

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

Injury No.: 04-149113

Employee: Francis Basler

Employer: Bausch & Lomb

Insurer: ACE American Insurance Co. c/o ESIS

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 27, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John A. Tackes, issued August 27, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Francis Basler

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 should be reversed and past medical expenses and future medical care should be awarded.

First, there is no question that employee developed bilateral cervical C5-6, C6-7 radiculopathy, which required surgery. However, it is my opinion, based upon the medical records, testimony provided, and other evidence provided that employee met his burden of proof regarding causation and should be awarded past medical expenses and future medical care.

As correctly stated in the award by the administrative law judge, under § 287.067.1 RSMo (2000) an occupational disease is defined as:

[A]n identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2 RSMo (2000) goes on to state that “[a]n occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable.... An occupational disease is not compensable merely because work was a triggering or precipitating factor.”

In examining occupational diseases, the courts have stated that the determinative inquiry involves two considerations: “(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort.” *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo. App. 1991), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Employee began working full-time for employer in the polishing department in 1984. Employee maintained this position until October 2002.

Employee's job duties consisted of taking a raw forged medical instrument and manually progressing through a series of polishing procedures using different types and grits of polishing wheels. This work was performed while seated on a chair in front of a machine which rotated the polishing wheels on a fixed axle. Employee testified that in

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order to properly polish an instrument, he would sit up close to the polishing wheel, holding the instrument in his hands and apply the instrument to the wheel with strong pressure. While doing this, his hands and arms were extended in front of him and he held his head in a flexed position with his chin pointed down toward his chest.

Through this process, employee initially developed bilateral carpal tunnel syndrome. On April 23, 2001, Dr. Crandall performed a bilateral carpal tunnel release. Employee returned to work, but on October 29, 2002, he returned to Dr. Crandall with neck and arm pain, and numbness and tingling in his fingers. Dr. Crandall diagnosed employee with bilateral C5-6 and C6-7 cervical radiculopathy.

Dr. Volarich examined employee on November 7, 2003, and again on August 11, 2004. On both occasions, Dr. Volarich diagnosed employee with C5-6 and C6-7 bilateral radiculopathy and concluded that the prolonged fixed flexed position of his neck while doing his job grinding and polishing was a substantial contributing factor causing the condition. In Dr. Volarich's August 11, 2004, report, he recommended employee see a neurosurgeon concerning his complaints.

Dr. Kennedy evaluated employee on April 4, 2006. Dr. Kennedy reviewed an MRI of employee's cervical spine and noted that it demonstrated employee had cervical spondylosis more prominent at C5-6 and C6-7 where there was bilateral foraminal encroachment. Dr. Kennedy diagnosed employee with cervical radiculopathy with noted cervical spondylosis and foraminal encroachment. Dr. Kennedy further stated that employee's job activities were a substantial contributing factor to the condition and recommended cervical discectomy and fusion.

Dr. Lee initially saw employee on March 3, 2004, following a cervical MRI. Dr. Lee's impression was C5-6, C6-7 spondylitic disc protrusions and indicated that his job would not be a causative factor in the development of that condition. Employee saw Dr. Lee again on August 28, 2006, and Dr. Lee again concluded that employee had C5-6, C6-7 spondylosis and opined that his work with employer was not a substantial factor in the development of his condition. However, at this August 28, 2006, visit, Dr. Lee did recommend cervical discectomy and fusion.

Dr. Lee's opinion regarding what caused employee's cervical condition is different from the opinions of Drs. Volarich and Kennedy in that Dr. Lee found that employee's work activities were not a substantial factor in the development of his cervical condition. Dr. Lee disagrees with Dr. Kennedy's assessment that such activities were a substantial factor in the development of employee's cervical condition, despite the fact that Dr. Kennedy came to this conclusion after taking an extensive history from employee, which included past medical history and employee's description in great detail about the specific tasks employee completed while working for employer for over 17 years. Ultimately, Dr. Kennedy found that the persistent neck flexion employee endured on essentially a daily basis for 17 years would "certainly" produce a cervical condition of such severity as employee's.

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On the other hand, Dr. Lee testified that he believed employee's cervical condition was a degenerative condition that, over time, progressively causes changes and wearing of the joints in the spine. Based upon that reasoning, Dr. Lee concluded that employee's condition was a common disease of everyday life to which the general public, outside of employee's job, is equally exposed. However, on cross-examination, Dr. Lee went on to significantly weaken the foundation of his aforementioned position. On cross-examination, Dr. Lee testified that repetitive motion, repetitive micro-trauma, or working in a fixed flexed position could cause the kind of condition found in employee. He further testified that holding one's head in a position of downward flexion for prolonged periods of time could cause this type of condition. Lastly, Dr. Lee testified that trauma could cause cervical spondylosis and agreed that micro-trauma could, under certain circumstances, over a lengthy period of time, be a substantial factor in the development of cervical spondylosis.

It is my opinion that the administrative law judge erred in finding Dr. Lee's opinion that employee's work was not a substantial contributing factor in the development of his cervical condition more credible than the opinions of both Drs. Volarich and Kennedy. Two out of three physicians clearly stated that the work activities of employee were a substantial factor in causing him to develop bilateral C5-6, C6-7 radiculopathy as diagnosed by each and every physician. The one doctor that found otherwise, Dr. Lee, testified that repetitive micro-trauma or working in a fixed, flexed position could cause this condition and, specifically, employee's positioning while doing his work could cause this condition.

It is also worth noting that Dr. Lee's conclusion rests upon the belief that employee's cervical problems were caused by a degenerative condition which progressed over time. This reasoning simply ignores the fact that employee worked for employer, completing the aforementioned tasks, for *over 17 years*. While employee's condition may have been something that progressed over time, it is illogical to conclude that 17 years of employee completing tasks requiring him to hold his hands and arms extended in front of him and while holding his head in a flexed position with his chin pointed down toward his chest did not render him any more likely than the general public to develop this cervical condition. Therefore, I agree with Dr. Lee in stating that employee's condition progressed over time, however, I believe it was employee's job that caused said condition and the subsequent deterioration, or progression.

Based on the above, I believe that employee has carried his burden of proving that there was an exposure to the development of bilateral C5-6, C6-7 radiculopathy which was greater than that which affects the public generally, and that there was a recognizable link between the bilateral C5-6, C6-7 radiculopathy and employee's job duties as a medical instrument polisher. In addition, employee credibly testified that he had not suffered any acute injuries to his cervical spine prior to the onset of the bilateral C5-6, C6-7 radiculopathy, nor had he experienced any neck problems whatsoever prior to his employment with employer.

I find Drs. Volarich and Kennedy's opinions more credible than Dr. Lee's.

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I find that employee is entitled to past medical expenses and future medical care. As such, I would reverse the award of the administrative law judge and award employee the same.

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

John J. Hickey, Member