

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

Injury No.: 01-064945

Employee: Ronald Clark
Employer: Harts Auto Repair
Insurer: Universal Underwriters
Date of Accident: May 22, 2001
Place and County of Accident: Liberty, Clay County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 5, 2007. The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued November 5, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 21st day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Ronald Clark

Injury No. 01-064945

Dependents: N/A

Employer: Harts Auto Repair

Insurer: Universal Underwriters

Additional Party: N/A

Hearing Date: August 29, 2007

Briefs Received: September 28, 2007

Checked by: KJC/lh

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: May 22, 2001.
5. State location where accident occurred or occupational disease was contracted: Liberty, Clay County, Missouri. By agreement of the parties the matter was heard in Kansas City, Jackson 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: The employee, while in the course and scope of his employment as an automobile mechanic for Harts Auto Repair sustained an injury when he fell from a 26-foot ladder and landed on the ground below and with his right leg in a bucket. Claimant was climbing the ladder to do some electrical work for his employer.
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 leg, back, hip, left leg, head and psyche.
14. Nature and extent of any permanent disability: Complex Regional Pain Syndrome and soft tissue injuries to back and hip and headaches and depression.

15. Compensation paid to-date for temporary disability: \$90,332.06.
16. Value necessary medical aid paid to date by employer/insurer? \$222,089.39.
17. Value necessary medical aid not furnished by employer/insurer? Undetermined.
18. Employee's average weekly wages: \$710.15.
19. Weekly compensation rate: \$473.46/\$314.26.
20. Method wages computation: By Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:
unpaid medical expenses Undetermined
weeks for temporary total disability (temporary partial disability) 183 and 6/7ths weeks paid
at rate of \$473.46 for a total of \$90,332.06
N/A weeks for permanent partial disability from employer
N/A weeks of disfigurement
permanent total disability benefits from employer Undetermined
22. Second Injury Fund liability: N/A
N/A weeks of permanent partial disability from Second Injury Fund
N/A permanent total disability benefits from Second Injury Fund
N/A weekly differential payable by Second Injury Fund

TOTAL: Undetermined

23. Future requirements awarded: Undetermined

Said payments to begin as of the date of the award 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:
Mr. James Martin.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ronald Clark

Injury No. 01-064945

Dependents: N/A

Employer: Harts Auto Repair

Insurer: Universal Underwriters

Additional Party: N/A

Hearing Date: August 29, 2007

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Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- 1) the nature and extent of the disability sustained by the Employee;
- 2) liability of the Employer for past medical aid in the amount of \$639;
- 3) liability of the Employer for future medical benefits; and,
- 4) liability of the Employer and Insurer for attorney's fees and costs.

At the hearing, Mr. Ronald Clark (hereinafter referred to as Claimant) testified that he was 49 years old. He stated that he obtained his GED while in the Navy, where he was trained in electronics and attended gunnery school.

Claimant testified that he was hired by Harts Auto Repair in 1998 as an auto body and engine transmission repair technician. He stated that he had advanced training and that he was ASE certified in refrigeration. He stated that his previous jobs were as a mechanic and as a machinist.

Claimant testified that his accident at work occurred when he was doing some electrical work on his employer's roof. He stated that his employer was remodeling and hanging signs on the outside of the building and that he had to climb a 26-foot ladder to reach the roof. He stated that while on the ladder, it slid to the left, causing him to fall to the right. He stated that he fell about 12 feet to the ground below. He stated that he was knocked unconscious by the fall. He stated that when he regained consciousness after about 30 to 45 minutes, his right leg was in a 35-gallon drum of gear lubricants and was bleeding profusely.

Claimant complained of immediate and severe pain in his right leg. He also complained of right hip and back pain and headaches. He stated that a few hours after the accident he was in agony. He stated that he was getting no circulation in his leg. He stated that he was screaming due to his leg pain. He stated that his leg was so swollen that he could not distinguish his ankle from his knee. He stated that he went to the hospital that night and had surgery on his right leg.

Claimant testified that afterwards he experienced numerous problems with swelling, infections and fluid draining from his leg. He stated that he had a two-by-four inch hole in his leg which would not heal.

Claimant testified that during a second surgery on his leg a nerve was severed. He stated that in addition to his leg, hip and back pain and headaches, he also developed spasms in his right shoulder with pain radiating to his elbow.

Claimant testified that Dr. Dugan released him to return to light duty in March 2002. He stated that he was not able to do the light duty. He stated that his leg doubled in size. He stated that he was in a lot of pain. He stated that he was on a lot of medication. He stated that he had horrible headaches. He stated that pain began to shoot to his other leg. He stated that due to the swelling in his leg, he was not able to remove his shoes and socks after his first day at work. He stated that the next day his boss saw his leg and sent him home with instructions to not return to work until his leg was "fixed".

Claimant testified that in July 2003, Dr. Bonar performed a third surgery on his leg. He stated that she cut his leg open from the knee to the bone. He stated that he was then referred to a vascular surgeon who did grafts and removed some of the skin from his leg.

Claimant testified that Dr. Bonar also referred him to Dr. Galate to treat his other complaints and to Dr. Allen, a neurologist, for his headaches. He stated that both Drs. Galate and Bonar told him that his back problems were related to his leg injury. He stated that both prescribed a cane. He stated that he wore a brace on his leg.

Claimant testified that he was on numerous medications. He stated that he had nine epidural injections. He stated that he was prescribed Bier blocks. He stated that he was referred to a psychiatrist for depression. He stated that the psychiatrist recommended vocational rehabilitation where he was advised that the program could not help him.

Claimant testified that he saw Dr. Kloster for pain management. He stated that neither that treatment nor the neurostimulator placed in his back relieved his pain. He stated that the stimulator caused horrible migraine headaches and was removed in February 2006. He stated that he had continued to treat with Dr. Kloster after the insurance company terminated his temporary total disability benefits.

Claimant testified that Dr. Bonar eventually advised him that he needed to learn to live with his right leg pain or to have his leg amputated. He stated that he considered an amputation. He stated that Dr. Fevurly advised against an amputation.

Claimant testified that he had a total of nine surgeries on his right leg and nine epidural injections. He stated that he had seen 20 doctors and 33 professionals about his leg injury. He stated that despite all the treatment, his condition was now worse than ever. He stated he had severe chest pain every morning. He complained of swelling in his leg. He stated that he needed to prop his leg to prevent even more swelling. He stated that he was extremely limited in his activities.

Claimant testified that he sometimes experienced shooting pains in his left leg. He stated that he was diagnosed with complex regional pain syndrome of the right leg. He stated that he now had complex regional pain syndrome in his left leg, but of less severity. He stated that the treatment had not improved his left leg or back pain.

Finally, Claimant alleged side effects from his medications. He complained of nausea, blurred vision and of being disoriented. He complained that he had fallen down his stairs.

Claimant also offered into evidence four medical depositions, a vocational expert's deposition and various medical reports and records. Bernard Abrams, M.D., a neurologist, testified that he examined Claimant on February 25, 2005. He noted Claimant's complaints. He diagnosed Claimant with numerous conditions, including complex regional pain syndrome in both legs, orthostatic hypotension due to chronic pain, a mild cognitive dysfunction secondary to the head injury and chronic headaches.

Dr. Abrams noted that the medical records showed that some doctors had found symptom magnification and somatization by Claimant. He indicated that Claimant's functional capacity evaluation on April 21, 2003, was invalid due to Claimant's "significant self-limitation and significant symptom magnification".

Dr. Abrams concluded that Claimant had sustained a permanent partial disability of 93 percent to the body as a whole due to his injuries in the May 2001 accident at work. He concluded that the accident had resulted in a permanent partial disability of 80 percent of the right lower extremity or 32 percent to the body as a whole;

20 percent of the left lower extremity or 8 percent to the body as a whole; 10 percent to the body as a whole due to the back injury; 20 percent to the body as a whole due to sexual dysfunction caused by the accident; 9 percent to the body as a whole due to urinary dysfunction; 5 percent to the body as a whole due to headaches and cognitive dysfunction; and 9 percent to the body as a whole due to hypotension.

Dr. Abrams concluded that Claimant would require ongoing medical and psychological treatment and maintenance for the spinal cord stimulator and the AFO brace. He noted that Claimant might need an amputation of the right leg at the knee level. He stated that Claimant was not a candidate for any type of employment, nor would he be in the future.

On cross-examination, Dr. Abrams indicated that if he were Claimant's treating physician, he would change Claimant's medications. He stated that an amputation was "absolutely fraught with many hazards". He stated that there was no more than a 50 percent chance that an amputation would succeed. He explained why he did not believe that Claimant was malingering.

Claimant's Exhibit L was the deposition testimony of Susan K. Bonar, M.D., an orthopedic surgeon. The direct examination of Dr. Bonar was by Claimant's employer. She stated that she graduated from Yale Medical School and that she initially performed a four compartment fasciotomy on Claimant's right leg.

Dr. Bonar testified that although Claimant progressed well after the surgery, he later complained of a deterioration in his condition, increased swelling and marked diffuse hypersensitivity into his foot and calf. She stated that by January 2003 he was considering an amputation. She stated that she was concerned that he might have RSD-type pain.

Dr. Bonar concluded in May 2003, that Claimant was restricted to sit-down duties only. She also stated that he demonstrated some evidence of symptom magnification during the functional capacities evaluation. She indicated that she did not find any such evidence of symptom magnification when she was treating him. She stated that she found Claimant to be consistent, reliable and sincere.

Dr. Bonar testified that in October 2003, Claimant was at maximum medical improvement. She stated that his choices were to either live with his symptoms or to consider a below the knee amputation. She stated that there were no guarantees that an amputation would rid him of his pain. She concluded that he had sustained a permanent partial disability of 50 percent of the right leg.

On examination by Claimant, Dr. Bonar testified that Claimant had developed an antalgic gait due to his right leg pain. She stated that either the altered gait or the original injury had resulted in his back pain. She characterized Claimant's injuries as very severe. She stated that Claimant was only capable of working on a job with sit-down duties. She stated that when she saw Claimant he was not capable of returning to gainful employment because he was so "distraught" about his leg.

Claimant offered into evidence the deposition testimony of Kathryn A. Hedges, M.D., a neurologist. Her direct examination was also by Claimant's employer. She indicated that she was board certified by the American Board of Psychiatry and Neurology. She stated that she examined Claimant on June 20, 2005.

Dr. Hedges indicated that if she were Claimant's doctor, she might adjust his medications. She noted abnormalities on the neurological examination and stated that it was difficult to do a muscle examination due to Claimant's complaints of severe right leg pain. She stated that he began sweating and that his blood pressure rose significantly when she attempted to do the muscle examination.

Dr. Hedges concluded that Claimant had a somatoform disorder and that he was not a good candidate to return to work. She stated that he might be able to work part-time or every other day, but certainly not a full-

time job in the labor market. She stated that even a sit-down job would have to be such that he could alternate positions and stand when necessary.

Dr. Hedges concluded that Claimant had sustained a permanent partial disability of 54 percent to the body as a whole, of which 39 percent was for his gait, 20 percent for his sexual dysfunction; and 7 percent for his urinary problems. She stated that she used the combined value table to render her rating. She stated that Dr. Abrams should have also used that table and that if he had done so, his rating would have been 64 percent to the body as a whole and not 93 percent to the body as a whole.

On examination by Claimant, Dr. Hedges admitted that she did not consider Claimant's somatoform disorder or depression when she rendered her rating. She stated that Claimant's depression and somatoform disorder were moderate to severe. She admitted that Claimant was not a realistic candidate to go into the open labor market. She stated that it would be speculative to conclude that Claimant would be able to work part time or do occasional work.

John Pro, M.D., a psychiatrist, also testified by deposition on Claimant's behalf. He diagnosed Claimant's condition as severe depression and an adjustment disorder. He stated that test results indicated that Claimant was not malingering. He rated Claimant's permanent partial disability at 30 percent to the body as a whole due to the depression. He stated that Claimant's psychological disability combined with his neurological and orthopaedic problems precluded him from working. He also concluded that Claimant needed additional psychological treatment.

Claimant's employer offered into evidence the depositions of Drs. Daniel R. Kloster, M.D., and Chris Fevurly, M.D. Dr. Kloster, board certified in pain management and anesthesiology, testified that he initially examined Claimant on March 26, 2003. He stated that Claimant reached maximum medical improvement on November 17, 2003, when Claimant told him that he was stable and pleased with his pain control. He stated that he recommended against an amputation.

Dr. Kloster indicated that he treated Claimant for nearly three years after November 2003. He stated that he stopped treating Claimant in March 2006 after he could no longer trust Claimant. He stated that Claimant began exhibiting "bizarre behavior". He stated that Claimant was "kind of just staring off into space". He stated that Claimant had tested positive twice for marijuana despite adamantly denying any use of it. He stated that he no longer felt comfortable prescribing medications for Claimant.

Dr. Fevurly, a board certified internist who also specialized in occupational and preventative medicine, testified that he examined Claimant in 2004 and in 2006. He stated that following the July 22, 2004 examination, he concluded that Claimant could do sedentary work. He stated, however, that Claimant should not drive nor operate dangerous machinery while taking some of the prescription medications. He diagnosed Claimant's condition as complex regional pain syndrome.

The depositions of two psychologists, Stanley V. Butts, Ph.D., and Patrick Caffrey, Ph.D., were admitted into evidence. Dr. Butts testified on Claimant's employer's behalf and indicated that he had practiced since 1971. He stated that about 50 percent of his practice involved treating patients with chronic pain complaints.

Dr. Butts testified that he examined Claimant on April 28, 2004. He stated that Claimant immediately began with a litany of complaints. He stated that Claimant acted very angry. He stated that "he gave me this big sad story about his kids were out working and that he was living on \$30 income a week that his children were giving him from their income". He stated that upon questioning, Claimant later admitted that he was receiving social security benefits. He stated that he thus had trouble finding Claimant believable. He concluded that Claimant's complaints were purposefully exaggerated. He stated that he notified Dr. Kloster, the referring physician of his opinion.

On cross-examination by Claimant, Dr. Butts admitted that he had not reviewed Claimant's medical records prior to the evaluation. He stated that the records were only sent to him two days prior to the evaluation. He stated that while he believed that Claimant had a pain disorder, he could not attest to its severity due to Claimant's lack of credibility. He recommended additional psychological treatment for Claimant in a group setting.

Dr. Caffrey testified that his Ph.D. was in vocational education for the handicapped. He stated that he evaluated Claimant over several days. He stated that Claimant's IQ scores were in the average range. He stated that Claimant did not do his part in developing an action plan and that he did not make much progress with him. He stated that he released Claimant to return to work with the restrictions given by Dr. Bonar. He also recommended a Vocational Rehabilitation Agency referral and indicated that Claimant reached maximum medical improvement on October 30, 2003.

On cross-examination, Dr. Caffrey stated that Claimant needed psychotherapy. He admitted that his tests resulted indicated that Claimant was depressed. He admitted that during the evaluation, Claimant exhibited symptoms of severe pain.

Mr. Michael J. Dreiling, a vocational expert, testified by deposition on Claimant's behalf. He stated that he had worked in vocational rehabilitation for 30 years. He stated that he evaluated Claimant on February 16, 2005.

Mr. Dreiling testified that in reaching his conclusions he considered Claimant's medical restrictions, education, training and experience, military and social background and past jobs. He stated that vocational testing was not necessary due to the severity of Claimant's disability and pain. He concluded that Claimant could not do any of his past jobs or perform any work in the competitive labor market. He stated that no employer in the usual course of business would be reasonably expected to hire Claimant. He stated that Claimant was not an appropriate candidate for any retraining or vocational placement services.

The remaining medical reports and records were essentially cumulative of the other evidence.

LAW

After considering all the evidence, including the testimony at the hearing, the doctors' depositions, the psychologists' depositions, the vocational expert's deposition, the medical reports and records, the other exhibits, and observing Claimant's appearance and demeanor, I find and believe that Claimant met his burden of proving that he was rendered permanently and totally disabled solely by the injuries he sustained in the May 22, 2001 accident at work. I find that Claimant proved that he became permanently and totally disabled effective with November 29, 2004, the day after his employer terminated his temporary total disability benefits. Thus, I find that he is entitled to back benefits from November 29, 2004, to the date of the hearing and that he shall be entitled to future permanent total disability benefits for so long as he remains so disabled. His employer is ordered to pay the benefits.

I find that Claimant did not prove his employer's liability for \$639 in past medical aid. I find that he did prove that he was in need of future medical aid to cure and relieve him from the effects of his injuries. Claimant's employer is ordered to provide the benefits.

In addition, I find that Claimant is entitled to fees and costs as set out in the award based on his employer's unreasonable defense. Claimant's employer is ordered to pay the fees and costs as set out in the award.

Missouri law provides that the employee has the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis-Cardinal Ritter, Inst., 793 S.W.2d 195 (Mo. App. E.D. 190); Griggs v. A.B. Chance, Co., 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 S.W. 2d 917 (Mo. App. S.D. 1997). Claimant met his burden as set out above.

Nature and Extent

Claimant made a credible witness. The uncontroverted evidence showed that he sustained injuries at work on May 22, 2001, when he fell approximately 12 feet from a ladder and landed on the ground below. He testified that he was knocked unconscious by the fall and that when he awakened his right leg was in a barrel, swollen and bleeding profusely. He complained of immediate and severe pain in his right leg, as well as back and hip pain and headaches.

The uncontroverted evidence showed that doctors performed nine surgical procedures on Claimant's right leg. He had nine epidural injections. He had a Bier block. He had a neurostimulator placed in his back. He developed numerous infections. He testified that he was treated by 20 doctors and about 33 health care professionals for his leg injury alone.

Claimant complained of constant and severe right leg pain and swelling. He complained of continuing back and hip pain and headaches. He stated that he had developed pain in his left leg. He complained of depression. He stated that he was severely limited in his ability to walk, stand and drive. He stated that he wore a brace on his right leg. He stated that he walked with a cane. He was diagnosed with complex regional pain syndrome.

Numerous doctors testified in the case. Based on all the evidence, including the medical reports and records, the physicians' testimony, the psychologists' testimony and the vocational evidence, Claimant clearly proved that he was rendered permanently and totally disabled by the injuries he sustained in the May 2001 accident at work. Dr. Sandow, an orthopedic surgeon, examined Claimant on March 30, 2004. He stated that "From a medical viewpoint, I would consider Mr. Clark as totally disabled". He explained that Claimant was still requiring multiple mind-altering drugs along with the use of the implant stimulator.

Dr. Abrams, a neurologist, concluded that Claimant was permanently and totally disabled. He noted that Claimant was "excruciatingly tender to touch". He stated that Claimant had back spasms. He concluded that Claimant had sustained a permanent partial disability of 93 percent to the body as a whole due to his injuries from the May 2001 accident at work. He rated Claimant's disability for the right leg injury at 80 percent of the lower extremity or 32 percent to the body as a whole.

Dr. Pro, a psychiatrist, also concluded that Claimant was permanently and totally disabled. He noted that testing showed that Claimant had severe depression. He noted that Claimant had an adjustment disorder and chronic pain syndrome. He rated Claimant's psychiatric disability at 30 percent. He stated that the psychiatric disability when combined with Claimant's disability from the orthopedic and neurological problems precluded Claimant from working.

Drs. Abrams, Sandow and Pro were credible in their opinions. The medical evidence supported their opinions. Mr. Dreiling, the vocational expert, agreed that there were no jobs that Claimant could do considering Claimant's age, education, work history and his impairments. He stated that no employer could be expected to hire Claimant. He also noted that while Drs. Bonar and Fevurly had concluded that Claimant could do sedentary work, that there were no such jobs that Claimant could do when all the factors were considered. Mr. Dreiling was credible in his opinion. No contrary vocational evidence was offered in the case.

Thus, based on the most credible, competent evidence, Claimant proved that he was rendered permanently and totally disabled by the injuries he sustained in the May 2001 accident at work. He proved

that he became permanently and totally disabled effective with November 29, 2004, when his employer terminated his temporary total disability benefits. Therefore, his employer is liable for past permanent total disability benefits from November 29, 2004. His employer is ordered to provide the past due benefits. His employer is also ordered to pay future permanent total disability benefits to Claimant for so long as he remains so disabled.

Finally, although Claimant clearly proved his permanent total disability, all contrary opinions were considered. Dr. Bonar, who testified on Claimant's employer's behalf, concluded that Claimant could do sedentary work. She only treated Claimant for his right leg injuries. She noted that his choices were to either live with his pain or to consider a below the knee amputation. She did not consider his depression nor his other physical injuries or the effects of his medications. She admitted that when she last saw Claimant he was not capable of working due to being "distracted" about his leg. The most credible, competent evidence did not support her opinion that Claimant could do sedentary work.

Dr. Hedges, a neurologist, testified on Claimant's employer's behalf, and concluded that Claimant had sustained a permanent partial disability of 54 percent of the whole person. She acknowledged that testing showed that Claimant had severe depression. Her rating did not include any disability for the severe depression. She admitted that she did not believe that Claimant could do a full-time job. She believed that at most Claimant could do part-time work or work every other day. She admitted that Claimant was not a good candidate to return to work. Her opinion in many ways supported Claimant's position that he was permanently and totally disabled.

Drs. Kloster and Fevurly testified on Claimant's employer's behalf and concluded that Claimant could work under the restrictions given by Dr. Bonar. As noted above, Dr. Bonar only considered Claimant's right leg injury. She did not consider any of his other physical or psychological injuries or the effects of his medications. Thus, Drs. Kloster and Fevurly's opinions were not based on all the evidence and their opinions when combined with the other evidence did not support Claimant's employer's position.

Also, the opinions from the two psychologists who testified on Claimant's employer's behalf were entitled to little if any weight. Dr. Caffrey concluded that Claimant was "a good candidate" to return to his established occupation, contingent on his "physical capacities". There was no credible, objective or competent evidence that Claimant could return to work as an automobile mechanic.

Similarly, Dr. Butts' stated that Claimant was angry, sarcastic and "purposely exaggerated his complaints". He stated that, "When I rarely get a patient that has a litany of complaints offered without my asking anything about such complaints, I generally find other reasons to conclude that the complaints are purposely exaggerated". Dr. Butts' statements showed that he was not objective. He was judgmental. He did not consider all the relevant information. His own statements showed that his opinions were based on speculation, conjecture and surmise. His opinions like Dr. Caffrey's, as noted above, were entitled to little weight.

Past Medical Aid

Claimant did not prove his employer's liability for \$639 in past medical aid. Claimant's Ex. J consisted of the bills comprising the \$639. While it appears that the bills may have been related to his accident at work, Claimant offered no evidence showing that the bills were in fact for treatment due to his May 2001 accident at work. He offered no evidence that the treatment was reasonable and necessary for any injuries he sustained in the accident at work. He offered no evidence that the charges for the treatment were fair and reasonable. Claimant failed to prove his employer's liability for the bills.

Future Medical Aid

Claimant did prove his employer's liability for future medical benefits. All the doctors and psychologists who testified on the issue agreed that Claimant would need future treatment both for his physical and psychological injuries to help cure and relieve him from the effects of his injuries. He is on numerous medications. He wears a brace on his right leg. The brace was prescribed by an authorized treating doctor. There was no contrary evidence. Claimant clearly proved his employer's liability for such treatment. His employer is ordered to provide the treatment for so long as he remains in need of it and to provide the braces and all other reasonable and necessary medical treatment needed to cure and relieve him of the effects of his injuries. His employer has the right to direct the treatment.

Fees and Costs

Finally, Claimant argued that fees and costs should be awarded because his employer defended the case without reasonable ground. Claimant's employer's attorney admitted at the hearing that his client would not even respond to his calls when he was seeking authority to try to settle the case or to make an offer. Claimant's employer's attorney admitted that his client would not even accept his phone calls to relay settlement demands made by Claimant.

The parties were further required to mediate the case on the morning of the hearing. At the mediation, Claimant's employer's attorney again stated that his client would not accept his phone call. We were not able to conduct a meaningful mediation. The trial judge after being apprised of the insurer's refusal to accept the phone call at the mediation on the morning of the hearing, advised the attorney to make another call and to report to the insurance company that our policies required the attorney to relay any settlement demands to his client and that we expected a response from the client. The attorney reported back that he had made the phone call and that his client was still refusing to provide any settlement authority.

Prior to the hearing, Claimant's employer admitted accident. Claimant's employer admitted liability. Claimant's employer's own evidence showed that its liability was substantial. Claimant offered evidence that he was permanently and totally disabled. Clearly, Claimant had a colorable claim of permanent total disability as evidence by the award in his favor on that issue. Yet, Claimant's employer refused to offer even one dollar to settle the case.

Thus, the issue was whether based on those facts, Claimant's employer's conduct amounted to an unreasonable defense. See § 287.560 RSMo. (1993); Landman v. Ice Cream Specialties, 107 S.W.3d 240 (Mo. banc 2003). Claimant's employer argued that costs should not be awarded because the statute provides that if the parties fail to agree on compensation, the Division shall hold a hearing. See §287.450. It stated that the "only so-called indiscretion by the employer and the insurance carrier was to follow or abide by the law". Claimant's employer also argued that the First Amendment to the Constitution guaranteed free speech. Claimant's employer questioned, "In Missouri, is it unreasonable to seek a judicial determination of a contested issue? The undersigned hopes that it is not". Finally, Claimant's employer argued that "The First Amendment protects vigorous advocacy". It stated that attorneys representing clients in workers' compensation cases or other matters should not be hesitant to engage in such advocacy or to analyze factual situations and compare "uniqueness to existing statutes and appellate opinions".

Claimant's employer's arguments clearly missed the point. There was no merit to any of its arguments. Its arguments were not even relevant to the issue. The issue was never whether a party had the right to a hearing. Clearly, all parties have such a right. A hearing was in fact held in the case. The issue has nothing to do with any free speech rights guaranteed under the constitution. No one is challenging Claimant's employer's or its attorney's right to free speech. The issue has nothing to do with an attorney's right to contest cases or to litigate matters.

The issue, as noted above, involved simply whether it constituted an unreasonable defense for an

insurance company to refuse to offer any money in a case when the insurance company had not only admitted accident and liability, but its own evidence was clearly contrary to the position it took in the case. The issue was whether the insurance company's conduct in defending the case was unreasonable when the insurance company to refuse to accept phone calls from its own attorney to relay settlement demands or to discuss the case. The issue was whether an unreasonable defense could be found when the insurance company's actions in refusing to accept phone calls from its own attorney prevented meaningful mediations in the case.

Clearly Claimant's employer's defense if one existed was contrary to its own evidence. As noted above, Claimant's employer refused to make an offer to settle the case, even though its own evidence showed that it had substantial liability. Based on Dr. Hedges' opinion, who testified on Claimant's employer behalf, Claimant's employer was liable for \$67,880.16 (54 percent to the body as a whole = 216 weeks x \$314.26 = \$67,880.16). Dr. Hedges even admitted that her rating did not encompass Claimant's severe depression. She further admitted that Claimant was not a good candidate to return to work, which could be argued supported Claimant's alleged permanent total disability.

Claimant's employer's other rating physician, Dr. Bonar, only rated Claimant's leg injury. She did not rate his back, hip, left leg and headaches. She did not rate his alleged severe depression. Based on Dr. Bonar's rating Claimant's employer's was still liable for \$25,140.80 (50 percent of the right leg at the 160 week level = 80 weeks x \$314.26 = \$25, 140.80). She too, however, stated that Claimant was not a good candidate to return to work when she last saw him. That too could be argued supported Claimant's alleged permanent total disability. Yet, Claimant's employer did not even offer the lower of its two rating physician's opinions.

Claimant's employer, as noted above, admitted accident and liability, but refused to even listen to settlement demands. Claimant's employer refused to negotiate in good faith. There were no justifications for Claimant's employer's actions. In a case where Claimant had credible evidence supporting his alleged permanent total disability, Claimant's employer refused to offer anything to settle the case or to accept phone calls from its own attorney to relay settlement demands.

Those facts clearly constituted an unreasonable defense. In Monroe v. Wal-Mart Associates, Inc. 163 S.W.3d 501 (E.D. 2005), the Court found an unreasonable defense when faced with similar facts and similar behavior by the employer. The Court in Monroe citing Landman conceded that costs should only be awarded where the issue was clear and the offense egregious. The Court in Monroe noted that the employee had made multiple demands for compensation. The evidence showed that a reasonable basis existed for the demands. The employer refused to provide compensation. Two mediations were scheduled in the case. Both were unsuccessful. The Court indicated that the mediations were unsuccessful due to the unreasonable behavior of the employer in refusing to even schedule or obtain a disability rating prior to the mediations.

In addition, after the employer in Monroe eventually obtained a rating, it asked the doctor to reconsider his opinion, which found liability of the employer. The doctor refused to do so. The Court noted that the employer after it obtained the report, "did nothing to further settlement, resume negotiations or promptly resolve the claim". Monroe at page 507. The Court noted that after the doctor refused to change his opinion upon being requested to do so by the employer, the employer again "did nothing to prompt resolution of Claimant's claim". *Id.*

Finally, the Court noted that "In the wake of Wal-Mart's continued refusal to resolve this matter despite both its own and Claimant's doctor's unwavering opinion that Claimant's hernia was the result of her workplace injury, counsel for Claimant was compelled to prepare for the May 22, 2003 hearing". *Id.* The court indicated that despite the clear opinions establishing Wal-Mart's liability, Wal-Mart did not make a

settlement offer until exactly one month before the hearing and even then ignored the opinion of its own physician and made a minimal offer.

Those facts were eerily similar to the facts in Claimant's case. In Monroe as in Claimant's case, both employers had definite evidence establishing their liability, but did nothing to further settlement discussions. In both cases, the employers refused to negotiate in good faith. In both cases, demands for settlement were not met or apparently given any serious or worthy consideration. In both cases, mediations were not successful because the employers refused to allow meaningful mediations. In both cases, the employers refused to make either reasonable offers or any offers to settle the case in accordance with their own evidence. The employer in Monroe eventually did make some offer to settle the case. Claimant's employer refused to make any offers to settle the case, although its liability was clearly more substantial than that faced by the employer in Monroe.

Thus, clearly Claimant's employer's actions constituted an unreasonable defense. Claimant's employer did produce a reasonable defense at the hearing itself. As the Courts noted, however, a vigorous defense in some aspects of a case, does not excuse the employer's other unreasonable actions or establish that there was not an unreasonable defense. Landman; Monroe.

In Claimant's case, his employer did offer several depositions and other evidence at the hearing in an effort to limit its liability. That was evidence of a vigorous defense. As the Court noted in Landman, however, an unreasonable aspect of an employer's defense cannot be ignored simply because of the "overall vigor with which a party defended a claim" Id at 250. The Court also stated that "we cannot ignore years of protracted litigation based on a proven groundless defense simply because the defense at one time had arguable merit". Id.

The Courts in Landman and Monroe stated that where, "the unreasonable conduct is tempered by reasonable conduct in other aspects of the defense, the remedy is not to simply deny all relief to the innocent party. Instead the {C}ommission may exercise its discretion to order only a portion of the cost of the proceedings". Landman at 250.

Thus, as noted above, Claimant's employer's actions were reasonable in attempting to obtain evidence to limit its liability. Based on the Court's reasoning as stated above, it would be reasonable to award to Claimant a portion of the fees and costs of the proceedings. Claimant is awarded his costs in taking the depositions of Drs. Abrams and Pro and Mr. Dreiling, the vocational expert. Those costs were clearly needed for him to prosecute the claim and to achieve his award of permanent total disability benefits. Claimant is awarded the costs he incurred for obtaining any medical records. Claimant is not awarded any costs he incurred in connection with the depositions taken by his employer. Claimant is also awarded the attorney's fees he incurred to obtain his permanent total disability award. Those fees subject to the award of fees and costs shall be assessed at 25 percent of all past due benefits. Past due benefits are all benefits owed up to the date of the hearing. Claimant is not awarded any attorney's fees on future permanent total disability benefits or future medical benefits.

Date: _____

Made by: _____

Kenneth J. Cain
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeff Buker

Director
Division of Workers' Compensation