

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

Injury No.: 99-107552

Employee: Roy L. Smith
Employer: Donco Construction
Insurer: Ohio Casualty Insurance Company
Date of Accident: Alleged August 12, 1999
Place and County of Accident: Alleged Greene County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 associate 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 associate administrative law judge dated July 26, 2004, and awards no compensation in the above-captioned case.

The award and decision of Associate Administrative Law Judge L. Timothy Wilson, issued July 26, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of February 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

V A C A N T

Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Roy L. Smith
Dependents: N/A
Employer: Donco Construction

Injury No. 99-107552
Before the
DIVISION OF WORKERS'

COMPENSATION

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

Additional Party:N/A

Insurer: Ohio Casualty Insurance Company

Hearing Date: January 28, 2004

Checked by: LTW/mp

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 August 12, 1999
5. State location where accident occurred or occupational disease was contracted: alleged Greene 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? yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant alleges that, as he was drilling holes in concrete, he felt a sharp pain in his low back.
12. Did accident or occupational disease cause death? N/A 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. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer?

17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$523.68
19. Weekly compensation rate: \$349.14/\$303.01
20. Method wages computation: stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

The claim for compensation is denied.

22. Second Injury Fund liability: No

TOTAL: \$.00

23. Future requirements awarded: none

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Roy L. Smith

Injury No: 99-107552

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Donco Construction

Additional Party N/A

Insurer: Ohio Casualty Insurance Company

Checked by: LTW/mp

The above-referenced workers' compensation claim was heard before the undersigned Associate Administrative Law Judge on January 28, 2004. The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about March 2, 2004.

The employee appeared personally and through his attorney, William W. Francis, Jr., Esq. The employer and insurer appeared by its attorney, Patrick J. Platter, Esq. The Missouri Division of Medical Services appeared by its representative, Lois Sandbothe, and its attorney Barbara Bean, Esq.

Also, in this case several health care providers have filed medical fee dispute applications entitled Notice of Services Provided & Request for Direct Payment. The applications were filed by individuals who are not licensed to practice law in Missouri. These health care providers include Springfield Physical Medicine (MFD No. 99-01024), Litton & Giddings Radiological Associates (MFD No. 99-00928), and Ozark Magnetic Imaging (MFD No. 99-01018). The health care providers Springfield Physical Medicine and Litton & Giddings Radiological Associates did not appear at the hearing; and Ozark Magnetic Imaging appeared by its attorney, Jason Shaffer, Esq., subsequent to the parties' stipulation and admission of evidence.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) At all times relevant to this case, Donco Construction was an employer operating under and subject to The Missouri Workers' Compensation Law and during this time was fully insured by Ohio Casualty Insurance Company.
- (2) On the alleged injury date of August 12, 1999, Roy L. Smith was an employee of the employer and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident or incident of occupational disease occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (4) The employee notified the employer of his alleged injury as required by Section, 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) At the time of the alleged accident or incident of occupational disease, the employee's average weekly wage was \$523.68, which is sufficient to allow a compensation rate of \$349.14 for temporary and permanent total disability compensation and a compensation rate of \$303.01 for permanent partial disability compensation.

The sole issues to be resolved by hearing include:

- (1) Whether the employee sustained an accident or incident of occupational disease, and whether the accident or incident of occupational disease arose out of and in the course of his employment with Donco Construction?
- (2) Whether the alleged accident or incident of occupational disease caused the conditions for which the employee seeks benefits?
- (3) Whether the employer and insurer are obligated to pay for certain past medical care and expenses?
- (4) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (5) Whether the employee is entitled to temporary disability benefits?
- (6) Whether the employee sustained any permanent disability as a consequence of the alleged accident or incident of occupational disease and, if so, the nature and extent of the disability?
- (7) Whether the Missouri Division of Medical Services, as an additional party, is entitled to payment in the amount of \$2,662.21 for medical services previously provided and pursuant to the filing of a medical services lien, pursuant to Section 287.266, RSMo?

EVIDENCE PRESENTED

The parties elected to present their evidence through the admission of exhibits, without the benefit or necessity of any individual testifying at the evidentiary hearing. The employee offered for admission the following exhibits:

- Exhibit A Deposition of Andrew I. Myers, M.D.
- Exhibit B Medical Records from General Medical Center
- Exhibit C Medical Records from Springfield Neurosurgical Clinic, Inc.
- Exhibit D Medical Records from Mtn. Grove Medical & Lazer Center

Exhibit E Medical Records from Ozark Magnetic Imaging
Exhibit F Medical Records from Springfield Physical Medicine
Exhibit G Medical Records from Heartland Physical Therapy
Exhibit H Medical Records from Ferrell – Duncan Clinic, Inc.
Exhibit I Medical Records from Cox Medical Center
Exhibit J Medical Bills & Medical Expense Summary
Exhibit K Temporary Total Disability Summary Sheet
Exhibit L Medical Report from Douglas E. Goodman, M.D.

The exhibits were received and admitted into evidence.

The employer and insurer offered for admission the following exhibit:

Exhibit 1 Deposition of Wolfe B. Gerecht, M.D., with Deposition Exhibits 1, 2, 3, & 4

The exhibit was received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File which include: Notice of Hearing; Noticed of Services Provided & Request for Direct Payment filed by Springfield Physical Medicine (MFD No. 99-01024); Notice of Services Provided & Request for Direct Payment filed by Litton & Giddings Radiological Associates (MFD No. 99-00928); Notice of Services Provided & Request for Direct Payment filed by Ozark Magnetic Imaging (MFD No. 99-01018); Medical Services Lien filed by Missouri Division of Medical Services; Entry of Appearances for Attorneys Patrick J. Platter, Esq., and William W. Francis, Jr., Esq.; Notice of Lien filed by Missouri Division of Child Support Enforcement; Answer of Employer and Insurer to Claim for Compensation; Claim for Compensation; Report of Injury; and Correspondence and Stipulations by Employer and Insurer dated February 3, 2004.

DISCUSSION

The exhibits admitted into evidence are summarized as follows:

Circumstances of Smith's Employment and the Onset of Physical Symptoms.

The Form 1 Report of Injury indicates that Roy Smith suffered a strain in his lower back when he was drilling holes in concrete using a hammer drill and while positioned upon his knees.

The Claim for Compensation states, "employee sustained injury to his back and body as a whole".

The chart note of General Medical Center of August 13, 1999, states under the history: "Patient states on 8/12/99 about 3:30 p.m. while at work he was drilling holes and states his back started hurting. States pain began to get worse later in the night."

The first note of Smith's personal physician, Dr. Doyle Hill, states that Smith was "hurt at work" on Friday, August 13th. He suffered from lower back pain and sought a company physician at Cox North, Dr. Atkinson. Smith, during that visit, reported that he had gotten to the point where he was not working at all and wanted an osteopathic manipulative therapy (OMT) and pain medication.

The history and physical report concerning Smith prepared by Dr. Mark Bower reflects that the patient was well until August 12th, 1999. He was drilling holes in concrete when he stood up and felt a sharp pain in his low back. He was treated conservatively, first by Dr. Atkinson, then began having fevers three or four days later. Smith reported to Dr. Bower that a urine test showed an infection.

Medical Treatment.

This case centers upon two closely related medical conditions. Those are discitis and intervertebral osteomyelitis. Dr. Wolfe Gerecht described these conditions during his deposition testimony. Discitis is an infection of the intervertebral disc itself. The infection may spread past the disc and surrounding area to be osteomyelitis, which is an infection of the osteovertebral bodies on either side of the disc.

There can be several causes. The most common type is the type without explanation ("de novo"). It is usually associated with the organism Staph aureas. It can also be associated with intravenous drug users and other deep related infections, such as endocarditis. It can result from direct trauma that penetrates the skin.

The disease can have a latent asymptomatic stage. The symptoms can be confusing since the first is back pain and

that pain may progress, such as an impingement upon a nerve root with radiculopathy. The disease can progress to having fevers, chills, and other systemic systems. The disease, if permitted to progress, may result in an abscess, in the spinal column where the spinal cord runs and causes an epidural abscess, or an impingement upon the spinal cord. 1 to 10 per hundred thousand cases will represent a vertebral osteomyelitis or discitis.

The best test to diagnose the condition is the MRI scan, possibly an MRI scan with gadolinium contrast. A sedimentation test may be elevated. One would review the MRI scan to see evidence of destruction of the bone where there is an enhancement of the disc space, suggesting an ongoing inflammation. One may also see an abscess cavity forming. One may also see surrounding edema of tissues outside the vertebral bodies because it will extend from the disc into the tissues of the back. One may also see an abscess projecting inward toward the spinal column. A sedimentation rate, usually 15 to 20 in healthy people, may be as high as 100. Most will average from the 30s to the 70s.

The recommended conservative treatment is a prolonged course of intravenous antibiotic therapy for a minimum of four weeks, but many times extending for six weeks. Hospitalization is common.

Smith started his medical treatment with Dr. Atkinson at General Medical Center. He saw a physician and staff at this facility on August 13th, 16th, 18th, and 19th, in 1999. Much of the record at General Medical Center is handwritten and is difficult to read. The diagnosis on the first record of treatment August 13th, 1999, was lower back pain. The physician at General Medical Center included a probable diagnosis on August 18th, 1999, of "probable kidney stones with pyelonephritis". The physician changed the diagnosis in full the next day, August 19th, 1999, to pyelonephritis - kidney stones. Smith's temperature on August 19th, 1999, was 100.4 degrees. The physician at General Medical Center eventually prescribed two antibiotics - Keflex and Ceftin. He was still taking Keflex when he last saw a physician at General Medical Center on August 19th.

General Medical Center referred Smith to Dr. Jeff Woodward. Dr. Woodward saw Smith on August 27th, September 3rd, 17th, and 30th in 1999. Dr. Woodward started treatment that would be commonly associated with a musculo-skeletal disorder. His initial diagnosis on August 27th, 1999, was "mid and lower lumbar pain of uncertain etiology". He also noted that there was a prior urinalysis abnormality that was suspicious for an acute urological disorder. Smith on that date was complaining of an aching pain in his hips which was atypical for a urologic disorder. Dr. Woodward on this date felt that treatment for a "work-relate" [sic] lumbar strain was warranted. He prescribed physical therapy and medication. He continued those recommendations on September 3rd, 1999, believing the urological disorder was "apparently coincidental".

Smith returned to Dr. Woodward on September 17th, 1999. Smith reported to Dr. Woodward on that date that the "family doctor" (apparently Dr. Hill) had recommended an MRI scan. Dr. Hill supposedly thought that Smith needed to be released from work. Dr. Woodward disagreed and released Smith to full-time modified duties, but referred Smith for the MRI scan. Dr. Woodward last saw Smith on September 30th, 1999. He reviewed the MRI scan of the lumbar spine that day. He noted the radiology report indicated a significant abnormality at the L2-3 disc and end plate regions, indicating possible infectious discitis. Dr. Woodward also noted that he reviewed the MRI images with a neuroradiologist at Cox Medical Center, who indicated that the most likely diagnosis was infectious discitis. Smith reported to Dr. Woodward on that day significant ongoing back pain throughout the lumbar region. Dr. Woodward noted that he "reviewed the apparent non work-relatedness of the discitis condition" with Smith. His work status and final comments were that Smith would need to remain off work for an apparent non work-related injury until there was a referral to a specialist in infectious disease and treatment for that condition. He concluded by saying that if the diagnosis of infectious discitis was correct, then there would have been no work-related injury in his opinion.

Smith, while seeing Dr. Woodward, was also seeing his personal physician, Dr. Doyle, Hill of Mtn. Grove Medical on the following dates: August 23rd, 26th, 30th, September 9th, 16th, 21st, and 30th, in 1999. Dr. Hill prescribed a course of treatment that generally followed prescriptions of Flexeril and OMT adjustments. While the handwritten notes of August 23rd are hard to read, it does not appear that Smith had significantly improved his condition by the last time he saw Dr. Hill.

Before his admission to the hospital, Smith was taking the medications of Lorcet, Darvocet, Celebrex, and Flexeril. None of these medications were aiding Smith, when considering the complaints he gave to Dr. Woodward on September 30th, 1999, and, likewise, the complaints he provided to hospital staff at Cox Medical Center South upon his admission to that facility.

An MRI scan was conducted at MRI of Springfield on September 29th, 1999. The radiologist, Dr. Douglas Goodman, indicated the following impressions:

The sagittal and axial images failed to demonstrate neural impingement. The L2-3 disc space is abnormal, highly suspicious for a disc space infection, however, it does not correlate clinically. There may be focal osteomyelitis of L2. There is an obvious epidural involvement. This was discussed with Dr. Woodward.. (2) Desiccation of the L4-5 disc space. (3) No

evidence of neural impingement.”

Smith was admitted into Cox Medical Center-South of Springfield on September 30, 1999, the same day he last saw Dr. Woodward. He was hospitalized until October 6, 1999. Dr. Woodward referred Smith to Cox, and internist Mark Bower was the attending physician. Smith reported that he had been treated for antibiotics for 8 or 9 days given the positive finding of a urinary tract infection with no improvement in pain. The back pain had, at that time, been unrelenting. He felt better when he was lying down, but the pain would become more severe if he sat up or bent over. It would occasionally radiate down both buttocks anteriorly to his thighs. He did not have any pain extend below his knees. Dr. Bower confirmed that an MRI scan of the lumbar spine demonstrated changes in the disc at L2-3 consistent with discitis. ACT-directed needle biopsy confirmed the diagnosis. Dr. Bower confirmed in his discharge summary that the CT-guided needle biopsy performed in the L2-3 disc space indicated chronic osteomyelitis and chronic periosteal inflammation. In consultation with Dr. Wolfe Gerecht, Smith was treated with antibiotics and a PICC line and discharged to go home with intravenous antibiotic therapy, which included Cefazolin as well as Cipro.

Dr. Gerecht saw Smith on several office visits at the Ferrell Duncan Clinic following Smith’s discharge from Cox South. Those dates were: October 26, November 11, December 3, and December 20, in 1999; and January 11, February 3, February 29, May 19, and June 8, in 2000. Dr. Gerecht saw Smith in outpatient office visits to ensure that therapy was going well, that there would be no side effects, that medication did not cause any complications and, finally, to ensure that success with therapy had been reached.

Testimony of Dr. Andrew Myers.

Dr. Myers practices in occupational industrial medicine. Ninety percent of his practice comes from referrals for litigation. Seventy five to eighty percent comes from plaintiffs’ and employees’ attorneys. 75% of the referrals are from workers’ compensation claims; the rest in personal injury. He did not complete any residencies after medical school. He is not on staff with any hospitals in the Kansas City area. He went to “full time consulting” in order to avoid paying malpractice premiums. 10% of his professional time is spent to treatment. If a patient such as Smith had presented to Dr. Myers, he would have referred him to other physicians for treatment.

Dr. Myers examined Smith at the referral of Smith’s counsel on June 28, 2000. He issued his report on September 26, 2000.

Dr. Myers diagnosed Smith to suffer from an annular tear in the disc at L4-5 and L5-S1. He entered a rating of permanent disability of 10% to 15% to the body as a whole. He recommended physical therapy, strengthening exercises, and medication for this particular condition. In addition, he also stated that Smith should take precautions if metallic instrumentation was removed from a left hip surgery for a fractured hip that happened from a motor vehicle accident in 1972.

Dr. Myers did not disagree with the treatment diagnosis or diagnostic measures taken by treating physicians who found discitis and intervertebral osteomyelitis.

Dr. Myers did not have the MRI report of September 23rd, 1999. Records of the evaluation were in storage. The MRI scan, as he remembered, indicated suspicion for disc space infection at L2-3, which would indicate an increase in signal intensity, indicating damage to the end plates of the L2-3 disc and L2 vertebral body. This would indicate discitis or intervertebral osteomyelitis. There was desiccation (or drying up) at L4-5. This meant that the intervertebral discs, as Smith aged, did not retain moisture as they would when Smith was younger. Dr. Myers also agreed that the radiologist who reviewed the MRI scan on September 23, 1999, did not find annular tears at any intervertebral disc.

Testimony of Dr. Wolfe Gerecht.

Dr. Gerecht is a specialist in infectious disease. He practices at the Ferrell Duncan Clinic. He is board certified in internal medicine with a board certified subspecialty in infectious disease. He is a graduate of U.M.K.C. Medical School and completed his residency and internship in internal medicine and infectious disease at the Mayo Clinic. His complete medical background is enclosed in Exhibit 1 of his deposition testimony.

The diagnosis of Dr. Gerecht was discitis with associated vertebral osteomyelitis. This condition did not result merely from Mr. Smith’s bending over. Discitis is not associated with physical activity without direct penetrating trauma. If Mr. Smith was bending over at the time he felt back pain, the bending over was not the cause of the pain, but the result of symptoms of the underlying disease. The discitis was the reason for the hospitalization at Cox Medical Center and, likewise, the reason for follow-up office visits at Ferrell Duncan Clinic and prescription of both IV and oral antibiotics.

Dr. Gerecht testified at length concerning a number of aspects concerning the conditions of discitis and vertebral osteomyelitis, as previously noted. He also described the course of Smith’s treatment, again as previously noted. He was interested in the cause of Smith’s disorder in order to determine the onset of symptoms and clarify exactly the time course of this illness. He wanted to know the time course exactly, specifically, whether there was or was not trauma, whether there had been penetrating trauma or not. He wanted to know what the onset of the infection was, such as at the start of

symptoms, or did it occur two to three weeks after the onset of symptoms. By his history, he obtained the onset of fever occurring within the first day of onset of symptoms. That was not critical in the opinions he rendered concerning causation.

Dr. Gerecht discounted the possibility that a needle stick would have led to this infection in the low back. He would not state that the IVP conducted on August 16, 1999, would have been a penetrating trauma resulting in the infection.

FINDINGS AND CONCLUSIONS

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

I.

Nature Of Injury

The parties offer and rely upon different medical opinion relative to the nature of Mr. Smith's claim of injury and medical condition for which he seeks workers' compensation benefits. After consideration and review of the evidence, I resolve the dispute in favor of the medical opinions offered by Dr. Gerecht who I find to be credible. Accordingly, after consideration and review of the evidence, and relying upon the opinion of Dr. Gerecht, I find and conclude that Mr. Smith did not suffer an injury by accident or incident of occupational disease. Rather, he suffers from an ordinary disease of life in the nature of discitis and related intervertebral osteomyelitis.

The medical conditions for which Mr. Smith seeks workers' compensation benefits do not pertain to an injury by accident, as defined in Section 287.020(2) and (3), RSMo, or an occupational disease, as defined in Section 287.067(1), RSMo. The exhibits before the Division do not identify an event or series of events, which would constitute an accident under §287.020.2 RSMo. Nor does the evidence support a claim of occupational disease based on repetitive trauma. See, generally, *Smith v. Climate Engineering*, 939 S.W.2d 429 (Mo. App. E.D. 1996).

Section 287.067.1, RSMo defines an occupational disease as follows:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

First, the focus upon whether an occupational disease occurs involves two basic considerations. First, was there an exposure to the disease, which was greater than or different from that which affects the general

public? Second, is there a recognizable link between the disease and some distinctive feature of the employee's job that is common to all jobs of that sort? *Kelley v. Banta & Stude Construction Company, Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999), cited by *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273 (Mo.banc 2002).

An allegation that asserts an occupational disease need not be sustained when there is independently verifiable evidence to support the proposition that the condition arose away from the workplace. *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200 (Mo.App. W.D. 1991). See also *Causey v. McCord*, 774 S.W.2d 898 (Mo.App. S.D. 1999). Additionally, a finding of a work-related occupational disease need not be sustained when there is an incomplete description of the claimant's job activities. *Putnam-Heisler v. Columbia Foods*, 989 S.W.2d 257 (Mo.App. W.D. 1999).

There are a number of reasons to explain that, in this case, the employee Roy L. Smith did not suffer an occupational disease. First, diagnostic testing specifically indicated discitis and intervertebral osteomyelitis. This includes the MRI scan and CT needle biopsy. No physician disagrees with this diagnosis, even Dr. Myers. Second, there is no diagnostic measure that found an annular tear at either L4-L5 or L5-S1. The MRI scan conducted on September 23, 1999, specifically did not find such a tear at either level. Third, Mr. Smith's condition did not improve in his low back when he first underwent treatment with his initial physicians for what they considered to be a musculo-skeletal disorder.

In addition, Mr. Smith never pursued his medical treatment long with any physician before the physician believed that the condition was not musculo-skeletal in origin. For example, Dr. Atkinson, after the initial abnormal urine test, believed Mr. Smith suffered from kidney stones. Dr. Woodward, on September 17, 1999, upon being presented by an increase in symptoms by Mr. Smith, referred him for an MRI scan and then retracted his opinion as to whether the condition was work related. Dr. Hill, Mr. Smith's personal physician in Mountain Grove, started treatment most commonly associated with that for musculo-skeletal disorders in the low back, found the treatment was not working, and then suggested the MRI scan, which Dr. Woodward finally ordered. None of these early physicians believed they had found the underlying diagnosis before the MRI scan was conducted.

Thus, discitis and intervertebral osteomyelitis are the only conditions that accurately follow the progression of Mr. Smith's symptoms, his diagnostic testing, and his eventual recovery. These conditions are extremely rare and there is no evidence to support the conclusion that they would have resulted from Mr. Smith's work with a drill hammer and concrete on August 12, 1999. Since these conditions are ordinary diseases of life, compensation must be denied.

Nor is there a basis for concluding that the employee sustained a lumbar strain on or about August 12, 1999. Dr. Gerecht clearly testified that the act of Smith in bending over was not the cause of Smith's low back pain, but only a symptom of the underlying disease process, which was in the process of beginning.

Therefore, in light of the foregoing, the Claim for Compensation is denied. Similarly, for the foregoing reasons, the Notice of Services Provided & Request for Direct Payment applications are denied. All other issues are rendered moot.

Date: July 26, 2004

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Renee Slusher
Renee Slusher
Director
Division of Workers' Compensation

