

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

Injury No.: 06-025561

Employee: Joel Norman
Employer: Bi-State Development Agency
Insurer: Self-Insured

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated Margaret D. Landolt, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued February 25, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of August 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed and permanent partial disability benefits, temporary total disability benefits, and past medical benefits should be awarded.

The administrative law judge determined that employee failed to meet his burden of proving that he sustained an occupational disease arising out of and in the course and scope of employment, and that his work was the cause of his medical condition. It is my opinion that the administrative law judge, in arriving at said decision, failed to properly weigh the evidence as a whole and, consequently, erred in denying employee benefits.

With regard to occupational diseases arising from repetitive motion, Section 287.067.3 RSMo (2005) provides the following:

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....

In this case, there is substantial evidence supporting employee's claim that his twelve plus years of working as a bus driver for employer was the prevailing factor in causing his bilateral carpal tunnel syndrome and resulting permanent disability.

Employee testified that the operation of the bus is hand intensive. The bus's steering wheel lies flat (parallel to the ground as opposed to a car's steering wheel which is more upright). The bus driver is constantly exposed to the vibration in the bus's steering wheel, which is made worse on rough roadways. A bus driver must constantly hold onto the steering wheel with both hands; otherwise the wheel will jerk from his grasp. The bus driver must push and pull the steering wheel while driving. In addition, the bus driver must open and close the doors to allow passenger transfers.

Dr. John O'Brien was employee's primary care provider. On October 4, 2005, employee saw Dr. O'Brien with complaints of his hands falling asleep with pain and cramping that progressively worsened during the course of each week. Employee continued to follow-up with Dr. O'Brien and on March 7, 2006, Dr. O'Brien noted that employee's upper extremity complaints and examination were consistent with carpal tunnel syndrome.

Employee had previously been diagnosed with diabetes, therefore, Dr. O'Brien went to great lengths to rule out or determine if employee's diabetes was the cause of his upper extremity complaints. Dr. O'Brien not only ordered a nerve conduction study for employee, but also ordered blood tests and x-rays. On April 12, 2006, Dr. O'Brien diagnosed employee with bilateral carpal tunnel syndrome which "is almost certainly related to his occupation as a bus driver."

Although neither Dr. O'Brien, nor any of the other medical experts provided testimony, it is clear from the records that he considered several factors in ruling out employee's diabetes or arthritis as the cause of employee's medical condition. In the year prior to employee's first complaints of upper extremity problems, Dr. O'Brien's records clearly show employee was not suffering any ill-effects associated with diabetes. The exams consistently failed to reveal edema, cellulitis, or ulceration. The prior exams also consistently

revealed good pulses and intact sensation. Also, after employee's complaints on October 4, 2005, it is clear that Dr. O'Brien was well aware that employee's diabetes could be a cause, but duly noted that "[a]lthough diabetes control has not been ideal, [employee's] most recent hemoglobin A1C was only 8."

Dr. O'Brien referred employee to Dr. David Strege. Employee complained to Dr. Strege that he had bilateral pain in the hands, worse on the right and trigger finger of the right ring finger. On June 1, 2006, Dr. Strege performed left carpal tunnel release and, on June 15, 2006, he performed right carpal tunnel release on employee. Dr. Strege's operative reports confirmed that the median nerves were both focally compressed at the transverse carpal ligament. Focal compression is consistent with Dr. O'Brien's diagnosis of bilateral carpal tunnel syndrome as opposed to a diabetic neuropathy. Employee was released from Dr. Strege's care in September of 2006.

Employer sent employee to Dr. Evan Crandall for an Independent Medical Evaluation on April 5, 2006. Dr. Crandall indicated that employee has symptoms and signs consistent with carpal tunnel syndrome, but Dr. Crandall went on to state in his report that "this would be considered a medical case and not a work-related injury ... [because employee's] work does not contain the physical activity that could cause, change or aggravate carpal tunnel syndrome. It is not hand intensive."

Employee was then sent, by his attorney, to Dr. Jerry Meyers on March 6, 2007, for a second Independent Medical Evaluation. Dr. Meyers concluded that employee's bilateral carpal tunnel syndrome and his trigger finger are indeed related to his work as a bus driver and that this is the prevailing factor in the development of his problem. Dr. Meyers assessed a permanent partial disability for the right wrist at 40% and partial disability for the left wrist at 25%.

The administrative law judge, in denying employee benefits, relied heavily on the fact that Dr. O'Brien's records incorrectly stated that employee had only been diagnosed with diabetes for three years prior to his upper extremity complaints when in fact employee had been diagnosed with diabetes for six years prior to his complaints. Although this may have been a misstatement by Dr. O'Brien concerning the precise timeline of the onset of employee's diabetes, the statement was intended as nothing more than a provisional assessment of a possible cause. In no way should this misstatement be dispositive as to the credibility of Dr. O'Brien's opinion; especially when the records clearly show that it was only after further investigation that Dr. O'Brien opined that employee's bilateral carpal tunnel syndrome was almost "certainly...a result of his occupation as a bus driver" (as opposed to diabetic neuropathy).

Essentially, there are medical records from three separate doctors; Dr. O'Brien, Dr. Strege, and Dr. Meyers, which all suggest that employee's work as a bus driver was the prevailing factor in causing his bilateral carpal tunnel syndrome. Dr. Crandall is the only doctor that indicated that employee's work was not "hand intensive" enough to cause this condition and Dr. Crandall made this suggestion without even addressing the position and movement of the hands required to operate a bus.

Based on the foregoing, I find Dr. O'Brien and Dr. Meyers more credible with regard to causation than I do Dr. Crandall. For this reason, I believe that employee has carried his burden of establishing that his job duties as a bus driver at Bi-State Development Agency are the prevailing factors in causing his bilateral carpal tunnel syndrome and, as a result, employee should be entitled to permanent partial disability benefits, temporary total disability benefits, and past medical benefits associated with his bilateral carpal tunnel syndrome. As such, I would reverse the award of the administrative law judge denying employee of any benefits regarding this matter.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

AWARD

Employee: Joel Norman

Injury No.: 06-025561

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Bi State Development Agency

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: January 13, 2009

Checked by: MDL

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: Alleged March 24, 2006
 - State location where accident occurred or occupational disease was contracted: St. Louis, 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
 - 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? N/A
13. Part(s) of body injured by accident or occupational disease: N/A

- Nature and extent of any permanent disability: 0

15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$824.21

Employee: Joel Norman

Injury No.: 06-025561

17. Value necessary medical aid not furnished by employer/insurer? \$6,244.99

- Employee's average weekly wages: \$789.20

19. Weekly compensation rate: \$526.13/\$365.08
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- | | |
|-------------------------------------|---|
| 21. Amount of compensation payable: | 0 |
| Total: | 0 |

23. Future requirements awarded: None

Said payments to begin 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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joel Norman

Injury No.: 06-025561

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Bi State Development Agency

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

Additional Party: None

PRELIMINARIES

A hearing was held on January 13, 2009 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Joel Norman ("Claimant") was represented by Mr. David Sokoloski. Bi State Development Agency ("Employer"), which is self-insured, was represented by Mr. John Johnson. Mr. Sokoloski requested a fee of 25% of Claimant's award.

The parties stipulated that on or about March 24, 2006, Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated Claimant was earning an average weekly wage of \$789.20 resulting in rates of \$526.13 for Temporary Total Disability ("TTD") benefits and \$365.08 for Permanent Partial Disability ("PPD") benefits. Employer paid medical benefits of \$824.21.

The issues for determination by hearing are: whether Claimant sustained an occupational disease arising out of and in the course and scope of employment on or about March 24, 2006; medical causation; liability of Employer for past medical benefits of \$6,244.99; whether Claimant is entitled to past TTD benefits of \$13,360.75 covering a period from March 24, 2006 to July 17, 2006, and July 27, 2006 to September 26, 2006 or 26 weeks of benefits; and nature and extent of PPD benefits.

FINDINGS OF FACT

Claimant is a 63 year old man who began working for Employer as a bus driver in 1994. Claimant drove a bus eight hours a day, five days a week. The steering wheels on buses are larger than standard steering wheels. They are flat and upright. Claimant used a push-pull motion to turn the steering wheel. There was a constant vibration from the street up through the steering column. The more pot holes and more rough the street, the more severe was the vibration. Each time Claimant came to a stop he opened and closed the doors of his bus. He constantly processed bus transfers, and took fares.

Claimant suffers from diabetes which was first diagnosed by Dr. O'Brien, his primary care physician, in 1999. Claimant testified initially his diabetes was treated with diet, until he was prescribed medication in 2002 or 2003. Dr. O'Brien's records reflect that on August 7, 1999 Claimant was first diagnosed with new onset diabetes, and Claimant told Dr. O'Brien his work schedule does not lend itself to seeing a dietician or following a diabetic diet. Dr. O'Brien prescribed Glucophage. Claimant testified he never had any kind of numbness or tingling in his feet.

Claimant testified he began to have upper extremity symptoms in 1999. On October 4, 2005, Claimant first complained to Dr. O'Brien of a two week history of numbness in the arms below the elbows, greater on the right side. He also complained of numbness of the lower left leg and foot. Dr. O'Brien noted Claimant has a history of diabetes, but it has only been present for about three years. Tinel's and Phalen's signs of the right wrist were positive, and Phalen's of the left wrist was positive. Tinel's sign of the left ankle was positive. Dr. O'Brien indicated numbness of the distal extremities seems to represent a compressive neuropathy, but he doubted diabetes in light of the fact that it had only been present for three years. After a course of conservative treatment, Dr. O'Brien recommended nerve conduction studies that were performed and were consistent with carpal tunnel syndrome, and also revealed a more diffuse peripheral neuropathy. Dr. O'Brien stated Claimant's carpal tunnel syndrome is almost certainly a result of his occupation as a bus driver. He referred Claimant to Dr. David Strege.

Dr. Strege first saw Claimant on April 28, 2006. Dr. Strege noted Claimant's EMG/Nerve Conduction Study of March 10, 2006, demonstrated evidence of bilateral carpal tunnel syndrome with left greater than right, as well as diffuse peripheral neuropathy. Dr. Strege indicated Claimant had signs and symptoms consistent with bilateral carpal tunnel syndrome, as well as triggering of the right ring finger.

On June 1, 2006, Dr. Strege performed a left carpal tunnel release, and on June 15, 2006, he performed a right carpal tunnel release and a release A1 pulley of the right ring finger. Dr. Strege kept Claimant off work until July 17, 2006. After Claimant returned to work he had some increased symptoms in his right hand. On July 26, 2006, Dr. Strege took Claimant off work, and ordered some physical therapy. Claimant saw Dr. Strege again on August 23, 2006. At that time Claimant's left hand was doing well, but he continued to have pain the right hand. Claimant also had mild tenderness over the left lateral epicondyle. Dr. Strege diagnosed left lateral epicondylitis, and offered Claimant an injection which he declined. Claimant was to be seen in three to four weeks for a follow up visit. There are no office visits with Dr. Strege after August 23, 2006.

Claimant saw Dr. Jerry Meyers, a general surgeon on March 6, 2007. Dr. Meyers opined Claimant's bilateral carpal tunnel syndrome and his trigger finger are related to his work as a bus driver, and this is the prevailing factor in the development of this problem. He further stated the treatment performed by Drs. O'Brien and Strege was reasonable, necessary, and done in an appropriate fashion. He stated the time Claimant was off work under the direction of Dr. Strege was reasonable considering the fact he had bilateral carpal tunnel syndrome and release of a trigger finger of the right hand. Dr. Meyer rated Claimant's disability at 40% of the right wrist and 25% of the left wrist. He did not think Claimant's elbow symptoms were related to his occupation, and did not think he has a disability from this problem.

Employer referred Claimant to Dr. Evan Crandall, a board certified plastic surgeon. Dr. Crandall first examined Claimant on April 5, 2006. Claimant reported having diabetes for two years. Dr. Crandall stated Claimant's symptoms could be consistent with carpal tunnel syndrome. Dr. Crandall did not have a copy of Claimant's nerve conduction study for review at that time. Dr. Crandall indicated if Claimant did have carpal tunnel syndrome, it would be considered a medical cause, and not a work related injury. Dr. Crandall opined Claimant's work does not contain the physical activity that could cause, change or aggravate carpal tunnel syndrome. He did not believe it was hand intensive or contained the factors of frequency, repetition or intensity to be able to damage muscles, tendons or nerves. According to Dr. Crandall, driving is not known as a cause of carpal tunnel syndrome either from vibration or repetitive movement. The fingers do not repetitively flex in and out in driving. Dr. Crandall stated the activity of bus driving is not considered hand intensive. He stated Claimant has well known risk factors for the development of carpal tunnel syndrome including age and diabetes. He stated diabetes is a well known cause of carpal tunnel syndrome.

Following Claimant's examination in April 5, 2006, Dr. Crandall had the opportunity to review Claimant's nerve conduction study which was performed on March 10, 2006. Dr. Crandall noted Claimant's nerve conduction study was positive for right and left carpal tunnel syndrome and also diabetic polyneuropathy. He stated Claimant has a case of carpal tunnel syndrome caused by his medical condition of diabetes. He stated it is not related to his work, and therefore not a considered a workers' compensation case.

Although Claimant's surgeries improved his condition, he continues to have residual symptoms of pain, reduced strength and loss of dexterity.

RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing and the application of Missouri law I find:

Claimant failed to meet his burden of proving he sustained an occupational disease arising out of and in the course and scope of employment, and that his work was the cause of his medical condition.

Section 287.067.3 RSMo 2005 states:

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. . . .

Claimant failed to prove his work as a bus driver was the prevailing factor in causing his medical condition. I find the opinion of Dr. Crandall more persuasive than Dr. O'Brien or Dr. Meyers. Dr. O'Brien's opinion is based in part upon a misstatement of the facts. Dr. O'Brien stated he doubted Claimant's diabetes was the cause of his compressive neuropathy, because it had only been present for three years. Claimant's diabetes was actually first diagnosed in 1999, six years before he presented with upper and lower extremity symptoms. In his report, Dr. Myers fails to address any impact Claimant's diabetes may have on his diagnosis of carpal tunnel syndrome.

Claimant is a poor historian, and his testimony is contrary to the medical evidence. Claimant testified he never had numbness or tingling in his feet, and Dr. O'Brien's records reflect he was complaining of numbness and tingling in his feet on October 4, 2005. Dr. O'Brien indicated Claimant had a positive Tinel's sign at the left ankle. Claimant also testified his diabetes was first treated by diet, and two or three years later he started taking medication. Dr. O'Brien's records reflect Claimant rejected the idea of controlling his diabetes through diet, and Dr. O'Brien prescribed medication when it was first diagnosed.

The nerve conduction study which was performed diagnosed carpal tunnel syndrome and a more diffuse peripheral neuropathy. I find Dr. Crandall's opinion more persuasive and more consistent with the medical evidence in this case. None of the experts testified, and the case was submitted upon medical reports only. Dr. O'Brien's opinion is inconsistent with the facts contained in his own medical records, and therefore lacks credibility. Because he did not testify, there is no clarification of his opinion, and it must be taken at face value. Dr. Meyers perfunctorily states Claimant's work was the "prevailing factor," but he does not address Claimant's diabetes, or the diagnosis of peripheral neuropathy.

Claimant failed to prove his work was the primary factor, in relation to any other factors causing both his condition and disability. Because Claimant failed to meet his burden of proving his work was the prevailing factor in causing his carpal tunnel syndrome, and right trigger finger, the remaining issues are moot, and the Claim for Compensation is denied.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Peter Lyskowski
Acting Director
Division of Workers' Compensation

As stated above, Claimant's diabetes was diagnosed in 1999, or six years earlier.