

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

Injury No.: 04-143003

Employee: Richard Bays

Employer: Dave Kolb Grading, Inc.

Insurer: Amerisure Companies

Date of Accident: Alleged April 24, 2004

Place and County of Accident: St. Charles County, 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 March 11, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued March 11, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of August 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee failed to meet the burden of proof with regard to the contraction of an occupational disease.

The employee must prove by substantial and competent evidence that he has contracted an occupational disease and not an ordinary disease of life. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App. S.D. 1991). The employee must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994). A single expert medical opinion will support a finding of compensability even where the causes of the occupational disease are indeterminate. *Id.*; *Kelley*, 1 S.W.3d at 48. Work conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. *Id.*

Employee has shown that his daily work environment exposed him to the hazard of an occupational disease and that there was a direct causal connection between the work in which he performed, and the contraction of the occupational disease.

Employee sought treatment from his primary physician, Dr. Fusco, for what he believed to be carpal tunnel syndrome on April 1, 2004. Employee underwent an MRI on April 24, 2004 which indicated that employee's problems stemmed from problems with his neck. Dr. Fusco referred employee to Dr. Bailey who evaluated employee and opined that his condition was aggravated by work and recommended surgery. Employee notified employer in order to proceed under workers' compensation and filed his claim on April 24, 2004. Employee's claim was denied and employer did not provide employee with any treatment for his condition.

Employee testified that he worked as working foreman for employer. Employee worked in both a supervisory role as well as a laborer. Employee testified that he spent approximately half of his time working in a supervisory capacity and the other half of his time performing manual labor. Employee's manual labor included carrying and laying pipe, shoveling gravel, as well as lifting and carrying 80 lb bags of cement. Employee testified that he did a significant amount of heavy lifting. Employee believed that his condition was caused by the repetitive lifting during his employment with employer. Employee testified that his hands and arms constantly ached and both arms would go numb. Employee testified that he had problems with his lower back and neck as well. Employee found that his condition, along with the associated chronic pain, prevented him from working on a consistent basis.

Employee testified that he reported problems with his neck and back to employer prior to April of 2004. Employee was in a motor vehicle accident in 2001, and received treatment for his shoulders. Employee fell into a ditch in 2003 which caused pain in his shoulders and hands. However, employee did not incur a specific injury to his neck on either of those occasions. Employee, on the other hand, experienced a deterioration of his condition over the course of his employment due to the repetitive nature of his work, including heavy carrying and lifting.

Testifying on behalf of employee was his wife. Employee's wife testified that employee's condition deteriorated during his employment with employer, specifically after April of 2004. Employee's wife confirmed that employee experienced problems with his neck, including tingling and numbness down to his fingers. Employee's wife testified that employee experienced pain which required the taking of pain medication; and that after taking the medication he would go to bed. She testified that employee spent 80-90% of the day in bed.

In addition to the credible testimony provided by employee and his wife, there was persuasive expert testimony. Through expert testimony, employee was able to establish that his work conditions were a major contributing factor to the disease. Dr. Bailey diagnosed employee with degenerative disc disease, stenosis, and radiculopathy secondary to stenosis. Dr. Bailey testified that employee reported a two year history of neck pain radiating down both arms. Dr. Bailey noted that employee's job required manual labor including heavy lifting. Dr. Bailey testified that the type of work employee performed could cause degenerative conditions of the spine which could be exacerbated by such activities. Dr. Bailey opined that employee's work was a causative factor in the development of his symptoms. Dr. Bailey recommended decompression after he evaluated employee in April of 2004. Dr. Bailey testified that after he evaluated and examined employee that he believed surgery was necessary to treat employee's condition.

Dr. Lee diagnosed employee with cervical spondylosis with radiculopathy. Dr. Lee opined that employee's work was not a causative factor in his condition as the diffuse or widespread changes indicated a degenerative process. Dr. Lee opined that causative factors in making employee's condition become symptomatic included the motor vehicle accident in 2001 and employee's smoking. However, employee continued to work for employer for nearly four years after the motor vehicle accident. Dr. Lee admitted, as well, that the motor vehicle accident did not cause employee's degenerative condition, but that it pre-dated his accident. It also appears that Dr. Lee did not have complete medical records for employee from Dr. Fusco regarding the treatment for his neck condition.

In addition, Dr. Lee did not inquire about employee's specific work duties during his evaluation; he knew only that employee performed work for a construction company. Therefore, Dr. Lee did not appropriately consider employee's manual labor including heavy lifting and shoveling when rendering his opinion as to causation. During cross-examination, Dr. Lee testified that it is possible that hard labor could cause an exacerbation of a previously existing degenerative problem of the neck.

Furthermore, Dr. Lee mischaracterizes what is necessary to prove an occupational disease. Dr. Lee opined that to have a repetitive injury that employee needs to have injury; and employee did not provide a history of any specific or ongoing recurrent injuries that happened at his job. Dr. Lee is misguided as to what employee must show in order to prove an occupational disease. It is clearly established that it is not necessary to prove a specific accident/injury when an employee is alleging an occupational disease. Employee's condition was due to the repetitive nature of his work not due to any specific accidents/injuries at work. Therefore, employer's expert is holding employee to the wrong standard and placing a burden upon employee which is not required under workers' compensation law. As such, I find Dr. Lee's opinion on the issue of causation to be incredible and not worthy of belief.

Additionally, employee is entitled to future medical benefits. Employer never authorized treatment for employee's condition as it was thought to be not work-related; however it is clear that surgery is necessary to treat employee's condition. Both Drs. Bailey and Lee testified that surgery would be reasonable and necessary to treat employee's condition.

I find the opinion of Dr. Bailey to be most persuasive, credible and worthy of belief. Based on the medical evidence and testimony, it is reasonable to conclude that employee's work duties exposed him to an occupational disease; and that the conditions were a substantial factor in the cause of his condition.

Employee satisfied his burden through expert testimony provided by Dr. Bailey establishing work place exposure as well as a link between employee's condition and his employment. I find that there was exposure in the workplace sufficient to conclude that employee's work duties were capable of producing his resultant medical condition. There was sufficient evidence to establish that his employment was a substantial factor in the development of his condition. Accordingly, I would reverse the decision of the administrative law judge

and award compensation.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Richard Bays

Injury No. 04-143003

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: None

Employer: Dave Kolb Grading, Inc.

Additional Party: None

Insurer: Amerisure Companies

Hearing Date: December 10, 2007

Checked by: GCG/ch

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? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged date of occupational disease is April 24, 2004.
5. State location where accident occurred or occupational disease was contracted: St. Charles County, 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? 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 occurred or occupational disease contracted:
Alleged repetitive trauma from manual labor.

12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Neck, shoulders, back and arms

- Nature and extent of any permanent disability: None

15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? Alleged \$7,804.46

18. Employee's average weekly wages: \$1,092.80
19. Weekly compensation rate: \$662.55 TTD/\$347.05 PPD

- Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$0
- Unpaid medical expenses: \$0
- 0 weeks of temporary total disability (or temporary partial disability)
- 0 weeks of permanent partial disability from Employer

22. Second Injury Fund liability: No

Total: \$0

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard Bays

Injury No: 04-143003

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: None

Employer: Dave Kolb Grading, Inc.

Additional Party None

Insurer: Amerisure Companies

Checked by: GCG/ch

PRELIMINARY STATEMENT

The parties appeared for evidentiary hearing on December 10, 2007 at the Division of Workers' Compensation in St. Charles County Missouri. Claimant was present in person, and represented by Rand S. Hale. Dave Kolb Grading, Inc. (Employer) and Amerisure Companies (Insurer) were represented by Stephen J. Barber. Attorney Rand S. Hale requested a fee of 25% on any monetary award made. The Second Injury Fund is not a party to this claim. Claimant requested the issuance of a Temporary Award; however, as the issue causation was determined in favor of Employer, this Award is issued as a Final Award.

The parties stipulated to the following at the hearing:

1. Claimant was an employee of Employer.
2. Venue is proper in St. Charles County.
3. Employer received proper notice of the claim.
4. The claim was filed within the time allowed by law.
5. The average weekly wage at the date of injury was \$1,092.80, the appropriate temporary total disability (TTD) rate is \$662.55, and the appropriate permanent partial disability (PPD) rate is \$347.05.
6. No benefits have been paid by Employer.

The issues to be decided at the hearing were as follows:

1. Occupational disease.
2. Arising out of and in the course of Claimant's employment by Employer.
3. Medical causation.
4. Employer's liability for past medical expenses.

5. Claimant's entitlement to future medical care and treatment.

- Claimant's entitlement to TTD benefits.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing are now overruled.

At the hearing, Claimant testified in person on his own behalf, as did his wife Shirley Bays. Steve Benskin, superintendent of Employer's utility division and Claimant's former supervisor, testified on behalf of Employer/Insurer. The following exhibits were offered by the parties and received into evidence:

Claimant's Exhibits:

- A. List of medical bills
- B. Records of Dr. Michael Fusco – April 1, 2004 through April 21, 2004
- C. MRI report from Imaging Center of Southern Illinois, dated April 5, 2004
- D. Records of Gateway Regional Medical Center, dated April 12, 2004
- E. Records of Dr. Benedict Painter – September 24, 2004 through June 15, 2005
- F. MRI report from Imaging Center of Southern Illinois, dated June 18, 2005
- G. Records of Dr. Rod Hartzel – February 6, 2006 through July 19, 2006
- H. Deposition of Dr. Gregory Bailey with exhibits

Employer/Insurer's Exhibits:

1. Deposition of Dr. Thomas Lee with exhibits
2. Employer's record of regular and overtime hours worked by Claimant from January 1999 through May 2005

Claimant testified that he worked for Employer from 1997 to 2005. He was a "working foreman," meaning that he had supervisory duties, but also performed manual labor. He estimated he split his time about equally between supervisory tasks and actual physical labor. He testified he had to carry pipe, chains and shovels. The pipes weighed approximately 40 pounds, and if a pipe fitter was absent, he would be required to lay the pipe as well. He also carried bags of cement that weighed 80 pounds.

Claimant testified that at times his neck and low back bothered him. He could not point to a specific date of onset because "it might hurt one day and you won't feel it for two or three weeks or a month later." On April 1, 2004 Claimant saw his personal physician Dr. Fusco. Claimant testified that at the time he saw Dr. Fusco his complaints were pain in his arms and hands, and sometimes pain in his neck and low back. Dr. Fusco referred Claimant for an MRI on April 5, 2004. After receiving the results of the MRI, Dr. Fusco

referred Claimant to Dr. Bailey.

Claimant testified Dr. Bailey wanted to perform surgery on his neck. After seeing Dr. Bailey, Claimant spoke to the Kolbs (Employer). The scheduled surgery was cancelled in order to proceed under a Workers' Compensation Policy, however, the claim was ultimately denied and no treatment was provided. Claimant continued to work for Employer for approximately a year.

Claimant testified he had three similar positions after his employment with Employer ended. Claimant testified he currently has pain in his arms and hands, and he also experiences numbness and tingling in his hands. He testified he was tested for carpal tunnel syndrome but the doctors thought the symptoms in his hands were related to his neck condition.

On cross examination Claimant testified that he was in a motor vehicle accident in March, 2001. He denied any specific injury to his neck from the accident. When asked what body parts were injured he stated "Hard to say. Shoulders and stuff. You know, just I locked up when I hit him. He testified he received treatment from a chiropractor after the accident, but that he had been seeing him before the accident.

Claimant also testified he had reported problems with his neck, back and arms to Steve (his supervisor at the time) and Troy Nance, his previous supervisor prior to April 2004. Claimant testified he did not miss any significant time from work prior to April 2004 due to his neck, back or arms.

Claimant's wife, Shirley Bays testified on behalf of Claimant. Ms. Bays testified Claimant had problems with his neck, with tingling and numbness going down to his fingers. She further testified his condition deteriorated after April 2004. She testified he would hurt, and have to take his medicine and go to bed.

Steve Benskin testified on Behalf of Employer. Mr. Benskin testified he was Claimant's supervisor. He testified Claimant's job duties were split 60% supervisory and 40% labor. He testified Claimant never complained of pain in his neck and arms, and that he never requested medical treatment prior to April 2004. Mr. Benskin further testified Claimant requested that if the insurance guy calls him, just agree with whatever he said.

Dr. Gregory Bailey testified on behalf of Claimant by deposition on December 9, 2005. Dr. Bailey's diagnosis was "First is degenerative disc disease, second was stenosis, and third was radiculopathy secondary to the stenosis." Dr. Bailey testified Claimant had stated he had a 2 year history of neck pain radiating down to both arms, right being worse than left; that his job requires him to do a significant amount of heavy lifting. Dr. Bailey opined that Claimant's work "was a factor causation in his symptomology." Dr. Bailey further opined Claimant needed surgical decompression in his neck.

On cross examination, Dr. Bailey indicated he had not reviewed any records of prior treatment on Claimant's neck, or that he had any knowledge of the 2001 automobile accident. Dr. Bailey indicated that a whiplash injury to the neck could cause a degenerative condition in the neck to become symptomatic. He also indicated that he did not have any specific information regarding Claimant's job duties, including the frequency or amount of weight which Claimant lifted in conjunction with his employment.

Dr. Thomas K. Lee testified by deposition on behalf of Employer on July 12, 2007. Dr. Lee testified he reviewed Claimant's past medical records as well as his deposition, and performed a physical examination of Claimant. The records review included treatment records of Dr. Fusco. Dr. Lee diagnosed Claimant's condition as "cervical spondylosis with radiculopathy." Dr. Lee opined that the diffuse or widespread changes indicate a degenerative process, and that Claimant's work was not a factor. Dr. Lee further opined that the motor vehicle accident in 2001 and the fact that Claimant is a smoker were factors in

making the degenerative condition become symptomatic.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the competent and substantial evidence presented in this case, including the testimony of Claimant and other witnesses, deposition testimony of expert witnesses, records received into evidence, and my personal observations, I find:

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). The quantum of proof of medical causation is reasonable probability. For an award of temporary disability and medical aid, proof of cause of injury is sufficiently made on reasonable probability. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1973). *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504 (Mo. App. W.D.1997).

MEDICAL CAUSATION

Claimant must present evidence to establish that it is reasonably probable that work was a substantial factor in causing his medical condition. In the present case, this issue rests upon the credibility of the expert medical testimony presented. Dr. Bailey's opinion failed to take into account Claimant's entire medical history, specifically his history of and treatment for neck pain from the 2001 motor vehicle accident. Dr. Bailey himself testified that he was not aware of the accident and injury, and that such information could have caused him to arrive at a different opinion regarding Claimant's condition. Dr. Bailey also did not have any specific information regarding Claimant's job duties. "A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence." (citations omitted) *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 904 (Mo.App. 1990). Dr. Bailey's testimony regarding causation is not adequately supported by reasons and facts to give it sufficient probative force in order for Claimant to meet his burden of proof regarding medical causation.

Dr. Lee did review the relevant records and testimony in order to form his opinion and give it sufficient probative force. Dr. Lee's opinion and testimony is more credible than those of Dr. Bailey. where the opinions of medical experts are in conflict, the fact finder may reject all or part of one party's expert testimony, which it does not consider credible, and accept as true the contrary testimony given by other experts. *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. E.D. 1992).

Claimant has failed to prove by a reasonable probability that his work for Employer was a substantial factor in causing his medical condition. The Claim for compensation is denied. All other issues presented are moot.

Date: March 11, 2008

Made by: /s/ GRANT C. GORMAN
GRANT C. GORMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ JEFFREY W. BUKER
JEFFREY W. BUKER, *Director*
Division of Workers' Compensation