

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

Injury No.: 97-497994

Employee: Robert McMahon  
Employer: Engineered Air Systems, Inc.  
Insurer: None  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged March 1, 1997  
Place and County of Accident: Alleged Franklin 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 July 3, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued July 3, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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## Secretary

# AWARD

Employee: Robert McMahon

Injury No. 97-497994

Dependents: None

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Engineered Air Systems, Inc

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

Additional Party: Second Injury Fund

Insurer: None

Hearing Date: April 3, 2008

Checked by: GCG/ln

### 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 March 1, 1997
5. State location where accident occurred or occupational disease was contracted: Alleged Franklin 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? 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? Not applicable
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Alleged repetitive trauma to back.
12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Alleged 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: \$281.51

19. Weekly compensation rate: \$187.67 for TTD/PPD

20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

0 weeks of permanent partial disability from Second Injury Fund

Permanent total disability benefits from Second Injury Fund: None

Total: \$0

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert McMahon

Injury No: 97-497994

Dependents: None

Employer: Engineered Air Systems, Inc

Additional Party Second Injury Fund

Insurer: None

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial Relations  
of Missouri  
Jefferson City, Missouri

Checked by: GCG/ln

### PRELIMINARY STATEMENT

Hearing in the above styled case was held in Franklin County, Missouri on April 3, 2008 before the undersigned Administrative Law Judge. Claimant was present and represented by Melvin G. Franke. The primary injury claim was previously settled against Engineered Air Systems, Inc. (Employer), which was self-insured. Assistant Attorney General Jennifer Sommers represented the Second Injury Fund (SIF). Mr. Franke requested a fee of 25% for legal services rendered on behalf of Claimant.

The parties made the following stipulations of fact: The alleged date of injury is March 1, 1997; Claimant was an employee of Employer; venue is proper in Franklin County, Missouri; Employer received proper notice; the claim was filed within the time allowed by law; at the relevant time, Claimant's average weekly wage was \$281.51, resulting in applicable rates of compensation of \$187.67 for temporary total disability (TTD) benefits and \$187.67 for permanent partial disability (PPD) benefits; Employer has not paid any medical benefits or TTD benefits.

The issues presented for resolution at hearing are: Whether occupational disease occurred; whether the occupational disease arose out of and in the course of employment; medical causation of the occupational disease; nature and extent of Claimant's disability from the primary injury; whether Claimant is permanently and totally disabled; disposition of child support lien.

## Summary of the Evidence

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. All exhibits offered by the parties have been received into evidence without objection with the exception of Exhibit K offered by Claimant. The objection to Exhibit K was taken under advisement, and is now hereby sustained. Exhibit K is not received into evidence.

Certain exhibits offered into evidence contained handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights were ignored by the undersigned ALJ in reaching any decision on the issues presented in this case.

Claimant testified at the hearing. He testified he began working for Employer in 1994. He testified his work required him at times to lift and push heavy objects. He stopped working for Employer in September or October 1997. He testified at that time he had sharp pains in his back that would get worse in cold and damp weather conditions. He testified he stopped working for Employer because of the pain. The primary back injury from this case settled on December 20, 2001 for 4.1% PPD of the body as a whole. The stipulation for compromise settlement was received into evidence as Exhibit I.

Claimant testified he had a pre-existing hernia injury from 1995. The Stipulation for compromise settlement was received into evidence as Exhibit H. That case, injury number 95-192511 settled on December 20, 2001, the same day as the primary injury settlement in this case. The hernia case settled for 1.5% PPD of the body as a whole.

Claimant testified he had a prior lung operation in 1977. He testified he has emphysema and can't perform physical labor like he used to. He stated he gets out of breath when climbing stairs. Claimant testified that the condition of his back, his hernia, and a pre-existing shoulder injury have all gotten worse since he left his job with Employer in 1997.

Claimant's wife, Sandra McMahon, testified on behalf of Claimant at the hearing. Mrs. McMahon testified she also worked for Employer and observed Claimant on the job. She further testified that his description of his job duties were accurate and that he did experience pain in his back in 1997.

Dr. Alan C. Umbright testified by deposition on behalf of Claimant on October 26, 2006 (Exhibit A). The deposition transcript has three exhibits attached. Exhibit 1 is Dr. Umbright's curriculum vitae. Exhibit 2 is a report of Dr. Umbright dated August 1, 2000. Exhibit 3 is a report of Dr. Umbright dated August 22, 2000. During testimony, Dr. Umbright stated that Exhibit 3 had been prepared by Mr. Franke's office and then given to him to sign. He later testified that the report contains his opinions.

Dr. Umbright diagnosed that Claimant, "Did develop a work related left inguinal hernia which still causes him restriction in movement in his left leg. In addition, Mr. McMahon has degenerative disc disease with osteoporosis and osteoarthritis of the facet joints."

Dr. Umbright opines that Claimant is permanently and totally disabled. He further opines that Claimant has 50% PPD to the body as a whole attributable to his back, 25% PPD to the body as a whole

attributable to the hernia, and a 20% PPD to the body as a whole attributable to his lungs. The second report, Exhibit 3, in the section labeled "Causation", states:

The repetitive trauma of pushing and lifting objects caused Mr. McMahon's hernia and greatly aggravated his back problems amounting to a repetitive trauma injury. His lung problem (obstructive pulmonary disease) was initially caused by smoking and the development of spontaneous pneumothorax disease. The back injury which has left Mr. McMahon with so much pain and limitation in his range of motion is superimposed on his weakened hernia injury and his weakened lungs leaving his total body unable to work.

During cross examination, Dr. Umbright testified as follows:

Q As of the time of your August 1, 2000 report, you did not in this report mention any type of repetitive trauma or give any type of opinion regarding repetitive trauma; is that correct?

A That's correct.

Q Were you aware at the time that you evaluated him in August of 2000, how much, and by that, I mean how much weight Mr. McMahon would have to lift in a given day?

A No, I was not.

Q Were you aware of how often he would have to do any lifting in a given day?

A No.

Q How much carrying? Weight-wise.

A About how much, no, I did not have a specific job description.

Q Or how much or how often he had to carry?

A Correct.

Q Or how often he had to bend from the waist?

A Correct.

Q Or how often he would have to lift from the floor?

A That's correct.

Q So you really weren't aware of any specific job duties; is that fair to say?

A Correct.

Dr. Jeffrey Magrowski, a vocational rehabilitation specialist, testified on behalf of Claimant by deposition on March 2, 2007 (Exhibit B). Dr. Magrowski opined that Claimant is not employable in the open labor market. In order to reach this opinion, he administered vocational testing and reviewed Claimant's medical records. Dr. Magrowski conducted his evaluation in October 2005 and on March 30, 2006.

During cross examination, Dr. Magrowski testified it was his understanding there had been no change in Claimant's physical condition since 1997. He also stated that he relied on what he observed of Claimant's physical condition in October 2005.

## FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, the testimony of other witnesses, my personal observations, the expert medical testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute

certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

For an award of temporary disability and medical aid, proof of cause of injury is sufficiently made on reasonable probability. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1973). *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504 (Mo. App. W.D.1997). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1973).

### Occupational Disease/Medical Causation

The Second Injury Fund is not bound by the settlement between Claimant and Employer and has put the existence of occupational disease and medical causation at issue in this hearing. While they are two separate issues, the evidence in this case regarding occupational disease and medical causation are intertwined such that analysis of the issues together is prudent.

Dr. Umbright does not state, in either of his reports or in his testimony, that Claimant's employment was a substantial factor in causing any condition in Claimant's back. In fact, in his diagnosis, he clearly labels the hernia a work related injury, but only diagnoses the back condition as, "degenerative disc disease with osteoporosis and osteoarthritis of the facet joints."

Dr. Umbright states in the August 22, 2000 report (Exhibit 3), "The repetitive trauma of pushing and lifting objects caused Mr. McMahon's hernia and greatly aggravated his back problems amounting to a repetitive trauma injury." However, this opinion does not acknowledge the pre-existing degenerative condition in Claimant's back. Further, Dr. Umbright does not provide an explanation or analysis of the mechanism of injury. His opinions regarding occupational disease and causation are further undermined by the fact that he had no knowledge of Claimant's job duties. "A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence." (citations omitted) *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 904 (Mo.App. 1990). Dr. Umbright's testimony and opinions are not credible.

Claimant has failed to prove by competent and substantial evidence it is reasonably probable that he suffered an occupational disease as a result of his employment. Claimant has also failed to prove by competent and substantial evidence that his employment was a substantial factor in the development of any injury in his back.

### Permanent Total Disability

Even if Claimant had proven the existence of an occupational disease and medical causation, he failed to prove that he is permanently and totally disabled. On August 28, 2000, Dr. Umbright opined that Claimant had a PPD to the body as a whole of 25% regarding the hernia and 50% regarding the low back (Exhibit 3). Claimant subsequently settled those claims for 1.5% and 4.1% PPD respectively on December 20, 2001. He then opines that cases which settled for 1.5% and 4.1% PPD of the body, in conjunction with the lung disease, which he rated at a lower PPD than the hernia or back, render Claimant permanently and totally disabled. Dr. Umbright's opinions regarding disability are not credible. The court may disbelieve the testimony of witnesses even though no contradictory or impeaching evidence is introduced. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 179 (Mo.App. E.D. 1995).

The opinion of Dr. Magrowski is not credible. He testified that to his knowledge there had been no

