

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

Injury No.: 06-126823

Employee: Carl Cantrell, deceased
Dependent: Kim Cantrell, substituted party
Employer: Baldwin Transportation, Inc.
Insurer: Cherokee Insurance Company
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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 1, 2008, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued October 1, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Carl Cantrell (deceased)

Injury No. 06-126823

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: Kim Cantrell (substituted party)

Employer: Baldwin Transportation, Inc.

Additional Party: Second Injury Fund

Insurer: Cherokee Insurance Company

Hearing Date: September 2, 2008

Checked by: VRM/meb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: December 11, 2006.
5. State location where accident occurred or occupational disease was contracted: Springfield, 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 the 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: Employee was walking on a dock and tripped and fell.

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: Left upper extremity.
14. Compensation paid to-date for temporary disability: \$0
15. Value necessary medical aid paid to date by employer/insurer? \$0
16. Value necessary medical aid not paid by employer/insurer? None.
17. Value of necessary medical aid paid to date by employer/insurer? None.
18. Employee's average weekly wages? \$814.72
19. Weekly compensation rate: \$543.17 TTD/\$376.55 PPD
20. Method of computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

Total: 0

22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

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Injury No. 06-126823

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INTRODUCTION

This workers' compensation claim was heard in Springfield, Missouri, before the undersigned Administrative Law Judge on September 2, 2008. Carl Cantrell, the deceased employee, died as a result of an unrelated disease. His widow, Kim Cantrell, is the substituted party (Claimant). She is represented by Randy Alberhasky. Baldwin

Transportation and its insurer, Cherokee Insurance Company (Employer), is represented by Patricia Musick.

STIPULATIONS

The parties agree that the deceased employee suffered an injury that arose out and in the course of employment. Employee was covered by the Workers' Compensation Law and Employer was subject to that Law. Employer was fully insured. Counsel for the Second Injury Fund signed an agreement as to the amount of its liability should the underlying claim be ruled in Claimant's favor. There is no dispute with respect to notice, venue, jurisdiction, or statute of limitations. The deceased employee earned an average weekly wage of \$814.72, which would yield a temporary total disability rate of \$543.17 and a permanent partial disability rate of \$376.55. There is no claim for additional medical or temporary total disability. The employee died as a result of causes unrelated to his work injury.

ISSUES

1. Whether permanent partial disability accrued prior to Employee's death?
2. If permanent partial disability is due, what is the nature and extent of permanent partial disability?

EXHIBITS

The following exhibits were admitted on behalf of the claimant:

Exhibit B	Medical records – St. John's Clinic Occupational Medicine
Exhibit C	Medical records – MRI of Springfield
Exhibit D	Medical records – St. John's Clinic, Orthopedic Specialists
Exhibit E	Medical report – Dr. Kubick
Exhibit F	Medical report – Dr. Paff
Exhibit G	Claim
Exhibit H	Answer – Employer
Exhibit I	Answer – Second Injury Fund
Exhibit J	Notice – 6/3/2008
Exhibit K	Notice – 6/10/2008
Exhibit L	Notice – 7/24/2008
Exhibit M	Report of Injury
Exhibit M	Memorandum of Agreement with Second Injury Fund
Exhibit O	Deposition – Dr. David Paff; including exhibits contained therein.

FINDINGS OF FACT

Carl Cantrell suffered a work-related injury on December 11, 2006, when he fell on both hands. On February 15, 2007, Mr. Cantrell saw Dr. Nachtigal for evaluation of some preexisting knee problems. Surgery for the knee was scheduled for March 6, 2007. A lung biopsy performed during that surgery due to a collapsed lung revealed cancer. Dr. Nachtigal also reviewed the MRI and opined that the employee suffered a rotator cuff tear. Dr. Kubick subsequently noted a positive impingement sign on the left shoulder and pain in the scapholunate ligament. Dr. Kubick diagnosed left shoulder impingement syndrome, left wrist ulnar impaction, and a triangular complex (TFCC) tear. She noted, however, that the employee had "other health issues." She recommended conservative care.

After a few months of conservative care, Dr. Kubick saw no significant improvement. She indicated that surgery was appropriate treatment but because the employee was undergoing chemotherapy, the employee was not a good surgical candidate. She, therefore, suggested that employee continue on limited duty and return in six weeks for a repeat check. The employee did not return to Dr. Kubick as he died shortly thereafter as a result of the lung cancer.

After the employee's death, Dr. Kubick issued a rating report to Claimant on July 19, 2007. Dr. Kubick stated that it was difficult to render an opinion "given the fact that although [employee] had a diagnosis, treatment was not possible given his other medical issues." Using "The Guides to Evaluation of Permanent Impairment," 5th Edition, Dr. Kubick issued an "estimate" of the employee's impairment (Ex. E).

Dr. Paff reviewed the medical records. He believed it was reasonable to stop treatment for the work injuries. Dr. Paff provided a disability rating, but he neither treated nor examined Employee. According to Dr. Paff, the disability rating was based on "the amount of disability [Employee] would have had" due to his work-related injury. Dr. Paff continued, "I am rating his disability based on the minimum disability that would exist following proper treatment." In Dr. Paff's deposition, Dr. Paff admits that Claimant was in active medical treatment for his left wrist and left shoulder as of June 11, 2007, and that he was not placed at maximum medical improvement by his treating doctors.

In deposition, Dr. Paff testified:

- Q. Was he then at maximum medical improvement on June 11th, 2007, when he elected to decline further treatment?
- A. Well, I don't think I would say that he was at maximum medical improvement because it's the best he ever got, but he could have had treatment for it that might have made him better.
- Q. Well, absent further treatment he was not going to get better?
- A. That's correct. But if I were seeing him when he was alive, I would have said that he had not reached maximum medical improvement and needed to have this treatment and this treatment and this treatment.

(Ex. O, p. 32 - 33).

Dr. Paff went on to state specifically that it would be mere speculation to provide an opinion as to the specific amount of permanent partial disability that the employee sustained. He states:

- Q. It would be mere speculation to provide an opinion as to the specific amount of permanent partial disability. You can only give a minimum?
- A. Yes. I couldn't tell you in his particular case what it would have been.

(Ex. O, p. 9).

With respect to Dr. Paff's findings as to permanency, Dr. Paff admits that his ratings could have been higher and possibly lower (Claimant's Ex. O, p. 28 - 29). He opined that, assuming the employee intended to seek no more treatment for his work injuries, then the minimum disability would be 15 percent to the left wrist at the 175-week level and 20 percent to the left shoulder at the 232-week level, with a 10 percent loading factor to the body as a whole as a result of all of the injuries, including the right knee. Dr. Paff said he was rendering his opinion within a reasonable degree of medical certainty.

CONCLUSIONS OF LAW

Section 287.230.1, RSMo Cum Supp. 2005, provides that upon the death of an employee due to causes unrelated to a work injury, any "accrued and unpaid compensation due the employee shall be paid to his dependents without administration..." Claimant argues that an employee has the right to terminate treatment pursuant to § 287.140.5, RSMo. And if that termination is reasonable, as opined by Dr. Paff, permanent partial disability can be affixed. While I am not unsympathetic to Claimant's position, based on the cases decided to date, I conclude the law precludes an award in her favor.

The General Assembly has defined permanent partial disability as "disability that is permanent in nature and partial in degree." § 287.190.6(1), RSMo. The permanent nature of an injury must be shown to a reasonable certainty and such proof of permanent disability "may not rest on surmise and speculation." *Sanders v. St. Clair Corp.*, 943 S.W.2d 12, 16 (Mo. App. S.D. 1997) *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). An employer's liability for permanent partial disability is not affected by the death of the employee, "so far as the liability has accrued and become payable at the time of the death." § 287.230, RSMo. Claimant has the burden of proving all elements of the claim, including accrual of permanent partial disability. *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). In this case Claimant has failed to meet that burden of proof.

In *Sanders v. St. Clair Corp.*, 943 S.W.2d at 12, an employee's dependents sought permanent partial disability after the employee died from cancer unrelated to the work injury. The Court of Appeals affirmed the Commission's holding that the claimant had not sufficiently met the burden of proving the nature and extent of disability. The claimant offered medical evidence, but the Commission deemed the evidence insufficient because one doctor had given no opinion about permanency of disability, another testified that the claimant had not reached maximum medical improvement, and a third doctor's opinion was based on an assumption of improvement if the claimant had not suffered from cancer. Because "Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation," any permanent partial disability award would have been inappropriate for the "lack of requisite proof." 943 S.W. 2d at 16. The holding in

Sanders was limited to the factually inadequate proof presented in that particular case and not based on whether maximum medical improvement must be reached for permanent partial disability to accrue as a matter of law.

The Commission decision in *Gregg Allen Peery v. Mid Continent Industrial*, Injury No.: 04-084324, 2008 WL 541376 (Mo. Lab. Ind. Rel. Com. February 25, 2008), is instructive on this issue. In *Peery*, the injured employee died before reaching maximum medical improvement. A doctor gave an estimate of the employee's permanent partial disability rating based on the employee's condition at death rather than on the employee's residual permanent disability after the completion of the healing period. The Commission held that the rating rested on surmise and speculation and thus the claimant failed to prove permanent partial disability to a reasonable degree of certainty. Like the appellate court in *Sanders*, the Commission in *Peery* noted that its decision was based on the particular evidence of the case and not a determination that maximum medical improvement must be reached for permanent partial disability to accrue as a matter of law, leaving that question open.

The question left open in *Sanders* and *Peery* was answered in *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008). In *Cardwell*, the Court of Appeals affirmed a Commission decision precluding payment of permanent partial disability benefits until maximum medical improvement was reached. The *Cardwell* Court acknowledged that "maximum medical improvement" is not a phrase used in the Missouri Workers' Compensation Law. Nevertheless, many cases used maximum medical improvement as the standard for determination of the accrual of permanent partial disability benefits, citing *Soard v. Town & Country Supermarkets*, 193 S.W.3d 446, 449 (Mo. App. S.D. 2006), and *Lorenz v. Sweetheart Cup Co., Inc.*, 60 S.W.3d 677, 681 (Mo. App. S.D. 2001). According to the Court, there is an intended timing of benefits paid by employers - permanent partial disability is to be awarded "[a]fter reaching the point where no further progress is expected." 249 S.W.3d at 910. Maximum medical improvement is one of several terms Courts have used to describe that point. Thus, permanent partial disability does not accrue until an injury "will no longer improve with medical treatment." 249 S.W.3d at 910. In other words, Claimant must reach maximum medical improvement before Employer is liable for permanent partial disability compensation.

Claimant offered the medical report of Dr. Victoria Kubik pursuant to § 287.210 RSMo. Dr. Kubik treated employee's left wrist injury. Employee was last seen by Dr. Kubik on June 11, 2007. At that time, Dr. Kubik recommended arthroscopic surgery for debridement and/or repair of employee's triangular fibrocartilage complex tear. Because employee died of cancer the next month, the surgery was never undertaken. Nonetheless, in a July 19, 2007 letter to Claimant's widow, Dr. Kubik assessed a permanent partial disability rating. According to Dr. Kubik, she would "estimate that [employee's] impairment of [the wrist] was approximately 25%." (Exhibit E, emphasis added).

Dr. Kubik's report cannot sustain a finding of Permanent Partial Disability because she did not find Claimant at maximum medical improvement. Rather, she recommended further surgery. Employee had not reached a point where his injury "will no longer improve with medical treatment," as required by *Cardwell*, 249 S.W.3d at 910, for permanent partial disability to accrue. Furthermore, Dr. Kubik was only able to offer an *estimation* of permanent disability. Under *Sanders*, a mere estimation is insufficient because disability cannot be established by surmise or speculation, but must be proven to a reasonable certainty. 943 S.W.2d at 16. Because further treatment was never provided, it can only be speculated as to how Employee's injury would have progressed had treatment continued and the healing period been completed. Employee could have had a fantastic or a disastrous result from surgery, leading to minimal disability or great disability. Dr. Kubik's report is insufficient to carry Claimant's burden of proof because Dr. Kubik clearly did not find Employee at maximum medical improvement.

Like Dr. Kubik's rating, Dr. Paff's rating is based on speculation as to Employee's condition following proper treatment. Such a rating is inherently based on surmise and speculation as specifically admitted by Dr. Paff. Dr. Paff clearly assumed an outcome from treatment then speculated as to residual disability. However, it could not be known what condition employee would have been in after he had reached a point where his injury "will no longer improve with medical treatment," as required by *Cardwell*, 249 S.W.3d at 910, for permanent partial disability to accrue. Dr. Paff testified Employee "could have had treatment for it [his medical conditions] that might have made him better." (Ex. O., p. 33). Thus, Dr. Paff's report is also insufficient to meet Claimant's burden of proof.

CONCLUSION

Claimant failed to sustain her burden of proof to establish that permanent partial disability benefits had accrued prior to Employee's death from causes unrelated to work. Benefits are denied.

Date: October 1, 2008

/s/ Victorine R. Mahon
Victorine R. Mahon
Chief Administrative Law Judge

A true copy: Attest:

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