

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

Injury No.: 00-178128

Employee: David Yocum
Employer: Honeywell Federal Manufacturing & Technologies
Insurer: Zurich North American Insurance Company
Date of Accident: May 2000
Place and County of Accident: Kansas City, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 24, 2006, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued March 24, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of February 2007.

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 upon 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 awarding compensation should be

reversed.

At the outset, I note that I find employee to be a credible witness and I accept his testimony regarding the extent and nature of his activities operating a grinder for employer.

The administrative law judge found as follows:

Both Drs. Prostic and Pratt indicated that Claimant's work activities had aggravated Claimant's preexisting problems. Recognizing that Claimant had preexisting problems to the same parts of the body, neither offered an opinion that Claimant's work activities at Honeywell were a substantial factor in the cause of Claimant's alleged occupational disease or the conditions he complained of. Neither provided any objective medical evidence to support such a finding.

The administrative law judge is mistaken if he concludes that "the substantial contributing factor" evidence requirement is not met unless a medical expert testifies in those exact words. See *Mayfield v. Brown Shoe Co.*, 941 S.W.2d 31 (Mo. App. 1997). "There is nothing talismanic about the phrase in question. The words a medical expert uses when testifying are often important, not so much in and of themselves, but as a reflection of what impressions such witness wishes to impart." *Mayfield*, 941 S.W.2d at 36 (citations omitted).

The record does not support the administrative law judge's finding that neither doctor offered an opinion that work activities were a substantial factor in causing an aggravation of conditions about which employee complained. To the contrary, both doctors testified that work aggravated employee's shoulder condition.

Dr. Prostic testified: "So it is my impression that grinding parts aggravated the shoulder rather than being the sole cause of the shoulder problem." Dr. Pratt testified: "My opinion is that he had involvement of the left shoulder related to non-vocational related activities in 2000 and had subsequent aggravation of this shoulder in relation to vocational-related activities."

"Causation is established by medical testimony. The commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." *Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo. App. 2004), citing *Elliott v. Kansas City, Mo., School Dist.*, 71 S.W.3d 652, 657-58 (Mo. App. 2002).

[A]ggravation of a pre-existing condition is a compensable injury if the claimant establishes a direct causal link between her job duties and the aggravated condition. See *Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo.App. E.D.1996). Work must have been a "substantial factor" causing the aggravated condition. Section 287.020.2. But if the aggravation is due to "a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non [-]employment life," then the injury is not compensable. Section 287.020.3(2)(d).

Rono v. Famous Barr, 91 S.W.3d 688, 691 (Mo. App. 2002), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

Operating a grinder for several hours a day is not a hazard or risk to which employee would have been equally exposed outside of his work. I find that employee has sustained his burden of proving that his work at Honeywell aggravated his underlying shoulder conditions.

I would award to employee his past medical expenses and permanent partial disability of 8% of the right upper extremity at the 232-week level in accordance with Dr. Pratt's opinion. For that reason, I would reverse the denial of compensation for this claim. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny compensation.

John J. Hickey, Member

AWARD

Employee: David Yocum

Injury No. 00-178128

Employer: Honeywell Federal Manufacturing & Technologies

Insurer: Zurich North American Insurance Company

Additional Party: N/A

Hearing Date: March 1, 2006

Checked by: KJC/abj

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 May 2000.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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? (See additional Findings of Fact and Rulings of Law.)
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: Employee alleged that while in the course and scope of his employment as a metallurgist at Honeywell, he was required to perform repetitive activities which aggravated his preexisting injuries to his shoulders and upper extremities.
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 shoulders and upper extremities.
14. Nature and extent of any permanent disability: Alleged rotator cuff tear and repetitive injuries to upper extremities.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$825.65
19. Weekly compensation rate: \$550.46 / \$303.01
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

Unpaid medical expenses: None.

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

-0- weeks of permanent partial disability from Employer

-0- weeks of disfigurement from Employer

N/A Permanent total disability benefits from Employer

22. Second Injury Fund liability: None.

TOTAL: -0-

23. Future requirements awarded: None.

Said payments to begin as of – N/A – and to be payable and 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 – percent 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 Yocum

Injury No. 00-178128

Employer: Honeywell Federal Manufacturing & Technologies

Insurer: Zurich North American Insurance Company

Additional Party: N/A

Hearing Date: March 1, 2006

Checked by: KJC/abj

ISSUES

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

1. Whether the limitation period had expired prior to the filing of the Claim for Compensation;
2. whether the employee provided timely and proper notice of the alleged injury;
3. whether the employee sustained an accident and/or occupational disease as a result of his employment with Honeywell Federal Manufacturing & Technologies;
4. the nature and extent of the disability sustained by the employee;
5. whether all the conditions complained of by the employee were caused by the alleged accident; and

6. liability of the employer for past medical aid.

FINDINGS OF FACT AND RULINGS OF LAW

At the hearing, Mr. David Yocum (hereinafter referred to as "Claimant") testified that from 1963 to 1967 he served in the Air Force. He stated that he received a bachelor's degree in psychology in the early 1980s.

Claimant testified that he worked at Honeywell or its predecessor company from 1975 until he retired. He stated that in 1982 he transferred to the metallography department, wherein he was required to use a grinding and polishing machine. He stated that the grinding work required him to stand, apply force for the heavy jobs, and to use a rotating motion.

Claimant testified that he later became a senior technologist in the department but continued to do the grinding and polishing work. He stated that his job became more difficult when the company changed from a floor grinder to a tabletop grinder. He stated that the tabletop grinders were more difficult to use because they were not as powerful as the floor grinders and due to their height the worker had to extend his arms at about chest level instead of at waist level for the floor grinders. He also stated that more force was required to use the tabletop grinders.

Claimant testified that for about one or two years he was the only worker in the department. He stated that he did all the grinding and polishing during that period. He stated that during that period he had to grind and polish about three hours per day. He stated that he never had any deadlines to do the grinding and polishing work.

Claimant admitted that he had back pain for several years and that he had treated with a chiropractor. He stated that on May 21, 2000, he complained to Mr. Gregg, his supervisor at work, that the tabletop grinders were causing him to experience pain. He stated that the company did an investigation of his work area and decided to use lower tables for the grinders. He stated that the lower tables caused fewer physical problems.

Claimant also testified that prior to providing his employer with notice of the alleged injury, he was not allowed to take breaks or rest periods. He stated that after reporting the alleged injury, he was allowed to do fewer mounts and to take breaks and rest periods.

In addition, Claimant testified that after reporting the alleged injury, his employer referred him to Dr. Bennett for treatment. He stated that she ordered x-rays and later told him that she did not believe that his injuries were work related and that he should seek medical care with his family doctor.

Claimant testified that when he saw his family physician, Dr. Mark Martin, he complained of shoulder and back pain and numbness in his hands and arms. He stated that Dr. Martin did not offer any treatment. He stated that he sought treatment at the VA Hospital where x-rays, an MRI, and an EMG were ordered.

Claimant testified that he retired from the company on March 1, 2002, under the threat of termination. He stated that after he retired, he filed a workers' compensation claim in which he alleged a repetitive-motion injury and also a specific incident wherein he experienced pain after doing a heavy job.

Finally, Claimant testified that after his retirement, his family doctor referred him to Dr. Larry Frevert at Rockhill Orthopedics. He stated that Dr. Frevert prescribed physical therapy, an arthrogram, and later did an arthroscopic surgery to repair an impingement and remove a part of the bone in his shoulder. He stated that the surgery was not successful and that afterwards he experienced a lot of pain.

On cross-examination, Claimant admitted that the company had floor grinders in the department during the period when he was the only employee. He admitted that the floor grinders were more powerful and easier to use than the tabletop grinders. He admitted that he could use the floor grinders with arms extended out at waist level. He admitted that he never complained to anyone at Honeywell about any work-related physical problems during the period when he was the only one in the department. He admitted that there were three employees in the department when the company installed the tabletop grinders.

Claimant admitted that his job at Honeywell did not require him to grind and polish eight hours per day. He testified that he did grinding "maybe" up to three hours per day when he was in the department by himself. He admitted that at his deposition he had testified that he could do other things when he got tired of doing the grinding work.

Claimant admitted that no one at Honeywell ever told him that he could not take breaks or rest periods. Instead, he stated that he was told that he had to work an eight-hour workday.

Claimant also testified that he believed that he injured his shoulder in a specific incident when he was working on a five-pound foraging job. He admitted that he did not report the alleged injury to his employer. He admitted that he did not know when that alleged injury occurred. He admitted that his claim indicated that “something” occurred in May 2000. He admitted that he did not know if that was when it really happened.

When confronted with his deposition testimony about the alleged injury, Claimant acknowledged that he had stated, “I am 60 years old and have arthritis and didn’t know if I was injured or not.”

Claimant admitted that he did not know if he complained to the medical department at Honeywell about any shoulder problems. He admitted that he could not recall whether he complained to his employer in May 2000 about any shoulder problems. He admitted that when he saw Dr. Bennett in May 2001, it was because the company was testing its employees for beryllium exposure. He admitted that when he saw Dr. Bennett for the testing, he complained of shoulder problems and she ordered x-rays.

Claimant further acknowledged that x-rays of his shoulder showed no fractures or dislocations. He acknowledged that the x-rays were interpreted to show degenerative changes in the acromioclavicular joint. He acknowledged that Dr. Martin’s office notes dated March 7, 2000, showed that he, Claimant, complained of left shoulder pain of two months’ duration. He admitted that Dr. Martin’s notes showed that he complained of pain across his trapezius and in his shoulder, hands, and thumb after he did some woodcutting. He did not allege that his job at Honeywell required him to do any woodcutting.

Claimant also admitted that at his deposition, he had testified that he did weed whipping at home and that the weed whipping caused back pain and problems with his hands and arms. He admitted that he did a lot of weed whipping. He admitted that he had 11 acres on his property at home. He further admitted that he engaged in recreational activities such as hunting, bowling, golfing, and fishing.

Claimant admitted that there were three employees in his department during his last three years of employment with the company. He admitted that at his deposition he had testified that his work decreased during his last three years with the company due to the work performed by the additional employees.

Finally, Claimant admitted that he was not sure if he had complained to his employer about work-related elbow, wrists, and hands problems. He acknowledged that his Claim for Compensation did not mention any problems with his hands, wrists, and elbows. He indicated that he did not recall whether he told Dr. Bennett about experiencing back pain and hand and wrist numbness as a result of using the weed whipper. He admitted that he injured his back while bowling after his retirement from Honeywell. He admitted that after his retirement, he continued to hunt, fish, bowl, and golf.

Claimant subpoenaed several employees at Honeywell to testify at the hearing. Ms. Linda Taylor, a business projects specialist and a member of the Accident Review Team, testified that Claimant e-mailed her requesting a meeting regarding his alleged injury. She denied that she had ever told Claimant that she believed that the company had treated him unfairly. She stated that as a group the company determined that his injuries were not work related.

Mr. Don Fitzpatrick, the manager of environmental safety and health at Honeywell, testified that he did not recall ever going to Claimant’s work station to review it or engaging in any discussions with Claimant’s supervisors about any alleged injuries.

Mr. Bruce Gregg, a technical manager at Honeywell, testified that he directed the purchase and installation of the three tabletop grinders in Claimant’s department. He admitted that Claimant mentioned some shoulder problems. He stated that he reviewed Claimant’s work area and that the company purchased a lower table and later variable-height tables for the grinders.

On examination by Honeywell, Mr. Gregg testified that in early May 2001, Claimant complained about his salary being too low. He stated that Claimant complained about his salary prior to when he complained about the alleged shoulder problems. He indicated that over the course of the next year and prior to his retirement, most of Claimant’s complaints were salary related and not about any alleged shoulder problems.

Mr. Gregg testified that on May 9, 2001, Claimant threatened that he would change the way he worked until the

company increased his salary. He stated that after May 9, 2001, Claimant's work output decreased by about 30 percent. He stated that Claimant also began complaining that his two coworkers were not doing their share of the work.

Mr. Gregg testified that the company analyzed the work in the department and determined that the other workers were doing their share of the work. He stated that workers usually polished two or three pieces per day for about one hour total. He stated that workers did not grind every day. He stated that workers could choose when to stop polishing and grinding.

Mr. William Rowe, a senior engineering technologist at Honeywell, testified that he had no recollection of being in a meeting with Mr. Gregg about the installation of new tables at the plant. He stated that he did recall that Claimant mentioned some shoulder problems, which Claimant attributed to the height of the tabletops.

Mr. Wayne McLarren, an engineering technologist at Honeywell, testified that around 1991 or 1992 he transferred to the metallurgical department. He stated that he did not recall Claimant making regular complaints about the table heights.

On examination by Honeywell, Mr. McLarren stated that a worker spent about two hours per day on the grinders and that the two hours were not continuous. He stated that a worker might spend about one hour on the grinders, take a break, and then resume grinding at a later time. He stated that while grinding they usually stopped every minute or two to change paper. He stated that they stopped grinding and went to another job when their hands got tired. He stated that on some days they did no grinding work.

Mr. Carl Boehning testified that he was a senior engineer at Honeywell. He stated that he had no specialized training in ergonomics. He stated that Claimant complained of shoulder pain. He stated that he had ordered the tabletop grinders and that he was aware that following an investigation the company ordered lower tables for the grinders.

On examination by Honeywell, Mr. Boehning testified that Claimant's work steadily declined around November 2001. He stated that he knew that Claimant had complained about his salary before the decline in his work. He stated that on Claimant's request, he attended a meeting with Claimant and Mr. Gregg and that Claimant was upset and engaged in a heated discussion in the meeting about his salary.

Mr. Boehning testified that a typical employee in the metallurgical department did 15 to 20 LTR projects per month. He stated that after Claimant complained about his salary, Claimant's production dropped from 15 to 20 per month to 2 to 3 per month.

Claimant's medical evidence consisted of a report by Dr. Edward J. Prostic, M.D., a board-certified orthopedic surgeon, and various physical therapy records. Dr. Prostic testified that he had practiced orthopedic surgery since 1975. He stated that he examined Claimant on April 8, 2003.

He stated that Claimant provided a history of aggravating both upper extremities while repetitiously grinding parts at work. He noted that on June 11, 2002, Dr. Frevert had performed an arthroscopic subacromial decompression and excision of Claimant's distal clavicle. He stated that Claimant denied any preexisting difficulties with his upper extremities or musculoskeletal system.

Dr. Prostic noted that the findings on physical examination of Claimant's cervical spine and upper extremities were essentially normal. He concluded, however, that Claimant had sustained repeated minor trauma to the upper extremities during the course of his employment and that he had developed left rotator cuff tendonitis and bilateral cubital tunnel syndrome. He stated that Claimant had made a good recovery from the shoulder surgery.

Dr. Prostic concluded that if Claimant's bilateral cubital tunnel syndrome worsened, Claimant might require surgery. He also concluded that Claimant had sustained a permanent partial disability of 10 percent of the right upper extremity at the shoulder level and 25 percent of the left upper extremity at the shoulder level for a combined disability of 20 percent to the body as a whole on a functional basis.

On cross-examination by Claimant's employer, Dr. Prostic admitted that he was not furnished Claimant's family physician's medical records. He admitted that he did not know that Claimant had complained of hand and joint pain as early as 1998 as noted in the medical records. He admitted that he did not know that a 1999 x-ray showed that Claimant had early degenerative disc disease at L4-5. He admitted that he did not know that Claimant had complained of back pain in 1999.

Dr. Prostic admitted that he had assumed that Claimant had been truthful. He admitted that Claimant told him that he had not experienced any problems with his upper extremities, arms, shoulder, or hands prior to the alleged work-related

incidents.

Dr. Prostic admitted that he did not have any “direct information” about Claimant’s job or job duties or the physical requirements to perform the job duties. He admitted that he had concluded that Claimant’s alleged impairments were job related based on the information Claimant provided to him.

Dr. Prostic reviewed Dr. Martin’s March 7, 2000, office notes and concluded that the information contained therein differed from the history Claimant provided to him of no preexisting problems with his upper extremities. He acknowledged that Dr. Martin’s March 2000 office notes showed that Claimant complained of intermittent numbness for two months and pain from his upper thoracic spine across his trapezius and down into his left arm and into his left thumb. He acknowledged that Claimant attributed those problems to his woodcutting.

Dr. Prostic acknowledged that Claimant’s VA records from April 24, 2002, showed that Claimant had stated that his elbows were “not terribly bothersome.” He acknowledged that the records showed that Claimant refused an elbow band because his problem was “not that bothersome.”

Dr. Prostic acknowledged that when he saw Claimant in 2003, Claimant had been retired about a year. He acknowledged that normally, if a person had repetitive-use type problems, the symptoms would decrease and the person would feel better after he stopped doing the tasks.

Later, on recross-examination, Dr. Prostic stated that he believed that the incident reported by Dr. Martin on March 7, 2000, was entirely separate from the partial thickness tear of the rotator cuff treated by Dr. Frevert. He stated that an impingement occurs over a long period of time and can easily be aggravated by a number of different mechanical types of incidents. He stated that he believed that the grinding aggravated Claimant’s shoulder problems but was not the sole cause of the problems. He stated that based on the history, Claimant’s woodcutting incident was more related to a mild C6 radiculopathy than a problem originating in the shoulders.

Dr. Terrence Pratt, M.D., a board-certified physician in physical medicine and rehabilitation, testified by deposition on Claimant’s employer’s behalf. He stated that he reviewed Claimant’s medical records. He admitted that he did not examine Claimant.

Dr. Pratt concluded that it was significant that Claimant had complained about symptoms across the upper thoracic region and into the arm and left thumb in March 2000, prior to the date for the alleged work-related impairments. He also concluded that it was significant that the medical records showed that Claimant had complained about problems with his left shoulder, left arm, and left hand as early as 1996. He noted that the 1996 complaints were related to a house painting job by Claimant and the 2000 complaints to woodcutting. He noted that there was no mention in any medical records of any vocational or work activity in relation to Claimant’s left shoulder complaints.

Dr. Pratt further noted that in 2000, VA doctors concluded that Claimant had diffuse arthralgia, or pain over the entire body. He stated that Claimant’s September 26, 2001, examination was important because the physician noted that x-ray findings showed no significant changes in Claimant’s shoulder. He also noted that Claimant’s EMG studies revealed mild cubital tunnel syndrome on the left and borderline problems on the right. He stated that Claimant’s July 2002 left shoulder operative report noted an impingement syndrome and bony spurs, a degenerative condition.

Dr. Pratt concluded that he could not, with medical certainty, express an opinion as to the cause of Claimant’s collarbone degeneration. He concluded that Claimant’s woodcutting in 2000 had caused Claimant’s left shoulder complaints, which had been subsequently aggravated by his vocational activities. Likewise, he concluded that Claimant’s distal upper sensory symptoms dated back to 1996 or 1997 and may have been aggravated by Claimant’s work activities.

Dr. Pratt concluded that Claimant had not sustained any permanent partial disability to the right wrist, right arm, right elbow or shoulder due to his work activities at Honeywell. He concluded that Claimant had sustained a permanent partial disability of 8 percent of the left upper extremity at the 232-week level and that the disability included the aggravation of the ulnar nerve and shoulder caused by Claimant’s work activities at Honeywell.

On cross-examination by Claimant, Dr. Pratt reiterated that he believed that Claimant’s left shoulder complaints resulted from the woodcutting incident in 2000 and were aggravated by his work activities. He admitted that ergonomics could play a role in a repetitive-motion type injury. He stated that it was possible that Claimant had aggravated his impairment when his employer lowered the table.

Dr. Pratt admitted that although bone spurs were a degenerative condition, work activities might have some involvement in the cause of bone spurs. He admitted that he could not, to a reasonable degree of medical certainty, exclude Claimant's work activities as a source for the bony spurs. He admitted that he could not, within a reasonable degree of medical certainty, state that Claimant's distal clavicle problems were related or not related to Claimant's work activities.

Finally, Dr. Pratt admitted that while activities such as painting a house and woodcutting might cause pain, a permanent injury would not normally occur.

The remaining exhibits were essentially cumulative of the other evidence. The Claim for Compensation was date-stamped by the Division of Workers' Compensation on April 25, 2002. Claimant alleged in the claim that he had sustained an accident/occupational disease in May 2000. He alleged in the claim an injury to his left shoulder and back, a torn tendon, and "reactive" motion injuries.

LAW

After considering all the evidence, including the reports of Drs. Prostic and Pratt, the medical records, the other exhibits, the testimony at the hearing, and observing Claimant's appearance and demeanor, I find and believe that Claimant did not meet his burden of proving that he sustained an accident and/or occupational disease as those terms are defined by Missouri law. Therefore, compensation must be denied and all other issues raised at the hearing were rendered moot.

As noted above, the Claim for Compensation appeared to have alleged both an occupational disease and a specific accident. Claimant indicated that he was only pursuing an occupational disease claim. Nevertheless, the evidence showed that he failed to prove either an accident and or occupational disease.

The evidence also showed, however, that Claimant did file his claim on a timely basis. He alleged a May 2000 accident and/or occupational disease in the claim. He filed the claim on April 25, 2002. Thus, he filed the claim within two years of the date of the alleged accident and/or occupational disease. See §287.430 RSMo. (1993), which provides that the employee has two years from the date of injury, or last payment made on account of the injury, to file the claim for compensation.

Case law further provides that the employee has the burden of proving all material elements of his claim. Fischer v. Archdiocese of St. Louis-Cardinal Richter Inst., 793 S.W.2d 195 (Mo.App. E.D. 1990); Griggs v. A. B. Chance Co., 503 S.W.2d 697 (Mo.App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 S.W.2d 917 (Mo.App. S.D. 1997). Claimant, as noted above, failed to meet his burden of proving that he sustained an accident and/or occupational disease as those terms are defined in the Missouri Workers' Compensation Act.

The applicable statute defines "occupational disease" as follows:

"Occupational diseases defined – loss of hearing, radiation injury, communicable disease, others. – 1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, 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.

"2. An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor."

§287.067 RSMo. (1993)

Subsections 2 and 3 of §287.020 under the "accident" section and as referenced above provides as follows:

"2. The word 'accident' as used in this chapter shall, unless a different meaning is clearly

indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

“3. (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

“(2) An injury shall be deemed to arise out of and in the course of the employment only if:

“(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

“(b) It can be seen to have followed as a natural incident of the work; and

“(c) It can be fairly traced to the employment as a proximate cause; and

“(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life; . . .”

§287.020 RSMo. (1993)

Thus, to prove an accident and/or occupational disease, the employee must show that the accident and/or occupational disease were “clearly” work-related. The employee must prove that his work was a substantial factor in the cause of the resulting medical condition or disability. Claimant did neither.

Claimant offered no evidence to support an accident claim. He admitted that he did not know when the alleged accident even occurred. He admitted that he was not even certain as to how any alleged accident occurred. He failed to prove an accident. There was simply no credible evidence of a clearly work-related accident or that his work was a substantial factor in the cause of any alleged injury from any alleged accident.

Claimant alleged an occupational disease due to repetitive activities at work. He never clearly testified as to exactly what occupational disease he was alleging. In his claim he alleged under parts of body injured, “left shoulder, back and reactive [sic] motion injuries.”

To prove an occupational disease the employee must show that he was exposed to a condition which could cause the alleged occupational disease. Claimant did not make such a showing. First, Claimant did not make a credible witness. There were numerous inconsistencies in his testimony at the hearing and at his deposition. His testimony at the hearing on direct and/or cross-examination conflicted. Dr. Prostic, who testified on Claimant’s behalf, admitted that the history Claimant provided to him was not truthful.

Furthermore, two witnesses subpoenaed by Claimant to testify at the hearing stated that Claimant did not complain of any alleged injuries until he met with the company and engaged in a heated discussion about his belief that his salary was too low. The witnesses testified that after the company refused to increase his salary, Claimant stated that he was going to do less work and proceeded to do so and then began complaining about an alleged injury due to the design of his workstation. Claimant also admitted that he still harbored bitter feelings toward the company.

Thus, Claimant’s lack of credibility supported Claimant’s employer’s position that Claimant had failed to prove that he sustained a job-related occupational disease during his employment at Honeywell. More importantly, however, Claimant simply failed to offer any credible evidence which showed that his alleged exposure to repetitive activities was an exposure which could cause his alleged occupational disease or the conditions he complained of. Proof that he did repetitive work did not constitute proof of an exposure which could cause the occupational disease or the conditions he complained of.

Also, nothing in Dr. Prostic's testimony showed that he had any knowledge as to whether Claimant was exposed to a condition which could cause the alleged occupational disease. There was no showing that Dr. Prostic had any knowledge as to the amount of time Claimant spent doing the repetitive activities, or how frequently Claimant took breaks, or the position of Claimant's hands, arms, and body when Claimant did the repetitive activities, or the heights of the various grinders. There was no showing that Dr. Prostic had any knowledge of the amount of force or torque used when doing the grinding work. There was no showing that Dr. Prostic had any knowledge as to the amount of friction or vibration involved in the grinding operations.

Dr. Prostic simply offered a conclusory statement that Claimant had sustained an occupational disease. He offered no evidence to show that Claimant's alleged occupational disease was clearly work related. He did not conclude that Claimant's work was a substantial factor in the cause of the resulting medical condition, occupational disease, or the conditions complained of by Claimant. That omission was significant because, as noted above, Dr. Prostic admitted that Claimant's work activities were an aggravation of Claimant's preexisting impairments. If more than one cause for the impairment existed, Claimant needed evidence that his work activities were a substantial factor in the cause of the alleged occupational disease.

Thus, Dr. Prostic's conclusory opinion, combined with Claimant's testimony and the other evidence, did not meet Claimant's burden of proof. The most credible testimony and evidence showed that a worker using the grinding machines had to stop using the machine every minute or two to change the paper. Claimant offered no evidence that exposure to repetitive activities, which were stopped every minute or two to change paper, was an exposure which could cause his alleged occupational disease or the conditions he complained of. The most credible testimony and evidence further showed that workers only used the grinders for about an hour at a time and for about two hours doing the course of a workday. Again, Claimant offered no evidence that such activities constituted an exposure to a hazard which could have caused his alleged occupational disease or the conditions he complained of.

The most credible testimony and evidence even showed that the worker could choose when to use the grinders and when to stop. The workers were under no time deadlines to do any jobs. Claimant admitted that he initially used his hands and arms at waist level to do the grinding work. The evidence showed that during most of his employment at Honeywell, he used his hands and arms at waist level to do the grinding work. The most credible evidence showed that the higher tabletop grinders were removed shortly after Claimant complained of an alleged injury.

Those facts did not support Claimant's allegation that his alleged occupational disease was clearly work related or that his work was a substantial factor in the cause thereof. Moreover, the evidence also showed that Claimant complained of problems with his back, shoulders, arms, and hands prior to the May 2000 date he alleged for his alleged occupational disease. The evidence showed that in March 2000, Claimant complained to his family doctor about shoulder and upper extremity problems of two months' duration, which he related to his woodcutting. Earlier he had complained about upper extremity problems, which he related to weed whipping on his 11 acres of property.

Both Drs. Prostic and Pratt indicated that Claimant's work activities had aggravated Claimant's preexisting problems. Recognizing that Claimant had preexisting problems to the same parts of the body, neither offered an opinion that Claimant's work activities at Honeywell were a substantial factor in the cause of Claimant's alleged occupational disease or the conditions he complained of. Neither provided any objective medical evidence to support such a finding.

Claimant failed in his burden of proof. He failed to show that his alleged occupational disease was clearly work related. He failed to show that his work was a substantial factor in the cause of his resulting medical condition or the alleged occupational disease.

In conclusion, Claimant had the burden of proof. Claimant offered no evidence to show that his alleged occupational disease was clearly work related. He offered no medical opinions and the evidence did not show that his work was a substantial factor in the cause of his alleged occupational disease or of the resulting medical condition or disability.

As noted by the courts, "substantial contributing factor" means that factor which is the more responsible of the two contributing factors. Mayfield v. Brown Shoe Co., 941 S.W.2d 31 (Mo.App. S.D.1997). In Claimant's case, as noted earlier, there were, several factors which may have contributed to his condition. Claimant failed to offer any evidence or a medical opinion that his work at Honeywell was a substantial contributing factor to the cause of his alleged resulting medical condition or the occupational disease. He failed in his burden of proof.

Date: _____

Made by: _____

Kenneth J. Cain
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation