

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

Injury No.: 00-158691

Employee: Garry W. Buescher
Employer: Missouri Highway and Transportation Commission
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 25, 2000
Place and County of Accident: Linn County, 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 administrative law judge dated May 31, 2005. The award and decision of Administrative Law Judge Robert J. Dierkes, issued May 31, 2005, 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 21st day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

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I respectfully dissent from the award and decision of the majority of this Commission affirming the award of the administrative law judge. I would modify the award.

The only issue presented for review is whether the employer is entitled a fifteen percent (15%) reduction in compensation under Section 287.120.5 RSMo. Section 287.120.5 reads:

Where the injury is caused by the willful failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, which rule has been kept posted in a conspicuous place on the employer's premises, the compensation and death benefit provided for herein shall be reduced fifteen percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a diligent effort to cause his employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

The statute establishes an affirmative defense so employer bears the burden of proving each element of the defense. The only element of employer's defense that is in dispute is whether employee's injuries were caused by his willful failure to use his seatbelt and his failure to obey employer's reasonable rule that he do so. The administrative law judge found that employer failed to satisfy this burden. I disagree.

Dr. Rupright, employee's treating physician, is a specialist in the treatment of brain trauma. He has treated hundreds of brain injury patients. In his experience, individuals who are thrown from vehicles during accidents usually suffer more involved injuries than individuals wearing seatbelts who stay in their cars. Dr. Rupright testified within a reasonable degree of medical certainty that employee's ejection likely caused employee to suffer a greater injury than he would have sustained had he stayed in the vehicle. Dr. Rupright based his opinion on his many years of experience treating brain injury patients as well as literature in the fields of physical medicine and rehabilitation. I find credible the opinion of Dr. Rupright.

The cab of the vehicle sustained minimal damage in the collision, which lends weight to Dr. Rupright's opinion that employee sustained greater injury because he was thrown from the vehicle.

Based upon the foregoing, I find employer has satisfied its burden of showing that employee's willful failure to wear his seatbelt and his failure to obey employer's reasonable rule to do so caused employee's injuries.

I would modify the award of the administrative law judge to reduce compensation benefits by fifteen percent (15%) in accordance with § 287.120.5 RSMo. For the foregoing reasons, I respectfully dissent from the portion of the award denying the reduction.

Alice A. Bartlett, Member
AWARD

Employee: Garry W. Buescher

Injury No. 00-158691

Dependents: N/A

Employer: Missouri Highway and Transportation Commission

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

Additional Party:

Second Injury Fund

Insurer: Self-Insured

Hearing Date: May 3, 2005

Checked by: RJD/tmh

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: October 25, 2000.
5. State location where accident occurred or occupational disease was contracted: Linn 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-employed.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was driving a highway striping truck, which collided with another vehicle.
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: Head, neck, shoulder, ribs, body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: \$32,751.72.
16. Value necessary medical aid paid to date by employer/insurer? \$168,033.05.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$577.15.
19. Weekly compensation rate: \$384.77/\$314.26
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Underpayment of temporary total disability: \$5,780.25

Permanent total disability benefits from Employer beginning September 27, 2002, and payable for Claimant's lifetime

22. Second Injury Fund liability: No

23. Future requirements awarded: Prescription medication benefits as set forth more fully herein

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark Akers

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Garry W. Buescher

Injury No: 00-158691

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

Dependents: N/A

Employer: Missouri Highway and Transportation Commission

Additional Party: Second Injury Fund

Insurer: Self-Insured

Checked by: RJD/tmh

ISSUES DECIDED

The evidentiary hearing in this case was held before the undersigned administrative law judge on May 3, 2005, in Macon. The hearing was held to determine the following issues:

1. Whether Employer shall be ordered to provide future medical benefits for Claimant, pursuant to Section 287.140, RSMo;

2. The nature and extent of Claimant's permanent disability (Claimant alleges he is permanently and totally disabled);
3. The liability of Employer, if any, for permanent partial disability benefits or permanent total disability benefits;
4. The liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits; and
5. Whether Claimant shall be assessed a 15% penalty against his benefits for alleged violation of Section 287.120.5.

STIPULATIONS

The parties stipulated:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That the accident occurred in Linn County; the parties agreed, on the record, to holding the hearing in Macon County;
3. That the Claim for Compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That the notice requirement of Section 287.420, RSMo, is not a bar to Claimant's Claim for Compensation;
6. That Claimant sustained an accident arising out of and in the course of his employment with Missouri Highway and Transportation Commission on October 25, 2000;
7. That the rates of compensation are \$384.77/\$314.26, based on an average weekly wage of \$577.15;
8. That Employer was an authorized self-insured for workers' compensation purposes at all relevant times;
9. That Employer paid medical benefits of \$168,033.05; and
10. That Employer paid temporary total disability ("TTD") benefits from October 26, 2000 through September 26, 2002, in the total amount of \$32,751.72, and that such benefits were paid at the rate of \$327.05 (invoking the 15% penalty).

EVIDENCE

The evidence consisted of the testimony of Claimant, Garry Buescher; the testimony of Patricia Ann Buescher, his wife; the testimony of Shari Dye, District 2 Safety and Health Manager for the Missouri Highway and Transportation Commission; the deposition testimony of Dr. Barry I. Feinberg; the deposition testimony of Dr. Jon Rupright; a "Vocational Rehabilitation Evaluation" written by Timothy G. Lalk; accident report from the Missouri State Highway Patrol; medical records; and photographs.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, Garry W. Buescher, was born on August 10, 1946, is married with two children, and has lived in Macon County, Missouri for twenty-six years. I find that Claimant was employed by the Missouri Highway and Transportation Commission for over 12 years at the time of his work-related accident on October 25, 2000. I find that, at the time of his injury, Claimant was a special maintenance crew leader and was driving a highway striping truck.

Claimant has no memory whatsoever of the accident. The Highway Patrol Report states that the accident occurred at the intersection of U.S. Highway 36 and Missouri Highway 139 in Linn County. According to the report, a Chevrolet Suburban driven by a Mr. Vandeventer was traveling westbound on U.S. 36 near the intersection of Mo. 139, when the striping truck driven by Claimant, which was stopped at a stop sign on Mo. 139, pulled out in front of the Vandeventer vehicle, causing the Vandeventer vehicle to strike Claimant's vehicle, and causing Claimant's vehicle to overturn. Claimant was ejected from the vehicle out of the driver's side window.

Claimant has no recollection of whether he was wearing his seatbelt. Claimant testified: "Sometimes I wore it, sometimes I didn't."

Claimant sustained multiple injuries in the accident. These included fractures of the C1, C2, and C7 vertebrae and herniated discs at C4-5 and C5-6, which ultimately required cervical fusion surgery. Claimant also sustained a malunion fracture of the left scapula, and a separation of the left AC joint. Claimant also sustained multiple rib fractures, which resulted in pulmonary problems including pneumonia. Claimant also sustained a closed head injury with a subdural hematoma, resulting in deficits including short-term memory loss.

Claimant has not worked since the accident. Claimant has been receiving Social Security Disability benefits and has now qualified for Medicare.

Claimant has a high school education. He served in the U.S. Navy, and worked as a freight dispatcher for many years, prior to working for the Missouri Highway and Transportation Commission. Claimant cannot use a computer.

Based upon Claimant's testimony and the Highway Patrol report, I find that Claimant was not wearing a seatbelt at the time of the accident. It is clear from the testimony of Shari Dye, Claimant's testimony and Exhibit 9 (photograph) that Employer had a clear and unambiguous rule requiring employees to wear seatbelts at all time, that such rule was posted in a conspicuous place (on the dashboard of the vehicle), and that Claimant had actual knowledge of the rule.

Permanent disability. Claimant has alleged that he is permanently and totally disabled. Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Fletcher v. Second Injury Fund, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. Messex v. Sachs Elec. Co., 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When the claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself renders a claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. Nance v. Treasurer of Missouri, 85 S.W.3d 767 (Mo.App. W.D. 2003).

Claimant's injuries are extremely disabling. Claimant's expert witnesses, Dr. Barry Feinberg, and Mr. Timothy Lalk, a vocational rehabilitation counselor, both opined that Claimant is clearly permanently and totally disabled. Mr. Lalk was unequivocal in his opinion that Claimant could not compete in the open labor market. In addition, Claimant's treating neurosurgeon (Dr. John Oro) and his treating physical medicine and rehabilitation physician (Dr. Jon Rupright) both opined that Claimant was unable to return to any employment.

I find that Claimant is permanently and totally disabled. There was no evidence adduced at the hearing that would support a finding that Claimant had any physical or mental disability whatsoever prior to the October 25, 2000, accident. The evidence is clear that Claimant sustained severely disabling injuries in the work-related accident of October 25, 2000. **Therefore, I find that Claimant is permanently and totally disabled as the sole result of the October 25, 2000, accident.**

Future medical benefits. Claimant testified that he is currently being prescribed the following medications: Neurontin, Ketoprofen, Zonegran, Roxicet, Zoloft, Advair, Spiriva, Albuterol and Flonase. The June 7, 2004, report of Dr. Robert B. Fischer stated that Claimant's medications were: Xanax, Neurontin, Ketoprofen, Zonegran, Zoloft, Flonase, Capzasin ointment, Advair, Albuterol and Atrovent; the report also stated: "We did write renewals for his Zanaflex, Ketoprofen, Neurontin and Zonegran ...".

