

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

Injury No.: 00-051159

Employee: Cardell McDonald
Employer: Missouri Highway and Transportation Commission
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: March 3, 2000
Place and County of Accident: Hannibal, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 7, 2005, as corrected in this award and decision, and awards no compensation in the above-captioned case.

The administrative law judge cited to an opinion regarding causation written by Dr. Jennifer Clark in the decision, which was excluded from evidence. We strike any and all references to Dr. Clark's opinion on causation. Her treating reports are properly in evidence and were properly considered by the administrative law judge. Dr. Clark's opinion on causation is not considered by the Commission in finding that employee failed to sustain his burden of proof in his claim for the other reasons specified by the administrative law judge.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued March 7, 2005, are attached and incorporated by this reference, except as to any recitation of the opinion regarding causation by Dr. Clark.

Given at Jefferson City, State of Missouri, this 8th day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Cardell McDonald

Injury No. 00-051159

Dependents:
Employer: Missouri Highway and Transportation Commission
Additional Party:
Insurer: Self-insured
Hearing Date: January 21, 2005.

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: HDF/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No. Claimant failed in his burden to prove that he sustained a work-related accident/condition.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged - March 3, 2000.
5. State location where accident occurred or occupational disease was contracted: Hannibal, 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?
No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
N/a.
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: Neck.
14. Nature and extent of any permanent disability: N/a.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? N/a
18. Employee's average weekly wages: \$730.38.
19. Weekly compensation rate: \$486.92 ttd/\$303.01 ppd.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/a.

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

No permanent total disability benefits from Employer.

22. Second Injury Fund liability: N/a.

TOTAL:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Cardell McDonald

Injury No: 00-051159

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Missouri Highway and Transportation Commission

Additional Party

Insurer: Self-insured

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on January 21, 2005. Memoranda were due by February 14, 2005.

The parties stipulated that on or about the 3rd day of March, 2000, the claimant was in the employment of the Missouri Highway and Transportation Commission; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was self-insured; a claim for compensation was filed within the time prescribed by law; the claimant's average weekly wage was \$730.38; the rate of compensation on the date of the alleged accident/occupational disease was \$486.92 per week for temporary total disability benefits, \$303.01 per week for permanent partial disability benefits; no temporary disability benefits have been paid to the claimant to date; no

medical aid has been provided.

The issues to be resolved by hearing include 1) the occurrence of an accident or occupational disease, 2) whether appropriate notice was given, 3) whether the alleged accident or occupational disease arose in the course and scope of employment, 4) the medical causation of the injuries alleged, 5) the nature and extent of permanent disability (permanent partial disability is alleged), and 6) the liability of the employer/insurer for future medical treatment.

FINDINGS OF FACT

The claimant, Cardell McDonald, began his employment with the Missouri Highway and Transportation Commission (MoDOT) in 1979, and, as of the date of the hearing of this workers' compensation claim, was still employed there. Since 1993, Mr. McDonald has been a senior account technician with MoDOT. Mr. McDonald's responsibilities include field work, but the majority of his work is done at his desk.

In the spring of 2000, Mr. McDonald's office was temporarily moved to a breakroom and he was given a desk purchased at Wal-Mart. Mr. McDonald is six feet two inches tall and weighs in the neighborhood of 225 pounds. Mr. McDonald's new desk was smaller and he had to keep his manuals, which were kept in binders, on the floor next to his desk. Because of the smaller desk size, Mr. McDonald's computer monitor was placed to the right of his desk.

Mr. McDonald stated that because of his height he had trouble sitting at his desk. He had to bend over to type, look to the right to see the computer monitor and reach to the floor to access his manuals. Mr. McDonald testified to an aching sensation at the base of his neck, as well as pain when he turned his head. Mr. McDonald later testified that his neck pain pre-existed the move to temporary quarters, but intensified thereafter. Mr. McDonald was at the temporary location for about six months.

In the fall of 2000, Mr. McDonald returned to his permanent work area, an L-shaped desk in a cubicle. In this permanent office arrangement, Mr. McDonald's desk had the monitor placed squarely in front of him, but the keyboard pulled out from beneath his desk and was on top of his knees.

On October 31, 2000, William Bell, a senior risk management specialist with MoDOT, evaluated Mr. McDonald's workstation. Mr. Bell's November 1, 2000 report includes the statement that "as currently configured Cardell's workstation is undersized for his six-foot, one-inch frame." Mr. Bell's recommendations regarding Mr. McDonald's workstation included placing the keyboard on the desk surface, utilizing the chair and its lumbar support "to improve posture and reduce back and cervical strain and relocating the telephone closer to the computer to reduce reaching."

Mr. McDonald initially saw Dr. Memken on March 30, 2000, with "a lot of coughing, especially dry hacky cough and he was having a lot of neck muscle pain."

On March 31, 2000, Mr. McDonald first saw Dr. Bieniek, an orthopedic specialist, who noted that Mr. McDonald came in complaining of neck pain which "began about three to five weeks ago." Dr. Bieniek's notes of March 31, 2000, reflect that Dr. Bieniek told Mr. McDonald "that if he can avoid a lot of repetitive bending and stooping, avoid excessive weight gain and avoid smoking then what happens to his back is just degenerative in nature and there is really nothing he can really do to change this other than continue to keep his back in good condition with some exercises."

On June 27, 2000, Mr. McDonald again saw Dr. Bieniek who recorded Mr. McDonald's complaints that his limited workspace along with the placement of a monitor in the corner of the desk "over the course of the last year" contributed to his neck pain. Dr. Bieniek notes that "this continued neck tilt and rotation by history appears to have contributed to the development of his neck pain." On June 27, 2000, Dr. Bieniek ordered an MRI for Mr. McDonald to "rule out herniated disk."

On July 11, 2000, Dr. Bieniek's notes reflect that Mr. McDonald was still experiencing some neck discomfort "which lasts until about mid-morning after sleeping through the night." He does have occasional discomfort in his neck over the course of the day. . . I think perhaps with the changing of the workstation layout this August or September this may contribute to the improvement of his neck." Dr. Bieniek noted that an MRI scan showed no pathology.

Mr. McDonald had three courses of physical therapy for a cervical strain at Hannibal Regional Hospital at Dr. Bieniek's direction: March 31, 2000, through July 11, 2000, January 21, 2003, through May 23, 2003, and December 2 through 21 of 2004. Mr. McDonald also had a course of

physical therapy in 2002 for lumbar pain, again at Dr. Bieniek's direction.

In June of 2003, Mr. McDonald saw Dr. Clark for neck pain. By September 23, 2003, Dr. Clark determined that Mr. McDonald had a C3-4 disk herniation after a repeat MRI. Dr. Clark's handwritten note dated October 29, 2003, reflecting her comments to Mr. McDonald's attorney, states that with regard to the C3-4 disk herniation, "workplace changes would make him (Mr. McDonald) more comfortable but would not be causative for this specific problem."

An MRI performed on August 30, 2003, at Hannibal Regional Hospital reflects a central disk protrusion at C3-4.

Dr. David Volarich, D.O., evaluated Mr. McDonald on September 27, 2004. Dr. Volarich stated that the history of injury given him by Mr. McDonald included eight to ten months of work at a temporary, small desk in 2000 causing Mr. McDonald pain in his neck radiating to the shoulders and upper back. Dr. Volarich found Mr. McDonald to have "the worst pain in the neck . . . with left side bending and flexion" along with "pain at the cervicodorsal junction and in the paraspinal muscles from C3 through C4" on palpation. Dr. Volarich found Mr. McDonald's work in a non-ergonomic workstation to be a "substantial contributing factors (sic) causing the disc herniation at C3-4" and ascribed a 25-percent-of-the-body rating of permanent disability attributable to the cervical spine. Dr. Volarich also found that Mr. McDonald would need medication and physical therapy in order for Mr. McDonald "to maintain his current state."

APPLICABLE LAW

To be entitled to workers' compensation benefits, the claimant has the burden of proving not only that the accident arose out of and in the course of his employment but that the alleged injury was directly caused by the accident and must establish a causal connection between the accident and the compensable injury, Kerns v. Midwest Conveyor, 126 S.W.3d 445, 453 (Mo. App. W.D. 2004), and has the burden of proving not only a work-related injury but that the injury resulted in the disability claimed. Rana v. Landstar TLC, 45r S.W.3d 614, 622 (Mo. App. W.D. 2001).

Accident, as defined by Section 287.020.2, is an unexpected or unforeseen identifiable event or series of events happening suddenly and violently . . . 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.

Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration follows an incident of employment. Section 287.020.3(1) RSMo.

An injury shall be deemed to arise out of and in the course of the employment only if It can be seen to have followed as a natural incident of the work, can be fairly traced to the employment as a proximate cause and does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life. Section 287.020.3(2) (a) (b) (c) (d) RSMo.

Similarly, occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsection 2 and 3 of Section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor. Section 287.060.2 RSMo.

To support a finding of occupational disease, an employee must provide substantial and competent evidence that they have contracted an occupationally induced disease rather than an ordinary disease of life, "which involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." Greenlee v. Duke's Plastering Service, 75 S.W.3d 273 (Mo. 2002).

AWARD

The claimant, Cardell McDonald, has failed to sustain his burden of proof that he sustained a work-related accident or occupational disease. Mr. McDonald's descriptions of the inception of his neck pain include 1) prior to the move to the temporary area, intensifying at the time of the move (Mr. McDonald's testimony at hearing), 2) at the time of the move to the temporary area (Mr. McDonald's history to Dr. Volarich), 3) three to five weeks prior to seeing Dr. Bieniek on March 31, 2000 (Mr.

McDonald's history to Dr. Bieniek), and 4) pain for a year prior to June 27, 2000, as the result of being confined to a small workspace (Mr. McDonald's history to Dr. Bieniek). The timing of the move to the temporary workspace was never pinned down, but was generally described as occurring in the spring of 2000.

Mr. McDonald received medical treatment for his neck from March to July of 2000 (Dr. Bieniek) and then resumed treatment for his neck in June of 2003 (Dr. Clark and Dr. Bieniek).

Dr. Bieniek described Mr. McDonald's neck pain as degenerative in 2000 and mentioned the workspace configuration as a possible contributing factor to Mr. McDonald's neck pain.

In 2003, Dr. Clark found a C3-4 disk herniation and stated that Mr. McDonald's workspace configuration was not the cause.

Neither treating doctor found Mr. McDonald's work environment to be the substantial factor in causing Mr. McDonald's neck pain.

Only Dr. Volarich found Mr. McDonald's workplace configuration to be the cause of his neck complaints and stated that the workstation was a substantial contributing factor in causing the C3-4 disk herniation.

In this case, Dr. Volarich's testimony regarding the cause of Mr McDonald's C3-4 disk herniation is found to be less credible where the C3-4 disk herniation was not discovered until three years after the alleged work environment caused the neck pain and where an MRI conducted in 2000, contemporaneously with the neck pain occurring in the work environment, failed to disclose a herniated disk.

Thus, Mr. McDonald's claim for workers' compensation benefits is denied. All other issues raised for resolution are hereby rendered moot.

Date: March 7, 2005

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret
Patricia (Pat) Secret, Director
Division of Workers' Compensation