

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

Injury No. 09-110050

Employee: Kevin Cook
Employer: Archdiocese of St. Louis (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Medical causation

Employee sought permanent total disability benefits from the Second Injury Fund. The administrative law judge denied employee's claim on the issue of medical causation, finding that Dr. Russell Cantrell was better informed and more persuasive than employee's evaluating expert, Dr. Robert Poetz. Employee's application for review sets forth the following allegations of error on the part of the administrative law judge:

1. The ALJ incorrectly determined the synergistic effect of the claimant's preexisting disability with his work related injury by determining that the agreed upon work accident against the Employer was not the prevailin [sic] for [sic] in causing an exacerbation of his preexisting back and neck disability as there was no reasonable or reliable evidence to conclude otherwise.
2. That the ALJ incorrectly interpreted the testimony of Dr. Poetz, so little or no weight to the same [sic] (while not finding his testimony to be incredible) and placed too much emphasis on the testimony of Dr. Buchowski which at the same time [sic] not identifying how (if at all) Dr. Buchowski's testimony contradicted the testimony of Dr. Poetz.
3. The ALJ improperly failed to consider that the claimant's work related injury "exacerbated" his prior injury rather than "causing it" as the ALJ stated.

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4. The ALJ concluded that Dr. Cantrell was better informed and more persuasive than Dr. Poetz but failed to explain or point out any facts to support this conclusion.

The foregoing leaves us with several concerns:

First, we note that these allegations of error are not only ungrammatical but also, in large measure, incomprehensible.

Second, we note that employee does not allege in his application for review that the administrative law judge erred in failing to award benefits for permanent total disability but, rather, alleges that the administrative law judge incorrectly determined the synergistic effect of employee's work-related and preexisting injuries. A permanent total disability determination requires no showing of synergy. See *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 157 (Mo. App. 2014). In his brief and at oral argument, employee failed to identify any evidence of synergy and advanced no argument that he should be awarded permanent partial disability benefits but, instead, argued he should be awarded benefits for permanent total disability.

Third, specific allegations of error set forth in employee's application for review are patently untrue. Employee alleges that the administrative law judge "placed too much emphasis on the testimony of Dr. Buchowski." In fact, Dr. Buchowski did not testify in this case. Employee further alleges (and reiterates in his brief) that the administrative law judge "failed to explain or point out any facts" to support his conclusion that Dr. Cantrell was more persuasive than Dr. Poetz. In fact, the administrative law judge provided *several* very specific reasons why he found Dr. Poetz's testimony less persuasive: (1) Dr. Poetz failed to consider employee's thirteen-level spinal fusion surgery of September 2012 in rendering his opinions; (2) Dr. Poetz failed to mention his own referral to Dr. Buchowski in December 2006 in connection with employee's preexisting diagnosis of Scheuermann's kyphosis; and (3) Dr. Poetz unpersuasively attempted to relate employee's (alleged) psychiatric disability referable to depression solely to the primary injury, notwithstanding records demonstrating that employee's depression preexisted the primary injury. This lack of candor on the part of employee's counsel toward this tribunal is troubling, to say the least.

As to employee's brief, we find that he has not provided a single colorable argument why the administrative law judge erred in crediting Dr. Cantrell over Dr. Poetz, and in fact does not even acknowledge the existence of Dr. Cantrell's testimony or opinions at all in his brief. Employee's counsel failed to separate employee's medical records and opinion evidence into separate exhibits, and instead submitted a single exhibit consisting of eight-hundred sixty-seven pages. In his brief, he fails to provide a single citation directing us to where Dr. Poetz's opinions can be found. We decline to act, in effect, as advocates by combing through the record searching for and piecing together facts in support of employee's claim.

The Second Injury Fund stipulated that employee sustained an accident at work on September 1, 2009. Based on the record before us, we find employee credible and that he is now totally disabled. This stipulation and these findings alone, of course, do not

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establish any liability on the part of the Second Injury Fund. In our judgment, regardless of the failings and shortcomings of advocacy noted above, employee's claim is ultimately, entirely undermined by its reliance on fundamentally uninformed medical opinions and testimony. Dr. Poetz last examined employee in February 2011, apparently without benefit of access to relevant medical records. Dr. Poetz testified in August 2011. Employee subsequently underwent a major, multi-level surgical procedure involving the same parts of his body that are the subject of both his work-related and preexisting injuries and conditions. We find that the opinions rendered and testimony given by Dr. Poetz in this case, because they fail to take into account the findings or the results of such a major, relevant surgical procedure, are almost devoid of probative value and entirely unpersuasive.

For the foregoing reasons, we affirm the administrative law judge's determination that employee has failed his burden of proof, and that the accident of September 1, 2009, was not the prevailing factor causing employee to sustain any identifiable medical condition or disability.

All other issues are moot.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued April 9, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 14th day of January 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kevin Cook Injury No.: 09-110050
Dependents: N/A
Employer: Archdiocese of St. Louis (settled)
Additional Party: Second Injury Fund
Insurer: Self-Insured (settled)
Hearing Date: January 6, 2015

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

Checked by: JED

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: September 1, 2009
5. State location where accident occurred or occupational disease contracted: St. Louis County
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 happened or occupational disease contracted:
Employee was retrieving paint supplies from closet shelf.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: spine (alleged)
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: PPD stipulated at 422.97; TTD/PTD disputed.
- 20. Method wages computation: Stipulation/moot

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: No

TOTAL: -0-

- 23. Future requirements awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Kevin Cook	Injury No.:	09-110050
Dependents:	N/A		
Employer:	Archdiocese of St. Louis (settled)		
Additional Party:	Second Injury Fund		
Insurer:	Self-Insured (settled)		
Hearing Date:	January 6, 2015	Checked by:	JED

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

This case involves an accident and injury to Claimant’s spine alleged to be compensable and permanent in nature with the reported accident date of September 1, 2009. Employer/ Insurer previously settled its risk of liability. The parties stipulate Employer paid no medical or TTD benefits. The Second Injury Fund (“SIF”) is a party to this claim. Both parties are represented by counsel.

Issues for Trial

1. medical causation;
2. nature and extent of permanent disability;
3. liability of the SIF;
4. average weekly wage.

FINDINGS OF FACT

1. Claimant, currently unemployed, was last employed at one of Employer’s high schools as an art teacher, earning \$30,000.00 annually, or \$575.92 weekly.
2. Claimant sustained accidental injury while moving some paint supplies from the top shelf to the floor inside a classroom closet. The paint cans fell on him. He felt pain symptoms in his upper to mid-back area.
3. Despite serious pre-existing spinal pathology and surgery for that specific pathology later in 2012, Claimant finished his shift on the day of the accident and worked the next day. Claimant indicates in his brief that as of October 2009, he “was no longer able to be employed with the Archdiocese or with anyone.”
4. He had treated with his chiropractor, Dr. Riesenberger, up to the day of the reported accident, and, after the reported accident, when he described his reported pain as 8 or 9 on a scale of 10.
5. Claimant takes morphine for pain and an anti-anxiety medication.

6. Claimant has not worked since October 2009 when he terminated his employment without settlement or award of benefits; he settled his case in December 2012 (Exhibit 1).

7. In 1993, Claimant developed thoracic spine symptoms for which he underwent injection therapy, physical therapy and chiropractic care “for about a year.”

8. In 2005, Claimant fell on his buttocks while carrying a portable air conditioner unit to his car.

9. Pre-accident treatments:

Sept 2005	Dr. Karahodzic	upper/low back
Oct 2005 to Mar 2006	Dr. Poetz	thoracic spine
Oct 2005	MRI/DePaul	degenerative changes/disc herniations, T10-T-12
Dec 2005	Dr. Bailey	Pain management/two thoracic disc herniations; Patient history of inability to work; vicodin
Feb 2006	Dr. Backer	bone scan
Mar 2006	Dr. Bailey	history of facet injections unsuccessful; tramadol, Elavil
Dec 2006	Dr. Buchowski	letter report to Dr. Poetz (on referral); Scheuermann’s kyphosis
Dec 2006	Dr. Padda	thoracic spondylosis; fact joint injections
Jan-Feb 2007	Dr. Padda	rhizlitic lesion of facets; fluoroscopic neurolysis; increased pain
Mar 2007	Dr. Bailey	history of ongoing chiropractic adjustments and physical therapy; valium, lidoderm patches
June 2007	Dr. Beyzer	two year history of pain from lifting A/C unit; Depression; thoracic HNP, chronic thoracic pain
Aug-Sept 2008	Dr. Periera	discography; subsequent spinal cord stimulator

10. Claimant underwent spinal fusion at T2-L2 on September 20, 2012 with Dr. Jacob Buchowski (Washington University) with pre-operative and post-operative diagnoses of

Scheuermann's kyphosis measuring 85 degrees. (See Exhibit III, generally, including radiological studies of thoraco-lumbar spine scoliosis and 2006 evaluation with same diagnosis.)

11. Claimant currently complains of severe, daily back pain that prevents him from working. He said he walks twice per day. Claimant testified about his inability to teach with his pain symptoms. Claimant receives Social Security Disability benefits.

Opinion Evidence

Dr. Poetz

Claimant offered the 2011 deposition of Robert Poetz, an osteopath, as Exhibit 3. Dr. Poetz examined Claimant and reviewed medical records. Dr. Poetz believed Claimant had become depressed prior to the reported injury because of his debilitating symptoms and inability to work; Dr. Poetz believed that no surgery had been undertaken because of the high risk involved (pp. 13-15). Dr. Poetz assigned a 20 percent spinal PPD and 15 percent psychiatric PPD for depression to the reported (primary) injury. He assigned a 40 percent pre-existing PPD to the thoracic spine.

At deposition he sought to opine that the depression was directly the result of the reported injury to which the Employer and SIF properly objected. The opinion not only lacked basic foundation in the preceding testimony but it was directly contradicted by Dr. Poetz's earlier statement that Claimant told him he had been depressed "in the past" due to his inability to work and engage in activities.

Dr. Poetz appeared to be well-informed about the serious pre-accident medical events and the disabling symptoms. The following exchange, however, suggests an attempt to somehow re-characterized the significant pre-accident history as cause for depression resulting from the reported accident herein:

Q: Well, how much [percentage PPD] did you give him for pre-existing depression? (Brackets added.)

A: I didn't give him anything for pre-existing depression.

Q: Do you know how much he was depressed?

A: It is my opinion that his depression became acutely significantly clinical at the time of his last injury, or the injury that we have in question, and it was at that time that he felt that his *procedures* were not successful, his ongoing *pain* was requiring him not to be able (*sic*) to continue working, and that is when I assessed this depression became clinically significant. (Underline and italics added.)

This assertio is, nevertheless, ostensibly based on events in the past. In the following lines, it was suggested to him that he had no medical records upon which to base this opinion, whereupon, he suggested Employer's counsel be more specific in his questions, deferring to his "chart" (pp. 62-63). Elsewhere, Dr.Poetz admits that his opinion, diagnoses and treatment

recommendations in 2009 are the same as those he had in 2005 (p. 66). This testimony is unpersuasive.

Finally, his deposition was taken in August 2011. Thus, he did not opine on Dr. Buchowski's remarkable surgery in 2012 which was based on a chronic congenital condition of Scheuermann's kyphosis (T2-L2). Thus, Claimant is without opinion evidence that integrates the critical event of Dr. Buchowski's surgery with his ultimate opinions. Dr. Poetz's deposition makes no mention of his referral of Claimant to Dr. Buchowski in 2006 as per cover letter (from Dr. Buchowski to Dr. Poetz) dated December 12, 2006, the New Patient notes and the Patient Questionnaire of even date (Exhibit III).

Dr. Cantrell

The SIF offered the deposition of Employer's examining physician, Dr. Russel Cantrell, as Exhibit II. Dr. Cantrell examined Claimant and reviewed the record. Significant in his physical examination is his note of spinal kyphosis. He did not find Claimant's back pain and treatment related to the reported injury. He characterized any inability to work as a chronic condition pre-existing the reported accident date (pp. 40-41). He opined that the reported work accident was not the prevailing factor in causing the complaints reported after the accident date (p. 80). Dr. Cantrell's testimony and opinions are easily reconciled with the medical records, including Dr. Buchowski's 2006 diagnosis and 2012 surgery.

RULINGS OF LAW

Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). Silman, 891 S.W.2d at 175. As with all proofs in complex medical evidence, a medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

Here, Claimant's expert was shown to have rendered opinions lacking foundational support in two fundamental respects, both involving Dr. Buchowski. In one respect, Dr. Poetz gave testimony that failed to integrate critical medical evaluation by Dr. Buchowski, performed at Dr. Poetz's special instance and request, in 2006. The other involves the proffer of Claimant's 2011 deposition of Dr. Poetz which necessarily does not contemplate the ultimate treatment of Claimant's symptoms in 2012 by complex surgical intervention at the thirteen levels, T2-L2. Missouri courts have long held that it is reasonable to expect experts to be fully informed. Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991). Dr. Poetz deposition revealed several important instances where medical records were not accorded their face value.

While SIF liability is set forth in Section 287.220.1 RSMo (2005), the SIF disputes compensability generally on the basis of medical causation. Noteworthy here is the fact of a work accident that is not disputed to have occurred. However, Sections 287.020.2-3 RSMo (2005), state that an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. Here, the resulting medical condition was Scheuermann's kyphosis.

This problem was confronted directly by the courts in Armstrong v. Tetra Pak, 391 S.W.3d 466, 467 (Mo.App. 2012). In that case, the employee sustain an accident at work but the medical record revealed a diagnosis of severe pre-existing degenerative changes in his shoulder. Here, there is substantial evidence by way of medical records, both pre-existing and subsequent to the reported accident date, that Claimant's condition was well-established, seriously disabling and treated extensively by numerous specialists for many years prior to the reported injury. These records included the 2006 diagnosis of kyphosis, unchanged in 2012 with the event of surgery, by Dr. Buchowski. In addition, the probative expert opinion evidence suggests Claimant's reported accident was not the prevailing factor in causing his spinal condition. Dr. Cantrell was better informed and more persuasive than Dr. Poetz.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof. Claim denied. The other issues are moot.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge