

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

Injury No.: 04-073840

Employee: Donald Brandenburg  
Employer: Poplar Bluff Regional Medical Center (Settled)  
Insurer: Liberty Mutual Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 3, 2012. The award and decision of Administrative Law Judge Carl Strange, issued October 3, 2012, 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 27<sup>th</sup> day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Donald Brandenburg

Injury No. 04-073840

Dependents: N/A

Employer: Poplar Bluff Regional Medical Center

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Hearing Date: July 2, 2012

Checked by: CS/rm

**SUMMARY OF FINDINGS**

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 17, 2004.
5. State location where accident occurred or occupational disease contracted: Butler 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? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was tending to a patient in the back of an ambulance when the ambulance was struck by another vehicle causing injury to Employee.

12. Did accident or occupational disease cause death? N/A.
13. Parts of body injured by accident or occupational disease: Body as a whole.
14. Nature and extent of any permanent disability: 60% permanent partial disability of the body as a whole referable to his neck and back.
15. Compensation paid to date for temporary total disability: 89 2/7 weeks.
16. Value necessary medical aid paid to date by employer-insurer: \$60,337.21.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate:  

\$675.90 for temporary total disability and permanent total disability; and  
\$354.05 for permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
  - a. Employee's claim against the employer-insurer previously settled by compromise settlement agreement.
  - b. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$321.85 per week for the period of April 21, 2006 to November 25, 2010 and then at a rate of \$675.90 per week beginning November 26, 2010 (See Findings).
22. Second Injury Fund liability: Yes.
23. Future requirements awarded: N/A.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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 costs plus 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: Michael Moroni and Jay Yorke

## **FINDINGS OF FACT AND RULINGS OF LAW**

On July 2, 2012, the employee, Donald Brandenburg, appeared in person and by his attorneys, Michael Moroni and Jay Yorke, for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

### **UNDISPUTED FACTS:**

1. On or about July 17, 2004, Poplar Bluff Regional Medical Center was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Liberty Mutual Insurance Company.
2. On or about July 17, 2004, the employee was an employee of Poplar Bluff Regional Medical Center and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about July 17, 2004, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability and permanent total disability is \$675.90, and his rate for permanent partial disability is \$354.05.
7. The employee's injury is medically causally related to the work injury occurring on or about July 17, 2004.
8. The employer has furnished \$60,337.21 in medical aid to employee.
9. The employer has paid temporary total disability benefits for 89 2/7 weeks.

### **ISSUES:**

1. Nature and Extent of Disability.
2. Liability of the Fund.

### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

#### Employee's Exhibits

- A. Deposition of Dr. Jerome Levy;
- B. Deposition of Susan Shea;
- C. Drawing of the inside of the ambulance;
- D. Medical records of Poplar Bluff Regional Medical Center;
- E. Medical records of Poplar Bluff Regional Medical Center;
- F. Medical records of Poplar Bluff Regional Medical Center;

- G. Records from ambulance;
- H. Social Security Administration Decision;
- I. Medical records of Dr. Kelly Brown;
- J. Medical records of Brain & Neurospine Clinic of Missouri;
- K. Medical records of Kneibert Clinic, LLC;
- L. Medical records of Dr. Austin Tinsley;
- M. Medical records of Ozark Physical Therapy;
- N. Medical records of Michel Chiropractic Center;
- O. Medical records of Poplar Bluff Neurology Center;
- P. Medical records of Cape Neurological Surgeons, PC;
- Q. Medical report of Dr. Stephen Segall;
- R. Medical records of Neurological Associates of Cape Girardeau;
- S. Accident Report;
- T. Stipulation for Compromise Settlement Injury No. 04-073840;
- U. Workers' compensation records of Minnesota;
- V. Medical records of Dr. Stephen Segall; and
- W. Drawing.

Second Injury Fund's Exhibits:

- I. Vocational report of James England; and
- II. Deposition of Donald Brandenburg.

**APPLICABLE LAW:**

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:
  - “All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be

liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.
- Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for

which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

- Although the workers' compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of his claim. *Melvi v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968).

***Issue 1. Nature and extent of disability. & Issue 2. Liability of the Second Injury Fund.***

Donald Brandenburg ("Employee") has requested an award of permanent total disability benefits against the Second Injury Fund. In support of his position, Employee has offered the opinions of Dr. Jerome Levy and Vocational Rehabilitation Expert Susan Shea. The Second Injury Fund has offered the opinion of Vocational Rehabilitation Expert James England in support of their position that they are not liable for permanent total disability benefits for Employee. If Employee is permanently and totally disabled, the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing disabilities and Employee's last injury occurring on July 17, 2004. The Second Injury Fund is not liable if the last injury alone caused Employee to be permanently and totally disabled.

Following his examination of Employee, Dr. Jerome Levy issued his medical report of April 29, 2006 and opined that Employee suffered a forty percent (40%) permanent partial disability of the man as a whole due to his neck, twenty percent (20%) permanent partial disability of the man as a whole due to his back, and a very significant disability due to the concussion and seizure sequelae as a result of the July 17, 2004 work injury. Further, Dr. Levy opined that Employee had a pre-existing fifty percent (50%) permanent partial disability of the left lower extremity at the knee and a pre-existing ten percent (10%) permanent partial disability of the right upper extremity at the shoulder. After noting that, he did not have an opinion as to the etiology of photophobia, Dr. Levy also opined that the combination of impairments created a greater disability than the simple total of each and a loading factor should be added and the disabilities render Employee permanently and totally disabled and unable to compete in the open labor market. At the time of his deposition, Dr. Levy testified that Employee continued to have many more problems after the accident with his back even though Employee had some back problems before (Employee's Exhibit A). After examining Employee, Susan Shea opined that Employee was unemployable in the regular work force of the national labor market (Employee's Exhibit B). Following a records review, Vocational Expert James England opined that Employee was permanently and totally disabled due to the effects of the primary injury in isolation and regardless of any pre-existing problems with his lower extremities (Employer-Insurer's Exhibit 1).

At the time of the hearing, Joe Jenkins testified that he worked with Employee five years prior to July 17, 2004. During that time frame, Mr. Jenkins noted that Employee had back pain, leg pain, and mood changes prior to July 17, 2004. Further, Mr. Jenkins testified that Employee frequently stayed in the operations center, could only work in three of the eight ambulances, and altered the way he lifted patients in order to perform his job. At the time of the hearing,

Employee also testified about his pre-existing back, leg, shoulder, blurred vision, and migraine problems. Further, Employee noted that he was controlling his seizures with medication and had not had one since the middle of 2005. After reviewing all of the evidence, I find that testimony of Joe Jenkins and Employee is credible and that the Second Injury Fund has failed to offer sufficient credible evidence to discredit the testimony of Joe Jenkins and Employee.

With regard to the expert opinions, Mr. England noted that Employee listed difficulties that included severe headaches about three times a week that require him to lie down, seizures and blackout spells, stiffness in his neck along with high pain levels, decreased attention span and lack of focus as well as panic attacks. Further, Mr. England opined that “considering the findings of Dr. Segal and the restrictions he placed on Mr. Brandenburg as well as Don’s description of his functional difficulties related to the primary injury he would likely be totally unemployable in any work capacity. This would certainly be due, however, to effects of the primary injury in isolation and regardless of any pre-existing problems with his lower extremities” (Employer-Insurer's Exhibit 1). Based on my above findings and the evidence, I find that the opinions of Mr. England are not credible because he takes in to account all functional difficulties related to the primary injury along with the effects of the primary injury and not just those medically caused by the primary injury. Further, I find that the Second Injury Fund has failed to offer sufficient credible evidence to discredit the opinions of Dr. Levy and Susan Shea. I therefore find the opinions of Dr. Levy and Susan Shea to be more credible than Mr. England’s opinions regarding Employee’s permanent and total disability.

On May 28, 2009, Employee settled his primary claim against Employer in this matter for 60% of his body as a whole referable to his neck and back (Employee's Exhibit T). Based on the evidence, I find Employee suffered a 60% permanent partial disability of his body as a whole referable to his neck and back as a result of the July 17, 2004 work injury. With regard to Employee’s pre-existing conditions, I find Employee met his burden of proving that his pre-existing conditions amounted to actual and measurable disability at the time of the work injury and were of such seriousness as to constitute a hindrance or obstacle to employment. In accordance with Dr. Levy’s opinion, I find that the combination of Employee’s impairments create a greater disability than the simple total of each separate injury.

Based on the evidence, I find that no employer would reasonably be expected to hire Employee in his present condition and that Employee is permanently and totally disabled as a result of a combination of his primary injuries and pre-existing injuries. Further, I find that Employee reached maximum medical improvement on April 20, 2006. In accordance with my above findings, I find that the Second Injury Fund’s liability for permanent and total disability benefits at a rate of \$321.85 per week began on April 21, 2006 and ended on November 25, 2010. Further, I find that the Second Injury Fund’s liability for permanent and total disability benefits at a rate of \$675.90 per week began on November 26, 2010. The Second Injury Fund is therefore directed to pay to Employee the sum of \$321.85 per week commencing on April 21, 2006 and ending on November 25, 2010. The Second Injury Fund is also directed to pay to Employee the sum of \$675.90 per week commencing on November 26, 2010, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended

during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2. Since part of the Second Injury Fund's liability has accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for the appropriate amount that is past due.

**ATTORNEY'S FEE:**

Michael Moroni and Jay Yorke, attorneys at law, are allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

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Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*