

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

Injury No.: 02-110132

Employee: Gregory D. Brown
Employer: City of Kansas City (Settled)
Insurer: City of Kansas City (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 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 March 9, 2010. The award and decision of Administrative Law Judge Lisa Meiners, issued March 9, 2010, 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 29th day of October 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Gregory D. Brown

Injury No. 02-110132

Dependents: N/A

Employer: City of Kansas City

Insurer: City of Kansas City

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: January 22, 2010

Checked by: LM/lh

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: September 25, 2002.
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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 occurred or occupational disease contracted: While in the course and scope of employee's work, employee was exposed to vibrating equipment and constantly used hand tools causing occupational exposure of the 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: Bilateral extremities.
14. Nature and extent of any permanent disability: Permanent Partial Disability.
15. Compensation paid to-date for temporary disability: \$15,563.00

16. Value necessary medical aid paid to date by employer/insurer? \$46,565.00
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$547.40/\$340.12
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:
22. Second Injury Fund liability: 35.11 weeks or \$11,941.61
23. Future requirements awarded:

Said payments to begin as of the date of the award 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 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Steve Wickersham.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gregory D. Brown

Injury No. 02-110132

Dependents: N/A

Employer: City of Kansas City

Insurer: City of Kansas City

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: January 22, 2010

Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

On January 22, 2010, the parties appeared for hearing. The Employee, Gregory Brown, appeared in person and with Counsel Steven Wickersham. The Employer, the City of Kansas City settled. The remaining party, the Second Injury Fund, was present and represented by Andrew Dickson.

STIPULATIONS

The parties stipulated to the following:

- 1) That the Employer and Employee were working subject to the workers' compensation law;
- 2) That Mr. Brown was its Employee;
- 3) That he filed a claim within the time allowed by law;
- 4) That the wage rate is \$547.40/\$340.12.

ISSUES

The issues to be resolved by this Award are as follows:

- 1) Whether Claimant sustained an occupational disease that occurred within the course and scope of his employment on or about September 25, 2002;
- 2) Whether notice was properly given to the Employer;
- 3) And the liability of the Second Injury Fund.

Claimant worked as a building maintenance worker for the City of Kansas City, Missouri. His primary job activities required constant grasping of tools and exposure to vibrating equipment as corroborated by a functional capacity evaluation of April 23, 2003. Specifically Claimant's job responsibilities consisted of janitorial work. Claimant worked full time, including overtime performing janitorial activities.

On or about September 25, 2002, Claimant noticed symptoms of numbness, tingling and pain of his hands. Claimant reported the upper extremity complaints to his Employer and thereafter a report of injury was filed October 22, 2002. The Employer sent Claimant for treatment of bilateral carpal tunnel syndrome and right deQuervain's syndrome.

Specifically, Claimant underwent two carpal tunnel releases of the right wrist and right cubital tunnel release without success. Claimant then was referred to a pain clinic in January of 2004. There doctors prescribed prescription medication, as well as a TENS unit.

On May 5, 2004, Dr. Zarr released Claimant with permanent restrictions of no lifting more than 25 pounds and occasional crawling and grasping of the right hand. Dr. Zarr recommended an electrical stimulator unit for Claimant to use long term in order to control pain. Dr. Zarr opined Claimant suffered 5 percent impairment of the right wrist as a result of the work-related condition. Another doctor, Dr. Koprivica, opined Claimant's work activities with the City of Kansas City, Missouri was a substantial factor of Claimant's bilateral carpal tunnel syndrome, cubital tunnel syndrome, as well as chronic impingement of the shoulders. Dr. Koprivica rated 30 percent at the right upper extremity 210-week level, 15 percent permanent partial disability of an unoperated left carpal tunnel, 5 percent to each shoulder due to chronic impingement syndrome.

On September 7, 2006, the Employer and Claimant reached a Compromise Settlement for Claim 02-110132 alleging occupational exposure. Specifically, the parties agreed to 25 percent of the right upper extremity at the 210-week level and 5 percent referable to the right shoulder. The Compromise Settlement also reveals the Employer paid \$46,565 of medical expenses and \$15,563 of temporary total disability benefits.

The Second Injury Fund makes issue whether Claimant sustained an occupational injury that arose out of and in the course of his employment. No evidence was presented to support their argument. Indeed, the medical evidence presented only reveals Claimant sustained an occupational disease as a result of performing repetitive work activity. As such, I find the occupational exposure of using hand tools on a constant basis and vibrating equipment a substantial contributing factor of Claimant's carpal tunnel syndrome, cubital tunnel syndrome and impingement of the right upper extremity.

The Second Injury Fund also make issue that Claimant did not provide notice of his occupational injury. I find Claimant gave proper notice to his employer as evidence by the First Report of Injury. Moreover, the Supreme Court case of Endicott states notice is not required in occupational exposure cases.

I also find Claimant as a result of the occupational injury has limited grip strength, dexterity and weakness of his upper extremities. Although Claimant continued to work, he was unable to lift more than 25 pounds and had difficulties with overhead activities. As such, I find Claimant sustained 25 percent permanent partial disability referable to the right upper extremity at the 210-week level and 5 percent permanent partial disability of the right upper extremity at the 232-week level.

Claimant also had pre-existing conditions that were hindrances and obstacles to his employment prior to September 25, 2002. Claimant is learning disabled. Although a high school graduate, Claimant only attended special education classes. Claimant is unable to read or write. Testing reveals Claimant has an IQ of 64. Additionally, Claimant has a speech impediment making him difficult to understand as observed by the Court during his testimony. Claimant is also diagnosed with mental retardation and a reading disorder.

I find that Claimant's significant intellectual limitations to be a hindrance and obstacle to his employment. A psychologist who performed testing on Claimant opines Claimant 50 percent impaired

due to his intellectual problems. Avner Stern, the psychologist, also found Claimant's cognitive situation permanent with little possibility of improvement.

Claimant also suffered from moderate obstructive lung disease. Claimant had problems working with sprays and fumes despite his vocational demands requiring constant exposure to dust and fumes. Specifically in 2003 Dr. Buren recommended Claimant find a desk job away from fumes. This too leads me to find Claimant's obstructive lung disease to be a hindrance and obstacle to his employment.

Dr. Koprivica opined Claimant to have 15 percent permanent partial disability body as a whole referable to speech impediment, and 15 percent permanent partial disability body as a whole referable to the obstructive pulmonary disease. I find based on the evidence presented that Claimant sustained 30 percent permanent partial disability referable to mental retardation and speech impediment, as well as 12.5 percent permanent partial disability due to obstructive pulmonary disease.

I also find when one combines the mental retardation, obstructive lung disease with the permanent partial disability attributable to the September 25, 2002 occupational injury there is a significant enhancement of the combined disabilities that arise above the simple sum. Indeed, it is the synergistic effect of the pre-existing conditions combined with the occupational injury to produce a greater overall disability. As such, the Second Injury Fund is liable to Claimant for 234.1 weeks multiplied times a 15 percent load factor or 35.11 weeks of compensation. The Second Injury Fund is ordered to pay Claimant \$11,941.61.

This Award is subject to an attorney's lien in the amount of 25 percent for services rendered by Steven Wickersham.

Date: _____

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2010, by:

Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 04-089140

Employee: Gregory D. Brown
Employer: City of Kansas City (Settled)
Insurer: Self-Insured (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 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 March 24, 2010. The award and decision of Administrative Law Judge Lisa Meiners, issued March 24, 2010, 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 29th day of October 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Gregory D. Brown

Injury No. 04-089140

Dependents: N/A

Employer: City of Kansas City

Insurer: Self-Insured

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: January 22, 2010

Checked by: LM/lh

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: June 19, 2004.
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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 occurred or occupational disease contracted: While in the course and scope of employee's work, employee injured low back moving an escalator vacuum.
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: Back and body as a whole.
14. Nature and extent of any permanent disability: Permanent Total Disability.
15. Compensation paid to-date for temporary disability: -0-

16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$466.00/\$354.05
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Second Injury Fund liability: The Second Injury Fund is liable to employee for permanent total benefits in the amount of \$466.00 per week. Beginning April 25, 2007, the Second Injury Fund must pay the difference of the permanent total disability rate of \$466 minus the permanent partial disability rate of \$354.05 or \$111.95 for 84 weeks. Thereafter, the Second Injury Fund is liable to Claimant in the amount of \$466 per week for Claimant's life time.

Said payments to begin as of the date of the award 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 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Steve Wickersham

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gregory D. Brown

Injury No. 04-089140

Dependents: N/A

Employer: City of Kansas City

Insurer: Self-Insured

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: January 22, 2010

Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

On January 22, 2010, the parties appeared for hearing. The Employee, Gregory Brown, appeared in person and with Counsel Steven Wickersham. The Employer, the City of Kansas City settled. The remaining party, the Second Injury Fund, was present and represented by Andrew Dickson.

STIPULATIONS

The parties stipulated to the following:

- 1) That the Employer and Employee were working subject to the workers' compensation law;
- 2) That Mr. Brown was its Employee;
- 3) That he filed a claim within the time allowed by law;
- 4) That the wage rate is \$466.00/\$354.05

ISSUES

The issues to be resolved by this Award are as follows:

- 1) Whether Claimant sustained an accident that occurred within the course and scope of his employment on or about June 19, 2004;
- 2) Whether notice was properly given to the Employer;
- 3) And the liability of the Second Injury Fund.

FINDINGS

Greg Brown, herein referred to as Claimant, is a high school graduate. Although receiving a high school degree Claimant was in special education classes beginning in second grade until his graduation. Claimant also has a noticeable speech problem that at times caused difficulty understanding his testimony during hearing.

Claimant is unable to read or write. Claimant does not possess a bank account since he is unable to balance a checkbook. Claimant underwent testing by a licensed psychologist who diagnosed significant intellectual limitations, mild mental retardation and a reading disorder. As a result I find Claimant a poor historian due to mental deficiencies rather than lacking credibility in order to reap secondary gain of the workers' compensation system. Not only did Claimant have significant intellectual limitations, as well as mild mental retardation and a reading disorder prior to June 19, 2004, I find Claimant also had other preexisting disabilities that were hindrances and obstacles to his employment.

On or about September 25, 2002, Claimant was diagnosed with right carpal tunnel syndrome and right cubital tunnel syndrome. He underwent two carpal tunnel releases of the right wrist and right cubital tunnel release without success. Claimant was then referred to a pain clinic in January of 2004.

There, doctors prescribed medication as well as a TENS unit. On May 5, 2004, Dr. Zarr released Claimant with permanent restrictions of no lifting more than 25 pounds and occasional crawling and grasping of the right hand. Dr. Zarr recommended an electrical stimulator unit for Claimant to use long term in order to control pain.

Dr. Zarr opined Claimant suffered 5 percent impairment of the right wrist as a result of the work-related condition. Another doctor, Dr. Koprivica, opined Claimant's work activities with the City of Kansas City, Missouri was a substantial contributing factor of Claimant's bilateral carpal tunnel syndrome, cubital tunnel syndrome, as well as chronic impingement of the shoulders. Dr. Koprivica rated 30 percent at the right upper extremity 210-week level, 15 percent permanent partial disability of an unoperated left carpal tunnel, 5 percent to each shoulder due to chronic impingement syndrome.

The Employer and Claimant reached a compromised settlement for Claim 02-110132 that alleged occupational exposure. Specifically, the parties agreed to 25 percent of the right upper extremity at the 210-week level and 5 percent referable to the right shoulder. I also find as a result of the occupational injury of his upper extremities, that Claimant had limited grip strength, dexterity and weakness of his upper extremities. Although Claimant continued to work, he was unable to lift more than 25 pounds and had difficulties with overhead activities.

Claimant also had, as mentioned earlier, a learning disability. I find that Claimant's significant intellectual limitations to be a hindrance and obstacle to his employment. A psychologist who performed testing on Claimant opined Claimant 50 percent impaired due to his intellectual problems. Avner Stern, the psychologist, also found Claimant's cognitive situation permanent with little possibility of improvement.

Claimant also suffered from moderate obstructive lung disease. Claimant had problems working with sprays and fumes despite his vocational demands requiring constant exposure to dust and fumes. Specifically in 2003 Dr. Buren recommended that Claimant find a desk job away from fumes. This too leads me to find Claimant's obstructive lung disease to be a hindrance and obstacle to his employment. Dr. Koprivica opined Claimant to have 15 percent permanent partial disability body as a whole referable to the speech impediment, 15 percent permanent partial disability body as a whole referable to the obstructive pulmonary disease.

On June 19, 2004, Claimant worked as a building maintenance worker for the City of Kansas City. His primary job activities consisted of janitorial work. Claimant worked full time, including overtime, performing janitorial activities for over 20 years for the City of Kansas City. The parties make issue whether Claimant sustained an accident by injury on June 19, 2004, that occurred within the course and scope of his employment. One argument the Second Injury Fund relies upon are medical records that reveal Claimant believed pain began one year ago from "lifting" incident. This record was in 2006. I cannot rely on Claimant's opinion regarding causation. Indeed, Claimant has significant cognitive limitations as noted by psychologist, Avner Stern, and Claimant is not a medical expert. Instead, I rely on Dr. Koprivica who opined the lifting incident that occurred on June 19, 2004, was a substantial contributing factor of Claimant's low back condition.

Moreover, Claimant made references throughout medical records of having to lift heavy objects while at work. A Claim for Compensation filed on September 3, 2004, states Claimant was lifting an escalator cleaner and injured his low back. These findings along with Dr. Koprivica's opinion lead me to find Claimant on June 19, 2004, injured his low back while lifting an escalator cleaner. As a result of the June 19, 2004 low back injury Claimant underwent an anterior lumbar discectomy, as well as a fusion at the L5-S1 level as a result of the lifting incident. Dr. Koprivica opined Claimant sustained 35 percent permanent partial disability body as a whole as a result of the June 2004 injury.

On January 21, 2009, Claimant settled with the Employer for 21 percent permanent partial disability body as a whole as a result of the June 19, 2004 accident. The Employer and Claimant agreed to an amount of \$29,999. The settlement was based upon disability of the lumbar spine, hip, leg and groin area.

I also find the City received notice of the injury outside of the 30-day requirement under 287.420 but was not prejudiced. The Employer did not pay any of Claimant's medical expenses and had ample opportunity to investigate this claim. Indeed the Employer received notice of the injury within 90 days of the occurrence as evidenced by the Claim for Compensation.

The next issue to be decided is whether the Second Injury Fund is liable to Claimant for permanent total disability benefits.

"In order to establish Second Injury Fund liability for permanent total disability benefits, the Claimant must prove the following:

- 1) That he has sustained permanent disability resulting from a compensable work-related injury;
- 2) That he has permanent disability predating the compensable work-related injury which is 'of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the Employee becomes unemployable.' §287 RSMo 1994, Messex v. Sachs Electric Company, 989 S.W.2d (Mo.App. 1997); Garibary v. Treasurer, 964 S.W.2d 474 (Mo.App. 1998); Rose v. Treasurer, 899 S.W.2d 563 (Mo.App. 1995);
- 3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury results in permanent total disability. Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 363 (Mo.App. 1992)."

The first requirement has been met and I find Claimant sustained a 21 percent permanent partial disability body as a whole referable to the June 19, 2004 accident. Indeed Claimant is unable to bend and lift as he did prior to June 19, 2004. Additionally, Claimant is only able to sit for 10 to 15 minutes before changing positions as a result of the June 19, 2004 injury. Claimant has constant pain in his back, shoulder and legs as a result of the June 2004 injury.

Prior to June 2004, Claimant had preexisting conditions that were hindrances and obstacles to his employment. Claimant had limited grip strengths. He had a 25 pound weight restriction. He was limited to occasional crawling and grasping of the right hand. Additionally, Claimant has intellectual limitations that I find were a hindrance and obstacle to his employment. He is unable to read or write. Lastly, Claimant also had obstructive pulmonary disease which a doctor recommended he find a job away from exposure to dust and fumes. This too leads me to find this condition a hindrance and obstacle to his employment.

Considering all the expert testimony and medical records I find Claimant sustained the following preexisting disability: 30 permanent partial disability referable to intellectual limitations, reading disorder and speech impediment; 12.5 percent permanent partial disability body as a whole referable to the obstructive pulmonary disease, as well as 25 percent permanent partial disability referable to the right upper extremity 210-week level; 5 percent permanent partial disability at the 232-week level of the right upper extremity.

The last requirement in establishing Second Injury Fund liability is proving that Claimant is permanently and totally disabled as a result of the combined effect of the disabilities. Missouri statute 287.020.7 defines total disability of the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged in at the time of the accident. It is not necessary that an individual be completely inert or inactive in order to meet the statutory definition of permanent total disability. It is necessary, however, that he be unable to compete in the open labor market.

I find based on the evidence presented that Claimant is unemployable in the open labor market as a result of the June 2004 injury combined with the preexisting disabilities. A vocational expert, Mary Titterington, found that no reasonable employer would hire Claimant due to the severe physical restrictions as well as the limited cognitive abilities of the Claimant. Titterington opined that Claimant did not have the physical or mental ability to actively compete for full-time employment. As such and based on Claimant's testimony, the testimony of experts and medical records I find Claimant is unemployable in the open labor market as a result of the combined effects of disability from the June 2004 injury and his disabilities predating June of 2004.

The Second Injury Fund is liable to Claimant for permanent total disability benefits in the amount of \$466 per week for Claimant's life time beginning on April 25, 2007, the date Dr. Koprivica found Claimant at maximum medical improvement of the June 19, 2004 injury.

This award is subject to an attorney's lien in the amount of 25 percent for services rendered by Steve Wickersham.

Date: _____

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2010, by:

Naomi Pearson
Division of Workers' Compensation