

FINAL AWARD ALLOWING COMPENSATION  
(Pursuant to the Mandate of the  
Missouri Court of Appeals, Western District)

Injury No.: 05-072941

Employee: Roger Bock  
Employer: City of Columbia  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

On December 30, 2008, the Missouri Court of Appeals for the Western District issued an opinion reversing the April 15, 2008, Final Award of the Labor and Industrial Relations Commission (Commission) in the above-referenced case. By mandate issued January 21, 2009, the Court reversed and remanded this matter to the Commission for further proceedings in accordance with the Court's opinion delivered December 30, 2008. *Bock v. City of Columbia*, WD69674, 2008 Mo.App. LEXIS 1741 (Mo.App. W.D. 2008).

Pursuant to the Court's opinion and mandate, we issue this new award reversing the award and decision of the Commission dated April 15, 2008. Having reviewed the evidence and considered the whole record, the Commission affirms the award and decision of the administrative law judge dated October 30, 2007, and awards compensation in the above-captioned case.

#### Discussion

The Court stated the following legal principles that direct our findings and conclusions in this matter:

"The determination of the specific amount or percentage of disability is a finding of fact within the special province of the Commission." *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. E.D. 1983) (overruled on other grounds by *Hampton*, 121 S.W.3d 220). "When the Commission makes the determination of disability it is not strictly limited to the percentages of disability testified to by the medical experts." *Id.* Moreover, this court has held that "[t]he Commission is authorized to base its findings and award solely on the testimony of a claimant. His testimony alone, if believed, constitutes substantial evidence . . . of the nature, cause, and extent of his disability." *Smith v. Terminal Transfer Co.*, 372 S.W.2d 659, 665 (Mo.App. 1963) (citing *Powers v. Universal Atlas Cement Co.*, 261 S.W.2d 512, 519 (Mo.App. 1953); *Tuller v. Ry. Express Agency, Inc.*, 241 Mo.App. 68, 235 S.W.2d 404, 406 (Mo.App. 1950)).

*Bock v. City of Columbia*, 2008 Mo. App. LEXIS 1741, 8-9 (Mo.App. W.D. 2008).

The Court went on to state:

We do not think that a per se rule, requiring expert testimony in all cases where the question of the extent of

the disability is complicated by a subsequent or pre-existing injury, is borne out in the cases. Where the compensable injury, all alleged exacerbating injuries, and the extent to which these injuries contribute to the claimant's disability all fall within the realm of lay understanding, then lay testimony, including that of the claimant himself, constitutes competent and substantial evidence of the percentage attributable to the compensable injury. To hold otherwise would invade the province of the Commission on the issue of "specific amount or percentage of disability," see *Banner Iron Works*, 663 S.W.2d at 773, and require burdensome expert testimony even in the case of a very simple injury.

*Id* at 12-13.

Accordingly, this Commission finds that because none of employee's injuries or their combined impact fall outside the realm of lay understanding, we are competent to determine the extent of employee's disability attributable to the impact of the fallen pipe, i.e., the July 28, 2005, work-related injury.

#### Award

Pursuant to the Court's mandate, we affirm the administrative law judge's award, that employee sustained a 7.5% permanent partial disability of the right lower extremity at the 155 week level.

The award and decision of Administrative Law Judge Robert Dierkes issued October 30, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 11th day of March 2009.

#### LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

### AWARD

Employee: Roger Bock Injury No. 05-072941

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

Dependents:

Employer: City of Columbia

Additional Party: Second Injury Fund (Deferred)

Insurer: Self-insured

Hearing Date: October 17, 2007                      Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law?  
Yes.
4. Date of accident or onset of occupational disease: July 28,2005.
5. State location where accident occurred or occupational disease was contracted: Columbia, Boone 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?  
Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee was involved in a demolition project when a large pipe hit the floor, bounced and hit employee's right shin.
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: Right lower extremity.
- Nature and extent of any permanent disability: 7.5 percent ppd of the right lower extremity at the 155-week level.
15. Compensation paid to-date for temporary disability: \$3,436.71.
16. Value necessary medical aid paid to date by employer/insurer? \$2,000.00.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$555.17.
19. Weekly compensation rate: \$365.08.
- Method wages computation: By stipulation.

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

Permanent partial disability from Employer: 11.625 weeks of permanent partial disability benefits \$4,244.06.

22. Second Injury Fund liability: Deferred

Total: \$4,244.06.

23. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 15% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Samuel Trapp

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Roger Bock

Injury No: 05-072941

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

Dependents:

Employer: City of Columbia

Additional Party Second Injury Fund (Deferred)

Insurer: Self-insured

Checked by: RJD/cs

An evidentiary hearing was held in this case on October 17, 2007 in Columbia. Roger Bock ("Claimant") appeared personally and by counsel, Samuel Trapp; City of Columbia ("Employer") appeared by counsel, Rick Montgomery. The hearing was held to determine the nature and extent of Claimant's permanent partial disability.

The parties stipulated to all jurisdictional issues. The parties also stipulated that Claimant sustained an accident arising out of and in the course of his employment with the City of Columbia ("Employer") on July 28, 2005. The parties also stipulated that Claimant's average weekly wage was \$555.17, and that the compensation rate for permanent partial disability is \$365.08. The only issue to be decided is the nature and extent of Claimant's permanent partial disability, if any.

### FINDINGS OF FACT AND RULINGS OF LAW

As stipulated, I find that Claimant, a maintenance mechanic at the City of Columbia power plant, sustained a work-related accident on July 28, 2005. I find that the accident occurred as a large, heavy piece of 5" pipe, 3/8" thick, fell from a distance onto a concrete floor, bounced off the concrete floor, and struck Claimant's right shin. A large area of skin was ripped off; Claimant testified that it was 1/4" or less from the bone. I viewed Claimant's right lower leg, and there is a large discolored area, about the size of a baseball, where the skin was ripped off.

Claimant testified that the accident occurred on a Friday. (July 28, 2005 was actually a Thursday.) Nevertheless, Claimant testified that he was instructed to keep the leg elevated during the weekend. (The first medical record, chronologically, in evidence is dated August 1, 2005, which was a Monday. Therefore, I am not sure from whence came the "instructions".) Claimant testified that the injury got worse over the course of the weekend. Claimant was seen by a physician on August 1, 2005. At this point, he was diagnosed as having "cellulitis" and was given a tetanus shot, was given an antibiotic, Augmentin, and was instructed to keep the wound clean and dry, and to keep the leg elevated. Claimant then came under the care of Dr. Michael Kinkade. When seen by Dr. Kinkade on

August 8, 2005, Claimant was still painful, the area was swollen and tender, and an abscess was noted. Claimant's antibiotic was changed to Levaquin, and he was to continue to elevate the leg. When seen on August 11, 2005, the wound was debrided, and pain medications were also prescribed. Claimant was instructed as to dressing changes and was given a topical antibiotic.

When Claimant was seen on August 19, 2005, his wound was finally healing well; he was continued on Levaquin and ibuprofen, and instructed to discontinue his Vicodin. Claimant was continued on work restrictions.

On August 25, 2005, the cellulitis had resolved, but the wound was still tender. The Levaquin was discontinued. Claimant was to continue his daily dressing changes with a topical antibiotic. Claimant was seen again on September 8, 2005; he had bumped the area of the initial wound getting out of the shower and sustained another abrasion. Swelling, though less than on the previous visit, was still noted, but no signs of infection were seen. Claimant was instructed to continue to keep the new abrasion covered with topical antibiotics and dressing. When Claimant was seen on September 22, 2005, new signs of infection were noted and Claimant was again placed on Levaquin. When Claimant was seen on September 28, 2005, the Levaquin was continued.

On October 4, 2005, Dr. Kinkade noted that the cellulitis had again resolved and Claimant was returned to work on full duty. On November 3, 2005, Claimant was released by Dr. Kinkade. On that date, Dr. Kinkade noted that Claimant had recently sustained an additional abrasion in the area, with a small scab in the periphery of the initial abrasion, but no swelling, erythema or bruising, and no signs of cellulitis.

Claimant testified that his current complaints are muscle aches and soreness with weather changes, that the skin is thinner, that the area is subject to reopening, and that the area does not heal well when re-injured. As noted above, there is an area on Claimant's right shin, about the size of a baseball, that is quite discolored and is noticeably indented.

The sole issue to be decided is the nature and extent of Claimant's permanent partial disability, if any. The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo. App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo. App. 2003); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

This case is different from most in that there are no estimates of disability from physicians in this case. It is obvious from the medical records and from a visual inspection that Claimant sustained a large and serious abrasion to his right lower leg, that he had a stormy recovery course with infection and re-infection, that the wound is indented, quite discolored, and that the skin is thinner. Claimant's complaints of muscle aches and soreness are, of course, subjective, but it is quite obvious from the visual inspection that some degree of continued and permanent discomfort is to be expected.

Also considering the nature of Claimant's work, some continuing disability is expected.

I find that Claimant has sustained a permanent partial disability of 7 ½% of the right lower extremity at the 155 week level. This results in 11.625 weeks of permanent partial disability benefits at the stipulated rate of \$365.08, totaling \$4,244.06. **Employer is ordered to pay Claimant the sum of \$4,244.06 for permanent partial disability**

**benefits.**

**Claimant's attorney, Samuel Trapp, is awarded 15% of the permanent partial disability benefits awarded herein as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon, until paid.**

Date: October 30, 2007

Made by: /s/Robert J. Dierkes  
Robert J. Dierkes  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/Jeffrey W. Buker  
Jeffrey W. Buker  
Division Director  
*Division of Workers' Compensation*