

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

Injury No.: 11-063136

Employee: Renee Cummins
Employer: Penske Logistics, LLC
Insurer: Old Republic Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Safety penalty under § 287.120.5 RSMo

Section 287.120.5 RSMo provides, in relevant part, as follows:

Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

The courts have enumerated the following four elements that the employer must prove in order to justify a reduction of compensation under § 287.120.5:

1. [T]hat the employer adopted a reasonable rule for the safety of employees;
2. that the injury was caused by the failure of the employee to obey the safety rule;
3. that the employee had actual knowledge of the rule; and
4. that prior to the injury the employer had made a reasonable effort to cause his or her employees to obey the safety rule.

Employee: Renee Cummins

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Employer asserts that employee's injuries resulted from her violation of employer's "one-door process" safety rule which required employees to open only one trailer door at a time to prevent cargo that may have shifted from falling out. The administrative law judge made only brief mention of this policy in a footnote on page 15 of his award; consequently, we discern a need for supplemental findings and analysis with respect to this issue.

Employer states, on page 6 of its brief and again on page 6 of its reply brief, that its witness, a safety manager named Mickey May, testified that employer trains all employees on the one-door process safety rule, and testified that employee had actual knowledge of the one-door process safety rule because she received training as to the rule on December 10 and 11, 2009. We have carefully reviewed Mr. May's testimony. He did not so testify. Mr. May did testify about employer's load securement policies, and identified employee's signature on a form memorializing her attendance at a training session covering such policies, but he did not even mention the one-door process safety rule. Suffice to say we find Mr. May's testimony lacking any probative value with respect to the question whether employee had actual knowledge of a one-door process safety rule.

We have carefully reviewed Employer's Exhibit 4, a document entitled "Load Securement – General" which includes the training materials identified by Mr. May. The training materials contain a number of employer rules regarding how to secure loads, but nowhere within this document are the words "one-door process" utilized, nor is there any other language that may be fairly characterized as setting forth such a rule. We note that elsewhere in employer's brief, it ultimately concedes that it did not have any written policy setting forth the one-door process safety rule before employee's accident on August 12, 2011. Especially in light of this specific concession on the part of employer, we find that Employer's Exhibit 4 is not probative as to the question whether employee had actual knowledge of a one-door process safety rule.

Employee presented testimony from Robert Harter, a coworker. Mr. Harter testified that employer did not adopt any rule regarding opening trailer doors until after employee's accident. Mr. Harter testified that he had never even heard of the one-door process safety rule before August 12, 2011. Given that there is essentially no contrary evidence on this point, we find Mr. Harter the more credible witness, and find that employer did not adopt the one-door process safety rule until after employee's accident on August 12, 2011.

We further note that even if such a policy was in effect at the time of the accident, this record provides no credible evidence that employee violated the policy, or that employee's accident or injury were caused by any violation of the rule. It follows that employer has failed to meet its burden of proof under § 287.120.5 with respect to the one-door process safety rule. We adopt, without further supplementation, the administrative law judge's findings, analysis, and conclusions with respect to employer's argument that employee's injuries resulted from her failure to properly secure the load.

Conclusion

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

Employee: Renee Cummins

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The award and decision of Administrative Law Judge Kenneth J. Cain, issued November 25, 2013, is attached and incorporated by this reference.

The Commission approves and affirms as fair and reasonable the administrative law judge's allowance of a 25% lien in favor of employee's attorney on compensation awarded herein.

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

Given at Jefferson City, State of Missouri, this 13th day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Renee Cummins Injury No. 11-063136
Employer: Penske Logistics LLC
Insurer: Old Republic Insurance Company/Gallagher Bassett Services
Additional Party: N/A
Hearing Date: August 29, 2013; Checked by: KJC/pd
Briefs Filed: September 30, 2013

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? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 12, 2011
5. State location where accident occurred or occupational disease was contracted: North Kansas City, Clay County, Missouri
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of her employment as a truck driver for Penske, opened the doors to a trailer and several 90-pound totes fell from the trailer and struck Employee on her head.
12. Did accident or occupational disease cause death? No. Date of Death? N/A
13. Part(s) of body injured by accident or occupational disease: head, neck, both upper and lower extremities and psyche

14. Nature and extent of any permanent disability: permanent total disability
15. Compensation paid to date for temporary disability: \$33,624.86
16. Value necessary medical aid paid to date by employer/insurer? \$75,301.95
17. Value necessary medical aid not furnished by employer/insurer? Undetermined (See additional findings of fact and rulings of law)
18. Employee's average weekly wages: \$880.40 per stipulation of the parties
19. Weekly compensation rate: \$586.96/\$425.19 per week per stipulation of the parties
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: Undetermined
Weeks for permanent partial disability: None
Weeks for temporary total and temporary partial disability: 57 2/7 weeks @ \$586.96 per week (previously paid and the employer is granted a credit)
Weeks for permanent total disability: Undetermined (See additional findings of fact and rulings of law)
22. Second Injury Fund liability: N/A

TOTAL: Undetermined

23. Future requirements awarded: Undetermined

Said payments to begin as of 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. Mav Mirfasihi

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Renee Cumming Injury No. 11-063136
Employer: Penske Logistics LLC
Insurer: Old Republic Insurance Company/Gallagher Bassett Services
Additional Party: N/A
Hearing Date: August 29, 2013 Checked by: KJC/pd

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 medial aid in the amount of \$1,615.13;
3. Liability of the employer for future medical aid;
4. Whether the employee's benefits may be increased by 15 percent due to an alleged violation of a state statute by the employer;
5. Whether the employee's benefits may be reduced by 25 to 50 percent pursuant to the statute due to the employee's violation of an employer safety rule or policy; and
6. Whether the employee is entitled to fees and costs due to an unreasonable defense by the employer.

At the hearing, Ms. Renee Cummins (hereinafter referred to as Claimant) testified that she was born on January 19, 1953 and that she would be 61 years old on her next birthday. She stated that she graduated from high school in 1971. She stated that she had no computer training.

Claimant testified that she worked as a truck driver for the last 31 years preceding her accident at work. She stated that she worked for the Penske Corporation from December 2009 to August 12, 2011. She stated that her job for Penske was to transport products to and from the Ford plant.

Claimant testified that the empty totes she hauled from the Ford plant were not secured in the back of the trucks. She stated that Penske employees had requested load locks to secure the totes and that Penske had denied the requests on the basis that Ford was responsible for loading the freight hauled from the Ford plant. She stated that unsecured freight would fall in the trucks three or four times per week.

Claimant testified that she sustained injuries at work on August 12, 2011. She stated that she did not remember what happened on that day, other than she was working alone and that she woke up in a hospital. She stated that she injured her head, neck, back, shoulders, arms, hands, and legs in the accident. She denied any prior injuries to those parts of her body.

Claimant testified that she had neck surgery in September 2011. She complained of continuing problems with constant pain from the base of her skull radiating down her back. She complained of sharp radicular pains in the neck. She rated her pain as a 7 on a scale of 1 to 10.

Claimant also complained of vertigo. She stated that she became dizzy once or twice per day after her accident. She stated that she fell on a "regular" basis after the accident due to her dizziness. She stated that she was diagnosed with post traumatic stress disorder (PTSD) and depression after her accident. She stated that she had experienced nightmares since the accident, although medication helped with her nightmares and PTSD.

Claimant testified that she was still taking Tylenol 3 and muscle relaxers. She stated that she could not sit for more than three hours. She stated that she could not stand for more than one hour. She stated that she had a loss of sensation in her hands. She stated that she had difficulty with bending, stooping and pushing. She stated that she no longer drove distances. She stated that she did not drive to the hearing and that on the 45 minute ride to the hearing, she had to stop one time to get out and stretch.

Claimant complained of difficulty with personal care and hygiene and in doing housework. She stated that she could only shower once per week due to her injuries and that she had to sit while doing so. She stated that it was difficult to shave her legs. She stated that she could not button a shirt. She stated that she dropped things due to the loss of sensation in her hands. She stated that she could no longer type. She stated that she could no longer vacuum, wash dishes or carry groceries.

Finally, Claimant testified that she did not believe that she could work. She stated that she no longer had any stamina. She stated that she had to lie down three to four times per day. She stated that she took two to three naps per day for pain relief. She stated that her naps lasted from one to eighteen hours.

On cross-examination, Claimant admitted that Penske provided training to the drivers on securing loads. She acknowledged that drivers were charged with load securement, although she stated that Ford was responsible for loading the freight on the trucks. She admitted that the truck was not moving on August 12, 2011 when her accident occurred. She admitted that her accident occurred on private property and not the public highways.

Claimant admitted that she had renewed her CDL and motorcycle licenses since her accident at work. She admitted that she had served as a nurse in Vietnam in a MASH unit.¹ She denied, however, any lingering dreams or thoughts about Vietnam. She expressed some anger and frustration with the local VFW which she believed had not properly recognized Vietnam veterans.

Claimant admitted that she still volunteered one day per month in the PTSD ward at the VA Hospital. She admitted that she had not sought employment since August 2011 and that she had not applied for any vocational retraining. She admitted that she was diagnosed with bilateral carpal tunnel syndrome prior to her accident at work.

Claimant's Medical Testimony

¹ Claimant denied any military service in the history she provided to Dr. P. Brent Koprivica. She told Michelle Sprecker that she enlisted in the military service under a friend's name because after she completed her LPN training she was going to be an officer and that her husband at the time was a private. She told Ms. Sprecker that the military did not allow a married officer and private to be "together".

P. Brent Koprivica, M.D. testified by deposition for Claimant. Dr. Koprivica indicated that he had performed more than 10,000 pre-employment and more than 10,000 post accident physical examinations to determine whether a person was physically able to work.

Dr. Koprivica testified that he examined Claimant on June 1, 2012. He noted that Claimant provided a history of injuries at work on August 12, 2011 when several 90 pound totes fell out of the back of a trailer and "hit" her on the top of her head. He noted that Dr. Park had diagnosed Claimant in September 2011 with a traumatically induced C3-C4 disk herniation and the development of symptomatic stenosis from C3 to C6. He noted that on September 28, 2011, Dr. Park performed an anterior discectomy and fusion on Claimant at C3-C4 and posterior decompressive laminectomies at C3, C4, C5 and C6.

Dr. Koprivica noted that on October 23, 2011 Dr. Killman diagnosed Claimant with mild bilateral carpal tunnel syndrome and numbness of her left arm and both hands. He noted that Claimant was diagnosed with a post concussion syndrome, PTSD, vertigo and some psychological overlay as a result of the August 2011 accident at work. He noted that Dr. Wilkinson, Dr. Park's associate, had released from treatment in April 2012 and stated that "I do not see her being able to return to work now or in the future".

Dr. Koprivica noted that on examination, Claimant was 5 foot 5 inches tall and 129 pounds. He noted that she did not display any inappropriate or exaggerated pain behaviors. He noted that she complained of severe neck, thoracic, low back and left shoulder pain. He noted that she complained that her arms and legs shook unpredictably.

Dr. Koprivica concluded that Claimant had significant deficits in her cervical range of motion. He stated that she had weakness and a loss of strength in her upper extremities and weakness in her lower extremities. He stated that he found no clinical evidence of carpal tunnel syndrome.

Dr. Koprivica concluded that Claimant's most significant clinical findings involved her cervical spine where she had weakness, sensory deficits and evidence of motor neuron deficits. He related each of the findings to her August 2011 accident at work. He also diagnosed Claimant with a post concussion syndrome, mild residual dizziness and PTSD.

Dr. Koprivica concluded that Claimant needed to be allowed to change or alternate her positions for pain relief. He restricted her from above chest level activities and from repetitive or sustained activities at chest level. He restricted her from repetitive use of her upper extremities. He restricted her from squatting, crawling, kneeling and climbing. He stated that she should avoid vibrations such as with operating equipment and commercial driving. He noted that Claimant's fatigue problems were a further limiting factor.

Dr. Koprivica noted that as an occupational physician, he had concluded that Claimant was permanently and totally disabled.² He stated that he based his opinion on Claimant's age

² Dr. Koprivica concluded that Claimant's spinal trauma had resulted in a permanent partial disability of 50 percent to her body as a whole. He concluded that her post concussion syndrome and the residuals from her dizziness had resulted in a permanent partial disability of 10 percent to her body as a whole.

and her physical and psychological injuries. He stated that as an occupational physician he did not believe that an ordinary employer would hire Claimant.

Finally, Dr. Koprivica concluded that Claimant needed continuing medical treatment. He stated that a physician needed to monitor her medications and that she needed mental health evaluations. He noted that Claimant's medical bills as contained in Exhibits I through P were reasonable and necessary due to the injuries she sustained in the August 12, 2011 accident at work.

On cross-examination, Dr. Koprivica admitted that he was not a specialist in orthopedics, neurosurgery or in treating mental health problems. He admitted that he was not an expert on job market surveys.

Dr. Koprivica admitted that he had not treated a patient for pay since 1992. He admitted that he worked for claimants or plaintiffs in 98 to 99 percent of his cases.

Dr. Koprivica admitted that he was not aware that Claimant had received therapy after he evaluated her. He admitted that he was not aware of Claimant's military service, or her past clerical, data entry or bookkeeping job duties. He acknowledged that Claimant did not tell him that she had been diagnosed with mild bilateral carpal tunnel syndrome in 2008.

Employer's Medical Testimony

Robert Sean Jackson, M.D. testified by deposition for Claimant's employer. Dr. Jackson indicated that he was an assistant professor in the orthopedics department at the University of Kansas Medical School and that he also practiced orthopedic surgery. He noted that he initially examined Claimant on August 14, 2012.

Dr. Jackson noted Claimant's history. He noted that on examination, Claimant had some limitations in her cervical range of motion and that she had some posterior tenderness in her cervical spine. He noted that she had hyperactive reflexes of the upper extremities which could represent a motor neuron problem of the spinal cord. He noted that she did not have any motor neuron problems in her lower extremities. He stated that she had diminished sensation of both hands.

Dr. Jackson indicated that Claimant's pre-surgical MRI showed cervical spondylosis or degenerative changes. He noted that she had moderate narrowing of the spinal canal. He stated that her March 2012 CT myelogram showed a successful and solid fusion at C3-C4. He stated that it showed no stenosis or residual nerve compression from C3 through C6.

Dr. Jackson indicated that Claimant's clinical findings and MRI results did not support a diagnosis of myelopathy. He stated that Claimant's options were conservative nonsurgical care in the future and non narcotic pain medications. He also recommended therapy. He concluded that Claimant reached maximum medical improvement on October 15, 2012.

Finally, Dr. Jackson testified that Claimant could not return to work as a truck driver. He restricted her to light work. He concluded that she had sustained a permanent partial impairment

of 12 percent to her body as a whole due to her injuries in the August 12, 2011 accident at work. He reiterated that he did not believe that Claimant was permanently and totally disabled.

On cross-examination, Dr. Jackson testified that he was board-certified in orthopedics. He stated that he had performed several hundred anterior cervical discectomies and several hundred posterior cervical laminectomies. He stated that typically a C3-C4 fusion results in only a "little" range of motion restriction. He stated that a C3-C4 fusion would not cause numbness of the hands. He stated that his best explanation for Claimant's complaints of numbness in her hands was the stenosis as noted in her MRI study prior to her surgery. He acknowledged, however, that the objects falling on Claimant's head at work in the August 2011 accident was a "potential" cause for her numbness.

Dr. Jackson testified that Claimant needed to "ad lib" or have the option of changing postures during the day. He stated that "potentially" it would be reasonable to allow Claimant to lie down from time to time in order to control her pain were she to return to the work force. He stated that she would "possibly" need to take pain medications the rest of her life.

Medical Records

The medical records were cumulative of the testimony. North Kansas City Fire Department records dated August 12, 2011 noted that Claimant provided a history of opening a trailer and of pallets falling on top of her. The records noted that Claimant complained of bilateral shoulder and arm pain and pain on the top of her head, as well as face pain and of being nauseated.

Claimant's Exhibit B which was admitted into evidence without objection contained the records of Steven Wilkinson, M.D. of Midwest Brain, Spine & Neurology Associates. Dr. Wilkinson noted on February 3, 2012 that Claimant complained of a "lot of migraines". He noted that Claimant complained that she needed to lie down to relieve her migraines. He noted that she had weakness of her left upper extremity and left leg and numbness and tingling of her left upper extremity. He noted that she had severe depression.

Dr. Wilkinson noted on April 12, 2012 that Claimant had an underlying spinal cord dysfunction as a result of her injury and that nothing else surgically could be done for her. He stated that Claimant was still "very" limited in her ability to stand, sit and walk. He diagnosed Claimant with myelopathy. He stated that, "I do not see her being able to return to work now or in the future". He indicated that he believed that it was reasonable for Claimant to continue on her intermittent use of Hydrocodone for pain relief.

Claimant's Exhibit D was admitted into evidence without objection. The exhibit contained the records of Dr. Krishna Divadeenam. On March 29, 2012, Dr. Divadeenam diagnosed Claimant with depression and PTSD. She also noted that Claimant provided a history of heavy cocaine and meth use while in the service and for 5 or 6 years after her discharge, a drug addicted and a physically abusive third husband and a fourth husband who was cheating on her. Dr. Divadeenam noted that Claimant was in the process of divorcing her fourth husband.

Claimant's September 2011 surgical report as contained in Exhibit G noted that she had preexisting spinal stenosis from C3 to C6. In Exhibit E, David Rouse, M.D., noted that Claimant had "significant" improvement in her concussion symptoms.

Claimant's Exhibit W contained a June 5, 2013 EMS report which showed that an ambulance was dispatched to Claimant's house due to Claimant's complaints of numbness and tingling in her arms, legs and mouth for two days.

Claimant's Vocational Evidence

Michael J. Dreiling, a vocational rehabilitation counselor, testified on Claimant's behalf.³ He stated that he had worked in the vocational field for 38 years and that he had performed thousands of vocational evaluations.

Mr. Dreiling testified that he met with Claimant on October 12, 2012. He noted Claimant's age, education, vocational history and medical restrictions. He noted that it was significant that Claimant's last formal education was 41 years ago and that she had no computer training.

Mr. Dreiling concluded that Claimant could not compete in the open labor market. He concluded that no employer could reasonably be expected to employ Claimant.

On cross-examination, Mr. Dreiling admitted that his practice had been exclusively in litigation since 2001. He admitted that 90 percent of his referrals were from claimants. He admitted that he did not do a job market analysis in Claimant's case. He admitted that he did not have Dr. Jackson's report or records when he rendered his opinions. He admitted that he was not aware that Claimant had worked as a nurse, both in the military and in private industry.

On redirect examination, Mr. Dreiling testified that Claimant's nursing experience from 40 years ago was no longer relevant. He indicated that he considered the most recent 15 to 20 years as relevant work experience. He stated that most employers of entry level jobs would not employ someone who needed to change positions.

Employer's Vocational Evidence

Michelle Sprecker, MS, CRC, a vocational rehabilitation counselor, testified for Claimant's employer. She stated that she had a master's degree in vocational rehabilitation and that she was board certified. She stated that she had 21 years experience in vocational rehabilitation.

Ms. Sprecker testified that 5 percent of her referrals were from claimants and the rest from defendants. She stated that she met with Claimant on June 11, 2013.

³ Claimant's employer's objection to Mr. Dreiling's report and testimony is denied. Claimant's employer's objection to Mr. Dreiling's report and testimony was that Mr. Dreiling had relied on Dr. Wilkinson's report in rendering his opinion. Dr. Wilkinson's report, however, was admitted into evidence without objection. Also, Mr. Dreiling, did not base his opinions entirely on Drs. Wilkinson report. Mr. Dreiling relied on Dr. Koprivica's restrictions in rendering his opinions.

Ms. Sprecker testified that in rendering her opinions she considered Claimant's age, education, work history and medical restrictions. She noted that Claimant scored a 21 on the Wonderlic intelligence test which placed Claimant in the average range of intelligence.

Ms. Sprecker testified that Claimant would be permanently and totally disabled based on Dr. Koprivica's restrictions and the opinion rendered by Dr. Wilkinson. She stated that Claimant was not permanently and totally disabled based on Dr. Jackson's restrictions and Dr. Rouse's opinion. She stated that based on Dr. Jackson's restrictions Claimant could work as a surveillance systems monitor, telemarketer, dispatcher, security guard, hostess, cashier and clerk in retail sales

Finally, Ms .Sprecker testified that Claimant told her that she would only consider a job where she could work days and earn a salary comparable to hers at Penske and if the job was within a 20-mile radius of her home.

On cross-examination, Ms. Sprecker testified that she had performed approximately 700 vocational evaluations to determine whether an injured person was able to return to work. She admitted that 15 years was generally accepted as the cut-off for relevant past work experience and transferable job skills.

Other Testimony

Mr. Robert Harter testified by deposition for Claimant. He stated that he was still employed at Penske. He stated that he knew Claimant prior to his employment at Penske. He stated that both he and Claimant made the Ford deliveries.

Mr. Harter testified that the problems with load securement occurred on the return from Ford to Penske. He stated that he had complained to Penske on four to six occasions about the unsecured loads on the return trips from Ford. He stated that two people were injured by totes falling from the trucks prior to Claimant's accident. He stated that after Claimant's injury Penske instituted a policy requiring employees to hold one hand on the truck's door and to use the other hand to open the door.

Finally, Mr. Harter was asked to read § 307.010.1 RSMo.⁴ He stated, however, that based on his experience and knowledge of federal regulations and the trucking industry; the statute did not apply to enclosed trucks such as those used on the Ford run. He stated that the statute applied to dump trucks and trucks with loads open to the air.

Ms. Christina Faye Barker, a friend of Claimant's, also testified at the hearing on Claimant's behalf. Her testimony was cumulative of the other evidence.

Mr. Mickey L. May, the health and safety manager at Penske, testified at the hearing on Claimant's employer's behalf. Mr. May testified that he had worked twenty-one years at Penske with 10 years in operations.

⁴ Claimant argued that §307.010.1 was the statute violated by Claimant's employer and that therefore, Claimant's employer was liable for a 15 percent penalty.

Mr. May testified that Penske provided training to its employees on load securement. He stated that Claimant attended the training and referred to Claimant's signature attesting to that fact. He also identified as Exhibit 4 Penske's load securement policy which he stated was given to the drivers at the training and which provided that the driver was responsible for load securement.

Mr. May noted that drivers were responsible for inspecting cargo and for making any adjustments needed to secure the loads. He stated that drivers were to notify Penske if there were any problems with the loads. He stated that a driver could refuse a load if the driver had concerns about the load.

Mr. May testified that Claimant's job was to take parts from Penske to the Ford plant and to bring totes from the Ford plant back to Penske. He stated that he had no knowledge of Claimant ever making a complaint about a load. He stated that Claimant never asked him for any netting or load bars for securement purposes. He stated that Penske gave load bars to drivers who requested them.

Mr. May testified that Ford was responsible for loading the totes. He stated that Penske drivers were not allowed on the docks at Ford. He stated that Ford workers did not close the doors on the trailers. He stated that Penske drivers would back the trucks out of the docks at Ford and that Penske drivers were responsible for closing the doors on the trailers and for making sure that the loads were secure.

Mr. May testified that on the day of her accident, Claimant did not lose any cargo while the vehicle was in transport, proving that the cargo was fully contained while the vehicle was in operation in compliance with the statutes. He stated that he was not aware of Mr. Harter requesting any load locks.

Law

After considering all the evidence, including Drs. Koprivica and Jackson's testimony, the numerous medical reports and records, Mr. Dreiling and Ms. Sprecker's vocational testimony, Claimant's testimony, the other testimony, the other exhibits and after observing Claimant's and the other witness' appearances and demeanor, I find and believe that Claimant proved that she was rendered permanently and totally disabled due solely to the injuries she sustained in the August 12, 2011 accident at work. Thus, she proved her employer's liability for permanent total disability benefits. Her employer is ordered to pay all such past due benefits owed to her as set out in the award and it is to pay future permanent total disability benefits to her for so long as she remains so disabled.

In addition, Claimant proved her employer's liability for future medical benefits. She did not prove her employer's liability for any past medical benefits. Neither she nor her employer proved the other party's liability for any penalties. Claimant did not prove her employer's liability for fees and cost due to an unreasonable defense of the case.

Claimant had the burden of proving all material elements of her claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003);

Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met her burden of proof as set out above.

Permanent Total Disability

Claimant alleged that she was permanently and totally disabled. Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in her present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d570 (Mo. App. W.D. 570); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996).

Claimant proved that she was rendered permanently and totally disabled due solely to the injuries she sustained in the August 2011 accident at work.⁵ Claimant sustained a herniated disk at C3-C4 in the accident at work. In September 2011 she had an anterior discectomy and fusion at C3-C4. She also had posterior decompressive laminectomies at C3, C4, C5 and C6 during the September 2011 procedure.

Claimant complained of continuing problems with severe neck pain and restrictions in her range of motion of her neck. She complained of pain radiating from the base of her skull down her back and from her neck down her extremities. She complained of a loss of sensation in her hands and difficulty in using her hands to hold things, type and even to dress. She also complained of dizziness and problems with falling on a “regular” basis. The August 2011 accident occurred when several 90 pound totes fell from the back of a truck and struck her on the head, causing her to lose consciousness.

The evidence supported Claimant’s complaints. In addition, Claimant is 5 foot 5 inches tall and she weighs between 125 and 130 pounds. She is nearly 61 years old. She was 59 years old at the time of her accident. She has a high school education. She graduated from high

⁵ Dr. Koprivica concluded that Claimant sustained a permanent partial disability of 50 percent to her body as a whole due to her cervical spine injuries which resulted in an anterior discectomy and fusion at C3-C4 and decompressive laminectomies at C3, C4, C5 and C6. Dr. Jackson concluded that Claimant sustained a permanent partial impairment of 12 percent to her body as a whole. Dr. Jackson’s impairment rating was not credible. Based on the evidence, Claimant proved that she sustained a permanent partial disability of 50 percent to her body as a whole due to her cervical spine injuries. Dr. Koprivica also concluded that Claimant sustained a permanent partial disability of 10 percent to her body as a whole due to here post concussion syndrome and dizziness. No other disability ratings were offered for those alleged injuries or impairments. Dr. Koprivica’s rating was credible. Based on the evidence, Claimant proved that she sustained a permanent partial disability of 10 percent to her body as a whole due to her post concussion syndrome and dizziness. Claimant did not offer a disability rating for any other alleged injury. She did, however, prove that she was rendered permanently and totally disabled due to her neck injury and the residuals from it, such as her upper extremity complaints and her post concussion syndrome and dizziness.

school in 1971. She worked as a truck driver for her last 31 years of employment. Her only relevant work experience, according to both vocational experts was as a truck driver.

Claimant can no longer drive a truck according to Drs. Koprivica and Jackson and both vocational experts. She has no transferable job skills to any job which she can perform with her restrictions. Drs. Koprivica and Jackson's testimony supported her complaint of a need to change positions for pain control. Dr. Jackson admitted on cross-examination, that it would "potentially" be reasonable for Claimant to be allowed to lie down during the day were she to return to work. There was no evidence that any employer would allow a person capable of doing only entry level work such as Claimant to lie down during the work day.

In addition, Dr. Koprivica, stated that as an occupational physician, he had concluded that Claimant was permanently and totally disabled. Mr. Dreiling, a vocational expert, concluded that Claimant could not compete in the open labor market and that no employer in the usual course of business would employ Claimant with her restrictions. The evidence supported their opinions. Claimant proved that she was rendered permanently and totally disabled due solely to her injuries from the August 12, 2011 accident at work.⁶

Start Date for Permanent Total Disability

Claimant had her anterior cervical discectomy and fusion at C3-C4 and her posterior decompressive laminectomies at C3, C4, C5 and C6 on September 28, 2011. Her employer paid temporary total disability benefits until September 17, 2012. Claimant, however, treated with Dr. Jackson or under his direction for therapy until October 15, 2012. Dr. Jackson concluded that Claimant reached maximum medical improvement on October 15, 2012.

The evidence supported Dr. Jackson's opinion. Claimant proved that her disability became permanent as of October 15, 2012.⁷ Thus, Claimant's employer's liability for permanent total disability benefits commenced on October 16, 2012. Claimant's employer is ordered to pay past due permanent total disability benefits to Claimant in the amount of \$586.96 per week for the period October 16, 2012 to August 29, 2013, the date of the hearing and to pay future permanent total disability benefits to Claimant at the same rate for so long as she remains so disabled.

⁶ As noted earlier, Dr. Jackson concluded that Claimant had sustained a permanent partial impairment of 12 percent to her body as a whole due to her injuries in the August 2011 accident at work. His impairment rating was not credible for injuries resulting in a herniated a disk at C3-C4 and an anterior discectomy and fusion at C3-C4 and posterior decompressive laminectomies at C3, C4, C5 and C6.

Ms. Sprecker, Claimant's employer's vocational expert, testified that Claimant was permanently and totally disabled based on Dr. Koprivica's restrictions and that Claimant could do light work based on Dr. Jackson's restrictions. Ms. Sprecker then indicated that based on Dr. Jackson's restrictions Claimant could work as a surveillance systems monitor, telemarketer, dispatcher, security guard, hostess, cashier and clerk in retail sales. She did not explain, however, how Claimant could do any of those jobs if Claimant had to be allowed to change positions when needed for pain control as both Drs. Koprivica and Jackson concluded or if Claimant would "potentially" need to lie down during the work day as Dr. Jackson testified to on cross-examination. The most credible evidence did not show that any employer would hire Claimant, a 61 year old woman with serious neck injuries and her restrictions to do any of those jobs or any other job.

⁷ The parties did not make liability for additional temporary total disability benefits an issue in the case. Therefore, that issue was not addressed in the award.

Future Medical Benefits

Claimant, as noted above, required major neck surgery due to the injuries she sustained in the August 2011 accident at work. Dr. Koprivica concluded that Claimant needed future medical treatment, including evaluations by a mental health expert. He concluded that Claimant needed chronic pain management and medications as necessitated by her chronic pain. Dr. Jackson stated that “certainly medications could be considered, and usually I recommend non-narcotic medications that would address pain . . . so like a nonsteroidal anti-inflammatory.” On cross-examination, Dr. Jackson testified that it was “possible” that Claimant would need pain medication for the rest of her life.

Thus, based on the evidence, including Claimant’s testimony and the opinions of Drs. Koprivica and Jackson, Claimant proved that she was in need of future medical treatment. Claimant’s employer is ordered to provide all reasonable and necessary medical treatment needed to cure and relieve Claimant of the effects of her injuries, including the physical and mental or emotional injuries. Claimant’s employer, however, maintains the right to direct the medical treatment. § 287.140 RSMo. 2005.

Past Medical Aid

Claimant argued that her employer was liable for \$1,615.13 in past medical aid. Of that amount, \$978 was a bill resulting from a June 5, 2013 ambulance charge to transport Claimant from her home to a hospital. Claimant’s complaints involved numbness and tingling in her arms, legs and mouth for three hours. The records further indicated that the symptoms had been present intermittently for two days and that Claimant had indicated that she normally had problems with numbness and tingling.

The treatment Claimant received was unauthorized. The evidence did not show that her numbness and tingling complaints constituted such as emergency that she could not have requested medical treatment from her employer which had the right to direct treatment. *Id.* The alleged numbness and tingling had been present for two days. She normally had numbness and tingling problems. There was no credible evidence showing that emergency ambulance services in June 2013 were reasonable and necessary for any injury she sustained in an accident at work in August 2011. Claimant did not prove her employer’s liability for the ambulance charges.

Similarly, Claimant failed to prove her employer’s liability for the remaining \$578 which resulted from a bill from Ram Chandra, D.O., Claimant’s family physician. Again, the treatment was unauthorized. The bill as contained in Exhibit A did not show the basis for the treatment. The treatment was rendered between 19 and 23 months after her injury at work. Some of the treatment rendered to Claimant by Dr. Chanda was for Claimant’s thyroid condition and for lab work. Claimant did not prove that the treatment was reasonable and necessary for any injury she sustained in the accident at work or that her employer was liable for it.

Whether Claimant’s Benefits May be Increased by 15 Percent Due to Her Employer’s Violation of a State Statute

Both Claimant and her employer argued that the other party was liable for a penalty, resulting in either an increase or decrease in the benefits owed due to the violation of a statute by

Claimant's employer or the violation of a safety rule or policy by Claimant. Both parties' arguments lacked merit.

Claimant relied on Chapter 307 of the Missouri statutes as the basis for her argument that her employer was liable for a 15 percent penalty.⁸ The specific statute cited by Claimant was under vehicle equipment regulations and it provides as follows:

307.010. 1. All motor vehicles, and every trailer and semitrailer operating upon the public highways of this state and carrying goods or material or farm products which may reasonably be expected to become dislodged and fall from the vehicle, trailer or semitrailer as a result of wind pressure or air pressure and/or by the movement of the vehicle, trailer or semitrailer shall have a protective cover or be sufficiently secured so that no portion of such goods or material can become dislodged and fall from the vehicle, trailer or semitrailer while being transported or carried. (emphasis added)

§ 307.010.1 RSMo. 2013

Thus, the purpose of the statute is to prevent materials or goods from falling out of vehicles onto the public highways causing a safety hazard. It only applies where it could be reasonably expected that due to wind or air pressure or by movement of the vehicle, materials could become dislodged and fall from the vehicle or trailer or semitrailer onto the public highways.

Claimant admitted that she was driving a truck with an enclosed trailer on August 12, 2011. It does not appear that the statute applies to enclosed trucks and trailers where it could not be reasonably expected that any materials or goods would fall from the truck or trailer onto the public highways. Claimant cited no authority showing that the statute applies to enclosed trucks or trailers. Certainly no materials or goods in an enclosed truck or trailer would be exposed to wind or air pressure and the enclosure of the truck or trailer would prevent any reasonable expectation of the materials or goods falling from the truck or trailer onto the public highways due to any movement of the vehicle.

Thus, assuming that the statute even applied to the enclosed truck and trailer driven by Claimant; there was no evidence that her employer violated any provision of the statute. Freight in an enclosed truck and trailer such as the one driven by Claimant, was at least, if not more secure than freight in an open-aired vehicle or truck where the goods were secured by a protective cover or some other means of securement as authorized by the statute. Also, Claimant's own witness, Mr. Harter, testified that the doors to the trailers were latched shut and that it was difficult to release the latches to open the doors when Penske instituted a policy requiring employees to use one hand to hold the doors of the trucks shut and the other hand to open the latches to the doors.

⁸ Claimant's witness on the penalty issue testified that the statute cited by Claimant did not apply to enclosed trucks such as the one Claimant was driving on the day of her accident and that the statute only applied to trucks with an open bed or dump trucks where debris could fall from the trucks onto an open road creating a safety hazard.

Furthermore, Claimant's accident occurred on private property. It did not occur on public highways. It occurred while the vehicle was stationary. It did not occur while materials were being transported or carried on public highways. It occurred when Claimant opened the trailer's doors. That would be no different than an accident which occurred when the driver removed the protective cover from the goods in an open-aired vehicle at her destination and then the goods without the protective cover fell from the truck and injured the driver. Such an incident would not constitute a violation of the statute. Neither did Claimant's. Her employer did not violate the statute and it is not liable for a penalty. Her employer is not liable for a penalty. See § 287.120.4 RSMo. 2005.

Whether Claimant's Employer is Entitled to Reduce Claimant's Benefits by 25 to 50 Percent Due to Claimant's Violation of an Employer Safety Rule or Policy

Claimant's employer's argument that it should be allowed to reduce Claimant's benefits by 50 percent due to Claimant's violation of a safety rule or policy was not supported by the evidence. See § 287.120.5 RSMo. 2005. Claimant's employer did, however, prove that it had a reasonable safety policy requiring drivers to secure all loads and that Claimant had knowledge of the policy as evidence by her signature on the training records.

Nevertheless, Claimant's employer is not entitled to a penalty because while it had an appropriate safety rule; it did not prove that it provided its employees with the equipment needed to properly secure the loads. Mr. Harter, who is still employed at Penske, testified that two people were injured prior to Claimant's accident by loads falling from trucks when the doors were opened. He testified that prior to Claimant's accident he had requested locks and other equipment to prevent the loads from shifting and falling out when the doors were opened. He testified that Penske failed to provide the equipment he requested which would have aided in securing the loads. Claimant testified that Penske refused to provide the equipment because it took the position that Ford was responsible for loading the trucks.

Mr. Harter made a credible witness. The evidence supported his and Claimant's testimony about the need for additional safety equipment such as locks, netting and load bars to secure the loads on the Ford trips and Penske's refusal to provide such safety equipment. Thus, Claimant's employer is not entitled to a penalty on the basis that Claimant failed to secure the load on August 12, 2011 when it refused to provide Claimant and other employees with the equipment needed to secure or at least aid in securing the loads. Claimant's employer's request for a penalty is denied.⁹

⁹ Mr. Harter also testified that subsequent to Claimant's accident, Penske adopted a policy requiring drivers to place one hand on the truck's door to hold it shut and to use the other hand to open the truck's door. The remedial measure adopted by Penske after the accident to prevent similar accidents was not considered in reaching the decision in the case. It was referenced due to the testimony regarding it and to show that Claimant could not have violated it as a safety rule because it was not in existence at the time of her accident. It was also noted that Mr. May testified that Claimant did not request any equipment to secure the loads in the trucks. He testified that load bars had been given to drivers who requested them. Mr. Harter, however, testified that he had requested from Penske equipment to prevent the loads from shifting on the Ford run and that Penske had failed to provide it. Furthermore, Penske should have provided necessary safety equipment to all employees doing similar jobs even if an employee had not requested the additional safety equipment.

Whether Claimant is Entitled to Fees and Costs Under § 287.560 RSMo. 2005 Due to Claimant's Employer's Alleged Unreasonable Defense of the Case

Claimant's argument that she was entitled to fees and costs due to her employer's alleged unreasonable defense of the case lacked merit. Claimant argued in her brief that both parties had disability ratings and that Claimant's employer failed to make an offer to settle the case until a few hours prior to the hearing. That alone, however, did not prove an unreasonable defense of the case.

Missouri law is clear that fees and costs should only be awarded where the issue is clear and the offense egregious. Landman v. Ice Cream Specialties, 107 S.W.3d 240 (Mo. banc 2003); Monroe v. Wal-Mart Associates, Inc. 163 S.W.3d 501 (Mo. App. E.D. 2005). Claimant seemed to rely on Clark v. Harts Auto Repair, 274 S.W.3d 612 (Mo. App. W.D. 2009) as support for her argument that fees and costs should be awarded. The Clark case, however, was clearly distinguishable from Claimant's case.

In the Clark case, the employee had a permanent total disability rating and the employer had a rating providing that the employee had sustained a permanent partial disability of 54 percent to his body as a whole.¹⁰ There were no issues as to compensability. There were no issues as to the employer's liability for a penalty for a safety violation. Based on its own evidence the employer owed a substantial amount of compensation.

The employee made several settlement demands in the Clark case. The employer did not respond to the demands. The employee requested a mediation. The mediation proved useless because according to the employer's attorney, the insurer would not accept his phone calls to relay or to respond to the demands. The employer's attorney admitted on the morning of the hearing that the insurer was still refusing to accept his phone calls to relay or to respond to the demands.

On the morning of the hearing, the judge told the employer's attorney to call the insurer and to inform the insurer that a response to the demands was required. The attorney returned a few minutes later and stated that the insurer was not making an offer in the case despite there being no issues as to compensability and the employer's own evidence showing that it owed a substantial amount of compensation. The judge found an unreasonable defense of the case. The insurer's unreasonable actions caused delays in the case, mediation to fail and the expenditure of unnecessary monies by the employee for depositions and other costs.

In Claimant's case, her employer did not engage in conduct similar to that by the insurer in Clark. Dr. Jackson, an orthopedic surgeon, found Claimant to be at maximum medical improvement effective with October 15, 2012. Claimant's hearing was held approximately ten months later on August 29, 2013. During that ten month period, expert evaluations and testimony had to be scheduled. A vocational expert's deposition was taken on August 16, 2013. Dr. Jackson's deposition was taken on August 27, 2013.

Thus, it was not unreasonable for Claimant's employer to make its initial offer to settle the case on August 28, 2013 after Dr. Jackson and a vocational expert had been deposed. That

¹⁰ The Clark case was heard by Judge Cain, the same judge as in the case at bar.

Claimant apparently chose to not give credence to the offer because it was made a few hours prior to the hearing as indicated in her brief, did not mean that her employer's actions were egregious or unreasonable. Claimant was the one who pushed for the hearing in such a short time period. Also, while Claimant's employer may have been in possession of Dr. Jackson's rating in January 2013 as argued by Claimant; it did not have a vocational report until July 10, 2013.

Claimant's employer indicated that the basis for Claimant's argument regarding fees and costs was that the employer refused to meet Claimant's demand for permanent total disability benefits. Again, if that were true, it did not mean that Claimant's employer's actions were egregious or unreasonable. Claimant's employer offered credible evidence that Claimant was not permanently and totally disabled. Claimant's employer offered a medical opinion and testimony from an orthopedic surgeon that Claimant was not permanently and totally disabled. Claimant's employer offered a vocational opinion and testimony supporting its position that Claimant was not permanently and totally disabled. It was not egregious or unreasonable for Claimant's employer to refuse to concede to Claimant's demand for a permanent total award or settlement.

In conclusion, Claimant offered no evidence showing that her employer's defense of the case was egregious or unreasonable in any respects. Her request for fees and costs is denied.

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