

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

Injury No.: 03-049525

Employee: Jeremy Cromley  
Employer: Chris Pierce  
Insurer: Missouri Employers Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: May 27, 2003  
Place and County of Accident: Jackson 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 April 19, 2005. The award and decision of Administrative Law Judge Rebecca S. Magruder, issued April 19, 2005, 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 13<sup>th</sup> day of January 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Jeremy Cromley

Injury No. 03-049525

Dependents: N/A

Employer: Chris Pierce

Insurer: Missouri Employers Mutual Insurance Company

Additional Party: Missouri State Treasurer, Custodian of Second Injury Fund (liability to be determined later)

Hearing Date: March 3<sup>rd</sup> and 4th, 2005

Checked by: RSM/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 27, 2003.
5. State location where accident occurred or occupational disease was contracted: Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While waiting for concrete truck to arrive and standing on scaffolding, Claimant slipped and fell to ground.
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: Neck, spine, right arm and right leg.
14. Nature and extent of any permanent disability: 60 percent permanent partial disability body as a whole.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? \$18,525.78.
18. Employee's average weekly wages: \$880.00.
19. Weekly compensation rate: \$586.67/\$340.12.
20. Method wages computation: §287.150.1(5) RSMo. 2000.

**COMPENSATION PAYABLE**

21. Amount of compensation payable:	
Past Medical.....	\$118,525.78
Temporary Total Disability 9 5/7 <sup>th</sup> weeks at \$586.67 per week.....	5,699.08
Permanent Partial Disability 60 percent body as a whole or 240 weeks at \$340.12 per week...	<u>\$ 81,628.80</u>
	TOTAL \$205,853.66
15 percent penalty.....	<u>30,878.05</u>
	GRAND TOTAL \$236,731.71

22. Future requirements awarded: Medical to be left open per Award.

Said payments to begin upon receipt of 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. Richard Scaletti.

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

Employee: Jeremy Cromley

Injury No: 03-049525

Dependents: N/A

Employer: Chris Pierce

Insurer: Missouri Employers Mutual Insurance Company

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

Hearing Date: March 3<sup>rd</sup> and 4<sup>th</sup>, 2005

Checked by: RSM/lh

At the hearing, the employer and employee stipulated:

- 1) that on or about May 27, 2003, Chris Pierce was an employer operating under the provisions of the Missouri workers' compensation law and that his liability was fully insured by Missouri Employers Mutual Insurance Company;
- 2) that on or about May 27, 2003, Jeremy Cromley was an employee of Chris Pierce and was working under the provisions of the Missouri workers' compensation law;
- 3) that the employer had notice of the injury and that a claim for compensation was filed within the time prescribed by law.

The issues to be determined in this case are as follows:

- 1) whether the Claimant sustained injury by accident arising out of and in the course of his employment on May 27, 2003;
- 2) whether any benefits awarded should be increased 15 percent due to the failure of the employer to comply with any statute in this state as provided in §287.120.4 RSMo 2000;
- 3) the applicable compensation rate;
- 4) liability for temporary total disability benefits;
- 5) liability for past medical aid in the amount of \$118,525.78 – the parties do agree, however, that if the

accident is ultimately found to have risen out of and in the course of the Claimant's employment, then the medical treatment was necessary and the dollar amount of the bills was reasonable;

- 6) the nature and extent of any permanent disability resulting from the accident;
- 7) liability for future medical aid – the parties do agree, however, that if the accident is ultimately deemed to have risen out of and in the course of the Claimant's employment, then medical should be left open; and
- 8) whether fees and costs should be awarded in this case under §287.560 RSMo 2000.

Claimant's evidence consisted of his testimony, the testimony of his wife and several lay witnesses as well as the testimony of his expert. Deposition testimony was also offered into evidence as were medical records, medical bills and medical reports. Photographs of the foundation and scaffolding where the accident took place were also admitted into evidence. Employer's evidence consisted of the testimony of the employer, the deposition testimony of the claimant and the expert testimony of Dr. Faddis.

There is no dispute in this case that Claimant's accident occurred on the employer's premises and at a time when Claimant was supposed to be working. Furthermore, there is no dispute that the Claimant fell some 4 to 5 feet to the ground when a 'scaffold board' on which he was standing broke. Finally, there is no dispute that Claimant sustained severe injury to his cervical spine and right upper extremity, requiring immediate hospitalization, surgery and extensive medical care and treatment as a result of his falling to the ground when the 'scaffold board' broke. The pivotal dispute in this case involves whether or not the Claimant's injury was the result of horseplay. The employer claims that the Claimant's injury did not arise out of and in the course of his employment because the injury was the result of horseplay. Claimant denies that he was engaged in any horseplay when the accident occurred and that therefore the injury was not the result of horseplay, but arose out of and in the course of his employment.

An employee's injury must arise out of and in the course of his employment in order to be compensable, §287.120.1 RSMo 2000. For an injury to "arise out of" the employment, there must be a causal connection between the nature of duties and conditions the employee is required to perform and the resulting injury Pullum v. Hudson Foods, Inc., 871 S.W.2d 94, 97 (Mo.App. 1994). For an injury to be "in the course of" the employment, it must occur within the period of employment at a place where the employee may reasonably be, while the employee is fulfilling the duties of employment or engaged in something incidental thereto. Parrish v. Kansas City Security Serv., 682 S.W.2d 20 (Mo.App. 1984). If, however, an injury results from "horseplay" it is not compensable if the conduct constitutes a deviation from employment. Whether the conduct constitutes a deviation from employment, depends on various factors. These factors include the extent and seriousness of the deviation, the completeness of the deviation, the extent to which the practice of horseplay has become an accepted part of the employment, and the extent to which the nature the employment may be expected to include some such horseplay. See II Larson's Workers' Compensation Law, §23.01, p 23-2 (2000).

The appellate cases in Missouri dealing with horseplay often deal with the issue of whether the horseplay has become incidental to the employment due to an employer's failure to take remedial action when the employer has knowledge of continuing and regular horseplay of its employees. See Peet v. Garder Oil Company, 492 S.W.2d 103. (Mo. App. 1973), Wisely v. Sysco Food, 972 S.W.2d 315 (Mo.App. 1998), and Pullum v. Hudson Foods, Inc., 871 S.W.2d 94, (Mo.App. 1994). These cases are not particularly instructive in the case at bar due to the fact that the Claimant's employer was present at the jobsite when the accident occurred and had told the Claimant in no uncertain terms to quit the prankish behavior in which Claimant was engaged prior to the accident's occurrence. On the day of the accident, there clearly had been a deviation from employment by the Claimant which constituted horseplay. The issue in this case is whether or not the Claimant heeded the advice of his employer and stopped the horseplay prior to the accident's occurrence. In other words, this case involves primarily a factual determination as to whether or not the Claimant had intended to return, and did return to his duties after he was reprimanded by his employer to quit the horseplay.

My factual findings regarding this issue are based on the following evidence:

- 1) the deposition testimony of the only eye witness of the event, Claimant's co-worker, John McCarty (Exhibit D along with deposition exhibits attached,);
- 2) the trial and deposition testimony of Claimant's employer, Christopher Pierce, who was present at the job site when Claimant fell but did not witness the fall (Exhibit E along with exhibits attached);
- 3) the trial and deposition testimony of Claimant (Exhibit 1);
- 4) the trial testimony of the two expert witnesses in the case and relevant accompanying documents; and
- 5) the medicals records on the day of the accident, particularly the recorded history portions.

Having considered the testimony of each witness separately and then having considered the testimony of all of the witnesses as a whole, I make the following findings:

On Tuesday morning, May 27, 2003, Claimant, a co-worker, Mr. McCarty and the employer, Mr. Pierce, were pouring concrete in foundation walls at a residential construction site. They began work around 7:30 or 8:00 a.m. Claimant's job was to operate the hose in order to direct the concrete as it was being poured into Styrofoam forms. This job required Claimant to walk around the perimeter of the foundation on scaffolding boards, which were approximately 5 feet from the ground. Mr. McCarty was on the ground getting tools or whatever needed to be done to assist the Claimant and Mr. Pierce who were up on the scaffolding boards. Although there were other individuals present at the site, cement truck drivers and a pump truck driver, all of these individuals were approximately 60 feet from the foundation walls. Two or two and a half hours after they had commenced pouring the concrete, Claimant, Mr. McCarty and Mr. Pierce had to take a break in order to wait for another concrete truck to arrive.

During this break time, Claimant and Mr. McCarty were joking around about the Claimant doing a back flip off the scaffold board. They were kidding around with each other and "giving Chris [the employer] a hard time, razzing him because...Chris is an older guy..." Ex. D, p. 16. As part of the razzing, Claimant, while bouncing and jumping up and down on the edge of the scaffold board, said at least three times that he could do a back flip off the scaffold boards. Mr. McCarty tauntingly replied, "Bullshit," insinuating that the Claimant couldn't or wouldn't do a back flip off the scaffold board. In accordance with Mr. Pierce's own testimony, I find that he either told the Claimant to stop doing that or not to do that. Also in accordance with Mr. Pierce and Mr. McCarty's testimony, I find that prior to Mr. Pierce's reprimand, the Claimant had been jumping and or intentionally bouncing on the boards, prankish behavior clearly constituting horseplay. Immediately after Mr. Pierce told the Claimant to quit that (i.e., stop jumping up and down or intentionally bouncing on the boards) or to not do that (i.e., don't actually do a back flip), Mr. Pierce, who was also up on a scaffold board towards the corner of the foundation, turned away from the Claimant and was unable to see what happened after he had warned the Claimant. Mr. Pierce testified that he assumed the Claimant had heeded his warning.

Considering all of the evidence taken as a whole, I find and believe that the Claimant did in fact comply with Mr. Pierce's warning in that he stopped jumping and/or intentionally bouncing on the board and said nothing else about doing a back flip. In other words, Claimant stopped the horseplay he had been engaged in. I further find, though, that the board continued to deflect as it had been doing all morning when either the Claimant or Mr. Pierce walked on the boards. I find that very shortly after Mr. Pierce's warning and turning away from the Claimant, and Claimant's stopping his jumping and/or intentional bouncing and threatening, Claimant lost his balance, the board broke, Claimant fell to the ground and landed on his head.

Although I cannot determine exactly what caused Claimant to lose his balance, I find that he did accidentally lose his balance. Claimant, as he testified at the hearing, may have taken a couple of steps and tripped. He may have also, as he testified, caught his foot on an overlapping board. Finally, he may have simply misstepped on the edge of the board. Whatever caused him to lose his balance is unknowable. It all happened so quickly that it's just impossible to determine. Upon losing his balance, he looked down and saw a metal spike sticking up out of the ground. In accordance with his deposition and trial testimony I find that he attempted to "jump back away from falling on to the metal spike when the board snapped in half" causing him to fall to the ground and land on his head. Thus, while I cannot determine exactly what caused the Claimant to lose his balance, I do find that the cause was purely accidental. I also find that the Claimant did not lose his balance because of jumping or intentionally bouncing on the board or because he was attempting to do a back flip. While I have found the Claimant had been jumping and/or intentionally bouncing on the scaffold boards prior to Mr. Pierce's warning, I have also found in accordance with the only eye-witness account, that the Claimant was not jumping up and down on the board immediately before he fell. Mr. McCarty testified more than once that Claimant's feet did not leave the board immediately before the fall. Claimant had discontinued the horseplay he had been engaged in before he lost his balance.

An important line of testimony on which I relied a great deal in making some of my ultimate factual findings regarding the vents immediately prior to Claimant's fall is from Mr. McCarty when asked about what happened right before the Claimant fell. That testimony is from Ex. D pp. 29-30 and is as follows:

"Q. I think you said that bouncing was a good word?

A. Well, shifting –

Q. Not jumping but bouncing.

A. It's hard to say because there was so much flex in the board, just him moving from – you know, just his shifting his weight could have been interpreted as a bounce, but the board was flexing and he was standing on the scaffolding and, you know, his weight was shifting. It looked like a bounce, but his feet never left the scaffolding board.

Q. Right, it wasn't like he was jumping up and down on the board?

A. Right. But walking on those boards was bouncing."

And from p. 33

“Q. And he was kind of bouncing to make the board flex, that kind of thing?

A. He was standing on the board and the board was flexing up and down. Now, whether that’s described as bouncing or shifting your weight, I don’t know. But he wasn’t like standing way up on his tippy toes and flinging his arms like that, but he was standing in the center of the board and the board was flexing. It may have been shifting and *he was just trying to catch his balance*, I don’t know. ...(*italics added*)”

Based on all of the evidence presented I therefore find that, after Claimant had quit intentionally bouncing or jumping on the boards, the Claimant accidentally lost his balance and then maneuvered the best he could to avoid falling onto a spike on the ground which caused the board to break. The board did not, therefore, break because of any intentional act or horseplay of the Claimant but because the Claimant lost his balance and made whatever desperate moves he could make while trying to prevent himself from falling on a spike on the ground. In doing so, he broke the board and fell.

At the time the accident occurred, Claimant had “returned to the duties for which he was employed” and therefore the injury must be deemed to have arisen out of and in the course of his employment. See Tabor v. Midland Flour Milling Company, 168 S.W.2d 458 (Mo. 1943). The fact that he was still waiting for the concrete truck to arrive and hadn’t begun pouring concrete again is absolutely irrelevant in determining whether he had returned to the duties of his employment.

The second issue in this case is whether the Claimant’s injury was caused by Mr. Pierce’s failure to comply with any state statute, thus increasing the compensation awarded by fifteen percent. Section 287.120.4 provides, inter alia, that:

“Where the injury is caused by the failure of the employer to comply with any statute in this state...the compensation...benefit provided for under this chapter shall be increased fifteen percent.”

To be entitled to the 15 percent increase under this section, the Claimant has the burden of demonstrating the existence of a Missouri statute, its violation, and a causal connection between the violation and the injury. Agris v. Warson Garden Apartments, 961 S.W.2d 50 (Mo.Banc 1998). The burden of proof rests with the Claimant on such a claim for penalties. Keener v. Wilcox Electric, Inc., 884 S.W.2d 744 (Mo.App. 1994). Claimant contends that Mr. Pierce constructed and/or erected scaffolding that was unsafe for his employees and that this unsafe scaffolding caused the Claimant’s injuries. Claimant specifically asserts that Mr. Pierce violated §292.090 and §292.480 Revised Statutes of Missouri, which relate to the health and safety of employees in the state of Missouri. Section 292.090 provides, inter alia, that:

“All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to ensure the safety of those working thereon...against the falling therein...”

Section 292.480 provides, inter alia:

“that all scaffolds...erected or constructed by any person...in this state, for the use in the erection...or any work whatsoever of any house...or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be erected and constructed, placed and operated, as to give proper and adequate protection to the life and limb of any person or persons, employed or engaged thereof...”

Claimant asserts that the scaffolding that Pierce had constructed and/or erected was unsafe in that the lumber used for the walkway was not “scaffold grade” planking. John Parkin, the Claimant’s expert, testified that the planks used on the scaffold were No. 2 grade Yellow Pine with a large knot and were not scaffold grade planks and were, therefore, unsafe for use as such. The boards were not fastened or secured in any way to the scaffolding system either. Finally, the boards had too much give, deflection, and bounced when simply stood and/or walked upon. This is in accordance with the eyewitness testimony of Mr. McCarty. Finally, the boards were only 7 ½ inches wide and were therefore not of sufficient width. Claimant contends that these unsafe conditions constitute violations of both §292.090 and §292.480. I do find in accordance with the testimony of both of the experts that the scaffolding was not in compliance with §292.090 and §292.480. A visual inspection of the photographs offered into evidence demonstrates the narrowness of the boards. The fact that grown men were going to be walking on these boards which were 7 ½ inches wide would certainly not seem to be in compliance with §292.090 which requires scaffolds of “sufficient width.” Whether the narrowness of the boards or the overlapping nature of

the boards caused the Claimant to lose his balance we will never know. The point is that the Claimant did lose his balance and fearing that he would fall on a metal stake below he did whatever he could in that split second to avoid falling onto the stake. By both his deposition and trial testimony he indicated he may have jumped back or shifted his weight in an attempt to regain his balance to avoid being impaled by the stake. As he made these maneuvers, the board broke. I find in accordance with both experts' testimony that this type of sudden physical pressure could have resulted in the breaking of the board. Had the boards been of scaffold grade, the boards most likely would not have broken causing Claimant to fall to the ground and sustain injury. I therefore find that Pierce, as the employer of Claimant, failed to comply with the above-described Missouri Statutes relating to scaffolding and that such failure was causally connected to Claimant's ultimate injury. Therefore, the compensation that is awarded in this case shall be increased by 15 percent as dictated by §287.120(4) RSMo 2000.

The third issue in this case is a determination of the appropriate compensation rate. As was stated earlier, Claimant began working for Mr. Pierce on Monday, May 19, 2003. He was to assist in the installation of ceramic tile at the O'Charley's restaurant and pub at or near Belton, Missouri. Pierce agreed to pay Claimant \$6,000 for working on this particular tile job which was expected to last approximately three weeks. On Friday, May 23, Pierce had instructed the Claimant to report to a residential construction site the following Tuesday morning to assist in pouring concrete walls for a residential basement. Pierce was the general contractor building the house at this location. I find that Pierce had agreed to pay the Claimant \$100 for pouring the concrete walls for the basement for this half-day (four hour) job, and that after that job was finished the Claimant was to have reported back to the O'Charley's jobsite and to have continued working on the tile job. Mr. McCarty was also to be paid \$100 for the four hours of concrete work. Claimant had been employed for Pierce for one week and one day prior to his injury. Although Claimant was to be paid \$6,000 for the O'Charley's job for laying tile, he was to be paid \$100 for the concrete pouring job where he was injured. I find that the applicable section to determine Claimant's compensation rate is §287.250.1.5.

That section provides as follows:

“If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury....”

Claimant had clearly worked for Mr. Pierce less than two calendar weeks preceding his injury and while an agreement had been made between Mr. Pierce and the Claimant as to the tile-laying job at O'Charley's, the wage agreement was different for the concrete pouring job where Claimant was injured. Again, however, Claimant had worked less than two calendar weeks immediately preceding his injury and Claimant provided evidence of the prevailing wage in similar employment. Daniel Muehlberger, who owns a concrete construction business in Parkville, Missouri, testified as to the wages paid laborers and finishers who pour concrete. Based on his testimony, I find that nonunion concrete pourers were typically paid \$22 an hour. Based on a 40-hour workweek, the average weekly wage of a nonunion concrete laborer would be approximately \$880. Claimant's average weekly wage therefore should be that which is equivalent to a nonunion concrete laborer or \$880 per week. Therefore, the weekly compensation rate for temporary total disability benefits would be \$586.67 and the weekly compensation rate for permanent partial disability benefits would be \$340.12 per week, the maximum allowed by law.

Claimant contends that he is entitled to six months of temporary total disability benefits. He claims he was unable to perform physical labor from the date of the accident, May 27, 2003, until released by his treating neurosurgeon in November 2003. The purpose of temporary total disability awards is to cover the claimant's healing period, so the award should cover only the time before the claimant can return to work. As was stated in Boyles v. U.S.A. Rebar Placement, Inc., 26 S.W.2d 418 (Mo.App. 2000), temporary total disability awards are owed until the workers' compensation claimant can find employment or the condition has reached the point of maximum medical progress. In this case, Claimant obtained gainful employment prior to the point of maximum medical improvement. Claimant points out he was ultimately released to duty in November of 2003. However, the Claimant, being the industrious individual that he was, managed to make a profit and earn a living by the end of July or early August. After his release from the hospital, he hired Chuck Hopkins, a friend of his, to drive him around so he could communicate with prospective customers and bid jobs. Although the Claimant did not do this full time and did not actually perform any physical labor and activities himself, he admitted on cross-examination that he made a profit during that period of time, i.e., from the end of July through November. Claimant is therefore entitled to temporary total disability benefits from May 27 through July 31<sup>st</sup> or 9 and 5/7ths weeks for a total of \$5,699.08.

The Claimant has severe and permanent disabilities as a result of his fall on May 27, 2003. Both medical experts in this case gave the Claimant significant disability ratings. The nature of injuries Claimant sustained as a result of the accident

of May 27, 2003, is well described by Dr. Swaim in his report wherein he summarizes the Claimant's condition as follows:

“Status post corpectomy of the C7 vertebra with graft strut replacement and stabilization with instrumentation anteriorly from C6 to T1 and posterior instrumentation from C6 to T1. Persistent upper motor neuron lesion involving the spinal cord at the C6-7 level, with weakness of both triceps and significant weakness of both hands, including claw hand deformity on the right; and significant clonus activity of both legs and decreased sensation of the left leg. This represents a moderate quadraparesis. Status post left wrist fracture with decreased motion, tenderness and mild crepitation.”

Dr. James. S. Zarr, M.D., examined the Claimant for purposes of evaluating the residual effects of the C7 vertebral fracture with underlying spinal cord injury and found that the Claimant had 45 percent whole body permanent impairment covering the full extent of his orthopedic and spinal cord injuries. Dr. Zarr recommended certain permanent work restrictions with Claimant able to return to light duty work as long as he did not lift greater than 25 pounds and did no work requiring balancing or manual dexterity with the right hand. Dr. Zarr was the Employer and Insurer's evaluating doctor. Dr. Zarr admitted that the Claimant could not control the muscles in his right forearm and could not voluntarily open his right hand without considerable effort. This made it difficult for the Claimant to grip anything according to Dr. Zarr. He also admitted that the Claimant's injuries significantly affected his ability to work in construction and his ability to play sports. He further stated that as a result of the injury Claimant could not control his right leg properly in that he could not bend his knee and ankle normally and therefore had to swing his leg around when he walked instead of projecting it straight forward. Therefore, Claimant's ability to walk or run was deleteriously effected. Even Dr. Zarr, the Employer and Insurer's examining physician found Claimant suffered significant permanent disability justifying a permanent disability rating of 45 percent to the body as a whole (*see* Exhibit F).

Claimant's examining physician, Dr. Truett Swaim, concluded that the Claimant sustained 60 percent permanent partial disability to the body as a whole. Dr. Swaim found that Claimant had weakness in both triceps and significant weakness in both hands. He found the Claimant had claw hand deformity in his right hand and had significant clonus activity in both of his legs. Dr. Swaim also stated that Claimant's condition had worsened over time and that there was a risk that his neurological condition would continue to deteriorate. He stated that Claimant has increased risk developing left wrist arthritis as a result of the fracture he sustained when injured. Dr. Swaim's 60 percent rating to the body as a whole is referable to Claimant's spinal injuries. In addition to the 60 percent rating to the body as a whole, Dr. Swaim concluded that Claimant had 18 percent disability at the 175-week level referable to the fractured right wrist.

Having read through the medical records and reports in this case, it is truly amazing that the Claimant walked into this hearing room in as good a shape as he was after the significant injury he sustained as a result of the fall on May 27, 2003. Claimant's determination and work ethic are certainly worthy of respect. Based on the doctor's reports and the witness testimony offered in this case as well as Claimant's own testimony, I find that the Claimant does have a significant disability, and that but for his determination and will, he would not be in the physical or mental shape that he is today. I find Claimant sustained injury to the body as a whole in the amount of 60 percent. This includes the disability to his left arm due to the wrist fracture. Therefore, I find that the Claimant is entitled to 240 weeks of permanent partial disability or \$81,628.80.

Because I have found that the Claimant sustained injury by accident arising out of and in the course of his employment, the employer has stipulated that the medical bills he incurred in the amount of \$118,525.78 were reasonable in amount and necessary treatment for the injury he sustained. Similarly, employer has stipulated that if the injury was deemed to have arisen out of and in the course of employment, future medical should be left open in this case. Therefore, employer is hereby ordered to pay to the Claimant \$118,525.78 for the medical bills he has incurred thus far and to provide future medical treatment as is needed. Again, this assumes that the finding of compensability is not set aside on appeal.

Finally, both parties ask for fees and costs under §287.560 RSMo. 2000. That section provides in relevant in part as follows:

“...if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.”

I find absolutely nothing unreasonable in the employer's defense of this claim based on horseplay. I have ultimately found that the Claimant's injury arose out of and in the course of his employment. I further found, however, that the Claimant was engaged in horseplay prior to his accident and that his employer rightfully and responsibly took charge and

reprimanded the Claimant. And while I did find that Claimant obeyed his employer, quit the horseplay prior to his accident and returned to the course and scope of his employment when he was injured, there is no way I could determine that the employer defended this case without reasonable ground. Given the fact that the Claimant ultimately persuaded me that his injury did arise out of and in the course of his employment, moots any claim by the employer that the proceeding was brought without reasonable ground. Therefore, both employee's and employer's requests that fees and costs be imposed under §287.560 are denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Rebecca S. Magruder  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*