

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

Injury No.: 97-499557

Employee: John B. Flaim

Employers: 1) University of Missouri
2) Capital Region Medical Center

Insurers: 1) Self-Insured
2) Self-Insured

Date of Accident: Alleged to be August 1997

Place and County of Accident: Alleged to be Cole County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 24, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued March 24, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: John B. Flaim

Injury No. 97-499557

Dependents: N/A
Employer: University of Missouri (self-insured)
Employer: Capital Region Medical Center (self-insured)
Hearing Date: January 11, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: RJD/tmh

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 to be August 1997.
5. State location where accident occurred or occupational disease was contracted: Alleged to be Cole County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Employee was employed by both employers.
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? No.
10. Was employer insured by above insurer? Both employers were self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
An occupational disease of the spine is alleged.
12. Did accident or occupational disease cause death? N/A. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: N/A.
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: N/A.
19. Weekly compensation rate: N/A.
20. Method wages computation: N/A.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John B. Flaim

Injury No: 97-499557

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: University of Missouri (self-insured)

Additional Party: Capital Region Medical Center (self-insured)

Insurer: Missouri Employers Mutual Insurance

Checked by: RJD/tmh

ISSUES DECIDED

The evidentiary hearing in this case was held on January 11, 2006, in Jefferson City. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on February 17, 2006. The hearing was held to determine the following issues:

1. Whether the statute of limitations, Section 287.430, serves as a bar to Claimant's Claim for Compensation against either or both employers;
2. Whether the notice requirement of Section 287.420 serves as a bar to Claimant's Claim for Compensation against either or both employers;

3. Whether Claimant sustained a compensable accident or occupational disease while in the employ of either or both employers;
4. Claimant's average weekly wage and resultant compensation rates;
5. The nature and extent, if any, of Claimant's permanent disability; Claimant alleges he is permanently and totally disabled;
6. Whether either employer shall be ordered to reimburse Claimant for medical bills and charges;
7. Whether Claimant is entitled to temporary total disability benefits, and if so, for what period(s) of time, and at what compensation rate;
8. Whether either employer shall be ordered to provide Claimant with future medical benefits pursuant to Section 287.140, RSMo;
9. A determination of the rights, if any, of the Department of Social Services, Division of Medical Services, under §287.266 for Medicaid payments made on Claimant's behalf; and
10. A ruling on Employer University of Missouri's request for attorney's fees and costs pursuant to §287.560.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Cole County;
3. That both employers and Claimant were covered by the Missouri Workers' Compensation Law at all relevant times;
4. That the University of Missouri was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times; and
5. That Capital Region Medical Center was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, John Benjamin Flaim, as well as the deposition testimony of Claimant; the medical report and testimony of Dr. Jerome Levy; the deposition testimony of Dr. John Oro; medical records, medical bills, and certain other documents.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, John Flaim, was born September 8, 1961, graduated from High School in St. James, Missouri, in 1979, and was trained as a respiratory therapist in 1987.

Claimant began working for the University of Missouri Hospital in December 1985 in the respiratory therapy department as an equipment coordinator. He worked in this capacity for approximately two years; after completing his training as a respiratory therapist, Claimant was hired as a critical care respiratory therapist. Claimant worked as a critical care respiratory therapist at University of Missouri Hospital from late 1987 or early 1988 through 1992

on a full-time basis. In 1992, Claimant left University of Missouri Hospital for a similar position at Ellis Fischel Cancer Center. (University Hospital and Ellis Fischel are listed as separate employers on the claim for compensation; however, since both entities are owned and operated by the University of Missouri, they will be treated as one employer for purposes of this award.) Claimant worked as a respiratory therapist at Ellis Fischel until December 1995, to go back to school. While Claimant was pursuing his degree at the University of Missouri, Claimant also worked some weekends as a respiratory therapist at Capital Region Medical Center in Jefferson City, from approximately March 1996 through early August 1997. Claimant has not worked as a respiratory therapist since early August 1997.

On November 1, 1999, Claimant filed his Claim for Compensation herein against Capital Region Medical Center, Ellis Fischel Cancer Center and University of Missouri Hospital and Clinics, alleging injury to “low back, lower extremities and body as a whole”. Claimant alleges that the injury occurred as follows: “While in the course and scope of employment, Claimant was required to repeatedly lift and transfer patients and move ventilators causing the above injuries. Proper notice was given. Claimant first discovered that the injury was work related in August 1999 pursuant to conversation with Dr. Oro.”

Although Claimant’s testimony is confusing and sometimes self-contradictory, it appears from Claimant’s testimony that his duties as a critical care respiratory therapist at University of Missouri Hospital were very physically demanding and Claimant alleges that these duties created stress on his back. It appears from Claimant’s testimony that he began experiencing back problems in late 1988 or early 1989, which he related to his work as a respiratory therapist. Claimant testified that when he left University of Missouri Hospital in 1992 to work at Ellis Fischel, his back was “pretty bad”, that he was experiencing radiating pain down into his foot toward the end of a work shift, and experienced frequent muscle spasms. It appears from Claimant’s testimony that one of the reasons he transferred to Ellis Fischel is because he felt he could no longer physically perform the work at University of Missouri Hospital.

Although it appears from Claimant’s testimony that he worked part-time during most of his tenure at Ellis Fischel (only working full-time for the last six months of that tenure), Claimant characterized the “workload” at Ellis Fischel to be “about the same” as at University of Missouri Hospital, and that his back continued to worsen over time while he was working at Ellis Fischel. Claimant testified that he left Ellis Fischel in December 1995, because “my body was telling me I had had enough”.

It appears from the evidence that Claimant had returned to school as a part-time student at the University of Missouri some time in 1995. After leaving Ellis Fischel, Claimant became a full-time student at the University of Missouri. Sometime in the Spring of 1996, Claimant took a job as a respiratory therapist at Capital Region Medical Center in Jefferson City. Claimant’s testimony was somewhat contradictory regarding how often he worked at this job. Claimant testified that he worked two 12-hour shifts every other weekend, but some of his testimony indicated that he only worked one 12-hour shift every other weekend. The wage statement in evidence showed that Claimant was paid every two weeks at Capital Region. For the pay period ending 5/2/97, Claimant worked 24.15 hours; however, for the pay periods ending 5/16/97, 5/30/97, 6/13/97, 6/27/97, 7/11/97 and 8/8/97, Claimant worked 12.25 hours, 12.50 hours, 11.75 hours, 11.75 hours, 12.45 hours and 12.25 hours, respectively. It is clear, therefore, that at least for the last 12 weeks of his employment at Capital Region, Claimant worked only one 12-hour shift every other weekend.

Regarding his work at Capital Region, Claimant’s testimony is again somewhat confusing; the work at Capital Region was, by some accounts, not as strenuous as it was at Ellis Fischel or University Hospital, and by other accounts, it was exactly the same. What is clear from Claimant’s testimony is that, on the last day he worked at Capital Region (probably August 2 or 3, 1997), Claimant performed a prolonged resuscitation on a patient, consisting of a “bag and mask” procedure, which required Claimant to work over the patient in a “bent-over” position. Claimant testified that during this procedure, and subsequent to this procedure, he experienced severe back and lower extremity pain as well as radiating pain in his hands. Claimant never worked another shift as a respiratory therapist after this incident.

Claimant went to the UMC Student Health service on August 11, 1997, and again on August 18, 1997, complaining of back pain. Claimant then saw a number of physicians over the next few years, including Dr. Robert Gaines, an orthopedic surgeon at the University of Missouri-Columbia, Dr. John Oro, a neurosurgeon at the

University of Missouri-Columbia, and Dr. Jaimie Henderson, a neurosurgeon and pain specialist at St. Louis University. Claimant has also seen several pain management specialists in Columbia, and has had a morphine pump surgically implanted. Claimant has had much diagnostic testing, including multiple MRI scans.

Claimant completed his bachelor's degree from the University of Missouri-Columbia in December 1998. Claimant worked in a paying position for Columbia Missourian Agricultural News Group as an editorial assistant from June 1997 through December 1998. Claimant worked for the Columbia Daily Tribune for just over a month in early 1999, and then worked at Small Farm Today magazine for approximately 18 months. His job with the magazine included writing, taking photographs, setting up trade shows, and selling advertising. In October 2000, Claimant was told that his salary would be eliminated, and that he would only be paid commission for selling advertising. At that time Claimant left Small Farm Today, and has not been employed since. Claimant is alleging permanent and total disability from the alleged work-related injury.

ISSUE: STATUTE OF LIMITATIONS

University of Missouri and Capital Region Medical Center have each raised the statute of limitations (Section 287.430, RSMo) as an affirmative defense. It is clear that Claimant filed his Claim for Compensation on November 1, 1999, more than four years after last working for the University of Missouri, and more than two years after last working for Capital Region Medical Center. Section 287.390 states:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, *except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.* The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a conservator shall be deemed the termination of the legal disability from minority or disability as defined in chapter 475, RSMo. The statute of limitations contained in this section is one of extinction and not of repose. (Italics mine.)

Neither employer filed a report of injury. I find, however, that the two-year statute of limitations nevertheless applies. This is for the reason that Claimant never notified either employer of an injury, accident or occupational disease prior to the filing of the claim for compensation. An employer's duty to file a report of injury is triggered by the employer's *knowledge of the injury*. As both employers herein had no knowledge of an injury, they had no duty to report that injury. Since the employers had no such duty, there could be no breach of duty triggering the three-year statute of limitations. See

Gander v. Shelby County, **933 S.W.2d 892 (Mo. App. E.D. 1996)** and *Weniger v. Pulitzer Publishing*, **860 S.W.2d 359 (Mo. App. E.D. 1993)**.

Claimant, in his claim for compensation, has alleged an occupational disease, rather than an accident. In his brief, Claimant cites §287.063.3, which states (in pertinent part): "(t)he statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure". Claimant contends in his claim for compensation that he "first discovered that the injury was work related in Aug 1999 pursuant to conversation with Dr. Oro." Claimant contends in his brief that he "testified that he did not know that his medical condition was

due to conditions he encountered, relative to three consecutive employers, where he had been performing services of a respiratory therapist until he was so informed by Dr. Oro, his first visit on January 23, 1998.” I find it irrelevant as to whether Claimant contends he first knew about the work-relatedness of his back condition in January 1998 or in August 1999. It is a virtual impossibility that Claimant’s “knowledge” came from Dr. Oro at all. As will be discussed in more detail hereinbelow, Dr. Oro himself does not believe that Claimant’s back problems are work-related. Further, Claimant made it clear in his testimony that he had “knowledge” of a work-related injury long before January 1998. In Claimant’s deposition, at page 89, Claimant was questioned about leaving the employ of Ellis Fischel in the Fall of 1995:

Q. Did you believe that the problems you were having were related to your job?

A. By then, yeah. I could see the direct correlation, and other people had pointed it out to me too.

At page 91 of his deposition, Claimant was question about the time just prior to his leaving the employ of University Hospital (in 1993):

Q. Okay. But I mean, you felt at that point there was a direct correlation between your job and your symptoms, right?

A. Very definitely by the time I left the University. That was part of my decision for leaving.

Claimant testified similarly at the evidentiary hearing. When asked if he knew his back problems were work-related more than two years before November 1, 1999, Claimant answered: “I knew I had back pain from doing my job, yeah.”

Dr. Oro testified that Claimant told him essentially the same thing on his first visit: “he had noted pain since the late 1980’s. He – moving, lifting, turning patients in his role as respiratory therapist, he believes, was the aggravating factor in his pain.”

Claimant cites *Moore v. Carter Carburetor*, 628 S.W.2d 963 (Mo. App. E.D. 1982) for the proposition that “an employee is entitled to rely on a doctor’s diagnosis of his condition, rather than the injured employee’s own impressions for determining when a claim should be filed.” I note, however, that in *Mann v. Supreme Exp.*, 851 S.W.2d 690 (Mo. App. E.D. 1993), decided eleven years after *Moore*, the Court noted: “Under certain circumstances, it can be foreseen the time should begin to run without having an expert’s opinion in the employee’s hands.”

I find that this case is certainly one where “the time should begin to run without having an expert’s opinion in the employee’s hands.” As I discuss more fully hereinbelow, Claimant actually did not have “an expert’s opinion in (his) hands” until he received Dr. Levy’s report of October 8, 2005. Nevertheless, Claimant contends that Dr. Oro gave him the “knowledge” that he had a work-related condition. I find that contention unworthy of belief. If anything, it was Claimant who was attempting to convince Dr. Oro that the back condition was work-related, not vice-versa.

Therefore, I find that the statute of limitations is a bar to Claimant’s claim for compensation against both employers.

- **ISSUE: DID CLAIMANT SUSTAIN A COMPENSABLE OCCUPATIONAL DISEASE?** -

Assuming for the moment that the statute of limitations is not a bar to this action, I want to address the issue of occupational disease and causation.

Dr. Oro was Claimant’s primary treating physician for his back. Dr. Oro is a well-respected neurosurgeon. Dr. Oro testified that Claimant’s primary problem with is spine is “diffuse idiopathic skeletal hyperostosis” also known by the acronym “DISH”. Regarding this condition, Dr. Oro testified (at pages 31-33 of his 9/8/05 deposition):

Q. In layman’s terms, what is diffuse idiopathic skeletal hyperostosis?

A. It’s an inflammatory condition of the spine itself where the ligaments that connect the blocks of bone together, the vertebrae, become bony in nature. So we call it diffuse because it, basically, runs up and down the spine; it’s not just necessarily in one spot. We call it idiopathic because we don’t know the cause

of it; skeletal, because it's part of the skeleton; and hyperostosis means extra bony formation of the spine.

Q. And typically what causes this type of condition?

A. The cause is unknown.

Q. Okay. Does it usually have any relationship to any other things that are going on in a person's spine or body?

A. It can occur in people doing a lot to a little. It's its own process, cause unknown, so it's hard to relate it to anything specific in a patient's history.

Q. In this particular case, you couldn't relate the DISH syndrome to anything on Mr. Flaim; is that what you're saying?

A. I'm not sure I understand the question. I think it helped me understand why he has so much pain and why he is limited in flexion and extension, so it did help clarify the ongoing nature of his pain syndrome.

In addition to DISH, Dr. Oro testified that Claimant also has lumbar degenerative disease. He testified that Claimant also had (but no longer has) an extruded disc at L1-L2. This condition was not present on Claimant's MRI of January 1998, but was present on the MRI of September 1999. An MRI in April of 2000 showed that "the previous disc rupture had completely resolved". Dr. Oro clearly testified that the L1-L2 disc problem had absolutely nothing to do with Claimant's work as a respiratory therapist.

At. Pages 42-44 of his 9/8/05 deposition, Dr. Oro testified:

Q: Based on all of your examinations and evaluations that you did on Mr. Flaim, your review of the medical consults and records that other physicians did on your referral of Mr. Flaim, and based on your tests that you performed, the MRIs that you reviewed, and the history that you obtained from Mr. Flaim, did you form an opinion, based upon a reasonable medical certainty, as to whether Mr. Flaim sustained some sort of an injury on the job?

A. I did not.

Q. Okay. Do you have an opinion today as to whether or not the injury that he related to you at work was a substantial factor or a significant factor in the medical conditions that you found him in when you first saw him here at the University?

A. It's a difficult case for me. The record states that he noted aggravation with his bending, twisting, etc. On the other hand, that's an unusual complaint, other than the initial strain from those type of activities, and that's why initially he was treated for strain. As time went on, it became apparent that it was more than strain. Again, difficult to relate because he wasn't then doing those activities any longer. And it was clear that he had more degenerative disease than most people his age would have. As time went on and the syndrome seemed to, if you will, even aggravate instead of improve, his stiffness in his back seemed to increase, it was quite puzzling. It led to, eventually, an MRI of his thoracic spine. And, over time, to me, it became apparent that he was developing these flowing osteophytes, is what we call them – these calcifications running up and down his spine on his ligaments. And I think finally then, with that realization, I was better able to understand why this man had the pain that he did, even though, again, limited activity. And we pursued other treatment options, including the pain clinic and then, eventually, rheumatology. So his history is there, but, in my own mind, it's hard to say whether one thing caused the problem in exclusion of the other thing.

And at pages 36-37 of his 9/15/05 deposition, Dr. Oro testified:

Q. Okay. And I guess my point is – what I want to ask you is at no point during your treatment of Mr. Flaim did he ever describe to you the job he had with Capital Region Medical Center or the duties associated with that, did he?

A. Not that I recall, no.

Q. He never described having an increase in back pain or even back pain at all as a result of any duties at Capital Region Medical Center, did he?

A. No.

Q. He never described any specific accident or incident that may have occurred while working ant Capital Region Medical Center, did he?

A. Not that I recall.

Q. And so, would you agree that you have not been provided any information that would lead you to conclude with any degree of probability that anything he did at Capital Region Medical Center as a part of his regular duties or as a result of any kind of accident caused any of the conditions in his back or contributed to cause a change in any prior condition of his back?

A. I would agree.

Dr. Jerome Levy testified via deposition taken January 6, 2006. Dr. Levy evaluated Claimant on September 13, 2005, at the request of Claimant's attorney. Dr. Levy testified that Claimant's back problems were caused by his work as a respiratory therapist.

I find that there were some deficiencies in the information that Dr. Levy considered in preparation of his report. First of all, Dr. Levy stated in his report that Claimant worked as a respiratory therapist at University of Missouri Hospital from 1997 to 2000. In his report, Dr. Levy made no mention of Claimant's work at Capital Region Medical Center.

Dr. Levy testified that his opinion that Claimant's work as a respiratory therapist caused Claimant's back problems were based upon Claimant's history as given by Claimant to Dr. Levy, and as given by Claimant to his treating physicians beginning August 11, 1997. Dr. Levy agreed that there were no medical records for treatment of Claimant's back during the time Claimant actually worked as a respiratory therapist. Dr. Levy's testimony was as follows:

Q. And your indication that it was made symptomatic by his work as a respiratory therapist is solely his history?

A. Principally.

Q. You haven't seen one medical record that showed contemporaneous complaints while he was working as a respiratory therapist?

A. I've not seen one contemporaneous record. I've seen numerous doctor records which refer back, as we've mentioned before, to the fact that he had this back pain for a number of years. (Levy deposition, page 40).

Q. But the only way you can link up his symptoms to his work at the University of Missouri that ended in 1996 is him telling you that – when I was working there, I had symptoms?

A. Him telling me and him telling other doctors, his doctors who were treating him.

Q. Not in 1996. Doctors were treating him in 2001, 2002, 2003.

A. I think the late '90s and – yes, I agree with that.

Q. Now, he wasn't working as a respiratory therapist then, was he?

A. No. (Levy deposition, page 44).

Dr. Levy testified that the DISH was not related to Claimant's work as a respiratory therapist. Dr. Levy testified that the L1-L2 herniated disc had nothing to do with Claimant's work as a respiratory therapist.

Regarding Claimant's work at Capital Region, Dr. Levy testified:

Q. So is it fair to say that you do not know the specific duties of his job at Capital Region Medical Center other than generally he said he was employed as a respiratory therapist?

A. No. What I'm saying is that he told me he did the same type of work for his entire career as a respiratory therapist, no matter which hospital of the three he worked at.

Q. The going back, I guess, to, you know, in determining whether the type of work can cause an aggravation or cause the conditions you diagnosed, it would make a difference if this person is a part-time employee versus full time to the extent of work that is performed, wouldn't it?

A. Well, the more work he performed, the more he could – it could cause the problems is what I guess you're saying.

Q. And I guess what I'm getting at is it sounds like what you were saying, you understood he worked the same amount at Capital Region Medical Center as he did at the University?

A. Well, I know now that he only worked two years at Capital Region versus eight or ten years at the other place. It's my opinion that he didn't work full time, he worked a considerable number of hours a week. He didn't work, you know, four hours a week or something or eight hours a week at Capital Region. My impression is that he worked 20, 30, 40 hours a week.

Q. And based on what? Where are you getting that?

A. I don't recall at this point but it's from the history that he gave me that he did this type of work. I did not – I did not have any history that the work at Capital Region was a very part-time work.

Q. But, so what you're saying though is if it's just one or two weekends a month, that might make a difference to you versus 20 or 40 hours a week?

A. Certainly.

It is abundantly clear to me that Dr. Oro does not believe that Claimant's work as a respiratory therapist was a substantial factor in the cause of Claimant's back complaints. Dr. Oro is a neurosurgeon who deals with back patients on a daily basis and was Claimant's principal treating physician.

Dr. Levy's opinion that Claimant's work as a respiratory therapist was the cause of his back complaints was based solely on Claimant's history. Yet it is clear from his deposition, taken on January 6, 2006, that Dr. Levy is still unaware of Claimant's work history. Claimant worked full-time at University Hospital through 1992. Claimant worked part-time at Ellis Fischel for all but the last six months of his tenure there (through 1995). Claimant worked no more than 18 months at Capital Region; while working at Capital Region, Claimant averaged working six to 12 hours per week. Yet, Dr. Levy was under the impression that Claimant worked essentially full-time at all three hospitals. Dr. Levy's causation opinion, based upon misinformation, provides little benefit in the understanding of this case.

What is clear is that Claimant's primary back problem is diffuse idiopathic skeletal hyperostosis, the cause of which is unknown, and which both Drs. Oro and Levy agree was NOT caused by Claimant's work. The other problem that Claimant has with his back is degenerative disease; again, both Drs. Oro and Levy agree that

Claimant's work did not cause this condition. Dr. Levy believes that Claimant's work as a respiratory therapist severely aggravated Claimant's degenerative disease because Claimant told him so, even though Claimant sought no medical treatment for his back during his working years.

I find from the evidence that Claimant did not sustain an occupational disease.

OTHER ISSUES:

As Claimant has not sustained a compensable accident or occupational disease, the claim for compensation against Employer must be denied, and all other issues are moot, save one.

The University of Missouri has requested that its costs and attorney's fees be assessed against Claimant, pursuant to Section 287.560, RSMo. The pertinent portion of that section reads: "All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; *provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.*" (Italics mine.)

The Missouri Supreme Court held in Landman v. Ice Cream Specialties, Inc., 107 S.W. 3d 240 (Mo. 2003), that the phrase "the whole cost of the proceedings" included an award of attorney's fees.

The portion of Section 287.560 italicized above is not a "loser pays" rule; far from it. First, the division or commission must find that a party proceeded "without reasonable ground"; even with such a finding, the award of costs and fees is permissive, not mandatory. Such award may be made "when the issue is clear and the offense is egregious." Landman at 252.

I find that Claimant did not "bring" or "prosecute" these proceedings without reasonable ground. When Claimant filed his Claim for Compensation, he was under the impression that Dr. Oro believed his back symptoms were related to his work. As is clear from Dr. Oro's testimony above, Claimant's impression in this regard has since proven incorrect. Nevertheless, Claimant did prosecute this case by securing a causation opinion from Dr. Jerome Levy. Although I do not find Dr. Levy's causation opinion persuasive, such opinion certainly provided Claimant with "reasonable ground" for continuing to prosecute his case. Therefore, the request for costs and attorney's fees is denied.

Date: _____

Made by: _____

ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation