

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

Injury No.: 08-107591

Employee: Don J. Bogan

Employer: The Salvation Army

Insurer: Zurich American Insurance Company c/o Chesterfield Services

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 July 29, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued July 29, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of December 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**FINAL AWARD  
DENYING COMPENSATION**

Employee: Don J. Bogan Injury No.: 08-107591

Dependents: N/A

Employer: The Salvation Army

Additional Party: N/A

Insurer: Zurich American Insurance Company c/o Chesterfield Services

Hearing Date: May 12, 2009 Checked by: MSS/pd

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No.
2. Was the alleged 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 alleged accident or onset of occupational disease: September 30, 2008
5. State location where alleged accident occurred or occupational disease was contracted:  
Jackson County, MO.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? No.
8. Did alleged 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? Yes, Zurich American Insurance Company c/o Chesterfield Services.
11. Describe work employee was doing and how alleged accident occurred or occupational disease contracted: alleged accidental injury to right shoulder due to lifting.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by **alleged** accident or occupational disease: right shoulder.

14. 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? None.

18. Employee's average weekly wages: \$288.40

19. Weekly compensation rate: \$192.27

20. Method wage computation: by stipulation.

**COMPENSATION PAYABLE**

21. Amount of compensable payable: None

22. Second Injury Fund liability: N/A

Total: ..... \$ 0.00

Employee: Don J. Bogan Injury No.: 08-107591

Dependents: N/A

Employer: The Salvation Army

Additional Party: N/A

Insurer: Zurich American Insurance Company c/o Chesterfield Services

Hearing Date: May 12, 2009 Checked by: MSS/pd

### **FINDINGS OF FACT and RULINGS OF LAW**

The parties convened on May 12, 2009 for purposes of conducting a hardship hearing. Specifically, the employee seeks an Order from the Court obligating the employer to provide medical treatment to a right shoulder injury, as reasonable and necessary. The employee also seeks past temporary total compensation since December 2, 2008, the last date worked. The parties stipulated to an average weekly wage of \$288.40, and a resulting compensation rate of \$192.27 per week. At trial, the Court received the testimony of claimant, Donald Bogan. The testimony of witness Jodi Caldwell was submitted by way of deposition. In the form of documentary evidence, the Court has received treatment records from the Swope Parkway Health Services, St. Luke's Hospital emergency room, Dr. Linda Singh, and the Dickson-Diveley Clinic. Claimant's own accident report form was received in evidence along with a narrative report from Dr. Michael Poppa, issued in claimant's behalf.

Claimant Donald Bogan testified that on September 30, 2008, he was a "floor manager" at the Salvation Army thrift store in Independence, Missouri. He alleges that at 9:00 a.m. that morning, as he commenced his work shift, he sustained an accidental injury to his right shoulder when he lifted a hanger of clothing to be placed on a rack approximately six feet off the ground. He describes a sudden onset of pain in the right shoulder joint while engaged in this maneuver. He was unable to estimate the weight of the clothing and also acknowledges that his movements were all as he intended them to be and that this was an activity he routinely performed as part of his work duties. Mr. Bogan testified that he immediately attempted to report his injury to his supervisor, Jodi Caldwell, but was told to wait until noon to complete the necessary paperwork. By that point, however, claimant states Ms. Caldwell had left the store for the day. Although another supervisor was present in the store that afternoon, Mr. Bogan made no effort to report the incident to the alternate supervisor.

Claimant testifies that over the next two months he made numerous efforts to report his injury to Ms. Caldwell and to initiate paperwork for a workers' compensation referral. He states all such requests were refused until approximately November 20<sup>th</sup>. He testified that, by that point, he had contacted one of the supervisors in the employer's home office in downtown Kansas City, Missouri, who, in turn, reportedly spoke with Ms. Caldwell and instructed her to initiate workers' compensation paperwork. On that date, claimant did complete his own hand-

written accident report form which lists November 20<sup>th</sup> as his injury date and states that his complaints developed after "hanging clothes all day" and referenced "repeated overhead movement" as the cause of his injury.

Claimant's medical treatment commenced on October 1, 2008, when he referred himself to the Swope Parkway Health Clinic. Hand-written notes from that date appear to describe right-sided neck and shoulder complaints for one week, with no history of right arm trauma. The history also contains the entry "woke up with it." Mr. Bogan denies providing these histories. Claimant was next seen at the St. Luke's Hospital emergency room on October 9, 2008. These hand-written notes contain various entries stating, among other things that right shoulder pain began "2 weeks ago after going to work," that the employee "does repetitive lifting" and that the claimant "works and lifts clothes to hang them up which is repetitive." Elsewhere, however, these same notes indicate that the employee had had no recent injury, "denies injury," and that "patient states no obvious injury." At trial, claimant was adamant that he had told the emergency room physicians of his history of specific accident.

From the emergency room, claimant was transferred to the care of Dr. Linda Singh. Her hand-written notes through the month of October 2008 contain no history of injury one way or the other. She did arrange for an MRI of the right shoulder, and that diagnostic report from October 29, 2008, contains the notation "no known injury." Throughout the month of October, claimant did provide the employer with several written light-duty restrictions, but these did not reference an on-the-job injury as the reasons for the restrictions.

Thereafter, Dr. Singh arranged for a referral to an orthopedic group. Her referral note from October 3, 2008, contains the notation "work-related injury" but provides no other background or explanation. From there, the claimant was referred to the Dickson-Diveley Clinic and to Dr. Thomas Phillips whose record on November 24, 2008, notes that the employee would return to the clinic for re-evaluation in four weeks.

Claimant denies any improvement since his last medical appointment and states that he is under the impression that he needs further treatment, possibly including surgery. His medical report from Dr. Poppa suggests a referral back to Dr. Phillips for a surgical evaluation.

Jodi Caldwell testified by deposition and identified herself as the assistant manager of the Salvation Army thrift store in Independence, Missouri. She has since advanced to the position of store manager. She testified that in late September 2008, she became aware that claimant was experiencing discomfort in his right shoulder. She is uncertain as to the specific date when she learned of his shoulder discomfort but states that she approached him at the time to inquire about the cause of his complaints and whether he was alleging any work-related injury. According to Ms. Caldwell, claimant declined to initiate the workers' compensation reporting process because he "didn't know" how his injury occurred. Over the next month, Ms. Caldwell stated she had repeated this or a similar conversation with claimant several times. She denied failing or declining to initiate workers' compensation paperwork and testified that she could be disciplined or even terminated for failing to complete such paperwork any time an on-the-job injury is alleged, irregardless of whether the claim itself is under suspicion. With regard to her work schedule on September 30, 2008, Ms. Caldwell denied that she had even worked that day and

offered her testimony only after checking her schedule with her home office, where such records are maintained. Ms. Caldwell acknowledged that she was generally aware that Mr. Bogan continued to experience right shoulder discomfort throughout the month of October and into November but denies that he provided any history of being injured on-the-job prior to November 20<sup>th</sup>. She denied providing Mr. Bogan with any instructions as to completion of his accident report form beyond telling him that the report itself should be dated November 20, 2008. Because she was suspicious of what she perceived to be late reporting, she prepared her own hand-written note detailing her interaction with Mr. Bogan over the preceding two months and provided that to her home office although she herself was not involved in any further investigation of the case, or a decision to deny or volunteer workers' compensation benefits. Her own notes from November 20, 2008, offered as part of her deposition, quote Mr. Bogan as stating that "he didn't think" his injury had happened at work when he initially discussed his right shoulder complaints with her in late September. At the time of Ms. Caldwell's deposition, she was allowed to view the treatment records from the Swope Health Clinic and St. Luke's Hospital emergency room. She testified that she had not seen the records previously nor had she been told of their contents, which she considered to be generally consistent with the information she received in late September.

The Court is being asked to choose between two different versions of events. Initially, it should be noted that an employee bears the burden of proving all essential elements of his claim. Thorsen vs. Sach's Electric Company, 52 S.W.3d 611 (W.D. Mo. 2001). This specifically includes the burden of proving "accident" as contemplated by statute. Tangblade vs. Lear Corporation, 58 S.W.3d 662 (W.D. Mo. 2001). The Court is mindful that if claimant's version of events is accepted, it leaves several inconsistencies unexplained or disregarded. Most notable is the initial treatment record from the Swope Health Center. Although claimant denied any language barrier with the personnel there, and insisted that he had provided a history of accidental injury as occurring on the preceding day, the note inexplicably describes discomfort for the preceding week, unaccompanied by trauma and provides the history that claimant "woke up with" his discomfort. Claimant offers no explanation as to how such a wholesale miscommunication could have occurred.

Similarly, the second source of treatment records, from the St. Luke's Hospital emergency room, are at least partly inconsistent with claimant's testimony. While these records do reference the fact that claimant engages in repetitive lifting at work, no where do they contain either an allegation or a medical conclusion that a causal connection exists. Indeed, in at least three different locations, and in what would appear to be two different hand writings, the records disavow any known injury. For that matter, Mr. Bogan does not allege that repetitive lifting, as mentioned in the records, caused his injury. Rather, he describes a specific event which precipitated an immediate onset of pain. If he had provided this history to his first two health care providers, as he alleges, it is inconceivable that the notes generated would read as they do. The MRI note from October 29 also contains the history of no known injury. This history as well would presumably trace to either the claimant himself or to Dr. Singh, who arranged for the evaluation. The records prior to that date carry no indication one way or the other whether she was treating a work-related injury and would not rebut the notion that as late as October 29, all of the health care providers were under the impression that the employee's complaints were of unknown etiology.

By the time the first reference to an on-the-job is documented, Dr. Singh's note of November 3<sup>rd</sup>, the MRI results were known, and the employee was in the process of being referred to a surgeon. While it could be coincidental, it is odd that the first documentation of a work-related injury coincides with a surgical referral. Additionally, the employee's hand-written accident report of November 20 is left partially unexplained. That report lists November 20 as the date of the injury. Mr. Bogan testified that he had been instructed to date the report as being prepared on November 20. Even if he misunderstood and listed November 20 as the date of the accident, it would not explain why he then proceeded to supply an inconsistent history of "repeated" lifting "all day." The event Mr. Bogan described at trial allegedly happened at precisely 9:00 a.m. as his work shift began and as he lifted his very first hanger of clothing for the day. If anything, he describes a method of causation that would be the opposite of repetitive lifting.

Conversely, if Ms. Caldwell's version of events is believed, all of these medical records are reconciled. If, indeed, claimant initially told Ms. Caldwell that he was uncertain how his condition developed, it would explain why the Swope Health Clinic might well contain the history of idiopathic onset. Similarly, the St. Luke's records, which appear to be searching for a medical cause, would mirror the type of non-specific presentation described by Ms. Caldwell. Her hand-written notes from November 20 were clearly written before claimant had retained an attorney, before any Claim for Compensation had been filed and before any disputes in workers' compensation court could have been predicted. Nevertheless, her comments from that date are strangely consistent with the medical records which she had not yet seen. It would be an odd coincidence at that point in time for her to hypothecate a defense to the claim which would then be borne out by the initial treatment records which have not yet surfaced. The more logical explanation is that her testimony is, in fact, accurate and fairly represents what the claimant was telling his health care providers for the first 30 days following the event. Since Ms. Caldwell's testimony is supported by the initial treatment records, it adds credence to her representation that she did not work on September 30<sup>th</sup>, and therefore could not have participated in any of the conversations claimant specifically attributes to that date.

From all of this, the Court is persuaded that the most plausible version of events is that offered by the employer. It leaves fewer questions unanswered and provides a viable explanation for at least all of the events that took place up to October 29, when the employee was on the verge of being referred to a surgeon. While the employee may have entertained a gradually developing theory that his condition was work-related (and his medical records may be somewhat supportive of this reading), this conflicts with his description of a specific accident taking place at a precise moment in time as well as his alleged efforts to immediately report the same and initiate the workers' compensation process through the place of employment. The thrust of the evidence supports the notion that claimant himself was unsure of the mechanism of injury. The Court is left with a similar impression, and this is an indication that claimant has failed to satisfy his burden of proof in establishing injury by accident.

While the employer has preserved the issue of notice, the Court, having found that accident has not been proven, will not pass judgment on the application of that defense. For failure to prove accident, all compensation is denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

**Mark S. Siedlik**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest

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**Naomi Pearson**  
*Division of Workers' Compensation*