Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No. 03-142853

Employee: Edward Arnold

Employer: MSTA, Inc.

Insurer: Nationwide Mutual Insurance Co.

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 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 19, 2014, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued June 19, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of October 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Edward Arnold

Injury No.: 03-142853

Dependents: N/A

Employer: MSTA, Inc.

Additional Party: Second Injury Fund

Insurer: Nationwide Mutual Ins. Co.

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: March 20, 2014

Checked by: JED

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

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: July 6, 2003

5. State location where accident occurred or occupational disease contracted: St. Louis County

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: Employee was moving equipment in a warehouse.

12. Did accident or occupational disease cause death? N/A Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: low back

14. Nature and extent of any permanent disability: None

15. Compensation paid to-date for temporary disability: -0-

16. Value necessary medical aid paid to date by employer/insurer? -0-

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: N/A

19. Weekly compensation rate: $311.78/$311.78

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

None

22. Second Injury Fund liability: No

TOTAL: -0-

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 Claimant shall be subject to a lien in the amount of N/A percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Edward Arnold

Injury No.: 03-142853

Dependents: N/A

Employer: MSTA, Inc.

Additional Party: Second Injury Fund

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This case involves three separate Claims for Compensation: 03-022663 (February 18, 2003), 03-142852 (March 22, 2003), and 03-142853 (July 6, 2003). The testimony and exhibits in this record constitute the evidence in each Claim. Each Claim is disputed by Employer. Separate Awards issue on each Claim. These cases may be referred to herein as the first, second, and third cases, chronologically. Employer went out of business in December 2003.

Employer admits Claimant was employed on each of the reported dates of injury and that any liability was fully insured. The Second Injury Fund ("SIF") is a party to these claims. Claimant seeks PTD benefits against the SIF in the third Claim. Both parties are represented by counsel. Objections are ruled upon consistent with the findings herein. At all times relevant herein, Claimant worked as a cable installer for this and two subsequent employers.

Issues for Trial

All three Cases

1. medical causation;
2. nature and extent of permanent disability;
3. past medical expenses
4. future medical expenses;
5. liability of the SIF.

FINDINGS OF FACT

Claims Outline

1. First Case – February 18, 2003. In the first case, Claimant sustained a fall from a ladder, landing on his back. Claimant treated neck and low back symptoms conservatively. Also, he had one appointment with his existing chiropractor, Dr. Robert Monti, and one appointment with his family doctor, Dr. Michael Patterson. Claimant underwent some physical therapy. This was Claimant's fourth low back injury, none involving surgery.

2. Second Case – March 22, 2003. In the second case, Claimant reported an accident in which he was driving a ground rod with a sledgehammer and experienced pain between the shoulder blades. Claimant asserted Employer denied treatment. Claimant offered no medical records corroborating this accident as a cause for treatment. Claimant treated privately beginning three weeks later on April 1, 2003 with his family physician Dr. Patterson and was released feeling much better.

3. Third Case – July 6, 2003. In the third case, Claimant sustained another low back injury moving equipment in a warehouse. Claimant was discharged from physical therapy on August 5, 2003. He continued working until Employer went out of business in December 2003.

4. Stipulated Benefits Payments:

Claim	*auth. medical expense*	*TTD payment*
First	$1,104.00	-0-
Second	-0-	-0-
Third	-0-	-0-

5. None of these Claims was submitted for hearing pursuant to Hardship Petition in order to receive (additional) medical or indemnity benefits. Claimant presented no evidence in any of the cases that he lost time from work, received TTD benefits or that he seeks past due TTD benefits herein.

Prior Medical Status

6. In 2002, prior to all three cases, Claimant's physician, Dr. Monti, projected a pattern of flare-ups proportional to activity prior to all three of the Claims herein. He also stated Claimant's prognosis for the future was "poor." (Exhibit D.)

7. Also in 2002, Dr. Patterson diagnosed osteoarthritis. (Exhibit C.)

Post-Accident Employment

8. On cross-examination, Claimant admitted that after he left MSTA in December 2003. He began working for AFRAM two days later, and later BNL Communications, performing the same kind of tasks, working 40-45 hour weeks, including 10-14 hour days. Specifically, he continued climbing telephone poles. At BNL, Claimant was submitted and passed a physical fitness exam.

9. On cross-examination, Claimant admitted prior deposition testimony that he could do "anything" prior to working for AFRAM. This included climbing multiple telephone poles during a workday. By the time he terminated with BNL, he could "hardly do anything." (T. 62-63.) He testified that his work with BNL worsened his condition.

10. Claimant worked until September 2006 when he was terminated because BNL left the area. He applied for unemployment benefits aware that he certified he was "ready and willing" to work. Claimant worked 40-45 hours per week between December 2003 and September 2006. He received unemployment benefits through April 2007. (T. 59-60, 66-67.)

Medical Treatment

11. Claimant had back and neck complaints which he treated conservatively from February to June 2003 when he was "feeling much better" according to Dr. Wilkinson.

12. Working full-time, Claimant did not treat for a period of eleven months, August 5, 2003 until July 6, 2004 (after Employer went out of business) even though Dr. Wilkinson had referred Claimant to pain management for cervical symptoms. Claimant did not make demand upon Employer for pain management but Claimant was working full-time performing the same work.

13. Another treatment gap occurred between July 2004 and June 2005 (eleven months). Claimant worked in the same capacity from August 2004 until 2006.

14. Subsequently, Dr. George examined Claimant in February 2005 for Employer and made no treatment recommendations.

15. In September 2005, another of Claimant's physician, Dr. Kevin Rutz, examined Claimant and noted somewhat dramatic presentation and lack of interest in surgery. Notes suggest confusion about the appointment. (Exhibit H.)

16. Notes from both Dr. Patterson and Dr. Rutz include cautionary notes against long-term use of vicodin and hydrocodone. Use of each, from different physicians, appears to overlap for some periods of years.

17. Dr. Rutz referred Claimant to a physiatrist but there is no evidence that Claimant acted on the referral.

18. Claimant had treatment for various serious pathologies after 2005. Claimant testified he had ten heart attacks. Claimant had a heart attack in October 2005 and was off-work for four weeks. Claimant developed cancer.

Medical Expenses

19. Claimant offered Exhibit J for medical expenses for medical treatment for which he sought reimbursement. The affidavits do not relate the expenses to any one of the three cases herein. Claimant attempted unsuccessfully to identify the expenses contained within the Exhibit on direct examination. He did not relate the expenses to any one of the three cases herein.

20. Separately, on cross-examination, Claimant admitted a number of the medical expenses in Exhibit J were for the period of employment with AFRAM and BNL, not Employer herein.

21. Claimant did not offer sufficient evidence of any treatment demands.

Opinion Evidence

22. Claimant offered the deposition of Dr. David Volarich as Exhibit A. Claimant told Dr. Volarich he had no low back issues hindering work prior to 2003. Dr. Volarich assigned ten percent PPD of the body referable to the low back on the first case. Dr. Volarich also assigned PPD ratings to each of the second and third cases and to numerous alleged pre-existing disabilities. He further found Claimant permanently and totally disabled as a result of the combination of current (i.e. 2003) disabilities and the pre-existing disabilities (See Exhibit A.)

22. Claimant offered the deposition of Mr. James England, rehabilitation counselor, as Exhibit B. Mr. England saw Claimant in 2012. He admitted that if Claimant was working 45-50 hours per week with BNL through 2006, in context with the above identified treatment gaps, that Claimant was employable at that time (pp. 23-30).

23. Employer offered the deposition of Dr. Philip George as Exhibit 1. Dr. George examined Claimant in 2005 and 2009. He assigned ten percent PPD of the body referable to the cervical spine referable to the first case. He did not assign any PPD to the second and third cases. Dr. George assigned ten percent PPD to the pre-existing low back condition.

RULINGS OF LAW

Credibility

Claimant's testimony was difficult to follow and unreliable. His responses were not straight-forward and often contradictory. Accordingly, Claimant's testimony is found not credible. This is not inconsistent with the assessment of Claimant's communications by Dr. Rutz and Mr. England. Separately, the suggestion of Claimant's (chronic) misuse of narcotic pain relievers prescribed by Claimant's own treatment providers also suggests that his testimony may not be reliable. (The provider precautions were unaddressed by Claimant's experts.)

On cross-examination, the following exchange, and denial, occurred:

> Q: Okay. And is it your testimony that prior to the accidents of 2003 you didn't have problems, the physical problems, with your neck and low back?
> A: No.
> Q: Okay.
> COURT: You didn't have problems or that wasn't your testimony.
> WITNESS: No, I did not have problems at that time.

(T. 51.) Testimony immediately succeeding this exchange includes Claimant's admission that prior to 2003 he had leg pain, could no longer hold his arms overhead, could only sleep four hours per night, underwent an MRI, reviewed the MRI and received Dr. Monti's "poor" prognosis for the future. (T. 52-54.) Claimant acknowledged onset of completely disabling symptoms in September 2006. Still later, near the end of trial, Claimant stated he had [some] memory loss. (T. 74.)

Medical Causation and Permanent Partial Disability

Claimant's testimony and the medical evidence require findings of self-contradiction, pre-existing lumbar pathology, and overwhelming post-accident physical deterioration. Awarding PPD or PTD benefits in these cases requires ignoring Claimant's remarkable post-accident work record, the nearly year-long treatment gaps, his own credibility deficits, and his experts' omissions in foundation regarding the long treatment gaps and undisputed post-accident work record in forming their opinions. These weaknesses render them unpersuasive. Understandably, Claimant's experts could not have addressed Claimant's contradictions and admissions at trial. Claimant's trial admission that he could do anything (prior to working for AFRAM in January 2004) renders dubious either medical expert's assertion of a PPD percentage.

Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). As with all proofs in complex medical evidence, a medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), citing Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984).

The record contains unrebutted probative evidence that (1) Claimant worked full-time from 2004 to 2006, including two eleven month treatment gaps, and (2) Claimant developed cardiac pathology and cancer during the years following his employment with BNL. These facts, one set contemporaneous, the other remote, each independently break the causal chain of events that might link any of the three Claims herein as a substantial factor in Claimant's inability to work.

Direct examination included eliciting severe, diffuse, current complaints (in 2014) from Claimant followed by query and answer that none of this existed prior to 2003 (year of all three reported accident dates) without mention during the examination of *onset* dates and other explication of the eleven year lapse of time between 2003 and today's current complaints. (T. 30, 33.) Claimant did not have completely disabling pain in the neck, low back or limbs as evidenced by his working full-time for AFRAM and BNL, from 2004 to 2006, performing the same demanding tasks. On cross-examination by the SIF, in context of his unemployment application and disability *onset*, the following exchange took place:

> Q: Okay. And do you remember, sir, when you applied for those benefits that they asked you for a date of onset of your disabling conditions?
> A: Yes.
>
> Q: And do you remember telling them that was around September 28th of 2006?
> A: Yeah, that's a good possibility.

> Q: And do you remember on your application where they asked about how many hours per week you were working and how many days per week you were working at your last job?
> A: Yes.
>
> Q: Do you remember representing that you worked a full eight hour day, five days a week up until September 2006?
> A: Yes.

(T. 59-60.) Thus, Claimant not only admitted these facts at trial but represented these facts to a third party, the employment security office, many years ago. Claimant expressly admitted deterioration while working for the subsequent employers, AFRAM and BNL. (T. 63.)

Claimant identified no new symptoms of the lumbar spine that might constitute additional permanent partial disability (PPD) as a result of any of the three reported accident herein. He had some cervical limitations that were rated by both medical experts at ten percent PPD.

Claimant's expert's opinions regarding causation and disability are much less probative to the extent each relied on Claimant's reports of symtomotology and the undisputed work record. Claimant's out-sized complaints are inconsistent with his own medical records exhibits, some trial admissions and the fact of uninterrupted work (no lost time). Regarding his ability to return to work full-time, Claimant said at trial he could not answer that question. (T. 46.)

Claimant offered no expert opinion of causation and resulting permanent disability that are reconcilable with Claimant's post-accident full-time, demanding work, the two treatment gaps, during the period 2004 to 2006, and credibility deficits. Dr. Volarich's testimony, as such in this case, lacks facts and reasoning that give his opinions of causation and disability probative force. Silman, *supra*. The significance of Claimant's post-accident work record (in all three cases) is impressive and the two, nearly year-long, treatment gaps in the years immediately subsequent to all three cases is inescapable. None of the three cases caused any temporary total disability and Claimant remained working unrestricted.

Dr. George's assignment of a ten percent PPD of the body referable to the cervical spine is, despite Claimant's credibility issues, easily balanced with the conservative treatment record during the Spring of 2003, during which no new lumbar symptoms were identified, or complained of, but where some minor cervical problems were treated until Claimant felt "much better" in June 2003. Dr. George's opinions are more persuasive than those of Dr. Volarich.

For the reasons stated, the record of evidence does not support a finding of permanent disability arising from the second or third cases.

Medical Expenses and Future Medical Care

Claimant's claims for reimbursement of medical expenses and future medical care fail for the same reasons his proofs for causation and disability were found insufficient above. Claimant's testimony and evidence did not give sufficient explanation of his incurrence of

medical expense or detail of attribution that his expenses were reimbursable. On cross-examination, Claimant admitted a number of the medical expenses in Exhibit J were for the period of employment with AFRAM and BNL, not Employer herein. (T. 63-64.) This admission creates doubt about any testimony from Claimant that these bills are work related.

Assuming, *arguendo*, that Claimant's proffer was both competent and probative, no attempt was made to assign the expenses among the three claims herein. Where, as here, the record covers years of pre-accident treatment and symptoms, multiple Claims, long treatment gaps and years of post-accident treatment and symptoms for the same complex pathologies, reimbursement seemingly becomes a complex question requiring expert opinion supported by facts and reasoning. Proof of medical expenses contemplating multiple Claims, pathologies and years cannot be fairly stated to be within the scope of lay opinion.

Noteworthy was Claimant's uncorroborated testimony regarding payment by an unnamed health insurer which is, at once, not reliable proof of payment and is, on the other hand, some evidence, by reasonable inference, that the expenses were paid by Claimant's health insurance because they were not work related. Such payment is not evidence of Employer denying benefits (as asserted by Claimant (T. 12-13)). Remoteness of treatment (and any payments) from the accident dates further complicates the issue as stated above.

Accordingly, past medical expenses and future medical care are denied.

SIF Liability

As found above, Dr. George's rating of PPD for both current disability and pre-existing disability for all three cases is more persuasive than that of Dr. Volarich. Accordingly, since his assignment of pre-existing disability of ten percent PPD of the body does not meet the statutory threshold, no liability for synergistic combination between current PPD and pre-existing PPD may be found. Section 287.220.1 RSMO (2000).

Conclusion

Accordingly, in the Third Case, identified by Injury Number 03-142853, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof. Claim denied.

Date: _____ Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation