

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

Injury No.: 06-070201

Employee: Theron Smith

Employer: Arom, Inc. d/b/a Aromondo Brothers Trucking

Insurer: Commerce & Industry Insurance Co. c/o AIG Domestic Claims, Inc.

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 November 20, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued November 20, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of April 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 upon 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.

The administrative law judge found employee did not prove that his employment was the prevailing factor in the development of his myofascial pain. The administrative law judge found the opinion of Dr. Cantrell to be more persuasive than that of Dr. Volarich; however, his reasoning for finding Dr. Cantrell's opinion more persuasive was not sound.

The ultimate determination of credibility of witnesses rests with the Commission. I find the deposition testimony from Dr. Volarich to be more credible, persuasive, and worthy of belief. Therefore, I believe the administrative law judge's conclusion is wrong, and competent and substantial evidence supports a finding that employee sustained his burden showing he contracted an occupational disease arising out of and in the course of his employment.

Section 287.067 RSMo (Cum Supp. 2006) provides:

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, 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.
2. An injury by occupational disease 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.
3. 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Employee established through his credible testimony along with the medical expert testimony provided by Dr. Volarich, that employee sustained an occupational disease arising out of and in the course of his employment.

Employee credibly testified that he did not have any prior problems with respect to his right upper extremity before April of 2006 when he began driving the Volvo 630 for employer. Employer had switched the vehicle in which employee was driving to an older model Volvo in April of 2006. Employee immediately noticed a problem with the air ride seat and inadequate cushion in the seat. Within a week of driving the truck, employee noticed an onset of pain in his right shoulder. Employee reported the problem with the air ride seat to employer within a week of driving the truck. According to employee, the owner, Mike Aromondo, inspected the seat at that time. Employee testified that employer's other owner, James Aromondo, promised employee that he would be switched to another vehicle. When employee called employer to request medical

treatment, employee was told to come collect his things. Employee sought treatment on his own including a cortisone shot and medications. Employee was unable to continue treatment or undergo the recommended physical therapy because he did not have medical insurance. Employee believed that he could not safely drive for employer in his condition, including the severe pain in his right shoulder.

Employee's testimony was supported by that of Dr. Volarich. Dr. Volarich diagnosed employee with repetitive trauma of the right upper extremity causing right shoulder girdle myofascial pain. Dr. Volarich opined that the repetitive trauma sustained to the right upper extremity while driving a truck for employer, including the faulty seat that bottomed out frequently causing him to jerk his right shoulder while holding on to either the steering wheel or shifting, were the substantial contributing factors, as well as the prevailing or primary factors causing the right shoulder girdle myofascial pain that required conservative care. Dr. Volarich found employee to have sustained a 20% permanent partial disability of the right upper extremity rated at the shoulder girdle and posterior chest wall (body as a whole), due to the right girdle myofascial injury and ongoing pain. Dr. Volarich's opinion is supported by the evidence in the record.

On the other hand, Dr. Cantrell's opinion was not supported by the evidence. Dr. Cantrell found that employee's condition was not connected to his employment in part because the pain he experienced while driving for employer had not improved after he ceased driving for employer. Employee reported severe pain and testified that he was unable to use or move his arm in May of 2006; at the time of hearing, employee reported aching in his right upper extremity but no severe pain. Employee's condition had clearly improved after he stopped working for employer. Dr. Cantrell also noted that employee had prior complaints as to his right shoulder, when in fact there is no medical evidence suggesting the employee suffered any medical condition related to his right upper extremity prior to April 2006. Furthermore, employee worked up and until his injury by occupational disease on or about May of 2006. Dr. Cantrell's opinion was not based on facts in evidence.

Employee's credible testimony along with the credible testimony of Dr. Volarich, established that the occupational exposure, defective seat, was the prevailing factor in causing employee's medical condition, myofascial pain syndrome, and resulting disability. Employee satisfied his burden proving the contraction of an occupational disease and entitlement to benefits. Therefore, I respectfully dissent from the decision of the Commission majority to deny employee's benefits.

---

John J. Hickey, Member

## **AWARD**

Employee: Theron Smith

Injury No. 06-070201

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: None

Employer: Arom, Inc. d/b/a Aromondo Brothers Trucking

Additional Party: None

Insurer: Commerce & Industry Ins. Co. c/o AIG Domestic Claims, Inc.

Hearing Date: August 27, 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 May 26, 2006
  5. State location where accident occurred or occupational disease was contracted:  
Alleged occupational disease claim from various locations as over-the-road truck driver.
  6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
  7. Did employer receive proper notice? Undetermined
  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:  
Alleged occupational disease occurred by driving truck with defective seat and shifting gears.
  12. Did accident or occupational disease cause death? No
  13. Part(s) of body injured by accident or occupational disease: Alleged Right Shoulder
- 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? \$0
  18. Employee's average weekly wages: \$981.08
  19. Weekly compensation rate: \$654.06 TTD/\$365.08 PPD
- Method wages computation: Stipulation

## COMPENSATION PAYABLE

21. Amount of compensation payable: None

Unpaid medical expenses: \$0

0 weeks of permanent partial disability from Employer

22. Second Injury Fund liability: No

Total: \$0

23. Future requirements awarded: None

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Theron Smith

Injury No: 06-070201

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: None

Employer: Arom, Inc. d/b/a Aromondo Brothers Trucking

Additional Party: None

Insurer: Commerce & Industry Ins. Co. c/o AIG Domestic Claims, Inc.

Checked by: GCG/In

## PRELIMINARY STATEMENT

The parties appeared for evidentiary hearing on August 27, 2008 at the Division of Workers' Compensation in St. Charles County, Missouri. Claimant was present in person, and represented by Tom Gregory. Arom, Inc. d/b/a Aromondo Brothers Trucking (Employer) and Commerce & Industry Ins. Co. c/o AIG domestic Claims, Inc. (Insurer) were represented by John Dietrick. Attorney Tom Gregory requested a fee of 25% on any monetary award. The Second Injury Fund (SIF) is not a party to this claim. The parties request a Final Award.

The parties stipulated to the following at the hearing:

1. Claimant was an employee of Employer pursuant to Chapter 287 RSMo. on May 26, 2006.
2. Venue is proper in St. Charles County.
3. The claim was filed within the time allowed by law.
4. Claimant's average weekly wage at the relevant time was \$981.08, resulting in a temporary total disability (TTD) rate of \$654.06, and a permanent partial disability (PPD) rate of \$365.08.
5. No benefits have been paid by Employer.

The issues to be decided at the hearing were as follows:

1. Occupational disease.
2. Arising out of and in the course of employment.
3. Medical causation.
4. Notice.
5. Payment of past medical expenses in the amount of \$3,295.31.
6. Nature and extent of permanent partial disability.

#### 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. Certain exhibits offered into evidence may contain 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 had no impact on any ruling in this case.

The following exhibits were offered into evidence as joint exhibits by the parties:

- I. Certified records of People's Health Center.
- II. Certified records of Barnes-Jewish Hospital.
- III. Certified records of Mid-County Orthopedic Surgery.
- IV. Certified records of Forest Park Hospital.
- V. Additional certified records of Forest Park Hospital.
- VI. Office records of Dr. James Knight.

Claimant offered into evidence the following exhibits:

- A. Letter from attorney Robert Sihnhold to employer dated July 19, 2006.
- B. Deposition of Dr. David Volarich.
- C. List of medical bills and copies of the bills referred to in the list.

Employer offered into evidence the following exhibit:

1. Deposition of Dr. Russell Cantrell.

## Live Testimony

Claimant testified at hearing. Claimant is 53 year-old left hand dominant man. Claimant testified he had worked for the 20 years previous to his employment with Employer as a truck driver. He began working for Employer in late April or early May of 2005. He worked full time as an over-the-road truck driver. He testified his usual route was to take a load to Iowa to drop off, and then pick up a load in Iowa to return to St. Louis.

Claimant testified in April 2006 he was assigned to an "older" truck. He stated the truck to which he was assigned was Truck 206, which was a Volvo, and it was "the oldest equipment they had." He further testified the driver's seat was an "air ride seat" which was defective. He stated the seat would sink down and the cushion was worn out. He stated he spent 75% of the time shifting gears.

Claimant testified he noticed pain in the first week of driving the truck. He described the pain as in his neck, right shoulder, and right arm to the elbow. He further testified that he notified Mike and James Aromondo, the owners of the company, of the pain he was experiencing. He testified the pain became progressively worse each week he was driving Truck 206. He stated it got so bad he couldn't move his arm.

Claimant testified the Monday after Memorial Day, 2006 he spoke to James Aromondo and told him he had pain in his right shoulder and thought he needed to see a doctor. He further testified that James Aromondo replied by telling him that if he couldn't make the run, he should clean out his truck. Claimant has not worked for Employer since that day. Claimant testified he did not work for several months, and did collect unemployment compensation during that time. He currently works for Schnuck's Bakery sorting breads to be delivered to the different stores.

Claimant testified he currently experiences an aching pain in his shoulder which comes and goes. He stated that his right arm can "give out". He further testified overhead work can bother his arm, air conditioning bothers his arm, and the weather can affect his right arm.

Michael Aromondo testified on behalf of Employer. Mr. Aromondo testified he, along with his brother James, are the owners of Aromondo Trucking. He testified he does not recall Claimant talking about the seat in Truck 206. He stated Truck 206 is a 2004 Volvo, he never inspected the seat with Claimant, and has since inspected the seat and not found any defects. Further the seat was never repaired before or after Claimant used it. He stated the company no longer has Truck 206.

Mr. Aromondo further testified the Workers' Compensation Claim filed in this case was the first notice of injury he regarding Claimant's alleged injury. He stated his brother James is also an officer of the company and a supervisor.

## Deposition Testimony

Dr. David Volarich testified by deposition on July 17, 2008 (Exhibit B). Dr. Volarich evaluated Claimant on July 10, 2007. Dr. Volarich reviewed Claimant's medical records, took a history from Claimant, and conducted a physical exam of Claimant. Dr. Volarich diagnosed repetitive trauma right upper extremity causing right shoulder girdle myofascial pain. Dr. Volarich, based on the history provided by Claimant that the seat was worn out and frequently bottomed out, opined his employment as a driver was a substantial factor as well as the primary or prevailing factor in causing the myofascial pain. Dr. Volarich opined Claimant

suffered 20% PPD to the body as a whole as a result of the injury.

Dr. Russell Cantrell testified by deposition on July 22, 2008 (Exhibit 1). Dr. Cantrell evaluated Claimant on November 19, 2007. Dr. Cantrell reviewed Claimant's medical records, took a history from Claimant, and conducted a physical exam of Claimant. Dr. Cantrell diagnosed infraspinatus myofascial pain. Dr. Cantrell opined there was no causal connection between Claimant's occupational activities and the diagnosis of infraspinatus myofascial pain.

#### 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)).

#### Occupational Disease/Medical Causation

The diagnoses provided by the expert medical witnesses are essentially the same. The ultimate issue is whether the condition is causally related to employment. Dr. Cantrell's opinion on causation is persuasive. Dr. Cantrell gives analyses of the possible mechanisms of injury and convincingly explains that the conditions of employment would not lead to myofascial pain.

On the other hand, Dr. Volarich's opinion is based entirely on Claimant's description of a defective seat and subjective pain complaints. Specifically, the testimony of Michael Aromondo is more credible than Claimant's regarding the condition of the seat. However, the condition of the seat is actually not dispositive of medical causation, as Dr. Cantrell's opinion took into account Claimant's description of the seat.

Where the opinions of medical experts are in conflict, the fact finder may reject all or part of one party's expert testimony, which it does not consider credible, and accept as true the contrary testimony given by other experts. *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. E.D. 1992). Dr. Cantrell's opinion is more credible than Dr. Volarich's opinion.

Claimant has failed to prove that it is reasonably probable that his employment with Employer was the prevailing factor in the development of myofascial pain. The claim for compensation is denied. All other issues are rendered moot.

Date: November 20, 2008

Made by: /s/ Grant C. Gorman  
Grant C. Gorman  
*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

/s/ Jeffrey W. Buker

Jeffrey W. Buker

*Director*

*Division of Workers' Compensation*