

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

Injury No.: 02-074468

Employee: Jack Chambers  
Employer: Dennis Rodgers d/b/a DS & F Plumbing (Settled)  
Insurer: Hartford Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the December 17, 2009, award and decision of the administrative law judge. We adopt the findings, conclusions, decision and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

**Preliminary Matters**

The administrative law judge heard this matter to consider whether the Second Injury Fund is liable for payment of wage loss benefits, as allowed in § 287.220.9 RSMo.

The administrative law judge found that, at the time of the accident, July 12, 2002, employee engaged in dual employment, and for the 13 weeks preceding the July 12, 2002, accident, he earned \$703.75 in additional income. The administrative law judge went on to state that the additional income of \$703.75, applied to the 13-week period provides an additional average weekly wage of \$54.13. Accordingly, the applicable compensation rate for employee's dual employment claim is \$36.09 ( $\$54.13 \times \frac{2}{3}$ ).

The administrative law judge found that employee did not reach maximum medical improvement for a total of 103 and  $\frac{2}{7}$  weeks. Therefore, the administrative law judge ordered the Second Injury Fund to pay employee the sum of \$3,717.27 in additional wage loss benefits under § 287.220.9 RSMo.

**Summary of Facts**

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are adopted by the Commission to the extent they are not inconsistent with the additional facts listed below.

Employee testified, and it was not disputed, that at the time of the injury on July 12, 2002, he was employed by DS & F Plumbing, Inc. However, employee also testified that he earned extra income working after his regular hours at DS & F Plumbing, Inc. Employee stated that DS & F Plumbing, Inc., MFA Propane, Empire Propane, L & J Plumbing, and Beanland Mobile Home Sales would send him to customers' residences to complete jobs

Employee: Jack Chambers

- 2 -

for them. Employee further stated that he directly billed the individuals he was doing the work for. Employee testified that he did the work for the aforementioned entities because they did not have the manpower to get the jobs done themselves.

On cross-examination, employee testified that the individuals he performed work for would call him at his home to have him come to their houses and work on their furnaces, pilot lights, plumbing, etc. Employee stated that he would then tell the individuals what time he would be able to come look at their problem.

With the exception of the invoices employee submitted for the jobs he completed for L & J Plumbing, all of the invoices employee offered as evidence list only the individuals' names that the supplies and labor were sold to. The invoices make no reference to the "employers" employee was allegedly completing the jobs for. In addition, employee offered no tax records or other financial documentation evidencing that the jobs were in any way connected to the alleged employers. Employee testified that he lost most of his tax records and other business documentation in a flood caused by a washing machine valve failing to shut off.

### **Conclusions of Law**

The administrative law judge found that only the \$703.75 of extra income employee earned for the five jobs he performed for L & J Plumbing should be used in calculating his additional wage loss benefits.<sup>1</sup> As for the other 20 jobs employee requested to be included in said calculation, the administrative law judge found that employee performed the work pursuant to an agreement with the individual customers for whom he performed the work as a contractor, engaged as a sole-proprietor in his own business. Consequently, said 20 jobs were not included in the calculation of his additional wage loss benefits.

We agree with the administrative law judge's conclusion. After reviewing the record in its entirety, we find that there is no credible evidence establishing a contractual relationship between employee and the alleged statutory employers (except for L & J Plumbing).

Although employee testified at the final hearing that the alleged statutory employers would call him and send him to the individuals' homes to complete the jobs on their behalf, employee stated on cross-examination that he had previously testified that the individuals for whom he completed the work for were the ones that called him directly. Further, none of the invoices, except the L & J Plumbing invoices, included any evidence that the job was being completed by employee on behalf of some other entity. Employee billed the individuals directly.

Based on the aforementioned, it would be illogical to conclude that employee completed the aforementioned jobs under any type of statutory employment relationship. Therefore, we find, as did the administrative law judge, that there was no contractual relationship between employee and any of the alleged statutory employers, other than L & J Plumbing.

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<sup>1</sup> The Commission notes that the Second Injury Fund did not appeal the administrative law judge's finding with regard to the inclusion of the L & J Plumbing jobs in the calculation of employee's additional wage loss benefits.

Employee: Jack Chambers

- 3 -

In addition to the aforementioned findings and analysis, we also found two numerical/calculation errors in the Award issued December 17, 2009, that need to be modified. The first error is found on page 7 of the Award in the table listing the relevant invoices. The first invoice listed, "Invoice No. 020004," states that the "Invoice Total" is "\$2,400.00." However, after reviewing a copy of the actual invoice included in Exhibit H, we find that the Invoice Total should actually be listed as \$2,450.00. The other error is found on page 12 with regard to the calculation of the additional wage loss benefits in the second paragraph. The paragraph states that "the Second Injury Fund is ordered to pay to the employee, Jack Chambers, the sum of \$3,717.27 in additional wage lost (sic) benefits under Section 287.220.9, RSMo. (103 and 2/7 weeks x \$36.09 = \$3,717.27)." However, 103 and 2/7 weeks multiplied by \$36.09 actually equals \$3,727.58.

For the foregoing, reasons we modify the Invoice Total of Invoice No. 020004 from \$2,400.00 to \$2,450.00 and we modify the amount of additional wage loss ordered to be paid by the Second Injury Fund to employee from \$3,717.27 to \$3,727.58.

**Award**

We modify the award of the administrative law judge as stated herein. In all other respects, we affirm the award.

The award and decision of Administrative Law Judge L. Timothy Wilson issued December 17, 2009, 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 fees herein as being fair and reasonable.

Given at Jefferson City, State of Missouri, this 8th day of June 2010.

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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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Jack Chambers

Injury No. 02-074468

Dependents: N/A

Employer: Dennis Rodgers d/b/a DS & F Plumbing

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

Insurer: Hartford Insurance Company

Hearing Date: October 26, 2009

Checked by: LTW

### 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 12, 2002
5. State location where accident occurred or occupational disease was contracted: Greene 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:  
While working, Claimant fell off of a ladder and sustained an injury to his back, tailbone, and head.
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, tailbone, and head
14. Nature and extent of any permanent disability: N/A
14. Compensation paid to-date for temporary disability: \$9,285.11
16. Value necessary medical aid paid to date by employer/insurer? \$8,930.88

Employee: Jack Chambers

Injury No. 02-074468

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages:
19. Weekly compensation rate: \$362.49 TTD/ \$340.12 PPD
20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

22. Second Injury Fund liability: Yes

The Second Injury Fund is ordered to pay claimant the sum of \$3,717.27 in additional wage lost benefits.

TOTAL: \$3,717.27

23. Future requirements awarded: None

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Patrick Platter, Esq.

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

Employee: Jack Chambers

Injury No. 02-074468

Dependents: N/A

Employer: Dennis Rodgers d/b/a DS & F Plumbing

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

Insurer: Hartford Insurance Company

Hearing Date: October 26, 2009

Checked by: LTW

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on October 26, 2009. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about November 23, 2009.

The employee, Jack Chambers, appeared personally and through his attorney Patrick Platter, Esq. The Second Injury Fund appeared through its attorney, Barbara Bean, Assistant Attorney General. (The employer and insurer are no longer parties to this case, having previously entered into a Stipulation for Compromise Settlement with the employee, which received approval on September 26, 2005.)

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about July 12, 2002, Dennis Rodgers d/b/a DS & F Plumbing was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by The Hartford Insurance Co.
- (2) On the alleged injury date of July 12, 2002, Jack Chambers was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about July 12, 2002, the employee, Jack Chambers, sustained an accident, which arose out of and in the course and scope of his employment with DS & F Plumbing.
- (4) The above-referenced employment and accident occurred in Stone County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.

- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the alleged accident, the claimant's average weekly wage was sufficient to allow a compensation rate of \$362.49 for temporary total disability compensation, and a compensation rate of \$340.12 for permanent partial disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$9,285.11, representing 25 4/7 weeks in disability benefits.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$8,930.88 in medical expenses.
- (10) The employee reached maximum medical improvement on July 7, 2004.

The issues to be resolved by hearing include:

- (1) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of wage loss benefits, as allowed in Section 287.220.9, RSMo?

### EVIDENCE PRESENTED

The employee, Jack Chambers, testified at the hearing in support of his claim. In addition, the employee offered for admission the following exhibits:

- Exhibit A..... Certified Copies of Records from Missouri Division of Workers' Compensation (Regarding Insurance Records for L & J Plumbing Supply, DS & F Plumbing, Blue Eye R-V School District, and A to Z Carpet Cleaning  
Exhibit D..... Medical Records from Branson Neurology and Pain Center  
Exhibit H..... Copy of Invoices

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official or judicial notice of the documents contained in the Legal File which include:

- Order (Denial of Continuance)
- Request for Continuance
- Notice of Hearing

- Request for Hearing-Final Award
- Stipulation for Compromise Settlement in Injury No. 02-074468 (B/T EE and ER/I)
- Answer of Second Injury Fund to Amended Claim for Compensation
- Answer of Employer/Insurer to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

Further, the undersigned took judicial notice of Chapter 287, RSMo and judicial notice of the IRS regulations for the years in question.

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

### **DISCUSSION**

The employee, Jack Chambers, is 54 years of age, having been born on January 29, 1955. Mr. Chambers is married and resides in Ridgedale, Missouri with his wife of 37 years.

Mr. Chambers is presently working as a supervisor for A to Z Restoration, and has worked in this employment for two years. The business operation involves rehabilitating houses damaged from fires, floods, etc.

The employment history of Mr. Chambers relates primarily to the construction industry. Mr. Chambers notes that he has worked as a plumber off and on since he was old enough to work. In describing the nature of his work as a plumber, Mr. Chambers indicated that this work involved gas, piping, water, sewer, electrical, HVAC, general construction, and "anything involving construction of pipe and pipe-line." Mr. Chambers further noted that plumbing includes electrical work, as electrical is necessary to hook up pumps and flow of sewage.

As a plumber Mr. Chambers is certified by the State of Missouri to install and work on gas lines, and he enjoys EPA certification to install and work with "Freon." Additionally, Mr. Chambers is licensed as a plumber with the City of Branson.

The underlying work-related injury involved Mr. Chambers' employment with Dennis Rodgers d/b/a DS & F Plumbing. Mr. Chambers noted that DS & F Plumbing engaged in new construction and installation of piping for water and sewage, installation of septic tanks, hookup of water lines, and tapping into main water lines. He performed all aspects of the plumbing work, including heating and cooling, for DS & F Plumbing.

As a plumber for DS & F Plumbing, Mr. Chambers used many of his own tools, including cordless sawsall, drills, hammers, and basic hand tools for plumbing. However, DS & F Plumbing provided the backhoe.

On or about July 12, 2002, while engaged in employment with DS & F Plumbing, and working in heat greater than 100 degrees, Mr. Chamber sustained an injury to his back, tailbone,

and head. The injury occurred as a consequence of falling off a ladder while he was approximately five feet off the ground. At the time of the injury, Mr. Chambers was drilling holes for pipes out to the roof. As he was doing this work the drill locked-up, causing him to be thrown off the ladder and to hit his head, back and the back of his shoulder against a 2' by 4' wall. One of the 2' by 4' broke, resulting in him landing on the floor decking. At the time of this incident, Mr. Chambers did not lose consciousness.

Mr. Chambers experienced immediate pain, but attempted to continue working. However, as he continued to work Mr. Chambers experienced shortness of breath, blurred vision, and dizziness; and he began to notice profuse sweating and inability to cool himself. He then lost consciousness. He was out for several minutes, and then noticed some numbness and tingling of the right upper extremity and face associated with weakness and inability to ambulate. Thereafter, he began to notice a headache, which the attending physician later described as occipital / suboccipital, pressure in nature.

Mr. Chambers was unable to complete the workday, resulting in his son picking him up at work and taking him to the emergency room of Skaggs Hospital in Branson, Missouri. Apparently, at the time of presenting to Skaggs Hospital, he was faced with a 2 ½ hour wait. In light of this wait, Mr. Chambers elected to leave the emergency room and to obtain an examination with David Afshar, D.O., who was available to see him immediately. Following the examination with Dr. Afshar, Mr. Chambers underwent an MRI diagnostic study and received a referral to Diane Cornelison, D.O., who is a neurologist with Branson Neurology & Pain Center.

On or about July 17, 2002, Mr. Chambers presented to Dr. Cornelison for examination and evaluation. In light of her examination and findings, Dr. Cornelison addressed the neurological nature of Mr. Chambers' condition and diagnosed Mr. Chambers with 1) Syncopal episode, and 2) Deep matter ischemic changes. Dr. Cornelison opined that the syncopal episode related to underlying "heat stroke"; the loss of consciousness with possible seizure activity related to the syncopal episode itself; and the presenting symptomology "directly related to the the episode at work, specifically the weakness being the underlying pathology." Dr. Cornelison prescribed various medications and physical therapy.

The insurer questioned the work-relatedness of Mr. Chambers' weakness, for which Dr. Cornelison prescribed physical therapy. Responding to this concern, Dr. Cornelison propounded the following comment:

I returned the call to physical therapy today in reference to Jack Chambers. We do believe that the weakness is directly related to the work situation with heat stroke, which exacerbated underlying pathology. We do recommend that he proceed with physical therapy, and there is no reason that workers' compensation should not approve such.

Eventually, Mr. Chambers underwent a course of conservative treatment. However, in light of the symptoms, Dr. Cornelison took away Mr. Chambers' drivers license. The conservative treatment involving physical therapy included electrical shock treatment, heat treatment, and using an exercise machine. Additionally, Dr. Cornelison prescribed the use of a cane to assist Mr. Chambers in walking relative to care of his right leg and right shoulder.

Also, Mr. Chambers received a referral to Michael Nachtigal, M.D. who is an orthopedic surgeon, relative to evaluation of his right shoulder. According to Mr. Chambers, Dr. Nachtigal recommended surgery; but Dr. Nachtigal felt that the improvement would be only about 5 percent. In light of the limited improvement anticipated from such surgery, Mr. Chambers indicated that he declined to undergo the surgery.

Mr. Chambers reached maximum medical improvement on July 7, 2004. Prior to reaching maximum medical improvement, the employer and insurer provided Mr. Chambers with 25 4/7 weeks of temporary total disability compensation.

On or about September 26, 2005, Mr. Chambers and the employer and insurer entered into a Stipulation for Compromise Settlement, wherein the employer and insurer agreed to pay a lump sum of \$46,000, based upon approximate disability of 15 percent to the right shoulder, 12.5 percent to the body as a whole for heat related injuries, and 12.5 percent to the body as a whole for psychological injuries and a compromise of all claims and issues relating to the claim against the employer and insurer. Additionally, as part of the settlement agreement, the employer and insurer agreed to pay the past outstanding medical expenses.

#### ***Additional Income***

During his employment with Dennis Rodgers d/b/a DS & F Plumbing, Mr. Chambers earned additional income working for himself as a plumber, relying on referrals from other individuals and businesses, including his employer Dennis Rodgers. Notably, according to Mr. Chambers, this additional work occurred "after hours", following his normal work day with DS & F Plumbing.

Also, Mr. Chambers noted that, in performing this additional work, he did not establish a corporation, limited liability company or similar legal entity. Mr. Chambers noted that, while he purchased workers' compensation insurance for his own business activity in 2000, he subsequently discontinued the insurance relying on the advice of his insurance agent, Tim Huddleston of Farmers' Insurance. Mr. Chambers did not have workers' compensation insurance for his personal business activity in 2002. And in 2002 he did not elect to include himself as a covered employer under Chapter 287, RSMo.

In identifying the additional income earned prior to the July 12, 2002 accident, Mr. Chambers offered copies of several invoices, which were admitted into evidence. The invoices are identified below.

Invoice Date	Invoice No.	Sold To	Description of Supplies & Work	Invoice for Supplies	Invoice for Labor	Invoice Total
04-06-02	020004	Not Identified	Heat Pump. Flex Box Duct Work	Not Identified	Not Identified	\$ 2,400.00
Not Identified	020055	Christopher Chase	Clean Pilot on Gas Logs		\$ 35.00	\$ 35.00
04-22-02	20024	Leonard Youngblood	Electrical Element. Replace Element on Range	\$ 60.00	\$ 45.00	\$ 105.00
05-03-02	020005	David Reeves	Cost of Freon. Clean a coil and 1lb. Freon; Clean Flame switch on Furnace	\$ 6.00	\$ 50.00	\$ 56.00

05-04-02	020006	John Christian	Feon. Contacter. Service Call: Replace Contacter and charge AC Unit	\$ 46.00	\$ 50.00	\$ 96.00
05-05-02	020007	Geneva Tate	Copper. Union. Flav Nuts. Service Call: Replace Gas Line	\$ 26.00	\$ 45.00	\$ 71.00
05-07-02	020008	John George	Feon. Repair Thermostat; Fix Switch on AC Unit; Charge AC Unit	\$ 17.90	\$ 50.00	\$ 67.90
05-13-02	020009	Dennis Beanland	Contacter. Freon. Replace Contacter on Condition Unit; Fix leak on line at condition unit; VAC System and Recharge	\$ 69.00	\$ 65.00	\$ 134.00
05-14-02	0200010	Twin Island Market	Hook-up New Range and Oven	N/A	\$ 45.00	\$ 45.00
Not Identified	0200011	Mary Ripley	Water Heater Element. Thermostat. Service Call: Replace Thermostat and Element; Clean Line Out	\$ 40.00	\$ 75.00	\$ 115.00
05-25-02	0200012	L & J Plumbing	Covert 3 Boiler from Natural Gas to LP Gas. Supplies provided by L & J Plumbing	None	\$ 150.00	\$ 150.00
05-25-02	0200013	L & J Plumbing	Replace Pilot Burner on Water Heater	None	\$ 50.00	\$ 50.00
05-27-02	0200014	L & J Plumbing	Charge out 2 Direct Vent Water Heater	None	\$ 200.00	\$ 200.00
05-29-02	0200015	Joyce Reeves	Put Together and Hook-up 2 Fireplace Vent Free; Check for Leaks & Working	None	\$ 100.00	\$ 100.00
06-01-02	0200016	Bob Rowe	Contacter. Freon. Hook-up AC Unit; Replace Contacter; Charge and Check for Working Order	\$ 68.00	\$ 100.00	\$ 168.00
06-02-02	0200017	Dennis Beanland	Transfore. Contacter. ACC Tub. Freon. Hook-up AC Unit; Install New Line; Set Contacter, transfor, Thermostat Wire; Find Short Wire... Cross in Braker Panel	\$ 111.90	\$ 250.00	\$ 361.90
06-08-02	0200018	Blue Eye School	Thermocouple. Pilot OVF. Pilot Burner. Replace Thermocouples and Pilot OVF and Pilot Burner on Steam Table	\$ 100.00	\$ 75.00	\$ 175.00
06-08-02	0200019	Bob Middleton	Milvot Gas Valve. Thermostat and Pilot for Pool Heater. Labor to Install Gas Valve, Thermostat, and Pilot Burner	\$ 556.00	\$ 75.00	\$ 631.00
Not Identified	0200020	Dennis Beanland	Freon. Charge AC Unit; Found Leak on Line at Condition	\$ 16.00	\$ 45.00	\$ 61.00
05-09-02	0200021	L & J Plumbing	Service Call. Check Water Heater Wires and Thermostat; Change Water Heater	None	\$ 150.00	\$ 150.00
07-08-02	0200022	Jim Nash	3.5 Ton Cond. Unit. Change Cond. Unit; Reclaim Freon, Charge New Unit and Check	\$ 948.00	\$ 250.00	\$ 1,198.00
06-29-02	020103	Dennis Rodgers	Install 2-4 Ton AC & Furnance Units and Duct Work	None	\$ 2,500.00	\$ 2,500.00
06-26-02	020081	Stan Patters	Freon. Charge AC Unit	\$ 12.00	\$ 45.00	\$ 57.00

05-09-02	020082	A & Z Carpet	Flet Strips. Replace Duct Work; Remove Water From Duct Work; Clean A Coil; Glue PVC Drain Line	Not Identified	\$ 350.00	\$ 350.00
05-28-02	020083	L & J Plumbing	Install 3 Second Stage Regulator	None	\$ 153.75	\$ 153.75
<b>Total:</b>				<b>\$ 2,076.80</b>	<b>\$ 4,953.75</b>	<b>\$ 7,030.55<sup>1</sup></b>

Mr. Chambers testified that the work identified in the invoices involved a variety of plumbing-type work on residential, governmental, retail and industrial properties. He further indicated that he performed this work with his own tools, and did not receive Form 1099s, although not required by IRS Regulations. Additionally, Mr. Chambers indicated that he suffered a fire at his home several years ago, and his financial records were destroyed or lost as a result of this casualty.

### FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident occurring on July 12, 2002, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on July 12, 2002, which is substantive in nature, and not procedural, governs the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and

<sup>1</sup> The figure of \$7,030.55 does not include the \$2,400.00 identified in Invoice No. 020004.

*Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

### Wage Loss Benefits / Dual Employment

The employee seeks additional temporary total disability compensation from the Second Injury Fund pursuant to Section 287.220.9, RSMo, relative to his claim of dual employment, Section 287.220.9, RSMo states:

Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury. The employee shall be entitled to a total benefit based on the total average weekly wage of such employee computed according to subsection 8 of section 287.250. The employee shall not be entitled to a greater rate of compensation than allowed by law on the date of the injury. The employer for whom the employee was working where the injury was sustained shall be responsible for all medical costs incurred in regard to that injury.

Pursuant to this statute an employee is entitled to be compensated from the Second Injury Fund for wages lost from the employment at which the injury did not occur. In the present case, the employee argues that he earned \$7,353.75 in the three months preceding the accident of July 12, 2002. The employee premises his argument on the assertion that, in performing this additional work for additional income, he was a statutory employee. And ,as a statutory employee, he is entitled to benefits under Section 287.220.9, RSMo.

The Second Injury Fund, however, argues that Section 287.220.9, RSMo is not applicable to the additional income earned by Mr. Chambers insofar as he earned this income as an independent contractor and not as an employee. In the context of this argument, the Second Injury Fund argues that Mr. Chambers, as a self-employed individual, who did not incorporate, chose not to elect to be covered under Chapter 287, RSMo; and, thusly, he cannot be considered an employee of his own business enterprise. The Second Injury Fund further argues that Mr. Chambers was not a statutory employee while performing this additional work and earning this additional income.

The evidence indicates that, with the exception of L & J Plumbing and Dennis Rodgers, Mr. Chambers performed work pursuant to an agreement with the individual customers for whom he performed the work as a contractor, engaged as a sole-proprietor in his own business. These customers, with the exception of L & J Plumbing and Dennis Rodgers, are not engaged in plumbing and Mr. Chambers was not a statutory employee of said customer. Further, there is no evidence that he performed this work pursuant to a contract with DS & F Plumbing or MFA Propane, as Mr. Chambers performed the work and billed the customers directly for both the cost of supplies and labor.

Accordingly, after consideration and review of the evidence, I find and conclude that Mr. Chambers is not a statutory employee of the customers (excluding L & J Plumbing), Dennis Rodgers d/b/a/ DS & F Plumbing or MFA Propane. Mr. Chambers is not a statutory employee of Dennis Rodgers d/b/a DS & F Plumbing, but a direct employee; and Dennis Rodgers was the employer for whom he was working when he sustained the underlying work-related injury.

Yet, there are five instances in which Mr. Chambers performed work for L & J Plumbing. These instances are identified as follows:

Invoice Date	Invoice No.	Sold To	Description of Supplies & Work	Invoice for Supplies	Invoice for Labor	Invoice Total
05-25-02	0200012	L & J Plumbing	Covert 3 Boiler from Natural Gas to LP Gas. Supplies provided by L & J Plumbing	None	\$ 150.00	\$ 150.00
05-25-02	0200013	L & J Plumbing	Replace Pilot Burner on Water Heater	None	\$ 50.00	\$ 50.00
05-27-02	0200014	L & J Plumbing	Charge out 2 Direct Vent Water Heater	None	\$ 200.00	\$ 200.00
05-09-02	0200021	L & J Plumbing	Service Call. Check Water Heater Wires and Thermostat; Change Water Heater	None	\$ 150.00	\$ 150.00
05-28-02	020083	L & J Plumbing	Install 3 Second Stage Regulator	None	\$ 153.75	\$ 153.75
<b>Total:</b>				None	<b>\$ 703.75</b>	<b>\$ 703.75</b>

Notably, in performing this work Mr. Chambers did not work directly with the customers and did not bill the customers for his services. Rather, he worked directly with L & J Plumbing, and billed L & J Plumbing for the work he performed. As such, Mr. Chambers was a statutory employee of L & J Plumbing, and the wages he earned in performing this work constitute wages earned in dual employment.

Accordingly, after consideration and review of the evidence, I find and conclude that, at the time of the accident of July 12, 2002, Mr. Chambers engaged in dual employment, and for the 13 weeks preceding the July 12, 2002 accident he earned \$703.75. The additional income of \$703.75, applied to the 13-week period provides an additional average weekly wage of \$54.13. Accordingly, the applicable compensation rate for Mr. Chambers' dual employment claim is \$36.09.

The parties stipulated to Mr. Chambers earning an average weekly wage in his employment with DS & F Plumbing sufficient to support a compensation rate of \$362.49 for

purpose of temporary total disability compensation. This stipulation thus provides a basis for finding that, in his employment with DS & F Plumbing, Mr. Chambers earned an average weekly wage of \$543.71. The additional compensation rate of \$36.09 does not exceed the statutory maximum compensation rate for temporary total disability compensation. Further, the parties stipulated that Mr. Chambers did not reach maximum medical improvement for a total of 103 and 2/7 weeks.

Therefore, the Second Injury Fund is ordered to pay to the employee, Jack Chambers, the sum of \$3,717.27 in additional wage lost benefits under Section 287.220.9, RSMo. (103 and 2/7 weeks x \$36.09 = \$3,717.27.)

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be provided is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by:                   /s/ L. Timothy Wilson  
                                  L. Timothy Wilson  
                                  *Administrative Law Judge*  
                                  *Division of Workers' Compensation*  
                                  (signed December 14, 2009)

This award is dated and attested to this 17<sup>th</sup> day of December, 2009.

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