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

Injury No.: 13-078932

Employee: Aleck Fineman

Employer: Stan Koch & Sons

Insurer: American Interstate Insurance Co.

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 May 29, 2014, and awards no compensation in the above-captioned case.

We deny employer's request for an award of attorney's fees under § 287.560. We will only exercise our discretion to award to any party the costs of a proceeding where the issue is clear and the offense egregious.[1] We do not find employee's prosecution of this claim to be egregious.

The award and decision of Administrative Law Judge Vicky Ruth, issued May 29, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

[1] *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

AWARD

Employee: Aleck Fineman

Dependents: N/A

Employer: Stan Koch & Sons

Additional Party: N/A

Insurer: American Interstate Insurance Co.

Hearing Date: February 27, 2014

Injury No. 13-078932

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

Checked by: VR/cs

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 October 18, 2013.

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

6. Was above employee in the employ of above employer at the time of the alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? N/A.

8. Did accident or occupational disease arise out of and in the course of the employment? No.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant worked for the employer as an over the road truck driver. He is uncertain how the injury occurred, but believes it may have happened when he was pulling the fifth wheel or while he was raising or lowering the landing gear of the trailer.

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: alleged left arm.

14. 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? None.

17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: $871.63.

19. Weekly compensation rate: $581.08 TTD/$446.85 PPD.

20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer: None.

22. Future medical awarded: None.

Employee: Aleck Fineman Injury No. 13-078932

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Aleck Fineman	Injury No. 13-078932
Dependents:	N/A	Before the **DIVISION OF WORKERS' COMPENSATION** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Stan Koch & Sons	
Additional Party:	N/A	
Insurer:	American Interstate Insurance Co.	
Hearing Date:	February 27, 2014	Checked by: VR/cs

On February 27, 2014, Aleck Fineman (the claimant), Stan Koch & Sons (the employer), and American Interstate Insurance Company (the insurer) appeared in Jefferson City, Missouri, for a temporary award hearing. Claimant was represented by attorney William Nacy. The employer/insurer was represented by attorney Ross Bridges. Blair Henry observed on behalf of the employer/insurer. Claimant testified in person at the hearing and by deposition. The parties submitted briefs on or about March 27, 2014, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about October 18, 2013, Aleck Fineman (the claimant) was an employee of Stan Koch & Sons (the employer). Claimant alleges that on that date, he sustained an injury by accident to his left arm.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by American Interstate Insurance Company.
4. The Missouri Division of Workers' Compensation has jurisdiction and, by agreement of the parties, venue in Cole County is proper.
5. Notice is not an issue in this proceeding.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's average weekly wage was $871.63, yielding a weekly compensation rate of $581.08 for temporary total disability benefits and $446.85 for permanent partial disability benefits.

ISSUES

The parties agreed that the following issues were to be resolved in this proceeding:

1. Accident or occupational disease arising out of and in the course of employment.
2. Medical causation.
3. Need for medical treatment.
4. Whether a final award should be issued if compensability is denied.
5. Unpaid temporary total disability benefits.
6. Additional/future temporary total disability benefits.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit 1 Medical records from Callaway Physicians.

On behalf of the employer/insurer, the following exhibits were admitted into the record:

Exhibit A Deposition of Claimant, Aleck Fineman.
Exhibit B Audio CD.
Exhibit C Medical records from Mercy Emergency Department, Ardmore, Oklahoma.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. All depositions were admitted subject to any objections contained therein. Unless noted otherwise, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born on September 30, 1971. On the date of the hearing, he was 42 years old.

2. Claimant began working for Stan Koch and Sons (the employer) on March 23, 2013, as a commercial truck driver. At the time of the alleged injury, Claimant lived in Fulton, Missouri, where he still resides.

3. Claimant testified that as a commercial truck driver, his duties were to pick up loads for trailers, attach them to his truck or tractor, drive them to a destination, and drop them off. He testified that he does not always unhook the trailer once he reaches his destination. Claimant further testified that he never loads or unloads a trailer, but simply attaches it to his vehicle and drives it to a destination. Claimant testified that he never drives more than eleven hours a day without taking a ten-hour break. While he is on the road, he generally sleeps in his truck and is not expected to stay in a motel. Nonetheless, he testified that he does have the ability to sleep in a motel if he chooses. Claimant testified

that during his breaks, while he is not driving, he is not performing duties for the employer. He has the right to choose where he goes and what he does during his ten-hour breaks. Claimant further testified that once he drops off his load and he is returning to his home he is not paid for the trip back to his home.

4. Claimant testified at trial, as well as in his deposition, that the duties of hooking and unhooking a trailer required a few steps, including the following: attaching the air lines from the back of the cab to the trailer, adjusting the tandems on the fifth wheel of the trailer, and raising and lowering the landing gear. At trial he testified that he performed these steps every time he picked up a load and, if he was required to unhook the trailer, he would perform these same steps as well. Claimant further testified that he did not always have to unhook the trailer. He stated that attaching and detaching a trailer took anywhere from five to thirty minutes and that he commonly used his left arm (his non-dominant arm) to perform these tasks. When asked if he also uses his left arm when he's not at work, Claimant testified in the affirmative.

5. Claimant testified that the amount of loads and distances he traveled varied from week to week. He stated the trips could be anywhere from 20 to 2,000 miles. He indicated that once the trailer was attached it stayed attached until he delivered his load, which might be a couple of days. He did not know how many times he had hooked or unhooked a trailer.

6. With regard to how he may have injured his arm, Claimant provided testimony at trial, at his deposition, and in his recorded statement. In all three situations his testimony has been that on October 18, 2013, he began to feel pain in his left arm. He stated that on October 18 he was hooking up a trailer in Mendota Heights, Minnesota, for a delivery to Ardmore, Oklahoma. After hooking up his trailer in Minnesota he set off for his destination. At trial and in his deposition Claimant testified that he began to feel pain in his arm approximately thirty minutes after leaving.[1] At his deposition Claimant testified that he believes he hurt his arm either while pulling the fifth wheel or raising and lowering the landing gear.[2] At trial he testified he does not recall what it was that caused the pain, but that he felt symptoms while driving down the road thirty minutes after hooking up his trailer.

7. In the recorded statement he made to an adjuster, however, Claimant stated as follows: "I have no clue if it was something that I did that hurt the arm or if it was something that happened over time or what was the instigating incident that started the pain."[3] He also stated “I can’t think of a specific incident that started it.”[4] Toward the end of the recorded statement, when asked if there was anything further he would like to add, Claimant stated as follows: “I can’t think of anything that I did to myself that could have done this.”[5] With regard to when he first felt pain, Claimant testified that on Friday

[1] Exh. A, p. 28, and trial testimony.
[2] Exh. A, p. 27.
[3] Exh. B; unfortunately, the employer/insurer elected not to transcribe this recorded statement to a written form. Thus, Exhibit B is simply the audio recording.
[4] Exh. B.
[5] *Id.*

morning, October 18, 2013, he noticed his left arm was aching when he woke up that morning.[6]

8. In his deposition, Claimant testified that after picking up the load in Minnesota on October 18, 2013, he drove his load to Ardmore, Oklahoma. He testified the load was due on October 21, but he delivered it on October 20 early in the morning. After dropping off his load, he bobtailed, or drove without a trailer, to the employer's drop yard in Ardmore, Oklahoma, which was about three and one half miles away. He stated that once he got to the drop yard in Ardmore, Oklahoma, he did not discuss the pain he was having with anyone.[7] Instead, he remained at the drop yard in his truck without informing anyone.[8] Claimant stated that the next day he asked one of the mechanics at the drop yard to drive him to the emergency room. He further stated that he informed his supervisor Tom Erickson that he needed to go to the emergency room.[9] Claimant testified this was the first time he had told anyone about the pain he was having.[10] Claimant explained that he sent a message to Tom Erickson via the Qualcomm, which is an onboard computer in the truck that has a direct link to his dispatcher or to Mr. Erickson [11] He indicated he informed Mr. Erickson that he needed to seek medical treatment prior to accepting another load. Claimant stated he did not inform Mr. Erickson why his arm was hurting or how he injured it.[12] Although he told Mr. Erickson he was having pain in his arm, Claimant did not request any treatment for this injury.[13]

9. Claimant treated at the Mercy Hospital's emergency room in Ardmore, Oklahoma, on October 21, 2013. In those medical records Claimant denied any traumatic event to his arm. The records also indicate there was no deformity and no erythema or swelling in the arm. No diagnosis was given and Claimant was released with pain medication. Claimant testified that he stayed in Ardmore, Oklahoma, for four days while he was on pain medication. At the conclusion of the four days, on Thursday, October 24, 2013, he was released back to work. There were no loads available so he spent another night in Ardmore. He attached a trailer to his truck on the morning of October 25, 2013, and drove it to Indianapolis, Indiana. When Claimant arrived in Indianapolis on October 28, 2013, his arm was hurting more than before. Nevertheless, he did not seek further medical treatment at that time. Instead, he picked up another load on October 29, 2013, which was to be delivered to Missouri. He delivered that load and returned to his home. He has not picked up another load since this time.

10. Claimant did not seek medical attention again until November 12, 2013, when he visited Dr. Jack Wells in Fulton, Missouri. Under the history of present illness section,

[6] *Id.*
[7] Exh. A, p. 33.
[8] Exh. A.
[9] Exh. A, p. 33.
[10] Exh. A, p. 34.
[11] Exh. A,.
[12] Exh. A, p. 35.
[13] Exh. A, p. 36.

Dr. Wells noted that Claimant complained of pain in the "left upper arm, posterior leg."[14] He told the doctor the left arm pain was nonspecific and he could not recall any incident.[15] Claimant reported that on Friday and Saturday (after October 18) the pain worsened and that it continues to worsen. Claimant also reported that the workers' compensation system would not approve any additional studies or evaluation and that he had retained an attorney.

11. At that November 2013 visit, Dr. Wells made the following notation under the heading of "Musculosceletal":

> Normal range of motion, left upper extremity has normal range of motion and flexion and extension of the shoulder joint and also at the elbow joint active range of motion of the shoulder and passive range of motion is intact. Active and passive range of motion of the elbow is intact however patient has pain on Phyllis test of the elbow has pain in the upper lateral tricep area and also pain lateral aspect of the forearm. Patient's grip strength is diminished but slightly when compared to the contralateral side. Mostly gripping and use of the arm for causes muscular groups to have pain. Patient has no loss of function. Patient has slight weakness due to pain prescription strength. There is no obvious deformity.[16] There is no real pain on palpation in the area described.

12. On December 5, 2013, Claimant returned to Dr. Wells. At that time the doctor indicated that Claimant had requested a letter saying that he cannot perform his duties; Claimant indicated that he cannot shift and drive the truck at the same time.[17] Under the heading "Impression and Plan," the doctor stated that there was no specific injury, but that Claimant did have a job (as a truck driver) with repetitive motions. Dr. Wells noted that the physical exam was largely normal except for some weakness of the left arm, and he indicated that there was no exact diagnosis.[18]

13. About this same time, Claimant suddenly developed a pain in his leg and he does not recall doing anything to create that pain.[19] At the time this new pain started, Claimant was not delivering a load for the employer.

14. In his deposition, Claimant testified that he had a prior workers' compensation injury in 2004 that resulted in an injury to his right shoulder.[20] Claimant stated that he was prescribed pain medication for four years following that right shoulder injury.[21] He also stated, however, that he did not take the medication for that entire time and instead flushed some of the medication down the toilet.[22]

[14] Exh. 1.
[15] Exh. 2.
[16] Exh. A.
[17] Exh. 1.
[18] Claimant's Exh. 1.
[19] *Id.*
[20] Exh. A, pp 47-48.
[21] Exh. A, p. 49.
[22] Exh. A, pp. 49-50.

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Issue 1: Accident or occupational disease arising out of and in the course of employment
Issue 2: Medical causation
Issue 3: Need for additional medical treatment
Issue 4: Whether a final Award should be issued

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.[23] Proof is made only by competent and substantial evidence, and may not rest on speculation.[24] Medical causation not within lay understanding or experience requires expert medical evidence.[25] When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.[26]

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.[27] Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.[28]

The fact finder is encumbered with determining the credibility of witnesses.[29] It is free to disregard that testimony which it does not hold credible.[30]

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."[31]

An "injury" is defined to be "an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical

[23] *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus*., 83 S.W.3d 581, 583 (Mo. App. 2002).
[24] *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).
[25] *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).
[26] *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).
[27] *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).
[28] *Webber v. Chrysler Corp*., 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).
[29] *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).
[30] *Id*. at 908.
[31] Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

condition and disability."[32] An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and 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 non-employment life.[33]

Section 287.067.3 provides that occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and the disability. Occupational disease is defined by Missouri Revised Statute Section 287.067.1 as follows:

> … an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need 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.[34]

The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."[35] An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and 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 non-employment life

In this case, Claimant requests a Temporary Award be issued and that the Award order the employer/insurer to provide him with medical treatment and temporary disability benefits. The employer/insurer has denied that there was a compensable work incident and has provided no medical treatment – not even an evaluation.

In his brief, Claimant argues that he either suffered an accident or that he may have an occupational disease; either way, he contends that he suffered a twinge and strain that occurred while performing the ordinary duties of his job. He further argues that the Division of Workers' Compensation can determine that this event is compensable even without the benefit of expert testimony, particularly since the employer/insurer refused to refer Claimant to a physician and Claimant did not have the resources to pay for such care himself. Claimant argues that while some occupational diseases require expert testimony, it may not be required in this case where he allegedly suffered a strain while hooking and unhooking a tractor trailer. Claimant, relying on the case of *Bock v. City of Columbia*, argues that his testimony is sufficient to establish

[32] Section 287.020.3(1), RSMo.
[33] Section 287.020.3(c), RSMo.
[34] Section 287.067.1, RSMo.
[35] Section 287.020.3(1), RSMo

causation.[36]

In *Bock*, the employee suffered a wound to his shin when a metal pipe fell from above, bounced off the floor, and hit the employee in his shin; the employee suffered significant bruising and inflammation. The court in that case held that the "initial injury is not sophisticated, nor did it require surgery or technical, scientific diagnosis. It is therefore within lay understanding and its effect on the disability is within the expertise of the Commission."[37] Claimant argues that following *Bock*, his testimony - that he used his left arm to hook and unhook the trailer, as he had done many times before, but that on this occasion he felt the twinge and strain - is sufficient to find that Claimant's injury is compensable.

The employer/insurer argues that Claimant has not met his burden of proof on the issues of whether Claimant suffered an accident or occupational disease arising out of and in the course of employment or medical causation. The employer/insurer notes that the court in *Henley v. Fair Grove R-10 School District* held that if Claimant is alleging an occupational disease, his medical expert "must establish the probability that the disease was caused by conditions in the work place, and there must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease."[38] The employer/insurer also relies on *Vickers v. Missouri Dept of Public Safety*, 283 S.W.3d 287 (Mo. App. W.D. 2009), in which the Missouri Western District Court of Appeals handed down a decision that stated that in order for a claimant to meet his or her burden, the claimant "had to submit medical evidence establishing a probability that working conditions caused the disease."[39]

The employer/insurer also relies upon a decision of the Labor and Industrial Relations Commission, *Grant v Anheuser Busch*, DOLIR 4-8-10. In that case the Commission affirmed an Award by the Administrative Law Judge whereby the ALJ denied benefits to an employee who alleged an occupational disease by way of repetitive trauma because the employee failed "to provide any expert medical opinions upon which to base a medical causation decision."[40]

In this case, Claimant is uncertain whether he sustained an injury by accident on or about October 18, 2013, or whether he sustained an occupational disease. Claimant is also uncertain what he did or could have done to cause an injury by accident or occupational disease to his left arm/shoulder, but he speculates that it may have happened when he was pulling on the fifth wheel of the tractor trailer or while he was raising or lowering the landing gear of the trailer. Claimant does not have a causation report and there is no expert medical opinion upon which to base a medical causation decision.

Based upon the facts adduced at trial, I find that Claimant has failed to meet his burden of proof regarding whether he sustained an injury by accident or occupational disease while in the course and scope of his employment. Claimant has also failed to meet his burden of proof that

[36] 274.S.W.3d 555 (Mo. App. 2008).
[37] *Id*. At 563.
[38] *Henley v. Fair Grove R-10 School District*, 253 S.W.3d 115 (Mo.App. S.D. 2008), citing *Dawson v. Associated Electric*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994).
[39] *Vickers v. Missouri Dept of Public Safety*, 283 S.W.3d 287 (Mo. App. W.D. 2009).
[40] *Grant v Anheuser Busch*, DOLIR 4-8-10.

any injury was medically, causally related to the alleged work accident or occupational disease. This case is not analogous to the situation in *Bock*, where a pipe fell and struck an employee, causing an immediately identifiable injury. Instead, in this case, Claimant speculates as to what may or may not have caused his injury – pulling on a fifth wheel or raising and lowering landing gear – but he is not certain what caused his injury. Moreover, Claimant did not feel immediate pain or injury while engaging in either of those activities. Instead, he felt pain at least 30 minutes later, after he was driving the load to its delivery location. In hindsight, he speculates that he may have suffered an accident or an occupational disease while engaging in the activities of pulling on the fifth wheel or raising and lowering the landing gear – noting that he cannot think of anything else he could have done to injure himself. In addition, Claimant has provided no expert medical testimony establishing that his injury is medically causally related to any work incident or occupational disease. Claimant's Claim for Compensation fails.

I further find that it is appropriate to issue this Award as a final Award rather than as a temporary Award.

Summary

I find that Claimant has failed to meet his burden of proof that an injury by accident or occupational disease arose out of and in the course of his employment with the employer; Claimant has also failed to prove that any such injury is medically causally related to the alleged work accident or occupational disease. I further find that a final Award, rather than a temporary Award, should be issued in this case. All other issues are moot.

Any pending objections not expressly ruled on in this award are overruled.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation