

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

Injury No.: 07-098360

Employee: Randy Doran

Employer: The Curators of the University of Missouri

Insurer: Self-insured c/o Corporate Claims Management, Inc.

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having heard the oral arguments of the parties, reviewed their briefs, 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 20, 2010. The award and decision of Administrative Law Judge Henry T. Herschel is attached hereto and incorporated by reference. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with what is set forth below.

INTRODUCTION

Administrative Law Judge Herschel's decision held that employee had not met his burden of proving the requisite causal connection between his work and the shoulder injury and depression from which he suffered. The decision, thus, denied employee's request for benefits. Employee filed an Application for Review with the Commission.

DISCUSSION

We first note that the administrative law judge made certain errors in the Findings of Fact. On page 5, the findings suggest that employee had gone through a divorce around 2004. The record indicates employee's last divorce prior to the hearing occurred in approximately 1991. Also, on pages 6 and 7, the findings indicate that employee stopped using the slide hammer at work in 2004. But the record reveals he last actually used this tool in 2006.

These factual changes, however, did not significantly impact our opinion in this matter. Employee's divorce was just one of a great number of non-work-related factors that may have led to his depression. It was not a factor upon which any opinion substantially relied. With respect to the error regarding the slide hammer, neither of the experts upon whom the administrative law judge relied used this erroneous fact. At the time they made their evaluations, it seems to have been assumed that employee had continued to use the slide hammer throughout the term of his employment. The fact that employer discontinued use of the slide hammer in 2006

Employee: Randy Doran

- 2 -

was not learned until employee testified during the hearing. If anything, this change in fact cuts against employee's experts and position.

Our opinion in this matter turns on our assessment of the credibility of the parties' medical experts. Drs. Volarich and Haupt provided medical opinions concerning employee's rotator cuff injury. Dr. Volarich is board certified regarding osteopathic and nuclear medicine, while Dr. Haupt is board certified concerning orthopedic surgery. We are persuaded that Dr. Haupt's certification is more relevant to the type of shoulder injury from which employee suffered.

Furthermore, Dr. Volarich was initially unaware (because employee did not tell him) that employee had not used the slide hammer at work since 2006. He was also misled as to the percentage of time that employee was using this apparatus at work. Dr. Volarich admitted that such changes in or withholding of facts could affect his opinion.

Lastly, it is apparent that Dr. Haupt had a more detailed and accurate knowledge of the actual workings of the slide hammer and the bodily movements involved in the use of this tool, as well as the amount of time employee was actually using the slide hammer. Dr. Haupt provided very specific reasons why he felt it unlikely that employee's use of the slide hammer caused the rotator cuff tear.

For the same reasons that the administrative law judge expressed, we also found the opinion of Dr. Wolfgram more persuasive than that of Dr. Markway. Dr. Markway expressed confusion when asked to explain certain aspects of how she formulated her ratings. Dr. Wolfgram is a physician and psychiatrist, whereas Dr. Markway is not a physician. And Dr. Markway relied on Dr. Volarich's opinion, whose opinion we have found to be less reliable. Even Dr. Markway admitted that employee had a great number of non-work-related factors in his life that would have built up to cause depression.

The ultimate determination of credibility of witnesses rests with the Commission; however, the Commission should take into consideration the credibility determinations made by an administrative law judge. When reviewing an administrative law judge's award, the Commission is not bound to yield to his or her findings including those relating to credibility and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865, 871 (Mo. App. W.D. 2004).

As indicated above, though, we agree with the administrative law judge's determination that the evidence from Drs. Haupt and Wolfgram should be given greater weight (than the evidence from Drs. Volarich and Markway) because their information most logically interprets the facts connected with this matter.

Employee: Randy Doran

- 3 -

CONCLUSION

Based on the most persuasive evidence and except as set forth above, we affirm the award and decision of the administrative law judge dated April 20, 2010, and award no compensation in the above-captioned case.

Given at Jefferson City, State of Missouri, this 3rd day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Randy Doran

Injury No. 07-098360

Dependents: N/A

Employer: The Curators of the University of Missouri

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: N/A

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

Third-Party

Administrator: Corporate Claims Management Inc.

Hearing Date: January 28, 2010

Checked by: HTH/sb

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: February 2007.
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? No.
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? No.
10. Was employer insured by above insurer? No.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: The claimant allegedly suffered a shoulder injury from using a slide hammer and had psychological damage due to workplace taunts.
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: Left shoulder/psychological.
14. Nature and extent of any permanent disability: No.
15. Compensation paid to-date for temporary disability: - 0 -.
16. Value necessary medical aid paid to date by employer/insurer? - 0 -.

Employee: Randy Doran

Injury No. 07-098360

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Randy Doran

Injury No. 07-098360

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: The Curators of the University of Missouri

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

Additional Party: N/A

Insurer: Corporate Claims Management Inc.

Checked by: HTH/sb

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge on January 28, 2010. The Division has jurisdiction to hear this case pursuant to §287.110 RSMo 2000. The parties provided briefs on the relevant issues on approximately February 28, 2010.

STIPULATIONS

1. The employee and the employer were operating under the provisions of the Workers' Compensation Law on or about February 2007;
2. The employer's liability was self-insured by Curators of University of Missouri;
3. The employee's average weekly wage was \$833.08;
4. The rate of compensation for temporary total disability was \$555.39 and \$376.55 for permanent partial disability; and
6. The employer has paid - 0 - in TTD and - 0 - in medical benefits to date.

DISPUTED ISSUES

1. The cause of Claimant's alleged permanent total/permanent partial disability.

EVIDENCE

EMPLOYEE'S EXHIBITS:

- A IME by Dr. Volarich, dated 4/15/08
- B IME by Dr. Volarich, dated 9/11/08
- C Deposition of Dr. Volarich, dated 1/15/10
- D IME by Dr. Markway, dated 6/10/08 and 6/19/08
- E CV of Dr. Markway
- F Deposition of Dr. Markway, dated 5/7/09
- G St. Elizabeth's Hospital records
- H University of Missouri records
- I Boone Hospital records
- J Dr. Weston records
- K Dr. Meyer records
- L Columbia Orthopedic Group records
- M Dr. Jackson report
- N Robert Frazier records
- O LW Lucas records
- P The Work Center records
- Q Peak Performance records
- R Medical Bills

EMPLOYER/INSURER'S EXHIBITS:

- 1 Report by Dr. Wolfgram, dated 10/30/08
- 2 Report by Dr. Wolfgram, dated 10/19/09
- 3 Report by Dr. Haupt, dated 4/30/09
- 4 Columbia Family Medical Group records
- 5 Deposition of Randy Doran, dated 2/14/08
- 6 Deposition of Randy Doran, dated 8/6/09
- 7 Physical Medicine & Rehab records
- 8 Boone Hospital Center records
- 9 Journal from Supervisor
- 10 Employee Agreement, signed 9/22/04

FINDINGS OF FACTS

Mr. Randy Doran (Claimant) is a 54-year-old man who was employed as a small engine mechanic at the University of Missouri since 2000. He completed the 6th grade and obtained a GED while he was confined in prison.

Claimant alleges that he injured his right shoulder in a series of work-related incidents while he was using a “slide hammer” to break a tire off its rim. To operate a slide hammer, Claimant would place a smaller pipe inside the pipe of the hammer and repeatedly strike the bead connecting the tire or tire rim. The end of the hammer pipe is flat, so that when the smaller, inside pipe strikes the flattened portion of the outside pipe, it breaks the bead of the tire with the rim and the tire is released. Claimant testified that he used the slide hammer approximately 10 times per day between 2000 and 2005. In the summer of 2006, Claimant used his employer’s credit card and purchased a machine that would remove a tire from the rim without the exertion of the slide hammer. The purchase was not authorized and claimant was disciplined; however, the Employer/Insurer kept the tire machine. Claimant alleges that his injury to his shoulder occurred prior to 2006, but he filed a report of injury in February 2007.

Claimant went to Dr. D. Weston in July 2007. Claimant complained of bilateral and upper back pain. This was later diagnosed by Dr. D. Meyer in August 2007 as rotator cuff tear. (Cl. Exh. A, p3.) Dr. J. Havey surgically repaired Claimant’s right shoulder in October 2007. (Cl. Exh. L, p3.)

Claimant also suffered a back injury in 2006 while he was moving a desk. Claimant did not have surgery but was treated with an injection and was placed on medical leave. (*Id.* at p5; Cl. Exh. H, pp9-10.) Claimant continued to have symptoms from his lower back injury. (Cl. Exh. B.)

Claimant lost the use of his right eye in approximately 1979. (*Id.* at p5.) In 2004, Claimant’s coworker mocked and verbally ridiculed Claimant because of his eye loss. Although his supervisor said the friction was mutual between Claimant and his antagonist, Claimant checked himself into Boone County Mental Health psychiatry after preparing a list of persons, including the mocker, he wanted to kill. (Cl. Exh. I, p3.) Claimant seemed to have many emotional trials during this portion of his life, including a divorce, death of his sister, and finding out that a brother had stolen his financial identity, which forced Claimant into bankruptcy. (Cl. Exh. O, pp1-3.) Claimant was treated for depression with the medication Lexipro and seemed to benefit from the medication. (*Id.* at p3.)

Claimant had occasional back pain in 1984. In 1990, Claimant fell off a ladder and fractured his heel and ankle. He injured his ribs in 2000.

Through most of Claimant’s later adult life, he suffered and endured arthritis in most of his joints in his body. (Cl. Exh. M.)

Keith Scott, Claimant’s supervisor at work, testified that Claimant worked for him five to seven years. The supervisor kept a detailed log of the attendance of employees and events for each employee. His records on Claimant indicated that Claimant missed quite a few days due to treatment of his arthritis and his 2006 back injury, but showed no treatment for his 2006 shoulder injury. The supervisor testified that Claimant did all the “tire work” and it was 10 to 15% of his

work duties. The supervisor testified that he was aware of the harassment of Claimant by a coworker but that he felt that it was mutual between the employees.

Dr. D. Volarich testified through deposition and noted that Claimant has a right shoulder rotator cuff injury due to using the slide hammer. (Cl. Exh. C, p13.) Dr. Volarich testified that Claimant had pre-existing injuries, including chronic lumbar syndrome secondary degenerative disc disease, joint disease at L4-5 and L5-S1, thoracic spine degenerative disease, blindness in the right eye, fractures of his heel and ankle, and chronic diffuse osteoarthritis involving spine and upper and lower extremities. (*Id.* at p13; depo. exh. 2, pp4-5.) Dr. Volarich rated Claimant as having 10% permanent partial disability (PPD) body as a whole (BAW) related to the cervical spine, 10% PPD at thoracic spine due to degenerative disc disease, 20% PPD of BAW at lumbosacral spine due to degenerative disc disease, 100% PPD of right eye due to complete blindness, 25% PPD of lower left ankle concerning a fracture and a lateral compartment tear of the anterior ligament, and a 20% PPD of BAW due to arthritis. (*Id.* of depo. exh. 2; Cl. Exh. C.)

Dr. B. Markway, Ph.D. testified for Claimant via deposition. She testified that she rated all of Claimant's psychological difficulties as 50% of the body as a whole as of February 2007. (Cl. Exh. F, p10.)

Claimant had rotator cuff surgery in September 2007. (Cl. Exh. L, p6.) The last time he used the slide hammer was in 2004.

Dr. E. Wolfgram testified for the Employer/Insurer via deposition. (Emp./Ins. Exh. 1.) After an examination of Claimant, Dr. Wolfgram determined that there was no psychiatric disability from the primary injury (rotator cuff tear). (Emp./Ins. Exh. I, p13.) Dr. Wolfgram found Claimant to be extraordinarily resourceful and tough to survive his many lifetime setbacks. (Emp./Ins. Exh. 2, pp29-32.)

Dr. H. Haupt testified for the Employer/Insurer via a report. (Emp./Ins. Exh. 3.) He testified that the operation of the slide hammer was not normally considered the type of motion that would put stress on the rotator cuff. (*Id.* at p3.) He opined that the slide hammer may have been the cause of Claimant's shoulder injury, but that it was "unlikely." (*Id.* at p3.)

CONCLUSIONS OF LAW

It is the claimant's burden to prove all the issues that are alleged in the hearing under Chapter 287. As noted by the Court in Cook:

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 by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. Banc 2003).

Claimant is asking for a determination that he is permanently totally disabled through his injury to his shoulder and his various pre-existing injuries. Claimant's list of pre-existing injuries are numerous and serious.

Claimant is alleging that he is eligible for permanent total disability from the Employer/Insurer and the Second Injury Fund (SIF). To make a determination for Employer/Insurer and SIF liability, first the determination of the disability from the last injury or injuries needs to be made. Karoutzos v. Treasurer of State of Missouri, 55 S.W.3d 493, 498 (Mo.App.W.D. 2001). Further, the injury has to be caused by a work-related prevailing cause. Section 287.020.3(1) RSMo. The proof of causation must be made by "substantial" evidence. Substantial evidence is, in part, provided by medical experts. Elliott v. Kansas City Sch. Dist., 71 S.W. 3d 652, 657 (Mo.App.W.D. 2002).

Claimant used the slide hammer 10% to 15% of the time as part of his duties at the University of Missouri. He testified that it was the slide hammer used in 2004 that caused his shoulder injury. (Emp./Ins. Exh. 5, pp29-30.) Claimant does not complain about the pain to any doctor until 2007. (Emp./Ins. Exh. K, p1.) In fact, when Dr. Meyer first began to examine Claimant, he thought the pain could be from a neck injury. (*Id.* at p3.) Claimant did not tell this doctor that his pain is in the shoulder because, I believe, Claimant did not know where this pain originates. When Claimant decides that his injury is caused by the "slide hammer," it is three years after he bought a "tire machine" to alleviate his slide hammer duties. (Cl. Exh. L, p1.)

Dr. Haupt discounts that the slide hammer impact was the cause of Claimant's rotator cuff injury:

He references the use of a slide hammer as the cause for his complaint. The mechanism described by the patient of slamming down on the slide to release the tire from the axle is not one that I would normally consider that would be associated with a rotator cuff tear. The forward extension of the elbow and the arm downward to impact the slide would not be putting much eccentric or even concentric stress on the rotator cuff. If the pull had been more upward in an eccentric fashion in the shoulder, this would have applied more energy and stress across the rotator cuff and would be a more likely mechanism to result in a tear. It is not to say that this mechanism in some way couldn't have resulted in a tear of the rotator cuff. I just think it is unlikely. Therefore, I would be unable to define the activity described

by the patient of using the slide hammer in his job activities as the prevailing factor resulting in a tear of the rotator cuff.
Emphasis added. (Emp./Ins. Exh. 3, p3.)

Frankly, I discount Dr. Volarich's and Dr. Markway's opinion of the causal link between the slide hammer and Claimant's shoulder and psychological injury. Although there is a note of minor shoulder pain in 2004, there are no other complaints until 2007. Dr. Volarich admits that a rotator cuff is an injury that can exist without the patient even knowing about it. I just cannot believe that Claimant did not complain about this injury sooner. Nor do I believe that his depression is related to this injury. Dr. Markway is unconvincing when she "grafts" depression onto Dr. Volarich's finding. It seemed that she was not sure in her assessment of his physical disorder or realized she was talking about the 2006 back or 2007 shoulder injury. (Emp./Ins. Exh. F, pp20-22.)

She equivocates concerning her evaluation of claimant:

- Q. Okay. Now, you also gave a disability assessment to Mr. Doran of 35 percent which is related to his work injury, which I think you say is up through 2007; would that be correct?
- A. Correct.
- Q. Okay. Would that include the incident in August of 2006 or is that isolated from February of 2007?
- A. I didn't know about the August 2006 (sic) at the time I did the evaluation. I don't think it would change it a whole lot one way or another.
- Q. Okay. But the assessment would be a combination of both of those two dates of injury, one to the right shoulder and one to the lumbar back, and both of them, I believe, have psyche?
- A. Yeah. Again, I didn't have that when I did it, but --
- Q. Well, what is it (sic) your understanding that happened in August of 2006; do you have any idea?
- A. I just got this today and that he had a thoracic strain.
Id. at pp22-23.

I do not believe Dr. Markway's assessment. I do believe Dr. Wolfgram's assessment of Claimant.

- Q. Do you -- Would it be your opinion that as a result of either the August '06 or February 2000 (sic) injuries that have been alleged, do you have any opinion as to whether or not either one of those has caused any psychiatric condition whatsoever?

A. They -- I -- That's actually addressed on Page 12 of my report where I indicate that he has a pain disorder associated with both psychological factors and a general medical condition, and I emphasize here that these are -- are temporary, that they're mostly a product of his inactivity and that there's -- that he's adjusted very well in the past to all kinds of pains and arthritides and he could be expected to do that now and that he can be rehabilitated from the pain disorder if we can get a clean shot at rehabilitating him and once medical-legal matters are -- are resolved.

I see him as -- as -- that being a very temporary outgrowth of where we are with the entire case at this time; that it's a temporary and treatable disorder. And then -- then also a diagnosis of dysthymic disorder acute and that this -- this cannot be addressed while there's still litigation involved but that he, of course, feels sort of down because he's sedentary, he doesn't have the work to go to, he's lost his purpose and function in life, and that, however, is temporary and I've indicated that and have discussed with him, although clearly indicating that I was not a treating physician, but this gentleman is -- would -- would respond very well to rehabilitation because he's tired of the way things are at the present time.

Emp./Ins. Exh. 2, pp29-31.

I do not find that Claimant's shoulder injury or depression are work related. I believe that the evidence of injury from the slide hammer has to be more pronounced than was evidenced in Claimant's exhibits. As noted by the legislature in Section 287.020.2(5) RSMo:

The term "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom.

This is not to say that an appliance such as a slide hammer could never be the source of a work-place injury, but that in this case is it not the cause for Claimant's rotator cuff injury.

Further, Claimant's depression is not the result of the pain that was endured from his shoulder injury. The records demonstrate that Claimant has a number of non-work-related reasons to have depression, and as Dr. Wolfram noted, Claimant was excited as to his prospects of obtaining rehabilitation. (Emp./Ins. Exh. 2, pp30-32.) Claimant does not qualify under the PPD criteria of Chapter 287 for either the Employer/Insurer or Second Injury Fund.

Employee: Randy Doran

Injury No. 07-098360

CONCLUSION

I do not find that Claimant sustained his burden of proof that his shoulder injury is work related nor do I find that his depression was related to his pain of this injury for either the Employer/Insurer or Second Injury Fund.

Date: _____

Made by: _____

Henry T. Herschel
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation