

TEMPORARY AWARD ALLOWING COMPENSATION

(After remand from the Court of Appeals
for the Southern District of Missouri)

Injury No.: 06-104584

Employee: David Taylor
Employer: Contract Freighters, Inc.
Insurer: Con-way Truckload, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

History

On July 25, 2008, this matter was called for hearing upon employee's request for a hardship hearing. Employee sought a temporary award of medical treatment and temporary total disability compensation. On October 1, 2008, the administrative law judge issued an award denying compensation. Employee filed an Application for Review with the Labor and Industrial Relations Commission (Commission).

On June 16, 2009, the Commission issued its final award denying compensation.¹ Employee appealed to the Missouri Court of Appeals for the Southern District.

On April 8, 2010, the Court of Appeals issued an opinion reversing the June 16, 2009, award and decision of the Commission. *Taylor v. Contract Freighters, Inc.*, 315 S.W.3d 379 (Mo. App. 2010) (SD29945). By mandate dated September 2, 2010, the Court reversed the Commission's June 16, 2009, award and remanded this matter to the Commission for a hearing not inconsistent with the opinion of the Court.

Pursuant to the Court's mandate, we issue this award. Having reviewed the evidence and considered the whole record in light of the opinion of the Court, we reverse the October 1, 2008, award of the administrative law judge and we award benefits.

Discussion

Arising Out of and In the Course of Employment

Employee, who is now sixty-eight years old, worked a total of over thirteen years in the employ of employer as an over-the-road truck driver. On November 4, 2006, while working for employer driving an 18-wheeler in Texas, employee claimed he felt a dip down as his truck veered to the right and started off the road. As he attempted to correct the truck and veer back to the left, the truck ran off the road. Employee received injuries from the accident. Employer denied coverage for the injuries on the basis that the accident involved an "idiopathic condition," which was not covered by Chapter 287; Employer claimed that employee coughed just prior to the accident and that his coughing was an idiopathic condition pursuant to § 287.020.3(3).²

¹ Commissioner Hickey dissented from the majority decision.

² Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

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The Court began its analysis of this matter by pointing out that employee's injury arose out of and in the course of employment.

Clearly, there is no question that Claimant would have sustained an injury arising out of and in the course of his employment absent the finding regarding his idiopathic condition. The injury, as defined by section 287.020.3(5), was the "violence to the physical structure of the body." The cough did not cause the physical violence to the body structure. Furthermore, an accident is defined as an "unexpected traumatic event or unusual strain identifiable by time and place of occurrence . . . caused by a specific event during a single work shift." Section 287.020.2. The cough was not an unexpected traumatic event or unusual strain identifiable by time and place of occurrence. The truck accident was the unexpected traumatic event. The truck accident caused the violence to the body structure. There is no claim that the injury came from a hazard or risk unrelated to the employment to which Claimant was equally exposed outside of and unrelated to the employment in normal non-employment life. Therefore, because Claimant met his burden in establishing that he sustained an injury arising out of and in the course of his employment, we now address section 287.020.3(3).

Id. at 381.

The court then ruled that there was no evidence in the record to support a conclusion that an idiopathic condition caused the cough preceding the accident because there was no evidence that the particular cough preceding the accident was caused by some coughing condition unique to employee.

Alleged Injuries and Treatment

After the injury, employee was transported by ambulance to the emergency room where he complained of back pain and thumb pain. An x-ray of employee's low back revealed no significant fracture.

After returning to Missouri, employee was treated on November 8, 2006, by employer's doctor, Dr. Estep. Employee reported his thumb was doing better. He complained mainly of back pain beginning in the thoracic area and extending down to the sacral area. Dr. Estep diagnosed employee with a lumbar strain, sacroiliac strain and right thumb strain. Dr. Estep recommended physical therapy. Dr. Estep released employee to work with restrictions of no over-the-road driving and minimal climbing. Dr. Estep checked the box marked "Prevailing Factor" on the Workers Compensation Treatment Form of Freeman OccuMed.

Employee saw Dr. Estep again on November 10, 2006. He complained of continuing back pain as well as pain in his right rib cage. Dr. Estep diagnosed employee with a lumbar strain, sacroiliac strain, right thumb strain, and abdominal wall contusion. Dr. Estep recommended continuing physical therapy. Dr. Estep released employee to work with

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restrictions of no over-the-road driving. Dr. Estep checked the box marked "Prevailing Factor" on the Workers Compensation Treatment Form of Freeman OccuMed.

Employee attended physical therapy on November 9, 10, 13, and 14. Freeman Health System records record that a representative of employer contacted Freeman Health on the afternoon of November 14 to inform Freeman Health that employer authorized no further therapy sessions.

On November 21, 2006, employee sought treatment in Pennsylvania for his back pain from his family physician, Dr. Shetty. Dr. Shetty requested diagnostic imaging of employee's lumbar spine. The resulting MRI and x-ray revealed employee had compression fractures at L3 and L4. Dr. Shetty recommended physical therapy.

Employee saw Dr. Shetty again on December 13, 2006, at which time Dr. Shetty requested pelvis x-rays and referred employee to Dr. Flannagan, a neurosurgeon. The pelvis x-rays revealed some degenerative changes.

On January 9, 2007, Dr. Flannagan recommended TLSO bracing and x-rays. Follow up x-rays showed loss of height inferiorly in the L3 and L4 vertebral bodies secondary to the compression fractures. The brace has not been provided.

On March 7, 2007, Dr. Shetty recommended that employee be seen at a pain clinic and prescribed Percocet for pain.

Dr. Shetty's June 6, 2007, office visit record reflects that employee was still taking Percocet for pain and that employee did not want to attend a pain clinic because of the cost.

Current Symptoms

Employee testified that regarding his current symptoms. He experiences numbness in his right hand of such severity that he cannot use the hand. Employee has severe back pain. He testified that activity makes the pain unbearable. Walking, lifting, and lying in one position are all activities that increase employee's back pain. By limiting his activities and using oxycodone, employee can maintain his back pain at level 5 on average (on a scale of 1 to 10). Employee testified that he did not believe he could work a regular job from the time of the November 4, 2006, injury, through the hearing date. We find credible employee's testimony.

Expert Medical Opinions

Employee was evaluated by his expert, Dr. Swaim, on September 10, 2007. Dr. Swaim reports that employee has constant back pain. The pain is usually an aching/throbbing pain but occasionally it is a severe sharp pain. Sometimes the pain is accompanied by spasms and/or leg cramping. Prolonged sitting increases employee's back pain.

Dr. Swaim provided his opinion that employee's injury of November 4, 2006, was the prevailing factor causing employee's disc bulging and chronic lumbar pain/strain with associated muscle spasms. Dr. Swaim opined that employee is at maximum medical

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improvement with regard to his lumbar strain. Dr. Swaim provided a permanent partial disability opinion as to the lumbar injury.

Dr. Swaim opined that employee's injury of November 4, 2006, was the prevailing factor causing employee to contuse/strain the right thumb and develop a right ulnar neuropathy. Dr. Swaim opined that employee is at maximum medical improvement with regard to the right hand injury. However, Dr. Swaim was unable to provide a permanent partial disability opinion as to the right hand because employee needs an EMG/nerve conduction study to assess his ulnar neuropathy.

In addition to the EMG for employee's hand, Dr. Swaim believed employee should undergo an EMG of both legs and a Doppler study of both legs. Dr. Swaim also opined that employee should follow-up with a spine surgeon and undergo repeat lumbar spine x-rays. In employee's December 17, 2008, brief filed with the Commission, employee argued that these tests still need to be performed. But employee testified during his November 29, 2007, deposition, that he had Doppler studies performed on his right upper extremity and both legs on October 24, 2007.

Employee was evaluated by Dr. Lennard, employer/insurer's expert, in March 2008. Dr. Lennard opined that the truck accident was the prevailing factor in causing employee's L3 and L4 compression fractures as well as employee's right hand symptoms. Dr. Lennard believed employee was at maximum medical improvement. Dr. Lennard was of the opinion that employee needed no additional treatment or testing. Dr. Lennard recommends that employee avoid lifting over 25 pounds and avoid prolonged lifting. Dr. Lennard offered permanent partial disability ratings.

Conclusions

Temporary Total Disability

Employee was injured by reason of an accident arising out of and in the course of his employment on November 4, 2006. Employee did not work a regular job from the date of the accident through the hearing date and employee believes he was incapable of doing so. Employee credibly testified about the severity of his pain and the steps he takes to relieve the pain, including the daily use of narcotic pain medication.

Dr. Swaim found employee to be at maximum medical improvement on September 10, 2007. Dr. Lennard also found employee to be at maximum medical improvement when he evaluated employee in March 2008.

The purpose of temporary, total disability benefits is to cover the cost for a worker's healing period. The test is whether an employee is able to compete in the open labor market given the employee's present physical condition.

Lane v. G & M Statuary, Inc., 156 S.W.3d 498, 506 (Mo. App. 2005) (internal citations omitted).

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One

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cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. Furthermore, an employers' liability for permanent partial or permanent total disability does not run concurrently with their liability for temporary total disability.

Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 910 (Mo. App. 2008).

Based upon the foregoing, particularly employee's testimony that he was incapable of working in the months following the accident, we conclude that employee was temporarily and totally disabled from November 5, 2006, through September 10, 2007, the date on which Dr. Swaim found employee to be at maximum medical improvement. Employee is entitled to temporary total disability benefits for 44-2/7 weeks at the stipulated weekly rate of \$576.55.

Additional Medical Treatment

Dr. Swaim recommended additional diagnostic tests, some of which were performed prior to the hardship hearing. Dr. Lennard does not believe additional testing is necessary. Both Dr. Swaim and Dr. Lennard believe employee is at maximum medical improvement; that is, both medical experts believe employee is at the point where his medical conditions will not improve with further medical treatment.

Accordingly, we deny employee's request for additional medical treatment. If further diagnostic testing and monitoring is needed, it may be the proper subject of an award of future medical care when this matter is tried on final hearing.

Award

We reverse the award of the administrative law judge. Employee sustained an accident and injury arising out and in the course of his employment and there is no evidence to support a denial of compensation under § 287.020.3(3) RSMo.

We direct the employer/insurer to pay to employee \$25,532.93 for temporary total disability benefits (\$576.55 X 44-2/7 weeks).

John Christiansen, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued October 1, 2008, is attached hereto solely for reference.

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Any past due compensation shall bear interest as provided by law.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

Given at Jefferson City, State of Missouri, this 7th day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David Taylor

Injury No. 06-104584

Dependents: N/A

Employer: Contract Freighters, Inc.

Additional Party: Second Injury Fund

Insurer: Con-way Truckload, Inc.

Hearing Date: July 25, 2008

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

Checked by:

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? N/A
3. Was there an accident or incident of occupational disease under the Law? N/A
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? N/A
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
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: \$577.47
16. Value necessary medical aid paid to date by employer/insurer? \$1495.27

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$666.41
- 19. Weekly compensation rate: \$576.55
- 20. Method wages computation: STIPULATED

COMPENSATION PAYABLE

- 21. Amount of compensation payable: -0-
 - Unpaid medical expenses: N/A
 - N/A weeks of temporary total disability (or temporary partial disability)
 - N/A weeks of permanent partial disability from Employer
 - N/A weeks of disfigurement from Employer
- 22. Second Injury Fund liability: NO

TOTAL: -0-

- 23. Future requirements awarded: NO

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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Taylor

Injury No. 06-104584

Dependents: N/A

Employer: Contract Freighters, Inc.

Additional Party: Second Injury Fund

Insurer: Con-way Truckload, Inc.

Hearing Date: July 25, 2008

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

Checked by:

AWARD ON HEARING

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on July 25, 2008. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about August 25, 2008.

The employee appeared personally and through his attorney John Christiansen, Esq. The employer appeared through its attorney, Greg Carter, Esq. The Second Injury Fund appeared through its attorney, Christina Hammers, Assistant Attorney General.

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

- (1) On or about November 4, 2006, Contract Freighters, Inc. ("CFI") was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured.
- (2) On the alleged injury date of November 4, 2006, David Taylor was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The contract of employment for the above-referenced employment by and between David Taylor and CFI was made in Joplin (Jasper County), Missouri. The parties agree to venue lying in Newton County, Missouri. Venue is proper.
- (4) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

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- (6) At the time of the claimed accident, the claimant's average weekly wage was sufficient to allow a compensation rate of \$666.41 for temporary total disability compensation, and the compensation rate of \$376.55 for permanent partial disability compensation.
- (7) Temporary total disability compensation has been provided by the employer in the amount of \$577.47, representing 6/7 weeks in temporary total disability compensation.
- (8) The employer has provided medical treatment to the employee, having paid \$1,495.27 in medical expenses.

The sole issues¹ to be resolved by hearing include:

- (1) Whether the employee sustained an accident on or about November 4, 2006; and, if so, whether the accident arose out of and in the course of the employee's employment with CFI?
- (2) Whether the alleged accident of November 4, 2006, caused the injuries and disability for which benefits are now being claimed?
- (3) Whether the employee has sustained injuries that will require medical care in order to cure and relieve the employee of the effects of the injuries?
- (4) Whether the employee is entitled to temporary disability benefits? (The employee seeks payment of temporary total disability compensation for the period of November 4, 2006 to the present, and continuing indefinitely into the future, less credit of \$577.47.)
- (5) Whether the employer and insurer are obligated to pay for certain past medical care and expenses?
- (6) Whether the claimant sustained any permanent disability as a consequence of the claimed accident; and, if so, what is the nature and extent of the disability?
- (7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

¹ The parties agree that issues 5, 6, 7, and 8 would be deferred pending a final hearing, in the event the undersigned issued a temporary or partial award.

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EVIDENCE PRESENTED

The employee, David Taylor, testified at the hearing in support of his claim. In addition, Mr. Taylor offered for admission the following exhibits:

- Exhibit A.....Medical Report from Truett L. Swaim, M.D.
- Exhibit B.....Medical Records from Dimmit County Memorial Hospital
- Exhibit C.....Medical Records from Freeman Health System
- Exhibit D..... Medical Records from Allegheny General Hospital
- Exhibit E.....Medical Records from Alle-Kiski Medical Center
- Exhibit F..... Letter Dated July 16, 2007
- Exhibit G..... Medical Records from UPMCHS Community Care Physicians
- Exhibit H.....Medical Records from Quest Diagnostics
- Exhibit I..... Correction Page, Deposition of David A. Taylor

Exhibits B, C, G, and H were received and admitted into evidence as to the claim involving both CFI and the Second Injury Fund. Exhibits A, D, E, and I were received and admitted into evidence as to the claim involving CFI, but denied as to the Second Injury Fund. Exhibit F was received but denied admission into evidence.

The employer and insurer presented two witnesses at the hearing of this case – Todd Rose and Troy Robertson. In addition, the employer and insurer offered for admission the following exhibits:

- Exhibit 1.....Medical Report from Ted A. Lennard, M.D.
- Exhibit 2..... Deposition of David A. Taylor
- Exhibit 3..... Notes of Conversation

Exhibit 3 was received and admitted into evidence as to the claim involving David Taylor and the Second Injury Fund. Exhibits 1 and 2 were received and admitted into evidence as the claim involving David Taylor, but denied admission as to the Second Injury Fund.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

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:

- Minute Entries
- Request for Hearing-Hardship Hearing
- Notice of Hearing
- Answer of Employer/Insurer to Claim for Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Claim for Compensation
- Report of Injury

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All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

The employee David A. Taylor is 66 years of age, having been born on July 5, 1942. Mr. Taylor is married and resides with his wife in the State of Pennsylvania. In addition, Mr. Taylor is approximately 6 feet, 0 inches, and weighs approximately 183 pounds. Additionally, Mr. Taylor is not presently employed or otherwise engaged in working.

Mr. Taylor's employment history includes working as an over-the-road truck driver. Notably, Mr. Taylor engaged in employment with CFI as an over-the-road truck driver on two different occasions, totally 13 ½ years of employment with CFI.

On or about November 4, 2006, while engaged in his employment with CFI and driving an 18-wheeler on U.S. Highway 83, approximately 18 miles from Carrizo Springs, Texas, Mr. Taylor sustained a motor vehicle accident. Notably, at the time of this motor vehicle accident, the road and weather conditions were clear and Mr. Taylor was familiar with the road. Further, the motor vehicle accident did not involve any other vehicles. Rather, the truck ran off the road toward the right side of the road, and while Mr. Taylor attempted to correct and veer back to the left, he did not get the truck turned and onto the highway. Instead, the truck went three-quarters of a mile back through brush, a fence, and Mesquite trees. Although the truck did not roll, the accident caused significant damage to the cab, including breaking out the windshield.

Injury / Medical Care

Upon coming to a stop, Mr. Taylor climbed out of the truck, and received assistance from two young men who approached him and assisted him in getting to the back of the truck. Additionally, an ambulance was called to the scene, which resulted in Mr. Taylor receiving immediate medical attention. The emergency medical technician personnel placed Mr. Taylor on a backboard and maintained his cervical spine with placement of a c-collar and headblocks, and then carried Mr. Taylor out of the brush area to the ambulance, then transporting him by ambulance to Dimmit County Memorial Hospital.

Mr. Taylor received diagnostic care and evaluative care in the emergency room of Dimmit County Memorial Hospital. Upon concluding that Mr. Taylor had not suffered any fractures and did not present with a medical condition necessitating admission into the hospital on an in-patient basis, the attending emergency room physician discharged Mr. Taylor from the hospital. Thereafter, Mr. Taylor went to a local motel, and then had a friend or co-worker pick him up and take him to Laredo, Texas, where Mr. Taylor stayed overnight. Thereafter, the co-worker transported Mr. Taylor by tractor-trailer to Joplin, Missouri.

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While in Joplin, Mr. Taylor received a referral by CFI for evaluation with a physician (Dr. Estep) in Joplin. At the time of this visit, Mr. Taylor complained of pain of the right thumb, left lumbar spine, and left sacral area. Dr. Estep diagnosed Mr. Taylor with a lumbar strain, sacroiliac strain and right thumb strain, and prescribed conservative care that included prescription for Medrol Dosepak, muscle relaxants, and physical therapy. Mr. Taylor received this care, which included therapy for two weeks. Later, CFI terminated Mr. Taylor, resulting in Mr. Taylor returning home to Pennsylvania by bus.

During the course of Mr. Taylor's presence in Joplin, CFI performed certain investigation into the nature and cause of the motor vehicle accident. Following its investigation, CFI concluded that the incident involved an idiopathic condition and a medical concern not covered by The Workers' Compensation Law for the State of Missouri. CFI thus informed Mr. Taylor of its intention to deny liability, and its decision to not provide him with any additional medical care.

Thereafter, Mr. Taylor followed-up with his family physician (Dr. Ashok Shetty), who ordered diagnostic studies that included an MRI of the lumbar spine, and additional repeat x-rays of the lumbar spine. The diagnostic care provided through Mr. Taylor's family physician revealed compression fractures of the lumbar spine. Additionally, Mr. Taylor continued to present with lumbar pain and discomfort, as well as numbness in his right ring finger and little finger.

Mr. Taylor received a referral to a different physician for treatment of his various concerns. However, lacking insurance or sufficient money to pay for the treatment being recommended, Mr. Taylor received limited medical care. Additionally, Mr. Taylor received several referrals, which included referrals to a neurologist for his lumbar spine and the numbness in his upper extremity, a psychiatrist for depression, and a gastroenterologist for a colonoscopy.

Mr. Taylor continues to present with constant back pain, and on a scale of 1 to 10, he describes his pain at a pain level 5 all the time. Mr. Taylor notes that it does not take much activity to cause pain. Additionally, Mr. Taylor notes that he experiences numbness in his right hand. According to Mr. Taylor, his injuries cause him to have trouble in performing daily activities. Additionally, Mr. Taylor notes that, since the accident, he has not been able to drive a truck; and he has engaged in limited work, primarily working for his son, who provides favorable accommodations for him.

Truett L. Swaim, M.D., who is a physician that is board certified by American Board of Orthopedic Surgery and American Board of Independent Medical Examiners, testified by submission of his complete medical report. Dr. Swaim performed an independent medical examination of Mr. Taylor on September 10, 2007. At the time of this examination, Dr. Swaim took a history from Mr. Taylor, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Taylor, Dr. Swaim opined that the November 4, 2006 accident caused Mr. Taylor to suffer an injury in the nature of a compression fracture of the lumbar spine at the level of L3 and L4, a contusion / strain of the right thumb, and right ulnar neuropathy.

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In addition, Dr. Swaim opines that Mr. Taylor is at maximum medical improvement relative to the injuries he sustained on November 4, 2006. Dr. Swaim, however, opines that Mr. Taylor is in need of additional medical care relative to treatment of his lumbar spine and right hand. Dr. Swaim is of the opinion that the November 4, 2006 accident caused Mr. Taylor to suffer a permanent partial disability of 40 percent to the body as a whole, referable to the lumbar spine. Yet, Dr. Swaim declines to issue a disability rating for the right upper extremity, in light of Mr. Taylor needing additional medical treatment and evaluation.

Cause of Accident

At the hearing, Mr. Taylor did not offer an explanation for losing control of the vehicle, and did not recall coughing or suffering a coughing attack. However, the medical records of the emergency medical personnel indicate that Mr. Taylor lost control of the 18-wheeler because he suffered a coughing episode. In this regard, the records of the emergency response team note the cause of Mr. Taylor's presenting medical concern as follows:

[Mr. Taylor] was driving 18 wheeler, began to cough and reared off side of road.
See Exhibit B.

And, in an additional section of the above-referenced medical record, wherein Mr. Taylor is noted to have provided the emergency medical personnel a history, the attending physician notes:

Patient [Mr. Taylor] stated that he was driving on 83 north towards Asherton, he began to cough and reared off side of road into brush area.

Similarly, in reporting the history of the present illness or injury, the attending nurse providing assistance and assessment of the injury in the emergency department of Dimmit County Memorial Hospital provides a history as follows:

Chief Complaint: MVC, Driver c/o pain to mid-back
Onset: today
Data Source: EMS
History of Present Illness or Injury: went off road onto ditch lost control of truck while coughing; wearing seatbelt; ambulatory @ scene

In addition, while Mr. Taylor did not recall suffering any coughing at the time of the motor vehicle accident, Mr. Taylor acknowledges that he told, or could have told, the emergency medical personnel, as well as the other treating physicians / nurses, that he lost control of the truck while coughing. In being questioned about the number of people who report him as having stated that the motor vehicle accident occurred while he was coughing, Mr. Taylor stated that he had "no idea why he would tell them that the accident happened while coughing if it didn't happen. Additionally, Mr. Taylor acknowledges that he had to have either coughed or thought he coughed, or he wouldn't have been telling everybody he coughed.

Relative to the issue of coughing, Mr. Taylor acknowledges that he is a smoker and has smoked for many years. Similarly, Mr. Taylor acknowledges that he has a smoker's cough, and

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coughs at different times. In addressing this issue during the taking of his deposition, Mr. Taylor propounded the following testimony:

Q. Before you went off the road, did you have a problem with coughing?

A. I supposedly told somebody that I coughed. When I coughed and who I told, I really don't know.

Q. Okay.

A. I don't know that I would have said that I had a problem with coughing. I could have said I coughed. I really do not know.

Q. Do you have a smoker's cough?

A. Well, I do cough at different times. I guess you could call it a smokers' cough. I think most people that smoked 45 years probably has some sort of cough.

Q. How often do you cough when you have your smokers' cough?

A. I've talked to your for an hour and a half and I haven't coughed once, so that's my answer. I'm more apt to cough when I get nervous or overly excited or upset.

In addition, the medical records of Dr. Estep indicate that Mr. Taylor suffers from coughing, and that he lost control of the truck while coughing. In his medical note of November 10, 2006, Dr. Estep notes that Mr. Taylor "continues to have some coughing spells. [And, he] will have increased discomfort when he does cough."

Additionally, while treating with Dr. Flannagan, Mr. Taylor provided a history of "driving through Texas when something occurred in his truck which forced him from the road." And, in completing his medical history for Dr. Flannagan, Mr. Taylor notes that he is a smoker, who has smoked two packs per day for over thirty years. Additionally, Mr. Taylor notes that he previously suffered a heart attack and suffered from asthma; and he presents with a cough, shortness of breath, and frequent urinary condition.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial amendment on or about August 28, 2005. This change governs the underlying workers' compensation case, which involves an accident date of November 4, 2006.

Employee: David Taylor

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I.

Applicability of Section 287.020.3(3), RSMo

The underlying issue presented in this case involves consideration of whether the motor vehicle accident sustained by Mr. Taylor on November 4, 2006 resulted in a compensable work-related injury, as recognized in Section 287.020, RSMo. In this regard, CFI does not readily dispute that Mr. Taylor sustained a motor vehicle accident on November 4, 2006, while engaged in his employment with CFI as an over-the-road truck driver. Notably, while driving an 18-wheeler on U.S. Highway 83, approximately 18 miles from Carrizo Springs, Texas, Mr. Taylor ran off the road toward the right side of the road. He attempted to correct and veer back to the left, but did not get the truck turned and onto the highway. Instead, in losing control of his vehicle, he traveled approximately three-quarters of a mile off the highway and into a ditch, through brush, a fence, and Mesquite trees.

Yet, CFI denies liability, contending Mr. Taylor did not sustain a compensable work-related injury. In asserting its defense, CFI argues, Mr. Taylor suffered an idiopathic condition in the nature of a cough, which caused him to lose control of the 18-wheeler and to suffer the motor vehicle accident that propelled him off the highway and into a ditch, through brush, a fence, and Mesquite trees.

In asserting the compensability of his claim, Mr. Taylor contends that the burden is on CFI to prove the affirmative defense of the injury resulting from an idiopathic condition, and CFI failed to sustain its burden of proof. At best, Mr. Taylor argues, the idiopathic nature of the cough causing an accident is speculative without definitive proof. Simply stated, according to Mr. Taylor, the cause of the accident cannot be sufficiently determined, and need not be determined to be compensable under the Act.

In 2005, the Missouri Legislature amended Section 287.020.3, in part, with the inclusion of subsection (3), which states:

An injury resulting directly or indirectly from idiopathic causes is not compensable.

In addition, in defining the term "idiopathic" the Missouri Court of Appeals recently reaffirmed earlier case law defining idiopathic to mean "peculiar to the individual, innate," and need not be "inborn." *Ahern v. P&H, L.L.C.*, 254 S.W.3d 129 (Mo. App., E.D. 2008). And, in offering this definition, the Court in *Ahren* declined to limit the definition of "idiopathic" to a condition "arising spontaneously or from an obscure or unknown cause." See Merriam-Webster.

In light of the foregoing, the adjudication of this case may be resolved in light of *Ahern*. Notably, in *Ahern*, the employee fell from a roof while working as a carpenter and suffered injuries associated with the fall. Yet, the court found the injury not compensable, determining that the fall was due to a seizure unrelated to work, and the seizure constituted an idiopathic condition. In rendering its decision the court noted that, at least indirectly, the fall and resulting orthopedic injuries suffered by the employee resulted from the seizure – an idiopathic condition triggering the applicability of Section 287.020.3(3), RSMo 2005.

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Notably, in *Ahern*, the employee suffered an injury associated with the risk of his employment, while performing roofing work on a roof. Further, the injuries sustained by the employee related directly to falling off the roof, and not to the seizure. In this context, there appears to be little question that the employee in *Ahern* sustained an injury arising out of and in the course of his employment as a carpenter, while engaged in construction of a roofing project. Yet, the court determined the seizure to be responsible for causing the fall, and the seizure to be an idiopathic condition that rendered the injury not compensable under the law. Thus, implicitly, in finding the injury not compensable, the court acknowledged an indirect causal relationship existing between the orthopedic injuries and the seizure, and the applicability of Section 287.020.3(3), RSMo.

The facts of the present case are similar to *Ahern*. In the present case, Mr. Taylor suffered an injury associated with the risk of his employment, while performing over-the-road truck driving. Further, the injuries sustained by Mr. Taylor relate directly to the motor vehicle accident. Yet, the motor vehicle accident resulted from Mr. Taylor engaging in a coughing episode, which caused Mr. Taylor to lose control of his 18-wheeler, and to veer off the highway and into a ditch, through brush, a fence, and Mesquite trees.

In this regard, after consideration and review of the evidence, I find and conclude that, on November 4, 2006, while engaged in his employment with CFI, and while operating an 18-wheeler, Mr. Taylor suffered a coughing episode. Further, this coughing episode caused Mr. Taylor to lose control of his 18-wheeler, and to veer off the highway and into a ditch, through brush, a fence, and Mesquite trees. Although Mr. Taylor stated at trial that he did not know the cause of the accident, the evidence is supportive of a finding that he lost control of his vehicle as a result of coughing. In this context, Mr. Taylor told the EMTs at the scene that he started coughing and lost control of the vehicle. Similarly, Mr. Taylor told emergency room personnel at Dimmit County Memorial Hospital, Dr. Estep at Occumed, Todd Rose of CFI, and Troy Robertson of CFI, that he started coughing and lost control of the vehicle.

In addition, the evidence is supportive of a finding that the cough suffered by Mr. Taylor prior to the accident is an idiopathic condition, as defined and enunciated in *Ahern*. Mr. Taylor is a 40-plus year smoker, who suffers from a smoker's cough. He smoked in his truck and conceded that the cigarette smoking could cause him to cough. Additionally, as noted by Mr. Taylor, he suffers coughing without warning. And, the medical records of Dimmit County Memorial Hospital, dated November 4, 2006, note associated symptoms to include coughing; while Dr. Estep, in a follow-up examination, notes that, on November 10, 2006, Mr. Taylor was continuing "to have some coughing spells." Also, the medical records of Allegheny General Hospital, Patient Registration form, dated January 9, 2007, indicates that Mr. Taylor suffers from among other things, a cough and shortness of breath; although, in an office note of Dr. Shetty dated March 7, 2007, Mr. Taylor denied any shortness of breath.

Accordingly, in light of the foregoing, I find and conclude that the coughing episode is an idiopathic condition, as defined by the court in *Ahern*. Similarly, I find and conclude that the injuries sustained by Mr. Taylor resulted indirectly from the idiopathic cough. Notably, similar to the seizure in *Ahern* causing the employee to fall off the roof, Mr. Taylor's coughing episode

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caused him to veer off the highway. The indirect causal relationship between the idiopathic cough (seizure in *Ahern*) and the resulting injuries is sufficient to render the injury not compensable under Section 287.020.3(3), RSMo 2005.

Section 287.020.3(3), RSMo 2005 includes not only injuries that result *directly* from an idiopathic cause, but also injuries that result *indirectly* from an idiopathic cause. Although the Court in *Ahern* does not address specifically the implications of this statutory exclusion, the principle enunciated in *Ahern* highlights the distinction existing between a compensable injury covered under Chapter 287, RSMo, which requires the accident to be the prevailing factor in causing the employee's injury, and an indirect idiopathic injury arising under Section 287.020.3(3), RSMo. Notably, an idiopathic condition need only be a triggering or precipitating event, and not the prevailing factor, in causing indirectly an injury, rendering Section 287.020.3(3), RSMo applicable and a basis for exclusion from coverage under the Act the worker's injury.

Therefore, for the forgoing reasons, and constrained by the principle set forth in *Ahern*, I find and conclude that the November 4, 2006 accident and resulting injuries were the indirect result of an idiopathic cough, and Section 287.020.3(3), RSMo 2005 is applicable to the present case. Accordingly, the Claim for Compensation is denied. All other issues are rendered moot.

Date: ___10/1/08_____

Made by: _____/s/ L. Timothy Wilson__

L. Timothy Wilson

Chief Administrative Law Judge

Division of Workers' Compensation

Signed September 17, 2008

A true copy: Attest:

_____/s/ Jeffrey W. Buker

Jeffrey W. Buker

Director

Division of Workers' Compensation