not on the clock or compensated for going to the tournament. Claimant did not take a vacation day.

Claimant testified that he had a prior DWI. It is not clear whether this was a prior DWI charge, plea of guilty or conviction. Claimant testified that his driver's license was suspended at the time of the accident.

Claimant did not ask Employer for any treatment or to go to a doctor. He did not file his claim until January of 2004. Claimant did not tell Employer he had a work accident because he felt it was in his best interest not to.

### *Other Witnesses*

James Lankford, Jr. testified on behalf of Claimant. Mr. Lankford worked for Employer as a night shift avionic supervisor, was Claimant's direct supervisor, and worked the same shift as Claimant. On September 15, 2001, he played in the golf tournament along with Claimant. Mr. Lankford testified that employees and vendors participated in the tournament. Free beer was provided during the tournament. The vendors were hole sponsors

and offered prizes and gifts during the tournament. After the tournament there was a buffet. One-third of the players in the tournament were vendors that Employer did business with. Mr. Lankford testified that you could pick three of the four persons you wanted in your foursome and they would add a vendor to your foursome. Mr. Lankford was not in Claimant's cart, but he was in his foursome.

The morning of the tournament, he picked Claimant up and they rode together. They got lost and showed up late. Their vendor was assigned to someone else because the organizers thought he and Claimant were not going to make it.

Mr. Lankford didn't see the accident happen but arrived immediately after, and saw Claimant lying in the sand trap in a lot of pain with a broken leg. They sent the fourth member of their group to call an ambulance. Mr. Lankford went to the hospital with Claimant. Mr. Lankford remembers that Claimant was out of work for three to four weeks following the accident, and had limitations when he got back to work.

Mr. Lankford testified that you had to be invited to participate in the tournament. Other aviation suppliers were included along with vendors. He considered the tournament to be a benefit. In his opinion, Employer got something out of it or they wouldn't do it. Mr. Lankford is considered management. He had some purchasing responsibilities with vendors. Claimant dealt with vendors, but not for purchasing or business purposes. Claimant was not a supervisor. Mr. Lankford testified that he doesn't know how the tournament was funded. Mr. Lankford did not help organize the event. He did not fill out an injury report. He notified his manager of the accident, but did not tell him it was a work accident.

Samuel Curless testified on behalf of Employer. He is the Director of Asset Management for Employer, and has been in his current position for five years. Mr. Curless is acquainted with Claimant and knows of his injury. Mr. Curless was at the tournament and helped to organize it. The tournament is an employee appreciation day for the benefit of the employees. The tournament was funded solely by vendors that do business with Employer. Employer does not donate money to fund it, but any employee is eligible to play. Employees fill out a form to secure a spot. Mr. Curless testified that there is no benefit to Employer for the employees' participation. Mr. Curless testified that he did not consider Claimant's injury to be work related. Mr. Curless is a salaried employee, and was not paid to be at the event.

Mr. Gary Hartling, Director of Insurance Programs for Employer, testified on behalf of Employer. Mr. Hartling handles the functions of human resources for Employer. Mr. Hartling found out about Claimant's injury sometime after January of 2004 when he received notice from the State advising him of the workers' compensation claim filed by Claimant. When he received the claim, he caused the first report of injury to be filed.

Mr. Don Whitrock testified on behalf of Employer. As Employer's hangar manager, he is responsible for everything that happens at the hangar including maintenance, servicing, and cleaning of planes. He knows Claimant because Claimant worked under him. He knows about Claimant's injury because he was at the tournament on the same team. There were no executives or vendors playing with him. Mr. Whitrock is unaware of who sponsored the tournament. Mr. Whitrock had a chance to rub elbows with the vendors and executives of the company. Mr. Whitrock testified he did not fill out an accident report because he wasn't Claimant's manager at the time, and that would have been up to his manager to do.

Mr. Powell Trout testified on behalf of Employer. He is the St. Louis base manager for Employer. He knows Claimant and is aware of the incident. The golf tournament was open to all employees. According to Mr. Trout, Claimant does not have a reputation for honesty and truthfulness.

### ***Medical Records***

The medical records reflect that Claimant underwent surgery on September 15, 2001. The procedure was a closed intramedullary nailing of the right femoral shaft fracture. Dr. Hoffman rated Claimant's disability at 35% of the right lower extremity measured at the right hip secondary to his fracture of the right femur with hip and knee involvement. Dr. Markenson rated Claimant's disability at 15% of the right lower extremity at the femur.

### **RULINGS OF LAW**

Based upon my comprehensive review of the evidence, including my observation of all witnesses at hearing, the review of the medical evidence, and the application of Missouri law, I find:

*Accident/Arising Out Of and In the Course of Employment*

Claimant's accident of September 15, 2001, did not arise out of and in the course of his employment. Section 287.120.7 RSMo states as follows:

Where the employee's participation in a voluntary recreational activity or program is the proximate cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored, or supported the recreational activity or program expressly or impliedly in whole or in part. The forfeiture of benefits or compensation shall not apply when: (a) the employee was directly ordered by the employer to participate in such recreational activity or program; (b) the employee was paid wages or travel expenses while participating in such recreational activity or program; or (c) the injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

It is clear that Claimant's participation in the voluntary recreational activity of the golf tournament was the proximate cause of his injury. None of the exceptions to this forfeiture statute apply in the instant case. First, Claimant was not ordered by Employer to participate in the activity. Claimant's participation was strictly voluntary. Second, Claimant was not paid to participate in the tournament. The evidence indicates that Claimant had to rearrange his work schedule because he was not being paid for the time that he participated in the tournament. Third, the injury did not occur on Employer's premises. Under a plain reading of the statute, Claimant cannot prevail.

However, in *Graham v. La-Z-Boy Chair Company*, 117 S.W.3d 182 (Mo.App. S.D. 2003), the court found that a golf tournament was not purely recreational if both employer and employee derived a mutual benefit from the employee's participation in the activity. In the instant case, Claimant derived a personal benefit from his participation. First, he received a free golf game, free beer, and free food. Second, he had the opportunity to rub elbows with management, which he felt could potentially help him advance within the company.

However, the benefit was not mutual. The second step in the mutual benefit analysis is whether Employer derived some benefit from Claimant's participation in the tournament. I find that it did not. Claimant was an avionics technician. He had no management responsibilities and was not a purchaser or a buyer. He had no business interaction with vendors. The only possible benefit Employer could have derived from Claimant's participation was a better showing for the tournament, which I believe is too attenuated to trigger liability for Employer. The Employee in the *La-Z-Boy* case was a supervisor, and the golf tournament allowed him to improve his working relationships with vendors and suppliers, which in turn, benefitted the Employer. Further, the employee in *La-Z-Boy* was a salaried employee, and he was paid while he was participating in the tournament.

Character evidence, evidence that Claimant was intoxicated, and improper impeachment evidence was introduced by Employer, but was not considered by the Court in reaching its conclusion.

Because I have found that the recreational exception in §287.120.7 RSMo applies, the remaining issues are moot.

The Claim for Compensation is denied.

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

Made by: \_\_\_\_\_

Margaret D. Landolt  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

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Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*