

## AWARD AFTER MANDATE

Injury No.: 00-177873

Employee: Larry Daly  
Employer: Powell Distributing, Inc.  
Insurer: Continental Western Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

### Preliminaries

On September 28, 2010, the Missouri Court of Appeals for the Western District issued an opinion reversing the award and decision of the Labor and Industrial Relations Commission (Commission). *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254 (Mo. App. 2010). By mandate dated January 27, 2011, the Court remanded this matter to the Commission for further proceedings in accordance with the opinion of the Court. Pursuant to the Court's mandate, we issue this award.

### Procedural History

With respect to the 1999 claim, the administrative law judge heard this matter to consider the nature and extent of employee's claimed occupational diseases or injuries to the low back, hips, lower extremities, abdomen, right shoulder, neck, head, and body as a whole through September 12, 1999. With respect to the 2000 claim, the administrative law judge heard this matter to consider the following issues: (1) whether employee, within the course and scope of his employment for employer, sustained injuries or occupational diseases of the neck, upper back, head, right shoulder and upper extremity through May 12, 2000; (2) whether employee provided proper notice to employer of his claimed injuries or occupational diseases; (3) liability for unpaid medical expenses and future medical care; (4) the nature and extent of injury and permanent disability, if any, referable to the claimed injuries or occupational diseases; and (5) liability of the Second Injury Fund, if any.

As to the 1999 claim, the administrative law judge found employee sustained a 40% permanent partial disability of the body as a whole referable to the lumbar spine and awarded permanent partial disability benefits to employee. As to the 2000 claim, the administrative law judge concluded: (1) employee failed to meet his burden of proving his hernia injury was causally related to work; (2) employer/insurer were properly notified of a possible compensable cervical spine injury claim; (3) the cervical spine injury is not causally connected to employee's work; and (4) employer is not liable for permanent total disability benefits, past temporary total disability payments, or medical treatment for the hernia or cervical spine injuries.

Employee appealed both awards to the Commission. Employee's Application for Review in the 1999 claim alleged the administrative law judge erred: (1) in not issuing any findings or rulings on the issue of whether work was a substantial factor in causing the hernia, right shoulder, and cervical spine injuries; (2) in finding Dr. Heim more credible than Dr. Cohen; (3) in finding employee not permanently and totally disabled; (4) in denying employee's

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claim for temporary total disability benefits; (5) in not finding employee's vocational expert credible; and (6) in denying employee's claim against the Second Injury Fund. Employee's Application for Review in the 2000 claim alleged the administrative law judge erred and entered findings contrary to the overwhelming weight of the evidence on the issues of: (1) medical causation; (2) medical treatment; (3) temporary total disability benefits; (4) nature and extent of disability; and (5) Second Injury Fund liability. On review, we affirmed and adopted the administrative law judge's awards in both the 1999 and 2000 claims as our own.

Employee filed an appeal with the Missouri Court of Appeals for the Western District, alleging that the Commission erred: (1) in denying medical causation for the cervical spine, right shoulder, and abdomen; (2) in denying permanent disability for the cervical spine, right shoulder, and abdomen; (3) in denying medical expenses for treatment to the cervical spine, right shoulder, and abdomen; and (4) in finding employee is not permanently and totally disabled.

The Court granted each of employee's points of appeal. The Court affirmed certain of our findings and reversed others. The Court reasoned that the Commission's findings as to medical causation on the cervical spine, right shoulder, and abdomen claims were not supported by competent and substantial evidence. The Court determined that employee's cervical spine, right shoulder, and abdomen injuries were compensable. The Court remanded the matter to the Commission for a determination on the issues of: (1) nature and extent of permanent disability resulting from the cervical spine, right shoulder, and abdomen claims; (2) employer's liability for past medical expenses; and (3) liability of the Second Injury Fund, if any.

We note that the Court of Appeals did not reverse, modify, or otherwise disturb any of our findings in our award issued for Injury No. 99-138008, in which we found that employee had a preexisting 10% permanent partial disability of the body as a whole referable to the lumbar spine and that he sustained an additional 40% permanent partial disability for which employer is liable. That award has thus become final and accordingly our decision herein does not reach any of the issues that were resolved by that award, but only those which were remanded by the Court to this Commission for determination.

## **Findings of Fact**

### **Nature and extent of permanent disability**

On December 5, 2001, Dr. Vogt found an umbilical hernia during an examination of employee, and on January 8, 2002, Dr. Breeding performed a surgical repair of the hernia. Dr. Cohen opined that employee sustained a 15% permanent partial disability of the body as a whole referable to the hernia, but provided no explanation for this rating. In his notes from his physical examination of employee, Dr. Cohen found that employee was "asymptomatic" after surgery for hernia repair. In his testimony, employee did not identify any current complaints related to the hernia. Given these factors, we find that employee sustained a 2.5% permanent partial disability of the body as a whole referable to the abdomen for the hernia injury.

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Employee received only minimal and conservative treatment specific to his right shoulder. On January 24, 2002, Dr. Tarbox diagnosed right shoulder impingement, and on February 21, 2002, Dr. Tarbox diagnosed resolving right shoulder impingement and noted employee had developed a tremor in the right upper extremity. Dr. Tarbox opined: "I feel this is all related to his neck and this tremor and not pathology within his shoulder." Dr. Tarbox referred employee to follow-up with Dr. Miles and released employee without restrictions. Employee received no further treatment specific to the right shoulder. Dr. Cohen opined employee sustained a 25% permanent partial disability of the shoulder, but provided no explanation for his rating, other than that employee complained of some pain in his right shoulder when reaching or performing overhead work. In light of his limited treatment specific to the right shoulder and the fact he was released without restrictions, we find employee sustained a 5% permanent partial disability of the right upper extremity at the 232-week level.

Employee's treatment for the cervical spine injury culminated in surgery, when Dr. Miles performed a bi-level fusion at C5-6 and C6-7 on June 25, 2003. On September 16, 2003, Dr. Miles released employee from post-operative care without restrictions. Dr. Miles' note from that visit includes his findings that employee had a great result from surgery and that employee was essentially symptom free. Employee had no other treatment for the cervical spine following that date. We find that employee reached maximum medical improvement for the cervical spine condition on that date. Dr. Cohen opined employee sustained a 50% permanent partial disability of the body as a whole referable to the cervical spine, but provided no explanation for this rating other than some reduced range of motion noted on physical examination. Employee complains of daily pain in his neck for which he takes Advil. In light of the treatment record, the evidence that employee had a good result following the bi-level fusion, and the fact employee has had no further treatment and manages his pain using over-the-counter medications, we find employee sustained a 25% permanent partial disability of the body as a whole referable to the cervical spine.

*Is employee permanently and totally disabled?*

Employee had left eye surgery, possibly in 1981, for a condition that may have been diplopia. Employee testified that he wears glasses as a result of his condition. We found no records from the surgery or any other treatment for an eye problem. Employee's work for employer involved daily driving for which he maintained a commercial drivers' license. Employee was an umpire in high school baseball games after the 1981 surgery. Dr. Cohen opined that the condition was a hindrance or obstacle to employment and rated it at 25% permanent partial disability of the body as a whole, but we find his opinion lacking in credibility. Dr. Cohen admitted he didn't know whether employee had any medical restrictions or accommodations from any employers for the right eye and admitted he didn't see any medical records in connection with the surgery or claimed condition. Given these factors, we are not convinced that employee suffered any preexisting permanent partial disability of his left eye or body as a whole due to the ocular condition, nor are we convinced that the condition constituted a hindrance or obstacle to his employment at the time of the primary injuries.

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In accordance with the result in the 1999 claim, we find that employee suffered from a 50% permanent partial disability of the lumbar spine as of February 22, 2002, the date employee first discussed the need for surgery for the cervical spine condition. Given the evidence that the lumbar condition interfered with employee's ability to return working for employer, we find that the condition constituted a hindrance or obstacle to employment as of that date.

Dr. Cohen opined that employee is permanently and totally disabled due to a combination of the work injuries, but noted he would defer to a vocational expert if there were jobs available for employee within his doctor's restrictions. Mr. England opined that, from what he saw in the medical record and restrictions from employee's treating doctors, there is no contraindication to employee returning to his prior work as a route salesman, and even assuming Dr. Cohen's restrictions, there are a number of light duty positions that employee could perform, especially considering employee's age, work history, and educational achievements. We find Dr. Cohen's opinion that employee is permanently and totally disabled lacking credibility. We find Mr. England's opinion that employee is able to work more credible.

The restrictions from employee's treating doctors are minimal—the only permanent restriction from a treating doctor on record comes from Dr. Trecha, who issued 40 pounds frequent and 50 pounds occasional lifting restrictions in connection with the lumbar spine treatment and surgery. Dr. Cohen assigned numerous significant restrictions, but provided nothing in the way of credible explanation for them, and we note that many of Dr. Cohen's restrictions actually run contrary to employee's testimony as to his abilities. For example, Dr. Cohen opined that employee should not do any walking, but employee testified he walks at least a mile per day for recreation.

There is other evidence supporting a finding that employee is not permanently and totally disabled. At the time of hearing, employee had been engaged in regular employment for several years during which he worked at least twenty hours per week as a bank courier. Employee had to interview for the job and there is no evidence of employee missing work or his limitations otherwise interfering with his ability to satisfy his employer's requirements and demands. The job consists of light duty work according to Mr. England, and although employee testified that he doesn't have to lift heavy boxes or move file cabinets if he tells his supervisor he is unable to do so, there is no other evidence of employer making special accommodations or modifications to employee's job as a bank courier. Although employee testified he doesn't believe he is capable of working a full day, we find his testimony as to his ability to work less credible than the expert testimony provided by Mr. England and the treatment record generated in connection with employee's injuries.

Given the credible testimony of Mr. England, the minimal restrictions from employee's treating doctors, Dr. Cohen's failure to explain the extreme restrictions he imposed, and the evidence of employee's current work history, we find that employee is not permanently and totally disabled.

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We note that Dr. Cohen opined that employee's various disabling conditions combine in such a way that the combined effect of the disabilities is greater than their simple sum, although he did not clarify how he came to this conclusion, which disabilities he believed interacted with which, or what an appropriate loading factor might be. We are persuaded that employee's cervical spine condition combines with his lumbar spine condition in a synergistic fashion such that the combined disability is greater than the simple sum. We find that employee's preexisting 50% permanent partial disability of the body as a whole referable to the lumbar spine combines with employee's 25% permanent partial disability of the body as a whole referable to the cervical spine such that a loading factor of 20% is warranted.

#### Past Medical Bills

Employee claims the following medical bills for treatment in connection with his cervical spine, right shoulder, and hernia injuries: \$2,900 from Columbia Radiology, \$6,493.00 from HealthSouth, \$3,891.54 from Columbia Orthopedic Group, \$31,518.87 from Columbia Regional Hospital, and \$2,549.45 from Boone Hospital Center. Employee produced the bills and the related treatment records and credibly identified them during his testimony as records and bills generated in connection with his treatment for the compensable injuries. Additionally, employee presented Dr. Cohen, who testified that he had reviewed the treatment records and it was his opinion that the treatment employee received was medically necessary and reasonable. We find Dr. Cohen credible in this regard.

Employee's treatment for his cervical spine, right shoulder, and hernia injuries extended from December 20, 2000, when employee first complained to Dr. Vogt of right upper extremity pain and numbness, until September 16, 2003, when he was released by Dr. Miles following the bi-level fusion at C5-6 and C6-7. Employee sought this treatment on his own with physicians he selected. Employee testified that he had no contact with employer after he stopped working there in May 2000, and admitted that he did not provide notice to employer or request treatment for his right shoulder, cervical spine, or hernia injuries. Employee testified he didn't ask employer for treatment because he didn't have an employer when he needed the treatment. Employee also testified he didn't notice any particular incident or injury that directly resulted in his cervical spine, right shoulder, or hernia conditions and complaints. Accordingly, we find that employee didn't request treatment from employer for his cervical spine, right shoulder, and hernia injuries prior to April 4, 2002, because he didn't know they were compensable, work-related injuries at the time he sought the treatment. Given the lack of any evidence that employer was prejudiced by employee's failure to provide notice or request treatment before that date, we further find that employer was not prejudiced thereby.

We note that on April 4, 2002, employee filed his 2000 claim for compensation, which provided notice to employer that he was making a claim for medical treatment for the cervical spine, right shoulder, and hernia injuries.

#### **Conclusions of Law**

##### Nature and extent of permanent disability

It is well established in Missouri that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission.

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*ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007). Employee urges he is entitled to permanent total disability benefits. We disagree.

The term "total disability" means the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. The pivotal question is whether an employer can reasonably be expected to hire this employee, given his present physical condition, and reasonably expect him to successfully perform the work.

*Sutton v. Vee Jay Cement Contr. Co.*, 37 S.W.3d 803, 811 (Mo. App. 2000) (citations omitted).

We have found that employee is not permanently and totally disabled as a result of the work injury, but rather that he sustained permanent partial disability as follows: 25% of the body as a whole referable to the cervical spine, 5% of the right upper extremity at the 232-week level, and 2.5% of the body as a whole referable to the abdomen for employee's hernia injury.

Accordingly, we conclude employee is not entitled to permanent total disability benefits from employer, but rather permanent partial disability benefits.

#### Past medical bills

Employee claims he is entitled to reimbursement from employer for his self-directed treatment for his compensable injuries. In relevant part, § 287.140.1 RSMo provides:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

By producing the bills and the related treatment records and credibly identifying them as records and bills generated in connection with his treatment for the compensable injuries, and by providing Dr. Cohen's credible opinion as to the reasonableness and necessity of the treatment, employee met his burden under *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111 (Mo. 1989). Nonetheless, employer claims employee is not entitled to his past medical expenses because he did not provide notice to employer of his continued treatment and did not request employer provide him with treatment, but rather pursued treatment with doctors of his own choosing.

It is uncontested that employee did not provide notice to employer of his right shoulder, cervical spine, or hernia injuries prior to April 4, 2002. Accordingly, the question before us is whether employee is barred from reimbursement for his self-directed treatment prior to April 4, 2002, due to his failure to provide notice to employer.

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[I]f an employee seeks necessary medical treatment for a work-related condition without knowledge at the time of that treatment that the condition was work related and the employer is not prejudiced by such treatment, then a liberal construction of 287.140 requires the employer to reimburse the employee for such medical treatment under section 287.140.1 even though the employer did not have the opportunity to select the treatment providers as granted by section 287.140.10.

*Meyers v. Wildcat, Inc.*, 258 S.W.3d 77, 82 (Mo. App. 2008).

Here, the cervical spine and right shoulder injuries were the result of occupational diseases that developed over time, the symptoms of which did not manifest until after employee stopped working for employer. Heretofore, medical causation of the cervical spine injury has been a contested issue in these proceedings, on which both parties presented conflicting medical evidence. The mechanism of employee's cervical spine injuries can certainly be said to be beyond the realm of lay understanding. Likewise, the hernia injury developed during work-hardening and physical therapy and thus did not clearly or obviously result from employee's work activity. We have found that employee didn't request treatment from employer for his cervical spine, right shoulder, and hernia injuries prior to April 4, 2002 because he didn't know they were compensable, work-related injuries at the time. We have further found that employer was not prejudiced thereby.

Given the foregoing factors, we conclude that *Meyers* is applicable here in regard to the treatment employee underwent prior to April 4, 2002, and that employee is entitled to his medical bills generated before that date in connection with his treatment for the right shoulder, cervical spine, and hernia injuries. Additionally, employee is entitled to his medical bills after April 4, 2002, because employer had notice of his claim for medical treatment when he filed his 2000 claim for compensation on that date.

We note that employer advanced the argument, in its brief filed in response to employee's Application for Review with this Commission, that employee failed to prove he remains liable for the claimed medical expenses, such that employer is entitled to reduce or avoid its liability under the rule of *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003). We disagree that employer is entitled to reduce or avoid its liability here. Once employee identified the bills and records and credibly testified that he was billed for the treatment, the burden is employer's to demonstrate (1) employee was not required to pay the billed amounts; (2) employee's obligation to reimburse the healthcare provider was extinguished; and (3) employee's obligation was not reduced due to a "collateral source" for purposes of § 287.270 RSMo. See *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 823 (Mo. 2003); *Ellis v. Mo. State Treasurer*, 302 S.W.3d 217, 225 (Mo. App. 2009).

Employer did not produce or identify any evidence to demonstrate employee's obligation to reimburse the healthcare providers was extinguished, let alone any evidence to demonstrate that employee's obligations were reduced by a means other than the collateral sources excluded under § 287.270 RSMo. Accordingly, we conclude employee

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has met his burden and award the full amount of the claimed medical bills to employee. See *Ellis*, 302 S.W.3d at 225-26.

### Second Injury Fund Liability

Section 287.220.1 RSMo provides for permanent partial disability benefits to be paid from the Second Injury Fund when an employee who suffers from preexisting permanent partial disability that constitutes a hindrance or obstacle to employment sustains a later injury that also results in permanent partial disability, so long as the permanent partial disability meets certain thresholds.

We first consider whether employee suffered from a preexisting permanent partial disability that constituted a hindrance or obstacle to employment on the date he sustained the primary injuries in this case. Although the difficulty of assigning a “date of injury” to an occupational disease has been recognized by the courts, there is authority suggesting that the employee first becomes disabled by the occupational disease on the date the need for surgery is first identified. *Lorenz v. Sweetheart Cup Co.*, 60 S.W.3d 677, 681 (Mo. App. 2001). We have found that employee suffered from a preexisting permanent partial disability of the body as a whole referable to the lumbar spine and that the condition was of such seriousness to constitute a hindrance or obstacle to employment as of February 22, 2002, when employee first discussed the need for surgery for his cervical spine condition. We have also found that employee’s permanent partial disability from the cervical spine condition combines with the permanent partial disability from his preexisting lumbar spine condition in such a fashion that the combined disabilities are greater than their simple sum.

We conclude employee has met his burden of proving he is entitled to permanent partial disability enhancement benefits from the Second Injury Fund consistent with our finding of a 20% loading factor for the synergistic combination of the lumbar and cervical spine conditions. We note that the hernia and right shoulder injuries do not meet the thresholds for permanent partial disability enhancement (12.5% for a body as a whole injury and 15% for a major extremity injury), thus we award no additional permanent partial disability from the Second Injury Fund for any combinative effect of the preexisting lumbar condition with these other injuries. See § 287.220.1 RSMo.

### **Award**

Employer is liable for permanent partial disability benefits consistent with our findings that employee sustained 25% permanent partial disability of the body as a whole referable to the cervical spine, 5% permanent partial disability of the right upper extremity at the 232-week level, and 2.5% permanent partial disability of the body as a whole referable to the abdomen for employee’s hernia injury, for a total of 121.6 weeks of compensation. Employer is thus liable for a total of \$36,846.02 in permanent partial disability benefits (\$303.01 x 121.6 weeks).

Employer is also liable for employee’s past medical benefits as follows: \$2,900.00 from Columbia Radiology, \$6,493.00 from HealthSouth, \$3,891.54 from Columbia Orthopedic Group, \$31,518.87 from Columbia Regional Hospital, and \$2,549.45 from Boone Hospital Center.

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Additionally, employee is entitled to benefits from the Second Injury Fund for permanent partial disability enhancement consistent with our finding of a 20% loading factor, or 60 weeks ((200 weeks for the lumbar spine + 100 weeks for the cervical spine) x 20%). Thus, the Second Injury Fund is liable for \$18,180.60 in permanent partial disability benefits (\$303.01 x 60 weeks).

Rick L. Montgomery, Attorney at Law, is allowed a fee of 25% of the compensation awarded herein for reasonable and necessary legal services, which shall constitute a lien on compensation.

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

Given at Jefferson City, State of Missouri, this 15<sup>th</sup> day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary