

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

Injury No.: 99-138008

Employee: Larry Daly
Employer: Powell Distributing, Incorporated
Insurer: Continental Western Insurance Company

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 January 7, 2009. The award and decision of Administrative Law Judge Henry T. Herschel, issued January 7, 2009, 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 1st day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Larry Daly

Injury No. 99-138008

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Powell Distributing, Incorporated

Additional Party: None

Insurer: Continental Western Insurance Company

Hearing Date: October 7, 2008

Checked by: HTH/scb

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: September 12, 1999.
 5. State location where accident occurred or occupational disease was contracted: Boone 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 the occupational disease contracted: Lifting and stacking cases of soda for a number of years.
 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: Cervical spine.
- Nature and extent of any permanent disability: N/A.

15. Compensation paid to-date for temporary disability: \$26,659.00.
16. Value necessary medical aid paid to date by employer/insurer? \$50,737.34.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$754.00.
19. Weekly compensation rate: \$503.00.
20. Permanent partial disability: \$303.01
21. Method wages computation: By agreement.

COMPENSATION PAYABLE

22. Amount of compensation payable: \$48,481.60
(400 weeks x .40 = 160 weeks; 160 weeks x \$303.01 = \$48,481.60)
23. Second Injury Fund liability: N/A.
24. Future Requirements Awarded: None.

Said payments to begin immediately 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: Rick Montgomery.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Larry Daly

Injury No: 99-138008

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

Dependents: N/A

Employer: Powell Distributing, Incorporated

Additional Party: None

Insurer: Continental Western Insurance Company

Checked by: HTH/scb

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on October 7, 2008. The Division has jurisdiction to hear this case pursuant to §287.110 RSMo 2000. The parties provided briefs on the relevant issues on approximately October 20, 2008.

STIPULATIONS

1. The employee and the employer were operating under the provisions of the Missouri Workers' Compensation Law on or about September 12, 1999;
2. The employer's liability was insured by Continental Western Insurance Company;
3. The employer had notice of the alleged accident and a claim for compensation was timely filed;
4. The employee's average weekly wage was \$754.00;
5. The rate of compensation for temporary total disability (TTD) was \$503 and \$303.01 for permanent partial disability (PPD); and
6. The employer has paid \$26,659.00 in TTD, and has paid medical benefits in the amount of \$50,737.34.

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DISPUTED ISSUES

The only issue before me is the nature and extent of the 1999 injury in the 99-13808 case.

EVIDENCE

EMPLOYEE'S EXHIBITS:

- Exhibit A: Raymond Cohen, M.D., Deposition, 11/28/07
- Exhibit B: Broadway Internal Medicine Assoc. Medical Records, 12/20/00 to 1/9/01
- Exhibit C: Columbia Orthopaedic Group Medical Records
- Exhibit D: Columbia Regional Hospital Medical Records, 4/28/03 to 6/26/03
- Exhibit E: Columbia Regional Hospital Medical Records, 10/18/99 to 1/8/02
- Exhibit F: Health South Medical Records, 12/17/99 to 2/11/02
- Exhibit G: Neurology Inc. Medical Records, 2/20/02
- Exhibit H: Neurology Inc. Medical Records, 12/31/01 to 2/6/02
- Exhibit I: Boone Hospital Center Medical Records

Exhibit J: Columbia Orthopaedic Group Medical Expenses, 9/1/99 to 7/20/04
Exhibit K: Univ. of MO Health Care System Medical Expenses, 1/4/02 to 4/13/04
Exhibit L: Columbia Radiology Medical Expenses, 4/5/00 to 6/25/03
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Exhibit N: Temporary or Partial Award signed 8/15/01
Exhibit O: Transcript of Hearing, 5/22/01
Exhibit P: Social Security Administration Decision, 4/16/02
Exhibit Q: Ergonomic Intervention for the Soft Drink Beverage Delivery Industry
Exhibit R: Gary Weimholt, Deposition, 9/12/08

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Exhibit 1: Douglas Vogt, M.D., Medical Report, 2/13/02
Exhibit 2: Columbia Orthopaedic Group Medical Records
Exhibit 3: Douglas Vogt, M.D., Medical Records
Exhibit 4: Letter from Randal Trecha, M.D., 1/4/02
Exhibit 5: James England, Deposition, 8/21/06
Exhibit 6: Robert Heim, M.D., Deposition, 4/5/06

SECOND INJURY FUND EXHIBITS:

Exhibit 1: Larry Daly, Deposition, 1/9/01
Exhibit 2: Larry Daly, Deposition, 8/12/02

FINDINGS OF FACT

This workers' compensation claim was heard on October 7, 2008, in Columbia, Missouri. The employee, employer/insurer, and the Second Injury Fund appeared .

Larry Daly (Claimant) is a 53-year-old male who was employed by Powell Distributing, Incorporated (Powell). Claimant was employed with Powell from 1995 to May 2000.

Claimant's work with Powell included "warehouse work." This included stacking and loading cases of soda on displays and onto trucks. Later he was promoted to a route salesman, in which he unloaded cases of soda at numerous stops on his truck route. He provided small and large stores with their daily supply of soda and other stock. He also assisted the stores in arranging the cases of soda into customer-appealing displays.

Mr. Daly described back pain which, while intermittent initially, became constant in the summer of 1999.

On September 12, 1999, Mr. Daly sought medical treatment after waking up in pain at about 4:30 a.m. Although he had worked the week before, he had not worked the day before because he had taken his wife shopping for her birthday. In September 1999, Mr. Daly had had stiffness and soreness in his back as well as some right hip pain. The next morning, Mr. Daly went to the Boone County Hospital emergency room and was then referred to his physician, Dr. Mack. Dr. Mack saw Mr. Daly on September 13, 1999, and recommended that Mr. Daly not work that week. Dr. Mack referred Mr. Daly to Dr. Trecha.

Dr. Trecha set up Mr. Daly with exercises, physical therapy, and a Med-Ex program designed to build strength, none of which afforded Mr. Daly relief. Dr. Trecha recommended surgery that Mr. Daly did not feel he could afford.

When Mr. Daly returned to work at Powell Distributing, Inc., his condition worsened and he eventually had surgery on May 18, 2000. Mr. Daly participated in a physical therapy program after his surgery, but quit after he could no longer afford to participate. Mr. Daly never returned to work at Powell Distributing, Inc.

Dr. Randall Trecha, a specialist in orthopedic surgery concentrating on adult reconstructive spine surgery, testified by deposition that he initially saw Mr. Daly on September 29, 1999. Dr. Trecha diagnosed degenerative disk disease and lumbar strain and recommended a conservative course of therapy, including low-impact exercise and anti-inflammatory medication.

Mr. Daly underwent surgery by Dr. Trecha on May 18, 2000. Mr. Daly was restricted from work by Dr. Trecha from May 15, 2000, through the date of surgery and since. Dr. Trecha never released Mr. Daly to return to work. Dr. Trecha described the surgery as a total decompression laminectomy at L4 and L5, a partial decompression laminectomy at L3, and a transverse fusion at L4-L5 and L5-S1, placement of pedicle screw instrumentation at L4-L5 and S1 bilaterally, and harvest of local bone graft.

Dr. Trecha recommended a four- to eight-week course of work hardening for Mr. Daly before he would declare him to be at maximum medical improvement.

Dr. Trecha opined that Mr. Daly's work with Powell Distributing, Inc., which required repetitive lifting of 300 to 400 cases of soda weighing approximately 20 pounds each, was a substantial factor in causing Mr. Daly's symptoms and his need for medical care. Dr. Trecha further opined that Mr. Daly's underlying degenerative spondylosis was accelerated by Mr. Daly's work-related duties.

Claimant has worked as a delivery person for a relative's cookie store and now does part-time courier duty with a local bank. He works in the morning and his supervisor allows him to do whatever physical labor he feels that he can do.

In deposition, Dr. R. Cohen testified that he personally took a history of Claimant and reviewed his medical records. (Cl. Exh. A, pp8-9). He noted that Claimant had a 50% permanent disability in his lumbar spine. (*Id.* at 21).

In deposition, Dr. R. Hein reviewed medical records and viewed a short videotape of Claimant. He noted that he would be surprised that the lumbar injury was caused by the lifting of heavy cases of sodas or other requirements of his employment. (Emp./Ins. Exh. 6, pp15-17).

CONCLUSIONS OF LAW

Claimant bears the burden of proof to demonstrate that his injury was caused by his occupational activities. The Eastern District Court of Appeal noted:

Claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and injury. Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo.App. E.D. 1996) citing: Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute, 793 S.W.2d 195 (Mo.App. E.D. 1990), overruled on other grounds; Hampton v. Big Boy Steel Erection, 121 S.W.3d (Mo. Banc 2003).

Since Claimant's surgery he has been unable to resume his prior work as a route truck driver. He has been able to perform delivery services for a cookie shop owned by a relative and is now a courier at a local bank. At the

bank he works half days and does what he “can manage.”

Claimant had surgery on his back on May 18, 2000. His last day of work was May 12, 2000. (Cl. Exh. C, p3-4). At the first deposition Claimant testified that the most he can pick up is 30 pounds, he cannot sit for more than 30 minutes, and cannot stand for any long period of time. (SIF Exh. 1, pp43-45). In the second deposition, he testified that he can do a little “house work” if it does not involve bending. (SIF Exh. 2, pp27-28). He can mow some of his lawn with his riding lawn mower. (*Id.* at 28). He gets help with his everyday affairs from his relatives. (*Id.* at 28).

Dr. Tracha, who performed Claimant’s back surgery, noted that Claimant was 30 to 35% disabled. (Cl. Exh. O, p293). He also noted that he had a degenerative arthritis in his back but that without the injury from his job he would not have this disability. (*Id.* at 291-295). Claimant is still experiencing substantial pain years after surgery. (SIF Exh. 2, p41).

Claimant’s expert, Dr. Cohen, opined that Claimant had suffered some degenerative damage in his spine, but that the injury on the job caused the greatest damage to the lumbar spine. Dr. Cohen noted that:

Q: And what is that opinion?

A: That at the cervical spine level a whole person disability of 50 percent; and at the abdomen level a 15 percent whole person disability. And lastly, at the lumbar spine level a 50 percent whole person disability. (Cl. Exh. A, p21).

In response, Dr. R. Heim testified that Claimant’s injury was not due to a work-related condition. (Emp./Ins. Exh. 6, p17). Dr. Heim testified:

Q. (By Ms. Turner) Do you have an opinion whether the changes that you observed in the diagnostic studies and as reported in the medical records of Mr. Daly were the result of the ordinary gradual deterioration or degeneration caused by aging?
MR. MONTGOMERY: Same objection.

A. First off, to answer that question, it’s not an easy -- it’s not an easy answer. Everyone develops arthritis in their -- in their spine, whether it’s their neck or their lower back, and literally by the time you’re in your mid to late thirties, virtually a hundred percent of the population has arthritic changes in the spine. Not everyone has symptoms from this, but virtually everyone has radiographic or MRI evidence of arthritic changes.

The question as to what caused Mr. Daly’s arthritic changes, I can’t say. According to the records that I reviewed, his symptoms came on spontaneously and were not as a result of any inciting trauma, either to the neck or to the lower back. So it’s hard for me to turn around and say these arthritic changes were caused by a specific inciting incident.

Q. And did you review any job description or did I provide you with any of his depositions that described his work?

A. No. I don’t think so.

Q. We could agree that arthritis is a degenerative condition and it’s caused -- it’s just a normal progression of aging?

A. That’s correct.

Q. And you didn’t see anything in the records to indicate any attributing incident or injury that would result in the symptoms that he had?

A. That’s correct.

Q. Now, is this spinal degen -- deterioration, degeneration something that individuals are exposed to outside of the work environment?

A. I'm not sure I understand your question.

Q. Well, degenerative arthritis, degenerative disk disease, is that something that occurs to people outside of a work environment?

A. Yes, ma'am. As I said, it occurs in a hundred percent of the population.

(Emp./Ins. Exh. 6, pp10-11).

It seems that Dr. Hiem is proposing that Claimant's injury is not work related. It is clear that the attorney for Emp./Ins. cleared up that confusion, but the expert is testifying to a fact that Claimant's injury was not work related, a fact that is already established and confirmed by the temporary award in this matter. (Cl. Exh. N, pp9-10). I do not believe there was any new evidence since the temporary award which in any way undercuts the evidence introduced in the temporary hearing. As I have already noted, I have accepted the findings of fact and conclusions of law in the temporary award as evidence.

It is the province of the ALJ to also determine the credibility of witnesses. The Commission has the obligation to judge the credibility of the witness at a hearing. As noted in Richardson Bros. Roofing:

Commission is the sole judge of the credibility of the witnesses. Reese v. Gary & Roger Link, Inc., 5 S.W.3d 522, 525 (Mo. App. 1999). Additionally, the Commission has sole discretion to determine the weight given to expert opinions. *Id.* The extent and percent of disability is a finding of fact within the Commission's discretion and the Commission is not bound by the expert's exact percentages. Jones v. Jefferson City Sch. Dist., 801 S.W.2d 486, 490 (Mo.App. 1990). The Commission is free to find a disability rating higher or lower than that expressed in medical testimony. *Id.* Hence, "when medical theories conflict, deciding which to accept is an issue peculiarly for determination of the Labor and Industrial Relations Commission." Grimes v. GAB Bus Serv., Inc., 988 S.W.2d 636, 641 (Mo.App. 1999). (quoting Hawkins v. Emerson Elec. Co., 676 S.W.2d 872, 877 (Mo. App. 1984)). Smith v. Richardson Bros. Roofing, 32 S.W.3d 568, 575 (Mo.App.S.D. 2000).

Although ably rehabilitated by the attorney for the Insurer, Dr. Heim had never examined Claimant and reviewed a relatively short video of Claimant to testify that Claimant's injury was not work related. (Emp./Ins. Exh. 6, pp29-32, 34, 35). I do not believe that Dr. Heim, although I believe he is testifying in good faith and with honesty, had the background to adequately evaluate Claimant. I believe that Claimant has a significant work-related injury as determined from the opinions of his doctor Dr. Trecha and his expert Dr. Cohen. Further, his injury is substantial, serious, and permanent. (Cl. Exh. C, pp29-45). To the present day, Claimant has ongoing pain and discomfort.

Claimant is also claiming that he is permanently and totally disabled by his lumbar injury and surgery.

The term total disability means that inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7 RSMo(1993). The test for permanent total disability in Missouri is "the worker's ability to compete in the open labor market in that it measures the worker's prospect for returning to employment." Patchin v. Nat'l Super Markets, Inc., 738 S.W.2d 166, 167 (Mo.App.1987). The question then becomes whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Reiner v. Treasurer of State of Missouri, 837 S.W.2d 363 (Mo.App. 1992).

Fletcher v. Second Injury Fund, 922 S.W.2d 402, 404 (Mo.App. W.D. 1996).

Some of the facts that can be applied are Claimant's age, education, pain, job skills, occupational history, and history of work subsequent to the injury. (*Id.* at 404).

The claimant in this case is of average intelligence. (Emp./Ins. Exh. R, p15). He reads and performs arithmetic at a sixth grade level. (*Id.* at p16). Claimant has an associate degree in business administration with a grade point of 2.9. (Emp./Ins. Exh. 5, p8). Mr. James England testified that Claimant could work at most limited mobility jobs even with Dr. Cohen's restrictions. (*Id.* at p12). He has and is working as a courier for a bakery and a

bank. He was a convenience store manager at one time. (*Id.* at 19). Claimant testified, and I believe, that he generally has a good work history and is well liked at his present and past jobs. Although I believe that Claimant is credible, I do not believe that his lumbar injury results in a permanent total disability. Without any of his later complaints, he managed to engage in meaningful part-time work in the bakery and at the bank and is able to engage in activities in his everyday life, including trips to the store, gardening, and house cleaning.

Mr. Gary Weimholt testified that Claimant was unable to compete in the open market for a job. (Cl. Exh. R, pp25-31). The reason I find this testimony less credible than Mr. England is that it is less dependant on his employment injury and its relation to his vocational prospects.

Mr. Weimholt seems more concerned that the market is not very good for 50-year-old males, not whether the Claimant's injury prohibits Claimant from any meaningful job. (*Id.* at 31). Although the market place is certainly a factor, Claimant has manageable work restrictions and could find work in the open labor market. (*Id.* at pp18-20). Claimant is employed on a regular basis for 20 hours a week. I do not find Claimant's vocational expert credible as to the lumbar injury rendering the Claimant unemployable in the open labor market.

Dr. Cohen has set Claimant's disability at 50%. I believe that he also testified that the pre-existing could be 20% degenerative arthritic condition of his back. Dr. Trecha set the back disability at 35%. I believe that after a review of these various reports that Claimant has a 10% preexisting degeneration condition and a 50% overall disability. I believe that Claimant has borne his burden of proof for 40% permanent total disability and is entitled to 40% of the body as a whole for his lumbar injury. This conclusion is only relevant to Claimant's lumbar injury. This does mean Claimant is not permanently disabled with his cervical disease/injury.

CONCLUSION

Claimant is 50% permanently disabled at BAW for his lumbar injury. He has a 10% preexisting degenerative injury and, therefore, is entitled to 40% BAW referable to his lumbar spine, which is \$48,481.60 (400 weeks x .40 = 160 weeks; 160 weeks x \$303.01 = \$48,481.60). His attorney, Rick Montgomery, should receive a lien of 25% on the award.

Date: _____

Made by: _____

HENRY T. HERSCHEL
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Nasreen Esmail
General Counsel
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION _____

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

Employee: Larry Daly
Employer: Powell Distributing, Incorporated
Insurer: Continental Western 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 7, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Henry T. Herschel, issued January 7, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Larry Daly

Injury No. 00-177873

COMPENSATION

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

Dependents: N/A

Employer: Powell Distributing, Incorporated

Additional Party: None

Insurer: Continental Western Insurance Company

Hearing Date: October 7, 2008

Checked by: HTH/scb

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 alleged occupational disease: May 12, 2000.
5. State location where accident occurred or occupational disease was contracted: Boone 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? 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 the occupational disease contracted: Lifting and stacking cases of soda for a number of years and/or the activity done during work hardening.
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: Cervical spine and hernia.
 - Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: None.
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: \$754.00.
19. Weekly compensation rate: \$503.00.

- 20. Permanent partial disability: \$303.01
- 21. Method wages computation: By agreement.

COMPENSATION PAYABLE

- 22. Amount of compensation payable: N/A.

TOTAL:

- 23. Second Injury Fund liability: N/A.
- 24. Future Requirements Awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Larry Daly

Injury No: 00-177873

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Dependents: N/A

Employer: Powell Distributing, Incorporated

Additional Party: None

Insurer: Continental Western Insurance Company

Checked by: HTH/scb

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on October 7, 2008. The Division has jurisdiction to hear this case pursuant to §287.110 RSMo 2000. The parties provided briefs on the relevant issues on approximately October 20, 2008.

STIPULATIONS

1. The employee and the employer were operating under the provisions of the Missouri Workers' Compensation Law on or about May 12, 2000;
2. The employer's liability was insured by Continental Western Insurance Company;
3. The employee's average weekly wage was \$505;
4. The rate of compensation for temporary total disability (TTD) was \$503 and \$303.01 for permanent partial disability (PPD); and
5. The employer has paid nothing in TTD, and has paid nothing in medical benefits.

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DISPUTED ISSUES

The issues for determination are:

1. Nature and extent of injury/disease to his cervical spine, shoulder, and hernia and whether those injuries result in permanent disability;
2. The Second Injury Fund liability for the injury/disease;
3. Whether the cause of the injury/disease was work related;
4. Liability for the unpaid medical expenses and future medical care for either Employer/Insurer or SIF.

EVIDENCE

EMPLOYEE'S EXHIBITS:

- Exhibit A: Raymond Cohen, M.D., Deposition, 11/28/07
- Exhibit B: Broadway Internal Medicine Assoc Medical Records, 12/20/00 to 1/9/01
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SECOND INJURY FUND EXHIBITS:

- Exhibit 1: Larry Daly, Deposition, 1/9/01
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FINDINGS OF FACT

This workers' compensation claim was heard on October 7, 2008, in Columbia, Missouri. The employee, employer/insurer, and the Second Injury Fund appeared. Briefs were submitted by the parties on approximately October 20, 2008.

Larry Daly (Claimant) is a 53-year-old male who was employed by Powell Distributing, Incorporated (Powell). Claimant was employed with Powell from 1995 to May 2000.

Claimant's work with Powell included "warehouse work." This included stacking and loading cases of soda on displays and onto trucks. Later he was promoted to a route salesman, in which he unloaded cases of soda at numerous stops on his truck route. He provided small and large stores with their daily supply of soda and other stock. He also assisted the stores in arranging the cases of soda into customer-appealing displays.

Mr. Daly described back pain which, while intermittent initially, became constant in the summer of 1999.

On September 12, 1999, Mr. Daly sought medical treatment after waking up in pain at about 4:30 a.m. Although he had worked the week before, he had not worked the day before because he had taken his wife shopping for her birthday. In September 1999, Mr. Daly had stiffness and soreness in his back as well as some right hip pain. The next morning, Mr. Daly went to the Boone County Hospital emergency room and was then referred to his physician, Dr. Mack. Dr. Mack saw Mr. Daly on September 13, 1999, and recommended that Mr. Daly not work that week. Dr. Mack referred Mr. Daly to Dr. Trecha for surgery.

Dr. Trecha performed surgery on Claimant on May 18, 2000. Dr. Trecha described the surgery as a total decompression laminectomy at L4 and L5, a partial decompression laminectomy at L3, a fusion at L4-5, and placement of screws at L4 and L5. (Lumbar spine injury).

After his surgery Dr. Trecha recommended a four- to eight-week course of work hardening for Mr. Daly before he would declare him to be at maximum medical improvement. Mr. Daly participated in a physical therapy program after his surgery, but quit after he could no longer afford to participate. Mr. Daly never returned to work at Powell Distributing, Inc.

During the "hardening" therapy related to his lumbar surgery, Claimant testified that he developed a hernia. (SIF Exh. 2, pp12-15). Claimant also complained that he suffered an additional injury to his neck and shoulder during the work hardening sessions. In the alternative, Claimant also contends that the degenerative disease he incurred during his employment of his neck manifested itself during the hardening therapy sessions. He eventually went to Dr. Tarbox and Dr. Miles of Columbia Orthopaedic Group, who recommended surgery. (*Id.* at pp19-22).

During a medical examination in December 2001 with Dr. Vogt, Claimant complained of shoulder discomfort and numbness. (Emp./Ins. Exh 1, pp3-5). A later MRI did not indicate any disc herniation. (*Id.* at pp4-5).

In December 2001, Claimant was examined by Dr. Vogt and Dr. Miles for pain in his neck, right shoulder, and arm. (*Id.* at pp16-18 Dec 18, 2001 and Jan 6, 2002). Claimant is later examined by Dr. Miles and Dr. Tarbox who believe that his pain symptoms are more likely due to his neck. (*Id.* at p7).

In December 2001, Claimant complained of neck and shoulder pain but was not aware of any "inciting" event. (*Id.* at p17). He attributes his hernia to the work hardening therapy. (Cl. Exh. C, p8).

In May 2003, Claimant has surgery for a fusion at C5-6 and C6-7. (Cl. Exh. C, pp4-5; Cl. Exh. D, pp7-5). The Employer/Insurer has denied the claim and has not paid any TTD or Claimant's medical expenses.

Dr. R. Cohen testified that the cervical neck injury and hernia was caused by Claimant's employment at Powell. (Cl. Exh. A).

Dr. England, a vocational expert for Emp./Ins., testified that Claimant could be meaningfully employed in the labor market. (Emp./Ins. Exh. 5, pp10-14).

Gary Weimholt, a vocational expert for Claimant, testified that in spite of Claimant's education, that claimant's permanent injuries would not permit Claimant to enter the labor market. (Cl. Exh. R, pp18-20).

CONCLUSIONS OF LAW

Claimant bears the burden of proof to demonstrate that his injury was caused by his occupational activities. The Eastern District Court of Appeal noted:

Claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and injury. Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo.App. E.D. 1996) citing: Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute, 793 S.W.2d 195 (Mo.App. E.D. 1990) overruled on other grounds Hampton v. Big Boy Steel Erection, 121 S.W.3d (Mo. Banc 2003).

Claimant is complaining that the hernia was caused by an event at his work hardening session. Further, claimant contends that his cervical neck injury and the resulting surgery was caused by the repetitive lifting and stacking of cases of soda and manifested the cervical spine disease during the work hardening therapy. (SIF Exh. 2, p34).

The proof of the hernia is relatively simple. During his hardening therapy, Claimant claims he heard a “pop” and noticed a lump on his abdomen. (SIF Exh. 2, pp31-33). Section 287.195 controls:

In all claims for compensation for hernia resulting from injury arising out of and in the course of the employment, it must be definitely proved to the satisfaction of the division or the commission:

- (1) That there was an accident or unusual strain resulting in hernia;
- (2) That the hernia did not exist prior to the accident or unusual strain resulting in the injury for which compensation is claimed.

See also Pemberton v 3M Co., 992 S.W.2d 365, 368 (Mo.App.W.D. 1999).

An injury suffered during a work therapy or “hardening” is compensatable under the workers’ compensation law. Lahue v Mo. State Treasurer, 820 S.W.2d 561, 563 (Mo.App.W.D. 1991). There is also no evidence that Claimant sustained the hernia at the work hardening session except for his testimony in his 2001 deposition. The only independent proof of the hernia is a three-year-old note in Dr. Trecha’s medical records. (April 16, 2003: See Cl. Exh. C). The records of the work hardening therapy, the medical records, or work therapy records offer no independent details of such an injury. The Claimant alleges some discomfort around the time he is participating in work hardening, but there is no indication that the work hardening was the cause. (Cl. Exh. C, pp14-17).

Claimant is very clear that he never notified his employer that the work hardening program caused the hernia. The first time the employer/insurer had any knowledge of the injury is his amended claim that he filed in May 2002. (SIF Exh. 2, pp32-33). In his second deposition, Claimant notes he never informed his employer of the injury until a substantial time later.

Q. Did you at any time make any request either verbally or in writing to the employer or the insurer seeking medical care and attention for the hernia before incurring those expenses?

A. No, sir.

Q. Why not?

A. It happened so quick. When Doctor Vogt said it needed to come out of there and it needed to come out of there quick, I said let’s have it done, and, you know, my insurance was okay with it, and I figured I’ll take care of my health and we will worry about

them down the road. The way they work it took so long I couldn't wait for them.

(*Id.* at p32)

This is not a notice issue. I do not believe that Claimant sustained an injury during work hardening session for which he sought workers' compensation care because the evidence and the medical records do not support that. Even Dr. Vogt's records do not indicate that the work hardening program had anything to do with his hernia. (Cl. Exh. C, pp11-12; See also: Cl. Exh. E, pp2-3). I do not believe Claimant has sustained his burden of proof with regard to his hernia injury.

Claimant also alleges that he suffered an injury or manifested a degenerative disease stemming from his employment that manifested itself during his work hardening session. In the case of degenerative disease, the notice requirement to the employer of the disease injury is distinctively different. As noted by the Eastern District Court of Appeals in Kintz v Schnucks:

The Commission was not asked to consider, and we do not review here, a case where causation of injury from job-related activities was known to employee on a particular date but withheld from employer and prejudice to the defense of the claim was the result. The characteristic of a job-related injury without an identified traumatic event is that the employee does not have knowledge of causation without an expert's diagnosis. Accordingly, this is not a case where actual knowledge of causation occurred on an identified date. There may be cases where notice is required for a claim of injury from repetitive trauma.

Second, §287.420 RSMo. 1986 presupposes knowledge of a work-related injury. An employee cannot give "written notice of the time, place and nature of the injury" where he does not know and could not know facts which the notice requires. Thus, the statute is inapplicable to the facts of a repetitive trauma case such as this one, at least until the claimant has knowledge of those facts which must.....

Finally, employer does not claim the lack of timely notice adversely affected its defense of the workers' compensation claim, point denied.

Kintz v. Schnucks Market, Inc., 889 S.W.2d 121, 124 (Mo.App. E.D.1994).

I do not remember the Employer/Insurer argued that a lack of notice of Claimant's injury was an issue at the hearing on this matter. I believe that the Employer/Insurer has been properly notified of a possible compensable claim under the law by Claimant's attorney.

Claimant alleges that his cervical neck injury manifested itself during the work hardening therapy, but that disease was developing over the years of his bending, lifting, and repetitive stacking of heavy cases of soda.

Section 287.020(2) (RSMo. 1993) requires that an injury arise out of employment shall have the following elements:

- (2) An injury shall be deemed to arise out of and in the course of the employment only if:
 - (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
 - (b) It can be seen to have followed as a natural incident of the work; and
 - (c) It can be fairly traced to the employment as a proximate cause; and
 - (d) It does not come from a hazard or risk unrelated to the

employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

There is doubt that Claimant has had consistent complaints concerning his pain in his neck and tremors in his hand. (Cl. Exh. B, pp2-3; Cl. Exh. G, p1). Claimant explained the reason he never complained about his neck pain was that his back hurt so much that it masked his neck pain. (SIF Exh. 2, p45). It is also true that during and after the healing of his lumbar surgery he also did not complain of any pain in his neck. (Cl. Exh. C, pp18-33). In December 2001 are the first complaints of neck injury; this coincides with the work hardening therapy but does not prove that Claimant's employment caused the disease. (*Id.* at pp14-16).

The key issue is whether there is medical causation for the occupational disease in Claimant's neck and is caused by his employment. For example, Claimant is perfectly able to testify to his degree of pain and to those medical conditions usually within the knowledge of a lay person. Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo.App. W.D. 1991). For matters that are beyond the common understanding of people, expert testimony is necessary. As noted by the Silman Court.:

However, an injury may be of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed. *Id.* Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor - in the absence of expert opinion - is the finding of causation within the competency of the administrative tribunal. *Id.* The subject of a herniated disc and its diagnosis, causation, and cure has been held to be "the realm of highly scientific techniques where expert opinion is essential." Downs v. A.C.F. Industries, Inc., 460 S.W.2d 293, 296 (Mo.App. 1970). Proper opinion testimony as to causal connection is competent and can constitute substantial evidence. Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo.App.1990). Silman v. William Montgomery & Assoc., 891 S.W.2d 173, 175-176 (Mo.App. E.D. 1995).

In the present case, Claimant began to complain about his neck discomfort in December 2001. (Emp./Ins. Exh. 2, p10-18; Cl. Exh. C, pp14-17). Claimant does not complain about any discomfort with his neck when he is seen by Dr. Trecha on September 29, 1999 (p32), January 10, 2000 (p27), February 14, 2000 (p27), March 13, 2000 (p26), April 19, 2000 (p25), June 7, 2000 (p23), August 14, 2000 (p22), October 16, 2000 (p21), November 27, 2000 (p20), January 5, 2001 (p19), February 21, 2001 (p18), October 17, 2001 (p17), and November 12, 2001 (p16). (Cl. Exh. C, see parenthetical after each date.)

Between the date of May 18, 2001, and November 12, 2001, I can find no record of any complaints concerning cervical neck pain or any other symptoms besides those associated with lumbar surgery.

There is not a mention of neck pain in the original hearing for his lumbar injury. (Cl. Exh. O). There is no mention that his neck may be work related in the various tests to determine the cause of the pain. (Cl. Exh. E, pp10-12; See also: Cl. Exh. D, pp1-10). There is no comment in the records concerning the neck pain at the time of the lumbar surgery (Cl. Exh. E, pp15-18 and *id.* at p10). When asked why Claimant did not complain about his neck when he was treated for the lumbar pain, Claimant said the lumbar pain masked the cervical pain. (SIF Exh. 2, pp45-46). It does not make sense that Claimant alleges that the cervical pain more or less existed simultaneously to his lumbar injury and yet does not complain of it until months or years later. Although I do not consider what a physician writes in his notes to be authoritative, there is little else besides Dr. Cohen's deposition testimony that links Claimant's neck malady to his employment.

In his testimony, Dr. Cohen notes that both the hernia and cervical neck injury are work related. (Cl. Exh. A).

- Q. And so while you've addressed this essentially, I just want to ask you more specifically, the type of work that he described, did he describe his job to you; right?
- A. Yes.
- Q. That's contained in your report?
- A. Yes.
- Q. Is that the type of work that could cause or contribute to cause the low back, cervical and shoulder conditions that you diagnosed?
- A. Yes, that's correct.
- Q. Okay. Do you have an opinion as to whether any of these conditions that you have diagnosed preexisted or were unrelated to his employment with Powell Distributing?
- A. I believe that he had some age related degenerative changes had he had x-rays taken of his neck or low back, but were clinically asymptomatic. And those are the changes that are commonly seen in x-rays of humans between 35 and 45. They may or may not be symptomatic, depending on the patient's history. If they have no complaints and they are seen on x-rays, then they would simply be age-related. If the x-rays were obtained and one would see some degenerative changes but the patient has no history. Those are the common types of findings that are seen on x-rays, but really don't have any clinical significance if the patient is asymptomatic.

(*Id.* at 16-17).

The injury /disease to the lumbar back is well documented and connected to Claimant's employment with Powell. The hernia and cervical neck disease are not. The injury is not recognized until after leaving Powell, and then only in retrospect. There is no doubt that Claimant had surgery and has a cervical disease that still causes him great pain, but I cannot say with even reasonable certainty that it was work related.

Dr. Cohen's testimony is not credible with regard to the cervical injury. There is nothing in the medical records of Drs. Miles, Vogt, or Trecha that indicate that there is the slightest of connection between the cervical neck injury and Claimant's employment. To connect the cervical condition to his employment is a leap of faith dependant on Claimant's testimony years after his symptoms allegedly appeared and Dr. Cohen's belief that there is a connection.

CONCLUSION

Since the hernia and cervical spine injury/disease was not caused by his employment with Powell, Claimant is not permanently totally disabled under chapter 287. Neither the Employer/Insurer or SIF are liable for permanent total disability payment, past TTD payment, or past or future medical payments or treatment.

Date: _____

Made by: _____

HENRY T. HERSCHEL

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Nasreen Esmail

General Counsel

Division of Workers' Compensation

The hearing for the medical fee dispute listed as 99-138008 was set for the same day. No one appeared, so the medical fee dispute will be placed on the dismissal docket.

The previous Temporary Award is attached hereto and incorporated herein by reference and made a part of this award as if fully set out herein.