I find that Claimant continues to require pain medications such as Neurontin, Ketoprofen, Zonegran, Roxicet, and Zoloft. I find that Claimant needs these medications as a direct result of his work-related injuries from the October 25, 2000, accident.

I find that Claimant also continues to require medications such as Advair, Albuterol, Spiriva and Flonase for respiratory-related conditions. There was no medical evidence in the record to prove that the work-related accident is a substantial factor in Claimant's need for these medications. While the work-related accident may indeed be a substantial factor, any such finding would be based upon speculation. In addition, Claimant has been a smoker for many years. I do not find that Claimant needs these medications as a result of his work-related injuries from the October 25, 2000, accident.

Employer is ordered to provide Claimant with future medical benefits for prescription pain medications, in accordance with the requirements of Section 287.140, RSMo.

Safety violation penalty. Section 287.120.5, RSMo, states:

Where the injury is caused by the willful failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, which rule has been kept posted in a conspicuous place on the employer's premises, the compensation and death benefit provided for herein shall be reduced fifteen percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a diligent effort to cause his employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

I find that the penalty provided by this section is in the nature of an affirmative defense, therefore, the burden of proof thereof is on Employer.

I find that a vehicle safety belt ("seat belt") is a safety device contemplated by this section. I further find that the safety device in question was provided by Employer. I find that Claimant willfully failed to use the safety device at the time of the accident. I find that Employer had a reasonable rule requiring seat belt use, that such rule was posted in a conspicuous place, that Claimant had actual knowledge of the rule, and that Employer had, prior to the injury, made a diligent effort to cause its employees to use seat belts and to follow the rule requiring the use of seat belts.

Therefore, I find that most of the requirements for imposing the penalty have been proven. The only remaining question is whether Claimant's injury was caused by the failure to use a seat belt.

Clearly, Claimant's failure to use a seat belt was not the cause of the accident itself. Employer attempted to prove that Claimant would have been uninjured in the accident had he been wearing his seat belt, or that his injuries would have been significantly less severe had he been wearing his seat belt. In that regard, Employer offered the deposition testimony of Dr. Jon Rupright. The pertinent portions of Dr. Rupright are as follows:

Q. Okay. Were the injuries for which you treated Mr. Buescher consistent with someone who had been ejected from a motor vehicle?

A. The injuries most likely would have been from an ejection. But with a severe enough auto accident he could have actually stayed in the car and had similar injuries.

Q. Your opinion is that he may have had similar injuries?

A. No, I said that he, these injuries could have occurred with an ejection but with a severe enough motor vehicle accident, depending on how he would have been hit, he could have had injuries like this and stayed in the car.

Q. Okay.

A. I've seen much worse than this that never left the car.

Q. Okay. In your experience if an individual is wearing a seatbelt is that a significant factor in keeping them from being ejected from the vehicle?

A. Well, I can't quote a statistic like you did but my personal experience with hundreds of head injury patients has shown that a majority of them leave the vehicle. Probably 75 percent are ejected.

Q. That do not have their seatbelt?

A. Not wearing seatbelts. Occasionally they're wearing belts and the rollover is so horrific that they slide out from under them. But that's been my clinical experience.

Q. I'm going to show you what's been marked as Exhibit 1 and ask if you can identify that?

A. This is a letter that I wrote on March 13, 2002 addressed to you.

Q. And in that letter were you advised that Mr. Buescher was not wearing his seatbelt at the time of the injury and asked for your opinion about the degree or the severity of his injuries?

A. Yes. And my response at this point was – My response was that Mr. Buescher was driving a truck struck by another vehicle and was ejected. And I stated the fact that he was ejected within reasonable medical certainty, which by legal definition is 51 percent, usually produces greater injury than what he would have occurred (sic) had he stayed in the vehicle. That was my response. (pages 7-10, Exhibit 2, Rupright deposition)

Q. Doctor, are you a forensic engineer? You're not a forensic engineer?

A. No, I'm not an engineer, no.

Q. Okay. So, therefore, you're not a forensic engineer?

A. Obviously.

Q. Are you an accident reconstructionist?

A. No.

Q. Have you had training in either of those specialties?

A. No.

Q. You're a physician, aren't you?

A. Yes, I am.

Q. All right. And your opinion that you gave earlier in this deposition regarding increased likelihood of injury if an individual is ejected, is that based on a personal study that you've made or what's that based on?

A. That's based on literature that's published in the physical medicine and rehab literature and it's also based on my personal involvement with hundreds of brain injury patients. And the ones that stay seatbelted and stay in the car, their injuries are always less involved than the ones that are thrown out.

Q. Always less?

A. Almost always.

Q. Well, how, what do you mean by almost always, Doctor? Give me a percentage.

A. It depends on the accident. If they have a rearending accident and a sideswiping type of accident, they're usually minimal. If they hit a tree at 90 miles an hour with a seatbelt, obviously they are still going to have injuries. So it does, it's accident dependent.

Q. So the dynamics of the accident itself have a lot to do with whether or not there is an increase in likelihood of injury as a result of the ejection, is that correct?

A. That's right.

Q. Okay. Now in this particular instant do you know anything at all about the dynamics of this accident?

A. No, just that he was ejected. I don't know the speed, the distance. I don't know any of that.

Q. Okay, obviously don't know the size of the truck he was driving?

A. No.

Q. Do you even know that he was driving a truck?

A. No.

Q. Do you know the weight of the truck he was driving?

A. The only thing I know is he had a head injury and how the mechanism he got it comes into play is minimal. I just look at what I see, the patient injury.

Q. Do you know how his vehicle was struck? In other words, was it struck by another vehicle, did it strike an embankment, a guardrail, anything like that?

A. I don't know that.

Q. Now, there are people who could suffer these exact same injuries that Mr. Buescher suffered who had not been ejected, isn't that correct, from a vehicle?

A. That's correct.

Q. Happens on a regular basis, does it not?

A. Probably.

Q. Let's assume that this individual was hit broadside by a very large vehicle at a reasonably high rate of speed on the driver's side door. Injury to the left ribs, the left shoulder would not be unusual in that accident, would they, Doctor?

A. No.

Q. Whiplash type injury would not be unusual, would it not?

A. No.

Q. Okay. Significant whiplash to the point where there would be fractures of the vertebra would not really be that unusual, would it, Doctor?

A. Probably not.

Q. Certainly cervical disc herniations and injuries would also not be something you would be surprised to see, would it?

A. Not necessarily.

Q. Okay. Rib fracture, however they were caused, could easily cause pneumothoraxes and resulting pneumonia, isn't that correct?

A. Yes.

Q. So the truth be told, Doctor, all you're telling us today is that in your opinion people who are ejected from automobiles suffer greater injuries as in your opinion compared to those individuals who do not leave?

A. Typically.

Q. All right. Now people can have injuries as a result of the dynamics of the accident before they're ejected from the vehicle, can they not?

A. Well, yes, they could.

Q. Obviously, they could have head injuries before they were ejected from the vehicle or inside the vehicle itself as a part of going out, isn't that right?

A. That's correct.

Q. They could hit the roof, could they not?

A. Yep.

Q. Could hit the steering wheel, could they not?

A. Yes.

Q. In fact brain injuries can actually be caused by an air bag going off, too, can it not? There have been instances of that, have there not?

A. I'm not aware of it in adults. I do know in children it can, yes.

Q. There have been facial injuries caused by –

A. Facial injuries, right.

Q. Do you know if there was an air bag in this vehicle?

A. No, I don't.

Q. Do you even know for sure that there were seatbelts in this vehicle?

A. No, I don't.

Q. You never talked to the client about the dynamics, or Mr. Buescher, my client, excuse me, about the dynamics of this injury, did you not? Did you?

A. I don't recall. (pages 16-22, Exhibit 2, Rupright deposition)

Based upon Dr. Rupright's complete lack of knowledge of any of the details and circumstances of the accident, I find that Dr. Rupright's testimony proves one thing only, i.e., that Dr. Rupright believes that a person ejected from a vehicle almost always has more serious injuries than a seat-belted person who is not ejected from the vehicle. I find that this belief (which I happen to share), considered alone, does not satisfy Employer's burden of proof on this crucial issue. Again the statute begins: "Where the injury is caused by the willful failure of the employee to use safety devices ...". What injury or injuries were caused by the failure to use the seatbelt? What injury or injuries were made more severe by the failure to use the seatbelt? Even considering the evidence in the light most favorable to Employer, I find there to be no answer to either question. I find, therefore, that the safety violation penalty of Section 287.120.5 is not applicable in this case, as Employer has not satisfied its burden of proving that Claimant's injury was caused by Claimant's failure to use the seat belt.

Underpayment of TTD benefits. As the penalty does not apply, I find that Employer underpaid TTD benefits by \$57.72 each week for 100 1/7 weeks. The total underpayment of TTD benefits was \$5,780.25. Employer is ordered to pay Claimant the sum of \$5,780.25 for underpayment of TTD benefits.

Permanent total disability benefits. As the penalty does not apply, Employer is responsible for payment

of permanent total disability benefits in the weekly amount of \$384.77, beginning September 27, 2002, and continuing for Claimant's life. As of May 26, 2005, 139 weeks of benefits has accrued, totaling \$53,483.03.

Second Injury Fund claim denied. Claimant's claim against the Second Injury Fund is denied.

Claimant's attorney, Mark Akers, is allowed 25% of all disability benefits awarded herein, including future benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

Date: _____

Made by: _____

ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation