

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

Injury No.: 98-115786

Employee: Donald Hagan
Employer: Western Waterproofing
Insurer: Aetna Casualty Company c/o Travelers
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: September 15, 1998
Place and County of Accident: St. Louis, 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 April 16, 2007. The award and decision of Administrative Law Judge Margaret D. Landolt, issued April 16, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 14th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Donald Hagan

Injury No.: 98-115786

Dependents: N/A

Employer: Western Waterproofing

Additional Party: N/A

Insurer: Aetna Casualty Company c/o Travelers

Hearing Date: January 25, 2007

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: MDL:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 15, 1998
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of 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? Yes
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:
Employee was operating a jackhammer when he inhaled dust.
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: Body as a whole - lungs
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Donald Hagan

Injury No.: 98-115786

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$861.70
19. Weekly compensation rate: \$562.67/\$294.73
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

137 3/7 weeks of temporary total disability (or temporary partial disability)	\$77,326.93
Past medical expenses	\$1,452.75

(* Employer is entitled to a \$10,000.00 credit pursuant to the agreement of the parties) (\$10,000.00)

Permanent total disability benefits from Employer beginning July 1, 2001 for Claimant's lifetime **

(** represents an indeterminate lifetime amount)

22. Second Injury Fund liability: No

TOTAL: \$68,779.68 **

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Mr. Dennis Barbour

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Donald Hagan	Injury No.:	98-115786
Dependents:	N/A	Before the	
Employer:	Western Waterproofing	Division of Workers'	
Additional Party:	N/A	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Aetna Casualty Company c/o Travelers	Checked by:	MDL:tr

PRELIMINARIES

A hearing was held on January 25, 2007, at the Division of Workers' Compensation in the City of St. Louis. Donald Hagan (Claimant) was represented by Mr. Dennis Barbour. Western Waterproofing (Employer) and its Insurer, Aetna Casualty in care of Travelers, were represented by Mr. Robert Hendershot. This case was consolidated with Injury Numbers 98-174736 and 98-115782 for purposes of hearing. All three claims allege a date of injury of September 15, 1998, and all allege permanent total disability. Before the hearing, Claimant dismissed his claim against the Second Injury Fund. Mr. Barbour requested a fee of 25% of Claimant's award.

The parties stipulated that on or about September 15, 1998, Claimant was an employee of Employer;

venue is proper in the City of St. Louis; and the claim was timely filed. The parties further stipulated Claimant was earning an average weekly wage of \$861.70 resulting in applicable rates of compensation for \$562.67 for total disability benefits and \$294.73 for permanent partial disability benefits. Employer has paid no benefits.

The issues for resolution by hearing are: Did Claimant sustain an occupational disease arising out of and in the course of employment; medical causation; liability of Employer for past and future medical care; is Employer liable for TTD benefits; what is the nature and extent of permanent partial disability sustained by Claimant; and is Claimant permanently and totally disabled.

SUMMARY OF EVIDENCE

Claimant is a 52 year old man who completed 11 ½ years of high school but did not graduate. After leaving high school, Claimant worked in various labor positions. In the 1970s, he was a gas station attendant and performed general mechanics. In the 1980s, Claimant worked for Hussmann in production for a brief period of time and also worked in the food and bartending industry. Claimant also worked for various construction companies doing mainly new commercial construction. Claimant began working for Employer as a general laborer in 1992 and worked until September 15, 1998. He has not worked since that time. Before working for Employer, Claimant never had any medical problems. He never had breathing problems, sinus problems, allergies or gastrointestinal problems. Claimant was an avid runner. Employer is in the business of repairing parking garages. Claimant operated jackhammers which ranged from 30 to 60 pounds. He used the jackhammer to break up concrete. Claimant also performed gunniting work, which involved mixing dry sand, cement, and microsilica, and then spraying the mixture onto the ceiling in a wet form. While working for Employer, Claimant also occasionally worked with a bonding agent called Armatec, and worked on deck coating jobs. Working on deck coating jobs involved removing old concrete, then cleaning before applying primer, basecoat, intermediate and top coat. When he applied deck coating, he had to mix basecoat, which produced fumes that gave him headaches, and caused him to have labored breathing and shortness of breath. It sometimes took his breath away.

The last job Claimant had with Employer was at the Pierre Laclede garage from January 1, 1998 to September 15, 1998. Claimant worked an eight-hour shift, five days a week operating his jackhammer for approximately six hours every day. Claimant did not perform any deck coating work while on the Pierre Laclede project. At the Pierre Laclede project, they started on the top deck with its half wall and cross breeze, and worked their way down the garage.

As they moved down the levels of the Pierre Laclede garage, there were numerous complaints regarding debris on parked cars, so plastic barriers were erected. These barriers were large sheets of plastic which were hung from the roof but not sealed either to the roof or to each other. These barriers were in place for the three months from January to April 1998 and then crews began working at night. During the night shifts the workers used a ventilating fan.

There was excessive dust on the Pierre Laclede project. About a one-inch thick layer of dust accumulated on the floor, and there were times when the dust was so thick that the workers could not see someone jackhammering within a few feet of them. Workers were provided with 3M paper dust masks but Claimant went through as many as six masks in a single shift, and occasionally Employer ran out of masks. While inside the barriers, Claimant's mouth and nose became clogged with dust, and sometimes turned his spit black or gray. Claimant testified that he could taste the microsilica in the concrete, and when he blew his nose black chunks came out. The jackhammers gave off an oil spray which combined with the dust to form a thick material on Claimant's hands and clothes. Toulene was used to wipe down their tools and occasionally they used Toulene to clean their faces. Although Employer's witness, Dave Economon, testified that workers used a product called "Scrubs in a Bucket" to clean their hands and faces, Claimant was not familiar with the product and had never seen it.

While working on the Pierre Laclede project, Claimant began to notice he was developing breathing problems and feeling run down. He experienced problems with excess mucous, spitting, chest tightness, raspiness of voice, headaches, increased coughing, shortness of breath, decreased stamina, and trouble sleeping. He began to notice severe breathing problems in March 1998, three months after beginning the Pierre

Laclede project. Claimant stopped running at the end of March 1998.

On September 15, 1998, Claimant went to work and began hammering. He became especially fatigued and his breathing was labored, and he had a pain in his throat area. Claimant left work at 4:00 a.m. and tried to do some clean up work, but he felt nauseated and eventually vomited. Claimant then left the job site and drove home, but because he was having breathing problems he responded to the emergency room at Christian Hospital.

At Christian Hospital, Claimant complained of chest pains, lung congestion, and a burning feeling lasting for the preceding six to eight months, as well as double vision, nausea, and dizziness. The clinical impression was acute dyspnea, and he was referred to Dr. Mark Wald, a pulmonologist. Claimant also went to his primary care physician, Dr. Knapp, with complaints of chronic bronchitis for the preceding six months and was referred to Dr. Wald.

Claimant saw Dr. Wald on September 14, 1998, for complaints of troubled breathing, a burning in chest, congestion, nausea, and headaches. Claimant denied any reflux symptoms. Claimant underwent a pulmonary function test with the impression of mild restrictive ventilatory abnormality. Dr. Wald prescribed Prednisone, but Claimant had a severe psychotic reaction to the medication which required hospitalization at DePaul Health Center. Following his release, Claimant underwent another course of pulmonary function testing on October 15, 1998, which again revealed mild restrictive ventilatory abnormality.

Claimant then sought treatment from pulmonologist, Dr. John King, who first saw Claimant on November 3, 1998. Dr. King noted Claimant denied symptoms of GERD. Dr. King's impression was diminished exercise tolerance suspect secondary to exposure to industrial irritants, and he recommended Claimant undergo a limited stress test and CT scans to rule out true silicosis and developing bronchospasm. Claimant also underwent a Methacholine Challenge test on November 26, 1998, which was interpreted as being equivocal for bronchospasm. Dr. King diagnosed asthmatic bronchitis which, he testified could also be called asthma or bronchospasm.

At the request of Employer, Claimant was evaluated by Dr. Robert Bruce, a pulmonologist, on May 4, 1999. Dr. Bruce noted complaints of an occasional cough, wheezing upon exertion, irritation of his eyes and burning in his lungs when exposed to second hand smoke, strong perfumes, odors or aerosols. Claimant reported occasional indigestion but no belching or burping. Dr. Bruce performed a physical examination, as well as laboratory studies which showed old granulomatous disease, a common radiographic finding. Dr. Bruce also performed a third series of pulmonary function tests which showed a mild restrictive process.

Dr. Bruce issued a second report on May 26, 1999, after he had reviewed additional medical records of Claimant, including the previous pulmonary function test results and the records of Dr. King. Dr. Bruce opined that Claimant had no diagnosable pulmonary condition and specifically noted that there was no evidence of any lung injury from the potential inhalation of materials at Employer.

On June 29, 2001, Claimant was evaluated at the request of his attorney by Dr. Thomas Dew, a pulmonologist. Dr. Dew noted complaints of shortness of breath and wheezing. Dr. Dew performed a physical examination, which he found to be normal, and reviewed the Methacholine Challenge test and pulmonary function studies. Dr. Dew interpreted the Methacholine Challenge test results of November 26, 1998 as positive. Dr. Dew stated that his findings were consistent with the diagnosis of asthma/reactive airways which may or may not have been related to his employment.

Terry Martinez, Ph.D., a toxicologist, testified on behalf of Claimant. It was his opinion that Claimant's pulmonary condition was the result of exposure to Diisocyanates, deck coating, and epoxy resins while working for Employer.

On April 1, 2004, Claimant was reevaluated by Dr. Bruce. Dr. Bruce's physical examination was normal. Dr. Bruce also had pulmonary function testing performed by Dr. Senior who concluded there was no significant ventilatory defect nor any impairment either at rest or at exercise. On June 25, 2004, Claimant underwent a fifth series of pulmonary function studies which were compared with the April 1 results. Dr. Bruce reviewed these results as part of his report and testified that the tests revealed normal results with a normal Methacholine

Challenge test in that, like the November 1998 test, there was no drop of 20% in the FEV 1.

On September 20, 2004, Claimant was reevaluated by Dr. Dew, who diagnosed isocyanate induced asthma as a result of exposure to isocyanates in the deck coating materials. Dr. Dew stated Claimant had a positive Methacholene Challenge test. Dr. Dew testified that Claimant developed reactive airways disease/asthma from exposure to isocyanates.

Dr. Bruce reviewed the testimony and records of Dr. Martinez, and on December 5, 2006, issued a fourth report. Dr. Bruce challenged Dr. Martinez' opinions, especially those relating to Methacholene Challenge tests, and again noted that the American Thoracic Society requires an FEV 1/FVC decrease of 20% for a test to be positive. Dr. Bruce reiterated that Claimant does not have any work related pulmonary conditions and further does not have reactive airways or industrial asthma.

Donald Volmert of Investigation Unlimited testified on behalf of Employer. Mr. Volmert conducted a surveillance of Claimant on three different dates on August 18, 19 and 22, 2006. The high temperatures on those days were 89, 92 and 81 respectively. The surveillance tapes were relatively consistent with Claimant's trial testimony with regard to his physical abilities.

David Economon testified on behalf of Employer. Mr. Economon has been Employer's branch manager since 2003. In 1998, Mr. Economon was the production manager, and he visited the Pierre Laclede project on a regular basis. Mr. Economon testified that he was familiar with Toulene, which is used for deck coating and cleaning tools. Mr. Economon testified that Employer used a product called "Scrubs in a Bucket". Mr. Economon testified that the "Scrubs in a Bucket" should have been there, but acknowledged that sometimes Toulene may have been used by workers to clean their hands. Mr. Economon testified that the plastic barriers were installed in an attempt to keep dust from getting on cars.

Mr. Economon testified that Armatec is a bonding agent which is used as a deck coating as well as an anti-corrosive for rebar. There was deck coating applied to some areas of the Pierre Laclede parking garage before 1998. Scotch-Clad, a 3M basecoat product and intermediate coat, was also used by Employer.

The Material Safety Data Sheets for Scotch-Clad basecoat and intermediate coat state that adequate ventilation should be used, and if there is not appropriate ventilation, a half mask organic vapor respirator, or a full face supplied air respirator should be used. Both products contain Toulene Diisocyanates which, if inhaled, can cause allergic respiratory reactions with symptoms of difficulty breathing, wheezing, tightness of chest and respiratory failure.

Claimant has been treated with multiple respiratory medicines, some of which resulted in a swollen and blistered tongue. He is sensitive to medications, particularly steroids. He was hospitalized for an acute psychotic reaction to steroids. He currently uses Singulair which seems help with his breathing problems but does not prevent episodes. He is now sensitive to a wide variety of irritants including but not limited to dust, fumes, gasoline, polish, asphalt, barbecues, grass, cold, laundry detergent, mouthwash, bug spray, roof tar, mulch, chemicals, pollen, aerosols, deodorant, hair spray, dusting compounds, scented candles, cleaning solutions, hand lotions, car exhaust, perfumes/colognes, cosmetics, hair compounds, weather, cigarette smoke, lawn fertilizers, chlorine/Clorox, pungent foods, and humidity. Stress, exertion, walking, and going up stairs also affect him. Claimant is still learning which substances trigger problems.

The severity of his attacks varies. If he is able to minimize his exposure, he can limit the severity of the attack or otherwise prevent the attack from escalating. When Claimant has an attack, he experiences chest tightness and shortness of breath, and to a lesser degree, coughing and wheezing. His airway passages swell and take his breath away. He has a burning sensation in his chest. He avoids crowds as much as possible, including shopping, movie theaters, church, and restaurants. Whenever he is out in public he isolates himself as much as possible.

When he has these attacks, he stops whatever he is doing and isolates himself for a period of time until he regains his breathing and composure. Sometimes the attack will last a few minutes and other times it can last up to twenty minutes or longer. The frequency of severe attacks has decreased, which he attributes to the Singulair,

minimizing his exposure to irritants, and drastic change in his lifestyle. He carries an Albuterol inhaler with him at all times.

Claimant continues to cough. Claimant has difficulty walking up steps. Humidity and cold weather, as well as stress, can trigger an episode. He has a hoarse voice and talking often irritates his breathing. He tries to keep as functional as possible by walking and using an elliptical machine, but overexertion can precipitate an attack.

Claimant has difficulty sleeping. He rarely sleeps more than a few hours, which is due in part to his breathing problems. He takes 20 to 30 minute naps throughout the day, and wakes up due to coughing spells among other problems. He has difficulty lying on the left side or back because of his breathing difficulties.

Dr. Knapp diagnosed Claimant with respiratory problems which he attributed to prolonged breathing of concrete dust, particularly in an enclosed environment. Dr. Knapp thought Claimant would be unable to be gainfully employed because of his sensitivity to a multitude of known and unknown irritants and inability to tolerate steroids. Dr. Knapp testified Claimant reached maximum medical improvement with respect to his breathing difficulties beginning in July 2001 when the frequency of his severe attacks started to level off. Dr. Knapp testified Claimant should avoid exposure to known irritants such as fumes, aerosols, chemicals, stressful situations, cleaning compounds, perfumes, dust, cigarette smoke, and other known irritants. He should avoid working in any environment with high humidity or cold, which is subject to change in temperatures. Dr. Knapp testified Claimant needs to work in as sterile an environment as possible.

Dr. Bruce did not find any respiratory abnormality which would prevent Claimant from working. Terry Martinez, Ph.D., testified that Claimant should avoid any environmental factors that can trigger an attack.

Karen Kane-Thaler testified on behalf of Employer. Ms. Kane-Thaler testified that Claimant would be able to access certain jobs including a desk clerk at a hotel, a greeter for Wal-Mart, parking lot cashier, appointment setter for an exterminating company, sales representative at Cingulair, and an automobile salesman. She testified however, that if she took into consideration Claimant's respiratory difficulties when exposed to irritants, the jobs she listed may be eliminated, and it is possible that the jobs would be contraindicated and his condition could possibly eliminate these positions.

Ms. Sherry Browning testified on behalf of Claimant. Ms. Browning testified that Claimant could not compete in the open labor market because of his lung condition.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant sustained an occupational disease arising out of and in the course of employment which was caused by his exposure to inhaling dust and other substances while working for Employer. I find the medical testimony and records support the conclusion that Claimant developed reactive airways disease/asthma as a result of breathing dust and other substances that contained Toulene Diisocyanates. Employer's witness, Mr. Dave Economon, testified that the deck coating that was in place when Claimant was jackhammering contained a TDI. The material safety data sheets state the components in the base coat and intermediate coat contained substances which are known to cause allergic and respiratory reactions such as difficulty breathing, wheezing, tightness of chest, and respiratory failure. They are also known to cause irritation to the upper respiratory tract including soreness of the nose and throat, coughing, and sneezing. Respiratory protection recommended are half-mask organic vapor respirators or full-faced pressure demand self-contained breathing apparatus, neither of which was provided to the employees on the Pierre Laclede project.

Employer exposed the laborers to these environmental conditions without the proper protection. The dust was so thick Claimant was unable to identify co-workers who were only a few feet away from him. The 3M masks that were provided by Employer were insufficient to protect Claimant from the dangers of inhalation.

In this case, there are several highly qualified medical experts who disagree on Claimant's diagnosis. I find the opinions of Dr. Dew to be more convincing than Dr. Bruce's. Dr. Wald, a pulmonologist, in his pulmonary function test, found Claimant had mild to moderate restriction, and his impression was mild restrictive ventilatory abnormality. Dr. King, also a pulmonologist, after reviewing Claimant's Methacholene Challenge test, found it equivocal for bronchospasm. His diagnosis was asthmatic bronchitis, bronchospasm or asthma. Dr. King also testified that once you have asthma any irritant can worsen it. Only Dr. Bruce finds Claimant suffers from no lung condition whatsoever. In addition, Dr. Bruce alone diagnoses GERD. There is no other medical evidence to support such a diagnosis.

I find Claimant is permanently and totally disabled as a result of his lung condition and is unable to compete in the open labor market. I find Claimant testified credibly with regard to his symptoms and complaints. I find that his symptoms and complaints are consistent with the medical evidence in this case. I do not believe Claimant's testimony was impeached by the surveillance performed by Employer. The activities observed were generally consistent with Claimant's testimony. Although Claimant's walks were a little bit longer than he testified he was capable of taking, the discrepancy was not significant. Furthermore, Claimant was walking on a flat surface on days which were unseasonably cool. When Claimant drove a short distance to a restaurant, he was observed leaving the restaurant before his party, and standing outside for some time, which is consistent with his testimony that he is bothered by environmental triggers, and tries to remove himself from those situations.

I find the testimony of Ms. Browning more persuasive than Ms. Kane-Thaler. There is no employer in the open labor market who would employ Claimant given his level of education and experience, which would allow Claimant the flexibility to remove himself from work when exposed to an irritant. Claimant would have to remove himself from the environment for an unknown period of time until he was able to resume his activity. Given Claimant's lack of education and work experience, there are no employers who would be able to accommodate Claimant.

Claimant is entitled to TTD benefits beginning on September 16, 1998 until June 24, 1999, and from August 19, 1999 until July 1, 2001.

Claimant is awarded permanent total disability benefits beginning on July 1, 2001, the date upon which Claimant reached MMI with respect to his lung condition. Because Employer paid Claimant a \$10,000.00 advance against permanency in Injury Number 98-115782, Claimant is entitled to a \$10,000.00 credit.

Claimant is awarded \$1,452.75 in past medical expenses for the Christian Hospital Emergency Room bill. There is no evidence that Claimant ever demanded medical treatment from Employer. Claimant elected to treat on his own, and did so at his own expense.

The evidence does not support a claim for future medical treatment.

This award is subject to a lien in the amount of 25% in favor of Claimant's attorney, Mr. Dennis Barbour.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation