

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

Injury No.: 03-146446

Employee: Suljo Cuskic
Employer: True Manufacturing, Inc.
Insurer: Liberty Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 18, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued July 18, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed and medical care and permanent partial disability benefits should be awarded.

First, there is no question that employee suffered bilateral rotator cuff tears. However, it is my opinion, based upon the medical records, testimony provided, and other evidence presented that employee met his burden of proof regarding causation and should be awarded medical care and permanent partial disability benefits.

As correctly stated in the award by the ALJ, under Missouri law, the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D. 2002) (citations omitted). Claimant is not required to prove the elements of his claim on the basis of "absolute certainty," but he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D. 1999) (citations omitted).

Employee began working for employer in October of 2000 and testified that he had no problems with either of his shoulders prior to working for employer. During the first three years of his employment, he made frames for refrigerators. Employee painted frames in one department and welded the frames in another department. Following his time making frames, employee spent a few months operating the decoiler machine, and his last year and a half on the RAS machine. Employee testified that his jobs with employer required a great deal of work at or above eye level.

When employee painted the frames he had to hook the frames up to a track. This required him to stretch his arms the width of the frame and hook the frames onto the track at about eye level. When taking the frames off the track, employee again would reach either to eye level or above his head with his arms partially or fully extended, take the frames down and carry them over to a separate table. He testified that the frames weighed between 20 to 25 pounds and that he would have to both hook and unhook between 400 and 700 frames per shift.

Employee testified that the second part of his refrigerator frame job involved screwing four screws in the holes of the frame. Two of the four screws were above head. He testified that he screwed between 1,600 and 2,800 screws during each five hour shift, half of which were overhead. Employee testified that one of his duties required him to carry the frames to and from pallets with his arms spread the width of the frames with one arm above shoulder level and the other arm below shoulder level. On the RAS machine, employee testified that he would take sheet metal off a pallet and carry it with one hand underneath the sheet metal and the other hand up above his head holding onto it.

Employee testified that he began feeling work-related shoulder pain in November of 2003 and that he reported said pain to his employer. Employee testified that he was told to go see a doctor or take some pills. Employee initially saw his family doctor, Dr. Ponnuru, but was referred to Dr. Sigmund, an orthopedist. Employee was also seen by Dr. Perry who administered cortisone shots and prescribed pain medication for employee's shoulders.

On January 27, 2006, Dr. David Volarich performed an Independent Medical Evaluation on employee. As part of said evaluation, Dr. Volarich reviewed employee's medical records and reports, took a history from employee regarding his shoulders leading up to November of 2003, physically examined employee, and

inquired about employee's job activities with employer. Dr. Volarich testified that it was his opinion, to a reasonable degree of medical certainty, that the repetitive nature of employee's work activities were the substantial and contributing factors, as well as the prevailing factors causing employee's bilateral rotator cuff tears.

On January 22, 2007, employee was evaluated by Dr. Mitchell Rotman. On exam, Dr. Rotman diagnosed employee's bilateral rotator cuff tears and inquired as to his job activities. Employee informed Dr. Rotman that his job required him to do a lot of shoulder level reaching. Dr. Rotman concluded that employee's work was a prevailing factor in causing employee's shoulder condition.

After receiving Dr. Rotman's report, employer then submitted employee's job description to Dr. Rotman and asked him to review the job description and provide a second report. Dr. Rotman reviewed the job description and then asked for a video depicting employee's job activities in order to further evaluate causation. Employer provided Dr. Rotman with a video of an individual performing employee's job activities. After reviewing the job description and video, Dr. Rotman issued a second report. In said report, Dr. Rotman contradicted his opinions in the first report and concluded that employee's work for employer did not appear to be a substantial or aggravating factor with regard to his bilateral chronic degenerative rotator cuff tears.

Dr. Volarich reevaluated employee on January 4, 2008. Dr. Volarich watched the video that Dr. Rotman reviewed. Dr. Volarich watched the video in the presence of employee and testified that employee agreed that the video depicted part of his duties, but did not include all of his duties requiring above the shoulder work. Dr. Volarich also testified that employee told him that the video did not accurately depict the pace at which he was required to perform the duties. Employee had told Dr. Volarich that the pace was much faster than that shown in the video.

Dr. Volarich testified that it was his opinion, to a reasonable degree of medical certainty, based on the video, history and job activities of employee, that the repetitive work employee did for employer was the substantial contributing factor, as well as the prevailing or primary factor causing employee's bilateral shoulder rotator cuff tears.

Based on the above, I believe that employee has carried his burden that there is a "reasonable probability" that his bilateral shoulder rotator cuff tears were caused by the repetitive work employee performed for employer. Both of the evaluating physicians at one point concluded that employee's job was the prevailing factor in causing his rotator cuff tears. Although Dr. Rotman later contradicted his initial opinion as to causation, his contradiction was based merely upon a job description and video prepared and provided by employer. Dr. Rotman did not inquire as to the accuracy of the job activities being performed in the video and listed in the job description, but merely accepted them at face value. On the other hand, Dr. Volarich watched the video with employee and asked various questions as to whether the video accurately depicted employee's job activities. Employee stated that the video was inaccurate in that it failed to show all of the activities that were performed above shoulder level and it did not show the activities being performed at the speed he was required to perform them. In addition, Dr. Rotman even stated that his opinion could change again if the job activities were different from the written job description and the video. Based on employee's testimony that is exactly the case in this matter. I find Dr. Volarich's opinions more credible than Dr. Rotman's because Dr. Rotman made a drastic change in opinion with regard to causation based only on a job description and video that were both prepared by employer, while Dr. Volarich's opinions remained constant throughout.

The ALJ gave little if any weight to the fact that: 1) Dr. Rotman bases his entire changed opinion upon a job description and video prepared and provided by employer; and 2) Employee testified that said job description and video do not accurately reflect the work he performed for employer. Further, the ALJ incorrectly finds Dr. Rotman more credible than Dr. Volarich based solely on the fact that Dr. Rotman is an orthopedic surgeon.

Although Dr. Volarich is not an orthopedic surgeon, he specializes in evaluating work-related injuries and is just as qualified, if not more qualified, than Dr. Rotman to determine causation in this matter. The ALJ incorrectly concluded that employee failed to prove by a reasonable probability that his employment with employer is a substantial causative factor in the development of his bilateral rotator cuff tears.

For the foregoing reasons, employee is entitled to medical care and permanent partial disability benefits. As such, I would reverse the award of the ALJ and award employee medical care and permanent partial disability benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Suljo Cuskic Injury No. 03-146446

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: None

Employer: True Manufacturing, Inc.

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance, Co.

Hearing Date: April 24 & April 29, 2008 Checked by: GCG/ln

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged Novemeber 30, 2003
5. State location where accident occurred or occupational disease was contracted:
Alleged St. Charles 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? Undetermined
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 occurred or occupational disease contracted:
Claimant alleges he suffered bilateral rotator cuff tears due to repetitive overhead reaching and lifting.
12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Right and Left upper extremities at the shoulder.

- Nature and extent of any permanent disability: Not Applicable

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: \$495.08
19. Weekly compensation rate: \$330.05 for TTD/PPD

- Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$0

0 weeks of permanent partial disability from Employer

22. Second Injury Fund liability: No

0 weeks of permanent partial disability from Second Injury Fund

Total: \$0

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Suljo Cuskic

Injury No: 03-146446

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: None

Employer: True Manufacturing, Inc.

Additional Party Second Injury Fund

Insurer: Liberty Mutual Insurance, Co.

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing in the above referenced case was held April 24 and April 29, 2008, in the St. Charles office of the Division of Workers' Compensation before the undersigned Administrative Law Judge. Claimant Suljo Cuskic (Claimant) was present and represented by attorney Frank Niesen. Employer True Manufacturing Company (Employer) and its Insurer Liberty Mutual Insurance Company (Insurer) were represented by attorney Maureen Cary. The Second Injury Fund (SIF) is a party, but was not present, by agreement of all parties SIF liability is left open. Violetta C. Niesen, wife of attorney Frank Niesen, acted as a sworn interpreter for Claimant, as her native language is Bosnian. Employer's counsel had no objection to Mrs. Niesen acting as an interpreter in this case. The evidentiary hearing was held in conjunction with injury # 04-024893.

The parties made the following stipulations: On or about the date of the alleged occupational disease, Employee was employed by True Manufacturing and was subject to the Missouri Workers' Compensation Act; the parties agree that venue is proper in St. Charles County; The parties agree the claim for compensation was timely filed; Claimant's average weekly wage was \$495.08 per week with an applicable rate of \$330.05 for temporary total disability benefits (TTD) and permanent partial disability benefits (PPD); Employer/Insurer has paid no TTD or medical benefits.

The following issues were presented for determination: Whether Claimant has an occupational disease; Whether Employer had notice of the injury; Whether Claimant's injury was medically causally related to his employment; Nature and extent of permanent disability; Whether Claimant is entitled to future medical aid.

The parties have requested a final award. Attorney Frank Niesen has requested a lien in the amount of 25% of any award in Claimant's favor for attorney fees.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. Certain exhibits offered into evidence contained handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights were ignored by the undersigned ALJ in reaching any decision on the issues presented in this case.

Claimant is a Bosnian who came to the United States in July of 2000; he is currently 51 years old. He began working for Employer in October 2000. Between June and December 2002, Claimant did not work for Employer, because he returned to Bosnia to care for his ailing father.

Claimant's job title was machine operator. With the exception of the time away from Employer in 2002, Claimant worked at alternating work stations during his employment until 2004. Some but not all of the work stations were depicted in a video submitted as Exhibit 2. Claimant worked eight hour shifts, five days per week, with an occasional hour of overtime. The day was split into shifts of five hours and three hours; they would be five hours and four hours on the days he worked overtime.

Claimant's time was split between two categories of job duties. One was referred to as robotic welding. Claimant would work the robotic welding job everyday for either the five hour or three hour component of his work day. The robotic welding job is depicted in the video which is Exhibit 2.

The second job category is the "dip tank". The dip tank actually consists of four different positions. During the hearing, the four positions were described as: rails on/off, second position of rails on/off, rivnut, and plastic caps. One of the jobs in the dip tank area was done for either three or five hours each day in the split with the robotic welding job. There was a daily rotation of the four dip tank jobs, meaning Claimant would perform only one of those jobs on any given day, and then a different one the next day, until the rotation was complete and would start over.

It is the dip tank jobs that are not fully shown in the video. Rails on/off is depicted in Exhibit 2. Second position of rails on/off is not depicted explicitly, but is completed in the same area as rails on/off, and is described by Claimant and Employer's witnesses during testimony. Rivnut and plastic caps are not depicted in Exhibit 2, but still photographs of the duties being performed are in evidence as Exhibits 3, 4, 5, and 6.

Dr. David Volarich testified on behalf of Claimant by deposition on two separate occasions, on August 23, 2006 (Exhibit H) and April 22, 2008 (Exhibit I). Dr. Mitchell Rotman testified on behalf of Employer by deposition on October 25, 2007 (Exhibit 1). After reviewing medical records and examining Claimant, both Dr. Volarich and Dr. Rotman reached a diagnosis of bilateral rotator cuff tears.

Dr. Volarich evaluated Claimant on January 27, 2006 and again on January 4, 2008. In the January 27, 2006 exam, Dr. Volarich reviewed Claimant's medical records, took a history from Claimant through an interpreter, and conducted a physical exam of Claimant. Dr. Volarich diagnosed bilateral rotator cuff tears

and recommended surgical repair. Dr. Volarich, based on the history provided by Claimant that he performed repetitive lifting above shoulder level for the majority of his day, opined that his job activities for Employer were substantial factors in causing the bilateral rotator cuff tears. Dr. Volarich did not provide a disability rating at that time as he did not believe Claimant was at maximum medical improvement (MMI).

Dr. Mitchell Rotman, an orthopedic surgeon, evaluated Claimant once, on January 22, 2007, and subsequently issued three reports. Dr. Rotman's opinion on causation changed based on new information he was given by Employer.

Claimant presented with complaints of bilateral shoulder pain. On exam, Dr. Rotman noted clicking with discomfort at the left shoulder, bilateral pain at the rotator cuff, biceps pain and a positive impingement sign. He diagnosed bilateral small rotator cuff tears, and concluded Claimant should undergo surgery if he continued to have pain. An MRI of the left shoulder showed chronic subchondral cystic changes from irritation. Based on Claimant's assertion he was doing a lot of shoulder level reaching five hours a day, Dr. Rotman concluded work was a prevailing factor in causing Claimant's shoulder condition. He felt Claimant would have impairment of 5-10% after he had surgery.

After he issued his initial January 22 report, Employer asked Dr. Rotman to consider a job description (Exhibit 7). In a second report dated February 2, 2007, Dr. Rotman noted the forces on the shoulder did not appear as significant as he originally thought, so he asked for a video.

Dr. Rotman then reviewed a video of someone other than Claimant performing the tasks associated with Claimant's job, and issued a report dated March 8, 2007. In watching the video, Dr. Rotman observed little (<5%) of the motions he felt would be causative of Claimant's condition, specifically outstretched arms at shoulder level, lifting to shoulder level, or overhead activities. Therefore, he concluded Claimant's work for Employer did not appear to be a substantial or aggravating factor with regard to his bilateral chronic degenerative rotator cuff tears. He reached this conclusion because he felt the degree of lifting at or above the shoulder did not meet his criteria for causation. Dr. Rotman agreed his opinion could change if Claimant's work differed from the video, and if his original understanding of Claimant's work proved accurate, Dr. Rotman's original opinion would stand.

Dr. Volarich then reevaluated Claimant on January 4, 2008. During this evaluation, Dr. Volarich watched the video with Claimant. Dr. Volarich testified Claimant agreed the video depicted part of his duties, but did not include all of them. He further testified Claimant indicated the video did not accurately depict the speed at which he performed his job duties. Based on the video and his conversations with Claimant, Dr. Volarich concluded Claimant spent 70% of his day working overhead, and again opined that job activities were the cause of Claimant's bilateral rotator cuff tears. Dr. Volarich conceded his opinions rely upon the accuracy of the history provided by Claimant.

Mr. Paul Kullman and Mr. Mike Lewis testified on behalf of employer regarding the production of the video which is Exhibit 2 and the pictures of the two dip tank positions not depicted in the video, which are Exhibits 3, 4, 5, and 6. Mr. Chris Moesch testified on behalf of Employer regarding the duties of a RAS machine operator which is depicted in Exhibit 2.

Claimant testified on his own behalf regarding the video and the pictures. He indicated the video and pictures were not entirely accurate. He testified the video did not accurately reflect the need to lift above shoulder level or the speed at which the job duties are performed. Claimant testified he operated the RAS machine job the last year and a half of his employment with Employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, the testimony of other witnesses, my personal observations, the expert medical testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

Medical Causation

As there is no dispute regarding the diagnosis of Claimant's condition, the resolution of this case turns on whether Claimant's job duties were a substantial causative factor of his bilateral rotator cuff tears. In such a case, the outcome is usually determined by the credibility of expert medical opinions in relation to one another. However, in this case, neither doctors' opinion is completely credible, because neither is based on an accurate factual foundation.

Dr. Volarich bases his opinion on Claimant's assertion that he spent 70% of his day working overhead. The video and the credible testimony of Paul Kullman and Mike Lewis demonstrate that this is not the case. The video shows operation of the robotic welding machine requires very little overhead work, and Claimant spent 50% of his time operating this machine. Likewise, the video shows that the rails on/off position also does not require a significant amount of overhead work.

The evidence demonstrates Claimant did not begin operating the RAS machine until after the onset of symptoms. The work performed on the RAS machine is not a substantial factor in the development of bilateral rotator cuff tears.

The rivnut and plastic caps positions of the dip tank job, which are not depicted in the video, but are depicted in the photographs, seem to require some shoulder level work. The tasks that require shoulder level work in these positions constitute at most 50% of the job requirements, when the rivnuts or the caps are being placed in the upper portion of the frame. In other words, Claimant spent 50% of his time on the four dip tank positions. Only 50% of the time on the dip tank job was spent in the rivnut and plastic caps positions. Only 50% of the tasks in those two positions required shoulder level reaching. Further, very little weight was required to be borne when performing the duties of the rivnut and plastic cap positions.

Dr. Rotman's opinion is credible as to the portions of Claimant's job duties which are depicted on the video. Dr. Rotman is an orthopedic surgeon and his opinion as to the effect of the activities depicted in the video on a rotator cuff is more credible than the opinion of Dr. Volarich. However, Dr. Rotman was not provided a video, a written description, or pictures of the rivnut and plastic cap positions in the dip tank area. The rivnut and plastic cap positions are arguably the most likely to put the arms in a position to cause damage to the rotator cuffs. Therefore, Dr. Rotman's opinion regarding causation is not completely credible either.

Ultimately, Claimant bears the burden of proof. Dr. Volarich's opinion regarding causation does not meet that burden. Dr. Rotman's opinion regarding the percentage of overhead work depicted in the video is credible. The job duties not in the video which require shoulder level or overhead work are a small percentage of Claimant's duties and are not performed on a daily basis. As a result, Dr. Volarich's opinion

regarding causation, which is based on the assumption that 70% of Claimant's work was performed overhead, is flawed.

Claimant has failed to prove by a reasonable probability that his employment with True Manufacturing is a substantial causative factor in the development of his bilateral rotator cuff tears. The Claim for compensation is denied. The Claim for compensation against SIF is also denied. All other issues are rendered moot.

Date: July 18, 2008

Made by: /s/ Grant C. Gorman
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation

In 2004, after the alleged date of injury, Claimant moved to a different workstation operating a RAS machine.