

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

Injury No.: 05-073767

Employee: Kenneth Buhman  
Employer: Johnson Controls Battery Group  
Insurer: Self-Insurer  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 18, 2011, award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminaries**

The ALJ heard this matter on January 25, 2011, and found that employee is permanently and totally disabled as a result of his primary injury combining with his preexisting disabilities.

Employer filed an Application for Review with the Commission and alleges that the ALJ erred in finding that employee met his burden of establishing that he sustained an accidental injury arising out of his employment.

The Second Injury Fund also filed an Application for Review with the Commission and alleges that the ALJ erred in finding that employee is permanently and totally disabled as a result of his primary injury combining with his preexisting disabilities. The Second Injury Fund argues that employee is permanently and totally disabled solely as a result of the primary injury and, therefore, there should be no Second Injury Fund liability.

With regard to employer's Application for Review, we find that the substantial and competent evidence supports the ALJ's finding that employee sustained an injury due to an accident arising out of and in the course of his employment. Therefore, we affirm the ALJ's decision with respect to this issue.

We find that the primary issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2004 unless otherwise indicated.

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### **Findings of Fact**

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the facts and stipulations listed below, they are incorporated and adopted by the Commission herein.

Employee testified that since the July 25, 2005, injury he has constant low back pain and has to lie down approximately 4-8 hours per day. He testified that lying down during the day takes the pressure off his back and that if he does not lie down, his back pain gets worse. Employee testified that he never had to lie down during the day prior to the July 25, 2005, work injury. He also stated that lifting anything hurts his back. Since the work injury, he can only stand for 30 minutes at a time. Employee is also unable to sit for long periods and must stand up to relieve the pressure and pain in his back.

Dr. Peterson, the operating surgeon who performed employee's spinal fusion at L5-S1, released employee from his treatment on January 11, 2007. Dr. Peterson stated in said medical note that "[i]t is [his] opinion that [employee] is unable to return to gainful employment at this time due to [employee's] symptoms." The only symptoms Dr. Peterson discussed in that medical note concerned employee's lumbar spine. Therefore, we find that Dr. Peterson's use of "symptoms" in the aforementioned sentence is strictly relegated to the symptoms associated with employee's lumbar spine, or the July 25, 2005, work injury.

Dr. Egea, employee's medical expert, testified that employee's need to lie down during the day is likely attributable to the July 25, 2005, work injury.

Mr. Dreiling, employee's vocational expert, concurred with Dr. Egea's opinion that employee's need to lie down is likely attributable to the July 25, 2005, work injury. Mr. Dreiling opined that employee's constant low back pain, standing and sitting limitations, and need for medication to sleep all appear to be due to the July 25, 2005, work injury. Mr. Dreiling concluded that, considering only the restrictions imposed for the July 25, 2005, lumbar spine injury, employee is unemployable.

Ms. Bankowski, employer's vocational expert, testified that employee is unemployable due to the restrictions imposed as a result of the July 25, 2005, injury coupled with his age. When asked if she considered employee's preexisting conditions in concluding that employee is unemployable, Ms. Bankowski stated, "I guess I was just basing it on the July 2005 injury."

Ms. Bankowski testified that it is reasonable to assume that employee's need to lie down is due to the July 25, 2005, injury. She opined that employee's need to lie down would make it hard for him to have a job unless he was looking for a part-time position.

### **Conclusions of Law**

While we agree with the ALJ's conclusion that employee is permanently and totally disabled, we disagree with the ALJ's determination that employee is permanently and totally disabled as a result of the primary injury combining with employee's preexisting disabilities. We find that employee is permanently and totally disabled solely as a result of the primary injury.

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We do not dispute the fact that employee had some preexisting disabilities. However, in evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – '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 preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

*Kizior*, 5 S.W.3d at 200.

There is no dispute that employee's lumbar spine problems are attributable to the July 25, 2005, work injury. Further, there is no dispute that employee's need to lie down for several hours during the day is attributable to the primary injury.

Dr. Peterson concluded that employee is unable to return to gainful employment due to his lumbar spine symptoms. Mr. Dreiling concluded that, considering only the restrictions imposed for the July 25, 2005, lumbar spine injury, employee is unemployable. Ms. Bankowski stops short of affirmatively stating that the primary injury, considered in isolation, renders employee unemployable, but does state that it is unlikely that he would be able to find any full-time employment with his need to lie down for several hours during the day.

Employee's primary limitation with respect to his employability concerns his need to lie down for several hours during the day. Because this limitation is solely due to his July 25, 2005, injury, we find that the weight of the evidence establishes that employee is permanently and totally disabled solely as a result of the July 25, 2005, injury. For this reason, we find that the aforementioned analysis stops at step (1) and there is no Second Injury Fund liability.

### **Award**

We find that employee achieved maximum medical improvement on January 11, 2007 (in accordance with Dr. Peterson's release). Therefore, beginning January 12, 2007, we find employer liable for employee's weekly permanent total disability benefit of \$696.97 for the remainder of employee's life, or until modified by law.

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The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued April 18, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

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 9<sup>th</sup> day of December 2011.

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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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: **KENNETH BUHMAN**

Injury No. **05-073767**

Employer: **JOHNSON CONTROLS**

Additional Party: **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND**

Insurer: **AUTHORIZED SELF-INSURER**

Hearing Date: **JANUARY 25, 2011**

Checked by: **NGA**

### 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 25, 2005**
5. State location where accident occurred or occupational disease was contracted: **Buchanan 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 occurred or occupational disease contracted: **Employee was at work changing into his uniform when he bent over to pick up his safety glasses and injured his back.**
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: **30% permanent partial disability to body as a whole combining with a pre-existing partial disability of 30% to body as a whole to render the claimant permanently and totally disabled.**

15. Compensation paid to-date for temporary disability: **None**

16. Value necessary medical aid paid to date by employer/insurer? **None**

17. Value necessary medical aid not furnished by employer/insurer? **None**

18. Employee's average weekly wages: **N/A**

19. Weekly compensation rate: **\$696.97 / \$365.08**

20. Method wages computation: **By Stipulation.**

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

**39-3/7** weeks of temporary total disability (or temporary partial disability) x **\$696.97** = **\$27,480.55**

**120** weeks of permanent partial disability from Employer x **\$365.08** = **\$43,809.60**

22. Second Injury Fund liability:

Permanent total disability benefits from Second Injury Fund:

weekly differential **\$331.89** payable by SIF for **120 weeks** beginning **January 12, 2007** and **\$696.97** thereafter for claimant's lifetime.

**TOTAL:**

23. Future requirements awarded: **Such medications as may be necessary to cure and relieve the conditions caused by claimant's injury of July 25, 2005.**

Said payments to begin **July 26, 2005** 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: **David W. Whipple**

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

Employee: **KENNETH BUHMAN**

Injury No. **05-073767**

Employer: **JOHNSON CONTROLS**

Additional Party: **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND**

Insurer: **AUTHORIZED SELF-INSURER**

Hearing Date: **JANUARY 25, 2011**

Checked by: **NGA**

**Prior to presenting evidence the parties stipulated that the issues to be determined by this hearing are:**

- 1. Whether the claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment;**
- 2. Liability for future medical treatment;**
- 3. Liability for past temporary total disability;**
- 4. Nature and extent of claimant's disability; and**
- 5. Liability of the Second Injury Fund.**

**The parties agreed that on July 25, 2005, Kenneth Buhman was an employee of Johnson Controls, Inc. The employer was operating under and subject to the Missouri Workers' Compensation Law and was an authorized self-insurer.**

**The parties also agreed that the correct rate of compensation is \$696.97 per week for temporary total disability and permanent total disability and \$365.08 per week for permanent partial disability. No compensation has been paid. No medical aid has been furnished but the claimant is not requesting any past medical expense.**

**The parties further agree that the employer had proper notice of claimant's injury and the claimant has filed a timely Claim for Compensation.**

**The claimant testified in person. He is 62 years old. He has a high school degree and has attended college for one year. He served in the Air Force for four years and has been in the Army National Guard for 16 years. He has no extra vocational training. He worked for Johnson Controls for 22 years. I found him to be a believable witness.**

**Mr. Buhman testified that on July 25, 2005 he clocked in at Johnson Controls. He went to a locker room. He changed into his work uniform and bent over to pick up his prescription safety glasses that were on a two-foot high bench. He felt pain in his lower back. He had to**

have assistance to stand up. The claimant was unable to complete his shift and went home. The claimant underwent a series of epidurals with little relief. When his condition did not improve, he had a microdiscectomy at L5/S1 on January 9, 2006, repeated on February 20, 2006 by Dr. Brent Peterson. This did not improve the claimant's condition and on July 10, 2005, the claimant underwent an L5 laminectomy with posterior lumbar inter-body fusion at L5/S1 with pedicle screw fixation for his recurrent ruptured disk at L5/S1 on the right.

Mr. Buhman said that as a result of his injury he was unable to work from July 25, 2005 until August 8, 2005; January 9, 2006 until February 13, 2006; and February 20, 2006 until April 3, 2006. This totaled 13 weeks. He last worked on June 19, 2006. He has not worked since.

The claimant had surgery for a herniated cervical disk at C5-6 on May 26, 1995 and a second surgery again for cervical disc herniation at C6-7 on May 21, 1996. Both of these injuries were Workers' Compensation cases and were settled based on 7% body as a whole for the first surgery and 13% body as a whole for the second injury. He also had a surgical right elbow in the 1990s with a pin in his elbow.

The claimant's job consisted of moving heavy batteries on and off of assembly line. After his neck injuries his job was modified. He did not have to "stack off" batteries anymore. He was also given a stool to sit on.

The claimant testified that after his last back surgery, he is in pain all of the time. That pain goes down his lumbar spine and down his right leg but not his left. He lays down every day. He can only stand for half-an-hour at a time. He is unable to sit for long periods and must stand up to relieve the pressure and pain in his back. He must lie down for a long period of time every day.

Mr. Buhman testified that he has a small yard and he is able to mow his yard using a self-propelled mower. He used to mow the yard in about an hour and mow it all at once. Now he takes two days to complete the mowing.

The claimant does play golf. He said before his injury he used to walk the course but now he uses a cart. He has a suction cup attached to his putter that allows him to pick up the ball without bending over. He also said he used to bowl and was a jogger. He said he had to give up those activities. He can only walk a couple of blocks at a time. He can only lift 15 pounds.

Mr. Buhman takes pain medication about two times a week. This makes him groggy and he must lie down.

Dr. Mark Bernhardt examined the claimant for the employer on November 6, 2007. He found that the claimant's bending over was a substantial factor in the employee's injury. He determined Mr. Buhman had sustained a permanent partial disability in the amount of 20% of the body as a whole with 50% of the permanent partial disability due to his pre-

**existing degenerative lumbar disc disease and 50% due to his disc herniation which occurred on July 25, 2005.**

**Dr. Fernando H. Egea examined the claimant on October 29, 2007. He found that the July 25, 2005 incident of the claimant bending over at work was the direct proximate and prevailing factor in claimant's injury. He restricted the claimant to no frequent bending, twisting, turning, squatting, crawling, reaching, stooping, jumping, climbing stairs, walking for periods of time over 30 minutes without stopping and resting for ten minutes, sitting for periods of 30 minutes without changing positions or standing and no lifting of over 20 pounds and no frequent lifting over ten pounds.**

**Dr. Egea rated the claimant as having a 30% permanent partial disability as a result of his July 25, 2005 injury. He also found the claimant was permanently, totally disabled as a combination of claimant's two pre-existing neck injuries. He also said that the claimant would need medical treatment in the future for control of pain and muscle spasms.**

**Dr. Brent P. Peterson, the claimant's operating surgeon, released claimant on January 11, 2007 and said, "It is my opinion he is unable to return to gainful employment at this time due to his symptoms."**

**Dr. Anne Idiculla of Heartland Physical Medicine and Rehabilitation found on October 12, 2010 that Mr. Buhman has chronic pain in his neck and back that limits his ability to stand or sit for any period of time.**

**Michael Dreiling testified by deposition for the claimant as a vocational expert. Gina Bankowski did the same for the employer. Both found the claimant was unable to compete in the open labor market for employment. They did not believe that a prospective employer would hire the claimant.**

**Mr. Dreiling based this on the claimant's July 25, 2005 back injury alone but did note the claimant's pre-existing neck surgeries and his age. He said the age of the claimant was a contributing factor.**

**Ms. Bankowski found that the claimant could find an entry level sedentary position but that was all. His age would prevent prospective employers from providing a retraining program. She also said his prior neck injuries resulted in limiting restrictions that hindered his employment options.**

**Both of the vocational experts agree that his years at Johnson Controls did not result in any transferable skills. There is no doubt that he is unable to return to his prior employment as he would be required to lift heavy batteries weighing in excess of his restriction.**

**I find and believe from the evidence that the claimant's bending over to pick up his safety glasses was both a substantial and prevailing factor in his back injury on July 25, 2005.**

**I find that the claimant was temporarily totally disabled from July 26, 2005 until August 8, 2005; January 9, 2006 until February 13, 2006; February 20, 2006 until April 3, 2006. This totaled 13 weeks and from June 20, 2006 until he was released by Dr. Peterson January 11, 2007, which is another 26-3/7 weeks. I order and direct the employer to pay to the claimant the sum of \$696.97 per week for 39-3/7 weeks for a total of \$27,480.55 for temporary total disability.**

**I find and believe from the evidence that as a result of claimant's injury on July 25, 2005, the claimant was permanently partially disabled in the amount of 30% body as a whole. I order and direct the employer to pay to the claimant the sum of \$365.08 per week for 120 weeks commencing January 12, 2007 for a total of \$43,809.60.**

**I find and believe from the evidence that the claimant had two prior cervical injuries and surgeries resulting in a pre-existing permanent partial disability of 20% body as a whole. This permanent partial disability combined with the pre-existing permanent partial disability of 30% body as a whole renders the claimant permanently totally disabled.**

**I order and direct the Treasurer of the State of Missouri to pay to the claimant the sum of \$331.89 per week for 120 weeks commencing January 12, 2007 for a total of \$39,826.80 and then \$696.97 per week thereafter for the remainder of the claimant's lifetime.**

**The claimant is not asking for past medical expenses. He is receiving prescription drugs for pain and sleeping problems caused by his July 25, 2005 injury and will be required to take medication in the future. I order and direct the employer to provide the claimant with such medications as may be reasonable and necessary to cure and relieve the claimant from the condition caused by his injury on July 25, 2005.**

**Mr. David W. Whipple is hereby assigned a lien in the amount of 25% of this award for necessary legal services rendered to the claimant.**

Made by: /s/ Nelson G. Allen  
*Nelson G. Allen,*  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

This Award is dated and attested to this 18th day of April, 2011

/s/ Naomi Pearson  
**Naomi Pearson**  
Division of Workers' Compensation