

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

Injury No.: 02-151207

Employee: Steven West

Employer: America's Body Company

Insurer: Commerce & Industry

Date of Accident: November 26, 2002

Place and County of Accident: North Kansas City, Clay 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 chief 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 chief administrative law judge dated December 21, 2004. The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued December 21, 2004, 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.

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

Given at Jefferson City, State of Missouri, this 4th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Steven West

Injury No. 02-151207

Dependents: N/A

Employer: America's Body Company

Insurer: Commerce & Industry

Additional Party: Missouri State Treasurer, Custodian of Second Injury Fund (Bifurcated)

Hearing Date: October 20, 2004

Checked by: KJC/lh

Final Brief filed: November 30, 2004

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: November 26, 2002.
5. State location where accident occurred or occupational disease was contracted: North Kansas City, Clay County, Missouri.
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: Employee, while in the course and scope of his employment as a mechanic for America's Body Company was lifting a 200 to 300 pounds steel bumper when his left elbow jerked and snapped.
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: Left elbow.
14. Nature and extent of any permanent disability: Tendon and biceps tear in the left elbow.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? \$5,135.76.
18. Employee's average weekly wages: \$550.
19. Weekly compensation rate: \$366.66/\$340.12.
20. Method wages computation: By agreement and \$287.250.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$5,135.76

21 weeks of temporary total disability (or temporary partial disability) @ \$366.66 equals \$7,696.86.

42 weeks of permanent partial disability from employer @ \$340.12 per week equals \$14,285.04

5 weeks of disfigurement @340.12 per week equals \$1,700.60

permanent total disability benefits for employer: N/A

22. Second Injury Fund liability: N/A

TOTAL \$28,818.26

23. Future requirements awarded: None.

Said payments to begin as of the date of the award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Stuart Wieland.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Steven West

Injury No: 02-151207

Dependents: N/A

Employer: America's Body Company

Insurer: Commerce & Industry

Additional Party: Missouri State Treasurer, Custodian of the Second Injury Fund

Hearing Date: October 20, 2004

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Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- 1) The nature and extent of the disability sustained by the Employee;
- 2) Whether all the conditions complained of resulted from the accident;
- 3) Liability of the employer for 21 weeks of temporary total disability benefits in the amount of \$7,696.86;
- 4) Liability of the Employer for \$5,135.76 in past medical aid;
- 5) Whether the Employee sustained any disfigurement as a result of the accident; and
- 6) Liability of the Employer for fees and costs under §287.560 due to an unreasonable defense in the case.

At the hearing, Mr. Steven West (hereinafter referred to as Claimant), testified that he was 50 years old. He stated that he sustained injuries at work on November 26, 2002, and March 25, 2003.

Claimant testified that he injured his left arm in both incidents. He stated that the November 26, 2002, injury occurred when he lifted a 200 to 300 pounds steel bumper to bolt on a truck and his left arm jerked and snapped. He stated that he felt immediate and sharp pain. He stated that he dropped the bumper. He stated that there were no witnesses to the alleged accident.

Claimant testified that he immediately told his supervisor, Randy Turley, about the injury. He also stated that he told Mr. Turley that he was afraid of losing his job due to company layoffs and that he did not believe that he needed to see a doctor.

Claimant testified that he favored his left arm the rest of the workday. He stated that he was then off work for two days for the Thanksgiving holiday. He stated that upon his return to work he mainly did light duty and favored his left arm until he re-injured it on March 25, 2003. He stated that the light duty primarily consisted of working on air lines to trucks and electrical connections to mirrors.

Claimant testified that the re-injury occurred in March 2003 when he attempted to "pop" a co-employee's back. He indicated that prior to the start of the workday, but while he was standing at his workstation, the co-employee, Danny Wilson, asked him to "pop" his back. He stated that he had never attempted to "pop" anyone's back prior to that day. He stated that he reached around Mr. Wilson and grabbed him by the elbows and was preparing to lift him from the floor when he felt pressure in his left elbow. He stated that he did not believe that he lifted Mr. Wilson from the floor.

Claimant indicated that while attempting to lift Mr. Wilson he realized that his arm had not healed when he experienced a sharp pain in his left elbow. He stated that the pain was less intense than what he experienced in November 2002, when he lifted the 200 to 300 pounds steel bumper.

Claimant testified that he told his supervisor on March 25, 2003 that he did not believe that his arm was going to heal and that he needed to see a doctor. He stated that his supervisor referred him to Steve Boles, the operations manager, who sent him to a clinic in North Kansas City for treatment. He stated that the treatment at the clinic was the first he received for his left elbow injury.

Claimant testified that he provided a history of the November and March incidents at the North Kansas City Clinic. He acknowledged that the doctor's records did not mention anything about the lifting incident on March 25, 2003. He stated, however, that he had no reason not to tell the doctor about the incident because he had already informed his employer of it.

Claimant testified that the doctor at the North Kansas City Clinic prescribed physical therapy three times per week. He stated that his employer refused to provide the treatment. He stated that both his employer and its workers' compensation insurer advised him by letter to submit any claims to his health insurance carrier because the injury was not work related. He stated that the last treatment provided by his employer was on March 26, 2003.

Claimant testified that on March 28, 2003, he sought treatment by his family doctor, who referred him to Dr. Alexandra Strong, an orthopedic surgeon. He stated that Dr. Strong had previously performed an ACL reconstruction on his left knee and treated him for back and ankle sprains. He stated that he told her about both the November 2002 and March 2003 incidents.

Claimant testified that Dr. Strong ordered an MRI of his left elbow and diagnosed a tear. He stated that she initially prescribed therapy, which he received until August 2003. He stated that she then performed surgery to reattach the tendon in his left biceps to his elbow. He stated that she told him that the injury was caused by the November 26, 2002 incident as opposed to the one on March 25, 2003.

Claimant testified that Dr. Strong placed no permanent restrictions on the use of his left elbow. He stated that on a scale of 1 to 10 his strength in the elbow was at a 7 or 8 level. He also stated that he returned to work on September 26, 2003, but at a different company because America's Body Company had terminated him on May 5, 2003, the day after a tornado had destroyed the plant.

Claimant testified that he was off work from March 26 until September 26, 2003. He stated that he was released to return to work on August 19, 2003, and that he was asking for \$7,699.86 in temporary total disability benefits, representing the 21 weeks ending on August 19, 2003. He also stated that he was seeking the \$5,135.76 he incurred in medical bills for treatment for his left elbow injury.

Claimant testified that when he returned to work on September 26, 2003, he did oil changes and grease jobs in his new position. He stated that he obtained a new job in February 2004, which allowed him to work on light trucks and perform similar duties as to those he did for America's Body.

Finally, Claimant testified that his left arm was still weak and that it was difficult to grasp things with his left upper extremity. He stated that he had pain in his elbow, but not of a constant nature. He complained of an inability to lift heavy objects. He stated that cold weather affected his elbow. He admitted that most of his range of motion in the elbow had returned.

In addition, Claimant's scar on his left elbow due to the tendon transplant extended approximately 4 ½ inches in both a horizontal and vertical direction. The scar was more pronounced vertically. It was also a little wider than pencil width in the horizontal direction.

On cross-examination, Claimant admitted that at his deposition he had indicated that following the November 2002 incident his pain on a scale of 1 to 10 was a 4. He admitted that he had testified that he only had a little loss of strength in his elbow prior to the March 2003 incident.

Claimant admitted that his employer did not tell him that he would be laid off if he requested medical treatment following a work related injury. He admitted that he did not seek treatment by his family doctor for his elbow complaints until after the March 2003 incident. He admitted that he had health insurance during the period November 2002 to March 2003.

Claimant admitted that he received disability benefits of approximately \$3,200 for the period March 25 to July 7, 2003. He stated that his employer told him to apply for the benefits.

On Redirect Examination, Claimant testified that he knew of three employees who were laid off after filing workers' compensation claims against America's Body. He stated that one of the employees had been with the company for 17 years.

The medical evidence in the case consisted of the report of Dr. P. Brent Koprivica, the deposition testimony of Dr. Theodore Sandow, and various other reports and records. Dr. Koprivica's November 15, 2003 report addressed to Claimant's attorney stated that he was board certified in emergency medicine and that he had practiced occupational medicine since 1983. He also stated that he was board certified in occupational medicine by the American Board of Preventative Medicine and that he had a master's degree in public health and in occupational and environmental medicine.

Dr. Koprivica noted that he had examined Claimant on the date of his report. He stated that Claimant was very pleasant and appropriate. He stated that Claimant's grip strength curves followed a Bell-type distribution bilaterally, which was indicative of maximal effort. He stated that on observation, Claimant was consistent in his behavior, both formally and informally.

Dr. Koprivica noted Claimant's inability to make a tight fist and to fully flex the left middle and ring fingers. He stated that Claimant had weakness of the left elbow flexor and patchy numbness distal to the surgical scar. He stated that the injury had resulted in a significant impact on Claimant's forearm supination.

Dr. Koprivica concluded that Claimant had sustained a tear of the distal biceps "as a direct and proximate result of the initial injury on November 26, 2002." He stated that the April 16, 2003 MRI results provided further proof that the tear had occurred in November 2002. He noted that the radiologist had concluded in April 2003 that the tear was chronic, which Dr. Koprivica related was consistent with the significant injury occurring in November 2002 rather than in March 2003, or three weeks prior to the MRI.

Dr. Koprivica found that the March 2003 incident was an aggravation of the November 2002 injury and was "a direct and natural consequence of the significant biceps tear that already occurred on November 26, 2002". He indicated that he based his conclusion on the MRI results and Claimant's history of "basically" not even lifting the individual off the ground while attempting to pop the individual's back. Dr. Koprivica concluded that the surgery and treatment Claimant received was medically reasonable and a direct necessity of the injury on November 26, 2002.

Finally, Dr. Koprivica concluded that Claimant had sustained a permanent partial disability of 25 percent of the left upper extremity rated at the elbow or 210-week level as a result of the November 26, 2002 accident. He

concluded that Claimant was temporarily and totally disabled from March 25 through August 26, 2003 due to the injuries Claimant sustained in the November 26, 2002 accident.

Dr. Sandow testified on Claimant's employer's behalf. He stated that he had a medical degree from Loyola University and that he interned at Northwestern University and the University of Illinois. He stated that his residency was in orthopedic surgery at the Mayo Clinic from 1960 to 1962 and from 1964 to 1966. He stated that he became board certified by the American Board of Orthopedic Surgery in 1968.

Dr. Sandow testified that he examined Claimant on September 30, 2003. His diagnosis was chronic left distal biceps rupture. He stated that based on Claimant's history, "it appeared that the chronic distal biceps rupture was caused by the injury in November 2002", while Claimant was lifting a heavy bumper.

Dr. Sandow also admitted that Claimant described an incident on March 25, 2003, when he, felt an onset of left elbow pain, as he was about to lift up a coworker in an effort to pop the coworker's back. He stated that he understood that Claimant was not able to lift the coworker off the floor. He concluded that the March 2003 incident constituted an aggravation of the initial injury.

Dr. Sandow indicated that Claimant's prognosis was good. He concluded that Claimant had sustained a permanent partial disability of 20 percent of the left elbow at the 210-week level. He stated that his disability rating was "inclusive" of the incident on November 26, 2002 and the aggravation on March 25, 2003. He stated that it would be "somewhat" speculative to try to apportion the disability between the two incidents, because Claimant did not receive any treatment after the initial injury. He stated that Claimant's history, however, was consistent with a tear or partial tear of the distal biceps tendon in November 2002. He admitted that it would be very difficult to conclusively prove it.

On cross-examination, Dr. Sandow admitted that he believed that Claimant had initially injured his left biceps on November 26, 2002. He admitted that he believed that the March 25, 2003 incident was "just an aggravation of the initial injury of November 26, 2002." He stated that the November 2002 tear of the biceps tendon had probably healed in with scar tissue and was a weak link, which was easily reagravated in the March 2003 incident. He indicated that the surgery to repair the biceps muscle tendon would have been necessary regardless of the March 2003 incident.

The remaining medical reports, records and other exhibits were essentially cumulative of the testimony and Dr. Koprivica's report. The radiologist who interpreted Claimant's April 16, 2003 MRI of the left elbow noted a tear of the biceps tendon and concluded that the findings were consistent with an injury in November 2002. Dr. Alexandra Strong noted on September 16, 2003 that Claimant was doing well and that she was going to release him.

Claimant submitted medical bills in the amount of \$5,135.76 for treatment of the biceps tendon rupture. Claimant's Exhibit G was an affidavit from Randy Turley, Claimant's supervisor in November 2002. Mr. Turley admitted that Claimant reported a left elbow injury in the fall of 2002 and indicated that Claimant described the injury as occurring during an incident in which he was attempting to install a heavy bumper on a vehicle by himself. He admitted that Claimant told him that he did not want to file a workers' compensation claim due to possible adverse effects on his employment with the company.

Claimant's Exhibits I and J were letters from his employer and its workers' compensation insurer advising him to seek medical treatment through his group health insurance carrier because his injury did not arise out of and in the course and scope of his employment.

LAW

After considering all the evidence, including Dr. Koprivica's report, Dr. Sandow's deposition, the other medical reports and records, the testimony at the hearing, and observing Claimant's appearance and demeanor, I find and believe that Claimant met his burden of proving that he sustained a permanent partial disability of 20 percent of the left upper extremity rated at the 210 -week level as a result of the injuries he sustained in the

November 26, 2002 accident at work. At a rate of \$340.12 per week for 42 weeks, Claimant's employer is liable for \$14,285.04. Claimant's employer is ordered to pay that amount to Claimant.

Claimant also proved that he was temporarily and totally disabled for 21 weeks, which at a rate of \$366.66 per week yields \$7,696.86. Claimant's employer is ordered to pay that amount to Claimant. In addition, Claimant proved his employer's liability for \$5,135.76 for reasonable and necessary past medical aid. Claimant's employer is ordered to pay that amount to Claimant.

Finally, due to the scars on Claimant's left elbow where his doctor performed the biceps tendon repair, Claimant is entitled to an additional five weeks of compensation for disfigurement. Five weeks of compensation based on disfigurement at the rate of \$366.66 per week, equals \$1,700.60. Claimant's employer is ordered to pay that amount to Claimant. Claimant, however, did not prove his employer's liability for fees and costs under §287.560.

Case law clearly provides that the employee has the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis-Cardinal Richter Inst., 793 SW2d 195 (Mo.App. E.D. 1990); Griggs v. A.B. Chance Co., 503 SW2d 697 (Mo.App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 SW2d 917 (Mo.App. S.D. 1997). Claimant, as noted above, met his burden of proof on all issues other than his employer's liability for costs for defending the claim without a reasonable basis.

Claimant testified that he injured his left elbow at work on November 26, 2002. He stated that the injury occurred as he was lifting a 200 to 300 pounds steel bumper for a truck and felt a pop in his left elbow. He stated that he felt immediate pain in his elbow.

Claimant made a credible witness. Both Dr. Sandow, the orthopedic surgeon, who testified on Claimant's employer's behalf and Dr. Koprivica, who wrote a report for Claimant concluded that Claimant sustained the left ruptured biceps tendon in the lifting incident in November 2002. Both were aware of the incident in March 2003, where Claimant apparently re-injured his left elbow at work while preparing to lift a co-employee in an effort to pop the co-employee's back. Both believed that the March 2003 incident was just an aggravation of the original injury from November 2002 and not the cause of the ruptured biceps tendon.

Drs. Sandow and Koprivica were credible in their opinions. No evidence was offered which contradicted their opinion that the ruptured biceps tendon occurred in the November 2002 incident, in which Claimant felt a pop in his elbow while lifting the 200 to 300 pounds steel bumper. Moreover, both noted that Claimant's history supported their opinion that Claimant had sustained the ruptured biceps tendon in November 2002 and not in March 2003. Dr. Koprivica further indicated that the radiologist who interpreted Claimant's April 2003 MRI of the left elbow had noted that the tear was chronic. Dr. Koprivica pointed out that the word "chronic" meant that the tear was not recent. The MRI was taken only a few weeks subsequent to the March 2003 incident, but several months after the November 2002 accident. In addition, the radiologist who interpreted the April 2003 MRI concluded that the tear had resulted from the November 2002 lifting incident.

Thus, the evidence clearly showed that Claimant tore his biceps tendon in the November 2002 incident in which he felt a pop in his left elbow while lifting a 200 to 300 pounds steel bumper. The evidence also showed that he sustained a permanent partial disability of 20 percent of the left elbow rated at the 210-week level as a result of the tear to his left biceps tendon from the November 2002 accident at work.

Dr. Koprivica concluded that Claimant had sustained a permanent partial disability of 25 percent of the left elbow or the 210-week level as a result of the November 2002 biceps tendon tear. He agreed that Claimant had aggravated the injury in the March 2003 incident. Dr. Sandow concluded that Claimant had sustained a permanent partial disability of 20 percent of the left elbow at the 210-week level due to the biceps tear. He also agreed that Claimant had aggravated that the injury in the March 2003 incident and noted that it would be speculative to try to apportion the disability between the two incidents.

Thus, based on the most credible, competent evidence, including the opinions of Drs. Koprivica and Sandow, and the aggravation of the initial injury in March 2003, Claimant proved that he sustained a permanent partial disability of 20 percent of the left elbow rated at the 210-week level as a result of the November 2002

accident. At a rate of \$340.12 per week, for 42 weeks, Claimant's employer is liable for \$14,285.04. Claimant's employer is ordered to pay that amount to Claimant.

In so finding, it was recognized that Claimant's employer argued that it was not liable for benefits. Claimant's employer argued that the biceps tear did not occur in November 2002 and that the March 2003 incident did not constitute a compensable accident. Claimant's employer argued that Claimant did not receive any treatment or miss any time from work immediately after the alleged November 2002 accident.

The most credible competent evidence, however, did not support Claimant's employer's argument. As noted above, both Dr. Sandow, who testified on Claimant's employer's behalf, and Dr. Koprivica concluded that Claimant sustained the ruptured biceps tendon in November 2002 while lifting the 200 to 300 pounds steel bumper. No contrary medical opinions were offered into evidence. No other medical evidence was offered which showed or even indicated that the ruptured biceps tendon occurred in any way other than the heavy lifting incident on November 26, 2002.

In addition, no evidence was offered which contradicted Claimant's testimony that his job required him to lift 200 to 300 pounds steel bumpers. No evidence was offered which contradicted Claimant's testimony that he was in fact lifting a 200 to 300 pounds steel bumper on November 26, 2002 when the alleged accident occurred. Furthermore, Claimant's supervisor even admitted in his affidavit that Claimant reported the November 2002 injury when it allegedly occurred. Thus, Claimant clearly proved that he sustained the ruptured biceps tendon in the November 2002 incident.

Claimant proved his employer's liability for \$5,135.76 in past medical aid. Again, both Drs. Koprivica and Sandow indicated that the treatment Claimant received for his ruptured biceps tendon was reasonable and necessary. Both agreed that the treatment was due to the injury Claimant sustained on November 26, 2002.

No evidence was offered which contradicted the opinions of the two doctors. Both were credible in their opinions. Claimant, as noted above met his burden of proving his employer's liability for the \$5,135.76 in expenses he incurred for past medical aid. His employer is ordered to pay that amount to Claimant.

Similarly, Claimant proved his employer's liability for 21 weeks of temporary total disability benefits or \$7,696.86. Claimant argued that he became temporarily and totally disabled on March 26, 2003 and that he was released to return to work on August 19, 2003. During that period he had surgery to repair his ruptured biceps tendon. Dr. Koprivica agreed that Claimant was not able to work during the disputed period.

Both Claimant and Dr. Koprivica were credible. No evidence was offered which showed that Claimant was able to work during the disputed period. Thus, Claimant clearly met his burden of proving his employer's liability for 21 weeks of temporary total disability benefits. At a rate of \$366.52 per week, for 21 weeks his employer is liable for \$7,696.86 in temporary total disability benefits. His employer is ordered to pay that amount to him.

As noted earlier, Claimant's scar due to the ruptured biceps tendon repair extended approximately 4 ½ inches in both a horizontal and vertical direction. Based on the scar Claimant is entitled to an additional 5 weeks of compensation for disfigurement. At a rate of \$340.12 per week for 5 weeks, Claimant is entitled to \$1,700.60 based on disfigurement. Claimant's employer is ordered to pay that amount to Claimant.

Finally, Claimant did not prove his employer's liability for fees and costs under §287.560. That statute provides as follows:

“...that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them...”

§287.560 RSMo. (1993).

Thus, to establish his employer's liability for fees and costs, Claimant needed to prove that his employer

had defended the claim without a reasonable basis. Claimant did not meet his burden of proof. The evidence showed that Claimant alleged two accidents at work. One was on November 26, 2002. He did not seek any medical treatment after that accident. The second incident was on March 25, 2003. He sought treatment after that incident and had surgery.

Those facts clearly showed that Claimant's employer had a reasonable basis for defending the claim. Clearly, there was an intervening accident or incident subsequent to November 2002. Moreover, simply because Claimant proved that the ruptured biceps tendon occurred in November 2002, did not in and of itself mean that his employer lacked a reasonable basis for defending the claim. A determination that a party had a reasonable basis for defending or prosecuting a claim is not dependent upon the ultimate outcome of the case. That determination is based on whether considering the facts of the case and the law, there was a reasonable basis for defending or prosecuting the case. Based on the facts and the applicable law to those facts, Claimant's employer clearly had a reasonable basis for defending the claim. Thus, Claimant did not prove his employer's liability for fees and costs.

In conclusion, Claimant met his burden of proving his employer's liability for \$14,285.04 in permanent partial disability benefits. He also proved his employer's liability for \$7,696.86 in temporary total disability benefits and \$5,135.76 in past medical aid.

Date: _____

Made by: _____

Kenneth J. Cain
*Chief Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Gary Estenson
*Acting Director
Division of Workers' Compensation*