

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

Injury No.: 01-170109

Employee: Ray Volk
Employer: Chrysler, LLC
Insurer: Self-insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, heard oral argument and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated November 4, 2010, by issuing a separate opinion denying compensation in the above-captioned case.

I. Preliminaries

The ALJ found that employee failed to sustain his burden of proof that he developed an occupational disease while working for employer. Having made this finding, the ALJ deemed all other issues moot. While we agree with the ALJ's decision to deny compensation, we disagree with the ALJ's analysis in arriving at said decision.

II. Findings of Fact

Employee's Testimony

Employee worked for employer for 19 years. His last date of employment was July 5, 2001. When employee began his tenure with employer, he was hired for the position of material handler, where he would open parts, stock parts, and keep parts available for use on the line. Employee testified that approximately one year after he was hired he started driving a fork-lift truck in addition to his handler duties. Employee ended up holding a number of different positions with different duties while he was employed with employer, ending in a position in the paint department. Employee testified that in his various positions he used his hands, arms, legs, and back.

With regard to the alleged primary injury of bilateral carpal tunnel syndrome, employee testified that he went to a doctor for problems with his hands prior to July 2001. Employee did not give the name of the doctor he saw with regard to his hands. Employee later testified that he did not go to see a doctor regarding his hands prior to leaving Chrysler on July 5, 2001.

¹ Statutory references are to the Revised Statutes of Missouri 2000 unless otherwise indicated.

Employee: Ray Volk

- 2 -

Employee testified that after his retirement he visited employer's clinic for follow-up care starting in 2001 at a frequency of "every 3 months or every 45 days." However, employee's follow-up care was for his shoulders. He testified that he did not say anything about any pain complaints involving his wrists or hands during these visits.

Employee testified that he was first diagnosed with carpal tunnel syndrome on July 14, 2003. Employee testified that he began experiencing symptoms approximately three years before he left the employment. Employee testified that when he was diagnosed with carpal tunnel syndrome, the emphasis was on his shoulder condition. His primary problems were with his shoulders, but he was told that he would need surgery for his carpal tunnel syndrome "sooner or later." Employee had two surgeries for his carpal tunnel syndrome, one to his left wrist in 2005, and one to his right wrist in 2006. Employee testified that he never went to employer's clinic with any complaints of aching, pain, or discomfort in either one of his hands prior to his carpal tunnel release surgeries.

Employee testified that he was diagnosed with avascular necrosis in his left and right hips in 1996. Employee also testified that he was diagnosed with avascular necrosis in his shoulders in 1999 or 2000. Employee testified that he had a knee injury in 1997 or 1998 for which he had surgery performed by Dr. Rende. Employee testified that he had surgeries to his left hip in 1997 and 1998. Employee had surgery to his right shoulder in 2001. Employee also testified that he was diagnosed with Klinefelter's Syndrome by Dr. Darren Pearson at some unspecified date, and was told that it is a possible cause for his avascular necrosis. The diagnosis of Klinefelter's Syndrome is not in the medical records.

Medical Records and Documents

Carpal Tunnel Syndrome

Employee complained of numbness and tingling affecting both hands, primarily the right, to Dr. David Fagan on June 30, 2003. Dr. Fagan noted that the symptoms began approximately two weeks before employee's visit. On June 30, 2003, none of the provocative tests were positive for carpal tunnel syndrome, but Dr. Fagan recommended that employee have nerve conduction tests and EMG's for further evaluation.

Employee had nerve conduction studies ordered by Dr. Fagan on July 14, 2003. He was diagnosed with carpal tunnel syndrome by Dr. Fagan on July 17, 2003.

In August 2003, a formal Claim for Compensation was filed by employee alleging bilateral carpal tunnel syndrome with a date of disability of May 1, 2003.

Employee followed up with Dr. Susan Mackinnon on October 7, 2004. Dr. Mackinnon noted that employee reported that his symptoms started in 2000 and had increased significantly. Dr. Mackinnon noted that employee would likely need bilateral carpal tunnel releases. Dr. Mackinnon made no reference to his employment with employer being related to his bilateral carpal tunnel syndrome or need for surgical releases.

Dr. Mackinnon performed a left carpal tunnel release surgery on August 2, 2005. On April 18, 2006, Dr. Mackinnon performed a carpal tunnel release surgery on employee's

Employee: Ray Volk

- 3 -

right wrist. On July 26, 2006, Dr. Mackinnon released employee from care stating that "he really has no complaints" following the surgeries.

Avascular Necrosis

Employee was diagnosed with avascular necrosis in multiple joints by Dr. Rende. On May 14, 1998, employee had a total hip replacement of his left hip by Dr. Rende. On November 16, 1998, employee was released to work and was doing well both symptomatically and clinically.

Employee was treated for right shoulder pain in June 1997. He was referred to physical therapy for conservative treatment. Employee later treated with Dr. Rende regarding this shoulder pain. On May 31, 2001, employee visited Dr. Ken Yamaguchi regarding his right-sided shoulder pain. Dr. Yamaguchi indicated in his notes that employee's pain had been a problem for "the last three years." Dr. Yamaguchi also noted that "[t]he etiology of his avascular necrosis is unknown at this time, although the only possibility is that [employee] was a severe drinker at one point. Employee reported a history of alcohol abuse to Dr. Yamaguchi. Dr. Yamaguchi noted that employee stated he was a spray painter, and used his left shoulder primarily in his job. Dr. Yamaguchi performed the right shoulder hemiarthroplasty on July 17, 2001.

On May 15, 2003, employee had a total shoulder arthroplasty for his left shoulder performed by Dr. Rende. On September 16, 2004, Dr. Rende noted in follow-up that employee was doing well both clinically and radiographically in regards to his shoulder.

On March 29, 2006, employee returned to see Dr. Yamaguchi with pain complaints regarding his left shoulder. Dr. Yamaguchi noted that employee reported he was recently diagnosed with Klinefelter's Syndrome with an extra chromosome affecting long bones and it is stated that this may have a possible relationship to his avascular necrosis. There is no name of a doctor listed in regards to this diagnosis, and no records evidence this diagnosis.

On June 6, 2006, Dr. Yamaguchi performed a shoulder revision total shoulder arthroplasty on employee's left shoulder. On June 14, 2006, one week following the revision, employee reported no pain.

Knee Injury

Employee suffered from a left knee lateral meniscus tear and chondromalacia. On March 13, 1997, Dr. Rende performed surgery on employee's left knee, a partial lateral meniscectomy chondroplasty of the patella, and chondroplasty of the femoral trochlea. Employee was released to work on October 30, 1997, after reporting that his knee was doing very well.

Expert Opinions

Dr. Jacques Van Ryn testified on behalf of employee by deposition on July 23, 2010. Dr. Van Ryn evaluated employee on June 10, 2010. Dr. Van Ryn reported reviewing the records regarding employee's treatment from 1996 to present. Dr. Van Ryn testified that employee's symptoms regarding his carpal tunnel syndrome began in

Employee: Ray Volk

- 4 -

approximately 1999. Dr. Van Ryn did not ask employee if his symptoms in his body parts from his avascular necrosis had gotten better, worse, or stayed the same as they were in June 2001. However, Dr. Van Ryn testified that according to the records, his pain symptoms had gotten worse in the affected body parts. Dr. Van Ryn opined that the work employee performed while at employer is the “predominant prevailing factor and the causation of bilateral ulnar and carpal tunnel syndromes.”

With regard to the primary injury, Dr. Van Ryn opined that employee is 15% permanently partially impaired of both the right and left upper extremities rated at the wrists due to his carpal and ulnar tunnel syndromes. With regard to employee’s preexisting conditions, Dr. Van Ryn opined that employee is 50% permanently partially impaired of the upper left extremity rated at the shoulder, 20% permanently partially impaired of the upper right extremity rated at the shoulder, 25% permanently partially impaired of the lower left extremity rated at the hip, 10% permanently partially impaired of the lower left extremity rated at the knee, and 5% permanently partially impaired of the body as a whole due to his degenerative cervical disc disease. Dr. Van Ryn also noted that employee has significant medical disease including diabetes, sick sinus syndrome, and has a pacemaker; however, he did not assign a disability rating for these preexisting conditions.

Dr. Van Ryn concluded that “as a result of the bilateral carpal tunnel and ulnar tunnel syndromes combined with his extensive preexisting medical condition has caused [employee] to be unable to do any gainful employment. He cannot compete in the open labor market. Therefore[,] he is permanently completely disabled for work.”

Ms. Delores Gonzalez, a vocational expert, testified by deposition on behalf of employee on July 26, 2010. Ms. Gonzalez evaluated employee on September 15, 2006 and November 24, 2006. Ms. Gonzalez opined that based on a combination of employee’s physical ailments and conditions and his vocational background, he is unable to engage in substantial gainful activity.

Ms. Gonzalez testified that her opinion that employee is not employable is based in part on how he presented physically as of the date she saw him in 2006. Ms. Gonzalez did not ask employee if his preexisting conditions got better, worse, or stayed the same after the primary injury date of July 5, 2001.

III. Conclusions of Law

Employee alleges his bilateral carpal tunnel syndrome is an occupational disease which he incurred while working for employer. Employee further alleges that his carpal tunnel syndrome combines with his preexisting disabilities to render him permanently and totally disabled. Employee seeks permanent partial disability benefits against employer for his carpal tunnel syndrome and permanent total disability benefits against the Second Injury Fund.

Before determining Second Injury Fund liability, an employee “must establish that he or she sustained a compensable [primary] injury and that the injury caused the requisite level of permanent partial disability.” *Nance v. Treasurer of Missouri*, 85 S.W.3d 767, 771 (Mo. App. 2002).

Employee: Ray Volk

- 5 -

In this case, employee alleges that his primary injury is the occupational disease of carpal tunnel syndrome. Section 287.067.1 RSMo defines occupational disease as:

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.

Section 287.067.2 RSMo goes on to provide that “[a]n occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable....” Therefore, an employee must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life.

The Courts have stated that the determinative inquiry with regard to occupational diseases involves two considerations: “(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort.” *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo. App. 1991) (citations omitted).

In this case, we find that employee has failed to satisfy his burden that his carpal tunnel syndrome was caused by his work activities with employer.

First of all, there are numerous inconsistencies related to employee’s alleged onset date of his carpal tunnel syndrome. Employee last worked for employer on July 5, 2001. Claimant filed a claim for benefits more than two years later alleging his carpal tunnel syndrome was caused by his employment with employer and that the onset date was May 1, 2003. Claimant later filed an amended claim alleging that the onset date was actually July 5, 2001, his last day of work. Employee then testified that he began experiencing symptoms three years before he left his employment with employer (approximately July 1998).

Dr. Fagan noted that employee’s symptoms began two weeks before June 30, 2003 (June 16, 2003). Dr. Mackinnon noted an onset date of sometime in 2000. Dr. Van Ryn testified that employee denied any prior problems with his hands before approximately 1999. Dr. Van Ryn also noted in his report that a March 9, 2004, report from Dr. Barry Feinberg indicates an onset date of May 2003.

While the onset date inconsistencies alone may be enough to find that employee is not credible and has failed to satisfy his burden of proving his carpal tunnel syndrome is work-related, we also find that the record lacks the requisite medical evidence linking employee’s conditions of employment to his carpal tunnel syndrome.

Employee: Ray Volk

- 6 -

Although employee testified that he had symptoms of carpal tunnel syndrome up to three years before last working for employer in July 2001, he never went to a physician regarding these problems, he never told the doctors or nurses at employer's clinic about these problems, and he had no diagnosis of carpal tunnel syndrome prior to seeing Dr. Fagan on June 30, 2003. In addition, when Dr. Fagan did diagnose employee's carpal tunnel syndrome, he noted that the symptoms of numbness and tingling started just two weeks before June 30, 2003. There was no mention at all of any history of work-relatedness during this visit.

The preliminary diagnosis of carpal tunnel syndrome was then confirmed by nerve conduction studies performed on July 14, 2003. None of the records related to these nerve conduction studies discuss his carpal tunnel syndrome being related to his work with employer.

Employee then followed-up with Dr. Mackinnon who performed carpal tunnel release surgeries on both his right and left wrists in 2005 and 2006, respectively. None of Dr. Mackinnon's records discuss his carpal tunnel syndrome being related to his work with employer.

The first reference to employee's carpal tunnel syndrome being work-related is his formal Claim for Compensation filed in August 2003. The only medical opinion of causation between employee's work activities and his bilateral carpal tunnel syndrome is in Dr. Van Ryn's independent medical evaluation report. Dr. Van Ryn saw employee on one occasion, June 10, 2010, nine years after he ceased working for employer. Dr. Van Ryn reviewed employee's voluminous medical records dating back to 1996, but did not note any work-related medical history prior to the filing of employee's formal claim.

Dr. Van Ryn appears to have heavily relied on employee's subjective history, given nine years after he left his employment, that his hand pain "probably" started in about 1999. Dr. Van Ryn took this history, characterized his paint spraying for employer as a "repetitive motion activity", and ultimately concluded that employee's work activities with employer were the predominant prevailing factor in causing his bilateral carpal tunnel syndrome. Dr. Van Ryn came to this conclusion despite the numerous inconsistencies regarding the symptom onset date and the fact that no treating doctor had found, or even mentioned, that his carpal tunnel syndrome was work-related. We do not find Dr. Van Ryn's opinions credible.

"In a workers' compensation case, the claimant carries the burden of proving all essential elements of the claim." *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195, 198 (Mo. App. 1990). To prove causation "[a] claimant must submit medical evidence establishing a probability that working conditions caused the disease...." *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 698 (Mo. App. 1999). In this case, we find that the only medical evidence establishing a probability that employee's working conditions caused his carpal tunnel syndrome is not credible. Therefore, we find that employee failed to satisfy his burden of proof that he sustained an occupational disease which arose out of his employment with employer.

Employee: Ray Volk

- 7 -

Because we find that employee failed to prove that he sustained a compensable primary injury, we also find that there is no Second Injury Fund liability and all other issues are moot.

IV. Decision

As stated above, the Commission agrees with the conclusions reached by the ALJ and affirms the ALJ's decision by this separate opinion. Thus, employee's claims for permanent partial disability benefits against employer and permanent total disability benefits against the Second Injury Fund are denied.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 4, 2010, is affirmed, and attached to this separate opinion.

Given at Jefferson City, State of Missouri, this 26th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Ray Volk

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the separate opinion affirming the award of the administrative law judge denying permanent partial and permanent total disability benefits.

William F. Ringer, Chairman

Employee: Ray Volk

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on 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 and employee should be awarded permanent partial and permanent total disability benefits.

First, there is no question that employee developed bilateral carpal tunnel syndrome, which required release surgeries in 2005 and 2006. Second, there is no question that employee is currently permanently and totally disabled and unable to compete in the open labor market. The primary issue concerning this claim is whether employee sustained a compensable primary injury. Contrary to the majority and ALJ's conclusions, it is my opinion, based upon the medical records, medical testimony, employee's testimony and the record as a whole that employee met his burden of proof regarding causation and should be awarded permanent partial disability benefits against employer and permanent total disability benefits against the Second Injury Fund.

Employee presented more than sufficient evidence to support his claim that his work activities were the cause of his carpal tunnel syndrome. Employee testified that as early as 1999, he had complaints of pain, numbness, and tingling in his fingers and the palms of his hands. Employee described his hand symptoms as being so severe that they woke him up on a nightly basis. Employee testified that his hand symptoms were ongoing while he was still employed with employer. Employee was consistent when reporting the onset of these symptoms to both Dr. Van Ryn and Ms. Gonzalez. Employee also credibly testified about the job duties he believed were the cause of his hand symptoms.

Dr. Van Ryn, a qualified orthopedic surgeon, reviewed employee's medical records dating back to 1996 and evaluated employee in person before coming to the conclusion that employee's job duties with employer, primarily his work as a paint sprayer, were a substantial factor in employee's development of bilateral carpal tunnel syndrome. Dr. Van Ryn identified specific work activities which caused employee's hand symptoms, namely his grasping and squeezing of the trigger of the paint gun, requiring the application of a significant amount of pressure, while simultaneously flexing his wrists, and pulling the hose of the spray paint gun. Neither employer nor the Second Injury Fund presented any evidence whatsoever, which contradicted the testimony and opinions of Dr. Van Ryn.

The fact that employee did not have a diagnosis of carpal tunnel syndrome until 2003 is not dispositive. Employee's burden of proof does not require that he have an occupational disease diagnosed prior to his leaving work. Employee testified that he began having symptoms in his hands and wrists three years prior to his last date of employment with employer. In addition, Dr. Yamaguchi's records reveal that on May 31, 2001, employee had pain in his right elbow and tingling in his fingers. Although carpal tunnel syndrome was not diagnosed at that time, the absence of a diagnosis does not mean that employee had not already begun developing carpal tunnel syndrome due to his repetitive work activities.

Employee: Ray Volk

- 2 -

Employee provided credible testimony regarding his repetitive work activities that caused his carpal tunnel syndrome. Employee also provided uncontradicted medical expert records and testimony linking his work activities to the development of his carpal tunnel syndrome. For the foregoing reasons, I find that employee satisfied his burden of proof with regard to causation.

I find that employee should be awarded permanent partial disability benefits against employer and permanent total disability benefits against the Second Injury Fund. As such, I would reverse the award of the administrative law judge and award employee the same.

Therefore, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member