

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

Injury No.: 02-034900

Employee: Jeff Lewis
Employer: Daimler Chrysler Corporation
Insurer: Self c/o Sedgwick Claims Management Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 September 30, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued September 30, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22nd day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jeff Lewis

Injury No.: 02-034900

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Daimler Chrysler Corporation

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

Additional Party: Second Injury Fund (SIF)

Insurer: Self c/o Sedgwick Claims Management Services

Hearing Date: July 7, 2008

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - 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
 - Date of accident or onset of occupational disease: April 9, 2002
 - State location where accident occurred or occupational disease was contracted: alleged St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? n/a
8. Did accident or occupational disease arise out of and in the course of the employment? No
 - 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 alleges he was struck by a material cart.
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: None

Nature and extent of any permanent disability: None

15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Jeff Lewis

Injury No.: 02-034900

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

- Employee's average weekly wages: \$930.00

19. Weekly compensation rate: \$620.00/\$329.42

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: n/a

Said payments to begin immediately 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: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jeff Lewis

Injury No.: 02-034900

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Daimler Chrysler Corporation

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

Additional Party: Second Injury Fund

Insurer: Self c/o Sedgwick Claims Management Services

Checked by: KMH

A hearing was held on the above captioned matter July 7, 2008. Jeff Lewis (Claimant) was represented by attorney Harry Nichols. Daimler Chrysler (Employer) was represented by attorney Bob Haeckel. The Second Injury Fund (SIF) was represented by attorney Mike Finneran.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

- Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on April 9, 2002, Claimant's alleged date of injury.
- Employer's liability was self insured. Employer had notice of the injury and a Claim for Compensation was timely filed.
- Claimant's average weekly wage was \$930.00 yielding TTD and PPD rates of \$620.00/\$329.42 respectively.
- Employer has paid no benefits to date.

ISSUES

The parties stipulated the issues to be resolved are as follows:

- Whether Claimant sustained an accident that arose out of and in the course of his employment.

- Whether Claimant's condition is medically and causally related to his work.
- Liability for past medical expenses in an unknown amount.
- Future medical care.
- Temporary total disability.
- Permanent partial or permanent total disability.
- Second Injury fund liability.

EXHIBITS

Claimant submitted exhibits A through X. Exhibits A-D, I, J, L, S, and U were admitted without objection. Exhibits E-G, M-P, T, and V are not admitted into evidence based on Employer's objection to lack of certification as required under Section 287.140.7 (RSMo 2000).

Exhibits H, K, Q-R, and X are not admitted based on Employer's objection that these exhibits are non-certified medical-legal reports. Claimant was referred to each of these doctors and facilities by his attorneys. Claimant did not comply with the procedure set forth in Section 287.210.7 in order to submit these reports into evidence.

Exhibit W contains medical bills. There is no foundation for this exhibit, and therefore, it is not admitted.

Employer submitted Exhibits 1 and 2, and they were admitted into evidence without objection.

FINDINGS OF FACT

Based upon the competent and substantial evidence, my observations of Claimant at trial, and all the reasonable inferences to be derived there from, I find:

- Claimant is a 49 year-old male who worked for Employer as a floater in assembly for approximately eight years. He testified he tried to get a permanent job with Employer, but repetitive work bothered his neck. He also had restrictions before 2002 due to his multiple hernia repairs. His last day of employment with Employer

was May 5, 2003.

- Claimant testified on April 9, 2002, an unmanned material cart, which is a little larger than a golf cart, hit a rack and struck a shelf that in turn struck Claimant. He testified the cart picked him up and threw him to the floor. He hit his tailbone and bounced his head off the floor. He took an ambulance to Plant Dispensary and complained primarily of low back pain. The doctor ordered x-rays and performed a physical exam. Claimant did not have any abrasions, lacerations, or bruises. Claimant testified the doctor was more concerned with doing a rectal exam for his tailbone complaints than anything else. He was sent home and instructed to return to Plant Dispensary the following day.
- Claimant testified he was in so much pain the following day that he wanted to take a personal day. He went to the plant, but the doctor was not there so he went to St. Joseph's Hospital Emergency Room on his own. The medical records reveal he complained of pain in his right elbow, neck and back, and he denied prior back pain or sciatica. Claimant testified he does not recall denying prior low back problems. The records reveal he also complained of "mild" neck pain the day before which was "better" on April 10th. He was diagnosed with a lumbar contusion and sent back to Plant Dispensary.
- Claimant testified he first noticed his neck symptoms the day after the injury. He testified his complaints worsened within a few weeks of his injury.
- Plant Dispensary records reveal Claimant did complain of neck pain April 10th, but stated it had subsided. By May 2nd, he had limited range of motion in his neck and was sent to Concentra for cervical traction. He had multiple follow-up visits at Plant Dispensary for neck and low back pin.
- On May 8, 2002, Dr. Phillips noted Claimant had developed neck stiffness and pain that spread into his right arm. He walked with his chin nearly lying on his chest. He had very little cervical range of motion initially, but later in the examination, he had full cervical range of motion.
- Employer sent Claimant to Dr. Gragnani in July 2002. At that point, he had complaints of pain down the back of his left arm and into his hand. He also had pain in his neck, low back, left hip, and pins and needles in his left foot. Dr. Gragnani examined Claimant and found no muscle spasms in the cervical, thoracic, or lumbar area. His cervical range of motion was normal. Dr. Gragnani noted Claimant had significant sunburn on both sides of his neck, which Claimant attributed to having been out over the weekend on his motorcycle. The sunburn on his neck, the fleeting changes in the range of motion, and the ability to ride a motorcycle all weekend, are entirely inconsistent with Claimant's offered history to the doctors and are at complete odds with his complaints.
- Claimant's cervical and lumbar x-rays and MRIs were negative. Dr. Gragnani ordered a bone scan which showed no increased activity that would have stemmed from the injury. The doctor concluded this indicated any inflammation Claimant had following the injury had cleared, or there never was any inflammation present following the injury. He opined Claimant's healing was complete.

- Claimant continued to receive physical therapy which he reported only gave slight improvement. On August 28, 2002, Dr. Gragnani opined Claimant had reached his maximum medical improvement, and had no permanent partial disability. Although Claimant had complaints of tightness in his neck and pain in his neck and low back, Dr. Gragnani found no muscle spasm. He felt Claimant's prognosis was excellent and there was no residual abnormality or inflammation.
- By October 2002, Plant Dispensary records indicate Claimant had severe, almost constant, spasm in his right trapezius muscle. In November 2002, the doctor noted that although Claimant complained he could not move his neck, he again had sunburn on the right side of his neck. He has had extensive work up, which had all been negative. The complete inability to move his neck is contradicted by the sunburn.
- Dr. Phillips examined Claimant in June 2003. He noted Claimant had gotten trigger point injections and was getting Botox injections. He was also taking valium and percocet. Claimant told Dr. Phillips he had left arm pain and numbness and tingling into his left foot when his head was cocked to the right. He stated he is in this position constantly and had been this way for the last fourteen months. Dr. Phillips noted Claimant's tests had all been normal. He opined he could not conclude Claimant's condition was neurologically related to the work accident and could not conclude Claimant had organic torticollis.
- In July 2006, Dr. Gragnani again evaluated Claimant. He noted Claimant was seeing Dr. Temple for botox injections related to a diagnosis of posttraumatic torticollis. Claimant's chief complaint to Dr. Gragnani was muscle spasm in the right side of his neck. He also had numbness in his left arm and leg, which Claimant said disappeared after he had the botox injections. Dr. Gragnani noted Claimant held his head rotated downward and to the right, but his posture changed when he was not paying attention. Dr. Gragnani examined Claimant and was unable to find spasm in his neck. He also noted Claimant's injections were into his right sternocleidomastoid muscle. He opined if that was the muscle involved, Claimant's head would be rotated to the left and upward. His actions contradict his complaints.
- Dr. Gragnani reiterated his opinion that Claimant had no permanent injury to his spine as a result of his work injury. He reached his maximum medical improvement in August 2002, and no further treatment was needed. He noted Claimant's complaints were all subjective and nonphysiologic. He opined anything subsequent to August 2002 was induced by the practitioners who treated Claimant and was not related to his work injury.
- Claimant testified he was diagnosed with post traumatic cervical dystonia with left sided gait disorder in 2002. He testified he has been undergoing medical treatment for this condition since his diagnosis, and he currently sees Dr. Fisher and Dr. Temple. He believes his condition is not improving and is getting worse. He testified he needs more botox and has to stretch out his treatments longer. Claimant testified he had no complaints like this before his 2002 work injury.
- Claimant testified some doctors told him cervical torticollis is usually spontaneous, has no cause, generally affects younger people, and could be genetic.

- From April 2002 through May 2003, Claimant rode his Harley. He testified he was able to ride if he had injections so that he could move his head. In July 2003, Claimant went on a two week motorcycle trip to Nova Scotia. He testified he had injections into his neck and left shoulder before his trip.
- Claimant testified he had no treatment for his neck before May 2002. He had multiple visits at Chapel Chiropractic beginning in 1989 for back pain. He was diagnosed with a lumbar disc herniation. Many of the records reveal complaints of neck pain and he was treated for cervico-thoracic joint dysfunction. In April 2002, Claimant returned to Dr. Chapel following his work injury. His pain drawings at that time reveal low back pain, and no neck pain. Dr. Chapel diagnosed acute lumbosacral impact sprain and spasm. In June 2002, Dr. Chapel noted acute “locking” up of Claimant’s neck on the left side.
- Prior to 2002 Claimant had some work restrictions due to hernias. Between 1998 and 2001 he had several surgical procedures to repair multiple hernias. He testified during that time, he had no complaints regarding his neck or arms. He also had carpal tunnel syndrome which affected his ability to work.
- Claimant has not worked since May 5, 2003. He received sickness and accident benefits and disability benefits for several months. He has been awarded Social Security Disability dating back to May 5, 2003.
- Claimant testified he can not work now because repetitive work causes the botox to wear off. His neck condition comes and goes depending on when he received his last injection. When the botox wears off, his neck “goes over”, his hand draws up and his left leg and right side of his face get numb. He is not able to do much physical activity. He takes numerous medications. Without his medications he would be in spasm all the time. He gets to the point that his head draws to the right, his ear touches his right shoulder, and his chin touches his chest. The nurse has to help the doctor pull his head up in order to get his injections.
- Claimant also takes medications for esophageal spasms and high blood pressure. He had a serious motor vehicle accident in 2005 leading to a left hip replacements and surgery for left arm fractures. He testified his neck condition worsened after the motor vehicle accident.
- When questioned on cross examination as to why numerous doctors would notice his neck tanned equally on both sides when Claimant said his neck was constantly bent to the right, Claimant responded “any doctor can say that, but was it factual”. He stated “if the doctors were all working together, they are going to come up with the same answer if that’s what they need.”
- Claimant testified his last botox injection was May 29, 2008. During the hearing, 40 days after his last injection, Claimant’s head was only slightly bent to the right.
- Claimant was not a credible witness. His continuous sunburn and vigorous motorcycle activities belie the truth

of any of his histories. He apparently only has symptoms in the doctor's office. He had numerous caveats in his testimony that make him unbelievable.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant was not injured by accident in the course and scope of his employment April 9, 2002.

Section 287.020 RSMO (2000) defines an accident as an “unexpected or unforeseen identifiable event or series of events happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.”

Claimant testified he was struck by a material cart. Claimant was taken by ambulance to Plant Medical, and they referred him to Dr. Gragnani for evaluation. I believe there was an incident at work, but it did not rise to the level of “accident” as defined in the Workers’ Compensation law. Claimant sustained no injuries as a result of the incident. Even if he had sustained an injury as a result of the incident, it was *de minimus* in nature, and completely resolved within a few weeks.

- **Claimant’s neck condition is not medically and causally related to his work injury.**

Claimant alleges his neck condition and treatment since his release by Dr. Gragnani are related to the work incident. Claimant has had substantial treatment to his neck, and by his testimony continues to receive regular injections into his neck.

Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” [Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 \[51 \(Mo.App.1991\)\]](#). This requires Employee's medical expert to establish the probability Employee's injuries were caused by the work accident. *McGrath v. Satellite Sprinkler Systems Inc.*, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994), (overruled on other grounds by *Hampton v. Big Boy Steel Erection* 121 S.W.3d 220 (Mo.2003)).

Claimant testified he has been diagnosed with cervical torticollis and cervical dystonia. This is not a condition within the realm of common knowledge or experience and requires expert medical opinions to establish the cause and effect relationship. Claimant presented Dr. Hanaway’s narrative report, but the court is unable to consider this as this evidence is inadmissible. There is no admissible medical expert opinion or testimony to support Claimant’s allegation. His testimony regarding causation also is inadmissible hearsay.

The only expert medical opinion in evidence is from Dr. Gragnani. Within less than four months of the injury, Dr. Gragnani found Claimant had a normal exam, and his tests were all normal. He released Claimant from care and recommended no additional treatment. Four years later, his physical examination again was normal and he was unable to find spasm in Claimant’s neck. He reiterated his opinion Claimant had no permanent injury to his spine as a result of his work incident.

I find the opinion of Dr. Gragnani well reasoned and persuasive. Claimant failed to produce other expert medical evidence to substantiate his claim.

Regardless of whether Claimant had a work incident or accident, there is no proof any of the treatment or complaints are in any way medically and causally related to the *de minimus* incident.

- **Employer is not liable for TTD benefits, past or future medical treatment, or PPD.**

Because I have found there was no compensable accident, Employer is not liable for any additional benefits.

- **The Second Injury Fund has no liability.**

Based on my findings above, the Second Injury Fund has no liability.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffery W. Buker
Director
Division of Workers' Compensation