

FINAL AWARD DENYING COMPENSATION

(Affirming Award and Decision of Administrative Law Judge with Supplemental Opinion and Denying Motion to Dismiss)

Injury No.: 05-059033

Employee: Alfred Bazile
Employer: Bi-State Development Agency
Insurer: Self-insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 14, 2005

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 July 26, 2006. The award and decision (decision) of Administrative Law Judge Cornelius T. Lane is attached hereto for reference. Except as indicated otherwise below, this Commission adopts the Findings of Fact as set forth in the decision.

INTRODUCTION

Administrative Law Judge Lane's decision relied upon the expert report of Dr. Bernard C. Randolph and held that employee's bilateral carpal tunnel syndrome was not a result of his employment as a bus driver. The decision, thus, denied employee's request for treatment.

Employee filed an Application for Review with the Commission. On September 6, 2006, employer filed with the Commission a motion to dismiss employee's Application for Review.

DISCUSSION

Motion to Dismiss

On September 6, 2006, employer filed a motion to dismiss employee's Application for Review for failure to comply with 8 CSR 20-3.030(3) (A). Employer contends that employee's Application for Review fails to state specifically why the administrative law judge erred. The Commission has fully considered employer's motion to dismiss and hereby denies it.

Error in Findings of Fact

The reports and deposition testimony of all the medical experts consistently agree that the results of employee's nerve conduction tests revealed abnormalities in his upper and lower extremities. Therefore, we are persuaded that the administrative law judge's statement in No. 2 of the Findings of Fact referencing "normal" nerve root studies was simply a typographical error. Accordingly, the first sentence of No. 2 of the Findings of Fact should read as follows:

Dr. Randolph saw the Claimant on behalf of the Employer on July 21, 2005, and found that the Phalen's and Tinel's tests were normal on both wrists, and found that because of Claimant's obesity as well as diabetes the nerve root studies being abnormal were consistent with diabetes and obesity.

Credibility

The ultimate determination of credibility of witnesses rests with the Commission; however, the Commission should take into consideration the credibility determinations made by an administrative law judge. When reviewing an administrative law judge's award, the Commission is not bound to yield to his or her findings including those relating to credibility and is

authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865, 871 (Mo. App. W.D. 2004).

In this case, however, we agree with the administrative law judge's determination that the information from Dr. Randolph should be given greater weight in that it most logically interprets the nerve conduction tests and the abnormalities present both in employee's upper and lower extremities. Even Dr. Schlafly admitted that employee probably suffers from diabetic peripheral neuropathy (Tr. 55) and that carpal tunnel syndrome is associated with diabetes (Tr. 37).

DECISION

Based on the most persuasive evidence, the Commission affirms the decision of the administrative law judge dated July 26, 2006, and awards no compensation.

Given at Jefferson City, State of Missouri, this 22nd day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon 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.

As indicated in the Commission majority's decision, the ultimate determination of credibility of witnesses rests with the Commission. Unfortunately, the Commission majority relies upon the expert medical opinion of Dr. Randolph. I disagree and find the deposition testimony from Dr. Schlafly to be more credible, persuasive, and worthy of belief.

Dr. Randolph was not subject to any type of questioning or cross-examination to probe the basis of his opinions. Only his written report is part of our record. His report is highly conclusory and provides little detail. On the other hand, Dr. Schlafly was subject to the questions of both parties during his deposition and provided detailed reasons for his belief that employee's 13 years of repetitive, hand-intensive work as a driver was a substantial factor in causing employee's carpal tunnel syndrome.

Furthermore, Dr. Schlafly, unlike Dr. Randolph, is a board certified orthopedic surgeon specializing in upper extremity maladies. Unlike Dr. Randolph, Dr. Schlafly exhibited his familiarity with employee's day-to-day duties and discussed why those repetitive activities caused employee's carpal tunnel syndrome. Dr. Schlafly discussed his greater experience in dealing with and treating carpal tunnel in drivers.

Dr. Schlafly also provided specific reasons for why he believed that diabetic neuropathy was not a substantial factor for employee's carpal tunnel problems. He testified that conventional wisdom indicates that diabetic neuropathy (if present)

should be more severe in the feet than the hands because the nerves running to the feet are longer and more prone to disease than the shorter nerves leading to the fingers. Consequently, since employee was not complaining of any numbness in his feet, logic would suggest that his carpal tunnel was not related to his mild diabetes but, rather, to his repetitive, hand-intensive work.

Employee's medical expert must have established the probability that conditions in employee's workplace caused his occupational disease. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo. App. W.D. 1994) (reversed on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)). Dr. Schlafly convincingly satisfied this burden. Therefore, I respectfully dissent from the decision of the Commission majority to deny employee's benefits.

John J. Hickey, Member

AWARD

Employee: Alfred Bazile

Injury No.: 05-059033

Dependents: N/A

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

Employer: Bi-State Development Agency

Additional Party:

Insurer: Self-Insured

Hearing Date: June 28, 2006

Checked by: CTL:tr

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 June 14, 2005
5. State location where accident occurred or occupational disease was 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? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant alleged occupational disease as a result of driving a Bi-State bus.
12. Did accident or occupational disease cause death? No Date of death? N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Alfred Bazile Injury No.: 05-059033
Dependents: N/A
Employer: Bi-State Development Agency
Additional Party: Second Injury Fund
Insurer: Self-Insured

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

Checked by: CTL:tr

PREFACE

The Claimant, Alfred Bazile, was represented by Attorney Mark Floyd and the Employer/Insurer was represented by Attorney John Johnson. The date of the hearing was June 28, 2006.

EXHIBITS

The Claimant offered the following exhibit:

Exhibit A. Deposition, Reports and Records of Dr. Bruce Schlafly.

The Employer/Insurer offered the following exhibit:

Exhibit 1. Records and Reports and Dr. Bernard Randolph.

ISSUE

1. Whether Claimant's alleged occupational disease, carpal tunnel syndrome, is causally connected to his employment with the Employer and, if so, what treatment should be rendered?

FINDINGS OF FACT

1. The Claimant, Alfred Bazile, has been employed by the Employer for approximately fourteen years as a bus driver and works approximately fifty hours a week. Claimant testified felt that his work as a bus driver was very hand intensive as a result of gripping the steering wheel, using a hand brake and opening doors, and providing transfers to Bi-State riders. Claimant worked fifty (50) hours a week and was paid \$18.35 per hour for a total of \$937.50 per week.
2. Dr. Randolph saw the Claimant on behalf of the Employer on July 21, 2005, and found that the Phalen's and Tinel's tests were normal on both wrists, and found that because of Claimant's obesity as well as diabetes the nerve root studies being normal were consistent with diabetes and obesity. The doctor stated that the Claimant's occupation as a bus driver for the Employer did not constitute a substantial factor in bilateral carpal tunnel syndrome and that the chief factors for the bilateral carpal tunnel syndrome was diabetes and morbid obesity. Dr. Randolph's explanation of the reason for Claimant's carpal tunnel syndrome was very credible.

RULINGS OF LAW

Based upon all of the evidence, I make the following findings:

1. That Claimant's bilateral carpal tunnel syndrome was not a result of his employment as a bus driver and thus his request for treatment is denied.

Date: _____

Made by: _____

Cornelius T. Lane
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation