

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

Injury No.: 01-127221

Employee: Wilbert Jones
Employer: Anheuser-Busch, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: September 1, 2001

Place and County of Accident: St. Louis City, 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 October 5, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued October 5, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Wilbert Jones

Injury No. 01-127221

Dependents: N/A
Employer: Anheuser-Busch, Inc.
Additional Party: Second Injury Fund
Insurer: Self-insured
Hearing Date: July 18, 2006

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

Checked by: JHP

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: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Alleged repetitive use of the shoulders in opening and closing boxcars, moving bulkheads, and operating a forklift
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
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Wilbert Jones

Injury No. 01-127221

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$898.00
19. Weekly compensation rate: \$598.66 TTD/\$329.42 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL:

None

23. Future requirements awarded: None

Said payments to begin 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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Wilbert Jones	Injury No. 01-127221
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Anheuser-Busch, Inc.	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Self-insured	Checked by: JHP

A hearing in this proceeding was held on July 18, 2006. All parties submitted proposed awards on August 22, 2006.

STIPULATIONS

The parties stipulated that on or about September 1, 2001:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;
3. the employee's average weekly wage was \$898.00; and
4. the rate of compensation for temporary total disability and permanent total disability was \$598.66 and the rate of compensation for permanent partial disability was \$329.42.

The parties further stipulated that:

1. the employer had notice of the alleged occupational disease and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer has not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant was exposed to an accident or occupational disease due to repetitive trauma which arose out of and in the course of claimant's employment;
2. if the employee was exposed to an occupational disease by his work-related activities, whether he sustained an injury as a result of the occupational disease exposure;
3. if the employee sustained a compensable injury, whether and to what extent employee sustained any permanent partial disability which would entitle him to an award of compensation; and
4. if the employee sustained a compensable injury, whether and to what extent employee has sustained any additional permanent partial or total disability for which the Second Injury Fund would be liable as a result of

the combination of any preexisting disabilities with the primary injury.

OCCUPATIONAL DISEASE

Employee claims that he developed bilateral rotator cuff disease as a result of
of loading cases of beer onto railroad cars.^[1]

27 years

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It defines occupational disease as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability."^[2]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance. In repetitive motion cases,^[3] as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally induced diseases also sometimes occur in the public at large, the courts have focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World

Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (2000). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Brufat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is only partially credible. ^[4] Based on that portion of claimant's testimony which I find to be credible and on the medical records, I make the following findings of fact.

Description of Employment

Employee worked for employer, Anheuser-Busch, Inc., for approximately thirty years from April of 1971 through September 1, 2001. With the exception of the first two or three years of his employment by Anheuser-Busch, employee worked as a forklift driver. He is six feet tall and weighs 195 pounds. In September of 2001 he was 57 years old.

Employee's job was to load cases of beer that were stacked on pallets onto railroad boxcars. To carry out this task, employee manually opened the boxcar door, moved the bulkheads inside, transferred the pallets of beer to the boxcar, and closed the boxcar door. (Claimant's Testimony)

Employee picked up two pallets of cases of beer with the forklift, drove to the railroad car, got off the forklift, cranked the door handle, raised the lever and pushed the door open. The boxcar door was ten feet high and twelve feet wide. When a door was stuck he pried it open with a metal bar. Employee opened and closed the door of about two boxcars every day. (Claimant's Testimony and Employer's Exhibit 1, Page 32 & Exhibit 5)

After opening the boxcar door, employee and a co-worker then moved the two bulkheads located inside the boxcars. The bulkheads were floor-to-ceiling metal panels whose purpose was to separate the cargo inside the boxcar. The bulkheads were suspended from the ceiling on rollers and moved in tracks. They weighed 100 pounds. Employee and a co-worker moved bulkheads by pushing and pulling on them. When a bulkhead was stuck, employee used a metal rod overhead to force the bulkhead to move. (Claimant's Testimony and Employer's Exhibit 5)

Employee then drove the forklift with the pallets into the boxcar. While operating a forklift, employee used his right

hand to operate the control levels and his left hand to steer the forklift. Employee moved 60 to 110 loads per shift. He operated the controls 120 to 220 times per shift to both retrieve and deposit the loads. Claimant frequently drove backwards. While doing so he turned his head to the right and looked behind him. Claimant occasionally lifted by hand a case of beer weighing 32 pounds which had fallen from a pallet. After loading one side of the railcar, employee and a co-worker moved the bulkhead and secured it with locking pins to the floorboard. After loading the other side of the boxcar, employee and a co-worker moved the other bulkhead and secured it with locking pins to the floorboard. Employee moved about 4 bulkheads twice per day. Employee then closed and secured the railcar door. (Claimant's Testimony and Employer's Exhibit 5)

Based on the foregoing findings, I further find that claimant engaged in very little physical activity at or above the shoulder level while performing his job at Anheuser-Bush, Inc.

Medical Treatment

Employee could not remember when he started having problems with his shoulders. (Claimant's Testimony)

The first medical record referencing any shoulder problem is an August 4, 1994 report from Dr. Daniel Phillips. Claimant told him that he developed left elbow and left shoulder pain after shooting basketballs with his grandson. Dr. Phillips' examination was unremarkable. He recommended that employee take anti-inflammatories and refrain from basketball for awhile and return as needed. (Claimant's Exhibit E and Employer's Exhibit 1)

On October 23, 1998 claimant next sought treatment for his left shoulder from Dr. Benjamin Goldstein, his internist. He complained of difficulty elevating his left shoulder because of shoulder pain. Dr. Goldstein referred claimant to Dr. Donald R. Bassman who examined claimant on November 10, 1998. His assessment was rotator cuff tendinitis. He prescribed Daypro and physical therapy. Claimant underwent physical therapy at HealthSouth. (Employer's Exhibit 1, Page 76-77)

Dr. Bassman reexamined claimant's left shoulder on December 8, 1998, January 5, 1999, and February 2, 1999. Employee's range of motion was excellent though he still had some mild pain with resisted motion, forward flexion, abduction and internal rotation of the shoulder. Dr. Bassman recommended that he continue his left shoulder exercises. (Employer's Exhibit 1, Pages 78-79)

Mr. Jones returned to Dr. Bassman on February 1, 2000. He complained that his lower back was "killing" him and that he was having pain in both shoulders. His right shoulder pain began around the prior Thanksgiving when he was carrying some plywood down a flight of stairs and dropped it due to shoulder pain. ^[5] He reported that his left shoulder always bothered him and that he had a difficult time positioning himself while sleeping. He had pain with resisted forward flexion, abduction and internal rotation of the right shoulder. He had only mild pain with resisted motion of the left shoulder. X-rays taken of his shoulders showed mild degenerative changes. Dr. Bassman's impression was bilateral rotator cuff tendinitis and lumbar pain. He prescribed Celebrex and physical therapy. (Claimant's Exhibit H, Pages 2-3 and Employer's Exhibit 1, Pages 88-89) Dr. Bassman reexamined claimant on February 22 and March 28, 2000. Claimant indicated that his shoulders were better at each examination. (Claimant's Exhibit H, Pages 6-7)

Claimant returned to Dr. Bassman on July 11, 2000 and reported that his arm/shoulder had been "killing" him for 5 to 6 weeks. Dr. Bassman's impression was bilateral rotator cuff tendinitis. He prescribed Celebrex. Dr. Bassman reexamined employee on August 8, 2000. Though claimant was somewhat better, Dr. Bassman ordered an MRI of the right shoulder. He reviewed the MRI on August 15 and diagnosed a rotator cuff tear. (Claimant's Exhibit H, Pages 9-10 & 20)

On September 25, 2000 Dr. Bassman performed surgery on employee's right shoulder. During surgery he found a partial tear of the biceps tendon and a full thickness tear of the rotator cuff. The biceps tear was debrided. The rotator cuff tear was debrided and repaired with 4 anchors. (Claimant's Exhibit J, Pages 21-22) On October 24 Dr. Bassman prescribed physical therapy for the right shoulder. On November 14, 2000 Dr. Bassman prescribed additional physical therapy. On December 12, 2000 claimant told him that he still had some soreness. Dr. Bassman prescribed additional physical therapy. On January 9, 2001 claimant told Dr. Bassman that he felt pretty good, though he had some pain with certain movements. Dr. Bassman released claimant to return to work. (Claimant's Exhibit H, Pages 16-18 & 23-24)

Mr. Jones returned to his job with Anheuser-Bush, Inc. and continued working until September 1, 2001. At that time he took advantage of an opportunity to retire with full retirement benefits and retired. (Claimant's Testimony)

On January 15, 2002 while seeking treatment for his left knee, claimant told Dr. Bassman that his left shoulder was achy at times. Dr. Bassman diagnosed him with degenerative joint disease of the left knee and left rotator cuff tendinitis and prescribed Celebrex. (Claimant's Exhibit J, Pages 6 & 8) Dr. Bassman reexamined claimant on April 9, 2002. Employee

reported that his left shoulder was “ok”, but that it hurt to be on it sometimes. Dr. Bassman diagnosed him with left rotator cuff tendinitis and prescribed Celebrex. On July 30, 2002 employee complained to Dr. Bassman that his left knee pain was getting worse; he did not mention his left shoulder. On August 20 employee reported to Dr. Bassman that his left knee was not as painful he did not mention his left shoulder. On September 2, 2002 Mr. Jones complained of pain in his left elbow and left knee; he did not mention his left shoulder. (Claimant's Exhibit J, Pages 6, 8, 10, 12 & 14)

On July 14, 2004 Dr. Bassman performed surgery on claimant's left shoulder. During the surgery he found a large tear of the rotator cuff. He debrided the cuff and labrum and performed a subacromial decompression. Using 5 anchors, he repaired the rotator cuff tear to the humeral head. (Claimant's Exhibit K, Pages 6-7)

Medical Opinions

Dr. Bassman wrote on November 10, 1998 that claimant did “a lot of work with his arms and may have just over the years suffered injuries to the muscles or the rotator cuff.” At that time claimant was complaining of left shoulder pain only. Dr. Bassman diagnosed him with left rotator cuff tendinitis. (Employer's Exhibit 1, Page 76)

Dr. Joseph Hanaway, a board certified neurologist, testified by deposition on behalf of employee on May 11, 2006. He examined claimant on August 12, 2002 and November 10, 2005. On August 12, 2002 claimant told him that he loaded and unloaded beer from boxcars with a forklift, manually opened and closed doors of the boxcar, and manually moved bulkheads inside the cars. Employee told him that doors and bulkheads were frequently stuck and that he used a crowbar to pry open a door or move a bulkhead. He loaded one side of the boxcar, moved the partitions and loaded the other side. Employee told him that he filled two or three boxcars in a day with cases of beer. (Claimant's Exhibit L, Pages 7-8)

Dr. Hanaway indicated that claimant developed right shoulder pain, was diagnosed with a work-related rotator cuff tear by Dr. Bassman and underwent surgery on September 25, 2000. There is nothing in the record that indicates that Dr. Bassman diagnosed claimant's right rotator cuff tear as work related. Dr. Hanaway testified that claimant told him that his left shoulder was bothering him, but that it had improved with exercises. As of August 12, 2002 he had not undergone surgery on the left shoulder. (Claimant's Exhibit L, Pages 9-10)

Dr. Hanaway's findings on his examination of the right shoulder were relatively benign. Employee had a little pain on external rotation. (Claimant's Exhibit L, Pages 12-13 & 28) When Dr. Hanaway reexamined the right shoulder on April 7, 2005 claimant had an excellent result and “no symptoms at all.”(Claimant's Exhibit L, Page 38)

Dr. Hanaway opined that the work activities performed by Mr. Jones at Anheuser-Busch, Inc. were a substantial factor in causing the rotator cuff tear in the right shoulder. Dr. Hanaway noted that employee performed a lot of relatively heavy manual work, as well as used a forklift to load and unload cases of beer. He thought that this was “a perfect situation to develop this kind of problem in the shoulder.” (Claimant's Exhibit L, Page 15)

Dr. Hanaway reexamined claimant on April 7, 2005. (Claimant's Exhibit L, Page 34) Claimant told him that he had undergone surgery on the left shoulder in May of 2004. Dr. Hanaway reviewed Dr. Bassman's operative note. (Claimant's Exhibit L, Pages 16 & 35) Dr. Hanaway opined that claimant's work activities performed by Mr. Jones at Anheuser-Busch, Inc. were a substantial factor in causing the rotator cuff tear of the left shoulder. He explained that the history of opening boxcar doors, sometimes with a crowbar, and moving the hanging partitions, his development of symptoms and diagnosis of a rotator cuff tear “all sort of fell in sequence.” (Claimant's Exhibit L, Pages 16-17)

On cross examination Dr. Hanaway testified that he assumed that claimant opened three to six boxcar doors per day. He did not know how many bulkheads claimant moved in a day or how many there were in a boxcar. (Claimant's Exhibit L, Pages 22-23) He admitted, except for Dr. Bassman's second operative note, that he did not review any medical records and that he obtained the medical history entirely from Mr. Jones. (Claimant's Exhibit L, Page 24)

On cross examination Dr. Hanaway agreed that the only complaint which Mr. Jones had with respect to his left shoulder on August 12, 2002 was that his left shoulder was bothering him and that it had gotten better with exercises. (Claimant's Exhibit L, Page 25) Dr. Hanaway acknowledged that his August 12, 2002 report did not include any examination findings pertaining to the left shoulder. (Claimant's Exhibit L, Page 28) He agreed that claimant had retired nearly a year prior to the August 2002 examination. (Claimant's Exhibit L, Page 26)

On cross examination Dr. Hanaway agreed that it was possible for an individual to have a degenerative process in a shoulder which results in rotator cuff pathology. He added that it was less probable in Mr. Jones' case given the kind of work he was doing. (Claimant's Exhibit L, Page 43)

Dr. Edward Schlafly, a board certified orthopedic surgeon, testified by deposition on behalf of employer on February 21, 2005 and February 13, 2006. He examined claimant on December 2, 2003 and July 19, 2005.

On December 2, 2003 claimant told Dr. Schlafly that he developed symptoms in his right shoulder in September of 1996, was ultimately diagnosed with a torn rotator cuff and underwent a surgical repair. There was no one specific injury and no one thing which he blamed for his shoulder problems other than his work activities. Employee described operating a forklift for Anheuser-Busch, Inc. for 31 years. He also reported that he had performed quite a bit of manual loading and unloading. He further described opening and closing of heavy rusted doors on boxcars. Employee told Dr. Schlafly that he felt that his symptoms were the result of the repetitive use of his shoulder. (Employer's Exhibit 7, Pages 8-9) Dr. Schlafly also reviewed a job analysis which described activities of driving a forklift, loading trucks and rail cars, and a number of other activities. Dr. Schlafly read that most of employee's time was spent driving the forklift. (Employer's Exhibits 5 & 6, Page 28)

Though he did not review Dr. Bassman's first operative report, Dr. Schlafly concluded, based on x-rays taken of the right shoulder which revealed 4 anchors in the shoulder, that claimant had a large full thickness tear. (Employer's Exhibit 7, Pages 14-15)

Dr. Schlafly opined that Mr. Jones developed his rotator cuff problem because of wear and tear (i.e. the natural aging process in adults). Dr. Schlafly believes that there is a significant genetic component to the development of rotator cuff disease^[6] and in the absence of a specific injury, he attributes the overwhelming majority of cases of rotator cuff disease to the natural aging process in adults. He testified that he felt that claimant's rotator cuff condition and the surgical repair were not related to any specific work injury or activity. (Employer's Exhibit 7, Pages 11-12 & 20)

On cross examination Dr. Schlafly testified that he sees full thickness tears all the time in patients who have absolutely no clue as to the cause of the tears. Dr. Schlafly tells them that it is the natural aging process in adults. He testified that the development of rotator cuff tears occurs in patients without any known cause. (Employer's Exhibit 7, Pages 16-17)

On cross examination Dr. Schlafly agreed that a physically demanding job could aggravate the underlying condition in a shoulder and make it symptomatic. However, he did not know the answer to the question of whether a physically demanding job could speed up the underlying condition in a shoulder which was going to become bad anyway. Dr. Schlafly added that while it might logically follow that a physically demanding job would speed up the process, it would not explain why many patients with equally demanding jobs do not develop rotator cuff disease. He explained that as he sees many patients with bad rotator cuff disease without any known cause he believes the cause of rotator cuff disease is not well understood. He stated that rotator cuff disease is just a very common condition. (Employer's Exhibit 7, Pages 17-18)

Dr. Schlafly testified that when he reexamined claimant on July 19, 2005 Mr. Jones again described his work as a forklift operator for Anheuser-Busch, Inc. He told Dr. Schlafly that his left shoulder began to bother him, he reported it to the employer's physicians and ultimately underwent surgery on the left shoulder. (Employer's Exhibit 8, Pages 9-10)^[7]

Dr. Schlafly testified that he obtained x-rays of the left shoulder which showed five anchors in the greater tuberosity which were consistent with a large tear of the rotator cuff. (Employer's Exhibit 8, Page 11)

Dr. Schlafly testified that rotator cuff disease is an exceedingly common condition in all walks of life. Except in rare circumstances physicians are unable to attribute the condition to any particular activities. Dr. Schlafly opined that 90% of rotator cuff disease occurs in people gradually with the type of onset that Mr. Jones described. He added that physicians see an equal incidence of rotator cuff disease in people who have sedentary jobs and those who have jobs like Mr. Jones. (Employer's Exhibit 8, Pages 13-14)

Dr. Schlafly added that the presence of rotator cuff disease in both of claimant's shoulder "would be most consistent with this gradual onset, wear and tear attrition type process that occurs in most patients over a period of time unrelated to any clear-cut or specific activity." Dr. Schlafly added that the fibrous tissue structures in the body, including the rotator cuff tendons, Achilles tendon, and patella ligament deteriorate over time. (Employer's Exhibit 8, Pages 14 & 18)

Dr. Schlafly testified that he sees large full thickness tears all the time in patients where neither he nor the patients are able to relate the tears to any particular activity. (Employer's Exhibit 8, Page 14) Dr. Schlafly opined that claimant's work at Anheuser-Busch, Inc. was not a substantial factor in the development of the left shoulder conditions and complaints. He added that the medical treatment was necessary for employee's rotator cuff disease which he did not relate to his work activities. (Employer's Exhibit 8, Page 15-16) Dr. Schlafly testified that he has seen a lot of patients for other orthopedic

conditions who engage in very physical activities and who have no problems with their shoulders. He also has seen patients with large rotator cuff tears who described no provocative activity for such bad rotator cuff disease. He has also seen many patients with sedentary lifestyles who develop full thickness tears of the rotator cuff. (Employer's Exhibit 8, Pages 19-20 & 30)

On cross examination Dr. Schlafly clarified his use of the phrase "wear and tear" to refer to the attrition that is developing in the rotator cuff tendon. (Employer's Exhibit 8, Page 24) Dr. Schlafly explained that he is unable to pinpoint a physical activity as the cause of rotator cuff disease because rotator cuff disease develops in individuals who engage in demanding physical activity and in persons who lead a sedentary lifestyle. (Employer's Exhibit 2, Page 25) He testified that he is unable to answer the question of whether an individual, who engages in physical activities which put greater stress on the shoulders compared to the reduced stress on the shoulders from a sedentary job, is placed at a greater risk of developing rotator cuff disease because "some people, despite everything they do, don't get rotator cuff disease, [and] some people despite outwardly doing very little, get rotator cuff disease." That is why he attributes a lot of rotator cuff disease to genetic predisposition. (Employer's Exhibit 8, Page 26) He added that he has not detected an increased risk of rotator cuff disease in other workers who do the same job as Mr. Jones. (Employer's Exhibit 8, Pages 27-28)

Additional Findings

Dr. Bassman's opinion of November 10, 1998 was equivocal and was not made to a reasonable degree of medical certainty. As his deposition was not taken Dr. Bassman did not express any causation opinion which met the "a substantial factor" test. Furthermore, this opinion was made more than six years prior to the diagnosis of a left rotator cuff tear and the left rotator cuff surgery in July of 2004. I find that the statement in Dr. Bassman's November 10, 1998 medical note does not constitute substantial evidence of a causal connection between claimant's left rotator cuff tear and the July 14, 2004 surgery and his work at Anheuser-Busch, Inc.

In comparing the conflicting opinions of Drs. Hanaway and Schlafly, I find that Dr. Schlafly's experience, education and training in the field of orthopedics are vastly superior to Dr. Hanaway's knowledge of this field. This vastly superior experience enabled Dr. Schlafly to explain the basis for his opinions.

Dr. Schlafly stated that rotator cuff disease, including a full thickness tear, is a common and ordinary disease of life which equally affects "little old ladies", business people with sedentary jobs, and workers with physically demanding jobs. He opined that attributing the cause of rotator cuff disease in the workers with physically demanding jobs to their work activities does not explain the cause of rotator cuff disease in persons who have sedentary lifestyles; nor does it explain the absence of rotator cuff disease in workers with the same physically demanding jobs. Dr. Schlafly believes that there is a strong genetic component to the development rotator cuff disease. Dr. Schlafly further testified that he has not detected any increased risk of rotator cuff disease in workers who have jobs similar to that of Mr. Jones. While he agreed that a physically demanding job could aggravate an underlying rotator cuff pathology and make it symptomatic, he did not know whether that job could accelerate the progression of the underlying pathology.

Other than stating his conclusion that claimant's bilateral rotator cuff tears were due to claimant's repetitive use of his arms at Anheuser-Busch, Inc., Dr. Hanaway offered no explanation of why that would be true. Other than incorrectly assuming that claimant opened three to six boxcar doors per day,^[8] Dr. Hanaway had no idea how many bulkheads claimant moved per day. He did not explain how any particular activity placed greater stress on claimant's shoulders than other activities of claimant's daily living. Furthermore Dr. Hanaway failed to respond to any of Dr. Schlafly's explanation. As Dr. Hanaway testified after Dr. Schlafly, he could have been asked to respond to the assertions of Dr. Schlafly. Nor did Dr. Hanaway explain how claimant's left rotator cuff tear which apparently did not become symptomatic until July of 2004 would be related to his employment which ended on September 1, 2001, especially considering that claimant told Dr. Hanaway on August 12, 2002 that his left shoulder had improved with exercises.

I previously found^[9] that claimant engaged in very little physical activity at or above the shoulder level while performing his job at Anheuser-Bush, Inc. Neither physician was asked about the particular stresses caused by repetitive work at or above the shoulder level. The only physically demanding activities involving employee's shoulders were occasionally lifting a case of fallen beer, opening and closing two railcar doors per day, and moving 4 bulkheads twice per day. I find that the claimant spent only a very small percentage of his time engaging in these physically demanding activities. I find that claimant spent the overwhelming portion of his time operating and driving the forklift.

While there was evidence that rotator cuff disease is an ordinary disease of life, there was no evidence that there is a greater exposure to or risk of this disease in claimant's occupation than in the public generally. Nor was there any evidence

of a greater incidence of rotator cuff disease among forklift operators than in the public generally. See Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 300 (Mo. App. 1991); Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Taking into account all of the evidence and the credible opinions of Dr. Schlafly, I find that claimant's bilateral rotator cuff disease was not an occupational disease. I further find that employee's rotator cuff disease was neither caused nor accelerated by claimant's employment activities at Anheuser-Busch, Inc. Accordingly, the claim for compensation against Anheuser-bush, Inc. is denied.

SECOND INJURY FUND LIABILITY

Employee is also seeking an award of permanent total disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that section where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself^[10] and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617-18 (Mo. App. 1995); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

As I have previously found that claimant failed to prove a compensable injury against the employer, the claim against the Second Injury Fund is denied.

Date: _____

Made by: _____

JOHN HOWARD PERCY

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret

Director

Division of Workers' Compensation

[1]

Though the amended claim for compensation (Employer's Exhibit 4, Page 5) alleged injuries to both elbows and both shoulders, claimant appears to have abandoned the claim with respect to the elbows. He did not present any medical evidence of any new injuries to his elbows subsequent to the June 5, 2000 hearing in Injury No. 96-161533 in which he claimed that his bilateral cubital tunnel syndrome was work-related. Claimant underwent ulnar nerve transpositions at the elbows in September and November of 1996. (Employer's Exhibit 1, Page 182 & 241). The only new medical causation opinion came from Dr. Daniel Phillips, a board certified neurologist, who opined that claimant's prior bilateral neuropathies and resulting surgeries were not related to his employment activities at Anheuser-Busch, Inc. (Employer's Exhibit 6)

[2]

Subsection 2 of Section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

[3]

The 1993 addition of section 287.067.7, which modifies the last exposure rule with respect to occupational diseases due to repetitive motion, could be construed as a legislative recognition that injuries caused by repetitive activities may be viewed as due to an occupational disease.

[4]

Claimant testified at the hearing that he operated the forklift 70 to 75% of the day. He also admitted that he had exaggerated at a prior hearing when he testified that he operated the forklift 90 to 99% of the time. (Claimant's Testimony; Employer's Exhibit 1, Pages 38-39)

[5]

Though claimant testified at the hearing that he did not injure his right shoulder during the Thanksgiving incident, I find his testimony to be not credible.

[6]

Dr. Schlafly stated that rotator cuff disease is a spectrum of pathology involving the rotator cuff tendon ranging from minor inflammation or

tendonitis in the tendon to a full thickness tear, where the tendon pulls completely free from the bone. (Employer's Exhibits 6, Page 13 and 8, Pages 12-13)

[7]

On examination of Mr. Jones's left shoulder on December 2, 2003, Dr. Schlafly found full range of motion, strength and stability. (Employer's Exhibit 7, Page 28)

[8]

I found that claimant only opened two per day. See Page 7 supra.

[9]

See Page 7 supra.

[10]

The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).