

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 09-104148

Employee: Matthew Worth
Employer: West County Physical Medicine
Insurer: Cincinnati Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated November 26, 2010.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued November 26, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27th day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED
Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

Employee: Matthew Worth

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed because employee's injury did not arise out of and in the course of his employment.

Employee bears the burden of proof with regard to whether an accident occurred and resulted in an injury to him while working for the employer. *McGrath v. Satellite Sprinkler Systems, Inc.*, 877 S.W.2d 704, 708 (Mo. App. 1994), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Employee did not satisfy his burden of proof. This case hinges primarily on the credibility of employee and I do not find employee credible.

Employee alleges that he fell off of a ladder on December 18, 2009, while changing a ballast and a light bulb in a fluorescent lighting fixture directly above a treatment table. Employee alleges that he fell to the side onto the treatment table with his arms extended. His right arm allegedly took the brunt of the load and subsequently required surgery. There were no witnesses to this alleged fall.

Employee is a healthcare professional and has treated individuals who were injured at work. Employee has performed case management for insurance companies, attorneys, and worked as an expert witness with respect to personal injury claims. For a new patient interview, employee agreed that he asks his patients when and how their symptoms began and where they hurt themselves. Employee agreed that it is important to know where an individual was hurt, how they were hurt and when their symptoms began when trying to assess whether their current condition is related to an accident.

Employee was first seen for his injury by Dr. Paletta on January 6, 2010. Dr. Paletta's office required employee to prepare a Patient Health Questionnaire as well as a New Patient Intake Form and Authorization of Assignment. With respect to the first document, employee left the answers blank to all of the following questions: 1) "When did the problem begin?"; 2) "How did the problem begin?"; and 3) "Is this a work related injury?"

Employee was asked to advise Dr. Paletta whether he had seen a doctor for his problem prior to seeing Dr. Paletta. Employee answered "yes" and asserted that he had seen Dr. Patt. Employee later admitted that he never saw Dr. Patt regarding his shoulder injury. Dr. Paletta was the first doctor employee treated with regarding his shoulder injury.

During the visit with Dr. Paletta on January 6, 2010, employee gave Dr. Paletta the following verbal history: "His history dates back to approximately December 18. He had an unfortunate episode where he fell off a ladder putting up some Christmas lights." Dr. Paletta's January 6, 2010, medical record indicates as follows: "This note was dictated in front of the patient, and the patient was given the opportunity to address any questions or discrepancies they felt were relevant to the dictation." Employee never

Employee: Matthew Worth

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told Dr. Paletta that his January 6, 2010, medical record was not accurately recorded, or that the record needed to be changed because there was no reference to him being at work when he fell while changing a ballast and light bulb in a lighting fixture. Dr. Paletta testified that employee never provided him with written or verbal history that he fell in his office.

With regard to credibility, one of employee's businesses (Neurology Consultants Midwest) has a website, which includes the name of a doctor (Dr. Michael Larson) whom employee admits is a fake person. In addition, the website refers to employee as a Diplomat of the American Academy of Pain Management and notes that employee is board certified in pain management. However, employee is not a Diplomat to that Academy and is not board certified in pain management.

Employee argues that he fell at work when nobody was there to witness his fall and that the only history regarding his injury in his medical records is false. Employee claims that he neglected to mention his fall was at work because he was concerned about his workers' compensation insurance rates increasing. When viewing the totality of the evidence, it is clear that employee has several credibility issues. In my opinion, the credible evidence establishes that employee was injured while putting up Christmas lights and this is not a compensable work related injury.

For the foregoing reasons, I disagree with the administrative law judge's conclusion that this is a compensable injury. As such, I would reverse the temporary or partial award of the administrative law judge and issue a final award denying compensation.

I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member

TEMPORARY OR PARTIAL AWARD

Employee: Matthew Worth

Injury No.: 09-104148

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: West County Physical Medicine

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

Additional Party: N/A

Insurer: Cincinnati Insurance Company

Hearing Date: September 2, 2010

Checked by: MDV

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: December 18, 2009
5. State location where accident occurred or occupational disease contracted: St. Louis, 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 happened or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: N/A
14. Compensation paid to-date for temporary disability: \$0.00
15. Value necessary medical aid paid to date by employer/insurer? \$8,236.80
16. Value necessary medical aid not furnished by employer/insurer? \$61,488.35

Issued by DIVISION OF WORKERS' COMPENSATION

Injury No.: 09-104148

Employee: Matthew Worth

Injury No.: 09-104148

- 17. Employee's average weekly wages: \$1,500.00
- 18. Weekly compensation rate: \$807.48/\$422.97
- 19. Method wages computation: Agreed

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$61,488.35
Past temporary total disability	\$23,301.57
Employer to provide future medical care as per award.	*
TOTAL:	\$84,789.92 *

This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

Donna Frayne

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Matthew Worth

Injury No.: 09-104148

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: West County Physical Medicine

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

Additional Party: N/A

Insurer: Cincinnati Insurance Company

Checked by: MDV

The issues to be resolved at hearing were:

1. Accident;
2. Arising out of and in the course and scope of employment;
3. Medical causation;
4. Future medical care;
5. Liability for past and future temporary total disability; and
6. Liability for past and future medical expenses.

FINDINGS OF FACT AND RULINGS OF LAW

1. Employee is a chiropractor employed by West County Physical Medicine, a company he wholly owns. Employee has duties as a chiropractic physician as well as maintenance duties at the office as the owner. Neurology Consultants Midwest, another company owned by Employee, is also located at 2007 Smizer Station Road, Valley Park, Missouri 63088.

2. On December 18, 2009, Employer had no office hours and the office was closed. Employee was changing a ballast and a light bulb in a fluorescent lighting fixture directly above a treatment table located adjacent to the receptionist area and waiting room at about 10:30 or 11 a.m.

3. Employee used a 6 foot fiberglass ladder and as he attempted to close the plastic cover on the fluorescent lighting fixture, he fell from the second step. The Employee fell to the right

side onto a chiropractic adjustment table and attempted to break his fall by reaching out with his arms.

4. The Employee's right and left arm were extended out but the right arm took the brunt of the load. Employee's arms hit the padded treatment table. Employee's right arm was extended upward and his left arm had actually hit the table and bounced off the table. The ladder did not fall over. Employee knew that he was hurt.

5. Employee stayed at the office for about another 30 minutes and put ice on both shoulders. Employee did not seek any additional care on that day. On Monday, December 21, 2009, Employee returned to his office and provided further self-treatment to his right and left shoulder.

6. On December 31, 2009, Employee saw Dr. Paletta to discuss the seriousness of the injury and the necessity for shoulder repair. Another Doctor of Chiropractic in his office, Dr. L. Patt, ordered an x-ray over the telephone and Employee requested that she order an MRI for his right shoulder. Employee indicated to Dr. Paletta that he had x-rays at Neurology Consultants Midwest on December 30, 2009, but Neurology Consultants Midwest does not own an x-ray machine.

7. Employee reported his workers' compensation claim to Cincinnati Insurance Company via their claims line. Mr. John Cole with Cincinnati Insurance Company advised the Employee that the insurance company wanted him to be evaluated by Dr. Michael Milne for treatment. Employee stated that he had already made an appointment to be evaluated on January 6, 2010 by Dr. George Paletta for treatment.

8. On January 6, 2010, Employee was evaluated by Dr. George Paletta. Dr. Paletta recorded a history that the Employee had a several week history of right shoulder pain dating back to approximately December 18, 2009. The notes say the Employee fell off a ladder putting

up some Christmas lights. He noted Employee landed on his arms out in front of him. He noted some pain in both shoulders but the right shoulder was the most problematic. Dr. Paletta noted that the Employee had previously undergone an MRI about ten years earlier of the right shoulder which raised a question of a full thickness rotator cuff tear.

9. Employee testified Dr. Paletta's note is inaccurate because he was not putting up any Christmas lights when he fell off the ladder. Employee testified that he did not speak to Dr. Paletta about Christmas.

10. Dr. Paletta's medical record was dictated in front of Employee and the patient was given the opportunity to correct discrepancies he felt were relevant. Employee testified that he disagreed with Dr. Paletta's reference in the January 6, 2010 medical record that he was putting up some Christmas lights when he fell.

11. Employee told Dr. Paletta's staff to bill his workers' compensation insurer. Employee originally provided private health insurance for billing.

12. Employee denied any history of previous shoulder problems. Nevertheless, Employee had previously undergone an MRI of the left shoulder on November 10, 2000.

13. Dr. Paletta performed surgery on the Employee's right shoulder on February 4, 2010. He found bursitis and a small focal tear of the supraspinatus tendon of the rotator cuff.

14. Dr. Paletta felt the left shoulder was separate and distinct from the right shoulder because he did not have any specific history with respect to any onset or injury or mechanism of the left injury.

15. On February 15, 2010, Dr. Paletta removed the surgical sutures and prescribed physical therapy on Employee's right shoulder.

16. On March 3, 2010, the Employee returned to Dr. Paletta. He had been doing well until Sunday of that week when he felt a pop in his shoulder and increasing pain while doing his post-surgical exercises. The employee had been getting up to 120 degrees or above shoulder level with the therapist.

17. Dr. Paletta says that active range of motion too early after surgery can cause re-injury because it puts too much stress on the repair. Patients start with passive range of motion exercises so they do not overstress the surgical repair.

18. Passive range of motion exercise is when the patient does not use any of their own muscles to power the extremity through a range of motion. Active range of motion is when the patient is actively using their muscles to drive the arm.

19. Dr. Paletta does not recommend active range of motion exercises until six weeks after a rotator cuff repair because the only thing that is really holding the repair together is the strength of the sutures. Dr. Paletta tries to minimize any stress or strain on the surgical repair by limiting or eliminating any active range of motion and sticking with passive range of motion because he wants early healing to occur without any undue stress on the repair.

20. This opinion does not really comport with Dr. Paletta's opinion that Employee could return to chiropractic work two days after surgery. I don't believe Employee would be able to perform the duties of a chiropractor using only passive ranges of motion.

21. After the surgery an ultrasound showed a small focal area of thinning with a little bit of separation of the fibers just posterior to the biceps tendon. Dr. Paletta did not immediately recommend any additional surgery but treated the Employee with modified therapy and an injection.

22. Employee continued to have symptoms with the right shoulder. Therefore, Dr. Paletta decided to perform a second surgery on July 1, 2010.

23. Dr. Paletta believes that by July 5 or 6, 2010, the Employee should have been able to return to work on one-handed duty.

24. Again, this return to work timeframe is somewhat undercut by Dr. Paletta's opinion regarding healing and active versus passive ranges of motion.

25. At the time of the second surgery, the majority of the rotator cuff appeared to be completely healed. There was one area that was very thin with a little bit of gapping and a suture was visible; however, there was no obvious full thickness perforation, meaning that there was not a complete re-tear. Dr. Paletta found an area of the repair that was very thin and had not healed completely but had not failed completely either. Dr. Paletta performed a revision rotator cuff repair with a single anchor at the point of focal thinning.

26. Dr. Paletta believes Employee suffered a fall on December 18, 2009 and had shoulder pain from that point on. Dr. Paletta believes the fall at work was the prevailing factor in causing Employee's right shoulder injury and surgery and also caused his left shoulder pain, treated with an injection.

27. On July 19, 2010, the Employee saw Dr. Paletta again. Dr. Paletta prescribed more physical therapy and discontinued the use of the sling.

28. By August 25, 2010 the Employee was having achy discomfort with dramatic improvement in his range of motion. Dr. Paletta continued physical therapy.

29. The Employee was paid for work from December 18, 2009 through the end of December 2009 as well as up to the first surgery on February 4, 2010. The Employee testified he has not been able to do any work since the first surgery on February 4, 2010.

ACCIDENT

The workers' compensation claimant bears the burden of proof a work accident did occur and resulted in an injury to him, §287.120 (1). McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W. 2d 704 (Mo. App. E.D. 1994). Employee bears the burden of proving all material elements of a workers' compensation claim Grimes v. GAB Business Services, Inc., 988 S.W. 2d, 636 (Mo. App. E.D. 1999). The Commission may disbelieve testimony of a witness even though no contradictory or impeaching evidence is presented. Gordon v. City of Ellisville, 268 S.W. 3d 454 (Mo. App. E.D. 2008).

Employee testified that he fell off a ladder at 2007 Smizer Station Road in Valley Park, Missouri on December 18, 2009 while working for West County Physical Medicine. He was performing maintenance duties which were part of his job duties as the owner of West County Physical Medicine. Employee was on a 6 foot fiberglass ladder attempting to change a fluorescent light bulb and ballast when he fell off the ladder landing on a treatment table below injuring his shoulders.

After New Years, Employee reported a workers' compensation claim to Cincinnati Insurance Company. He went to Dr. Paletta for treatment and ultimately underwent surgery to the right shoulder and injections to the left. Thus, his credible testimony supports an accident and injury which arose out of and in the course of his employment with his employer, West County Physical Medicine.

ARISING OUT OF IN THE COURSE OF EMPLOYMENT

Dr. Paletta testified the fall caused the need for right shoulder surgery and left shoulder injections

Dr. Paletta opined “the need for his surgeries were related to the pain and dysfunction he was having in the right shoulder. Based on his history, that right shoulder injury occurred as a result of the fall on 12/18/09.”

While Dr. Paletta noted on his February 4, 2010 medical record that he did not have a specific history with respect to any onset of injury or mechanism of injury to the left shoulder, Employee’s history on the matter is sufficient to establish causation when it is combined with Dr. Paletta’s testimony.

After reviewing all of the evidence impartially, the Employee has established that an accident occurred and that accident was the prevailing factor in causing both the resulting medical condition and disability to his shoulders.

PAST AND FUTURE MEDICAL CARE AND MEDICAL EXPENSE

Under §287.140 (1) Claimant is entitled to receive such medical, surgical, chiropractic and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury.”

Employee has proven an accident occurred and he incurred medical bills in the amount of \$74,223.74 to cure and relieve the effects of this work related injury. Employer paid \$12,745.39. Employer shall pay Claimant the remainder, \$61,488.35. Claimant is also entitled to the physical therapy prescribed by Dr. Paletta. There should be no more need for temporary total disability during the period of physical therapy, but as this is a temporary award, it is subject to revision.

PAST AND FUTURE TEMPORARY TOTAL DISABILITY

Employee is only entitled to temporary total disability benefits during his recovery period.

Milton Minnick v. South Metro Fire Protection District, 926 S.W. 2d, 906 (Mo. App. W.D. 1996).

The Employee was temporarily and totally disabled from the first surgery, February 4, 2010, until August 25, 2010, a reasonable healing period consistent with Dr. Paletta’s opinion regarding active and passive ranges of motion after the last surgery or 28 6/7 weeks at \$807.48 or \$23,301.57.

DISCUSSION

There were some anomalies in this case. I believe they were harmless and due to Employee being in the medical profession and unofficially cutting through red tape. Those anomalies do not undercut Employee’s credibility. Likewise, the insurer had adequate reason to contest this case. There is no reason to assess costs.

Date: _____

Made by: _____

MATTHEW D. VACCA
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation