

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

Injury No.: 98-123959

Employee: James Espie
Employer: Virgil Schmidt
Insurer: Safeco/American States Insurance Company
Date of Accident: September 10, 1998
Place and County of Accident: Grover, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge 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 March 17, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued March 17, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of March 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

Secretary

DISSENTING OPINION

I have reviewed and given consideration to 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 should be reversed. I find employee has established that he sustained a compensable accident.

Prior to discussing the merits of this claim, I must comment on the administrative law judge's markings and comments throughout the transcript, which demonstrate his bias in the claim. Both of the original depositions of

Dr. Raymond Cohen, which was offered by employee, and Dr. Richard Covert, which was offered by employer/insurer, contain multiple scribbles, inappropriate comments, and certain pointed questions are circled. While this Commission is capable of ignoring the administrative law judge's marks and comments when considering the evidence to render a fair decision, it certainly demonstrates his bias in this claim. Marking up an official transcript is completely inappropriate, and should this case be appealed to the Missouri Court of Appeals or the Missouri Supreme Court, I want the appellate judges to know that the markings were not done by any member of this Commission. I certainly did not take into account the personal opinions of the administrative law judge. My decision is based on the facts of the case in accord with the law and not the administrative law judge's extraneous and arbitrary markings of the transcript.

In addition, I must comment on the administrative law judge's cross-examination of employee. An administrative law judge is entitled to ask questions, but when those questions cross the line and the administrative law judge appears to have undertaken an advocacy role, that administrative law judge should recuse himself from hearing the case. The administrative law judge crossed the line in this case.

A judge may ask questions of a witness in order to clarify the testimony or to attempt to find the truth. *State v. Farmer*, 978 S.W.2d 68, 69 (Mo. App. 1998). However, the authority to ask questions is limited. A judge may not make comments that indicate his opinion regarding the merits of the claim. *Id.* The administrative law judge interrupted employee's attorney on numerous occasions to ask questions, then interrupted some of employee's answers to those questions.

In *Jones v. State Department of Public Health and Welfare*, 354 S.W.2d 37 (Mo. App. 1962), the court held that:

A referee is a quasi-judicial officer. It is elementary that he must observe the strictest impartiality and show no favor to either of the parties by his conduct, demeanor or statements.

Id., at 40.

Although the administrative law judge's conduct in this claim is not as egregious as demonstrated in the *Jones* case, his abruptness with employee during employee's testimony, coupled with the administrative law judge's extraneous markings of the transcript, show bias and constitute expressions of the administrative law judge's opinion concerning the merits of the case. The statements give the appearance of impropriety and tended to intimidate employee. I do not find that employee was not afforded a fair or impartial trial nor received a fair and impartial award and decision. Fortunately, there is sufficient evidence to correct the administrative law judge's error and his personal reflections on the claim are ignored.

James Espie, employee, worked as a cabinet maker/carpenter. On September 10, 1998, employee was assembling wall cabinets. He had placed six to seven cabinets on the floor to assemble them all at once. He bent over at the waist level, with his legs and arms in a straight position. He was holding a staple gun in his left hand. He bent at the waist in an awkward and twisted position to deploy the staple gun with his left hand. The staple gun required some force to pull the trigger and bump the cabinets that he was trying to staple. The gun weighed approximately five pounds. When he pulled the trigger of the gun, he felt something give around the tenth rib. He thought he had pulled a muscle. He took a break to stretch and rest. He tried to continue working, but the pain increased.

Employee reported the accident to employer's owner's wife. She asked him if he needed a ride to the doctor. He declined and drove himself to his family doctor because he still believed that he had simply pulled a muscle. The trip to his doctor from employer's premises was approximately 45 minutes. By the time he reached his doctor, he was having chest pains and thought he was having a heart attack. His family doctor performed an EKG, gave employee nitroglycerine, and called an ambulance. He was transported to Des Peres Hospital where he remained hospitalized for three days. While hospitalized, he was diagnosed with a pneumothorax on the left side and a chest tube was inserted to reinflate the lung. The intubation tube was inserted through his armpit. He was off work for two weeks. Employee went to work for a different employer as a full-time cabinet maker.

Employee suffered a second pneumothorax of the left lung two years later in September 2000. He again required

intubation to reinflate the lung. He was intubated approximately three and one-half inches below the collar bone. In 2001, employee began treating with Dr. Tabakian for pain management.

Employee offered the deposition testimony of Dr. Cohen. He examined employee on July 25, 2003. Dr. Cohen stated that employee had a small bleb, which is a weak spot, in the left lung. Dr. Cohen explained that when employee was in the odd and awkward type of position he was in when he bent over at the waist in a sideways position, the area of the lung space was decreased and pressure in that area was increased. Because of the increased pressure and decreased lung space and due to the fact that he was maintaining his awkward position, the continuing increase in lung pressure caused the bleb to rupture or burst, which caused the lung to leak air out, which in turn,

caused the lung to collapse. Dr. Cohen concluded that employee's work was a substantial factor in causing this condition.

Employer/insurer offered the deposition testimony of Dr. Covert. Dr. Covert examined employee on October 22, 2002. Dr. Covert assumed that the position employee was in when the rupture occurred was limited and not of significance. He concluded that the pneumothorax occurred spontaneously.

I find Dr. Cohen's opinions more credible and in accord with the current workers' compensation laws that the work is a substantial factor in causing the disability.

Dr. Covert testified twice that employee's work was not "the proximate cause" in employee developing the pneumothorax. While that standard has been proposed to be a future standard for compensability, it is not our current standard.

Employee's work duties required him to bend over in an awkward position, maintain that position, and exert force with his left hand to use a staple gun to secure wall cabinets. This is not a position to which the general public is exposed. The pressure that was placed on his left lung while in that position was a substantial factor in causing the pneumothorax. There was nothing to support Dr. Covert's opinion that the left lung simply, and coincidentally, spontaneously collapsed while he was maintaining this position. While employee may have had a preexisting bleb on the lung, there was no indication that employee had experienced any previous problems with his lungs prior to the accident on September 10, 1998. "Disability sustained by the 'aggravation of a preexisting nondisabling condition or disease caused by a work-related accident is compensable even though the accident would not have produced the injury in a person not having the condition.'" *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 90 (Mo. App. 2004) (citations omitted.) Furthermore, "[c]ommon conditions exacerbated by employment requirements are not idiopathic." *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852, 854 (Mo. banc 1999).

Dr. Covert testified, and the administrative law judge found, that employee's condition was idiopathic. The Supreme Court in the *Kasl* case distinguished a true idiopathic and non-compensable condition from those situations where an employee has a preexisting anomaly, but the conditions of that employee's work exacerbates that anomaly into a disability. The employee in *Kasl* managed a residential care facility. Part of her duties involved dispensing medications to the residents of the facility. While waiting for the appointed time to dispense the medications, she sat down in a chair. When the time came to dispense the medications, she stood up and discovered that her foot had fallen asleep. As a result, she fell and broke her ankle. In finding that Ms. Kasl's condition was not idiopathic, the Court concluded that her work requirement of standing up to dispense medications subjected her to her injury. If she had not had to wait to dispense the medications, her foot would not have fallen asleep.

In the facts before us, employee's job requirements put him in an awkward position where the lung space was decreased while at the same time the lung pressure was increased, which in turn caused the bleb to rupture and the lung to collapse. This is not

a situation where employee was simply standing or sitting at work and performing no physical activity when the pneumothorax occurred. If that were the situation, I would agree that his condition is idiopathic. But here we have an unexpected and identifiable work event that produced objective symptoms of an injury. The fact that employee had a second pneumothorax occur two years later does not persuade me that his condition is idiopathic. Employee testified that he was working when the second pneumothorax occurred. It may also be work related.

However, no evidence was produced regarding the circumstances surrounding the second pneumothorax. It is speculative and based on surmise to conclude that because he had a second pneumothorax two years after the first one occurred, the first one has to be idiopathic or caused spontaneously. I find employee has met his burden.

I would award employee two weeks of temporary total disability based upon the time that he was unable to work after the pneumothorax occurred. Additionally, I would award employee 20% permanent partial disability as a result of this accident. Although Dr. Cohen testified that employee sustained 40% permanent partial disability and employee testified as to ongoing complaints, the evidence persuades me that Dr. Cohen's rating is excessive because it appears that many of employee's ongoing complaints are referable to the second pneumothorax. I further find that employee is not entitled to future medical care. He did not begin to treat with Dr. Tabakian for pain management until January 2001, which was after the date of his second pneumothorax. Employee did not receive ongoing medical treatment after he reached maximum medical improvement from the first pneumothorax and the evidence is insufficient to establish his entitlement to future medical care from the pneumothorax that occurred on September 10, 1998.

Because my fellow Commissioners affirm the decision of the administrative law judge, I strenuously, but respectfully, dissent.

John J. Hickey, Member

AWARD

Employee:	James Espie	Injury No.: 98-123959
Dependents:	N/A	Before the
Employer:	Virgil Schmidt	Division of Workers'
Additional Party:	N/A	Compensation
Insurer:	Safeco/ASI	Department of Labor and Industrial
Hearing Date:	January 9, 2004	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED:tr

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: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Espie	Injury No.: 98-123959
Dependents:	N/A	Before the Division of Workers'
Employer:	Virgil Schmidt	Compensation
Additional Party:	N/A	Department of Labor and Industrial Relations of Missouri
Insurer:	Safeco/ASI	Jefferson City, Missouri
		Checked by: JED

This case involves a disputed pneumothorax injury resulting to Claimant with the reported accident date of September 10, 1998. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is not a party to this claim. Claimant and Employer/Insurer are represented by counsel. St. Louis Heart Institute is not represented and appears not, despite notice of hearing.

Issues for Trial

1. accident;
3. whether injury arose "out of" and "in" the course of employment;
4. liability for future medical expenses;
5. nature and extent of permanent partial disability;

FINDINGS OF FACT

Stipulations

1. The applicable compensation rates are \$330.00 for temporary total disability and \$294.73 for permanent partial disability.
2. The parties stipulated that Employer paid no interim benefits.

Dispositive Evidence

3. Claimant was an employee of Employer on the reported accident date.
4. Claimant performed duties as a cabinetmaker for Employer at all times relevant herein.
5. Claimant testified that, working alone, he routinely laid previously machined plywood cabinet pieces out before himself on the floor and undertook a process of assembly in which he joined matching pieces and fastened them with a hand held pneumatic staple gun.
6. Claimant did not describe any of the cabinets or tools as unusually heavy.
7. He reported that while bending over one such assembly on the reported accident date, he felt pain in his lower left rib area.
8. Upon notice to Employer's wife, Claimant drove himself to an urgent medical care facility; during this drive the pain reportedly spread to his left chest area.
9. Initial diagnosis was chest pain/pneumothorax (deflated lung); testing was ordered concurrently to rule out cardiac origin.
10. Claimant was transported to a hospital and diagnosed and treated for pneumothorax. Surgical intubation at the T-3 level

ribs and the lung was inflated. Claimant was off work ten days and returned to work for Employer.

11. Claimant treated continuing complaints of pain in the lower left rib cage (T-11) at the same urgent care center. Still later, in February, he treated with Dr. Ojile. He continued to work during this period.
12. Claimant sustained a second pneumothorax in 2000.
13. Claimant has always worked full-time since the reported injury and currently earns substantially higher wages working for another cabinetmaker.

Opinion Evidence

1. Dr. Cohen testified on behalf of Claimant. Dr. Cohen found both the pneumothorax and subsequent intercostal neuralgia work related. He stated the intercostal neuralgia is from “both the bending over” [performing assembly work] and “entrapment or inflammation of the intercostal nerve on the lefts side.”
2. Dr. Covert assigned a forty percent PPD of the body referable to the chest. He assigned restrictions for Claimant against repetitive bending and any lifting that would increase his chest pressure. Dr. Covert was aware of Claimant’s full-time employment.
3. Dr. Richard Cover testified on behalf of Employer. He is a specialist in occupational medicine and internal medicine. He took a history from and examined Claimant and his medical record. He diagnosed pneumothorax.
4. Dr. Covert did not believe the treatment commenced by Dr. Tabakian, after the second pneumothorax in 2000, was necessitated by the 1998 reported injury.
5. Dr. Covert denied the possibility of strain or tear if muscles between the ribs. Dr. Covert testified that Claimant described no chest trauma and none of the ensuing treatment was for chest trauma.
6. He believed the treatment was typical of a recovery from a spontaneous pneumothorax.
7. Dr. Covert did not believe Claimant’s pneumothorax was work related. He stated it was idiopathic. He also stated that intercostal neuralgia was not a likely outcome of a pneumothorax but that it was a possibility at the site of a surgical intubation, here T-3.

RULINGS OF LAW

This case turns upon the expert testimony of Dr. Cohen and Cr. Covert. Dr. Cohen’s testimony was not fully informed. He was unaware of medical facts that necessarily inhere in any opinion on the work relatedness of Claimant pneumothorax. Nevertheless, he stated the pre-existing bleb on Claimant’s lung was disturbed upon bending over and remaining in that position, presumably during assembly work, which increased pressure in his lungs causing the bleb to rupture and leak air. The record contains no history of a heavy or sustained bent-over lift that supports this theory. On the contrary, Claimant’s testimony and job description appear to support a theory of a job which includes substantial periods of bent over assembly work which tasks would not encompass a great exertion (Valsalva activity).

Separately, Dr. Cohen’s restrictions are tied exclusively to complaints rather than integrating same with clinical findings. The restrictions against repetitive bending are contrary to Claimant’s nearly unbroken employment subsequent to the reported accident despite a history showing the same cabinet work for another employer. While Dr. Cohen’s testimony regarding symptoms from the intubation surgery was definite, his testimony on medical causation was generic and equivocal. The intubation is not disputed; proof of it and its painful sequelae is not a substitute for proof of causation.

Dr. Cohen’s rating is excessive and irreconcilable with Claimant’s unchanges and nearly unbroken employment. He failed to make attribution between the reported injury and the subsequent pneumothorax in 2000. See *Bersett v. National Super Markets, Inc.*, 808 S.W.2d 34, 36 (Mo.App. 1991).

Dr. Covert seemed was more informed on the medical record and his practice and experience gave his testimony greater probative value. Dr. Covert plainly testified that neither the accident history nor the resulting treatment record support a theory of a work related injury. Rather, he consistently identified typical symptoms, routine treatment and spontaneous pneumothorax. He explained the increased pressure created by Valsalva activity. His testimony is bolstered by that of an examining orthopedist who found no work related injury or

condition.

Finally, the record contains no opinion evidence that the 2000 pneumothorax was related to the first incidence of pneumothorax. Similarly, the record does not support a finding of compensability for the current symptomatology and current treatment issues which, of course, post date the second occurrence. The record contains insufficient evidence upon which to impose liability against the Employer.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof. Claim denied.
The other issues are moot.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renee T. Slusher
Director
Division of Workers' Compensation