

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

Injury No.: 03-075373

Employee: Robert Pratte  
Employer: Hauser Mechanical  
Insurer: Hanover Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: July 17, 2003

Place and County of Accident: St. Charles 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 March 1, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued March 1, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 23<sup>rd</sup> day of March 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

Attest: John J. Hickey, Member

\_\_\_\_\_  
Secretary

DISSENTING OPINION

I must respectfully dissent from the award and decision of the majority of this Commission affirming the award and decision of the administrative law judge. 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. I find employee has established that he sustained a compensable accident.

Employee has worked as a sheet metal worker for 35 years. Before July 17, 2003, employee performed his sheet metal duties, including overhead work, without restriction by his left shoulder. Employee testified he experienced severe pain in his left shoulder while lifting ductwork on July 17, 2003. He testified that he sought medical treatment on July 28, 2003. Employee has a torn left rotator cuff.

The administrative law judge concluded that employee failed to prove the occurrence of a work accident and/or occupational disease. The administrative law judge focused primarily on his belief that employee failed to prove the alleged July 17, 2003, ductwork-lifting accident. The administrative law judge acknowledged that employee's work activities are of the type that may cause an occupational disease of the shoulder but the administrative law judge never decided this issue.

I find credible employee's testimony regarding the ductwork-lifting incident. I find credible employee's testimony regarding his symptoms and complaints thereafter. I find credible employee's testimony that he was rendered unable to perform his overhead duties by loss of strength, which loss he discovered when he attempted to perform overhead duties on July 28, 2003. I find that the July 17, 2003, ductwork-lifting accident occurred as described by employee and resulted in the symptoms and complaints described by employee.

The testimony of Dr. Solmon and Dr. Hertel establishes that employee suffered a compensable injury, although the doctors disagree on the extent of the injury. Dr. Solmon testified employee suffered only a bicep tendon strain, as a result of the July 17, 2003, accident. Dr. Solmon and Dr. Hertel agree that employee suffers from a torn rotator cuff and that employee needs a surgical repair, but Dr. Solmon does not believe the July 17, 2003, accident caused the tear. I find more credible Dr. Hertel's testimony that the tear was caused by the lifting incident. I find persuasive Dr. Hertel's reasoning that employee would have been unable to perform his overhead duties as a sheet metal worker pain-free with a rotator cuff tear of such magnitude as his.

Based upon the foregoing, I conclude that employee suffered a work accident on July 17, 2003, and that the work accident was the substantial factor in causing employee's bicep tendon strain and his torn rotator cuff.

Employee's injury is also compensable as a work-related repetitive trauma injury. Dr. Hertel's testimony establishes that the conditions of employee's work were the substantial factor in causing his rotator cuff tear. Employee's work requires extensive overhead work. Dr. Hertel explained that repetitive overhead work over many years wears down the rotator cuff and the worn condition can lead to tears. The wearing affect is even more dramatic with individuals with a type III acromion such as employee. The medical evidence establishes that the repetitive trauma inflicted upon employee's rotator cuff by his working conditions caused employee's weakened shoulder condition.

According to Dr. Hertel, employee's working conditions – specifically, lifting ductwork -- resulted in his shoulder condition becoming symptomatic on July 17, 2003. This change in employee's shoulder condition from asymptomatic to symptomatic evidenced, at a minimum, an aggravation of his shoulder condition. It is clear that the performance of the usual and customary duties of employee's work led to a change in pathology. Employee's injury by repetitive trauma arose out of and in the course of his employment and is clearly work related. *Smith v. Climate Engineering*, 939 S.W.2d 429, 435, overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 227 (Mo. banc 2003). The injury is compensable under a theory of accident or occupational disease. *Id.* at 436.

I would issue a temporary award finding employee's shoulder injury compensable and directing employer to provide additional medical treatment.

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## AWARD

Employee: Robert Pratte

Injury No.: 03-075373

Dependents: N/A

Before the  
Division of Workers'  
Compensation

Employer: Hauser Mechanical

Department of Labor and Industrial  
Second Injury Fund Relations of Missouri  
Jefferson City, Missouri

Additional Party:

Insurer: Hanover Insurance Company

Hearing Date: February 11, 2004

Checked by: MDV:tr

### 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: July 17, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No      Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Robert Pratte

Injury No.:

17. Value necessary medical aid not furnished by employer/insurer? -0-

18. Employee's average weekly wages: Maximum

19. Weekly compensation rate:

20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin 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 of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Pratte

Injury No.: 03-075373

Dependents: N/A

Before the  
Division of Workers'  
Compensation

Employer: Hauser Mechanical

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Insurer: Hanover Insurance Company

Checked by: MDV:tr

### **ISSUES PRESENTED**

The issues presented for resolution by way of this hearing are accident, occupational disease medical causation, past medical expenses for Dr. Hauser's bill, future medical care, future temporary total disability, past temporary total disability from August 1, 2003 until the date of the hearing and into the future until such time as Claimant reaches maximum medical improvement.

### **SYNOPSIS**

Claimant is a 58-year-old sheet metal worker for Employer. Claimant had recently returned to work from an extended temporary disability for a work related right shoulder surgery while in the employ of a different employer. He was installing duct work at the Boeing plant for the Employer herein, which contained "burglar bars". "Burglar bars" are rods inside ductwork so that surveillance devices cannot travel through the HVAC system. Claimant contends that while he was working there alone he injured his left shoulder. Employer contends that Claimant had several opportunities to inform other co-workers and supervisors of the accident but failed to do so. Claimant then went on a camping trip to Hannibal, Missouri and first made a co-worker aware of shoulder problems on the following Monday. Claimant was later fired because he didn't have a mechanics license. Claimant contends he was fired for injuring his shoulder. I cannot ascertain with a reasonable degree of certainty as to what occurred, therefore Claimant has failed to satisfy his burden of proof and the claim for compensation is denied. All other issues are moot.

### **FINDINGS OF FACT**

1. Claimant is a 58-year-old sheet metal worker who was employed by Employer, Hauser Mechanical, on July 17, 2003.
2. Claimant contends that he suffers from both an accident and an occupational disease which arose on or about July 17, 2003. July 17, 2003 was a Thursday. Claimant was working at the Boeing aircraft manufacturing plant.
3. Claimant was installing ductwork with "burglar bars". "Burglar bars" consist of iron rods within normal ductwork that prevent surveillance devices from traversing the HVAC system at a defense contractor's manufacturing plant.
4. Claimant testified he was holding up ductwork and trying to attach it to the ceiling or wall when he asked a Hauser pipefitter, Mike Ruzicka, for help because he had injured his arm.
5. Mike Ruzicka testified that he did in fact help Claimant attach some ductwork on July 17, but that Claimant never mentioned anything about a shoulder problem and that he only needed assistance getting the drive started because of the awkward positioning of the ductwork.
6. Claimant testified that the next day he had trouble performing overhead work. Claimant says he worked the next week but did no overhead lifting. Bill Finer, another sheet metal worker, worked with Claimant that week installing ductwork at The Brasher Law Firm and recalls Claimant working overhead.
7. Claimant went over the weekend on a recreational vehicle campout with several other couples to Hannibal, Missouri and did not do anything but take it easy.
8. Claimant testified that he did not injure his left shoulder over the weekend and did not do any shoulder intensive activities.
9. Claimant called his supervisor, Paul Hauser, on Sunday evening July 27 to get his assignment for the following Monday. Claimant contends he told Mr. Hauser of the accident on July 17 when he spoke with him on Sunday evening. Paul Hauser denies knowledge of the injury on that date.
10. Claimant reported for work on Monday, July 28, and was working with the sheet metal foreman on the job, Bill Finer. The first Mr. Finer became aware of any problems was when Claimant said his left shoulder was sore. He had these complaints before work began on Monday morning.

11. Contrary to custom and policy, Claimant left the job site without informing his foreman, Mr. Finer, and when he returned, Claimant said he had called his lawyer about his left shoulder and that his injury should be "on Rock Hill Mechanical" where he was previously injured in relationship to his right shoulder. Mr. Finer thought it was unusual that Claimant would call his lawyer before work began and therefore Mr. Finer called his supervisor, Paul Hauser, and informed him of the situation.
12. Mr. Hauser made an appointment for Claimant to see a physician.
13. Claimant's private physician is Dr. Hauser although no relationship with Paul Hauser or the company herein.
14. Claimant had previously fallen off a ladder in June of 1982 and Dr. Keohane injected his left shoulder and believed that he had torn his rotator cuff and suggested surgery then. Surgery was not undertaken at that time.
15. Claimant denies that when he was treating for his right shoulder complaints as a result of working at Rock Hill Mechanical that he had left sided complaints. Nevertheless, the BJC notes from the Rock Hill Mechanical injury show that Claimant reported a history of tearing his rotator cuff on the left. Claimant denies reporting this to BJC.
16. Claimant was fired in August for failing to have his proper trade certification from St. Louis County. Claimant's Employer could have lost significant amounts of business and been fined because of Claimant's failure to have this certificate.
17. Claimant collected unemployment during the time period after which he was fired from Hauser Mechanical.

### RULINGS OF LAW

1. Mr. Finer and Mr. Ruzicka were very credible, disinterested witnesses.
2. Claimant has employment issues with the Employer regarding his proper licensing.
3. Medical records contradict rather than corroborate Claimant's story.
4. A co-worker in the pipe fitter's union and a co-worker in the sheet metal workers' union contradict Claimant's story.
5. Claimant has failed to satisfy his burden of proof that he sustained an accident and/or occupational disease arising on July 17, 2003 while working for Hauser Mechanical.

### DISCUSSION

The best that can be said about Claimant's left shoulder condition is that work might have been a triggering factor. It stands to reason that his overhead work would produce that type of injury. Nevertheless, because of conflicting stories in the medical records and the conflicting stories given to co-workers, and the bad blood between the Claimant and the Employer, I am not able to ascertain with any reasonable degree of certainty as to when, where and how Claimant's left shoulder complaints arose. They are just as likely to have been caused as part of his injuries in 1983 or perhaps an occupational disease while working for Rock Hill Mechanical or even perhaps while working for Hauser Mechanical. Nevertheless, there is insufficient evidence to nail down any scenario with a reasonable degree of certainty. Therefore, the burden of proof has not been satisfied and the claim must be denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
 Reneé T. Slusher  
*Director*  
*Division of Workers' Compensation*

