

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

Injury No.: 00-128224

Employee: Ronald Kliethermes  
Employer: ABB Power T&D  
Insurer: Pacific Employers Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: November 9, 2000  
Place and County of Accident: Jefferson City, Callaway County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 13, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert Dierkes, issued June 13, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of February 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

CONCURRING OPINION

I submit this concurring opinion in which I join in and adopt the award and decision of the administrative law judge denying benefits.

I find the medical opinion of Dr. Schuman to be the most credible, believable and trustworthy, when compared and contrasted to all other expert opinions rendered at trial.

Based on a reasonable degree of medical certainty, Dr. Schuman opined that employee's heart conditions were all attributable to his underlying heart disease and the electrical shock sustained by the employee on November 9, 2000, was not a substantial factor in causing any of employee's present heart conditions alleged to be related to the accident.

Dr. Schuman thoroughly explains the reasons for his medical opinions and I am convinced that the employee did not sustain any damage to his heart based on the electrical shock occurring November 9, 2000; the employee reached maximum medical improvement almost immediately; the employee did not sustain any residual permanent disability attributable to the electrical shock sustained November 9, 2000; the employee will not require any future medical care to cure and relieve him from the effects of the injury sustained November 9, 2000; and the employee did not sustain any adverse effect as to his employability in the open labor market attributable to the electrical shock occurring November 9, 2000.

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William F. Ringer, Chairman

### DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Worker's Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge concluded that employee failed to carry his burden of proving the electrical shock employee suffered at work was a substantial factor in causing his current heart problems. I disagree.

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." Furthermore, the element of causation must be proven by medical testimony, "without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence."

*Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo. App. 2004)(citations omitted).

Missouri case law makes clear that, "[t]he worsening of a preexisting condition is a 'change in pathology.'" *Winsor v. Lee Johnson Constr. Co.*, 950 S.W.2d 504, 509 (Mo. App. 1997)(citation omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

Employee had preexisting arrhythmias (heartbeat irregularities), to wit: atrial fibrillation and atrial flutter. Before the electrical shock, employee experienced infrequent minor episodes of arrhythmia. After the electrical shock, employee experienced much more frequent episodes of arrhythmia such that he required the implantation of a pacemaker to control the arrhythmia and he is unable to work.

Dr. Kanagawa testified within a reasonable degree of medical certainty that the electrical shock was a substantial factor in exacerbating employee's underlying heart conditions. Dr. Kanagawa explained the mechanism of injury. The electrical shock damaged the circuits (pathways) in employee's heart.

The administrative law judge determined that Dr. Kanagawa's opinion that the electrical shock damaged the circuits in employee's heart was based solely on the temporal relationship between the shock and the increased heart symptoms. The administrative law judge concluded, therefore, that Dr. Kanagawa's causation opinion is really a mere suspicion and is no more valuable than a layman's opinion.

Dr. Kanagawa specializes in cardiology. He is qualified by his training and experience to offer an opinion about injuries to the heart. He has treated employee for approximately 20 years so he is particularly qualified to offer an opinion regarding changes in employee's symptoms and functioning. Dr. Kanagawa has the benefit of the functional history recorded by the pacemaker to provide him with objective information regarding the permanent nature of employee's exacerbated heart condition.

The administrative law judge would seem to require expert proof of some physical change in employee's heart to support a finding of a "change in pathology." Dr. Kanagawa explained in detail why a "change in pathology" of the heart is sometimes only identifiable by a change in the way the heart functions. Dr. Kanagawa's explanation is consistent with the definition of "pathology:"

1 : the study of abnormality; esp: the study of diseases, their essential nature, causes, and development, and the structural and functional changes produced by them. 2 : something abnormal: a (1): the anatomic and physiological deviations from the normal in the tissues of animals and plants that are manifested as disease...(2) : the complex of signs, symptoms and bodily changes that characterize a particular disease...

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1655 (3d ed. 1971)(emphasis added).

Dr. Kanagawa's opinion that the shock was a substantial factor in exacerbating employee's heart condition was not based merely upon a temporal relationship between the shock and the increase in symptoms. Rather, his opinion was based upon expert medical knowledge acquired through his medical training and years of practice in the field of cardiology. Dr. Kanagawa is qualified to describe how electric shock affects the heart. He is qualified to testify about objective changes in the function of employee's heart. He is qualified to render an opinion that the shock caused the objective changes in heart function. I find Dr. Kanagawa credible.

Not only did the administrative law judge improperly discount Dr. Kanagawa's expert opinion, he completely ignored the opinion of Dr. Pierce. Dr. Pierce stated that, "the patient has continued to suffer greatly increased palpitations and recurrent atrial fibrillation since his electrical shock and with a reasonable degree of medical certainty, I would conclude the increase in atrial fibrillation is related to his shock."

Based upon the medical records provided him, Dr. Shuman could not assert there was a causal relationship between the shock and employee's increased arrhythmia but he did agree that employee had a marked increase in arrhythmia after the shock as compared to before the shock. Dr. Shuman acknowledged that employee's pre-shock mild arrhythmia did not prevent employee from working but his post-shock arrhythmia prevented employee from working. Dr. Shuman agreed that the type of shock employee suffered could cause an increase in atrial fibrillation but he would have expected to see laboratory evidence of any such damage in the 24-48 hour period of hospitalization after the shock. Dr. Shuman did not see such a record so he could not testify with reasonable medical certainty to a causal relationship. Dr. Shuman admitted on cross-examination that it was possible that the shock could cause damage that did not appear in the period immediately after the shock.

Based upon the opinions of Dr. Kanagawa and Dr. Pierce, I find employee has carried his burden of establishing a medical causal relationship between the electric shock and the exacerbation of his non-disabling heart condition to the level of a permanently disability.

I would reverse the award of the administrative law judge denying compensation. I would award past medical expenses, additional temporary total disability, future medical care, and permanent total disability against employer/insurer. I find persuasive employee's arguments regarding the applicability of the 15% enhancement of compensation due to employer's failure to comply with OSHA safety standards.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

# AWARD

Employee: Ronald Kliethermes Injury No. 00-128224  
Dependents: N/A  
Employer: ABB Power T&D  
Additional Party: Second Injury Fund  
Insurer: Pacific Employers Insurance Company  
Hearing Date: March 14-15, 2005

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: RJD/tmh

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No additional benefits are awarded.
2. Was the injury or occupational disease compensable under Chapter 287? No compensable permanent injury.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: November 9, 2000.
5. State location where accident occurred or occupational disease was contracted: Jefferson City, Callaway 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? Yes.
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: Claimant was testing a transformer when he received an electrical Shock.
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.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: \$35,348.28.
16. Value necessary medical aid paid to date by employer/insurer? \$61,452.34.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$658.08.
19. Weekly compensation rate: \$438.72/\$314.26.
20. Method wages computation: Stipulation.

## COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Second Injury Fund liability: No

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Ronald Kliethermes

Injury No: 00-128224

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: ABB Power T&D

Additional Party: Second Injury Fund

Insurer: Pacific Employers Insurance Company

Checked by: RJD/tmh

### **ISSUES DECIDED**

The evidentiary hearing was held in this case on March 14, 2005, in Jefferson City. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on May 2, 2005. The hearing was to determine the following issues:

1. Whether the work-related accident of November 9, 2000, is the medical and legal cause of the injuries and conditions

alleged by Claimant;

2. Whether Employer and Insurer shall be ordered to pay Claimant for medical bills incurred, allegedly as a result of the work-related accident;
3. The nature and extent of Claimant's permanent disability; Claimant alleges that he is permanently and totally disabled;
4. The liability of Employer and Insurer for permanent partial disability benefits or permanent total disability benefits;
5. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits;
6. Whether Employer and Insurer shall be ordered to provide additional future medical benefits for Claimant, pursuant to Section 287.140;
7. Whether Employer and Insurer shall be ordered to pay additional temporary total disability ("TTD") benefits, and, if so, for what period or periods of time; and
8. Whether Employer and Insurer shall be subject to a 15% penalty on Claimant's benefits, due to an alleged safety violation.

## STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Callaway County and adjoining counties, and that Cole County is an adjoining county to Callaway County, and thus a proper venue for the hearing;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That the rates of compensation are \$438.72/\$314.26, based on an average weekly wage of \$658.08;
6. That Claimant sustained an accident arising out of and in the course of his employment with ABB Power T&D on November 9, 2000;
7. That the notice requirement of Section 287.420 is not a bar to this action; and
8. That Pacific Employers Insurance Co. fully insured the Missouri Workers' Compensation liability of ABB Power T&D at all relevant times;
9. That Employer and Insurer paid \$35,348.28 in TTD benefits; and
10. That Employer and Insurer paid \$61,452.34 in medical benefits.

## EVIDENCE

The evidence consisted of the testimony of Claimant, Ronald Kliethermes.; the testimony of Dixie Kliethermes, Claimant's wife; the testimony of Dena Saak, Employer's Health Services Administrator; the testimony of John Sutzenfield, Claimant's former supervisor; the testimony of Gary Weimholt, a vocational rehabilitation consultant; the deposition testimony of Dr. Harold Kanagawa;; the deposition testimony of Dr. Stephen Schuman; the deposition testimony of Wilbur Swearingen, a vocational rehabilitation counselor; narrative reports of Dr. Dan Pierce; extensive medical records; and medical bills.

## FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, Ronald Kliethermes, was born June 21, 1943, attended high school for four years, and received a high

school equivalency certificate in 1979. Claimant began his employment at Employer's plant in Jefferson City (the Callaway County portion of Jefferson City) when the plant opened in April 1972, and worked there continuously until his injury on November 9, 2000.

Prior to November 9, 2000, Claimant enjoyed many physical activities, including water-skiing, swimming, hunting, fishing, weight lifting and power-walking. Prior to November 9, 2000, Claimant felt himself to be in good health. Claimant testified that he underwent a cervical fusion sometime in the decade of the 1980's, due to headaches, and that his headaches were cured by the surgery. Claimant testified that he had no physical limitations whatsoever due to his neck surgery. There was no documentation of this surgery in evidence. Claimant also had injuries to his left hand and left foot prior to November 9, 2000.

Prior to November 9, 2000, Claimant also suffered from hypertension and heart irregularities. In June 1995, Claimant was seen because of "heart beating rapidly and chest discomfort". According to Dr. John Sanfelippo's consultation report of 6/19/95,

This patient has a history of paroxysmal atrial fibrillation with a history of episodic chest discomfort, a history of mitral valve prolapse ... . He was hospitalized in 1991 with chest discomfort with multiple bouts of atrial fibrillation in spite of Tambocor as an antiarrhythmic.

Claimant was also treated in September and October of 1999 for what was characterized as "atrial flutter", "cardiac arrhythmia", "cardiac dysrhythmia" and "atrial fibrillation". He was treated with medication.

On November 9, 2000, Claimant was testing transformers. He reached to grab both leads and was shocked while disconnecting them. He was thrown back against the fence and went down to one knee. He was transported by ambulance to the hospital. The magnitude of the electric shock is unknown. There was no loss of consciousness, and no entry or exit sites.

Claimant was released from the hospital on November 10, 2000. There was no documentation of irregular heart activity, such as atrial fibrillation, during this initial hospital stay. Claimant returned to work on Monday, November 13, 2000. When at work on Tuesday, November 14, 2000, Claimant complained of continuing to feel tired and shaky, and requested to be seen by Dr. Glen Cooper, the company doctor. When Claimant was seen by Dr. Cooper on November 16, 2000, Claimant told Dr. Cooper that he was experiencing atrial fibrillations. Dr. Cooper referred Claimant to Dr. Dan Pierce for cardiac evaluation, but Claimant chose to see his personal cardiologist, Dr. Harold Kanagawa. Dr. Kanagawa changed Claimant's medications. Claimant later decided to see Dr. Pierce. Dr. Pierce found a blockage in Claimant's right carotid artery, and surgery was performed for this on January 29, 2001. All of the physicians agree that the carotid blockage was an "incidental finding", and had nothing to do with the work-related electrical shock of November 9, 2000.

In the Spring of 2001, Dr. Kanagawa did not believe that Claimant had suffered any permanent injury as a result of the work-related electrical shock of November 9, 2000. In a letter dated March 2, 2001, Dr. Kanagawa stated:

I do not know of any permanent injury that Mr. Kliethermes suffered with his electrical shock. He was hospitalized at Capital Region Medical Center at that time for observation for 24-48 hours, and he did not appear to have any cardiovascular damage or muscle damage at that time and his rhythm was normal. He, however, subsequently has had a flare-up of his hypertension and his cardiac arrhythmias which are atrial fibrillation and flutter ... . Obviously, the electric shock has aggravated his underlying condition ... . To my knowledge Ron's prognosis is fairly good. Obviously the electric shock did flare up his underlying conditions, but he should probably be back to his baseline in the future.

Unfortunately, Claimant continued to have frequent recurrence of atrial fibrillation. In order to address the problem, Claimant underwent a pacemaker implantation in late April 2001 and ablation surgery in October 2001. Claimant continues to experience atrial fibrillation, although it is controlled by the pacemaker. Claimant will require the use of a pacemaker for the remainder of his life.

**Causation.** Clearly, Claimant had heart problems prior to the November 9, 2000, electrical shock. The *type* of heart problems that Claimant has experienced since November 9, 2000, are not new or different. Therefore, it is clear that the electrical shock did not *cause* Claimant's heart problems. The *frequency* and *severity* of Claimant's heart problems *have changed* since November 9, 2000. The question, therefore, is whether this change was caused by the electrical shock or whether this change is mere coincidence.

It is undisputed that diagnostic testing performed both before and after November 9, 2000, revealed no physical changes to Claimant's heart after the electrical shock. Dr. Stephen Schuman testified that he did not believe the electrical shock was a substantial factor in causing a change in the frequency and severity of Claimant's heart problems.

Dr. Harold Kanagawa testified on behalf of the Claimant as to the issue of medical causation. In this regard, Dr. Kanagawa testified, on direct examination, as follows:

Q. Can you describe for the court the current condition of Ron's heart?

A. Ron has a cardiomyopathy, which is some slight weakness of the heart muscle, and irregularity of the heart induced by this cardiomyopathy and *possibly* injury he had to it with an electrical shock. (Emphasis added. Exhibit Y, Kanagawa deposition, p. 5)

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Q. Doctor, can you explain for the court in lay terms how an electrical shock affects the heart and the body's electrical system?

A. In layman's terms it is like a recycling of the heart. The heart has an electrical system like a car or a telephone or anything else. And what happens when you get an electrical shock, it actually fries some of the circuits and can actually recycle the pathways.

Q. Is that what happened to Ron with his electrical shock at work in November of 2000?

A. Right. Right. (Exhibit Y, Kanagawa deposition, p. 6)

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Q. Can you say with a reasonable degree of medical certainty that Ron's cardiac problems were exacerbated by his work place shock in November of 2000?

A. I can. (Exhibit Y, Kanagawa deposition, p. 11)

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Q. Can you say within a reasonable degree of medical certainty that the electrical shock that Ron suffered was a substantial cause in the present cardiac problems?

A. Yes. (Exhibit Y, Kanagawa deposition, p. 12)

On cross-examination, Dr. Kanagawa testified:

Q. It is my understanding that Mr. Kliethermes, dating back to 1983, was diagnosed of hypertension, hypertensive cardiovascular disease with the history of cardiac arrhythmias –

A. Arrhythmias.

Q. – and atrial fibrillation. Is that correct?

A. Yes. (Exhibit Y, Kanagawa deposition, p. 16)

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Q. Has, Doctor, there been any change in pathology for Mr. Kliethermes since the accident?

A. Pathology? Could you explain that?

Q. Has there been any physical change in his heart?

A. I don't know.

Q. Is it possible that Mr. Kliethermes' pre-existing condition could have deteriorated naturally?

A. It is possible.

Q. Is it possible that he would have needed a pacemaker without any intervening act?

A. Possible but unlikely.

Q. You've talked about in both of your reports that – let me make sure – that his pre-existing conditions have been aggravated. Is it possible and maybe even probable that the shock was a triggering factor that made his condition worse and nothing more than that?

A. Highly suspect it. (Exhibit Y, Kanagawa deposition, pp. 19-20)

“In a workers' compensation case, the claimant must prove all of the essential elements of his claim, including a causal connection between the accident and the injury, by a reasonable probability. In cases involving medical causation, which is not

within the common knowledge or experience, he must present medical or scientific evidence showing the cause and effect relationship between the complained-of condition and the asserted cause.” *Davis v. General Electric Co.*, 991 S.W.2d 699, 706 (Mo.App.S.D. 1999)

In this case, Claimant Ronald Kliethermes has the burden of proof on all contested issues. Claimant has the burden of proof on the causal connection between the accident and the injury; in other words, Claimant has the burden of proving that the November 9, 2000, electric shock **caused** an increase in the frequency and severity of his atrial fibrillation. This issue of medical causation is not within common knowledge or experience; a layperson does not know what causes atrial fibrillation, nor what causes the frequency and severity of atrial fibrillation to escalate. The mere fact that there is some temporal proximity between the electrical shock and the escalation of the atrial fibrillation does not satisfy Claimant’s burden of proof.

The *only* medical evidence in the case on this crucial issue is found at page 6 of Dr. Kanagawa’s deposition, in which he suggests that the electrical shock “fried” some circuits in the electrical system of Claimant’s heart. Yet Dr. Kanagawa stated “I don’t know” when asked if there was any physical change in Claimant’s heart. A “frying” of circuits would be a physical change in Claimant’s heart. Even on an open-ended question on direct examination by Claimant’s counsel, Dr. Kanagawa offered only that Claimant *possibly* had a heart injury due to electrical shock. Dr. Kanagawa concedes that all testing done showed no change in Claimant’s heart due to the electrical shock. Dr. Kanagawa “highly suspects” the shock was a triggering factor that made Claimant’s condition worse.

Therefore, what Dr. Kanagawa’s testimony really means is that he suspects that the electrical shock “fried” the circuits in Claimant’s heart not based on any scientific reasoning or analysis, nor based upon any diagnostic testing (particularly since the diagnostic testing would lead to an opposite “suspicion” or conclusion), but based solely on a temporal proximity between the shock and the escalation of symptoms. This is really no more and no different than a layman’s “suspicion”. It is not based upon medical or scientific analysis. While I, too, strongly suspect that the shock caused Claimant’s increased symptoms, based upon temporal proximity, Dr. Kanagawa’s concurring suspicion adds nothing to the case. His opinion does not establish a “cause and effect relationship between the complained-of condition and the asserted cause” as required by *Davis v. General Electric*, but rather *assumes* one, based on the temporal proximity.

In the case of *Muriel Montgomery v. Nordyne, Inc.*, Injury No. 94-070333, the undersigned administrative law judge denied compensation, and the award was affirmed by the Labor and Industrial Relations Commission. In that case, Ms. Montgomery alleged that an acute inhalation of freon gas caused an increase in the frequency and severity of her respiratory problems. In that case, a physician testifying on behalf of Ms. Montgomery concluded that Ms. Montgomery had a “toxic reaction to freon gas in the pulmonary system with result in coughing, shortness of breath, weakness and difficulty in being able to do any kind of work.” The basis for the physician’s opinion was because “prior to the exposure she did not have any trouble and then from then on she did, and I felt that the freon gas was the toxic agent that was causing her to have her problem”. I found that the physician’s testimony in that case was insufficient as it “presumed a cause and effect based upon mere coincidence, not upon any scientific or medical information.” Such is the case here with Dr. Kanagawa’s testimony.

I find, therefore, that Claimant has failed in his burden of proof on the crucial issue of causation. Therefore, I must deny compensation in this case. Claimant’s claim against Employer ABB Power T&D is denied. Claimant’s claim against the Second Injury Fund is also denied. All other issues are moot.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

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

A true copy: Attest:

\_\_\_\_\_  
Patricia “Pat” Secrest  
*Director*  
*Division of Workers' Compensation*