

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

Injury No.: 03-005045

Employee: Travis Clark
Employer: Brookfield Fabricating Corporation
Insurer: Missouri Retailer's Insurance
Date of Accident: January 21, 2003
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. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated September 13, 2005. The award and decision of Administrative Law Judge Nelson G. Allen, issued September 13, 2005, is attached and incorporated by this reference.

I. Preliminary Matters

The stipulated issues at the hearing before the administrative law judge were as follows: (1) liability, if any, of the employer, for temporary total disability benefits; and (2) nature and extent of employee's permanent partial disability on account of the accident.

The administrative law judge awarded the following benefits: no additional temporary total disability; 10% permanent partial disability of the right thumb at the proximal joint; 30% permanent partial disability of the left hand at the wrist joint; and awarded disfigurement of five weeks.

The employer filed a timely Application for Review with the Commission alleging one point on appeal, i.e., that the permanent partial disability awarded was excessive, and, consequently, not supported by the competent and substantial evidence in the record.

The Commission, after reviewing the entire record, modifies the amount of permanent partial disability awarded as follows: 30% permanent partial disability of the left index finger at the proximal joint. The remainder of the award, concerning the issues of temporary total disability and disfigurement are affirmed.

II. Facts

Testimony of Employee

In summary fashion, employee testified as follows: his job included welding and running an industrial drill press which involved at times changing the drill bit; on January 21, 2003, employee was in the process of changing the bit and while so doing the drill caught his left hand while his right hand was cut but not actually caught in the drill; his initial treatment was rendered the day of accident at the emergency room of Pershing Health System in Brookfield, Missouri, and the same day of the accident his medical care and treatment was transferred under the auspices of Dr. John Seaberg, a plastic surgeon, in Columbia, Missouri; employee testified that the principal injury sustained was to his left index finger, which required surgical repair performed by Dr. Seaberg; employee also sustained cuts to his left thumb, left ring finger and right thumb, which did not require surgery or sutures; and during the course of the surgical repair of the left index finger, two donor sights were utilized to cover missing skin of the left index finger, the donor sights being the left middle finger and the left forearm.

Other than employee's treatment received in the emergency room of Pershing Health System, employee's treatment was rendered under the auspices of Dr. Seaberg; employee was off work until January 27, 2003; he initially was able to return to work with the restriction not to use his left hand which the employer accommodated; he worked with this restriction for two and one-half to three months and during that time frame he was attending physical therapy; employee was later separated from employment with employer; employee subsequently was employed at a lumber yard and a construction company; while working with the construction company, employee has primarily performed concrete work and his duties have included setting concrete forms, pouring concrete, and using a shovel and a sledge hammer; and up to the date of the hearing he was performing farm labor, washing trailers used to haul hogs, which required employee to use a high powered hose, which shot out 90 gallons of water per minute; and the employee has been able to perform his work duties without any problems concerning his left or right hand.

At the hearing, employee testified he could no longer fully extend the first finger of his left hand and could not bring it back against the palm of his hand to make a fist; he testified further that some of the "meat" had been taken from the finger and he also testified that the thumb of his left hand had been injured; employee testified the middle finger of his left hand was not injured in the accident but skin was removed during surgery for a skin graft; he testified that he has lost feeling in the index finger of the left hand and that during cold weather it stiffens and hurts; employee testified his left ring finger and the palm of his left hand were injured, which has affected his grip but he admitted his left ring finger did not require any treatment other than bandages and his left thumb allegedly had a few stitches; he stated his right hand had been cut by the press but was not caught in the press during the accident and he has experienced a diminished grip as the result of his injury.

Testimony of Dr. Seaberg

In summary fashion, Dr. Seaberg testified as follows: he is board certified in general surgery; he is board certified in hand surgery; and he is board certified in plastic surgery.

Dr. Seaberg began treatment of employee when Dr. Seaberg received a telephone call from a physician in Brookfield, Missouri, requesting Dr. Seaberg to accept transfer of the patient (employee) to Boone Hospital to treat his injury; Dr. Seaberg accepted the transfer of the patient and initially saw employee the day of the accident at Boone Hospital; employee described the accident to Dr. Seaberg, and Dr. Seaberg thoroughly described the injury employee sustained to his left index finger; Dr. Seaberg clearly and unequivocally stated on numerous occasions that there was no other significant injury; Dr. Seaberg took the patient (employee) to the operating room surgically repairing the tendons concerning his left index finger injury borrowing a skin flap from employee's left middle finger and also borrowing a skin graft from employee's left forearm to cover the donor sight of the left middle finger; Dr. Seaberg followed employee post-op until Dr. Seaberg released and discharged him from treatment on June 30, 2003; and on the same date of discharge Dr. Seaberg rated the employee's disability at 25% permanent partial disability of the left index finger at the 35 week level attributable to the work accident.

Dr. Seaberg was requested to review the emergency room treatment records of Pershing Health System and was further asked to testify as to what treatment was provided and his answer was as follows: "He was given a gram of Ancef intravenously. That's an antibiotic. His tetanus was updated, diphtheria/tetanus. The hands were treated with betadine soak and cleansing. He was given some pain medication, Demerol, 50 milligrams, and Phenergan, 25 milligrams." Dr. Seaberg also noted that a dressing was applied and there was nothing in the emergency room treating records to indicate there was any suturing of lacerations by any physician. As further stated by Dr. Seaberg, concerning the cuts/lacerations to employee's left thumb, left ring finger and right thumb, "those lacerations were so shallow that they weren't through the full thickness of the skin and did not require any suturing or treatment other than just to be allowed to heal on their own". Dr. Seaberg further testified that he could not imagine that if the other digits required treatment that it would not have either been called to his attention or he would have noticed it himself if treatment were required.

In summary, Dr. Seaberg testified that the only significant injury sustained due to this accident was the injury to the left index finger. Dr. Seaberg saw no indication of tenosynovitis, which Dr. Seaberg testified is most commonly caused by repetitive motion, grasping tools in the palm of the hand such that the pressure from the handle tool is exerted on the tendon sheath and tendon, which initiates a scarring process followed by the development of constriction in the tendon sheath and a lump in the tendon.

Testimony of Dr. Ross

In summary fashion, the testimony of Dr. Ross is as follows: Dr. Ross is an osteopathic physician certified in family practice; at the request of employee's attorney, Dr. Ross examined and evaluated employee on November 20, 2004; Dr. Ross obtained a history from the employee concerning the accident/injury and also elicited his complaints and then performed a physical examination; Dr. Ross subsequently rendered the following opinions: 50% permanent partial disability of the left index finger at the proximal joint; left middle finger reveals a large scar and some early tenosynovitis; 25% permanent partial disability of the left middle finger at the proximal joint; 20% permanent partial disability of the left ring finger at the proximal joint; and 17% permanent partial disability of the right thumb at the proximal joint. Dr. Ross was of the opinion that these permanent partial disabilities were all attributable to the work related accident.

On cross-examination Dr. Ross admitted that he had no expertise in surgery or the treatment of hand injuries; that prior to rendering his medical opinions Dr. Ross did not review any treating medical records; and the history of the accident, complaints, etc., that he relied on, was all received from the self-serving history and complaints given him by the employee when he examined and evaluated him November 20, 2004.

III. Findings of Fact and Conclusions of Law

Upon its own motion or upon the application of any party in interest, the Commission may end, diminish, or increase the compensation awarded by an administrative law judge in the Commission's final award. *Shaw v. Scott*, 49 S.W.3d 720 (Mo. App. 2001); *Champ vs. Doe Run Company*, 84 S.W.3d 493 (Mo. App. 2002).

The ultimate determination of credibility of witnesses rests with the Commission; however, the Commission should take into consideration the credibility determinations made by an administrative law judge. When reviewing an award entered by the administrative law judge, the Commission is not bound to yield to his or her findings including those relating to credibility, and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire and Rubber Company*, 147 S.W.3d 865 (Mo. App. 2004).

It is the employee's burden to prove the nature and extent of his disability to a reasonable certainty. *Davis v. Brezner*, 380 S.W.2d 523 (Mo. App. 1964); *Matzker v. St. Joseph Minerals*, 740 S.W.2d 362 (Mo. App. 1987). The determination of a specific amount or percentage of disability to be awarded an injured employee is a finding of fact within the unique province of the Commission. *Landers v. Chrysler*, 963 S.W.2d 275 (Mo. App. 1998). In making this determination, the Commission can consider all the evidence in the record and draw all reasonable inferences from that evidence. *Id.* The Commission is not bound by the percentage estimates of the medical experts and is free to assess a disability either higher or lower of that expressed in the medical or vocational testimony. *Id.*

After reviewing the entire record the Commission finds the amount of compensation awarded by the administrative law judge was excessive, and not supported by the competent and substantial evidence. As stated previously, the Commission modifies the award as follows: 30% permanent partial disability of the left index finger at the proximal joint. Consequently the amount of compensation payable for residual permanent partial disability attributable to the accident occurring January 21, 2003, is 13.5 weeks of permanent partial disability or a lump sum amount of \$3,264.98 (45 weeks x 30% x \$241.85). To the amount of permanent partial disability is added the five weeks of disfigurement or an additional \$1,209.25 (5 weeks x \$241.85), which was awarded by the administrative law judge and is affirmed by the Commission.

In reaching this conclusion and modification of the permanent partial disability awarded, the Commission has relied on the treating medical records of Pershing Health System and Dr. Seaberg, as well as the deposition testimony of Dr. Seaberg. The Commission determines that these medical records and medical opinions are the most credible, persuasive and trustworthy.

A close review of the treating medical records as well as the medical opinions rendered in this claim, convinces the Commission the employee sustained an injury principally to his left index finger, and any additional cuts,

scratches and or lacerations to the other digits, were extremely insignificant in nature, not requiring any treatment other than emergency room cleansing as testified to by Dr. Seaberg, and certainly not resulting in any permanent residuals.

During the six months Dr. Seaberg treated employee, employee had no complaints concerning his right hand; Dr. Seaberg testified there was no indication of tenosynovitis; and there was virtually no treatment rendered any other body part other than employee's left index finger. Dr. Seaberg found no permanent residuals concerning the left middle finger, left ring finger and left thumb; and Dr. Seaberg found no permanent residuals concerning the right thumb.

In contrast, Dr. Ross, who examined and evaluated employee one time for the sole purpose of a rating has rendered opinions that are not credible. To begin with, his ratings are based solely on the self-serving history of the injury given him by employee and, more significantly, Dr. Ross admittedly did not even review any of the treating records prior to rendering any opinion. The Commission finds Dr. Ross was not truly cognizant or apprised as to the extent of employee's actual injuries since he was unaware of the treatment provided. His subsequent opinions rendered are of no persuasion to the Commission.

Likewise, employee's complaints at trial, concerning any possible residuals to any of the digits of his left hand other than the left index finger, and any complaints to the right thumb when compared and contrasted to the treating records and the testimony of Dr. Seaberg, are not credible or reliable.

The only significant injury sustained on account of this accident was an injury to the left index finger, which was appropriately treated, and residual permanent partial disability was sustained, i.e., 30% permanent partial disability of the left index finger at the proximal joint. The competent and substantial evidence does not support a finding of any additional permanent partial disability on account of this injury.

IV. Conclusion

Based on the above modifications, employee is awarded the following amounts of permanent partial disability compensation payable: 30% permanent partial disability of the left index finger at the proximal joint which equates to a lump sum amount of \$3,264.98 (45 weeks x 30% x \$241.85); the award of disfigurement of five weeks is affirmed which is an additional amount of \$1,209.25 (5 weeks x \$241.85). The total amount of compensation payable employee by employer is \$4,474.23.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

This award also is subject to a lien in favor of the Division of Child Support Enforcement.

Any past due compensation shall bear interest as provided by law.

As found by the administrative law judge, employee is not entitled to any additional temporary total disability benefits. The award and decision of Administrative Law Judge Nelson G. Allen dated September 13, 2005, as modified, is attached and incorporated by reference.

Given at Jefferson City, State of Missouri, this 27th day of July 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed without modification.

The majority limits the award of permanent partial disability to an award for the index finger as rated by Dr. Seaburg. I believe the majority places undue reliance on the testimony of Dr. Seaburg. He admitted that he only treated the index finger and only rated the index finger. Dr. Seaburg did not evaluate employee's other fingers or employee's hands. Dr. Seaburg concedes employee may have suffered other injuries treated by other physicians that did not require treatment by Dr. Seaburg, a surgeon. In fact, the emergency room records document the multiple lacerations on employee's left ring finger as well as gashes on his right hand and thumb. While Dr. Seaburg's opinion is relevant to the determination of disability to employee's left index finger, as to any other body part, it is purely speculative.

I am persuaded by the testimony of Dr. Ross who evaluated both of employee's hands. Dr. Ross heard employee's complaints regarding his right hand and observed the swelling of his right hand and thumb. The administrative law judge heard employee's testimony regarding the difficulties he experiences with his right hand and the administrative law judge observed employee's scars. The administrative law judge's award of permanent partial disability as to the right thumb should not be disturbed.

Dr. Ross testified that employee is suffering from tenosynovitis in the palmer surface over the second, third, and fourth fingers. Dr. Ross conducted testing that revealed that employee's grip strength is severely diminished in the left hand as compared to the right hand. Because the work injury diminished the function of the entire hand, the administrative law judge's conclusion that the employee suffered a 30% permanent partial disability at the 175-week level is supported by the record.

I would affirm the administrative law judge's award without modification. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: **Travis Clark** Injury No. **03-005045**
Employer: **Brookfield Fabricating Corporation**
Insurer: **Missouri Retailer's Insurance**
Hearing Date: **August 17, 2005** 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: **January 21, 2003**
5. State location where accident occurred or occupational disease was contracted: **Lynn 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 changing a drill bit on a drill press when the drill activated.**
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: **Right thumb and left hand.**
14. Nature and extent of any permanent disability: **10% right thumb at proximal joint and 30% of the left hand**
15. Compensation paid to-date for temporary disability: **\$103.65 or 3/7 of a week**
16. Value necessary medical aid paid to date by employer/insurer? **\$3,640.66**
17. Value necessary medical aid not furnished by employer/insurer? **None**
18. Employee's average weekly wages: **N/A**
19. Weekly compensation rate: **\$241.85 / \$241.85**
20. Method wages computation: **By Stipulation**

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

58.5 weeks of permanent partial disability from Employer × \$241.85= \$14,148.23

5 weeks of disfigurement from Employer × \$241.85= \$1,209.25

Permanent total disability benefits from Employer beginning for claimant's lifetime.

22. Second Injury Fund liability:

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:

weekly differential payable by SIF for weeks
beginning and, thereafter, for claimant's lifetime.

TOTAL: \$15,357.48

23. Future requirements awarded: None

Said payments to begin January 22, 2003 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: James A. Rahm.

This award is further subject to a lien in the amount of 50% of the remainder of this award for child support liens.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **Travis Clark** Injury No. **03-005045**

Employer: **Brookfield Fabricating Corporation**

Insurer: **Missouri Retailer's Insurance**

Hearing Date: **August 17, 2005** Checked by: **NGA**

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

1. Liability of the employer for additional temporary total disability.
2. Nature and extent of claimant's permanent partial disability.

The parties agreed that on or about January 21, 2003, Travis Clark was an employee of Brookfield Fabricating Corporation. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law and was fully insured by Missouri Retailer's Insurance Trust.

The parties also agreed that on or about the 21st of January 2003, the claimant sustained an injury by accident arising out of and in the course of his employment. The employer had proper notice of claimant's injury. The claimant has filed a timely claim for compensation.

The parties further stipulated that the correct rate of compensation is \$241.85 per week for both temporary total disability and permanent partial disability. Compensation has been paid in the amount of \$103.65 representing 3/7 of a week. Medical aid has been provided in the amount of \$3,640.66.

The Claimant testified in person. He is now 26 years old. I found him to be a believable witness.

On January 21, 2003, the claimant was operating a drill press for the employer. The drill press was large. It stood on the floor and was about six feet high.

The claimant was changing the bit. He was holding the drill with both hands. The drill was not active but somehow it activated automatically.

He said the machine spit out his right hand. While his right hand was injured, it was not caught in the drill. His left hand was caught in the drill. He had gloves on at the time. The glove on his left hand was destroyed.

The drill cut into the flesh and tendon of his left hand. The most severe damage was done to his left index finger. He has scarring on the inside of his left thumb and first three fingers and on the palm of his hand. There is also scarring on his left middle finger and right forearm as skin was removed for

skin grafts.

The claimant was treated at Brookfield Hospital and was transferred to Columbia to be treated for the injury to his left index finger only by Dr. John Seaberg.

The claimant was off one week and returned to work on a restricted basis. His left index finger was tied to his middle finger for two weeks in order for a skin graft to form. He could only use one hand for 2-1/2 to 3 months. He claimed he was fired two weeks after he was released for being 9 minutes late for work.

He said he was unable to find work for two months. He then got a job at a lumber yard. He now works at Premium Standard Farms. His job is to operate a high-pressure hose and clean hog manure and other debris from trailers. He must hold the hose with two hands instead of one because he can't grip well because of his injury.

The claimant testified that he has little grip in his left hand. He has pain in the hand but because of his injury is unable to locate the exact source of the pain. Much of his hand is numb. He has no sense of touch where the skin flesh was torn from his hand. His hand also causes him additional pain when it is cold.

The most serious injury was to his left index finger. The finger could not be extended beyond 45 degrees. It also could not be completely flexed and could not make a fist.

There was also scarring on his middle and ring fingers. He said he also had problems grabbing with those two fingers. His little finger was not injured.

On his right hand he has a scar on the web between his thumb and index finger. He also has a scar on the distal joint of his right thumb. He also had a horizontal scar on his thumb.

Mr. Clark said that when he holds things with his right hand for a period of time, he loses his endurance or his grip.

Dr. Seaberg testified by deposition taken on May 10, 2005 and admitted into evidence as Employer/Insurer Exhibit Number 4. All objections thereto are hereby overruled.

Dr. Seaberg had performed surgery to repair both flexor tendons of the left index finger and skin grafts of the middle finger and right forearm. He found full range of motion and normal sensation in the left middle finger. He rated the claimant's disability at 25% permanent partial impairment of the left index finger at the metacarpal phalangeal joint.

Dr. Marvin Eugene Ross, D.O., testified by deposition taken on August 2, 2005 and admitted into evidence as Claimant's Exhibit Number A. All objections thereto are overruled.

He examined the claimant on November 20, 2004. Dr. Ross said the drill took away most of the tendon in the left index finger and a lot of its skin. A graft was done on the palmar surface of the hand. The finger was fixed at a 45 degree angle. The finger could not be totally flexed or extended. It is in a nearly frozen position.

The 3rd and 4th finger of the left hand have scars formed over the palmar surface. He had adhesive tenosynovitis in his fingers and the palm of his hand. A lot of adhesions were developing in the palm of his left hand.

He rated the left index finger as 50% permanent partial disability, the left middle finger at 25%, and the ring finger at 20%. Dr. Ross rated the right thumb at 17% permanent partial disability.

I find and believe from the evidence the claimant has sustained a permanent partial disability of 30% of the left hand and 10% of the proximal joint of the right thumb. I also assess five weeks disfigurement allowance for his scars. I order and direct the employer to pay to the claimant the sum of \$241.85 per week for 63.5 weeks for a total of \$15,357.48.

Even though the claimant was unable to find employment for two months after his discharge, there was no evidence that the reason was because of any disability that was temporary in nature. Claimant's request for additional temporary total disability is denied.

Mr. James A. Rahm is hereby assigned a lien in the amount of 25% of this award for necessary legal services provided claimant.

This Award is further subject to a lien in the amount of 50% of the remainder of this award for child support liens.

Date: 9/13/05

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

A true copy: Attest:

/s/ Patricia "Pat" Secret
Patricia "Pat" Secret, *Director*
Division of Workers' Compensation