

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

Injury No.: 11-017103

Employee: Antonio Watkins
Employer: ADM Grain Company
Insurer: Old Republic 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 March 1, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued March 1, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20TH day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Antonio Watkins Injury No.: 11-017103

Dependents: N/A

Employer: ADM Grain Company

Additional Party: N/A

Insurer: Old Republic Insurance Company

Hearing Date: December 3, 2012

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

Checked by: SC

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: Alleged February 20, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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 occurred or occupational disease contracted: Claimant alleged he injured his left shoulder while sweeping a barge.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left shoulder
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

Employee: Antonio Watkins

Injury No.: 11-017103

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for the rate listed in number 19 below.
- 19. Weekly compensation rate: \$418.58
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: None

TOTAL: None

23. Future requirements awarded: N/A

Said payments to begin 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: Mark A. Cordes

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Antonio Watkins	Injury No.: 11-017103
Dependents:	N/A	Before the
Employer:	ADM Grain Company	Division of Workers'
Additional Party:	N/A	Compensation
Insurer:	Old Republic Insurance Company	Department of Labor and Industrial
Hearing Date:	December 3, 2012	Relations of Missouri
		Jefferson City, Missouri

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on December 3, 2012, for a hearing for a final award at the request of Antonio Watkins (“Claimant”) to determine the liability of the Employer, ADM Grain Company, and their Insurer, Old Republic Insurance, Company, for permanent partial disability “(PPD”) benefits and other issues, if any.

Attorney Mark A. Cordes represented Claimant. Attorney Vicky L. Anthony represented the Employer. ¹ The Second Injury Fund (“SIF”) is not a party to this case. The record closed on December 3, 2012. Memorandums of law were due by January 4, 2013. Venue is proper and jurisdiction lies with the Missouri Division of Workers’ Compensation. The court reporter was Ms. Peggy Lange.

The parties stipulated that on or about February 20, 2011, Claimant was employed by Employer in St. Louis City, Employer and Claimant operated under the Missouri Workers’ Compensation Law, ² Employer’s liability was insured by Old Republic Insurance Company, Employer had proper notice that an injury occurred, a claim for compensation was timely filed, Claimant’s average weekly wage was sufficient for a compensation rate of \$418.58 for PPD benefits, and Employer paid no TTD or medical benefits.

The parties identified the following issues for disposition:

1. Did Claimant sustain an accident?
2. If so, did the accident arise out of and in the course of his employment?
3. Is Employer liable for past medical expenses totaling \$826.00?
4. What is the nature and extent of Employer’s liability for PPD, if any?

¹ All references in this award to Employer also include the Insurer.

² All statutory references in this award are to the Cum Supp.2010 of the Revised Statutes of Missouri unless otherwise stated.

EXHIBITS

Claimant's Exhibits A and B and Employer's Exhibit 1 were offered and received into evidence without objection. To the extent that marks or highlights are contained in the exhibits, those were made prior to becoming part of this record and were not placed there by the undersigned administrative law judge.

SUMMARY OF EVIDENCE

All evidence was reviewed but only evidence that supports this award is summarized below.

Live Testimony- Claimant

1. At the time of the hearing Claimant was 25 years old and had been employed by St. Patrick's Center for three months where he served food to the homeless.
2. Claimant worked for Employer for nearly four years. Claimant worked twelve hours a day, seven days a week, from 6 a.m. to 6:00 p.m. Claimant's last day of work was February 20, 2011. Claimant worked as a laborer. He dumped and loaded rail cars rail cars, barges, worked as a deckhand and performed maintenance. He used various brooms to clean the building and the barge.
3. The job was very physical, strenuous, and required lifting heavy items, i.e. machinery cables, for long hours. Claimant reported to Mr. Ron Hours and Mr. Danny Jaspering.
4. Prior to February 20, 2011, Claimant was suspended for a positive drug test for use of marijuana. He informed co-workers his parents were moving and showed them pictures of a riding lawn mower and slabs of granite t his parents were selling.
5. On February 19, 2011 Mr. Wayne Healy, a co-worker, purchased the mower, and requested a tour of the house, which was vacant.
6. On February 20, 2011, Claimant reported to the barge area to sweep barges. While sweeping, Claimant felt a sharp pain in his left shoulder that radiated to his arm. He informed his co-worker, Mr. Charles Butler, who offered to help Claimant finish sweeping. After Claimant finished cleaning the barge, he went to the medicine cabinet and took ibuprofen and applied Icy Hot.
7. That night, Claimant had difficulty sleeping due to pain, and the next morning he reported the injury to Mr. Ron Albers, his supervisor. Claimant spoke on the phone with the doctor. Mr. Albers authorized Claimant to see either his doctor or the company doctor. Claimant waited for the doctor's office to open, and Mr. Albers proceeded to talk to other employees about the incident.
8. Four hours later, Mr. Albers informed Claimant he rescinded the offer for medical treatment due to conflicting reports about how Claimant was injured. Mr. Albers learned from other workers that Claimant injured his arm when he helped his parents move.

However, Claimant testified he did not help his parents move, they hired a moving company.

9. On February 24, 2011, Claimant reported to work and Mr. Jaspering notified him he was terminated for falsifying an injury. Since Claimant's termination, he has not exerted as much physical effort on any job as he did for Employer.
10. Claimant identified an MRI bill from Open Sided MRI for an MRI on April 4, 2011, and testified he continues to receive bills.
11. Current left shoulder complaints include a sharp pain, once a week or four times a month. He takes over-the-counter medication as needed. Claimant denied testifying during deposition that he had no problem with his arm. Occasionally his arm flares up, but he had no problems with activities at home. He had no treatment for his left shoulder before or after February 20, 2011.

Live Testimony – Mr. Ronnie Albers

12. **Mr. Ronnie Albers**, who testified on behalf of the Employer, has worked in St. Louis for Employer for ten years as a Superintendent, where he is responsible for outside activities in the grain division. Employees dump whole grains from trucks and rail cars, and load barges, trucks, and rail cars with grain. Mr. Albers works twelve hour shifts, sometime seven days a week.
13. Mr. Albers coordinates benefits for workers injured on the job. Employees are instructed on an annual basis to immediately report all work injuries to supervisors regardless of the severity of the injury. Supervisors investigate reports of injury; obtain statements, and direct medical care.
14. Claimant was a good employee that followed instructions. Mr. Albers testified Claimant received instruction on how and when to report work injuries. However, an employee may report serious injuries right away and delay reporting a scratch.
15. On February 20, 2011, Mr. Albers was at work and he supervised Claimant. Claimant did not report a work injury. The next morning, Claimant informed Mr. Albers about the injury the day before and requested medical treatment.
16. As part of the investigation, Mr. Albers talked with co-employees Mr. Charles Butler and Mr. Eugene Hamilton, who worked with Claimant at the time he reported the accident occurred. They informed Mr. Albers that Claimant said he injured his shoulder the day before, helping his Mom move. Mr. Albers sent Claimant home pending further investigation.
17. Mr. Albers contacted the corporate head of safety and informed them of the inconsistencies, and several days later, Claimant was terminated for falsifying an injury. Claimant filed a grievance, which was eventually settled.

Live Testimony – Mr. Charles W. Butler

18. **Mr. Charles W. Butler**, who testified on behalf of the Employer, has worked for Employer for seven years as a laborer. He works from 8:00 p.m. to 6:00 a.m. four nights a week. Mr. Butler works on barges on the river, although work has been slow for the past three years.
19. It takes about three hours to load a barge. About 90 minutes into loading the barge he is called to close some doors and open others. After grain is loaded, he sweeps dust and grain from the barge. No sweeping is done in the rain. If it is dry, grain and dust is swept into a bucket. He has as much time as he needs to sweep. The work is not very physical, unless there is a spill, and all workers will sweep and shovel. He also operates a tractor. While grain is being loaded, Mr. Butler has a lot of down time to sit in the break room or walk.
20. Mr. Butler knew Claimant from work because they perform the same job and worked together. On February 20, 2011, he worked on the barge with Claimant, and it was a slow barge day. It took all day to fill a barge because there was insufficient grain.
21. Claimant told him he injured his back or shoulder when he helped his mother or mother-in-law move. Mr. Butler overheard Claimant tell someone on the telephone that he hurt himself moving his mom on the stairs, and wanted to leave work, so he was going to tell his supervisor.
22. Mr. Albers asked him if he knew how Claimant was injured. Mr. Albers told him Claimant reported he injured his shoulder sweeping at work. That was the first time Mr. Albers heard the injury was work related.
23. Claimant did not tell him he hurt himself sweeping at work and Mr. Butler denied saying he would help Claimant finish sweeping. Also, Claimant did not tell him he was going to the medical supply cabinet for Icy Hot, because they already had it in the area where they were working. Mr. Butler has no grievance with Claimant.
24. Mr. Butler was disciplined for excessive absences, but he has not received accommodations from the supervisors and was not instructed to be hospitalized to avoid termination. He is instructed to report injuries immediately to a supervisor.

Medical Treatment

25. On March 28, 2011, Dr. Woiteshek examined Claimant for an Independent Medical Examination, ("IME"), and wrote a report at the request of Claimant's attorney.
26. On April 4, 2011, Dr. Woiteshek ordered an MRI of Claimant's left shoulder and interpreted it to show minimal posterior supraspinatus-upper infraspinatus insertional subcortical marrow edema within the posterior aspect of the greater tuberosity and humeral. He opined the condition may be old, but no rotator cuff tear was found.
27. Dr. Woiteshek diagnosed traumatic internal derangement of the left shoulder with subsequent impingement, and opined the sweeping incident on February 20, 2011 was the prevailing factor in the development of the condition.

28. Dr. Woiteshek concluded Claimant had reached maximum medical improvement (MMI”), and rated 20% PPD of the left shoulder.
29. On January 23, 2012, Dr. Nogalski examined Claimant for an IME, and wrote a report at the Employer’s request. Dr. Nogalski diagnosed possible mild multidirectional instability with no clear mechanical findings. He released Claimant to work full duty. Dr. Nogalski did not identify a specific “event.”
30. After review of the MRI, Dr. Nogalski diagnosed mild degenerative changes in the acromioclavicular joint and mild labral abnormalities inferiorly but no tear. Also, Dr. Nogalski noted Claimant’s pain complaints were out of proportion to the MRI findings.

FINDINGS OF FACT & RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, Claimant’s demeanor during the hearing, and the applicable law of the State of Missouri, I find Claimant did not meet his burden to prove an accident occurred that arose out of and in the course of employment for the reasons stated below.

Claimant asserts he injured his left shoulder in an accident on February 20, 2011. Employer contends the injury did not occur at work. “To be entitled to workers' compensation benefits, the employee has the burden to prove the injury was caused by a work-related accident.” *Spencer v. Sac Osage Elec. Co-op., Inc.*, 302 S.W.3d 792, 800 (Mo.App.2010).

Section 287.020.2 was amended in 2005 to narrow the definition of accident to include 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. *Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671, 672 -673(Mo.2009).

Section 287.120.1 provides for Employer liability for personal injury caused by accidents arising out of and in the course of the employee's employment. Section 287.020.3 states:

(1) [T]he 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.

(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. ...

A claimant in a worker's compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). I find Claimant did not meet his burden.

I find the testimony of Mr. Albers and Mr. Butler is more credible than Claimant's testimony. Claimant testified he injured his left shoulder while sweeping the barge. However, Mr. Butler testified Claimant told him he injured his shoulder helping his mother move. He overheard Claimant repeat this history of accident on the telephone.

Mr. Butler learned that somewhere between the little house where they worked and the office, Claimant changed the story and said he injured his shoulder while sweeping at work. Claimant did not tell Mr. Butler he hurt his shoulder sweeping at work; and Mr. Butler denied telling Claimant he would help him finish sweeping. Also, Claimant did not tell Mr. Butler he was going to the medical supply cabinet to get Icy Hot, because they had supplies in the area where they worked.

Mr. Butler testified he has no grievance with Claimant, and he did not receive special accommodation to avoid termination for excessive absences or for his testimony at the hearing.

I find Mr. Albers' testimony is credible that he learned from Mr. Butler that Claimant injured his left shoulder helping his mother move. As a result, Claimant was terminated for falsifying a work accident.

I do not find Claimant's testimony credible that he did not report the accident the day it occurred because not all injuries are reported and he did not think it was serious. Claimant testified the day of the alleged accident he accepted help from Mr. Butler and took ibuprofen and applied Icy Hot to relieve pain.

Also, Claimant testified he continues to have sporadic left shoulder pain, but he has not received medical treatment as of the date of the hearing. Dr. Woiteshek diagnosed traumatic internal derangement and impingement but did not recommend treatment and concluded Claimant had reached MMI. Dr. Nogalski diagnosed possible mild multidirectional instability with no clear mechanical findings, and concluded Claimant's complaints were out of proportion to the MRI findings.

Based on credible testimony by Mr. Albers, Mr. Butler and Dr. Nogalski, and less than credible testimony from Claimant and Dr. Woiteshek, I find Claimant did not meet his burden to prove he sustained an unexpected traumatic event or unusual strain that was identifiable by time and place of occurrence which produced at the time objective symptoms of an injury caused by a specific event during a single work shift. I further find the injury came from a hazard or risk unrelated to employment, helping his parents move.

Having found Claimant did not sustain an accident that arose out of and in the course of his employment, all other issues are moot.

CONCLUSION

Claimant did not have an accident which arose out of and in the course of his employment.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation