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

Injury No.: 05-035873

Employee: Aaron Zentz

Employer: Kraft Foods

Insurer: Indemnity Insurance Company of America c/o ESIS

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 13, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Vicky Ruth, issued July 13, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Aaron Zentz

Dependents: N/A

Employer: Kraft Foods

Additional Party: N/A

Insurer: Indemnity Insurance Company of America, c/o ESIS

Hearing Date: May 14, 2009

Injury No. 05-035873

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

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? N/A.
4. Date of accident or onset of occupational disease: Alleged April 26, 2005.
5. State location where accident occurred or occupational disease was contracted: Adair 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: The claimant was working on the flex line when he reached across the line and then felt pain in his back as he straightened up.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Alleged body as a whole referable to the lower back.
14. Nature and extent of any permanent disability: None/see award.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.

17. Value necessary medical aid not furnished by employer/insurer? N/A.

18. Employee's average weekly wages: $527.41.

19. Weekly compensation rate: $351.61 for TTD and PTD.

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from Employer: None.

22. Second Injury Fund liability: None.

23. Future Requirements Awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Aaron Zentz

Dependents: N/A

Employer: Kraft Foods

Additional Party: N/A

Insurer: Indemnity Insurance Co. of North America, c/o ESIS

Injury No: 05-035873

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

On May 14, 2009, the claimant and the employer/insurer appeared for a final award hearing. The claimant, Aaron Zentz, was represented by David Briggs. The employer/insurer was represented by Jared Vessell. The claimant testified in person at the trial. There was no deposition testimony. The parties submitted briefs on or about June 4, 2009.[1]

STIPULATIONS

The parties stipulated to the following:

1. On or about April 26, 2005, the claimant was an employee of Kraft Food (the employer).
2. The employer was operating subject to Missouri's workers' compensation law.
3. The employer's liability for workers' compensation was insured by Indemnity Insurance Co. of North America, and the third-party-administrator is ESIS.
4. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Adair County is proper.
5. A Claim for Compensation was filed within the time prescribed by law.
6. At the time of the alleged accident or occupational disease, the claimant's average weekly wage was $527.41, yielding a compensation rate of $351.61 for permanent partial disability and temporary total disability benefits.
7. The parties think that the employer/insurer did provide some medical aid, but they did not have any details.
8. No temporary total disability benefits were paid.

ISSUES

[1] Attached to the claimant's brief were copies of numerous medical bills. And, scattered throughout his brief were several references to medical bills allegedly paid by the claimant. This information was not provided at the hearing. On June 15, 2009, the employer/insurer filed its Motion to Strike Employee's Brief. The employer/insurer requested that the claimant's entire brief be stricken, or in the alternative, that any portion of the brief relying on facts not in the record be stricken. By order issued July 10, 2009, the administrative law judge granted the motion in part, striking the attachment and all portions of the brief relying on facts not entered into the record.

At the hearing, the parties agreed that the issues to be resolved by this proceeding are as follows:

1. Whether the claimant sustained an accident that arose out of and in the course of employment.
2. Medical causation.
3. Nature and extent of permanent partial disability benefits.
4. Temporary total disability benefits.
5. Liability for unpaid medical expenses.

EXHIBITS

On behalf of both the claimant and the employer/insurer, the following joint exhibits were entered into evidence without objection:

Exhibit 1	Medical records of Dr. R.W. Sparks
Exhibit 2	Medical records of Dr. Dennis Abernathie/Columbia Orthopedic Group
Exhibit 3	Medical records of NE Missouri Orthopedic Associates, P.C.
Exhibit 4	Medical records of Midwest Bone and Joint Center, P.C.
Exhibit 5	Medical records of Des Peres Hospital
Exhibit 6	Medical report of Dr. Jerome F. Levy
Exhibit 7	Medical records of Advances In Therapy
Exhibit 8	Prescription record from Rider Drug, Inc.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. The claimant currently works at G-Tech, where he has been employed for about three years. At the time of the alleged injury, the claimant worked for Kraft Foods, where he had been employed for approximately 11 years. On April 26, 2005, the date of the alleged injury, the claimant was working on the flex line filling packaging with bacon. He testified that he reached across the line and then had pain in his back when he straightened up.

2. The claimant has a history of prior back complaints. He previously sought treatment with Dr. Glen Browning on September 27, 2001, with complaints of pain in his low back and aches in his left leg.[2] An MRI later revealed a very large nucleus pulpous at L5-S1 on the left, which was causing foraminal stenosis and pressure on the root sleeve L5-S1 on the left. The claimant had a series of epidural steroid injections and physical therapy. He eventually was referred to Dr. Abernathie of the Columbia Orthopedic Group, and in January 2002, he underwent a lumbar discectomy. The postoperative diagnosis was herniated disc left L5-S1.

[2] Exh. 3, page dated 9/27/01.

After the surgery, he went through a course of physical therapy. The claimant was released by Dr. Abernathie on March 5, 2002, and given a rating of 10% of the body as a whole with no restrictions.

3. At the time of the alleged injury on April 26, 2005, the claimant was working at Kraft Foods (the employer) on the flex line filling packaging with bacon. He testified that approximately half way through his one-hour rotation at this position, he lifted a slab of bacon and reached across the line to fill an opening on the far side of the line when he felt immediate pain upon straightening his back. He continued working that day, but notified his supervisor of the injury at the next break.

4. The employer instructed the claimant to consult with Dr. Robert Sparks, of N.E. Missouri Orthopedic Associates, P.C. He visited this doctor on or about April 28, 2005, at which time he complained of pain running down his left leg and back pain in the thoracic, lumbar, and sacral areas.[3] According to Dr. Sparks' notes, the claimant reported that he had twisted his lower back on April 26, 2005, and that he has a history of a ruptured disc in his low back, for which he apparently underwent a microdiscectomy. Dr. Sparks diagnosed the claimant with an acute lumbar strain and prescribed Voltaren and Skelaxin with osteopathic manipulative treatment. Dr. Sparks also noted that the claimant could continue on full duty.

5. After two weeks, Dr. Sparks referred the claimant for an MRI of the spine. Dr. Sparks' May 17, 2005 records indicate that the MRI revealed a small central herniated nucleus pulposus at T10-11, and a small left paracentral herniated nucleus pulposus at L5-S1 with some scar and granulation tissue at the L5-S1 level on the right.[4] Dr. Sparks indicated that his "opinion would be that Aaron really hasn't done anything at work that would cause a ruptured disc" and that he does not think that the claimant's work has been a significant contributing factor.[5] Dr. Sparks also noted that he feels "that more than likely this is not a work-related problem" but he did indicate that the claimant should be referred to an orthopedic surgeon for further evaluation.

6. On May 19, 2005, the claimant consulted Dr. Christopher Main, a board-certified orthopedic surgeon of Midwest Bone and Joint Center, P.C. Dr. Main diagnosed the claimant with an acute lumbar strain, noting the herniations revealed in the MRI, and sciatica. He indicated that "it is very difficult to correlate his injury pattern with simply twisting and lifting small light weight objects that could have caused his recurrent disc herniation."[6]

7. The claimant followed up with Dr. Main on June 6, 2005. Dr. Main compared the MRI film from 2001 with the claimant's most recent ones. He stated that the MRI films do reveal evidence of a small left paracentral disc herniation, but that the majority of that was encasing scar and granulation tissue from the prior surgery.[7] Dr. Main further stated that "based on his initial examination as well as his subjective history and work environment, I do not believe that his current symptoms are work-related. My concern would be that this would be

[3] Exh. 3, page dated 4/28/05.
[4] Exh. 1, page dated 5/17/05.
[5] *Id*.
[6] Exh. 4, page dated 5/19/05.
[7] Exh., 4, page dated 6/06/05.

something related to his prior disc herniation."[8] Dr. Main concluded that the claimant required further treatment for his back, but that his history does not correlate with a disc herniation.

8. The claimant then treated with Dr. Michael Chabot, an orthopedic spine specialist, on July 7, 2005. Dr. Chabot's admitting diagnosis was recurrent disc herniation L5-S1, sciatica, and intractable back pain.[9] The next day, the claimant received an epidural steroid injection, but reported no significant change or relief. On July 9, 2005, Dr. Chabot performed surgery on the claimant, a decompressive laminectomy with partial facetectomies and foraminotomies, redo of L5-S, posterior lumbar interbody fusion at L5-S1 , and insertion of two MTF allograft interbody implants. Following the surgery, the claimant was instructed to avoid lifting more than 10-15 pounds.

9. At the request of the claimant's attorney, Dr. Chabot reviewed the claimant's medical records and wrote a report dated October 16, 2006.[10] In the discussion portion of the report, he stated that "it would appear from the limited medical records that I have and per the patient that he sustained a strain injury at work in April 2005."[11] Dr. Chabot further opined that "[i]t is certainly plausible that the patient could have sustained a strain injury at work that resulted in a re-herniation at L5-S1."[12] The doctor then reiterated that he had a limited amount of records regarding the claimant's initial treatment following his alleged injury in April 2005. Dr. Chabot then offered to review additional medical records if the claimant's attorney would send them.

10. At the request of his attorney, the claimant saw Dr. Jerome Levy on January 9, 2008, for an independent medical exam (IME). Dr. Levy indicated that he did not review any medical records in writing his IME report, but that he would be happy to review them if any become available. Dr. Levy noted that the claimant had a normal gait, his lumbodorsal curvature was normal, and there was no sciatic notch tenderness. He also noted that the claimant reported that he has no pain in his back; instead, the pain is in his lower extremities. The range of motion showed a 33% loss in flexion, but no loss in extension, lateral bending, and rotation. Dr. Levy diagnosed the claimant with (1) a history of discectomy, L5, S1-old, (2) status post recurrent discectomy L5-S1, (3) chronic lumbosacral strain, and (4) persistent radiculopathy, S1, left. Dr. Levy rated the claimant as having a 20% permanent partial disability of the body as a whole as a result of the April 26, 2005 accident, plus 15% permanent partial disability of the body as a whole due to the claimant's pre-existing back injury.

11. The claimant testified that he thinks he was off work due to his April 2005 back injury for 12 weeks, and he requested that he be paid temporary total disability benefits for this period. He did not specify the exact dates that such TTD should be paid. In his brief, the claimant's attorney requested 11 weeks of TTD for the period of July 9, 2005, through September 26, 2005.

[8] *Id.*
[9] Exh. 5, page dated 7/07/05.
[10] Exh. 4.
[11] *Id*.
[12] *Id*.

12. The claimant testified that he thinks that his out-of-pocket expenses for medical treatment for this injury amount to between $2,000 and $5,000. The only receipt or bill the parties offered was Exh. 8, a prescription record from Rider Drug, Inc. This document lists the medication the claimant received for the period of April 26, 2005, through January 18, 2007. The only co-pay listed was for $25 for an "epi-pen 0.3 mg auto-injector." It is not clear how the epi-pen was related to the claimant's alleged injury.[13]

CONCLUSIONS OF LAW

Based upon the findings of fact, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.[14] Proof is made only by competent and substantial evidence, and may not rest on speculation.[15] Medical causation not within lay understanding or experience requires expert medical evidence.[16] Where the condition presents itself as a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, proof of causation is not within the realm of lay understanding.[17] Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury.[18] When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.[19]

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.[20] Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.[21]

The claimant must establish a causal connection between the accident and the injury.[22] The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence.[23] "Arising out of employment" means that a causal connection exists between the employee's duties and the injury for purposes of workers' compensation.[24] An injury is compensable only if it is clearly work-related, and an injury is clearly work-related only if work was a substantial factor in the cause of the injury and the

[13] An epi-pen auto-injector is generally used for the emergency treatment of an allergic reaction (anaphylaxis).
[14] *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).
[15] *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).
[16] *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994); see also *Brundage v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo. App. W.D. 1991).
[17] *Silman v. William Montgomery & Associates*, 891 S.W.2d 173 (Mo. App. E.D. 1995).
[18] *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo. App. 1985).
[19] *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).
[20] *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).
[21] *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).
[22] *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 198 (Mo. App. E.D. 1990).
[23] *Id. at 199.*
[24] *Cruzan v. City of Paris*, 922, S.W.2d 473 (Mo. App. E.D. 1996), overruled on other grounds by *Hampton.*

resulting medical condition. However, an injury is not compensable if work was merely a triggering or precipitating factor.[25]

Section 287.020.3 defines an "injury" to be one that "has arisen out of and in the course of employment." In addition, the "injury must be incidental to and not independent of the relation of the employer and employee. Ordinarily, 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."[26]

Dr. Sparks and Dr. Main believe that the claimant's symptoms were not work-related. Dr. Main stated that "it is very difficult to correlate [the claimant's] injury pattern with simply twisting and lifting light weight objects that could have caused his recurrent disc herniation."[27] Dr. Main also indicated that "based on his initial examination as well as his subjective history and work environment, I do not believe that his current symptoms are work-related. My concern would be that this would be something related to his prior disc herniation."[28]

Dr. Sparks indicates that his "opinion would be that [the claimant] really hasn't done anything at work that would cause a ruptured disc" and he that he does not think that the claimant's work has been a significant contributing factor."[29]

Dr. Chabot notes that "it would appear from the limited medical records that I have and per the patient that he sustained a strain injury at work in April 2005."[30] He further opined that "[i]t is certainly plausible that the patient could have sustained a strain injury at work that resulted in a re-herniation at L5-S1," however he reiterated that he had a limited amount of records regarding the claimant's injury and he offered to review additional medical records if the claimant's attorney would send them.[31] Dr. Chabot does not decisively conclude that the accident caused the claimant's complains. His opinion does not convincingly establish a cause and effect relationship between the claimant's condition and the asserted cause as required by *Davis v. General Electric Co.*[32] Dr. Chabot's opinion seems to be based on temporal proximity between the accident and the escalation of the claimant's symptoms; it does not seem to be based upon medical or scientific analysis. His opinion is not convincing as to causation.

Although Dr. Levy did examine the claimant, he did not review **any** medical records in writing his IME report. He did, however, offer to review such records if any became available. Dr. Levy's opinion is weakened by the fact that it was formed without the benefit of relevant facts and records. An expert's opinion must be founded upon substantial information, not mere conjecture or speculation, and there must be a rational basis for the opinion.[33]

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[25] Section 287.020.2, RSMo. 2000.
[26] Section 287.020.3, RSMo.
[27] Exh. 4, page dated 5/19/05.
[28] Exh. 4, page dated 6/06/09.
[29] Exh. 1, page dated 5/17/09.
[30] Exh. 4.
[31] *Id.*
[32] 991 S.W.2d 699, 706 (Mo App. S.D. 1999).
[33] *Rigali v. Kensington Place Homeowners*, 103 S.W.3d 839 (Mo. App. E.D. 2003), citing *Missouri Pipeline Co. v. Wilmes*, 898 S.W.2d 682, 687 (Mo. App. E.D. 1995).

The most reliable and credible opinions are those of Dr. Sparks and Dr. Main. Both these physicians failed to see a causal link between the activities described by the claimant and his symptoms. I find that the claimant has not met her burden of proof to establish medical causation/injury, and therefore his claim must fail. As such all other issues are moot.

Summary

I find that the claimant's claim for compensation fails. Any pending objections not expressly addressed in this award are overruled.

Date: _____ Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Naomi Pearson
Division of Workers' Compensation