

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

Injury No.: 08-021371

Employee: David Wallace
Employer: Chrysler, LLC
Insurer: Self-Insured c/o Sedgwick Claims Management
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 28, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued October 28, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 31st day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based 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 temporary total disability benefits and future medical benefits should be awarded.

First, there is no question that employee has a herniated disc at L3-L4 as well as degenerative changes in his lower back. However, I disagree with the administrative law judge's conclusion that said condition was not in any way caused by employee's work-related activities.

Employee alleges that his back condition is an occupational disease that was caused by his duties of employment. Section 287.067.2 RSMo. provides:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.3 RSMo goes on to list the requirements for an occupational disease caused by repetitive motion. Specifically, Section 287.067.3 states:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Employee began experiencing low back pain problems as early as July of 1999. In fact, employee visited the Chrysler Medical Center complaining of back pain thirteen times during the time period of 1999-2003. The medical records from eleven of those thirteen visits show that employee was being seen for either a new work-related back problem or in follow-up to a previous work-related back problem. Most of employee's complaints involved repetitive bending and strain on his back.

On October 30, 2000, Dr. Malak, of the Chrysler Medical Center, determined that employee's work activities did not aggravate, contribute, or cause his chronic mild on/off back pain. After this visit, employee continued to visit the Chrysler Medical Center for his ongoing back pain complaints, but also began seeing his family doctor, Dr. Schuerman.

In arguing that employee's current back pain is not work-related and is merely the result of an acute injury that occurred while employee was off work, employer points to the fact that employee did not visit the Chrysler Medical Center regarding his back pain from the time period of 2004-2007. However, employee did visit Dr. Schuerman in 2004, 2005, 2006, and 2008 regarding his back pain. Employee's treatment for his back pain has been ongoing and continuous since 1999.

Dr. Taylor, employee's expert, took a "very long and complex history of [employee's] problems that culminated in a severe exacerbation and change in symptomatology resulting in severe back and leg pain."

In addition, Dr. Taylor performed a physical examination of employee and reviewed the MRI of employee's low back. Dr. Taylor also noted that the types of movements employee was performing as part of his job as an assembly line worker, were consistent with the type of disc herniations he currently has. Dr. Taylor ultimately concluded that employee's job duties as an assembly line worker at Chrysler were the prevailing factor which caused his current back problems.

On the other hand, Dr. Chabot, employer's expert, opined that employee "may have experienced temporary exacerbations of his condition with mild strain injuries in the course of his employment," but that it was [his] "opinion that the prevailing issue responsible for [employee's] complaints is progressive degeneration involved in the lumbar spine, his age, his genetics, obesity, and general decondition...." However, on cross-examination, Dr. Chabot acknowledged that, on numerous occasions, work-related duties at Chrysler had exacerbated employee's back pain. Specifically, Dr. Chabot conceded that employee had experienced back pain from work duties on February 17, 2000, April 7, 2000, and April 28, 2000.

It is my opinion that Dr. Taylor's records and testimony are more credible than Dr. Chabot's. First, Dr. Chabot acknowledges the fact that employee's job requires lots of bending, twisting, and lifting of heavy vehicle parts. Second, Dr. Chabot further acknowledges that employee had at least three specific work-related injuries/exacerbations resulting in his back pain and eventual visit to the Chrysler Medical Center. Lastly, Dr. Chabot is of the opinion that employee currently suffers from multiple disc herniations that will require future medical treatment. However, after acknowledging all of these facts, Dr. Chabot still came to the illogical conclusion that employee's job duties were not the prevailing factor in causing his current back condition.

Dr. Taylor properly weighed the decade's worth of medical history regarding employee's work-related back problems, and came to the proper conclusion that employee's job duties were the prevailing factor in causing his current back condition.

In my opinion, Dr. Chabot failed to give the proper weight to employee's extensive work-related back pain complaints. For this reason, I find Dr. Taylor to be more credible than Dr. Chabot.

Based on the above, I believe that employee has carried his burden of establishing that his job duties at Chrysler are the prevailing factor in causing his current back condition and, as a result, employee should be entitled to temporary total disability benefits and future medical treatment to relieve his back pain. As such, I would reverse the award of the administrative law judge denying employee benefits regarding this matter.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: David Wallace

Injury No.: 08-021371

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Chrysler, LLC

Department of Labor and Industrial

Additional Party: Second Injury Fund (open)

Relations of Missouri
Jefferson City, Missouri

Insurer: Self c/o Sedgwick Claims Management

Hearing Date: July 23, 2008

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - 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
 - Date of accident or onset of occupational disease: alleged January 28, 2008
 - State location where accident occurred or occupational disease was contracted: alleged St. Louis County
 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
 - 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:
Claimant alleges he injured his back as a result of repetitive trauma at work.
 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 low back
 - Nature and extent of any permanent disability: None
 15. Compensation paid to-date for temporary disability: None
 16. Value necessary medical aid paid to date by employer/insurer? None
- Employee: David Wallace Injury No.: 08-021371
17. Value necessary medical aid not furnished by employer/insurer? None
 - Employee's average weekly wages: Unknown

19. Weekly compensation rate: \$742.72/\$389.04

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None

Weeks of permanent partial disability from Employer None

22. Second Injury Fund liability: No

Total: NONE

23. Future requirements awarded: n/a

Said payments to begin immediately 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 Wallace

Injury No.: 08-021371

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Chrysler, LLC

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

Additional Party: Second Injury Fund (open)

Insurer: Self c/o Sedgwick Claims Management

Checked by: KMH

A hearing was held on the above captioned matter July 23, 2008. David Wallace (Claimant) was represented by attorney Jennifer Finley. Chrysler (Employer) was represented by attorney Elizabeth Shocklee. The Second Injury Fund was left open.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

- Employer and Claimant were operating under the provisions of the Missouri Worker's Compensation Law on the alleged date of injury.
- Employer's liability is fully self-insured.
- Employer had notice of the alleged injury and a Claim for compensation was timely filed.
- Claimant's average weekly wage was sufficient to yield the maximum rates of compensation for TTD of \$742.72 and PPD of \$389.04.
- Employer has paid no benefits to date.

ISSUES

The parties stipulated the issues to be resolved are as follows:

- Whether Claimant's back condition is an occupational disease which arose out of and in the course of his employment.
- Whether Claimant's back condition is medically and causally related to his employment.
- Whether Claimant is entitled to future medical care.
- Whether Claimant is entitled to past and future TTD benefits.

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and all the reasonable

inferences to be derived therefrom, I find:

- Claimant is a 48 year-old male. He graduated from high school and earned some college credits. He earned a certification in substance abuse counseling, and worked five years as a counselor. He has worked for Employer on the assembly line since 1995. He earns \$28.00 an hour and worked forty hours a week plus several hours of overtime each week. He is currently not working due to his back pain and cardiac condition.
- In 2005 Claimant's job changed, and he became a Utility Worker. In order to keep the production line moving, he filled in on the line to give co-workers breaks when they had to leave early, take medical time or sick leave. He worked almost every job on the line, which includes ten to fifteen jobs.
- Many of these jobs required a lot of bending and twisting. He lifted parts and was often in awkward positions. Between 1999 and 2003, he visited Employer's medical dispensary with back complaints numerous times. He was generally given Ibuprofen and returned to work. He also saw his own doctor, Dr. Schuerman, for back pain. His doctor gave him stronger pain medication and muscle relaxers.
- Claimant did not go to Plant Medical between 2004 and 2007 for back pain. He did see his private physician Dr. Schuerman December 6, 2004, for complaints of low back pain the night before when changing clothes. Claimant explained his back hurt after a hard day at work and often bothered him when he changed clothes at night. He also saw Dr. Schuerman in January 2006 for complaints of back pain during baseball practice. There are no other visits to Dr. Schuerman for back pain until 2008. Claimant believes the change in job duties to utility in 2005 eased his back complaints.
- In November 2007, Claimant went out on disability for treatment of a heart condition. In late December, his doctor released him with no restrictions, and there is no mention of back complaints during this examination. Claimant went to Chrysler medical December 20, 2007, for a reinstatement exam. He was cleared for work, but he continued off work until January 28, 2008, due to plant closure.
- Claimant testified his back pain "flared up" in early January 2008 while he was off work. He testified he had pain and discomfort like he had before the utility job for the last five to ten years. He testified he did not have a specific incident that caused the flare-up.
- Claimant went to Dr. Schuerman January 10, 2008, with a history of back pain that had flared up 1 ½ to 2 weeks ago with pain radiating into his upper buttocks. This was while Claimant was off work due to a plant closure. Dr. Schuerman diagnosed low back pain, mechanical. He did not keep Claimant off work.
- Claimant returned to Dr. Schuerman January 25, 2008, and complained of back pain with radiation into his abdomen and groin. Dr. Schuerman ordered x-rays of his low back which revealed moderate disc disease at L3-4, mild disc disease at other levels and osteoarthritis in facet joints at L5-S1. He diagnosed degenerative disc disease of the lumbar spine. He allowed Claimant to return to work when the plant reopened January 28th.

- On January 28, 2008, Claimant returned to work as a Utility Worker performing all the jobs on his line. He worked his full shift January 28 through February 1st, and the following Monday, February 4th. He testified he was fully able to do the job, but as the first week progressed, his back got worse. He took Excedrin Back Pain, and his pain increased to the point his medications weren't effective. His pain was in the low back, both buttocks, the groin and leg.
- Claimant testified when he was working the week of January 28th, his pain felt like a stabbing that didn't stop. When he had this type of pain in the past, he took his medication and the pain stopped. He testified the pain had never been as excruciating as it was the week of January 28th. His pain was now severe and felt different than it had in the past. He felt like he had been kicked in the groin. Claimant believes something changed to make his pain worse, and his return to work January 28th caused an increase in his pain. He testified he did not return to plant medical because the only treatment they ever provided was Ibuprofen and then he was returned to work.
- Claimant testified the weekend of February 2nd and 3rd, he was in terrible, excruciating pain and could not do anything. On Monday, February 4th, he called Dr. Schuerman. The doctor advised Claimant he probably had a muscle flare-up. Claimant told the doctor he believed something was wrong and this was not his normal pain. Dr. Schuerman recommended an MRI, which was performed that day.
- The MRI revealed borderline developmental spinal stenosis with superimposed disc disease, L3-4 moderate left lateral disc and osteophyte, L4-5 broad based and central and left disc herniation.
- Claimant reported to work late in the afternoon since he was working second shift. He was able to work his normal duties, but went to plant medical due to excruciating pain. He testified plant medical did nothing for him. Claimant has not returned to work since February 4, 2008.
- On February 5th, Claimant called plant medical before his shift and spoke to Dr. Malak about the MRI results and additional treatment. He testified Dr. Malak told him he had read the MRI, and Employer would not authorize treatment because he felt the condition was not work related. The plant medical records reveal Claimant advised them his back pain started while he was off work for his heart condition. He said the back pain started slowly and kept getting worse. He advised he had back pain for several years, but nothing like this.
- Employer refused treatment, so Claimant returned to Dr. Schuerman who sent Claimant to Dr. Dave. On February 12, 2008, Dr. Dave diagnosed lumbar degenerative disc disease and lumbar spondylosis. Since Claimant was on Plavix, interventional pain management was not an option, so Dr. Dave prescribed a steroid pack. Claimant testified this didn't help, so he was referred to Dr. Taylor.
- Claimant saw Dr. Taylor in March 2008. Despite Claimant testifying his back pain developed slowly with no discrete incident, Dr. Taylor opined Claimant had an accident at work that arose in the course of his employment and recommended surgery for his herniated disc. He recommended Claimant seek a second opinion.

- Claimant saw Dr. Buchowski April 1, 2008, for a second opinion and told the doctor his back pain had worsened over the last few months. He continued to have radiating pain into his buttocks and both legs. Dr. Buchowski recommended physical therapy and evaluation by a physiatrist to determine what non-operative treatment options were available.
- On April 15, 2008, Claimant saw Dr. LaBore. He also recommended physical therapy and opined the L4-5 disc was likely causing Claimant's pain.
- In May 2008, Dr. Schuerman opined Claimant was totally disabled and had been disabled since February 5, 2008. Claimant had been to several orthopedic and pain management consultations. Dr. Schuerman found surgery was not an option until Claimant was off Plavix for one year's time.
- Claimant saw Dr. Chabot, Employer's expert, May 23, 2008. He advised Dr. Chabot his back pain was longstanding and increased in severity while off work for his heart condition. Dr. Chabot diagnosed chronic low back pain, disc degeneration and spinal stenosis. He opined the prevailing factor in the development of Claimant's condition was progressive degeneration caused by Claimant's age, genetics, obesity and general deconditioning. He also recommended pain management and possibly surgery.
- Claimant continues to see Dr. LaBore and Dr. Schuerman. He takes Vicodin and Oxycontin for his pain. He continues to have low back pain daily. Without the Vicodin, his pain is at a nine out of ten. With the Vicodin, his pain is at a three out of ten. He still has pain radiating into his buttocks and both legs. This increases if he walks or stands too much. Without his pain medications, he can only walk five to ten minutes without pressure into his low back and pain in his legs. He is able to sleep all night if he takes Oxycontin. He participates in low impact water exercise at the YMCA as recommended by his doctor.
- Claimant doesn't do anything around the house. He gained over twenty pounds in one month due to his inactivity. His low back pain affects his mood. He believes his wife is now uncomfortable with him, he has mood swings, is often angry and frustrated, and he feels abandoned by Employer.
- His typical day includes very little activity. He reads, watches TV, and plays cards with the kids instead of sports. He does very little chores around the house. He does not do any more yardwork or car repairs. He is not able to go on bike rides, go fishing, or participate in school activities with his kids.
- Claimant had no injury or treatment to his low back before working for Employer.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

- **Claimant's back condition is not an occupational disease that arose out of and in the course of his employment.**

Claimant alleges his herniated disc is the result of his job duties for Employer. Section 287.067.2 (RSMo 2005) provides in order for an injury by occupational disease to be compensable, the occupational exposure must be the prevailing factor in causing both the resulting medical condition and disability. A prevailing factor is the primary factor, in relation to any other factor. In addition, ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living are not compensable.

Claimant must prove, by medical testimony, the claimed occupational disease was caused by conditions in the work place. Claimant's medical expert is Dr. Taylor. He testified Claimant had a long and complex history of back problems that culminated in a severe exacerbation and change in his symptoms in December 2007. He opined the disc herniation was new and the performance of Claimant's job duties was the prevailing factor in causing the herniation and recent exacerbation of his low back pain. He was not able to identify a specific job duty or incident that caused the herniation. In fact, Claimant was not working in December 2007 and most of January 2008. The medical records from Claimant's treating physician document his increased back complaints while he was off work.

Employer's expert, Dr. Chabot, also noted Claimant's back complaints increased while he was off work. He diagnosed chronic back pain, disc degeneration, spinal stenosis and a disc herniation. He opined while Claimant may have experienced temporary exacerbations with mild strains in the course of his employment, the prevailing factor in causing his conditions and herniation was progressive degeneration of the lumbar spine. He also noted there is no history of a work injury at the time Claimant's herniation occurred.

I find the testimony of Dr. Chabot more persuasive, and I find Claimant did not sustain an occupational disease to his back.

Claimant has a longstanding, well documented history of intermittent back pain dating back to 1999. His back pain got better while he was on the Utility Job to the extent he did not visit the plant dispensary for three years. Claimant testified, and the medical records corroborate, his back pain "flared up" while he was off work in January 2008.

While I agree with Claimant something changed while he was off work for treatment of his heart condition, I don't believe there is sufficient evidence to support a conclusion that it was in any way work related. To the contrary, the evidence established just the opposite, to wit, that the back is not in any way related to work and arose during the two month hiatus from work. Based on this finding, there is no accident or occupational disease.

- **Claimant's condition is not medically and causally related to his work.**

Based on the above findings, the back complaints and need for back treatment are not related to anything that happened at work, rather the need for medical treatment was caused by something that happened during the two month hiatus from work.

- **Claimant is not entitled to TTD benefits.**

- **Since there is no compensable injury, Claimant's Second Injury Fund claim is hereby dismissed.**

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

Employee visited Dr. Schuerman on January 10, 2008, regarding his back pain before eventually going back to the Chrysler Medical Center on February 4, 2008, when his back pain became unbearable.