

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

Injury No.: 03-115266

Employee: Damon B. Hosick

Employer: Little Tykes Commercial Play Systems, Inc.

Insurer: Self-Insured (TPA: Corporate Claims Management, Inc.)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: July 31, 2003

Place and County of Accident: Alleged Farmington, St. Francois 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 March 3, 2008, and awards no compensation in the above captioned case.

The award and decision of Administrative Law Judge Carl Strange, issued March 3, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Damon B. Hosick

Injury No. 03-115266

Dependents: N/A

Employer: Little Tykes Commercial Play Systems, Inc.

Additional Party:

Insurer: Self-insured
(TPA: Corporate Claims Management, Inc.)

Hearing Date: December 11, 2007

Checked by: CS/kh

SUMMARY OF FINDINGS

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? July 31, 2003
5. State location where accident occurred or occupational disease contracted: alleged Farmington, St. Francois County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Denied
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 happened or occupational disease contracted: Due to continuous lifting of heavy pipes and metal parts from June 2000 to July 31, 2003 for employer, the employee alleged that

he had

pain, clicking and popping in his right shoulder.

12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: alleged Right Shoulder
14. Nature and extent of any permanent disability: Denied
15. Compensation paid to date for temporary total disability: \$0.00
16. Value necessary medical aid paid to date by employer-insurer: \$795.00
17. Value necessary medical aid not furnished by employer-insurer: None
18. Employee's average weekly wage: \$494.40
19. Weekly compensation rate:
\$329.60 for temporary total disability, permanent total disability, & permanent partial disability
20. Method wages computation: By Agreement
21. Amount of compensation payable: Denied
22. Second Injury Fund liability: Denied
23. Future requirements awarded: Denied

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

FINDINGS OF FACT AND RULINGS OF LAW

On December 11, 2007, the employee, Damon B. Hosick, appeared in person and by his attorney, Ray Gerritzen, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, R. Scott Reid. The Second Injury Fund was represented at the hearing by Assistant Attorney General Gregg Johnson. Prior to beginning the hearing, the employee dismissed his claim against the employer and the Second Injury Fund in injury #02-150403. The parties proceeded to the hearing on injury #03-024741, #03-088603 & #03-115266. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about July 31, 2003, Little Tykes Commercial Play Systems, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer with a third party administrator of Corporate Claims Management, Inc.
2. On or about July 31, 2003, the employee was an employee of Little Tykes Commercial Play Systems, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage was \$494.40, his rate for temporary total disability, permanent partial disability and permanent total disability is \$329.60.
5. The employer has furnished \$795.00 in medical aid to employee.

6. The employer has paid no temporary total disability benefits.

ISSUES:

1. Accident;
2. Notice;
3. Medical Causation;
4. Additional Medical Aid;
5. Additional Temporary Total Disability;
6. Nature and Extent; and
7. Liability of the Fund.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A1. Deposition of Dr. Bruce Schlafly with Exhibits A-F dated September 1, 2004;
- A2. Deposition of Dr. Bruce Schlafly with Exhibits A-B dated July 13, 2006;
- B. Medical Records of Hand Therapy of Chesterfield;
- C. Medical Records of Orthopedic Associates, L.L.C.; and
- D. Medical Records of Parkland Health Center.

Employer-Insurer's Exhibits

1. Deposition of Dr. Evan Crandall;
2. Deposition of Dr. David B. Fagan dated August 21, 2004;
3. Deposition of Dr. David B. Fagan dated October 3, 2006;
4. None;
5. MRI Report;
6. EMG Report;
7. 02-150403 Claim for Compensation;
8. 03-024741 Claim for Compensation;
9. 03-088603 Claim for Compensation;
10. 03-115266 Claim for Compensation;
11. Timeline;
12. Employee Payroll Records; and
13. Calendar.

FINDINGS OF FACT:

Based on the testimony of Damon B. Hosick ("employee"), the testimony of the witnesses, the medical records and evidence admitted, I find as follows:

The employee graduated from High School in 1992 with 2 years of vocational training in electrical studies. Prior to starting work for Little Tykes Commercial Play Systems, Inc. ("employer") in 2000, the employee worked for Huffy as a line hanger and a paint stripper. Before being employed at Huffy, the employee worked for Wal-Mart, County Mart, Karsch's Grocery Store, County Mart, Eagle Lake and B & T Pallet. On cross examination, the employee admitted that he had changed 7 jobs in 9 years prior to starting work with the employer. As part of his job duties with the employer, the employee was required to hang metal parts on the line. While the weight of these parts ranged from a few ounces to 150 pounds, their size ranged from a few inches to 6 feet. The employee typically worked five to six days a week at eight hours per day as needed to complete the orders of playground equipment. On

March 10, 2003, the employee was dumping excess water from the parts washer when his wrist snapped and popped. At that time, Marty Allen, the supervisor over paint and weld, was present and witnessed the accident from approximately 20 to 30 feet away. The injury was reported to the employee's supervisor, Kenny Stricklin, and the employee was taken to Parkland Health Center. After examination and testing, the employee was diagnosed with a sprained right wrist and given Motrin and a split. The employee was initially released with a temporary weight restriction of lifting of no more than 30 pounds and then authorized to return to full work duty on March 15, 2003 (Employee Exhibit D).

At the time of the hearing, the employee testified that he was off work for 10 days due to the March 10, 2003 accident. However, the employee's time records only indicate that he missed three days of work following the accident and took vacation for the following week (Employer-Insurer Exhibit 12). After his return to work on March 24, 2003, he worked as a line hanger until there was a mass lay off on April 7, 2003. The employee filed his claim for compensation with the Division of Workers' Compensation regarding the March 10, 2003 injury on April 17, 2003. This claim was assigned injury #03-024741 (Employer-Insurer Exhibit 8). The following day, the employee was examined by his own physician, Dr. Bruce Schlafly, who found no Tinel's sign over the median nerve. In addition to noting that the Phalen's test for carpal tunnel was negative at the right wrist, Dr. Schlafly found that all of the flexor tendons of the right hand were working properly despite the employee's complaints of pain. As a result of the examination, Dr. Schlafly opined that the employee had a case of tendonitis of the right wrist with no definite diagnosis of carpal tunnel established. Finally, Dr. Schlafly noted that the employee had an additional complaint of a click in his shoulder but did not have time to investigate it (Employee Exhibit A-1, Deposition Exhibit B, page 3). Upon his return to work with the employer around the end of May 2003, the employee was placed in a temporary position on the roto line. As part of his job duties on the roto line, the employee was required to pry parts out of molds and scrap off excess plastic from small and large playground parts. Each part on the roto line was approximately 8 to 10 feet wide and was suspended from a chain and hoist. In order to perform his job, the employee would have to lift and pull the parts while they were suspended in the air.

On July 22, 2003, the employee was working for the employer on the roto line. The employee testified at the hearing that on that date around 6:30 to 7:00 p.m. he pulled a heavy mold that caused his wrist to pop and shoot pain to his elbow. Further, the employee testified that he reported the accident immediately to his supervisor, Mike Debert, who sent him home. On July 29, 2003, the employee was terminated by the employer (Employer-Insurer Exhibit 11). Around September 20, 2003, the employee's deposition was taken and he testified that he had some pain but the clicking was the main problem in his shoulder. At that time, the employee did not mention range of motion problems or grinding in his shoulder. On September 22, 2003, the employee filed his claim for compensation with the Division of Workers' Compensation regarding the July 22, 2003 injury to his right wrist. This claim was assigned injury #03-088603 (Employer-Insurer Exhibit 9). On September 24, 2003, the employee returned to Dr. Schlafly for examination and reported that "the right wrist pain became worse after he performed lifting of heavy molds" at the employer shortly before he was fired. After examining the employee, Dr. Schlafly opined that the employee is in need of further evaluation and treatment and that his work at the employer was a substantial factor in the cause of the right wrist complaints with tendonitis and carpal tunnel syndrome. Finally, Dr. Schlafly noted that the employee still had right shoulder complaints that have not been evaluated (Employee Exhibit A-1, Deposition Exhibit C). On November 17, 2003, the employee filed his claim for compensation with the Division of Workers' Compensation regarding the July 31, 2003 occupational injury to his right shoulder. This claim was assigned injury #03-115266 (Employer-Insurer Exhibit 10). At the time of the hearing, the employee testified that he reported his shoulder complaints and problems to the lead man, Danny Russell. However, Danny Russell testified at the hearing that he did not remember any report of injury made to him by the employee and that he would be the one to file any report of injury when they worked together.

The employer then sent the employee to Dr. David B. Fagan, an orthopedic specialist, on December 4, 2003 for evaluation of his wrist shoulder and wrist. After examining the employee, Dr. Fagan recommended cortisone injections and further testing for his shoulder tendonitis and acromioclavicular arthritis. As for the employee's wrist complaints, Dr. Fagan doubted that the employee still suffered from tendonitis due to the length of time that had past and then recommended further testing (Employer-Insurer Exhibit 2, Deposition Exhibit 2, page 2). On January 16, 2004, Dr. Daniel Philips performed a nerve conduction study and EMG report that were within normal limits and not impressive for carpal tunnel (Employer-Insurer Exhibit 6). At his deposition, Dr. Fagan testified that he did not have a

firm diagnosis on the employee's right wrist since he just had wrist pain. After noting that the employee did not need surgery on his wrist, Dr. Fagan opined that the employee's problems with his shoulder were degenerative in nature and not related to his work at the employer (Employer-Insurer Exhibit 1, Deposition Pages 12-14).

On March 10, 2004, the employee returned to Dr. Bruce Schlafly for further examination. After providing the employee with a cortisone injection, Dr. Schlafly continued his diagnosis of right carpal tunnel syndrome with flexor tenosynovitis and secondary compression of the ulnar nerve. With regard to the right shoulder, Dr. Schlafly recommended further evaluation and care with an orthopedic surgeon. Finally, he opined that the employee's work with the employer was the substantial factor in causing the condition in the employee's right wrist and shoulder and the subsequent need for treatment. On March 17, 2004, Dr. Schlafly spoke with the employee regarding the shot wearing off and opined that the employee's wrist condition required surgery (Employee Exhibit A-1, Deposition Exhibit D). The employee was then examined by Dr. R. Evan Crandall, a plastic surgeon, on April 27, 2004. At his deposition, Dr. Crandall admitted that 99% of his practice is hand surgery with 80% of that being limited to carpal tunnel (Employer-Insurer Exhibit 1, Deposition Page 5). After reviewing the medical evidence and examining the employee, Dr. Crandall opined that the employee did not have carpal tunnel syndrome but recommended an MRI of the wrist and shoulder (Employer-Insurer Exhibit 1, Deposition Exhibit 2). The MRI was completed by Dr. John P. Crotty on May 12, 2004 and showed no abnormality of the right wrist (Employer-Insurer Exhibit 5). After reviewing the MRI, Dr. Crandall opined that he would not recommend any surgery since the objective tests do not show any evidence of injury (Employer-Insurer Exhibit 1, Deposition Exhibit 2, page 6).

On October 20, 2004, Dr. Fagan reviewed the medical records and reports of Dr. Crandall. Regarding the employee's right shoulder, Dr. Fagan opined that if the employee complained of shoulder pain months after he was working then it was not related to his work. If the employee did complain of pain during his work, the shoulder problem possibly could be work-related (Employer-Insurer Exhibit 3, Deposition Exhibit 3). The employee returned to Dr. Schlafly on January 25, 2005 for examination. At that time, Dr. Schlafly recommended a right carpal tunnel release with flexor tenosynovectomy on the wrist and an MRI with cortisone injections on the right shoulder. Further, Dr. Schlafly opined that if the employee was unable to get treatment, then the employee had suffered a 35% permanent partial disability of the right wrist due to the work injury of March 10, 2003 and a 35% permanent partial disability of the right shoulder due to impingement syndrome and tendonitis from lifting at work with the employer (Employer-Insurer Exhibit A-2, Deposition Exhibit B, page 4). On March 22, 2005, Dr. Fagan repeated x-rays which indicated Type II acromion and spurring of the acromioclavicular joint. After Dr. Fagan reviewed the MRI scan brought by the employee, he opined that the employee had some impingement, some acromioclavicular arthritis and a possible partial rotator cuff thickness tear or tendinitis (Employer-Insurer Exhibit 3, Deposition Exhibit 3).

At the time of the hearing, the employee complained that he had constant popping, pain, and cramping in his wrist. As a result of these problems, the employee testified that he has difficulty lifting more than 25 pounds, carrying bags of groceries, driving long distances and holding things. With regard to his right shoulder, the employee noted that he had grinding in the joint, pain and difficulty lifting things overhead. The only prior injury to the employee's hand was a boxer fracture to the 5th metacarpal in September of 2001 (Employee Exhibit C). While he worked for the employer, he was written up for 3 violations of the employer's policies. In July of 2000, the employee was cited for falling asleep at work. The employee was counseled for unsatisfactory performance in December of 2002. Finally, the employee was written up for improper positioning of his hands due to the March 10, 2003 injury.

APPLICABLE LAW:

· The burden is on the employee to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only he sustained an accident that arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A.B. Chance Company*, 503 S.W.2d 697(Mo.App.1973).

· Section 287.063.2 RSMo. in effect at the time of the alleged occupational disease provided that "the employer who is liable to pay compensation for an occupational disease shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure."

Section 287.063.1 RSMo. in effect at the time of the alleged occupational disease stated that “an employee is conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo.”

Although the workers’ compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of his claim. *Melvius v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968). Therefore the employee has the burden of proving not only that he sustained an accident, which arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A. B. Chance Company*, 503 S.W.2d 697 (Mo.App.1973).

RULINGS OF LAW:

Issue 1. Accident & Issue 3. Medical Causation

The ruling on the issue of accident and medical causation boils down to a question of credibility. At the time he filed his claim on November 17, 2003, the employee alleged that he had pain, clicking and popping in his right shoulder due to continuous lifting of heavy pipes and metal parts from June 2000 to July 31, 2003 for the employer. The employee also stated in his claim that he reported the pain and clicking in his shoulder to his lead man, Danny Russell. At the time of the hearing, Danny Russell testified that he did not remember the employee reporting any injury to him and that if he did that he would have filed an accident report. The only medical evidence concerning his right shoulder that exists prior to the employee’s termination is Dr. Schlafly’s report of April 18, 2003. At that time, Dr. Schlafly noted that the employee had an additional complaint of a click in his shoulder but did not have time to investigate it (Employee Exhibit A-1, Deposition Exhibit B, page 3). There is no mention by Dr. Schlafly of any pain, grinding, range of motion problems or popping in the right shoulder. The employee was terminated on July 29, 2003, but alleged in his claim that the last exposure occurred on July 31, 2003. Following the termination, the employer-insurer took the employee’s deposition on September 20, 2003. At his deposition, the employee testified that he had some pain but the clicking was the main problem in his shoulder. At that time, the employee did not mention range of motion problems, popping or grinding in his shoulder. On September 24, 2003, Dr. Schlafly notes that the employee has some shoulder problems, but still does not examine or treat it. On October 20, 2004, Dr. Fagan opined that if the employee complained of shoulder pain months after he was working then it was not related to his work. If the employee did complain of pain during his work, the shoulder problem possibly could be work-related (Employer-Insurer Exhibit 3, Deposition Exhibit 3).

Both Dr. Fagan’s and Dr. Schlafly’s opinion are based on subjective complaints and a causation history provided by the employee. The employee has failed to provide sufficient corroborating evidence that his right shoulder complaints were attributed to his work with the employer. As time passed, the employee’s right shoulder complaints grew progressively worse after he was fired by the employer. After reviewing all of the evidence and observing the employee testify, I find that the employee is not credible regarding his case and complaints of pain, popping, grinding and range of motion problems with regard to his right shoulder. There appears to be an exaggeration of symptoms by the employee, subsequent deterioration and/or an ulterior motive for his claims against the employer.

Based on these facts and the medical evidence submitted, I find that the employee has failed to satisfy his burden of proof on the issue of occupational disease and medical causation for his July 31, 2003 claim. The evidence does not support a finding that the employee suffered an occupational disease and was last exposed to that disease on July 31, 2003 and that the occupational disease was a substantial factor in causing his current shoulder problems or any disability related to his shoulder. The employee’s claim for compensation must therefore be denied.

As a result of this denial, the remaining issues are moot and shall not be ruled upon.

Date: _____

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Director
Division of Workers' Compensation