

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

Injury No.: 95-100975

Employee: Robert Cox
Employer: Richard Collins Construction
Insurer: Granite State Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 8, 1995
Place and County of Accident: Sedalia, 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 2, 2004. The award and decision of Administrative Law Judge Emily S. Fowler, issued November 2, 2004, 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 25th day of March 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Robert Cox

Injury No. 95-100975

Employer: Richard Collins Construction

Insurer: Granite State Insurance Co.

Hearing Date: September 15, 2004

Checked by: ESF/abj

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 8, 1995.
5. State location where accident occurred or occupational disease was contracted: Ten miles south of Sedalia, 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 fell off a ladder, fracturing his spine at T6-T7, requiring a fusion at T1-T9 and rendering him a paraplegic.
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, body as a whole.
14. Nature and extent of any permanent disability: Claimant has been rendered permanently and totally disabled.
15. Compensation paid to date for temporary disability: The respondent has paid \$30,076.53, including \$16,500.00 in advances toward permanent benefits. The Second Injury Fund has not made any payments.
16. Value necessary medical aid paid to date by employer/insurer? Medical expenses totaling \$661,625.05 have been paid by the respondent as of the date of the hearing.
17. Value necessary medical aid not furnished by employer/insurer? Undetermined.
18. Employee's average weekly wages: For the respondent, the employee had an average weekly wage of \$85.00 for temporary benefits and \$150.00 for permanent benefits. For the second employer wages (Wal-Mart) the claimant had an average weekly wage of \$252.28.
19. Weekly compensation rate: For the wages the employee earned at the respondent, he has a compensation rate of \$56.67 for temporary benefits and \$100.00 for permanent benefits. For the wages the employee earned at Wal-Mart (second employer wages), he has a compensation rate of \$168.20 for both permanent and temporary benefits.
20. Method wages computation: By agreement of all parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: The employee is entitled to permanent total disability in the amount of \$100.00 per week for life from the respondent and \$168.20 for life from the Second Injury Fund. As of the date of hearing, the respondent owes 198.286 weeks of temporary total disability benefits payable at a rate of \$56.67, followed by 281.286 weeks of permanent total disability benefits payable at a rate of \$100.00 per week for a total of \$39,365.47 less the \$30,076.53 previously paid. The Second Injury Fund owes, at the time of the hearing, 198.286 weeks in temporary total disability benefits and 281.286 weeks of permanent total disability benefits payable at a rate of \$168.20 for a total

of \$80,664.01 due and owing as of the date of the hearing. The employee shall continue to receive weekly benefits of \$100.00 from the respondent and \$168.20 from the Second Injury Fund from the day after the hearing continuing for his life.

22. Second Injury Fund liability: Employee's claim for compensation is approved.
23. Future requirements awarded: Future medical, future modifications to the employee's vehicle, and modifications to his residence are awarded.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Cox

Injury No. 95-100975

Employer: Richard Collins Construction

Insurer: Granite State Insurance Co.

Hearing Date: September 15, 2004

Checked by: ESF/abj

On September 15, 2004, the employee, Robert Cox, appeared through his attorney, Ms. Lisa McWilliams, for a hearing for a final award. The employer was represented at the hearing by Mr. John R. Emerson. The Second Injury Fund appeared telephonically by its attorney, Christina Hammers. At the time of the hearing the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the Findings of Fact and Rulings of Law, are set forth below as follows:

UNDISPUTED FACTS

1. On or about July 8, 1995, Richard Collins Construction was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act and was fully insured by Granite State Insurance Company.
2. On or about July 8, 1995, Robert Cox was an employee of Richard Collins Construction and was working under the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of the employee's alleged accident.
4. The employee's claim for compensation was filed within the time allowed by law.
5. The employee's average weekly wage at Richard Collins Construction qualified him for a compensation rate of \$56.67 per week for temporary total disability and \$100.00 per week for permanent total disability. The employee's compensation rate for wages he earned at Wal-Mart is \$168.20.
6. Medical aid has been furnished by the employer or insurer.
7. Temporary total disability benefits were paid only by the employer or insurer. The Second Injury Fund has not paid any temporary total disability benefits.

ISSUE

1. Whether the Second Injury Fund or the respondent is responsible for the employee's wages attributed to his work for Wal-Mart, the second employer?

SUMMARY OF THE EVIDENCE

The employee, Robert Cox, was 34 years old at the time of hearing, with a date of birth September 25, 1969. He is a high-school graduate. He was employed part-time at Richard Collins Construction as a laborer. While working on a roof he hit his hand and became dizzy. While descending the ladder, claimant lost consciousness and fell about 10 feet to the ground. He was unable to get up and was transported to the hospital. He was diagnosed with a fracture dislocation at T6-T7. He underwent surgery and had a T1-T9 fusion using Isola Rods. The fall rendered the employee a paraplegic and left him in a wheelchair.

At the time of his injury, Claimant was also employed as a mechanic at Wal-Mart. Following his medical treatment, Claimant underwent vocational retraining, which proved unsuccessful. He was unable to return to work as a laborer or as a mechanic. Ultimately, in August 1999, Claimant returned to Wal-Mart to work as a greeter. Wal-Mart made accommodations to his work after the accident. Claimant remained at his job as a door greeter until May 16, 2001. From May 16, 2001, until August 25, 2001, Claimant was unable to work as a door greeter because he had developed decubitus ulcers from sitting in his wheelchair too long. He returned to Wal-Mart but redeveloped the ulcers and was unable to work from November 16, 2001, until October 2, 2002. He returned to an accommodated work schedule, working four days a week on two shifts per day of three hours each. He worked three hours in the morning and then went home for a couple of hours to lie down and get out of the wheelchair and returned to work for another three hours. Claimant was terminated from the Wal-Mart job in April 2004 for reasons unrelated to his injury.

RULINGS OF LAW

Claimant is permanently and totally disabled due to his work-related accident with the employer. The parties agree that his compensation rate for permanent total disability benefits are \$100.00 per week for his wages from the employer. The employer is ordered to pay weekly benefits of \$100.00 from March 1, 1998, and continuing for the remainder of his life.

The claimant held another job at the time of his injury. All the parties agree that his compensation rate for all benefits from the wages he earned at Wal-Mart is \$168.20. The employer contends that the wages Claimant earned at Wal-Mart, the second employer, should be the responsibility of the Second Injury Fund. The Second Injury Fund argues that it is only responsible for the Wal-Mart wages for the period of time Claimant was temporarily and totally disabled.

The Missouri Workers' Compensation Act states that the Second Injury Fund is responsible for all wage loss benefits attributed to a second employer's wages. The employer argues that permanent total disability is a wage loss benefit as its purpose is to compensate the injured employee on a lifetime basis, for his inability to engage in any employment. Moreover, permanent total disability benefits have the same statutory maximum as temporary total disability benefits.

The Fund argues that it is not responsible for the permanent total benefits of the second employer and cites in support of its position *Ristau v. DMAPZ*, 130 S.W.3d 602, 605 (Mo. App. W.D. 2004) and *Hillyard v. Hutter Oil Co.*, 978 S.W. 2d 75 (Mo. App. S.D. 1998). It argues that *Ristau* holds that the Fund is only responsible for the payment of multiple employer wages for temporary total disability benefits and argues that *Hillyard* stands for the proposition that only the employer is responsible for the multiple employer wages for all permanent benefits. Its argument is without merit.

RSMo 287.250.8 addresses multiple employer wages. The statute concerning multiple employer wages in effect in July 1995 was substantially different from its current version. In 1995, RSMo 287.250.8 read as follows:

For an employee with multiple employments, the employee's total average weekly wage shall be equal to the sum of the total average weekly wage computed separately for each employment pursuant to the provisions of this section to which the employee is unable to return because of his injury.

This statutory language clearly provides that the wages Claimant earned at Wal-Mart should be included in his average weekly wage and that such is to occur without limitations or restrictions.

The Second Injury Fund argues that *Ristau* holds that a claimant may not receive an award for multiple employer wages for any purpose other than temporary benefits. In *Ristau*, the claimant was a part-time employee at a bar and a full-time employee at Ford. He was killed in the course and scope of his employment with the bar. The court in *Ristau* held that the Fund was not liable for the second employer wages. However, the statute the court relied upon in *Ristau* was the one adapted in 1998 and in effect on the date of injury, January 31, 1999. RSMo 287.250.8, which was amended in 1998, now reads as follows:

For an employee with multiple employments, as to the employee's entitlement to any temporary total or temporary partial disability benefits only pursuant to subsection 9 of section 287.220, and for no other purposes, the employee's total average weekly wage shall be equal to the sum of the total of the average weekly wage computed separately for each employment pursuant to the provisions of this section to which the employee is unable to return because of this injury.

Ristau was killed while the definition of average weekly wage only included multiple employer wages for the purposes of temporary total and temporary partial disability benefits and "for no other purpose." The reason the Fund escaped liability for the multiple employer wages was because the statute in effect at the time of *Ristau*'s injury prevented the inclusion of the second employer wages for any purpose other than temporary benefits. The Fund does not have that same defense in the present case. In fact, the *Ristau* decision suggests that had the date of injury been prior to the enactment of the 1998 amendments to RSMo 287.250.8, the Fund would have been liable for the death benefits attributable to claimant's second employer wages under the category of "wage loss" benefits. The Fund's reliance on the holding of *Ristau* is without merit.

The Fund also argues that *Hillyard* stands for the proposition that it is not responsible for a second employer wage in relation to any permanent benefits. The Fund's reliance on *Hillyard* is also misplaced. *Hillyard* is a permanent partial disability case and not a permanent total disability case. Permanent partial disability benefits have a different purpose than permanent total disability benefits. Permanent partial disability benefits are awarded to compensate an injured worker for the loss of use of function of a body part and each body part is broken down into a specific number of weeks by statute. Also, the maximum compensation rate for a permanent partial disability case is limited to 55% of the State's average weekly wage. Permanent total disability benefits, by contrast, are paid to compensate an injured worker when he is incapable of engaging in any employment, the same standard required for an award of temporary total disability benefits. Permanent total disability benefits are paid for the life of the injured worker and at 105% of the State's average weekly wage, the same rate as temporary total disability benefits. The Fund's reliance on *Hillyard* is misplaced.

The Employer's arguments are found to be persuasive. The version of RSMo 287.250.8 that was in effect at the time of the injury clearly states that the second employer wages are added to claimant's average weekly wage and there are no conditions or contingencies for such calculation. The next issue to be decided is which party is responsible for the second employer wages.

RSMo 287.220.9 governs which party is responsible for the second employer wages. At the time of Claimant's injury, RSMO 287.220.9 provided:

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. The provisions of this subsection shall expire on August 28, 1996.

Pursuant to the RSMo 287.220.9, Claimant is entitled to receive benefits from 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.”

If permanent total disability benefits are a wage loss benefit, then the Wal-Mart wages are the responsibility of the Second Injury Fund. The term “wage loss benefit” is not defined by the statute nor are there reported cases defining it. Since the term is not defined, we must look at the Legislature’s intent.

The Court concludes that it is the Legislature’s intent to include permanent total disability benefits as a “wage loss benefit.” The purpose of permanent total disability benefits is to compensate the injured worker for his inability to engage in meaningful labor on the open labor market. The term “total disability” is defined by statute. “The term ‘total disability’ as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.” RSMo 287.020.7

The Fund admits that it is responsible for the Wal-Mart wages for the period of time that Claimant was temporarily and totally disabled. The definition of “total disability” is the same for both temporary and permanent total disability. The purpose of temporary total and permanent total benefits are the same, that is to compensate the injured worker for his inability to engage in any employment, or in other words to compensate him for his lost earnings due to the injury.

Whether the claimant is temporarily or permanently disabled, the same maximum compensation rate is used (105% of the State’s average weekly wage). The Legislature made the rate higher than the permanent partial rate (55% of the State’s average weekly wage) given that the employee is wholly incapable of earning any wages.

Permanent total benefits are a wage loss benefit\ as they are designed to be paid over life. They differ from permanent partial benefits in three ways: First, they are paid at a higher rate than permanent partial benefits; second, they are paid for the life of the Claimant, not 400 weeks; and third, they are paid to compensate the disabled employee for his loss of earnings rather than for the loss of use of function, which is the province of permanent partial disability. The specific reason for permanent total benefits having the higher statutory maximum and being paid for life is to compensate the claimant for his lost earnings.

The Fund’s argument that it is not responsible for any permanent benefits is without merit. RSMo 287.250.8, the subsection discussing average weekly wage, was in fact amended in 1998 to reduce the Fund’s potential liability. After the 1998 amendments, a second employer’s wages are added to the average weekly wage only for temporary total or temporary partial disability benefits and for no other reason. The Legislature made the change to limit the Fund’s liability on multiple employer cases when permanent total disability or death benefits are awarded. The present case, however, is governed by the earlier version of RSMo 287.250.8.

The Court finds that the principle purpose of permanent total disability benefits is to compensate the injured employee for his lost earnings, and thus it finds that permanent total disability is a “wage loss benefit” and the second employer wages are the responsibility of the Second Injury Fund. *Hillyard* is not authority to the contrary because it is a claim for permanent partial disability benefits only. The only thing lost from Employee’s second job with Wal-Mart was wages. There is no disability loss due to that job. Further it is clear from the statute that the employment where the injury occurred is only responsible for wage loss from that employment. This intent is clear in that the legislature wished for employers to feel free to hire employees who might work more than one job. To burden an employer with a second wage loss it had no control over is not fair and clearly not the intent of the

Legislature.

The Court finds that permanent total disability benefits are "wage loss benefits" under RSMo 287.220.9. They are designed to compensate an individual for his lost earnings over his life, they are paid at the same rate as temporary total disability benefits (105% of the State average weekly wage), over the Claimant's life, are not designed to pay Claimant for the loss of use of function of his body and are not limited to the 400-week schedule which is applicable to claims for permanent partial benefits. The wages Claimant earned at Wal-Mart are the responsibility of the Second Injury Fund.

AWARD

The claimant is awarded temporary total disability benefits from July 8, 1995, through February 28, 1998. The respondent shall pay weekly benefits of \$56.67 during this period. The Fund shall pay weekly benefits of \$168.20 during the same period.

Beginning March 1, 1998, Claimant is entitled to permanent total disability benefits. The respondent is ordered to pay \$100.00 per week for the remainder of the claimant's life. The Second Injury Fund is ordered to pay \$168.20 per week for the remainder of the claimant's life.

As of the date of hearing, the respondent owes \$39,365.47 less the \$30,076.53 previously paid in temporary total and permanent total disability benefits. The Second Injury Fund owes \$80,664.01 in past temporary and permanent total benefits.

The injured worker is awarded future medical for his injuries for the remainder of his life. The claimant's attorney's fees of 25% are also awarded for all temporary and permanent total disability benefits.

Date: _____

Made by: _____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary Estenson
Acting Director
Division of Workers' Compensation