

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

Injury No.: 02-154696

Employee: Timothy P. Whitworth
Employer: Integram St. Louis Seating (Settled)
Insurer: American Casualty Company (Settled)
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. Having reviewed the evidence, read the briefs, 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 § 286.090 RSMo, the Commission affirms the award of the administrative law judge dated August 5, 2010, by separate opinion.

Introduction

The issues stipulated in dispute at the hearing were: (1) accident or occupational disease; (2) whether the accident or occupational disease arose out of and in the course of employment; (3) medical causation; (4) nature and extent of employee's primary injury; (5) Second Injury Fund liability; and (6) dependency of employee's spouse and minor child.

The administrative law judge made the following findings and conclusions: (1) employee failed to establish the existence of any accident or occupational disease; (2) employee's testimony at the hearing was not credible; (3) employee failed to prove a causal connection between his work activities and back condition; (4) Dr. Poetz's opinions in this case are not credible; and (5) employee's claim against the Second Injury Fund is denied.

Employee filed an Application for Review alleging the administrative law judge erred: (1) as a matter of law in admitting employee's entire deposition; (2) in failing to understand and address the issues of occupational disease as an aggravation of a preexisting condition; (3) in failing to address whether employee's work activities were sufficient to cause aggravation of his preexisting conditions; (4) in faulting employee for not providing evidence of other employees suffering repetitive injury from the same unsafe condition at work; (5) in reciting an ultimate conclusion of the experts in summary fashion with no analysis; and (6) in faulting employee for not relating to medical providers the causation of his condition.

The Commission affirms the award of the administrative law judge with this separate opinion.

Discussion

Admissibility of employee's deposition

Employee claims the administrative law judge erred in admitting, over employee's objection, his entire deposition without requiring the Second Injury Fund to specify what

Employee: Timothy P. Whitworth

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portion and for what purpose the deposition was offered. We disagree. Section 287.560 RSMo governs the use of depositions in workers' compensation proceedings and provides, in relevant part, as follows:

Any party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, and at his own cost to take and use depositions in like manner as in civil cases in the circuit court, except that depositions may be recorded by electronic means.

The foregoing provision directs us to the rules for using depositions in civil cases in circuit court. Missouri Supreme Court Rule 57.07 governs the use of depositions in civil court proceedings and provides, in relevant part, as follows:

Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose.

The rules are clear and offer no support for employee's position. The Second Injury Fund was entitled to use employee's deposition for any purpose at the hearing. Counsel for the Second Injury Fund offered the deposition in order to give the administrative law judge "more information." Tr. 107. This is "a" purpose, and we conclude that the deposition was properly admitted.

Employee argues further that the Second Injury Fund's attempted impeachment was improper and lacked foundational inquiry as to the time, place, and circumstances of the prior statement. Employee also argues he was deprived an opportunity to explain or rebut the alleged inconsistencies between his deposition testimony and his testimony at the hearing. Beside the fact that counsel for the Second Injury Fund *did* ask the appropriate foundational questions and employee *was* given an opportunity to explain or rebut any alleged inconsistencies, both of employee's arguments miss the point.

Employee was not impeached. For a witness to be impeached with a prior inconsistent statement, there must be a "real inconsistency" between the prior statement and the one made at trial. *Aliff v. Cody*, 26 S.W.3d 309, 319 (Mo. App. 2000). The administrative law judge appeared to find that employee was impeached because he testified to a different chronology of injuries in his deposition (where employee said the right foot was hurt *before* the back), than he did at the hearing (where employee said the right foot was hurt *after* the back). But employee is claiming a gradual onset occupational disease to his right foot. It would be consistent with the nature of gradual onset occupational diseases if employee's foot was hurting both *before and* after the alleged back accident, and thus his prior statement is not necessarily inconsistent, and we find that he was not impeached by offering a chronology at hearing different from that at his deposition.

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The problem with employee's claim is not that he was impeached, but rather that the expert testimony does not support his claim against the Second Injury Fund, as will be seen immediately below.

Second Injury Fund liability

The dispositive issue in this matter is whether employee met his burden of proving his entitlement to either permanent partial or permanent total disability benefits from the Second Injury Fund stemming from the alleged combination of his many preexisting disabling conditions with a primary injury by accident to his low back on April 9, 2002, or alternatively, an occupational disease to the low back up through August 8, 2002. Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the Fund in "all cases of permanent disability where there has been previous disability."

For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). The present claim was heard together with employee's claim for a later-in-time injury. Both of employee's experts included the later-in-time injury in their opinion that employee is permanently and totally disabled. Dr. Poetz was specifically asked whether the low back injury combined with any preexisting disability to render employee permanently and totally disabled. Dr. Poetz reiterated his opinion that it was all of employee's preexisting conditions and injuries (including the later-in-time injury) that rendered employee permanently and totally disabled. Gary Weimholt, employee's vocational expert, also lumps the primary injury together with later-in-time injuries as well as employee's preexisting conditions in reaching his opinion that employee is permanently and totally disabled. Employee testified that he thinks he is unable to work at all and described his limitations related to his back, but did not indicate which, if any, of his preexisting conditions he thinks combines with his back to render him permanently and totally disabled.

Where the uncontested expert testimony does not support a finding that employee is permanently and totally disabled due to any combination of the back injury with employee's preexisting conditions, and where employee's testimony likewise does not provide a basis for such a finding, we are persuaded that employee has failed to meet his burden of proving he is entitled to permanent total disability benefits from the Second Injury Fund in this matter. We find that employee is not permanently and totally disabled due to any combination of his primary low back injury and his preexisting conditions.

For the Fund to be liable for permanent partial disability enhancement benefits, employee must establish that the combination of the preexisting disability with the disability from the primary injury results in a greater disability than the sum of the two disabilities. See § 287.220 RSMo. Employee offers the opinion of Dr. Poetz in support of his claim (Mr. Weimholt does not address the issue of permanent partial disability enhancement). But Dr. Poetz merely rendered his conclusory opinion that the "present and prior" disabilities combine to enhance employee's overall permanent partial

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disability, without identifying *which* of employee's many preexisting conditions or the multiple primary injuries combine, let alone *how* they combine. Conclusory expert opinions that fail to provide any legitimate, persuasive explanation are generally insufficient to meet an employee's burden of proof. See *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 378 (Mo. App. 2006). Here, the problem with Dr. Poetz's combination opinions is that his report lacks any explanation or basis for them, and his relevant testimony consists almost entirely of monosyllabic responses to a series of ponderous leading questions. This evidence is not useful or persuasive and ultimately we find Dr. Poetz's opinion lacking credibility because we are unable to discern the basis for or the meaning of his opinions.

As employee recognizes in his Application for Review, this case presents medically complex issues. We are convinced that where the existence, nature, and extent of any combination of employee's low back problems with any of his many preexisting disabilities is not plainly within the realm of lay understanding, Dr. Poetz's lack of credibility (and Mr. Weimholt's failure to address the issue) is fatal to employee's claim for permanent partial disability enhancement from the Second Injury Fund. We find that any disability resulting from the primary low back injury does not combine with any preexisting disability to render employee more disabled than the sum of the two disabilities.

Given the foregoing findings, we conclude that employee failed to meet his burden of proving his entitlement to either permanent partial or permanent total disability benefits from the Second Injury Fund. All other issues are moot.

Decision

We affirm the award of the administrative law judge with this separate opinion. Employee's claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Grant C. Gorman, issued August 5, 2010, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 20th day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Timothy P. Whitworth

Injury No. 02-154696

Dependents: N/A

Employer: Integram St. Louis Seating (settled)

Additional Party: Second Injury Fund

Insurer: American Casualty Company (settled)

Hearing Date: May 3, 2010

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

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 April 9, 2002
5. State location where accident occurred or occupational disease was contracted: Alleged 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? 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 employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Alleged repetitive trauma to lumbar spine with acute injury on April 9, 2002.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged lumbar spine
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$717.16
- 19. Weekly compensation rate: \$477.63 TTD/\$329.42 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Claimant's lifetime

22. Second Injury Fund liability:

No

TOTAL: \$0

23. Future requirements awarded:

Employee: Timothy P. Whitworth

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Timothy P. Whitworth

Injury No: 02-154696

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Integram St. Louis Seating (settled)

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

Additional Party Second Injury Fund

Insurer: American Casualty Company (settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing in the above referenced case was held May 3, 2010, in Franklin County before the undersigned Administrative Law Judge. Timothy Whitworth (Claimant) was present and represented by attorney Jeff Estes. Employer/Insurer previously settled liability. The Second Injury Fund (SIF) was represented by Assistant Attorney General Jennifer Sommers. The evidentiary hearing was held in conjunction with injury # 02-154700. Mr. Estes requested a lien for attorney fees in the amount of 25% on behalf of attorney Ron Edelman.

The parties entered into the following stipulations:

1. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
2. Employer received proper notice.
3. The Claim was filed within the time prescribed by law.
4. Venue is proper in Franklin County.
5. Claimant earned an average weekly wage of \$717.16 resulting in applicable rates of compensation of \$477.63 for total disability (TTD) benefits and \$329.42 for permanent partial disability (PPD) benefits.

The following issues were presented for resolution in this hearing:

1. Accident/occupational disease.
2. Arising out of and in the course of employment.
3. Medical causation.
4. Nature and extent of Claimant's disability from the primary injury.

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5. Liability of the Second Injury Fund.
6. Dependency of spouse and minor children.

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. Certain exhibits offered into evidence may contain 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 and had no impact on any ruling in this case.

Claimant offered the following Exhibits which were received into evidence:

- A. Division of Workers' Compensation files in Injury Number 02-154696, 02-154700 and prior claims regarding Employee.
- B. Request for Statements and Proof of Service to Employer dated 8/21/2003 on the two primary claims.
- C. Deposition of Dr. Robert Poetz taken 11/01/2007. (Subject to objections contained in the deposition).
- D. Deposition of Gary Weimholt, certified vocational counselor taken 5/22/2009. (Subject to objections contained in the deposition.)
- E. St. John's Mercy Hospital Records 4/10/2002-4/13/2002 (back) and 9/25/2001 (left eye).
- F. Dr. Karl A. Jacob, C.N.S. Consultants, records 4/17/2002-5/06/2002 and 11/10/02/1998-5/11/1999 including surgery 11/19/1998 surgery records (back).
- G. Missouri Baptist Hospital, St. Louis records 11/06/1998-11/10/1998, surgery 11/09/1998 (back) and 4/19/2002 MRI lumbar spine and 4/30/2002 CT and body scan (back)
- H. Dr. John Visser records 08/02/2002-3/26/2003, surgery 08/08/2002 and 12/10/2002 (right foot)
- I. Des Peres Hospital records/Dr. Richard Lehman 05/19/2003, surgery (right ankle)
- J. Dr. John Visser records 5/31/2000-10/04/2000, surgery 07/11/2000 (right foot)
- K. Dr. Evan Crandall certificate of Destruction of Records (related to upper extremities prior work related injuries)
- L. Dr. Norbert Richardson records 12/12/1998-03/02/1999 hiatal hernia repair.
- M. St. John's Mercy, Washington Hospital Records 02/01/1999 and 02/11/1999 records relating to hiatal hernia repair and dysphagia.
- N. Dr. David Chalk records 07/13/1999-10/7/1999 right knee injury and surgery.
- O. St. John's Mercy, Washington 07/11/1999-07/27/1999 right knee injury.
- P. Dr. Charles Mannis, Metropolitan Orthopedics records 05/22/2000 and 11/17/2000 right shoulder.
- Q. Missouri Baptist Medical Center St. Louis radiology records right shoulder 05/22/2000.
- R. Dr. Michael Nogalski, St. Louis Orthopedic, Inc. records 12/17/2001-03/21/2002 right shoulder injury and surgery.

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- S. HealthSouth Surgery Center of West County records right shoulder surgery 02/01/2002.
- T. ProRehab PC physical therapy records 02/11/2002-03/20/2002 right shoulder.
- U. Dr. James Rotramel, Patients First Health Care, records 03/12/2002-04/02/2002 left shoulder excision of mass.
- V. Dr. Michael S. Korenfeld, Comprehensive Eye Care Ltd, records left eye injury - 8/18/2003-08/20/2003.
- W. Dr. Patrick Smith records, 02/24/1998-5/13/2004 primary care physician records all conditions.
- X. Dr. Patrick Smith records 2002-06/28/2005 primary care physician all conditions.
- Y. Dr. Patrick Smith records, 06/28/2005-03/10/2010, primary care physician all conditions.
- Z. Settlement Stipulations entered 04/08/2010 between Employee and Employer/Insurer in Injury No. 02-154696 and Injury No. 02-154700. (Over objection of the Second Injury Fund.)

The Second Injury Fund offered the following Exhibits which were received into evidence:

- II. Deposition of Timothy Whitworth taken 5-12-2005. (Over objection of Claimant).
- III. Deposition of Dr. Cantrell taken 3-29-2007. (Subject to the objections contained in the deposition.)

Live Testimony

Claimant testified at trial. He testified he began working for Employer in 1995. Integram made seats for Chrysler automobiles. Claimant testified he lifted parts out of bins and used equipment to assemble various parts of the automobile seats. He indicated he had to step up on a rail about two times every five minutes in order to reach into the bins to remove the parts. He indicated he worked on the line with the rail for about six years, and that he did not go back to work after August 2002.

Claimant testified he had back surgery in 1998, and after he returned to work he had continuing back pain while working. In April 2002 he went to pick up a part from the bin and his back "popped". He indicated the pain was more dense than the usual pain and that it took his breath away, however he finished the last 30 minutes of his shift and drove home. When he got home, he couldn't get out of the car and eventually had to crawl towards the house. At some point his wife called an ambulance and he was taken to emergency room. Morphine was administered to Claimant for his pain. Claimant testified he does not recall the history which he gave to medical personnel.

Claimant testified he did not report this as a work injury, he indicated he was afraid he would lose his job because he had a number of other injuries and claims. He also testified he didn't understand what was causing his continuing and ongoing problems so he didn't initially pursue it as a work injury.

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Claimant testified he had surgery on his right foot in 2000. He did pursue that as a work injury. He stated that in 2002 he experienced pain in his right foot which became progressively worse, until he couldn't lift it and was dragging it. Sometime in 2002, Claimant is unsure of the exact date, he stepped up on the rail to get a part and his foot "popped". He testified he reported this incident to "Doug", the supervisor, but was told to go back to work. Claimant further testified he told Doug about the injury "a number of times." Claimant had surgery on the right foot in August 2002, and never returned to work after being released from treatment.

Ms. Cheryl Terschluse testified on behalf of Claimant. Ms. Terschluse testified she worked for Integram during the same time period Claimant worked there. She testified she knew Claimant from work but they were not close friends. She testified to the fact that on the line where the 3 passenger seats were assembled, there was a 5 inch high rail between the line and where the parts were located, and there was no way around it, so if you were "height challenged" you had to step onto the rail to get the parts you needed.

Ms. Terschluse testified she knew that this rail had been reported to the "safety man" on a number of occasions, and that she knew of some instances of people getting hurt. She further testified that she had twisted her ankle on the rail.

Deposition Testimony

Dr. Robert Poetz testified on behalf of Claimant by deposition on November 1, 2007. Regarding causation of the back and foot injuries, Dr. Poetz, in his written report, opined:

Mr. Whitworth's job duties which involved continuous standing, frequent bending and lifting, and repetitive use of his hand and arms throughout the course of and (sic) eight to ten hour work day placed and (sic) excessive amount of strain on his body. These activities would be an unusual stressor that a normal person would not be exposed to in an average day. Therefore, it is my opinion that these work related activities directly caused the patient to develop his various injuries.

In the deposition, regarding medical causation of the back injury, Dr Poetz testified to the following:

Q Doctor, do you have an opinion, to a reasonable degree of medical certainty, as to whether or not the activities he described to you as occurring on that date caused or aggravated his preexisting lumbar spine disease and caused the injuries that you have diagnosed?

A I do have an opinion.

Q And what is it?

A That it did in fact exacerbate the preexisting condition in his lumbar spine.

Q And his employment activities were a substantial factor in the cause of that condition for which he subsequently received treatment?

A Yes, sir.

Q Doctor, your diagnosis in reference to that event or in reference to his lumbar spine in regard to the primary injury was what, sir?

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A A small central disc protrusion L3-4 and disc protrusion L5-S1 attributable to the 4/9/02 injury.

During cross examination regarding medical causation of the back injury, Dr. Poetz testified to the following:

Q And there's no indication in the history on page 2 of your report that in the days preceding April 9 of '02 he had any problems, any complaints of ache, pain, discomfort, or unusual sensation in his back as a result of this repetitive bending over, correct?

A I don't think that I indicated in any way, shape, or form that he had pain before the date of that injury that was coming from repetitive bending. Our assertion was that the repetitive bending made him physiologically and mechanically more prone to having injury to a back that was going through excessive and repetitive and degenerative changes over time.

Dr. Russell Cantrell testified by deposition on behalf of Employer on March 29, 2007. This testimony was offered at trial by the Second Injury Fund. Regarding medical causation of the injuries to the low back and foot, Dr. Cantrell opined:

Q Okay. And as of that date, did you have an opinion, within a reasonable degree of medical certainty, as to whether Mr. Whitworth had incurred any permanent partial disability as a result of his employment with Integram?

A Directly as a result of his employment, I did not feel he had any permanent partial disability.

Medical Records

Medical records regarding the treatment of the alleged primary injury to the back are contained in Exhibits E, F, and G. Medical records regarding treatment to the alleged primary right foot injury are contained in Exhibit H.

In Exhibit E, the ER Nurse, on April 10, 2002, records a history from Claimant which states "Walking in from barn, felt a "pop" severe low back pain...Just prior to pain pt. had a coughing episode." The ER doctor, Dr. Nestor Shust, records a substantially similar history and notes that Claimant is "alert and oriented."

On the same day, also in Exhibit E, Dr Patrick Smith recorded a history which states "The patient was out in the field taking care of his horses. He came back through a screen door that led to his house. He said he closed the screen door, took three steps, and heard a pop and has had sharp shooting pain in his lower back with radiation down his legs."

In Exhibit G, Dr. Karl Jacob records a history on April 30, 2002, which is not as specific as those in Exhibit E, regarding onset of the injury, but does not indicate a history of a work injury.

In Exhibit H, there is a short term disability form signed by Dr. John Visser on August 7, 2002, in which a box is checked that the injury is not work related. Also in Exhibit H, there is a

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form signed by Claimant on February 20, 2003 requesting leave. On that form he describes the accident as "Ankle Hurts And Is Locked Up." And a box is checked that the condition is not the result of a work related injury/illness. Just above the signature line is the following:

I have reviewed all of the above information and it is complete and accurate to the best of my knowledge. I understand that providing false information may result in discipline up to and including termination.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, the testimony of other witnesses, my personal observations, the expert medical testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. **Grime v. Altec Indus.**, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also **Davies v. Carter Carburetor**, 429 S.W.2d 738, 749 (Mo.1968); **McCoy v. Simpson**, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

Accident/Occupational Disease

Claimant has failed to establish the existence of any accident or occupational disease. Claimant's testimony at trial is not credible. In order to believe his trial testimony, one must believe that four separate medical personnel wrote his history down incorrectly. In fact, three of the histories contained very specific accounts of the "pop" occurring at Claimant's home.

It strains credulity that Claimant would not file an injury claim for fear of losing his job considering he had already filed several injury claims. Further, it is logically inconsistent that he would be afraid to make a claim for his low back in April 2002 because he might get fired, yet he alleges he tried on numerous occasions to make a claim for his foot injury in the summer of 2002.

Further, at trial, he clearly testified differently than he had at his depositions regarding which injury occurred first, the back injury or the foot injury. The Division is charged with the responsibility of passing upon the credibility of witnesses. It may disbelieve testimony of a witness even though no contradictory or impeaching information is introduced. **Lawson v. Emerson Electric Co.**, 833 S.W.2d 467, 470 (Mo.App., S.D. 1992); **Page v. Green**, 686 S.W.2d 528, 530 (Mo.App., S.D. 1985). Contradictory or impeaching evidence may infer that the claimant did not carry a burden of proof upon a particular element of a claim. **Lawson**, supra.

Employee: Timothy P. Whitworth

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Medical Causation

Claimant failed to prove a causal connection between work activities and the condition of his back. Dr. Poetz' report and testimony are not credible. In his report, Dr. Poetz opines that Claimant's work related activities caused him to develop his various injuries, which is the basis of a repetitive trauma occupational disease case. However, in his testimony he states the specific event of 4/9/02 was the cause of the condition in his back, which is a specific injury opinion. On cross examination he again changes his opinion to state that the work activities made Claimant more prone to an acute injury, which is a combination occupational disease/acute injury opinion.

The opinions of Dr. Poetz regarding medical causation are inconsistent and are not credible. The court is free to accept or reject medical evidence. **Lytle v. T-Mac, Inc.**, 931 S.W.2d 496, 501 (Mo.App. W.D. 1996). Claimant carries the burden of proof regarding medical causation. Claimant has failed to meet his burden of proof regarding medical causation.

CONCLUSION

Claimant failed to prove that it is reasonably probable the he suffered a work related injury to his low back. The Claim against the Second Injury Fund is denied. All other issues are moot.

Made by: /s/ Grant C. Gorman
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 5th day of August, 2010.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 02-154700

Employee: Timothy P. Whitworth
Employer: Ingram St. Louis Seating (Settled)
Insurer: American Casualty Company (Settled)
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. Having reviewed the evidence, read the briefs, 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 § 286.090 RSMo, the Commission affirms the award of the administrative law judge dated August 5, 2010, by separate opinion.

Introduction

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The administrative law judge made the following findings and conclusions: (1) employee failed to establish the existence of any accident or occupational disease; (2) employee's testimony at trial is not credible; (3) employee failed to prove a causal connection between his work activities and his right foot condition; (4) Dr. Poetz's opinion is not credible because it is based on information provided by employee; and (5) employee's claim against the Second Injury Fund is denied.

Employee filed an Application for Review alleging the administrative law judge erred: (1) as a matter of law in admitting employee's entire deposition; (2) in failing to understand and address the issues of occupational disease as an aggravation of a preexisting condition; (3) in failing to address whether employee's work activities were sufficient to cause aggravation of his preexisting conditions; (4) in faulting employee for not providing evidence of other employees suffering repetitive injury from the same unsafe condition at work; (5) in reciting an ultimate conclusion of the experts in summary fashion with no analysis; and (6) in faulting employee for not relating to medical providers the causation of his condition.

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Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose.

The rules are clear and offer no support for employee's position. The Second Injury Fund was entitled to use employee's deposition for any purpose at the hearing. Counsel for the Second Injury Fund offered the deposition in order to give the administrative law judge "more information." Tr. 107. This is "a" purpose, and we conclude that the deposition was properly admitted.

Employee argues further that the Second Injury Fund's attempted impeachment was improper and lacked foundational inquiry as to the time, place, and circumstances of the prior statement. Employee also argues he was deprived an opportunity to explain or rebut the alleged inconsistencies between his deposition testimony and his testimony at the hearing. Beside the fact that counsel for the Second Injury Fund *did* ask the appropriate foundational questions and employee *was* given an opportunity to explain or rebut any alleged inconsistencies, both of employee's arguments miss the point.

Employee was not impeached. For a witness to be impeached with a prior inconsistent statement, there must be a "real inconsistency" between the prior statement and the one made at trial. *Aliff v. Cody*, 26 S.W.3d 309, 319 (Mo. App. 2000). The administrative law judge appeared to find that employee was impeached because he testified to a different chronology of injuries in his deposition (where employee said the right foot was hurt *before* the back), than he did at the hearing (where employee said the right foot was hurt *after* the back). But employee is claiming a gradual onset occupational disease to his right foot. It would be consistent with the nature of gradual onset occupational diseases if employee's foot was hurting both *before and after* the alleged back accident, and thus his prior statement is not necessarily inconsistent, and we find that he was not impeached by offering a chronology at hearing different from that at his deposition.

Employee: Timothy P. Whitworth

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The problem with employee's claim is not that he was impeached, but rather that the expert testimony does not support his claim against the Second Injury Fund, as will be seen immediately below.

Second Injury Fund liability

The dispositive issue in this matter is whether employee met his burden of proving his entitlement to either permanent partial or permanent total disability benefits from the Second Injury Fund stemming from the alleged combination of his many preexisting disabling conditions with a primary injury by occupational disease to his right foot on August 8, 2002, or alternatively, an injury by accident to his right foot on some unknown date in 2002. Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the Fund in "all cases of permanent disability where there has been previous disability."

For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Employee claims his right foot injury combines with his multiple preexisting conditions of ill to result in permanent total disability, relying upon the opinion of Dr. Poetz. We are not convinced.

We note that the task of discerning the substance of Dr. Poetz's opinions is difficult in this matter because his report lacks explanation and, at his deposition, the doctor did not expound upon his ultimate opinions but rather rendered them in conclusory fashion one after the other in response to a series of leading questions. Some explanation would have been helpful, as Dr. Poetz's permanent total disability opinion is perplexing. Dr. Poetz opined that employee was permanently and totally disabled as of the last date he worked for employer, which Dr. Poetz understood to be in early August 2002. But employee had not even undergone the multiple surgeries for the right foot condition at that time, let alone reached maximum medical improvement, so Dr. Poetz either believes the disability from the right foot injury does not actually combine with anything (or in other words, employee was already permanently and totally disabled, and thus the Fund is not liable) or his opinion is premature or incomplete because he apparently did not consider the improvement, if any, employee experienced after the right foot surgery. Either way, we do not consider Dr. Poetz's opinions to be helpful, credible, or persuasive where we have no explanation or basis for them. We find that employee is not permanently and totally disabled due to any combination of his primary right foot injury with any preexisting disabling condition.

For the Fund to be liable for permanent partial disability enhancement benefits, employee must establish that the combination of his preexisting disability with the disability from the primary injury results in a greater disability than the sum of the two disabilities. See § 287.220 RSMo. Again, employee offers the opinion of Dr. Poetz in support of his claim (the vocational expert, Gary Weimholt, does not address the issue

Employee: Timothy P. Whitworth

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of permanent partial disability enhancement). But Dr. Poetz merely rendered his conclusory opinion that the “present and prior” disabilities combine to enhance employee’s overall permanent partial disability, without identifying which of employee’s many preexisting conditions or the multiple primary injuries combine, let alone how they combine. Conclusory expert opinions that fail to provide any legitimate, persuasive explanation are generally insufficient to meet an employee’s burden of proof. See *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 378 (Mo. App. 2006). As we noted above, the problem with Dr. Poetz’s combination opinions are that his report lacks any explanation or basis for them, and his relevant testimony consists almost entirely of monosyllabic responses to leading questions. This evidence is not useful or persuasive and ultimately we find Dr. Poetz’s opinion lacking credibility because we are unable to discern the basis for or meaning of his opinions.

As employee recognizes in his Application for Review, this case presents medically complex issues. We are convinced that where the existence, nature, and extent of any combination of employee’s right foot problems with any of his many preexisting disabilities is not plainly within the realm of lay understanding, Dr. Poetz’s lack of credibility (and Mr. Weimholt’s failure to address the issue) is fatal to employee’s claim for permanent partial disability enhancement from the Second Injury Fund.

In sum, we find that employee failed to meet his burden of proving his entitlement to either permanent partial or permanent total disability benefits from the Second Injury Fund. All other issues are moot.

Decision

We affirm the award of the administrative law judge with this separate opinion. Employee’s claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Grant C. Gorman, issued August 5, 2010, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 20th day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Timothy P. Whitworth

Injury No. 02-154700

Dependents: N/A

Employer: Integram St. Louis Seating (settled)

Additional Party: Second Injury Fund

Insurer: American Casualty Company (settled)

Hearing Date: May 3, 2010

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

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 August 8, 2002
5. State location where accident occurred or occupational disease was contracted: Alleged 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? 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 employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Alleged repetitive trauma to right foot with acute injury on unknown date.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged lumbar spine
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Timothy P. Whitworth

Injury No. 02-154700

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$717.16
- 19. Weekly compensation rate: \$477.63 TTD/\$340.12 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Claimant's lifetime

22. Second Injury Fund liability:

No

TOTAL: \$0

23. Future requirements awarded:

Employee: Timothy P. Whitworth

Injury No. 02-154700

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Timothy P. Whitworth

Injury No: 02-154700

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Integram St. Louis Seating (settled)

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

Additional Party Second Injury Fund

Insurer: American Casualty Company (settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing in the above referenced case was held May 3, 2010, in Franklin County before the undersigned Administrative Law Judge. Timothy Whitworth (Claimant) was present and represented by attorney Jeff Estes. Employer/Insurer previously settled liability. The Second Injury Fund (SIF) was represented by Assistant Attorney General Jennifer Sommers. The evidentiary hearing was held in conjunction with injury # 02-154696. Mr. Estes requested a lien for attorney fees in the amount of 25% on behalf of attorney Ron Edelman.

The parties entered into the following stipulations:

1. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
2. Employer received proper notice.
3. The Claim was filed within the time prescribed by law.
4. Venue is proper in Franklin County.
5. Claimant earned an average weekly wage of \$717.16 resulting in applicable rates of compensation of \$477.63 for total disability (TTD) benefits and \$340.12 for permanent partial disability (PPD) benefits.

The following issues were presented for resolution in this hearing:

1. Accident/occupational disease.
2. Arising out of and in the course of employment.
3. Medical causation.
4. Nature and extent of Claimant's disability from the primary injury.
5. Liability of the Second Injury Fund.

Employee: Timothy P. Whitworth

Injury No. 02-154700

6. Dependency of spouse and minor children.

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. Certain exhibits offered into evidence may contain 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 and had no impact on any ruling in this case.

Claimant offered the following Exhibits which were received into evidence:

- A. Division of Workers' Compensation files in Injury Number 02-154696, 02-154700 and prior claims regarding Employee.
- B. Request for Statements and Proof of Service to Employer dated 8/21/2003 on the two primary claims.
- C. Deposition of Dr. Robert Poetz taken 11/01/2007. (Subject to objections contained in the deposition).
- D. Deposition of Gary Weimholt, certified vocational counselor taken 5/22/2009. (Subject to objections contained in the deposition.)
- E. St. John's Mercy Hospital Records 4/10/2002-4/13/2002 (back) and 9/25/2001 (left eye).
- F. Dr. Karl A. Jacob, C.N.S. Consultants, records 4/17/2002-5/06/2002 and 11/10/02/1998-5/11/1999 including surgery 11/19/1998 surgery records (back).
- G. Missouri Baptist Hospital, St. Louis records 11/06/1998 - 11/10/1998, surgery 11/09/1998 (back) and 4/19/2002 MRI lumbar spine and 4/30/2002 CT and body scan (back)
- H. Dr. John Visser records 08/02/2002-3/26/2003, surgery 08/08/2002 and 12/10/2002 (right foot)
- I. Des Peres Hospital records/Dr. Richard Lehman 05/19/2003, surgery (right ankle)
- J. Dr. John Visser records 5/31/2000-10/04/2000, surgery 07/11/2000 (right foot)
- K. Dr. Evan Crandall certificate of Destruction of Records (related to upper extremities prior work related injuries)
- L. Dr. Norbert Richardson records 12/12/1998-03/02/1999 hiatal hernia repair.
- M. St. John's Mercy, Washington Hospital Records 02/01/1999 and 02/11/1999 records relating to hiatal hernia repair and dysphagia.
- N. Dr. David Chalk records 07/13/1999-10/7/1999 right knee injury and surgery.
- O. St. John's Mercy, Washington 07/11/1999-07/27/1999 right knee injury.
- P. Dr. Charles Mannis, Metropolitan Orthopedics records 05/22/2000 and 11/17/2000 right shoulder.
- Q. Missouri Baptist Medical Center St. Louis radiology records right shoulder 05/22/2000.
- R. Dr. Michael Nogalski, St. Louis Orthopedic, Inc. records 12/17/2001-03/21/2002 right shoulder injury and surgery.

Employee: Timothy P. Whitworth

Injury No. 02-154700

- S. HealthSouth Surgery Center of West County records right shoulder surgery 02/01/2002.
- T. ProRehab PC physical therapy records 02/11/2002-03/20/2002 right shoulder.
- U. Dr. James Rotramel, Patients First Health Care, records 03/12/2002-04/02/2002 left shoulder excision of mass.
- V. Dr. Michael S. Korenfeld, Comprehensive Eye Care Ltd, records left eye injury - 8/18/2003-08/20/2003.
- W. Dr. Patrick Smith records, 02/24/1998-5/13/2004 primary care physician records all conditions.
- X. Dr. Patrick Smith records 2002-06/28/2005 primary care physician all conditions.
- Y. Dr. Patrick Smith records, 06/28/2005-03/10/2010, primary care physician all conditions.
- Z. Settlement Stipulations entered 04/08/2010 between Employee and Employer/Insurer in Injury No. 02-154696 and Injury No. 02-154700. (Over objection of the Second Injury Fund.)

The Second Injury Fund offered the following Exhibits which were received into evidence:

- II. Deposition of Timothy Whitworth taken 5-12-2005. (Over objection of Claimant).
- III. Deposition of Dr. Cantrell taken 3-29-2007. (Subject to the objections contained in the deposition.)

Live Testimony

Claimant testified at trial. He testified he began working for Employer in 1995. Integram made seats for Chrysler automobiles. Claimant testified he lifted parts out of bins and used equipment to assemble various parts of the automobile seats. He indicated he had to step up on a rail about two times every five minutes in order to reach into the bins to remove the parts. He indicated he worked on the line with the rail for about six years, and that he did not go back to work after August 2002.

Claimant testified he had back surgery in 1998, and after he returned to work he had continuing back pain while working. In April 2002 he went to pick up a part from the bin and his back "popped". He indicated the pain was more dense than the usual pain and that it took his breath away, however he finished the last 30 minutes of his shift and drove home. When he got home, he couldn't get out of the car and eventually had to crawl towards the house. At some point his wife called an ambulance and he was taken to emergency room. Morphine was administered to Claimant for his pain. Claimant testified he does not recall the history which he gave to medical personnel.

Claimant testified he did not report this as a work injury, he indicated he was afraid he would lose his job because he had a number of other injuries and claims. He also testified he didn't understand what was causing his continuing and ongoing problems so he didn't initially pursue it as a work injury.

Employee: Timothy P. Whitworth

Injury No. 02-154700

Claimant testified he had surgery on his right foot in 2000. He did pursue that as a work injury. He stated that in 2002 he experienced pain in his right foot which became progressively worse, until he couldn't lift it and was dragging it. Sometime in 2002, Claimant is unsure of the exact date, he stepped up on the rail to get a part and his foot "popped". He testified he reported this incident to "Doug", the supervisor, but was told to go back to work. Claimant further testified he told Doug about the injury "a number of times." Claimant had surgery on the right foot in August 2002, and never returned to work after being released from treatment.

Ms. Cheryl Terschluse testified on behalf of Claimant. Ms. Terschluse testified she worked for Integram during the same time period Claimant worked there. She testified she knew Claimant from work but they were not close friends. She testified to the fact that on the line where the 3 passenger seats were assembled, there was a 5 inch high rail between the line and where the parts were located, and there was no way around it, so if you were "height challenged" you had to step onto the rail to get the parts you needed.

Ms. Terschluse testified she knew that this rail had been reported to the "safety man" on a number of occasions, and that she knew of some instances of people getting hurt. She further testified that she had twisted her ankle on the rail.

Deposition Testimony

Dr. Robert Poetz testified on behalf of Claimant by deposition on November 1, 2007. Regarding causation of the back and foot injuries, Dr. Poetz, in his written report, opined:

Mr. Whitworth's job duties which involved continuous standing, frequent bending and lifting, and repetitive use of his hand and arms throughout the course of and (sic) eight to ten hour work day placed and (sic) excessive amount of strain on his body. These activities would be an unusual stressor that a normal person would not be exposed to in an average day. Therefore, it is my opinion that these work related activities directly caused the patient to develop his various injuries.

In the deposition, regarding medical causation of the foot injury, Dr Poetz testified to the following:

Q Doctor, do you have an opinion, to a reasonable degree of medical certainty, as to whether or not the activities he described while working at Integram Seating, stepping up and off onto this rail repetitively over time, caused or contributed to the development of the conditions that you've diagnosed in regard to his right foot and ankle?

A I do have an opinion.

Q And what is it, sir?

A That it did.

Q Doctor, in reference to the right foot condition, the date of injury alleged is 8/8/02, which in fact is probably the last date that he worked there; is that correct?

A Yes.

Employee: Timothy P. Whitworth

Injury No. 02-154700

Q So is it your opinion or do you have an opinion as to whether or not the continuing activities, although he said that the specific event he described about feeling a pop in his right foot occurred in mid 2002, whether or not the continued employment at Integram Seating continued to cause or aggravate or exacerbate the condition that he had in his right foot and ankle?

A Yes, I do have an opinion.

Q What is it, sir?

A That it did.

Q Up until the last date he worked?

A Yes, sir.

Dr. Russell Cantrell testified by deposition on behalf of Employer on March 29, 2007. This testimony was offered at trial by the Second Injury Fund. Regarding medical causation of the injuries to the low back and foot, Dr. Cantrell opined:

Q Okay. And as of that date, did you have an opinion, within a reasonable degree of medical certainty, as to whether Mr. Whitworth had incurred any permanent partial disability as a result of his employment with Integram?

A Directly as a result of his employment, I did not feel he had any permanent partial disability.

Medical Records

Medical records regarding the treatment of the alleged primary injury to the back are contained in Exhibits E, F, and G. Medical records regarding treatment to the alleged primary right foot injury are contained in Exhibit H.

In Exhibit E, the ER Nurse, on April 10, 2002, records a history from Claimant which states "Walking in from barn, felt a "pop" severe low back pain...Just prior to pain pt. had a coughing episode." The ER doctor, Dr. Nestor Shust, records a substantially similar history and notes that Claimant is "alert and oriented."

On the same day, also in Exhibit E, Dr Patrick Smith recorded a history which states "The patient was out in the field taking care of his horses. He came back through a screen door that led to his house. He said he closed the screen door, took three steps, and heard a pop and has had sharp shooting pain in his lower back with radiation down his legs."

In Exhibit G, Dr. Karl Jacob records a history on April 30, 2002, which is not as specific as those in Exhibit E, regarding onset of the injury, but does not indicate a history of a work injury.

In Exhibit H, there is a short term disability form signed by Dr. John Visser on August 7, 2002, in which a box is checked that the injury is not work related. Also in Exhibit H, there is a form signed by Claimant on February 20, 2003 requesting leave. On that form he describes the accident as "Ankle Hurts And Is Locked Up." And a box is checked that the condition is not the result of a work related injury/illness. Just above the signature line is the following:

Employee: Timothy P. Whitworth

Injury No. 02-154700

I have reviewed all of the above information and it is complete and accurate to the best of my knowledge. I understand that providing false information may result in discipline up to and including termination.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, the testimony of other witnesses, my personal observations, the expert medical testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. **Grime v. Altec Indus.**, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also **Davies v. Carter Carburetor**, 429 S.W.2d 738, 749 (Mo.1968); **McCoy v. Simpson**, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

Accident/Occupational Disease

Claimant has failed to establish the existence of any accident or occupational disease. Claimant's testimony at trial is not credible. Dr. Visser obviously did not have any information which led him to believe Claimant's foot injury was work related. Further, Claimant himself filled out a form and checked the box which indicated his foot injury was not the result of a work injury. His trial testimony to the contrary is unsupported and self-serving.

Claimant concedes he had pain in his right foot and even had surgery in 2000, and that he did not pursue it as a work injury. He further asserts that he had pain in 2002 in the right foot but did not report it until his foot "popped" at work. He then contends he attempted a number of times to report it, but that his supervisor took no action. It does not make sense that Claimant would hesitate to file a claim for his back for fear of being fired, but would have no compunction about making a claim for an injured foot during the same time period.

Further, at trial, he clearly testified differently than he had at his depositions regarding which injury occurred first, the back injury or the foot injury. The Division is charged with the responsibility of passing upon the credibility of witnesses. It may disbelieve testimony of a witness even though no contradictory or impeaching information is introduced. **Lawson v. Emerson Electric Co.**, 833 S.W.2d 467, 470 (Mo.App., S.D. 1992); **Page v. Green**, 686 S.W.2d 528, 530 (Mo.App., S.D. 1985). Contradictory or impeaching evidence may infer that the claimant did not carry a burden of proof upon a particular element of a claim. **Lawson**, supra.

Employee: Timothy P. Whitworth

Injury No. 02-154700

Medical Causation

Claimant failed to prove a causal connection between work activities and the condition of his back. Dr. Poetz' report and testimony are not credible. Dr. Poetz, in his report and testimony opines that the right foot injury is the result of repetitive trauma. Claimant testified that he had pain in his foot, but he had a preexisting foot condition from 2000, for which he had surgery, which he concedes was not a work injury.

Claimant's own testimony was that he did not report his foot condition until after the "pop" that occurred sometime in 2002. This is indicative of a single event, not repetitive use. Ms. Terschluse testified credibly about the rail on the line at Integram. However, she gave no details about any of the other injuries of which she had knowledge except her own. She testified she twisted her ankle, a specific event, not an occupational disease. Her testimony that the rail had been reported as unsafe, or that she was aware of other injuries does nothing to support the position that Claimant sustained an occupational disease from stepping on to it.

Dr. Poetz' opinion is based on information provided by Claimant, which is not credible and in conflict with information contained in the medical records, including his own statement that the foot condition was not work related. Claimant has failed to meet his burden of proof regarding medical causation.

CONCLUSION

Claimant failed to prove that it is reasonably probable that he suffered a work related injury to his right foot. The Claim against the Second Injury Fund is denied. All other issues are moot.

Made by: /s/ Grant C. Gorman
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 5th day of August, 2010.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation