

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

Injury No.: 10-039435

Employee: Ronald Armstrong
Employer: Tetra Pak, Inc.
Insurer: Travelers Indemnity Company of America
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, 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 § 286.090 RSMo, the Commission affirms the award and decision of Chief Administrative Law Judge Lawrence C. Kasten dated June 29, 2011, as supplemented herein.

The award and decision of the administrative law judge is attached hereto and incorporated by reference. We adopt the findings, conclusions, award and decision of the administrative law judge to the extent that they are not inconsistent with what is set forth below.

INTRODUCTION

Chief Administrative Law Judge Kasten found the testimony of Drs. Cooper, Straubinger, and Lehman to be more credible and persuasive than the opinion of Dr. Woiteshek. Based on this finding, the administrative law judge then held that employee had not met his burden of proving that he sustained a compensable accident or that the alleged accident was the prevailing factor in causing employee's right shoulder problems. Lastly, the administrative law judge denied employee's claim for compensation against the Second Injury Fund. Employee filed an Application for Review with the Commission.

DISCUSSION

We first note that the administrative law judge inaccurately referenced a "February 22, 2001," visit to Dr. Rodriguez. The date connected with this visit was actually February 22, 2011. This error was inadvertent and had no affect on the ultimate award.

Section 287.120.1 RSMo provides, in pertinent part, as follows:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

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The definition of “accident” was significantly changed in 2005. Section 287.020.2 RSMo and related subsections read, as follows:

2. 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.
3. (1) In this chapter the term “**injury**” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “**The prevailing factor**” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Since legislative changes in 2005, we must also consider the following interpretative guides contained in § 287.020.10 RSMo:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of “accident”, “occupational disease”, arising out of”, and in the course of the employment” to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo. App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Lastly, §§ 287.800.1 RSMo and 287.800.2 RSMo, respectively, provide, as follows:

- 287.800. 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Pursuant to these statutes, in order for employee to establish a compensable case, he must have proven he sustained an injury due to an accident. Accordingly, we look first to see if employee met his burden of proving that he suffered 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.

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Employee testified regarding numerous medical problems that pre-existed May 12, 2010. But employee testified that as of May 12, he was not suffering from any pain in his shoulder or right upper extremity. He further testified credibly that during the course of performing a rush job at work on that date, he reached and stretched above shoulder level and felt a sharp, deep pain in his right shoulder. Employee believed the pain would go away; but, when it had not gone away by the following day and he was unable to work, employee reported it to his supervisor, Brian Fowler. Mr. Fowler confirmed that employee had reported this incident approximately the day after it occurred. Consequently, based on these facts, we conclude that employee did suffer an accident at work.

Employee also established that he suffered from an injury to his right shoulder. To show that the injury arose out of and in the course of employment, though, § 287.020.3(1) required employee to prove that the “accident was the prevailing factor in causing both the resulting medical condition and disability.” That same statute defines “the prevailing factor” as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” And, as indicated in the administrative law judge’s award, the more credible evidence shows that employee’s shoulder complaints are predominately degenerative in nature and not primarily due to the May 12, 2010, accident.

CONCLUSION

Accordingly, since employee has not proved that his May 12, 2010, accident was the prevailing factor in causing both his medical condition or any disability, the administrative law judge’s decision to deny him benefits from employer and the Second Injury Fund should be affirmed.

AWARD

Based on the most persuasive evidence and except as set forth above, we affirm the award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued June 29, 2011, and award no compensation in the above-captioned case.

Given at Jefferson City, State of Missouri, this ___8th___ day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Ronald Armstrong Injury No. 10-039435
Dependents: N/A
Employer: Tetra Pak, Inc.
Insurer: Travelers Indemnity Company of America
Appearances: Kimberly Heckemeyer, attorney for employee.
Steve Larson, Attorney for the employer/insurer.
Hearing Date: March 29, 2011 Checked by: LCK/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease? N/A.
5. State location where accident occurred or occupational disease contracted: N/A.
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? No.
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.
13. Parts of body injured by accident or occupational disease: N/A.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to date for temporary total disability: None.
16. Value necessary medical aid paid to date by employer-insurer: \$2,403.27.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: \$645.59
19. Weekly compensation rate: \$433.06 for temporary total disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT AND RULINGS OF LAW

On March 29, 2011, the employee, Ronald Armstrong, appeared in person and with his attorney, Kim Heckemeyer, for a hearing for a temporary award. The employer-insurer was represented by its attorney, Steve Larson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issue, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Tetra Pak Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Travelers Indemnity Company.
2. On or about May 12, 2010 Ronald Armstrong was an employee of Tetra Pak Inc. and was working under the Missouri Workers' Compensation Act.
3. The employer had notice of the employee's alleged May 12, 2010 accident.
4. The employee's claim was filed within the time allowed by law.
5. The average weekly wage was \$649.59. The rate of compensation for temporary total disability is \$433.06 per week.
6. The employer-insurer paid medical expenses of \$2,403.27.
7. The employer-insurer did not pay any temporary total disability.

ISSUES

1. Accident.
2. Medical causation.
3. Additional medical treatment.
4. Temporary total disability.

EXHIBITS

Employee's Exhibits

- A. Report of Dr. Woiteshek
- B. Dr. Woiteshek's Curriculum Vitae
- C. Medical Records

Employer-Insurer's Exhibits

1. Medical Records of Dr. Lehman
2. Medical Records of St. Francis Medical Center Occupational Medicine Clinic
3. Flyer from Armstrong Fitness Center
4. Return to Work form of Dr. Rodriguez dated October 18, 2010
5. Newspaper photo of the employee with martial arts students
6. Medical records of Dr. Park

WITNESSES: Ronald Armstrong, the employee. Brian Fowler for the employer-insurer.

BRIEFS: The employee filed his brief on May 2, 2011. The employer-insurer filed its brief on April 29, 2011.

FINDINGS OF FACT

The employee is 46 years old. After graduating from Charleston High School, he worked at Town & Country as a cashier and stocker from 1983 until 1987. In 1987 he started working at Triangle Wire & Cable. He was a lead person and was in charge of other co-workers. In 1995, the employee started a martial arts business on the side giving lessons to students until 2007.

The employee testified that he had a work related left ulnar nerve transposition by Dr. Lents in 1996. In 2001, he had a work related neck injury and had a fusion by Dr. Gocio. After being released he did not have any pain or numbness in his shoulders or upper extremities. He returned to work full duty. In 2003 the employee had a work related left hip injury. Dr. Johnston performed a hip replacement and the employee returned to work without restrictions. He worked at Triangle until September of 2003 when the company closed down. He began working at Tetra Pak in April of 2005 as a sacker. Due to neck problems and numbness in his extremities, Dr. Park performed an additional surgery which helped. Dr. Park released him to work with permanent restrictions of 18 pounds above the shoulder.

In August of 2003, the employee saw Dr. Park for persistent neck and bilateral arm pain. X-rays suggested a possible non-union. In September Dr. Park noted that a CT scan showed the C6-7 cages were well incorporated but the employee had a radicular component. A cervical myelogram showed a probable C5-6 left-sided foraminal encroachment and previous C6-7 surgery without evidence of recurrent stenosis. In November, Dr. Park stated the employee was improved and released him from care but noted the possibility of needing future C5-6 treatment. In October of 2005, Dr. Park noted the cervical myelogram showed the C6-7 fusion had not occurred. In January of 2006, Dr. Park performed a removal of the C6-7 cage and performed a fusion with plate from C5-6 through C6-7. In April, Dr. Park stated that the CT scan showed excellent fusion at C5-6 and C6-7, and returned the employee to full duty on May 1. In May of 2006, Dr. Park gave restrictions of no lifting overhead of more than 15 pounds.

The employee testified that due to a required return to work slip, the employer would have known about the permanent restrictions. The employee returned to Tetra Pak and started working on the feeder/checker line. About half of a shift was performing the feeding. The other half was performing the checking which was quality control. The feeding part involved taking stacks of cartons off of a table and putting them into a machine. There were different sizes of cartons. Stacks of four ounce cartons weighed 10-12 pounds. Quart size stacks weighed about 28 pounds. The pallet was normally shoulder height but the height of the platform varied and depended upon the weight of the product. The table moved with weight and could be adjusted by air. He never did adjust the tables.

The employee testified that when he began his job as a feeder/checker he did not have any shoulder pain. On May 12, 2010 he started his shift without any right shoulder problems. Around 1:40 p.m. he was told by his supervisor that a rush order needed to be finished as soon as possible. The job involved quart sized containers and the containers were stacked higher than normal. The table was weighted down with so many containers that it was nearly collapsed to its lowest level and the top of the material was above shoulder level. He did not try to adjust the table on May 12. The stack of cartons weighed approximately 35 pounds. He pulled the first stack of quart-size cartons and fed it into the machine without problem. In attempting to get the second stack into the machine, he reached and stretched over above shoulder level and felt a sharp deep pain in the ball of his right shoulder. The pain was 7-8 out of 10 and was different than before. The product was above shoulder level which was higher than normal and weighed more. He continued to feed the quart-size cartons into the machine and completed the rush job. He finished the rest of his shift and did not report it that day because he thought the pain would go away. That night his pain increased and he went to Missouri Delta Medical Center where he received a pain shot. The employee is aware that there are no Missouri Delta Medical Center records for his May 12, 2010 visit and he had no explanation as to why there were no records. The next day at work he had severe right shoulder pain and reported the injury to his supervisor Brad Fowler. He could not finish the shift and he asked for treatment.

Brian Fowler testified that he is employed at Tetra Pak Inc. and for the past two and a half years has been an operations supervisor including of the employee. Mr. Fowler testified that he is familiar with the feeder/checker jobs and there are rush orders all of the time. On May 12, 13 or 14 of 2010 the employee told him that he had strained his right shoulder. The workstation that

the employee was operating runs different sizes of materials. The lift table where product is put can have its height adjusted by air. Most employees adjust it to waist level. There are numerous air hoses to adjust the tables and it only takes about 15-30 seconds to do so. The adjustable table is provided so that the employees are not bending to the floor or reaching overhead. Frequently there is enough weight that the tables are close to the ground. When the product is stacked high on the table, the table will collapse fully below waist level. It was possible that some of the products on the table will be overhead but it is not probable. He did not personally see either the employee or the work table on the date in question. Mr. Fowler could not say with certainty that the work table was not collapsed and could not say whether the employee's testimony that the product was stacked on pallets overhead was not accurate.

The employee was seen on May 14, 2010 by Dr. Cooper for right shoulder pain that started on May 12. He developed shoulder pain when feeding cartons into a machine. The employee was accustomed to four ounce cartons which weighed about 12 pounds a stack. He was placed on a machine transferring quart-size cartons which weighed about 28 pounds per stack. There was a lift that raised the pallet up to an ergonomic level for transferring to the machine. The work was performed standing up and below shoulder level. The employee denied shoulder pain prior to May 12, 2010. The employee did not describe any particular incident where one of the bundles became entangled or stuck. He developed the pain moving a stack from either the pallet to the machine or vice-versa. The employee had been a martial arts instructor and stopped doing that that about three years ago. He had bilateral hip replacements due to arthritis; and a cervical fusion. X-rays did not show any degenerative changes. Dr. Cooper diagnosed subacromial bursitis and mild rotator cuff tendonitis. Ibuprofen and light duty was prescribed.

The employee testified that on May 14 he described the injury to Dr. Cooper. When asked about the discrepancy between Dr. Cooper's notes and his description of the injury, the employee did not know why Dr. Cooper indicated that the product was below shoulder level. When asked about the discrepancy about the weight of the product, the employee stated that when he saw Dr. Cooper he did not know the exact weight of the product. Later a co-worker weighed a stack that was approximately the size of what he was lifting when he injured himself and it weighed approximately 35 pounds. Since 2006, he had permanent restrictions by Dr. Park which included no overhead lifting greater than 15 pounds. The employee told Dr. Cooper about those permanent work restrictions but could not recall if he had told Dr. Lehman or Dr. Woiteshek.

On May 19, the employee told Dr. Cooper that he had a burning sensation and aching in his right shoulder. Dr. Cooper prescribed home exercises, muscle stretching, and medication. Stable subacromial bursitis with mild rotator cuff tendonitis was diagnosed. Dr. Cooper stated that the employee was lifting from about waist level with the onset of pain and that he was not actually injured but perceived some limitations in shoulder motion while performing new tasks.

The employee saw Dr. Rodriguez on May 19 for worsening low back pain, buttocks and hip pain. X-rays of the low back and hips were performed. The employee testified that he did not mention his right shoulder to Dr. Rodriguez on that visit because he was already being treated through workers' compensation.

The employee saw Dr. Cooper on May 26 with some improvement in his pain but continued dull aching; weakness; a pins and needles sensation extending from the right side of his neck into his right thumb; and a burning sensation in his neck and shoulders. Dr. Cooper diagnosed impingement syndrome, improving subacromial bursitis, and mild rotator cuff tendonitis; and ordered physical therapy.

On June 9, the employee had developed left shoulder pain and tingling from his neck into his upper extremities in addition to the right shoulder pain and symptoms. Dr. Cooper diagnosed impingement syndrome, subacromial bursitis and mild rotator cuff tendonitis; and ordered physical therapy. Dr. Cooper stated that the alleged precipitating event for the shoulder pain was lifting 28 pounds at waist height which may have risen to the level of awakening or aggravating a bursitis and might create mild tendonitis. It was really not possible for it to create clinical situations such as damage. Dr. Cooper stated that there was a question in his mind as to whether the employee's complaints and findings rise to the level of a workers' compensation case.

The employee saw Dr. Cooper on June 25 after having therapy. He had some improvement in his range of motion but still had left shoulder pain with tingling in his ring and small fingers; and complex symptoms in his right shoulder including pins and needles and aching. Dr. Cooper stated that while doing his sorting job he started having tingling in his upper extremities. Dr. Cooper diagnosed impingement syndrome of the right shoulder with subacromial bursitis.

On July 9, the employee told Dr. Cooper that he had some disciplinary action at work due to working beyond his work restrictions. Dr. Cooper returned the employee to full unrestricted duty. The employee testified that when he saw Dr. Cooper on July 9 he had been written up when working light duty. He asked Dr. Cooper to release him to full duty. When he returned to working full duties as a feeder/checker his right shoulder and neck pain got worse and became so painful he went to the emergency room.

The employee went to Missouri Delta Medical Center on July 15. It was noted that the employee had injured his shoulder at work about a month ago. He had just gone back to work for a two week trial and had shoulder pain. A Toradol shot was given.

On July 19, Dr. Cooper noted that the employee had right shoulder and neck pain that had escalated to the point that he had sought treatment at the emergency room on July 15. He was prescribed Naproxen and Tramadol. Dr. Cooper noted that the employee had not tolerated the return to full duty and diagnosed right shoulder pain and possible low-grade impingement. Dr. Cooper discharged the employee from care with restrictions of no lifting more than five pounds with his right arm and no work above the right shoulder. The employee needed additional testing and referred him to an orthopedist.

The employee testified that he continued to have significant pain in his right shoulder that was radiating into his neck and his left shoulder. The employer sent him to Dr. Lehman an orthopedic surgeon.

Dr. Lehman saw the employee on September 2. The employee stated that on May 12 he injured his right shoulder transferring quart-size cartons. He noticed pain when moving one stack from the pallet to the machine or from the machine to the pallet. The employee denied prior problems with his shoulder. He had been a martial arts instructor for a period of time. X-rays showed mild degenerative arthritis of the shoulder and mild changes of the AC joint. It was Dr. Lehman's opinion that the employee's symptoms were related to a pre-existing breakdown of the shoulder with spurring and pre-existing impingement syndrome due to the pre-existing spurring. Dr. Lehman diagnosed impingement syndrome and a possible torn glenoid labrum. Dr. Lehman thought if the employee had an acute labral tear it would be compensable and might explain his symptoms. If there was not an acute process then the pre-existing impingement syndrome, pre-existing arthritis and rotator cuff pathology which was noted for a long period of time would be the prevailing factor for the shoulder pain. The employee had used his shoulder for many activities unrelated to the job. Dr. Lehman recommended an MRI and thought he could return to light duty work.

In a September 14, 2010 letter Dr. Lehman stated that the employee had a pre-existing impingement syndrome and a possible torn glenoid labrum. Dr. Lehman felt that his symptoms were related to his pre-existing impingement syndrome and possibly rotator cuff pathology. It was his opinion that the sum total of his symptoms are from his pre-existing pathology.

The October 4, 2010 MRI showed a thickening and inhomogeneous signal in the rotator cuff particularly at the distal supraspinatus tendon compatible with tendinosis with no tear seen. There was osteoarthritis of the acromioclavicular joint with mild to moderate impingement. The impression of the radiologist was tendinosis right rotator cuff, osteoarthritis of the glenohumeral joint with subcortical cysts of the glenoid, and fraying of the anterior glenoid labrum.

On October 5, Dr. Lehman stated that he had reviewed the MRI. Based on the MRI and severity of his degenerative condition he thought there was some fraying of the rotator cuff. It was Dr. Lehman's opinion that the prevailing factor for the pathology is pre-existing subcortical cyst and arthritis. The employee's mechanics are consistent with an arthritic component and spurring. Based on the MRI, it appeared to be chronic and long-term in nature as well as pre-existing. Dr. Lehman did not believe his work related injury was the prevailing factor.

Dr. Rodriguez saw the employee on October 18, 2010 and his notes indicate an injury to the right shoulder on May 12, 2010 while pulling cartons. Darvocet was prescribed. The employee was requesting to work on his regular job without limitation. A slip from Dr. Rodriguez stated that the employee may return to work anytime without restrictions.

The employee testified that he requested a full return to work slip from Dr. Rodriguez because he wanted to return to work to feed his family. The five pound lifting restriction could not be accommodated by the employer.

On October 20, 2010, the employee saw Dr. Straubinger to establish the work relatedness of his right shoulder condition. In July Dr. Cooper continued the employee on modified duty with no above the shoulder activities of the right and a maximum force of five pounds. He had

been on modified duty sorting bad material and tossing them in a container. The employee stated he was injured on May 12 lifting cartons which weighed 30-32 pounds. He lifts and/ or slides the product into the machine with no trauma or jerking. The right shoulder had limited motion in abduction and forward flexion with obvious hesitations and signs of impingement. Dr. Straubinger stated that the MRI showed chronic long standing changes not related to a singular event as described happening on May 12. Dr. Straubinger stated that he observed the employee's job as a line feeder personally and in his opinion it was not very challenging. There was no particular change that occurred on May 12, 2010 that was unique and responsible for an injury. The clinical examinations by multiple examiners and the objective information from the MRI suggested that his current complaints are predominately (prevailing) from chronic degenerative changes. Dr. Straubinger concurred with Dr. Lehman that the shoulder complaints are not work related but are degenerative in nature. It was his opinion that the employee's right shoulder complaints from May 12, 2010 had resolved and his ongoing complaints were chronic, degenerative in nature and not work related.

The employee testified that after seeing Dr. Straubinger on October 20, 2010, he went back to the employer and was told that he could not go back to work. Due to the restrictions, he applied for short term disability. Since October 20, 2010, he has been out of work on short term disability and has been receiving about \$251.00 a week.

The employee saw Dr. Woiteshek, an orthopedic surgeon, on November 3, 2010. The employee reported that on May 12, 2010, he was feeding quart size milk cartons into a machine and developed right shoulder pain when moving one stack from the pallet to the machine. He denied having any problems with his right shoulder prior to that date. Dr. Woiteshek reviewed the October 4, 2010 MRI which showed tendinosis of the right rotator cuff with osteoarthritis of the GH and AC joints. Dr. Woiteshek diagnosed impingement of the right shoulder with resulting tendinosis of the right rotator cuff. It was his opinion that the right shoulder injury on May 12, 2010 when the employee was feeding stacks of cartons that weighed 28 pounds into a machine was the prevailing factor in the cause of his impingement of the right shoulder with resulting tendinosis of the right rotator cuff seen on the October 4, 2010 MRI.

It was his opinion that the employee has not reached maximum medical improvement for the impingement of the right shoulder with resulting tendinosis of the right rotator cuff. The employee needs further medical treatment including consultation with an orthopedic surgeon that specializes in shoulder surgery for possible arthroscopic decompression of the right shoulder impingement syndrome. It was Dr. Woiteshek's opinion that since May 12, 2010, the employee had not been able to work as result of the condition. He put restrictions of all overhead use of the right arm and prolonged use of the right arm away from the body especially above chest level; minimize pushing, pulling and particular traction maneuvers with his right upper extremity; not use weights greater than three pounds with the right arm extended from the body, and lifting no more than 15 pounds with both hands.

On December 12, 2010, the employee saw Dr. Rodriguez. The employee had tried to return to work but was told he could not work due to residual shoulder and neck pain. Dr. Rodriguez prescribed Norco; and noted that the employee was on sick leave until February 15,

2011. On February 22, 2001 the employee saw Dr. Rodriquez with shoulder and neck pain. Flexeril was prescribed and Norco was discontinued. The employee wanted to return to regular work but his employer refused due to the continued shoulder pain. Dr. Rodriquez noted that he had written a return to work but the company had rejected it.

The employee testified that between 1995 and 2007, the employee did a lot of kicking and punching in connection with his operation of his martial arts business. He retired in 2007 but in the fall of 2010, just after the company would not provide any more light duty, he reopened the business to provide for his family. He is limited in doing instructions and gets those with experience to help him. He has been instructing the students on how to perform the moves instead of demonstrating all of them due to his physical limitations, including the right shoulder pain that radiates to his neck. He has eight students and does instruction two nights a week from 6:00 to 7:30 p.m. Since reopening the business his shoulder has not been injured and is the same.

Included in the exhibits was a flyer from Armstrong Fitness Center advertising rates and benefits. There was a March 23, 2011 newspaper picture of the employee and two of his students from the Standard Democrat. On February 26, the two students placed at a Karate Championship in Benton, Kentucky.

The employee testified that he submitted the photo to increase business but did not attend the tournament. He has done stocking at Piggly Wiggly on four different days because he has to support his family. He was not required to lift above his shoulder and it did not exceed the weight restrictions. He can lift his right arm to his shoulder but anything above that increases his pain. He is taking ibuprofen and muscle relaxers. He has not re-injured his right shoulder and it is stronger now than before the injury due to daily home exercises.

RULINGS OF LAW:

Issue 1. Accident & Issue 2. Medical causation.

The employer-insurer is disputing that the employee sustained an accident arising out of and in the course of his employment and that the injury to the right shoulder was medically causally related to the alleged accident.

The burden of proof is on the employee to prove all material elements of his claim. See Marcus v. Steel Constructors, Inc., 434 S.W.2d 475 (Mo. 1968) and Walsh v. Treasurer of the State of Missouri, 953 S.W.2d 632,637 (Mo. App. 1997). The employee has the burden to prove that his injuries arose out of and in the course of employment. See Smith v. Donco Construction, 182 S.W.3d 693, 699 (Mo. App. 2006).

Under Section 287.020.3 (1) and (2) RSMo, “injury” is defined to be an injury which has arisen out of and in the course of employment. An injury shall be deemed to arise out of and in the course of employment only if it is reasonably apparent upon consideration of all the circumstances that the accident is the prevailing factor in causing the injury. An injury by accident is compensable only if the accident was the prevailing factor in causing both the

resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Black’s Law Dictionary 621 (Abridged Fifth Edition 1983) defines primary as “First; principal; chief, leading.” Webster’s College Dictionary 1071 (1991) defines primary as “First in rank or importance; chief;”

In order to be a compensable injury, the employee has the burden to prove that the alleged accident was the prevailing factor in causing the resulting medical condition and disability.

Dr. Cooper diagnosed impingement syndrome, subacromial bursitis and mild rotator cuff tendonitis. Dr. Cooper stated that the alleged precipitating event for the shoulder pain was lifting which may have risen to the level of awakening or aggravating a bursitis and might create mild tendonitis. Dr. Cooper stated that there was a question in his mind as to whether the employee’s complaints and findings rise to the level of a workers’ compensation case.

Dr. Lehman stated that x-rays showed mild degenerative arthritis of the shoulder and mild changes of the AC joint. It was Dr. Lehman’s opinion that the employee’s symptoms were related to pre-existing breakdown of the shoulder with spurring and pre-existing impingement syndrome due to the pre-existing spurring. Prior to the MRI, Dr. Lehman thought if the employee had an acute labral tear it might explain his symptoms and would be compensable. If there was not an acute process then the pre-existing impingement syndrome, pre-existing arthritis and rotator cuff pathology would be the prevailing factor in the shoulder pain. Dr. Lehman stated that the employee had a pre-existing impingement syndrome and a possible torn glenoid labrum. It was Dr. Lehman’s opinion that the symptoms were related to his pre-existing impingement syndrome, and the sum total of his symptoms are from his pre-existing pathology.

The MRI showed a thickening and inhomogeneous signal in the rotator cuff particularly at the distal supraspinatus tendon compatible with tendinosis and no tear. There was osteoarthritis of the acromioclavicular joint with mild to moderate impingement. The impression of the radiologist was tendinosis right rotator cuff, osteoarthritis of the glenohumeral joint with subcortical cysts of the glenoid, and fraying of the anterior glenoid labrum.

Dr. Lehman stated that based on the MRI and severity of his degenerative condition he thought there was some fraying of the rotator cuff. It was Dr. Lehman’s opinion that the prevailing factor for the pathology was pre-existing subcortical cyst and arthritis. The employee’s mechanics are consistent with an arthritic component and spurring which appeared to be pre-existing, chronic and long-term in nature. Dr. Lehman did not believe the alleged work accident was the prevailing factor.

Dr. Straubinger stated that the MRI showed chronic long standing changes not related to a singular event described as happening on May 12. The clinical examinations by multiple examiners and the objective information from the MRI suggest that his current complaints are predominately (prevailing) from chronic degenerative changes. It was Dr. Straubinger’s opinion

that the employee’s shoulder complaints are not related to his work but are degenerative in nature.

Dr. Woiteshek stated the MRI showed tendinosis of the right rotator cuff with osteoarthritis of the GH and AC joints. Dr. Woiteshek diagnosed impingement of the right shoulder with resulting tendinosis of the right rotator cuff. It was his opinion that the May 12, 2010 injury to the right shoulder while feeding cartons into a machine was the prevailing factor in the cause of the right shoulder impingement with resulting rotator cuff tendinosis.

Based on a thorough review of the evidence including the testimony of the witnesses and the medical records, I find that the opinions of Dr. Cooper, Dr. Straubinger, and Dr. Lehman are credible and very persuasive and are more credible than the opinion of Dr. Woiteshek. I find that the alleged work accident was not the prevailing factor in causing the resulting right shoulder medical conditions and disability. I find that the employee failed to satisfy his burden of proof on the issues of accident and medical causation. I further find that the employee did not sustain a compensable work-related accident or injury that arose out of and in the course of his employment and the employee’s right shoulder condition is not medically causally related to the alleged accident.

Given the employee’s failure to prove that he sustained an accident and his failure to prove a medical causal connection between his right shoulder condition and the alleged accident, the employee’s claim for compensation is denied. Although this case was heard as a temporary hearing, this award is final. Given the denial of the employee’s claim on the issues of accident and medical causation, the remaining issues are moot and will not be ruled upon. Based on the denial of the employee’s claim against the employer-insurer, the employee’s claim for compensation against the Second Injury Fund is also denied.

Date: _____

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Person
Division of Workers' Compensation