

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

Injury No.: 09-082752

Employee: Michael Faught

Employer: AT&T

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Credibility of the employee

Employee claims compensation for a low back occupational disease injury caused by employer's (alleged) requirement that he sit continually throughout his eight-hour work shift. In denying the claim, the administrative law judge relied, in part, on an express finding that employee's testimony lacks credibility with regard to the conditions and circumstances of his work. In finding that employee's testimony lacked credibility, the administrative law judge expressly relied on his observations of employee's demeanor at trial.

Generally speaking, we are especially reluctant to second-guess an administrative law judge's credibility determinations that expressly derive from personal observations of a witness at trial. After careful consideration and a review of the whole record, we are not persuaded to make an exception in this case. Although we do not doubt that some prolonged sitting at work may have resulted in symptoms of back pain related to employee's prior injuries, we agree with the administrative law judge that employee's testimony that he was not permitted to move around at all while working for employer is not credible, and that he fails therefore to persuade that prolonged sitting at work resulted in any change in pathology or increased disability referable to his spine, because his medical experts relied upon incorrect information regarding his work circumstances.

Uncontested expert medical opinion

Employee argues that the administrative law judge impermissibly and arbitrarily disregarded uncontested expert medical opinion evidence, because employer and the Second Injury Fund did not advance expert medical testimony to rebut the testimony from employee's experts. We disagree. Far from arbitrarily disregarding employee's evidence, the administrative law judge provided a thorough and thoughtful discussion of

Employee: Michael Faught

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such, and identified numerous, very specific reasons why he found the testimony from employee's medical experts to lack persuasive value.

After our own review of the record, we must agree with the administrative law judge's determination that employee's experts fail to provide persuasive support for his claim. Apart from the fact that they relied upon an incorrect history from employee with regard to his work duties, we additionally note that employee failed to provide Drs. Stuckmeyer and Fleming with highly pertinent medical records, including those from his primary care physician Dr. Frein. When confronted with these omitted records on cross-examination, both Drs. Stuckmeyer and Fleming agreed that it appears employee may have been suffering from the very injury claimed in this case (failed back syndrome) *before* the alleged captive sitting beginning in 2009. See *Transcript*, pages 957 and 1477. We have long held that medical expert opinion testimony rendered without the benefit of relevant medical history from the employee is generally inadequate to meet an employee's burden of proof, because it lacks foundation. Once again, we discern no basis to depart from that general rule in this case.

Spinal cord stimulator

On page 8 of the administrative law judge's award, the administrative law judge states as follows: "Dr. Stuckmeyer admitted that it was significant that Dr. Thomas P. Laughlin with the KC Pain Centers had recommended a spinal cord stimulator to treat employee's complaints of low back pain in 2008, prior to [employee's] alleged 2009 occupational disease." Employee, in his brief, claims that the foregoing statement is incorrect, and that the administrative law judge has affirmatively misrepresented the record owing to alleged "bias and passion" against employee.

We have, of course, carefully reviewed all of the records from Dr. Laughlin, and it appears to us that while Dr. Laughlin did consider a spinal cord stimulator as a possible option to treat employee's preexisting failed back syndrome as of November 2004, he apparently ruled it out and did not approach employee with that option, and therefore did not technically "recommend" such for employee. *Transcript*, page 610. And, in the cross-examination of Dr. Stuckmeyer to which the administrative law judge refers, Dr. Stuckmeyer did not actually concede that Dr. Laughlin "recommended" a spinal cord stimulator, only that such had been "discussed" and that employee was "potentially a candidate for that." *Transcript*, page 958.

We provide the foregoing comments solely to make clear that we did not rely upon any mistaken understanding of Dr. Laughlin's records, or Dr. Stuckmeyer's concessions on cross-examination, in rendering our decision herein. At worst, the administrative law judge's choice of words was somewhat inaccurate, but we are not convinced that it affected his analysis in any way. More importantly, the distinction as to whether Dr. Laughlin "recommended" or merely "considered" a spinal cord stimulator, in our view, does not distract from the critical fact that employee failed to provide Dr. Stuckmeyer with the basic factual information regarding his preexisting medical history and treatment necessary to permit Dr. Stuckmeyer to render a persuasive opinion in this case. This includes the aforementioned records from Dr. Laughlin.

Employee: Michael Faught

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Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued November 24, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 14th day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Michael Faught

Injury No. 09-082752

Dependents: N/A

Employer: AT&T

Self-Insurer: Self-Insured

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: October 6, 2015

Briefs Filed: November 6, 2015

Checked by: KJC/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged July 31, 2009.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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? See additional Findings of Fact and Rulings of Law.
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: Employee, alleged that AT&T adopted a mandatory sitting rule in January 2009 and that pursuant to the rule he was not allowed to take any breaks or lunch periods or

stand and stretch or to even go to the restroom. He alleged that he sustained an occupational disease due to the "repeative" {sic} sitting he was required to do pursuant to the rule.

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: Alleged low back.
14. 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.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: See Additional Findings of Fact and Rulings of Law.
19. Weekly compensation rate: See Additional Findings of Fact and Rulings of Law.
20. Method wages computation: See Additional Findings of Fact and Rulings of Law.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
Unpaid medical expenses: None.
Weeks for permanent partial disability: None.
Weeks for temporary total (temporary partial disability): None.
Weeks for permanent total disability: None.
Weeks for disfigurement: N/A
22. Second Injury Fund liability: None.

TOTAL: None

23. Future requirements awarded: None.

Said payments to begin as of N/A 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Thomas Hill.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Faught

Injury No. 09-082752

Dependents: N/A

Employer: AT&T

Self-Insurer: Self-Insured

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: October 6, 2015

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FINDINGS OF FACT AND RULINGS OF LAW

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

1. Accident or occupational disease;
2. Notice;
3. The nature and extent of any disability sustained by the employee;
4. Liability of the employer for 32 months of temporary total disability benefits covering the period July 31, 2009 to March 30, 2012¹;
5. Liability of the employer for \$19,570.31 in past medical aid; and
6. Liability of the Second Injury Fund for compensation, and if so the extent of the liability.

At the hearing, Mr. Michael Faught (hereinafter referred to as Claimant) testified that he was born on November 4, 1962 and that his last job was as a network center technician for AT&T. He stated that in his job he answered phones, repaired service outlets in Missouri, Kansas, Arkansas, Oklahoma and later Texas by computer and that he did data entry work.

Claimant testified that he worked for AT&T for 10 years. He stated that he worked the midnight to 8:00 a.m. shift. He stated that AT&T instituted new rules and regulations when Southwestern Bell became part of it. He stated that pursuant to the new rules and regulations, network technicians were required to sit the entire 8 hour work shift.¹ He stated that network

¹ Claimant testified on cross-examination by the Second Injury Fund that the mandatory sitting requirement was instituted by AT&T in January 2009. Earlier, he had testified that new rules were instituted upon the merger of AT&T and Southwestern Bell. The evidence showed that the merger occurred in 2005. Claimant never testified, however, that any mandatory sitting rules were instituted until 2009.

technicians were not allowed to take any breaks or lunch periods. He stated that because he had to be continuously logged into the telephone and computer, he could not stand nor move around to do his job.

Claimant testified that he complained to his supervisor, Jean Garcia about the mandatory sitting requirement. He stated that her response was to threaten to get human resources involved if he did not stay logged into the system.

Claimant attributed his alleged back impairment to the sitting he was allegedly required to do at work at AT&T for 8 hours without any breaks or lunch periods and sometimes an inability to go to the restroom due to the need to stay logged into the system. He stated that he could not even stand up or move around.

Claimant testified that he had two surgeries after 2009 to implant a spinal cord stimulator in his back. He stated that in March 2012 he had neck surgery. He complained of continuing problems with back pain and pain radiating down his legs to his feet. He stated that pain pills provided some relief from his pain.

Claimant testified that he coached baseball and basketball until the alleged rule change. He stated that until the alleged rule change he would get off work at 8:00 a.m. and then go home and work on his farm for another 5 to 6 hours. He stated that he rode a tractor, mowed, did fence work for his pasture, cared for his animals, rode horses, used an ax or sledge hammer to break holes in the ice on his pond, put drainage pipes in his pond, pulled weeds from his pond, and got on his hands and knees to scrub and clean his swimming pool. He stated that he chopped down Christmas trees. He stated that he went on family vacations to Florida and to the Ozarks.

Claimant testified that his salary at AT&T was \$31 or \$32 per hour. He stated that he did construction work prior to his job at AT&T. He stated that he was a student at the Electronics Institute from 1996 to 1997 where he enrolled to learn a new trade. He stated that as a student he was allowed to stand up and stretch and walk around when needed.

On cross-examination by AT&T, Claimant testified that the mechanism for his alleged injury or impairment was sitting. He stated that a chair caused his alleged injury. He admitted, however, that he sat in his personal life as well as at work. He admitted that he drove to work at AT&T. He admitted that he sat while driving. He admitted that he sat while at home. He admitted that he sat when he went to sporting events. He admitted that he sat on his deck at home.

Claimant admitted on cross-examination that employees were not penalized for going to the restroom, although he had testified on direct examination that sometimes employees had to just "hold" it when they needed to go to the restroom. He admitted that employees were allowed to go to the break room for coffee or water or something to eat. He admitted that he was not constantly on the phone. He admitted that he could stand up at his desk when there were no phone calls.

Claimant admitted that he was a union employee while working at AT&T. He admitted that 15 minute breaks were part of the collective bargaining agreement between his union and AT&T. He admitted that he had injured his back prior to his employment at AT&T. He admitted that he had three back surgeries prior to his employment at AT&T. He admitted that he had settled three workers' compensation cases where he received settlements based on permanent partial disability to his low back prior to his employment at AT&T².

Claimant admitted that he had alleged that he was permanently and totally disabled in his 1995 low back injury case. He admitted that he returned to work in 1998. He admitted that he did not tell the Second Injury Fund that he was working when he effectuated his settlement as to the Fund in 1998 on the basis that he was permanently and totally disabled.

Claimant admitted that he did not allege a neck injury when he filed his original claim for compensation in October 2009. He admitted that he never physically returned to work at AT&T after August 2009. He admitted that he did not amend his claim to allege a neck injury until November 2013.

Finally, Claimant admitted that Dr. Frein was his primary care physician in 2009. He acknowledged that Dr. Frein's notes from August 20, 2009 showed that he complained to the doctor of low back pain as a result of moving from his farm to the city and of not getting enough exercise while living in the city and no longer doing farm work. He acknowledged that Dr. Frein's records made no mention of any discussion about Claimant's job at AT&T causing Claimant's alleged low back problems. He admitted that Dr. Frein was prescribing Hydrocodone for his alleged low back pain prior to his alleged occupational disease at AT&T.

Employer's Witnesses

Mr. Charles Kennedy and Ms. Jean Garcia testified for Claimant's employer. Mr. Kennedy testified that he was the area manager in the network delivery center for AT&T where he had worked for 40 years. He stated that Claimant worked under his jurisdiction.

Mr. Kennedy testified that all the work stations for the technicians were the same. He stated that all the workstations were ergonomically designed. He stated that all the desks could be raised or lowered in a few seconds. He stated that the headsets used by network technician were attached to a 10 to 15 foot cord which allowed the worker to stand or sit. He identified Exhibit 2 as a photograph of a technician standing with a headset on in front of his computer entering data and with a desk which had been raised to allow the worker to stand while doing his job. He stated that the desks depicted in the photographs were the same desks used when Claimant worked at AT&T.

Mr. Kennedy testified that some phone calls did not require any data entry. He stated that there were sometimes intervals between ½ and 1 hour between phone calls on the midnight shift.

²Claimant's files showed that Claimant settled workers' compensation cases in Missouri due to low back injuries based on a permanent partial disability of 25 percent to his body as a whole and 15 percent to his body as a whole. Dr. Koprivica's report showed that Claimant provided a history of settling a workers' compensation case under Kansas law due to a low back injury based on a "disability" of 22 percent.

Mr. Kennedy testified that AT&T and Southwestern Bell merged in 2005. He stated that no new rules were instituted pertaining to how technicians were required to do their jobs after the merger. He stated that employees were allowed to go to the restroom. He stated that employees could log in and out of the phone system in one or two seconds. He stated that all employees received a 15 minute break twice per day per the collective bargaining agreement with the union. He stated that all employees received a lunch break. He stated that employees were allowed to go to the break room for coffee.

Mr. Kennedy testified that AT&T had begun the process to terminate Claimant's employment in 2008. He indicated that Claimant's employment could not be terminated until all the union requirements had been met or while Claimant was on FMLA and short term disability. He stated that Claimant last physically worked at AT&T on August 3, 2009 and that Claimant was scheduled to return to work in October 2009, at which time his employment was going to be terminated. He stated that Claimant telephone his supervisor on the day before he was scheduled to return to work and told her that he was going to file a workers' compensation claim.

Mr. Kennedy testified that Claimant's employment was being terminated due to departmental leave theft of time and excessive absenteeism. He stated that prior to August 2009 Claimant had been placed on departmental leave when AT&T discovered that Claimant was falsifying his time records to show that he had worked during periods where he had been gone from his job for 6 to 7 hours at a time. He stated that Claimant had been "written up" several times for attendance problems prior to August 2009. He also stated that Claimant had been disciplined prior to August 2009 for being away from his work station for hours at a time.

Ms. Garcia, a Manager of Network Operations for AT&T, provided corroborating testimony. She stated that she had worked at AT&T for 30 years. She stated that she was Claimant's supervisor from January to August 2009 or for 196 work days. She stated that Claimant was physically at work on 61 of the 196 days. She stated that Claimant did not work the other days allegedly due to migraine headaches and ulcers and that part of the time he was on FMLA.

Ms. Garcia testified that she did not create any new work rules when she became a supervisor. She stated that Claimant never complained about his workstation or requested any modifications to it. She stated that he never mentioned any injuries or back problems as a result of sitting. She also stated that Claimant was already under a formal disciplinary review when she became his supervisor. She stated that his work performance and productivity were poor. She stated that his performance was in the bottom 10 percent of the employees she managed. She stated that the company had a problem with Claimant wandering off from his workstation to go to other employees' desks to visit for 10 to 15 minutes at a time instead of doing his work. She corroborated Mr. Kennedy's testimony about workers receiving breaks and lunch periods and being allowed to go to the break room and to the restroom.

Claimant's Rebuttal Testimony

Claimant testified in rebuttal that he did not falsify records. He stated that he did not leave the building for 6 or 7 hours at a time. He stated that he was off work in 2009 because his daughter had colon cancer. He stated that Ms. Garcia "knew" about his back problems and his daughter's illness. He stated that he had a 2 ½ foot cord attached to his headset and not a 10 foot cord.

Medical Evidence

Claimant offered into evidence the deposition testimony of James A. Stuckmeyer, M.D., a board-certified orthopedic surgeon and Kandice Fleming, M.D., as well as numerous reports and records. Dr. Stuckmeyer testified that he examined Claimant on April 26, 2012. He noted Claimant's medical history. He noted that Claimant had three surgeries on his lumbar spine prior to January 2009, including a lumbar fusion from L4 to S1. He noted that Claimant told him that he developed increased low back pain which radiated down his legs when AT&T adopted a new rule which required him to sit for prolonged periods and did not allow him an opportunity to get up and move around.

Dr. Stuckmeyer noted Claimant's medical history subsequent to August 2009. He noted that Alexander Bailey, M.D. had performed an anterior "radical" discectomy and fusion at the C5-6 and C6-7 levels of Claimant's neck in 2012. He stated that Claimant told him that he had developed "severe and incapacitating" neck pain due to prolonged "recumbency" from his back problems at AT&T.

Dr. Stuckmeyer concluded that Claimant presented "a very complicated orthopedic evaluation". He stated that Claimant had sustained a permanent partial disability of 35 percent due to his preexisting lumbar spine problems, including the three lumbar surgeries and the fusion. He concluded that Claimant had sustained an additional permanent partial disability of 20 percent to his lumbar spine due to the alleged protracted sitting he was required to do on his job at AT&T. He also concluded that Claimant had sustained a permanent partial disability of 20 percent due to his neck problems resulting from the alleged prolonged sitting for his back condition as Claimant related to him. He concluded that Claimant was permanently and totally disabled due to the five operations on his lumbar spine and the one on his cervical spine as well as his need for chronic narcotic medications.³

On cross-examination by Claimant's employer, Dr. Stuckmeyer admitted that in reaching his conclusions he relied on the history Claimant provided to him about the amount of sitting Claimant did at work and Claimant's employer's alleged refusal to allow Claimant to take any breaks. He admitted that he did not attempt to verify the accuracy of Claimant's subjective history. He admitted that he diagnosed Claimant with failed back syndrome due to the alleged sitting at work. He also admitted, however, that Claimant had the symptoms for failed back syndrome prior to Claimant's employment with AT&T.

³ Dr. Stuckmeyer included in the five operative procedures, Claimant's two operations for the placement of the spinal cord stimulator in his back.

Dr. Stuckmeyer testified that failed back syndrome was a “wastebasket” term and that it only meant that the person had not responded to back surgery and had ongoing back symptoms. He stated that the diagnosis was most common with multiple back surgeries. Again, he admitted that Claimant’s three back surgeries and chronic low back pain prior to his employment at AT&T were symptomatic of failed back syndrome. He admitted that Claimant’s radiating pain down his extremities prior to his employment at AT&T was symptomatic of failed back syndrome.

Dr. Stuckmeyer admitted that Claimant had not furnished him with the medical records of Dr. Frein. He stated that if Dr. Frein had noted on several occasions in 2006, 2007 and 2008 that Claimant had chronic back pain and that if Dr. Frein had prescribed narcotic pain medication including Hydrocodone for Claimant’s back prior to 2009; that too supported a diagnosis of failed back syndrome prior to the alleged 2009 occupational disease. Dr. Stuckmeyer admitted that it was significant that Dr. Thomas P. Laughlin with the KC Pain Centers had recommended a spinal cord stimulator to treat Claimant’s complaints of low back pain in 2008, prior to Claimant’s alleged 2009 occupational disease. He agreed that Claimant’s need for a spinal cord stimulator was suggestive of failed back syndrome prior to the alleged 2009 occupational disease from sitting at work.

Finally Dr. Stuckmeyer stated that if Claimant were permanently and totally disabled; that it was due to “past and present” conditions. On cross-examination by the Second Injury Fund, Dr. Stuckmeyer testified that Dr. Bailey’s records showed that Claimant’s cervical spine problems were caused by degenerative conditions.

Dr. Fleming’s Deposition Testimony⁴

Dr. Fleming, Claimant’s family physician, testified that Claimant would need narcotic pain medication in the future. On cross-examination by Claimant’s employer, Dr. Fleming agreed that Dr. Frein’s records showed that Claimant had complained of chronic back pain with radiculopathy to his lower extremities on October 2005, June 2007, October 2007, January 2008, September 2008, November 2008 and December 2008. She agreed that Claimant’s medical history prior to January 2009 was consistent with a diagnosis of failed back syndrome. She stated that her opinion as to Claimant’s need for medical treatment was based on his medical condition and not that it was due to his alleged 2009 work-related occupational disease.

Medical Records

Claimant’s medical records were cumulative of the testimony. In 1987, Bernard Abrams, M.D., a neurologist, noted that Claimant complained of back pain exacerbated by prolonged sitting, lying, twisting, lifting and bending. He noted that he believed that there was a psychological component to Claimant’s alleged back pain.

4 At the deposition, Claimant’s employer and the Second Injury Fund objected to the taking of the deposition on the basis that neither a medical report nor any of Dr. Fleming’s medical records had been furnished to the employer or the Fund. Both parties, however, agreed to the admission of the deposition into evidence at the hearing.

On February 11, 1988, Dr. Abrams again noted that Claimant complained that sitting increased his back pain. On April 11, 1988, Dr. Abrams noted that Claimant complained that his back pain had gradually gotten worse. He noted that Claimant's complaints were "far in excess of any objective findings".

Records from Dickson-Diveley Midwest Orthopaedic Clinic documented Claimant's three low back surgeries, including the fusion from L4 to S1 prior to January 2009. On February 19, 1996, Claimant complained of low back pain and severe leg pain. Lowry Jones, M.D. a board-certified orthopedic surgeon, recommended conservative treatment.

On February 22, 2007, Donald Frein, M.D., Claimant's primary care physician, noted that Claimant was complaining of increased back pain with the onset of cold weather. He noted that Claimant wanted to increase his Vicodin dosages to three per day.

On July 24, 2007, Dr. Frein noted that Claimant complained of a sudden onset of severe back pain of four days duration and that the pain was not as a result of any trauma or heavy lifting. Dr. Frein noted that Claimant complained that he had been unable to sit for more than 5 minutes at a time. He noted that Claimant complained that he was most comfortable when lying flat and that rolling over in bed was "very" painful.

On August 8, 2007 Claimant completed a questionnaire at Cass Medical Center Rehabilitation. He stated in the questionnaire that his low back pain was worse with moving, lifting over 25 pounds and sitting for over 30 minutes and with bending and twisting.

On January 25, 2008, Dr. Frein noted that Claimant was still taking Vicodin and a muscle relaxer. On February 18, 2008 Claimant told his therapist that his daughter had colon cancer when she was 15 years old. She was 25 years old in 2008 according to the therapist's report. The therapist noted that Claimant thought his daughter was going to die.

In April 2008, Claimant complained to his therapist that his job and home life was "so" stressful. On April 8, 2008, Dr. Frein noted that Claimant complained of low back pain radiating down his leg. On April 11, 2008 Claimant told his therapist that he was going back to work, despite his back and leg pain.

Claimant's psychological progress notes showed that in July 2008 he complained of marital and financial difficulties. He told the therapist that he was in the process of losing his tractor. He told the therapist that he hated his job. He complained that there were cliques on his job and that he was not a part of the cliques and did not want to be part of them. He complained that he had few friends. He complained that his life was tedious and boring.

In August 2008, Dr. Frein diagnosed Claimant with chronic low back pain and radiculopathy to his lower extremities. He noted that Claimant was on seven prescription medications including Hydrocodone.

On November 24, 2008, Claimant complained to Dr. Frein of back pain radiating down both legs. On January 20, 2009 Dr. Frein noted that Claimant had adequate control of his back

pain with medication. Dr. Frein's records further showed that from January to July 2009 Claimant's primary complaints involved gastrointestinal problems and stress due to his daughter's illness. Claimant was off work for most of that period.

On September 9, 2009, John Gillen, II, M.D., noted that Claimant complained of back and left leg pain which began two weeks ago. He noted that Claimant did not recall any precipitating event or injury. Dr. Gillen noted that "Aggravating factors contributing to the back pain may be lifting and bending over".

On October 28, 2009, Mark Bernhardt, M.D. of Dickson-Diveley Orthopaedic Clinic noted that Claimant had a history of low back pain dating back to a roofing accident. He noted that Claimant had been on Hydrocodone since the roofing accident. He noted that Claimant had been on Morphine for a year.

On December 1, 2009, William S. Rosenberg, M.D. of Midwest Neurosurgery Associates, P.A. included a detailed history in his report of Claimant's complaints. He noted that despite Claimant's history of three low back surgeries, Claimant was able to work and "even enjoy his farm until the last six months or so." He noted that Claimant complained that his back pain had gotten worse since approximately eight months ago when AT&T mandated against employees getting up from their chair. He noted that Claimant described his pain on average as a 10 on a pain scale of 1 to 10 with 10 being the most severe pain. Dr. Rosenberg concluded that Claimant "seemed" to have a combination of failed back syndrome with a neuropathic pain syndrome. He stated that such a condition was not responsive to additional surgery.

On March 15, 2010, Dr. Rosenberg stated that "I can come up with absolutely no explanation for the patient's upper extremity complaints".

On January 19, 2011, Alexander Bailey, M.D. of Advanced Spine and Orthopaedic Specialists noted that Claimant's chief complaint was neck and arm pain. On February 9, 2012 Dr. Bailey noted that he had advised Claimant against any surgery for his neck complaints. He noted that Claimant told him that the past year had been miserable. He noted that Claimant complained that his neck pain was severe.

On February 23, 2012, Dr. Bailey noted that Claimant's CT myelogram of the cervical spine showed evidence of a disc herniation at C5-6. His assessment was stenosis and arthrosis at C5-6 and C6-7. On March 23, 2012, Dr. Bailey performed a complete anterior radical discectomy at C5-6 on Claimant's neck as well as an anterior cervical spine decompression at C5-6, ligament excision, herniated disk excision at C5-6, partial corpectomy at C5-6, and an interbody fusion at C5-6, and C6-7.

On May 29, 2014 Claimant had x-rays of his pelvis, tibia, femur, ankle and cervical spine after providing a history of falling 8 feet from his deck. No acute fractures, dislocations or malalignments were noted.

Vocational Evidence

Mary Titterington, a vocational rehabilitation consultant, testified for Claimant. She stated that she evaluated Claimant in 1997 and in 2012.

Ms. Titterington testified that in 1997 she had concluded that it was “highly” doubtful that Claimant would be able to return to work. She stated that she had noted at the time that Claimant was only able to function for about 5 hours per day and that he would then need to go home and lie down and that he needed to rotate positions, and required medications.

Ms. Titterington testified that when she evaluated Claimant in 2012 his narcotic medications had increased “dramatically”. She stated that in 2012 Claimant complained of radiating back and neck pain, a sleep disturbance, anxiety and headaches. She stated that his IQ in 2012 was 81 and that it had dropped roughly 20 points since 1997.

Ms. Titterington concluded that Claimant was not a candidate for any additional training and that he could not return to his prior jobs. She concluded that Claimant was unemployable based on the restrictions rendered by Drs. Stuckmeyer, Holden and Koprivica.

On cross-examination by Claimant’s employer, Ms. Titterington admitted that she had not attempted to verify Claimant’s allegations about an alleged mandatory sitting requirement at AT&T. She admitted that she believed that Claimant was “teetering on the brink of unemployability” in 1997. She admitted that she had not reviewed any of Claimant’s medical records from Dr. Frein, Claimant’s primary care physician. She admitted that she had no knowledge as to whether Claimant’s back problems were as a result of a deterioration in his back due to his three prior surgeries or his alleged occupational disease due to sitting.

On cross-examination by the Second Injury Fund, Ms. Titterington admitted that a person’s scores on an IQ test were dependent on the person’s effort. She admitted that she had in fact concluded that Claimant was permanently and totally disabled when she evaluated him in 1997.

Ms. Titterington’s 1997 Vocational Report

Ms. Titterington noted in her 1997 report that Dr. Koprivica had concluded that Claimant was limited to captive sitting of fifteen to twenty minutes at any one interval. She noted that Dr. Koprivica had concluded that Claimant needed to be allowed to change postures as needed between sitting, standing and walking. She noted that Dr. Koprivica had restricted Claimant from all bending activities.

Ms. Titterington noted that Dr. Lowy Jones, Claimant’s treating orthopedic surgeon had restricted Claimant on January 27, 1997 from bending, lifting and prolonged standing or sitting.

Ms. Titterington noted that Claimant told her in 1997 that he no longer took hot baths because he could not get out of a bathtub by himself. She noted that he told her that he had to sit down to put on his clothes due to his inability to bend. She noted that he complained of hip and

leg pain and difficulty with sleeping. She noted that he told her that he no longer went to movies or out to eat because he could not tolerate the extended sitting. She stated that he told her that he spent approximately ½ of each 24 hour day lying down to relieve his hip and back pain.

Law

After considering all the evidence, including the deposition testimony and report of Dr. Stuckmeyer, the deposition testimony of Dr. Fleming, the other medical reports and records, the vocational testimony and reports of Ms. Titterington, the other exhibits and after observing Claimant's appearance and demeanor, I find and believe that Claimant did not prove that he sustained an occupational disease, repetitive motion injury or injury by accident as defined by Missouri law.⁵ Therefore, compensation must be denied.

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo .App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant did not meet his burden of proof.

Credibility

Claimant did not make a credible witness. His testimony was replete with inconsistencies, contradictions, mischaracterizations and allegations completely lacking in credibility. Claimant first alleged permanent total disability due to low back pain in his 1995 workers' compensation case. Dr. Koprivica and Ms. Titterington, Claimant's experts in his 1995 case, evaluated him in 1997. Both concluded that he was permanently and totally disabled.

Dr. Koprivica also concluded that Claimant could only sit for 15 to 20 minutes. Ms. Titterington noted that Claimant told her that due to his low back pain he had to spend ½ of each 24 hour day lying down. She noted that he told her that he could not get out of a bathtub due to back pain and that he had difficulty with even getting dressed due to his back pain. The evidence clearly showed that those complaints by Claimant were not credible.

Claimant settled his alleged permanent total case as to his employer in 1997. A year later he returned to work. He clearly was not permanently and totally disabled as he had alleged. He settled his case as to the Second Injury Fund in 1998. He admitted that he did not tell the Second Injury Fund that he was working when he effectuated the settlement in 1998 on the basis that he was permanently and totally disabled.

⁵ Claimant offered no evidence showing that he sustained an accident as defined in § 287.020 RSMO. 2005. Also, while as noted earlier, Claimant testified that AT&T implemented new rules upon its merger with AT&T; he indicated that the alleged mandatory sitting rule was implemented by Ms. Garcia in January 2009. The merger was in 2005. Claimant failed to prove that AT&T implemented any mandatory sitting rules. He failed to prove that he sustained a compensable occupational disease or repetitive motion injury.

Claimant worked until 2009 when he again alleged that he was permanently and totally disabled. He admitted that he worked at AT&T from 1999 to 2009. He admitted that after completing an 8-hour work shift at AT&T he would go home and immediately work another 5 to 6 hours doing moderately heavy farm work. He was able to work a 13 to 14 hour day despite telling Ms. Titterington that he had to spend ½ of a 24 hour day lying down due to severe back and hip pain when he was seeking permanent total disability benefits a few years earlier.

In addition to doing farm work, Claimant admitted that he was able to ride horses, chop down Christmas trees, use an ax and a sledgehammer to chop holes in the ice in his pond and place drainage pipes in his pond. Those activities also clearly contradicted Claimant's complaints in his 1995 case where he had initially alleged permanent total disability.

Similarly, the evidence showed that Claimant was not credible in his 2009 alleged permanent total disability case. In his 2009 case, Claimant argued that his back was essentially fine as demonstrated by his activities as set out above, until AT&T in January 2009 allegedly adopted a new policy requiring employees to sit for the entire 8-hour work shift with no breaks or lunch periods or an opportunity to get up and stretch or to even go to the restroom. He stated that employees had to just "hold" it when they needed to go to the restroom. He stated that the prolonged sitting on his job at AT&T caused his back problems.

Again, Claimant's allegations were not credible. Claimant's medical records showed that he had had three low back surgeries prior to January 2009. Each surgery resulted from a workers' compensation case. He had a lumbar fusion from L4 to S1 prior to January 2009. He settled each of his three workers' compensation cases involving his back injuries on the basis that he had sustained substantial permanent disability.

Claimant remained on prescription narcotic pain medications after his surgeries. He was on prescription narcotic pain medications as of January 2009. Less than two years prior to January 2009 Claimant had requested increased dosages of his narcotic pain medications. In November 2008, Claimant's doctor discussed implanting a spinal cord stimulator in Claimant's low back.

Claimant's primary care physician's records prior to January 2009 were replete with references to Claimant's complaints of severe back pain and pain radiating to his lower extremities. In July 2007, Dr. Frein noted that Claimant was complaining that he could only sit for 5 minutes due to severe back pain. Claimant told Dr. Frein in 2007 that it was even painful to roll over in bed. Claimant's attempt to attribute his alleged back problems after January 2009 to sitting at work was not credible.

Furthermore, the most credible evidence showed that there was no mandatory sitting policy at AT&T. Claimant admitted that the collective bargaining agreement between his union and AT&T provided that employees were to receive two 15-minute breaks per day. Claimant offered no credible evidence showing that employees did not receive the breaks as set out in the collective bargaining agreement. He offered no testimony from any fellow employees in support of his allegation. He offered no evidence showing that any type of union grievance had been

filed against AT&T for violating the terms of the collective bargaining agreement or for any unfair labor practices.

Mr. Kennedy and Ms. Garcia testified that employees received two 15-minute breaks per day plus a lunch period and that employees could stand at their desks and go to the restroom and to the break room.⁶ Both were credible witnesses.

AT&T also proved that the workstations were ergonomically designed and that employees could either sit or stand and do their jobs as illustrated by the photographs admitted into evidence of a network technician standing at his raised desk as he did the job. AT&T proved that 10 foot cords were attached to the phones. AT&T proved that on the midnight shift where Clamant worked there were often ½ to 1 hour breaks between phone calls during which employees could stand if they so chose to do so.

Thus, Claimant clearly failed to prove that he sat for 8 hours at work without getting up or that any such mandatory sitting policy existed at AT&T. In fact, the most credible evidence showed that Claimant failed to sit at his desk and do his job. The most credible evidence showed that Claimant was in the process of being fired from his job when he alleged an injury due to sitting at work. The most credible evidence showed that his employment was being terminated due to departmental leave theft of time and excessive absenteeism.

Mr. Kennedy explained that the departmental leave theft of time resulted from Claimant disappearing from work for 6 to 7 hours at a time and then later falsifying his time records to show that he had worked the 6 to 7 hours. He stated that on other occasions Claimant would be away from his workstation for hours. Ms. Garcia explained that Claimant would go and visit with other employees for 10 to 15 minutes at a time instead of staying at his workstation and doing his job.

Again, Mr. Kennedy and Ms. Garcia were credible witnesses. Claimant offered no credible evidence in opposition to their testimony. Claimant was not a credible witness.

Occupational Diseases and Repetitive Motion Injuries

Claimant alleged in his amended claim for compensation filed in November 2013 that he sustained injuries to his low back, extremities and neck as a result of “repeaitive {sic} on the job mandatory sitting without any opportunity to stand up and move around.”⁷ The evidence, as noted above, did not support his allegation.

The applicable statute pertaining to occupational diseases and repetitive motion injuries provides as follows:

⁶ Claimant even admitted on cross-examination that employees were not penalized for going to the restroom and that employees could go to the break room.

⁷ Claimant did not allege a neck injury in his original claim for compensation filed in October 2009. Also, he never explained what he meant by “repeaitive {sic} on the job mandatory sitting.” There was no evidence that his job required him to repetitively sit, unless he interpreted “repeaitive” (sic) to mean alleged prolonged sitting,

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

2. An injury or death by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable. . . .

§ 287.063 RSMo. 2005

The statutes must be strictly construed. § 287.800 RSMo. 2005. Thus, to establish an occupational disease as set out in subsections 1 and 2, Claimant had to prove that there was an identifiable disease arising out of and in the course of his employment.⁸ He also had to show that his alleged occupational disease had its origin in a risk connected with his employment and that it flowed as a rational consequence from that risk. Claimant failed in his burden of proof.

Claimant argued through Dr. Stuckmeyer's report that his alleged occupational disease or repetitive motion injury was failed back syndrome. He argued that the risk for his alleged occupational disease or repetitive motion injury resulted from the "repeative" {sic} sitting he had to do at work after his employer allegedly adopted a new policy in January 2009 which allegedly did not allow him to take any breaks or lunch periods, or to stand and stretch or to even go to the restroom.

The evidence did not support Claimant's allegation that such a policy existed or as to the extent of the sitting he did at work. Claimant, as noted above, did not prove that he sat for 8-hours at work with no breaks or a lunch period or the opportunity to even go to the restroom. He even admitted on cross-examination that employees were not penalized for going to the restroom and that employees could go to the break room to get coffee or a snack.

The evidence, as noted above, also showed that Claimant was in the process of being fired due to falsifying his time sheets to show that he was working when he was disappearing

⁸ Claimant referenced "repeative {sic} mandatory sitting in his claim. He never clearly explained what he apparently meant by repetitive sitting.

from work for 6 to 7 hours at a time and for excessive absenteeism from work when he alleged the occupational disease due to sitting.⁹ There was no credible evidence showing that Claimant sustained an occupational disease due to his employment at AT&T or that his alleged occupational disease from sitting or “repeaitive” {sic} sitting arose out of and in the course of his employment or that sitting constituted a risk for the occupational disease or repetitive motion injury he alleged.

Similarly, Claimant did not prove that his alleged occupational disease or alleged repetitive motion injury flowed as a rational consequence of the alleged risk for the occupational disease or repetitive motion injury connected with his employment as set out in the statute. Claimant had been complaining of problems with sitting since the 1980s. He sat in his normal activities of day-to-day living. He admitted that he still drove. He admitted that he drove himself to work during the period of his alleged risk of the occupational disease from sitting at work. His job was located in downtown Kansas City, Missouri. He testified at his deposition that he lived in Harrisonville, Missouri all of his life. Kansas City to Harrisonville, Missouri is approximately 40 miles each way.

Claimant also admitted that he sat at home. He admitted that he sat on his deck at home. He admitted that although he rarely went out to a movie or to dinner; that he sat when he engaged in those activities. He sat when he went to sporting events. He admitted that he rode his tractor. He admitted that he rode horses. There was no credible evidence showing that Claimant’s alleged occupational disease allegedly from sitting at work flowed as a rational consequence of the sitting he did at work as opposed to the sitting he did in his normal day-to-day activities away from work. Claimant did not prove a compensable occupational disease as set out in the statute.

Prevailing Factor

Although Claimant did not prove an occupational disease or repetitive motion injury as set out above, had he done so, his case would have still failed on the basis of prevailing factor. The statute provides that an occupational disease or repetitive motion injury is only compensable if the occupational exposure was the prevailing factor in causing the resulting medical condition and disability. *Id.* Prevailing factor is defined in the statute as the primary factor in relation to all other factors in causing both the resulting medical condition and disability. *Id.* Thus, Claimant had to prove that sitting at work was the primary factor in causing the condition in his low back and the disability in his low back which he attributed to the sitting at work. He did not do so.

As noted above, Dr. Stuckmeyer diagnosed Claimant’s condition as failed back syndrome. Dr. Stuckmeyer, however, offered no credible evidence showing that sitting could even cause failed back syndrome. He referred to no medical cases or any medical literature showing that anyone had ever been diagnosed with failed back syndrome due to sitting. He admitted that failed back syndrome generally occurred with multiple back surgeries and with

⁹ The uncontroverted evidence showed that Claimant had 196 scheduled workdays from January 1, 2009 to August 3, 2009. The uncontroverted evidence was that he worked on 61 of the 196 days. Thus, he missed 135 days from work during that period and he worked on only 31 percent of his scheduled workdays at AT&T in the year where he alleged an occupational disease due to sitting at work.

ongoing complaints of radicular pain down the extremities and a failure to respond to the back surgeries.

Claimant's multiple back surgeries occurred prior to his employment at AT&T. He had sustained a permanent partial disability of at least 62 percent to his body as a whole due to low back injuries prior to his employment at AT&T.¹⁰ His ongoing radicular pain down his extremities occurred prior to his employment at AT&T. His failure to respond to the back surgeries occurred prior to January 2009 when AT&T allegedly adopted the mandatory sitting rule.

Prior to January 2009, Claimant had complained to Dr. Koprivica of problems in sitting, standing, walking and bending. He complained to Ms. Titterington prior to January 2009 of spending ½ of each 24 hour day lying down due to severe back pain and of difficulty in dressing and getting out of a bathtub due to low back pain. He told Dr. Frein, his primary care physician, in July 2007 that he could only sit for 5 minutes due to severe back pain and that even rolling over in bed caused back pain. He had been complaining of back pain while sitting for more than 20 years prior to January 2009.¹¹ He had been on narcotic pain medication for his back for 20 years prior to January 2009.

Thus, not only did Claimant fail to prove that AT&T adopted a mandatory sitting rule as he alleged; he also failed to prove that whatever sitting he did at work was the prevailing or primary factor in causing his alleged occupational disease or failed back syndrome. It was impossible to determine that sitting at work was the prevailing or primary factor in causing Claimant's failed back syndrome or any other condition in his back, with his history of three prior low back surgeries and of numerous complaints of radicular pain and problems in sitting prior to the alleged occupational disease as well as his need for potent narcotic pain medication, including morphine prior to his alleged occupational disease.

Similarly, Claimant failed to prove that his work was the prevailing factor in causing his alleged neck injury or occupational disease.¹² Again, Claimant relied on Dr. Stuckmeyer's opinion. Based on Dr. Stuckmeyer's opinion, however, the compensability of Claimant's alleged neck impairment was dependent on the compensability of Claimant's alleged low back occupational disease or repetitive motion injury, which Claimant did not prove.

Dr. Stuckmeyer stated at his deposition that, "Mr. Faught informed me, and this would be based on his history, that due to prolonged recumbency for his back condition that he did develop the neck symptoms which culminated in the operative procedure. .." on his neck.

10 Claimant's workers' compensation files showed that he settled two cases under Missouri law prior to when he went to work at AT&T involving low back injuries based on a permanent partial disability of 25 percent to his body as a whole in the case under Injury No. 95-165489 and 15 percent to his body as a whole under Injury No: 87-062621. Dr. Koprivica's 1997 report showed that Claimant told him that he had settled a 1990 injury under Kansas law based on a permanent partial disability of 22 percent, meaning that Claimant had sustained a permanent partial disability of 62 percent to his body as a whole due to low back injuries prior to when he went to work at AT&T and not taking into account any enhanced disability due to the combined effect of the disability from the three injuries.

11 Dr. Abrams noted in the 1980s that Claimant was complaining of low back pain due to sitting.

12 Claimant did not allege a neck injury in his original claim for compensation filed in October 2009. He did not allege a neck injury until he amended his claim for compensation in November 2013. He last physically worked at AT&T on August 3, 2009.

(emphasis added). That quote offered no probative value as to the compensability of Claimant's alleged neck impairment. Dr. Stuckmeyer did not conclude that Claimant's alleged neck impairment was work-related. He did not conclude that Claimant's work was the prevailing factor in causing Claimant's alleged neck impairment. Instead, he merely offered a quote in the history Claimant provided to him without any commentary as to whether he believed the allegations made by Claimant in the quote or as to the validity of the allegations made in the quote. He did not conclude that it was even possible that recumbency due to a back injury or for any other reason could result in a neck injury severe enough to require surgery.

Claimant failed in his burden of proving a compensable occupational disease or repetitive motion injury or injury by accident. Thus, all other issues raised at the hearing were rendered moot.

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation