

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

Injury No.: 02-144836

Employee: Ruben Walker

Employer: Bon Appetit Management

Insurer: St. Paul Fire & Marine 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 24, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued April 24, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29<sup>th</sup> day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Ruben Walker

Injury No.: 02-144836

Dependents: n/a

Employer: Bon Appetit Management

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund (previously dismissed)

Insurer: St. Paul Fire & Marine

Hearing Date: February 6, 2013

Checked by: KMH

### 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? unknown
3. Was there an accident or incident of occupational disease under the Law? unknown
4. Date of accident or onset of occupational disease: alleged January 17, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis
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? unknown
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: Claimant alleges he was injured in the course and scope of his employment on January 17, 2002.
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: unknown
14. Nature and extent of any permanent disability: none
15. Compensation paid to-date for temporary disability: none
16. Value necessary medical aid paid to date by employer/insurer? \$1,579.28

Employee: Ruben Walker

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$379.89
- 19. Weekly compensation rate: \$253.27/\$253.27
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: NONE

23. Future requirements awarded: none

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:

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Ruben Walker

Injury No.: 02-144836

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Bon Appetit Management

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

Additional Party: SIF (previously dismissed)

Insurer: St. Paul Fire & Marine

Checked by: KMH

A hearing was held on the above captioned matter February 6, 2013. Ruben Walker (Claimant) was represented by attorney Brian Stokes. Bon Appetit Management (Employer) was represented by attorney Karen Mulroy. The SIF was dismissed prior to the hearing.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award. All exhibits were admitted without objection. Employer requested permission to submit a trial brief, and filed this brief March 8, 2013.

Claimant alleges he was injured by accident January 17, 2002. Employer denies liability.

### **STIPULATIONS**

The parties stipulated to the following:

1. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on the alleged date of injury.
2. Employer's liability was fully insured by St. Paul Fire & Marine.
3. Employer had notice of the alleged injury.
4. A Claim for compensation was timely filed.
5. Claimant's average weekly wage was \$379.89. His TTD and PPD rate is \$253.27.
6. Employer has paid \$1,579.28 in medical benefits and no TTD benefits.

### **ISSUES**

The parties stipulated the issues to be resolved are as follows:

1. Accident
2. Arising out of and in the course of employment
3. Medical causation
4. PPD
5. Viability of the claim

## **FINDINGS OF FACT**

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant's case was set for numerous prehearings and mediations between 2005 and 2013. In 2011, his case was set for a mediation or prehearing five times. The Division properly sent a notice of mediation or prehearing for each of those five settings. The notices sent to Claimant were returned to the Division by the United States Postal Service as "unable to forward".
2. On November 14, 2011, the Division sent notice to Claimant of a December 6, 2011 "Notice to show cause why claim should not be dismissed" docket setting. The notice also advised the parties the claim would be dismissed unless good cause was shown as to why an Order of Dismissal should not be entered. Claimant's notice for this docket setting was returned to the Division as "unable to forward".
3. Claimant's attorney and Employer's attorney appeared at the Division for the December 6<sup>th</sup> docket setting. Claimant did not appear for that docket. Judge Wenman dismissed the case with prejudice for failure to prosecute.
4. The Division issued an Order of Dismissal and sent this order to Claimant. Claimant's copy of the Order of Dismissal was returned to the Division.
5. Claimant's attorney filed an Application for Review with the Labor and Industrial Relations Commission (LIRC) alleging the case was dismissed in error.
6. The LIRC set aside the Order of Dismissal and reinstated the claim finding because no record was made of the show cause hearing, the LIRC had no evidence to review.
7. The Division set the case for hearing July 12, 2012. That hearing was continued by consent of the parties.
8. The Division reset the case for hearing November 13, 2012. The ALJ noted Claimant was missing, and the ALJ agreed to reset the case on certified notice to Claimant. The ALJ noted the case was to be either tried or dismissed at the next setting.
9. On November 16, 2012, the Division sent Claimant a certified copy of a notice of hearing scheduled for February 6, 2013. That notice was returned to the Division.
10. The case proceeded to trial February 6, 2013, before the undersigned ALJ. Claimant did not appear for the hearing. The only testimony at trial was a brief statement from each of the attorneys.

## RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

### **1. Claimant failed to prove a compensable accident.**

Claimant's 2007 deposition was admitted into evidence without objection. Claimant's attorney contends Claimant's deposition testimony in lieu of his live testimony is sufficient to establish the elements of his case. I do not find this question addressed in Employer's sixty-five page trial brief.

Section 287.560 provides any party may use depositions in like manner as in civil cases. While Rule 57.07 provides depositions may be used in court for any purpose, Claimant must still meet other statutory provisions in order to use a deposition in lieu of live testimony.

Section 492.400 (RSMo) authorizes depositions to be read and used as evidence as if the witness was present and examined in open court during trial under the following circumstances:

1. If the witness resides or is gone out of the state;
2. If the witness is dead;
3. If the witness resides in a county other than that in which the trial is held, or he has gone a greater distance than forty miles from the place of trial without the consent, connivance or collusion of the party requiring his testimony;
4. If the witness is a judge of a court of record, a practicing attorney or physician and engaged in the discharge of his official or professional duty at the time of trial;
5. If the witness is absent without the consent, connivance or collusion of the party requiring his testimony and the party, in the exercise of due diligence, has been unable to procure the attendance of the deponent by subpoena.

Chapter 492 also allows deposition to be taken to perpetuate testimony. Section 492.570 allows such depositions to be used and read as evidence in a judicial proceeding if the deponent is dead; if he is unable to give testimony by reason of mental incapacity; if he is rendered incompetent; or if he was removed so his testimony cannot be obtained.

In Claimant's case, no evidence was presented to establish any of these conditions.

In addition, Claimant's deposition was taken in August 2007. It is outdated, and cannot be relied on to establish Claimant's current condition.

I find Claimant's deposition is not sufficient to establish the elements of his case.

**2. The unapproved settlement stipulation is not an enforceable settlement.**

Section 287.390 (RSMo 2000) provides “no agreement of settlement or compromise of any dispute or claim for compensation under this chapter shall be valid until approved by an administrative law judge”.

The stipulation in this case was prepared and presented to Claimant’s attorney. The stipulation was never signed by all parties and presented to a judge for approval. This stipulation does not meet the statutory requirements of a valid settlement.

**CONCLUSION**

Claimant failed to prove the essential elements of his claim. The settlement offer is not a valid and enforceable settlement. Claimant’s case is hereby dismissed for failure to prosecute.

Made by: \_\_\_\_\_  
KATHLEEN M. HART  
*Administrative Law Judge*  
*Division of Workers' Compensation*

