

FINAL AWARD ALLOWING COMPENSATION
(After Mandate from the Missouri Court of Appeals
for the Western District of Missouri)

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

Preliminaries

On June 17, 2008, the Missouri Court of Appeals for the Western District issued an opinion reversing the February 10, 2006, award and decision of the Labor and Industrial Relations Commission (Commission). *Kliethermes v. ABB Power T&D*, 264 S.W.3d 626 (Mo. App. 2008) (WD66700) (June 17, 2008). By mandate dated October 31, 2008, the Court remanded this matter to the Commission for further proceedings in accordance with the opinion of the Court.

Pursuant to the Court's mandate, we issue this award. Having reviewed the evidence and considered the whole record in light of the opinion of the Court, we reverse the June 13, 2005, award of the administrative law judge and award benefits. The award and decision of Administrative Law Judge Robert J. Dierkes is attached and incorporated to the extent it is not inconsistent with our findings, conclusions, decision, and award herein.

Causation

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. We disagree. 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.

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).

The law in effect at the time employee received the electrical shock dictated that, "[w]here the performance of the usual and customary duties of an employee leads to physical breakdown or a change in pathology, the

injury is compensable.” *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781, 784 (Mo. 1983). “[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).

The evidence in this case establishes that employee sustained a change in pathology as a result of the electrical shock. Because we are guided by the thorough analysis and recitation of the evidence set forth by the Court, we adopt the following as part our findings and reasoning:

There is obvious medical significance to the "temporal proximity" of claimant's disability as related to the accident. See, e.g., *Cochran v. Indus. Fuels & Res., Inc.*, 995 S.W.2d 489, 495 (Mo. App. 1999). Dr. Schuman acknowledged that if there were atrial fibrillation "in close proximity" to the injury (by which he apparently meant sooner than six weeks), it would indicate a causal connection. Dr. Schuman, however, was inconsistent in indicating whether he knew that the claimant experienced atrial fibrillation between the date of the shock and the hospitalization six weeks later on December 18, 2000. In his deposition, introduced at the hearing, he seemed to be unaware of the documented reports of fibrillation, but in his earlier written report, he acknowledged that early fibrillation was reported in the medical records he reviewed. It seems that, regardless of the data, he had in his head the idea that the claimant had little or no difficulty until the December 18 hospitalization. That conclusion is distant from reality, as shown by the medical records. One can reach such a conclusion only by ignoring or disbelieving (without warrant) the claimant's reported history and medical visits to Dr. Cooper and Dr. Kanagawa following the injury

The claimant, who was active and able to work without difficulty before the shock, has never, since the shock, recovered the energy, conditioning, and endurance he enjoyed before the shock. There is no dispute about the fact that the claimant could not successfully perform even one day of work after the shock. After two days of stoically and unsuccessfully attempting to perform at work, he saw the company physician, Dr. Cooper, who put him on medical leave from work. He has never been medically allowed to return to work at ABB.

Dr. Schuman admitted he never heard of anyone with mild atrial fibrillation deteriorating so rapidly. And when he says "so rapidly," he is apparently referring to the period between the November 9 injury and the December 18 hospitalization, not the virtually immediate deterioration which was actually shown to be the case. Again, Dr. Schuman seems in denial of the fact that the claimant began experiencing difficulty controlling the fibrillation and fatigue promptly, if not immediately, after the electrical shock and was unable to work. Dr. Schuman seems to forget that the claimant's abnormal EKG at the hospital, while not so abnormal as to show physical damage to the heart muscle, was consistent with the occurrence of atrial fibrillation. ...Dr. Schuman clearly agreed with the concept that a shock could redirect the electrical pathways and that such a physical event in the heart would not show up on objective measurements. The fact that Dr. Kanagawa, an experienced cardiologist, described something in "layman's terms" does not mean he lacked professionalism or was engaging in a "layman's suspicion" and was not scientific.

...Dr. Kanagawa did not at first conclude there was a causal relationship. He did not jump to such a conclusion. He at first assumed the atrial fibrillation in the late fall of 2000 would be temporary. He also, like Dr. Pierce and Dr. Cooper, was aware that it would be difficult to show through objective measurement that the increased atrial fibrillation resulted from the electrical shock. But Dr. Cooper and Dr. Pierce both thought that the electrical injury had caused cardiac complications.

Continued study of the matter by Dr. Kanagawa, and the continued inability to control the fibrillation, convinced the doctor that there was such a marked and severe deterioration from the prior mild condition to the current state that it only made sense medically that the electrical shock must have caused a recycling of the electrical pathways, which in turn produced the extremely rapid deterioration. This appears to have

involved a judgment that physicians are often called on to make in considering a history reported by a claimant. For example, both Dr. Cooper and Dr. Pierce exercised such a judgment, believing there was a connection between the injury and the current disabling condition of the claimant. Dr. Kanagawa and the others certainly did consider the "temporal proximity," but not without good scientific reason.

Dr. Schuman also acknowledged that an electrical shock *could* produce such a result. Dr. Schuman, however, by ignoring some of the data, ended up with an essentially irrational explanation for how the claimant's condition declined. He said it could be natural deterioration, and yet he *had never seen or even heard of such a rapid major natural deterioration*. He had no explanation for how (even if he ignores the early fibrillation), the claimant could go, in less than two months, from a very stable condition to an "uncontrolled," and "severe," (using Dr. Schuman's own terminology) condition. Although his disease would have progressed naturally as a part of the aging process, there is *no reason* to believe that, absent the electrical injury, he would have gone precipitously from being stable and active at 57 years of age to being significantly disabled at 57 years of age very promptly after the injury, with neither medication, ablation, nor a pacemaker being sufficient to deliver him from disability.

There is no hint that the claimant is a malingerer. The record speaks loudly that he was an energetic fifty-seven year old who loved being active and pursuing a healthy lifestyle. He did have heart disease, including electrical conduction disease, but it was entirely non-disabling, and the claimant evidently did everything he consciously could to keep it stable. His attempt to return to work four days after the injury was, in keeping with his apparently hardy psychological make-up, more likely an exercise in hopeful stoicism than in realism.

...

Dr. Pierce, the electro-physiologist (of all the physicians, the one with the most experience and specialized knowledge in rhythm disease), who acknowledged that although the causal relation was difficult to prove, concluded that, because the atrial fibrillation could no longer be controlled with medication: "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." To the extent that Dr. Kanagawa is non-scientific because he expresses an opinion without having an imaging study comparing the heart functioning before and after the injury, surely Dr. Pierce was also presumably non-scientific in reaching his view (as was Dr. Cooper, who also expressed belief that the shock caused "cardiac complications").

...

[A]fter three years of finding the atrial fibrillation to be uncontrollable and severe, after failed experimentation with different medications, after ablation, and after the installation of a pacemaker, [the treating doctors] could not deny the obvious, though they had no imaging studies that would demonstrate the change visually: *the electrical shock must have caused a recycling of the electrical pathways of the heart and that is what so drastically altered the claimant's condition*. There was no other medically plausible explanation.

Dr. Schuman offered no plausible countervailing theory that would explain the data. Yes, he said, it could have been only the natural progression of the disease; but no, he had never heard of such a drastic natural progression of disease in such a short time. In short, he lacked an opinion based on reasonable medical certainty that would adequately explain the data...

We find the opinions of the treating doctors to be more credible than that of Dr. Schuman.

Based upon the opinions of Dr. Kanagawa and Dr. Pierce, we find employee has carried his burden of establishing that the electric shock he sustained on November 11, 2000, was a substantial factor in causing the exacerbation of his non-disabling heart condition to the level of a permanent disability. We reverse the

award of the administrative law judge and award compensation.

Permanent total disability

On February 5, 2002, Dr. Pierce offered his limitations on employee's physical activities. He believed employee would be unable to perform electrical work because of his pacemaker. Dr. Pierce believes employee has a psychological intolerance to work with electricity as a result of the electrical shock at work. Employee is unable to perform heavy activity including lifting greater than 20-30 pounds on a repetitive basis and employee is unable to stand repetitively during the day due to his recurrent atrial fibrillation. Dr. Pierce assigned a disability rating of 50%, presumably of the body as a whole, due to employee's inability to perform physical activities because of the recurrence of the atrial fibrillation.

Employer/insurer authorized Dr. Glen E. Cooper, D.O., to treat employee for the work injury. Dr. Cooper released employee from his care on January 18, 2002, but did not return employee to work for employer. On June 5, 2002, Dr. Cooper reported employee's physical restriction should he return to work for employer. He stated:

The patient is restricted to no overtime. He is restricted to 7.5 hours per day and 37.5 hours per week. He is to avoid climbing and/or working at unprotected heights. He must avoid electrical equipment, which would include electrical testing, power-tools, welding, and could include other types of tools. He is to avoid electromagnetic fields such as are found in several areas at ABB. I advise sedentary to light activity to include lifting 20-25 pounds as well as limiting him to pushing and pulling 25 pounds. He should limit his walking and standing to about 25% of his workday. It is my opinion that if he works within these restrictions that he will be within his physical capabilities.

Dr. Kanagawa offered his opinion that employee is totally disabled from any vocation because of his "hypertension, hypertensive cardiovascular diseases, cardiomyopathy, his persistent symptoms, and ongoing medical care" (April 29, 2003) and "probably [employee] is unemployable because of his ongoing medical problems and his age (May 15, 2003)."

Mr. Wilbur Swearingin considered employee's medical restrictions as summarized above and concluded that employee is unable to perform work at any exertion level, not even sedentary level. Mr. Swearingin reported that employee cannot be a dependable employee due to his recurrent episodes of atrial fibrillation. After considering employee's medical impairments, functional limitations, advanced age (age 60 at time of evaluation), limited educational background (G.E.D. at age 35), and history of factory work, Mr. Swearingin testified that employee is neither employable nor placeable in the open labor market. Ultimately, Mr. Swearingin is of the belief that employee is permanently and totally disabled. Mr. Swearingin testified that he did not identify any preexisting disabilities that were a hindrance or obstacle to employment.

Mr. Gary Weimholt was offered as a vocational expert by employer/insurer. Mr. Weimholt did not meet employee or personally evaluate him. Rather, he offered his opinion based upon a review of the medical records and the physical restrictions imposed by the medical experts. In his report, Mr. Weimholt indicated he believed employee could perform some jobs in the sedentary category and he identified a few in the Mid-Missouri area. On cross-examination at the hearing, Mr. Weimholt acknowledged that employee could not perform some of the tasks required of the jobs he identified.

Mr. Swearingin personally evaluated employee and had a firmer grasp of employee's physical limitations. We find Mr. Swearingin more credible and worthy of belief on the issue of employee's ability to compete in the open labor market. We conclude that no employer could reasonably be expected to hire employee in his present condition. We conclude that employee is permanently and totally disabled. We believe his inability to compete in the open labor market is due to the disability he suffers from the uncontrollable recurrent atrial fibrillation, which we have already found was medically caused by the November 9, 2000, electrical shock at

work.

We award to employee permanent total disability benefits from employer/insurer beginning January 19, 2002, and continuing for his lifetime or until modified by law. Because we find that employee was rendered permanently and totally disabled by the last injury alone, the Second Injury Fund has no liability.

Mileage

Employee claims mileage expense for visits to doctor's appointments in Columbia, Missouri. The claimed expenses are itemized in Exhibit HH. Employee is claiming entitlement to a mileage reimbursement of \$580.32.

We could not find in the transcript medical records showing treatment in Columbia on November 5, 2002, and January 27, 2003, at the Missouri Heart Center (claimed mileage reimbursement of \$64.32). We could not find in the transcript medical records showing treatment in Columbia on April 29, 2004, August 30, 2004, and February 21, 2005, at Nephrology & Hypertension Associates (claimed mileage reimbursement of \$97.92). We deny the mileage expense for these unsubstantiated trips.

We award to employee mileage reimbursement in the amount of \$418.08, and employer/insurer is directed to pay same.

Past medical expenses

In order to establish a sufficient factual basis for the Commission to award compensation for past medical benefits, the employee must identify the medical bills, testify that the bills relate to and are a product of his injury, and show that the bills relate to the services provided as demonstrated by the medical records. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

Employee testified that he carefully reviewed the expenses reflected on the medical bills offered into evidence (Exhibits II through SS) and testified that the expenses notated with checkmarks are expenses flowing from the work injury. The bills are summarized in Exhibits TT through YY.

Our review of the bills reveals that the checkmark notation system is flawed. Employee offered many medical records, although as will be seen, there is not a record to support each expense claimed.

Linn Drug Bills

Employee claims he is entitled to \$4,329.44 for prescription drug expenses related to his work injury. (Exhibit TT). Unfortunately, due to the manner in which the bills are compiled and summarized, we are unable to verify this total on the bills submitted. The prescription expenses are not listed in date order on the Linn Drug billing statements (Exhibits II and JJ). Nor did employee summarize the bills chronologically. The billing statements of Linn Drug contain charges for prescriptions admittedly not related to the work injury.

Apparently, employee invites us to scan the exhibits line-by-line looking for prescriptions filled for each of the 93 dates listed on Exhibit TT, add each day's charges together and then see if they match the total found on Exhibit TT. We tried it for the first line item on Exhibit TT claiming prescriptions filled February 1, 2001, for \$36.82. On Exhibit JJ, we found two prescriptions filled on February 1, 2001, each of which is billed at \$7.00 for a total of \$14.00. We decline to go through this cumbersome process 92 more times.

Another problem is that many of the drugs prescribed by Drs. Pierce, Winkelmeyer, and Kanagawa – each of whom was a doctor involved with treating employee's cardiac and hypertension issues – are *not* notated with a checkmark. Employee's testimony that the expenses related to the work injury are marked with a checkmark is not credible as it relates to the prescription charges.

Employee had the burden to show us why he is claiming each prescription charge. He has failed to show us. We deny all expenses identified on Exhibit TT.

Jefferson City Medical Group (JCMG) Bills

Employee claims he is entitled to \$4,259.00 for medical expenses billed by JCMG. Exhibit UU. The charges on Exhibit UU are ostensibly supported by the billings contained in Exhibits KK, LL, and MM. These exhibits are subject to the same problems as the Linn Drug exhibits in that none of the exhibits are in date order and the billing statements contain charges for services admittedly not related to the work injury. The individual charges on the supporting billing statements (Exhibits KK, LL, MM) are not marked to indicate if employee is claiming entitlement to them under §287.140. It was employee's burden to prove entitlement to these expenses. We simply cannot determine which of the charges in Exhibits KK, LL, and MM flow from the work injury. We deny all expenses identified in Exhibit UU.

Missouri Heart Center

Employee claims he is entitled to \$3,130.00 for medical expenses billed by Missouri Heart Center. Each of the charges claimed is supported by a medical bill in Exhibit NN. However, the administrative law judge sustained objection to Exhibit V which contains the medical records for the visits on July 8, 2004, October 28, 2004, December 2, 2004, and January 5, 2005. The expenses for those dates totaling \$1,750.00 are denied. See *Martin*. All other expenses are substantiated by medical records contained in Exhibits R through U. We award to employee past medical expenses in the amount of \$1,380.00 for treatment at Missouri Heart Center, and employer/insurer is directed to pay same.

Best Buy Health Care

Employee claims he is entitled to \$6,657.82 for medical expenses billed by Best Buy Health Care. Exhibit WW. The charges claimed are reflected on bills contained in Exhibit RR, which support that Best Buy submitted claims to employee's health insurer for 26 equal monthly medical supply charges related to treatment of hypersomnia with sleep apnea. We find no medical record wherein a physician indicates that employee's hypersomnia and sleep apnea were caused by the work accident. We deny all expenses claimed in Exhibit WW.

Nephrology and Hypertension Associates LLP

Employee claims he is entitled to \$357.00 for medical expenses billed by Nephrology and Hypertension Associates LLP. We could find not medical records to substantiate treatment on the dates claimed – April 29, 2004, August 30, 2004, and February 21, 2005. We deny all expenses identified in Exhibit XX.

MO Cardiovascular & Thoracic Surgeons

Employee claims he is entitled to \$225.00 for medical expenses billed by MO Cardiovascular & Thoracic Surgeons (Exhibit YY). The charge is supported by a medical bill in Exhibit QQ. However, the bill states it is for an outpatient consult with Dr. Peter DeSanto. Exhibit C contains a medical record of Dr. DeSanto who saw employee for carotid stenosis after a referral from Dr. Pierce. Employee testified that Dr. DeSanto treated him for a carotid blockage that was not related to the work injury. Employee's evidence shows that he is not entitled to this medical expense as the underlying treatment was not to cure and relieve the work injury. We deny the expense identified in Exhibit YY.

Employee has established that he is entitled to past medical expenses in the amount of \$1,380.00. Employer/insurer is directed to pay same.

Temporary total disability

Dr. Cooper took employee off work on November 16, 2000. Employee was never able to return to work. Dr. Cooper released employee from care on January 18, 2002, without returning him to work. We conclude this is the date employee attained maximum medical improvement. Employee is entitled to temporary total disability for the period November 16, 2000, through January 18, 2002, and employer is directed to pay any

unpaid portion of this temporary total disability award.

Future medical care

In order to receive future medical benefits under the Missouri Workers' Compensation Law, employee has the burden of proving there exists a "reasonable probability" future medical treatment is needed. *Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo.App. 1997), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003). See also, *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 372 (Mo.App. 2005).

The claimant does not have to absolutely establish the elements of her case. It is sufficient if she shows them by a reasonable probability. 'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt. In determining whether this standard has been met, the court should resolve all doubt in favor of employee.

Dean, 936 S.W.2d at 604 (citations omitted).

Testimony that speaks in terms of likelihood rather than certainty, is admissible and probative...[S]uch testimony, particularly when combined with other credible evidence of a nonmedical character, can be enough to support an award: 'A doctor's use of such words as 'might', 'could', likely', 'possible' and 'may have', coupled with other credible evidence of a non-medical character, such as a sequence of symptoms or events corroborating the opinion, is sufficient to sustain an award.

Dean, 936 S.W.2d at 605 (citations omitted).

Dr. Kanagawa testified that employee will need medical treatment for the rest of his life to cure and relieve him of the effects of his work injury. Dr. Kanagawa believes this care will include medication, on-going appointments, pacemaker maintenance, and pacemaker replacement. Dr. Schuman agrees employee will need future medical care related to his cardiac condition and hypertension, although he does not believe the care is necessary to cure and relieve employee of the effects of the work-related injury.

Employee has established he is entitled to future medical care to cure and relieve the effects of his work injury and employer/insurer is directed to provide same.

15% enhancement due to employer's failure to comply with OSHA safety standards
Employee invites us to enhance the weekly permanent total disability benefit by 15% pursuant to §287.120.4 RSMo, which provides:

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

Employee first argues that the enhancement is proper because employer was cited for violations of OSHA standards regarding personal protective equipment for testers, training in electrical safe work procedures, and slip hazards due to oil covered floors. These standards are contained in the Code of Federal Regulations. Under the plain language of the statute, the OSHA citations are not evidence of a violation of a statute.

Employee reasons that the OSHA findings provide evidence of the violation of §§292.020 and 292.380 RSMo, for which employee recites small portions of text that do not convey the full meaning of the statute. Section 292.020 states that machinery shall be guarded or notice posted of its danger. Employee does not

explain what OSHA citation tends to prove a violation of §292.020. Section 292.380 sets forth the requirement that floors be maintained such that dust does not build up and create an injury hazard. We suspect employee is inviting us to use the citation for oil on the floor as proof of a violation of the statute requiring the floor to be free of dust. We decline to equate oil and dust.

Employee has failed to prove that employee's injury was caused by employer's failure to comply with a statute in this state. We decline to enhance employee's weekly permanent total disability benefit pursuant to §287.120.4.

Roger G. Brown, Attorney at Law, is allowed of fee of 25% of the compensation awarded herein for reasonable and necessary legal services, which shall constitute a lien on compensation.

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

Given at Jefferson City, State of Missouri, this 24th day of February 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I agree with the conclusions of my colleagues on the Commission. I write separately to further explain my denial of many of employee's medical expenses. I am aware that proving entitlement to medical expenses presents a difficult challenge in a case such as this where employee has multiple medical conditions, some work-related, some not. But Missouri law is clear that the burden falls squarely on the employee to produce for each medical expense claimed: 1) the medical bill, 2) the medical record reflecting the treatment giving rise to the bill, and 3) testimony establishing that the treatment flowed from the compensable injury. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989). In this case, I could not find all three elements of proof for many of the medical expenses and I am constrained by precedent to deny those expenses.

AWARD

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

Hearing Date: March 14-15, 2005

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.

- 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.

- 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

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:

- Whether the work-related accident of November 9, 2000, is the medical and legal cause of the injuries and conditions alleged by Claimant;
- Whether Employer and Insurer shall be ordered to pay Claimant for medical bills incurred, allegedly as a result of the work-related accident;
- The nature and extent of Claimant's permanent disability; Claimant alleges that he is permanently and totally disabled;
- The liability of Employer and Insurer for permanent partial disability benefits or permanent total disability benefits;
- The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits;
- Whether Employer and Insurer shall be ordered to provide additional future medical benefits for Claimant, pursuant to Section 287.140;
- 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
- 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:

- That the Missouri Division of Workers' Compensation has jurisdiction over this case;
- 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;
- That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430;
- That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
- That the rates of compensation are \$438.72/\$314.26, based on an average weekly wage of \$658.08;
- That Claimant sustained an accident arising out of and in the course of his employment with ABB Power T&D on November 9, 2000;
- That the notice requirement of Section 287.420 is not a bar to this action; and
- That Pacific Employers Insurance Co. fully insured the Missouri Workers' Compensation liability of ABB Power T&D at all relevant times;
- That Employer and Insurer paid \$35,348.28 in TTD benefits; and
- 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)

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)

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)

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)

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

Although, the administrative law judge sustained objection to Exhibit V which contains the medical records for the visits on July 8, 2004, October 28, 2004, December 2, 2004, and January 5, 2005, we may allow the mileage reimbursement because it is not subject to the same standard of proof as are the medical expenses.