

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

Injury No.: 02-148229

Employee: James Hanks, dec.

Widow: Violet Hanks

Employer: Crawford County Road District #1

Insurer: Self-Insurer c/o Missouri Association of Counties

Date of Accident: September 1, 2002

Place and County of Accident: Crawford County, 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 Margaret Ellis Holden, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued July 29, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 18th day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: James Hanks Injury No. 02-148229
Dependents: Violet Hanks
Employer: Crawford County Road District #1
Additional Party: N/A
Insurer: Self-insured, managed by Missouri Association of Counties
Hearing Date: 5/5/08 Checked by: MEH

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: 9/1/02
5. State location where accident occurred or occupational disease was contracted: CRAWFORD COUNTY, MO
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
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: CHANGING BRAKES AND CLUTCHES.
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: N/A
14. Nature and extent of any permanent disability: N/A
14. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: JAMES HANKS Injury No. 02-148229

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

- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: #312.00
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
Unpaid medical expenses: 0
0 weeks of temporary total disability (or temporary partial disability)
0 weeks of permanent partial disability from Employer
0 weeks of disfigurement from Employer
Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime
- 22. Second Injury Fund liability: Yes No Open
0 weeks of permanent partial disability from Second Injury Fund
Uninsured medical/death benefits: N/A
Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0weeks, beginning N/A
and, thereafter, for Claimant's lifetime

Total: SEE AWARD

- 23. Future requirements awarded: NONE

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

BRyAN SCHEIDERER

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Hanks Injury No. 02-148229
Dependents: Violet Hanks
Employer: Crawford County Road District #1
Additional Party: N/A
Insurer: Self-insured, managed by Missouri Association of Counties
Hearing Date: 5/5/08 Checked by: MEH

The parties appeared before the undersigned administrative law judge on May 5, 2008, for a final hearing. The claimant, Violet Hanks, appeared in person represented by Bryan Scheiderer. The employer and insurer appeared represented by George Flores. Memorandums of law were filed by June 4, 2008.

The parties stipulated to the following facts: On September 1, 2002, the date of injury listed on the claim, James Hanks was no longer employed by the employer. He retired in 1999. Prior to the employee's retirement in 1999, Crawford County Road District #1 was an employer operating subject to The Missouri Workers' Compensation Law. The employer's liability was fully self-insured, managed by Missouri Association of Counties. Prior to his retirement in 1999, James Hanks was an employee of the employer. The employee was working subject to the Missouri Workers' Compensation Law. This employment occurred in Crawford County, Missouri. The claimant notified the employer of his injury as required by Section, 287.420, RSMo. The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo. At the time of the alleged occupational disease, the claimant's average weekly wage was sufficient to allow a compensation rate of \$312.00 for temporary total disability and permanent partial disability compensation. No temporary disability benefits have been paid to the employee or the claimant. The employer and insurer have paid no medical benefits. The attorney fee being sought is 25%.

ISSUES:

1. Whether the employee sustained an occupational disease which arose out of the course and scope of employment.
2. Whether the occupational disease caused the injuries and disabilities resulting in his death for which benefits are being claimed.
3. Whether the employer is obligated to pay past medical expenses, for which a Medicare lien has been filed.
4. The nature and extent of permanent disabilities, including permanent partial disability or permanent total disability.
5. An attorney lien has been filed by Timothy Evans.

FINDINGS OF FACT:

The employee, James Hanks, was 67 years old at the time of his death in 2004. His testimony was admitted by deposition. His wife and the claimant in this case, Violet Hanks, testified in person. The central issue in this claim is whether during the employee's employment he was exposed to asbestos, which caused his fibrotic lung disease and ultimate death.

The employee worked as a mechanic for Crawford County, Missouri for 21 years. Prior to this he had worked in construction, was in the military, and worked as a mechanic. Claimant also worked in construction as a truck driver and a concrete laborer. He dealt with concrete; it was wet. He did not work in the concrete plant or in situations in which he was exposed to dry concrete dust. The employee had smoked approximately 2 packs of cigarettes a day for 20 years, stopping in 1978.

As the mechanic for Crawford County, his duties included repairing and maintaining the numerous county vehicles ranging from a motor grader to pickup trucks. This work included changing brakes and clutches. The linings of the brakes and clutches contained asbestos fibers. The employee described the procedure he used in changing brakes. He would take the wheels and drums off. He would have a trouble light in one hand and an air hose in the other. He would then blow the dust clean before putting the new ones in. He said that the same process was used when he changed clutches. The shop he worked in was 50 feet by 40-45 feet. The building had bay doors and another door. There were no windows, air-conditioning, or ventilation. The employee also did welding. He was not provided with any protective gear.

The employee retired in May 1999. Mr. Hanks began having heart issues in the 1990's. He was treated by Dr. Sanfillipo who performed the first heart surgery on the claimant. He began seeing Dr. Caywood as a family doctor around 2000. Dr. Caywood referred him to Dr. Baird at the Missouri Heart Center.

Mr. Hanks testified that he began having breathing problems approximately a year before he retired. He described this as initially shortness of breath when he was doing heavy work such as lifting 100 pounds. He recalls seeing a doctor in Sullivan, Missouri but does not recall his name. He said that this doctor diagnosed him with interstitial fibrosis. He did not receive any treatment at that time. This doctor referred him to Dr. Onofrio.

Dr. Onofrio, at University of Missouri Hospital, treated him for his pulmonary conditions along with Dr. Baird,

who treated him for the heart condition. Mr. Hanks testified that Dr. Onofrio told him in 2002 that he suspected asbestosis. The employee also testified that although he was having health problems before this, this was the first time he was aware that his conditions could have been caused by exposure to asbestos. Mr. Hanks testified that at one of his early visits Dr. Onofrio asked him if had been in asbestos, and at first the employee said he had not. After further thinking about it, he believed he was exposed to asbestos during his work at Crawford County because of reports in the media that there was asbestos in the brakes.

Mr. Hanks' condition continued to deteriorate. When Dr. Baird first saw him for chest pain on July 2, 2002, employee's history was interstitial pulmonary fibrosis, coronary disease, previous angioplasty and stent placements times three, hypercholesterolemia, nephrolithiasis and osteoarthritis. He also noted a family history of myocardial infarctions in both his mother and father. He had been having exertional chest discomfort for six to seven months with increasing frequency. He recommended treatment for his heart condition such as medications, cardiac catheterization, angioplasty, and stent placement.

Mr. Hanks underwent heart catheterization and coronary angiogram in July 2002. He was readmitted to the hospital in September with increased shortness of breath. He was put on oxygen therapy. On November 7, 2002, Dr. Baird found him stable from a cardiovascular standpoint overall. Dr. Baird continued him on his current medications and noted was to see Dr. Onofrio later that day.

On November 7, 2002, Dr. Onofrio's records reflect "pulmonary fibrosis in association with coronary artery disease and exercise desaturation. He is using oxygen around the clock."

Dr. Baird saw employee in December 2002 for a cardiac evaluation, and noted a one month history of gradual decline in exercise tolerance, increased dyspnea on exertion and dyspnea at rest. In July 2003 he was continuing to use the oxygen and medications and was prescribed pulmonary rehab as well.

Dr. Baird again admitted the claimant for cardiac catheterization testing in June 2003. On admission, his diagnosis included worsening dyspnea on exertion and worsening coronary artery stenosis. Employee was admitted again in October 2003. A CT of the chest on October 30, 2003, showed interstitial thickening with cystic changes on the right and left lung as well as an indeterminate pulmonary nodule, which was new.

On November 13, 2003, Dr. Onofrio states in his treatment records that employee was fairly stable at that time, but was markedly limited due to his shortness of breath. Dr. Onofrio continued, "We discussed his pulmonary fibrosis, the probability of poor reversibility given his chest x-ray and CT scan. We will continue with the present regimen ... We did talk about his chest CT. It shows some chronic scarring, suggestive chronic interstitial fibrosis and certainly, asbestos is one of the possible etiologies." There also appeared a new nodule that he wanted to check out.

Again on March 30, 2004, Dr. Onofrio addressed the possibility of asbestos, discussing the employee changing brakes and clutches both made of material containing asbestos, noting "I don't have definite confirmation but Mr. Hanks says that is certainly true. We would need to get that information. He does have interstitial lung disease. He has had what appears to be exposure to asbestos while working with brake liners and clutches. He is also in the cement industry and there are reports that there can be asbestos in that occupational environment as well. He doesn't have any pleural plaquing on his CT scan but he does have interstitial fibrosis which is fairly chronic and asbestos certainly would be a reasonable causative agent for his clinical picture."

Claimant's condition continued to deteriorate. In July 2004 radiology reports compared to May 2004 studies showed changes of diffuse bilateral pulmonary fibrosis present, appearance was similar. In July 2004 Dr. Onofrio stated that the lung mass was most likely cancer. He felt a bronchoscopy or a needle biopsy would be too dangerous at that time. He also said that the treatment would primarily be chemo and radiation which would make his lung worse.

Claimant died on September 30, 2004. The death certificate listed the cause of death as lung cancer. No autopsy was performed. No lung biopsy was taken which would have confirmed or denied the presence of asbestos fibers in Mr. Hanks lung tissue.

The claimant presented the expert testimony of Dr. Arnold Tepper. Dr. Tepper's practice is in the area of general internal medicine with an emphasis on lung disease and geriatrics. Dr. Tepper examined the employee on July 26, 2004. In his initial report he concludes that Mr. Hanks had "diffuse pulmonary fibrosis and probable lung cancer. It appears that he has had significant exposure to asbestos and most likely the diagnosis is that he has: asbestosis, lung cancer, coronary artery disease, and respiratory failure." He later stated that the claimant's work was a substantial factor in causing the asbestosis leading to lung cancer, respiratory failure and death. In his deposition, Dr. Tepper testified that he did not feel it was necessary to see plural plaquing in order to have asbestosis. He testified "I have seen it before without the plural plaques, that people have developed asbestosis or they have developed lung cancer with significant asbestos exposure without plural plaques." Dr. Tepper did not review the CT scans themselves but reviewed the reports on them. From the reports he reviewed, he felt the employee had lung cancer. He agreed the CT

scan reports showed no evidence of plural plaquing.

The employer and insurer offered the expert testimony of Dr. Robert Bruce by deposition. Dr. Bruce is a physician affiliated with Barnes Hospital and Washington University. He is board certified in internal medicine and pulmonary disease. He diagnosed asbestosis as “a fibrotic lung condition caused by exposure to asbestos where you find ferruginous bodies or asbestos bodies within the fibrotic lung. In addition to being pulmonary fibrosis in the lung with a history of asbestos exposure, he felt that to complete the definition there needed to be a finding of asbestos fibers within the tissues or other associated findings of asbestos exposure. He said these other associated findings were examination findings or radiographic findings. Dr. Bruce said that in cases where there is no clear explanation for the cause, the label of idiopathic pulmonary fibrosis is given.

Dr. Bruce examined employee’s medical records, radiographic reports and the actual films. He testified that these showed Mr. Hanks had extensive idiopathic pulmonary fibrosis with honeycombing and traction bronchiectasis which progressed from April 2002 to August 2004. Plural plaquing is a thickening of the lung tissue. He found “no plural plaquing as one would expect to see if the pulmonary fibrosis was secondary to asbestos exposure.” He explained the importance of this by saying, “Mr. Hanks had scarring in his lungs, that the scarring was diffuse throughout all lung areas. It was very prominent in both lung bases. As the scarring progressed it pulled the bronchial tubes apart causing what’s called bronchiectasis. There was also loss of the distal lung architecture leading to what’s called honeycombing.” Further addressing the plural plaquing, he said, “especially if it is bilateral and in the typical locations posteriorly in the lower portion of the chest and anterior up high, especially if it’s calcified, is characteristic of asbestos exposure. To have exposure to asbestos to the degree where you develop fibrosis that is asbestosis, you almost always will have pleural plaquing present.” He said it would be extraordinarily unusual to have asbestosis without plural plaquing.

Dr. Bruce said he took the films to Washington University to view them and there were two chest radiologists there, Dr. Anderson and Dr. Purols. They also reviewed the films and felt that in the absence of plural plaquing, this was not asbestos. Dr. Bruce found two things significant. First the lack of plural plaquing, and second, that “asbestosis tends to progress relatively slowly and doesn’t pull the lung apart to the extent that occurred in Mr. Hanks’ case. The traction bronchiectasis and the honeycombing are much more characteristic of idiopathic pulmonary fibrosis.”

Dr. Bruce also testified that the dust that is present in brakes and clutches is there because the linings have heated up, and that if they had contained asbestos, the asbestos “was degraded to an inert compound where the fibers are less than five microns in length. Fibers that small are usually not retained in the lung.” He concluded that the Mr. Hanks’ employment did not create any significant exposure to asbestos, with either working with brake linings and pads or with welding anything. He felt the employee did not have asbestosis. He did not find that it was possible to make a diagnosis of asbestosis from the scans he reviewed without other markers of asbestosis exposure, which were absent here.

CONCLUSIONS OF LAW:

This is a case that deals with such a medical condition, asbestosis, which is so complex that expert medical testimony is crucial. In this case, there are two differing medical opinions offered by the parties. Dr. Tepper finds that the claimant had asbestosis and that it was caused by his employment. Dr. Bruce, on the other hand, found that Mr. Hanks had idiopathic pulmonary fibrosis, and that his work did not sufficiently expose him to asbestos and that he did not have asbestosis.

After carefully reviewing all of the evidence, I find Dr. Bruce’s opinion the most credible. Although Dr. Tepper deals with lung conditions, Dr. Bruce is board certified in pulmonology. In reviewing Dr. Bruce’s testimony, I found convincing his explanation why there were insufficient markers of asbestosis present in this case. This included the lack of plural plaquing, the honeycombing present, and the speed in which Mr. Hanks’ condition progressed. I also found persuasive his explanation of why the asbestos in the dust from brakes and clutches, after being heated, would not pose a danger as it was degraded and the fibers too small to be retained in the lung and cause asbestosis.

Based on the evidence as a whole, and particularly on the testimony of Dr. Bruce, I find that the employee did not sustain an occupational disease which arose out of the course and scope of employment which caused his condition resulting in his death.

Therefore, claimant’s claim is denied. As a result of this ruling, I find that the employer and insurer are not obligated to pay any past medical expenses for which a Medicare lien has been filed. I further find that the employee, Mr. Hanks, did not incur any permanent disability, and that his death was not caused by his employment. The attorney

lien of Mr. Evans is moot as no benefits are awarded.

Date: July 29, 2008

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation