

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

Injury No.: 02-114293

Employee: John Blackburn  
Employer: J & J Steel, Inc.  
Insurer: Liberty Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 30, 2002  
Place and County of Accident: Jefferson City, 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 chief administrative law judge dated November 2, 2006, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued November 2, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2<sup>nd</sup> day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

\_\_\_\_\_  
Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge found that employee failed to prove that his work accident of July 30, 2002, resulted in the injury to his cervical spine for which he had two surgeries and for which he still has complaints. However, competent and substantial evidence shows that employee did suffer a cervical spine injury on that date and that his subsequent surgeries and continuing disability are a direct result of that injury.

By clearly overstepping the bounds of her authority, the administrative law judge found employee's testimony that the bar struck him in the neck and then the back incredible. This was in part based on her belief that employee was well aware of the anatomy and correct medical terminology of the human back due to a previous back injury in 1989.

In *Wright v. Sports Associated, Inc.*, 1994 Mo. App. LEXIS 79 (Mo.App. 1994), the Court of Appeals for the Western District held that administrative law judge did not have the authority to substitute her opinion on a matter beyond the common understanding. Similar to the instant case, employee in *Wright* suffered an injury to his lower cervical spine. *Id.* at \*3. The administrative law judge attempted to rely on the "well-known proposition that an individual who suffers a herniated disc in his neck as a result of a traumatic event will have some immediate, noticeable symptoms and that the symptoms will be in the area of the body consistent with a herniated disc in the neck, i.e., in the upper extremities or the neck area." *Id.* at \*8. The administrative law judge believed that the determination of the cause of the employee's injury was within the understanding of the lay person, and therefore that expert medical testimony was not required. *Id.* at \*10. The court disagreed. "The question of whether the symptoms related by [employee] were necessarily inconsistent with the diagnosis of a herniated disc is not a matter of common understanding among lay persons." *Id.* at \*14.

Such is the situation here where the administrative law judge overstepped her bounds and used her own opinion that employee's cervical spine injury could not have been caused by the accident because employee consistently referred to the accident as the result of the pry bar striking him in the upper back or thoracic back. Clearly, the determination of whether employee's description of where the bar struck him and whether or not it could have caused his cervical spine injury is only for a medical expert to determine. As such, it is inconceivable that the administrative law judge would make a credibility determination from the same information. As a lay person, she is not qualified to determine whether employee's cervical spine injury was caused by the pry bar striking employee's upper back. Hence it is axiomatic that she is also unqualified to determine whether employee is credible or not based on those same statements.

Furthermore, employee should not be discredited for not knowing the exact spot the pry bar struck him on his back. Employee is a layman construction worker with no special medical knowledge. It is not surprising that he could not positively identify whether the pry bar struck him between his lower cervical spine and upper thoracic spine, areas of the spine which are within a few inches of one another in an area of his body that he cannot see.

I also find employer's handling of the situation suspicious and indicative that it was aware employee needed medical treatment. Immediately after the grizzly bar fell on employee's upper back a Supervisor's Report of Injury was completed. That report clearly stated that the bar struck employee's upper back between the shoulder blades. Employee declined medical treatment at the time of the accident, but sought medical treatment from the emergency room the next day. During the emergency room visit, employee complained of upper back pain. On August 30, 2002, employer laid-off employee. Employer never approved medical treatment for employee. Suspiciously, for some unbeknownst reason, employer did not file a report of injury until November of 2002, nearly four months after employee's work accident and three months after it laid him off.

It is undisputed that the grizzly bar struck employee in his back. The symptoms produced as a result of accident, primarily intense pain, prevented employee from performing his job duties which he had performed prior to his injury. Employee never sought treatment for neck problems prior to his injury. After his injury and unfortunate lay-off, employee sought care from multiple physicians for his cervical injury at his own expense. This revealed that he had a disk protrusion at C6-7 and a bulging disk at C5-6. Subsequently, employee had two surgeries in an attempt to correct this problem. However, employee is still in a great deal of pain and unable to perform any work.

Employee was asymptomatic prior to his work injury on July 30, 2002. Dr. Koprivica testified that he believed employee's work incident on July 30, 2002, was a substantial factor in causing his cervical condition. Dr.

Koprivica, along with Dr. Koenig, found that employee was permanently and totally disabled.

Therefore, I would find that employee has met his burden by establishing that he suffered a work-related injury on July 30, 2002, and that his cervical condition is medically causally related to the work-related injury. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

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:	John Blackburn	Injury No. 02-114293
Dependents:		Before the
Employer:	J & J Steel, Inc.	<b>DIVISION OF WORKERS'</b>
Additional Party:	Second Injury Fund	<b>COMPENSATION</b>
Insurer:	Liberty Insurance Company	Department of Labor and Industrial
Hearing Date:	September 20, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: HDF/cs

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No. Claimant failed to prove that the accident and injury of 7/30/2002 resulted in the injury to his cervical spine, a work-related injury.
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? Yes.  
Yes.
4. Date of accident or onset of occupational disease: June 30, 2002.
5. State location where accident occurred or occupational disease was contracted: Jefferson City, Mo.
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?  
Yes.
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:  
(See award.)
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: Thoracic and cervical spine.

14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? Some.
  
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$649.32 ptd, ttd; \$340.12 ppd.
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None.
  
22. Second Injury Fund liability: No.

TOTAL:

23. Future requirements awarded: None.

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: John Blackburn

Injury No: 02-114293

Before the  
**DIVISION OF WORKERS'**  
**COMPENSATION**

Dependents:

Employer: J & J Steel, Inc.

Additional Party Second Injury Fund

Insurer: Liberty Insurance Company

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on September 20, 2006. Memoranda were due by October 6, 2006.

The parties stipulated that on or about the 30<sup>th</sup> day of July, 2002, the claimant was in the employment of J & J Steel, Inc.; the claimant sustained an injury by accident; the accident arose out of and in the scope of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Liberty Insurance Company; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; the rate of compensation on the date of accident was \$649.32 per week for temporary total and permanent total disability benefits, \$340.12 per week for permanent partial disability benefits; no temporary disability benefits have been paid to the claimant to date; some medical aid has been provided.

The issues to be resolved by hearing include 1) the causation of the injury alleged, 2) the liability of the employer/insurer for past and future medical treatment, 3) the liability of the employer/insurer for past temporary total disability benefits, 4) the liability of the Second Injury fund, and 5) the nature and extent of permanent disability.

#### FINDINGS OF FACT

The claimant, John Mark Blackburn, testified that on July 30, 2002, while working for J & J Steel, Inc., he was lying down on his chest and stomach on the ground assisting in the placement of concrete panels when a pry bar fell on him striking him in the neck and then the back. Mr. Blackburn filled out a report of injury shortly after the accident describing the injury as being to his "upper back" and stating that "grizzlie bar hit between shoulder blades." Mr. Inghram, Mr. Blackburn's supervisor, noted on the report that a similar accident could be prevented by no longer propping pry bars on the panels.

The following day Mr. Blackburn went to the emergency room at St. Mary's Hospital. The "triage" note reflects that Mr. Blackburn "states injured self at work yesterday when steel bar hit T-spine." There is further mention of the July 30, 2002 injury being "in same area of back as previous injury." Mr. Blackburn was discharged within two hours and told to follow up with Dr. Moline for a "recheck." An x-ray performed on July 31, '02, of the thoracic spine reflects "right lateral superior end plate compression of T9" and "questionable mild superior end plate compression of T8 and T7." The age of the injuries was stated to be "radiographically indeterminate."

Mr. Blackburn worked for J & J Steel, Inc., throughout August of 2002, after missing three days of work subsequent to July 30, 2002, and missing work the week of August 12, 2002, due to his mother's auto accident and a rain-out day. Mr. Blackburn was laid off on August 30, 2002, due to lack of work and a workforce reduction.

On September 17, 2002, Mr. Blackburn was seen in the Shannon county Medical Clinic for left upper arm and shoulder pain with an onset three days before. Tendonitis of the left shoulder was diagnosed. The neck was specifically noted to be normal in the clinic's records for that date.

On September 23, 2002, Mr. Blackburn was again seen in the Shannon County Medical Clinic for spasms and pain in the mid upper back with a notation of "constant stabbing like pain - hurts when he tries to put his shoulders back, having muscle spasm again bad." The "assessment" is noted as "chronic pain and muscle spasms: t-spine." There is also a reference to a 1989 compression fracture and an injury a month prior to September of 2002 and a visit to the emergency room where an x-ray was taken, reflecting no new fractures.

On October 1, 2002, Mr. Blackburn was again seen at the Shannon County Medical Clinic and diagnosed with "chronic pain and muscle spasms T-spine. There is a specific reference to the "steel bar hit pt. in back at site of 1989 injury at work on 7.30.02."

An MRI performed on October 14, 2002, revealed "non-acute and uncomplicated T7 and T9 anterior superior compressions" and "disk protrusion at C6-7 likely."

A pain management questionnaire completed by Mr. Blackburn on October 16, 2002, notes Mr. Blackburn's history of thoracic pain for 10 years with an onset of pain March 4, 1989, as the result of a "t-spine injury." Physical activity was noted by Mr. Blackburn to increase the pain.

An October 24, 2002 cervical spine MRI reflects "diffuse disk bulging at C5-6" and "left paracentral protrusion at C6-7 with mass effect on the cord."

Mr. Blackburn subsequently had surgery on his neck in March of 2003 and July of 2004.

Dr. Koprivica's history of an accident as related by Mr. Blackburn is one of the pry bar striking Mr. Blackburn in the neck and upper back. Dr. Koprivica found Mr. Blackburn's neck surgeries to have been caused by his July 30, 2002 accident and found Mr. Blackburn to be permanently and totally disabled as the result of the July 30, 2002 accident.

Dr. Reinsel's history of an accident is that Mr. Blackburn was struck by the pry bar between the shoulder blades. Dr. Reinsel found Mr. Blackburn's neck surgeries to be unrelated to his July 30, 2002 accident and found no permanent disability as the result of the accident.

Mr. Blackburn testified to complaints of pain and treatment modalities prior to 2002 to his cervical, thoracic and lumbar back.

#### APPLICABLE LAW

Section 287,020.3 provides as follows:

- (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;
- (3) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

#### AWARD

The claimant, John Mark Blackburn, has failed to prove that his accident and injury of July 30, 2002, resulted in the injury to his cervical spine for which he had two surgeries and has continued complaints. The medical records for Mr. Blackburn's treatment the day after his accident clearly indicate that the pry bar struck Mr. Blackburn in the thoracic spine and that he had an injury to the thoracic spine. Mr. Blackburn had no additional medical treatment until six weeks later, at which time left arm and shoulder complaints were discussed, and Mr. Blackburn's neck was found to be normal. It is just a week shy of three months after the July 30, 2002 accident that Mr. Blackburn is diagnosed with disk bulges and protrusions at the C5 through C7 region of his neck.

Mr. Blackburn knew the various parts of his back from his history of neck, upper back and low back injuries prior to 2002, yet he consistently referred to his accident as the result of the pry bar striking him the upper back or thoracic back and to his injury as to his upper back or thoracic back in his initial request for

treatment after his 2002 accident. Thus, I do not find Mr. Blackburn's testimony that he was struck first in the neck and then in the upper back credible. Dr. Koprivica' believed that Mr. Blackburn had been struck by the pry bar in the neck in rendering his opinions on causation, treatment and disability. Because I find Mr. Blackburn's testimony regarding the pry bar striking him in the neck incredible, I also find Dr. Koprivica's testimony which relied solely on Mr. Blackburn's testimony incredible as well.

All other issues raised for resolution are hereby rendered moot.

Date: November 2, 2006

Made by: /s/Hannelore D. Fischer

*Chief Administrative Law Judge  
Division of Workers' Compensation*

A true copy: Attest:

/s/Patricia "Pat" Secrest  
Patricia "Pat" Secrest, *Director*  
*Division of Workers' Compensation*