

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

Injury No.: 07-126377

Employee: Douglas Wyckoff
Employer: City of Lee's Summit
Insurer: City of Lee's Summit
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Past medical expenses

We write to address employer's argument on appeal that it should not be held liable for employee's past medical expenses because they were unauthorized. Employer suggests that employee was required under the law to proffer a competing expert opinion, or make some formalized demand on employer for additional medical treatment, and that his failure to do so is conclusive on the issue of past medical expenses.

We are not persuaded. Employer's argument ignores the fact that medical care became a disputed issue in this case as soon as Dr. Langford rendered his opinion that underlying degeneration was the prevailing factor causing employee's injury, which prompted employer to deny treatment. The well-established case law on the issue provides that after an employer denies treatment for a work injury, the employee may pursue his own course of treatment, while later seeking an award holding the employer liable for his past medical expenses. *Reed v. Associated Elec. Coop., Inc.*, 302 S.W.3d 693, 700 (Mo. App. 2009). The rationale is that an employer "waives" its statutory right to direct care if it denies compensation for an injury that is later determined to have been compensable. *Shores v. General Motors Corp.*, 842 S.W.2d 929, 931 (Mo. App. 1992).

Employer cites *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81 (Mo. App. 1995), which stands for the proposition that where an employer had previously accepted liability and provided treatment and released employee at maximum medical improvement, but thereafter the employee never returned to work and never contacted employer, and instead pursued extensive treatment on his own, the employee was not entitled to an award of past medical expenses, because employee's conduct denied employer the opportunity to direct his care. *Id.* at 84-5. Subsequent courts have

Employee: Douglas Wyckoff

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followed the *Blackwell* rule in circumstances where the employer clearly had no idea an employee was demanding or receiving treatment as a result of a work injury. See e.g. *Poole v. City of St. Louis*, 328 S.W.3d 277, 291 (Mo. App. 2010).

The *Blackwell* facts are not present here. Notably absent from employer's argument is a citation to any evidence that would suggest employer (or the relevant personnel with employer) were deprived actual knowledge of employee's need for treatment. This is probably because employer unquestionably knew employee needed additional treatment when Dr. Langford recommended an arthrogram. Instead of providing that treatment, employer chose to deny it. Accordingly, we find that this employer had notice and an opportunity to provide medical treatment, but that employer failed to take advantage of that opportunity on the basis of Dr. Langford's theory the accident didn't cause the injury.

Certainly, as employer argues, it was entitled to rely on the opinion of Dr. Langford and deny treatment, but likewise, employee was entitled to disagree with that opinion and seek treatment for his work injury. At that point, both parties assumed the risk inherent in their respective positions. Employee assumed the risk a fact-finder would agree with Dr. Langford or find that employee's additional treatment was not reasonably required to cure and relieve the effects of his work injury, with the result that he would ultimately have to pay for his own treatment. Employer, on the other hand, assumed the risk that Dr. Langford's opinion would be rejected and that it would be deemed to have waived its right to direct care and also be held liable for employee's self-directed care. As it turns out, we were not persuaded by Dr. Langford's speculative opinion about preexisting degenerative conditions.

Accordingly, we affirm the administrative law judge's conclusion that employer is liable for employee's past medical expenses.

Clerical errors

We also wish to correct certain unclear or grammatically incorrect language found in the administrative law judge's award. Specifically, on page 3, the administrative law judge states:

The employer, the City of Lee's Summit, through its insurer through its authority self-insure was represented by Kip Kubin.

We correct the foregoing to read as follows: "The employer appeared through its attorney, Kip Kubin."

Also on page 3, the administrative law judge states:

Claimant's diagnosis of the complete tear of the upper bicep tendon to be based on a preexisting condition.

We correct the foregoing to read as follows: "Employer contends employee's injury was caused by a preexisting condition."

Employee: Douglas Wyckoff

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Conclusion

The Commission affirms and adopts the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with this supplemental opinion.

The award and decision of Administrative Law Judge Lisa Meiners, issued May 2, 2012, is attached and incorporated by this reference.

We approve and affirm 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 28th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Douglas Wyckoff Injury No. 07-126377
Employer: City of Lee's Summit
Insurers: City of Lee's Summit
Hearing Date: April 12, 2012 Checked by: LM/cy

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, 2007
5. State location where accident occurred or occupational disease was contracted: Lee's Summit, 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 was filling air tanks when pressure released causing Claimant to jerk his right upper extremity.
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: Right bicep tendon rupture
14. Nature and extent of any permanent disability: 15% permanent partial disability of the 222 week level.

15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? \$3,926.22
17. Value necessary medical aid not furnished by employer/insurer? \$7,643.20
18. Employee's average weekly wages: \$1,064.00
19. Weekly compensation rate: \$389.04
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. The employer is liable to claimant for 15% permanent partial disability (222 week level) or \$12,955.03 as well as \$7,643.20 of medical expenses.

TOTAL: \$20,598.23

22. Future requirements awarded: N/A

This award is subject to a lien in favor of Brianne Thomas, Claimant's counsel, in the amount of 25% percent of sums recovered for legal services rendered.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Douglas Wyckoff Injury No. 07-126377
Employer: City of Lee's Summit
Insurers: City of Lee's Summit
Hearing Date: April 12, 2012 Checked by: LM/cy

On April 12, 2012, the parties appeared for hearing. Douglass Wyckoff appeared in person and with counsel, Brianne Thompson. The employer, the City of Lee's Summit, through its insurer through its authority self-insure was represented by Kip Kubin.

STIPULATIONS

The parties stipulated to the following:

- 1) That employer and employee were operating subject to Missouri workers' compensation law in Lee's Summit, Missouri, Jackson County;
- 2) That Mr. Wyckoff was its employee;
- 3) That he provided proper notice;
- 4) That the claim was filed within the time allowed by law;
- 5) That he sustained an accident on December 18, 2007;
- 6) That the wage rate is \$1,064.00, which makes the permanent partial disability rate \$389.04;
- 7) That the employer has paid medical in the amount of \$3,926.22.

ISSUES

- 1) Whether the accident of December 18, 2007 was the prevailing factor of Claimant's ruptured bicep tendon of the right upper extremity, as well as any disability;
- 2) Whether the employer is liable to employee for outstanding medical expenses in the amount of \$7,643.20.

The employer stipulates Claimant sustained an accident on December 18, 2007, however, employer believes a healthy tendon would not rupture by jerking or sudden external rotation movement. Claimant's diagnosis of the complete tear of the upper bicep tendon to be based on a preexisting condition. I disagree and find the accident of December 18, 2007 the prevailing factor of the complete tear of the right bicep tendon.

I also find that Claimant, a Lee's Summit firefighter testified credibly during the hearing. Claimant testified on December 18, 2007 he was filling air bottles. During that time, an air bottle he was filling released pressure, causing him to jerk his right arm away and back. Claimant felt a snap of the right upper bicep area along with pain. This was immediately reported and Claimant was sent for treatment.

On December 18, 2007, the authorized treating physician diagnosed Claimant with rupture of the proximal right bicep tendon. Thereafter, the employer sent Claimant to Dr. Langford who recommended an MRI and diagnosed Claimant with a torn bicep tendon of the right arm. Dr. Langdon reported the mechanism of injury as "reflexively jerking" his right arm.

Dr. Langford informed the employer that the injury of yanking his arm back while at work caused a tear to his right bicep. Dr. Langford also stated that he suspected Claimant had an underlying medical condition of the bicep tendon because sudden motion of the arm would not tear a healthy bicep tendon. I find Dr. Langford's opinion to be based on some speculation, as he did not review an MRI of the right shoulder or prior medical records indicating there was a complete, if any, tear of the right bicep tendon prior to December 18, 2007.

In fact, no medical records were admitted into evidence that Claimant had a complete right bicep tear or even a partial tear prior to December 18, 2007. Instead, all the credible evidence and objective testing revealed the December 18, 2007 accident was the prevailing factor causing the right bicep tendon tear.

Indeed, my findings are based on the medical records generated close in time to the date of injury, objective diagnostic tests, and the reports of Dr. Chris Maeda and Dr. John Pazell. Moreover, Dr. Maeda reviewed objective diagnostic tests rather than suspicions when deriving his opinion.

I also find Claimant sustained a 15% permanent partial disability of the 222 week level. Claimant is unable to lift as he did prior to December 2007. Claimant also has limitations carrying and pulling using his right arm. This, too, is related to the December 18, 2007 accident. The employer is liable for 33.3 weeks or \$12,955.03.

The employer is also liable to Claimant for \$7,643.20 for outstanding medical expenses. I find that the treatment was reasonable in order to cure and relieve the effects of the right torn bicep. Both orthopedic doctors testified it is not unusual to repair a bicep tendon for those performing overhead and/or heavy labor. I find some of Claimant's job duties to include both overhead activities and heavy exertion as a firefighter.

Overall, the employer is liable to employee to \$12,955.03 or 15% percent permanent partial disability of the 222 week level and \$7,643.20 of outstanding medical expenses.

This award is subject to an attorney's lien for services rendered by Brianne Thomas in the amount of 25% percent.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation