

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

Injury No.: 02-148095

Employee: Gary C. Shroder

Employer: Clarkson Construction Company

Insurer: ACIG Insurance Company

Date of Accident: Alleged June 2002

Place and County of Accident: Alleged Kansas City, Jackson 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 May 13, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge R. Carl Mueller, Jr., issued May 13, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 24th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

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.

Employee testified that during the first week of June 2002, near the end of a work shift, he was placing baskets

and steel forms. After placing a basket, employee was unable to straighten up and experienced soreness in his back and numbness in his leg. Employee thought he had pulled a muscle and figured he would feel better by the next day. He did not. Employee informed his supervisor who failed to offer any medical attention. Instead, his supervisor encouraged employee to keep working. Employee worked with the back pain (and, subsequently, the pain from a shoulder injury suffered in October 2002) because his work stopped in the winter months and he wanted to earn as much money as he could before work ended for the winter.

The administrative law judge places undue emphasis on the entry in Dr. Wilt's records indicating that employee reported back pain of three months duration. Employee saw Dr. Wilt for his back and shoulder conditions in January 2003, after his winter layoff. Employee explained that he gave a three month history of shoulder pain but that he told the doctor he had been experiencing back pain since June 2002. I conclude the employee's physician confused the shoulder and back histories reported by employee. I find employee's testimony credible regarding when he began experiencing back and leg symptoms and what he was doing when the symptoms began. I also find credible employee's testimony that he informed his supervisor of the injury.

"[A]n injury is compensable when it is an unexpected result of the performance of the usual and customary duties of an employee which leads to physical breakdown or a change in pathology. *Wolfgeher*, 646 S.W.2d at 784; See also § 287.020.3." *Smith v. Climate Engineering*, 939 S.W.2d 429, 436 (Mo. App. 1996), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003) (citing *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781 (Mo. banc 1983)).

The medical evidence establishes that employee suffered from a preexisting degenerative condition in his lumbrosacral spine. However, before June 2002, employee suffered only the usual aches and pains associated with heavy manual labor but employee did not experience disabling symptoms. Since the June 2002 work incident, employee has experienced pain and numbness in his lower back and left leg. He has difficulty bending, lifting, and walking distances. Employee is unable to sleep for more than a couple hours at a time. Employee must alternate between sitting and standing. Employee has been unable to work since employer laid him off in December 2002.

It has long been the rule in Missouri that an inherent weakness or bodily defect, such as degenerative spine disease, occurring in conjunction with an abnormal strain will support a claim for compensation. See *Johnson v. General Motors Assembly Division G.M.C.*, 605 S.W.2d 511, 513 (Mo. App. 1980). (citations omitted) (overturned on other grounds). To prove a compensable injury, employee must prove he experienced a change in pathology as a result of the work incident. "The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a 'change in pathology.'" *Winsor v. Lee Johnson Construction Co.*, 950 S.W.2d 504, 509 (Mo. App. 1997), citing *Rector v. City of Springfield*, 820 S.W.2d 639, 643 (Mo. App. 1991).

Dr. Smith testified that the lifting and bending associated with employee's job duties were substantial contributing factors in causing his lumbrosacral spine problems. Although Dr. Chilton explained that employee's work duties did not *cause* the anatomical changes to employee's back, he testified within a reasonable degree of medical certainty that the heavy labor physical activity associated with employee's employment (highway paving work) *aggravated* employee's preexisting back condition. The medical evidence convinces me that employee's performance of his usual and customary work duties aggravated his preexisting back condition.

I find employee's work activities aggravated his pre-existing, asymptomatic, non-disabling back condition resulting in a symptomatic disabling back condition. I conclude employee sustained an injury by accident arising out of and in the course of employment in June 2002.

I would reverse the award of the administrative law judge denying compensation. I would award compensation including past medical expenses, further medical treatment, and temporary total disability benefits. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

FINAL AWARD DENYING COMPENSATION

Employee: Gary C. Shroder Injury No. 02-148095
Dependants: N/A
Employer: Clarkson Construction Company
Additional Party: N/A
Insurer: ACIG Insurance Company
Hearing Date: April 5, 2005
Briefs Filed: April 26, 2005 Checked by: RCM/rm

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 June, 2002
5. State location where accident occurred or occupational disease was contracted: alleged 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? 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 the time required by Law? Yes
10. Was employer insured by the above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleged he injured his back while carrying and setting steel rod baskets for concrete highway paving .
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged back, body as a whole.
14. Nature and extent of any permanent disability: The parties requested that this not be addressed at this temporary hearing.
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? 1,517.00
18. Employee's average weekly wages: Sufficient for maximum compensation rate.

19. Weekly compensation rate: \$628.90 for temporary total disability

20. Method wages computation: By stipulation

21. Compensation Payable

Benefits Currently Due:

Medical Expenses

Medical Already Incurred \$0.00

Additional Medical \$1,517.00 plus cost of August 30, 2004 myelogram [\[1\]](#)

Total Medical Owing \$1,517.00 plus cost of August 30, 2004 myelogram

- Total Benefits Due: \$1,517.00 plus cost of August 30, 2004 myelogram

Ongoing Benefits None

Total Ongoing Benefits 0

Total Award \$1,517.00 plus cost of August 30, 2004 myelogram

22. Second Injury Fund liability: N/A

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gary C. Shroder Injury No. 02-148095

Dependants: N/A

Employer: Clarkson Construction Company

Additional Party: N/A

Insurer: ACIG Insurance Company

Hearing Date: April 5, 2005

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On April 5, 2005, the employee and employer appeared for a hardship hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Gary C. Shroder, appeared in person and with counsel, Chris Brennan. The employer and insurer appeared through Paul D. Cowing. The Second Injury Fund was not a party to the case. The primary issue the parties requested the Division to determine was whether Mr. Shroder suffered an accident arising out of and in the course of his employment. For the reasons noted below, I find that Mr. Shroder's back condition did not result from a work injury.

STIPULATIONS

The parties stipulated that:

1. During the first week of June 2002, Clarkson Construction Company ("Clarkson") was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by ACIG Insurance Company;
2. Mr. Shroder was its employee working subject to the law in Kansas City, Jackson County, Missouri;
3. Mr. Shroder filed his claim within the time allowed by law;
4. Mr. Shroder's contract of employment was made in Missouri;
5. The nature and extent of disability was not an issue to be considered at the hearing;
6. Mr. Shroder earned an average weekly wage sufficient to result in him qualifying for the maximum weekly compensation rate of \$628.90 for temporary total and \$329.42 for permanent partial disability compensation;
7. The employer provided TTD through September 11, 2003 for a shoulder injury which was the subject of injury number 02-148094. The parties stipulate that if TTD is awarded for Injury No. 02-148095 - the subject of this award - then such benefits would begin no sooner than September 12, 2003.; and,
8. Clarkson has not provided Mr. Shroder with any medical care, but has agreed to pay for a myelogram taken on August 30, 2004 and \$1,517.00 in expenses related to the neutral examination agreed upon between the parties by Steven Reinjtes, M.D.

ISSUES

The parties requested the Division to determine:

1. Whether Mr. Shroder sustained an accident arising out of and in the course of employment?
2. Whether Mr. Shroder notified Clarkson Construction Company of the injury as required by law?
3. Whether Mr. Shroder is entitled to temporary total disability benefits from September 12, 2003 through today and continuing until he reaches maximum medical improvement?

4. Whether Clarkson Construction Company must reimburse the employee for medical expenses totaling \$1,517.00? And,
5. Whether Clarkson Construction Company must provide the employee with additional medical care?

FINDINGS

The Claimant testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- | | | |
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| A | - | Deposition, J. Michel Smith, M.D., January 13, 2005 |
| B | - | Midwest Radiology Bill for January 14, 2003 MRI |
| C | - | Pain Management Associates Bill for Epidurals |
| D | - | Letter dated May 2, 2003 from Lyons to Shroder |

While the employer did not call any witnesses, it did offer the deposition testimony of Jonathan Chilton, MD, taken on January 26, 2005; the exhibit was admitted into evidence as Employer's Exhibit 1 without objection.

Based on the above exhibits the testimony of the Claimant I make the following findings.

Mr. Shroder worked for Clarkson as a laborer on the basket crew setting up steel rod baskets ahead of the paving crew at approximate 15-foot intervals. Sometime during the first week of June 2002 while working on Highway 150 between 71 Highway and Holmes Road Mr. Shroder felt numbness and could not straighten up after being bent over working. He thought that he pulled a muscle and continued to work. I find that he did report this complaint to his supervisor but did not request or seek medical care and continued to work through the remainder of the work season until mid-December, 2002.

In addition, I find that after completing the work year Mr. Shroder applied for - and received - unemployment compensation. He did not make any effort to pursue medical care until his made an appointment to see his personal physician, Dr. David Wilt, on January 6, 2003. See, Claimant's Exhibit A at 91-92. At that time he presented with complaints of right *shoulder* pain which was treated and was the subject of Injury No. 02-148095. He also complained of back pain and leg pain on the left side with numbness and tingling in the L4-5 distribution with duration of "approximately 3 months." *Id.* Dr. Wilt ordered an MRI that was taken on January 14, 2003. The radiologist, Dr. Richard Trevor, interpreted the MRI as showing moderate spinal and bilateral foraminal stenosis at L4-5 with a very prominent left-sided facet hypertrophy and ligamentum flavum hypertrophy. *Id.* at 80. Dr. Trevor also noted degenerative changes at L5-S1 as well as L3-4 and L2-3. The results of the August 30, 2004 myelogram confirmed spinal stenosis at L1-2 through L4-5. Dr. Wilt later arranged, on March 31, 2003, for Mr. Shroder to have an appointment with Dr. Chilton. Dr. Chilton first examined Mr. Shroder on April 11, 2003.

Dr. Chilton recorded that Mr. Shroder had a one-year history of burning aching pain across the low back with a historical finding that pain was increased with sitting, working, bending over and lifting. Dr. Chilton examined the MRI scan of the lumbar spine performed on January 14, 2003 and concluded that Mr. Shroder had degenerative joint disease of the lumbar spine from L3-4 through L5-S1 and suggested that a myelogram and CT scan be performed. He also advised Mr. Shroder that a lumbar laminectomy could be undertaken to decompress the nerve roots which would likely alleviate lesser radicular symptoms, but would not necessarily result in significant relief of progressively incapacitating low back pain.

Mr. Shroder did not file a claim for compensation until August 22, 2003. In paragraph 8 of his Form 21, Claim for Compensation, Mr. Shroder alleged that his injury occurred as follows:

While bent over setting baskets in the ground, Claimant felt a pop in his lower back, causing injury to Claimant.

However, at hearing, Mr. Shroder admitted at hearing on cross-examination that he did not feel a pop in his lower back and that he never reported such an event to any medical care provider including Dr. Chilton, Dr. Wilt or Dr. Smith. He also admitted that the event he described as occurring during the first week of June while setting

baskets on the Highway 150 job was what he considered to be a triggering or precipitating event.

Dr. J. Michael Smith evaluated the Claimant on December 1, 2003 at his attorney's request. After reviewing the records from various medical care providers - including Dr. Wilt and Dr. Chilton - Dr. Smith testified that Mr. Shroder reported to him that he was working on a paving project, setting baskets and that he was bent forward and lifting when he developed numbness and pain in his leg as well as some back pain. See, Claimant's Exhibit A at 6:15-19. Dr. Smith also testified that the bending and lifting which he was doing on the job when he developed the numbness and pain in his left leg was the ultimate cause of his symptoms and that it was a substantial contributing factor to the injuries he sustained to a reasonable degree of medical certainty.

Dr. Smith acknowledged that the MRI study showed multi-level spinal stenosis rather than just spinal stenosis at L4-5 and that these findings pre-existed the onset of symptoms.

Dr. Smith testified that he did not disagree with any of Dr. Chilton's opinions. *Id.* at 29:20-22. Dr. Smith agreed that the congenital narrowing characterized by the stenosis in Mr. Shroder's lumbar spine was not caused by work or trauma.

Mr. Shroder was examined by Stephen L. Reintjes, M.D. on June 2, 2004 by agreement between the Claimant and the Employer. Dr. Reintjes reviewed records including the MRI scan of the lumbar spine. Dr. Reintjes concluded that the lumbar spinal stenosis was pre-existing and went on to state that the disk bulge or central herniation could be related to the work injury of June, 2002. *Id.* at 65. He agreed with Dr. Chilton's recommendation that a myelogram be performed.

The parties arranged for the myelogram and Dr. Chilton prepared a report. Dr. Chilton concluded that work would not be a substantial contributing cause to the anatomical changes specifically referring to the congenital lumbar stenosis and degenerative disease of the lumbar spine, but stated that heavy labor and physical activity could aggravate the pre-existing condition. See, Employer's Exhibit 1 at 19:9-15. He also testified with a reasonable degree of medical certainty that work did not cause the congenital lumbar spinal stenosis or degenerative lumbar spinal disease. He further testified that the conditions were the result of gradual deterioration and were definitely an age-related process. I note that Dr. Chilton did not testify that work in fact did - but only that it *could* - aggravate the low back condition.

RULINGS

I find that Mr. Shroder's lumbar stenosis and degenerative disease of the lumbar spine pre-existed the event of June, 2002 and that the work that was being performed at that time was at most a triggering or precipitating factor with regard to Mr. Shroder's claimed injury. I further find that the condition was not work-related and that work was not a substantial factor in the cause of the resulting medical condition or disability. Mr. Shroder did not feel a pop in his low back at the time of the events described the first week of June 2002 even though he alleged said fact in his claim. He did not seek medical treatment until January 2003 and did not make a report to Clarkson until February 2003. When Mr. Shroder saw Dr. Wilt more than six months after the claimed event on January 6, 2003 it was recorded that the back symptoms had only existed for approximately three months. When Dr. Chilton examined him on April 11, 2003, it was reported that the symptoms had been going on for one year, which would have preceded the claimed event.

No doctor has given an opinion that it is *probable* that the low back degenerative condition was caused by work except Dr. Smith. Drs. Chilton and Reintjes have only stated that the condition *could* have been aggravated by work activity. I find that the testimony of Dr. Chilton and the report of Dr. Reintjes are more credible than the report and testimony of Dr. Smith. Testimony and evidence that an event could aggravate a pre-existing condition is not equivalent to medical causation or a finding that the event was a substantial factor and the cause of the resulting medical condition or disability. An injury is not compensable merely because, as Mr. Shroder admitted, the event was a triggering or precipitating factor. While an aggravation of a pre-existing infirmity or condition may be compensable, it must be caused by a compensable accident. The alleged work aggravation must be a substantial factor in the claimed injury. Putnam-Heisler v. Columbia Foods, 989 S.W.2d 257, 260-261 (Mo.App.W.D. 1999). There was no aggravation here which was a substantial factor in Claimant's condition. Instead I find that, if anything, only a triggering event transpired.

Thus, I find that Mr. Shroder did not sustain an accident arising out of and in the course of his employment and that he is not entitled either to any temporary disability benefits or medical care related to his alleged June 2002 back injury. Of course, the Employer stipulated that it would pay \$1,517.00 in medical costs for Dr. Reintjes' examination it authorized plus the cost of Mr. Shroder's August 30, 2004 myelogram regardless of whether his injury was found compensable; thus, I order that these amounts be paid. I do not award any fee to Mr. Shroder's attorney on these amounts.

Date: _____ Made by: _____
R. Carl Mueller, Jr.
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) The parties' stipulated that the employer would pay these amounts regardless of whether the injury was found compensable.