

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 00-112184

Employee: Tommie Cohu  
Employer: Earth Grains Bread Company  
Insurer: Pacific Employer's Insurance Co.  
Helmsman Management Services  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the August 20, 2010, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Discussion**

*Liability of the Second Injury Fund*

We agree with the administrative law judge that employee met his burden of establishing Second Injury Fund liability for permanent total disability benefits owing to the combination of the effects of the primary occupational disease with his preexisting bilateral shoulder conditions. We disagree, however, with the administrative law judge's Second Injury Fund analysis.

Section 287.220 RSMo creates the Second Injury Fund and provides the framework for our analysis. The first step in determining whether the Second Injury Fund is liable for compensation is to determine "the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained." § 287.220.1 RSMo. In order to implicate Second Injury Fund liability, the employee must show that "at the time the last injury was sustained," he suffered from "a preexisting permanent partial disability ... of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed." *Id.* The foregoing language requires us to first identify the appropriate "time [that] the last injury was sustained," or the proper date of the primary injury, before we assess the degree of preexisting disability. *Id.*

The administrative law judge determined the date of the primary injury in this matter to be October 10, 2000, and looked at the extent of employee's preexisting permanent partial disability on that date to resolve the question of Second Injury Fund. The evidence shows that employee twisted his left knee on October 10, 2000, but the primary injury in this matter is not an injury resulting from that incident, but rather a bilateral knee injury by occupational disease caused by years of work activity. We are convinced October 10, 2000, is not the "time [that] the last injury was sustained" for

Employee: Tommie Cochu

- 2 -

purposes of § 287.220. Rather, the courts have instructed that an occupational disease does not become a compensable injury until the disease becomes disabling. *Garrone v. Treasurer of State*, 157 S.W.3d 237, 242 (Mo. App. 2004). As the *Garrone* court explained:

An occupational disease does not become a compensable injury until the disease causes the employee to become disabled by affecting the employee's ability to perform his ordinary tasks and harming his earning ability. An employee can be diagnosed with an occupational disease and experience symptoms of the disease prior to the time that it becomes disabling.

*Id.* (citations omitted).

Here, employee twisted his left knee on October 10, 2000, but received only conservative treatment and went back to work without restrictions. (Employee worked light duty when he went back to work for employer, but the record does not show this was due to employee's knee condition, but rather suggests the light duty was related to employee's left shoulder, for which he underwent surgery in November 2000). After reviewing the medical record related to employee's bilateral knee conditions, we find the date of disability for the primary occupational disease to be July 5, 2006, the date employee underwent a left total knee replacement surgery, and the first time employee's earning ability was clearly and adversely impacted by his bilateral knee condition. Accordingly, for purposes of Second Injury Fund liability, we look at employee's preexisting conditions of ill on July 5, 2006, rather than October 10, 2000.

Employee underwent his last significant treatment for the bilateral shoulder condition in 2002. In our award in employee's claim for Injury No. 00-140019 (employee's claim for his bilateral shoulder condition), we have found that employee sustained a 40% permanent partial disability of the left shoulder and a 25% permanent partial disability of the right shoulder. We find that employee suffered these preexisting permanent partial disabilities and that they were serious enough to constitute hindrances or obstacles to employment on July 5, 2006.

Employee reached maximum medical improvement from the primary bilateral knee injuries on January 19, 2007, the last date he received treatment from Dr. Browne. We adopt the administrative law judge's ratings of 40% permanent partial disability of each knee as our findings as to the nature and extent of disability resulting from the primary injury. Because we agree that employee is permanently and totally disabled as a result of the combination of his preexisting bilateral shoulder conditions and the primary injury in this matter, we affirm the award of permanent total disability benefits against the Second Injury Fund.

### **Award**

We modify the analysis and the award of the administrative law judge on the issue of Second Injury Fund liability. The Second Injury Fund is ordered to pay to employee weekly payments of \$225.67, the difference between employee's permanent total disability rate

Employee: Tommie Cochu

- 3 -

(\$539.93) and employee's permanent partial disability rate (\$314.26) for 128 weeks (the extent of employer's liability for the primary injury) beginning January 19, 2007. Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$539.93 for his lifetime, or until modified by law.

The award and decision of Administrative Law Judge Lisa Meiners, issued August 20, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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VACANT  
Member

Attest:

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Secretary

## FINAL AWARD

Employee: Tommie Cohu Injury No: 00-112184

Dependents: N/A

Employer: Earth Grains Bread Company

Insurer: Pacific Employer's Insurance Co.  
Helmsman Management Services

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: June 9, 2010

Checked by: LM/cy

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
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: Through October 10, 2000
5. State location where accident occurred or occupational disease was contracted: Price Chopper, Blue Springs, Jackson 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? 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 occurred or occupational disease contracted:  
Claimant sustained bilateral knee injuries due to cumulative trauma from work activities.
12. Did accident or occupational disease cause death? No Date of death? N/A

- 13. Part(s) of body injured by accident or occupational disease: Bilateral knees
- 14. Nature and extent of any permanent disability:
- 15. Compensation paid to-date for temporary disability: \$0
- 16. Value necessary medical aid paid to date by employer/insurer? \$2,576.18
- 17. Value necessary medical aid not furnished by employer/insurer? \$72,591.00
- 18. Employee's average weekly wages: \$809.86
- 19. Weekly compensation rate: \$539.93/\$314.26
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:
  - Medical expenses owing .....\$72,591.00
  - Total TTD Owing.....\$37,719.97
- 22. Second Injury Fund liability: Yes. The Second Injury Fund is liable to Claimant for permanent total disability benefits for Claimant's lifetime.

**TOTAL:** Unknown

- 23. Future requirements awarded: Yes. The employer is liable to employee for future medical care in order to cure and relieve effects of employee's bilateral knee conditions.

Said payments to begin upon receipt of Award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Michael Knepper.

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

Employee: Tommie Cohu Injury No: 00-112184  
Dependents: N/A  
Employer: Earth Grains Bread Company  
Insurer: Pacific Employer's Insurance Co.  
Helmsman Management Services  
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund  
Hearing Date: June 9, 2010

Checked by: LM/cy

This case was set for hearing before Administrative Law Judge Meiners, in Kansas City, Missouri on June 9, 2010. Claimant, Tommie Cohu, was represented by his counsel, Mr. Michael A. Knepper. The Employer and Self-Insurer were represented by their counsel, Mr. Bart Eisfelder. The State Treasurer as Custodian of the Second Injury Fund was represented by its counsel, Assistant Attorney General, Mr. Andrew Dickson.

### **STIPULATIONS**

The parties stipulated to the following:

- 1) That the employee and employer were operating subject to the Missouri Workers' Compensation statute;
- 2) That proper notice was given;
- 3) That Claimant filed his claim within the time allowed by law;
- 4) That Claimant's average weekly wage was \$809.86 per week with a comp rate of \$539.93 for PTD and \$314.26 per week for PPD. (No TTD has been paid.);
- 5) That the employer has paid \$2,576.18 in medical expenses and no temporary total disability benefits.

### **ISSUES**

The issues to be resolved by this hearing are as follows:

- 1) Whether employee sustained an accident or occupational disease arising out of and in the course of his employment up to and including October 10, 2000;

- 2) Whether the employer is liable to employee for past temporary total disability benefits from July 5, 2006 through November 6, 2007;
- 3) Whether the employer is liable to the employee for past medical expenses in the amount of \$72,591.00;
- 4) Whether employer is liable to employee for future medical care as a result of the October 10, 2000 accident;
- 5) Whether the Second Injury Fund is liable to Claimant.

## **FINDINGS AND RULINGS**

Claimant is a 68-year-old man with a Bachelor's degree from Kansas City College and Bible School with several credit hours toward a Master's degree from the University of Missouri at Kansas City. Claimant has work experience in the areas of teaching/coaching and bread truck driver. Although Claimant taught school from 1970 to 1976 and 1985 to 1987, he does not have a state teaching certificate.

Claimant worked as a bread delivery man for approximately 13 years. In this capacity, Claimant had to climb out of his truck 20 to 40 times a day. Claimant had to climb numerous stairs carrying at times 45 pounds of bread. On larger stops Claimant pulled 115 pounds of bread with a 2-wheeled dolly up and down stairs. Claimant also had to kneel and squat when unloading bread from his truck and stocking the bread on clients' shelves.

On October 10, 2000, Claimant twisted his left knee stepping down from employer's truck at his delivery site in Jackson County, Missouri. He timely reported the incident to the employer. His initial treatment was authorized through Physicians Industry Health Group. Following a brief period of physical therapy and re-examination by Physicians Industry Health, no further treatment of the left knee was provided by employer.

Employer offered testimony by the late Roger P. Hood, M.D., with a report dated December 12, 2002. Claimant reported his knees buckling and having difficulty getting in and out of chairs and having to pull himself up from "putting bread on the bottom racks". Dr. Hood recommended bilateral knee replacements. However, Dr. Hood found Claimant's work activities were not a substantial factor in deterioration of his knees. He considered that the knee condition was genetic. Dr. Hood noted that Claimant could walk on level ground and would not be surprised if he mowed his yard. (Depo, p. 26). Dr. Hood admitted he could not testify that Claimant's knees would have been in the same condition had he not worked as a bread man and that his knees were in the worst 1 percentile of the population for his age. (Id., p. 52, 53).

Claimant's knees were also examined by Allen Parmet, M.D. on behalf of the employer on two separate occasions. In the initial examination of January 16, 2003, Claimant described excruciating pain going up and down stairs in his knees. (Rep., p.2). Dr. Parmet found no crepitus in Claimant's knees. "I found the knees and back to be remarkable" and no diagnosis was assigned for the knees. Dr. Parmet also testified he found no crepitus in the knees on examination. (Depo. P. 33). He described a normal examination of both knees, and other than the enlarged right knee, denied abnormal findings. (Id., p. 70). Dr. Parmet then rated Claimant's knees at 35% PPD at the 160 week level, post total knee replacement.

Claimant presented the testimony of Jon Browne, M.D., P. Brent Koprivica, M.D. and James Stuckmeyer, M.D. with regard to his knees. Jon Browne, M.D. is an orthopedic surgeon specializing in the treatment of knees who performed bilateral knee replacements on Claimant's knees. Dr. Browne performed a left knee replacement on July 5, 2006 and a right knee surgery on November 11, 2006 on Claimant. Dr. Browne thought Claimant's job duties of squatting, kneeling, and bending were a substantial contributing factor of Claimant's advanced arthritis of both knees. Dr. Browne testified that squatting, kneeling, and bending over many days, many years is going to create problems with the patella femoral joint areas, which is where the X-ray showed advanced arthritis in his knee caps. Dr. Browne stated the treatment provided was necessary to cure or relieve the injury to his knee. I find Dr. Browne's opinions with regard to Claimant's knee to be persuasive and his testimony to be credible.

Dr. Stuckmeyer found Claimant's occupational duties were a substantial contributing factor to the degeneration of the right and left knees. He recommended bilateral knee replacement. Dr. Stuckmeyer identified repetitive bending, squatting, stooping, and kneeling at work as a substantial contributing factor to Claimant's present knee condition. He rated the knees at 40% permanent partial disability each. Dr. Stuckmeyer re-examined Claimant October 4, 2005 and reviewed the surveillance video. On 12/22/2005, Dr. Stuckmeyer testified by deposition that the surveillance video did not show Mr. Cohu doing any activities beyond his work restrictions. (Ex. O, p. 7).

P. Brent Koprivica, M.D. also attributed the need for bilateral knee replacements to Claimant's work activities of climbing in and out of the truck, climbing multiple stairs, squatting and crawling, and the use of the two-wheeler dolly on the stairs. These activities Dr. Koprivica found were unique to his employment and a substantial contributing factor to the development of end-stage degenerative joint disease in both knees. Also, Dr. Koprivica testified the bilateral knee replacement was reasonably necessary to cure or relieve the effect of the work related condition. He rated Claimant's knees at 50% of each knee, post replacement, or 45% of the body as a whole.

As such, I find Claimant sustained injury by occupational exposure with the last exposure occurring on or about October 10, 2000. This finding is based on Dr. John Browne as well as Drs. Koprivica and Stuckmeyer. I find the specific incident of October 10, 2000 to be a triggering factor of Claimant's bilateral knee condition. Before the knee replacement, he would unexpectedly fall. Stairs and inclines were bad for him, although he could walk on level terrain. Since the knee replacement, he has residual pain in the knee. He limits his walking, squatting, kneeling and climbing since October 10, 2000. He now sleeps three to four hours a night due to knee pain.

As to the issue of temporary total disability, Dr. Browne recommended nine months to one year Claimant abstain from squatting, bending, and kneeling. The restrictions prevented him from returning to his delivery position. Claimant's initial surgery was July 5, 2006 (left knee) and the right knee was operated November 11, 2006. I find Dr. Browne's recommendation credible. I therefore find that Claimant was temporarily and totally disabled from July 5, 2006 through November 6, 2007 and order employer to pay Claimant TTD for that period.

The employer is also liable to Claimant for \$72,591.00 of past medical expenses. Indeed, this finding is based on the testimony of Dr. Browne, medical records and the corresponding bills. I also find the past medical expenses incurred were reasonable and necessary in order to cure the effects of the October 10, 2000 occupational injury.

The Claimant has met his burden of proof that the employer is liable for future medical care. The majority of the physicians indicated future medical care is needed as a result of repetitive exposure while delivering bread. As such, the employer is liable to Claimant for future medical care of his bilateral knees.

Claimant, as a result of the occupational exposure to his bilateral knees sustained physical restrictions. Claimant is unable to squat, kneel, and climb stairs as he did prior to the last exposure of October 10, 2000. Claimant is unable to walk for prolonged periods. As a result, I find Claimant sustained 40% permanent partial disability of each knee at the 160 week level or 128 weeks of compensation, which equals \$40,225.28.

Prior to October 10, 2000, Claimant sustained injury by occupational exposure to both shoulders. As a result of the injury to both shoulders, Claimant had limited range of motion of both arms and occasional lifting restriction on an occasional basis of 10 to 15 pounds. Indeed, I find the shoulders were a hindrance and obstacle to his employment prior to October 10, 2000. Claimant sustained 40% of the left and 25% of the right shoulder as a result of the exposure.

The Second Injury Fund bears liability for the synergistic effect of Claimant's pre-existing conditions combined with the last injury. To impose liability on the Fund, Claimant must have pre-existing disability and when combined with the primary injury sustained of such seriousness as to constitute a hindrance or obstacle to his employment or re-employment.

"In order to establish Second Injury Fund liability for permanent total disability benefits, the Claimant must prove the following:

- 1) that he has sustained permanent disability resulting from a compensable work-related injury;
- 2) that he has permanent disability predating the compensable work-related injury which is 'of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable.' §287 RSMo 1994, Messex v. Sachs Electric Company, 989 S.W. 2d (Mo. App. 1997); Garibay v. Treasurer, 964 S.W. 2d 474 (Mo. App. 1998); Rose v. Treasurer, 899 S.W. 2d 563 (Mo. App. 1995);
- 3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury results in permanent total disability. Boring v. Treasurer, 947 S.W. 2d 483 (Mo. App. 1997); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo. App. 1992).

I do not find the knees alone preclude Claimant from the open labor market. Indeed, I find Claimant permanently totally disabled as a result of the bilateral knees combined with the residual effects of both shoulders. I find Michael Dreiling, Claimant's vocational expert,

persuasive on this issue. Dreiling testified that Claimant had not acquired any significant transferable job skills from his 20 years as a bread truck driver. Indeed, he found Claimant not qualified to teach in state schools because of his lack of teacher's certificate, nor did he find that Claimant's skills in teaching would transfer due to the passage of time. Due to Claimant's age at the time of the examination, Dreiling did not feel it realistic to pursue further education or training. He felt the best way to have kept this individual employed in the open labor market would have been continued light duty activities with his employer where he had worked since 1987.

Dreiling testified that Claimant is unemployable considering the shoulder restrictions in combination with the knee restrictions alone. Dreiling found the effects of the bilateral shoulder injury combined with the effects of the bilateral knee injury rendered Claimant unemployable. Dreiling did not rely upon Claimant's alleged ADHD or the psychological condition alleged by Claimant. I find based on the evidence presented a combination of the bilateral shoulder injury and his bilateral knee injury presented greater hindrance and obstacles to his employment than either considered alone. I also agree with Dreiling that Claimant is permanently and totally disabled due to the knees and shoulders without considering his ADHD and psychological condition.

I also disregard the testimony of Allan Schmidt, Ph.D with regard to Claimant's mental status. Dr. Schmidt believed that both the shoulder injury and knee injury were both substantial and predominant factors in the aggravation of Claimant's preexisting psychological condition. He testified that the ADHD is present from birth. Claimant never received any treatment for preexisting mental conditions nor do I find the ADHD was a hindrance or an obstacle to his employment prior to October 10, 2000. Therefore, I do not find the October 10, 2000 occupational exposure of his knees a substantial factor of Claimant's current mental condition.

I find the employer is liable to Claimant for permanent partial disability in the amount of 128 weeks or \$40,225.28, as well as past medical expenses in the amount of \$72,591.00. The employer is liable to Claimant for past temporary total disability benefits from July 5, 2006 up to November 6, 2007. The employer is also liable to Claimant for future medical care of the knee injury as a result of the October 10, 2000 occupational exposure.

The Second Injury Fund is liable to Claimant for permanent total disability benefits beginning November 7, 2007. Beginning on November 7, 2007, the Second Injury Fund is liable to Claimant for the difference of \$539.93 minus \$314.26 or \$225.67 per week for 128 weeks. Thereafter, the Second Injury Fund is liable to Claimant for weekly permanent total disability benefits of \$539.93 for Claimant's lifetime.

This award is subject to an attorney's lien in the amount of 25% for services rendered by Michael Knepper.

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

Lisa Meiners  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_, 2010, by:

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

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

Injury No.: 00-140019

Employee: Tommie Cohu  
Employer: Earth Grains Bread Company  
Insurer: Pacific Employer's Insurance Co.  
Helmsman Management Services  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Denied)

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 20, 2010. The award and decision of Administrative Law Judge Lisa Meiners, issued August 20, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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VACANT  
Member

Attest:

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Secretary

## FINAL AWARD

Employee: Tommie Cohu Injury No: 00-140019  
Dependents: N/A  
Employer: Earth Grains Bread Company  
Insurer: Pacific Employer's Insurance Co.  
Helmsman Management Services  
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund  
Hearing Date: June 9, 2010

Checked by: LM/cy

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
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: October 3, 2000
5. State location where accident occurred or occupational disease was contracted: Price Chopper, Blue Springs, Jackson 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? 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 occurred or occupational disease contracted:  
Cumulative trauma of bilateral upper extremities unloading and loading bread trays to customers.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Both shoulders
14. Nature and extent of any permanent disability: 40% of the left shoulder 25% of permanent partial disability of the right shoulder.
15. Compensation paid to-date for temporary disability: \$34,845.07
16. Value necessary medical aid paid to date by employer/insurer? \$81,618.43
17. Value necessary medical aid not furnished by employer/insurer? \$487.17
18. Employee's average weekly wages: \$809.86
19. Weekly compensation rate: \$539.93/\$314.26
20. Method wages computation: Stipulation

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: 150 weeks x \$314.26 = \$47,139.00
22. Second Injury Fund liability: None
23. Future requirements awarded: Yes. The employer is liable to employee for future medical care in order to cure and relieve symptoms of occupational exposure on or about October 3, 2010.

Said payments to begin upon receipt of Award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Michael Knepper.

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

Employee: Tommie Cohu Injury No: 00-140019

Dependents: N/A

Employer: Earth Grains Bread Company

Insurer: Pacific Employer's Insurance Co.  
Helmsman Management Services

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: June 9, 2010

Checked by: LM/cy

This case was heard before Administrative Law Judge Meiners in Kansas City, Missouri on June 9, 2010. Claimant, Tommie Cohu, was represented by his counsel, Mr. Michael A. Knepper. The Employer and Self-Insurer were represented by their counsel, Mr. Bart Eisfelder. The State Treasurer as Custodian of the Second Injury Fund was represented by its counsel, Assistant Attorney General, Mr. Andrew Dickson.

### **STIPULATIONS**

The parties stipulated to the following:

- 1) That Claimant suffered an accident to the left shoulder within the course and scope of his duties;
- 2) That Claimant provided notice to employer as required by law;
- 3) That the appropriate comp rate was \$539.93 for PTD and \$314.26 per week PPD;
- 4) That medical has been furnished by the employer in the amount of \$81,618.43 and TTD paid in the amount of \$34,845.07;
- 5) That the employer/self-insurer was operating under and subject to Missouri Workers' Compensation Act and;
- 6) That claim for compensation was filed within the time required by law.

## ISSUES

The issues to be resolved by this hearing are as follows:

- 1) Whether employee sustained an accident or occupational injury that occurred within the course and scope of employment;
- 2) Whether employee's work was a substantial factor in causing the medical conditions of the right shoulder;
- 3) Whether employer received proper notice of the right shoulder injury;
- 4) Whether the employer is liable to the employee for future medical care as a result of the October 3, 2000 injury;
- 5) The nature and extent of any permanent disability of the right and left shoulders;
- 6) Whether employer is liable to employee for past medical expenses in the amount of \$487.17;
- 7) Liability of the Second Injury Fund.

## FINDINGS AND RULINGS

Based on the evidence and testimony, I find the following regarding Injury No. 00-140019:

On October 3, 2000, Tommie Cohu felt a tugging sensation of his left arm and shoulder while pulling a bread tray from his bread truck. Employer admitted this injury by accident to the left shoulder. Treatment of the left shoulder was authorized with an initial treatment date of October 11, 2000. However, Claimant also alleges he injured both shoulders by occupational exposure that culminated over 20 years as an Earth Grains delivery man.

The delivery work did not vary significantly from 1987 through the end of his employment in October of 2000. Claimant testified he ranged from 20 - 40 delivery stops to deliver bread daily. He worked 5 -7 days and 60 - 70 hours per week.

The interior of his bread truck had racks that were filled with trays of bread. Each tray would hold ten loaves of bread. The truck would hold 400 trays or 4,000 loaves of bread. A tray of bread weighed from 11 to 16 lbs., depending on which bread it contained.

Each of the trays slid on metal rails that were separated by crossbars. In order to reach the interior of the truck, "pull-poles" were used. These poles would slip off the trays and catch on the crossbars of the racks causing numerous jerks and pulls of Claimant's right and left shoulder during the course of each day he worked. The top rails required Claimant to pull from the back with his arms extended over his head.

Claimant testified he stressed both shoulders delivering bread from his truck to customers. On small stops of two or three trays (approximately 45 lbs.), he would carry the tray waiter style over his shoulder into the facility. On larger stops he would use a two-wheeled dolly

that held up the ten trays or 115 lbs. of bread, dragging the dolly up steps, which strained his shoulders. At larger grocery store stops he would use a transport rack of 12 trays high, weighing several hundred pounds. He would have to pull it up a ramp straining his shoulders.

Once in the customer's facility, Claimant had to stock the bread where the customer wanted. Schools particularly had numerous steps (Few to over 60), which Claimant delivered bread with the two-wheeler, one step at a time. The top row of bread was lifted above shoulder height for stocking. Claimant then removed the out of date bread back onto trays and back onto his truck, again using his arms above shoulder level. As such, I find based on Claimant's testimony that Claimant was exposed to repetitive motion of his bilateral extremities.

Due to the shoulder complaints, Claimant underwent authorized surgery by Everett Wilkinson, Jr., D.O. Dr. Wilkinson diagnosed an acute rupture of the long head of the biceps with impingement syndrome. On November 20, 2000 Dr. Wilkinson performed an acromioplasty with resection of the coracoachromial ligament and clavicle and repair of the left rotator cuff.

On December 18, 2000, Dr. Wilkinson noted a continuation of pain and crepitus in the right shoulder which increased after surgery of the left shoulder. Dr. Wilkinson added physical therapy to the right shoulder in addition to the left shoulder on December 18, 2000. Dr. Wilkinson testified by deposition consistent with his report of February 15, 2005 (Deposition Exhibit No. 2). He believed damage to both shoulders was related to Claimant's work activities. The authorized treating physician testified that Claimant's work lifting bread trays, carrying them overhead, pulling them in and out of racks was a substantial factor in the development of the left shoulder injury. (Exhibit 2, Pg. 6).

Dr. Wilkinson testified that he requested the employer provide an MRI of the right shoulder. (Id, Pg. 9). He testified that Claimant's work as a bread truck driver, with over 20 years of lifting bread or pulling it in and out from an overhead as well as an under the waist level position with other work motions was a substantial factor in causing the conditions in the right shoulder. Dr. Wilkinson testified that Claimant most likely had nearly identical problems on the right that he had on the left, with the rotator cuff being the most probable. (Id., Pg. 20). Dr. Wilkinson testified that when he treated Claimant in 2001 for the right shoulder, that surgery was most probably necessary for the right shoulder, in addition to the left shoulder. (Id, Pg. 23).

Claimant's authorized treatment was continued by Larry Frevert, M.D. On July 19, 2001, Dr. Frevert performed additional authorized surgery on the left rotator cuff. He also recommended treatment of the right shoulder. Dr. Frevert noted he was waiting approval of an MRI to evaluate the right rotator cuff and the acromioclavicular joint. (Ex. G, p. 71). On 4/10/02, Dr. Frevert noted: "We had originally asked back at the end of February to have an MRI done of his right shoulder." (Id, p. 16). On 5/10/02, Dr. Frevert noted: "We are still awaiting a decision on the right shoulder. I think he has an impingement and possible cuff tear there. I think it is probably related to the repetitive movements over the multiple years of time and I think at least has been greatly aggravated by his work, if not caused by it." (Id, p. 14). Treatment was not authorized on the right shoulder. Dr. Frevert released Claimant with a 5 - 10 lb. lifting and no overhead lifting for the left shoulder.

Claimant was also examined by P. Brent Koprivica, M.D. Dr. Koprivica testified that Claimant's repetitive work activities of pushing, pulling, lifting and overhead activities were a substantial contributing factor of Claimant's bilateral shoulder conditions. Indeed, Dr. Koprivica testified the repetitive stresses on his shoulders are the type that are competent to result in repetitive injury. Dr. Koprivica believed that Claimant would likely require arthroplasty in both shoulder girdles eventually. (*Id.*, p. 92). He assessed 35% permanent partial disability of the right upper extremity at the shoulder, as well as 40% of the left shoulder.

Employer also obtained two examinations of Claimant by Allan Parmet, M.D. , who was deposed on two separate occasions. In his first deposition of May 31, 2006, Dr. Parmet testified there was no abnormality in the right shoulder. (*Id.*, p. 30). He attributed no disability to the right shoulder. He did attribute 25% disability to the left shoulder. Dr. Parmet found on his second examination as to the right shoulder a permanent partial disability of 30% at the 232 week level. (*Id.*, p. 9). I find his opinions inconsistent with the MRI report and, therefore, do not find his testimony persuasive.

I find that Claimant has met his burden of proof that his work activities were a substantial contributing factor of his bilateral shoulder condition. I find that Claimant proved he was exposed to repetitive motion of pushing, pulling, lifting and overhead activities. Moreover, I find Dr. Wilkinson's opinion credible, along with Dr. Koprivica, Dr. Stuckmeyer, and Dr. Frevert, that Claimant's work related activities were a substantial factor of both shoulder conditions. I find the October 3, 2000 jerking incident a mere triggering factor rather than a substantial factor of his bilateral shoulder condition. I also find the employer received actual notice when Dr. Wilkinson requested treatment of the right shoulder. Regardless, the Missouri Supreme Court stated in Endicott v. Display Technologies, Inc., that Missouri Statute §287.420 does not require notice of occupational disease.

The employer is also liable to employee for the past medical expense of \$487.17. Indeed, the medical records reveal the bill relates to treatment in order to cure the work related injury of his shoulders. Indeed, I find Claimant is liable to Medicare in the amount of \$487.17 as submitted in Claimant's Exhibit AA.

Claimant also has met his burden of proof that the employer is liable to him for future medical care of his bilateral shoulders. This finding is based on Dr. Wilkinson, Dr. Koprivica, Dr. Frevert, and Dr. Stuckmeyer. As such, the employer is liable to Claimant for future medical care in order to cure and relieve the effects of Claimant's bilateral shoulder condition.

Claimant also sustained 40% percent permanent partial disability at the 232 week level of the left shoulder and 25% percent permanent partial disability of the right shoulder as a result of the injury by occupational exposure. Indeed, Claimant is under severe restrictions placed by various physicians. Claimant has limited range of motion of both shoulders and is able to occasionally lift 10 to 15 pounds. I find the employer liable to Claimant for 150 weeks compensation multiplied by \$314.26, or in the amount of \$47,139.00.

I do not find the Second Injury Fund liable to Claimant. Indeed, Claimant testified he did not have any hindrances or obstacles to his employment prior to the occupational exposure of his shoulders, including Claimant's attention deficit hyperactivity disorder.

The employer is liable to Claimant for \$47,139.00 of permanent partial disability, as well as future medical care in order to cure and relieve the symptoms of the bilateral shoulder injury that occurred by occupational exposure. The employer is also liable for past medical expenses in the amount of \$487.17.

This award is subject to an attorney's lien in the amount of 25% percent for necessary legal services rendered by Claimant's attorney, Michael Knepper.

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

Lisa Meiners  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_, 2010, by:

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