

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

Injury No.: 02-137333

Employee: John Nienhause
Employer: City of Town & Country
Insurer: St. Louis Area Insurance Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: November 17, 2002
Place and County of Accident: St. Louis County, 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 February 27, 2006. The award and decision of Administrative Law Judge Joseph E. Denigan, issued February 27, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 23rd day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: John Nienhause Injury No.: 02-137333

Dependents: N/A Before the
Division of Workers'
Employer: City of Town & Country **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund (Open) Relations of Missouri
Jefferson City, Missouri
Insurer: St. Louis Area Insurance Trust
Hearing Date: December 13, 2005 Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: November 17, 2002
5. State location where accident occurred or occupational disease was contracted: 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? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant sustained injury from repetitive movement performed as part of his employment.
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:
14. Nature and extent of any permanent disability: 15% PPD of the body referable to the low back
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? Unknown

Employee: John Nienhause Injury No.: 02-137333

17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: Maximum
19. Weekly compensation rate: \$649.32/\$340.12
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

60 weeks of permanent partial disability from Employer \$20,407.20

22. Second Injury Fund liability: Open

TOTAL: \$20,407.20

23. Future requirements awarded: Yes (see narrative award)

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant:

Andrew L. Mandel

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	John Nienhause	Injury No.: 02-137333
Dependents:	N/A	Before the
Employer:	City of Town & Country	Division of Workers'
Additional Party:	Second Injury Fund (Open)	Compensation
Insurer:	St. Louis Area Insurance Trust	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

This case involves a disputed recurrent low back condition resulting to Claimant with the reported onset date of November 17, 2002. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is a party to this claim but remains open for a determination of liability at a future date. Both parties are represented by counsel.

Issues for Trial

1. Incidence of occupational disease;
2. liability for future medical expenses;
3. nature and extent of permanent disability.

FINDINGS OF FACT

Stipulations

The parties stipulated the applicable rates of compensation of \$649.32 for temporary total disability benefits and \$340.12 for permanent partial disability benefits. No interim benefits were paid and none are sought at trial.

Dispositive Evidence

1. Claimant is a 50-year-old male and has worked for Employer the past twenty-one years as a police officer.
2. Claimant testified that as part of his job duties he is required to lift individuals at nursing homes, carry equipment, pick up heavy debris at accident scenes, wear a utility [waist] belt with a gun, radio and other attachments that is bulky around the waist especially when sitting. This bulk is accentuated when twisting and turning while entering and exiting a vehicle or while bending at the hips.

weighs up to fifteen to twenty pounds, and exit his vehicle wearing his utility belt which requires him to twist and turn to exit the cramped vehicle.
3. Claimant has been unable to perform the running portion of his fitness evaluation since November 2002.
4. Claimant slipped and fell in 1994 injuring his low back. On January 13, 1995, Dr. Michael P. Nogalski evaluated Claimant for low back pain related to a fall on January 14, 1994. He noted Claimant was initially treated by pain medication and returned to work within a week. Dr. Nogalski recommended a physical therapy program and scheduled a follow-up visit. On March 31, 1995, Dr. Nogalski evaluated Claimant and released him p.r.n. On July 3, 1995, Dr. Nogalski noted claimant's back pain and leg pain and ordered an MRI. The positive findings on that date were a slightly positive straight leg test. Dr. Nogalski ordered an MRI that showed a herniation at L5-S1.
5. Prior to the reported injury herein, Claimant had not received medical treatment for his low back condition since 1995.
6. On November 25, 2002, Claimant saw Dr. Richard Lord, who noted, by x-ray, narrowing at L5-S1 and subsequently referred Claimant to Dr. Lange, an orthopedist. Dr. Lange saw Claimant one time and he did not take a detailed history of Claimant's job duties.
7. On November 26, 2002, Dr. Lange noted an absent reflex at the left ankle and a positive straight leg-raising test. He ordered x-rays and an MRI. On December 2, 2002, Dr. Lange noted that because Claimant's pain was now progressive, surgery was an option and that it was probably reasonable to associate his current symptoms with his initial injury in 1994.
8. Dr. Lange testified that Claimant has a symptomatic herniation at L5-S1. Dr. Lange recommended a discectomy and fusion as necessary to treat the back pain.
9. Dr. Lange did not form any opinions whether Claimant's activities as a police officer were a substantial factor in causing the herniation. He acknowledged that a review of the records showed no surgical recommendation in 1995.
10. Dr. Peter Mirkin, an orthopedist, evaluated Claimant on May 25, 2005 and diagnosed degenerative disc disease including herniation at L5-S1, which was also noted in 1995. He recommended weight loss and exercise, or possibly surgery, but that such treatment was not related to Claimant's employment.
11. Dr. Mirkin opined that, among other activities, a condition such as Claimant's might be worsened by work activity including bending, twisting and lifting. He testified that the 2002 MRI showed a slightly worse disc condition than the 1995 MRI, including additional compression of the nerve root and bulges not noted earlier.

On November 11, 2003, Claimant saw Dr. Cohen. Dr. Cohen testified that he reviewed Claimant's job description and a MRI film from 2002 and a MRI report from 1995. He opined that the 2002 MRI showed a worsening condition, including an extruded fragment not present in the prior MRI, and that the absence of a left ankle reflex pointed to an encroachment on the S1 nerve root that was not present in prior exams.

12. Dr. Cohen diagnosed Claimant as sustaining a cumulative trauma disorder to his low back and due to that condition has left lumbar radiculopathy and lumbar myofascial pain disorder. He further stated that Claimant's work as a police officer was a substantial factor in causing the disability. He testified that within a reasonable degree of medical certainty that Claimant would require lumbar surgery. Dr. Cohen evaluated Claimant and found a 35% disability to the BAW (low back) with a 10% pre-existing and 25% as a direct result of the primary injury.

RULINGS OF LAW

Incidence of Occupational Disease

Exposure

Here, Claimant's testimony established the specific tasks he performed as a police officer and how these tasks differed from his personal and everyday life. For instance, as a result of his equipment belt, exiting his vehicle involves increased twisting and bending in addition to the increased number of entries and exits performed by a patrolman. He is also required to perform strained lifting and bending on a frequent basis as part of his job duties (eg. relative to accidents, arrests, etc.). In addition, Claimant is no longer able to attempt the running portion of his [annual] physical test.

While Dr. Mirkin did not relate Claimant's condition to his work, he did acknowledge that twisting, bending, and lifting could aggravate Claimant's low back condition. Seven years lapsed where this familiar yet work related exposure persisted. Therefore, there is substantial and competent evidence to support the conclusion that Claimant's work was repetitive in nature and causally related to his current condition.

Medical Causation

It is also important in this case to note the differences between Claimant's complaints and clinical signs from 1995 until 2002. Claimant did not receive any medical treatment for the low back from July 1995 until November 2002. Claimant's clinical and radiological findings in November 2002 contrast with those in 1995, in degree, in numerous respects of the conventional clinical measures. His pain is more frequent, more severe, and more pervasive (i.e. radicular). Claimant's MRI data reveal increased degenerative changes at L5-S1 and at new levels of the lumbar spine. The medical evidence of serious degenerative changes and recommendation for additional medical treatment is undisputable. The IMEs are replete with serious positive findings suggesting an active disc pathology.

With regard to expert evidence, Dr. Lange stated the treatment recommendation to relieve the symptoms he noted on physical examination now included surgery. No surgery recommendation was made after the 1995 manifestation.

Separately, neither Dr. Lange nor Dr. Mirkin rendered dispositive opinions on causation that disprove Claimant's condition was work related. Dr. Lange simply did not provide an opinion and Dr. Mirkin was not fully informed regarding the exposure. Dr. Lange testified that Claimant's herniation occurred in 1994; however, he admitted that he did not have an opinion on the issue of causation. While Dr. Mirkin was not able to state Claimant's employment was a substantial factor, he did not have the opportunity to review the entire job description of Claimant and testified that he was only generally aware of police officer duties.

Claimant's expert, Dr. Cohen was much better informed on Claimant's job requirements and physical activity than the orthopedists who testified. Dr. Cohen merely embraced their clinical findings. Inferentially, he noted the absence of any

interim treatment or intervening event that might place causation with a non-compensable event. Thus, Claimant's testimony and the testimony of Dr. Cohen establish causation with reasonable certainty.

Nature and Extent of Disability

Here, the only express evidence of PPD offered in evidence is that of Dr. Cohen. Dr. Cohen evaluated Claimant and found a 35% disability low back, with 10% pre-existing and 25% a direct result of the reported condition. Dr. Mirkin testified that there is no disability referable to the current accident, but does place some restrictions on Claimant due to his condition. Given the abundance of positive, indeed undisputed, clinical evidence of an active disc pathology, Dr. Mirkin's restrictions together with Dr. Lange's suggestion of surgical intervention provide ample basis to find current disability. This evidence suggests overall permanent partial disability in the range of one-third of the body. A reasonable attribution model obtains at fifteen percent for the pre-existing L5-S1 herniation and an additional fifteen percent for subsequent progression of the occupational disease. Surgery may improve Claimant's current disabling symptoms.

Future Medical Care

Section 287.140, RSMo (2000), requires the employer/insurer to provide "such medical, surgical, chiropractic, and hospital treatment...as may reasonably be required...to cure and relieve [the employee] from the effects of the injury." It has been held a claim for future medical treatment is a component of the compensation due an injured worker under section 287.140.1, R.S.Mo. Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 888(Mo.App. S.D. 2001).

Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathis v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). The Act permits an allowance for the cost of future medical treatment in a permanent partial disability award. Sharp v. New Mac Elec. Co-op., 92 S.W.3d 351, 354 (Mo.App. S.D. 2003). This includes treatment that gives comfort or relieves even though restoration to soundness is beyond avail. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 249 (Mo. banc 2003).

The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W. 2d 1 (Mo. App. 1984). While conclusive evidence is not required, evidence which shows only a mere possibility of the need for future treatment will not support an award. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997).

Here, it is not reasonable to infer that Claimant may remain reasonably active without future medical treatment. At a minimum, prescription grade analgesics will be required to permit sleep. More probable is surgical intervention. Employer's own experts provide this evidence. Indeed, Dr. Mirkin seems to suggest, beyond surgery, that a fusion was the correct "route." It is recognized that the dermatome of L5-S1 is particularly dangerous.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a fifteen percent PPD of the low back in addition to the pre-existing PPD. Claimant is entitled to future medical treatment. The Second Injury Fund claim remains open.

Date: _____ Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation