

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

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

Injury No.: 01-169155

Employee: Michael Tyree
Employer: Jefferson Smurfit Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged September 28, 2001
Place and County of Accident: Alleged Franklin County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 9, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued May 9, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Michael Tyree

Injury No. 01-169155

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: None

Employer: Jefferson Smurfit Corporation

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: February 6, 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 September 28, 2001
5. State location where accident occurred or occupational disease was contracted: Franklin 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? 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:
Occupational disease alleged due to repetitive motion.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Alleged body as a whole referable to cervical spine, back, shoulders, arms and hands.

- Nature and extent of any permanent disability: Undetermined

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? Alleged \$39,414.81

18. Employee's average weekly wages: \$871.31

19. Weekly compensation rate: \$580.88 TTD/\$329.42 PPD

- Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: 0

Unpaid medical expenses: 0

0 weeks of temporary total disability (or temporary partial disability)

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: Michael Tyree

Injury No: 01-169155

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

Dependents: None
Employer: Jefferson Smurfit Corporation
Additional Party Second Injury Fund
Insurer: Self-Insured

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing in the above-referenced case was held before the undersigned Administrative Law Judge on February 6, 2008 Franklin County, Missouri. Michael Tyree (Claimant) was present, and represented by Ronald Edelman and Jeff Estes. Peggy Hecht represented Jefferson Smurfit Corporation (Employer), Employer is self-insured. Assistant Attorney General Jennifer Sommers represented the Second Injury Fund (SIF). The parties requested a final award.

The parties entered into the following stipulations: Claimant was an employee of Employer; Venue is proper in Franklin County, Missouri; The Claim was filed within the time prescribed by law; The average weekly wage at the date of injury was \$871.31, resulting in compensation rates of \$580.88 for temporary total disability (TTD), and \$329.42 for permanent partial disability (PPD); Employer has not paid any benefits to date.

The following issues were presented for resolution. Notice; Occupational disease; Medical Causation; Employer's liability for future medical treatment; Employer's Liability for past medical bills in the amount of \$39,414.81; Nature and extent of claimant's disability; Liability of the Second Injury Fund.

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 contained 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 were ignored by the undersigned ALJ in reaching any decision on the issues presented in this case.

Claimant offered the following Exhibits:

- A) Certified copy of the Division's Workers' Compensation file on Injury No. 01-169155;
- B) Deposition transcript of Dr. Poetz;
- C) Deposition transcript of Gary Weimholt;
- D) Medical records of Dr. Anthony Guarino;
- E) Medical records of Dr. Duane Turpin;
- F) St. John's Mercy Hospital records of October 12, 2001;
- G) Medical records of Dr. Robert Dunn;
- H) Medical records of Dr. Glenn Calvin;

- I) Deposition transcript of Dr. Raymond Cohen;
- J) Medical records of Dr. Sanjay Ghosh;
- K) Medical records of Dr. Karl Jacobs;
- L) Medical records of Missouri Baptist Hospital;
- M) Medical records of Dr. Wanda Rogers;
- N) Medical records of Dr. Clinton Hayes;
- O) Medical report of Dr. Joseph Long;
- P) Itemized statement of Dr. Anthony Guarino in the amount of \$16,257.00;
- Q) Itemized statements from Barnes-Jewish West County Hospital in the amount of \$23,091.81;
- R) Wage records of Michael Tyree; and
- S) Collection letter from Nicholas Higgins.

Employer/Insurer offered Exhibit 1, the deposition testimony of Dr. Michelle Koo. SIF offered Roman Numeral I, deposition transcript of Claimant's testimony given on September 8, 2003.

Claimant testified on his own behalf at hearing. Claimant is a 44 year old divorced man with no dependents. He is not currently employed and receives social security disability. He last worked on September 28, 2001. That position was with Employer. He worked for Employer from April, 2000 through September 28, 2001. Claimant completed the tenth grade and later received a GED. He subsequently attended technical school and received training as an auto mechanic. Prior to working for Employer, he had been employed as an auto mechanic and a fork truck mechanic. In 1999, he was working for G & J Industrial as a fork truck mechanic and injured his low back. A claim has been filed in that case which is still pending.

Claimant had two positions with Employer. First he worked on the assembly line. His duties were to inspect the finished product, which were cereal boxes and cardboard beer containers, and pack them into boxes. The boxes weighed 20 to 40 pounds. Claimant was also required to assemble the boxes in which the various packaging products were to be loaded. In the last three months of his employment, he worked as a shredder. The duties in the shredder position were to operate the shredding machine and to empty waste cans full of scrap into the shredder. The cans could weigh up to 120 pounds.

Claimant testified that due to his low back injury from 1999, he was had to rely on his upper body and arms more to complete his job. He testified he often worked overtime, sometimes 70 to 80 hours per week. Claimant testified he injured his hands, neck, arms, shoulders and upper back while working for Employer. He testified he had three prior automobile accidents in which he injured his neck in 1985, 1994, and 1997; and that he has had numbness and tingling in his arms and hands since 1985. Claimant testified he told his supervisor "Mike" on 2 or 3 occasions that he was having pain in his neck and arms and was told if he couldn't work he should go home. He also testified he requested medical treatment on 2 or 3 occasions.

Claimant testified that after working for employer for a couple months he began to notice abnormal symptoms in his upper body, neck, arms and hands. He testified the pain continued to increase during his employment. He ultimately stopped working there on September 28, 2001, which Claimant indicates was due to having pain, numbness and tingling in neck, shoulders, arms and hands.

Dr. Raymond Cohen testified by deposition on behalf of Claimant on May 21, 2007. Dr. Cohen examined Claimant on September 4, 2001 and March 17, 2003 in conjunction with his claim for the low back injury sustained at G & J Industrial in 1999. Dr. Cohen performed a physical exam during the 2001 evaluation. Dr. Cohen testified that the exam of Claimant's cervical spine was negative. He did not assign any disability to the cervical spine at that time. Dr. Cohen indicated Claimant "wasn't having a lot of complaints when I saw him in his neck, and the neck exam wasn't very remarkable when I saw him."

Dr. Robert Poetz testified by deposition on behalf of Claimant on January 11, 2007. Dr. Poetz examined Claimant March 14, 2006. Dr. Poetz opined Claimant suffered 25% permanent partial disability to the body as a whole measured at the cervical spine due to his employment with Employer. He further opines that Claimant is permanently

and totally disabled due to a combination of his preexisting conditions, the work injury of 1999 and the work injury of September 28, 2001.

Gary Weimholt, a vocational rehabilitation consultant, testified by deposition on behalf of Claimant on July 6, 2007. Mr. Weimholt opines that Claimant has a total loss of access to the competitive labor market. His opinion is based on Claimant's physical limitations, education, lack of transferable skills and testing results.

Dr. Michele Koo testified by deposition on behalf of Employer/Insurer on January 18, 2006. Dr. Koo examined Claimant on September 19, 2005. Dr. Koo opines that Claimant's arm and hand complaints are not related to his employment with Employer. She further opines his complaints are related to his cervical spine, and gives no opinion regarding treatment of the neck.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the competent and substantial evidence presented in this case, including the testimony of Claimant, deposition testimony of expert witnesses, records received into evidence, and my personal observations, I find:

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); *Bruflat 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). The quantum of proof of medical causation is reasonable probability. For an award of temporary disability and medical aid, proof of cause of injury is sufficiently made on reasonable probability. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1973); *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504 (Mo. App. W.D.1997).

Medical Causation

Claimant had degenerative disc disease and three prior traumatic injuries to his neck which existed prior to his employment with Employer. On March 22, 1999, Dr. Karl Jacob diagnosed Claimant with, among other things, "cervical sprain and pain" and "cervical spondylosis with myelopathy". (Exhibit K). The records of Dr. Sanjay Ghosh (Exhibit J) indicate Claimant made complaints of neck pain on several occasions in 1997 and 1998.

Despite the fact that his cervical spine conditions predate his employment with Employer, medical records contemporaneous to, and shortly after, his employment with Employer do not indicate he made complaints regarding his neck, shoulders, arms or hands during his employment. During the evaluation and exam with Dr. Cohen in September 2001, Dr. Cohen did not record any complaints regarding Claimants neck, shoulders, arms or back. The physical exam of Claimant's neck was also negative. Additionally, Dr. Duane Turpin reviewed an EMG of Claimant's upper extremities on October 10, 2001, just 12 days after Claimant stopped working for Employer, the results of which were normal. (Exhibit E).

Claimant's testimony during the hearing was not credible. The testimony at hearing was in conflict with testimony provided in his deposition taken September 8, 2003. Most notably, his testimony regarding the onset of symptoms is contradictory. In the deposition, he testified that his hands and arms started to go numb when he began the shredder job, then later added it occurred occasionally toward the end of the assembly line job. (Exhibit Roman Numeral I, pp. 13-14). In his testimony during the hearing, he stated the symptoms began after working a couple of months.

Further, during his testimony at hearing, Claimant testified he had reported his symptoms to his supervisor, Mike, and that he had requested medical treatment. In his deposition testimony, Claimant was asked "Did you ever report that injury to Smurfit Stone or seek any treatment from Smurfit Stone for your hands and arms?" To which he replied "I have had that problem for a long time off and on, but that job made it intensify." (Exhibit Roman Numeral

In his testimony during cross-examination, Claimant indicated a belief that he had informed Dr. Cohen, Dr. Turpin, and Dr. Dunn of his increased symptoms of pain, numbness and tingling associated with his job with Employer. Yet none of their records contain a reference to any complaints regarding increased symptoms from his work. In fact, Claimant filled out a form for Dr. Dunn's office on November 06, 2001, and when it asked if this was a "workmens comp claim", Claimant wrote "No". Dr. Dunn's notes then reflect a history of neck and low back pain "going on since 85".

Claimant testified the pain medications he takes interfere with his memory. He also testified that Dr. Gaurino prescribed heavy sedatives and a morphine patch for him in March 2002, and as a result, he does not remember what he may have told Dr. Gaurino. Based on this testimony, and the fact that his testimony regarding his symptoms while working for Employer contradicts the contemporaneous medical records in evidence, which were made much closer to the time of his employment, Claimant's testimony during the hearing is unreliable.

Claimant was evaluated by Dr. Poetz in June 2006, and the opinion of Dr. Poetz is predicated upon the unreliable history provided by Claimant. In addition, Dr. Poetz testified that multiple injury or "multitrauma" may cause the progression of the degenerative condition. As a result, the opinion of Dr. Poetz is not credible.

Based on the competent and substantial evidence, it is not reasonably probable that Claimant's employment with employer is a substantial causative factor in the condition of his cervical spine, shoulders, arms and hands. The claim for compensation is denied. All other issues are rendered moot. The claim for compensation from the Second Injury Fund is denied.

Date: May 9, 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