

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

Injury No.: 00-131367

Employee: Tim Temple
Employer: Smurfit Stone Container Corporation (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 3, 2000
Place and County of Accident: Saint Louis

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 29, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge William L. Newcomb, issued November 29, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this ___9th___ day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee:	Tim Temple	Injury No: 00-131367
Dependents:	N/A	Before the
Employer:	Smurfit Stone Container Corporation	DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Self-Insured	
Hearing Date:	September 14, 2004	Checked by: WLN

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: October 3, 2000
5. State location where accident occurred or occupational disease was contracted: Saint Louis
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 claim for compensation filed within time required by Law? Yes
11. Was employer insured by the above insurer? Yes
12. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant suffered a right spontaneous pneumothorax while loosening a bolt with a wrench.
13. Did accident or occupational disease cause death? No Date of death? N/A
14. Part(s) of body injured by accident or occupational disease: alleged body as a whole
15. Nature and extent of any permanent disability:
none – Claimant settled for 15% PPD with employer, but the SIF was not a party to that settlement. Medical evidence reveals no disability from a “spontaneous pneumothorax” or that such “spontaneous pneumothorax” was work related.
16. Compensation paid to date for temporary disability: None
17. Value necessary medical aid paid to date by employer/insurer? None
18. Value necessary medical aid not furnished by employer/insurer? Zero
19. Employee's average weekly wages: Unknown
20. Weekly compensation rate: Unknown
21. Method wage computation: Unknown

COMPENSATION PAYABLE

22. Amount of compensation payable: N/A
23. Second Injury Fund liability: None

AWARD

Employee:	Tim Temple	Injury No: 00-131367
Dependents:	N/A	Before the
Employer:	Smurfit Stone Container Corporation	DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Self-Insured	
Hearing Date:	September 14, 2004	Checked by: WLN

PRELIMINARIES

The Claimant was represented by Shaun Falvey and the Second Injury Fund was represented by Jill Selzer. The Claimant against the Employer had been settled. The Second Injury Fund was not a party to that settlement. No issues had been previously adjudicated.

ISSUES

1. Was the Claimant injured in an accident arising out of and in the course of his employment?
2. Was the Claimant's alleged injury medically caused by Claimant's work?
3. Is the Second Injury Fund liable for permanent partial disability, and if so, what is the nature and extent of that liability?
4. Is the Second Injury Fund liable for permanent total disability?
5. What is the Claimant's average weekly wage and resulting benefit rates?

EXHIBITS

The Claimant offered the following Exhibits:

Claimant's Exhibit A:	Almiron Clinic Records
Claimant's Exhibit B:	St. Anthony's Medical Center records
Claimant's Exhibit C:	Cedar Hill Medical records
Claimant's Exhibit D:	Cardio Thoracic Surgery records
Claimant's Exhibit E:	St. Luke's Hospital records
Claimant's Exhibit F:	Dr. Ojile medical records
Claimant's Exhibit G:	report cards (not admitted)
Claimant's Exhibit H:	Jefferson Memorial Hospital records
Claimant's Exhibit I:	Stipulation for Compromise Lump Sum Settlement
Claimant's Exhibit J:	Deposition of Timothy G. Lalk
Claimant's Exhibit K:	Deposition of Dr. Poetz

The Second Injury Fund offered the following Exhibits:

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

1. On October 4, 2000, Claimant was using a large wrench to “yank” a bolt loose on a press machine when he felt a sharp pain in the right side of his chest and heard a gurgling sound. Claimant sought treatment at Jefferson Memorial Hospital and he was diagnosed with “spontaneous right pneumothorax” and was treated with a right tube thoracostomy. A “spontaneous right pneumothorax” is a collection of gas in the pleural space (the space surrounding the right lung).
2. Claimant’s treating doctors diagnosed a “spontaneous right pneumothorax” and began treatment with the placement of tube into the lung to inflate it. The Claimant was kept in the hospital to see if this treatment would resolve his collapsed lung. On October 10, 2000 the doctors believed the leak was reoccurring and surgery was performed. Dr. Suen performed a right thoractomy with bleb resection and abrasive pleurodesis. ^[1]
3. Claimant testified he tried to go back to work but he could not stand the pain resulting from his 2000 injury and because he missed so much work he was eventually fired.
4. Currently, Claimant experiences shortness of breath with exertion such as climbing stairs or running. He also experiences pain and cramping in his chest when he tries to take a breath as well as low back pain running down his left leg into his ankle. He stated that his back pain worsens with any activity. Walking and weight bearing activity significantly increases his pain level. His pain radiates down his pelvis and he maintains that it is completely unbearable. He also testified that his back pain intensifies with any significant movement of his legs. Claimant also experiences pain in his left shoulder when he tries to raise his arm. He experiences spasms in his shoulder blades and stiffness in his neck. He has the same complaints in his right shoulder but they are not as severe.
5. Claimant is currently thirty-five years old and has not worked since he was fired. He dropped out of school in the eighth grade and has worked as a press operator since 1996. Claimant settled his claim with the Employer for the October 2000 injury for 12.5% PPD BAW (lungs) in the amount of \$15,713.00. This stipulation was offered and admitted into evidence by Claimant.
6. Claimant testified about his past medical history: surgery for a hernia repair, hemorrhoidal surgery in 1994, bilateral knee problems and laminectomy in 1995. On August 31, 1999 Claimant was involved in a motor vehicle accident. He was diagnosed with left shoulder strain and low back radicular complaints. The MRI findings stated that Claimant’s “supraspinatus muscle is somewhat large and is narrowed by the acromion process somewhat. This could lead to impingement syndrome.” The MRI also revealed “no evidence of a complete rotator cuff tear.” Claimant underwent physical therapy and returned to work on 10/6/1999. Dr. Brewer, Claimant’s treating physician, did not place any restrictions on Claimant when he released him to work. No corresponding direct medical records were introduced into evidence for these injuries.
7. Claimant offered the testimony of Dr. Robert Poetz. Dr. Poetz wrote three reports dated January 4, 2002, August 20, 2002 and July 21, 2004. Such reports were based on Dr. Poetz’s physical examination and Claimant’s statements to the doctor. No testimony was presented that the doctor based his opinion in part on medical records as there is no indication that medical records were provided to the doctor. Dr. Poetz January 4, 2002 report found a 40% PPD BAW directly related to the October 4, 2000 injury, 35% PPD BAW (lumbar) preexisting and 20% PPD left shoulder preexisting. Dr. Poetz second report dated August 20, 2002 that Claimant’s chief complaints at his third evaluation were sharp pains in the lungs, shortness of breath and stiffness in the lower back that increases with activity. Dr. Poetz also stated that Claimant had been involved in a *subsequent motor vehicle accident* that had “increased his symptoms in his neck and back since this time.” (My emphasis). Dr. Poetz testified that his diagnoses added Claimant’s left shoulder impingement and mild chronic obstructive pulmonary disease. He opined that Claimant is *at temporary total disability until Claimant quits smoking* and his lungs and back are reevaluated (my emphasis).

8. Dr. Poetz's third report was dated July 21, 2004 and it stated that Claimant's chief complaints at his third evaluation were problems with his knees locking up, pain in both of his shoulders and the inability to raise his left arm up due to pain. Claimant also testified that his low back hurts constantly and that he had radiating pain down his left leg, shortness of breath and the inability to walk long distances. Dr. Poetz found the Claimant permanently and totally disabled as a direct result of his October 2000 injury in combination with his preexisting injuries.
9. In his January 3, 2003 report, Dr. Thomas Dew, retained by Claimant, stated that Claimant developed his pneumothorax due to his underlying condition of eosinophilic granulomas of his lung, which leads to cyst-like structures in his lungs. The doctor opined that Claimant's October 2000 injury was the result of one of his cysts being ruptured causing the development of a subsequent pneumothorax. He opined that Claimant had no ongoing disability as the surgery corrected Claimant's problem. However, the doctor stated that Claimant has two lung diseases, neither of which were related to his employment.
10. Dr. Ojile, in his May 15, 2002 letter stated there was no relationship between the Claimant's employment and his pulmonary emphysema and his bleb formation. Further he had stated there was a "slight possibility" that the pneumothorax may be a result of the sudden physical stress exerted at the time of the incident, but otherwise "I do not believe there to be a direct cause to his workplace environment. Certainly, there is no relationship at all with the bleb formation, emphysematous physiology or his chronic obstructive lung disease to his workplace." On August 16, 2002 he supplemented this earlier letter and stated that "the physical stress exerted by Mr. Temple at the time of the incident was not a substantial factor in the development of his pneumothorax."
11. Dr. Mark Breite in his October 10, 2000 report gave two impressions. The first impression was spontaneous pneumothorax with an "etiology secondary to rupture of bleb. Differential diagnosis includes F1 antitrypsin deficiency, eosinophilic granuloma and congenital paraseptal emphysema as well. A pathology report from or for Dr. Kurzweil was made on October 10, 2000 of a section of the Claimant's lung and he found the lungs were "fibrosis near the pleura which is also fibrous and associated variably sized cyst-like spaces or blebs. There were a few lymphoid aggregates present."
12. Tim Lalk, a vocational rehabilitation counselor, testified that when he was asked to evaluate the Claimant's vocational abilities in August of 2004, Mr. Temple's statements to him concerning his current symptoms and limitations were such that Lalk determined him not able to secure and maintain employment in the open labor market and unable to compete for any position. Mr. Lalk added he could not recommend vocational rehabilitation for the Claimant unless his symptoms could be controlled and/or he improved his reading abilities so that he could function in a sedentary position.

RULINGS OF LAW

Based upon the above findings of fact, I find:

Accident, Injury, Medical Causation And Primary Disability.

Although the Claimant reached a settlement with his Employer, the settlement was not res adjudicata for the Second Injury Fund. The Second Injury Fund could assert any defenses to prevent the imposition of liability upon them. If an injury did not occur from an accident arising out of and in the course of Claimant's employment or if said injury was not disabling, then there can be no Second Injury Fund liability for without a primary compensable injury there can be no combination of injuries.

The Claimant presented the following medical evidence in his Exhibits:

- A. Jefferson Memorial treating records in which Dr. Kurzweil state the Claimant presented with a "right spontaneous pneumothorax." Dr. Mark Breite in his October 10, 2000 report gave two impressions. The

first impression was “spontaneous pneumothorax” with an “etiology secondary to rupture of bleb. Differential diagnosis includes F1 antitrypsin deficiency, eosinophilic granuloma and congenital paraseptal emphysema as well. A pathology report from or for Dr. Kurzweil was made on October 10, 2000 of a section of the Claimant’s lung and he found the lungs were “fibrosis near the pleura which is also fibrous and associated variably sized cyst-like spaces or blebs. There were a few lymphoid aggregates present.”

- B. Dr. Ojile, in his May 15, 2002 letter stated there was no relationship between the Claimant’s employment and his pulmonary emphysema and his bleb formation. Further he had stated there was a “slight possibility” that the pneumothorax may been a result of the sudden physical stress exerted at the time of the incident, but otherwise “I do not believe there to be a direct cause to his workplace environment. Certainly, there is no relationship at all with the bleb formation, emphysematous physiology or his chronic obstructive lung disease to his workplace.” Further, Dr. Ojile stated he did “not find any residual, and in giving this patient a rating for Pulmonary would rate him as 0% permanent partial disability as related to this incident.” On August 16, 2002 he supplemented this earlier letter and stated that “the physical stress exerted by Mr. Temple at the time of the incident was not a substantial factor in the development of his pneumothorax.”
- C. Dr. Thomas Dew in his January 2003 letter to Claimant’s attorney states that the Claimant was performing hard manual labor when cyst in his lung ruptured. He stated this cyst existed from an underlying lung condition of eosinophilic granulomas. When this cyst ruptured the Claimant developed a pneumothorax and ultimately needed surgery. Dr. Dew said the Claimant “has no ongoing disability at the present time from his pneumothorax.” He did find however, that the Claimant “has two lung diseases, neither of which is related to his employment.” Further Dr. Dew noted that the Claimant “continues to smoke cigarettes and he is developing chronic obstructive pulmonary disease that is related to his cigarette smoking.” Dr. Dew further found that Claimant continues to have the underlying lung disease of eosinophilic granulomas and that from a pulmonary viewpoint hard manual labor would result in the possibility of developing a recurrent pneumothorax.

Doctor Dew, Dr. Ojile, Dr. Kurzweil and Dr. Mark Breite developed an explanation of what happened with Claimant’s lungs. Dr. Poetz did not. The Claimant suffered from ongoing lung diseases, eosinophilic granuloma and chronic obstructive pulmonary disease as a result of his smoking cigarettes. The eosinophilic granuloma produced cysts. Dr. Dew opined that when a cyst ruptured the Claimant developed a pneumothorax and ultimately needed surgery. This was the spontaneous pneumothorax. Dr. Ojile stated that he did not believe there was any relationship to Claimant’s employment and his bleb formation and emphysema. As to the yanking of a bolt, he stated within a reasonable degree of medical certainty there was a “slight possibility but not a substantial factor” in causing the pneumothorax. Subsequently he clarified this and said Claimant’s work incident was not a substantial factor in the development of his pneumothorax. Dr. Dew suggested the hard manual labor could “help cause” the spontaneous pneumothorax but the pneumothorax resulted in no disability. He stated the disability was Claimant’s preexisting ongoing lung diseases, eosinophilic granuloma and chronic obstructive pulmonary disease. Based upon this competent and substantial evidence, I find the Claimant’s work was not a substantial factor in causing Claimant’s “spontaneous pneumothorax” nor did it result, itself, in any permanent disability. The Claimant had a serious preexisting lung condition and this condition was the substantial factor in causing his spontaneous pneumothorax not his work activities. Because of the lack of a disabling primary work injury, I find that the Second Injury is not liable. All other issues are moot.

Date: _____ Made by: _____

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Gary Estenson
*Director
Division of Workers' Compensation*

[1] A lung biopsy taken at the time of surgery revealed Claimant had an underlying lung disease called eosinophilic granuloma.