

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

Injury No.: 01-032299

Employee: Francis X. Crotty, Jr.
Employer: Wire Rope Corporation
Insurer: Self c/o Missouri Private Sector Self-Insurance Guaranty
Date of Accident: April 9, 2001
Place and County of Accident: St. Joseph, 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 (ALJ) is not supported by competent and substantial evidence and was not made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated January 25, 2005, and awards no compensation in the above-captioned case.

The only claim before the ALJ was an injury due to an accident arising out of and in the course of employment occurring on April 9, 2001, when employee was "pulling shaft from wooden reel." Employee distinctly injured his right upper extremity specifically due to this singular event.

Following the injury, employee received treatment and returned to his regular work on May 4, 2001. He asserted that he had no problems whatsoever, and all medical treatment on account of the accident ceased.

Employee's testimony, and the medical opinion of Dr. Koprivica, convinces the Commission, that employee's right upper extremity complaints and problems, as well as ensuing medical treatment, which arose in 2002, and continued thereafter, were not, and are not, medically causally related to the accident occurring on April 9, 2001.

Employee had achieved maximum medical improvement by May 4, 2001; continued to work without restrictions; had "no problems whatsoever"; and worked for more than one year thereafter without complaints.

The competent and substantial evidence does not persuade the Commission that employee's ensuing right upper extremity problems arising in 2002 and thereafter, and the medical treatment rendered and/or sought, were substantially caused by or were substantially attributable to the singular, traumatic accident occurring on April 9, 2001.

Consequently, the Commission does not find the accident of April 9, 2001, to be a substantial factor as to the cause of employee's right upper extremity complaints arising in 2002 or in 2003, nor a substantial factor concerning the need for the medical treatment rendered in 2002 or in 2003 or any additional future need.

The injury was reported to the Division of Workers' Compensation (Division) in April 2001, pursuant to section 287.380 RSMo. The record shows no further treatment, lost time, or payment for this accidental injury occurring April 9, 2001, subsequent to his returning to work without restrictions in May 2001.

A claim for compensation was filed on July 23, 2004. Section 287.430 RSMo, requires that a claim for compensation be filed within two years of the date of injury or payment on account of the injury attributable to the reported accident.

As the claim was filed more than two years after employee returned to work in May of 2001, no proceedings for compensation shall be maintained under Chapter 287 RSMo.

We find employee's claim for compensation was untimely filed. Compensation for the injury of April 9, 2001, is denied.

The award and decision of Administrative Law Judge Rebecca S. Magruder, issued January 25, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

Secretary

DISSENTING OPINION

I must respectfully dissent from the opinion of the majority of the Labor and Industrial Relations Commission (Commission). I would affirm the award of the administrative law judge (ALJ).

The evidence shows that lost time and medical benefits were provided to employee for his right shoulder condition as late as December 9, 2002. This payment effectively extends the statutory filing deadline to December 9, 2004, as the claim must be filed within two years of the last payment on account of compensation. Section 287.430. RSMo. December 9, 2002, is clearly within two years of the date of the filing of the claim on July 23, 2004.

The majority ignores the evidence in the record of treatment, provided by employer to employee, for his right shoulder. There is no evidence in the record that this treatment was not related to the injury of April 9, 2001. To so conclude would require a medical opinion that we do not have before us. *Jones v. Dan D. Services, L.L.C.*, 91 S.W.3d 214 (Mo. App. 2002).

I would disagree with the majority on the question of the expiration of the statutory period within which a claim may be filed.

I would affirm the award of the ALJ regarding further treatment. I would accept the statement of Dr. Koprivica that the need for treatment "does arise as a direct and natural consequence of the original injury of April 9, 2001." In my judgment, this statement is the most clear and concise of the doctor's statements on causation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 704 (Mo. App. 1973 E.D.).

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee: Francis X. Crotty, Jr.

Injury No. 01-032299

Dependents: N/A

Employer: Wire Rope Corporation

Insurer: Missouri Private Sector Self-Insurance Guaranty

Additional Party: N/A

Hearing Date: January 7, 2005

Checked by: RSM/lh

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: April 9, 2001.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, 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: While removing a shaft from an empty spool, claimant injured his right shoulder.
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: Right shoulder.
14. Compensation paid to-date for temporary disability: \$4,509.27
15. Value necessary medical aid paid to date by employer/insurer? \$14,081.24.
16. Value necessary medical aid not furnished by employer/insurer? None.
17. Employee's average weekly wages: \$584.51.
18. Weekly compensation rate: \$389.69/\$314.26.
19. Method wages computation: By agreement.

COMPENSATION PAYABLE

20.Amount of compensation payable: Employer is to provide medical treatment and surgery to Claimant's right shoulder and future temporary total disability as determined by authorized treating doctor.

TOTAL Unknown

Each of said payments to begin upon receipt of award and be subject to modification and review as provided by law. This award is only temporary pr partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Robert Douglas.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Francis X. Crotty, Jr.

Injury No: 01-032299

Dependents: N/A

Employer: Wire Rope Corporation

Insurer: Missouri Private Sector Self-Insurance Guaranty Corporation.

Additional Party: N/A

Hearing Date: January 7, 2005

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At the hearing, the parties stipulated:

- 1) that on or about April 9, 2001, Wire Rope Corporation was an employer operating under the provisions of the Missouri workers' compensation law and that their liability under said law was fully insured by the authority to self-insure;
- 2) that on or about April 9, 2001, Francis Crotty (hereinafter "Claimant") was an employee of Wire Rope Corporation and was working under the provisions of the Missouri workers' compensation law;
- 3) that on or about April 9, 2001, Francis Crotty sustained an injury by accident arising out of and in the course of his employment;
- 4) that the employer had notice of the injury;
- 5) that the average weekly wage was \$584.51 and that the applicable compensation rate for temporary total disability benefits is \$389.69 per week and \$314.26 per week for permanent partial disability benefits;
- 6) that compensation has been paid in the amount of \$4,509.27;

7) that medical aid has been furnished in the amount of \$14,081.24.

The issues to be determined by the hearing are:

- 1) whether the conditions complained of by the Claimant result from the accident sustained on April 9, 2001;
- 2) whether there is a statute of limitations defense on the part of the employer for the conditions complained of;
- 3) whether further treatment, including surgery to the Claimant's right shoulder, is the responsibility of the employer as a result of the accident occurring on April 9, 2001;
- 4) whether the employer is liable for temporary total disability benefits commencing on June 17, 2003 up to the present and ongoing as needed.

This case was heard on an application for a temporary (hardship) award on January 7, 2005. The evidence consisted of Claimant's testimony and the reports from Claimant's independent medical examiner, Dr. Koprivica. No other medical reports or records were offered into evidence and no deposition testimony or other witness testimony was submitted.

Based on the evidence I make the following findings of fact: Francis Crotty, age 52, started working for Wire Rope Corporation in 1973 and worked continuously with that company up to April 9, 2001. On April 9, 2001, Mr. Crotty and a co-worker were removing a shaft from an empty spool. The co-worker was pulling and Mr. Crotty was pushing on the shaft. It was while Mr. Crotty was pushing on the shaft that he felt something like an electric shock in his right shoulder. He reported the injury to his employer and was sent by the employer to the Med Clinic for treatment the same day. Prior to April 9, 2001, Claimant had no shoulder problems nor medical treatment for his right shoulder, nor was there any significant degenerative disease identified in the x-ray taken on April 9, 2001.

At the Med Clinic the Claimant was examined by Richard Campbell, a registered nurse. Mr. Campbell took x-rays, which were read as normal and diagnosed a shoulder strain. Mr. Campbell took the Claimant off work for approximately one month, during which time the Claimant received physical therapy. He was seen by Mr. Campbell on April 9, 13, 20, 27, and May 4, 2001. On May 4, the Claimant was released to return to work. The employer paid medical expenses in the amount of \$1,279.99 during this period of time and paid temporary total disability benefits of \$1,867.60. After receiving this limited course of conservative treatment, the Claimant testified, and I find in accordance with his testimony, that he was able to fully perform the regular duties of his job, which was essentially the same job he was doing prior to the injury. He testified, and I find in accordance with that testimony, that he had "no problems whatsoever" with his shoulder on his return to work; and, furthermore, had no more shoulder problems for over a year.

The employer does not dispute that the Claimant sustained an injury to his shoulder as a result of this April 9, 2001 accident. The employer is asserting, however, that any further treatment the Claimant may need after one year, after May of 2002, was not in fact related to the April 9, 2001 injury.

The Claimant did not seek any further treatment for his right shoulder until September of 2002. At that time, he reported problems with his right shoulder to his employer and the employer referred him to a Dr. Douglas Stokes. Examination by x-ray taken at that time indicated a degenerative cyst of the humeral head. A follow-up MRI on October 2nd indicated a labral tear as well. Dr. Stokes performed arthroscopic surgery on October 18, 2002, for chondroplasty and repair of the labral tear. The Claimant was released to return to work without restrictions on December 24, 2002. The Claimant received temporary total disability during this period of time and the employer apparently paid for the medical bills.

Several months after the surgery in October of 2002, the Claimant sought chiropractic treatment for his right shoulder due to stiffness he was experiencing. The Claimant testified that he hoped acupuncture would improve his ability to use his arm. He was not satisfied, however, with the results. Therefore, in May of 2003, the Claimant again reported his shoulder problems to his employer who sent him to Dr. Cathcart at Med Clinic. Dr. Cathcart examined the Claimant on May 30, 2003. Dr. Cathcart referred the Claimant to Dr. Alexander Strong, an orthopedic surgeon, who examined him for the first time June 17, 2003. Dr. Strong ordered an MRI, which was performed on June 19, 2003. The MRI showed "advanced glenohumeral degenerative joint disease." (Dr.

Koprivica report p. 5) Dr. Strong re-evaluated Mr. Crotty on June 24, 2003, and ultimately recommended joint replacement surgery. (Dr. Koprivica's report p. 6 quoting Dr. Strong's records.)

Mr. Crotty was referred to Dr. Terence Pratt, a physiatrist, for an Independent Medical Examination on behalf of the employer/insurer. Dr. Pratt's report is not, however in evidence. Dr. Brent Koprivica examined the Claimant on August 28, 2004, at the Claimant's request for an Independent Medical Examination. The real dispute in this case is whether the employer is responsible for workers' compensation benefits after the Claimant was released from treatment approximately one month after the April 9, 2001 accident.

The only medical evidence in the case are Dr. Koprivica's reports dated August 28, 2004 and September 4, 2004. There is little question that the Claimant had advanced degenerative joint disease involving the right glenohumeral joint that requires at this time a total shoulder arthroplasty. Dr. Koprivica states in his report that Claimant's need for this surgery "does arise as a direct and natural consequence of the original injury of April 9, 2001. Specifically, Mr. Crotty's attempt at removing the shaft from the wooden reel represents a substantial factor in the cause for Mr. Crotty's degenerative joint disease at this point and the need for further treatment, including total shoulder arthroplasty."

While Dr. Koprivica does, therefore, state in this one above-quoted sentence that the accident of April 9, 2001, caused the Claimant's severe degenerative joint disease and need for surgery, three other times in his report, he states the accident AND Claimant's ongoing employment activities caused the Claimant severe shoulder problems which now require surgery. Furthermore, a statement in Dr. Koprivica's report indicates that he believed that the Claimant had continued symptoms since the April 2001 accident. That statement is as follows: "Mr. Crotty reports to me that he continued to have problems with his right shoulder, despite that initial care and treatment [the month long treatment following the April 9, 2001 accident] after he had been released from treatment to his right shoulder." As stated above, I have found that Claimant was symptom free for approximately one year after his shoulder injury in 2001. The Claimant testified in his deposition, on direct exam and cross-exam that he was in fact symptom free for one year after the accident. How Dr. Koprivica came to the conclusion that the Claimant had ongoing symptoms after his release from treatment in May of 2001, I have no idea. This was apparently a misunderstanding on Dr. Koprivica's part. I certainly don't believe that this Claimant intentionally lied to the doctor, as he has consistently admitted he had no problems for the year after release from initial treatment. The basis of the doctor's opinion that the one-time event in April of 2001 caused the Claimant's need for surgery is based on facts not in evidence. The fact that the Claimant did return to work without restrictions at Wire Rope in May of 2001 and had no problems whatsoever with his right shoulder until at least one year after the spring '01 accident are extremely significant.

Based on all of the above, I find the Claimant indisputably needs surgery due to the severe degenerative joint disease for which he suffers. I do not find, however, that the accident of April 9, 2001, was a substantial factor in causing his condition or his need for any surgery. Rather, I find that the catching he first noticed in May 2002 and his ensuing shoulder problems and need for treatment are causally related to the accident of 2001 COUPLED WITH his ongoing employment activities. Admittedly, there is scant evidence regarding what type of work activities the Claimant did at Wire Rope; however, I believe there is sufficient evidence for me to conclude, based on Dr. Koprivica's report, that both the effect of the accident on April 9 and the Claimant's continued employment activities at Wire Rope were a substantial factor in his current condition and need for treatment. The Claimant did testify that all of the work at Wire Rope is physical work. Furthermore, the activity that he described that he was doing on the day of the accident, required heavy pushing and pulling. Finally, Claimant did give general descriptions of three types of jobs at Wire Rope, all of which he did, which do demonstrate that he at least had to use his arms and shoulders. There was no evidence, however, of whether the Claimant did overhead work or not and the amount of weight he had to lift. Nonetheless, I do find the evidence is sufficient to sustain my finding that Claimant's severe degenerative joint disease and need for treatment are causally related to his work activities.

The real issue in the case then is whether the Claimant, who has alleged in his claim for compensation only the accident of April 9, 2001, as the cause of the conditions for which he complains, can now have the pleadings in essence conform to the evidence presented. The cases I deem controlling of this issue are Shaffer v. St. John's Regional Health Center, 943 S.W.2d 803 (Mo.App. S.D. 1997); Smith v. Climate Engineering 939 S.W.2d 429 (Mo.App. E.D. 1996); and Kintz v. Schnucks Markets, Inc., 889 S.W.2d 121 (Mo.App. E.D. 1994). These three

cases essentially dictate that when an employee files a claim alleging injury due to a specific accident but the evidence ultimately proves that the cause of the injury was not a single event but rather a progressive injury which resulted from repeated or constant exposure to on-the-job hazards, then compensation must be granted. In essence, the only requirement is that the injury be job related. The courts have held that the concept of accident encompasses gradual and progressive injuries resulting from repeated exposure to on-the-job hazards. The Court in Smith v. Climate Engineering, supra, reviews the cases which stand for the proposition that the term “accident,” even after the 1993 amendments, encompasses gradual and progressive injuries resulting from repetitive traumas. Compare Holaus v. William J. Zickell Company, 958 S.W.2d 72 (Mo.App. E.D. 1997) (where the Court held that Claimant’s amended Claim for Compensation which stated occupational disease claim did not relate back to initial claim for accident and therefore was barred by the statute of limitations).

In the case at bar, the Claimant filed only one Claim for Compensation alleging his injuries were due to an accident. Although I have found that the injuries were not caused by a one-time event but by the combination of the accident and repeated on-the-job hazards, Missouri appellate law dictates that I find the claim compensable. Furthermore, pursuant to this analysis, there is no statute of limitations defense because Claimant did not file an amended claim for compensation alleging an occupational disease, as was the case in Holaus v. Zickell, supra. Thus, all of the conditions complained of must be deemed to be encompassed by the claim for compensation alleging an accident. This is due to the broad construction the courts have given to the term “accident.” See e.g. Smith v. Climate Engineering, 939 S.W.2d 429 (Mo.App. E.D. 1996); Wolfgeher v. Cartage Service, Inc., 646 S.W.2d 781, (Mo banc 1983).

In summary, I have found there is no statute of limitations defense for the reasons state above. Furthermore, as previously stated, I have found Claimant’s serious degenerative joint disease in his right shoulder causally related to his work at Wire Rope, and therefore have found that it arose out of and in the course of his employment. With regard to the third issue in the case, I find that the employer properly provided medical treatment in 2002 and 2003 and properly paid temporary total disability benefits. Furthermore, I find in accordance with the only medical evidence in the case that the employer now needs further medical treatment to his right shoulder. Therefore, the employer is ordered to provide medical treatment as recommended by Dr. Koprivica and Dr. Strong. (See Reports of Dr. Koprivica)

With regard to the fourth issue in the case, Claimant’s entitlement to temporary total disability benefits from June 17, 2003 to the present, I make the following findings. Claimant is requesting that the employer in this case pay temporary total disability benefits to him from June 17, 2003 to the present and ongoing. In determining whether an employee is entitled to temporary total disability benefits, the main issue is whether any employer, in the usual course of business, would reasonably be expected to employ that individual in his present physical condition. Thus, the employer is responsible for temporary total disability benefits only if the claimant cannot compete in the open labor market for employment. See Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo.App. W.D. 1997) and Boyles v. USA Rebar Placement, Inc., 26 S.W.3d 418 (Mo.App. W.D. 2000). The burden of proving entitlement to temporary total disability benefits is on the Claimant. The Court in both Cooper and Boyles discussed a list of factors relevant to a claimant’s employability on the open labor market. Included in that list were the anticipated length of time until claimant’s condition had reached the point of maximum medical process, the nature of the continuing course of treatment, and whether there was a reasonable expectation that the claimant would return to claimant’s former employment. In the case at bar, these factors are extremely hard to analyze given the fact that the employer has not yet provided the treatment recommended to the Claimant’s right shoulder. The Court in both Cooper and Boyles indicated that a significant factor in judging the reasonableness of the inference that a claimant was not employable on the open labor market was the anticipated length of time until his condition reached the points of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open labor market. If the period is quite long, then it would never be reasonable to make such an inference. The problem in this case is that the Claimant’s condition has remained untreated and therefore his condition of having a right arm that doesn’t function well remains unaddressed.

The Claimant clearly has problems with his right shoulder and significant limitations. The Claimant did not, however, testify to any severe degree to pain with regard to his arm or shoulder. Considering these facts regarding his current physical condition, I must determine whether or not the Claimant is capable of competing for employment on the open labor market. The evidence I consider in this regard is his past work experience,

education and age. The evidence shows that the Claimant is a middle-aged man who has done physical labor all of his life. However, the Claimant has a high school diploma and took college courses for law enforcement at Missouri Western in the 1970s. Dr. Koprivica's report indicates that the Claimant received a Bachelor of Science degree in criminal justice from Missouri Western after three years of college. The Claimant spoke well at the hearing and seemed to be quite intelligent. There was virtually no evidence that the Claimant could not compete for gainful employment even if I assume he could not use his right arm. Claimant clearly could not return to Wire Rope to work with his arm in the condition it is in. While it is obvious that Claimant could not continue doing physical labor at Wire Rope with his arm in the condition it is in, there is no evidence that the Claimant could not find some other type of employment. Therefore, Employee's request for temporary total disability benefits is denied.

Entitlement to any future temporary disability benefits while the claimant is under medical treatment shall be left to the authorized treating doctor's recommendations.

Date: _____

Made by: _____

Rebecca S. Magruder
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation