

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

Injury No. 99-087591

Employee: Tony Dowling
Employer: K & R Electric, Inc.
Insurer: Silvey Companies

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 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 July 7, 2015, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued July 7, 2015, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of November 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Tony Dowling

Injury No. 99-087591

Dependents: Not Applicable

Employer: K & R Electric Inc.

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

Additional Party: None

Insurer: Silvey Companies

Hearing Date: May 20, 2015

Checked by: VRM/ps

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 May 1, 1999.
5. State location where accident occurred or occupational disease was contracted: Alleged Greene 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? There was only an exposure and not an occupational disease.
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 was exposed to asbestos while working as an electrician.
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: None.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? Amount unavailable.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$540.00.
19. Weekly compensation rate: \$360.18 (PTD & TTD)/ \$294.73 (PPD).
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: Not applicable.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tony Dowling

Injury No. 99-087591

Dependents: Not Applicable

Employer: K & R Electric Inc.

Additional Party: None

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Before the
**DIVISION OF WORKERS'
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Department of Labor and Industrial
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INTRODUCTION

The undersigned Administrative Law Judge conducted a final hearing in this case to determine the liability of Employer and its Insurer. Attorney Patrick Platter represented Tony Dowling. Attorney Brandon Potter appeared on behalf of K & R Electric, Inc., and the Silvey Companies. There is no Second Injury Fund claim. Because the Administrative Law Judge finds no injury by occupational disease, and no liability, this decision is designated as a Final Award.

STIPULATIONS

The parties stipulated to the following facts:

1. On May 1, 1999, Tony Dowling (Claimant) was employed by K & R Electric (Employer). Both Claimant and Employer were subject to the Missouri Workers' Compensation Law.
2. The Silvey Companies (Insurer) fully insured Employer's liability under the Missouri Workers' Compensation Law at the time of the alleged injury.
3. Claimant was exposed to asbestos while working for Employer in the "Frisco Building" located in Springfield, Missouri. The last date of exposure was May 1, 1999. Venue and Jurisdiction is proper in Greene County. There is no dispute as to notice or timeliness of the claim.
5. The parties claim no penalties.
6. Claimant's average weekly wage was \$540.00, yielding a compensation rate of \$360.18 for temporary total and permanent total disability, and \$294.73 for permanent partial disability.
7. The Employer and Insurer paid no temporary total disability. They paid medical expenses for one or more x-rays, but the cost was not available.
8. Attorney Platter seeks an attorney's fee of 25 percent of all amounts in dispute and asserts a lien under § 287.260 RSMo.

ISSUES

The following issues are the only ones to be determined:

1. Did Claimant sustain an injury by occupational disease?
2. Has Claimant's condition reached maximum medical improvement and, if so, what is the nature and extent of any disability?
3. Is Claimant entitled to future medical treatment?

EXHIBITS

The following exhibits were offered and admitted into evidence:

1. Report of Dr. Norbert Belz;
2. Curriculum vitae of Dr. Belz;
3. Questionnaire and diagnostic reports of Cox Environmental & Occupational Medicine.

FINDINGS OF FACT

There was no live testimony as the parties do not dispute the essential facts which are gleaned from the exhibits. All exhibits were admitted without objection. I accept as true the recitation of the facts in Dr. Belz's report. The essential facts are briefly summarized as follows:

From 1988 to 1999, Claimant worked as an electrician in the "Frisco Building" located on East Chestnut Expressway in Springfield, Missouri. Claimant performed most of his work in a crawl space above some false ceiling tiles called the plenum. There was encapsulated asbestos in the plenum; however, there also were areas of free asbestos lying in powder form around conduit, piping and air conditioning ducts. Claimant would disturb the powder in the plenum where he worked. He also worked in other parts of the building which may have had asbestos. The parties agree Claimant was exposed to asbestos while working in the Frisco Building.

From 1994 to 1998, Claimant wore paper masks, and occasionally wore double rubber band masks. He also wore a beard and mustache. He never used a NIOSH approved respirator. He eventually obtained a respirator through a company called Sun Belt Environmental. He received no instruction on its use.

Claimant became concerned about his exposure to asbestos after reading an environmental impact study prepared by Geo Tech of Kansas City in January 1999. Although he made complaints, Claimant believes his employer was unresponsive in addressing his health concerns. This coincided with Claimant's father breaking his ankle, making it difficult for his father to operate his guttering business. Consequently, Claimant quit his job in May 1999 to begin work with his father in the guttering business. When his father's health improved, Claimant drew unemployment.

Dr. Norbert Belz examined Claimant May 14, 2001, about two years after Claimant quit working for Employer. Dr. Belz's examination of Claimant included chest x-rays and a pulmonary function study. The chest x-rays were normal. The pulmonary function study indicated a normal diffusing capacity and only a mild obstructive ventilatory defect with no significant bronchodilator response. As Dr. Belz reported, Claimant's pack-a-day smoking habit was responsible for a finding of very minimal chronic

obstructive disease. Dr. Belz was emphatic Claimant did not have any signs or symptoms of an occupational disease:

CONCLUSION:

No evidence of asbestosis in the medical records. No evidence of lung cancer in the medical records and, of course, no evidence of mesothelioma in the medical records.

No radiographic findings of asbestos exposure. No clinical findings of asbestosis, lung cancer or mesothelioma.

Thankfully at this juncture there exists no occupational disease. The mild chronic obstructive pulmonary disease present on spirometry is smoking induced. The occupational exposures to asbestos will not cause, aggravate, accelerate or precipitate the pulmonary function study findings

(Exhibit 1, p. 16). Dr. Belz recommended that Claimant quit smoking, refrain from future asbestos exposure and monitor his health through a medical surveillance program. Dr. Belz did not indicate that Claimant was disabled.

CONCLUSIONS OF LAW

Claimant asserts he has a compensable claim at this time, necessitating that Employer and Insurer pay for the ongoing medical monitoring recommended by Dr. Belz. He relies on *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 763 (Mo. App. W.D. 1997), in which the Court of Appeals held that an occupational disease is compensable when the employee has suffered a loss of earning ability due to an occupational disease. Claimant contends he lost earning capacity with K & R Electric when he quit work to avoid additional exposure to asbestos, as recommended by Dr. Belz. As noted above, however, Dr. Belz's recommendation came two years after Claimant quit work for Employer.

In further support of his position, Claimant notes the applicable version of § 287.800 RSMo, in effect in 1999. The statute requires that the Workers' Compensation Law be "liberally construed" and doubts are to be resolved in favor of the injured employee. *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 557 (Mo. App. E.D. 2006). Even though this statutory provision has since been amended to require strict statutory construction of the Workers' Compensation Law, a substantive change in the law does not apply retroactively. *Lawson v. Ford Motor Company*, 217 S.W.3d 345, 348-350 (Mo. App. E.D. 2007).

The definition of an occupational disease, set forth in § 287.067.1 and 2 RSMo 1994, reads in applicable part as follows:

1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases flow as an incident of an occupational disease as defined in this section. The disease needs not to have been foreseen or expected, but after its contraction, it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

2. An occupational disease is compensable if it is clearly work related and meets the requirement of an injury which is compensable [as defined as a substantial factor]. An occupational disease is not compensable merely because work was a triggering or precipitating factor.

Even with the most liberal construction of the above statute, the facts simply do not support a claim for compensation. Dr. Belz clearly stated that while Claimant suffers some mild chronic obstructive pulmonary disease related to Claimant's smoking, Claimant has no occupational disease.

Claimant cites to *Cunningham v. Research Medical Center*, 108 S.W. 3d 177 (Mo. App. W.D. 2003), which addressed the issue of whether an employee was entitled to an annual diagnostic chest x-ray due to tuberculosis exposure. The Labor and Industrial Relations Commission ruled that an annual chest x-ray was necessary for the remainder of Ms. Cunningham's lifetime to monitor her condition for signs of an active infection. The Court of Appeals affirmed, noting that Claimant had a "substantially increased likelihood for future medical treatment than the general population because of her work exposure." 108 S.W.3d at 180. Claimant contends he is entitled to have Employer and Insurer pay for the medical surveillance program contemplated by Dr. Belz, just as the ongoing monitoring was ordered in *Cunningham*.

In *Cunningham v. Research Medical Center*, however, the employee had tested positive for tuberculosis antibodies through a skin test. 108 S.W.3d at 178. Despite prophylactic treatment, there remained a possibility that the bacteria were not completely eliminated, and Ms. Cunningham still could develop active tuberculosis. Unlike Ms. Cunningham who had a demonstrable positive skin test, Claimant's exposure to asbestos in the instant case has caused no pathology. Objective radiographic tests do not even substantiate exposure to asbestos. Clinical examination reveals no asbestos related symptoms. "Exposure to disease-producing conditions is not synonymous with contraction of the disease." *Copeland v. Associated Wholesale Grocers*, 207 S.W.3d 189, 193 (Mo. App. S.D. 2006), quoting *Tunstill v. Eagle Sheet Metal Works*, 870 S.W.2d 264, 267 (Mo. App. S.D.1994). Likewise, "a stipulation to a date of exposure is not a stipulation to a date of disability." *Garrone v. Treasurer*, 157 S.W.3d 237, 244 (Mo. App. E.D. 2004). See also, *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 456 (Mo. App. S.D. 2010) (holding that the date of injury for purposes of applying a workers' compensation rate cap was the date the injury becomes compensable, which is the date on which the claimant becomes disabled). Here, there is no evidence that Claimant is disabled from an occupational disease or otherwise.

Claimant also asserts that a determination that his claim is premature and he does not yet have an occupational disease will cause confusion as to when a claim must be filed. But, it long has been the law that the statute of limitations for occupational diseases does not begin to run "until it becomes reasonably discoverable and apparent that a compensable injury has been sustained..."§ 287.063.3 RSMo 1994. "[A]nd usually this is when some degree of disability results, which can be the subject of compensation under the Act." *Staples v. A. P. Green Fire Brick Co.*, 307 S.W.2d 457, 461 (Mo. banc 1957). In this case, Claimant has no occupational disease, no symptoms of a disease related to asbestos exposure, and no degree of disability as a result of asbestos exposure. Claimant is not entitled to ongoing medical surveillance at Employer/Insurer's expense. The claim is not compensable and is denied.

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation