

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

Injury No.: 01-152270

Employee: Joseph Zimmerman
Employer: City of Richmond Heights
Insurer: St. Louis Area Insurance Trust
Date of Accident: November 14, 2001
Place and County of Accident: Clayton, 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 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 administrative law judge dated February 15, 2005. The award and decision of Administrative Law Judge Margaret D. Landolt, issued February 15, 2005, is attached and incorporated by this reference.

We offer this supplemental opinion to explain in some detail our basis for agreement with the conclusions of the administrative law judge (ALJ).

The ALJ did find that work was a substantial factor in causing the single seizure. On that basis, the ALJ awarded employee the \$214.75 that had not been paid for emergency room services. We affirm that finding. The ALJ also found that employee's injury did not result in any permanent partial disability. We affirm that finding by the ALJ.

There was no treatment provided to employee in the emergency room or after his discharge. He was released the same evening. No medication was ever administered or later prescribed. The post-seizure diagnostic MRI and EEG of employee's brain were both normal. Employee did not suffer any physical injury as a result of the seizure. Employee has returned to full-duty status, with no limitations whatsoever. Dr. Cohen, a board-certified neurologist, and the medical expert the Commission finds persuasive as to the issue of permanent disability, opined that claimant's minor residual permanent partial disability of 2% to the body as a whole, was not attributable to the injury.

Thus, there is no competent and substantial evidence in the record indicating any limitation whatsoever in employee's ability to work as a result of this single seizure and the denial of benefits for permanent partial disability by the ALJ was appropriate.

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 November 2005.

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING IN PART AND DISSENTING IN PART

John J. Hickey, Member

Attest:

Secretary

CONCURRING IN PART AND DISSENTING IN PART

Employee, a police officer, suffered a seizure while waiting to testify in court. The administrative law judge (ALJ) held that employee suffered a work-related injury, but awarded employee only unpaid past medical costs, ruling that employee was not permanently partially disabled by such injury. I, John J. Hickey, join with my fellow Commissioners in affirming the ALJ findings supporting the conclusion that the injury sustained by employee was within the course and scope of employment. I also join in the conclusion that the award of past medical costs should be affirmed. I respectfully dissent from the opinion of the majority of this Commission that employee was not entitled to benefits as a result of incurring a permanent, partial disability.

In a workers' compensation case, it is employee's burden to prove the elements of a workers' compensation claim, but only to a reasonable probability, not to an absolute certainty. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo. App. 1986). Employee proffered un-contradicted and credible expert medical testimony that employee was permanently partially disabled, in the form of the medical opinion of Dr. Feinberg. Dr. Feinberg's opinion was not contradicted. The testimony of Dr. Cohen, employer's expert, concurs with and supports Dr. Feinberg's opinion, clearly also stating that employee is permanently, partially disabled. Therefore, there is absolutely no medical evidence in the record upon which the majority could base a conclusion that employee was not permanently partially disabled. Neither the medical experts nor the treating physician testified that employee was not permanently partially disabled. Thus, employee has clearly met the burden in this case with regard to the extent of his disability.

To reach their conclusion, the ALJ and the majority ignored competent and substantial evidence in the record, presented by credible and un-contradicted medical experts testifying for both employee and employer. That evidence concluded unanimously that employee was permanently partially disabled, 8% and 2% respectively, related to the body as a whole. The majority relied on the testimony of Dr. Cohen, whom it found to be "persuasive." Yet they ignored the testimony that follows, which clearly undermines their conclusion. Dr. Cohen was asked, "[A]re you basically saying that but for the sleep deprivation Officer Zimmerman would not have had this seizure?" Dr. Cohen's answer: "Yes."

Employee had worked a night shift for approximately ten nights in a row. He worked a night shift through 7:00 a.m. on November 14, 2001. As part of his work duties, he had to testify in court at 1:00 p.m. After taking out the time it took for employee to go home, clean up, dress, eat, and leave again for court, he only got about two hours of sleep. Dr. Cohen testified that but for this sleep deprivation caused by his work, employee would not have had the seizure. Dr. Cohen also testified that employee had suffered a 2% permanent partial disability to his body as a whole as a result of the seizure. Accordingly, for the Commission majority to rely on Dr. Cohen for a conclusion that employee's disability was not attributable to his injury is not logical. The Commission majority is not free to arbitrarily disregard and ignore un-contradicted and un-impeached competent and substantial evidence in

reaching their decision. *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 179 (citing *Corp v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo. Banc 1960)).

Thus, the decision of the ALJ and the majority is contrary to the overwhelming weight of the medical evidence in the record. Therefore, on the sole issue of the extent of disability, the ALJ should be reversed. I find, based on the overwhelming weight of the medical evidence in the record, that the employee is 8% permanently and partially disabled.

John J. Hickey, Member

AWARD

Employee: Joseph Zimmerman Injury No.: 01-152270
Dependents: N/A Before the
Division of Workers'
Employer: City of Richmond Heights Compensation
Department of Labor and Industrial
Additional Party: N/A Relations of Missouri
Jefferson City, Missouri
Insurer: St. Louis Area Insurance Trust
Hearing Date: November 17, 2004 Checked by: MDL:tr

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 14, 2001
5. State location where accident occurred or occupational disease was contracted: Clayton, 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 had a seizure as a result of sleep deprivation.

- 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: None
- 14. Nature and extent of any permanent disability: -0-
- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Joseph Zimmerman Injury No.: 01-152270

- 17. Value necessary medical aid not furnished by employer/insurer? \$214.75
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$314.26 for permanent partial disability benefits
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$214.75

22. Second Injury Fund liability: No

TOTAL: \$214.75

23. 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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Mr. Mark Akers

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Joseph Zimmerman	Injury No.: 01-152270
Dependents:	N/A	Before the Division of Workers'
Employer:	City of Richmond Heights	Compensation
Additional Party:	N/A	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	St. Louis Area Insurance Trust	Checked by: MDL:tr

PRELIMINARIES

A hearing was held on November 17, 2004 at the Division of Workers' Compensation in the City of St. Louis. Joseph Zimmerman ("Claimant") was represented by Mr. Mark Akers. The City of Richmond Heights ("Employer") and its Insurer, St. Louis Area Insurance Trust, were represented by Ms. Julie Hovermale. Mr. Akers requested a fee of 25% of Claimant's award.

The parties stipulated that on or about November 14, 2001, Claimant was an employee of Employer; venue is proper in the City of St. Louis; Employer received proper notice of injury; and that the claim was timely filed. The parties further stipulated that Claimant's rate of permanent partial disability benefits is \$314.26. Employer has paid no benefits.

The issues for determination by hearing are whether Claimant sustained an accident arising out of and in the course of his employment; medical causation; liability of Employer for past medical expenses of \$214.75; and nature and extent of permanent partial disability sustained by Claimant.

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

On November 14, 2001, Claimant was working the night shift as a street patrol officer for Employer. On the evening of November 13, Claimant worked the overnight shift, and got off work at 7:00 a.m. on November 14, 2001. The night of November 13 was the tenth day in a row that Claimant had been working the night patrol. On the morning of November 14, Claimant drove home, got ready for bed, and went to sleep between 8:15 and 8:30 a.m. Claimant was only able to sleep briefly because he had been subpoenaed to testify at a trial at the courthouse in Clayton, Missouri at 1:30 p.m. Claimant got up about 10:30 a.m., ate lunch at home, and then drove his personal car to the police department so that he could ride to court with one of the detectives.

Claimant reported to the assigned courtroom, and walked to a bench to wait to be called to testify. Walking to the bench is the last thing Claimant remembers until he awoke in the emergency room.

Claimant was taken by ambulance to the emergency room where he remained for a few hours. Claimant was told that he had a seizure. Claimant never had a seizure before November 14, 2001. Claimant stayed in the emergency room until 5:00 or 6:00 in the evening, and his wife drove him home. Following his seizure, Claimant required light duty because he was not allowed to drive for six months, and Employer had no light duty job that did not require driving. Claimant did not

work anywhere from November 14, 2001 until May of 2002, and was paid full salary during that time period. Employer advised Claimant to see his primary care physician. Claimant's primary care physician referred him to Dr. Logan, a neurologist.

Claimant testified that after six months he returned to full duty. Claimant is concerned about his condition because he had hoped to apply for a job in federal law enforcement and he is concerned now about whether the federal government would hire him. Claimant saw Dr. Logan twice and hasn't been to his office since his last visit. No treatment has been provided to Claimant as a result of his seizures and he has not had any seizures since. Claimant is taking no medications for his seizures. Claimant has never applied for, or been rejected for any position.

The records of Dr. Logan reflect that Claimant saw him on November 16, 2001. An EEG and MRI of Claimant's brain were negative. Dr. Logan's impression was that Claimant had a single tonic clonic seizure. Dr. Logan expressed the opinion that there was no specific defining cause found for Claimant's seizure, although certainly his sleep deprivation, which was related to his job, was quite likely a contributory factor.

Dr. Raymond Cohen, a board certified neurologist, testified on behalf of Employer. Dr. Cohen performed a neurological examination on Claimant on March 14, 2003, which was normal. Dr. Cohen diagnosed a history compatible with a tonic/clonic generalized seizure on or about November 14, 2001 with a normal neurological exam on March 13, 2003. Dr. Cohen testified that Claimant's seizure on November 14, 2001 was related to his employment with Employer. It was his medical opinion that the seizure was from his work, but was not a substantial factor from the work. Dr. Cohen testified that Claimant's seizure occurred while he was at work, and he had worked the night before and did not have enough sleep, so in part it was from the work, and in part it was "bad luck", but that certain people are predisposed. Dr. Cohen testified that if one does not have enough sleep, the seizure threshold in the brain becomes lowered in certain circumstances, and sleep deprivation can lower the seizure threshold. Dr. Cohen testified that he felt in part it was work related in that he was at work, but since it was a minor part, and that the seizure threshold is simply there in the individual, it can be lowered from certain factors, but the work was not a substantial factor. He testified that it was a precipitating factor. Dr. Cohen did not feel that Claimant needed any additional treatment, and that Claimant suffered a permanent partial disability related to the seizure on November 14, 2001 of 2% of the body as a whole. Dr. Cohen's opinion was that Claimant's seizure was from a triggering event and was not a substantial factor.

Dr. Barry Feinberg testified on behalf of Claimant. Dr. Feinberg testified that he examined Claimant on January 6, 2004. Dr. Feinberg testified that Claimant had a history of a single isolated seizure that appeared to be situational and related to his sleep deprivation. Dr. Feinberg testified that the situation of Claimant's sleep deprivation was the substantial factor in Claimant developing his seizure on November 14, 2001. Dr. Feinberg rated Claimant's disability at 8% permanent partial disability of the body as a whole.

RULINGS OF LAW

Medical Causation

Based upon my examination of the entire record, Claimant's testimony and the applicable law of the State of Missouri, I find:

Claimant's work as a police officer was a substantial factor in his having a single seizure on November 14, 2001. Although Dr. Cohen's conclusion is that Claimant's sleep deprivation was a triggering or precipitating factor and not a substantial factor in causing Claimant's seizure on November 14, 2001, his testimony is clear that had it not been for Claimant's sleep deprivation, which was caused by his work, he would not have had the seizure.

Dr. Feinberg testified that Claimant's work was a substantial factor, and although Dr. Cohen's opinion would seem to state otherwise, the two doctors actually do not disagree that Claimant's seizure was caused by sleep deprivation.

Permanent Partial Disability/Past Medical

Although I find Claimant's seizure was caused by his work, I do not feel that Claimant has met his burden of proving he sustained any permanent partial disability as a result of the seizure. The only testimony from Claimant regarding disability is that he has thought about applying for a job with the federal government and is afraid he may not get hired. Claimant did not physically injure any part of his body. The MRI and EEG of Claimant's brain were normal. Claimant is on no medication, and has had no treatment as a result of his seizure. There is no evidence that Claimant has sustained any permanent partial disability whatsoever as a result of his seizure.

Because I find Claimant's work was a substantial factor in causing his seizure, Claimant is awarded \$214.75 for the emergency room bill he incurred following his seizure.

Although I find Claimant's seizure resulted from the sleep deprivation brought on by his employment, Claimant has failed to show that he has sustained any permanent partial disability resulting from that seizure. Accordingly, no permanent partial disability benefits are awarded.

This award is subject to a lien in the amount of 25% in favor Claimant's attorney Mark Akers.

Date: _____ Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation