

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

Injury No.: 08-038351

Employee: Greg Wentz
Employer: O'Charley's
Insurer: Zurich American Insurance Co.

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 2, 2011. The award and decision of Administrative Law Judge Linda J. Wenman, issued March 2, 2011, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

This award is subject to liens in favor of the Division of Child Support Enforcement and Brent Cantor, as ordered by the administrative law judge.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 29th day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Greg Wentz

Injury No.: 08-038351

Dependents: N/A

Employer: O'Charley's

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

Additional Party: N/A

Insurer: Zurich American Insurance Co.

Hearing Date: November 29, 2010

Checked by: LJW

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? Yes
4. Date of accident or onset of occupational disease May 13, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
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 occurred or occupational disease contracted: Claimant developed back pain after assisting in unloading a delivery truck and stocking the supplies.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Thoracic spine
14. Nature and extent of any permanent disability: 7.5% BAW PPD referable to the thoracic spine.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$953.70

Employee: Greg Wentz

Injury No.: 08-038351

- 17. Value necessary medical aid not furnished by employer/insurer? \$1,170.53
- 18. Employee's average weekly wages: \$246.53
- 19. Weekly compensation rate: \$164.36
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$1,170.53
30 weeks of permanent partial disability from Employer	\$4,930.80
TOTAL:	\$6,101.33

22. 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 25% of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Kenneth Vuylsteke

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Greg Wentz	Injury No.:	08-038351
Dependents:	N/A	Before the	
Employer:	O'Charley's	Division of Workers'	
Additional Party:	N/A	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Zurich American Insurance Co.	Checked by:	LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on November 29, 2010. Post-trial briefs were received, and the case was formally submitted on January 5, 2011. Attorney Kenneth Vuylsteke represented Greg Wentz (Claimant). O'Charley's, (Employer) is insured by Zurich America Insurance Company, and represented by Attorney Susan Kelly. The Second Injury Fund was not a party to the claim.

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: accident; medical causation; past medical expenses; and liability of Employer for permanent partial disability (PPD) benefits. Claimant offered Exhibits A-B, and Employer offered Exhibits 1-7. The exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled. Claimant will protect an attorney's lien filed in the case, and Claimant's recovery is subject to Child Support liens filed.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is 28 years old, completed the 9th grade, and completed a carpenter's apprentice program. Claimant's primary employment is as a carpenter, but during slow construction periods he will work as a grill cook. Two to three months before his date of injury, Employer hired Claimant as a grill cook. Claimant's job duties included receiving supply deliveries, assisting in unloading the truck, and stocking the supplies after unloading. Additionally, Claimant occasionally would work his normal shift as a grill cook, and then work a second shift as a waiter.
2. On May 13, 2008, Claimant was working as a grill cook when a shipment of produce and meat was delivered. Claimant positioned himself at the rear of the truck and depending on the

weight of the box; the boxes were tossed or dropped into his arms, and then loaded onto a dolly. When the delivery was complete, Claimant placed the boxes on shelves that were 7-9 feet high. Once the delivery was stocked, Claimant returned to his duties as a grill cook. After completing his shift, Claimant began a second shift as a waiter. When lifting food trays, Claimant noticed stabbing pain in his mid to low back. Claimant notified the manager on duty, and Claimant left his shift to seek medical care.

3. Claimant was seen at St. Anthony's Urgent Care on May 13, 2008 complaining of back pain after lifting boxes. Claimant reported he was unsure if the pain was from trauma or an upper respiratory infection. Claimant was diagnosed with cervico-thoracic pain, advised to ice the area, and he was given medication for pain control. Claimant continued to experience back pain and returned to Urgent Care on several occasions. On May 19, 2008, a thoracic spine x-ray was obtained that demonstrated a "5 to 10% loss of height of the T9 thoracic vertebral body of indeterminate age."

4. On May 30, 2008, Claimant was seen at Urgent Care following a bicycle accident, and complaining of musculoskeletal pain.

5. Claimant has not received recent medical care. As of hearing, his complaints include burning pain in his lower thoracic spine, he is able to lift 30-40 pounds, but needs to lift at least 75 pounds to perform all aspects of carpentry work.

6. Claimant was examined at his request by Dr. Poetz on September 18, 2009. Upon examination, Dr. Poetz noted tenderness to palpation at T9, and decreased spinal flexion. Dr. Poetz noted Claimant had no prior back injury, and opined the May 13, 2008 injury was the substantial and prevailing factor in causing disability to Claimant's thoracic spine. Dr. Poetz rated the disability at 25% BAW PPD referable to the thoracic spine. Dr. Poetz also opined the medical care and associated expenses were reasonably and necessary to treat Claimant's injury.

7. Claimant was examined by Dr. Tate at the request of the Employer on August 28, 2008. Upon examination, Dr. Tate noted Claimant's thoracolumbar range of motion was normal, and "the patient is very jumpy with palpation inconsistently over the entire thoracic spine." Dr. Tate opined the alleged mechanism of injury was highly unlikely to have caused the T9 compression fracture. Dr. Tate rated 0% disability related to the alleged May 13, 2008 injury.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

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

Issues relating to accident and medical causation

Claimant bears the burden of establishing the essential elements of his claim. Included in the essential elements, is establishing accident. The Missouri Workers' Compensation law was amended during the 2005 legislative session. Section 287.020.2 RSMo., 2005,¹ now provides:

¹ Unless otherwise indicated all further references are to RSMo Supp.2005.

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. Claimant testified after unloading and stocking supplies he developed back pain. Claimant’s testimony is bolstered by the medical records documenting injury on the date alleged. Employer questions accident as it was un-witnessed. I find Claimant sustained a work related accident on May 13, 2008.

To be medically causally related the work must be the prevailing factor in the cause of the resulting medical condition and disability. §287.020.2 RSMo. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert’s testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Two physicians provided opposite opinions regarding medical causation. Dr. Poetz finds the unloading and stocking of supplies to be the mechanism of injury causing the compression fracture, noting the absence of any prior thoracic spine injury. Dr. Tate simply does not believe given the age of Claimant, and absent traumatic force that a work injury occurred. Dr. Tate did not pursue further testing to determine the age of the fracture. I find the opinion of Dr. Poetz to be credible and persuasive, and find Claimant has met his burden to establish medical causation.

Issues related to past medical expenses

Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Claimant seeks reimbursement of medical expenses in the amount of \$1,170.53. Itemized listings of the charges were issued by the medical providers, supported by the appropriate medical records and Claimant’s testimony. Employer did not challenge the reasonableness of the treatment provided. Claimant’s injury is compensable, and he has met his burden of evidence. Accordingly, I find Employer liable for \$1,170.53 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Issues related to PPD benefits

A permanent partial disability award is intended to cover claimant’s permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991). Two medical experts provided ratings. Dr. Poetz rated Claimant’s injury at 25% BAW PPD, and Dr. Tate rated the disability at 0% PPD. With respect to the degree of permanent

partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Based on the testimony and evidence presented, I find Claimant's disability to be 7.5% BAW PPD.

CONCLUSION

In summary, Claimant sustained an injury to his thoracic spine that arose out of and in the course and scope of his employment with Employer. Claimant is awarded past medical expenses and PPD benefits from Employer not inconsistent with this award. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation